

Taiwan judicial workers' training programme

ICCPR and judicial practice in France

Yves Charpenel, first advocate general at the supreme judicial court of France

1- The European standards of human rights :

Since the Second world war 3 organizations have been founded to "bring peace and stability" to Europe :

- the **Council of Europe**, to promote the rule of law, human rights and democracy, 47 countries for 800 millions people ;
- the **European Union**, for promoting trade and economic stability for its members, 27 countries for 501 millions people ;
- and the **OSCE** (Organization for security and co-operation in Europe), mostly dedicated to the military security within Europe.

Today these organizations are deeply involved in guaranteeing human rights, as a common rule for all European people.

The global human rights instruments edicted by the United Nations as the UN Charter and the ICCPR are integrated in the European standards.

1.1 The Council of Europe (COE) is the most involved :

Established by the treaty of London in 1949, the COE is based on principles of pluralist democracy, human right and the rule of law.

In order to achieve its objectives, the COE has many instruments which mainly include :

The Convention for the protection of human rights and fundamental freedoms (ECHR, European convention on human rights) inspired by the United nations' Universal declaration of human rights of 1948.

It is a legal treaty adopted in 1950, to protect human rights with enforceable mechanisms.

The treaty deals with civil and political rights which are found in articles 1 to 18.

Articles 19 to 51 list the working mechanisms, and various protocols have included additional rights.

Article 25 obliges the States to accept the European Court of Human rights as having authority to rule over issues from within these States.

The ECHR admits only member States of the COE.

The **European Court of Human rights** (EC) was established in 1953 and is located in Strasbourg near to the European Parliament.

The EC has jurisdiction over COE member States to ensure compliance with the ECHR.

Once a State has accepted that jurisdiction, all EC decisions regarding are binding.

The 47 Judges (one by country) are elected to the Court by the COE parliamentary assembly.

They are independent and elected for a non renewable period of 9 years.

The EC accepts instances of human rights violations from individuals as well as States.

In order that an application should be accepted by the EC, all domestic legal remedies available to the applicant must have been exhausted.

Admissibility must meet 4 criteria :

- a non anonymous petitioner must bring the case to the EC within 6 months after the final domestic ruling on it ;
- the issue must be a violation of a guarantee set forth in the ECHR ;
- the applicant must be a victim (if he has been directly persecuted) ;
- petitioners may not repeat the substance of a previous petition.

Then the EC holds a public hearing with 9 judges to determine if there has been a violation to the Convention.

In rare and important instances, 21 judges can seat in a Grand Chamber.

If the application is declared admissible, the Court advocates try to reach a friendly settlement to find a "just satisfaction", from financial compensation paid by the condemned State to a change of legislation.

In 2011 the EC issued 70 convictions for violation of the right to life, 8% of the whole violations judgements.

An appeal is possible to the Grand Chamber whose judgements are final: all judgements are binding under international law, and may be delivered in Court or in writing.

The condemned States are obliged to prevent similar violations in the future.

The **Committee of ministers of the COE** monitors the Court's judgements to ensure compensation is paid and to assist victims by reopening proceedings.

The Committee also sees if the requisite changes are made following a judgement, such as changes in legislation, case law, rules and practices.

Monitoring is also provided by various **special committees** such as:

- European committee of social rights: for rights to housing, health or non discrimination; monitors the violations of the European social charter.
- European committee for the prevention of torture (CPT): to monitor the treaty on prevention of torture and inhuman or degrading treatment or punishment.

The CPT is used to visiting any institution of detention, unscheduled or not. It writes reports on countries that it visits to make recommendations, and it publishes a "CPT standards" for the treatment of detained persons.

- an Advisory committee of experts monitors, along with the committee of ministers, the convention for the protection of national minorities.
- the European Commission against racism and intolerance (ECRI) was set in 1993 with one member per COE member State, appointed by the governments but independent.

At last a **Commissioner for human rights** was established in 1997 and is elected by the Parliamentary assembly for 6 years.

He has 3 main missions :

- promote human rights education and awareness of human rights ;
- identify areas of laws that fail to recognize human rights to a full extent ;
- promote a respect and enjoyment of human rights in COE State members.

1.2 The European Union :

Established on July 1952, the European Economic Community (EEC) has constantly expanded its missions from economic issues to citizen's rights, mainly after the Maastricht treaty in 1992 (after which EEC became the European Union).

All the members had to ratify the European convention of Human rights, as a prerequisite for joining the EU. This means for example that all members States have abolished the death penalty.

To ensure "freedom, security and justice" the EU has created 5 institutional bodies :

- the European Parliament, which has the power to legislate ;
- the Council of the UE, sharing legislative power mainly in economic policies ;
- the European Commission, executive branch of the EU ;
- the European court of auditors, to supervise the financial operations ;
- the **European court of justice** (ECJ) in Luxembourg, to ensure that European treaties are respected. It looks to decisions of the European court of human rights for guidance in its decision making on human rights issues.

The ECJ has 27 judges, one per member state, and 8 advocates general.

Since 1952, the mission of the ECJ is to ensure the respect for law in the interpretation and the application of treaties
15,000 judgements were delivered.

In the matters of human rights the EU policy is to defend the universal and

indivisible nature of human rights, by promoting and protecting them within its borders and by a partnership with others countries in 4 main areas :

- strengthening democracy (i.e. support political pluralism, free media and sound justice system) ;
- abolishing the death penalty where it still exists ;
- combatting torture by preventive and punitive measures ;
- fighting racism and discrimination.

1.3 The OSCE

Although its missions are mostly on military security the OSCE, established in 1975 by the Helsinki Act has included in its deals the human rights promotion, as a major factor of peace and post conflict rehabilitation.

Three main instruments are dedicated to these issues :

- the Helsinki final act which linked in 1975 human rights and security with 10 guiding principles in accordance with the United Nations Charter of 1945 and the Universal declaration of human rights of 1948 ;
- the Vienna mechanism since 1998, with a regulatory board to investigate accusation of violations coming from one State about another and to require answers through bilateral meetings ;
- the Moscow mechanism since 1991, where independent experts are allowed to resolve human dimension conflicts in member States.

A high commissioner of national minorities and a representative on freedom of the Media were also created to address reports when necessary.

As you can see, Europe has, step by step, created a very complex body of laws and organizations dedicated to the human rights.

Over time the impact has changed deeply the European legal landscape.

The two major positive effects are a progressive harmonization of fundamental and procedural laws, and significant evolution on daily effective compliance of human rights in every member State.

The only reservations that may exist today are the importance of the training effort of all legal servants, and delays growing that lengthens the decisions of the EC due to a proven success.

Now let us see how France has gradually incorporated this broad movement for more effective human rights.

2- The French judicial practice :

The highest court in the French judicial system is the Court of cassation. Its purpose is to ensure the uniform interpretation of the Republic's laws throughout the country via its jurisprudence.

There is one Court for the entire Republic says the judicial code.

The Court checks the legality of decisions that are submitted to it, and regulate the laws and ensures its uniform application.

The Court can quash decision whose dispositions are nullified by a contravention of the law.

With its six specialized chambers, the Court judges every year around 30,000 cases.

After a written submission has been lodged, a judge-rapporteur analyses the written submission and drafts a report.

At the end of the report the judge issues a proposal on how the case should be heard, either by an ordinary or a grand bench, depending on the legal difficulty presented by the case.

The rapporteur draws up an opinion in which he sets out his personal point of view.

The case is communicated to the public prosecutor general's office which issues an opinion on the merit of the submission.

After a preparatory conference a public hearing is held during which the rapporteur presents the case, the parties' advocates can expand verbally their written explanation and the Public prosecutor general's office does the same.

The decision is delivered once the Chamber has completed its deliberation, mostly on the same day.

Statistically , the Cour quashes 5% of the criminal cases and 30% of the civil cases.

The influence of the European Convention on human rights and fundamental freedoms has profoundly changed the methodology for examining appeals submitted to the Court of cassation.

The European Convention of human rights has primacy over French national laws in the hierarchy of norms.

Judges, at all levels, may assess the compliance of internal laws with the European convention, either supplementing or enriching national law or replacing it.

Adherence to the rights of the defence and the principle of equality of arms has in fact raised specific issues in respect of the status of the Public prosecution service in the Court of cassation.

After two judgements of the European court, Reinhardt (31 March 1998) and Slimane-Kaid (25 January 2000), the conclusions of the advocate general are communicated to the parties. The opinion of the rapporteur is no more given to the prosecutor, and prosecutor no longer takes part to the preparatory conference or the deliberation.

Generally speaking, the jurisprudence integrates directly as a national standard all the European laws on human rights.

To take the example of the custody, the Court had to declare contrary to the European Convention the traditionnal system that denied the lawyer access to the files of the case in the custody.

So the rights of defence and the principle of fair trial have led to a change in French law, in order to remain compliant with the principles outlined by French and European jurisprudence

The public prosecutor concluded that the French procedural rules were non compliant with the European Convention when they do not guarantee an equal right for all defendant :

In 2002 the Court put an end to legislation forbidding the defendant absent from a hearing to be effectively defended by a counsel.

In 2004 the Court put an end to the refusal to allow foreign national of States outside the European Union to benefit from various social services.

This decision, based on the human rights standards, had also a great impact on material conditions, since we had to immediately change the operating condition of a measure to more than 800,000 people each year.

The prosecutor office intervenes whenever necessary if internal legislation is contrary to the European Convention of human rights, raising the issue by way of written or verbal conclusions or opinions developed by advocates general before the various benches of the Court.

Otherwise, the prosecutor office carefully monitors through training the courts of first instance and their application of the law of European Convention.

In 2011 France was condemned 23 times by the EC which the same year for all State members issued 987 judgments of violation.

3- The right to life in France :

After the public executions during the reign of Terror, the Convention abolished the death penalty on 15 October 1795 by an Act of "publication of the general peace", on the grounds that it was unjust, with risk of judicial error, and that it was not a deterrent.

Capital punishment was reintroduced in the 1810 penal code by Napoleon.

We had to wait until a law on 9 October 1981 for our present abolition bill.

In 1986 France ratified additional protocol n°6 to the Convention for the protection of human rights and fundamental freedoms.

On 19 February 2007 the French Parliament adopted a bill amending the Constitution according to the ICCPR article 6, prohibiting, at a constitutional level, the death penalty.

France used to support human rights activists campaigning for abolition of the death penalty.

Since 1981 the campaign over restoring the death penalty has become residual.

However French authorities are very attentive to this issue, every time a request for mutual legal assistance or extradition has been made by a country that has not abolished the death penalty.

Several times, notably with the USA, extraditions have been granted with the express consent of the applicant not to state the death penalty.

Since 1981 France has never been condemned by the EC on behalf of

violations of the right to life.

Finally this common duty of a constant improvement of human rights should not be forgotten.

According to Eastern **Mengzi** "happiness and unhappiness are only from ourselves" and to Western **Heraclite** "justice is always a fight".