THE FEDERAL JUDGE VIS-À-VIS THE JURISDICTION OF THE ECHR

by

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A. *Introduction*

The following reflections may demonstrate how the *Swiss Justices*, particularly the Federal Judges, concern themselves with the jurisdiction of the European Court of Human Rights.

- What is the importance of the European Convention on Human Rights to the Swiss jurisdiction and to Swiss legal practice?
- Which instruments ensure the Convention's implementation and right application?
- Which part take the Swiss Federal Constitution, the law statutes and the case law, respectively, in order to achieve these perspectives?

Since 1963, Switzerland is a member of the European Council. Our country proceeded to the ratification of the Convention on Human Rights in 1974. In its jurisdiction, the Swiss Supreme Court, called "Federal Court" or "Federal Tribunal", took care of the application of the Convention's fundamental guarantees without delay and with perseverance. As a result, the Convention has rapidly been acknowleged and considered in the entire country. This procedure has been supported by favourable initial circumstances. These circumstances include especiallly the following elements:

B. *Implementation of the Convention in Swiss law*

I. The system of Monism

Let me *first* refer to the system of *"Monism"* which Switzerland practices, regarding the implementation, adoption and application of international law. The monist concept is based, primarily, on customary constitutional law, and it is implied also, de facto, by several constitutional principles. The monist system renders self-executing all provisions of binding international law all over Switzerland.

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Thus, the international law is not only binding for the Legislator, but for all authorities on all governmental levels. Consequently, in case of a conflict of norms, the international law - principally - overrules the national law, in the way that the divergent national norm can not be applicated. This rule about the conflict of norms must be observed at least when the priority of international law is based on norms aiming the protection of individual fundamental Rights, like the principles of the European Convention.

In the Swiss Federal Constitution, this view is being very clearly expressed for the international ius cogens[1]. When concerned with a conflict of law, the Swiss Federal Court, however, has to consider the Article 191 of the Constitution, saying that international law and national federal law statutes are binding for the jurisdiction of the Court.

The case law developped by the Federal Court on this matter gave increasingly more importance to the priority of international law. The leading case "Schubert"[2] was sentenced in 1973 already. The Schubert judgement ruled the legal presumption that the Swiss Legislator intended to respect all norms of international treaties being properly ratified by Switzerland. This presumption can only be disproofed, if it seems evident that the Parliament, when adopting divergent national law, deliberately intended a conflict with international law. In case of doubt, the national law must be interpreted in accordance with the international law.

Since the Schubert case, this jurisdiction has been continually developed und precised. The Federal Court, at last, is allowed to examine and ascertain whether the federal law statutes are in conflict with international law. The Swiss constitutional law does not prohibit to examine and verify the conflict of law, it only provides the duty to appy the federal law statutes in accordance with international law.

As a result, the Federal Court examines the respect of international law in all cases submitted; and the Court endeavours to avoid eventual conflicts by interpreting the national norms in accordance with international law.

II. The "open-ness" of the Swiss constitutional system

Let me now refer to the so-called *"open-ness" of the Swiss constitutional system* as the second favourable element to the fast and effective implementation of the Convention in Switzerland: Switzerland has a federal political structure relying on a various and open constitutional basis. Twenty-six different and independent Constitutions of the Swiss Cantons exist besides the Federal Constitution, each of them with special fundamental rights and liberties. The twenty-six cantonal Constitutions partially overlap and complement each other. Since 1875, the Federal Court in

1 cf. Art.193 al.4 and194 al.2 Cst.
2 BGE 99 Ib 39, 44;=Pr 62 Nr. 106

Lausanne is concerned with the harmonization, concretization and development of these Constitutions.

Thereby and on the ground of individual constitutional appeals, the Federal Court has also created several non-written constitutional guarantees; many of them have been adopted later on formally in the Federal Constitution. Let me mention for example the personal liberties, the freedom of private property, the autonomy of the communal political entities, or the right for social minimum support and welfare which all have been, initially, created and confirmed as constitutional rights and liberties by case-law jurisdiction. Therefore, the concept of integrating the principles and guarantees of the European Convention, in direct application, into the existing fundamental rights protection order as well as the concept of granting them a constitutional importance, was neither uncommon nor difficult to the practice of the Swiss Federal Court.

III. The standard of Human Rights Protection

The *third* crucial point is the institutional and procedural *standard of Human Rights* protection: One of the most important tasks of the Federal Court has always been to decide on individual appeals of private citizens. The primary legal remedy herefore in swiss law is the constitutional appeal. Still, other forms of appeals and procedures, like the appeal on administrative federal law, contribute to the efficient protection of the Human Rights. (The constitutional appeal being a subsidiary remedy.) In the material grounds, the constitutional rights and liberties must be respected throughout the whole legal system. Any officer executing governmental tasks is committed to support and materialize the fundamental rights. In addition to that, the authorities have to provide that the Human Rights shall prevail and be effective among the private parties too. According to Article 36 of the Federal Constitution, any interference with fundamental rights must be based on a legal norm. Important interferences need a clear legitimation by a formal law statute. Exceptions of these rule are only lawful in the case of serious, imminent and, by milder means, not avoidable dangers. Interferences must be justified by a sufficient public interest or by the necessity to protect the rights of others; they must be non-excessive and proportional, and the basic essence of the concerned fundamental right must not be completely injured.

IV. The "federalist" division of legal power

Element number *four* which supported the impact of the European Convention in Swiss law is the *"federalist" division of legal power* between the Swiss Cantons and the Swiss Federal Parliament and Authority: Until recently, the competence to legislate on issues of criminal and civil procedure always was in the hands of the

Cantons. The Federal Constitution, however, follows the principle of the primacy of federal law in case of collision with the cantonal law. Therefore, the Federal Court was clearly committed to enforce and let prevail the European Convention being part of the federal law, whenever the Convention's fundamental rights collided with cantonal legislation or governmental acts. As the Convention is acknowledged to be of constitutional importance, the Convention's impact on the jurisdiction of the Federal Court was very strong, as well as the impact of the fundamental individual rights guaranteed in the Federal Constitution.

The cantonal law of criminal and civil procedure is of major importance for the guarantees of Articles 5 and 6 of the European Convention. The "federalist" division of legal competence, as I mentionned, has thus contributed very strongly to the fast and effective enforcement of the Convention, soon after its adoption into Swiss law.

In March 2000, the Swiss citizens and Cantons accepted a reform of the swiss justice system which soon will be entirely in vigour. According to this reform the legislation on issues of criminal and civil procedure lies now in the competence of the Federal Parliament. As I mentionned earlier, Article 191 of the Constitution provides that international law and national federal law statutes are binding for the Federal Court. However, the mere fact that criminal and civil procedure are now issues of federal law, and not exclusively in the cantonal competence anymore, has not changed the Federal Court's practice regarding the European Convention, the Convention being part of the primary and binding international law as well as an uncontested part of the Swiss legal practice and order.

V. The Swiss system of revision

As the *fifth* and last factor supporting the effective implementation of the Convention's guarantees I would like to point out the *Swiss system of revision* against final judgements which violated the Convention.

Since February, 1992 the Swiss law explicitly allows the revision and changement of final decisions of the Federal Supreme Court as well as of lower instances, if the European Court of Human Rights or the Committee of Ministers have approved an individual appeal for violating the Convention or one of its Protocols and, as a second condition, if the "just" legal "satisfaction" or compensation to the injured person is only possible by the way of revision of the final decision.

If the Federal Court ascertains that revision is due, but lies in the competence of a lower instance, the case is delegated to this authority for revision. The cantonal instance is obliged to open a procedure of revision, even if the cantonal law does not provide the violation of the Convention as a cause of revision. The appellant must request the revision within ninety days after receiving the European authority's judgement transmitted by the Swiss Federal Office of Justice. The request for revision is to be adressed to the Swiss Federal Court. The right to seek revision is

reserved to all individuals who formally took part in the procedure which led to the final decision violating the Convention and who thereby can claim a legitimate interest in seeking revision.

If financial interests, exclusively, are at stake and reparation can only be granted by financial compensation, the procedure of revision, principally, is excluded. In this case, the issue of "just satisfaction" is to be treated by the European Court of Human Rights according to Article 41 of the Convention.

An exception takes place, if the financial compensation and the ascertainment of the violation are not able to heal or compensate the injury in an adequate way. This can be the case, for example, if a reproach, maybe implicit, of criminal guilt remains unremoved, or if the infringing status continues further on, in spite of the European authority's decision. In these cases, the revision of a Federal Court's final decision is possible, if this procedure is able to remove those specific kinds of infringements beyond financial interests. The original final procedure then has to be re-opened for the particular revision-cause of violation of the Convention.

C. The recent reform of the justice system

Let me finish this outline on the Swiss legal situation with a few remarks on the recent *reform* of our *justice system*, which has been approved, in March 2000, by the Swiss citizens and Cantons in a constitutional referendum: Based on that, the Parliament has adopted three federal law statutes: The first establishes a new order for the organization and jurisdiction of the Federal Supreme Court in Lausanne. The second and the third law create two completely new Federal Tribunals of first instance, namely, one, the Federal Administrative Court which shall have its seat in St. Gallen, and, two, the Federal Criminal Court which shall reside in Bellinzona, Ticino, in the Italian speaking part of Switzerland. The new laws concerning the Federal Supreme Court and the Federal Administrative Court shall be in vigour, prospectively, in the year 2007. The law on the Federal Criminal Court in Bellinzona, as well as the Court itself, are already operating since April 2004.

Regarding the way of appeal to the European Court of Human Rights, the reform brings the following changement: Up to now, there has been one way of appeal, principally, to the Federal Supreme Court for issues concerned by the European Convention. The Federal Court decided as last and final instance. On behalf of final decisions of cantonal instances this system shall be unchanged, as the reform provides a subsidiary constitutional appeal to the Federal Supreme Court against such cantonal decisions. This, however, is not the case for some kinds of judgements given by the two new Federal Tribunals of first instance, as some of these judgements are not subject of an appeal to the Federal Supreme Court. As far as the Federal Administrative Court in St. Gallen and the Federal Criminal Court in Bellinzona

give final judgements as last instances, the way of appeal against these decisions is directly open to "Strassburg".

Earlier, I mentionned the revision of final judgements violating the European Convention. That system of revision shall be continued, essentially, by the new law. The request for revision is to be adressed to the Federal Supreme Court within ninety days after the judgement given by the European Court of Human Rights became final in the sense of Article 44 of the Convention. The causes for revision, the procedure and the consequences of the revision to the former decisions are disposed in the new law on the Federal Supreme Court coming to vigour, prospectively, in the year 2007. The same rules, analogously, are applicable for the revision of final decisions of the new Federal Administrative Court and the Federal Criminal Court.

I do hope, that these reflections may have illustrated the specific instruments which ensure the Convention's implementation and development based on Swiss law:

D. Conclusions

I mentionned

- the "monist" system of adoption,
- the so called "open-ness" of the Swiss constitutional system,
- the emphasis on the protection of individual rights and liberties,
- the federalist division of power between the Cantons and the central Authority, and finally,
- the system of revision against final decisions.

These five elements have, basically, contributed to the strongful implementation of the Convention in Swiss law since nineteen-seventy-four; the Convention having been acknowledged and applyed by the Swiss Supreme Court on the same level and with the same impact as the national constitutional law.