

HUMAN RIGHTS V. POLITICAL REALITY: THE CASE OF EUROPE'S CONVERGING CRIMINAL JUSTICE SYSTEMS

Theo Gavrielides (LL.B, LL.M, PhD)*

ABSTRACT

The purpose of this article is to continue the discussion on Europe's converging criminal justice systems. In particular, I test a hypothesis that has recently appeared in the literature, which sees the jurisprudence of the European Court of Human Rights as one of the most significant factors that encourage a harmonization process between the adversarial and inquisitorial criminal justice systems of Europe. This claim is supported by examining the Court's jurisprudence to identify decisions that led to legislative and policy amendments in the domestic legal orders of the 46 member states of the Council of Europe. This account shows how an interplay currently taking place between judicial, policy, and statutory powers is marking the end of the adversarial-inquisitorial era. Finally, the conclusion identifies the three most important impediments that are likely to hamper this harmonization process.

Introduction

"It would require the shock of two world wars for us finally to appreciate not only the cultural but also the technical possibility of a rapprochement. This possibility is, in effect, demonstrated case by case by the European Court of Human Rights...this is the time of reforms in Europe." (Delmas-Marty 1995: 196)

In the aftermath of World War II, 10 European States¹ formed the Council of Europe (Council), a regional body that has now become Europe's oldest political organization comprising 46 member States. One of the Council's

* Independent Academic Research Studies, PO Box 376, Hatfield, Hertfordshire AL10 1ZY, U.K., Tel: 0044-7720057750, (T.Gavrielides@lse.ac.uk), and London School of Economics and Political Science, Houghton Street, London WC2A 2AE, U.K.

most significant achievements is the European Convention of Human Rights (ECHR or Convention). In its preamble, the ECHR stated that the aim of the Council is “the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms.” Fifty-five years later, the Council remains faithful to this promise, while arguably the ECHR has now become the first, or a new, Bill of Rights for many of the Council’s member States including the U.K.²

Irrespective of whether we are ready to adopt an optimistic or pessimistic attitude towards this view, the Convention cannot be considered a mere subchapter in the discussion on the relationship between public international law and national law. This, of course, is old news, as the special character of the Convention is evident in its many peculiarities. For example, it was designed to protect individuals against acts of States, establishing a regional judicial authority that is now bestowed with powers of a constitutional human rights court. This is the European Court of Human Rights (hereafter Court or EcrTHR) which sits in Strasbourg. After the ratification of Protocol 11, the Court became the sole body that deals with applications from members’ nationals (individuals or legal entities) who claim that one of their convention rights has been infringed by public national authorities (including private organizations exercising public functions³).

The aforementioned powers that have been given to the Court by the Convention⁴ have now been extended through case law.⁵ For example, the Court introduced, *inter alia*, the notion of *drittwirkung*, allowing the application of the ECHR to legal relations between private parties acting in a non-public capacity. Moreover, decisions of the Court have often declared incompatibilities of national law with the Convention, calling States for immediate legislative and policy amendments.⁶

The extent and significance of these statutory and common law powers that have been given to the Court will constitute the focus of this paper. In particular, the paper will collect evidence to examine the hypothesis that the Court’s jurisprudence has become significant enough to encourage a harmonization process among Europe’s criminal justice systems.

Undoubtedly, the criminal process and the administration of criminal justice by State agents are the battle fields where human rights are tested. Admittedly, the Convention was not conceived of as a criminal procedure text *strictu sensu*. Nonetheless, many of its Articles have now

been interpreted to be strictly related to the criminal process (principally 5, 6 and 7). As I will argue, it is through the application of human rights provisions regulating the criminal pre-trial and trial phases that the Council's 46 member States are said to be developing convergent criminal justice systems.

Before we proceed with an in-depth analysis of how the Court's case law encourages harmonization in the processing of criminal cases in Europe, a brief account of the principal European criminal justice models is in order.

Traditional Criminal Justice Models in Europe

It has been a long-standing tradition to think in terms of "systems" when talking about criminal procedures. When we use this word in everyday communication we have in mind something complex with interconnected parts and subsystems with inputs and outputs, such as the educational system. The same word is used when referring to the formation of criminal justice agents and organizations.

Almost all criminal justice systems are divided into four key subsystems (Davies and Croall 1998: 2): (1) law enforcement officers (police and prosecuting agencies), (2) the machinery of the courts (pre-trial detention, adjudication, and sentencing), (3) the penal sub-system (probation and the prisons), and (4) crime prevention machinery, comprising both private and governmental agencies.

The structure of a criminal justice system is a reflection of society's attitudes and preferred response to crime, which is why such systems vary from nation to nation. Countries have different ways of prosecuting, investigating, and processing criminal cases. However, systems often follow basic principles that are shared by other systems. It is within this context that comparative lawyers and academics classify them into *legal models*.

In Europe, the two most dominant models are the common law/"adversarial" system, found principally in Great Britain and former colonies, and the continental/civilian "inquisitorial" system found in almost all European States. It is said that we only need to look at a country's history and socioeconomic development to understand its legal model. Zweigert and Kotz (1998) believe that if we want to know what led to the adoption of a given legal model, then most of the times "we only need to look at the nationality of the last soldier who departed the country's shores" (p.48).

Apparently, countries that have been under the control of empires, either as colonies or newly discovered land, tend to adopt their ruler's legal system. As history reveals, the last conqueror tends to be the most influential in the crystallization of the country's legal model. Europe is definitely not an exception.

The adversarial system is described by many as "a contest between two equal parties, seeking to resolve a dispute before a passive and impartial judge, with a jury ('the people') pronouncing one version of events to be the truth" (Jorg et al. 1995: 42). The system is based on the "fight theory" of justice, mainly described by its adversarial principles, whereby parties "fight out" their case in front of a jury and an impartial tribunal. That is why criminal justice in the adversarial model is said to be treated as a "contest." Arguably, the prominent characteristics of this model are: the control of litigation and the choice of the issues of adjudication by the parties, the continuous oral trial, the detailed evidentiary norms and the strict rules and principles for the achievement of "equality of arms."

On the other hand, the inquisitorial system is described as "the investigation of an event, and the persons involved, by the State with a view of establishing the truth" (Jorg et al. 1995: 42). The truth in such a system must be discovered in the investigative procedure. Therefore, the criminal process is seen as an "inquest." Some of the key features of the inquisitorial system are control by State officials, de-centered trials, few and ambiguous rules of evidence, the hierarchical relationship between the State and the individual, and the overriding objective of the discovery of the truth.

The EcrtHR does not officially belong to these two models, as its practices are adjusted depending on the nature of a case *in concreto*. This approach is becoming very popular among the Council's member States especially the 25 countries that are also members of the European Union (EU). The most obvious reason is, of course, the powerful EU law. Its legal nature and enforceability in the community was set out in two precedent-setting judgments by the European Court of Justice (ECJ) in *van Gend en Loos v Netherlands* and *Costa v ENEL* [Case 6/64 (1964) ECR 585]. The ECJ established, *inter alia*, the "Doctrine of Primacy," through which EU law gained direct applicability into the members' domestic legal order which do not have the power to overwrite it.⁷

Although a discussion on the impact of EU law on Europe's criminal law is appealing—particularly in the light of the "European Constitution"—it does not fall under the scope of this article. The same

applies for a number of other factors that have been described by the extant literature as “harmonizing factors” that encourage convergence among Europe’s criminal justice systems. To name but a few: Europol, the introduction of the European warrant, the International Criminal Court and the Rome Statute, and a number of multilateral treaties (e.g., in the areas of organized crime, money laundering, corruption and drugs). It would be naïve to think that the discussed harmonization process is the outcome of a single factor. Over the last 10 years the creation of regional *fora* inspire—and sometimes require—the collaboration between national governmental or private authorities. It is within this context that our analysis will be developed, as the Council of Europe—with its organs and regional influences—said to draw national criminal justice systems closer.

The Harmonizing Influence of the ECHR and the Weakening of the Adversarial-Inquisitorial Criminal Justice Division: An Evidence-Based Approach

Evidence shows that an interplay is taking place between judicial, political, and legislative powers that lead to a gradual conversion of Europe’s criminal justice system. This evidence is found in the EuCHR’s jurisprudence, which, for presentation purposes, has been divided into different sections each corresponding to a different ECHR Article/human right that is related to the *criminal process*.

The Right to Life (Article 2) and Freedom from Torture or Inhuman or Degrading Treatment or Punishment (Article 3)

Article 2 obliges States to make adequate provisions in their laws for the protection of human life. This extends liability for taking a person’s life not only to State agents, but also to private individuals (Harris et al. 2001: 37). The Article’s relevance to the criminal process resides in par 2(b) and its impact on the use of force in arrest or the prevention of escape.

This is evident in a series of cases with Northern Irish connections. For example, in *McCann* [(1995) 21 EHRR 97], specially trained British soldiers, in their attempt to arrest suspected IRA terrorists and initiate criminal proceedings against them, used force resulting in the death of the terrorists. The Court interpreted the Article so that its provisions would be

understood and applied by all member States in the same way. The Court focused on the term “absolutely necessary,” clarifying that a “stricter and more compelling test of necessity must be employed from that normally applicable when determining whether a State’s action is necessary in a democratic society”. In particular, it said “the force used must be strictly proportionate to the achievement of the aims set out in 2 par 2abc.”⁸

The Court reaffirmed that neither the Convention obliges parties to incorporate its provisions into national law nor is it the role of the Court to examine *in abstracto* the compatibility of national legislation with the Convention. However, it also pointed out that it would be a breach of conventional obligations if a member did not protect the substance of Article 2 as the Court interpreted it through its jurisprudence. In *Osman v U.K.* [(1999) 1 FLR 198], the Court was even more demanding, stating that the duty that Article 2 imposes includes the *obligation* on behalf of all 46 States of putting in place “effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery.”

Article 2, together with 3, “enshrines one of the basic values of the democratic societies making up the Council of Europe.”⁹ Article 3 has been invoked for cases relating to serious assaults in custody (e.g., *Tomasi v France* A/241-A (1992) 15 EHRR 1), the application of psychological interrogation techniques (e.g., *Ireland case*), prison conditions (e.g., *McFeeley v U.K.* (1980) 20 DR 44), suspects in detention, rape while in prison (e.g. *Aksoy v Turkey* (1996) 23 EHRR 553), and extradition or expulsion where torture or ill treatment might be a consequence (e.g., *Cruz Varas v Sweden* (1992) 14 EHRR 1).

In the *Ireland case*, for example, the Court defined the meaning of the terms of the Article,¹⁰ establishing minimum standards to be respected by all members of the Council. After the decision, the U.K. government compensated the victims and ordered the discontinuance of the techniques used, although these were previously officially taught to the members of its security forces.¹¹ This practice was followed by a number of other member States who saw the decision as laying a principle that was applicable throughout the Council.¹²

In the case of *Hurtado v Switzerland* [A/280-A 2 (1994)], the Commission explained that it is inherently difficult to prove breaches of this Article. Consequently, in *Klass* [A/28 (1978) 2 EHRR 214] and

Ribitsch [(1995) 21 EHRR 573], the Court set the principles regarding the standard of proof in these types of cases where ill treatment during police detention is alleged. These rules became obligatory for all 46 contracting parties.¹³

Equally important is the landmark decision in *Soering v U.K.* In this case, the deportation of a prisoner was found to be in breach of Article 3, as it would automatically lead to the so called “death row phenomenon” (i.e., imposing the death penalty). With its judgment, the Court introduced an exception to a rule of public international law, whereby no State could be found responsible for the acts of third States. As noted by the Court, “this (rule) cannot exclude State responsibility under the ECHR with respect to events taking place outside their jurisdiction.” In a series of other cases, it was confirmed that a person’s deportation or extradition might give rise to an issue under Article 3, when there are reasons to believe that the individual will be subjected to treatment not permitted under the provisions of the Article. Consequently, the British executive refused the extradition of Mr. Soering and was willing to proceed with it only if the U.S. government agreed not to execute him.¹⁴

As it would be expected, this decision had a major impact not only on the accused State but also on the criminal justice policies of all the Council’s members. For instance, the civil chamber of the Dutch Supreme Court held the surrender of an American soldier as long as the U.S. government failed to give sufficient assurances that a death sentence imposed by a national court would not be carried out.¹⁵ The decision also affected the members’ asylum policies, because, as the Court noted, although States are free to expel foreigners, “the specific importance of preventing torture justifies an exception to that freedom.”¹⁶

Undoubtedly, the way a country treats its prisoners is an important yardstick for the protection of human rights. The Council, recognizing the importance of this right in a democratic Europe, promulgated the “European Prison Rules,” setting minimum standards for custodial institutions in member States. It also established the Council for the Prevention of Torture (CPT), through the drafting of the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment which was signed by all members of the Council. As Morgan put it, the CPT is another European institution “that promotes harmonization of criminal justice policy within Europe” (Morgan 1998: 64).

By using its authority, the CPT inspects the prisons and police stations of member States, developing phrases and a common glossary to be used when referring to allegations of physical ill treatment by the police. What is important to mention here is that, although the reports of this Commission are confidential, if a party “fails to co-operate or refuses to improve the situation in the light of these recommendations, the CPT may decide to make a public statement on the matter”¹⁷ (this has often been the case).¹⁸

The Rights to Liberty and Security of the Person (Article 5)

Article 5 protects the liberty of the person and is considered the chief guarantee for the rights of the detainees in the criminal pre-trial phase, although in the period between charge and the beginning of the trial, Articles 5(1)c, 5(3) and 6(1) operate together.

In the first case against the Netherlands [*Engel and Others* (1976) 706], the Court defined “arrest” and “detention,” laying two requirements that have to be met in order for a pre-trial detention not to be in breach of the Article. In particular, detention has to be “lawful” and “prescribed by law.” What is important to note here is that this “lawfulness” gains its meaning through European and not national standards, while its constituent ingredient can only be defined by the EcrTHR.¹⁹ This means that all 46 countries have to refer to the Court’s interpretation and jurisprudence to identify the meaning and extent of this term which has to be respected to avoid violation of the ECHR. On the other hand, the “prescribed by law” requirement mainly refers to domestic legislation, which again has to meet with “lawful,” thus with European standards.²⁰

In the *Winterwerp* case [(1979) 2 EHRR 387], the Court stated that between the two aforementioned requirements there is an overlap, which is caused by the fact that the notion of “prescribed by law” is not exclusively a matter of domestic legislation. In short, national law must itself be in conformity with the ECHR, including the “general principles expressed or implied therein” (par 45). This can mean two things. First, domestic law alone is now considered insufficient to carry the exceptions of Article 5(1). Second, the EuCHR acquires jurisdiction to examine whether the conditions of national law have been fulfilled. Although the Court does not normally review the observance of domestic law *in abstracto*,²¹ there are exceptions to this. This is observed especially in cases where the Convention refers back to national law.

This is arguably a significant force driving common practice during the criminal pre-trial phase.

For instance, after *Winterwerp*, the Dutch Minister of Justice issued a set of guidelines by way of interim response to the judgment, setting out the consequences for the legal practice. Soon thereafter, the impugned legislation was amended.²² However, as this legislation was tardy (over 13 years), a new wave of successful cases were brought against the Netherlands (e.g., *Van der Leer* (1990) 12 EHRR 567), illustrating in this way that member States cannot escape from their responsibilities which may include adapting their national legislation to conform with the ECHR and the Court's decisions.

Para 3 of Article 5 regulates pre-trial detention. Its provisions require that everyone arrested under 5(1)c on suspicion of having committed an offence be brought "promptly" before a judge. In *De Jong* [A/77 (1984)], the Court ruled that a military prosecutor (*auditeur militaire*) charged with deciding upon detention cannot be considered a "judge," while in two cases against Switzerland [Schuesser A/34 (1979) 2 EHRR 417 and Huber A/188 (1990)] the Court listed what elements "an officer" needs to have to fall within the sphere of 5(3). After this, by virtue of an Act in 1989, the Dutch government amended its legislation, directing all criminal cases against members of the armed forces to ordinary criminal courts and not to military tribunals.²³ The paradigm introduced through these cases became obligatory for all member States.

Very important is also the case of *Brogan v U.K.* [A/145-B (1988) 11 EHRR 117]. Mr. Brogan and three others were arrested by the British police on suspicion of involvement in IRA terrorist activities. They were released after four to six days, without being brought before a judge. After the Court found that there had been a violation of Article 5(3), it attempted to define the term "promptly." Although it is not always possible to determine exactly the meaning of this word, the Court said, "in the member States of the Council of Europe a delay of 48 hours, or even a bit longer, is usually permitted."

As a result, the Court moved on to distinguish between "terrorist" and "conventional" criminal cases (par 61), ruling that a period of four days and six hours was too long for the purposes of 5(3). Consequently, if that period was too long in "exceptional" circumstances (e.g., terrorism), then it will certainly constitute a breach in "normal" cases. These standards, became

obligatory for all 46 members, and were later confirmed in *Brannigan* [(1993) 17 EHRR 539], although no violation was found there, because the U.K. had made a valid emergency derogation under Article 15 (this allows members to derogate from certain obligations set out in the ECHR).

Both cases gain major significance in today's circumstances, since they show how the EcrTHR dealt with the issue of striking a balance between the protection of individual rights and the need to maintain security for society. The reasoning is particularly relevant to terrorist suspects and detention carried out for the purpose of collecting evidence. The Court held that, although it is not required to examine the impugned legislation *in abstracto*, there are some exceptions to this principle. In fact, on several occasions the Court found that domestic legislation did not always contain sufficient safeguards against abuse of suspected terrorists' rights, while in many other cases it found incompatibilities of national legislation with the Convention, calling governments to correct them.²⁴

Brannigan v U.K. provoked strong reactions in the U.K. and other member States, since its consequences for pre-trial detention and the way investigations were carried out were considerable. For instance, in light of this decision against the U.K., in 1994 the Dutch government had to adopt a complicated Act that would bring domestic law in line with the Convention. The same reaction was also observed after the *Engel* judgment, which brought amendments to domestic legislation with the Act of 12 September 1974.²⁵

Equally important for the criminal pre-trial phase is Article 5(4), the *habeas corpus* provision of the Convention. This requires that all detainees have the right to take judicial proceedings to test speedily the lawfulness of their detention. Again, through its jurisprudence the Court defined the terms "court"²⁶ and "speedily."²⁷ The leading cases on this matter are *X v U.K.* [(1981) A/225-B] and *Winterwerp*. These mainly concerned convicted persons that were ordered to be detained in mental hospitals under the power of the Mental Health Act in the U.K. These cases were followed by *Weeks* [(1987) 10 EHRR 293], where the EcrTHR adjudicated on the matter of prisoners serving discretionary life sentence. The same matter was discussed in *Koendjihari* [11497/85 13EHRR 820] and *Keus* [(1990) 13 EHRR 666] against the Netherlands. All these judgments were followed by legislative amendments (e.g., the U.K. introduced the Mental Health Act 1983²⁸).

According to the Court, the right of Article 5(4) should be subjected to “the rule of reason,” since national courts “can not be mandated with an endless stream of identical requests.” Repeated litigation involving mentally ill patients had posed many problems to the Strasbourg authorities. Therefore, in *Golder* [(1979-80) 1 EHRR 524], the Court decided to introduce the notion of “implied limitations” for the right, noting, however, that mental illness cannot justify impairing the very essence of the rights under 5. The Court added that legal representation should, as a rule, become available to all detainees challenging the lawfulness of their detention.²⁹ This should be seen as a rule applicable throughout the Council.

Finally, the CPT noting the absence of uniformity in Europe on the matter of legal assistance to the detainees issued the Sixth General Report,³⁰ aiming at reaching a common understanding for these rights. Although some very strict provisions were introduced in that Report, States have not yet complied fully, principally because police tends to object with the presence of a lawyer who they believe will persuade the accused to refrain from confession.

The Right to a Fair Trial (Article 6)

Article 6 has a position of pre-eminence in the ECHR, mainly due to the great number of applications it has attracted. One of the most serious problems that the EcrtHR faced in relation to this Article was the different understanding that the two European criminal justice models have of the norms it refers to. Therefore, the need for a homogenous understanding and application of its text by all 46 States became visible.

The best way to go about this was by supplying the contracting parties with a standardized interpretation of the rights protected by the Article. To this end, the Court, through its case-law, clarified what constitutes “determination of criminal charge.” Bearing in mind the different understandings that the various legal systems have of this phrase, and knowing that this could prove to be a serious practical problem, the EcrtHR developed an *autonomous* meaning. This was done in the *Engel* case, where the Court laid down three criteria (the “Engel criteria”) that are to be used by all 46 States when deciding whether an offence is criminal.

The decision also had a lasting and profound impact on Dutch disciplinary military law. In 1989, the law was subjected to a total revision of the

Military Disciplinary Act 1989, which, *inter alia*, created the possibility of an appeal to ordinary criminal courts against the imposition of military disciplinary sanctions. Finally, the Netherlands abolished by statute all disciplinary sanctions depriving a person's liberty.

The test of the *Engel criteria* was confirmed in *Campbell and Fell v U.K.*, where prison disciplinary offences were considered as criminal charges and thus attracted the protection of Article 6. This decision resulted in a change in the guidelines followed by British courts in the granting of legal representation, but most importantly, concluded to an overhaul of their disciplinary system.³¹ In addition, the British police's arrest powers (Emergency Provisions Act 1978) were abolished after an official report which criticized the statute's incompatibility with Article 5(1)c, requesting the enactment of the Emergency Provisions Act 1987.³²

In the *Ozturk* case [(1983) A73], the Court decided that regulatory offences can fall within the meaning of a "criminal charge," while many other offences which were not classified as criminal by national laws can now prove to have criminal characteristics under ECHR standards. Some examples are price-fixing regulations [e.g., *Deweere v Belgium* (1980) 2 EHRR 439], customs code [*Salabiaku v France* A/141-A (1988) 13 EHRR 379], police regulations forbidding public demonstrations [*Belilos v Switzerland* (1988) 10 EHRR 466], and rules of competition in tendering for contracts [*Société Stenuit v France* (1992) A 323-A].

The consequences that followed the *Ozturk* case constitute another good example of ECHR's jurisprudence influencing not only the accused State's legal order but also other members of the Council. For example, the decision led Germany to amend the Code of Criminal Procedure and the Court Costs Act,³³ while all members imported into their domestic legal orders the "*de minimis* rule" introduced by the Court. According to this rule, a sanction can be deemed criminal in nature depending on its seriousness. The impact of this case was also apparent in the Dutch legal system. For instance, in 1985 the tax chamber of the Supreme Court held Article 6 to be applicable where fiscal fines might be imposed.

Finally, an *autonomous* meaning was also given by the Court to the word "charge" in the Article. In the *Deweere* case, the term was defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or some other act which carries "the implication of such an allegation and which likewise

substantially affects the situation of the suspect.” Again, the Court pointed out that the term is to be given a “substantive” and not a “formal” meaning, so that it is necessary to “look behind the appearances and investigate the realities of the procedure in question.”

Probably the most creative interpretation of the Convention is the one given in *Golder*, the first case brought in Strasbourg against the U.K. This involved the question of whether the restrictions on a convicted prisoner’s access to a lawyer were contrary to Article 6. The Court found that by preventing access to legal advice, the right to have access to court was violated. After this decision, the U.K. government changed the Prison Rules 1964 to permit prisoners access to a lawyer.³⁴ The same positive response was observed by the Netherlands after *le Compte v Belgium*, which, along with the Belgian law, made the Dutch reconsider the applicability of Article 6 in disciplinary proceedings against practicing lawyers and doctors.

Arguably, the right to a fair trial, the core guarantee of Article 6, has an open-ended residual quality, and this allowed the Court to add further specific rights not listed in the Article. For example, in order for this right to be effective, it has to be exercised “within a reasonable time.” On many occasions, the Court had the opportunity to specify what this term means, establishing common standards for all 46 States.

For example, in a number of cases against Italy [e.g., *Salesi* (1996) EHRLR 66], the Court laid three principles under which the “reasonableness” of the length of criminal proceedings is to be assessed. For the Strasbourg authorities these start from the moment a formal “charge” is brought against the applicant, and end when the “charges are finally determined or the sentence imposed becomes final.”³⁵ What is also important is that States show that they had acted with deliberate speed.

Delays in criminal proceedings mainly concern inquisitorial systems where court assessment is primarily based upon the dossier of the case, which can take considerable time before it is deemed complete. This is confirmed in *Abdoella v Netherlands* [(1992) A248-A], where the Court found that delays in appellate proceedings were in violation of the Article. The delay did not amount to more than two years and the Court admitted that the proceedings in their totality were not unduly long, but two periods of inactivity were deemed unacceptable. On the other hand, very few cases of reasonable time were brought against the U.K., which follows adversarial procedures. One of these was *Orhin v U.K.* [(1983) 6 EHRR 391]. This

resulted in a remarkable response by the British government, which increased the number of its judges and set time-limits on the different stages of criminal proceedings with the Prosecution of Offences Act 1985.

Another core element of the “fair trial” notion is the independence and impartiality of the judiciary. The Court repeatedly emphasized the importance of the application of the English law doctrine: “justice must not only be done, it must also be seen to be done.” Through its jurisprudence, the Court provided member States with two kinds of tests (objective-subjective), which have to be successfully passed so as questions of impartiality can be dismissed.

For example, in *De Cubber* [(1984) 7 EHRR 236] and *Oberschlick* [(1991) 19 EHRR 389], a violation was found, because the trial judge had participated in the pre-trial phase. Additionally, the case of *Hauschildt* [(1989) 12 EHRR 266] against Denmark provoked a great debate in the Netherlands, as the Dutch Supreme Court refused to accept that members of Dutch courts should be disqualified from participation in public hearings if they had previously been involved in deciding on pre-trial detention. A few years later, however, the Dutch government adjusted the legislation in the fear of being referred to the EcrtHR.³⁶

The jurisprudence of the Court also showed that in order to secure independence in the judiciary, a list of guarantees needed to be attributed to the judicial members. For example, in *Le Compte v Belgium* [(1987) 10 EHRR 29], the presence of legally qualified members was found to be a strong indicator of independence, while in *Sramek v Austria* [9890/79 (1984) A84], the regional authority in land-dispute, which was composed of three civil servants from the local government, created doubts about their independence. While the *Le Compte* case led to the modification of the Belgian as well as the Dutch law, the *Sramek* case set the example for other member States who amended domestic laws that allowed government officials to stand as judges in land-disputes. Finally, in the *Demicoli* case [(1991) A210], Malta was found to be in violation of Article 6(1), because the House of Representatives in a hearing of a matter related to two of its members did not qualify as an “impartial tribunal.” After the Court’s judgment, the Maltese House of Representatives Ordinance was amended.³⁷

Article 6(1) also guarantees the right to a public hearing and a public pronouncement of the judgment. While the former brought troubles to inquisitorial systems, the latter complicated matters for adversarial countries. To

explain, the first guarantee aims to “protect litigants from the administration of justice in secret with no public scrutiny.”³⁸ This became relevant to the inquisitorial way of delivering justice, as the public hearing of the courts’ consideration is often limited to the written pleadings and the evidence gathered in the dossier. On the other hand, the courts in the adversarial systems do not pronounce their decisions in public, but are kept to the “guilty or not” verdict, which was not considered by the court to be sufficient. The application by the Court of these two standards shows how much the two models can learn from each other.

Article 6(2) and the right to be presumed innocent is directly related to the evidentiary burden of proof principles and the way in which courts penalize defendants’ costs or issue qualified acquittals (Kokott 1998). Arguably, the most important decision regarding this right is *Salabiaku v France*. This concerned presumptions of law and fact, which had considerable impact on French law and on the legal order of other members. For instance, the Dutch Supreme Court held in a 1988 decision that alterations need to be made to the Dutch fiscal law, because it imposed the burden of proof on the taxpayer, a provision that violated the presumption of innocence under Article 6(2).

Very important in our discussion is the right to call and cross-examine witnesses, because the two families of criminal proceedings differ on the matter considerably. The civil law judge, during the trial process, does not put the same weight on witnesses’ testimonies, as the judge relies on the dossier and the pre-trial investigation, which of course is not conducted by the police, as in the common law systems, but by an independent investigating *magister*. An example of harmonizing case-law may be found in the *Kostovski* case [(A/166 (1989) 12 EHRR 435)]. The Netherlands was found to be in breach of Article 6(3)d, as its national courts, based on the domestic Code of Criminal Procedure, convicted the applicant on the sole basis of a statement made by two anonymous witnesses. Although the use of hearsay evidence may be used during investigation, the Court said, the right of the accused to challenge this evidence must be respected at all times. Following the Court’s decision, the Dutch Supreme Court, redefined the conditions under which statements of unidentified witnesses may be acceptable as evidence (NJ 1990, No 692). More importantly, in 1993 the Netherlands amended its Code of Criminal Procedure, introducing a set of conditions for using statements of anonymous witnesses as evidence.³⁹

Discussion

The Three Most Important Impediments Hampering the Harmonization Process

The above list of cases, policy adaptations, and legislative amendments was not meant to be exhaustive but rather illustrative of the interplay in which different powers engage in the region of Europe through the judicial activities of the Council. With the interpretation and application of human rights standards that are enshrined in the ECHR, this regional body aspires to bring greater unity among its 46 members and safety in the continent. The effect of the Court's jurisprudence on national policies and legislation bears evidence of the harmonization process that has started and could possibly lead to convergent criminal justice systems in Europe. As illustrated, the Court's case law lays principles that are generally applicable throughout the Council and do not simply concern the accused States. The examples that were provided showed that disrespect or infringement of these common law principles laid by the Court will result in the same State—or any of the 46 members—being brought again in front of the Council's judicial authorities. This practice is expected to gradually collapse traditional divides such as the one between criminal justice models, and also harmonize national legal systems so that they understand and apply human rights norms in the same way. Ultimately, this will hopefully create what Francesca Klug calls a "human rights culture" (Klug 2000).

However, it would be naïve to believe that this harmonization process would face no impediments. Here, three of these obstacles will be discussed. The first is to be found in the Convention's Articles. Unable to convince national governments to accept a complete collapse of their sovereignty, the Council introduced the notion of "margin of appreciation." In general terms, it means that members are allowed a certain measure of discretion, subject, of course, to European supervision. This can refer to any legislative, administrative or judicial actions they take in the area of a Convention right. The doctrine was first explained by the Court in *Handyside* and *Lawless*. This doctrine, however, has as much to do with diplomacy and although it aided adaptation of the Convention, it also encouraged a number of inconsistencies among member States. In fact, many have claimed that "it is because of this doctrine that ECHR case-law is comparatively underdeveloped in a whole range of areas" (Klug 2001: 14).

The second impediment concerns the war that Western countries have declared on terror. The recent tragic events of September 11 and the consequences of the wars in Afghanistan and Iraq made the threat of terrorism more visible than ever. This created new and increased obligations on behalf of governments to protect their citizens and enhance security. Over the last five years, new anti-terrorism legislation and executive measures have been introduced in the hope of meeting these obligations. Special powers have been handed over to the executive and *ad hoc* procedures have been introduced with the belief that these will increase effectiveness and reduce the risk of terror. However, while doing so, a number of human rights and civil liberties are put in danger, or on hold, until the “crisis is resolved.”

James Madison once said: “Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended from abroad” (Letter of James Madison to Thomas Jefferson, May 13 1798). How true these words sound when considering, for example, the most recent anti-terrorism legislation in the U.K. The Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, and the Prevention of Terrorism Bill 2005 have exposed the British government to a number of criticisms mainly coming from international NGOs such as Amnesty International (2002) Human Rights Watch (2001) and other national human rights groups such as JUSTICE (2005) and Liberty (2005). More importantly, however, the exceptions included in these Acts brought the U.K. before the EcrtHR, which was called to investigate claims that were primarily concerned with arrest and detention powers, detainees’ rights to legal advice and contact with their relatives and entry and staying in the country.

To justify the provisions of its new legislation, the U.K. used Article 15 to derogate from certain sections of Article 5. However, as the first paragraph of Article 15 states, its provisions can be used only “in time of war or other public emergency threatening the life of the nation,” while measures can be employed “to the extent strictly required by the exigencies of the situation and provided such measures are not inconsistent with its other obligations under international law.” In Section 5(1) of the Special Immigration and Appeals Commission Act, the U.K. government stated that the justification of the derogation from Article 5 is that “there exists a state of emergency threatening the nation.” According to the government, this fear is due to foreign nationals present in the country who are “suspected of

being concerned in the commission, preparation or instigation of acts of international terrorism.”⁴⁰

However, the EcrTHR has defined the requirement of Article 15 as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”⁴¹ Undoubtedly, the EcrTHR has been extremely tolerant with the use of Article 15 because of the fear spread among the Council’s members after the recent terrorist events. However, the Article’s “time of war” and “public emergency” criteria, by definition, can only exist within a certain period of time and cannot extend infinitely.⁴²

The third and probably most important impediment is the imperialistic foreign policy of certain countries. Here, the example of Cyprus will principally be used. In a revealing interview in the *Turkish Daily News*, Turkish ambassador Yuksel Soylemez explained why the Cypriot problem has gained so much urgency and momentum. He said: “Above all else, because the strategic island of Cyprus is part of the ‘grand new design’ of the extended map of the Middle East. This map encompasses the sources of power and oil and natural gas in Iraq, Kuwait, Saudi Arabia, the Caucuses, Azerbaijan, Kazakhstan and Turkmenistan. In other words, the new extended map of the Middle East includes in addition to the above, Iran, Afghanistan and some States bordering China and Russia as drawn by the Pentagon cartographers of the US. This map certainly includes the strategic ‘aircraft-carrier’ island of Cyprus” (*Turkish Daily News*, February 23, 2004).

After thirty-one years of unfruitful negotiations between Greek and Turkish Cypriots, the United Nations (UN), through the Secretary General, presented to the two communities, what they called, “The Comprehensive Settlement of the Cyprus Problem.” It is not the intention of this paper to analyze this plan in depth, which is anything but “comprehensive.” However, what is indeed relevant here is the role of different foreign powers in undermining the enforceability and uniform application of the Articles listed in the ECHR through this particular UN plan.

To explain, the Cypriot problem has often been the issue of adjudication by the Strasbourg authorities involving some of the most fundamental rights of the Convention including the right to life [e.g., *Cyprus v Turkey*, 4 EHRR 482 (1976) Com Rep]. In all occasions, Turkey was found to be in breach⁴³ but nonetheless remained indifferent to the Court’s decisions mainly claiming that these were more the result of political

motives rather than legal circumstances. For example, one of the most serious breaches of the Convention was found in *Aksoy v Turkey*, where Articles 3, 5 par 3 and 13 were violated, while it became impossible to investigate the death of the applicant, which occurred *after* he had been released from custody and filed his complaint for the treatment suffered by the Turkish police authorities.

The case of *Loizidou v Turkey* [40/1993/435/514] is also relevant. In 1989, a Cypriot national filed an application against Turkey holding its government responsible for human rights violations in the northern part of Cyprus, which is still under the overall control of the Turkish armed forces. This mainly concerned her right to access and use of property. The decision was taken in 1996 and imposed considerable fines on the Turkish government, requesting its authorities to allow Mrs. Loizidou to enjoy her right. This was, of course, ignored by Turkey who was called again in 1998 to comply. This was followed by Interim Resolutions in 1999, 2000, and 2001, which were adopted by the Committee of Ministers⁴⁴ who urged Turkey to conform to the Court's decision. The importance of this development is twofold.

Firstly, Turkey seems to constitute the best example whereby the enforcement machinery of the Council seems to fail. This weakness of the Court to enforce its decisions is one of the dimensions of this third impediment as it places an important barrier to the Court's harmonizing jurisprudence. It puts a stop to the general applicability of the rules and principles developed through the Court's decisions, and creates legislative and judicial vacuums making the authority of the Council appear soft and theoretical. The counter-argument is that by providing the Court with powers to impose its decisions, the very concept of democracy that this jurisprudence hopes to create will fall apart (although certain pressure mechanisms have now been provided to the Strasbourg authorities).

Secondly, with the admissibility and positive adjudication of the *Loizidou* case, the Court established a legal precedent which could be used by thousand of similar cases from Cypriots whose property rights have been under continuous breach since Turkey's invasion in 1974. This, of course, was not something that Turkey was willing to allow. However, withdrawal from the Council or the ECHR would damage severely its current application for EU membership.

But there could be a way out for Turkey via the Secretary General's "comprehensive plan." Through its fifth Article, Mr. Annan tried to introduce

a binding obligation on both Cypriot communities whereby any pending claims concerning the violation of property rights of Cypriots on behalf of Turkey would be withdrawn after the ratification of the proposed Constitution. More importantly, against all basic principles of the legal doctrine and the rule of law, Article 5 also forbade the filing of new cases that would use a legal or factual basis similar to the one used by Ms. Loizidou.

After the rejection of this plan by 76 percent of Greek-Cypriots, Mr. Annan said in his report: “Another key *Turkish Cypriot* concern related to the legal security of the settlement from challenge in EU courts or in the EcrthR...[Regarding the latter] the finalized plan elaborated on this by including draft letters by which the federal government would inform the President of the EcrthR that the settlement established a domestic mechanism for dealing with claims to affected property and that to this end the ‘United Cyprus Republic’ would be the sole responsible State party concerning such matters.”

It is highly questionable how this would benefit the Turkish Cypriots. What was apparent, however, was that it removed Turkey’s responsibilities for the illegal occupation and use of the claimants’ property, shifting the obligation for compensation to the constituent State who, in fact, had been the victim of this violation for over 31 years.

The effect that this plan had—even in its rejected version—on the application of the ECHR is reflected in the pending case of *Xenides-Arestis v Turkey* [46247/99]. Here, the applicant—using the precedent of the *Loizidou* case—asked for compensation and discontinuance of the violation of her property right by Turkey. The accused State, however, denied responsibility claiming that the Greek-Cypriot community had rejected the UN plan which—as Turkey had hoped—would have “resolved” (or to be more accurate, dissolved) all pending cases using Mr. Anan’s grounds. (While this Article was prepared for publication, the Court adjudicated on this case, dismissing Turkey’s arguments, finding it in breach of the Convention. The impact of this ruling is yet to be seen.)

Nevertheless, it is doubtful that the idea to use this plan to resolve this matter was a Turkish product. Ambassador Soylemez said in his interview:

It is the Bush administration that is determined to solve the Cyprus problem. This will facilitate putting together one part of the jigsaw puzzle of the grand design of the extended Middle East. Let me add

that it is to the advantage of...Turkey that the question be solved now rather than later to facilitate even guarantee the start of Turkey-EU negotiations...This is why Prime Minister Tayyip Erdogan was so astonishingly forthcoming in his new initiative first in Davos and later at the White House...He was in the White House with President George Bush to repair and reconstruct Turkish-American relations which were badly damaged because of renegeing on promises about Iraq...[accepting the Anna plan] was indeed a huge gamble [for the Turkish Prime Minister]. But remember the dictum 'no risk no gain'. He took a calculated risk and he knew he had to take it to ensure Turkey's candidature for the EU. He realized that the Bush administration was as much behind the idea of the plan as its main author. It was an American plan as much as it was a British plan." (*Turkish Daily News*, February 23, 2004)

Even if we are still not ready to accept half of what this Turkish ambassador said about Mr. Kofi Annan's initiative, one thing is certain. The hypothesis of the existence of a harmonizing trend to unify criminal justice systems using the foundations of pure legal principles inspired and sustained through human rights norms might seem far-fetched for the time being. The overriding of these rights by powers of interest and foreign policy make the harmonization process look like a complete waste of time.

What is also very disappointing is that one of the most important institutions of the UN, the Secretary General, seems to be biased towards the achievement of foreign agendas. Ambassador Soylemez said: "Undoubtedly, the Secretary General needs a success for the UN. He is staking his reputation on the success or the failure of the efforts. In other words he too has taken a calculated gamble, but he must have been given assurances that this time was not like any other time. Success is almost at hand for the UN. The success of a solution, whatever form it may take was virtually guaranteed from the time Bush told Erdogan in the Oval Office: 'Solve the Cyprus problem' and Erdogan as a Turkish samurai immediately promised he would do so" (*Turkish Daily News*, February 23, 2004).

Conclusion

This article provided evidence of a harmonizing influence that is exerted on the criminal justice systems of Europe through the jurisprudence of the

European Court of Human Rights. This harmonization process was observed through an account of some of the most important criminal cases that were brought before the Court and concerned human rights principles that are enshrined in the European Convention on Human Rights. Although this analysis leaves us with no doubts as to the significance of the Court's jurisprudence in joining a number of other harmonizing factors that promote unity and convergence of Europe's criminal justice systems, the discussion around three of the most important impediments that may seem to hamper this development showed that harmonization not a straightforward process. The "margin of appreciation" doctrine, the recent anti-terrorism policies/legislation, and finally, the foreign policy of certain countries undermine the Court's attempts for a homogenous application of the human rights principles underlying the ECHR. In fact, it appears that these three impediments, which were presented only as illustrative and not as exhaustive examples, are taking Europe back to "dark ages."

NOTES

- 1 Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the U.K.
- 2 See, for example, Klug (2000).
- 3 See, for example, Joint Committee on Human Rights (2003).
- 4 Even the text of the ECHR often refers expressly to the internal legal order (e.g., "in accordance with the law"). See, for example, Article 8(2).
- 5 For example, *Malone v U.K.*, 8671/79 [1985].
- 6 *Infra* notes 10-11, 18-19, 21, 24, 27, 28-30, 33, and 35.
- 7 This refers only to "primary" and some types of "secondary" EU law (i.e., Regulations and Directives). Decisions, Recommendations and Opinions are without direct applicability, but binding.
- 8 See also *Farrell v U.K.* (1982) 30 DR 96.
- 9 *Soering v U.K.* (1989) 11 EHRR 439, p.34, par 88.
- 10 *Ireland v U.K.* A 25 para 239 (1978).
- 11 Resolution (78) 35 of the Committee of Ministers, acting under A54, adopted on 27 June 1978.
- 12 See a report prepared by the Council at (<http://www.echr.coe.int/Eng/EDocs/EffectsOfJudgments.html>).
- 13 *Ibid.*

- 14 Resolution DH (90) 8 of the Committee of Ministers, acting under
A54, adopted on 12 March 1990.
- 15 HR 30 March 1990, [1991] NJ 249.
- 16 *Loc cit supra* note 8.
- 17 Article 10 of the ECPTIDT.
- 18 See, for example, public statement on Turkey: CE 1993a and CE
1996e.
- 19 *K v Austria* A/225-B (1993) Commission Report.
- 20 A 22 para 91 (1976).
- 21 *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34, par 45.
- 22 Resolution DH (82) 2 of the Committee of Ministers, acting under
A54, adopted on 24 June 1982.
- 23 Resolution DH (84) 7 of the Committee of Ministers, acting under
A54, adopted in 1984.
- 24 *Funke v France* (1993) 16 HER 297, *Van de Hurk v Netherlands*
A/288 91994 18 EHRR 481.
- 25 Resolution (77) 10 of the Committee of Ministers, acting under
A54, adopted on 2 of April 1977.
- 26 *Chahal v U.K.* (1997) 23 EHRR 413; *Winterwerp v Netherlands*
(1979) 2 EHRR 387.
- 27 *E v Norway* Appl 11701/85 17 EHRR 30 and *Luberti v Italy* (1984)
6 EHRR 441.
- 28 Resolution DH (83) 2 of the Committee of Ministers, acting under
A54, adopted on 23 March 1983.
- 29 *Megyeri v Germany* (1993) 15 EHRR 584, *Bouamar v Belgium*
(1987) 11 EHRR 1
- 30 Doc. CPT/Inf.(96) 21, p. 7.
- 31 Resolution DH (86) 7 of the Committee of Ministers, acting under
A54, adopted on 27 June 1986.
- 32 Resolution DH (91) 39 of the Committee of Ministers, acting under
A54, adopted in 1991.
- 33 Final Resolution DH (89) 31 of the Comm of Ministers, acting
under A54, adopted on 10 Nov 1989.
- 34 Resolution (76) 35 of the Committee of Ministers, acting under
A54, adopted on 22 June 1976.
- 35 *Eckle v Germany* (1982) 5 EHRR 1, par 77.
- 36 This view was confirmed in *Sainte-Marie v France, Sainte-Marie v*
France (1992) A 253A.

- 37 Resolution DH (95) 211 of the Committee of Ministers, acting
under A54, adopted on 11 Sept. 1995.
- 38 *Pretto and Others v Italy* A/71 (1983) 6 EHRR 182.
- 39 Resolution DH (94) 47 of the Committee of Ministers, acting under
A54, adopted on 19 June 1994.
- 40 2001 Notification by the British Secretary of State of the derogation
from Article 5 ECHR to the Secretary General of the Council of
Europe.
- 41 *Lawless v Ireland* (1961) A3.
- 42 Human Rights Watch and Amnesty International has criticised this
derogation and the basis on which the British government laid its justi-
fication; See Amnesty International (2001) and Human Rights Watch
(2004).
- 43 For example, Application No. 25781/94.
- 44 Committee of Ministers Resolutions of 6 of October 1999, 24 of
July 2000, and 26 of June 2001.

REFERENCES

- Amnesty International. 2001. "UK: Creating A Shadow Criminal Justice System in the Name of 'Fighting International Terrorism.'" Available at (<http://web.amnesty.org/library/index/engEUR450192001?Open>).
- _____. 2002. *UK: Rights Denied. The UK's Response to 11 September 2001*. London: Amnesty International.
- Davies, M. and H. Croall. 1998. *Criminal Justice: An Introduction to the Criminal System in England and Wales*. London: Longman.
- Delmas-Marty, M. 1995. *The Criminal Process and Human Rights: Towards a European Consciousness*. Dordrecht: Martinus Nijhoff Publishers.
- Harris, D.J., M. O'Boyle, and C. Warbick. 2001. *Law of the European Convention on Human Rights*. London: Butterworths.
- Human Rights Watch. 2001. "Commentary on the Anti-Terrorism, Crime and Security Bill 2001." Retrieved January 8, 2005. Available at (<http://www.hrw.org/>).
- _____. 2004. "Is Derogation Warranted?" Available at (<http://www.hrw.org/backgrounder/eca/uk/4.htm>).

- Joint Committee on Human Rights. 2003. *The Meaning of Public Authority under the Human Rights Act*. Joint Committee on Human Rights.
- Jorg, Nico, Stewart Field, and Chrisje Brants. 1995. "Are Inquisitorial and Adversarial Systems Converging?" In *Criminal Justice in Europe: A Comparative Study*, edited by P. Fennell, C. Harding, N. Jorg and B. Swart. Oxford: Clarendon Press.
- JUSTICE. 2005. "Briefing on the Prevention of Terrorism Bill." London: Justice.
- Klug, F. 2000. *Values for a Godless Age: The Story of the United Kingdom's Bill of Rights*. London: Penguin Books.
- _____. 2001. "The Human Rights Act: Basic Principles and Values." *Journal of Local Government Law* (2): 41.
- Kokott, J. 1998. *The Burden of Proof in Comparative and International Human Rights Law*. The Hague: Kluwer Law International.
- Liberty. 2005. "Prevention of Terrorism Bill: Liberty's Briefing for Second Reading in the House of Lords." London: Liberty.
- Morgan, R. 1998. "Another Angle on European Harmonization: The Case of European Committee for the Prevention of Torture." In *The New European Criminology: Crime and Social Order in Europe*, edited by V. Ruggiero, N. South, and I. Taylor. London: Routledge.
- Turkish Daily News*. "Interview with Yuksel Soylemez." February 23, 2004.
- Zweigert, K. and H. Kotz. 1998. *An Introduction to Comparative Law*. 3d ed. Oxford: Oxford University Press.