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GUEST EDITORIAL

The new European Court of Human Rights

This winter the majority of the judges were appointed for the new full time European Court of Human Rights which will replace the present Court and Commission on 1 November this year. Both the selection of the judges and the functioning of the new Court may have some influence on the European Union.

The members of the present, part-time, European Court of Human Rights are elected by the Parliamentary Assembly of the Council of Europe from a list of persons nominated by the Member States. This rule is virtually the same for the new, permanent, Court, but the Parliamentary Assembly of the Council of Europe has fundamentally changed its role in the election proceedings. For the old Court, each Member State used to propose three candidates of whom the Parliamentary Assembly usually elected the number one. Often numbers two and three were not even serious candidates. For the new Court this has been changed. The Parliamentary Assembly requires a list of three serious candidates. Where a State had proposed candidates who either did not want to be elected or could not be considered as being serious, the list was returned with the request to propose three eligible candidates. The Parliamentary Assembly, or rather a subcommittee thereof, subsequently interviewed all candidates and appointed one for each Member State. The candidate elected was not always the one preferred by the government. Compared to the previous system, the Parliamentary Assembly of the Council of Europe has enormously increased its influence on the selection of judges. Undoubtedly the members of the

European Parliament will look at this with some envy.[1] On future occasions they may well exert pressure to obtain similar influence on the election of judges of the Court of Justice.

After 1 November 1998 there will be two courts of a constitutional character responsible for important issues within the European Union. The interest in human rights is still growing and a close cooperation between the two courts seems desirable. There has never been any formal provision for mutual co-operation but, as each court had its own well-defined responsibility, there were never any conflicts between the courts. So far the Court of Justice has carefully followed the rulings of the European Court of Human Rights whenever fundamental rights have been at issue. There is no reason why that should change. However, the basis for the Court of Justice to leave issues of human rights to the Court in Strasbourg may have become somewhat weaker. The new permanent European Court of Human Rights was created to cope with fundamental changes which had taken place in Europe. One of the most important of these changes is the increase in the membership of the Council of Europe, and also of the parties to the European Convention on Human Rights. For a long time the Council of Europe had not many more than 20 Member States. Apart from the present Members of the European Union they were States such as Iceland, Norway and Switzerland which are culturally close to the Members of the Union. Turkey was the only State where traditions in the field of human rights differed to some extent from those of the other Parties. Since November 1990, sixteen Central and Eastern European States have been admitted as Members to the Council of Europe. Some of them do not differ from Western European States in their attitude to human rights but in others the situation with respect to human rights diverges greatly from that in Western Europe. Prison conditions in Russia, the attitude of jailors towards prisoners in several Eastern European countries, traditions with respect to the freedom of information and the freedom of the press may well influence the case law of the new European Court of Human Rights. The rights enumerated in

1. In the Rothley report of 1993 the European Parliament pleaded for greater influence on the election of judges of the Court of Justice (doc. A3-0228/93).

the Convention do not change, but one third of the members of the Chambers of the new Court, which will decide all future cases, will be from Central and Eastern Europe, which may in some cases mean that they are from States with a different legal culture from that of Western Europe. Furthermore, if the new Court is faced with a large number of infringements of the prohibition on torture and inhuman treatment, will it then still have the necessary time and attention to refine further the case law on issues of private life, length of court proceedings or freedom of information?

Even more important is that the basic attitude towards the aim of the Convention is becoming less homogeneous. When the Convention was drafted, its only purpose was to protect fundamental human rights better. In recent years, however, participation in the European Convention on Human Rights is a condition for membership of the Council of Europe, it is the condition of being recognized as a civilized European State and it will be a condition for ever becoming a Member of the European Union. This means that States adhere to the Convention not necessarily with the primary purpose of a better protection of human rights. Adherence may be equally, or even more, motivated by the wish to show that one belongs to the club. In a number of recent cases this difference of attitude was demonstrated. When serious complaints of torture during police detention were brought against them, the founding States were shocked; they investigated the matter seriously and cooperated with the Commission to establish the facts. In recent cases, however, reactions are increasingly of the kind: "this cannot be true, this is slander by the opposition against our State; in our civilized society, such things do not happen." Investigation of serious infringements of the Convention will be greatly hampered if the primary aim of States is to protect their good reputation rather than to protect fundamental human rights.

The broader, and more divergent, basis on which the new Court stands, may reactivate the wish for a separate catalogue of fundamental rights in the Treaty of the Union. The European Parliament has pro-

posed several times to add fundamental rights to the Union Treaties.[2] So far, these wishes have been resisted successfully. There was no indication that within the Union human rights protection could go any further than within the Council of Europe. The split in Europe between Union Members and other Western European States was caused by economic and political reasons but there were no reasons justifying a split in Europe with respect to fundamental human rights. This may be different when the common cultural basis is weakened by the large growth in membership towards the East of Europe.

Still, we will be faced with the question whether a separate catalogue of Human Rights for the European Union is justified. That catalogue will be interpreted by the Court of Justice. There is no reason why that Court would be less able to do so properly than the European Court of Human Rights. One might even expect that the Court of Justice would interpret human rights provisions more in line with the traditions of the Member States of the European Union than the European Court of Human Rights, which stems from and focuses on the legal tradition of 40 more divergent European States. One could expect, therefore, that a human rights catalogue of the Union could be developed even better by the Court of Justice than by the Court in Strasbourg. For the Union, human rights protection might be further improved. For Europe as a whole, however, there would also be a considerable loss. Europe would be split with respect to human rights, most certainly to the detriment of the non-members of the Union. The system of the Council of Europe would suffer enormously if the Members of the European Union were to go their own way in protecting human rights. A disadvantage would also be that the Union would not be subjected to "outside" judicial review in the field of human rights. No-one questions the independence, impartiality and judicial wisdom of the Court of Justice. Just as the House of Lords, the *Bundesverfassungsgericht* and the *Cour de Cassation* have excellent reputations. Yet the existence of the Strasbourg authorities – which do not form part of the society

2. See the Parliament's Declaration in O.J. 1989, C 120/51. For an extensive analysis, see Bieber et al. (Eds.), *Au nom des peuples européens – In the name of the peoples of Europe* (Nomos Verlag, 1996).

whose measures they review – has proved to be an important safeguard for the individual.

Finally, to empower the Court of Justice to deal with "domestic" violations of human rights – i.e. situations outside the scope of Community law – would entail fundamental changes in the existing legal order of the Union.

Taking account of the enormous number of complaints under the European Convention on Human Rights[3] one may also doubt whether the Court of Justice would be sufficiently equipped to handle a large number of complaints of human rights violations. Some specific rules would have to be made to select the complaints which should be handled by the Court from a large number of complaints which do not merit handling by a supreme judiciary.

It is too early to draw conclusions. One should allow the New European Court of Human Rights a reasonable period for finding its way. It will not be easy. The present European Court of Human Rights handled less than 100 cases a year, all other applications having been selected out by the European Commission of Human Rights. The New Court will have at least 3000 cases a year, which will be handled in at least four different Chambers of seven judges working simultaneously. This could easily lead to divergent interpretations. According to the new text of the Convention such divergences should be prevented by a Grand Chamber of 17 judges. Relinquishment of jurisdiction to the Grand Chamber requires the approval of the parties to the dispute; and referral to the Grand Chamber of a case decided by a Chamber of Seven is permitted only "in exceptional cases". Practice will have to show what role the Grand Chamber can ultimately play. Some of the drafters of the new text of the Convention wanted a Grand Chamber as a sort of Court of Appeal, others wanted to limit its role as much as possible. It will be for the new Court to develop a workable system which at the same time leads to a proper further development of the European Convention of Human Rights, and to obtaining and keeping the confidence of all participating States.

3. In 1997, the European Commission of Human Rights received 12,469 complaints; 4,750 cases were formally registered.

Participation of the European Union in the European Convention on Human Rights is now most unlikely. When the first proposals for such participation were made in 1979 the non-members of the Communities reacted rather positively. At that time, it would probably have been possible to adapt the European Convention on Human Rights to the possibility of Community membership. Since the opinion of the Court of Justice that the Community has no power to adhere to the European Convention on Human Rights, participation of the Union requires some amendment of the Union Treaties. As several Member States of the European Union are not in favour of Union participation to the European Convention, such amendment is not very likely for the time being; but even if it were made, one may doubt whether Russia and other Eastern European States would support Union participation in the European Convention in the same way as Western European States supported it in the past. And for the necessary amendment of the Convention their agreement will be needed.

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