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Richard Kay

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HUMAN RIGHTS IN THEORY AND PRACTICE: A TIME OF
CHANGE AND DEVELOPMENT IN CENTRAL AND EASTERN
EUROPE

THE EUROPEAN CONVENTION ON HUMAN
RIGHTS AND THE AUTHORITY OF LAW

*by Richard S. Kay**

By almost all accounts, the system of international law established by the European Convention on Human Rights has been successful to a degree unimaginable when the Convention was signed in 1950. The European Court of Human Rights now routinely issues judgments finding the states party to the Convention to have defaulted in their obligations under it. Those judgments, sometimes touching on difficult and contro-

* William J. Brennan Professor of Law, University of Connecticut School of Law. This is a revised version of introductory remarks delivered at a panel on the International Protection of Human Rights at the Conference on Human Rights in Theory and Practice held in Budapest, Hungary on March 19, 1993.

versial issues that might have been thought to lie at the center of state sovereignty, are, almost equally routinely, honored by the respondent states who both pay the compensation ordered by the Court and also adjust their laws and governmental practices to conform to the Court's interpretations.¹

Now the European human rights system stands on the verge of an extraordinary expansion. With the fading of the totalitarian regimes in Central and Eastern Europe many of their democratic replacements are seeking admission to the economic, social and political institutions of Western Europe. While these institutions take many forms, the first step towards association with almost all of them involves membership in the Council of Europe. A tacit understanding has developed that membership in the Council is to be open only to those states who engage speedily to ratify the Human Rights Convention and, moreover, to recognize the compulsory jurisdiction of European Court of Human Rights and the right of individuals to initiate complaints alleging human rights violations before the European Commission on Human Rights.² Given the effectiveness of the Convention in Western Europe in providing well-defined and progressive standards of state conduct, its extension to these new democracies is a hopeful event.

By the same token, an extraordinary expansion of this kind is sure to pose serious challenges to the continued efficacy of the system. It may be useful in evaluating those challenges to re-examine, in very general terms, what has made the European human rights system work so well. And then, having extracted the factors that have contributed to its success, to see how future developments are likely to affect those factors in the new, larger legal universe.

The most singular aspect of the success of the European Convention on Human Rights and the institutions created by it has been its acceptance as a genuine system of *law*. The existence of any legal system depends on the presence of certain indispensable political and social preconditions. Since those preconditions determine what law is,

1. MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW* xlii-xlv (1990). *But see* P. VAN DIJK & G.J.H. VAN HOOD, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 616-45 (1990) (suggesting there may be a growing resistance to the Court's judgments).

2. These steps are optional for parties otherwise agreeing to the Convention. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, E.T.S. 5, U.K.T.S. 71 (1953) (signed at Rome Nov. 4, 1950; entered into force Sept. 3, 1953) [hereinafter *European Convention*], Arts. 25 and 46.

they cannot themselves be the product of law.³ For an advanced legal system, moreover, it is not sufficient that there be social acceptance merely of standards of conduct. Such a system depends, as well, on the acceptance of what H.L.A. Hart called "secondary rules."⁴ These are rules about the creation and operation of the "primary rules" directly governing conduct. With respect to the questions of interest here, this means acceptance of the legitimate authority of recognized institutions, working according to specified procedures, to decide what is and what is not appropriate conduct, to translate those decisions into articulated rules, to interpret those rules and to enforce them. Once this kind of acceptance exists, the actions of these agencies are treated as authoritative.⁵ This political acceptance of certain authoritative lawmakers and law-appliers amounts to a kind of *pre-commitment* to be governed by the judgments of these agencies. We agree, at least insofar as our actions are concerned, to suspend any critical re-examination of those judgments.⁶ Put yet another way, any doubts we may have about a particular exercise of legal authority are swamped by our prior, and more basic, adherence to the legitimacy of that authority.

The success of the European human rights system seems best explained in exactly these terms. The remarkable thing about it is not so much the widespread agreement on the very general standards of conduct expressed in the substantive provisions of the Convention. These principles have, after all, long been incorporated into a widely-shared European political morality. Far more extraordinary, in light of the historic sensitivity of modern states to any perceived incursions on their

3. See H. L. A. HART, *THE CONCEPT OF LAW* 111-13 (1961). I have discussed this phenomenon in the particular context of constitutional law in Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981) and Richard S. Kay, *Comparative Constitutional Fundamentals*, 6 CONN. J. INT'L L. 445 (1991).

4. See HART, *supra* note 3, at 78-79.

5. The phenomenon of the acceptance of law-making institutions, of course, cannot, in practice, be as clearly divorced from substantive standards as this summary might suggest. A set of substantive limitations on the kinds of legal rules the law-making agencies may promulgate may thus be an essential ingredient of their legitimacy.

6. There may, of course, be an intermediate position in which the legal system, as a whole, is respected, but particular results are so objectionable as to justify resistance. Such an attitude may manifest itself in individual acts of civil disobedience. In these circumstances, as Tamás Földesi has noted, a person can be "an enemy to a certain legal measure and a friend of the constitution at the same time." Tamás Földesi, *Civil Disobedience: The "Step-Brother" of Civil Rights*, in 32 ANNALES UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS DE ROLANDO EÖTVÖS NOMINATE 23, 26 (1991). The extent to which a fragile legal system can be maintained in the face of instances of civil disobedience is a particularly important question for the regime of the European Convention on Human Rights. See *id.* at 31.

sovereignty, has been the continued acceptance of the legitimate authority of the institutions it has created — and especially the European Court of Human Rights — to make binding interpretations and applications of European Human Rights law in concrete cases. The Court, in its judgments, often pronounces on matters of great controversy. That its decisions have been so uniformly respected cannot be attributed to their often quite disputable results, nor to the sometimes uneven logic of the reasons the Court gives for them. Rather they are accepted now, in largest part, simply because the Court has earned acceptance as the authoritative interpreter of binding legal rules.

If this description of the legal authority of the European human rights system is correct, we are in a position to return to the original question posed. What are the principal threats posed to that system by the expected rapid expansion of its field of application? This analysis suggests that we ought to be most worried about those aspects of the extension which might subvert the fragile social, political and psychological attitudes that underlie the recognition of the authority of the organs of the Convention, and especially the Court, to make binding pronouncements of law. Three factors of this kind stand out.

First, the expansion of the European human rights system will bring within its scope societies and individuals with different histories, different traditions and, almost certainly, different basic social or political ethics about the values that underlie many of the Convention rights.⁷ More exactly, there is a wide range of views in the world about the relative roles of social and individual decisionmaking. While the jurisprudence of the Convention has recognized this inevitable variation through the application of a margin of appreciation allowed to individual states,⁸ that margin has not, and if the Convention is to constrain at all, could not, expand indefinitely.⁹ It would be a mistake, of course, to discount the significant historic commonalities of European legal history. Certainly, in many of the new democracies there are rich, if more

7. See David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks*, 8 CONN. J. INT'L L. 243, 245-47 (1993); Henricus Schermers, *International Human Rights in the European Community and in the Nations of Central and Eastern Europe: An Overview*, 8 CONN. J. INT'L L. 313, 319-21 (1993).

8. See JANIS & KAY, *supra* note 1, at 244-58; Ronald St. John MacDonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, in INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO 187 (1982).

9. See, e.g., *Olsson v. Sweden*, 103 Eur. Ct. H.R. (ser. A) at 32 (1988) (stating that the Court's review "is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith.").

recently suppressed, traditions of legality. Nevertheless, the variety of deeply rooted social attitudes relevant to the European human rights system promises to be greater after the adherence of the states of Central and Eastern Europe than anything the system has encountered up to now. Therefore, more judgments of the Court may end up being disturbing, if not offensive, in more of the places where the Convention is to govern. The more such serious objections to the results of Court decisions occur, the harder it will be for people to maintain that suspension of substantive judgment in favor of the legitimacy of the authority of the Convention organs that we have identified as central to the Convention's success as a system of law.¹⁰

Second, the enlargement of the field of application of the Convention will have to be accompanied by a proportional sharing of the personnel duties of the system with individuals from the new states. The ranks of judges, commissioners and staff will now be fuller and will be comprised of people of a larger number of nationalities. The mere increase in the size of the adjudicative and administrative machinery will, itself, create obvious problems. The prospect of a thirty-five or forty member Court and Commission has already stirred an active discussion about structural change in the system.¹¹ Beyond this problem, however, as the staffing of the system becomes more diverse, the decisions generated by that system may come to be viewed with more suspicion throughout Europe. To be sure, such increased diversity may be expected to enrich the decision-making process. But it may also aggravate the natural resistance to important domestic policies being regulated from outside as the decision-makers are perceived as increasingly "foreign." The essential characteristic of a legal system, as I have described it, is an implicit and widely held trust that, in the long run, the legal institutions will act in the general welfare. It is regrettably, but undeniably, true that such trust is more readily ceded to individuals who are most similar to the population involved in language, culture and tradition.

Finally, the extension of the European human rights system to Central and Eastern Europe may work a change in the dominant human rights themes that concern that system. Put briefly, there is a risk that the activities of the institutions of the Convention may be in-

10. See Seymour, *supra* note 7 at 245-47.

11. See Seymour, *supra* note 7 at 255-59; Schermers, *supra* note 7 at 317-18; Michael O'Boyle, *Right to Speak and Associate Under Strasbourg Case-Law With Reference to Eastern and Central Europe*, 8 CONN. J. INT'L L. 263, 266-67 (1993).

creasingly directed to issues that appear more political than legal.

First of all, the human rights concerns in the newly adhering states may focus on different matters and the Convention itself may be expected to be revised and amplified to deal with those concerns. The status of national, ethnic and religious minorities has already become tragically associated with the abuse of human rights in this part of Europe. In response to these developments, the Parliamentary Assembly of the Council of Europe has recommended a new protocol to the Convention dealing with the rights of such minorities.¹² The very question of the character of nationality and citizenship is, for similar reasons, likely to become more prominent, as are the associated questions of the rights of immigrants and refugees.¹³ While it is easy to conclude that gross mistreatment of individuals on the basis of race, religion or ethnicity should be characterized as violations of human rights, a general recognition of the rights of groups to some kind of self-defining and self-perpetuating status presents practical and conceptual problems of the most difficult kind.¹⁴

Furthermore, even more familiar rights, such as the rights of expression and association, in Articles 10 and 11 may appear in a new and more perplexing light. The idea that the operation of the press may proceed independently of the interests of the state may be a curious one in some of the countries of Central and Eastern Europe, even after the institution of democratic governments. Controversy over the independence of the media has emerged in a number of these countries.¹⁵ Casting these controversies into the form of human rights issues may involve the determination of questions which, like those related to minority rights, seem to present choices which appear far more political than they do in the West where the separation of state and media is a more familiar concept.¹⁶

12. See *Report on an Additional Protocol on the Rights of Minorities to the European Convention on Human Rights*, Eur. Parl. Ass., Doc. No. 6742 (1993).

13. See Tamás Földesi, *The Right to Move and its Achilles' Heel, the Right to Asylum*, 8 CONN. J. INT'L L. 289 (1993). The Fourth Protocol to the European Convention protects the rights of movement into, out of and within states, but only for nationals of those states.

14. See Carol Weisbrod, *Minorities and Diversities: The "Remarkable Experiment" of the League of Nations*, 8 CONN. J. INT'L L. 357 (1993).

15. See, e.g., Ken Kasriel, *Hungary's 'Media War' Curbs Press Freedom*, CHRISTIAN SCI. MONITOR, Jan. 11, 1993, at 5; Ben Sullivan, *Czechoslovakia: Press Protests As Slovakia Tightens Media Control*, Inter Press Service, Sept. 1, 1992, available in LEXIS, Nexis Library, INPRES File; Peter Humphrey, *Romania's Independent Press Claims Government Strangling It*, REUTERS, May 16, 1991, available in LEXIS, Nexis Library, LBYRPT File.

16. See O'Boyle, *supra* note 11 at 268-71; Gábor Kardos, *Freedom of Speech in the Time of*

Both the potential emphasis on new kinds of rights and the recasting of established rights, threaten to undermine the critical perception of the institutions of the European human rights system as dealing with the application of pre-existing law and not with matters of fresh policy. The questions which the application of the abstract rights will present to the European Commission and Court will much less often be defensible as mere elaboration of a prior legal right. The decisions of these agencies may then look much more like the exercise of raw political choice. To the extent this is so, their special legitimacy as authoritative appliers of law will be reduced, not merely when these new kinds of rights are at issue, but in general.¹⁷ After all, there seems to be no reason why the merely political judgments of a group of foreigners, debating and deciding far from home, should be preferred to those of the safer and more familiar legal authorities at home.

Of course, I do not wish to be understood as arguing that the expansion of the reach of the European Convention on Human Rights, is, for the reasons mentioned, something to be feared rather than welcomed. It is plain that the well-developed and deeply-rooted traditions of legality in Central and Eastern Europe were not extinguished, even by fifty years of totalitarianism. As I mentioned at the outset, it is reasonable to hope that the application of the standards of the Convention will be a natural and helpful part of the process whereby democracy, respect for human rights and the rule of law become firmly established in these countries. Indeed, the risks I have outlined may pale in comparison with the doubts that might have been entertained by sober realists in 1950 as to the effect of the Convention on the original parties. The extraordinary development of that system provides a cautionary lesson for the most committed skeptics.

That development, may, in fact, provide a useful model for the manner in which the Convention system should be applied to the new states. That system, it will be recalled, was largely inactive for the first twenty or so years of its existence. Only slowly did it begin to take on more and more controversial claims.¹⁸ It seems likely that it was exactly this gradual, almost imperceptible, growth that facilitated its reception in the societies on which it had an impact. This experience suggests that the most prudent course in the application of the Convention

Transition, 8 CONN. J. INT'L L. 525, 525-32 (1993).

17. See András B. Baka, *The European Convention on Human Rights and the Protection of Minorities Under International Law*, 8 CONN. J. INT'L L. 227, 232, 241-42 (1993).

18. See Janis & Kay, *supra* note 1, at 93-95.

to the new democracies is necessarily a restrained and deliberate one. As I have mentioned, it is now understood that the price of admission to the Council of Europe includes a clear understanding that the applicant state will ratify the Convention and, significantly, that it will, within a fairly short period, also agree to recognizing the compulsory jurisdiction of the European Court of Human Rights and the right of individual petition to the Commission.¹⁹ The effect of such full scale, rapid assimilation of the Convention in these countries would have the effect of making them subject, quite rapidly and in a specifically enforceable way, to the fully developed and detailed interpretation of the Convention that has emerged from jurisprudence of the European Court.²⁰ An attempt to impose these rules at one blow, as it were, may exacerbate all of the concerns which I have raised. A more cautious and staged approach, one more closely mirroring the emergence of European human rights law in Western Europe, seems a safer alternative.

This is a time of great hope for the future of government by law. But we use the word law in a strictly formal sense if we include within it rules and institutions which are not legitimated by the social consensus which cause those rules and institutions to be respected. The mere use of legal form can do little to effect social change. The ritual of ratification is insufficient to constitute the norms and institutions of the European Human Rights Convention a true and effective system of law. To rely on the existence of law, in this strictly technical sense, is to confuse the relative priority of legal and social-political facts. There is no doubt that legal rules and agencies can themselves affect the values of a society. But they can do so only gradually and within limits created by the social and cultural environment into which the law is introduced. The effectiveness of law is a function, in large measure, of the readiness of society to embrace it. *By itself*, law can do nothing. It can

19. The leeway now being accorded seems designed mainly to permit the state to make the technical amendments to its law that would bring them generally into conformity with Convention. See O'Boyle, *supra* note 11 at 263; Seymour, *supra* note 7 at 250-52; Schermers, *supra* note 7 at 321. It does not appear to be intended to allow the more extended period which, I suggest here, may be needed for more basic political and social adjustment.

20. There is, of course, a built in delay between the time of full ratification and the time when a state will actually become subject to judgments of the Court. This results from the necessary lag created by the requirement of exhaustion of domestic remedies and the time it will take for the local population, and especially the legal profession, to become aware of the utility of recourse under the Convention. European Convention, art. 26. See O'Boyle, *supra* note 11 at 265-66. With respect to the latter point, however, the very prominence of the Convention in Western Europe may reduce significantly the time in which "European rights consciousness" develops in Eastern Europe.

channel, refine and strengthen values and possibilities already embedded in the society. It can aim high, but no higher than the people it aspires to govern.