Is the ECHR facing an existential crisis?

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Speech delivered at the Mansfield College, Oxford
28 April 2017

Why the strain?

It is stating the obvious that the current relationship between the United Kingdom and the European Court on Human Rights is a strained one. But why the strain?

There are three political critiques frequently levelled against the Court, all encapsulated in the idea that the Strasbourg judge acts as a subsidiary legislator, an *Ersatzgesetzgeber*. The criticism is directed to the working methods of the Court, the status of judges and the lack of consideration for the British exceptional situation.

The argument drawn from the working methods of the Court is the following: judicial activism leads the Court to a mission creep. The Court´s attempt to aggrandise itself is visible in the invention of new rights and the enlargement of its own powers. The Court's micro-management of cases threatens democracy and State sovereignity, since Governments lose control of the Convention and domestic authorities are side-stepped and discredited.

The argument based on the status of the judges states that the Strasbourg judge lacks political legitimacy to act as a subsidiary legislator, the Court suffering from a democratic deficit. The problem of the unaccountable judge is aggravated by the fact that some judges come from allegedly second-class democracies. The undemocratic pedigree and doubtful democratic reality of some Contracting Parties taint the Court's reputation and the case law's authority.

The British exceptionalism argument goes like this: Parliament is sovereign and domestic courts must defer to it, and the same applies a fortiori to international courts, since that parliamentary sovereignity is protected by a dualist system of relationship between national and international law. As Lord Neuberger put it, «the idea of courts overruling decisions of the UK parliament, as is substantially the effect of what the Strasbourg and the Luxembourg courts can do, is little short of offensive to our notions of constitutional propriety.»[1]

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[1] Cambridge Freshfields Annual Law Lecture 2014 The British and Europe, Lord Neuberger, President of the Supreme Court, 12 February 2014.

The second type of critiques made against the Court is more complex, since they pertain to the nature of the subject matter that the Court deals with, namely the rights and freedoms enshrined in the ECHR. They turn around the motto that there is a conflict between « genuine » v. « fake » human rights. Three claims are made:

First, human rights are residual, civil liberties which serve only minorities, not the majority of citizens. The Convention is portrayed as the villains' charter, not as the bill of rights of the common man on the street. Furthermore, social rights are not human rights, not enforceable rights at all. Human rights only imply negative, not positive obligations and certainly not a budgetary cost. The transformation of the Convention into a desguised social charter betrays its nature.

Second, human rights result from an originalist, « true » interpretation, not an evolutive, « abusive » interpretation. The true interpretation of the convention is based on the travaux preparatoires and eventually also on the Contracting Parties' law at the time of drafting of the Convention. Soft law is not law, and should not be taken into account, not even as a contextual element of interpretation of the Convention and its protocols.

Third, human rights are truly « homegrown », not « foreign » rights. There are no universal human rights. Universal human rights are indeed foreign human rights, imposed by alien judges who lack sensitivity to domestic traditions. The defence of homegrown rights imposes a sort of skepticism regarding international law and bodies. Cultural relativism is the sole weapon to oppose to the Court's moral tutelage.

Evolutive interpretation

A response to these claims requires us to go back to basics and recall what the European Court on Human Rights was built for.

The Council of Europe is an autonomous legal order, based on agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms (Article 1, paragraph b, of the 1949 Statute of the Council of Europe). With 217 treaties, the legal order of this international organisation has at its top an international treaty, the European Convention on Human Rights (the Convention). Being more than just a multilateral agreement on reciprocal obligations of States Parties, the Convention creates obligations of negative and positive nature for States Parties towards all individuals within their jurisdiction, with a view to the practical implementation of the protected rights and freedoms in the domestic legal order of the States Parties. Put it in legal jargon, the Convention is a law making treaty and not a mere contract treaty.

Very early on, the former Commission, in its decision of 11 January 1961 in the case of *Austria v. Italy*, expressed the same principle when it affirmed the "objective character" of the Convention: "... the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" [2].

Therefore, the States Parties to the Convention are legally obliged not to hinder in any way the effective exercise of the right of individual application and to make such modifications to their domestic legal systems as may be necessary to ensure the full implementation of the obligations incumbent on them[3]. Seen from another perspective, these are the consequences of the principle of good faith in fulfilling treaty obligations, provided for in Articles 26 and 31 of the Vienna Convention on the Law of Treaties.

The Convention cannot be interpreted in a vacuum, but must be interpreted in harmony with other international law and soft law. Ever since *Golder*, account shall be taken of any relevant principles and rules of international law applicable in the relations between the parties, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969[4]. Hence, the European Court of Human Rights (the Court) departs from the contested position that there are "self-contained regimes" within international law[5]. From the Court's perspective, there is no methodological difference between the interpretation of international human rights law and other international law, or between contractual and law-making treaties, and therefore it assumes that the same interpretative methods can be applied in both fields of international law. As Judge Rozakis so elegantly formulated it, the judges of Strasbourg "do not operate in the splendid isolation of an ivory tower built with material originating solely from the ECHR's interpretative inventions or those of the States party to the Convention"[6].

This methodology is warranted by the Court's cardinal principle of interpretation, according to which the Convention must be interpreted in the light of present-day conditions[7]. It was in the seminal case *Tyrer v. the United Kingdom* that the Court for the very first time used the leitmotiv of "the Convention as a living instrument", whose interpretation has to take

[2] Commission, *Austria v. Italy* (no. 788/60, Yearbook 4, pp. 166-68). The Court adhered to this doctrine in *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25.
[3] *Maestri v. Italy ([GC]*, no. 39748/98, § 47, ECHR 2004-I).
[4] *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18.
[5] The point was already made in my opinions in *Al-Dulimi and Montana Management Inc v. Switzerland [GC]*, no. 5809/08, 21 June 2016, § 71, *Sargsyan v. Azerbaijan [GC]*, no. 40167/06, 16 June 2015, footnote 23, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]*, no. 47848/08, 17 July 2014, footnote 14.
[6] Rozakis, The European Judge as a Comparativist, in *Tulane Law Review*, 2005, p. 278.
[7] *Tyrer* judgment of 25 April 1978, Series A no. 26, p. 15, para. 31.

account of evolving norms of national and international law[8]. Deeply entrenched into American[9] and Canadian[10] constitutional law since the early twentieth century, this interpretation technique was introduced in European human rights law in 1978.

In *Tyrer*, confronted with the Attorney General of the Isle of Man' arguments advanced under former Article 63 of the Convention that, "having due regard to the local circumstances in the Island", the continued use of judicial corporal punishment on a limited scale was justified as a deterrent, the Court replied that "it is noteworthy that, in the great majority of the member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times; (...) If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country." By concluding that the Isle of Man must be regarded as sharing fully that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble to the Convention refers, the Court rejected that there were local requirements affecting the application of Article 3 in the Isle of Man and, accordingly, found that the applicant's judicial corporal punishment constituted a violation of that Article.

Hence, since the very beginning of the Court's existence, the evolutive interpretation of the Convention was intimately linked to the need for a consensual reading of the text, based on the consideration of the domestic legal framework of the "great majority" of the member States of the Council of Europe and, ultimately, of the common heritage of political traditions, ideals, freedom and the rule of law, to which the preamble makes reference.

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[8] *Tyrer*, cited above, § 31.

[9] *Missouri v. Holland* 252 U.S. 416 (1920). Writing the majority's opinion, Justice Holmes made this remark on the nature of the constitution: "With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." The Supreme Court's reference to "evolving standards of decency" is also understood as a clear mention to the "living constitutionalism" (see *Trop v. Dulles*, 356 U.S. 86 (1958): "The words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

[10] *Henrietta Muir Edwards and others v. The Attorney General of Canada* [1929] UKPC 86, [1930] A.C. 124 (18 October 1929). The case is not only memorable because it established that Canadian women were eligible to be appointed senators, but also because it introduced the "living tree doctrine" in Canadian constitutional law, according to which the constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing times.

The foundational principle of evolutive interpretation has been recently put at stake in *Hassan v. the United Kingdom*[11]. Contrary to the Government's position, the Grand Chamber affirmed that IHRL applies to international armed conflicts concurrently to IHL, but it went on to admit, as pleaded by the Government, that IHL namely the Third and Fourth Geneva Conventions relating to internment may be used to qualify, in practical terms, to weaken IHRL standards. On the basis of an alleged subsequent practice of the Contracting Parties during international armed conflicts outside Europe, which did not use the derogation clause of Article 15 of the Convention in order to detain people indefinitely in such war scenario, the Grand Chamber assumed that all Contracting Parties had proceeded to an implicit review of their own Convention commitments and enlarged the exhaustive list of detention grounds of Article 5 of the Convention. The principle of evolutive interpretation of the Convention was turned upside down with a view to include in Article 5 a new ground for detention, namely internment under international humanitarian law, the practical consequence being that in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, Article 5 can be interpreted as permitting the exercise of such broad powers and the looser standards of review of detention of the Geneva Conventions will apply. Hence, review of such detention should take place by a "competent body" with "sufficient guarantees of impartiality", and not necessarily by a judicial authority. In other words, evolutive interpretation of the Convention may now permit a regression in terms of human rights protection in Europe.

European consensus

In Strasbourg, soft law provided, and still provides, the most important source of crystallization of the European consensus and the common heritage of values. In fact, soon after *Tyrer*, the Court took the fundamental step of enlarging the array of sources of law in the light of which the European consensus may be established. In *Marckx v. Belgium*, the Court took into consideration the European shared values based on the domestic law of the "great majority" of member States of the Council of Europe, as well as the 1962 Convention on the Establishment of Maternal Affiliation of Natural Children, signed but not ratified by the respondent State, and the Council of Europe 1975 Convention on the Legal Status of Children born out of Wedlock, not even signed by the respondent State, and finally the Committee of Ministers Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children. To the argument that the

[11] *Hassan v. the United Kingdom (GC)*, no. 29750/09, 16 September 2014.

1962 and the 1975 conventions had a small number of parties, the Court replied that "Both the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between "illegitimate" and "legitimate" children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies."[12] Mirroring the interpretative techniques of constitutional courts, the Court went even further and modulated the effects of its judgment, dispensing the respondent State from re-opening legal acts or situations that antedate the delivery of the judgment. For that purpose, it made reference to the fact that "a similar solution is found in certain Contracting States having a constitutional court: their public law limits the retroactive effect of those decisions of that court that annul legislation."[13] As if it were a European Constitutional Court, the Court resorted to the principle of legal certainty to accord itself the implied power of modulation of the temporal effect of its own judgments.

In the landmark case of *Demir and Baykara v. Turkey*, after having recalled that "the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies", and having regard to the developments in labour law, both international and national, and to the pertinent practice of Contracting States, the Court concluded that the right to bargain collectively with the employer had, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of one's interests set forth in Article 11 of the Convention. For that purpose, it cited the relevant ILO conventions, which the respondent State had ratified, the respective ILO Committee of Experts' interpretation, as well as Article 28 of the European Union's Charter of Fundamental Rights, Article 6 § 2 of the European Social Charter, which Turkey had not ratified, the European Committee of Social Rights' interpretation of this article, and Principle 8 of Recommendation No. R (2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe[14].

In other words, for the purpose of the interpretation of the Convention, the legal relevance of human rights standards set out in other treaties and conventions depends neither on the number of their respective ratifying parties, nor on the number of Council of Europe member States bound by them and nor even on the fact that the respondent State ratified them. Thus,

[12] *Marckx v. Belgium*, no. 6833/74, § 41, 13 June 1979.
[13] *Marckx*, cited above, § 58.
[14] *Demir and Baykara v. Turkey [GC]*, no. 34503/97, §§ 146-154, ECHR 2008-VI.

under European human rights law, hard law is profoundly interwoven with soft law.

The Court's soft law and social rights friendly stance has been questioned in recent times. A remarkable example of this trend is *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*[15]. The United Kingdom banned secondary action more than two decades ago and throughout this time has been subject to critical comments by the ILO Committee of Experts and the ECSR. The applicant union prayed these soft law materials in aid. The Government did not consider the particular criticisms made to be relevant to the factual situation denounced in the present case, or otherwise significant. The Court acknowledged the wealth of international-law material relevant for the case and that the analysis of the interpretative opinions emitted by the competent bodies set up under the most relevant international instruments mirrored the conclusion reached on the comparative material before the Court, namely that the UK outright ban on secondary industrial action finds itself at the most restrictive end of a spectrum of national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach. Nonetheless, the Court preferred to underscore the distinct character of its review compared with that of the supervisory procedures of the ILO and the European Social Charter and consequently it concluded that in this legislative policy area of recognised sensitivity the respondent State enjoys a margin of appreciation broad enough to encompass the existing statutory ban on secondary action. No violation of Article 11 of the Convention was therefore found.

Evolutive interpretation of the Convention also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court made use, for example, of the work of the European Commission for Democracy through Law (the Venice Commission). The first case where the Court cited the Venice Commission was *Hirst v. the United Kingdom (No. 2)*[16]. The source quoted was the Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 51st Plenary Session (5-6 July 2002).

The unfortunate *Hirst* saga is a telling example of another danger facing the European human rights protection system. The British legal framework imposed a blanket restriction on all convicted prisoners in prison. It applied automatically to such prisoners, irrespective of the length of their sentence

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[15] *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, ECHR 2014-II.

[16] *Hirst v. the United Kingdom (no. 2) [GC]*, no. 74025/01, ECHR 2005-IX.

and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right, as the Court put it, must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.

Thirteen years have passed without implementation of the *Hirst* judgment delivered in 2004, this omission being aggravated after 2010 by the delivery of a pilot judgment in *Greens and M.T. v. the United Kingdom*[17]. In spite of the Court's crystal clear indication that the disenfranchisement system of prisoners in the UK constituted a systemic failure which required the adoption of measures of general nature, none were adopted even after the Grand Chamber itself nuanced the Court's position in *Scoppola v. Italy (GC)* in 2012[18]. In an exact similar case of automatic disenfranchisement as a result of a life sentence, without any assessment of the individual case, the Grand Chamber backtracked from the principled position taken in *Hirst* by accepting the Italian legislation depriving of voting rights automatically all those who are sentenced to three years or more in prison, irrespective of the nature of their offence and their individual circumstances. Despite the compounding circumstance that deprivation of voting rights could entail a life ban in Italy, while the UK deprived all persons sentenced to imprisonment, for the duration of their time in prison, the Court found that the Italian system was indeed acceptable in the light of Article 3 of Protocol 1.

Both the UK rebellion against *Hirst*, and the Court's backtracking from its own principles of interpretation, have had an enduring, negative effect on the European system of human rights protection, as the recent *Anchugov and Gladkov* case shows[19].

After the shock waves sent by the 2012 *Konstantin Markin* Grand Chamber case on the right of servicemen to parental leave[20], which was felt as an interference with the organization of the Russian army, the 2013 *Anchugov and Gladkov* dealt with the exact same issue of *Hirst*, the ban of the voting rights of prisoners, but this time with the particularity that the ban was based on a constitutional provision: Article 32 (3) of the Russian Constitution. That did not hinder the Court from repeating the finding of a violation of Article 3 of Protocol 1, which would logically entail a constitutional reform in Russia. No such thing happened. On the contrary, in July 2015 the Russian Constitutional Court judgment on the Federal Law On the Accession of the Russian Federation to the European Court of Human Rights affirmed that a judgment of the Court is not enforceable in

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[17] *Greens and M.T. v. the United Kingdom*, nos. 60041/08, 60054/08, ECHR 2010-VI.
[18] *Scoppola v. Italy (GC),* no. 126/05, 22 May 2012.
[19] *Anchugov and Gladkov v. Russia*, no. 11157/04 and no. 15162/05, 4 July 2013.
[20] *Konstantin Markin v. Russia*, no. 30078/06, ECHR 2012-III.

Russian territory if the Constitutional Court finds that it contradicts the Russian Constitution. Since there was no legal framework for such finding, the Constitutional Court suggested that the Duma approve legislation to create a special legal mechanism "to ensure the supremacy of the Constitution in the implementation of European Court of Human Rights judgments." Such interpretation of the Russian Constitution was enshrined in December 2015 in a Law on the Constitutional Court powers, which establishes the Constitutional Court power to declare rulings of international judicial bodies non-executable (including on compensation) if they contradict the Russian Constitution. In April 2016, the Russian Constitutional Court applied the new law for the first time and decided that the *Anchugov and Gladkov* judgment is not enforceable in Russia.

The 2016 Constitutional Court judgment only worsened the present existential crisis of the Court. If it is true that the vast majority of the Court's judgments are implemented with more or less delay or precision, the fact remains that in a fast growing number of cases States are not willing to go along with the court and oppose directly or indirectly any kind of implementation of its judgments. In the case of Russia, there are now pending 1573 non executed judgments, of them 204 in leading cases, among which the famous 2014 Yukos judgment that set the highest ever compensation amount in the history of the Court, 1,8 billion euros to be paid to the applicants.

International democracy

From the seminal formulation of the European consensus in *Tyrer* emanates a vision of an deliberative, international democracy in which a majority or representative proportion of the Contracting Parties to the Convention is considered to speak in the name of all and thus is entitled to impose its will on other Parties. As a matter of constitutional principle formatting the Council of Europe, consensus is decoupled from unanimity. Consensus as a *volonté générale* can still exist even if not all Contracting Parties concur in the same reading of the Convention.

It cannot be argued today that the founding fathers did not want this to happen, and States had been trapped into engagements that they did not agreed upon. The now worn-out argument of lack of State consent is sometimes accompanied, as the reverse side of the coin, by the no less *démodé* critique to the Court's lack of political legitimacy to interpret innovatively the Convention, *rectius*, to create law, using soft law to circumvent the competent legislative bodies and to flout the principles of democracy, rule of law and subsidiarity. Underlying this speech is almost invariably the sovereignist leitmotiv *in dubio pro mitius*.

The preamble sets the Convention against the background of the Council of Europe general aims, with a view to creating a "closer union" among member States, based on "a common understanding and observance of the Human Rights upon which they depend". In the Statute of the Council of Europe, the language used makes reference not only to a "closer unity between all like-minded countries of Europe", but also to an "organisation which will bring European States into closer association". The very first Article of the Statute sets as the aim of the Council "to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". In the explicit terms of the Statute, the realisation of these ideals and principles warrants "agreements and common action" in all relevant areas of social life (economic, social, cultural, scientific, legal and administrative matters) and "in the maintenance and further realisation of human rights and fundamental freedoms". No better words could proclaim the primacy of human rights obligations in all areas of governance. The principle *in dubio pro persona* could find no better formulation. Hence, social and economic progress is intimately connected to the progress of human rights as two sides of the same coin.

This put, evolutive interpretation, European consensus and hardening of soft law compose the three pillars of the European normative system within which State consent is relevant. Based upon these pillars from the very beginning, and animated by the common quest for "economic and social progress", the Council of Europe legal order can no longer be confused with the traditional international accord of juxtaposed national egoisms. Sovereignty is no longer an absolute given, as it was in the Westphalian times, but an integral part of a human rights-serving community.

In this context, the Convention cannot but be interpreted in the light of the formally binding "agreements" (ie treaties) and the immense plethora of formally not binding "common actions" performed by the political and technical bodies of the Council of Europe, such as recommendations, guidelines and declarations of its Committee of Ministers. Furthermore, the Convention itself calls for an open-minded approach to international law and soft law, since it is inspired by the Universal Declaration on Human Rights, as the preamble states, and open to other legal instruments, both of domestic or international legal nature, when these offer a better human rights protection (Article 53 of the Convention). In sum, the Court's interpretative latitude is dictated by the letter and the very nature and purpose of the Convention themselves. No Contracting Party can legitimately claim special exemption from its Convention obligations on the basis of its exceptional situation, other than in the strict terms of Article 15 of the Convention, and even then that exemption is under the Court's oversight.

Let me close these remarks with a reference to a debate between Chief Justice Frankfurter and Rawls. Once Justice Hughes said to Justice Douglas:

"you must remember one thing. At the constitutional level where we work, 90 percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." Inspired in these words, Justice Frankfurter concluded : "The Constitution is the Supreme Court". Rawls' rebuttal was vehement and straightforward: "The Constitution is not what the Court says it is".

In European human rights law, there is a specific mode of legal reasoning. Since its early days, the Court has always sought for a purposeful (*pro persona*), objective, open-ended (to international law and subsequent practice of CP), autonomous, evolutive, effective (effet utile) and consensual Convention interpretation. The Court's golden rule of interpretation rejects a formalistic, subjective, self-contained, literal, originalist, *in dubio mitius* and sovereigntist Convention interpretation.

The Convention is not what Strasbourg judges say it is, it is a constitutional instrument of European public order, and like any other Constitution it evolves. At least in Europe, Rawls is right.