DEVELOPMENTS

Book Review - The European Human Rights System: a Gathering Storm? - Reviewing Steven Greer's *The European Convention on Human Rights* (2006)

By Achilles Skordas[*]

[Steven Greer, *The European Convention on Human Rights – Achievements, Problems, and Prospects*, Cambridge University Press (2006), ISBN-13: 9780521608596, pp. 365, £23.99.]

Steven Greer's book describes and evaluates the system of the European Convention on Human Rights, explores the symptoms of its current crisis and proposes remedies. As the former President of the European Court of Human Rights, Luzius Wildhaber, wrote in the foreword to Greer's book, "this is neither a handbook nor a textbook – it is instead a thoroughgoing argument for the constitutionalization of the Convention and its Court, which the author portrays not as a transformation, but rather as consolidation". For Steven Greer, constitutionalizing the adjudication system of the European Convention on Human Rights is not a theoretical exercise, but a practical necessity. Following a socio-legal approach, he first demonstrates the roots and elements of the crisis of the system (chapters 1 and 2), and he proposes remedial action through constitutional justice (chapter 3), to be complemented through re-conceptualization of the Convention's rules of interpretation (chapters 4 and 5) and through improvement of compliance (chapter 6). In his subtle reasoning, the author does not offer the recipe for one-off re-invention of the system, but he rather describes a complex evolutionary path that would rectify the current shortcomings. The question is, however, how possible is this future, in view of accumulating negative trends.

[*] PhD (Johann Wolfgang Goethe University, Frankfurt-am-Main), Reader in Law, University of Bristol, email: Achilles.Skordas@bristol.ac.uk

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

A. The Problem

The author stresses that the crisis of the system of the European Convention on Human Rights (ECHR) has its origins in the transition from the Cold War era to the expanded Council of Europe of the 1990s, as well as in the ensuing change of the Convention's purpose – from war avoidance through strengthening of the cohesion of Western Europe to "gentle encouragement" of domestic reform[1] – and is embodied the backlog of the pending individual applications.

He then identifies the major systemic compliance problems with the Convention by distinguishing between patterns of violation in Western Europe (including Turkey) and in Central and Eastern Europe. He proceeds after carefully assessing the empirical methods for measuring compliance and violation rates. After establishing that Italy, France and Turkey have the highest annual average violation rates in the periods under consideration, he seeks to explain the structural causes thereof.[2]

For Greer, the "French Paradox" can be explained by the lack of effective judicial remedies that would safeguard Convention rights.[3] The Turkish problem stems, in the author's words, "from the attempt by the modernizing Kemalist political movement …. to identify the state with an uncompromising conception of secularism and 'Turkishness', and from an authoritarian law enforcement tradition".[4] Worth mentioning is also the author's conclusion that, given the progress in the reform of the state and its institutions in connection with the EU accession negotiations, "it is … hard to deny that the EU has had a much greater impact than the Council of Europe on the position of human rights in Turkey".[5] Is it perhaps because a transnational integration process offers a more effective path for safeguarding human rights, than the intergovernmental Convention system? Finally, the "Italian problem" is characterized by structural defects in the administration of justice, and the author is rather pessimistic on the prospects of reform.[6]

[1] STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS – ACHIEVEMENTS, PROBLEMS, AND PROSPECTS (2006), 56-57.

[2] *Id.*, 81, Table 4, 1960-2000 and 1999-2005.

[3] *Id.*, 87-93.

[4] GREER (note 1), 96-97.

[5] *Id.*,102.

[6] *Id.*,103-105.

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

The figures with respect to Central and Eastern Europe are less clear and, as the author acknowledges, "information from other sources indicates that this seven-year time frame is not long enough for stable violation patterns to have emerged".[7] Despite the uncertainties, Greer classifies states in three categories with respect to their human rights record: 'good' (Czech Republic, Poland, Hungary, Slovenia, the Baltics), 'satisfactory' (Bulgaria, Romania, Croatia, Slovakia and Macedonia), and 'poor' (Russia, Armenia, Azerbaijan, Moldova, Georgia, Ukraine, Albania, Serbia, Montenegro, Bosnia and Herzegovina).[8] The author considers Russia as the most problematic member-state of the Council of Europe,[9] and, given its policies of violent repression in Chechnya, he raises the question, whether expulsion is warranted. However, he stops short of endorsing such a policy: "While expulsion has the short-term merit of signifying profound condemnation, it also raises the much more troubling question of how the rest of Europe can collectively exert any further influence over a neighbour which has been shunned." [10]

The systemic problems in West and East re-enter the system of adjudication in the form of backlog of court cases. Greer's account is here almost dramatic: the Court has jurisdiction over 800 million people from 47 states in a space extending eastwards from the Atlantic to the Pacific; with an annual average of 40,000 applications a year, and a capacity to give 1039 judgments on the merits annually (2005), only about 1-2% of the applications are expected to be adjudicated on the merits. The current average time that lapses between the lodging of the application and the decision on the merits is 5 years; however, the waiting period will most probably rise, as the number of pending applications is likely to reach 250,000 by 2010.[11] It is visible that the output-capacity of the system is rapidly approaching a dead-end – if not in terms of bureaucratic routines, certainly in terms of its legitimacy, and of the maintenance or frustration of the normative expectations of right holders.

[7] *Id.*,117.

[8] *Id.*,121-131.

[9] *Id.*, 134.

[10] *Id.*, 130.

[11] *Id.*, 38-40, 170.

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

B. Constitutional Justice as Remedy: Admissibility and Compliance

Greer locates the fundamental question of the system's health in the choice between individual and constitutional justice. However, he goes a step further and stresses that the institution of individual application is the core element of the ECHR. Thus, the real choice is between a system that ensures that every victim receives a judgment "however slight the injury, whatever the bureaucratic cost, whether or not compensation is awarded, and whatever the likely impact of the judgment on the conduct or practice in question" ('systematic delivery of individual justice'); or whether the Court should select the cases "in a manner which contributes most effectively to the identification, condemnation, and resolution of violations, particularly those which are serious for the applicant, for the respondent state, or for Europe as a whole" ('constitutional justice').[12] Though Greer admits that strong players and actors, such as NGOs, and the Parliamentary Assembly of the Council of Europe, are in favour of the individual justice system, he clearly speaks for the constitutional model.

The author contributes substantially to the debate on the constitutionalization of international law. He takes a broad view of constitution as referring "to the terms upon which any human association – from a university stamp collectors' club to the United Nations – is based". He then argues that the ECHR "contains an 'abstract constitution' which seeks to structure the relationship between various national and trans-national institutions and attempts to constrain the exercise of public power within a framework of, what are effectively, constitutional rights".[13] At this point, Greer rejects both the idea of expansion of the Court's advisory jurisdiction, as well as the introduction of a preliminary reference procedure, similar to that of Art. 234 of the EC Treaty.[14] Though these two alternatives might seem *prima facie* attractive, the author's critical comments feature a common thread: that the Convention should not lose its idiosyncratic character by either merging into the overall structures of a classical international organization, or by deciding a reform along the lines of an integration regime. Instead, Greer opts to draw his lessons from the US Supreme Court and the German Federal Constitutional Court,[15] and proposes a single inadmissibility criterion, that "the application does not raise an allegation of a Convention violation which, in the opinion of the Court, is sufficiently serious for the applicant, the respondent state, and/or for Europe as a whole to warrant

[12] GREER (note 1), 166.

[13] *Id.*,172.

[14] *Id.*, 174-180.

[15] Id. 181-189.

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

adjudication on the merits".[16] This is the core of Greer's reformist concept that would facilitate the transition from individual to constitutional justice.

With respect to compliance, Greer proposes a system that would increase the effectiveness of domestic legal systems. This would, in effect, minimize pressure on the Court. The author focuses in particular on the role of the National Human Rights Institutions (NHRIs).[17] Though he rejects, with good reason, the expansion of their powers to include judicial or quasi-judicial dispute settlement, he recommends that they mediate between the European and the domestic legal order in two ways: "(by) 'domesticating' the European debate about how effectively national institutions and processes protect Convention standards", and by 'Europeanizing' national human rights debates by providing European human rights institutions with reliable information on the domestic issues and controversies.[18]

The author stresses the risk that NHRIs, depending on the national model, might be linked too much with the national administration. He is particularly critical of the French model, in which the institution is closely associated with the office of the Prime Minister.[19] In Greece, a country lacking a constitutional court and ranking rather poorly (56th) in the Transparency International 2007 Corruption Perception Index,[20] the recent legal practice with respect to the National Human Rights Commission is illustrative of the problem and affirms the author's concerns. Following a request for an advisory opinion by a member of the Commission, the Legal Council of the State – a quasi-judicial advisory organ of the administration – decided that the Human Rights Commission is a public authority, part of the national administration, and is hierarchically subordinate to the Prime Minister, who has the power the appoint its members. The Legal Council considered the election of the new Chairperson of the Human Rights Commission as illegal, because its members were not convened by the Prime Minister for that purpose.[21]

---

[16] *Id.*, 191.

[17] *Id.*, 289-312.

[18] *Id.*, 314.

[19] *Id.*, 304.

[20] Available at: http://www.transparency.org/news_room/in_focus/2007/cpi2007/cpi_2007_table (last accessed 23 October 2007).

[21] Legal Council of State, Greece, Advisory Opinion 540/2006, available at: http://www.nsk.gr/gnompdf/2006/5402006.pdf (last accessed 23 October 2007).

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

This interpretation either demonstrates an inadequate understanding of the role and function of NHRIs, or constitutes an effort by the state to keep the institution under tight control and cover-up systemic human rights problems. It can be expected that the more structural problems a country faces in the area of human rights, the more it needs a NHRI, and the more it might be tempted to patronize it. There are clear indications that at the periphery of the European space, states are attempting to discipline civil society and non-governmental organizations and neutralize the risk of protest.

Greer's book offers opportunity for thought and research on the necessity of further institutionalization of human rights in the domestic realm. Civil society organizations should occasionally work together with the authorities, but they should also keep a safe distance from them to protect their separate identity and preserve their protest potential. The tension between societal spontaneity and public service is clearly visible in the structure and operation of the NHRIs.

Greer makes another suggestion for the improvement of compliance. In view of the fact that the bulk of the Court's judgments concern alleged breaches of the right to fair trial, many stemming from delays in the administration of justice, he proposes the creation of a European Fair Trials Commission to study the problem and propose solutions.[22] However, the relationship between such a body and the recently established European Commission for the Efficiency of Justice, which has a similar mandate, is unclear. Nevertheless the author is right to criticize the Council of Europe for its continuing failure to tackle effectively such a glaring problem, which has afflicted so many member states for so long.

C. (Re)constructing the System of Principles and Rights

Admissibility reforms and better compliance systems are necessary, but not sufficient, conditions for the sustainable re-ordering of the Convention into a system of constitutional justice. In chapter 4, the author pursues his concept further, by drawing, through teleological interpretation and analysis of the Court's jurisprudence, a coherent set of interpretive constitutional principles. In the author's words, "the teleological principle… suggests a re-arrangement of the primordial soup of principles of interpretation, and a re-structuring, but not a substantive revision, of the orthodox principle of *effective protection of human rights*, and the principles of *legality/rule of law* and *democracy*, to produce three primary constitutional principles, each exercised according to the principle of

[22] GREER (note 1), 282-289.

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

legality/procedural fairness/rule of law, to which the remaining principles of interpretation are subordinate" .[23] He thus considers the rights principle, the democracy principle, the principles of legality, procedural fairness and the rule of law, as well as balancing and the principle 'priority-to-rights' as the primary constitutional principles of interpretation of the Convention's system.[24] Greer considers also secondary principles of interpretation, derived from the primary principles: commonality, autonomous and evolutive/dynamic interpretation, positive obligations, subsidiarity and review, proportionality and strict/absolute necessity, non-discrimination, and margin of appreciation.[25]

In chapter 5, the author discusses the jurisprudence of the European Court of Human Rights and explores, whether the Court adequately considers the above constitutional principles, in particular, the priority-to-rights principle. Greer identifies a number of "clusters" of rights that share some common features and normative density. For instance, Art. 3 (prohibition of torture and inhuman or degrading treatment or punishment), Art. 4 (prohibition of slavery and forced labor), and Art. 7, para.1 (no punishment without law) are, for the author, "not rights as such, but unqualified negative…principles".[26] In Art. 2, para. 2 (deprivation of life), and Art. 15 (derogation in time of emergency), the relationship between public interest and rights should not be determined by balancing and proportionality, but by the "strict" or "absolute" necessity test.[27] The other clusters include Art. 5 (right to liberty and security), Art. 6 (right to a fair trial), and Art. 2, para.1 (right to life); Art. 8 (right to respect for private and family life), Art. 9 (freedom of thought, conscience and religion), Art. 10 (freedom of expression) and Art. 11 (freedom of assembly and association); and, finally, Art. 1 of the First Protocol (property rights).[28]

In Arts. 8-11, rights and public interest are reconciled through recourse to the proportionality principle and the margin of appreciation doctrine.[29] Here the author comments on the conflict between freedom of speech and respect of religious beliefs, stressing that in democratic society, religion is not free from criticism. For

[23] *Id.*, 196 (italics in the original).

[24] *Id.*, 195-213.

[25] GREER (note 1), 213-226.

[26] *Id.*, 232.

[27] *Id.*, 241.

[28] *Id.*, 231-277.

[29] *Id.*, 266-274.

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

Greer, freedom of expression includes the right "to criticize religious beliefs, but not to be abusive or gratuitously offensive towards those who hold them".[30]

The author, who is critical to the restrictive interpretation of the freedom of expression by the Court, is perhaps too cautious here, as it is difficult to reach agreement on a legal criterion neatly separating critique from provocation, and satire from offense. Even the freedom to change one's religion, explicitly recognized by the Convention, might be considered as an offensive act by some religious communities. Moreover, despite the long list of restrictions of the freedom of expression in Art. 10, para. 2,[31] the sociological strength and value of this freedom goes far beyond its conceptualization in the ECHR. The institutional dimension of the freedom of expression that guarantees freedom and pluralism of national and transnational media organizations should be protected against pressure from the system of religion. It is up to the media organizations themselves to introduce self-regulation, structure their message and determine their audience. Courts, including the European Court of Human Rights, should rather recognize a strict necessity test or a very limited margin of appreciation to states when they intervene in the freedom of speech.

Moreover, it would be preferable to differentiate between freedom of thought and conscience, on the one hand, and on the other, rights of the cluster (religion and expression). Art. 9 does not provide for any exceptions or restrictions from the freedom of thought and conscience.[32] The freedom of thought and conscience, including the prohibition of indoctrination, should be conferred protection comparable to that of the integrity of human body and mind, as recognized in Art. 3.[33]

Greer considers the right to the peaceful enjoyment of possessions in Art. 1 of the First Protocol as the weakest form of the priority principle, though he acknowledges that the Court developed limits through the proportionality principle and the prohibition of arbitrariness.[34] Indeed, here is a paradox, in that though property rights constitute the foundation of the global economic system,

---

[30] *Id.*, 269.

[31] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, 1 November 1998, Art. 10(2), available at: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG (last accessed 23 October 2007).

[32] *Id.*, Art. 9.

[33] Convention for the Protection of Human Rights and Fundamental Freedoms, (note 31), Art. 3.

[34] GREER (note 1), 274-276.

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

their protection under the Convention may appear *prima facie* rather limited. However, it is necessary to consider the evolutive/dynamic interpretation of the First Protocol, as well as the involvement of property rights in a plurality of international or transnational regimes [WTO, EU, ECHR, Bilateral Investment Treaties (BITs), intellectual property rights, International Centre for the Settlement of Investment Disputes (ICSID), *lex mercatoria*]. The EU Charter of Fundamental Rights recognizes both the right to property (Art. 17) and "the freedom to conduct a business in accordance with Community law and national laws and practices" (Art. 16).[35] Recently, the Court of First Instance of the European Communities considered the right of property in the context of the "mandatory rules of general international law" and evaluated its arbitrary deprivation as potentially contrary to *jus cogens*.[36] Moreover, the standard of just compensation for expropriation has been stabilized in international customary law through the practice of BITs.[37] Thus, property in broad sense is normatively strong, *because* it is fragmented, and the protection and regulation of economic activities permeates the whole of international economic law.

The arguments presented in chapters 4 and 5 are thought-provoking and, though they might appear too formalistic, as the author himself admits, they exemplify a reflexive approach to the constitutional re-interpretation of the Convention.

D. Whither European Human Rights Order?

Greer's book is a major contribution to the research on the state of human rights in Europe by making the diagnosis of a looming crisis that has not yet caught the public eye. Developments that followed the publication of the book affirmed that the problems are perhaps more difficult to tackle than one might assume. The first step of the reform has stalled, because the Russian Duma refused to ratify the 14th Protocol to the European Convention on Human Rights, directly confronting the will of the other 46 member states of the Council of Europe. Though the Parliamentary Assembly decided to go forward with the reform of the system of

[35] Charter of Fundamental Rights of the European Union, 7 December 2000, Arts. 16 – 17, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, C 364/1, 18 December 2000.

[36] Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, [2005] E.C.R. II-3533, para. 293.

[37] S. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 ASIL PROCEEDINGS 27-30 (2004).

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

protection of human rights[38] and the Committee of Ministers expressed its serious concern over Russia's stance,[39] the capacity of the Council of Europe to deal with the current crisis and the backlog of cases seems rather meager. The reasons why Russia is reluctant to proceed with the ratification are not clear; however, the Kremlin should be rather unhappy with the pressure exercised by the Strasbourg institutions on the authoritarian features of the Russian legal and political order, including the Chechen and Transnistrian cases.

A different kind of dissatisfaction and "disobedience" towards the ECHR system comes from another direction. In Britain, some circles of the political establishment have expressed their uneasiness with the 1998 Human Rights Act, which incorporated the European Convention on Human Rights into the domestic legal order. The critique here focuses on the obstacles to deportation of immigrants and to the fight against terrorism the above legislative act allegedly imposes. In fact, it is the jurisprudence of the European Court of Human Rights that established enhanced protection for asylum-seekers and immigrants through a creative and activist interpretation of Arts. 3 and 8 of the Convention.[40] Should the UK repeal the Human Rights Act, as the Conservative leader David Cameron proposed,[41] this would weaken the effectiveness of the domestic judicial remedies, and contribute further to the Court's backlog in Strasbourg.

Despite the major challenges that the European system of human rights faces, it is premature to declare bankruptcy. The truth is, however, that various negative trends accumulate over time, and even when political consensus enables a reform to be implemented, the stage for the next one has been already set, as it happened with Protocol no. 11.[42] In fact, the landscape of the European human rights order is

[38] Council of Europe, Parliamentary Assembly, Recommendation 1756 (2006), Implementation of the decisions of the 3rd Summit of Heads of State and Government of the Council of Europe, adopted by the Assembly on 28 June 2006, available at: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1756.htm (last accessed 23 October 2007).

[39] Council of Europe, Parliamentary Assembly, Doc. 11135, 22 January 2007, Reply from the Committee of Ministers to the Implementation of the decisions of the 3rd Summit of Heads of State and Government of the Council of Europe, Recommendation 1756 (2006), adopted at the 984th meeting of the Ministers' Deputies (17-18 January 2007), available at: http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11135.htm (last accessed 23 October 2007).

[40] Convention for the Protection of Human Rights and Fundamental Freedoms, (note 31), Arts. 3, 8.

[41] *David Cameron: Call that election. We will fight. Britain will win*, 3 October 2007, Conservatives, available at:http://www.conservatives.com/tile.do?def=news.story.page&obj_id=139453&speeches=1 (last accessed 23 October 2007); see also *Cameron 'could scrap' rights act*, BBC NEWS, 2006/06/25, 11:52:42 GMT available at: http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/5114102.stm (last accessed 23 October 2007).

[42] Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 11 (note 31).

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press

under deep structural pressure. As the 27 members of the European Union and the countries aspiring for future membership ensure respect for fundamental rights on a different level through the integration process itself, Russia – and potentially its "near abroad" – increasingly views the system of the Council of Europe as invasive and as "transmission belt" of Western legal standards. Whether this emerging split will evolve into fragmentation of the European human rights order that would make the ECHR irrelevant is still an open question.

There is widespread feeling that international institutions cannot identify the path of reform that would optimize their capacities. The European Union engaged in the wrong discussion on political constitutionalism, the United Nations made only insignificant steps toward institutional reform, and the Council of Europe struggles to improve the effectiveness of its human rights system, with limited success. NATO seemed to overcome the existential crisis of the first post Cold War period and the loss of its adversary, but the "long war" on terror puts the will of the member states and the effectiveness of the Alliance to test. We may wonder, whether these are epiphenomena of deeply rooted dysfunctionalities of "the political" in world society. Greer's book should be read in this broader context of necessity and ambivalence of reform.

https://doi.org/10.1017/S2071832200006210 Published online by Cambridge University Press