CURRENT LEGAL DEVELOPMENTS

Acceptance of International Supervision of Human Rights

Henry G. Schermers[*]

Keywords: human rights; European Court of Human Rights; sovereignty.

Abstract: The present article traces the developments with respect to questions of admissibility of claims brought before the European Commission of Human Rights and the European Court of Human Rights by private individuals. It would appear that over the years, the Commission and Court have dealt with an increasing number of cases, and have extended the scope of the infringement they permitted themselves to make on the domestic jurisdiction of states members to the European Convention of Human Rights.

1. TRADITIONAL INTERNATIONAL LAW

For older international lawyers it was not easy when the foundations of their branch of knowledge fundamentally changed after World War II. For them, a basic rule of international law had always been that a state had full sovereignty over individuals living in its territory. International law regulated the relations between states, rules with respect to individuals were a matter solely of national legislation. The protection of human rights regarded each individual state and was not of any concern to the international community. The treatment of Armenians in Turkey, early this century and the treatment of Jews in Germany during the thirties were national matters for which the international community had no competence and did not feel responsibility. Then after World War II the protection of human rights became a matter of international concern. One of the purposes of the United Nations was to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms.[1] Apart from promoting international co-operation, the United Nations themselves also had to promote universal respect for and observance of human rights and fundamental freedoms.[2]

* Professor of Law, Leiden University, The Netherlands.

1. UN Charter, Art. 1, para. 3 and Art. 13, para. 1b.
2. UN Charter Art. 55c, Art. 62, para. 2 and Art. 68.

12 Leiden Journal of International Law 821-831 (1999)

But fundamental changes are slow and difficult. The UN gained no direct responsibility for the protection of human rights inside member states. They had to help, to stimulate, to co-ordinate activities of member states in this field, however, the member states still had the exclusive competence to make the rules. Human rights protection remained a matter for each individual State, fully covered by national sovereignty. The proposal to codify the most important human rights in a binding treaty was still unacceptable. The most that could be reached was a universal declaration on human rights, a common standard of achievement to which both individuals and organs of society had to strive.[3]

Europe broke through the barrier of full national sovereignty by accepting the European Convention on Human Rights as a binding international treaty.[4] For the first time states were legally committed to other states to respect fundamental human rights. But what is legal commitment without judicial control? Proper human rights protection requires international supervisory organs. This, however, would be a further infringement of national sovereignty. The supremacy of national supreme courts would be degraded if an international organ would be permitted to criticize their judicial decisions. For many states this went too far. An inter-european commitment to protect human rights was acceptable but a European court supervising the Convention would undermine the sovereignty of the state and could not be generally accepted. As a compromise, supervision was attributed to an organ of state representatives, the Committee of Ministers of the Council of Europe. An independent Commission could try to settle cases and could make recommendations to the Committee of Ministers, but it was not permitted to make any binding ruling on the violation of a human right by a sovereign state.

Also the proposal that individuals would be permitted to raise human rights issues before an international forum went too far for many states. Individuals are fully governed by their domestic legislation. Any direct access of an individual to an international body would infringe the sovereignty of that individual's state. In no way could individuals be subjects of international law.

Finally, political compromises were found. Both the competence of a European Court of Human Rights and the right of individual petition were subject to optional clauses; individuals could only lodge complaints before the European Commission of Human Rights against states that expressly accepted the right of individual petition; only states that expressly accepted the competence of the European Court of Human Rights could be brought before that Court.

The European Convention on Human Rights, signed on 4 November 1950, came into force on 3 September 1953. On that date only Denmark and Ireland had accepted the competence of the Court and only Denmark, Ireland and Sweden had accepted the right of individual petition. For the creation of the Court

3. Universal Declaration of Human Rights, preamble.
4. European Convention on Human Rights and Fundamental Freedoms, 218 UNTS 221 (1955).

the acceptance by eight states was required. The entry into force of the right of individual petition required acceptance by six states. In 1955 the right of individual petition became effective, in 1958 the European Court of Human Rights was constituted. The vast majority of the declarations concerned were made for a limited period of time, between two and five years.

Both the right of individual petition and the competence of the European Court of Human Rights were novelties. The participating states were uncertain how it would work out. It was quite possible that both optional clauses would prove to be unacceptable infringements of national sovereignty. The Convention gave reason for hesitation. Some provisions are extremely vague, for example Article 3 prohibits inhuman and degrading treatment. Nobody knew what that could include. It offered the European Court of Human Rights a possibility to censure almost any treatment of individuals. This explains why states were hesitant at the beginning and preferred to wait and see how these optional clauses would work out before accepting them. Other states accepted for a limited period in order to be able not to renew their acceptance when the limitation of their national sovereignty was considered too great.

Both the Commission and the Court were interested in demonstrating to the states concerned that the limitation on their sovereignty was acceptable, or, in other words, the European institutions would not be too critical of their behaviour. From the beginning they abstained from interpreting too drasticly the articles of the Convention. Inhuman and degrading treatment are recognised only if they are above a rather high threshold of seriousness. Controversial issues are avoided as much as possible. However, the more the institutions become recognised and accepted, the more critically they supervise the behaviour of the participating states.

In the present article we shall study the development of both the Commission and the Court from a stage in which they took great care to gain acceptance by the member states of the Council of Europe towards a stage of careful supervision of fundamental human rights. The process is still going on. The European Court of Human Rights still leaves a considerable margin of appreciation to individual states in many fields of human rights law. The 'Europeanization' of human rights is a slow process that requires the support of national governments and national public opinion. The process has its ups and downs. In a period of enthusiasm for Europe emphasis can be laid on common European rules, in a period of greater nationalism more attention must be given to the margin of appreciation that leaves greater freedom to the individual states. A 'Europeanization' trend which would go too fast could put off the participating States in actively co-operating. In the initial period this could lead to non-acceptance or non-renewal of the right of individual petition or of the acceptance of the jurisdiction of the Court. In later years the position of the human rights institutions had be-

come so strong that this reaction became politically impossible. With the entry into force of Protocol 11 on 1 November 1998[5] the possibility not to accept the Court or not to accept the right of individual petition was abandoned. Since that date all European citizens have the right of individual complaint and all cases are decided by a court of law. Still, the full co-operation and support of the member states is needed for executing the judgments of the European Court. Alienation of the member states would finally lead to disobedience.

Supervision over the execution of the judgments of the Court remains attributed to the Committee of Ministers of the Council of Europe. A general opinion that the Court would go too far in infringing national sovereign rights could negatively influence the Committee of Ministers' pressure on the member states to abide carefully by the judgments of the Court.

We observe an interesting development of a chapter of law. By carefully avoiding the Scylla of too great an infringement of national sovereignty and the Charybdis of ignoring human rights, the European human rights institutions are successfully sailing to a fundamental change of law: from being fully covered by national sovereignty the protection of human rights is becoming a matter of common European rules, supervised by a common European Court. Both the European Commission and the European Court of Human Rights contributed to this development.

2. DEVELOPMENT OF THE CONVENTION

The right of individual petition came into force in respect of six states on 5 July 1955. Between that date and 31 December 1957, 343 individual applications were lodged with the Commission. Of these applications 277 were declared inadmissible and 15 were struck off the list (in most cases owing to withdrawal). Of the remaining cases further investigation was considered necessary. By the end of 1959 three applications had been declared admissible.[6] All others had been rejected by the Commission as inadmissible, either for formal reasons or because they were manifestly ill-founded. This strict policy of the Commission convinced many governments that the infringement of their sovereignty was not excessive. By the end of 1959, nine of the 15 states parties to the Convention had accepted the right of individual petition.[7]

5. Protocol 11, Document H (94) 5 of the Council of Europe; Trb. 1994, 141 and 165.
6. Cases nr. 214/56, 332/57 and 343/57, *see* Yearbook of the European Convention on Human Rights Vol. 2, at 200. Two of these cases finally came before the Court (De Becker and Lawless). In the third one (Bjørn Schouw Nielsen) the Commission found no violation of the Convention (*see* Yearbook of the European Convention on Human Rights Vol. 2, at 413; Yearbook of the European Convention on Human Rights Vol. 4, at 494-589), which was confirmed by the Committee of Ministers (Yearbook of the European Convention on Human Rights Vol. 4, at 590-592).
7. Yearbook of the European Convention on Human Rights Vol. 2, at 92, 93.

By the end of 1961, 1307 applications had been filed, of which only 7 had been declared admissible[8] (0.5 %). Ten out of 16 participating states had accepted the right of individual petition. After 1961 both the number of participating states and the acceptance of the right of individual petition gradually increased, but only since January 1993 had all participating states accepted the right of individual petition.[9]

The percentage of cases declared admissible also grew. In 1993, 2037 applications were registered, 218 were declared admissible (more than 10 %). Compared to the 0.5 % by the end of 1961, this may lead to a distorted picture. In the early years virtually all individual applications were registered whilst as of 1973 the Secretariat of the Commission played a more active role in dissuading applicants with hopeless cases from continuing their case, which meant that in 1973 out of 1632 provisional files only 442 cases were registered. But even of all provisional files (9323 in 1993) the percentage of admissible cases in 1993 was considerably higher than in 1961 (2.3 %, compared to 0.5%). These figures may still not be fully comparable. By 1993 the legal profession was better informed about the Convention and may for that reason have lodged a smaller number of manifestly ill-founded cases. But as 57 % of the cases were brought by applicants without legal representation[10] even this cannot fully explain the increase of cases declared admissible. I would submit that over the years the Commission became more critical of the behaviour of Governments. In 1993 there was no longer a reasonable risk that member states would not renew the right of individual petition or that they would withdraw from the Convention. Public opinion in the member states of the Council of Europe would not easily accept such a step. I was a member of the Commission during 15 years (1981-1996). This does not enable me to predict with any certainty whether the Commission will declare a particular case admissible or not, but experience permits to estimate with some accuracy what kind of cases the Commission will accept. Re-reading the early decisions of the Commission and comparing them with the more recent policy of the Commission I have a strong impression that the Commission has become more critical. I found no old admitted case which would have been declared inadmissible in recent years, whilst on several of the old inadmissible cases I at least had serious doubts. With respect to several issues a change of the Commission's position can be rather clearly demonstrated. Five of them may serve as examples.

8. Yearbook of the European Convention on Human Rights Vol. 4, at 426.
9. Yearbook of the European Convention on Human Rights Vol. 36 (1993), at 11.
10. *Id.*, at 33.

2.1. Homosexuality

Are homosexual acts in private by consenting adults part of their private life or may these be regarded as criminal offences? European public opinion is not consistent. In some countries such acts are still considered criminal; in other countries they are seen as part of an individual's private life. In the beginning the Commission was reluctant to deal with this issue on the European level. In 1955 the Commission held:

> The Convention allows a High Contracting Party to punish homosexuality, since the right to respect for private and family life may, in a democratic society, be subject to interference in accordance with the law of that Party for the protection of health or morals (Art. 8, para. 2 of the Convention).[11]

The case was confirmed in 1956.[12] In both cases the complaints of convicted homosexuals were declared to be inadmissible. In 1980 the Commission was less tolerant. In the case of Dudgeon it more clearly accepted that legislation with respect to homosexuality infringes the respect for private life guaranteed by Article 8, paragraph 1 and it refined the question whether Article 8, paragraph 2 justified interference. It accepted that the interference was not in breach with Article 8 when persons under 21 years of age were involved but it held that the legal prohibition of homosexual acts between male persons over 21 years of age constituted a breach of Article 8.[13] Later, the Court confirmed this opinion of the Commission in a number of cases.[14]

2.2. Compulsory labour

In the 1950s there was a great want of dentists in the north of Norway. To cover this shortage the Norwegian Parliament, on 21 June 1956, approved a "Provisional Act Relating to Obligatory Public Service for Dentists" which was to remain in force until 1966. The law provided that young dentists could be required for a period of up to 2 years to take a position in public dental service in the north.[15] Mr. Iversen, a young Norwegian dentist, submitted that this law was in violation with Article 4 of the Convention on compulsory labour. He brought the case before the European Commission of Human Rights.[16] The case was seri-

11. Decision 104/55, Yearbook of the European Convention on Human Rights Vol. 1, at. 228 and Yearbook of the European Convention on Human Rights Vol. 2, at 510.
12. Decision 167/56, Yearbook of the European Convention on Human Rights Vol. 2, at 235.
13. Report of the Commission of 13 March 1980. ECHR (Ser. B) no. 40, at 41.
14. Judgment of 22 October 1981, ECHR (Ser. A), no 45 (Dudgeon); judgment of 26 October 1988, ECHR (Ser. A), at 142 (Norris); and judgment of 22 April 1993, ECHR (Ser. A), at 259 (Modinos).
15. On this case *see* H.G. Schermers, *The Norwegian Dentist Case on Compulsory Labour*, 11 Netherlands International Law Review 366-371 (1964).
16. Application nr. 1468/62, Decision of 17 December 1963, Collection of Decisions nr. 12, p. 80.

ously discussed during 1963. At that time there was still a risk that a state would not renew the right of individual petition if it considered the intervention by the Convention organs too much of an infringement on its national sovereignty. This risk was demonstrated by the fact that Norway, which used to accept the right of individual petition for periods of two years (in 1955, 1957, 1959 and 1961), made its renewal in 1963 for one year only.[17] There is no indication that this kind of pressure influenced the decision of the Commission, which by a majority of six to four declared the application inadmissible as manifestly ill-founded. Normally, dissenting opinions are not allowed in questions of admissibility but in this particular case a special statement of the minority was added to the Commission's report. The minority found it impossible to declare this case *manifestly ill-founded* because of the conditions under which the applicant was required to perform his work which was imposed upon him subject to penal sanctions. In the minority's opinions the case required further examination and therefore should have been declared admissible.

In 1980 a Belgian lawyer, Mr Van der Mussele, brought a comparable case. Under Belgian law he had been obliged to represent a destitute client at his own expense. His claim that this amounted to forced labour was declared admissible in March 1981. Four members of the Commission were of the opinion that the prohibition of forced labour was indeed infringed. The majority, however, and subsequently also the Court, found to the contrary considering that free legal assistance to indigent clients is part of the job which Van der Mussele had freely chosen.[18]

A third case, where persons were obliged either to perform a duty without pay or to pay a levy, was brought in 1987 but focused on discrimination rather than on forced labour. Under the law applicable in the municipality of Tettnang in Baden-Württemberg (Germany) all male adults residing in the municipality could be required to serve as firemen, but since they were not needed they were required to pay 200 DM instead. Women did not have to pay this fire service levy. Mr Karlheinz Schmidt complained of a breach of sexual equality.

The European Convention on Human Rights contains no *general* prohibition of discrimination. It is only prohibited in the enjoyment of the rights and freedoms set forth in the Convention (Article 14). Before it could condemn the discrimination in Karlheinz Schmidt's case the European Commission and Court had to establish that the discrimination concerned a provision of the Convention. Two provisions could be considered: Article 4 on forced labour and Article 1 of Protocol 1 on the enjoyment of one's property. The Commission referred to both articles, but the Court founded its decision that the prohibition of discrimination

17. Yearbook of the European Convention on Human Rights Vol. 6, at 26.
18. Van der Mussele, Judgment of 23 November 1983, ECHR (Ser. A), at 70.

was applicable (and infringed) solely on forced labour.[19] It therewith accepted that the case concerned forced labour.

Considering the more recent cases I have no doubt that the case of Iversen would have been declared admissible had it been brought after 1980. Whether the Commission or the Court would finally have found a violation of the Convention is, of course, a different matter. The important aspect is that in 1963 the Commission refused to accept that there was a problem under the Convention, whilst in more recent times the Commission, and subsequently also the Court, carefully consider whether domestic legislation is in conformity with the European Convention.

2.3. Prescribed by law

In a number of cases the Convention permits exceptions to the obligation of governments to respect particular rights and freedoms. In the case of freedom of expression, for example, exceptions can be made in the interest of national security or in order to prevent the disclosure of information received in confidence. In almost all cases where exceptions are permitted such exceptions must fulfil particular conditions. Furthermore, these exceptions have to be supported under national law. The purpose of this additional condition was to make sure that the national legislator considered the exception to be necessary.

Whenever an exception to an article is invoked the Commission and the Court verify whether that exception was prescribed by domestic law (*prévue par la loi*). This seems to be a formal control. In 1960 the Commission held with respect to the term 'law': "Law No. 44 of 1957 was duly enacted by the Parliament of Iceland (Althing) and signed by the President of the Republic of Iceland in accordance with the relevant provisions of the Constitution of Iceland."[20] The content of the law was not examined. In 1979 the Court intensified international surveillance. After accepting that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law, it added the condition that "the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein."[21] This means that the European Court not only verifies whether a particular rule has been formally adopted by the national legislator, but it also investigates whether that law is in conformity with the Convention, and thus, it supervises the national legislator. I am almost certain that the Court would not have dared to make such a strong statement in the early years of the Convention, when states still had to be persuaded to participate fully in the system.

19. Karlheinz Schmidt, Judgment of the Court of 18 July 1994, ECHR (Ser. A), at 291 B.
20. Application 511/59, Decision of 20 December 1960, Yearbook of the European Convention on Human Rights Vol. 3, at 394, 422.
21. Winterwerp case, Judgment of 24 October 1979, ECHR (Ser. A) 33, at 19, para. 45.

2.4. Margin of appreciation

Articles 8-11 of the Convention contain rights which cannot be unlimited. Respect for private life, family life, home and correspondence and the freedom of thought, religion, expression and assembly cannot be absolute. The protection of public order and rights of others require restrictions. The articles have a second paragraph permitting the national authorities to interfere with the said rights, if such interference is prescribed by law and necessary in a democratic society in the interest of public order, public safety, health, morals or the rights and interests of others. The European Court always accepted that the national authorities are, in principle, better placed than the international judge to decide on the need to restrict these rights. Accordingly, a margin of appreciation is left to the national authorities. This margin of appreciation is, however, accompanied by a European supervision. In the beginning this supervision was limited. In 1975 the Commission only examined whether the authorities concerned acted reasonably and in good faith.[22] It did not reasses the situation. In a recent case the Court carefully reviewed the evaluation by the national authorities (and accepted by the national courts) and replaced it by its own evaluation.[23] The facts were as follows. Mr and Mrs McLeod were divorced. The UK court ruled that Mrs McLeod could keep the house but that she had to deliver some expressly mentioned furniture to Mr McLeod. Mrs McLeod failed to deliver. Mr McLeod suggested that he would come at a certain date to collect the furniture. He understood that Mrs McLeod agreed, but his solicitor feared that there could be problems. Therefore, he asked two police officers to be present. The police officers were given a copy of the list of furniture attributed to Mr McLeod, but not of the court order. The solicitor's clerk offered to return to his office to get a copy of the order but the police officers did not require that this be done. Mrs Mc Leod happened to be absent but her mother opened the door and because of the presence of the police she let the party in. The furniture mentioned on the official list was taken away, the police checked that no other items were removed. Mrs McLeod sued her former husband and the police for having trespassed on her land and property. She won the case against her former husband and was awarded £ 1,950 by way of compensation. But the action against the police was dismissed. Mrs McLeod brought a complaint under Article 8 of the European Convention on Human Rights claiming a violation of her right to respect for her home and private life. The Commission declared the case admissible but held that the infringement was justified under Article 8, paragraph 2 being necessary in a democratic society for the prevention of disorder. The Commission considered the behaviour of the British police not to be unreasonable, but the Court weighing the interest of the individual against that of society, held that the police

22. As expressed in Handyside, ECHR (Ser. A), 24, para. 47.
23. McLeod *v.* UK, Judgment of 23 September 1998, Reports of Judgment and Decisions 1998.

had insufficiently respected Mrs McLeod's home and private life and therefore concluded that the UK had violated Article 8.

I am convinced that some 30 years ago the Commission would not even have declared the case admissible, but if it would have, the Court would not have found a violation.

2.5. Fair trial

Article 6 of the Convention guarantees fair court proceedings in civil and criminal cases. In the early years the Commission interpreted these notions restrictively considering administrative law cases not covered. Gradually the Commission and especially the Court have widened the scope of the articles which now also covers administrative law cases which affect private rights, which many administrative law cases do.[24]

2.6. The new Court

After the merger of Commission and Court into a new Court on 1 November 1998, further developments took place. In some respects the new Court seems even more audacious than its predecessors. Under their rules of procedure the Commission and the former Court could "indicate to the parties any interim measures the adoption of which seems desirable" (Rule 36). Such indications were not binding. The new Court makes the same indications but communicates them also to the Committee of Ministers, apparently wishing to add political pressure. The Commission consistently held that neither the European Community, nor its member states could be held liable under the Convention for Community acts. The new Court held the UK responsible for the Community act which excludes citizens of Gibraltar from the elections for the European Parliament.[25]

3. CONCLUSION

What can we learn from this development of the European Convention on Human Rights? First, we must put on record that the European Convention on Human Rights has been highly successful. It lifted an important field of law from domestic sovereignty to the European level.

In my opinion this success is largely due to the careful and reticent way Commission and Court operated during the initial years. In the beginning it was

24. *See, e.g.*, Benthem Case A 97; Feldbrugge Case A 99; Tre Traktörer AB Case A 159.
25. Matthews, Judgment of 18 February 1999, Application no. 24833/94, *see* www.dhcour.coe.fr/Hudoc2-doc2/HEJUD/199903/matthews%20eng2.doc.

only the Commission (as the Court was inaugurated five years after the Commission), and its unclear status may have helped. It was not a court, it could base its decisions on political as well as on legal arguments. In practice, however, the Commission considered itself a legal body. Other new courts could learn a lesson from the careful development of the case-law by the supervisory bodies of the European Convention on Human Rights. Too great steps at too early a phase may alienate the participating governments, diminish their will to co-operate and thus endanger future developments.

https://doi.org/10.1017/S0922156599000412 Published online by Cambridge University Press