Ceremony of the Slovenian Constitutional Court
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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 Charta of 1215 and the Joyeuse Entree 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 Charta protected every free Englishman, not only the barons of the 13th century, and that it had to be respected even by Parliament. As he put it, "Magna Charta is such a fellow that he will have no Sovereign". 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 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.

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. In their minds, the notions of democracy and of human rights were inescapably interconnected. 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 thus had no effect on governments" wish to keep important parts of the control mechanism within their own power. Summing up, then, the intention of the fathers of the Convention was to establish a standard-setting protection and early warning system to help both democracies and individuals 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, which in turn was followed by a period of slow, but constant expansion. The idea of a continuing development of the Courts 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.

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. I have met politicians who told me that the new member States, having ratified the Convention, had now - in a sense automatically - become democracies. In my view, this is Voodoo politics and is utterly naive. Democracy and human rights are not something that you acquire once and then effortlessly keep forever. To the contrary, you have to keep working on these notions so that they will remain living and real.

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 53'500 applications will be

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%. Of the 104'000 applications which are pending before the Court, some 23% are from Russia, 12% from Rumania, 10% from Turkey, 8% from Ukraine and 6% from Poland, all in all almost 60% from these five countries. As a result of continuous rationalization and streamlining, the Court managed to increase its productivity substantially. Nevertheless, the number of applications is expanding inexorably.

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

This summary 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 670 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.

Two audit reports and one management report in 2004 and 2005 established that the Court is well managed and that it would need about the double of its 50 million-Euro-budget in order to cope. There is a sizeable group of non-governmental organizations, academics and even a minority of judges who adhere to the dogma that the right of individual application must not be touched, thoroughly, even completely ignoring the steadily growing number of pending and of backlog cases. Somewhere in between is the Court, still remarkably successful, but praying for a better balance.

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 misunderstand it as 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. On Interpretation

A few words may be in place with respect to interpretation. Human rights guarantees are very broad and programmatic and do not lend themselves to grammatical or historical interpretation and to what is called in the American discourse "originalism". If we have to decide whether pornography on the internet can be prohibited despite the freedom of expression, or whether DNA tests clash with the notion of a fair criminal trial, or whether evidence obtained by means of torture can ever be used in a procedure governed by the rule of law and Articles 3 and 6 ECHR, resort must be had to more modern methods and approaches. The Convention has become and has remained a dynamic and a living instrument, which has shown its capacity to evolve in the light of social and technological developments that its drafters, however far-sighted, could never have imagined. The Convention has shown that it is capable of growing with society. Its formulations have proved their worth over close to six decades. It has remained a live and modern instrument. The "living instrument" doctrine is one of the best-known principles of Strasbourg case-law, the principle that the Convention is interpreted

teleologically, "in the light of present-day conditions" and of changing societal values, that it evolves, through the interpretation of the Court.

Let me emphasize that I do not plead for a "Gouvernement des Juges". Giving broad answers which are in no way called for by the facts of a case is to confuse a judicial mandate with that of the legislature or of the executive, and cannot and should not be the role of courts. I believe that international human rights judges should do what is just and fair and should fear no one, but they should at the same time have regard for the context in which they live and for the aims they are serving. Democracy and human rights are our common responsibility. First and foremost they must be respected by the national parliaments, governments, courts and civil society at large. Only if they fail, does the Strasbourg Court come in. The subsidiarity which I describe and advocate here is more than pragmatic realism. It is also a way of paying respect to democratic processes (always provided they are indeed democratic). And I am firmly convinced that it is the best means of translating the "human-rights-law-in-the-books" not only into a "human-rights-law-in-the-court", but into a "human-rights-law-in-action" and - hopefully - in reality across Europe.

E. Conclusion

And so, in 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.