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Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

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Rüdiger Wolfrum · Ulrike Deutsch (eds.)

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Foreword

The European Court of Human Rights is faced with a huge and ever-growing workload. Up until 1998, the Court pronounced only 837 judgments, while it rendered 4.000 judgments in the last three years alone. On 18 September 2008, the European Court of Human Rights delivered its 10.000th judgment; currently, there are some 100.000 cases pending before the Court. This enormous caseload is both a testimony to the Court's success and of the considerable threat posed to the effectiveness of the protection of the rights and freedoms guaranteed by the European Convention on Human Rights and its Protocols. Moreover, Protocol No. 14, which was intended to alleviate the problem by increasing the efficiency of the Court, is still not in force.

This publication is intended to contribute to the ongoing discussion about the reforms that are necessary to prevent a failure of the European system of human rights protection. It compiles the contributions of a workshop which took place on 17-18 December 2007 at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and the discussions following the presentations. The convening of this workshop was recommended by Christian Tomuschat.

The conference brought together academics and practitioners and thus offered an excellent opportunity for the discussion of possible approaches to the dilemma. Christian Tomuschat's presentation outlined the success story of the European Court of Human Rights and the resulting danger of failure of the system and gave an overview of possible solutions. Rudolf Bernhardt concentrated on the merits of introducing a discretionary admission procedure and argued for a radical reform of the present system. Jochen Abr. Frowein focused on the need to introduce a filtering mechanism as part of the exhaustion of domestic remedies, which would consist of special chambers on the Supreme Court level of Member States for dealing with Convention cases. Luzius Wildhaber analysed the approach of the Court to issuing pilot judgments in cases concerning structural problems affecting a large number of persons. Finally, Mark Villiger took a close look at a particular group of cases responsible for the huge back-log, i.e., cases concerning the length of proceedings.

Our personal thanks go to Yvonne Klein and Falilou Saw in whose hands rested the entire organization of the workshop. We would also

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Heidelberg, November 2008

Rüdiger Wolfrum

Table of Contents

The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions

Christian Tomuschat

I. Introduction

Is it not an almost unbelievable success story? Currently, the jurisdiction of the European Court of Human Rights (ECtHR) extends to 47 States with more than 800 million inhabitants. Accordingly, international judges review the activities of 47 governments as to their compatibility with the European Convention on Human Rights (ECHR). No injusticiable areas or groups of acts exist. The ECtHR has abstained from evolving a doctrine of act of State or *acte de gouvernement*.[1] Everyone who feels aggrieved by a decision or some factual conduct of public authorities can bring the relevant dispute before the Strasbourg judges after having exhausted domestic remedies. Invariably, the case will be heard.[2] The Strasbourg Court has no discretion to accept or reject a case *a limine*. In 2006, it handed down no less than 1.560 full judgments. Thus, paradise in full blossom seems to have been ushered

[1] But see the Grand Chamber decision in *Markovic v. Italy*, application 1398/03, 14 December 2006, where the ECtHR had to assess a doctrine of *acte de gouvernement* evolved in Italy.

[2] This is the excruciating strength and weakness of the system of the ECHR, see Paul Mahoney, "Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order", in Lucius Caflisch *et al.* (eds.), Liber Amicorum *Luzius Wildhaber: Human Rights – Strasbourg Views*, Kehl 2007, p. 263, at 267.

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in. Can we therefore assume that the rule of law, as encapsulated in human rights, has found its definitive consecration in Europe?

II. The Growth of the Strasbourg System

Indeed, who would have thought, when the journey to the peak we have reached by now began in the late forties of the last century, that human rights in Europe would ever be based on such strong foundations? There is no need to dwell at length on the political and historical origins of the ECHR. I shall confine myself to mentioning some basic facts. After the horrors of the Nazi regime in Germany, the world community was generally agreed that any recurrence of a murderous dictatorship should be forestalled by all conceivable means. For that reason, the UN Charter defined the promotion and the encouragement of respect for human rights and fundamental freedoms as one of the primary purposes of the World Organization (Article 1 (3)). A few years later, on 10 December 1948, with a view to particularizing this general formula, the Universal Declaration of Human Rights was proclaimed. This Declaration served as a source of inspiration for the newly founded Council of Europe (the Statute of the Council of Europe entered into force on 3 August 1949). Taking the work which had already been performed by the UN Commission on Human Rights for a world covenant on human rights as the basis for its own drafting efforts, the Council of Europe succeeded in finalizing the draft text of the ECHR in the autumn of the next year. On 4 November 1950 the ECHR could be signed during a solemn ceremony in Rome. After having received the first ten ratifications, it entered into force on 3 September 1953. The UK had been the first State to accept the new instrument, but Germany was also among the pilot group of ten States who had the courage to bind themselves under the terms of an international regime the effects of which were unforeseeable at that time.

The first years saw a slow, but progressive enlargement of the circle of States parties. Especially the bigger States hesitated initially to follow the adventurers who had paved the way. While Turkey joined the group in May 1954, Italy took the decision not earlier than in October 1955. But it was France which adjourned its ratification for more than two decades. Although the ECtHR took its seat in Strasbourg, and although *René Cassin* was one of the first Presidents of the ECtHR (1965–1968), the French government waited until May 1974 before finally joining the

States that had manifested their confidence in the operation of the new regime by submitting to it. Apparently, France felt that as the country where the Déclaration des droits de l'homme et du citoyen had been proclaimed in 1789, in other words, as "la patrie des droits de l'homme", it had no ground to submit to international control its governmental conduct. In a country which had "invented" human rights, everything was fine by definition.

Until the great change in Europe, the number of parties to the ECHR remained at the level of 22 States. The demise of socialism as a political doctrine brought about by the political occurrences in 1989/90 entailed dramatic results and led eventually to a tremendous increase in membership to more than the double of the figures reached until then. The first State to become a member of the Council of Europe and thereafter to ratify the ECHR was Finland (10 May 1990), which during the reign of socialism in Eastern Europe had not dared to embark on the way to Strasbourg, out of fear to antagonize its great neighbour to the east, the Soviet Union. With some slight delay, taking a lot of precautions, the former satellites of the Soviet Union followed suit: the Czech Republic on 3 March 1992, Hungary on 5 November 1992, and Poland on 19 December 1993. Currently, all the Eastern European States have joined the family of nations grouped around the ECHR, with the sole exception of Belarus which, because of open disregard for the rule of law, being under the tight grip of a dictatorship, is currently still unfit for membership in the Council of Europe. It was a dramatic event when the former superpower itself, now under the name of Russia, was admitted to membership in the Council of Europe in February 1996 and thereafter ratified the ECHR in May 1998. It is not absolutely clear what objectives were pursued by Russia when it made that move to the west of the continent. One may presume that in 1996/98 Russia felt that in order to demonstrate its definitive rupture with its Stalinist past it should accept international obligations to respect and observe human rights. It must have felt politically weak, seeking to rehabilitate itself morally by cooperating with the other States of the continent on a level of parity, without enjoying any prerogatives. Indeed, within the Council of Europe, contrary to the configuration obtaining at the United Nations, the larger States have not been granted any special status, which, in principle, is acceptable even for more powerful countries since the Council of Europe has no true decision-making power.

However, such powers do exist under the regime of the ECHR. From the very outset, it was the particularity of the ECHR that it established not only a certain number of substantive guarantees but that it sought

at the same time to make those guarantees truly effective by providing for enforcement machinery. It was an exceptionally bold decision to introduce an inter-State application by virtue of which every State party is entitled – and politically even called upon – to act as guardian of legality in instances where another State party is seen as breaching the provisions of the ECHR (formerly Article 24, now Article 33). This was a principled departure from the rule of consent which normally governs international dispute settlement: under general international law, reflected in Article 33 (1) of the UN Charter, States have the right of free choice regarding the way in which they wish to lay to rest any international disputes that they may have with another State. Here, by contrast, they accepted to be made accountable before the European Commission for any violation of the obligations incumbent upon them under the ECHR. The relevant provision can be seen as the precursor of what the ICJ, many years later, in its famous *Barcelona Traction* judgment, called 'obligations *erga omnes*'. The provision giving leave to challenge another State must be viewed as the expression of the idea that the ECHR as a whole protects common goods, the preservation of which lies in the public interest of the community of States assembled under the roof of the ECHR.

As everyone here knows, little use was made of the inter-State application. A couple of years ago, the Parliamentary Assembly invited the States parties to bring an application against Russia on account of the tragic occurrences in Chechnya,[3] but no government took up that challenge. Notwithstanding that reluctance to put into motion a procedure specifically designed for such occurrences,[4] one should not lose sight of the fundamental importance which the inter-State application holds as a matter of principle. The existence of this remedy underlines the position of the community of States parties as guarantors of the rights set forth by the ECHR. In practice, though, it has been more or less supplanted by the individual application which permits the victim of a violation directly to bring his/her case to the Strasbourg system, without having to prevail upon his/her home state to initiate a process of diplomatic protection.

Originally the individual application depended on a special declaration which every State party was free to make or not to make (Article 25). A

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[3] Recommendation 1456 (2000), 6 April 2000, *HRLJ* 21 (2000) 286.

[4] On 27 March 2007, an application was filed by Georgia against Russia. It is still pending.

government could choose just to be bound by the substantive provisions of the ECHR without assuming at the same time the remedy of individual application. In this regard, progress was slow. The Scandinavian States Sweden, Denmark and Iceland, together with Ireland, took the lead. The acceptance of the individual application by both Belgium and Germany in July 1955 brought the procedure into force (Article 24 (4) required six declarations before it could be applied). Again, many of the bigger States had enormous difficulties in taking this second step which moved the ECHR to the top of all mechanisms of human rights protection world-wide. The United Kingdom waited for more than ten years before making its declaration under Article 25 on 14 January 1966. Italy came several years later, it followed suit in July 1973. Again, France was the last one of the big European nations to submit to the control mechanism of individual application. Only in October 1981, more than 30 years after the signature of the ECHR, did it take the step which Germany had taken a quarter of a century earlier.[5] Was it fear, was it arrogance, was it the mindset of sovereignty which prevented the French government from accepting the principle of international monitoring of its activities? In any event, it was a hard decision for it to take. Obviously, France needed a lot of time in order to get accustomed to the idea that the last word in a dispute was not spoken in Paris but in Strasbourg, and by an international body.

After France had eventually overcome its hesitations, the conviction spread that the split between accepting the ECHR as an instrument embodying substantive guarantees and rejecting its jurisdictional clauses had become outdated and could not be accepted any longer. Whoever takes a commitment to respect and observe human rights seriously must also be prepared to submit to international monitoring.[6] Eventually, only three States remained outside the jurisdiction of the ECtHR, namely Malta, Turkey and Cyprus. Pressure was increased on these three States. Bowing to that pressure, they made the requisite declarations. Turkey's declaration under Article 25 of 28 January 1987 was accompanied by far-reaching reservations through which Turkey sought to evade any accountability for the activities of its armed forces

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[5] See Christian Autexier, "Frankreich und die EMRK nach der Unterwerfungserklärung (Art. 25) vom 2. Oktober 1981", *ZaöRV* 42 (1982) 327.

[6] See Luzius Wildhaber, "The European Convention on Human Rights and International Law", *ICLQ* 56 (2007) 217, at 222.

in Cyprus.[7] In 1989/90, at the time when the Berlin wall fell and thereby the artificial division of Europe into east and west, all of the then 22 States parties had finally made the declarations permitting individuals to file complaints and recognizing the jurisdiction of the Court at a second level after the Commission.

It was even more difficult to get the control machinery rolling. After the individual application had become applicable for six States in 1955, one might have expected that lawyers from those countries would not wait for a second to make use of the new legal opportunity offered to them. But that was not the case. In 1955, just 138 applications were registered, and this number decreased over the next years: in 1956 only 104 applications were filed, 101 in 1957, and 1958 reached a low point with no more than 96 applications. It was not so much ignorance on the part of lawyers which explains this drop. On the contrary, the legal profession noted with great attention that the European Commission conceived of its role as being that of a defender of governmental interests, to put it drastically. With stubborn rigidity, initially it rejected all incoming applications as being inadmissible, basing itself largely on the criterion of "manifestly ill-founded". The Strasbourg system appeared to be just an artificial construction, not really caring for the common man. Since the Commission swept any complaints away, there was not even any need for the Court that was to commence its activity after eight States would have recognized its jurisdiction. Only in 1959 did the Court come into being, and it could hand down its first judgment on 14 November 1960 in the case of *Lawless*. After having rejected the preliminary objections raised by the respondent, the government of Ireland, it pronounced its first judgment on the merits of that case on 1 July 1961.

But this was by no means the great breakthrough which the elected judges had hoped for. In the second case, a case against Belgium (*De Becker*), the Court could only note that the case had become moot as a consequence of a number of measures taken by the Belgian authorities with a view to rehabilitating the complainant who had been sanctioned for collaboration with the German occupation forces during World War

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[7] For a comment see Christian Tomuschat, "Turkey's Declaration under Article 25 of the European Convention on Human Rights", in *Progress in the Spirit of Human Rights. Festschrift für Felix Ermacora*, Kehl *et al*. 1988, p. 119. In its judgment of 23 March 1995 in *Loizidou v. Turkey (Preliminary Objections)*, A 310, p. 34, the Court declared Turkey's restrictions to its declarations under Articles 25 and 46 of the Convention to be invalid.