The relevance of the ECHR

Until not so long ago, in the Netherlands 'turning 65' was merely another term for 'retiring'. And although today one has to wait increasingly longer before pension payments kick in, reaching the age of 65 still means that birthday wishes are accompanied by pieces of 'good advice': to take it a bit easier, or try a hobby. The 65th birthday of the European Convention on Human Rights evokes a slightly different response. Unfortunately, perhaps, its work is not yet done. Yet also when celebrating the ECHR, rather than only looking back at what has been achieved it seems appropriate to provide some well-meant advice for the years ahead.

It is inspirational to see that in 65 years, the ECHR has become the backbone of fundamental rights protection throughout Europe. This is not least due to the tireless efforts of the European Court of Human Rights to give the Convention a 'practical and effective' application in numerous cases of individual hardship. In fact, it is the ECtHR's well-reasoned and binding judgments that make that the Convention serves as an exemplar for the protection of human rights worldwide.

Nevertheless, regardless of – or in fact because of – the omnipresence of the ECHR, the advice I would like to give concerns the 'relevance' of the Convention. I will argue that this is an issue that is closely related to the scope that is given to the Convention. In this regard it is important to realise that no matter how central the ECtHR may be to the ECHR, the Convention is not *only* a judicial tool. Whereas many human rights documents are considered to be merely 'political' as they do not translate into binding legal obligations, with the ECHR we tend to focus almost exclusively on the judicial context. Thereby we may forget that the Convention contains a set of ideals. Ideally, these influence the behaviour of those who may be tempted to use their powers in a too far-reaching manner, or are unwilling to provide for what fundamental, human rights demand, regardless of whether judicial review eventually kicks in.

As things stand, I think it can be doubted that policy and lawmakers always consider the Convention to be truly relevant. Over the years, the Court has significantly expanded the scope of the Convention. Consider its broad interpretation of 'respect for private and family life' (Article 8), the recognition of positive obligations and horizontal protection under various articles, or the protection of social security interests as 'possessions' under Article 1 of the First Protocol. Yet when hardly anything is *a priori* excluded from protection under the ECHR, how can it play a concrete and meaningful role in decision-making? Illustrative is a comment by the Programme Director for Human Rights at the Equality and Human Rights Commission in the UK, who holds that '[h]uman rights play only a marginal role in policy discourse', and that 'it does not help our case for human rights to be seen as always an obstacle'.[1]

In order to ensure that the Convention rights are actually relevant also beyond the courtroom, the ECtHR should not only underline the possibilities of the Convention, but also clarify where limits to the ECHR rights can be found. By placing a lot of emphasis on proportionality review and balancing case specific interests – which indeed is seen as an important tool for individual *judicial* rights protection – the Court often does not provide more general guidance on why certain interests deserve to be protected in the first place. Yet what do authorities gain from knowing that more or less in every corner there *could* be a

[1] N. Crowther, Equality and Human Rights Commission speech 16 march 2011, available at: http://www.equalityhumanrights.com/about-us/our-work/human-rights/articles-and-speeches/speech-is-austerity-compatible-with-the-uks-human-rights-obligations.

potential violation, when this does not say much on whether something is actually prohibited or demanded or not?

It cannot be said that throughout its case law, the Court has failed to provide more general guidance, but let me give two examples of where, by paying more attention to its scope and essence, the Court could increase the relevance of the Convention. First, consider the recognition of positive socio-economic obligations under Articles 3 and 8. For example, the fact that there are positive obligations in the field of housing and health care makes that virtually all complaints related to socio-economic and other measures – or the lack thereof – can be linked to the Convention. Yet wouldn't it be more helpful to know – for example in the context of ensuring a dignified life for refugees in times of a crisis the contours of which are only about to become visible – what more concrete minimum level of protection the ECHR actually demands? Secondly, there is the issue of pensions and other forms of social security. We may seem to be in the aftermath of economic and financial crises, yet European states are confronted with severe and enduring issues on social state commitments in the face of a rapidly aging population. It is naïve to think that today retrogressive measures can be avoided, but when Article 1 P1 forms an obstacle no matter what social security measures are taken, it seems impossible for a rights discours – at least without further information on core obligations – to really add something.

Hannah Arendt, a political philosopher who had fled her home country in 1933, did not really believe in *human* rights. Whereas they appear to be pre-political, it is naïve to think that a person can benefit from his human rights without being embedded in a political community that is willing to grant him these. I think this is one of the big challenges of our time: communities' willingness to grant 'a right to have human rights', also to newcomers – and it is also the task of the ECHR and the ECtHR to help remind these communities of what these rights are essentially about.

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