



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

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***Implementing the European Convention on Human Rights in Times of Economic Crisis***

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Excellencies,

I would like to thank the Court for this invitation to speak at the seminar opening the Court's judicial year.

We Europeans have been very fortunate in recent times to live in and enjoy the culture of human rights. However, most of us are aware in the abstract, and many remember through personal experience, that this culture is not necessarily self-evident; that societies and political power can, in principle, be organised without a particular emphasis on human rights. Let us not overlook the fact that this continues to be the case today in a number of important parts of the world. I understand that the main question of today's seminar, in broad terms, is whether the relatively clear skies of the protection of rights in Europe have become cloudier. Will the economic and financial problems facing Europe today have a negative impact on the culture of rights? To put it dramatically: is it necessary to be rich, as a society and as individuals perhaps, in order to fully protect and enjoy human rights? To what extent is prosperity a precondition for the culture of rights? If a society loses some of its absolute or relative wealth, are rights endangered too?

Let us look at some news regarding the economic crisis. The EU Commission, in its recent study entitled "Employment and Social Developments in Europe 2012", comes to quite devastating conclusions: joblessness has been increasing in a number of countries, the gap between the European periphery and the centre, or the South and East on the one hand and the North on the other hand, has been increasing.<sup>1</sup> Relatively random examples taken from the media give a similar snapshot of the gloominess of our present situation and the future. Finland's Prime Minister Jyrki Katainen has in his recent speeches argued that the country will be unable to support the welfare society as it has been maintained so far – owing to the changing demographic situation and economic conditions. In Finland, one of the economically most successful

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<sup>1</sup> <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7315>. For one reaction in Germany, see also <http://www.bild.de/geld/wirtschaft/europaeische-union/armer-sueden-reicher-norden-so-gespalten-ist-europa-28011168.bild.html>.

European countries, some 60,000 jobs have been lost over the last four years.<sup>2</sup> The Swiss banker Christophe Barnard, a Frenchman by nationality, points out in an interview with *Die Welt* that in France, State expenditure accounts for 56 % of GDP, the highest percentage in Europe.<sup>3</sup> Barnard considers the mentality of the elites who assume that the State will ultimately fix things as the biggest challenge for the future of France – and Europe.

Another aspect of the problem is demography. Perhaps in the future there should also be a Court seminar on the impact of demographic decline in Europe on the culture of human rights and, if I may be a bit provocative, *vice versa*: the impact of the culture of human rights on demographic processes. For example, the German demographic scholar Thomas Straubhaar argues that Europe's biggest crisis is not the "debt" or the "economy" as such; it is declining birth rates.<sup>4</sup> In 1964, per 100 women in Germany, 250 children were born; currently, the number is 136. According to the same scholar, the biggest cause for concern is the shift in mentalities and in people's general outlook on life. He cites by way of example the fact that not even half of Germans (45 %) in the 18-50 age bracket who do not have children believe that their lives would be more fulfilling and happier if they had children. Linking these issues together, economic and demographic experts consider the level of social expenditure in certain Council of Europe countries, particularly in western Europe, to be a ticking time bomb. Furthermore, the need to rely heavily on immigration in order to maintain the level of welfare will potentially trigger other kinds of human rights conflicts.

I imagine that people in your position, on occasions like today's, will primarily be interested in personal experience rather than in the repetition of the wisdom of books or reports from the media. In the following paragraphs, I will therefore try to combine some personal hunches and observations "at the grassroots level" with reflections on my most lasting academic interest, which is the history and theory of international law, including human rights theory.

When I taught on the EU-supported Master's Programme in Human Rights and Democratisation, based in the Human Rights Village in Venice's Lido, my teaching was always scheduled for the week dealing with social and economic rights. I tried to impart to students an awareness of the history of social and economic rights, through the experience of post-Communist eastern Europe. In doing so, I sensed that some students were very frustrated by the status of social and economic rights as the "poor relation" in the general architecture of human rights. The political promise that human rights were "universal and indivisible" often did not hold up in the face of real-life facts. How could it be that civil and political rights had such strong protection mechanisms as this distinguished Court, for example, whereas social and economic rights were often non-justiciable in practice, at least on a regional or international level?

Of course, how this issue is perceived is also a matter of whether one's political sympathies lie with the political left or the right. At this distinguished Court too, there are judges who in their previous lives as human rights scholars have, in terms of political philosophy and ideas, given clear preference to civil and political rights. In the period of "real existing socialism", social and economic rights used to be a bastion of pride in and defence of the official State ideology, in contrast to the Western – Council of Europe – emphasis on freedom-based rights. It is no

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<sup>2</sup> <http://www.e24.ee/1088898/katainen-soomel-ei-jatku-raha-et-heaoluuhiiskonda-toetada/>

<sup>3</sup> <http://www.welt.de/finanzen/article111840008/Sollte-Europa-scheitern-dann-an-Frankreich.html>

<sup>4</sup> <http://www.welt.de/wirtschaft/article112160366/Kinderlosigkeit-ist-das-wirkliche-Problem-Europas.html>

coincidence that some of today's most prominent European sceptics on social and economic rights have this historical experience and background in the back of their minds. Thus, in their mental rejection of extensive social and economic rights, post-Communist elites in a number of countries in central and eastern Europe seem to follow what is understood here as the more freedom-oriented Anglo-Saxon concept of rights.

How to relate to social and economic rights continues to be a divisive matter – just think of the reservations entered with regard to the EU Charter of Fundamental Rights. Between 2003 and 2006, when I was a member of the EU Network of Independent Experts on Fundamental Rights – as was the Court's current President Dean Spielmann – we experts were supposed to report on fundamental rights developments in our respective countries, based on the Articles of what was later officially adopted as the EU Charter of Fundamental Rights. We were given very detailed and elaborate questionnaires on civil and political rights and very few, if any, details on Articles dealing with social and economic rights. Either those Articles were not considered equally important or the conveners of our network did not want to alienate even further certain critically minded Member States. It is worth noting, by the way, that the Fundamental Rights Agency has still not been given a comprehensive mandate to regularly monitor the observance of all EU Charter rights within the EU Member States.

The governments of a number of Council of Europe member States seem to hold the view that securing social and economic rights is a national rather than a regional or international matter. It seems that while torture is everybody's business, deep poverty and depravation are not. In some ways, the dividing line even goes through the core – and if you like, the rich core – of Europe. Whereas France has ratified all Articles of the 1996 Revised European Social Charter, Germany, Denmark, Luxembourg, Poland and the UK, for example, have not ratified this instrument.

Moreover, there seems to be a sense in a number of countries that not only are social and economic rights strictly a national matter, they are also primarily a political (that is, not judicial or justiciable) matter. Some five years ago, in Estonia, when the Chancellor of Justice – then Mr Allar Jõks – became judicially active in raising the issue of social rights as fundamental rights, his initiatives, to put it euphemistically, were not received with great enthusiasm by the Government, and the Parliament did not re-elect Mr Jõks to the position of Chancellor of Justice for another term. I advised Mr Jõks at that time, albeit not on social rights issues, and am thus not an entirely neutral observer of course. It seemed to me that the matter was one of principle for the political parties forming the Government: they seemed to want to imply that high-ranking legal officials should keep their fingers out of democratic policy-making and decisions as to who got how much, even if some got really very little.

This brings our discussion finally to the European Court of Human Rights. In times of budget cuts, austerity and crisis, can the ECtHR to some extent step in like a guardian angel and correct the worst forms of deprivation and the lack or scarcity of social security? The non-official background paper to today's seminar raises the same questions. Firstly, the question is to what extent does the scope of protection offered by the Convention encompass severe hardship caused by economic crisis? Secondly, what impact does the economic crisis have on governments' Convention obligations and their margin of appreciation? I suppose what looms behind these questions is an even more general one: what can rights achieve; where are their limits?

So, does the ECtHR have any mandate to decide on social and economic rights? The background paper notes that the Court argued in the case of *Airey* that “the further realisation of social and economic rights is largely dependent on the situation – notably financial – reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions. ... the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.” Further, the background paper concludes that “an evolution in the general economic situation is something which the Court can take into consideration”. But this does not give us guidance as to *how* this taking into consideration should happen or what it should look like.

In another case, that of *Larioshina v. Russia* (2002), it was stated in the admissibility decision that a “complaint about a wholly insufficient amount of pension and the other social benefits [could], in principle, raise an issue under Article 3 of the Convention”. The non-official background paper concludes: “It therefore seems that, although the Court has so far been somewhat cautious in its approach, it has by no means ruled out the application of Convention standards to situations of severe hardship caused by the economic crisis.”

Yet the tricky issue in *Larioshina* was that this promising statement was rather an *obiter dictum*, since in essence the Court rejected the application. Generally speaking, no such case – about a wholly insufficient pension amount – has as yet been decided by the Court in the applicant’s favour. Why is the case of *Larioshina* tricky? It is tricky because the applicant was a Russian pensioner who received a total amount in social payments of 653 Russian roubles per month (currently, that would be approximately 16 euros). Now, one wonders: if *that* is not an insufficient pension amount, *what* would be?

The case of *Larioshina* reveals that economic crisis is not a new state of affairs for a number of Europeans – and European countries. Average living standards and social security allowances in some post-Communist countries have been at such a low level that one can speak of a continuing economic crisis since the collapse of the Eastern Bloc (and possibly before that). It would be morally questionable to consider that no judicial intervention was necessary when *Larioshina* got her 16 euros from the State but that the present economic crisis, forcing cuts in Western Europe but on an entirely different scale – let us say bringing an allowance down from 800 to 300 euros – should finally trigger judicial rights protection. I suppose that this kind of judicial protection should be possible and may even be necessary at some point, but on a national rather than a regional or international level. Living expenses in different Council of Europe countries differ too, as does the culture of helping one’s family members economically. Nevertheless, if and when substantive inequalities exist, including between Council of Europe countries, it will be very difficult, and probably impossible, to eliminate these disparities via regional judicial policy. The Court could not help Ms *Larioshina* primarily because in terms of policy in her country, her case was just the tip of the iceberg. Judges may in principle be able to help but it remains impossible for them to advise where the money should come from. By the way, this concern applies even to national judges to some extent.

Thus, my own advice is straightforward: the Court should, if possible, avoid going down this route and starting to tell States that the low level of certain social allowances and benefits violates Articles of the Charter.

Let us now turn to the second issue discussed in the background paper: could economic hardship constitute a valid excuse for member States not honouring their Convention obligations? In legal parlance, might it be relevant in terms of the use of the margin of appreciation doctrine? If a Council of Europe country needs to serve its huge foreign debt and cut social allowances, can that country neglect prison conditions or conditions for asylum seekers as well? In democracies, we know that these kinds of groups will often be targeted first – financially and verbally – in times of economic hardship.

The background paper concludes that insufficient resources will not normally justify failure to secure Convention rights and freedoms. The well-known *Burdov v Russia* case is a good illustration of this position. The background paper concludes:

“It is therefore clear that while States retain a relatively wide margin of appreciation in regard to issues falling within the ambit of socio-economic policy, only in rather extreme circumstances will the lack of resources justify a failure to comply with Convention standards. This suggests that, from the Court’s perspective, the economic crisis will have little impact on how it assesses the acts and omissions of the public authorities. At the same time, where it is necessary to weigh up the individual interest against that of the community, it may be that the economic situation tips the scales in favour of the community in certain circumstances.”

While it is easy to agree emotionally with this policy suggestion expressed in the background paper, one wonders whether this position can always be upheld consistently. If we take a natural law approach to human rights, then economic hardship should have little to do with the safeguarding of human rights. Rights are universal and unconditional. However, if we take a Marxist perspective, then it is questionable whether the economic *Unterbau* and the ideological *Überbau* can be separated from each other in that manner. Europe’s high level of protection of fundamental rights may after all have something to do with the fact that Europe is still quite wealthy and prosperous. On the other hand, from a liberal perspective, the opposite may be true as well: Europe may have become wealthy because it cherished human freedom and rights. Viewed in this way, compromises in the sphere of rights protection may not be an efficient “cure” for economic hardship but, on the contrary, an accelerator of further economic decline.

One final point. When discussing economic crisis and its impact on human rights, we tend to primarily think, by instinct and habit, about vulnerable groups and the poor – and rightly so. However, one might also ask whether in some ways, the rich can also become a vulnerable group rights-wise. If the rich – some famous actors, for example – are subjected to extremely high taxes, is there a point at which massive taxation, which is arguably in the interests of the whole of society, can constitute expropriation and violation of property rights and human rights? Diplomats of some Council of Europe member States are currently having an interesting time discussing this issue with their peers and it cannot be ruled out that in a few years’ time cases of that kind may end up on the ECtHR’s docket as well.

All the issues I have just sketched out are not only of concern for Europe, of course. Considering the fact that this Court and its jurisprudence have been role models for many other countries and jurisdictions beyond Europe, the measures taken here will be studied and sometimes borrowed elsewhere too, thus creating a global spill-over effect. Where will Europe go with its culture of rights and, once again, where are the limits of rights? The eyes of the world are on its most influential human rights court.

Thank you.