

Schriften zur Europäischen Integration
und Internationalen Wirtschaftsordnung

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Stefan Kadelbach | Rainer Hofmann (eds.)

70 Years of Human Rights and the Rule of Law in Europe



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Internationalen Wirtschaftsordnung

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Preface

The years of 2019 and 2020 offered the opportunity to commemorate four anniversaries: On 4 November 2020, it was 70 years ago that the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention on Human Rights (ECHR), was signed. Ten years later, the European Court of Human Rights (ECtHR) began its work, so that the Court has been watching over the application of the ECHR for 60 years. The Council of Europe, the ECHR's umbrella organization, had its 70th anniversary on 5 May 2019. Finally, the European Commission for Democracy through Law, the so-called Venice Commission, established in 1990, could celebrate its 30th birthday. These jubilees offer a good reason to take a look at how these institutions have contributed to making human rights and the rule of law a matter of common interest in Europe, and what their present condition is.

The work of these institutions had diverse impacts on furthering European integration. Initially, many thought the Council of Europe would be the organization from which the European Union should originate. Its task "to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress", as it is stated in Art. 1 of its Statute, has been incorporated in the EU's catalogue of aims and values. The ECHR's guarantees have been the basis for the European Court of Justice's case law and the Charter of Fundamental Rights of the European Union. The work of the Venice Commission, another body operating under the aegis of the Council of Europe, is tightly connected with the rule of law framework under which the European Commission monitors critical constitutional developments in EU member states.

The Council of Europe as well as the European Union have recently been confronted with tendencies of renationalization and an emphasis on interests of national governments in the politics of several European states. An increase in reservations concerning the impact of the ECHR and judgments of the ECtHR can be observed at the level of highest courts in some European states. These tendencies, although different in their causes, seem to fit into a global political climate and rough times for individual rights and the rule of law.

Preface

At the 19th Walter Hallstein Symposium, which took place on 5 and 6 March 2020 and the contributions of which are documented in the present volume, the central question was how far these observations can be validated by looking at the practice of the competent institutions. Applying paradigms of political sciences, it might be tempting to divide their history, as is the case with other international institutions, into different phases (such as foundation, consolidation, expansion and backlash). However, the starting hypothesis of the current volume is that this question cannot be answered by an abstract historical periodization, but rather by taking a closer look at the central elements of the European Council's system of values. Therefore, after a reminder of the origins of the ECHR, different protection systems will be discussed from a practitioner's and an academic point of view. A case study will be devoted to the highly sensitive cross-sectoral field of procedural rights flowing from the rule of law. Finally, a contribution will be devoted to the Venice Commission and its impact on the rule of law in Europe, thus also offering a perspective at how further constitutional practice may develop.

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Frankfurt am Main, autumn 2020

Rainer Hofmann

Stefan Kadelbach

Rainer Klump

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Introduction: 70 Years of Human Rights and the Rule of Law in Europe

Stefan Kadelbach and Rainer Hofmann

A. *Changes of Paradigm in International Relations, and the Omnipresence of “Crisis”*

The 1940s, when the Council of Europe (CoE) was conceived and founded, were the phase in history when the institutional architecture came about, which underlies international relations still today. The guiding ideas, inspired by Franklin Roosevelt’s vision of “one world”, were global and regional systems of collective security that would contain war, the reconstruction of the destroyed economies in Europe and elsewhere under the principles of free trade, the free flow of payments and of lending in the spirit of the Bretton Woods agreements, and the elevation of human rights to the level of international norms by the Universal Declaration of Human Rights (UDHR)¹ and, later, by binding treaties.

The fact that the preamble of the Statute of the CoE declared personal freedom and the rule of law to be the fundament of true democracy is the expression of a “constitutional moment” of Europe at an interstate level.² Emphatic observers consider the UDHR, from which the European Convention of Human Rights (ECHR) evolved,³ as the beginning of normative cosmopolitanism.⁴ The continuity between both documents was impersonated by Nobel Prize laureate *René Cassin*, who, as is well known, was one of most influential drafters of UDHR, was Vice President of the European Court of Human Rights (ECtHR) in the year the Court was set up in

1 GA Res 217 (III) of 10 Dec 1948, UN General Assembly Official Records, part I, Resolutions (Doc A/810), 71.

2 Statute of the Council of Europe of 5 May 1949, entry into force 3 Aug. 1949, Council of Europe Treaty Series (CETS) No. 1.

3 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1950, entry into force 3 Sept. 1953, CETS No. 5.

4 *Benhabib*, *The Philosophical Foundations of Cosmopolitan Norms*, in: Post (ed.), *Another Cosmopolitanism – Hospitality, Sovereignty, and Democratic Iterations*, 2006, pp. 20 ff.

1959, and later became its president.⁵ In the years to come, and most particularly from the 1970s onwards, the ECtHR contributed substantially and progressively to the development of a common standard of rights.⁶ The Court began early to refer to itself as a constitutional court.⁷

In order to fulfil its mandate, the CoE has worked out 225 treaties so far, which cover all aspects of law, mostly with a certain ethical connotation, not to mention the numerous instruments of a legally non-binding nature. Among them are important documents such as the European Social Charter,⁸ the European anti-torture convention,⁹ two landmark treaties on the protection of minorities,¹⁰ conventions on bioethics,¹¹ against corruption,¹² against cybercrime,¹³ against trafficking in human be-

5 See *Cassin*, La déclaration universelle et la mise en œuvre des droits de l'homme, RdC 79 (1951), 241 ff.; cf. also *Simmons* Mobilizing for Human Rights, 2009, pp. 23 ff.

6 *Nußberger*, Die Europäische Menschenrechtskonvention – Eine Verfassung für Europa?, JZ 2019, 421 ff.

7 ECtHR, *Marckx v. Belgium*, Ser. A No. 31, p. 26, para. 58.

8 European Social Charter of 18 Oct 1961, entry into force 26 Feb. 1965, CETS No. 35.

9 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 Nov. 1987, entry into force 1 Feb. 1989, CETS No. 126.

10 European Charter for Regional or Minority Languages of 5 Nov. 1992, entry into force 1 March 1998, CETS No. 148; Framework Convention for the Protection of National Minorities of 1 Feb. 1995, entry into force 1 Feb. 1998, CETS No. 157.

11 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention Human Rights and Biomedicine of 1 April 1997, entry into force 1 Dec. 1999, CETS No. 164; Additional Protocol on the Prohibition of Cloning Human Beings of 12 Jan. 1998, entry into force 1 March 2001, CETS No. 168; Additional Protocol Concerning Transplantation of Organs and Tissues of Human Origin of 24 Jan. 2002, entry into force 1 May 2006, CETS No. 186; Additional Protocol Concerning Biomedical Research of 25 Jan. 2005, entry into force 1 Sept. 2009, CETS No. 195; Additional Protocol Concerning Genetic Testing for Health Purposes of 27 Nov. 2008, entry into force 1 July 2018, CETS No. 203.

12 Criminal Law Convention on Corruption of 27 Jan 1999, entry into force 1 July 2002, CETS No. 173; Civil Law Convention on Corruption of 4 Nov 1999, entry into force 1 Nov 2003, CETS No. 174.

13 Convention on Cybercrime of 23 Nov. 2001, entry into force 1 July 2004, CETS No. 185.

ings¹⁴ and against domestic violence,¹⁵ to mention just a few. More than 90 of these conventions were opened for signature after the fall of the Berlin Wall. This event was also epochal in that it opened the CoE to the states of Central and Eastern Europe, so that it today comprises all European states, with the exceptions of Belarus and Kosovo. This means that it has 47 member states today, the territories of which range from Lisbon to Vladivostok and from the polar region to the Mediterranean, so that its law, including the ECHR, applies to 835 million people. Since 1998 and the entry into force of 11 Protocol to the ECHR,¹⁶ the jurisdiction of the ECtHR and the individual complaint procedure is mandatory for all states, so that everyone who sees him- or herself violated in rights enshrined in the ECHR may, after the exhaustion of domestic remedies, file an application before the Court. This cornerstone in the judicial protection system encouraged Court judges and academic observers alike to understand this reform as a further step in a process of “constitutionalisation”.¹⁷

Events of the recent two decades, however, raise the question whether these times are over and whether this narrative of progress has to be rewritten. It is difficult to tell when the edifice of post-war international order began to display its first fissures. Probably, they have been there from the beginning. One may interpret rising criticism of judicial activism by the Court of Justice of the European Communities in the early 1990s as first signs of a rediscovery of state sovereignty,¹⁸ which became visible in later constitutional and supreme-court rulings.¹⁹ It assumed an entirely new quality by critical trends of the recent past which have been summa-

14 Convention on Action Against the Trafficking of Human Beings of 16 May 2005, entry into force 1 Feb. 2008, CETS No. 197 (so-called Warsaw Convention).

15 Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011, entry into force 1 Aug. 2014, CETS No. 210 (so-called Istanbul Convention).

16 Protocol No. 11 of 11 May 1994, entry into force 1 Nov. 1998, CETS No. 155.

17 *Walter*, Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß, *ZaöRV* 59 (1999), 961 ff.; *Ryssdal*, On the Road to a European Constitutional Court, *Collected Courses of the Academy of European Law*, 1993, Vol. II-2, pp. 2 ff.; *Wildhaber*, A Constitutional Future for the European Court of Human Rights, *Hum Rts L J* 23 (2002), 161 ff., see also the contribution by *P. Pinto de Albuquerque* in this volume.

18 For an early critique, see *Rasmussen*, On Law and Policy in the European Court of Justice, 1986.

19 *F. Mayer*, Multilevel Constitutional Jurisdiction, in: A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed. 2010, pp. 399 ff.

rized as a “polycrisis”.²⁰ In its constitutional dimension, it has become apparent in some of the transition states in Central and Eastern Europe, but also in elections in almost all states in Europe. Dark sides of international interdependence in the epoch of globalism appear to have shown during the subprime and state finance crises since 2008 at the latest. Old power nostalgia, now visible in Brexit Britain, the revival of authoritarianism and assertive interventionism in Russia, the Trump phenomenon in the USA, as well as new power claims as raised by China have all contributed to a general climate which is averse to multilateralism, international co-operation, international norms and human rights, in particular those of migrants and refugees.²¹ This all seems to have affected the norms and institutions of the old post-war system, and it would not come as a surprise if it had left its traces in the international legal order itself.

B. Developments in International Law

The recent tectonic movements in international relations triggered a debate as to whether they have changed international law in substance or, even more, are accompanied by a general distrust in the normativity of international law, which may hardly be without consequences for the rule of law within the CoE.

With respect to general international law, there seem to be three camps in the discussion about the impact of the new geopolitical landscape and the changes in the political and constitutional culture in many states on the international order. Whereas some writings call the “co-operation thesis” underlying international law into question,²² others emphatically uphold multilateralism as a legal principle.²³ A third group of authors embraces a nuanced approach in pleading for analysing each legal regime sep-

20 For a recent account, see the contributions in *Schmahl* (ed.), *Die EU zwischen Niedergang und Neugründung: Wege aus der Polykrise*, 2020.

21 See *Hopgood*, *The Endtimes of Human Rights*, 2013; more recently, *Bílková*, *Populism and Human Rights*, *Neth Yb Int'l L* 49 (2018), 143 ff.; *Neuman* (ed.), *Human Rights in a Time of Populism*, 2020.

22 *Hakimi*, *The Work of International Law*, *Harvard International Law Journal* 58 (2017), 1 ff.

23 *Daudet*, 1919-2019, *Le flux du multilatéralisme*, *RdC* 403 (2019), 9 ff.

arately rather than synthesising individual observations to a general rise or decline diagnosis.²⁴

At first sight, the picture appears to be clear and to leave little room for optimism. Recent history is full of examples which could serve as evidence for a backlash thesis. World trade law is at a standstill, and unilateralism is advocated by at least one of the previous proponents of multilateralism, the USA. The same state withdrew from the regional trade agreement NAFTA and uses retaliatory customs as a tool of policy. The USA withdrew from the Paris Agreement against climate change, the so-called nuclear deal with Iran, and the World Health Organization. Russia, to take up another example, breached the prohibition of the use of force in Georgia in 2008, continues to do so in Ukraine since 2014 and is blatantly violating international humanitarian law in Syria every day. China is violating the agreement on Hong Kong by suppressing the political rights of its citizens, as well as interning millions of people in camps and relying on the unilateral enforcement of claims it raises with respect to large portions of the South China sea. The list is easy to enlarge with examples from Turkey, which calls into question the maritime zones regime in the Mediterranean, and Brazil, which disregards international environmental law and the protection of indigenous peoples. African states have withdrawn from the Statute of the International Criminal Court or threatened to do so.

Unsettling as these examples are, they point to very different phenomena which all have their own causes, and they alone do not answer the question whether they go beyond the state of non-compliance existing at all times and must instead be regarded as symptoms of a general decline of the international rule of law. Much of the conduct is accompanied by legal argument: The United States frequently claim to follow the structure of the respective treaty systems it terminates, sometimes also with the intention to renegotiate, so that the general approach to international law is less clear-cut than it appears.²⁵ China bases its claims on alleged historic titles.²⁶ And even the Kremlin uses international law as an argument, for in-

24 *Nolte*, *Treaties and Their Practice: Symptoms of Their Rise or Decline*, RdC 392 (2017), 205 ff.

25 *Goldsmith & Togawa Mercer*, *International Law and Institutions in the Trump era*, GYIL 61 (2018), 11 ff.

26 Cf. *Carty*, *Archives on Historical Titles to South China Sea Islands*, Jus Gentium 4 (2019), 7 ff.

stance by alleging that its annexation of Crimea followed the pattern accepted by the international community in the Kosovo crisis.²⁷

However, it is hard to deny that any breach of, or any withdrawal from, or any unilateral modification of an international legal regime is a more or less implicit challenge to its validity, even though the authority of law in general must not necessarily be impaired. It appears that the state of affairs is best represented by the geology metaphor suggested by *James Crawford*. Accordingly, international law consists of different geological layers and formations, some of which are hard and enduring, whereas others are more easily subject to erosion.²⁸ The model reminds us of earlier descriptions of international law which distinguished between spheres of close cooperation of like-minded states and others of relationships of mere co-existence.²⁹

Interestingly, actors of European politics and academics have long been convinced that Europe lends itself as an example of closer, if not special, relations, due to the relative homogeneity of its states. Thus, the CoE may prove as an area to rethink two sets of theories: The rise-and-decline discourse, and the search for a proper description of international relations and international law of our day.

C. The Rule of Law and the Council of Europe

So far, we have seen that there is a plausible assumption that the domestic political cultures of states have an impact on their stand vis-à-vis their fidelity to international law. When it comes to the CoE, however, there is an established link between the domestic and the international rule of law, given the fact that this organization aims at upholding the basic principles of a liberal constitution. This connection is defined, as quoted above, in the Statute of the CoE, and is taken up in central provisions of the found-

27 *Peters*, The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum, in: *Liber Amicorum Stein*, 2015, 278 ff.; *van den Driest*, Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law, *Neth. Int'l L Rev.* 62 (2015), 329 ff.

28 *Crawford*, The Current Political Discourse Concerning International Law, *The Modern Law Review* 81 (2018), 1.

29 *Tunkin*, Coexistence in International Law, *RdC* 95 (1958), 6 ff.; *Friedmann*, The Changing Structure of International Law, 1964; *Rawls*, *The Law of Peoples*, 1999; *Slaughter*, *A New World Order*, 2004.