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Introduction

IULIA MOTOC

The contributors of this volume have written about the democratization process in their own countries in Central and Eastern Europe with the view to address the question of the relationship between the case law of the European Court of Human Rights (referred to throughout the book as the Court or ECtHR) and major changes in the New Europe over the last twenty years. The great majority of the contributors are or have been judges at the ECtHR and the Constitutional Courts. Many of them are judges with an academic background.

First drafts of the papers were presented at the conference 'The Impact of the European Convention on Human Rights and the case law on democratic changes and developments in Eastern Europe' held at the ECtHR in Strasbourg on 18 February 2013. The event brought together judges of the ECtHR, Constitutional Courts, academics, and practitioners from across Europe. Presentations were organized in four panels covering different regions and legal systems of Central and Eastern Europe. In each panel, four judges or academics presented their papers which were commented on by other judges or practitioners of the Council of Europe.

The impact of the European Convention on Human Rights (ECHR) and its Protocols has been analysed by other projects,[1] as well as the evolution of the protection of fundamental freedoms in Central and Eastern Europe following the accession to ECHR.[2] Some studies have focused on

[1] L. Hammer and F. Emmert, *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague: Eleven International Publishing, 2012); H. Keller and A. Sweet-Stone, *A Europe of Rights, The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008).

[2] W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' and L. Garlicki, 'Some Observations on Relations between the European Court of Human Rights and the Domestic Jurisdictions', in J. Iliopoulos-Strangas (ed.), *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant, 2007); D. Shelton, 'The

Constitutional Courts in Eastern Europe or the enlargement process.[3] Compared to these other projects, the current book is wider in its scope, it covers practically all the countries of Eastern and Central Europe – with the exception of Bulgaria, Georgia, and Moldova – and the change is reflected to by so-called double insiders, that is, the judges of the Court from the countries concerned.

The analyses of the impact of the ECHR on the democratization process in Central and Eastern Europe, as proposed in this book, seeks to fill two gaps: the first relates to a still rather low number of legal research related to processes in Central and Eastern Europe and the second attempts to bring the judges of the Court and the practitioners in the field of the Convention from the region together.

1. The impact of the ECHR

One of our main assumptions when embarking on this project was that the Court was the best-placed institution to influence the process of democratization in Central and Eastern Europe. This has been confirmed by the contributions and the reader will be able to get the details (also see Conclusions). The second point was the assumption that in each country the process was different and that probably raised many questions, including those relevant to the work of the Court as such. Also this assumption was confirmed.

This volume presents twenty-two chapters analysing the impact of ECHR in Central and Eastern Europe. They follow to the extent possible a descriptive and analytical plan. Following the examination of historical aspects of the accession to the ECHR, each chapter gives an overview of the relationship between domestic law and ECHR and of the status of the Convention in the legal order.

The question of the impact of the ECHR requires a description of the mechanism of implementation of the Convention and coordination thereafter at the legislative, executive, and judicial levels. The judicial level is the most difficult one. The subsidiarity principle implies certain

Boundaries of Human Rights Jurisdiction in Europe', *Duke Journal of Comparative & International Law*, 13 (2005), 95–153.

[3] W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2nd ed. (The Netherlands: Springer, 2014); W. Sadurski and L. Morlino (eds.), *Democratization and the European Union: Comparing Central and Eastern European Post-Communist Countries* (London and New York: Routledge, 2010);

coordination between the interpretations of fundamental rights given by the domestic courts and those of the European Court. The interpretative task is even more difficult because the fundamental rights are not absolute and the questions of limitations for objective reasons and in view of general interests have been often seen differently in the domestic and international arena.

There is an interesting range of diversity among the chapters in this volume. Even if the plan of the chapter was common, the contributors have chosen to follow it in a closer manner or to adapt to their vision of the role of the ECHR in their country. The book addresses some questions that are asked by the students of Europeanization, Constitutionalism, and Pluralism, as well as of treaty-based systems. At the same time, the book has a clear normative dimension, assessing different ways to improve the dialogue between the Court and national courts and the other institutions in Central and Eastern Europe.

2. Historical aspects of the accession to the ECHR

It is not a surprise that historical aspects are playing a central role in several chapters. The accession to the ECHR occurred after the end of a totalitarian system. This system in Europe had not been explored enough neither by political philosophy nor by other social sciences. In his chapter about the Czech Republic, Aleš Pejchal draws attention to human rights thinking in Czechoslovakia during the most important moments starting with Czech King George of Poděbrady and his 'Universal Peace Organisation' and ending with the signature of the ECHR by President Vaclav Havel. The process of decommunization of the Czech Republic reached the Court through the case law on restitution of property.[4] Danutė Jočienė has a special chapter analysing the 'KGB' cases and their impact of democratization process in Lithuania.[5] Lustration is dealt with by Lech Garlicki and Ireneusz Kondak.[6] Communist history plays an important role in the case law of Latvia.[7] The fall of communism and the follow-up given to that gave raise to specific case law reflected in the Romanian chapter.[8]

J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe* (Oxford: Oxford University Press, 2001).

[4] See Chapter 8 by A. Pejchal.

[5] See Chapter 12 by D. Jočienė.

[6] See Chapter 15 by L. Garlicki and I. Kondak.

[7] See Chapter 11 by M. Mits.

[8] See Chapter 16 by I. Motoc and C. Kaufman.

3. The Constitutional Courts and the ECHR

The Constitutional Courts opinions are analysed extensively in the majority of the chapters. Indeed, the relationship of the Constitutional Courts with the Court varies from one country to another. In Slovenia, the Constitutional Court regularly refers to Strasbourg case law, even if Jan Zobec argues that the ECHR has become only the 'back-up upper premise'.[9] In 1995, the Constitutional Court of Lithuania came to the conclusion that there is no contradiction between the provisions of the Constitution of Lithuania and the Convention. Also the Constitutional Court of Poland observed on several occasions that the ECHR judgments are binding in all Contracting States. The relationship of a Constitutional Court with the ECHR is never a simple one. Even if the Constitutional Court of Albania used to quote some inappropriate decisions of the Court, the depth of the analysis improves with time.[10]

The main question disputed before the Constitutional Court of Serbia was the issue of political pluralism, tackled extensively in the chapter in all its controversial aspects, and especially the ban on so-called extremist associations.[11] In Slovakia after the amendment of the Constitution in 2002, the recourse to the Constitutional Court was considered as an effective remedy, which needs to be exhausted in individual applications to the Court against Slovakia. As stated by the authors of the chapter, the approach of the Constitutional Court to complaints about the breach of the convention rights or their constitutional equivalents has not always coincided with that of the Court.[12] An even more complicated relationship between the Constitutional Court of Russia and the ECHR is analysed in the Russian chapter.[13] Most recent constitutional changes and their compatibility with the ECHR are tackled in the Hungarian chapter.[14]

4. Rule of law

The role of the judiciary is seen as essential by the contributors giving different emphasis to Constitutional Courts or ordinary courts in the implementation of the Convention. The Latvian chapter provide a deep analysis

[9] See Chapter 20 by J. Zobec.
[10] See Chapter 3 by L. Bianku.
[11] See Chapter 18 by D. Popović and T. Marinković.
[12] See Chapter 19 by M. Blaško and M. Kučera.
[13] See Chapter 17 by A. I. Kovler.
[14] See Chapter 10 by K. Bárd.

of the way in which the domestic courts have accepted the Convention. It shows the tendencies of the Supreme Court methodology. Some courts, for example, the Supreme Court of Lithuania, have settled the status of the Convention and have said that it applies not only to Lithuanian citizens but also to foreigners who are residing legally in Lithuania. The direct applicability of the Convention was clearly stated by some courts, for example, the Supreme Court of Macedonia.[15] It is not a surprise that sometimes lower courts are more keen to apply the ECHR than the highest ones, as demonstrated by the Montenegro example.[16] Ukraine adopted in 2006 a special Law of the Enforcement of Judgements and Application of Practice of the European Court on Human Rights. The law provides that the case law of the ECHR is a source of law. In practice, again thousand of judgments of national courts contain references to the case law but few offer a deep analysis of these judgments.[17]

The book offers an insight into some aspects of a long and complex process of change from totalitarian regimes to democracy through the implementation of the ECHR obligations. That process is not completed. On behalf of the editors of the book I am grateful to the contributors for their efforts to bring their story into this book, which will make it more accessible to the reader in Europe and worldwide. We would like to thank Mr Karoly Benke and Mr Ciprain Sadagurschi from the Constitutional Court of Romania and in particular Ms Rose During at the ECtHR for the assistance in organizing the conference in 2013 as well as for her initial help with the preparation of the manuscript and the staff members of the Latvian Constitutional Court, Ms Madara Marcinkus and Mr Juris Priednieks, for further assistance with the preparation of the book. Finally, it has been a pleasure working with Finola O'Sullivan and her colleagues at the Cambridge University Press.

[15] See Chapter 13 by M. Lazarova Trajkovska and I. Trajkovski.
[16] See Chapter 14 by N. B. Vučinić.
[17] See Chapter 21 by G. Yudkivska.

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Comments on the early years and conclusions

LUZIUS WILDHABER

1. Introduction

The conference of February 18, 2013 and the book that grew out of it are highly topical and long overdue. A simplification of the statistics of the past few year[1] shows that roughly 65 percent to 70 percent of all applications submitted to the European Court of Human Rights (ECtHR) came from the twenty-two Member States that joined the Council of Europe after the fall of the Iron Curtain, some 10 percent from Turkey and some 20 percent to 25 percent from the twenty-four Western European States.[2] Quantitatively speaking, therefore, more than two-thirds of all applications had their origins in the twenty-two new Member States. High and sometimes exaggerated hopes were placed in the ability of the European Convention (ECHR) and the European Commission and Court of Human Rights to help realize fundamental freedoms and civil and political rights in the post-Soviet countries. The effort of this book to sketch and evaluate the effects of the Strasbourg human rights system on the domestic law and the politics and reality of the new Member States is eminently laudable. The effort will have to be repeated again and again, sometimes with different focus and changing perspectives.

In the 1990s, political concerns were expressed about double standards and dilution.[3] The time is ripe to ask what has become of these concerns. One of the earliest studies in which the Estonian Judge Rait Maruste described the ECtHR's evolving case law emphasized the importance of

[1] My calculations on the basis of the Court's Annual Reports.
[2] I take Turkey separately because the points I want to make become clearer.
[3] E. Bates, *The Evolution of the European Convention on Human Rights* (New York: Oxford University Press, 2010), 432–72.

Art. 5 and 10 ECHR for the new Member States.[4] But it could be claimed that Art. 2, 3, 6 and 8 ECHR and 1 and 3 of Additional Protocol No. 1 are equally important. Wojciech Sadurski stressed the difference of approaches between Central European Constitutional and Supreme Courts.[5] Would we still appraise the situation in Sadurski's words? This book draws on the wisdom of hindsight to twenty years of shared common and sometimes not so common law and experience. Perhaps its main merit is the comprehensiveness and ambition of its endeavor to do justice to the differences between the twenty-two new Member States and to their uniqueness.

My contribution will consist of some thoughts and comments about the early years of the arrival of Central and Eastern Europe in the Council of Europe and the Court of the twenty-two states, regimes, colleagues, and friends.

2. Gradual changes of the Strasbourg system in the 1990s

I arrived in Strasbourg as a newly elected Judge of the ECtHR in 1991, at the period of the Convention's "Coming of Age."[6] The first Central European Judge, András Baka from Hungary, arrived in the same year.[7] Czechoslovakia, Bulgaria, and Hungary ratified the ECHR in 1992, Poland in early 1993, and Romania and Slovenia in mid-1994.[8] By 1998, the year of the entry into force of Protocol No. 11 and the beginnings of the "new" Court, nine more States had followed.[9]

[4] R. Maruste, "The Impact of the Accession of Eastern Block Countries on the Convention Machinery and its Case-Law," in L. Caflisch et al. (eds.), *Human Rights – Strasbourg Views, Liber amicorum Luzius Wildhaber* (Kehl: Engel Publishers, 2007), 285–308.

[5] W. Sadurski, "Partnering with Strasbourg: Constitutionalisation of the ECtHR, the Accession of Central and East European States to the Council of Europe and the Idea of Pilot Judgments," *Human Rights Law Rights*, 9 (2009), 397–453.

[6] This expression is borrowed from Bates, *The Evolution*, 432. And see P. Mahoney, "The Changing Face of the ECtHR," in R. Zerbini et al. (eds.), *The Protection of Human Rights in Europe and the General Rules of International Law, Liber Amicorum Cançado Trindade* (Porto Alegre: Fabris, 2005), Tomo II, 251–66; L. Wildhaber, "Changing Ideas about the Tasks of the ECtHR," in L. Wildhaber, *The ECtHR 1998–2006, History, Achievements, Reform* (Kehl: Engel Publishers, 2006), 136–49.

[7] Soon to be followed (in 1992–3) by Bohumil Repík (first Czechoslovakia, then Slovak Republic), Jerzy Makarczyk (Poland), Dimitar Gotchev (Bulgaria), Karel Jungwiert (Czech Republic), and Peter Jambrek (Slovenia).

[8] Bates, *The Evolution*, 447, 521–4, 539–40.

[9] Ibid.

3. Interim Consultative Committee 1992–1993

In 1992, I became a member of a group of ten legal experts, which was chaired by (then Commissioner) Ireneu Cabral Barreto and which had to work out the bases for an "Interim Consultative Committee on Human Rights for European States not yet members of the Council of Europe."[10] The idea was to have two judges, two commission members, and a minority of members proposed by the respective State, which would receive complaints from individuals claiming to be victim of a violation of a Convention right. The Interim Committee's opinion was to be "advisory in character." When the expert group had largely terminated its work in 1993, it was informed that a different political orientation was to be given to the issues discussed. The States not yet members of the Council of Europe were to become directly members without any intermediate steps.[11]

4. Preparatory compatibility studies

Individual judges and Commission members helped prepare compatibility studies for the Parliamentary Assembly which evaluated whether particular States measured up to Council of Europe standards.[12] It is difficult to guess what weight was attributed to these reports, but it is fair to state that in the end the outcome largely depended on political considerations. Initially, the new Member States were given a time frame of two years to adjust their legislation, case law, and practice to Council of Europe and particularly to Convention standards. After a while, the time frame

[10] Contrôle du respect des droits de l'homme dans des Etats européens non encore membres du Conseil de l'Europe, Doc. CM (93) 113 du 15 juin 1993.

[11] And see the communication of the Committee of Ministers to the Parliamentary Assembly of 29 June 1994, Doc. 7113 (Réponse intérimaire à la Recommandation 1204 (1993) et à la Recommandation 1219 (1993), where reference is made mostly to Bosnia-Herzegovina.

[12] R. Pekkanen and H. Danelius, "Human Rights in the Republic of Estonia," *Human Rights Law Journal*, 13 (1992), 236–44; J. De Meyer and Ch. Rozakis, "Human Rights in the Republic of Latvia," *HRLJ*, 13 (1992), 244–9; R. Bernhardt and H. Schermers, "Lithuanian Law and International Human Rights Standards," *HRLJ*, 13 (1992), 249–56; D. Seymour, "The Extension of the ECHR to Central and Eastern Europe: Prospects and Risks," *Connecticut J. Int'l. L.*, 8 (1993), 243–61; A. Drzemczewski, "Ensuring Compatibility of Domestic Law with the ECHR Prior to Ratification: The Hungarian Model," *HRLJ*, 16 (1995), 241–7; H. Winkler, "Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe," *Austrian J. Publ. Int'l. L.*, 47 (1995), 147–72; I. Ziemele, "The Role of International Organizations in Strengthening Human Rights Performances in the Baltic Sea Region," *German YBIL*, 43 (2000), 9–37; R. Harmsen, "The ECHR after Enlargement," *International Journal of Human Rights*, 5 (2001), 18–43.

was halved to one year only, although the latecomers presumably would have had more obstacles to surmount. Rudolf Bernhardt, Stefan Trechsel, Albert Weitzel, and Felix Ermacora wrote an extensive report on Russia in 1994.[13] They concluded, "after careful consideration of the evidence submitted to them and the findings during their mission … that the legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the statute of the Council and developed by the organs of the ECHR."[14] Nevertheless, and despite the Parliamentary Assembly's condemnation of the excessive use of force in Chechnya in 1995, Russia was allowed to join the Council of Europe and ratified the Convention in 1998.[15]

In the context of compatibility studies I submitted in 1995, at the request of the Council of Europe's Directorate of Human Rights a Legal Opinion, in which I discussed *inter alia* the new draft constitution of the Ukraine. The Opinion dealt with the possibility to outlaw political parties and claimed that such measures were only admissible to the extent necessary in a democratic society. I argued that "a party which would advocate a larger autonomy for the Crimean (peninsula) would have to be considered as lawful, whereas a party which would try to achieve a breakaway of the Crimean by means of direct violence could be outlawed."[16]

5. Conflict over diluting standards

It is well known that an acrimonious debate arose in these years whether the Council of Europe had become flaccid,[17] whether its standards were

[13] R. Bernhardt, S. Trechsel, A. Weitzel, and F. Ermacora, "Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards," *HRLJ*, 15 (1994), 249.

[14] Ibid., Conclusions, para. 13.

[15] For more details, see B. Bowring, "Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?," *European Human Rights Law Review* (1997), 628–43; id., "Russia's Accession to the Council of Europe and Human Rights: Four Years On," *EHRLR* (2000), 362–79; M. Janis, "Russia and the 'Legality' of Strasbourg Law," *European Journal of International Law*, 1 (1997), 93–9; R. St. J. Macdonald, "The Entry of New Member States into the Council of Europe," *Am. Soc'y Int'l L. Proc.*, 91 (1997), 523–9.

[16] L. Wildhaber, Legal Opinion submitted to Pierre-Henri Imbert, Director of Human Rights on August 17, 1995.

[17] This expression goes back to Peter Leuprecht, former Deputy Secretary General of the Council of Europe, who resigned from his post in 1997 because of disagreement with dilution of Council of Europe standards and values. See his article, "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?," *Transnational Law & Contemporary Problems*, 8 (1998), 313–36.

being diluted, and whether admissions of new Member States were merely therapeutic rather than real and effective. Secretary General Catherine Lalumière conceded that "the Europe of the Council of Europe is thus less homogeneous and more unstable," but it must help its member "to become democracies in the full sense of the term."[18] While her statement may be praised for being both realistic and aspirational, it makes clear at the same time that certain standards were admittedly being softened.

6. From the "old" to the "new" Court

As Ed Bates puts it aptly, and as I can confirm, "the Commission and Court had no control over this 'enlargement agenda.'"[19] And so, when the "new" Court began its work in November 1998, it consisted of twenty-four Western European[20] and sixteen Central and Eastern European States. The Commission had, of course, seen a rapid yet still moderate growth of cases from the new Member States.[21] However, for the "old" Court the changing reality sank in quite slowly. It pronounced only nine judgments against four of the new Member States from 1992 to 1998,[22] the first one being the case of *Lukanov v. Bulgaria*.[23]

The full extent of the changes brought about by the enlargement became visible only in the "new" Court, which soon attracted more cases, more exposure, more interest, and, over time, more criticism.[24] The early leading cases concerning Central and Eastern Europe were largely pronounced by the "new" Court.[25] A few illustrations will suffice: *Rekvényi v. Hungary*,[26] *Kudła and Broniowski v. Poland*,[27] *Malhous and Gratzinger v. Czech Republic*,[28] *Kopetzký v. Slovak Republic*,[29] *Brumărescu and Rotaru v. Romania*,[30]

[18] Doc. CM (94) 78 of April 27, 1994, The Council of Europe in the new Europe.
[19] Bates, *The Evolution*, 447.
[20] Including Turkey.
[21] Cf. Bates, *The Evolution*, 526.
[22] ECtHR, Survey, *40 years of activity 1959–1998* (1999), 71–85.
[23] *Lukanov v. Bulgaria*, March 20, 1997, ECHR 1997 II.
[24] Cf. Paul Mahoney and Luzius Wildhaber, see preceding note 6.
[25] Cf. Bates, *The Evolution*, 527–8.
[26] *Rekvényi v. Hungary*, May 29, 1999, ECHR 1999-III.
[27] *Kudła v. Poland*, October 26, 2000, ECHR 2000-XI; *Broniowski v. Poland*, June 26, 2004, ECHR 2004-V.
[28] *Malhous v. Czech Rep*., September 13, 2000, ECHR 2000-XII; *Gratzinger & Gratzingerova v. Czech Rep.*, July 10, 2001, ECHR 2002-VII.
[29] *Kopetzký v. Slovak Republic*, September 28, 2004, ECHR 2004-IX.
[30] *Brumărescu v. Romania*, October 28, 1999, ECHR 1999-VII; *Rotaru v. Romania*, May 4, 2000, ECHR 2000-V.