Only the spoken word counts

The Transformative Power of the European Court of Human Rights

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Celebrations?

Last year, the sixty-fifth anniversary of the European Convention of Human Rights was celebrated. In the Netherlands, for many years, sixty-five has been the retirement age. Reaching that age is still regarded as something special, a cause for festivities, and an age that makes us want to look back and see what has been achieved. So not surprisingly, many celebratory events took place, but if they showed anything, it was that the Convention is very far from being able to stop working, lay back and relax.[1] Quite to the contrary – it seems that ever more human rights problems arise all over Europe. There is the situation in Turkey, where judges have been dismissed and journalists and individuals are being prosecuted for allegedly having supported Gülen.[2] In Hungary and Poland, the work of constitutional courts is curtailed and minority rights and religious freedom are under pressure.[3] In France, an emergency situation has been announced nearly a year ago, resulting in serious restrictions of individual liberties and fair trial rights.[4] In the UK, the Brexit only seems a forewarning for the UK's wanting to leave the European Convention of Human Rights.[5] And I am afraid I can continue for quite a long time summing up urgent threats and risks to the protection of human rights in nearly all the European states.

Thus, sixty-six years after the birth of the European Convention, there are many reasons to worry about the protection of our most precious and important rights. Clearly we continue to be in need of a European mechanism that can be of help in this respect. We can consider ourselves lucky that so many years ago, the drafters of the Convention did not only lay down a well-considered list of human rights, but also conceived of a system to monitor compliance, an alarm bell that could be rung by both States and individuals who saw a risk that a State would fall back into totalitarianism.[6] It was hoped that the mechanism would scarcely be needed, and therefore its tasks and competences were rather limited. Little could the drafters have expected that, nowadays, the Court would be one of the most world's most influential and effective international institutions.[7]

The Court's transformative power

Surely it is a bad sign for national human rights protection that forty to sixty thousand complaints are brought to the Court each year.[8] Yet at the same time, this very fact illustrates the public support for the Court, and the trust individuals put in the ability of the Court to provide for protection and offer redress. It is further well-documented that the Court's judgments have great impact on national law.[9] In the Netherlands, for example, the entire system for legal protection against administrative decisions was overhauled after just one judgment of the Court told us that the old system offered individuals too little access to court.[10] The Nordic countries have had to abolish their age-old 'closed-shop' systems, which compelled workers to become members of trade unions, after the Court had found that this was contrary to the freedom of association.[11] In Italy, efforts are being made to make court procedures more efficient.[12] Central and Eastern European states actively try to comply with the Court's judgments when restoring property that has been nationalised under communist regimes and, more generally, to model their legal systems to the standards set in the Convention.[13] The

list of such changes is endless – at some point, every single State has made fundamental, structural or systemic changes in national law and policy in response to a judgment of the Court.[14]

Of course, the long list of current human rights problems shows but too clearly that effective protection of Convention rights on the national level is very difficult to achieve. However, the examples of implementation show that having an independent European watchdog has great value. By means of its judgments in individual cases, the Court can make clear which flaws in a national system have caused a breach of the Convention. Remarkably, by far the most States appear to accept these analyses and act upon it,[15] even if they sometimes do so grudgingly and reluctantly, and even if they may severely criticise the Court for making inroads on their national sovereignty.[16] In many cases, the judgments are complied with, national legislation is adapted, domestic practice is changed, and, in short, national law is transformed.[17]

The power of reasoning and the Court's standard-setting role

Many explanations can be given for the Court's transformative power. They range from the independent status of the Court and the authority of its judges to the socialising effect of the public nature of the Court's judgments – if it is for everyone to see that a State has violated individuals' most important rights, this may cause a public outcry that many States will try to avoid, or at least States may want to repair their reputation as soon as they can.[18] However, such explanations are for social and political scientists to give. Being a legal scholar, the best way for me to explain the Court's transformative power is by highlighting one of its most important tasks: its role of interpreting the Convention, explaining its wording, and determining how the various provisions should be applied in concrete cases.[19]

At this point, I need to emphasise that the Court has no strong tools available to guarantee the execution of its judgments. It cannot impose a fine if a State does not comply, and there is no European police force that can bring a State to justice.[20] For the Court, this means that its transformative power strongly depends on whether it manages to convince the national authorities of the rightness of its decisions.[21] The interesting question therefore is: what is contained in the Court's judgments that makes them so authoritative, and that makes States comply even without a mechanism of coercion?

In my view, at least part of the answer to this question can be found in the way the Court has fulfilled its role of interpretation and standard-setting. Although initially, the Court still received very few applications, when they started to trickle in in the 1970s, they gave it occasion to start developing the Convention.[22] The Court's judges made good use of this unique opportunity to think deeply and provide for a set of a very well-considered set of general criteria, principles and notions of human rights adjudication.[23] In fact all judgments the Court handed down in this first period of its existence can be rightly claimed to be 'classics', which continue to be read and studied by law students and professionals alike.[24] To lawyers I need but mention the doctrine of the margin of appreciation, common ground review, the fair balance test, and methods of meta-teleological and autonomous interpretation, which were all developed at the time.[25] Yet, the creation of such standards and doctrines is one step, but it is not enough to guarantee their automatic implementation in national law. There is an additional factor that is needed to explain the successful transition of the Court's standards and its transformative power. This factor is the gradual, but deep embedding of the Court's standards and doctrines in national case-law.

Embedding of Convention standards in national case-law

Importantly, in the early days of the Convention, human rights law was not yet strongly developed, on the international level nor on the national level. There are a few notable exceptions, such as Ger-

many with its very active Federal Constitutional Court, but in most States, it was difficult and very uncommon for individuals to complain about violations of their human rights before the national courts. In the Netherlands, for example, there was, and still is, a prohibition on constitutional review, which means that it is not possible for individuals to complain about legislation that infringes their constitutional rights, such as the right to freedom of religion or property rights.[26] Similarly, in the Nordic states it has for long been considered hardly acceptable that a court would set aside legislation for its incompatibility with fundamental rights.[27] In the United Kingdom, the Convention could not be directly invoked before the courts until 1998,[28] and, of course, for the Eastern and Central European States the Convention had not even entered into force.

Over the 1970s and 1980s, many changes occurred. Over this period, the human rights discourse gained enormous importance.[29] Citizens in western Europe became much more active in trying to influence legislation and policy-making by bringing cases to the courts, and they became very creative in finding new sources to make their claims, one of which was the European Convention.[30] And what's more, there was that other European Court, the Court of Justice of the European Union, which empowered national courts by creating new competences for them to review and possibly set aside national legislation and decisions.[31] In many European States, these developments brought about a gradual but steady increase in human rights adjudication on the national level.

Of course, to decide these cases on human rights, courts needed standards, doctrines and criteria. Human rights are often rather openly formulated, and much is needed to decide what exactly is covered by, for instance, the right to respect for one's private life, or to explain why an infringement of the freedom of expression can be justified. In some States, such standards could readily be found in their own constitutional systems,[32] but in other States, these were lacking. For individuals, non-governmental organisations, civil society, as well as courts in these States, it appeared to be very useful that this Court had already provided for a number of well-developed and authoritative doctrines and standards.[33] Parties to court proceedings eagerly invoked them and, in response, many domestic courts adopted the Court's standards and fitted them into their own argumentative traditions. For example, various studies have shown that in Austria, Belgium and the Netherlands, courts have taken to apply the Convention standards in almost all cases on fundamental rights.[34] Similarly, a recent discourse analysis has revealed how the Finnish courts have increasingly adopted the Court's standards in relation to the right to a fair trial.[35] And even in States with well-established constitutional doctrines, courts have found reasons to apply European standards.[36]

So in various way and for various reasons, and perhaps to varying degrees, most courts in the 'older' Convention States have learned to apply and value the European Court's standards and doctrines.[37] This has resulted in a deep embedding of these standards in the domestic law of these States.[38] Importantly, they thereby set an important example to the member states newly acceding to the Convention in the 1990s. Courts in post-communist Europe moreover have derived their own benefits from the standards set and applied by the European Court. In many Central and Eastern European States, Convention review of legislation has proven of great importance to the development of the new democratic systems.[39] In particular, in many Central and Eastern European States, the possibility of using the Court's standards has provided the constitutional courts with sufficient power to effectively exercise their supervisory role over the national legislative and executive bodies.[40]

Achievements

In short, the existence of useful and high-quality standards by the European Court of Human Rights at a time that national courts were in particular need of such standards, seems to be an important explanation for the Court's success. National courts have adopted its standards and use them in their

own, national adjudication.[41] In turn, this has brought about an even deeper impact of the Convention case-law when, applying the newly adopted doctrines, national courts start to re-interpret national legislation or quash decisions which they find to be inconsistent with the Convention. This has often led to legislative or administrative changes after a domestic judgment has been handed down, and national legislators and decision-makers have learned to anticipate on this and may now try to prevent Convention violations from taking place.[42] Admittedly, this process of embedding has been (and continues to be) slow and halting, but it goes a long way to explaining why and how the Court's standard-setting helps to transform national law and make it Convention-compatible. This process of embedding and transformation further is a constant one, as the Court has never stopped to develop new standards and criteria to keep pace with developments in European law and society.[43] Very recently, for example, it has refined its standards in relation to the harm done by overcrowded prisons,[44] and it has clarified the standards of protection of the procedural rights of suspects of crime[45]. Also in relation to these new standards, it is clear that national courts will have to fit them in with their own case-law, and they actually will make best endeavours to do so.

Surely, many of today's human rights problems cannot be solved by means of judgments of the European Court, however good they are and however useful standards they may contain. The empowerment of national courts can solve systemic problems only to a certain degree, and in some States, the system of transforming national law through case-law simply does not function very smoothly at all.[46] In addition, the national application of the Court's case-law strongly depends on the continuing quality and persuasiveness of these standards, a matter which is under serious pressure as a result of the Court's heavy case-load.[47] Nevertheless, I am convinced that the Court has made a truly impressive contribution to the national protection of human rights by means of the standard-setting in its judgments, and it has come a long way to making national law compatible with the Convention. That is why I think the Court deserves this medal perhaps more than any other institution or person in Europe, and I really hope it will encourage it to continue its great work long after the Convention's retirement age.

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[1] See eg the anniversary special issue of the Netherlands Journal for Human Rights [*Nederlands Tijdschrift voor Mensenrechten*] with 'birthday wishes' for the 65-year old ECHR, 2016 (40-4) pp 437ff.

[2] For more information, see e.g. www.coe.int/en/web/media-freedom.

[3] Cf eg Commission Recommendation regarding the rule of law in Poland, Brussels, 27 July 2016, C(2016)5703 final; European Parliament Resolution on the situation in Hungary, Brussels, 16 December 2015, 215/2935(RSP).

[4] See Declaration contained in a Note verbale from the Permanent Representation of France, dated 24 November 2015, registered at the Secretariat General on 24 November 2015, via http://conventions.coe.int and see Loi nº 2015-1501 of 20 November 2015; the emergency situation was extended for another six months in July 2016; see Loi nº 2016-987 of 21 July 2016.

[5] 'UK must leave European convention on human rights, says Theresa May', *The Guardian* 25 April 2016, www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum.

[6] On this objective of the Convention, see further e.g. E. Bates, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, Oxford University Press, 2010).

[7] H. Keller and A. Stone Sweet, 'Introduction: The Reception of the ECHR in National Legal Orders', in H. Keller and A. Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: OUP 2008) pp 3-28 at p 3.

[8] For the statistics, see www.coe.int > statistics.

[9] See e.g. L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *European Journal of International Law* (2008) pp 125-159; H. Keller and A.

Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press, 2008); G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen, European Law Publishing, 2010); P. Popelier, C. Van de Heyning and P. van Nuffel (eds), *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp, Intersentia, 2011); J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis* (Antwerp, Intersentia, 2014).

[10] *Benthem v the Netherlands*, ECtHR 23 October 1985, appl no 8848/80.

[11] See in particular *Sørensen and Rasmussen v Denmark*, ECtHR (GC) 11 January 2006, appl nos 52562/99 and 52620/99.

[12] This has been done upon *Bottazzi v Italy*, ECtHR (GC) 28 July 1999, appl no 34884/97, but without much success; see *Gaglione and Others v Italy*, ECtHR 21 December 2010, appl nos 45867/07 et al; for the efforts made, see www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp.

[13] See classically *Broniowski v Poland*, ECtHR (GC) 22 June 2004, appl no 31443/96 and the follow-up judgment in *Wolkenberg and Others v Poland*, ECtHR 4 December 2007 (dec), appl no 50003/99. More generally, for the impact on the national law in these states, see I. Motoc and I. Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge, Cambridge University Press, 2016).

[14] See the report by the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, 'Impact of the European Convention on Human Rights in States Parties: selected examples', 8 January 2016, AS/Jur/Inf (2016) 04. Moreover, such changes are made both in response to judgments against that particular State and in response to judgments against other States, as is clear from Gerards and Fleuren (n 9). See further K.J. Alter, L.R. Helfer and M.R. Madsen, 'How Context Shapes the Authority of International Courts', 79 *Law and Contemporary Problems* (2016) pp 1-36 at pp 10-11, 16. It may be argued that the extent of the ECtHR's authorities differs between the various States – its authority in a State like the Netherland is likely to be much stronger than that in, for example, Russia.

[15] The Committee of Ministers of the Council of Europe even noted an increase in the number of cases closed in 2015; see Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, Annual Report, Strasbourg 2016.

[16] In more detail on these dynamics, see P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention system: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016).

[17] *Ibid*; see also the sources mentioned in n 9.

[18] For such explanations, see already L.R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Review* (1997) pp 273-391; see more recently Alter, Helfer and Madsen (n 14) p 17ff.

[19] See Article 19 ECHR and cf Cf A. Stone Sweet, 'The European Convention on Human Rights and National Constitutional Reordering', 33 *Cardozo Law Review* (2012) 1859-1868.

[20] Cf Alter, Helfer and Madsen (n 14) p 6.

[21] See eg A.-M. Slaughter, 'A Typology of Transjudicial Communication', 29 *University of Richmond Law Review* 99 (1994); Keller and Stone Sweet (n 7); Alter, Helfer and Madsen (n 14) p 3-4.

[22] See further also M.R. Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash', 79 *Law and Contemporary Problems* (2016) pp 141-178 at p 146.

[23] See also W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', 9 *Human Rights Law Review* (2009) pp 397-453.

[24] Bates (n 6) speaks of the 'golden era' of Strasbourg jurisprudence (p 320).

[25] See classically cases such as the *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium*, ECtHR 23 July 1968, app no 1474/62; *Golder v the United Kingdom*, ECtHR 21 February 1975, app no 4451/70; *Engel v the Netherlands*, ECtHR 8 June 1976, app no 5100/72; *Tyrer v the United Kingdom*, ECtHR 25 April 1978, app no 5856/72; *Marckx v Belgium*, ECtHR 13 June 1979, app no 6833/74; *Airey v the United Kingdom*, ECtHR 9 October 1979, app no 6289/73. See also Bates (n 6) pp 321ff.

[26] See Article 120 of the Netherlands Constitution. On this, see further eg J.H. Gerards, 'The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It', *Revue Interdisciplinaire d'Études Juridiques* (2017, forthcoming).

[27] See eg I. Cameron and Th. Bull, 'Sweden', in J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis* (Antwerp, Intersentia, 2014) p 269ff.

[28] In 1998, the Human Rights Act entered into force, which allows for a certain degree of judicial review of decisions and legislations for conformity of the Convention rights as incorporated in that act. See elaborately eg A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press, 2009).

[29] See elaborately Bates (n 6) pp 277ff.

[30] See generally B.A. Simmons, *Mobilizing for Human Rights. International Law in Domestic Policies* (Cambridge, Cambridge University Press, 2009) pp 131ff.

[31] On the impact of this Court's work on national courts, see eg M. de Visser, *Constitutional Review in Europe. A comparative analysis* (Oxford, Hart, 2014). See also Madsen (n 22) p 152.
[32] Cf E. Bjorge, *Domestic application of the ECHR. Courts as faithful trustees* (Oxford, Oxford University Press, 2015); Sadurski (n 23) p 433.
[33] Cf R. Harmsen, 'The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges Facing the European Court of Human Rights', in G. Martinico & O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws* (Groningen, Europa Law Publishing, 2010) pp 27-54 at p 33. Moreover, in particular litigants were helped by the standards to shape their cases, for example in the United Kingdom; see Madsen (n 22) p 158.
[34] See A. Gamper, 'Austria: Endorsing the Convention System, Endorsing the Constitution', in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention system: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016) pp 75-102 at p 90; G. Schaiko, P. Lemmens and K. Lemmens, 'Belgium', in J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis* (Antwerp, Intersentia, 2014) p 137; P. Popelier, 'The supremacy dilemma: The Belgian Constitutional Court caught between the European Court of Human Rights and the European Court of Justice', in P. Popelier, C. Van de Heyning and P. van Nuffel (eds), *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp, Intersentia, 2011) p 155; J.H. Gerards and J.W.A. Fleuren, 'The Netherlands', J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis* (Antwerp, Intersentia, 2014) p 239.
[35] V. Koivu, *European Convention on Human Rights and the transition of legal culture. Reception of the argumentation of the European Court of Human Rights by the Finnish supreme jurisdictions* (Rovaniemi, Lapin Yliopisto, 2015) pp 368-369.
[36] Cf Bjorge (n 32) pp 41ff; Madsen (n 22) p 158; E. Klein, 'Germany', J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law* (Antwerp, Intersentia, 2014) at p 210; R. Masterman, 'The United Kingdom', in the same volume, pp 320 and 321. These studies also show, however, that such implementation often may be limited and not all national courts are willing to make changes. To illustrate, the UK Supreme Court has made clear that the standards defined by the ECtHR could not be fitted in with the typical UK criminal law system, and it has requested the UK to revise them; although the ECtHR has not really done so, it has clarified and refined the standards in such a way as to make them more easily applicable in the UK. See, respectively, *R (Horncastle and Others)* [2009] UKSC 14 (*per* Lord Phillips), para. 11 and *Al-Khawaja and Tahery v the United Kingdom*, ECtHR (GC) 15 December 2011, appl nos 26766/05 and 22228/06.
[37] Cf Harmsen (n 33) p 47; Madsen (n 22) p 143.
[38] Helfer (n 9).
[39] Cf Sadurski (n 23) p 442; A. Albi, 'On secret legislation, blanket data recording, arrest warrants and property rules: questions on the rule of law and judicial review in the light of post-communist constitutions', in P. Popelier, C. Van de Heyning and P. van Nuffel (eds), *Human rights protection in the European legal order: The interaction between the European and the national courts* (Antwerp, Intersentia, 2011) pp 173-210. Of course, there are differences between the various states; on this, see in particular the various chapters on these states in Popelier, Lambrecht and Lemmens (n 16).
[40] Cf Sadurski (n 23) p 438.
[41] Cf Alter, Helfer and Madsen (n 14) p 22-23.
[42] Cf Koivu (n 35).
[43] Quite to the contrary; cf Sadurski (n 23) p 431.
[44] *Muršić v Croatia*, ECtHR (GC) 20 October 2016, app no 7334/13.
[45] *Ibrahim and Others v the United Kingdom*, ECtHR 13 September 2016, app nos 50541/08, 50571/08, 50573/08 and 40351/09.
[46] Cf O. Akbulut, 'Turkey: The European Convention on Human Rights as a tool for modernisation', in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention system: Counter-Dynamics at the National and EU Level* (Antwerp, Intersentia, 2016) pp 413-446 at p 443-444 and A. Matta and A. Mazmanyan, 'Russia: In quest for a European identity', in the same volume, pp 481-502.
[47] There certainly is criticism of these standards, sometimes of a concrete nature, sometimes more general; the degree of criticism may influence the willingness of national courts to adopt the principles and criteria developed in the Court's case-law. See further eg N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford, Oxford University Press, 2010) p 126; Gerards and Fleuren (n 9); Popelier, Lambrecht and Lemmens (n 16); for some critical reflections, see in particular S. Flogaitis, T. Zwart and J. Fraser (eds), *The European Court of Human Rights and its Discontents. Turning Criticism into Strength* (Cheltenham, Edward Elgar, 2013).