Sosyal Bilimler Dergisi, 3(1), Haziran 2006

STRENGTHS OF THE COUNCIL OF EUROPE'S HUMAN RIGHTS PROTECTION MECHANISM: THE CONVENTION AND THE COURT

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Abstract: The Council of Europe has long been regarded very successful in the field of human rights. As a quasi-supranational regional organization, the Council has taken remarkable steps toward ensuring the protection of individuals' rights and freedoms in Europe. Its success has mostly depended upon its two major tools of protection: the European Convention of Human Rights and the European Court of Human Rights. Both are to be recognized as innovations in the field. Although similar to other treaties in some respects, the European Convention significantly differs from "traditional" legal texts. This difference makes the Convention original as well as effective in the field. In addition to the Convention, the Court was introduced as a salient breakthrough toward remedying the violations of individuals' rights. It has produced impressive remedies, outstanding in terms of both number and scope, for the violations that took place in the jurisdictions of member states. The acceptance and recognition of the Convention and the Court by the State Parties as the protection tools of human rights have made them legitimate and powerful.

***Key words*:** Council of Europe, the European Convention on Human Rights, the European Court of Human Rights, protection of human rights.

Özet: *Avrupa Konseyi çok uzunca bir süredir insan haklarında başarılı olarak görülüyor. Yarı-uluslarüstü bir bölgesel örgüt olarak Konsey Avrupa'da kişi hak ve özgürlüklerini güvence altına alma yolunda çok önemli adımlar attı. Örgütün bu başarısı daha çok iki temel koruma aracına dayanıyor: Avrupa İnsan Hakları Sözleşmesi ve Avrupa İnsan Hakları Mahkemesi. Her iki araç da alanda bir yenilik olarak düşünülmek durumundadır. Her ne kadar diğer uluslararası anlaşmalarla bazı açılardan benzerlikler taşısa da Sözleşme "geleneksel" anlaşmalardan önemli ölçüde farklılıklar içermektedir. Bu farklılıklar Sözleşmeyi alanda hem etkili hem de orijinal bir araç durumuna getirmektedir. Sözleşmeye ek olarak Divan da temel hak ihlallerinin giderilmesinde çok önemli bir adım olarak sunulmuştur. Divan ihlallere karşı çok önemli çareler üretmiştir. Hem Sözleşmenin hem de Divan'ın Konsey üyesi ülkelerce insan haklarını koruma aracı olarak tanınması ve kabul edilmesi bu iki aracın hem meşruiyet derecesini hem de gücünü arttırmıştır.*

Anahtar sözcükler: *Avrupa Konseyi, Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi, insan haklarının korunması.*

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I. INTRODUCTION

The article seeks to reveal the reasons for the success of the Council of Europe in protecting human rights. It should be interesting to observe that while besides the one operating under the Council of Europe there are other international mechanisms to protect human rights at the international level, it appears that the former is the most advanced and the most welcome in the world. As such, it would not be an exaggeration to claim that the human rights protection mechanism established by the Council is the most prominent and effective one.

Given this prominence and efficiency, there should be important factors and determinants that have contributed to the success of the Council in the field of human rights. This article deals with two of them: the European Convention on Human Rights and the European Court of Human Rights created to ensure the compliance of the Convention provisions by the High Contracting Parties. Both are to be seen as innovations at least to some extent. In general terms, the article aims to explore the important aspects of these two innovative tools that make them different from their counterparts.

II. ADOPTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

It is undeniable that the Council of Europe has set up the most advanced and operative regional human rights protection mechanism. The European Convention on Human Rights is the core component of that mechanism. Over the time, it has become the most prominent document in the field of human rights. Storey (1995: 138) notes on the prominence of the Convention that

> The ECHR was the first international treaty under which respect for fundamental rights was collectively guaranteed by all the States who became its 'High Contracting Parties'. For the first time a number of states were prepared not only to undertake obligations to secure human rights but also to establish a supervisory body empowered to give judgments against contracting States in cases brought before it either by one of their number or by individuals. By and large rights were couched in the form of guarantees available to all individuals as persons, irrespective of nationality, economic status, or any other status.

Its success is mostly derived from its acceptance and compliance by States Parties, and not only from its content. Although its content is not very much different from those of other human rights documents, it very much

contributed to the development of international human rights law. Batum (1993:27) argues even much further, stating that at the European level, that human rights has become a notion of international law was made possible by the European Convention on Human Rights (ECHR). Because, the Convention, which contains provisions safeguarding rights and freedoms, and not some 'ideal rights', brought clear and carefully designed legal institutions and a joint protection system that safeguards those rights and freedoms as well. As a consequence, this document, which created a European Human Rights Law at the European level, is called as "the Human Rights Constitution" of Europe.

According to Steiner and Alston (1996:571), the ECHR was "the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most developed of the three regional systems; and it has generated a more extensive jurisprudence than any other part of the international system".

It might be argued that the Convention is unprecedented in three respects: First, under the Convention, States are empowered to bring before an international tribÜnal other states alleged to have violated the rights of individuals. Second, individuals were made subjects of international law. The Convention realized that by giving them the right to petition an international body with complaints against a state or states. Third, it established an enforcement mechanism to ensure the compliance of States Parties with the provisions of the Convention (Fuhrmann, 2000:829).

Introduced shortly after the adoption of the Universal Declaration Human Rights, the ECHR is much more effective than the Declaration. While the Declaration remains a declaration of principle, the Convention has carried the hopes expressed in the Declaration and other UN documents on human rights into the sphere of action (Coblentz and Warshaw, 1956:95).

The ECHR differs from the Universal Declaration in two important respects. First, the Universal Declaration sought only to proclaim and recognize fundamental rights rather than give them binding effect. On the contrary, the ECHR explicitly seeks to legally bind the Contracting Parties. Secondly, the Universal Declaration did not establish an enforcement mechanism, whereas the Convention provides a mechanism to secure compliance with the provisions. Therefore, "it constitutes a great advance over the Universal Declaration of Human Rights of the United Nations. While the latter amounts to nothing more than an expression of intentions, the Convention contains specific legal commitments, which have been accepted by [forty-five] governments and which, as a result, should

strengthen the cause of freedom throughout the world" (Coblentz and Warshaw, 1956:103).

The European Convention is different from other human rights document in some respects. The most important one is that it provides an effective monitoring mechanism with the aim of ensuring the protection of rights it covered. The originality of the Convention is, therefore, that it created, for the first time, an international monitoring and safeguarding system, with the idea that the rights covered by the Convention are useless without a protection mechanism in mind (Yüzbaşıoğlu, 1994:26-27). The objective monitoring system created by the Convention supplies the protection with both abstract and concrete checking methods, thus, provides a European monitoring mechanism (Gündüz, 1993:40).

The Convention is different form other human rights legal documents also in that it was not built on the principle of reciprocity. This means that a Contracting Party is not allowed to connect its respect to human rights with the condition of other states' respect (Ünal, 1995:94). In this respect, in order for the Contracting State to lodge a complaint against another Contracting Party, it is not necessary that the latter harms the interests of the first, or violates the fundamental rights of one of its citizens. For instance, after the military junta took the power in Greece in 1967, Norway, Sweden, Denmark, and the Netherlands filed a complaint with the Commission, claiming that Greece was violating human rights. However, whose rights were violated were Greeks only (Gündüz, 1993: 45-46). Likewise, when Scandinavian States, and France and the Netherlands filed a complaint against Turkey in the aftermath of 1980 military takeover in Turkey, they did not claim the violations of their own citizens' rights, but claimed that Turkey violated the provisions of the Convention. Because the system the Convention established is 'the European Public Order' and transcends national borders (Gündüz, 1993: 46).

One of the major strengths of the protection system established by the Council of Europe is that the Contracting Parties to the ECHR are obligated to treat every person within their jurisdiction in accordance with the provisions of the Convention they are bound by. In this regard, the view that individuals have some rights originated from international law is adopted (Ünal, 1995: 90). When applying the provisions of the Convention, States cannot take the ethnic origin or nationality of the individuals into account. All provisions of the Convention are applicable to all persons in the countries that are Parties to the Convention, regardless of their nationality, or the citizenship they hold (Ünal, 1995: 94). For instance, many Turkish citizens, who do not hold a citizenship of Germany, and living in this

country, filed complaints against Germany. In a considerable number of such cases, Germany was ordered by the Court to pay compensation to those whose rights were found to have been violated. Therefore, it is evident that States Parties, under the Convention, are responsible not only to each other, but also to the individuals in their jurisdiction (Gündüz, 1993: 34-35). This is not quite usual in the practices of international law. In general, treaties, conventions and the like are applicable to states only. That is to say, a State Party to an agreement is responsible to, and can be held responsible by, other Parties to that agreement. However, the ECHR seeks to protect the individual. Therefore, it has been focusing on the practices pertaining to the individuals' rights and freedoms, rather than national interests of the Contracting Parties. This is not to say that States Parties do not seek to achieve their goals, and meet their interests by the Convention. This is more to say that States Parties became concerned with not only their citizens, but also with individuals as human beings. Individuals, under the Convention, are given a right to seek to pursue their own betterment.

The most notable strength of the Convention is, probably, its recognition by both the Contracting Parties, and the rest of the world as a common standard in the field of human rights. By being in effect for five decades, it has become much stronger and more legitimate.

The status of the Convention in legal systems of Member States reveals the significance of the Convention. In Austria, the Convention is expressly incorporated into the constitutional law. In that country, it has the rank of the constitutional provisions. Thus, no legislation is valid if it violates conventional rules. In the vast majority of the Member States of the Council of Europe, the Convention is the part of the domestic legal order. The Convention, in these countries, may have a higher rank than normal legislation does, but below the constitution. In several states the Convention is the part of the domestic law with the same rank as normal legislation. In these states, the Convention is approved by the legislature and introduced into the legal order similarly to normal legislation. In a minority of the Member States of the Council of Europe, the principle that domestic law and the Convention are totally distinct legal areas is still followed. However, Great Britain abandoned this view by adopting the Human Rights Act in 1998. Although the European Court of Human Rights has repeatedly declared that States Parties are not obliged to make the Convention part of their domestic law, that Great Britain set its traditional approach to international legal agreements aside, verifies the significance and recognition of the Convention. There is also another tendency in some of the States which have not incorporated the Convention in their domestic law: national

courts frequently refer to the Convention and its interpretation by the organs the Convention established in their decisions; and they try to avoid conflicts between the Convention and national law (Steiner and Alston, 1996: 728-730).

Even though the implementation of the Convention is left to the national authorities, a superficial look at the degree of compliance of States with the provisions of the Convention would lead us to conclude that States Parties have frequently taken the Convention seriously. In Austria, where the Convention is ranked to the constitutional law, the Code of Criminal Procedures was modified as a result of case law of the Court. Belgium introduced amendments in its Penal Code to ensure equal rights to legitimate and illegitimate children. In Germany, modifications have been made to bring legislation better into line with the Convention's provisions. Various measures have been taken to expedite criminal and civil proceedings, and transsexuals have legally been recognized. In the Netherlands, changes have been made in the Military Criminal Code and the law on detention of mental patients. In Ireland, court proceedings have been simplified. In Sweden, rules concerning time limits for expropriation permits has been enacted. In Switzerland, the Military Penal Code has been modified and judicial organization and criminal procedure has completely been reviewed. France altered the law pertaining to the secrecy of telephone communications. Italy enacted a new Criminal Procedure Code to change the law on the regulation of detention on remand. In the United Kingdom, changes have been made in the areas of freedom of information, privacy, prison rules, mental health legislation and payments of compensation for administrative miscarriages of justice (Steiner and Alston, 1996: 587).

It should be noted that the impact of the Convention on States' practices concerning human rights may have several forms: States Parties may take measures to regulate their legislation so as to meet the requirements set by the provisions of the Convention in advance, before the Court would find violations of rights. This is often the case, as the States do not want to be found violator. The Court's verdict against a State for being the violator would damage the prestige and the image of the State Party in international fora. Secondly, States Parties make amendments in their legislation as a result of the Court's decisions. The impact of the Convention is also visible in friendly settlements. The procedure for friendly settlements has generated significant results. In many instances, after settlements have been reached either formally or informally, often with the Commission's or the Court's approval, subsequent measures have been taken by the governments concerned.

In addition to legislative organs, and executive bodies in the member states of the Council of Europe, the judicial institutions have also extensively relied on both the Convention rules and the judgments of the European Court of Human Rights. National courts in the Member States have often avoided to conflict with the Convention. The interpretation of laws by those courts has enormously been affected by the Convention. Given that the judiciary is in principle independent of external influence, including pressure by government, or parliament, the fact that the courts have given a high priority to the Convention, when making decisions, is of significant importance. It should also be noted that the impact of the Convention is not limited to the practices of the Contracting States. The States having the intention to ratify the Convention have also shown great interest in changing their legislation and practices to comply with the Convention. There are many instances that States have modified their legislation and administrative practices prior to the ratification of the Convention, particularly in the case of those States which have recently joined the Council of Europe (Steiner and Alston, 1996: 587-588).

III. THE SIGNIFICANCE AND EMINENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The Court established under the European Convention on Human Rights is a rare success story that is seen in the field of human rights. It is unprecedented in that it admits complaints from individuals, states, and/or non-governmental organizations and other collectivities concerned; and releases judgments against the States Parties. In many instances, the Court has made decisions against even powerful and influential states. This surely means that the Court under discussion acts free of political pressure and influence from external powers. Although there are other courts dealing with human rights violations in other parts of the world, none of them has both the reputation and influence of the European Court. The oldest Court of its kind, the European Court is today highly regarded and respected by States Parties, and trusted by those who think their rights are violated. Therefore, it could be easily argued that the most significant success and strength of the human rights protection system established by the Council of Europe is the European Court of Human Rights. Without the Court, the Council of Europe would be unable to fulfil most of its goals concerning human rights. To a large extent, focus on individuals' interest was made possible by the establishment of the Court. Individuals residing within the borders of the European countries are now feeling themselves more secure and confident; as they are very well aware of the existence of a higher Court that is devoted

to generate remedies for the violations f their rights. It could even be argued that individuals in at least several member states trust in the Court more than they do their own national judicial bodies.

The Court is of great significance for several particular reasons. First of all, it has dealt with a large number of cases, and consequently, generated a substantial body of case law. This feature of the Court makes that case law one of the sources of international law. Therefore, the European Court, over the time, has become one of the lawmakers in the field of international human rights. Here is how the European Court and the European Convention on Human Rights have become legal sources for human rights practices of States, and for international law. Since the institutions the Convention created have applied the provisions concerned to the conflicts for a long period of time, for almost every Article of the Convention, an established and accepted body of case law has emerged. Therefore, the Contracting Parties are obligated to interpret the provisions of the Convention as its institutions, including the Court, understood and interpreted them (Gündüz, 1993: 38). This implies that the Contracting States are not free to interpret the provisions of the Convention; instead, they have to rely on the decisions of the European Court.

The impact of the jurisprudence generated by the European Court is visible in numerous areas. For instance, it "set new international standards for the conduct of criminal investigations and trials, and thereby opened up new chapters in the protection of rights and liberties of suspected offenders" (Silva, 2000: 45).

The case law of the Court functions as a guideline for both the Court itself, when dealing with the future cases, and for national courts, when dealing with domestic cases. That should not be surprising; as the Convention is incorporated into national legal systems of Member States.

The European Court of Human Rights created a new European jurisprudence of human rights. This is mostly based on its interpretive role in its decisions. The Convention the Court interprets binds signatories not merely with the pronouncements of the Parties, but also with the case law of the Court. In this regard, as a law making force, the Convention and the Court transcend the long-standing boundaries between international and national law. As a consequence, signatory states are subject to a common law supreme to their own national law within the sphere of human rights. The European Court, as a final arbiter of States' duties under the European Convention, assumes "the ultimate role of defining normative standards among member states for those classes of rights enumerated in the European Convention" (Cope, 1993: 745-746). In final analysis, the Court has the

unique role "to shape, if not ultimately determine, the path of human rights among the European Convention's member states". Even in non-member countries, national courts can be expected to be influenced by the Court's decisions in developing attitudes toward human rights (Cope, 1993: 746).

Jean-Paul Costa (2003), Vice-President of the European Court of Human Rights, in his words, describes the significance of the Court and its case law:

> As a whole this case law has made a very positive contribution to the protection of human rights in Europe, not only offering remedies to the persons who are victims of violation of their rights and freedoms, but also by encouraging the Contracting States to modify their legislation or their own case law. Many examples could be given of the improvement of the situation in various countries, including "old" democracies, considered to have good records. For example, many east European states, as well as Turkey, adopted impressive new steps towards democracy and the rule of law in 2001-2002, in significant part under the influence of the Court's judgments and decisions (p. 455).

The words of the Vice-President of the Court reflect the effectiveness of the Court. This is the second most important feature of the Court: its decisions are strictly followed by Member States. In other words, the rate of compliance of member states with the Court's decisions is quite high. In many cases, decisions by the Court have prompted remedial action by the Defendant State, even though in some of these cases, a strong political opposition existed to act otherwise. And governments in some cases have taken those measures before the Court has announced its decision (Cope, 1993: 746).

Not only member states, but also non-members have been inspired by the Court's case law. As Mr. Wildhaber (2004) noted, the European Communities have paid a remarkable attention to the case law of the Court. Moreover, as Steiner and Alston (1996: 598) point out, the jurisprudence of the European Court, along with that of the Commission to a lesser extent has been very influential in the normative development of other international human rights systems. The Inter-American Court, the judicial body of the international human rights regime established by the Organization of American States (OAS), and the International Covenant on Civil and Political Rights' (ICCPR) Human Rights Committee have frequently referred to the judgments of the European Court of Human Rights.

Zorn (2001: 2) attributes the success of the Court in the field of human rights to "member nations' widespread compliance with the decisions of the Court". In comparison to other international tribunals, levels of the compliance with the European Court's rulings are significantly high. Member States "routinely abide by the decisions of the Court" (Zorn, 2001: 2). The Court's interpretation of the European Convention on Human Rights has proved to be highly persuasive with regard to national jurisdictions and legislatures. As such, with the exception some rulings by the Austrian Constitutional Court, the Belgian Court of Cassetion and the French *Conseil d'Etat* on the applicability of Article 6.1of the European Convention to certain proceedings, it has never been openly defied by national courts. This convincing authority is attributable not only to the strength of the Court's arguments, but also to the possibility that domestic court's rulings could eventually be challenged by the Strasbourg institutions (Steiner and Alston, 1996: 733).

The high level of compliance should be considered carefully for a number of reasons. First, the European Convention itself does not stipulate that member states follow specific procedures to ensure compliance with the Court's decisions. That is to say, unlike the laws of the European Community, it is left to the constitutional and legal systems of the ratifying states themselves to ensure the implementation of the Court's rulings. Thus, the high level of compliance of member states with the Court's rulings, notwithstanding the lack of a procedure clearly defined by the European Convention to ensure its implementation is quite remarkable.

Another reason for regarding the Court as notable is that, in the majority of its cases, the Court's rulings constitute "positive integration", that is "the generation and elaboration of supranational rules that modify, limit, or even replace national laws" (Zorn, 2001: 4). These rulings range from some procedural changes to those which alter long-standing social and political norms in the society.

The European Court of Human Rights is a remarkable breakthrough also for the reason that in the discussions concerning its place in the European Constitutional landscape, the European Court occupies a central place. Traditionally, the Court has participated in the Conferences of the European Constitutional Courts. Although its status at the Conferences is observer, it is a real actor in the field of the European constitutional justice. Luzius Wildhaber, the President of the Court, expounds the place of the Court in the European Constitutional landscape:

> Whether it is itself a "Constitutional Court" is largely a question of semantics. We can always call it a quasi-Constitutional Court, sui generis. What is not in doubt is that the issues which it is called upon to decide are constitutional issues in so far as they concern the fundamental rights of European citizens. What is also not in doubt is that these issues are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national constitutional bodies (Wildhaber, 2004).

In conclusion, the place of the European Court in the constitutional landscape is the nerve center of a human rights protection system, which radiates out through the national legal order of 45 European States (Wildhaber, 2004).

IV. CONCLUSION

Both the European Convention on Human Rights and the European Court of Human Rights are now seen as the major tools of human rights protection in Europe. Their place in the field of human rights is so strong that the European Convention is viewed by many as a common standard, and the Court as the sole determinative authority of human rights violations. Therefore, the Convention, in addition to its binding character over the States Parties as a treaty, it has also become a customary international law over the time. As for the Court, it is now seen by masses as the legitimate and powerful Court of the whole Europe. It is quite apparent that the Convention and the Court should be regarded as a great success of the Council of Europe in the field of human rights. This success is a good example for cooperation among nation-states seeking a common achievement with the aim of improving living conditions of people in Europe. It should be noted that the success was made possible as a result of consensus and compromises by the States Parties.

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