

PERCEPTIONS
JOURNAL OF INTERNATIONAL AFFAIRS

December 1998 - February 1999

Volume III - Number 4

EUROPEAN CONVENTION OF HUMAN RIGHTS: 45 YEARS OF IMPLEMENTATION

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With the entry into force of the 11th Protocol to the European Convention on Human Rights, a new international collective guarantee system was put into place as of 1 November 1998. The structure which was charged with a similar supervisory power, namely a European Commission of Human Rights and a European Court of Human Rights, both bodies composed of part-time members, was dismantled; at the same date, the Committee of Ministers of the Council of Europe, composed of the Foreign Ministers of all member States of the Council of Europe, ceased to exercise decision-making powers on the merits of certain claims. Thus, the structure which over 45 years, to follow the language of Article 19 of the Convention, “ensured the observance of the engagements undertaken by the High Contracting Parties in the Convention”, has come to an end. It is, however, obvious that the legacy of past practice will inspire and indeed guide to a certain extent the jurisprudence of the single court, which is composed of full-time judges. Having said this, it is equally obvious that adjustments will emerge in future case practice, if only by taking into account the much broader geographic scope of application of the Convention. When the Commission of Human Rights started its work, in June 1955, there were only twelve contracting states, now there are forty, many of which have different social and political experiences to one another, especially in the recent past. They also have various degrees of judicial or administrative development.

The Commission and Court, assisted by the Committee of Ministers of the Council of Europe, have achieved a stunning result. In thousands of individual claims they were able to redress individual injustice and even more, to provoke through their pronouncements an adjustment of much established administrative practice and legislative acts that had turned out to be adverse to fundamental rights. This record can be compared to a revolution.

Without any doubt, international law of today carries the imprint of this European adventure. Under the terms of the Convention organs and because of the quality of the work of its supervisory bodies, the rights of individuals are now recognised, in principle, within the framework of international law. The standards set by the Commission and Court with respect to both procedural and substantive rights serve as a model world-wide.

Almost at the same time as the Commission was established, the International Court of Justice held (and quite correctly so under the principles of international law as recognised as such at the time) in the *Nottebohm* judgement of 1955. This stated that when a state takes up the claim of one of its nationals against another state, the claimant state can only assert its own rights (as opposed to a right invested in an individual), namely the right it has to see his national to be correctly treated. Individuals without the link of citizenship had almost no rights under international law, except after

World War I if they were members of a recognised minority. What is even more relevant to note is that under traditional international law, an individual had no right of action before an international judicial body.

All this has been fundamentally changed by the Convention and by its implementation. Under the terms of the Convention, not only can a foreigner who comes in one way or another under the jurisdiction of another state bring an action against the government of that state, but also a national can bring an action against his own state by invoking international law, namely the law of the Human Rights Convention. It may be recalled, that many governments of contracting states had in the beginning some difficulty in coping with this new framework, which grants an individual claimant the same judicial standing before the Strasbourg machinery as has the defendant state.

Both the Commission and the Court of the past have progressively clarified and sharpened this new, revolutionary concept. They have over the years strengthened the position of the individual in proceedings under the Convention (especially with respect to an individual's standing before the Court) which has broadened far beyond the wording of the Convention provisions. In this respect, the Commission and the Court have acted as lawmakers. They started exploring this avenue first with respect to procedural rights before the Strasbourg Convention organs, then they turned also to substantive rights by interpreting several Convention provisions step by step in a sense which broadened the meaning and thus the scope of the application of a given right. This is most notable under Article 8 of the Convention, trade union related rights pursuant to Article 11, or the meaning of 'due process' in accordance with Article 6 of the Convention.

In a series of cases directed against Turkey concerning allegations about Northern Cyprus, the Commission and the Court started to qualify the Convention provisions in a general way as being the expression of European *ordre public*. They were driven in that direction by their desire to be recognised as the European Constitutional Court. It is to be expected that the new permanent court in Strasbourg will continue to strive in this direction. The written terms of Convention provisions risk becoming more and more reduced in their significance. The predictability of rights and obligations under the Convention may thus suffer. A word of caution may be appropriate with respect to this development. The Strasbourg Court may perceive its role and function in a similar way, if not superior to national Constitutional Courts, which in several instances assume the constitutional power of lawmaking, if only by striking out of the statute book enactments of democratically constituted parliaments. But the Strasbourg Court is not a constitutional court. The Convention is not identical to national Courts, which operate in a fully structured legal system. The Convention is an international treaty providing for control of member states with respect to undertakings made by ratifying the Convention. It does not carry with it a fully developed constitutional legal order. There is no legislative power put next to the Court, nor an executive power. In a national context, a decision of a Court with power to declare legislative acts as being unconstitutional, is balanced by the power of the legislature to cope with such a decision. This is lacking in Strasbourg. Strasbourg can only adjust an individual legal situation with the sanction of essentially a money payment in case that a domestic legal situation cannot be repaired otherwise (Article 50). In this context, would it be too utopian to say a word of caution to the Court not to over-stretch the system and to operate with a certain dose of judicial restraint? In the new era of Convention life, the Court has to fulfil a role of integration over all of Europe. And it seems that this could only be successful by avoiding positions in the interpretation of the Convention rights that could well be justified in *concreto* but, if transposed to the legal and social order of another contracting state, would provoke questions and

thus uncertainties.

In the past 45 years, the Commission and the Court have given a very particular meaning to the requirement of previous exhaustion of local remedies, with the result that Strasbourg has ignored existing local remedies for the sake of what was called the overriding interest in protecting fundamental rights. In some extreme instances this might have been justified. But seen in a longer time-perspective and a firmer consolidation of human rights in a domestic context, it seems extremely odd to relieve—as was done—domestic Courts of their duty to assume the first level of judicial implementation of fundamental rights. In a longer perspective nothing will be achieved by ignoring or neutralising domestic courts of law. Quite the opposite is needed. The national courts-of-law carry the first and foremost responsibility of ensuring the observance of Convention rights. National courts should not be relieved easily of this role. In some of their more recent discussions, the former Commission and Court have interpreted the requirement of prior exhaustion of local remedies (Art. 26 of the Convention) in a way which ignored the existence of local courts and, as a result, made the Commission the Court of first instance. Such a striking deviation from the Convention system, if repeated, could negatively affect the entire system.

There is another coin in the brilliant picture of the achievements of 45 years of Convention practice, and this refers to the dichotomy of law and politics in convention decision making. A few days before these lines were written, German Minister of Justice, Mrs. Dabblers-Gmelin, declared - in connection with the unfortunate matter of a possible request to Italy to extradite the PKK chief Abdullah Öcalan to Germany because of an existing search warrant for undisputable acts of Terrorism, - that the German government would refrain from asking for extradition for the simple reason that while the legal situation was clear with respect to a request for extradition, Germany also had to take into consideration 'political implications'. She added: "I am sure that we will find a way which will reconcile the concept of law with political solutions". In fact, in the case at hand, it was finally the Rule of Law which took a backstage to a purely political solution. The Minister's statement was thus the unsuccessful attempt to neutralise the respect of the clear-cut rule of Law. It translates into modern language what, regrettably, has over the centuries been a fact of life. For Strasbourg this means that in matters of political significance that which the potential to threaten the maintenance of peace inside or outside national borders, the Court should not pursue a judicial practice which could meet the adage of fiat justitia periret mundi. The former Court, in one of its very first judgements, stated correctly that when taking a decision on a claim, the Court should also take into consideration issues of law and of fact that characterises the life of the nation concerned. In other words, the Court should always remain aware of the possible consequences of its pronouncements, above all with respect to decisions involving a broader social or political context with peace threatening components.

These are but a few observations by someone who had the privilege to be associated in different capacities on both sides of the bar, with the life of the Convention. They are the fruit of experience of a strong supporter of an international agreement—the Convention—whose ultimate purpose is, by respecting the fundamental rights of individuals, to ensure the maintenance of peace between nations.

*On the occasion of the 50th Anniversary of the Universal Declaration of Human Rights

