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LEGAL TRANSFORMATION AND THE IMPACT OF INTERNATIONAL HUMAN RIGHTS MECHANISMS: THE CASES OF TURKEY AND RUSSIA

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Abstract:

This paper compares Turkey and Russia with respect to their implementation of international human rights law. Both countries have entered important commitments by accessing to international human rights treaties including the European Conventions on Human Rights and on the Prevention of Torture. They have thus subjected themselves to enforcement and inspection mechanisms that should lead to an enhanced respect for human rights. Such a development, however, has so far only taken place in Turkey. Following numerous judgments by the Human Rights Court and recommendations by the Committee for the Prevention of Torture, Turkey has implemented legislative and administrative reforms that have led to a substantial improvement in the human rights situation. In Russia, which has only recently acceded to the human rights enforcement mechanisms, such a development cannot be made out so far. However it is submitted that the dynamics of an enforcement mechanism including individual applications, binding Court judgments and effective enforcement by an inter-governmental body like the Committee of Ministers of the Council of Europe are well-designed to lead to positive developments in Russia as well.

Keywords: Human Rights, Prevention of Torture, Implementation, Enforcement, Turkey, Russia.

Özet:

Bu makalede Türkiye ile Rusya uluslararası insan hakları hukukunu uygulama yönünden kıyaslanmaktadır. Her iki ülke, Avrupa İnsan Hakları ve İşkenceyi Önleme Sözleşmeleri'ni kapsayan uluslararası insan hakları

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anlaşmalarının da kabulüyle önemli taahhütlere katılmışlardır. Böylece, insan haklarına saygının artırılmasına yönelik uygulama ve denetim mekanizmalarına tabi olmuşlardır. Fakat böyle bir gelişme, şimdiye dek sadece Türkiye'de gerçekleşmiştir. İnsan Hakları Mahkemesi'nin çeşitli hükümlerinde ve İşkenceyi Önleme Komitesi'nin tavsiyelerini müteakiben, Türkiye, insan hakları konusunda önemli gelişimlere yol açan yasal ve idari reformları uygulamaya koymuştur. Sadece, kısa bir süre önce insan hakları icra mekanizmalarına dahil olan Rusya'da ise, henüz böyle bir gelişme kaydedilmemiştir. Fakat, hükümetler arası bir birim olan Avrupa Konseyi Bakanlar Komitesi'nin uygulama konusundaki etkisi, Mahkemenin bağlayıcı kararlarını ve bireysel başvuruyu içeren uygulama mekanizmasının dinamiklerinin de Rusya'da olumlu gelişmelere yol açmak için tasarlanan iyi gelişmeler olduğu ileri sürülmektedir.

Anahtar Kelimeler: İnsan hakları, İşkencenin önlenmesi, Uygulama, Türkiye, Rusya.

Introduction

Human rights law contains rules on how persons should be treated by their own government. In this respect, the approach which was dominant in international law for a long time can best be described as indifference. Well into the 20th century international law has considered human rights protection to be an internal matter of states in which other states were not supposed to intervene. In other words, governments were, under international law, in a way obliged to be indifferent with regard to the suffering of persons in other countries. It was considered to be impossible that international law could grant an individual right to private persons. At the beginning of the 21st century, however, this situation has changed considerably (Nowak, 2003: 16-30).

It was in 1945 that the founding members of the United Nations took a revolutionary step and included the promotion of human rights among the aims laid down in their Charter (UN Charter). The atrocities committed by the German national-socialist government motivated them to make human rights a subject for regulation in international law. In 1948 they adopted the Universal Declaration of Human Rights: a list of rights as a common standard of achievement for all states and peoples.

This declaration had a non-binding character and did not create individual rights. Human rights acquired the force of law only through the process of codification: their description in international treaties which had

to be ratified by states (and today have been ratified by the majority of states). This codification took, at the universal level, about 40 years: we are now in possession of international treaties on civil and political rights, economic, social and cultural rights, on the rights of women and children, against torture and discrimination.

We have found out very much about the content of human rights, but that, unfortunately has not prevented human rights from being violated at a very large scale throughout the world. Since the world conference on human rights took place in Vienna in 1993 human rights experts and activists agree that for human rights law the age of implementation and enforcement is about to begin, or should begin now¹.

In Europe, developments have been somewhat faster than at the universal level. The binding European Convention on Human Rights was adopted as early as 1950 and entered into force in 1953². From the beginning this Convention contained an enforcement mechanism which was subject to a major reform in 1998. Since then everyone within the jurisdiction of a Contracting State can apply to the European Court of Human Rights once he or she thinks that his or her human rights have been violated³. In 1987 the member states of the Council of Europe adopted a special Convention for the Prevention of Torture⁴.

It appears to be generally accepted that economic transformation should go hand in hand with respect for individual human rights as laid down in international human rights instruments. Promotion and protection of human rights are among the political criteria for accession to the European Union as adopted by the European Council of Copenhagen⁵. Respect for human rights is one of the fundamentals and one of the important general aims of the European Union, as expressed in Article 6 of the Treaty on European Union

¹ In the Preamble to the Vienna Declaration and Programme of Action (UN Doc. A/CONF.157/23 of 12 July 1993), governments declare their commitment to the "full realization of human rights", to "prevent the continuation of human rights violations" and to "secure full and universal enjoyment of these rights".

² Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No. 3.

³ Article 35 of the Convention.

⁴ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987, ETS No. 126.

⁵ European Council in Copenhagen, 21-22 June 1993, Conclusions by the Presidency I-13; Bulletin of the European Communities 6/1993, p. 13.

as well as in the Preamble and Article 2 of the draft Constitutional Treaty. Human rights are the basis of the Common Foreign and Security Policy⁶, of the European Neighborhood Policy⁷ and of the Strategic Partnership with Russia⁸.

II. Human Rights Rhetorics and the Spiral Model

However, despite the many promises and commitments to respect and protect human rights it is also rather obvious that we live in times of human rights rhetorics and even hypocrisy. In times where wars of aggression are conducted in the name of democracy progress in the field of human rights protection cannot be measured by verbal and legal commitments alone, but only by assessing the actual reception, implementation and enforcement of human rights norms within the legal order and practice of states, in other words: by having a close look on the actual human rights situation and its possible improvement in a given country. When doing this, it is helpful to consider the typical stages that states may pass on their way from a human rights violating to a human rights respecting country.

Risse, Ropp and Sikkink have examined a number of countries in which the human rights situation had improved over the years, and according to them, such improvements can be described (and partly explained) by a "spiral model" (Risse, Ropp, Sikkink, 1999: 233-250). It appears that the "socialisation" of states in the field of human rights very often passes through five phases: in the first phase, *repression*, people live in a state where human rights are massively violated. People try to establish domestic human rights organisations, to document human rights violations and bring them to the attention of the international community including international human rights NGOs. If they succeed, the human rights situation in this country is on the international agenda, and the government must somehow answer to these charges. Very often the reaction will be *denial* which is the second phase of the model. Governments may deny that the international community is entitled to discuss the situation of individuals in their territory, citing the principle of non-intervention in internal affairs. They may also deny the existence or scope of a particular human right or the

⁶ See, Article 11 para. 1 of the Treaty on European Union.

⁷ See, as the most recent reference, European Parliament Resolution on the European Neighbourhood Policy (2004/2166(INI)) of 19 January 2006, no. 1, 6.

⁸ Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, of 24 June 1994, Articles 1, 6.

factual basis of the allegations. If the pressure is high enough, however, governments move to the very important third phase of *tactical concessions*. This depends on the strength of the human rights networks and the degree to which the state is vulnerable to external pressure. States enact now policies which claim to safeguard human rights, and they enter into a domestic and international dialogue on human rights protection. This in turn leads to the fourth, *prescriptive phase* which means that states have been brought to accept international and national human rights norms as part of their legal order though not of everyday real life. The dynamics of this process will often lead either to a substantial liberalisation or to a constitutional or governmental change. The last phase of the spiral model is the phase of *rule-consistent behaviour*. In this stage international and national rules on human rights protection are generally respected though occasional abuses are possible.

Risse and his colleagues illustrate their model by conducting numerous case studies (Risse, Ropp, Sikkink, 1999). They do not state that these five steps are taken in each and every case but that many countries where a substantial improvement in the human rights situation has happened have passed these stages. While it is not the purpose of this paper to give a full analysis of developments in the human rights situation in Turkey and Russia in the light of the spiral model, it appears plausible that transition to the *prescriptive phase* where human rights are respected on paper but not in practice is normally achieved before human rights violations disappear in reality.. That means that human rights rhetorics, even dishonest statements made by governments, though not satisfactory from a human rights point of view, can, if seen in historic dimensions, be regarded as an important and necessary step on the way to rule-consistent behaviour.

The present paper deals with the situation in Turkey and Russia. These two countries have in common not only their geographical situation connecting Europe and Asia. Both countries had, in the past, governments whose priority was not to protect human rights and faced considerable problems in this field. Towards the end of the 20th century, however, both countries acceded to the enforcement mechanism under the European Convention on Human Rights and to the inspection system under the European Convention on the Prevention of Torture⁹. The paper attempts to

⁹ Turkey had been a Contracting Party to the European Convention of Human Rights since 1954, but did not recognise the right to individual petition until 1987. Russia acceded to the Convention in 1998.

analyse developments in the light of the standards laid down in these two conventions.

III. Human rights law and the national legal order

Article 15 of the Russian Constitution of 1993 provides for the priority of international treaties over national law. In addition, the Constitution itself contains a long list of human rights that cover the content of most human rights laid down in international treaties. The Turkish Constitution of 1982, although created under military rule, also includes a list of fundamental rights of the citizen. Article 90 para. 5 provides that international treaties have force within the internal legal order. Since a Constitutional Amendment was adopted in 2004 international human rights accords have priority over national law that contradicts them. Turkey as well as Russia are Contracting Parties to the European Convention of Human Rights and to the Convention for the Prevention of Torture. So we can see that, all in all, the norms of international human rights law are, from a legislative and theoretical point of view, well-protected in both Turkey and Russia. Both states have at least reached Phase 4 – the "prescriptive" phase of the spiral model. In both countries, however, the implementation of these rules has not been unproblematic.

IV. Implementation and enforcement

1. Current human rights problems in Russia

In Russia, human rights violations as reported by organisations and institutions like Amnesty international (AI, 2005), Human Rights Watch (HRW, 2006) and the U.S. State Department (2004) include numerous illegal executions of civil persons in Chechnya, frequent overcrowding of places of detention to an extent that the conditions must be considered to be degrading, the exercise of pressure by the police on journalists who report on corruption, and the arbitrary non-registration or closure of private (human rights) associations. It is not surprising that at the time of Russia's accession to the Council of Europe in 1996 there was no agreement as to whether Russia had reached a level of human rights protection compatible with the aims and principles of that organisation¹⁰.

¹⁰ For an overview see I. Ziemele (2004). "The EU, the Council of Europe and the OSCE: Possibilities and Limits of a Common Human Rights Policy in Europe". R. Alleweldt et al. (eds.). *Human Rights and the Rule of Law*. Krakov, pp. 165, 171-173.

The judgments given by the European Court of Human Rights in 2005 reflect these problems. In the case of *Khashiyev* the Court found a violation of the right to life with regard to killings of civil persons in Chechnya¹¹. Such a violation was also found in the case of *Trubnikov* where a prisoner had apparently committed suicide; the Court did not establish that an unlawful killing had taken place but held that the lack of an effective investigation did not conform to the Convention¹². In *Romanov* the conditions of detention in a psychiatric institution, long pre-trial detention and trial in absentia was found to be violating human rights¹³. The criminal conviction of a journalist named *Grinberg* for criticism of a Region Governor was not compatible with his right to freedom of expression under Article 10 of the Convention¹⁴.

It must be added that, unfortunately, the lodging of an application with the Court may have serious and tragic consequences for an applicant. In Chechnya, Russian citizen *Anzor Pokayev* was taken into custody after his house had been searched and was found being shot some hours afterwards. His father had filed an application to the European Court of Human Rights in 2003 concerning the disappearance of another son. (AI, 2005)

Similarly, the European Committee for the Prevention of Torture (CPT) has encountered some problems on its visits to Russia. Its task is to visit places of detention, to examine the treatment and the conditions of detention of persons deprived of their liberty. It has certain powers including the power to interview detained persons in private. Subsequently it gives recommendations to the Government proposing, for example, to strengthen formal safeguards like access of any detainee to a lawyer or a doctor. Its reports are confidential but it can issue a public statement if the Government refuses to cooperate or to improve the treatment of detainees in the light of the Committee's recommendations¹⁵.

With respect to Russia, the CPT has so far issued two public statements on the situation in Chechnya and one report concerning a visit to Russia in 2001. The co-operation encountered by the CPT was described as being only partly satisfactory. Inter alia, the CPT was incorrectly informed so that

¹¹ *Khashiyev and Akayeva v. Russia*, Judgment of 25 February 2005, para. 147.

¹² *Trubnikov v. Russia*, Judgment of 5 July 2005, paras. 78, 95.

¹³ *Romanov v. Russia*, Judgment of 20 October 2005, paras. 83, 101, 113.

¹⁴ *Grinberg v. Russia*, Judgment of 21 July 2005, paras. 26-35.

¹⁵ European Convention on the Prevention of Torture (n. 6), Articles 7-11.

it traveled to non-existing detention facilities whereas there were other places of detention whose existence was not communicated to the CPT¹⁶.

In the course of criminal investigations, the main aim of the Russian Militia appears to be to extract a confession out of suspects with all available means including torture and ill-treatment¹⁷. At the time of the CPT's visit (December 2001) it was clear that a new Code of Criminal Procedure would enter into force in 2002 which stipulated that confessions made without the presence of a lawyer and not confirmed by the suspect in court, are not admissible evidence. The CPT welcomed these provisions, but expressed doubts as to their actual impact on future behaviour of Militia officials. The CPT delegation spoke to many members of the Militia of all ranks about their thoughts on these reforms, and the "consistent and unwavering" response was that the new provisions were unlikely to generate any significant effects on the practice and culture of interrogations carried out by the Militia¹⁸.

The general picture is that in Russia, by and large, the correct legal rules may be in force, but in many cases they are disregarded by the Russian authorities.

2. The situation in Turkey

In Turkey, many allegations of torture were raised in particular in the aftermath of the military coup in 1980. A state application claiming, inter alia, violations of the prohibition of torture was lodged with the European Court of Human Rights; this case ended in a friendly settlement in the context of which Turkey entered a number of commitments in order to improve the protection of human rights¹⁹. Some patterns in the human rights situation in Turkey have been similar to that of Russia. The CPT began its regular visits in 1990, and in its first public statement of 1992 the Committee complained about the lack of co-operation from the part of Turkish authorities and, inter alia, about attempts to remove prisoners to

¹⁶ Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 17 December 2001, CPT/Inf (2003) 30, para. 8.

¹⁷ See, CPT Report (n. 24), paras. 15-23.

¹⁸ See, CPT Report (n. 24), para. 22.

¹⁹ *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Decisions and Reports of the European Commission of Human Rights 44, 31.

prevent them from speaking to the CPT²⁰. The Committee, in 1992, considered torture and other forms of ill-treatment to be important characteristics of police custody in Turkey²¹. In 1990 Turkey recognised the jurisdiction of the European Court of Human Rights, and after this recognition an ever accelerating avalanche of cases started rolling to the Strasbourg Court. In many of these cases the Court has found that Turkey has violated human rights including the right to life²², the prohibition of torture²³ or freedom of expression²⁴, that persons had been made "disappear"²⁵ or subjected to an unfair trial²⁶.

Turkish authorities did apparently not appreciate to be brought by their own citizens before international courts: a number of applicants were subjected to pressure by police or prosecuting authorities²⁷; one of the first applicants, Mr Aksoy, was killed under unclear circumstances²⁸. After some years had passed, however, things started to change. On CPT recommendations the period of maximum incommunicado detention was shortened considerably, the internal rules on interrogations were amended, and police officers were frequently reminded that torture and ill-treatment are not acceptable methods of work for the police²⁹. On the governmental level numerous initiatives against torture were started, supported inter alia by Council of Europe advice. It took some years until these efforts reached

²⁰ European Committee for the Prevention of Torture, Public Statement on Turkey of 15 December 1992, CPT/Inf 93 (1), para 7..

²¹ *Ibid.*, paras. 4, 21.

²² See, e.g., *Mahmut Kaya*, Judgment of 28 March 2000; *Ağdaş*, Judgment of 27 July 2004; *Şimşek*, Judgment of 26 July 2005.

²³ *Salman*, Judgment of 27 June 2000; *Akkoç*, Judgment of 10 October 2000.

²⁴ *Karademirci*, Judgment of 25 January 2005; *Biröl*, Judgment of 1 March 2005; *Kürkçü*, Judgment of 27 July 2004.

²⁵ *Orhan*, Judgment of 18 June 2002; *Timurtaş*, Judgment of 13 June 2000; *Taş*, Judgment of 14 November 2000.

²⁶ *Kolu*, Judgment of 2 August 2005; *Şener*, Judgment of 18 July 2000.

²⁷ *Şarlı*, Judgment of 22 May 2001; *Akdeniz*, 31 May 2001; *Orhan*, Judgment of 18 June 2002.

²⁸ *Aksoy v. Turkey*, Judgment of 18 December 1996, paras. 101-106.

²⁹ Cf., e.g., Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 17 October 1997, CPT/Inf (1999) 2, para. 14-54; Report on the visits from 21 to 27 March and 1 to 6 September 2002, CPT/Inf (2003) 28, para. 28; Report on the visit from 7 to 15 September 2003, CPT/Inf (2004) 16, para. 6.

the level of everyday police activities, but in 2003 detained persons at Turkish police stations stated that their treatment was much better than it used to be, and they were surprised that gendarmes started to inform them as to their rights³⁰. The problem of torture and ill-treatment by the police in Turkey is certainly not solved completely, but it appears that the treatment of persons in police custody has improved considerably.

Further structural human rights problems have been tackled by legislative measures. In 2002 a right to a retrial was introduced for persons that had suffered from an unfair trial, in 2004 the death penalty was abolished with respect to all crimes whether in war or peacetime. Equally in 2004 a more liberal press law and law of associations were adopted as well as a law containing a right to compensation for people who lost their home in the course of the fightings in South-Eastern Turkey³¹.

Still many persons bring cases against Turkey to the European Court of Human Rights. In 2005 their number was approximately 2000; 240 were declared admissible. In 2003, however, the number of applications had been about 4000, in 2003 about 3000³². It appears that there is presently a downwards trend in the number of applications lodged with the Court and a clearly positive trend with respect to the overall human rights situation.

3. Effectiveness of the Convention system with regard to Russia

In Russia the effective application of the European Convention on Human Rights is certainly still in its starting phase. Few judgments have been adopted with respect to Russia in Strasbourg: five judgments in the year 2003, 15 in 2004 and finally 82 in 2005. In 2005, 8000 new applications were filed against Russia and 110 declared admissible.

It appears that once a state has subjected itself to the Convention system applicants, all in all, cannot be stopped. The Convention system has proven to be a slow but to a large extent sustainable mechanism for the protection of human rights. Judgments of the European Court finding a human rights violation have a negative effect on the image of the state concerned, and they also show to governments that human rights violations are expensive in

³⁰ Report on the visit from 7 to 15 September 2003, CPT/Inf (2004) 16, para. 8.

³¹ See, e.g., H. Günügür (2005). "Reforms in the Turkish Legal System in the Context of the Copenhagen Political Criteria". H. Kabaalioglu et. al.. *The Europeanisation of South-Eastern Europe*. Istanbul, pp. 185-192.

³² All statistical information is taken from the Surveys of Activities of the Court, www.echr.coe.int.

that a monetary compensation has normally to be paid as "just satisfaction" to each applicant³³. The Committee of Ministers of the Council of Europe supervises the execution of judgments³⁴ and, in the case of structural deficiencies, expects from contracting states to prevent future human rights violations by introducing changes in domestic legislation and practice³⁵. They will take up the same matter, if necessary, again and again: the debates in the Committee of Ministers constitute an ongoing dialogue on human rights issues, a dialogue which is sometimes missed in other institutions like, for instance, the United Nations Human Rights Commission. Not all cases brought before the European Court are of a highly political nature; the applicant in *Solodyuk* complained of a considerable delay in pension payments³⁶, and 37 judgments adopted in 2005 concerned the non-enforcement of civil court decisions (ECHR, 2005: 22). In *Ryabykh* a domestic civil court had given final judgment for the applicant, but this judgment had been quashed subsequently in a supervisory-review procedure initiated by the president of the civil court. The European Court considered this procedure, which was not subject to any time limit, to be incompatible with the principle of legal certainty and thus unfair³⁷. In such non-political cases which can hardly be (ab)used for political aims it is not very probable that the Russian Government will permanently refuse to enter into a dialogue and to improve the situation in the light of the Court's judgments. In fact, the provisions on the supervisory-review procedure have been amended in 2003 although perhaps not to a sufficiently large extent³⁸. The Code of Criminal Procedure has in fact been amended in 2002, and it appears that, in spite of the expectations on the part of militia officials, Russian courts today actually do not accept as evidence confessions made by suspects in police custody unless a lawyer has been present (U.S. State Department, 2004). In the Committee of Ministers, human rights are discussed on a diplomatic level; the enforcement of human rights in this body is institutionalized, perhaps even bureaucratized, and it

³³ Cf. Article 41 of the European Convention on Human Rights.

³⁴ It is empowered and obliged to do so under Article 46 of the Convention.

³⁵ For details, see www.coe.int/T/E/Human_Rights/execution/.

³⁶ *Solodyuk v. Russia*, Judgment of 12 July 2005.

³⁷ *Ryabykh v. Russia*, Judgment of 24 July 2003.

³⁸ Cf. Committee of Ministers of the Council of Europe, Interim Resolution ResDH(2006)1 concerning the violations of the principle of legal certainty through the supervisory review procedure ("nadzor"), of 8 February 2006.

may be exactly this process which contributes to the long-term effectiveness of the Convention system.

Conclusion

Why is human rights protection of such a crucial importance? Human rights and human dignity are the basis of society, of the *contrat social*. Rule of law means that governments are constituted by law and act through law and not (merely) through power. Once a government ceases to take serious the most fundamental norm of law – to respect the dignity of all people subjected to its rule – the logical consequence will be that the governed will in the course of time lose all respect for the law as well. How can a government which disrespects fundamental rules of law be justified in expecting from its citizens to respect the rules made by this government as "law"? This may be not just a philosophical, but a legal question. Human rights violations are capable of undermining the whole idea of law as binding rules between citizens and governments. Unfortunately, such violations persist in many countries. It must be highly appreciated if governments decide to subject themselves to international control mechanisms like the ones established under the European Convention on Human Rights and under the Convention for the Prevention of Torture.

In sum we see that Turkey has gone far beyond the stage of merely entering commitments: Turkey is moving towards respecting the rules of human rights law. We cannot, as matters stand, draw the same conclusion with regard to Russia. Experience shows, however, that at present there is no need to give up hope. The "spiral model" so far has not been falsified with respect to Russia.

On the other hand, nothing in this paper should be understood to the effect that the implementation and enforcement of international human rights law is something like an automatic process. Not one single case in Strasbourg is won "automatically" – the fight for human rights is painstaking work. We can never be sure that human rights will be secured permanently; the respect for human rights certainly requires the permanent vigilance of everyone.

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