Various Looks at the European Court of Human Rights

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A. Some Introductory Comments on the History of Human Rights

If we look at the history of human rights, two things are striking. First of all, when certain human rights were proclaimed, these proclamations were not always immediately executed or implemented. It sometimes took centuries for them either to become realities or to be accepted in a wider sense. Secondly, while claims for the protection of human rights were addressed to nation-states, the formulation of these claims often had a universalist or self-evident ring that transcended nation-states.

The two points I am making might appear as contradictory: If it took so long for human rights to be fully realized and implemented, then they were apparently less than self-evident. Perhaps we might summarize matters by saying that human rights, once proclaimed, may over time become symbols or programmes. Whether the proclamations will additionally become binding norms or lived reality will depend on a multitude of legal, political, sociological and economic factors.

Let me illustrate more concretely. The political theory of the Enlightenment was the first to associate the idea of a democracy bound up in a constitution with that of overriding or supranational freedoms. Prior to this, the contractual guarantees of the mediaeval corporate state, such as the king's agreement with the Cortes of Leon of 1188, the Magna Carta of 1215 and the *Joyeuse Entrée* of Brabant in 1356, had been less like universally valid human rights packages than lists of corporate rights wrung from their kings by individual groups of subjects. Four centuries later Sir Edward Coke claimed that Magna Carta protected every free Englishman and not only the barons of the 13th century, and ultimately his view prevailed.

The magnificent declarations of human rights devised in the USA and France at the end of the 18th century had undoubtedly a lasting influence. Yet when the American Declaration of Independence stated in 1776 that "We hold these truths to be self-evident, that all men are created equal . . .", only some 6% white male landowners were free and equal. The rights of the women, of the Indians and the slaves, of white men who were no landowners had to be conquered in struggles some of which lasted decades and centuries. France's situation was similar at the time of the Declaration of the Rights of Man and

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Citizen in 1789. In 1794, France got rid of slavery in its colonies, only to reinstate it under Napoleon; Britain abolished the slave trade in 1807, in 1833 also in the colonies; the American Emancipation Proclamation came only in 1863. It was followed by the *Plessy v. Ferguson* judgment of the Supreme Court and its "separate but equal"-doctrine which declared lawful racially separate institutions and utilities, provided they were equal. When it had become painfully clear that the outcome was all too often a "separate and unequal"-doctrine, the Supreme Court desegregated the American schools in *Brown v. Board of Education of Topeka* in 1954, 178 years after the Declaration of Independence.

B. Stages of the Evolution of the European Convention on Human Rights

The internationalization of human rights protection began only after the Second World War. Taking the Universal Declaration of Human Rights of 1948 one decisive step closer to reality, the European Convention on Human Rights was an innovative, perhaps even revolutionary, reaction to the mass murders, atrocities and inhumanities of the Second World War and the preceding period. There was also a need, for protective purposes, after the iron curtain had come down, to make a "pre-emptive strike" against the menace of new tyrants. This is how the founders of the Convention talked of the 7, 8 or 10 freedoms that had to be guaranteed to ensure a democratic lifestyle — a kind of international-law insurance policy or early warning system to prevent democracies from relapsing into dictatorship. Pierre-Henri Teitgen talked movingly of his imprisonment by the Gestapo while one of his brothers was in Dachau and his brother-in-law was meeting his death in Mauthausen: "I think we can now unanimously confront 'reason of State' with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded — the sovereignty of justice and of law". The preamble to the Convention asserted a "profound belief" in the fundamental freedoms to be guaranteed and upheld a "common heritage of political traditions, ideals, freedom and the rule of law".

However, the Western European Governments of the post-war period did not take matters too far too quickly. They rejected proposals to let the European Court quash national court judgments which would violate the Convention or to let it review national legislation as to its compatibility with the Convention. Not only did the ratification and amendment of the Convention remain under member States' control, but the right of individual petition to the Commission and the Court's jurisdiction were governed by merely optional procedures, and the supervision of the execution of judgments was a matter for the Committee of Ministers. The idealistic beliefs of the Convention's drafters had no effect on governments' wish to keep important parts of the control mechanism within their own power. The intention of the fathers of the Convention was thus to establish a standard-setting protection and early warning system to avert the danger of tyranny, based

on just a few cases, supervised to a large degree by national governments, and mainly operating on a voluntary basis or at the prompting of public opinion or of other states.

The early years of the Convention mechanism saw a careful, steady process of consolidation. Not until 1953 was the Convention ratified by ten west European states. The Commission began work in 1954 and the Court in 1959. Many states chose to start just by ratifying the Convention, then waited years, or even decades, before allowing individual applications.

The *interstate case against Greece*, which led to the withdrawal of Greece from the Council of Europe and the Convention during the regime of the military junta 1969-1974, was practically the only case where it could be claimed that what was in play was a conflict between democracy and dictatorship. Instead, most of the cases that came to Strasbourg were of the type that a constitutional or supreme court would be expected to deal with in a pluralist democracy.

To take a well-known example, in the *Belgian Linguistic Case* of 23 July 1968, the Court was confronted with a national legislation that divided the country into four linguistic regions. Except in the region of Brussels, each region had its own language, and education had to be given in the territorial language of the region. Parents could send their children to schools of a different linguistic region or to private schools within the same region, where education was given in a language other than that of the region. Only those private schools which gave instruction in the language of the region were, however, subsidized by the State. And the school-leaving certificates of private schools, in which instruction was given in a language other than that of the region, were not recognized by the State; only a difficult additional examination gave access to higher studies. The European Court of Human Rights decided that Article 2 of the First Additional Protocol to the Convention, guaranteeing a "right to education", contained in itself no linguistic requirement. Ultimately, the Court found fault with only one very specific aspect of the Belgian linguistic legislation. It considered as discriminatory the residence requirement for sixteen heads of family who, if living in a community of the Greater Brussels Area, could ask that school classes be conducted in French.

The *Belgian Linguistic Case* touched on a highly emotional aspect of Belgian politics. Yet it was hardly an issue of democracy v. dictatorship.

The subsequent years can be described as a period of slow, but steady consolidation and expansion. The idea of a continuing development of the Court's case-law gained acceptance. Commission and Court interpreted Convention concepts autonomously and insisted that the Convention guarantees were something more than illusory and empty rhetoric and had to be made effective and tangible.

By 1989, the Convention was widely established in western and southern Europe. After individual applications had been allowed by France (1981), Greece (1985), Turkey (1987), Malta (1987) and Cyprus (1989), the Convention mechanism was part of the system

of the whole Europe west of the iron curtain. After the disappearance of the iron curtain in 1989, the Convention spread to the "new democracies" of central and eastern Europe. These were allowed to join the Council of Europe relatively quickly, raising the number of member States to 47 (in 2007) compared to 22 at the time of joining. Ratification of the Convention seemed to be like a confirmation of the newly acquired democratic character of the new member States. The new members were all required to ratify the Convention within first two years, then one year of joining the Council of Europe.

In 1998, Protocol No. 11 "judicialized" the whole Convention system. Commission and Court were merged into a single, full-time European Court of Human Rights. The right of individual petition and the jurisdiction of the Court, which had been optional, now became compulsory. The non-binding, somewhat more political aspects of the system (e.g. the power of the Committee of Ministers to approve reports by the Commission) were abolished. However, the extent of this "judicialisation" should not be overestimated either, for the Committee of Ministers still takes decisions on the Court's budget and the execution of judgments, and the Convention system is still just as reliant on co-operation in good faith by the national authorities.

As a consequence of the accession of the new member States and the comprehensive judicialisation of the Convention system, from 1998 onwards the number of applications increased year on year by an average of 15%. In 2007, some 53'000 applications were submitted to the Court. The shift in the balance towards the new member States became obvious. In 1999, some 36% of all applications came from Central, Balkan, Eastern, Baltic and Caucasian Europe, in 2001 56%, in 2004 63%. In 2006, 22% of the pending petitions were from Russia, 12% from Rumania, 10% from Turkey, 8% from Ukraine, 6% from Poland. As a result of continuous rationalization and streamlining, the Court managed to increase its productivity substantially, Nevertheless, the number of applications is expanding inexorably. In the fall of 2007, the Court counted 104'000 pending applications. In the meantime, the Court has gone back to its earlier method of calculating. Omitting what used to be called the provisional files, it now counts only those applications for which it has received a correctly completed form, accompanied by copies of relevant documents. Instead of 104'000 pending applications, it now counts some 79'400. However, the backlog of 10'000 cases remains the same.

C. Originality, Problems and Limitations of the European Court of Human Rights

This description of the Convention's history since 1949 was the first part of my considerations. I now move to the second part and shall describe the special character of the Convention and also some of its problems and limits.

Looking back over the period since 1949 and since 1998, the importance and relevance

of the European Court of Human Rights has not ceased to grow. In its own way, it is more than just another European institution, it is a symbol. It harmonizes law and justice and tries to secure, as impartially and as objectively as is humanly possible, fundamental rights, democracy and the rule of law so as to guarantee long-lasting international stability, peace and prosperity. It strives to establish the kind of good governance which Ambrogio Lorenzetti depicted in the town hall of Siena some 665 years ago. The European Convention on Human Rights has brought into being the most effective international system of human rights protection ever developed. As the most successful attempt to implement the UN's Universal Declaration of Human Rights of 1948 in a legally binding way, it is part of the heritage of international law; it constitutes a shining example in those parts of the world where human rights protection, whether national or international, remains an aspiration rather than a reality; it is both a symbol of, and a catalyst for, the victory of democracy over totalitarian government; it is the ultimate expression of the capacity, indeed the necessity, for democracy and the rule of law to transcend frontiers.

Now this passage was more or less an official speech of the departing Court President, trying to explain to the member States and the public opinion in these States and beyond the benefits and the successes of an international human rights protection system based on binding court judgments. But I am of course keenly aware of the fragility of this system and its imperfections. So let me add a few remarks, this time more in the role of a critical observer.

There is a lack of stability built into the Convention system. The workload continues to rise inexorably. The Court has become a sort of a quasi-Constitutional Court for each of the member States; a sort of a wailing wall for applicants irrespective of priorities in European human rights protection; and a sort of an incarnation of a truly independent tribunal that must legitimize national judicial systems whose credibility is still too low. Despite the very remarkable and laudable gains in productivity it is difficult for the Court to cope. It is in danger of losing its credibility if it itself violates more and more the length-of-proceedings standards that it imposes on domestic courts. Of course that leads to the question of whether and to what extent the States and their Governments really want the Court to guarantee the right of individual application and the execution of the Court's judgments fully and comprehensively. And this is why the Convention system has an element of fragility.

To this second set of considerations I wish to add a third passage, which comes from a philosophical, somewhat distant observer.

I believe in Tocqueville's maxim that each principle, carried to its extreme, carries in it the roots of its own destruction. That, I think, applies to principles such as democracy which, as the history of the last century has amply proved, if limitless, allows the election of dictators, the suppression, ethnic cleansing and killing of minorities or the aggression of neighbouring states.

It equally applies to the rule of law. This is a fundamental and - if one wishes to avoid arbitrariness — indispensable principle. But we must be sure not to let it degenerate into empty formalism. Indeed, speaking of the situation of the new member States of central and Eastern Europe, some writes discern what they call a "post-Stalinistic formalism", which expresses an unwillingness and/or incapacity to explore the real contemporary meaning of human rights protection clauses to its full.

Finally, de Tocqueville's warning against carrying matters to their extreme also applies to human rights. A Human Rights Court is not always helped by the thought that the guarantee of a human right is the rule, to be interpreted extensively, whereas the limits of human rights should be interpreted restrictively. Nor would it be correct to state that the limits of human rights, constituting *lex specialis*, should necessarily prevail. I rather believe that what is characteristic of the European Court of Human Rights is the constant pondering and balancing of all sorts of public and private interests, taking into account a hugely complex pan-European context at the same time as the very specific circumstances of each case.

D. Some Recent Cases

The last part of my presentation consists of an endeavor to illustrate the enormous variety of the applications that reach the Court by discussing a few recent cases.

The case *of Streletz, Kessler and Krenz v. Germany* of 22 March 2001 concerned the applicants' conviction for their part in the border-policing policy followed in the former German Democratic Republic (GDR) and the shooting of at least 264 persons who had intended to cross the border and flee the GDR. The applicants had argued that their actions had not constituted offences under the applicable GDR criminal law at the time when they were carried out and that therefore their conviction was a breach of the prohibition of the retrospective application of criminal law under Article 7 of the Convention. They further maintained that the acts in question did not constitute offences under international law either. However, the relevant provisions of GDR legislation expressly proclaimed the principle that human life must be preserved, and provided for the application of the principle of proportionality in respect of the use of force. The fact that a practice was grafted on to that legislation which effectively emptied of their substance the provisions concerned could not help the applicants. Such a practice, which flagrantly infringed human rights and above all the right to life, could not attract the protection of Article 7 § 1 of the Convention. The applicants had created the appearance of legality, but then implemented a practice disregarding those principles. The purpose of Article 7 was to prevent arbitrary prosecution, conviction or punishment, not to protect those who flouted fundamental rights under a cloak of legality. The GDR border-policing policy also disregarded the need to preserve life enshrined in the relevant international instruments.

The *Leyla Şahin v. Turkey* case of 10 November 2005 concerned the prohibition from wearing the Islamic headscarf at the Faculty of Medicine of Istanbul University. The applicant alleged a violation of her freedom of religion under Article 9 of the Convention.

The Court noted that the impugned interference was based in particular on the principles of secularism and equality. The Turkish Constitutional Court, in rejecting the applicant's arguments, had stated that "secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements".

The European Court accepted that such a notion of secularism was consistent with the values underpinning the Convention. Upholding that principle could be considered necessary to protect the democratic system in Turkey. After reiterating that pluralism and tolerance were among the fundamental principles of any democratic society, the Court said that it also had to take into account the need for the public authorities to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which was vital to the survival of democratic society. In this case, it found that, in a context in which the values of pluralism and respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should wish to preserve the secular nature of the institutions concerned and so consider it contrary to such values to allow religious attire, including the Islamic headscarf, to be worn. So no violation of the Convention was found.

In the case of *Nachova v. Bulgaria* of 6 July 2005, the Court applied Article 14 of the Convention, which prohibits discrimination in the enjoyment of Convention rights, in conjunction with Article 2, which protects the right to life. The case originated in a military operation in which two young deserters of Roma origin were shot and killed by members of the military police who had received orders to track them down. The applicants, who were members of the victims' families, alleged that prejudice and hostile attitudes of a racist nature had played a role in their deaths. The Court found that it had not been established that the men had been killed as a result of racism. However, it went on to find that the domestic authorities should have examined, in the course of their investigation, whether racist motives had played a role in the men's death and, if so, brought those responsible to justice.

In the case of *Mamatkulov and Askarov v. Turkey* of 4 February 2005, the two applicants had been extradited by the Turkish Government to Uzbekistan, although the Court had indicated in an interim measure that the applicants should not be extradited. The Court reviewed its earlier case-law in the light of developments in international law

concerning interim measures. Referring to recent decisions of other international tribunals such as the International Court of Justice and the Inter-American Court of Human Rights, and of the Human Rights Committee of the United Nations, it stated that henceforth "A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention".

In the case of *Bosphorus v. Ireland* of 30 June 2005, the Court made an important and much awaited contribution to clarification of the relationship between the Convention and European Community (EC) law. It found that the protection of fundamental rights by EC law, unless manifestly deficient, could be considered equivalent to that of the Convention system. Consequently, there was a presumption that a State would not depart from the requirements of the Convention when it was merely implementing legal obligations flowing from its EC membership.

In the case of *Hutten-Czapska v. Poland* of 19 June 2006, the applicant owned a house and a plot of land in Gdynia. She complained that Polish law imposed tenancy agreements on her and set an inadequate level of rent. She was not only unable to derive any income from her property but also, owing to restrictions on the termination of leases of flats subject to the rent-control scheme, she could not regain the possession and use of her property. The Court found for her and held that there had been a violation of Article 1 of Protocol No. 1 to the Convention. Since some 100'000 landlords were similarly affected by the Polish legislation, the Court decided to adopt the so-called "pilot-judgment-procedure". It held that the Convention violation "has originated in a systemic problem connected with the malfunctioning of domestic legislation" and ordered "that, in order to put an end to the systemic violation identified in the present case, the respondent State must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention".

The last case I wish to mention is *Guja v. Moldova* of 12 February 2008. In 2002, four police officers arrested ten persons suspected of offenses related to the parliamentary elections. Later the suspects were released from detention and complained to the Prosecutor's Office of ill-treatment and illegal detention by the four police officers. When a criminal investigation was initiated against the police officers, they wrote letters to the President, the Prime Minister and the Deputy Speaker of Parliament, Mr. Mişin, seeking protection from prosecution. Mr. Mişin wrote a favourable letter on official headed paper and asked whether what was at stake was "fighting crime or the police". The criminal proceedings against the police officers were discontinued. The head of the Press Department of the Prosecutor General's Office, Mr. Guja, leaked Mr. Mişin's letter to a

newspaper, which published and commented it. Mr. Guja was then dismissed. His reinstatement proceedings remained unsuccessful. The Supreme Court of Moldova stated that obtaining information through the abuse of one's position was not part of freedom of expression.

Guja argued that the leaking of the letter had to be regarded as whistle-blowing on illegal conduct. The Court carefully balanced the various interests at stake. It accepted that civil servants owed to their employer a duty of loyalty, reserve and discretion. However, the Court emphasized that open discussion of topics of public concern was essential to democracy. The public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed outweighed the interest in maintaining public confidence in the Prosecutor General's Office. Moreover, the heaviest sanction possible was imposed on Mr. Guja. Accordingly, there had been a violation of his freedom of expression.

E. Conclusion

The European Court of Human Rights has been, and is, a very special, original, ambitious and successful institution, constantly facing new challenges, responding to individual complaints and systemic malfunctionings, neglects and discriminations. It has been a privilege to be connected with, and to shape, such an exceptional institution.