Laurids Mikaelsen

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The practice and procedure of the European Commission of Human Rights on the admissibility of applications from individuals and states

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Preface

Almost ninety-eight per cent of all applications introduced before the European Commission of Human Rights have—for one reason or another—been rejected by the Commission.

The purpose of this study has been to describe an applicant's sticky job of finding his way through to those organs established for the very purpose of protecting Human Rights in Europe.

For my work I have received financial support from various sources. Grants from two Danish foundations, the P.M. Gertz's Mindelegat and the Otto Mønsted's fond, and from the Danish Ministry of Foreign Affairs have made it possible for me to study the subject in Strasbourg at the Palais des Droits de l'Homme. The Danish Social Science Research Council has granted financial aid for linguistic revision and typing of the manuscript.

During my work with the manuscript the support from three persons has been of the utmost importance. Professor Carl Aage Nørgaard, Vice-President of the European Commission of Human Rights, has been my teacher and supervisor, Mrs. Birgit Bjøreng has had the tedious task of correcting my linguistic errors, and my wife, Grete, has patiently typed and retyped successive drafts and the final manuscript.

Copenhagen, September 1979 *Laurids Mikaelsen*

Introduction

The European protection of Human Rights has developed considerably during the past few years. Since 1974 the Convention has been ratified by France, Greece, Switzerland, and Portugal bringing the number of participating States up to nineteen. Today Spain and Liechtenstein are the only members of the Council of Europe who are not parties to the Convention.[1]

Also the two optional parts of the European protection system have been strengthened. Since 1974 Switzerland and Portugal have made declarations under Article 25 of the Convention recognizing the individual right of petition, and France, Switzerland, Portugal and Greece have recognized as compulsory the jurisdiction of the Court of Human Rights under Article 46 of the Convention.[2] The individual right of petition has thus been accepted by fourteen States and the jurisdiction of the Court by sixteen.

Another major development is that the European Court of Human Rights has finally started functioning. Following a rather slow start since it was set up in 1959, where only ten cases were submitted to it during the period up to 1970, and a temporary "breakdown" during the years 1970–1974 where only one case was transmitted to it, the Court has, since late 1974, received a great number of cases, until the autumn 1979 some twenty cases, and delivered judgements in the major part of them. There is no doubt that in these cases the Court has proved to be highly effective and that it is prepared to play its proper role in the European protection system in the future. However, all cases submitted to the European protection system must first be submitted to the Commission of Human Rights. Only the Commission is competent to receive applications from individuals and from States.

One cannot study the statistics on the European protection system

1. After the manuscript has been finalized for publication Spain has, on 4 October 1979, ratified the Convention.

2. Spain has made no declarations under Article 25 but has as from 15 October 1979 recognized the jurisdiction of the Court.

without being astonished by the fact that an absolutely overwhelming number of cases have been rejected by the Commission on one ground or another. Out of a total number of 8,500 registered cases, introduced since 1955, the Commission has (January 1979) decided on the admissibility in 8,100 cases. Of these cases, 7,900 have been declared inadmissible or have been struck off the Commission's list of cases while only 200 cases have been admitted. Converted into a ratio, this means that almost ninety-eight per cent of all registered cases have been rejected. To this must be added that only one in eight cases brought to the attention of the Commission by individuals are registered formally. On a yearly basis some 2,000 provisional files are opened by the Commission and only a very small part of these have ever been registered and are therefore not included in the figures mentioned above.

The Commission's practice and procedure on rejection or acceptance of applications from States and individuals is the subject of the present study. It is necessary to make a few preliminary remarks on the material forming the basis of this study. Although a great number of the Commission's decisions on admissibility have been published in *Yearbook*, *Collection* and *Decisions and Reports*, (compare with the Selective Bibliography p. 247) it is to be noted that the published part of the Commission's practice is very modest compared to the total number of decisions. It appears that only one out of ten decisions have been published. Furthermore, it appears that the decisions of the Commission are published with considerable delays, in most cases one to two years after the decision has been taken by the Commission. This, of course, makes it difficult for observers to be completely up to date with the Commission's practice. This study is based on the decisions of the Commission *published* at the latest February 1979. Practice published subsequently has only been referred to very briefly. Decisions of the Commission are generally only referred to by use of case numbers. References to the *Yearbook*, *Collection* and *Decisions and Reports* are made in the table of cases, see p. 251.

The literature about the European Convention on Human Rights and the protection system established thereunder is enormous. Reference is made to the *Bibliography Relating to the European Convention on Human Rights*, published by the Council of Europe in February 1978. However, only a comparatively small part of this specifically concerns the subject matter of this study. A selective bibliography is given on p. 247, and more specialized literature is quoted in footnotes.

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CHAPTER 1

The European Protection of Human Rights in a Historical and International Context

1 The Main Problems Concerning Protection of Human Rights

Under the heading "protection of human rights" at least three problems require consideration.

The first main problem can be formulated in the question: What rights and freedoms are fundamental to such an extent that they should be regarded as human rights? This is a problem of the definition of the rights and freedoms to be protected as human rights. Throughout the ages this problem has been the subject of discussion and examination in various contexts in different national and international fora.

The second main problem is: How can States, in a binding manner, declare that they recognize certain rights and that they promise anyone within their jurisdiction the right to enjoy these recognized rights and freedoms? This problem has, to some extent, found solutions in the embodying of certain provisions in national constitutions and in the conclusion of international agreements.

The third main problem is: How can these defined and recognized human rights be effectively protected? Obviously, this problem can only be partly tackled on the national level. Even if the State has defined the rights and set up a protections system in the constitution, this is not sufficient because the problem is normally that of how to protect the individual against encroachment by his own State. The State as such is quite able to abolish the rights guaranteed without running the risk of sanctions for such non-observance. Some kind of international measures seem to be necessary. The latter half of this century saw the first development in this respect.

Obviously, these problems are concurrent. Before setting up a protection system it is necessary to define the rights and freedoms to be protected. In addition, so long as these rights are dependent on the States' free will, a basic requirement of such a protection system will be that the State shall recognize certain rights and freedoms and further, that it will accept the protection system.

2 National Efforts

When delving back into history one discovers several examples of attempts which have been made to formulate and define certain rights which should be regarded as fundamental rights, and which as such should be more inviolable than other rights, and which should be subject to more intensive and absolute protection than other rights.

It is hardly a coincidence that these questions have been discussed particularly in connection with class struggle, rebellion, revolution and such similar situations. An example of this is the English *Magna Carta*, which was given by King John in 1215 to meet the demands put forward by the barons, who, in the feudal society at that time—as the magnates they were—played an important role, and therefore had an opportunity to force certain concessions on an otherwise autocratic monarchy. The fact that the Magna Carta was given in the form of a "treaty" does not indicate that it is an international instrument in the modern sense of the word. It enacts or proclaims a number of rules and customs as binding *in England*, and enumerates the "liberties of free men."[1]

The English *Bill of Rights* of 1689, which was the statute-form of the coronation oath which the coming sovereigns William (of Orange) and Mary had to swear to Parliament before they could ascend the throne, which James II was forced to give up, contained what the Parliament considered to be the fundamental principles of the Constitution. The aim was, of course, to protect liberty and the rights of Parliament against future sovereigns.[2] The *American Declaration of Independence* (1776) and the *French Declaration of the Rights of Man* (1789) are other well-known examples.

In addition, a great number of States have adopted (different but familiar) catalogues of fundamental rights in their *constitutions*. Only two examples will be mentioned here: The *Bill of Rights in the United States' Constitution* (1789/1791), which is the oldest example, and the *Constitution of the People's Republic of China*, 1954, which in its chapter three under the heading "Fundamental Rights and Duties of Citizens" enumerates those freedoms and rights which are protected by the constitution, such as: equality of all citizens before the Law; the right to vote; freedom of speech; freedom of the press; freedom of assembly, association, procession and demonstration; freedom of

1. J. E. A. Jolliffe, *The Constitutional History of Medieval England* (London 1961) in particular pp. 250–263.

2. D. L. Kair, *The Constitutional History of Modern Britain 1485–1951* (London 1953) pp. 267–288.

religious belief; inviolability of the home; privacy of correspondence; the right to work (and in the 1975-constitution the right to strike); the right to rest and leisure; the right to material assistance in old age and in case of illness or disability; the right to education; freedom to engage in scientific research, literary and artistic creation and other cultural pursuits; and women's equal rights with men in all spheres.[3]

This list of rights and freedoms is in no way exhaustive as regards the Chinese Constitution and, obviously, other rights could be found in other constitutions. But nevertheless, it shows that on the global level, there is a practically common view as to what should be regarded as fundamental rights and freedoms. Corresponding catalogues are laid down in almost all constitutions including, e.g., the constitutions of the Union of Soviet Socialist Republics, the United States of America, Denmark, the German Democratic Republic, Spain, and Switzerland.

Even though several of the rights mentioned—on the face of it—seem broadly accepted on a global basis, it is very clear, the socioeconomic and ideological backgrounds of the various societies taken into account, that there are substantial differences as far as the exact contents and application of the rights and freedoms are concerned.

Thus, there seems to be a clear tendency that the Western countries in their constitutions limit themselves to what has been called civil and political rights, whereas eastern constitutions to a larger extent contain and protect economic, social, and cultural rights.[4]

> The national constitution, municipal legislation, decisions of the national courts must be the principal bulwark to protect the rights of the individual. Why then do we talk about the international protection of human rights?[5]

This question, expressed by A. H. Robertson, may—when passing on to the following sections in this chapter—give rise to comprehensive considerations, especially taking into account the apparently common global perception as to the enumeration of rights and freedoms to be protected. Why don't we just rely on the protection available under national law?

Even if the measures mentioned above are regarded as actual results of a general flow based on the innate feeling that some rights, such

3. Yuan-li Wu, *China—A handbook* (Newton Abbot, 1973) p. 799 f. This constitution has been replaced by a new constitution passed by the fourth National People's Congress on 17 January 1975. The new constitution is a simplification of the 1954-constitution, as a number of needless articles have been cut out.

4. About this distinction, see subsection 4.1.1

5. A. H. Robertson, *Human Rights in Perspective. An Historical Introduction*, p. 9.

as the right to life, are more fundamental than other rights, it must be noticed that all measures mentioned were national. All the practical efforts to answer some of the questions concerning human rights are contained within the framework of individual States.

3 Growing Internationalization

After the First World War a number of European frontiers were determined on the principle of self-determination. Consequently, minority groups arose along the borders, and often on both sides.

In order to protect such minority groups, the Principal Allied and Associated Powers (USA, United Kingdom, France, Italy, and Japan) concluded treaties regarding the protection of minorities with a number of countries in Eastern Europe and the Balkans, e.g., Czechoslovakia, Poland, and Rumania.

These treaties were framed so as to give all inhabitants the same rights and at the same time maintain certain minimum rights. For example, Article 2 of the treaty with Rumania reads:

> Rumania undertakes to assure full and complete protection of life and liberty to all inhabitants of Rumania without distinction of birth, nationality, language, race or religion.[6]

After the Second World War corresponding provisions were laid down in a number of peace treaties. For instance, Article 15 of the Peace Treaty concluded between the Allied Powers and Italy reads as follows:

> Italy shall take all measures necessary to secure to all persons under Italian jurisdiction, without distinction as to race, sex, language, or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.[7]

Similar provisions are laid down in peace treaties with other countries[8] as well as in the State Treaty for the re-establishment of an independent and democratic Austria, signed in Vienna on 15 May 1955.[9]

It should be noticed that in all cases these postwar treaties are

6. LNTS, vol. 5, p. 335.
7. UNTS, vol 49, p. 3.
8. Bulgaria, UNTS, vol. 41, p. 21, Hungary, UNTS, vol. 41, p. 135, Rumania, UNTS, vol. 42, p. 3, and Finland, UNTS, vol. 48, p. 203.
9. UNTS, vol. 217, p. 223.

unilateral, in the sense that the victorious parties do not undertake similar obligations, and further it should be noticed that they do not indicate sanctions of any kind in case of infringements.

Although the minority treaties concluded after the First World War stated that they constituted obligations under the guarantee of the League of Nations, this never led to any action by the League. However, in 1950 certain events in Bulgaria, Hungaria, and Rumania gave rise to a debate in the General Assembly of the United Nations as to whether these countries had violated their obligations under their respective peace treaties (concluded after the Second World War). On 3 November 1950 the General Assembly expressed as its opinion that the conduct of these Governments was such as to indicate that they were aware of breaches being committed of the provisions of the Peace Treaties under which they were obliged to secure enjoyment of human rights and fundamental freedoms in their countries and that they were callously indifferent to the sentiments of the world community.[10]

It has already been mentioned that these attempts to protect human rights have all been unilateral. We still have not seen institutionalized, collective protection of rights based on various countries' mutual promises that they will respect certain rights. But it is possible, however, to regard the above-mentioned example of UN-control as a transitional phenomenon. This is, in fact, a case where a widely composed international forum, with the strength inherent therein, pronounces itself with regard to a single State's internal affairs as far as the protection of human rights is concerned.

Also the fight of the General Assembly against South Africa through the 1950s and 1960s shows that attempts have been made to fight suppression of human rights with ordinary means of international law. Unfortunately, it lies near at hand to conclude that this fight with traditional means has been fruitless.

4 Creation of Multilateral Protection Instruments

After the Second World War an urgent need for re-establishment of international order was generally admitted, both on the global level, where the League of Nations never became a success, but also in the regions, first and foremost in Europe.

The experience of the Second World War was still printed clearly in the memories and gave rise not only to growing public awareness

10. Resolution 385 (V) of 3 November 1950.

but also to political action. Within a few years great conquests were made, and as will be seen below, these conquests have also been of the greatest importance for the development of the international protection of human rights.

4.1 Under the auspices of the United Nations

The United Nations was created in 1945, and on the preparatory stage it became clear that the protection of basic human rights should be an important task for this new international organization. In the preamble of the Charter of the United Nations it is said that the peoples of the United Nations are determined

> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

This clearly demonstrates that the protection of human rights, which was not mentioned in the Covenant of the League of Nations, is assigned a central position in the Charter of the United Nations, hand in hand with the effort to save succeeding generations from the scourge of war.

Article 1 of the Charter, which defines the purposes of the United Nations, indicates in para. 3 as one of the main purposes of the organization:

> To achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

However, specific rights and freedoms were not defined in the Charter, and consequently, there were no provisions dealing with their enforcement. Article 2 para. 7 of the Charter contained a variation of the "non-interference-in-domestic-affairs rule":

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

This provision has been subject to discussion, and it has been referred to several times in support of the view that the General Assembly