The European Court of Human Rights.
A few Considerations Regarding its Juridical Reasoning

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Abstract

Reasoning refers to the application of the rule, once interpreted, to the facts of the cause established by the Court and to the deduction of the conclusion of an infringement or non-infringement – in the respective case – of the rule invoked. The order of the examination of the questions – classical according to the opinion of a French judge – is the following: the competence of the Court, the admission of the petition, a good substantiation of the demand. The competence can be denied for incompatibility ratione materiae, if the litigation is outside the material domain of application of the Convention, ratione personae, if the defendant State is not part of the Convention or if the defendant is not the State or State-related; finally, ratione temporis, if the defendant State did not ratify the Convention or the pertinent protocol at the date when the facts were committed. The issue of the incompetence ratione loci is out of the question. Certainly, we can mention that renunciation exists and it triggers the disappearance of the case from the Court’s roll; yet, the priority of this situation over that of incompetence is not solved as clearly as via the French administrative jurisprudence. Actually, the competence-related issues are dealt with by the Convention organs, the Commission and then the Court, as admission issues, which the State solves with the help of some preliminary exceptions or which the Court solves ex officio. Finally, it is essential that the European Court of Human Rights must defend the persons against the abusive violation of their rights by States, without condemning them systematically and a priori. And after 50 years of jurisprudence, we consider that, neither systematic, nor dogmatic, the reasoning of the Court of Human Rights, Strasbourg tends to evolve towards a pragmatic syncretism, which seems to us to be an acceptable possible approach.

Keywords: European Court of Human Rights; European Convention on Human Rights and Fundamental Freedoms; juridical reasoning; interpretation in law; international jurisdiction; pragmatic syncretism
1. Introduction

The European Court of Human Rights formulated its first decision in 1960. It had much time to reflect on its own methods, as during the first half of its activity it only emitted a few decisions every year. This changed significantly after the Protocol no. 11 came into force, combined with the increase of the number of States that have signed the European Convention on Human Rights. Among the reflections of this type, many were expressed in the 1970s, for instance by the judge Ganshof Van Der Meersch in relation to the famous decision Golder, of February 21, 1975 (Pfersmann, O. et Timsit, G. 2001).

However, gradually, as the years went by, the Court and its members did not have to go through so much methodological effort and a compromise was reached between the spirit of the system and pragmatism. What is the activity of the Court of Human Rights, Strasbourg? It is, actually, quite simple. Its activity (which could be consultative) was up to a certain moment exclusively jurisdictional. The cases it is called to solve are against States and nowadays come, almost exclusively, from individuals and from groups, the appeals among States being very rare. The Court needs to decide whether or not the rights and the freedoms invoked were infringed upon or, more precisely, whether the declared disregard of those rights did occur, and, in case it did, whether this disregard took place under the provisions of the text of reference, namely the European Convention on Human Rights and Fundamental Freedoms. This text represents a quite stable set of regulations in time, seemingly more stable than, for instance, the constitutional laws of the French domestic legislation. Even enriched through protocols that have developed the substance of the laws, even interpreted evolutively, the present-day Convention does not differ much from the one signed on November 4, 1950 (as far as its substance is concerned; yet, for the control mechanisms, it is obviously different, at least because of the obligatory character, at present, of the acceptance of the Court’s competence and of the right to individual appeal). The convention also provides for narrower block of rights than the French constitutional texts: the economic and social rights (which will need to find one day their rightful place in the European order) are absent, with a few exceptions such as labour union freedom; and even the principle of equality as such (with the exception of non-discrimination in the exercise of another guaranteed right) was still missing from the Convention and had to be inserted by means of a new protocol, named Protocol no. 12.

Finally, the Court’s jurisdictional work is also quite simple and plain: it refers to the determination of the facts of a case, the interpretation of the directive that needs to be applied as uniformly as possible, and the concrete decision whether or not the respective directive was infringed upon. The European Court of Human Rights puts the State’s behaviour towards the alleged victim face to face with the demands of the text of reference and establishes the consequences. This does not mean that its task is easy!

2. Determining the facts of the case

In order to succeed in their activity, the judges from Strasbourg go through an empirical approach. As the State is defendant, the burden of proof is not in its charge, but in the plaintiff’s charge, by virtue of the well-known principle “actori incumbit probatio”. Yet, the consequences of the respect of this rule would be unjust in a trial concerning human rights and would make it impossible to prove that a law has been violated. So, the European judge tends to transfer the burden of proof to the state authorities, for instance by announcing the presumptions. So, a person held at a police station, in good health in the beginning, needs to remain just as...
healthy by the end of this period; otherwise, the defendant – namely the State – needs to justify any change in the respective person’s health condition.

In general, the rules of the burden of proof in front of the judge from the European Court of Human Rights are similar to those for an abuse of power judge from France; if the plaintiff comes with enough elements from the burden of proof – precise and concordant elements – the Court, whose procedures are similar to those in the French administrative jurisdictions, invites the government to explain its attitude through the observations of the defence (written, or, if such is the case, oral). Just as in the case of the Barel decision, silence makes the State responsible, and goes against it.

Yet, the inquiry procedure can go even further. The European Commission of Human Rights, which has ceased to exist, but which, for over 50 years did a wonderful job, did not hesitate to make inquiries into alleged infringement, to hear witnesses, to go through in-depth investigations; it will be necessary for this Court, which has become unique, to proceed in a similar manner in the serious cases, when the facts are unclear. Generally, the ordinary trial rules are given less attention, in the name of the superior protection of the fundamental rights.

One can note that the Court of Human Rights, Strasbourg has always acknowledged itself as an autonomous evaluative power in relation to the national jurisdiction, even to the criminal ones. It does not consider itself bound by either the appreciation of the facts operated by national judges, or the juridical qualification they gave to the facts. An example among others is the decision of the Court of December 18, 1996, Akçoy c. Turquie. This attitude is paradoxical, as the Court of Strasbourg has always stated that it respects the principle of subsidiarity and does not represent a third or a fourth instance. But it is explainable through a double preoccupation for efficiency and realism. Especially as far as the juridical qualification is concerned, the text of reference is the Convention; so, according to the Convention, an action needs to be qualified: for instance, an act can be an instance of torture or slavery according to the Convention, even though the national judge did not consider it as such in the light of the domestic legislation.

3. Text interpretation

The competence of the Court is defined in article 32 of the Convention, amended through the Protocol no. 11, and comprises all the problems related to the interpretation and the application of the Convention and of its Protocols, which are submitted to its attention by a State or by an individual, or – but this has never occurred so far – as part of a consultative demand formulated by the Committee of Ministers of the Council of Europe. However, there is no mechanism to send a case of prejudice to Strasbourg, as it (frequently) happens with Luxembourg. According to the same article, the Court has the competence of its competence. In fact, the Court of Human Rights, Strasbourg considers itself free to develop its competence. So, despite the silence of the Convention, the Commission, and now the Court, can order provisional measures⁵. Actually, not without some boldness, the Court has awarded itself the right to judge the validity of the reserves issued when the Convention was ratified or of one of its Protocols and invalidated an interpretative declaration which it considered too extended⁴. The European Court of Human Rights considers itself competent to censor the virtual or potential infringements of the Convention⁵.

On a more general and more elevated level, the Court did not hesitate, for instance, in one of the cases Loizidou c. Turquie, of March 23, 1995, to state about the Convention that it was the European public order instrument of human rights; implicitly, but this was a necessity, it substantiated a sort of supra-constitutionality of the Convention: no norm, even constitutional, is allowed to be an obstacle in the way of the obligation of each

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³ Article 39 of the present internal regulations of the Court; see the case Cruz Varas c. Suède of March 20, 1991.


⁵ Such is the situation of the famous case Soering c. Royaume – Uni of July 7, 1989, in which art. 3 was considered violated because of the risk of extradition to the USA of a German citizen and because of the risks he would have been faced with, as one knows the risks of the “death corridor”. This decision is not without relation to that of the State Council of 1987, Fidan...
signatory State to respect the Convention. At the same time, the case Matthews c. Royaume-Uni of February 18, 1999 gives priority, based on a community rule that excludes Gibraltar from the elections of the European Parliament, to the right to elections which results from art. 3 of the Protocol no. 1. In other words, a community rule does not exonerate the States from their obligations under the Convention.

4. Interpretation methods of the European Court of Human Rights

It has been convened to say that when it interprets the Convention and its protocols (as well as its own regulations, if necessary), the Court of Human Rights, Strasbourg uses a global method (the convention represents a whole) that is teleological (the authors’ intention and especially the goal pursued are primordial), evolutive (the Convention is a living instrument, to be read in the light of the present conditions), and finally ample: no literal rigidity should trigger/become an obstacle for other reading grids of the respective text. Actually, in case of ambiguity – or discrepancy between the official English and French versions – the Court does not refuse itself the right to make use of the preparatory works, yet they are just an indicator among other interpretation criteria.

Among many others examples, one can evoke, as a global method, the already-mentioned Golder case (the Convention, its protocols and even its foreword form a coherent whole). For the teleological method, one can quote the case Groppera Radio AG et autres c. Suisse of March 28, 1990, by means of which the Court has extended the freedom of expression, guaranteed by art. 10, to radio-television. The case Tyrer c. Royaume-Uni of April 25, 1978, which forbids corporal punishment in schools, is a good illustration of the evolutive method and not of the historical method. As far as the respect of the authors’ intentions is concerned, the Court applies almost exactly the articles 31 to 33 of the Vienna Convention concerning the treaty regulations, including the obligation of interpreting them in good faith. Also, in another case, Pellegrin c. France of December 8, 1999, the actual problem – that of the application domain of art. 6 of the European Convention in an equitable trial – is the issue of the discrepancy of the English and French versions of the Convention, a discrepancy from which it seems to result that all that is not criminal is not necessarily civil, in the sense of art. 6.

The method of the Court is a flexible method: it aims to adapt the text and to extend it in the interest of human rights protection, and this extension is not incompatible to the will of the authors of the text.

5. The “stricto sensu” juridical reasoning

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The order of the examination of the questions – classical according to the opinion of a French judge – is the following: the competence of the Court, the admission of the petition, a good substantiation of the demand. The competence can be denied for incompatibility ratione materiae, if the litigation is outside the material domain of application of the Convention; ratione personae, if the defendant State is not part of the Convention or if the defendant is not the State or State-related; finally, ratione temporis, if the defendant State did not ratify the Convention or the pertinent protocol at the date when the facts were committed. The issue of the incompetence ratione loci is out of the question.

Certainly, we can mention that renunciation exists and it triggers the disappearance of the case from the Court’s roll; yet, the priority of this situation over that of incompetence is not solved as clearly as via the French administrative jurisprudence. Actually, the competence-related issues are dealt with by the Convention organs, the Commission and then the Court, as admission issues, which the State solves with the help of some preliminary exceptions or which the Court solves ex officio.
So, the committee of three judges can remove a demand for incompetence or for non-admission and only the Chamber of seven judges (or the Great Chamber, made up of 17 judges) can reject it as unfounded. Moreover, we shall mention that – according to its practice – the Court pronounces itself almost always on the preliminary exceptions, even when it rejects a substantiated matter; it does not use the formula, classical in front of the French administrative jurisdictions “without needing to state the reason of its non-admission...”.

As far as the examination of the prejudices is concerned, the interpretation method often varies, according to the prejudices. Some, like the ones extracted from the articles 3, 4, 5, 13, are considered as referring to intangible rights. The Court only needs to verify if these rights were or were not acknowledged. On the contrary, for the rights from which it is possible to make a derogation (for example, those enumerated in art. 8-11 or in art. 1 of Protocol no. 1), the Court exercises a proportionality control. More precisely, if the law-related prejudice is proven, the Court examines whether or not it was “foreseen by the law” and whether or not it was related to a “legitimate goal”; if such was the case, the criticized measure had to be “necessary in a democratic society”: in this last stage, proportionality is controlled, according to the “standard” measure (in principle, the same for all the participant States) of the democratic society; any disproportionate measure, so any measure that is not necessary, is considered as breaching the Convention. Certainly, according to a classical and logical method of interpretation. The Court understands the principle (the law) extensively and the exceptions (the prejudices to the law) restrictively; the need may go up to an “imperative social need”, when fundamental freedoms are at stake.

Two cases of 1999 show that, for example, the Court of Human Rights, Strasbourg, protects the freedom of expression and the freedom of the press: Fressoz et Roire c. France of January 21, 1999 and Bladet Tromso et Stensaas c. Norvège of May 20, 1999. The similarity, the relation between the Court methods and those of the French State Council is easily perceivable. 17 years before the signing of the Convention, the Benjamin case already relied on the idea that, as far as public freedoms are concerned, freedom is the rule, police measures are the exception and the exception is legal only if it is not excessive...

Is there a certain “self-limitation” in the juridical reasoning of the Court? Yes, and this certainly happens in three ways. First, the Court often deals with situations in which it has to reconcile different freedoms, for instance, religious freedom and the right to respect family life, or religious freedom and freedom of expression.

Then, the Court admits a “margin of appreciation” for the States, in the way they apply the Convention, and this margin is variable depending on the rights involved.

Finally, even though the notion is vague, the principle of subsidiarity leaves the States a certain freedom as far as the means of respecting the rights guaranteed through the Convention are concerned, especially the procedure-related ones.

**Conclusions**

The juridical reasoning of the European Court of Human Rights is not surprising for the French administration, and even less for someone who has worked for a long time in the juridical system, in the name of the French people, within an administrative jurisdiction. Even though, *ratione materiae*, the activity of the Court refers to numerous and different law branches, the litigations it solves are more often than not appeals, for declared abuses of power, against States accused of having infringed upon freedoms of the person (admitted as

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6 It is true that an “unfounded” demand is considered equivalent to a non-admitted demand according to art. 35, paragraph 3 of the Convention.

7 The issue under discussion is the case of the publication by “Canard enchaîné” of the tax balance sheets of Mr. Calvet.


9 Otto Preminger Institut, decision made on September 20, 1994.

10 See, for instance, the case Muller et autres c. Suisse of May 24, 1988, in which the condemning of the artists for exhibiting what was called obscene paintings was deemed necessary for ethical protection.
such through texts), either by their acts or by omission. Certainly, this is an international jurisdiction: the text is a treaty uniting 41 States and the Court is made up of just as many judges as States; its control is exerted within a less homogenous juridical sphere than that of a national order. Yet, the important difference mentioned before, which is the specific mark of a Court like this with a rich activity must not wipe out the essential thing: the European Court of Human Rights must defend the persons against the abusive violation of their rights by States, without condemning them systematically and \textit{a priori}. And after 50 years of jurisprudence, we consider that, neither systematic, nor dogmatic, the reasoning of the European Court of Human Rights, Strasbourg tends to evolve towards a pragmatic syncretism, which seems to us to be an acceptable possible approach.

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