Strasbourg, 5 December 2002
<cdl\doc\2002\cdl-ju\040-e>

Restricted
CDL-JU (2002) 40
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Role of the Supreme Court in the protection of fundamental freedoms and human rights

Report by Mr Luigi Ferrari Bravo
(European Court of Human Rights, Ad-hoc Judge, Professor)

Conference on "Human Rights Protection Systems"
(Bishkek, 21-22 November 2002)

Madame President, distinguished participants, Ladies and Gentlemen,

I am here not representing any particular organisation or body, as I am only a "former" judge of the European Court on Human Rights. I can, therefore, enjoy complete freedom in talking to you what I really think, and feel, about the problems which are at issue.

First of all, however, I want also express my sincere gratitude to the Venice Commission and to the authorities of Kyrgyzstan for the kind invitation extended to me. I want also express my sincere admiration for this very beautiful country which I now see for the first time, thus realising a dream born in my spirit when, as a young boy, I was listening to Borodin's music inspired by the plains of this part of the world.

The European Convention of Human Rights tries to define in its first part what these Rights are. It has been completed by some additional Protocols. Of course not all the rights give rise to the same quantity of case-law of the European Court. For instance there is almost nothing in relation to article 4 (prohibition of slavery and forced labour) or to article 12 (right to marry). This does not mean that the rights protected there have a minor importance. It means perhaps that they are more peacefully respected so that no disputes arise about them. But it is quiet possible that if the Convention becomes applicable to another jurisdiction the life or cultural conditions prevailing over there may create cases which did not occur in States with a different cultural background.

There is, therefore, a certain relativity of the meaning of the Convention when it applies to different States; the question arose (and remained unanswered) when the Convention was made applicable to the former Communist world whose basic values were not the same than those of the West. So far, however, we have not yet seen major accidents but the problem is there (*Ilascu and others v. Moldova and the Russian Federation* application).

To mention this point is important as the Convention is in practice subsidiary in its application. Individuals or private parties in general may make applications, according to article 34, but the Court will hear them only if "all domestic remedies have been exhausted" as it is stated in article 35. In my opinion the Court, overwhelmed by an excessive number of new cases, will create more and more use of this clause; the Pinto Law is an issue on this point. If this is true, the relationship between the Court and the highest national jurisdiction will become all the more crucial.

To start from the beginning, article 2 (right to life) is certainly of the utmost importance. Because of the situation of permanent unrest (to use a very nice word) which existed and still partly exists in Kurdistan an avalanche of cases were presented against Turkey, involving deaths or unexplained disappearances. The jurisprudence formed on that problem will be of extreme importance if, for instance, the situation in Chechnya creates cases against Russia!

Article 3 relates to torture. It is very short "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". This notwithstanding, the case-law created by this article is conspicuous. All the major western countries incurred in condemnation according to article 3. Italy, my country, was severely condemned for behaviour equivalent to torture in a famous case relating to jails of maximum security in, the island of Pianosa (the *Labita v. Italy* case). And it is important to say that after the condemnation the detention system was changed and certain practises disappeared. The same applied to France in the *Selmouni v. France* case with the condemnation of police offices of Bobigny near Paris (protests). The

fact that the two individuals (Labita and Selmouni) were already condemned for other reasons does not matter. Article 3 demands a certain conduct in a course of police operations, no matter if they are applied to criminals. But Irish people in jail in the United Kingdom invoked the same article, because they struggled for the independence of Northern Ireland. And again, methods like lights on for 24 hours, deprivation of food or beverages, beating, and the like were condemned and the British practice subsequently changed.

But Article 3 has been invoked also in different context. As you have heard yesterday, prohibition of torture and control thereof is provided for by major one of the UN conventions. The movement against torture has therefore gained intensity and weight and today the number of ratification of different conventions in the matter, the existence of instruments of control (both in the Council of Europe and the UN), the movement of public opinion, have created a situation where by one can consider that prohibition of torture represents an imperative created by a rule of *ius cogens*, that to say a rule of universal application.

It is against this background that the question arose before the House of Lords (the highest court) when extradition of the former Head of State of Chile Senator Pinochet, was demanded by a Spanish judge, inter alia, for conspiracy to commit acts of torture. It is impossible to comment here the reasoning, on these occasions, of their Lordships. But it is important to note that torture was recognised as *crimen iuris gentiun*, the final delivery of Senator Pinochet to the Chilean authorities having no importance to this effect.

Before the Pinochet affair the British Court had to deal with torture also on another case: *Al-Adsani v. UK*. The case thereafter went to the European Court of Human Rights where, by a very narrow majority (nine to eight), the Grand Chamber refused to accept the idea that, because of the importance of condemnation of torture, this should prevail over the rule of state immunity and that, therefore, the State of Kuwait, which had invoked the immunity, could be judged by the British Court. I fervently hope that such a narrow and, in a way, strange majority, can be reversed on a new occasion, so permitting the Court to mark a point of importance in the fight against torture.

Articles 5, 6 and in a way 7 relate to the liberty of persons and to the way jurisdiction is organised. In particular article 6, which was extended to civil jurisdiction ("in the determination of his civil rights and obligations or of any criminal charge against him…") constitutes today the clause on which most of the case-law, sometimes produced without reflecting on it, is produced. The situation is grave as justice is slow in many countries (not only in Italy, which has produced the Pinto law, but also in France, Poland etc., so to say all the countries where recourse to justice is not terribly expensive).[1]

Article 8 protects private and family life. It was understood from the very beginning not to refer to a family created according to the law, but to the "fact" - of a family, being however understood that it was a family originated by a man and a woman. It applies to all kinds of families wherever they are settled. According to that it has an impact on matters of immigration and it may clash with some too strict rules. Expulsion, inter alia, may enter into the picture.

[1] (Pinto law; what in its turn the Court could do, inter alia in the framework of a general reform of the Convention)

Articles 9, 10 and 11 relate to the different freedoms, freedom of thought, conscience and religious (art 9), freedom of expression (art 10) and freedom of assembly and association (art 11). These are problems when a religion is accorded a better status (like in Greece). The basic idea is that of a secular state or regime: as far as art 10 is concerned, the case law is oriented to protect maximum freedom of expression. The same does not apply to freedom of assembly or association which recognises some derogation in case of political parties (Turkey).

To conclude, I should mention art 1 of additional Protocol 1 relating to the right of property. This right is different from the others and its protection was introduced later during the period of the climax of the cold war. Its protection is certainly useful, but it may create unbalances, in particular in cases of immaterial goods or in the case of workshop arts where the Court tends do appreciate the real value of the piece at the moment of the decision (see *Beyeler v. Italy*); or when the Court tends to become, like in the case of Romanian denationalisation, a judge of fourth instance, when the local remedies don't have produced an accepted result (see *Brumarescu* v. *Romania* and the case-law inspired by it).

But, with those cases, we touch the limits of the jurisprudence according to the present convention. To do more, or in a different way, to include other rights, would imply a reform of the convention. Something for which the States are not yet ready.
Thank you very much.