Tagungsbericht

"The Past in the Present: The European Convention on Human Rights, its Historical Roots and Current Challenges"

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Prof. Dr. Helmut Philipp Aust und Dr. Esra Demir-Gürsel

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The workshop took place on 8-9 November 2018 at Freie Universität Berlin. Thirteen speakers participated in the event (for the list of speakers see Annex I). One of the speakers had to cancel his trip to Berlin. Nevertheless, his paper was read and could be discussed. Alongside the speakers, approximately a total number of 10 more invited audiences participated in the event.

The workshop was organized in six parts: an opening session, four panels on different aspects of the workshop theme, and a concluding session (for the programme see Annex II). In addition to the workshop, the event also hosted a public lecture by one of the workshop participants, *Dr. Marco Duranti*,

Opening Session

In the opening session, *Prof. Helmut Aust* welcomed the participants and introduced the crosscutting themes that the workshop will address, namely the discourse of backlash, the investigation into the historical roots of the European Convention on Human Rights (the ECHR) and the question how the European Court of Human Rights (the ECtHR) deals with the historical injustices. He further elaborated on their relation to and importance for broader scholarly currents in international law, human rights law, and the history of the development of human rights law.

Panel 1: Current Challenges: Rising Authoritarianism and Resistance to the Court

The first panel following the opening session addressed the current challenges to the ECtHR, and more specifically the challenges posed by the rise of authoritarian governments within Europe. *Prof. Başak Çalı* (Hertie School of Governance) presented a paper titled "History as an Afterthought: Bad-faith Case Law of the Court under Article 18 of the European Court of Human Rights." Prof. Çalı's presentation focused on the ECtHR's case law with regard to Article 18 of the ECHR, which developed simultaneously with the rise of authoritarianism among the member states. She elaborated on the reasons for and the consequences of the discovery of Article 18 by the ECtHR and its own alarm bell function only in the early 2000s. Following Prof. Çalı, *Dr. Dilek Kurban* (Hertie School of Governance) presented her paper titled "The Authoritarian Slide, Large-Scale Violations and the Limits of the Court." Focusing on the ECtHR's case-law addressing Turkey's Kurdish conflict, she discussed the possibilities and limitations of effective review by an international human rights court of authoritarian regimes. She thus approached authoritarianism among the members of the Council of Europe (the CoE), and for that matter, the limited effectiveness of the ECtHR in the face of authoritarianism not as new but persisting phenomena. The last presentation in this session was that of *Prof. Marten Breuer* (University of Konstanz) with the title "Principled Resistance to the European Court of Human Rights and its Case-Law: A Comparative Assessment." Prof. Breuer analyzed the increasing level of resistance of domestic actors to implement the ECtHR's judgments. He connected this

increase with the rise of populist and authoritarian regimes. He introduced a model, what he named as "principled resistance," to address this phenomenon and comparatively analyzed examples from Russia, United Kingdom, and Italy.

Panel 2: Drafting Histories and Political Contexts

The second panel contrasted these current developments with the drafting history and the origins of the ECHR. First, *Dr. Marco Duranti* (University of Sydney) presented his paper titled "From Culture to Politics to Law: The European Convention on Human Rights and the Postwar European Imagination." He stressed the importance of cultural and political history as an approach for understanding not only the ECHR's past but also its present. Dr. Duranti discussed the original intent of the drafters of the ECtHR and the examples where it is possible to see that the original intent might have constrained its interpretation by the ECtHR. He further argued that a study on the origins of the ECtHR is also helpful to understand the conditions, which can make a stronger human rights regime in Europe possible. This was followed by a presentation with the title "The European Convention on Human Rights and Decolonization" by *PD Dr. Fabian Klose* (LMU München). Dr. Klose reflected on how international human rights became a diplomatic "source of embarrassment" and "anti-colonial threat" for the colonial powers during this period. He argued that the process of decolonization strongly influenced European rights discourses and the position of European states. The last presentation of the first day was held by *Dr. Esra Demir-Gürsel*, entitled "The European Convention on Human Rights as a Mechanism to Protect and Preserve a Liberal International Order." Dr. Gürsel noted that while postwar attempts to codify human rights into international instruments have been criticized for not setting effective limitations on the principle of national sovereignty, the ECHR has been usually singled out as an exception. She argued that what was exceptional about the ECHR was rather the discursive role it played in the formation of political unity in Europe rather than setting limits on the principle of sovereignty.

Public Lecture

The first day of the workshop ended with a lecture by *Dr. Marco Duranti*, titled "The Reinvention of Human Rights as European Values." In this lecture, Dr. Duranti focused on the Treaty on the European Union, as it defines human rights as part of "cultural, religious, and humanist inheritance of Europe." Based on rich archival documents and images, and focusing on crucial moments of the European history, he elaborated on the question how human rights can be both universal and a product of "European heritage." The public lecture was attended by the workshop participants plus members of the broader academic community in Berlin (both from Freie Universität and beyond).

Panel 3: Selected Issues in the Case Law of the European Court of Human Rights

The second day of the workshop started with the third panel addressing the ECtHR's case law dealing with history. The first speaker of this panel, *Professor Aleksandra Gliszczynska-Grabias* (Polish Academy of Sciences), presented her paper titled "Memory Laws in the European Court of Human Rights: Holocaust as the Last Taboo." Dr. Gliszczynska-Grabias discussed how references and comparisons to the crimes of the past, Holocaust, and Nazism, in particular, are assessed by the ECtHR. She argued that "the ECtHR treats more leniently state interference with freedom of expression

when memory about Nazism and the Holocaust should be protected than when a post-Communist state wants to preserve a critical memory about communism." This presentation was followed by another on the ECtHR's case-law with regard to "historical truth" by *Dr. Björnstjern Baade* (Freie Universität Berlin). In his presentation entitled "Historical Truth before the ECtHR," Dr. Baade elaborated on the interaction between history and the jurisprudence of the ECtHR and proceeded from the view that as much as historical memories influence its legal reasoning, its jurisprudence may have an impact on the writing of history. Based on extensive review of the ECtHR's case-law, he argued that "since the ECtHR lacks the resources and expertise to conduct historical research into controversial historical issues in a manner satisfying the scientific standards of the field, it should continue to confine itself to pronouncements on well-established historical facts and of course to the facts that are necessary to decide the case at hand." The third speaker of this panel, *Prisca Feihle* (a doctoral candidate at Freie Universität Berlin), presented a paper titled "Immigration under the European Convention on Human Rights - An Exclusive Universality?". Feihle's presentation focused on both the absence of a right to asylum in the ECHR and limited protection provided by the subsequent regulations relevant to migration in the Protocols added later to the ECHR. She argued that both the silence in the ECHR and its drafting history and states' current criticism against the ECtHR's case-law regarding migration may be related to the subsidiary place given to the individual in international order by international law and the ECHR's affirmation of territorial sovereignty. A final paper by *Prof. Eirik Bjorge* (Bristol University) was read by Prof. Helmut Aust, as Prof. Bjorge himself was not present at the workshop. Prof. Bjorge's paper, titled "Time Present and Time Past: The Current Challenge of Jurisdiction Ratione Temporis," approached the question of jurisdiction *ratione temporis* as an issue connected both to the historical roots and the current challenges. Prof. Bjorge's paper analyzed the ECtHR's recent case-law where the boundaries of its temporal jurisdiction were tested in connection with the failure of effective investigations over crimes committed during World War II before the ECHR was drafted, and during British colonial rule before the United Kingdom recognized the right to the individual application. The paper argued that in such kind of cases the ECtHR tends to make "pragmatic" determinations.

Panel 4: Reflections from a Comparative Perspective

The last panel of the workshop brought comparative insights to the table. The first speaker of the panel, *Prof. Alexandra Huneeus* (University of Wisconsin) delivered a presentation titled "Illiberalism and Human Rights in Latin America" where she focused on the relation between illiberal politics and human rights. Prof. Huneeus pointed to the conflation of liberal constitutionalism with human rights doctrine. She reminded of the historical fact that international human rights instruments were created not only by liberal states but also by communist and authoritarian states. In that framework, she discussed the implications of how populist governments also invoke human rights discourse and institutions in Latin American countries such as Venezuela and Bolivia today. This was followed by a comparative insight from the United Nations Human Rights Committee by *Prof. Yuval Shany* (The Hebrew University of Jerusalem). In his presentation titled "Can Strasbourg be replicated at a global level? A view from Geneva," Prof. Shany reflected on the similarities and differences between the operations of the Committee and the ECtHR, as well as the legal and political environment of their operations. Prof. Shany argued that in the context of the UN, unlike the CoE, the absence of a political unification project and also the conditions

within the institutionally "weaker" setting of the Committee compared to the ECtHR to some extent leave more room for the Committee to independently assess violations more openly and to set in some cases more ambitious normative standards. In the third presentation within this panel, titled "Between the Past and the Future: Human Rights in a Shifting International Legal Order," *Prof. Heike Krieger* (Freie Universität Berlin) contrasted the phase of the human rights project's development after the World War II, based on a clear consensus about the recent past and intended to secure the future against retrogression, with current criticism against human rights. She linked such critical views to a certain overestimation of human rights law as to the role it can play in an armed conflict or in the prevention of democratic regression. She pointed to the difficulty of applying the value-based criteria of human rights into all other fields of law, especially when a consensus about such values is nonexistent.

Concluding Remarks

Within his concluding remarks, *Prof. Helmut Aust* reconnected the insights gained from the different panels and respective discussions to the introductory questions posed. He pointed to the increase of nuance within the discussion brought about by the interdisciplinary exchange. Those resulted in a further clarification that there is not a single backlash discourse, but variegated critiques of human rights stemming from different perspectives, not only from populist movements but also against the adoption of human rights language by illiberal governments themselves. In addition, not only one original intent connected to the human rights project seemed dominant but instead different perspectives, interests, and backgrounds were discussed. In a similar way, the analysis of the case-law of the ECtHR did not bring about the idea of a certain unified historical truth. The interdisciplinary approach was also especially fruitful in further clarifying certain concepts such as liberalism, illiberalism and conservatism by connecting them to their historical background.

Central issues and themes

All of the presentations were followed by vibrant and stimulating discussions. As the group of scholars that came together during the workshop hailed from different disciplinary, methodological and geographical backgrounds, each presentation received enriching feedback. In particular, the following issues that came to the front during two days of long vibrant discussions are as follows:

➢ The dilemmas of unified standards vs. differentiation in jurisprudence when dealing with states sliding into authoritarianism: problems connected to the idea of a certain "good-faith-approach" hindering strong/timely assessments of human rights violations, the application of positive obligations when the state which should offer protection is at the same time the perpetrator of the violence;
➢ The role that authoritarian backsliding might play for the greater European peace project of which the European Convention is a part; these discussions were particularly enriched by the comparative insights from historiography as well as from the perspectives of the universal and Inter-American system of human rights protection respectively;
➢ Historical effects of the development of human rights: which role did human rights effectively play in the process of decolonization;

- Meaning of original intent, its dynamics, and evolution (with the adoption of later Protocols); relation and differentiation of original intent and historical context of the development of the ECHR;
- Historical Development: whether the development of the ECHR intended to protect individuals or was more focused on stabilizing liberal orders/states and/or a conservative worldview;
- The place of the historical roots of the ECHR in the ECtHR's case-law: how much the ECtHR can know and work with its own history or how much such reference to historical roots not backed up with historical research rather tends to construct a certain "imagined narrative;" how courts, in general, are apt to and involved in the construction of memory;
- The different historical and institutional settings in which the compared human rights regimes developed: at which historical juncture the different regimes developed; judicial vs. quasi-judicial; universal vs. regional; risks and benefits of fragmentation; variation of normative standards between those different regimes; difference in approaches such as pragmatic vs. aspirational and their potential connection to compliance/effectiveness;
- How open human rights are to be detached from their specific origins (and what are those exactly) and (re)used in different meanings as e.g. by illiberal regimes backing up their policies with human rights arguments; how prepared/unprepared are human rights treaties to be reconfigured in such a way (e.g. Art 18 ECHR).

II. Outcome of the workshop

The findings of the workshop will be published in an edited volume, which is currently under preparation.

III. Abstract

The workshop has looked at the role of history and historical events for the protection of human rights in contemporary Europe that is facing an authoritarian and populist backslide. It brought together three important debates:
- firstly, the current challenges for the protection of human rights in Europe;
- secondly, the historical roots of the European Convention of Human Rights (ECHR) which was intended to provide an early warning mechanism against a fallback into authoritarianism and totalitarianism and
- thirdly, the way the European Court of Human Rights (ECtHR) has dealt so far in its case law with historical injustices, i.e. the type of situations it was meant to prevent from arising again.

The current rise of authoritarian and populist tendencies poses the risk of turning into a severe threat for a European public order based on the ideals of human rights, the rule of law and democracy – all of which are essential to securing peace and stability in Europe. The workshop has mapped the strengths and weaknesses of the ECHR system to keep its initial promise in the face of this current challenge. It has connected three strands of discussion, which have so far been leading separate lives yet need to be seen together. When thinking about the current challenges for the ECHR system the workshop has confirmed that it is worthwhile to reflect upon the conditions, under which the Convention and its Court were set up. What was the role that the Court was supposed to play in

upholding human rights, democracy and the rule of law when the Convention was drafted? How have these expectations shifted over time? How has the ECtHR defined its role when dealing with cases, which concerned large-scale historical injustices? The workshop has provided a forum for reflection on these issues, which are of great importance for the maintenance of peace and stability in Europe and beyond. The way that the European system of human rights protection will deal with these situations is likely to have repercussions on a global scale.