Universiteit Leiden

leidenlawblog

Rick Lawson
Professor of European Human Rights Law

The ECHR at 70: A Living Instrument in Precarious Present-day Conditions

February 07, 2020 • Public Law • 3 comments • 7 min read

The European Court of Human Rights must respond immediately to cases where it is argued that judicial independence is undermined. The Court should review its priority policy as well as its practice concerning interim measures.

The European Convention on Human Rights (ECHR) was adopted in 1950. Seventy years later it is still alive and kicking. This is in no small part due to a judgment of the late 1970s. In the famous *Tyrer* case the European Court of Human Rights observed:

'the Convention is a living instrument which … must be interpreted in the light of

present-day conditions'.

This statement marks the introduction of the so-called evolutive doctrine. The Court rejected a static or originalist approach – whereby one would continue to interpret the Convention as it was understood by its drafters in 1950 – as this would lead to undesirable results. Such a 'frozen' attitude could not guarantee the continued relevance of the Convention as our societies develop. A dynamic approach would surely be in keeping with the preamble of the Convention, which refers to 'the maintenance and further realisation of human rights and fundamental freedoms'.

And so *Tyrer* became the starting point for an impressive body of highly dynamic case law. The case itself illustrates how the evolutive doctrine is applied. The Court noted that judicial corporal punishment – which was still practised in some countries when the Convention was adopted – had been abolished throughout Europe. This new consensus enabled the Court to qualify this type of punishment as 'degrading', and hence in breach of Article 3 ECHR, whereas it might have reached a different conclusion in the 1950s.

The Court's evolutive approach may also extend to procedural matters and lead to institutional adaptation. When confronted with problems of a systemic nature, the Court developed the practice of pilot judgments. And what about the countless measures to cope with the caseload: don't they reflect the living character of the Convention? These procedural innovations illustrate that the capacity to adapt is crucial for the Court's effectiveness – and, indeed, survival.

It is important to keep this in mind, because the Convention's environment does not just offer opportunities for the Court to happily move on and enhance its standards. It also presents challenges. Indeed, today we are experiencing a genuine 'climate change' that cannot be ignored. The Secretary-General of the Council of Europe, the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission: they have all stated, and deplored, time and again, that the rule of law is under pressure.

So we face new 'present-day conditions', that may have a direct impact on the very foundations of the Council of Europe: human rights, democracy and the rule of law. I am not saying that each and any of these developments involve violations of the Convention. This is for the Court to decide. But that is the very problem. Virtually all the organs of the Council of Europe continue to express their views about measures that allegedly affect our common values. They are joined by the European Commission, the OSCE, the UN. But the voice that, if I may say so, matters most to us is rather muted. In the current rule of law debate we hear relatively little from the 'Conscience of Europe' – the Court, that is.

But there is an urgent need to hear from the Court! There are tough debates in a number of countries about the independence of the judiciary, the position of civil society, human rights defenders, and about academic freedom. Controversial measures are adopted, creating facts on the ground: systemic changes that – if found to be in breach of the Convention – cannot easily be reversed. Justice delayed has always meant justice denied, but now the ramifications of delays may extend beyond the individual applicant and affect the entire system for the domestic protection of human rights. What does this mean for the Convention as a living instrument?

The well-known case of *Baka* illustrates the point. The President of the Hungarian Supreme Court complained about the premature termination of his mandate, which occurred in the context of a reorganisation of the judiciary. He brought his application in March 2012 and obtained a favourable Grand Chamber judgment – in June 2016. But this did not bring about his reinstatement in his original position: a *fait accompli* had been created. Of course, this is inherent in the *ex post* review exercised by the Court. A violation of the right to life cannot be undone either. However, there is a difference: what happened to Mr Baka was, *because of his function*, part of a much wider picture. The judiciary has a central place in the 'human rights ecosystem'. This means that a measure affecting the position of the judiciary is *necessarily* capable of affecting the State's institutional capacity to secure effective protection of the rights and freedoms protected by the Convention. If *in this context* a breach of the Convention occurs, one might say: an attack on one is an attack on all.

To take another example: Every reader of this blog will be familiar with the widespread concern that has been voiced, since the end of 2015, about the series of measures concerning the position of the Polish judiciary. The government seeks to defend its reforms; critics claim that judicial independence is undermined. In this situation, it is crucial to know the Court's position on the various measures taken. A speedy and authoritative Court judgment is in the interest of all: the applicant who claims that his rights have been violated, and the respondent government which claims that its policies are fully justified. A speedy and authoritative judgment provides legal certainty and guidance.

And it can be done! One only has to think of the speed and diligence with which the case of *Astradsson v. Iceland* was dealt with. The case was communicated within a month, a judgment was delivered well within a year. And so it is difficult for an outsider to understand why this has not happened in the case of Poland. It is clear that the Court depends on applications being lodged, but the fact remains that a relevant case, brought in January 2018, was only communicated in September 2019.

That is 20 months. Of course, the Court faces an enormous caseload and, despite all efforts, it has a significant backlog. But that raises the question if the Court should not reflect on its priorities. European judicial intervention is a scarce commodity, and it should be applied where and when it is most needed.

Again, it is not my aim to express a substantive opinion on these cases, or to start a discussion about the situation in several other countries that come to mind. The point I wish to make is a different one. I would argue that in cases where it is stated, *prima facie* on arguable grounds, that the rule of law is under pressure, that structural changes affect judicial independence, and that as a result the integrity, indeed the very core of the system for the protection of human rights is at issue, the Court ought to respond immediately. This entails to my mind that the Court should review its priority policy as well as its practice concerning interim measures.

In this respect, inspiration may be taken from the Court of Justice of the European Union. The Luxembourg Court has had to rule on a whole series of cases involving the rule of law in various EU Member States. In doing so it has been in a position to develop its case law considerably, and to influence the course of events.

Space does not permit us to go into detail. But one element that stands out is *procedure*. The Luxembourg Court has been able to play its role through the use of expedited procedures and, where necessary, the adoption of interim measures. There is nothing that could prevent the Strasbourg Court from doing exactly the same thing.

This year we will celebrate that the Convention was adopted 70 years ago. More than 40 years ago, the *Tyrer* judgment was delivered. It opened the door for the Court to respond to the changing environment that it is part of. Many have applauded the 'living instrument' doctrine and the benefits it has brought. Others are more cautious. But all will agree that the Court was set up as the 'Conscience of Europe'. It must act decisively to protect what is really precious – decisively and quickly.

This blog is based on Rick Lawson's contribution to the seminar "The Convention as a Living Instrument at 70", held in Strasbourg on 31 January. The seminar was organised by the European Court of Human Rights on the occasion of the Opening of the Judicial Year 2020.

RULE OF LAW | HUMAN RIGHTS | EUROPEAN COURT OF HUMAN RIGHTS

3 COMMENTS

RL **Rick Lawson** · 11 months ago

@Elroam - 2

Would interim measures intervene too much with the sovereignty of a state? By signing and ratifying a treaty, such as the ECHR, a state assumes international obligations; it can no longer invoke its sovereignty as an argument not to comply with the treaty. Under the ECHR, States have undertaken to secure the Convention's rights and freedoms to all (Art. 1), to respect the independence of the courts (Art. 6), to offer effective domestic remedies (Art. 13), to allow individuals to apply to the Court (Art. 34) and to accept the Court's judgments as binding (Art. 46). Interim measures serve merely to preserve the integrity of this system (see the case of Mamatkulov v. Turkey). Clearly cases may raise sensitive issues, and it is obvious that the Court should use its power to indicate interim measures carefully. I am not advocating their use in connection to freedom of speech or climate change. My proposal relates only to complaints that arguably raise serious concerns about a State's continued institutional capacity to secure human rights through independent courts.

· Reply

RL **Rick Lawson** · 11 months ago

@Elroam

Thank you for your comment. Let me try to address the questions that you raise. Sure, interim measures might have to deal with legislation. That in itself is not necessarily an obstacle. The judgment on the merits would also deal with legislation, and in fact, that is what happens more often in cases before the Strasbourg Court. Sometimes the Court will rule on the implementation of a law. sometimes the qThe interim measure would merely have the effect of 'freezing' the situation, so as to allow the Court to give a meaningful judgment. At the end of the blog I refer to the practice of the EU Court of Justice. If you follow the link in that paragraph, you get to that Court's judgment in case C-619/18. In para's 18-22 you will find that this Court, too, used interim measures to avoid a situation where it would be confronted with a fait accompli, and possibly irreversible damage, before it had rendered judgment.

· Reply

E **Elroam** · 11 months ago

Important indeed. But we couldn't understand, such interim measures, would have to deal with legislation also (typically). Suppose, reforms in the judiciary, typically it is implemented through legislation. Now, it is one thing to intervene in certain case, where the law of certain state, has been wrongly implied. Yet, another thing, to freeze legislation proceedings, until ruled on merits. Isn't it too far in terms of intervention in one sovereignty of one state ? Let alone before enacted.

By the way, may touch every aspect of life then: freedom of speech, climate change, family, etc.... Can generate massive interventions, in legislation.

Thanks

· Reply

Add a comment

Register · Forgot password?

Your name or email

Remember me

Login

RELATED

The EU, Poland and the rule of law: writing a new chapter

As the Council starts to discuss the rule of law in Poland, the EU enters a new stage as a guardian of human rights in its member states. Some observers have claimed that the Commission acted too late and did too little, but this criticism is undeserved.

Rick Lawson · June 25, 2018 · 1 comment

Disenfranchising criminals? The Right to Vote and the European Court of Human Rights

In Kulinski and Sabev v. Bulgaria, the ECtHR heard complaints about interferences with the right to vote in prison. Its decision seems problematic in two ways and illustrates how States at times use criminal law to disenfranchise convicts.

Patrick van Berlo · June 24, 2017

France and the state of emergency: moving in the wrong direction

After the 2015 terrorist attacks the French government initiated numerous legislative projects, most notably the state of emergency. What impact have these legal changes had on French citizens? How do they relate to human rights and the rule of law?

Tom Bollemeijer and Friso van de Pol • May 09, 2016 • 3 comments