The Copenhagen Declaration: Are the Member States about to Pull the Teeth of the ECHR?

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On Thursday, the member states of the European Convention of Human Rights will meet in Copenhagen to adopt a joint declaration on the future of the human rights system in Europe. The Draft of the Copenhagen Declaration, presented on 5 February 2018 and sponsored by the current Danish Presidency of the Council of Europe, has met with considerable alarm on the part of human rights activists and academics. It makes unclear, ambiguous or inaccurate statements that could represent a serious crisis of the system if not redefined in the adoption of the final Declaration.

The draft Declaration is one more step in the ongoing process of improving the system, pursued at a series of conferences in Interlaken (2010), Izmir (2011), Brighton (2012) and Brussels (2015). These conferences were principally concerned with the compliance of States to their ECHR obligations. The current Copenhagen conference, however, seems to focus more on increasing the member states' control over the Strasbourg Court.

The draft Declaration has been subject of lively debates over the last few weeks by relevant experts in the field (most of all on Strasbourg Observers and EJIL Talk). And this is because the text of the draft has generated well-based suspicions among them all. It aims, at least formally, to reinforce the subsidiary nature of the European guarantee system but also to bolster the legal status of the State's margin of appreciation. Both concepts are fully subsumed in the European guarantee system, in the supervisory role of the ECtHR and in the supervision of the Committee of Ministers, as well as in the doctrine devoted to their study. So much so that Protocol No. 15 to the ECHR, which is awaiting ratification in six member states (including Spain) to enter into force, provides for an additional recital in the preamble of the ECHR so that both principles are explicitly recognised in the Convention text as follows:

> "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

In any case, the Draft Copenhagen Declaration is in line with the boost given to the principle of subsidiarity in the jurisdiction of the Strasbourg Court, which had also been the *Leitmotiv* of the Brighton Declaration of 2012, and to the principle of the margin of appreciation, which is somewhat more complex and generates conflicting positions within the doctrine.

The declaration touches the following topics: (a) shared responsibility: better balance, improved protection; (b) national compliance: the main role of the States; (c) European supervision: the subsidiary role of ECtHR; (d) interaction between the national and

European levels: the need for dialogue and participation; (d) the workload challenge: the need for further action; (e) interpretation: the need for clarity and coherence; (f) the selection and election of judges: the importance of cooperation; and (g) the enforcement of sentences. It also refers to the entry of the European Union and the entry into force of Protocols No. 15 and 16 to the ECHR, albeit on a residual basis.

This sounds all familiar. But there also appears be have been a change of focus. The draft declaration seems to call on the ECtHR, and not so much on the States, to modulate their action. And it is precisely this change of direction that has alerted academia and other stakeholders in the system (especially NGOs).

I'll explain myself. There is a strong tension between the function of individual protection of rights and the constitutional function exercised by the ECtHR. This tension is experienced by the ECtHR itself in at least two ways: on the one hand, the case overload it has to face and which it has been trying to overcome with improvements in its internal organisation and functioning. And, on the other hand, the increasingly evident tendency of the Court to opt for the establishment of general standards so that States, using their margin of appreciation, are responsible for applying them in each specific case. In such a context, the ECtHR must deal with domestic failures to guarantee fundamental rights, sometimes structural failures, repetitive cases, and the fact that for some individuals the ECtHR is not a subsidiary guarantee of their rights, but the first and only one. So, the Court must handle different type of cases and sometimes such reality forces the Court to go the bottom of a case, calling into question the margin of appreciation highly appreciated by the States. In practice, moreover, States do not like the ECtHR establishing general principles that define the scope of domestic rights, because this implies conditioning their sovereign scope.

Basically, in the words of Prof. Janneke Gerards, "although the States thus seem to embrace the Court's constitutional role and even appear to want to enhance its function of standard-setting, apparently they do not like to accept the consequences of this".

In my opinion, the scope of competence of European Court and its right to adjudicate over the scope of the ECHR rights, its judicial independence and the authority of its judgments are at stake.

In the section on shared responsibility, which is undoubtedly one of the foundations of the European system of rights, the draft Declaration incorporates two particularly shocking elements. In particular, the definition of subsidiarity adds a hitherto non-existent reference to the constitutional tradition and the national circumstances of each State. As the ECtHR points out in its opinion on the draft, these two elements may be taken into account by the Court when deciding each specific case. However, it is not acceptable that the Court's jurisdiction should be limited or conditioned a priori by each of the normative and/or social peculiarities of each State.

With regard to the enforcement of judgements at the domestic level, there is nothing to criticize. It would be very positive for the European system if everything set out in the draft were to be complied with, since it reinforces the idea that compliance with judgments is the primary obligation of States, and even incorporates a series of measures that should be

adopted and that were already recommended in Brighton in 2012, relating to the obligation of States to make their general provisions, administrative practices and case law compatible with the European standard.

Many more questions arise, however, in the following sections of the Draft Declaration. With regard to subsidiarity, the criterion developed by the ECtHR in response to the Declaration of Brighton is taken up: "qualitative and democracy-enhancing approach". This term, coined by the current ECtHR Judge Robert Spano, implies that the Court tries to limit its analysis of the correct protection of conventional rights to verify whether the internal decision-making processes were sufficiently weighted. However, this does not mean, as the Court itself claims, that the scope of subsidiarity should be determined by the States in, for example, a Declaration, but that it is the European Jurisdiction itself that must assess in each case what role subsidiarity plays. Otherwise, the very role of the ECtHR as a guardian would be distorted.

The current wording of the paragraphs on the dialogue to be held between States and the European Court is also alarming. While it the intention to foster the dialogue between the public authorities and the ECtHR is laudable, the dialogue instruments pointed out may involve a direct attack on the independence of the Court. Thus, while the Draft is right to encourage member states, for example, to make more use of third party interventions, it does not seem appropriate, on the other hand, for States to seek to draw up reports through a sort of discussion group on human rights and for these to be referred to the ECtHR for consideration. The dialogue to be maintained by the ECtHR is with the other judges and courts involved in the European system of rights protection, i.e. the ordinary courts and constitutional courts of the States parties. But a proposal for direct dialogue between states, indeed governments, and the Court could call into question its judicial independence. The current wording of the proposal to allow States to participate in the request for a case to be re-examined by the Grand Chamber also raises doubts. This proposal could be of interest to the ECtHR as a kind of third party intervention (given the nature of the cases that go to the Grand Chamber), provided that it is understood that the expression used in the draft "to take such support into account when determining whether the conditions of Article 43 (2) of the Convention have been met" implies exclusively that the ECtHR will take into account but will not be bound or compelled by them.

In any event, and in line with what was said in its Opinion by the ECtHR, the Draft of the Copenhagen Declaration needs to be modified before it can be adopted, in order to clarify that the European Court alone has the power to monitor the fulfilment of the States' obligations under the ECHR (both from the point of view of the exclusivity of the power of control and from the point of view of its competences) and that, in order to do so, they must respect the judicial independence and the legal content of the Convention.

On these premises, a profound reform of the Convention and the Court to improve its functioning, and increase its effectivity and the quality of its decisions, requires time. And money: as the ECtHR points out, the member states should make a greater budgetary effort to improve the situation, a request which had already been expressed in the Brussels declaration and which is mentioned somewhat superficially in the Copenhagen draft.

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