

## Global contemporary challenges to the regional human rights protection systems

*Ganna Yudkivska\**

Let me start with thanking wholeheartedly the organisers of this unique event. The mere fact that three regional human rights courts, despite all differences in our respective mandates, procedures and guaranteed rights, came together and speak in one voice, demonstrates our solidarity in the face of a current regrettable trend of opposition to human rights all over the world.

We are speaking today about global challenges as we find ourselves at the crossroads of different crises that are interconnected, an economic crisis, a migration crisis, territorial armed conflict in Europe and terrorism. And those crises have resulted, on the one hand, in new waves of cases being brought before international judicial institutions but on the other hand, in a wave of populism which is very far from our perception of democracy.

Our respective international human rights courts are now invited to address the consequences of these crises for people in our continents. As a result, do we feel a pushback against the international courts? Undoubtedly, yes. It is important to note that today academia differentiates between a “backlash” that means resistance to the authority of a court (withdrawal from the system being the most extreme form of it), and pushback —resistance to

---

\* Judge of the European Court of Human Rights.

directions of a court's jurisprudence).<sup>1</sup> There are instances of resistance to the way of jurisprudential developments in the ECtHR from a number of states, Russia, Turkey and United Kingdom.

Past two years showed that in Europe, unfortunately, we cannot anymore take for granted that European States are democratic by definition; and when we consider our role as international judges "business as usual" will not suffice. We cannot ignore a dramatic u-turn to authoritarian tendencies in some States, and simply address any legal problem in isolation; in other words, we should see the forest behind the trees and assess consequences of our decisions in a given society.

Let me give you just one example, the case of *Magyar Helsinki Bizottság v. Hungary*,<sup>2</sup> on the right to access to information for an NGO. It might be argued that the Court's finding that the denial of access to information constituted an interference with an applicant NGO's freedom of expression was evolutive interpretation of the Convention, since drafters of the Convention deliberately excluded access to information from the guarantees of Article 10. However, the Court made it clear that "the manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable them to impart information on matters of public concern...", as a lack of transparency is a key feature of totalitarian regimes, this was precisely "seeing forest behind the trees" and fulfilling the mission of the Convention.

"Founding fathers" of human rights treaties saw them more as inter-State pacts against totalitarianism than anything else, with the international system of control unlikely to be invoked other than in extreme cases.<sup>3</sup> However, for example, the Europe-

---

<sup>1</sup> See Çali, Başak, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights", *Wisconsin International Law Journal*, Vol. 35, No. 2, 2018.

<sup>2</sup> *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 165, 8 November 2016, ECHR 2016.

<sup>3</sup> Greer, Steven M., "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights", Council of Euro-

## Global contemporary challenges to the regional human rights...

---

an Convention with its right to individual petition quickly turned from being a “paper tiger” to a real mechanism of protection of individual rights. Today it guarantees so many rights, which the “fathers” of the Convention could not even think about. But has it remained “a pact against totalitarianism”? Erik Posner had recently sarcastically written: “the European Court of Human Rights has presided over the return of authoritarianism to Russia, Poland, and Hungary”.<sup>4</sup>

Unfortunately, some other States demonstrated a move toward this direction, still remaining a part of the Council of Europe human rights system. Whilst the drafters “hoped that a supra-national human rights system would safeguard liberal democratic institutions”, that, in fact, has not materialized. Nowadays, we can see that being under the jurisdiction of the ECtHR does not prevent liberal democracies from producing far-right regimes, and from legitimizing xenophobic discourse and practices.<sup>5</sup>

Does that mean uselessness of the human rights system nowadays? A couple of years ago a Harvard professor Beth Simmons published a wonderful body of research called “Mobilizing For Human Rights”.<sup>6</sup> She had investigated why States ratify human rights treaties and why they then comply with them. As a result of her study, she suggested that “Governments are more likely to ratify rights treaties with which they can comply at a reasonable cost”, but political benefits obviously should exceed the costs.

We have a perfect example of that in Eastern and Central European States: the Convention was ratified by these States in the 90’s, after a fall of the Berlin wall, at the moment when they desperately needed the European family and wanted to be accepted

---

pe Publishing, Strasbourg, 2000.

<sup>4</sup> Posner, E., “Martti Koskenniemi on Human Rights”, in W. Werner, M. De Hoon, & A. Galán (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi*, Cambridge, Cambridge University Press, 2017, pp. 121-136.

<sup>5</sup> See Nanopoulos, Eva, “Will human rights law actually protect us from fascism?”, *Open Global Rights*, 14 March 2017.

<sup>6</sup> Simmons, Beth, *Mobilizing for Human Rights: International Law in Domestic Politics*, New York, Cambridge University Press, 2009, pp. 468.

GANNA YUDKIVSKA

---

into it with all subsequent political and economic benefits. And they received those benefits.

Applying Simmons' theory to today's pushbacks and backlashes against human rights courts, we can say that a regional human rights system will be successful only when it is clear for the national authorities that the costs they would bear by changing relevant legislation and practice according to the relevant treaties' standards is less than costs of non-compliance with the Court's judgments. It does not mean that making their legislation and practice compatible with the Convention should always be cheap; it means that non-compliance should be always costly.

Obviously, the pushback against the Court often takes form of non-compliance with its judgments. However, the very fact of non-compliance does not reflect a complete ineffectiveness of the human rights system. Human rights law—as with any other legal system—remains effective not when its decisions are always complied with, but when it is truly needed by its beneficiaries.

The biggest threat for human rights nowadays, enhanced by populism, is an acceptance of trade-offs as the only possible solution. Post-9/11 society has become conditioned by a fear. Security and safety became our new religion. Some are now widely convinced that security can only be achieved through making those trade-offs, shrinking civil rights, including freedom of movement, privacy, liberty. And in the absence of generally presented studies about any causal link (indeed, in the absence of a causal link) between these limitations and security, the general public is persuaded that these trade-offs are unavoidable.

Far-right and populist politicians, who play on sovereignty, national interests, national pride, national values, provoke this hostility against human rights courts trying to present them as 'foreign' or external interference with their "domestic affairs".

Human rights bodies are also presented to the general public as protecting only marginalized and oppressed individuals, convicts, 'asylum seekers', different minority groups. Some seek to present institutions like human rights courts as undermining se-

## Global contemporary challenges to the regional human rights...

---

curity and actively promoting the interests of those who seek to do harm, like terrorist suspects.

Civil society is responsible for changing this focus. We should always remember that law develops together with society. “No legal system can be better than a society, which it serves”, as the distinguished ICJ Judge Sir Christopher Greenwood used to say.

Our role, role of judges is “to bridge the gap between law and society”.<sup>7</sup> Especially when we see some worrying tendencies that we observe now, we must stick to our principles. According to the late Justice of the US Supreme Court Louis Brandeis “experience teaches us to be most on our guard to protect liberty when the government’s purposes are beneficent”.

If we depart from a paradigm of threats and challenges, we might find ourselves in a paradigm of opportunities, we have a unique opportunity to protect human rights in the most difficult circumstances. For the European Court of Human Rights, it was an opportunity to strengthen human rights protection across Europe: without displaying activism, it has adopted a wise approach to the economic crisis, bringing the principle of subsidiarity into play as regards major economic decisions. At the same time, it strongly preserved the essence of the Convention. The Court’s case-law has provided guidance for the States when it comes to migration in a number of cases concerning conditions of detention, conditions of subsistence of asylum seekers, lawfulness of detention and collective expulsions.<sup>8</sup>

When it comes to terrorism, the Court, while not ignoring the difficulties of a struggle against terrorism, clearly refused to enter into the false dilemma of choice between liberty and security.<sup>9</sup>

---

<sup>7</sup> See Barak, Aharon, “The Judge in a Democracy”, Princeton University Press, 2006, at p. 11.

<sup>8</sup> See more on that in Sicilianos, Linos-Alexandre, “The European Court of Human Rights at a Time of Crisis in Europe”, SEDI/ESIL Lecture, European Court of Human Rights, 16 October 2015, [http://esil-sedi.eu/wp-content/uploads/2018/04/Sicilianos\\_speech\\_Translation.pdf](http://esil-sedi.eu/wp-content/uploads/2018/04/Sicilianos_speech_Translation.pdf)

<sup>9</sup> *Idem*.

GANNA YUDKIVSKA

---

Let me finish with a personal remark. Last year, together with the European Society of International Law, we have organised a big international conference on post-conflict justice in Kyiv, Ukraine. One of the invited speakers was Professor Cherif Bassiouni, “the father of international criminal law” who played a key role in the drafting of almost all major international criminal law instruments developed in the last fifty years, including the Torture Convention, the Rome Statute and the Apartheid Convention.

By the time the conference took place he was already terminally ill. Nevertheless, he undertook incredible efforts to appear before the audience via videoconference; and this was one of his last public appearances if not the last one, he passed away shortly after. He has addressed the audience, explaining to us why he overcame his terrible health condition and constant pain to talk to us: “we lawyers should stay together in these challenging times of transition, we have to group, likeminded persons together, likeminded institutions developing a policy of common actions, we should not allow to be split, we must learn how to come together and be a joint force”.

It sounded like his last will. Today’s historic event —three international courts sitting together and discussing current challenges with representatives of the academia— is precisely an enforcement of his will: he would be particularly happy to get to know about the “San Jose Declaration”, which is exactly our “joint force” in the face of all those who tend to undermine achievements of the human rights system.

Finally, this morning, as all of you, I was privileged to listen to the core of wisdom of the Central American continent —nine Presidents of the Inter-American Court of Human Rights, who shared with us their vision and sagacity, and let me express my sincere admiration and gratitude to President Eduardo Mac-Gregor for this most inspiring and unique panel. They were clear enough precisely in this difficult time, we must preserve our integrity. If we act in the name of integrity, we are stronger than any populist government in the world and any group of irresponsible politicians.