Françoise Tulkens

DIFFERENT STANDARDS OF JUDICIAL REVIEW. THE NATURE AND OBJECT OF THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

Françoise Tulkens
Judge of the European Court of Human Rights
President of the Second Section.

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At the outset it must be stressed that the nature and object of the judgment of the European Court of Human Rights is quite different from that of a Court of Cassation, a *Conseil d'Etat*, and even a Constitutional Court. I will limit myself here to mentioning three aspects of this: the jurisdiction of the Court (1), the means of access to the Court (2), and the question of its relationship to Convention standards, especially by way of interpretation (3).

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I. THE JURISDICTION OF THE COURT AND THE PRINCIPLE OF SUBSIDIARITY

The jurisdiction of the Court is clearly defined in Article 32 of the European Convention on Human Rights. It shall extend "to all matters concerning the interpretation and application of the Convention". This means that the Court is called upon both to "declare the law" of the Convention and to "apply the law" in individual situations. In other words, the Court must exercise both a constitutional **and** a judicial function[2].

This requirement of the Convention was already reaffirmed in the *Ireland v. the United Kingdom* judgment of 18 January 1978. The Court considered that "the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of Article 3. The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties"[3]. In the *Guzzardi v. Italy* judgment of 6 November 1980, the Court went even further. In response to the argument relied on by the Italian Government that the object of the proceedings had disappeared, the Court reiterated what it had said in 1978: "The Court's judgments also serve 'to elucidate, safeguard and develop the rules instituted by the Convention thereby contributing to the observance (...) of the engagements undertaken' by the Contracting States"[4], and it added: "The present case does raise – notably with regard to Article 5 – issues of interpretation sufficiently important to call for decision."[5]

This jurisdiction of the Court is, however, exercised in accordance with the principle of **subsidiarity**, a principle which radiates throughout the entire European Convention on Human Rights. For the Court, this principle is essential, as the Court has to respect the democracy and legitimacy of domestic institutions, and it requires from us, therefore, a form of judicial restraint. In other words, no legislation from the bench! When we are saying that the system operates under the principle of subsidiarity, which explains and gives meaning to the rule of exhaustion of domestic remedies, it means that the primary responsibility for securing the rights and freedoms set out in the European Convention on Human Rights lies with the domestic authorities and particularly the judicial authorities. The Court can and should intervene only where the domestic authorities fail in that task.

It further introduces to this fundamental idea that between the national and the inter-

[2] R.C.A. White, "Judgments in the Strasbourg Court: some reflections", in M. Andenas et S. Vogenhauer (eds.), *A Matter of Style? The Form of Judgments in the United Kingdom and Abroad. Essays in Honour of Lord Bingham of Cornhill*, Oxford, Hart Publishing, forthcoming.

[3] ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 154.

[4] ECtHR, *Guzzardi v. Italy*, judgment of 6 November 1980, § 86.

[5] *Ibidem.*

national judge, in the field of human rights, there is clearly a **common responsibility**. The national authorities assume the first responsibility of the respect of human rights, by all the organs of State, whereas the European Court of Human Rights assumes the last responsibility. It is in fact accepted these days that in order to have credibility the protection of fundamental rights must accept scrutiny from the outside. The Court's role is that of an outside observer, which exercises third-party control. Conversely, the European Court of Human Rights is not, in any way, a court of fourth instance; it is not, in any way, a superior instance in the sense that it would hold a "superior" position as compared to the domestic courts which would hold an "inferior" position[6]. The European Court of Human Rights should not replace but reinforce the protection of human rights at the national level. This way of thinking about human rights should invite the courts to adopt an attitude of encounter and openness, reflecting the indispensable complementarity between the national and the international legal order in ensuring the implementation of fundamental rights.

II. MEANS OF ACCESS / APPLICATION

The means of access to the Court is by individual complaint of a person or a group of individuals who can claim to be the victim of an alleged violation of the Convention, that is to say, who are personally affected by it (Art. 34). *A contrario*, the Court cannot be called upon to pass judgment when the object of the complaint is to question *in abstracto* a body of laws or the case-law of a State. If we are talking about objective review (disputes) vs. subjective review (disputes), or concrete review (disputes) vs. abstract review (disputes), the control of the European Court of Human Rights is certainly of the concrete type. We are seized by complaints which assert alleged violations of the Convention in particular situations. In this respect I share completely Max Weber's analysis according to which the people's interests, revealed by the violation to them, help in bringing to the fore judicial questions which are more often than not invisible when screened through abstract norms.

This element determines which type of reasoning is held by the Court and what is the motivation of its judgments. Thus, for example, as S. Van Drooghenbroeck aptly observes, when it comes to the control of proportionality which the Court is often called upon to do, the way in which the interests are balanced depends on whether this control is of a concrete or abstract character. It is either an ***ad hoc* balancing** "which focuses the control on the unique situation, *hic et nunc*, and which brings about a decision anchored in the totality of the circumstances of the case and its validity is thus confined to the resolution of the

[6] L. Boltanski and L. Thévenot, *L'Amour et la Justice comme compétences*, Paris, Métailié, 1990.

matters at issue"; or a **categorical balancing** "where a control of the conventionality of the restrictive norm itself is carried out and not just its application to the applicant in question, given that the decision to be taken will have a normative scope, since it will be applicable to any person in the same type of situation, creating a general and abstract hypothesis of the controlled norm"[7]. The method applied by the Court is certainly of the *ad hoc* balancing type, in so far as, most of the time, the interests are weighed in a particular case and according to its specific needs, without generalising.

This option comes out of a real choice by the European judge who is led by the wish not to go against the State authorities by condemning, in a general and abstract way, their laws, rules and practices. More fundamentally, this option expresses "the wish to place human rights justice, not in the abstraction of general situations which law-makers have regard for, but in the concreteness of particular cases, irreducible in their singularity"[8].

That said, nuances must be introduced[9]. Should the Court be "a peace-maker" for particular disputes who, while obeying the precepts of "judicial minimalism", confines itself to deciding "one case at a time", in a casuistic way without being burdened with *hic et nunc* useless, even dangerous, theoretical debates? To quote C. Sunstein: "We might describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided as 'decisional minimalism'"[10]. And the same author then characterises the "minimalist" judges as those who "seek to avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to decide in particular cases", in contrast to the maximalists who endeavour "to decide cases in a way that establishes broad rules for the future and [to give] deep theoretical justifications for the outcome"[11]. Or shoud the Court have a "pedagogical" role, taking as a pretext the selective (*ponctuel*) disputes which it receives to give to the front-line judges of the ECHR – the State authorities – general directives and clarifications concerning rights and duties that it recognises and imposes? *Judicial restraint vs. judicial activism*? Judicial minimalism vs. judicial supremacy? There are arguments on both sides[12].

This debate is certainly to be found within the Court. It relates, in turn, to numerous questions or observations. A form of tension within the Court between the supporters of leading cases – and who could in this regard be qualified as dogmatic – and those who fa-

[7] S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux,* Brussels, Bruylant / Publications des Facultés universitaires Saint-Louis, 2001, § 336, p. 250.

[8] Fr. Tulkens and S. Van Drooghenbroeck, "La Cour de cassation et la Cour européenne des droits de l'homme. Les voies de la banalisation", in *Imperat Lex. Liber Amicorum Pierre Marchal*, Brussels, Larcier, 2003, p. 133.

[9] Cf. Fr. Tulkens and S. Van Drooghenbroeck, "La Cour européenne des droits de l'homme depuis 1980. Bilan et orientations", in *En toch beweegt het recht*, W. Debeuckelaere and D. Voorhoof (eds.), Tegenspraak, cahier 23, Bruges, Die Keure, 2003, pp. 211 *et seq.*

[10] Cass. R. Sunstein, "Foreword. Leaving Things Undecided. The Supreme Court Term 1995", (101) *Harvard Law Review,* 1996, p. 6.

[11] *Ibid.*, pp. 14-15 See also, by the same author, *One Case at a Time. Judicial Minimalism at the Supreme Court,* Cambridge/London, Harvard University Press, 1999, esp. pp. 3-24.

[12] See A.B. Morrison, "The right and wrong kinds of judicial activism", *Issue Brief*, American Constitution Society for Law and Policy, May 2010.

vour an approach based on the case at hand – and who could in this regard be qualified as pragmatic. The tension could also be related, at least partly, to the nature and especially to the method of the judicial system, that of common law or of the European continental system. Finally, it leads to the emergence of the question of the status of the European Court as a possible "European Constitutional Court".

III. THE RELATIONSHIP TO STANDARDS (*NORMES*) AND THE QUESTION OF INTERPRETATION

The common denominator or common grammar of all the judges of the European Court of Human Rights are, of course, the **standards** of the European Convention on Human Rights. Article 1 of the Convention, according to which the States **shall secure** to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention is the starting point for the **interpretation** by the Court of the standards of the Convention.

The interpretation of the rights and freedoms guaranteed in the Convention lies at the heart of the adjudication of the European Court of Human Rights. As stated in Article 32 § 1, already mentioned, "[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto". The process of interpretation consists in giving a meaning to a text and in delineating boundaries with a view to the application of that process to specific facts. Interpreting the Convention is thus a complex hermeneutic process; furthermore, the Court does not follow one but several rules of interpretation, depending on the case at hand (evolutive, autonomous, comparative interpretation, margin of appreciation, principle of proportionality, principle of subsidiarity, implied powers, etc.).

The Court's methods of interpretation have always been guided by the Vienna Convention on the Law of Treaties (Articles 31 and 32), the provisions of which constitute, as Judge Matscher put it, "constraints on judicial interpretation"[13]. Article 31 § 1 of the Vienna Convention establishes the purposive / teleological method of interpretation, i.e., it gives priority to the *object* and *purpose* of treaties as a general rule of interpretation[14]. The flexibility of the object and purpose have allowed the Court to develop its own method of interpretation[15].

[13] F. Matscher, "Les contraintes de l'interprétation juridictionnelle. Les méthodes d'interprétation de la Convention européenne", in F. Sudre (ed.), *L'interprétation de la Convention européenne des droits de l'homme*, Brussels, Bruylant / Nemesis, 1998, pp. 15 *et seq.*

[14] G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, p. 59.

[15] R. Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights", *German Yearbook of International Law*, 1999, vol. 42, pp. 11 *et seq.*

FOUNDING JUDGMENTS

In the *Wemhoff v. Germany* judgment of 27 June 1968, the Court found that "[g]iven that it is a law-making treaty, it is (…) necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties"[16]. Such an interpretation – concerning Article 5 of the Convention – is based on international jurisprudence but is also inspired by the Preamble to the Convention, which refers not only to the maintenance but also to the further realisation of human rights and fundamental freedoms, and by Article 1 of the Convention which provides that States "shall secure" the rights and freedoms guaranteed under the Convention. A few years later, in the *Golder v. the United Kingdom* judgment of 21 February 1975, the Court reiterated, concerning the teleological method, that "this is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the *very terms* of the first sentence of Article 6 § 1 read in its context and having regard to the object and purpose of the Convention, a law-making treaty"[17]. The *Golder* case has been described as "one of the most creative steps of the Court in the interpretation of any Article of the Convention"[18] and "one of the most important cases in the history of the ECHR"[19].

THE "EFFET UTILE" THEORY

This case-law has had natural offshoots. The Court has developed the idea of *effective protection* of the rights that the Convention intends to protect. This is the "effet utile" theory which "has become a fundamental cornerstone for the protection of Convention rights and freedoms"[20]. As the European Court of Human Rights has often stated, it is important to give the rights their full scope since the Convention's aim is to "guarantee rights that are not theoretical or illusory, but practical and effective", which explains, among other things, the famous sentence in the landmark *Airey* case: "there is no water-tight division separating [the socio-economic] sphere from the field covered by the Convention."[21]

[16] ECtHR, *Wemhoff v. Germany*, judgment of 27 June 1968, § 8.

[17] ECtHR, *Golder v. the United Kingdom*, judgment of 21 February 1975, § 36.

[18] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, Oxford University Press, 2nd edition, 2009, p. 235.

[19] G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, *op. cit.*, p. 61.

[20] D. Rietiker, "The principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*" *Nordic Journal of International Law*, 2010, vol. 79, p. 256.

[21] ECtHR, *Airey v. Ireland*, judgment of 9 October 1979, § 26.

It is in this perspective or against this background that evolutive interpretation has to be considered and understood: "human rights treaties are living instruments, whose interpretation must consider the changes over time and, in particular, present-day conditions"[22]. In other words, the concepts used by the Convention are to be understood in the sense given to them by democratic societies today[23]. The "living instrument" approach to interpretation is the temporal dimension of the principle of effectiveness[24].

In parallel, the Court has produced different **constructions** such as, for example, the protection "by ricochet", the elements inherent in a right or the autonomous concepts systematised in the *Engel* judgment[25].

The Court has also progressively extended the scope of States' obligations to protect rights as effectively as possible. So, if States' obligations are, of course, negative – not to interfere with the rights and freedoms guaranteed – a requirement that States take action is now being added to the requirement that they be passive, which takes the form of **positive obligations**, or even preventive obligations. In this respect, it is true that positive obligations could extend the scope of control by the European judge, particularly towards economic, social and cultural rights. Finally, from this viewpoint, the jurisprudence of the Court inferred an obligation on States to take appropriate legislative, administrative and judicial measures, in order to prevent the commission of violations of the Convention up to and including in inter-individual relations. This is **the horizontal application** of the Convention which expands in different directions and we cannot fail to notice its deep effects on the general theory of human rights.

BETWEEN FLEXIBILITY AND LEGAL CERTAINTY

Fundamental rights have an open texture and their exact meaning remains still to be determined. Their application is consequently intrinsically linked to a process of interpretation by the judges. Never can a fundamental right determine the conditions of its

[22] ECtHR, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, § 31; ECtHR, *Loizidou v. Turkey*, judgment of 23 March 1995, § 71; ECtHR, *Christine Goodwin v. the United Kingdom*, judgment of 11 July 2002, § 75; ECtHR, *Öcalan v. Turkey*, judgment of 12 March 2003, § 193. See L. Wildhaber, "The European Court of Human Rights in Action", *Ritsumeikan Law Review*, 2004, vol. 83, p. 84. See also S. C. Prebensen, "Evolutive Interpretation of the European Convention on Human Rights", in P. Mahoney *et al.* (eds.), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal*, Köln/Berlin/Bonn/Munich, Heymanns Verlag, 2000, pp. 1123-1137.

[23] F. Matscher, "Les contraintes de l'interprétation juridictionnelle. Les méthodes d'interprétation de la Convention européenne", *op. cit.*, p. 23.

[24] S. C. Prebensen, "Evolutive Interpretation of the European Convention on Human Rights", *op. cit.*, p. 1125; E. Dubout, "Interprétation téléologique et politique jurisprudentielle de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, 2008, pp. 383 *et seq.*, esp. pp. 392-393.

[25] ECtHR, *Engel and Others v. the Netherlands*, judgment of 8 June 1976.

application. It is general and abstract in nature and acquires a concrete meaning in the particular context in which it is raised.

Legal certainty, what Fuller calls the internal morality of law, is obviously a factor to be taken into account, notably in order to define the nature of the obligations on the States. But, at the same time, one cannot prevent or exclude a flexible interpretation of the Convention which is in line with the fundamental goals pursued by the text. "Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times."[26]

The Grand Chamber judgment in the case of *Scoppola (no. 2) v. Italy* of 17 September 2009 summarises the essence of this approach: "[w]hile the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases (…). Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved (…). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. (…)."[27]

A fine balance is to be found between legal certainty and other, just as important competing values, to which the Court must be equally sensitive: paying attention to the specific circumstances of the case, respecting the pluralism of interests, being aware of the fast evolution of things and ideas – all these values partake of the constraints of argumentation to which lawyers have paid attention to and from which, since Aristotle, they earned the name of "prudents" (*prudentes*, jurisprudence). In other words, the Court's action requires both moderation and courage.

CONCLUSION

As legal theorists have observed, "the law must be stable yet it cannot stand still"[28]. Adaptation and modification have been constant features of the Convention since 1950 and continue to be so today. The Convention is now sixty years old and the Court's case-

[26] *National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41, per Lord Nicholls of Birkenhead.

[27] ECtHR (GC), *Scoppola (no. 2) v. Italy*, judgment of 17 September 2009, § 104.

[28] Attributed to Roscoe Pound in his book *Interpretations of legal history*, New York, MacMillan, 1923.

law has been evolving for fifty years, alongside profound changes that have occurred in Europe over recent decades. The Convention has become a pan-European instrument of protection of human rights and, in many countries, has made it possible to achieve a level of respect for fundamental rights that would have been hardly imaginable in 1950 when the Convention was drafted. It would probably not have survived if it had not been regarded as a living instrument that has to be interpreted in line with developments in the society in which we live. The development of law is inseparable from the development of society.