

Speech for the celebration of the 65th anniversary of the European Convention on Human Rights

Today is a special day to celebrate. Today it is exactly 65 years ago that the European Convention on Human Rights was signed in Rome, in the Palazzo Barberini. An event that deserves congratulations.

It is remarkable that this Convention cannot be characterised as elderly. It is constantly rejuvenating, thanks to the case law of the European Court of Human Rights. The Court considers the Convention as a living instrument, an instrument which has to be interpreted in the light of present day conditions.¹ Otherwise we would have been confronted with a document imposing the spirit of the fifties. Imposing the views of our parents and grandparents, views which we partly respect, but part of which we have left behind us. And without this dynamic interpretation, even future generations would be chained to the spirit of the fifties. In that case, there would be considerably less to celebrate today.

The Convention guarantees fundamental rights. The importance of these rights was confirmed by our King, in a speech during his State visit to China last week. These are rights that should be observed in all contracting states and in principle under all circumstances. Europe just had left the horrors of the Second World War behind, and looked at the future with a positive, almost idealistic view. The states were convinced that similar horrors should be prevented forever. The Convention is thus concerned with quality: quality of the structure of the state, of the relation between authorities and individuals, and quality of society as a whole.

What makes this Convention so special is the international supervision, first of all by the European Court. In the beginning, contracting states were convinced that they would observe the Convention by definition, that their systems and behaviour were always correct. As we ourselves are also inclined to believe that we are correct, at least most of the time. This is quite a human

¹ ECtHR 25 april 1978, Tyrer vs. United Kingdom, nr. 5856/72.

characteristic. But, according to a Dutch saying, foreign eyes compel you. And therefore it is a good thing that an outsider can offer a mirror to the European states in the field of fundamental rights, and thus gives an incentive for reflexion on what is considered as usual, as normal in these states. An independent body which looks at cases from a broader perspective, from a bird's eye's view. That saves us from tunnel vision. The quality impulse which was intended by the Convention, thus becomes practical and effective.

I will mention two examples of such effective impulses in Dutch law. Examples chosen from the perspective of the judge. In the fifties of the last century, general legislation on fiscal administrative penalties was enacted in our country. These penalties are imposed by the executive power, by the tax inspector. And the burden of proof then lied with the taxpayer: when he a mistake, he had to prove that he did not act with intent or gross negligence. The possibilities for judicial review of these penalties were seriously limited. The government defended this system with the argument that the penalties are in good hands with the tax inspectors. Therefore, they enacted a system with limited checks and balances. Without the case law of the European Court, that system would probably be still in force today. But the Strasbourg court decided that Article 6 of the Convention is applicable to such administrative penalties and therefore there must be a possibility of a fair trial before an independent court.² On the basis of that case-law, the Dutch Supreme Court made an end to many limitations in the legal protection of taxpayers against these penalties. We can see the destruction of these limitations as a coproduction of these two high courts, or perhaps rather a co-destruction. This complex of court decisions has led to a whole new set of legal rules in the General Act on Taxation. At present, the legal protection of taxpayers against these penalties is to a great extent comparable to the legal protection of the suspect in a criminal case.

A second example which I would like to mention concerns proceedings against government decisions. Until some 30 years ago, legal protection of individuals against many decisions of the

² ECtHR 21 February 1984, *Öztürk vs. Germany*, nr. 8544/79. See also about fiscal administrative penalties: ECtHR 23 November 2006, *Jussila vs. Finland*, nr. 73053/01.

administration was limited to the possibility of an appeal to the Crown. It was the Minister who in fact decided on the appeal, which often was directed against a decision of his own ministry. In that field checks and balances were also limited. And it was again a decision of the European Court of Human Rights which brought the change. The Court was of the opinion that Article 6 of the Convention is applicable in various administrative proceedings, and it decided that the Crown as deciding authority does not fulfil the conditions of an independent judicial body as required by Article 6.³ As a consequence, legislation was changed and now we have a system of administrative procedural law in the Netherlands in which the decision lies in the hands of a judicial body.

There are many more examples of the positive influence of the Convention on the Dutch legal system which I could mention, but my introduction also has to comply with the reasonable time requirement. And as time is concerned: the organisation of this symposium asked the speakers to address the future of the European Convention. My message is that the European Court should continue its balanced course. A course in which the European judges do not run ahead of developments in society. But also a course in which the Court, as a supervisor of the contracting states, does not aim to get the approval of these states all the time, and therefore is not eager to please.

I would like to toast on the next 65 years of the Convention.

M.W.C. Feteris, 4 November 2015

³ ECtHR 23 October 1985, *Betnhem vs the Netherlands*, nr. 8848/80.