

European Court of Human Rights - Developer of Legal Doctrines. Theoretical Bases

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Abstract

The purpose of the paper is to analyze the contribution of the European Court of Human Rights to its transformation into a viable solution for the protection of human rights, fulfilling its role as "developer of legal doctrines regarding human rights", a role conferred by the object and purpose of the European Convention on Human Rights, for the maintenance and development of the democratic society model. Moreover, the evolution of the European Court of Human Rights in the last two decades has undoubtedly had a major effect in order to mediate the applicants to access justice, but also on the national courts that must correctly interpret the Convention, in the cases that are subject to judgment, on the basis of the principle of subsidiarity.

Keywords: European Court of Human Rights, fundamental freedoms, jurisprudence, the principle of subsidiarity, the domestic legal system.

JEL Classification: K33, K38

1. Introduction

Since De Visscher (1953) and even the adoption of Articles 31-33 of the Vienna Convention (1969), the world has changed profoundly. The advent of the internet continues to change the way we think. The world has not only become smaller but is evolving at a pace that can only be described as dizzying. International documents have become more accessible and it is all due to the many sources of information available. The impact on the problem of interpretation also cannot be overlooked. Even national courts are not immune to the debate: in the United States, for example, the debate on the appropriateness of references to foreign case law is raging because it is more accessible than ever. At the international level, the proliferation of international bodies has left its mark. The creation of international courts, or at least more frequent recourse to them, has created another legal reality. A new light on the links between interpretation theory and the reality of public international law is therefore not superfluous.

The European Convention for the Protection of Human Rights and Fundamental Freedoms has a special place in the system of protection of human rights and fundamental freedoms created by the Council of Europe. The European Court of Human Rights has also made an exceptional contribution to the promotion and guarantee of rights in Europe over the last fifty years, and its case law has been at the origin of significant legislative progress in terms of communication or even the balance of legal proceedings.

According to M.L. Entin, the ECHR has become a control mechanism created for the purpose of interpreting and applying the Convention, using the terminology of Article 19, to ensure that the State fulfils its obligations towards the parties. Other scholars of international law note that "the Convention is not a frozen monument, but a living organism, subject to progressive influences". Thus, it is considered that one of the main principles formulated in the decisions of the European Court is the rule of law, which with its components has legal certainty and legal effectiveness².

Established in 1959, it has served as a model for other regional human rights courts: the Inter-American Court of Human Rights, established in 1979, and the African Court on Human and Peoples' Rights, established in 2006. In fact, although it has regional jurisdiction, it is arguably the most influential of all international courts, seemingly a much more important body than the International Court of Justice or even the International Criminal Court³.

These issues are of particular importance because acceptance of the European Convention on

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² Entin M.L., *International guarantees of human rights: the experience of the Council of Europe*, Moscow, 1997.

³ K. Surinder, *Historical development of human rights*, „Journal of social science research”, vol. 6, no. 2, 2014, pp. 996-999.

Human Rights is the first step towards its implementation in national law, while the Convention leaves states free to decide for themselves how to respond to their commitment to respect and implement its provision.

Even so, simply incorporating the Convention into the domestic legal system is not able to solve all the problems that have arisen in its application, nor does it guarantee its full and effective application. It is therefore even more important to review the role of the courts in this process. It is necessary to examine to what extent national courts can examine the conformity of the authorities' procedures with the provisions of the European Convention and the willingness of judges to apply the principles contained in the case law of the European Court of Human Rights, even in cases where the domestic legal framework provides a clear basis⁴.

2. Historical development

The horrors and atrocities of the Second World War were at the origin of a profuse initiative aimed at preventing the recurrence of such events, by establishing a fundamental system of human rights protection and by a stronger political union between states.

First, there was the Universal Declaration of Human Rights, drawn up within the United Nations and adopted by the United Nations General Assembly in 1948.

However, it took many years for fundamental rights to become binding and to benefit from a control mechanism, thanks to the adoption of the International Covenants on Civil and Political Rights and on Social, Economic and Cultural Rights.

Because of the difficulties encountered in drafting these instruments, the question arose in Europe as to whether a regional system of protection would not be more effective, and the answer was ultimately in the affirmative.

In this respect, the European Movement took a major initiative at the Congress of Europe, held in The Hague in May 1948, when certain proposals were put forward concerning the creation of a body with the power to control states with regard to respect for human rights and fundamental freedoms. The European Movement took up these ideas at the Brussels Congress in February 1949, after which one of its committees drew up a first draft of a European convention on human rights.

This draft provided for the guarantee of dozens of rights and freedoms and the creation of a court which, after filtering administered by a commission, would overturn decisions and measures deemed manifestly incompatible with the principles deriving from these rights and freedoms.

As the debate continued within the European Movement, the governments of Western European states took diplomatic steps to strengthen cooperation between states, promote reconciliation between peoples and protect the individual from the threat of dictatorship and oppression. These initiatives came to fruition when ten states signed the Statute of the Council of Europe at a diplomatic conference in London on 5 May 1949. This text led to the safeguarding and development of human rights and fundamental freedoms, one of the objectives pursued by the Council⁵.

The draft of the European Movement was submitted in June 1949 to the Committee of Ministers and then to the Consultative Assembly (now called the Parliamentary Assembly) of the Council of Europe. The Assembly held its first session in Strasbourg from 10 August to 8 September 1949.

Some states strongly opposed the inclusion of the item "safeguarding and development of human rights and fundamental freedoms" on its agenda on the grounds that the United Nations was already aware of this issue. However, this item was debated and, after having been exposed, the draft of the European Movement was communicated to the Legal Affairs Committee of the Assembly.

First, the committee listed the rights to be included in the convention, drawing on the

⁴ A. Cozzi, A. Sykiotou, D. Rajska, I. Krstic, M. Filatova, N. Katic, P. Bard, S. Bourgeois, *Comparative study on the implementation of the ECHR at the national level*, Council of Europe, Belgrade, 2016, p. 5.

⁵ Costa J. P., Titun P., "Advisory opinions before the ECtHR", *Man in International Society: Mixtures in omage to Professor Paul Tavernier*, Bruylant, 2013, p. 25.

Universal Declaration for this purpose. It also envisaged a "collective guarantee" mechanism, a court that would be called upon to decide, and a commission with investigative and conciliatory powers.

In this, some opposed the proposal to set up a court, but failed. The draft of the Committee on Legal Affairs was adopted on the last day of the Assembly session and submitted to the Committee of Ministers on 5 November 1949. Despite some objections from the Assembly, the Committee of Ministers decided to submit the draft to a committee of experts for consideration as a whole.

The experts, some of whom would later become the first members of the Commission or the Court, met in February and March 1950. While the principle of drafting a convention was accepted, there was disagreement on how to formulate the rights guaranteed, with some preferring a simple enumeration and others a specific definition of rights and their possible limitations. The experts therefore proposed several alternatives to the Committee of Ministers in this respect. In addition, given that this was a question requiring a political decision, they did not comment on the advisability of creating a court⁶.

The Committee of Ministers decided to submit the whole question to a conference of senior officials, which met in June 1950.

Once again, opinions were divided on the creation of a court, with France, Italy, Belgium and Ireland voting in favour, but not the Netherlands, the UK, Norway, Sweden, Greece and Turkey. There was also no agreement on the precise role of the commission proposed by the Assembly.

There were also questions about the appropriateness of conferring powers on the Committee of Ministers to take decisions, essentially of a judicial nature, on alleged human rights violations.

In the end, the conference succeeded in producing a single draft, based on the majority opinion on each controversial point. In particular, on the proposal for the creation of a court, the compromise that emerged was that it would be optional, in that Member States could accept or not accept its jurisdiction⁷.

The Committee of Ministers examined the work of the Conference at the beginning of August 1950, after consulting the Assembly's Legal Affairs Committee. The recommendation to a committee of experts was proposed again, but finally, on 7 August, it decided to adopt the draft with a number of amendments and communicated it to the Assembly for its opinion. Another compromise was adopted at this stage, on the condition that the right of appeal, which would allow any person to claim a violation of guaranteed rights, would also be optional, as it could only be submitted to the committee whose creation had proposed the remedies against states that had accepted this possibility.

On 25 August, albeit with regret at the various changes made to the original draft, the Assembly unanimously declared itself in favour of the new draft. Its opinion was accompanied by a number of proposed changes, in particular concerning the guarantee of certain rights omitted from the draft of the senior officials' conference⁸.

In order not to delay the further process, the Committee of Ministers decided to refer the Assembly's proposals to a committee of experts and to open the work for the signature of the text of the Convention, adopted by the Assembly on 7 August.

Thus, on 4 November 1950 in Rome, or shortly afterwards in Paris, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed by all the member states of the Council of Europe. This is why the Convention was originally called the "*Treaty of Rome*", which entered into force on 3 September 1953, after ratification by the tenth signatory state, in this case Luxembourg.

Since the opening of the Court in 1959, Council of Europe member states have adopted a series of protocols to the European Convention on Human Rights to improve and strengthen its supervisory mechanism.

In 1998, Protocol No. 11 thus replaced the Court's original two-tier structure, consisting of a Court and Commission on Human Rights, which met several times a month, and a single full-time

⁶ Ibid.

⁷ Harris D., *Cases and Materials on International Law*, 6th edition, Sweet & Maxwell, 2004, p. 57.

⁸ Costa J.P., Titium P., "Advisory opinions before the ECtHR", *op. cit.*, p. 32.

Court. This change ended the Commission's filtering function, allowing applicants to bring their cases directly to the Court.

A second major reform to deal with the considerable increase in the number of applications and the backlog of cases before the Court was brought about by the entry into force of Protocol No. 14 in 2010. This protocol introduced new judicial formations for the simplest cases and established a new admissibility criterion; it also extended the judges' term of office to 9 years, which cannot be renewed⁹.

Since 2010, four high-level conferences have been convened on the future of the Court to identify ways to ensure the long-term effectiveness of the Convention system. In particular, these conferences led to the adoption of Protocols 15 and 16 to the Convention.

Protocol No 15, adopted in 2013, introduces a reference to the principle of subsidiarity and the doctrine of margin of appreciation in the preamble to the Convention; it also reduces from 6 to 4 months the time within which an application must be lodged with the Court after a final national decision.

Protocol No 16 was also adopted in 2013, which will allow the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle concerning the interpretation or application of the rights and freedoms defined in the Convention, or in protocols thereto. Protocol No. 16 is optional¹⁰.

3. ECHR - theoretical basis

The ECHR is primarily addressed to the national judge by virtue of the principle of subsidiarity. This gives the national supreme courts, as Guy Canivet pointed out during his opening speech at the 8th Conference of the Presidents of the Supreme Courts of the Council of Europe (Paris, 26 October 2006), "a huge task"¹¹. In general, it is his role to interpret and therefore a significant role in establishing the basis "for the protection of rights and freedoms in European constitutional law"¹².

This is where rules are adopted on individual or state claims alleging violations of civil and political rights under the Convention. It is also the physical place where judgments are delivered.

The Court is in many ways unique and part of a larger political and legal system that seeks to preserve peace by creating a unified system for the protection of human rights. To this end, the court not only considers national law when examining a case, but also takes into account how the state has dealt with the issue.

As an international court it is also governed by international law and general principles of international law, elements of which are transferred by the court to national judicial systems, where they can be enforced for the benefit of the individual.

The European Court of Human Rights adopts the general principle of treaty interpretation applied in international law. The text of the European Convention on Human Rights is therefore interpreted in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties. Above all, this means that the ordinary meaning of the words underlying the interpretation when explaining the text in the specific context, and in accordance with the object and purpose of the whole Convention, including its preamble and protocols. The contextual method of interpretation means that the Court sometimes interprets the ordinary meaning of the words in a provision by reference to other provisions of the Convention, its protocols or its preamble, as long as such an interpretation is consistent with the object and purpose of the Convention. The consequence of this approach is that a more specific provision in a protocol may form part of a more general provision of the Convention, extending its scope of protection. The contextual approach also means that the Court adopts an evaluative approach to interpretation in order to provide practical and effective protection of

⁹ A. Cozzi, A. Sykiotou, D. Rajska, I. Krstic, M. Filatova, N. Katic, P. Bard, S. Bourgeois, *op. cit.*, 2016, p. 54.

¹⁰ *Idem*, p. 58.

¹¹ Sudre F., *La Convention européenne des droits de l'homme*, Presses Universitaires de France, 2008, p. 7 and Sudre F., *L'Europe des droits de l'homme*, „Droits, Revue française de théorie du droit”, no. 14, 1991, pp. 106-114.

¹² *Ibid.*

Convention rights in a contemporary setting, where developments in national, regional and international law can be taken into account. This makes the Convention a living instrument that "must be interpreted in the light of current conditions"¹³.

In the context of treaty interpretation, it could be noted that the Court clarified that the reference to "general principles of international law" in the first article of the First Protocol to the Convention has the same meaning as Article 38(1)(c) of the Statute of the International Court of Justice¹⁴. Therefore, principles common to the major legal systems of the world, such as the principle of equity, are part of the treaty interpretation process. However, the Court has held that only persons with another nationality can rely directly on general principles of international law if they have been deprived of their property¹⁵.

The Court's interpretative approaches are discussed both in the context of a conventional perspective, i.e. applying the perspective correctly, and an external perspective for the particular benefit of individuals and society. It is based on the knowledge that the development of human rights in the 21st century has created a new branch of the corpus of international law that influences other areas of international and national law.

The development of international law also influences and develops through case law, as courts tend to apply a new development when analysing and interpreting the meaning of treaties concluded decades earlier.

Moreover, the case law of the European Court of Human Rights covers a wide range of subjects as a result of the application of the provisions of the European Convention on Human Rights and its protocols. In this respect, the Court's Registry publishes a range of materials to help understand the Court's case law and official texts.

Thus, it follows that as far as human rights are concerned, the ECHR has a supra-legislative rank and all courts are obliged to implement treaty rights following ECHR case law; all judges must interpret domestic law as far as possible in line with the Court's interpretation.

In this respect, it is important that the Convention is interpreted and applied in such a way that its provisions are fully respected, not just theoretical or unworkable. Failure by the Court to follow a dynamic and evolutionary approach would indeed risk obstructing the reform or improvement of the Convention.

4. Romania signatory state to the Convention

Accession to the Council of Europe and also accession to the European Convention on Human Rights and Fundamental Freedoms was an important step in Romania's integration into the European legal area, as well as a new stage in the development of national law enforcement practices.

It was natural that Romania, a country whose history and tradition of civilisation and culture has its roots in ancient times, should attach paramount importance to international law and especially human rights standards. In view of the primary instruments, international human rights law has enriched and strengthened domestic legislation in this regard.

Thus, after the Revolution of December 1989, following the invitation to become a member, launched by the Committee of Ministers (CM) of the CoE, on 4 October 1993, by Resolution no. 37/1993, Romania joined the Council of Europe, on 7 October 1993, signing on this occasion the statutory documents and the European Convention of Fundamental Human Rights and Freedoms, during the CoE Summit in Vienna.

One of Romania's first tasks has therefore been to examine the treaties extended to its territory and to make known, where appropriate, whether it intends to remain bound by these treaties; it has also reviewed and acceded to or ratified in most cases existing regional and international human rights instruments, a policy which has remained unchanged to date.

¹³ *Tyrer v. United Kingdom* No. 5856/72 (25 April 1978).

¹⁴ *Lithgowen and Others v. the United Kingdom* Nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 (ECHR, July 1986).

¹⁵ *Ibid.*

Recognition of the predominance of international law, the objectives and principles of the European Convention on Human Rights and Fundamental Freedoms, in particular the peaceful settlement of disputes on the basis of respect for human rights and fundamental freedoms, occupy a central place in the conduct of international relations in Romania.

Romania has become party to most of the core and other international human rights instruments adopted at European and regional international level. The standards and obligations arising from these instruments are an integral part of the country's legal system.

While enforcing the rules necessary for the promotion of human rights, it ensures a separation of powers and, in particular, the independence of the judiciary.

The Constitution, Romania's supreme law, is the main instrument for the recognition and protection of human rights. Title II of the Constitution, entitled "Fundamental Rights, Freedoms and Duties", repeats and develops the Universal Declaration of Human Rights and the European Convention on Human Rights.

The legislative, executive and judicial authorities are obliged, under Title III of the Constitution, to supervise, within the limits of their respective powers, the effective implementation of human rights.

Legislation in general and criminal procedure in particular have the purpose and effect of protecting human rights. The Supreme Court has declared unconstitutional any law or provision that contravenes human rights, as it has repeatedly done.

Any restriction or limitation of human rights guaranteed by the Constitution must be provided by law and be absolutely necessary in the interests of Romania's security, constitutional order, public safety, order or health or the protection of the rights guaranteed by the Constitution to each individual. Provisions relating to such restrictions or limitations must be strictly interpreted.

Whenever a positive measure is provided for in the Constitution or other instruments in respect of certain rights, and in particular economic, social or cultural rights, such a measure must be taken within a reasonable time.

The remedies available to a person claiming that their rights have been violated include:

- a) right of appeal and hierarchical appeal;
- b) appeal to the High Court of Cassation and Justice for the annulment of any act, omission or decision of a body or authority (both at first instance and pending);
- c) the constitutionality of a law or a decision is challenged by one of the parties to a lawsuit; the court is then obliged to refer the case to the High Court of Cassation and Justice and suspend the proceedings;
- d) civil proceedings for compensation, restitution or declaratory judgment. In case of irreparable damage, a court order may be granted;
- e) criminal proceedings brought by individuals;
- f) the right of appeal in both civil and criminal cases;
- g) the responsibility of the State is engaged for any other wrongful act or omission which has caused damage that has been committed by its officials or authorities in the exercise or purported exercise of their functions;
- h) in the exercise of their functions, in particular the monitoring of parliamentary activity, parliamentary committees regularly examine allegations of situations that have led to human rights abuses;
- i) the public prosecutor is specifically responsible for ensuring respect for the rule of law; he or she may, of his or her own motion or at the request of a complainant, request investigations or advise on courses of action.

Romania has also accepted the compulsory jurisdiction of the European Court of Human Rights and recognised the compulsory jurisdiction of the International Court of Justice under the optional clause in Article 36(2) of the Statute of the Court.

The international conventions that Romania has ratified or acceded to are incorporated into domestic law and take precedence over all other laws as soon as they are published in the Official Gazette. They are directly applicable in the country and can be (and are effectively) invoked before

the courts and administrative authorities.

If an international convention contains provisions which cannot be applied automatically, the legislature is legally obliged to adopt laws to harmonise domestic law and the convention in order to make it fully applicable.

Romania is a pluralist democracy that ensures absolute respect for individual rights and freedoms. It continually strives to make progress in the field of human rights by overcoming difficulties. Through positive action, in particular through training and education, the state is fighting against the last prejudices, especially in the field of gender equality.

Human rights are seen as an issue of great importance; therefore, special efforts are made to raise awareness among the public and the authorities concerned of the rights set out in the various instruments.

5. Conclusion

Since ancient times human rights have been of concern to mankind, but after the Second World War and its atrocities, the European continent developed the European Convention on Human Rights to promote respect for the rights of all people.

Initially the Convention guaranteed the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the principle of "*no punishment without law*", the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, the right to an effective remedy and the prohibition of discrimination; but through the amending protocols it has undergone important transformations, including the right to property, the abolition of the death penalty and the regulation of collective rights and freedoms.

Since its establishment, the European Court of Human Rights has been the most influential international court for the protection of human rights, interpreting the articles of the European Convention on Human Rights through its judgments.

Seventy years after the adoption of the European Convention on Human Rights and 60 years during which the European Court of Human Rights has issued judgments defending the rights of individuals who have been wronged by States that have ratified the Convention, the conclusion would not change: the role of the ECHR in the development of national legal systems is to be appreciated.

The European Court of Human Rights is the ultimate "conscience" in human rights questions, a final legal instance or decision-making body similar to a constitutional court.

In many cases, it has given guidance to national courts - as a national constitutional court does. Sometimes it even uncovers structural problems that can only be solved by adapting and modifying the legal system. The modification of the legal system is influenced by European best practice, or at least better practice.

As has been done so far with the amendments to the European Convention on Human Rights, it is very likely that the ECHR will further broaden the scope of human rights in the future and that its case law will contribute considerably to promoting protection against any abuses.

But we believe that the most important and perhaps the most significant progress in the field of human rights will come from a constant, continuous and respectful dialogue between all those for whom justice is not only a function and a concern, but also an experience and a virtue, because it is about our common humanity.

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