Grundrechte in Bedrängnis: ein Blick aus Straßburg

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2013, 279

I. Einführung

Sehr geehrter Präsident Wolff, liebe Rechtsanwälte, liebe Co-Referenten, Kollegen, Richter, sehr geehrte Damen und Herren!

Es bereitet mir große Freude, mich heute hier in Wien an Sie wenden zu können. Ich bedanke mich für diese Einladung, da es für mich von großer Bedeutung ist, dass die Europäische Präsidentenkonferenz, die Wiener Advokatengespräche, das aktuelle Thema der „Grundrechte in Bedrängnis" als Konferenzthema gewählt hat und sich besonders für die Entwicklung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte interessiert.

Für den Europäischen Gerichtshof für Menschenrechte ist die Beziehung zu den Rechtsanwälten bedeutsam, vor allem weil sie die Vermittler der Menschenrechtsrechtsprechung in Mitgliedstaaten sind und den Rechtssuchenden Hilfestellung geben, damit diese ihre Rechte besser kennenlernen und wissen, wie man sich an den Gerichtshof wenden kann.

Über unser heutiges Treffen freue ich mich auch deshalb besonders, da der Präsident des Europäischen Gerichtshofs für Menschenrechte, *Dean Spielmann*, mir Ende vorigen Jahres die ehrenvolle Aufgabe zuteil werden ließ, mich der Weiterentwicklung der Beziehungen zwischen dem Gerichtshof und dem Rat der Europäischen Anwaltschaften (CCBE) anzunehmen. Ich nehme diese Aufgabe besonders ernst, bei der ich auf meine Erfahrungen als ehemalige Präsidentin des Beirats der Europäischen Richter aufbauen kann.

Mit großem Interesse habe ich die für die heutige Konferenz verfassten Länderberichte der Anwaltschaften aus verschiedenen Staaten Europas gelesen, über die Probleme, die leider in einigen Bereichen fast überall in Europa bestehen, nachgedacht und festgestellt, dass die Rechtsanwälte und Richter viele ähnliche Sorgen haben. Deshalb ist es immer wieder notwendig zu betonen, dass die unabhängige Rechtsanwaltschaft eine der Voraussetzungen für die unabhängige Justiz und Richterschaft ist und *vice versa:* für die Rechtsanwälte die Unabhängigkeit der Gerichte unverzichtbar ist.

Ladies and Gentlemen,

Indeed, I suppose we could not but agree that fundamental rights are at the moment more or less under pressure in almost all European countries.

Let me firstly elaborate in general, what kind of rights are under what kind of pressure and then analyze in this context in a more detailed way some of the most important rights and their protection. I will focus on a larger Europe – that of the Council of Europe's 47 contracting states with around 800 million people, whereas it has been quite difficult to choose the relevant issues and examples, because „human rights under pressure" relates to a large variety of the case law of the European Court of Human Rights (the Court, the so-called Strasbourg Court, because of it's location) and we have currently pending around 128.000 applications.

II. What rights under what kind of pressure?

Of course, the economic depressions expose above all the **fundamental rights** of the most vulnerable people, children, migrants and minorities. But not only the poor, also some rich, eg famous actors and football players who are taxed with high taxes can feel themselves as ‚victims' of the economic pressure.

However, it is also important to admit that economic crisis threatens not only economic, social and cultural rights, but also civil and political rights.

When we are talking about **‚the pressure'** – of course the first thing that comes to our minds is the economic crisis connected with financial crisis, but I think **there is much more to that,** because one crisis has tendency to create extremism and other crisis: Europe's identity crisis, ethical crisis, crisis of trust and of confidence, cultural crisis, crisis of solidarity, democracy and rule of law, environmental crisis, demographic crisis, security crisis and last but not least – human rights crisis?

Crisis is a test to human rights, to solidarity and democracy.

True knowledge and sense of reality is the beginning of wisdom. But we must avoid making out of crisis a **„thing in itself." I am waiting for a Crisis of crises, eventually it will come and hopefully not too late.**

Unfortunately, the mechanisms to overcome crisis are not easy to be found. We all have a **joint responsibility** in this respect. Many plans and strategies have been proposed and carried out both in **different states as well as on overall European** level. Most of them **influence people and their rights.** Crisis measures will both **lower social guarantees as well as protection of rights.** So that two pertinent questions arise: Whether crisis measures are compatible with principles of state based on rule of law *(Rechtsstaat)* and social justice *(Sozialstaat)* and **how will the principle of legitimate expectation – an integral part of the principle**

of rule of law continue to be respected in these circumstances?

Certain **constitutional principles** may **set limits to the legislator's freedom** to narrow the scope of assistance provided and also some **support mechanisms** for citizens in order to facilitate their coping with economic and social hardships are taken. Here the **obvious question is: Whom to continue to protect in times of crises and from whom to take the necessary money? These are complicated political decisions which however need to have legal basis and respect the principle of rule of law.**

Regardless of the crisis both during the crisis and outside the crisis **human beings and respect of their rights and above all their dignity should be of primary importance.**

It is true that **effective human rights protection is expensive,** but **human rights are not an option they are a fundamental value** and therefore measures taken to address the economic crisis should not be at the expense of the minimum standards set out in the European Convention on Human Rights (the Convention). No matter how difficult or even unpopular it might seem, but there should be limits to budget cuts that threaten the proper functioning of democracy and rule of law, because eventually for a state it will be much more expensive to combat for example the ferocity than to keep up an independent and impartial judicial system.

At the annual seminar of the European Court of Human Rights in Strasbourg on 25 January this year the European judges discussed on how to implement the European Convention on Human Rights in times of economic crisis. Following questions were addressed at this conference:

To what extent does the scope of the protection offered by the Convention extend to severe hardship caused by economic crisis?

What impact does the economic crisis have on Governments' Convention obligations and their margin of appreciation?[1]

In order to try to answer at least some of these questions, allow me now to speak more concretely about the protection of some of the crucial fundamental rights in times of pressure.

III. How to protect the essential fundamental rights in times of pressure?

1. Economic and social rights in general

First of all one must admit that the European Convention on Human Rights does not enshrine generally economic and social rights, unlike the European Union's (EU) Charter of Fundamental Rights.

Are the social rights therefore indeed poor rights: ***droits des pauvres: pauvres droits*** as has asked *Paul-Henri Imbert*, a former high official of the Council of Europe?[2]

However, the Court has held in1976 in the judgment *Airey v. Ireland:* „the further realisation of social and economic rights is largely dependent on the situation – notably financial – reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions […] and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. […]"[3] In that case the Court found violations of access to justice Article 6 § 1 of the Convention and private life Article 8 of the Convention arising out of the prohibitive cost of litigation to obtain a decree of judicial separation from an allegedly alcoholic and abusive husband.

The statement in the *Airey* judgment would of course apply not only in times of crisis. Unfortunately poverty has been and will likely to continue to be a subject in many European countries both before and after the current global economic difficulties.

Another question is, **whether the war on poverty as such can be won through broad interpretation of the Convention.** This question has been answered negatively by former judge *Thór Vilhjaálmsson* in his dissenting opinion to the *Airey* judgment.[4]

2. Poverty

Let me first talk more precisely about **the poverty in the light of Article 3 of the Convention which prohibits the inhuman and degrading treatment.**

At this place I would like to emphasize two cases: *Larioshina v. Russia* of 2002[5] and *Budina v. Russia* of 2009.[6] Although in both cases the applications were declared inadmissible, the Court did not exclude that a complaint about wholly insufficient amount of pension and other social benefits could in principle raise an issue of inhuman or degrading treatment under Article 3 of

1) Opening of the judicial year 2013 of the European Court of Human Rights, the seminar: "Implementing the European Convention on Human Rights in times of economic crisis". Speeches, background paper and other material available at the website of the Court: www.echr.coe.int/ECHR/EN/Header/The+Court/Events+at+the+court/Opening+of+the+judicial+year/
2) *P.-H. Imbert,* Droits des pauvres, pauvre(s) droit(s)? Réflexions sur les droits économiques, sociaux et culturels, Revue du Droit Public 1989/3, 739 ff.
3) *Airey v. Ireland,* judgment of 16 May 1978, Series A No. 32 at § 26.
4) Dissenting opinion of judge *Thór Vilhjaálmsson, Airey v Ireland,* judgment of 16. 5. 1978, Series A No. 32.
5) *Larioshina v. Russia* (dec.), no. 56869/00, 23. 4. 2002.
6) *Budina v. Russia* (dec.), no. 45603/05, 18. 6. 2009.

the Convention. One could of course argue that this promising statement was in essence only an *obiter dictum* and so far the wholly insufficient amount of pension, eg less than € 30,– per month, has not yet been found to violate Article 3 of the Convention.

3. Asylum seekers

Another consequence of the economic pressure which the Court has dealt with in the context of Article 3 is the increasing influx of migrants and asylum seekers which throws up new challenges to European States. In the Grand Chamber Judgment of last year *Hirsi Jamaa and Others v. Italy*,[7] the Court has referred directly to the economic crises and has not hesitated to assert that having regard to the absolute character of the rights secured by Article 3, the unusual influx of migrants cannot absolve a State of its Convention obligations.

Already on 21 January 2011 in the judgment in the case of *M.S.S. v. Belgium and Greece*,[8] the Grand Chamber of the Court concluded that where, due to the inaction of the public authorities, an asylum seeker had found himself for several months living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs, the asylum seeker had been victim of humiliating treatment. The *M.S.S.* judgment was very important for many European Union states, such as the Netherlands, Denmark, Sweden, Finland, and Austria, since they encounter daily the implementation of the European Union Dublin II Regulation on examination of asylum applications. It is interesting to note that Austrian courts had already earlier criticised the Greek asylum system and asylum seekers' living conditions in Greece.

The Court of Justice of the European Union (CJEU) echoed the European Court of Human Rights on 21 December 2011 in the case of *NS v. United Kingdom*.[9] In 2010 Greece was the point of entry to the European Union of almost 90% of illegal immigrants and it was evident that the Greek authorities were unable to cope with the situation in practice. The CJEU noted that the EU common asylum system was created in a context that considered it possible for all Member States to respect human rights. However, Member States may not transfer an asylum-seeker to a ‚responsible Member State' if they know that in said state an asylum-seeker could face a real risk of being subjected to inhuman or degrading treatment.

4. Right to private and family life

Many applicants have asked for help also invoking Article 8 of the Convention which provides the respect for private and family life. In general the Court has reminded them that the Convention does not guarantee, as such, socio-economic rights and that the Court cannot replace the national authorities in this respect. However, by examining the concrete circumstances of the case, the Court has for example in the judgment of 24 April 2012 in the case *Yordanova and Others v. Bulgaria* indicated that an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases.[10]

The Court has also found on 26. October 2006 in the judgment in the case *Wallova et Walla v. Czech Republic* that where a decision to place a couple's five children in care was based solely on the unsatisfactory accommodation of the children due to their parents' insufficient resources, the right to respect family life has been breached.[11] It is interesting to note that recently, in November 2012 the Estonian Supreme Court has made a similar decision and advised the first instance court while re-examining the case to explore alternative less radical means.[12]

5. Protection of property

Protection of property is guaranteed by the Article 1 of the Protocol 1 of the Convention. In its admissibility decision of 6 July 2005 in the case *Stec and Others v. United Kingdom*, the Grand Chamber of the Court has said: „In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Where an individual has a right under domestic law to such welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable."[13]

In a different context the Court has in its decision of 12 October 2012 in the case *Société Cofinfo v. France*[14] declared inadmissible a complaint under Article 1 of Protocol 1 of the owners of a building against the public authorities because the latter refused to evacuate a building occupied by squatters on the ground that the occupiers were in a situation of vulnerability which required for enhanced protection.

7) *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09 § 176, ECHR 2012.
8) *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.
9) Judgement of the Court of Justice of the EU (Grand Chamber) of 21. 12. 2012, joined cases C-411/10 *(N.S. v. Secretary of State for the Home Department)* and C-493/10 *(M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform)*.
10) *Yordanova and Others v. Bulgaria*, no. 25446/06, judgment of 24. 4. 2012.
11) *Wallová et Walla v. Czech Republic*, no. 23848/04, judgment of 26. 10. 2006.
12) Judgment of 14. 11. 2012 of the Civil Law Chamber of the Supreme Court of Estonia, in the case no. 3–2-1–121-12.
13) *Stec and Others v. the United Kingdom*, [GC], nos. 65731/01 and 65900/01, § 51, decision of 6. 7. 2005.
14) *Société Cofinfo v. France* (dec.), no. 23516/08, 12. 10. 2012.

6. Access to justice

Access to justice is one of the most important tools in order to guarantee the respect of fundamental rights in practice. It is at the same time itself a fundamental right. Access to justice is only a part of the right to a fair trial; it is connected to the issues of alternative dispute settlement, legal aid and quality thereof, court fees, to extending the right to defence to early stages of the proceedings, but also to the proportionality of compensations awarded by the courts. For example, on 22 November 2011 the Court has found in the judgment in the case of *Koprivica v. Montenegro* a violation of Article 6 because the domestic courts ordered a retired journalist to pay for a defamation a compensation which amounted 25 times to his pension.[15)]

But the fair trial does not end with a judgment; it covers also the enforcement of judgments. According to the constant case law of the European Court of Human Rights the rights need to be practical and effective, not theoretical and illusory.[16)] Despite the crisis or because of them access to justice needs to be increased, not so much on quantity, but on quality.

In this context I would like to draw your attention to one aspect related to the reform of the European Court of Human Rights and the procedure before the Court. Namely, during the intergovernmental conferences about the future of the Court there were some proposals made to include court fees into the procedure in Strasbourg' Court. However, the judges of the Court expressed their disagreement to this proposal[17)] and fortunately this matter was not pursued.

IV. General Considerations instead conclusions

I suppose we could agree that the Court should continue its case law within the existing scope of protection, there is no turning back. The other issue is how much there is room to widen the scope of protection. And this is connected with the question if and how much the Court could take into consideration the economic situation of the Member States.

I would like to underline the well elaborated principle in the Court's case law **that a lack of resources cannot justify the non-compliance with the Convention.** This has been said in many different contexts as for example concerning **the non-enforcement of court decisions** in many cases against Russia, *Burdov* being the leading pilot judgment[18)] or **very poor prison conditions.**[19)] **This does not as such mean that the budgetary considerations should not at all be taken into account. However, an interference with the Convention rights can occur only in extreme circumstances and needs to be well justified.** Of course, the **economic crisis has influenced even the States capacity to both pay compensation where violations have been found and to take necessary remedial action,** in particular of structural or systematic violation.

As far as **austerity programmes in European States** are concerned there are examples of cases adjudicated at the European Court of Human Rights concerning the pressures on **cuts in public sector salaries** (eg *Khoniakina v. Georgia*[20)]; *Bakaradze v. Georgia*[21)] etc) and **pension reforms** as such, eg more recently the decision of 15 January 2013 in the case of *EB. v. Hungary*[22)]). In the case of *Mihaies and Sentes v. Romania*[23)] of December 2011, the applicants complained under Article 1 Protocol 1 of the Convention that their remuneration as public sector employees had been reduced by 25% as part of the Government's austerity programme. The Court found that even assuming that the applicants had a "possession" the authorities had remained within their margin of appreciation.

Margin of appreciation is a topic of endless discussions. At the moment, based on the Brighton declaration a new Protocol 15 of the Convention has been drafted. According to this draft the principles of subsidiarity and margin of appreciation will be inserted into the preamble of the Convention.[24)]

The Court has usually allowed to the State a margin of appreciation when it comes to general social and economic measures; unless the national legislature's choice is manifestly without reasonable foundation. Yet, **the States tend to combine the welfare of the state with the general interest of the community and it is complicated to weigh it up with the individual interest. Another question is, if and how far**

15) *Koprivica v. Montenegro*, no. 41158/09, judgment of 22. 11. 2011.
16) See e.g. *Belgian Linguistic*, judgment of 23. 7. 1968, Series A No. 6, §-s 3 and 4; *Marckx v. Belgium*, 13. 6. 1979, Series A No. 31 § 31.
17) See e.g. the Speech of President at the time *Jean-Paul Costa* at the Izmir Conference on the future of the Court, 26.-27. 4. 2011, available at: www.echr.coe.int/NR/rdonlyres/62B68D2C-00F4 – 4A1E-B87C-C969D0AD7C77/0/20110426_IZMIR_Discours_Costa_FR.pdf
18) *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III and *Budov II v. Russia*, no. 33509/04, judgment of 15. 1. 2009.
19) See e.g. *Poltoratski v. Ukraine*, no. 38812/97, § 148, ECHR 2003-V; *Orchowski v. Poland*, no. 17885/04, judgment of 22. 10. 2009, § 153; *Samaras and Others v. Greece*, no. 11463/09, judgment of 28. 2. 2012.
20) *Khoniakina v. Georgia*, no. 17767/08, judgment of 19. 6. 2012.
21) *Bakradze v. Georgia*, no. 1700/08 22552/08 6705/09, judgment of 8. 1. 2013.
22) *E.B. v. Hungary,* no. 34929/11 34929/11, decision of 15. 1. 2013
23) *Mihaies and Sentes v. Romania, no.* 44232/11 44605/11, judgment of 6. 12. 2011.
24) See eg Steering Committee for Human Rights (CDDH), drafting group B on the reform of the Court (GT-GDR-B) 2 nd Meeting, Strasbourg, 10. 12. 2012, available at: www.coe.int/t/dghl/standardsetting/cddh/GT_GDR_B/GT-GDR-B%282012%29OJ002_DRAFT%20Annotated%20agenda_2nd%20meeting%20GT-GDR-B_10 – 12%20Oct%20%2712%20%282%29.pdf

the Court should take note of the serious socio-economic problems faced by countries in transition, as it has done in the past in cases of German reunification[25] and whether this could be used in cases involving economic crisis? For example in its judgment of 11 February 2010, in the case *Malysh and Others v. Russia*,[26] the Court observed that in the 1990 s the Russian State went through a transition from a State-controlled to a market economy. Its economic well-being was further jeopardised by the financial crisis of 1998. Therefore, the Court agreed that defining budgetary priorities in terms of favouring expenditure on pressing social issues was a legitimate aim in the public interest. However, the Court found that the State had filed to strike a fair balance between the general interest and the applicants' rights.

The United Kingdom Supreme Court had in 2010 in the case of *Cadder v. Her Majesty's Advocate*[27] by overturning a long-standing Scottish case law which was contradictory to the jurisprudence of the European Court of Human Rights, the courage to point out that **the UK may not violate the Convention and be different from the other Member States in this respect.** The UK Supreme Court further noted that the European Court of Human Rights relies on **universally applicable principles,** with the aim of achieving harmonious protection of human rights in all of Europe – **not the protection that would be dictated by national choices and preferences.** It cannot be that one set of rules applies to Eastern Europe and to Turkey, and another set to Western Europe and to Scotland. Lord Hope, who authored the UK court's unanimous opinion, concluded that **pride in one's legal system is one thing but isolation is quite another.**

In this context it is interesting to note that the **Member States' courts often give legitimacy to their decisions by citing the judgments of the European Court of Human Rights** so that the national courts could be considered to have taken the lead in incorporating the Convention into their domestic legal systems.

This brings me to **the final thought of my speech:** namely the importance of **dialogue between the judges and the judges and the lawyers** and in general **the significance of a fundamental rights culture in Europe** which is especially vital in times of crises. I wish us all bon courage in further developing this culture at our respective work in our respective countries and disseminating the knowledge about their fundamental rights to those who are in need to be protected.

Vielen Dank!

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25) Eg *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI.

26) *Malysh and Others v. Russia,* no. 30280/03 30280/03, judgment of 11. 2. 2010.

27) *Cadder v HM Advocate* [2010] UK Supreme Court (UKSC) 43, decision of 26. 10. 2010.