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*The place of
the European Court of Human Rights
in the European Constitutional landscape*

Address

by

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COUR EUROPÉENNE DES DROITS DE L'HOMME EUROPEAN COURT OF HUMAN RIGHTS

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The European Court of Human Rights has traditionally participated in the Conferences of the European Constitutional Courts and has always followed the proceedings of the Conferences with great interest. Its status at the Conferences is as an observer, but that does not mean that it is not an actor in the field of European constitutional justice. On the contrary, as I understand its role, the European Court works in partnership with national Constitutional Courts and national courts of equivalent jurisdiction. Whether it is itself a “Constitutional Court” is largely a question of semantics. We can always call it a quasi-Constitutional Court, *sui generis*. What is not in doubt is that the issues which it is called upon to decide are constitutional issues in so far as they concern the fundamental rights of European citizens. What is also not in doubt is that these issues are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national constitutional bodies.

That is the theory. The practice is rather different and I would say that there are problems on both sides. On the one hand, problems arise with the effectiveness, or even the existence, of remedies available in the Contracting States in respect of alleged violations of the Convention rights and freedoms. On the other hand, the Strasbourg Court may sometimes have found it difficult to resist the temptation of delving too deep into issues of fact and of law, of becoming the famous “fourth instance” that it has always insisted it is not. It is where grievances have not been, or have not been effectively, ventilated in national proceedings that the Court finds itself in something of a dilemma. Should it examine the substantive complaint at the root of the application, or confine itself to establishing a procedural violation? In a number of cases¹ involving alleged breaches of the right to life guaranteed by Article 2 of the Convention where it has been unable to establish to the required standard of proof the substantive violation, the Court has found a “procedural” violation on account of the lack of

¹ *Kaya v. Turkey*, 19.2.1998, *Reports* 1998-I, p. 329, § 105; *Tanrikulu v. Turkey*, 8.7.2000, § 101.

an effective investigation or effective judicial proceedings at national level capable of establishing the true facts at the origin of the allegation. In any event the Convention has a strong procedural bias. Clearly this is the case for the due process provisions which are essentially aimed at securing procedural safeguards in relation to detention and the conduct of judicial proceedings under Articles 5 and 6 of the Convention. But it is also true in respect of other substantive Convention rights. The Court has repeatedly held² that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 (which prohibits torture and inhuman or degrading treatment) at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention, likewise requires by implication that there should be an effective official investigation. As with the duty to carry out an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible. In the context of Article 8 the Court will have regard to whether there are adequate procedural safeguards in place to protect the Article 8 interest³. Indeed I would argue that practically all the Convention guarantees contain an implied positive obligation to set up and render effective procedures making it possible to vindicate the right concerned at national level. This is of course confirmed by the requirement of exhaustion of domestic remedies under Article 35 of the Convention and the obligation to afford an effective remedy under Article 13. This must indeed be so if the system is to function as a subsidiary one. As the Court has recently emphasised, "the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity"⁴. This was confirmed in the context of Article 13 when the Court held that the obligation to provide a remedy extended also to problems of length of proceedings in breach of Article 6. As the Court noted: "the rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights. In that way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*⁵, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court"⁶.

This should work both ways. In other words, where there are no or insufficient procedural safeguards protecting the right in question, there may well be a violation of the right in both its substantive and procedural aspects and of Article 13. On the other hand, where such safeguards are in place a significant part of the Contracting State's obligations has been fulfilled. That does not mean that the Court in exercising its supervisory review is precluded from finding a violation, since, clearly, substantive issues will also arise, but it does make it possible for that review to be carried out from the right distance, from the right

² See for example, *Assenov v. Bulgaria*, 28.10.1998, *Reports* 1998-VIII, p. 3290, § 102; *Labita v. Italy*, 6.4.2000, § 131; *Veznedaroglu v. Turkey*, 11.4.2000, § 32.

³ *Chapman v. the United Kingdom*, 18.1.2001, ECHR 2001- ..., § 114.

⁴ *Z. and Others v. the United Kingdom*, 10.5.2001, ECHR 2001- ..., § 103.

⁵ See the Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651.

⁶ *Kudła v. Poland*, 26.10.2000, ECHR 2000-XI, § 152.

perspective. If in addition the national authorities are in a position to apply Convention case-law to the questions before it, then much, if not all, of the Strasbourg Court's work is done. This is ultimately the objective underlying the system: to ensure that European citizens throughout the Convention community are able fully to assert their Convention rights within their own domestic legal system.

Another way of putting this is that fulfilment of the procedural obligation leaves room for the operation of what we call the margin of appreciation, for those Articles in respect of which a margin of appreciation is capable of existing and therefore excluding Articles 2 and 3. This area of discretion is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law. It reflects on the one hand the practical matter of the proximity to events of national authorities and the sheer physical impossibility for an international court, whose jurisdiction covers 43 States with a population of some 800 million inhabitants, to operate as a tribunal of fact. Thus the Court has observed that it must be cautious in taking on the role of first instance tribunal of fact. Nor is it the Court's task to substitute its own assessment of the facts for that of the domestic courts. Though the Court is not bound by the findings of domestic courts, it requires cogent findings of fact to depart from findings of fact reached by those courts⁷.

But the margin of appreciation also embraces an element of deference to decisions taken by democratic institutions, a deference deriving from the primordial place of democracy within the Convention system. It is thus not the role of the European Court systematically to second-guess democratic legislatures. What it has to do is to exercise an international supervision in specific cases to ensure that the solutions found do not impose an excessive or unacceptable burden on one sector of society or individuals. The democratically elected legislature must be free to take measures in the general interest even where they interfere with a given category of individual interests. The balancing exercise between such competing interests is, as I have said, most appropriately carried out by the national authorities. There must however be a balancing exercise, and this implies the existence of procedures which make such an exercise possible. Moreover the result must be that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest concerned. In that sense the area of discretion accorded to States, the margin of appreciation, will never be unlimited and the rights of individuals will ultimately be protected against the excesses of majority rule. The margin of appreciation recognises that where appropriate procedures are in place a range of solutions compatible with human rights may be available to the national authorities. The Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide an Europe-wide framework for domestic human rights protection.

That being said, there is a fundamental dichotomy running throughout the Convention. This is as to whether the primary purpose of the Convention system is to provide individual relief or whether its mission is more a "constitutional" one of determining issues on public policy grounds in the general interest. If the latter is the case then the mechanism of individual applications is to be seen as the means by which defects in national protection of human rights are detected with a view to correcting them and thus raising the general standard of protection of human rights. This analysis may be taken further by looking at the Court's judgments and the process of execution. As you are aware, the Strasbourg judgments are declaratory in

⁷ Tanli v. Turkey, 10,4, 2001, at § 110.

nature. The original intention of among others Pierre-Henri Teitgen, often referred to as the “father of the Convention”, was that the Court should be endowed with cassation powers and the competence to declare laws invalid, but this maximalist approach was rejected by the Governments. The Court has moreover consistently confirmed that it is not empowered to order consequential measures. It establishes the existence of a violation, and the process of giving effect to that finding is left to the Committee of Ministers of the Council of Europe, “peer pressure” being the most likely way to ensure proper execution of the judgment of what is, after all, an international court. The function of this execution process is to secure the elimination of the causes of the violation. In this sense the role of the Convention and the Court is prospective as much as it is retrospective.

On this view the place of individual relief, while important and particularly so in respect of the most serious violations, is secondary to the primary aim of raising the general standard of human rights protection and extending human rights jurisprudence throughout the community of Convention States. In terms of the effectiveness of the system the emphasis will thus be on the need to avoid repetition of the circumstances giving rise to the violation. Now I would be the first to admit that this analysis of the Convention system is not universally accepted and that this is the case even among my fellow Judges in Strasbourg, but whether or not it was correct at the outset, given the current situation with the ever-rising case-load from 43 States, soon to increase to 44 and even 45 and more, an area, as I have said, with a population of over 800 million, the future of the system cannot be individual-relief based.

This brings me to some figures. The Court has currently some 23,000 applications pending before its decision bodies. An audit carried out in 2001 by the Council of Europe Internal Auditor predicted over 20,000 applications annually by 2005. Our own figures suggest an even steeper rise. In 2001 we registered some 14,000 applications. Applications have increased by around 130% since the present Court took office in November 1998, by about 1,400% since 1988. The potential for growth is almost unlimited as a result of the expansion of the Council of Europe over the last decade and this situation will be compounded when new member States ratify. Moreover, the evolution of case-load is not merely quantitative. The nature of the cases coming before the Court inevitably reflects the changed composition of the Council of Europe with a significant number of States which are still in many respects, and particularly with regard to their judicial systems, in transition, even if considerable progress has been made in some of them. In such States there are likely to be structural problems, which cannot be resolved overnight. The understandable political imperatives of the heady days post 1989 have, it must be said, left the Court with a major headache, just because it is a Court and must decide issues of law, without reference to political expediency.

I am now more than ever convinced that, only just over three years after the radical reform of the Convention mechanism implemented by Protocol No. 11, replacing the two original institutions by a single judicial body, the system is in further need of a major overhaul. This view has been confirmed by an Evaluation Group set up by the Council of Europe’s Committee of Ministers with the brief to identify means of ensuring the continued effectiveness of the Court⁸. The Group’s report⁹ made two main recommendations: firstly it called for an amending protocol to the Convention which would “empower the Court to decline to examine in detail applications raising no substantial issue under the Convention”. Its second

⁸ Decision of the Ministers’ Deputies, 7.2.2001.

⁹ EG(2001)1 of 27.9.2001, available from the Committee of Ministers website, www.coe.int.

recommendation was that “a feasibility study be carried out into the creation within the Court of a new and separate division for the preliminary examination of applications”.

These recommendations address the two principal problems facing the Convention system: how to absorb and filter out the mass of unmeritorious applications without taking up valuable time of senior judges and how to preserve the coherence and quality of the leading judgments, the judgments of principle, the judgments that contribute to the Europe-wide human rights jurisprudence, that help to build up the European “public order”. It is these judgments which place the Court in its true “constitutional” role, deciding what are essentially public-policy issues.

It is I believe evident, and this will no doubt be backed up by the experience of many of the Courts participating in this Conference, that there is a limit to the number of cases that can be properly adjudicated over a given period of time. The United States Supreme Court for example delivers something in the region of eighty to ninety judgments in a year. The German Federal Constitutional Court issued I believe seventeen judgments in 2000. The Court of Justice of the European Communities gave around 240 judgments in 2001. In Strasbourg we delivered nearly 900 judgments in 2001, in addition to the 9,000 odd decisions of inadmissibility. That is already to me a worrying and frankly excessive amount, even if the majority of them were routine, straightforward cases, for example complaints of excessive length of proceedings, which are more a question of arithmetic than legal reasoning. These cases too take time however and that is why I consider that it is essential for the Court to be given the means to reduce the flow of cases so that it can concentrate on its constitutional role.

The logical consequence of this is that, in addition to a mechanism for the expeditious and cheap disposal of applications which do not satisfy the admissibility requirements, it is necessary to relieve the Court of routine, manifestly well-founded cases and indeed beyond that cases which do not raise an issue in the sense that the issue of principle has already been resolved. If the obligation for a respondent State arising from a finding of a violation of the Convention is the elimination of the causes of the violation to prevent its repetition, then subsequent applications whose complaint derives from the same circumstances should be seen as problem of execution. This is particularly true of violations of a “structural” nature¹⁰. Once the Court has established the existence of a structural violation or an administrative practice, is the general purpose of raising the level of human rights protection in the State concerned really served by continuing to issue judgments establishing the same violation? Here we see the conflict between general interest and individual relief at its clearest. If individual relief is the primary objective of the Convention system then of course in the situation described the Court must continue to give judgments so as to be able to award compensation to the individual victim. Yet if we look at the scheme for just satisfaction set up by the Convention under Article 41, we can see that it hardly supports the individual relief theory. To begin with it is discretionary as the Court is to award satisfaction “if necessary”. The Court’s case-law shows that it is indeed not the automatic consequence of a finding of violation. Hence the Court’s well-established practice of holding in appropriate cases that a finding of a violation is in itself sufficient just satisfaction¹¹. This is surely also an indication of the “public-policy” nature of the system.

¹⁰ See *Botazzi v. Italy*, 28.7.1999, ECHR 1999-V.

¹¹ The first time this formula was used was in *Golder v. the United Kingdom*, 21.2.1975, Series A no. 1975.

But let us take a concrete example. If the Court was to find a violation of Article 3 prohibiting inhuman and degrading treatment in respect of prison conditions in one of the newer contracting States and that the evidence adduced indicated that this was a widespread situation throughout the State concerned, would there be any sense in the Court's processing the potentially tens of thousands of applications brought by detainees in similar conditions? Would the award of the no doubt quite substantial compensation on an individual basis, always supposing that the Court was able to deal with the cases concerned, hasten the resolution of the problem, contribute to the elimination of the causes of the original violation? Very probably not and particularly if it is considered that one of the causes may well be a lack of funding. At the same time it would undermine the credibility of the Court for it to continue to issue findings of violations with no apparent effect. The inflow of thousands of same issue cases would clog up the system almost irremediably. This might lead to judgments delivered five, six years or more after the lodging of the application. Not only is this sort of delay unacceptable, it also complicates the execution process because Governments can claim that the situation represented in the judgment no longer reflects the reality. I cite prison conditions, but the same problem could, indeed undoubtedly will, arise in relation to structural dysfunction in the operation of legal systems in some contracting States. We have already a foretaste of this with length of proceedings in Italy. We now realise that about half the Contracting States have problems with the length of judicial proceedings; we also know that there are in many of them grave difficulties with regard to the non-execution of final and binding judicial decisions.

It follows that this type of problem must be regarded as part of the process of execution. But that process should not be solely "condemnatory". Once a structural problem has been identified, if the Governments are serious about raising the standard of human rights throughout Europe, then they must ensure that the Council of Europe is in a position to assist the State concerned to resolve it, in particular by providing expert advice, judicial or police training schemes and so on. In other words I believe that we need to look again not just at the way the Court operates, but at the whole Convention system, and particularly the approach to execution, with the emphasis being not only on the pressure to be exerted on the respondent State, but also where appropriate the necessary assistance to deal with the problem raised by the judgment.

It does therefore seem to me that the way forward is to make it possible for the Court to concentrate its efforts on decisions of "principle", decisions which create jurisprudence. This would also be the best means of ensuring that the common minimum standards are maintained across Europe. The lowering of standards is often cited in European Union circles as a potential consequence of the enlargement of the Council of Europe. Examination of the cases decided over the last three years belies this fear. Yet there is a risk in the longer term, a risk that can be avoided if the Court adheres to a more "constitutional" role as I have advocated.

Let me here again enter a caveat. What I am saying today does not necessarily represent the views of my colleagues on the Court. Some of them may well disagree strongly with the approach I am recommending. I can also imagine that the Non Governmental Organisations, who are understandably greatly attached to the principle of individual relief, will resist moves which dilute the right of full access to the Court. Yet with many thousands of applications being brought annually the right of individual application will in practice be in any event seriously circumscribed by the material impossibility of processing them in anything like a reasonable time. Will we really be able to claim that with say 30,000 cases a

year, full, effective access can be guaranteed? Is it not better to take a more realistic approach to the problem and preserve the essence of the system, in conformity with its fundamental objective, with the individual application being seen as a means to an end, rather than an end in itself, as the magnifying glass which reveals the imperfections in national legal systems, as the thermometer which tests the democratic temperature of the States? Is it not better for there to be far fewer judgments, but promptly delivered and extensively reasoned ones which establish the jurisprudential principles with a compelling clarity that will render them *de facto* binding *erga omnes*, while at the same time revealing the structural problems which undermine democracy and the rule of law in parts of Europe?

The place of the European Court of Human Rights in the European constitutional landscape will therefore be determined by its future role, which, if I am right in my analysis, will be increasingly “constitutional” in the sense that I have tried to explain. In this role it will, among other things, be necessary to clarify the relationship between the Convention and European Community law. I therefore welcome the Laeken Declaration of 15 December 2001, which invites the Convention charged with preparing the institutional reform of the Union to give thought to “whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.” In attributing “particular significance” to the Strasbourg case-law, the Court of Justice of the European Communities has demonstrated its attachment to a coherent conception of fundamental rights in Europe. Fundamental rights occupy an increasingly prominent place in Community law, not only in the Court of Justice’s case-law, but also in the Union’s founding texts. Article 6 § 2 of the European Union Treaty now establishes a formal link between the Union and fundamental rights, and it is significant to note, in that connection, that Article 6 names as the sole reference text the European Convention on Human Rights. The Charter of Fundamental Rights, proclaimed in Nice on 7 December 2000, takes the Convention as setting out the minimum level of protection to be secured, while making it clear that the minimum level did not prevent a higher level of protection. That solution recognises that when the Union’s member States implement Community law they may be accountable under both the latter and the European Convention on Human Rights. Hence the importance of coherent solutions in this field.

Work is currently underway in this area. In Strasbourg, a group of Government experts is discussing the technical and legal issues raised by the Community’s accession. Another group is considering reform of the Convention system. These two strands will have to come together; the work on reform should inform the debate on accession and vice versa. In any event we must not lose sight of the overall objective which is to preserve for all of Europe, Union members and non-Union members alike, a system for the protection of human rights which is and can remain effective in securing as its fundamental purpose the “maintenance and further realisation of human rights and fundamental freedoms”¹² throughout the community of States on the basis of the common minimum standards set out in the European Convention with a view to ensuring that “the Europe of human rights remains a single entity with common values”¹³. The resulting structure must, as I have said, be coherent, but it must also be adapted to the reality of the situation. This means that we must find an approach which continues to respect the logic of subsidiarity based on effective domestic procedures, but which at the same time can accommodate States with very advanced levels of constitutional protection and States whose constitutional protection is still in the process of

¹² Preamble to the Convention.

¹³ Preface to the Evaluation Group’s report, see note 9 above.

consolidation. This involves making it possible for the Court to confine itself to judgments of a “constitutional” nature.

The Evaluation Group considered that the place of the European Court of Human Rights on the constitutional landscape was the nerve centre of a system of human rights protection which radiates out through the domestic legal orders of 41(3) European States¹⁴. We could also say that its place is well reflected by its presence here today among its partners in the field of constitutional jurisdiction. Whatever the evolution of the system it will be the national courts of constitutional jurisdiction which make it work. Let me just reiterate that the Strasbourg Court attaches the greatest importance to its relations with such courts for that very reason. We have had the pleasure of meeting many of you and this is a process which must continue if we are to fully understand each other. This mutual exchange of information makes it possible for the international Judges to appreciate more clearly the problems that arise at national level, and allows the national Judges a closer insight into the Convention case-law and the reasoning behind it. You too are concerned by the process aimed at reforming the Convention. I ask for your support and your contribution to the discussion.

¹⁴ Ibid.