Strasbourg, 4 May 2010

CDL-UD(2010)006
Engl. Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE FACULTY OF LAW AND THE CLUSTER OF EXCELLENCE "FORMATION OF NORMATIVE ORDERS" OF GOETHE UNIVERSITY, FRANKFURT AM MAIN, GERMANY

and with

THE CENTRE OF EXCELLENCE IN FOUNDATIONS OF EUROPEAN LAW AND POLITY RESEARCH HELSINKI UNIVERSITY, FINLAND

UNIDEM SEMINAR

"DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS AND POPULAR SOVEREIGNTY IN EUROPE"

Frankfurt am Main, Germany

15 – 16 May 2009

"DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS IN THE INTERNATIONAL CONTEXT AND POPULAR SOVEREIGNTY"

by
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I *Introduction*

Speaking about national sovereignty and international human rights, I think there is still truth in the saying that "the proof of the pudding lies in the eating". My observations will, therefore, be linked to legal practice rather than legal theory and take the form of a supplement to Professor Brunkhorst's intervention but also serve as a follow-up to some of the previous speakers.

I shall limit myself to discuss the European Convention of Human Rights (ECHR) and the European Court of Human Rights (ECtHR) which may be regarded as perhaps the greatest achievements of the Council of Europe. They serve as a guarantee for the rule of law and human dignity within Europe and provide a bulwark against a possible return to regimes and living conditions of past times.

Let us also bear in mind that the Council of Europe is an organisation of independent nation states cooperating, above all, to secure certain fundamental values which have been severely threatened in the past. It is not a kind of union replacing the nation states and their governments.

Thus, it is another prime objective of the Council of Europe to support and sustain democratic rule in its member states – government "of the people, by the people and for the people". This calls for a wide acceptance of majority decisions and of compromises that may find favour with, as the case may be, a large majority in a given member state. In this perspective, it is a paradox that important value judgments are made and issues affecting democratic governance are decided by international judges acting independently in their personal capacity, with limited democratic legitimacy.

A number of European judicial systems are faced with heavy backlogs and unacceptable handling times that create situations where "justice delayed becomes justice denied".[1] Against this background, it is much to be regretted that the handling time in the ECtHR frequently equals that in national jurisdictions violating convention rights.

The backlog of the ECtHR jeopardizes the proper functioning of the Court. A steady increase has brought the number of pending applications to more than 100 000, although only a fraction of these materialize for actual consideration by the Court.[2] There seems to be widespread agreement that the measures agreed in Protocol no. 14 will not be sufficient to remedy the situation and at present it is even doubtful if the protocol will enter into force.[3] The success of the Court risks becoming a fatal blow to the Court.

My proposition is that this state of affairs does not necessarily reflect the actual state of human rights in many Council of Europe member states. In part, it is the result of the Court's willingness to expand the rules of the ECHR and its substantive protocols. Ever more legal questions are decided in terms of human rights under the Convention's wide and vague rules. The more willing the Court is to expand and to extend the rules, the more complaints are likely

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[1] Quoted from Abraham Lincoln's well-known speech in Gettysburg 19 November 1863.

[2] By the end of 2008 97 3000 applications were pending before a judicial formation of the Court. Another 21 450 applications were at the pre-judicial stage, under preliminary consideration by the Registry as further information was required from the applicants in order to allow for processing. In the course of 2008, 49 850 applications were allocated to a Committee/Chamber, an increase of 20 % from 2007. See the Court's Annual Report 2008 ch. 12.

[3] Some help will now be provided by the coming into force (as from 1 October 2009) of Protocol no. 14bis (opened for signature on 27 May 2009), which makes some of the provisions of Protocol no. 14 binding in respect of Convention states ratifying no. 14bis.

to be generated. This expansion is a threat to the European human rights system itself, to legal certainty in member states, and to national sovereignty and democratic rule alike.

II *Legal practice – three examples from the European Court of Human Rights*

I shall provide you with four examples from the Court's recent practice to illustrate and discuss my proposition.

(1) My first example concerns naming traditions and practices, which vary throughout Europe. In *Johansson v. Finland* (6 September 2007) the parents wished to name their son "Axl Mick", apparently after the popstars Axl Rose and Mick Jagger – Axl accordingly without the letter e. The missing *e* made the difference from Finnish naming traditions where Axel, spelt with an e, is a traditional and commonly used forename. Since the spelling without the e departed from Finnish practice the authorities refused to accept it and the decision was upheld by the Finnish administrative courts. The ECtHR, however, found a violation of ECHR Art. 8 and added that, indeed, some five other boys had been registered in Finland with the forename of Axl without an e.

One may agree or disagree about the substance of the matter – the spelling of Ax(e)l. But can the dropping of the letter e with any justification be regarded as a human right? Surely, it is far from apparent that it infringes the right to respect for private and family life laid down in Article 8.

Whether unlawful discrimination had taken place, is a matter that, in this case at least, would be better left to national courts to decide – for one thing, the wrong might consist in a wrongful acceptance of the five spellings without an e, and nobody can claim as a human right that national authorities persist in their wrongful decisions. In short, this is a case where the ECtHR would have acted wisely by leaving the decision and the discretion involved to the national authorities and courts.

(2) I now switch from personal life to transnational business activities illustrated by the Grand Chamber judgment in *Anheuser-Busch Inc. v. Portugal* (11 January 2007, GC).[4] The Portuguese Supreme Court had refused an application from a US company to register a beer under the trade mark of Budweiser. Registration was denied because it would have contravened a bilateral treaty between Portugal and the Czech Republic, where Budweiser is a traditional brand name for a Czech beer. The majority found no violation of the ECHR in the actual case, but the Court accepted that registered trade marks as well as other intellectual property rights enjoy the protection given to property rights granted by Article 1 of Protocol 1 and a large majority even extended this protection to an application for trade mark registration.

This opens a new vast battlefield for companies to pursue their business interests and adds the ECHR to the numerous legal remedies already exploited by affluent firms for their commercial purposes. The Court boldly resisted any temptation to restrain the interpretation of the conventional rule in question. Since the case backlog is heavy and the resources of the ECtHR system are after all limited, this invitation to business may be at the expense of individuals suffering a breach of a fundamental right and in need of relief.

(3) My third example deals with democratic infrastructure as illustrated by *TV Vest & Rogaland Pensjonistparti v. Norway* (11 December 2008). Here, the question was whether a general ban on political TV advertising violated freedom of expression as protected by Article

[4] It is settled law, however, that companies and other legal persons at least in some respects are protected by the ECHR, see, *e.g.*, Marius Emberland, *The Human Rights of Companies* (Oxford 2006). It follows from the wording of Protocol no. 1 Article 1 that companies enjoy protection under this Article, but the actual scope of the protection remains to be determined.

10. Political advertising on television has never been permitted in Norway although advocated by some political parties. However, prior to a local and regional election, a regional branch of the small Pensioners Party managed to purchase advertising time from a local television chain. The administrative fine which the media authorities subsequently imposed on the TV company was upheld by the national courts under the Norwegian Constitution as well as under Article 10 in the light of the margin of appreciation.[5] The ECtHR, however, found unanimously a violation of Article 10.

Clearly, it is a prerequisite for democratic elections that the various parties have a right to make their views known to the electorate, but it is still open to question whether this should apply to all media. Surely, there is evidence to suggest that political advertising on TV may have an impact on the quality of public debate and give political parties that have large budgets an advantage over other parties. The ECtHR seemed to accept that TV advertising may have undesirable effects in a democratic perspective. It nevertheless found that a blanket ban was disproportionate with respect to the applicant, but failed to consider the general ban in the light of what other means of access to the public were available to a political party.

According to the ECtHR, a prohibition on political TV advertising cannot be applied to a small political party which receives little or no mention in the edited TV media, depending on the form and content of the specific advertising. It is difficult to see how such an exception can be carried out without an assessment on a case by case basis which may engender legal uncertainty and arbitrariness as well as unnecessary bureaucracy. The judgment illustrates, I think, how the ECtHR may make an effort to accomodate an applicant at the expense of general and uniform rules that are simple to administer and leave no room for arbitrary individual decisions. It is worth noting that general uniform rules used to be regarded as a prominent feature of the rule of law.

It must be added that political advertising on TV is a controversial matter where rules vary greatly between different Council of Europe member states. Apparently, that did not affect the Court. One may ask if the judgment can be explained in terms of the composition of the Court. Indeed, it is a problem if judges coming from states with no tradition of a diversified free press and where new political parties meet various suppressive measures from the established leadership apply their experience and outlook indiscriminately to states with democratic traditions of longer standing.

(4) The last example concerns prisoners' right to artificial insemination, the Grand Chamber judgment *Dickson v. United Kingdom* (4 December 2007, GC). Mr. Dickson, born in 1972, was convicted of murder in 1994 and sentenced to life imprisonment with a possible release only after 15 years, i.e. not until 2009. While in prison he met his future wife in 1999 through a prison pen pal network. She was imprisoned then, but later released. She was born in 1958 and had three children from earlier relationships, whilst Mr. Dickson had no children. They married in 2001 and wished to have a child. Their application for facilities for artificial insemination was, however, refused by the Secretary of State, and his refusal was upheld by the English courts.

The Grand Chamber found under dissent (12-5) that this refusal breached the couple's right to family life under Article 8 of the Convention. The right to beget a child was regarded as an essential part of the right to respect for private and family life and applied to prisoners as much as to anyone else. In any case, a prisoner could not be refused artificial insemination facilities for the sole reason that it would be offensive to the public at large. The majority made the point that artificial insemination would be the only practical means for the applicants to conceive a child, since Mrs. Dickson would be 51 years old at Mr. Dickson's earliest release and the

[5] See the judgment by the Norwegian Supreme Court in NRt. [Norsk Retstidende, Norwegian Law Gazette] 2004 p. 1737, quoted in part in the judgment of the ECtHR.

English prison regime does not allow for unguarded conjugal visits. The fact that Mr. Dickson for a good many years would be unable to take part in the upbringing was of no importance since Mrs. Dickson could take care of the child. The majority found that in these circumstances the English policy in the field did not allow for a fair balance between the competing interests and fell outside any acceptable margin of appreciation.

This judgment goes a long way towards making artificial insemination a human right for couples who would otherwise be prevented from conceiving a child. Prison rules vary between Council of Europe member states, and in other judgments the ECtHR has not considered unguarded conjugal visits in prison as a human right. Accordingly, it is no wonder that the minority of the Grand Chamber found a lack of coherence in the majority's ruling that a prisoner nonetheless is entitled to artificial insemination facilities as a matter of human rights. The weight accorded to the adults' wish to become parents, compared to the lack of importance attached to the information on social environment awaiting the prospective child, is also striking.

The *Dickson* judgment is an example showing how the concept of human rights may be stretched and extended in fields that are linked to value judgments and public services in the Convention states where the relevant national rules of law differ.

III *General features of the Court's reasoning*

There are certain features in the reasoning of the ECtHR which create an inherent risk of causing legal uncertainty as well as infringing national sovereignty. The impact on sovereignty affects national legislatures in particular, but also national judiciaries, especially the Supreme Courts.

This risk might have been more limited if the effect of each single judgment, including its value as a precedent, was confined to the factual situation that gave rise to the application. However, the rulings are often based on general statements that lend themselves to be applied to other circumstances, and the Court often does so by reiterating them in new cases, maybe encouraged by legal scholars. The Court seldom retreats from its previous decisions in the direction of a more restrained application of the Convention. In this sense, one can speak of a doctrine of precedent, but it does not prevent various sections of the Court from making judgments that are hard to reconcile (*Orr v. Norway*, 15 May 2008, vs. previous judgments).[6] The court tends to state its reasons in a manner which leaves the door open for a further step. For example, when the ECtHR found in *Taxquet v. Belgium* (13 January 2009) that the jury verdict contravened the right to a fair trial for want of reasons, it gave rise to doubts as to whether the jury system can be maintained at all under the ECHR.[7] The doctrine of precedent – to the extent it does exist – is hardly applied so as to prevent the Court from taking a further step to enhance the rights of defendants and other individuals if it thinks fit.

The crucial point here is the perception of the ECHR as "a living instrument"[8] and the

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[6] *Orr v. Norway* deals with the question to what extent the presumption of innocence according to ECHR Art.6 para. 2 prevents a court from holding a defendant liable to pay compensation to the victim after acquitting him of criminal liability. The prosecution for rape makes the question particularly relevant, as indeed it did in the *Orr*case. The Norwegian request for referral to the Grand Chamber was refused by the Panel of five judges acting under ECHR Art. 43.

[7] The Norwegian Supreme Court unanimously held in a plenary judgment of 12 June 2009 that the Norwegian jury system is compatible with the right to a fair trial under the ECHR in the light of other procedural rules (*i.a.*, on the judge's summing up, setting aside of jury verdicts and motivation of the penal sanction) that are capable of fulfilling broadly similar functions as a reasoned verdict would do.

[8] See, originally, *Tyrer v. United Kingdom* (25 April 1978), holding that birching of schoolchildren ran contrary to ECHR Art. 3.

corresponding doctrine of dynamic or evolutive interpretation.

The ECHR must of course be applied to new factual situations and conflicts as they arise in our societies and in this context the ECtHR should take account of new value judgments in the convention states. But it does not follow that the Court is free to create ever more far-reaching rights on the basis of the convention rules.[9] The Convention will not become "theoretical and illusory" and cease to be a living instrument once the number of violations diminish – quite the contrary, it would be a proof of the Convention's success. Even if states should fully comply so that no violations are found, there would be no cause to increase the obligations through Court practice. National legislatures have, on the basis of public debates and general elections, a much stronger democratic mandate to do this, particularly as individual rights may often have repercussions on others, individually or taken together. Subsidiarity should be applied: National legislatures and courts are often much better placed than the ECtHR to assess how the values enshrined in the Convention can be applied in the national legal system. In my view, it is unfounded to assume that "[a] failure by the Court to maintain a dynamic and evolutive approach would ... risk rendering it a bar to reform or improvement" (*Christine Goodwin v. United Kingdom*, 11 July 2002, para. 74). Such an assumption overlooks the fact that legal reform, even in the field of civil liberties and human rights, can come about by national legislation as well as by new international conventions and protocols.

Neither the doctrine of "the states' margin of appreciation" nor that of "fourth instance" provide adequate safeguards in this respect. For example, the principle of "fourth instance" has not prevented the ECtHR from making an independent assessment, different from that of the national supreme court, of the meaning of certain terms or words in the national language.[10] Even less has the ECtHR felt constrained from diving into the details of the case, as illustrated by *Johansson v. Finland* and by *Walston (no. 1) v. Norway* (3 June 2003). One can get the impression that Strasbourg judges behave, and reason, as if they were justices of national supreme courts, not judges of an international court whose task is to see that the goals and values enshrined in the Convention rights are duly taken into account in the national decision-making process. If the acclaimed judicial dialogue between the ECtHR and national supreme courts is to be taken seriously, it requires judicial restraint from Strasbourg in particular where the national supreme court has thoroughly considered the application of the conventional rules.[11]

IV *Conclusion*

To sum up: The present practices of the ECtHR are unsustainable in the long run, with respect to national and democratic sovereignty as well as legal certainty, let alone the

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[9] The ECtHR does recognise, however, that the Court cannot create new right without support in the text of the Convention, see *Johnston v. Ireland* (18 December 1986) concerning an alleged right to divorce.

[10] In *Orr v. Norway* the majority seemed to accept that the concept of "violence" [vold] was not exclusively criminal in nature, but it nevertheless considered that the Court of Appeal's use of the concept when deciding the compensation claim did confer criminal law features on its reasoning overstepping the bonds of the civil forum (para. 51).

[11] Maybe judicial dialogue from the ECtHR's point of view is primarily aimed at other international courts and not so much at the supreme courts of the Convention States. In *Zolothukin v. Russian Federation* (10 February 2009, GC) concerning the prohbition against double jeopardy (ECHR Protocol no. 7 Article 4) reference is made to various international conventions and judgments by international courts as wll as the US Supreme Court, but to no judgments from supreme courts in the Convention States. (The Norwegian Supreme Court has had to consider this article in some 50 judgments, some of which are plenary judgments.) See more generally on the use by ECtHR of other international instruments and decisions *Demira and Baykara v. Turkey* (12 November 2008, GC). The judicial dialogue organised by the ECtHR includes since 2005 annual seminars "Dialogue between judges"; the seminar reports are accessible on the Court's website.

Court's own function as a last resort against violations of fundamental human rights. In order to rectify the situation, the Court needs both to reconsider its traditional canons of interpretation and to take a more detached view of applications alleging violations that do not go to the core of convention rights.