THE TENTH ANNIVERSARY OF RUSSIA' ACCESSION TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:

A CONVERSATION OF THE JOURNAL'S EDITOR-IN-CHIEF WITH MR VLADIMIR A. TOUMANOV

Vitaly A. Portnov: The date when the European Convention for the Protection of Human Rights and Fundamental Freedoms became legally effective in the territory of Russia (5 May 1998) is approaching. Vladimir Aleksandrovich, you were the first judge on the European Court of Human Rights who was elected in respect of Russia. Please share with our readers about your work as the judge on the Court.

Vladimir A. Toumanov: I shall tell the story approximately in the following way.

I shall tell a few words about myself. Then first how the work of the Court was organised, then I shall tell about the composition of the Court and finally I shall tell about the nature of cases that were dominant in the caseload at that time.

All of it will give a picture of how former Court differs from the current Court.

When I retired from the Constitutional Court of Russia and I was proposed to go to Strasbourg to sit on the European Court as a judge, I had no more or less detailed notion about this Court in Strasbourg, in particular, I did not suppose that – as it turned out – even before the ratification of the Convention by a State it is entitled to have its judge on the European Court of Human Rights. It turned out to be possible, and the vivid example is an eminent French jurist, human rights champion, associate of Charles de Gaulle, Mr René Cassin; for some time he was Vice President of the Court while France has not yet ratified the Convention. Strasbourg even has its Rue René Cassin, but this is, as they say, *obiter dictum*. Nonetheless, I agreed to the proposal. An appropriate submission went to Strasbourg, and it should be noted that pretty soon, within a month, in October 1997, I was elected by the Parliamentary Assembly of the Council of Europe (PACE) as a judge in respect of Russia. On the submitted list of candidates in respect of Russia, there were two more candidates: Mr Tchernichenko, an eminent expert in international law, who is still alive, and Mr Reshetov, our former ambassador in Iceland, who previously worked at the Institute of State and Law and at the Ministry of Foreign Affairs. The votes were divided. I got 55 votes out of all cast ballots, Mr Reshetov got 17 votes, and Mr Tchernichenko got 9 votes. Mr Daniel Tarshis, then the Secretary General of the Council of Europe, sent a letter confirming that I had been elected for a 9-year term up to 2004 inclusive (in those days judges of the Court were elected for a 9-year term). However, these figures turned out to be illusory. The Protocol No. 11 to the Convention arrived, and in the end of October 1998 the letter was received, this time it was signed by three Council of Europe officials, by the Chairman of the Committee of Ministers of the Council of Europe, the President of PACE and the Secretary General of the Council of Europe (same letters were received other judges as well). The letter advised that the powers of the then Court had expired. The Protocol No. 11 to the Convention has set the age limit of the judicial tenure, and it turned out so that the new Court retained less than a half of the old composition, and accordingly more than a half of the previous composition has left the Court (in passing I should note that it was twice that I was affected by the age limit of the judicial tenure, and this is a rare occurrence indeed: first time it happened in the Constitutional Court of the Russian Federation, and then it happened in the European Court of Human Rights). True, the judges on the Strasbourg Court before the 1998 reform were overgrown, however, perhaps, it was the Court's strength.

Parting with the Court was a hard thing for some judges who worked with the Court for a long time, as the case was with French judge Louis-Edmond Pettiti. He was quite a faithful judge. He always worked until late at night in his office. During the farewell ceremony at the Council of Europe, having noticed that Mr Pettiti is taking the situation hard, I came up to him and asked: *Monsieur Pettiti, pourquoi vous êtes tellement triste? La vie continue*. – Why are you so sad? Life goes on. He replied: *Parce que partir c'est toujours mourir un peu*. – It is just because parting means a little passing. He told that not only to me. In two weeks after his return to Paris, he, leaving a taxicab, died of a heart attack. It was quite mysterious. In the Court, they felt keenly about it.

On the eve of the reform, there were 36 judges on the Court, and there were five more free vacancies. After I left, no one was elected to my post immediately.

The Court worked on a non-permanent basis. Every month a session was held, which lasted from one week to 11–12 days. During such period, all cases prepared for a hearing were adjudicated. Afterwards, judges went home,

Editor's note. **Mr Vladimir A. Toumanov is an eminent Russian scholar, statesman and world renown jurist; retired justice of the Russian Federation Constitutional Court, Ex-President of the Russian Federation Constitutional Court; he currently holds posts of the Chairman of the Presidential Council on Improvement of Administration of Justice, Advisor to the the Russian Federation Constitutional Court, a Titular Member of the International Academy of Comparative Law, he was the first judge on the European Court of Human Rights elected in respect of the Russian Federation; he has started his academic career in 1952 working with the Institute of State and Law of the Academy of Sciences since 1959; Doctor of Juridical Sciences (1969), Professor of Law (1971), Distinguished Scholar of the Russian Federation (1987), Titular Member of the International Academy of Comparative Law; President of the International Political Science Association founded under the auspices of UNESCO (1994 – 1998). Mr. Toumanov has authored fundamental academic works and multitudinous scholarly articles in the realm of jurisprudence, constitutional law and comparative law.**

but they had «homework» to take home: each of them was given several cases to study while at home and to prepare conclusions in three to four cases. Thus, it is impossible to propose that judges worked during 10 to 12 days and then they were taking their time, because preparation of two or three cases was quite a complicated task, and judges had to carry with them huge case-files.

Plenary hearings of the Court *en banc* were held infrequently, they touched upon mostly organisational matters. Where a particular case concerned issues of special significance, such case was examined by the Grand Chamber, similar to the existing system now.

However, Chambers, each composed of seven judges, examined most cases. Chambers were formed *ad hoc* from the general composition of the Court. There were no Sections.

During a session the Court usually examined 10 to 12 cases, sometimes it examined 15 cases; some of them were examined by the Grand Chamber. Lawyers of the Court prepared judgments and decisions. I am not aware how things are done now, but in those days, lawyers of the Court had the right to be present at the session of the Court. They were preparing draft judgments and participated in the sessions, where committee of three judges was editing draft judgments.

The way of discussion of some complex cases during public hearings of the European Court, sitting as the Grand Chamber, is of certain interest. President of the Court or judge rapporteur read out the list of issues that seemed to be of vital interest for adjudication of a case. Each of the issue was discussed separately and there was voting upon each of them. As a result of the discussion, part of these issues was filtered out, if judges reached a general conclusion that those were not the issues of fundamental importance. This was a very effective way of the discussion of cases. In general, however, the procedure of a hearing (public hearing including) did not differ from the way it is carried out these days.

It seemed to me not to be quite correct that in the staff of the Court cases were prepared based not on the subject-matter, but on the linguistic criterion. Cases in French were handled by one division, while cases in English were handled by another division. Perhaps today English is prevalent and then the correlation was almost «fifty – fifty».

Vitaly A. Portnov: True, at present, English is prevalent. There are lawyers and Section Secretaries whose main language is French but these people are minority. Lately, lawyers switched to specialisation.

Vladimir A. Toumanov: Out of 36 judges exactly half of them were former judges of the courts of High Contracting Parties and exactly another half were university professors. Perhaps, «exactly half» is not an exact definition, since several persons were both professors *and* judges. I belonged to that category and I was not the only one in it. The age of most judges was high, which was quite apparent when parting judges were sitting together at the farewell ceremony of PACE. However, their professional level was high as well. I learnt much in the course of procedure to discuss cases. But I was not a young boy; for all that, I came to the Court from the post of the President of the Constitutional Court of Russia.

It is hard for me to single out somebody from the old-timers of the Court. I cannot say anything about the President of the Court, Mr Rolv Ryssdal. When I joined the Court, he was already seriously ill. I was introduced to him, we had a talk, I met him once more, and then he discontinued showing up in the Court at all, and soon he passed. He was replaced by Professor Rudolf Bernhardt, previously the Director of the Max Planck Institute for Comparative Public Law and International Law (Heidelberg, Germany). I knew him very well even before my joining the Court. The Institute of State and Law of our Academy of Sciences had academic contacts with the Max Planck Institute. Besides Mr Rudolf Bernhardt, I would like to name a few more judges, who were playing active roles at the Court. This is, for instance, Mr Luzius Wildhaber, who represented Switzerland and who later became the first President of the reformed Court; Mme Elisabeth Palm, the only lady on the Court, the representative of Sweden, who previously was the President of the Administrative Court of Appeal in Göteborg, she was rigorous and adamant as regarded protection of the rights of an individual; there were also experienced and quite competent judges: Mr Carlo Russo, the representative of Italy, former minister of the government and a lawyer of the Court of Cassation; Sir John Freeland of the United Kingdom, former judge; Mr Franz Matscher of Austria, Professor of the Salzburg University. As regards judges from the States of Central and Eastern Europe let me name Mr Volodymyr Butkevych, a judge elected in respect of Ukraine, who was earlier the head of the international law department of the T.G. Shevchenko Kiev State University; Mr Dimitar Gotchev, formerly a judge on the Constitutional Court of Bulgaria; Mr Pranas Kûris, the representative of Lithuania, formerly President of the Supreme Court of the Republic, and even earlier he was the Vice President of the Soviet Association of International Law. Canadian professor Ronald Macdonald, who was representing Liechtenstein in the Court, upon his retirement called upon his western colleagues to be attentive to «young judges» from the countries of Eastern Europe and share their expertise with them.

When I first arrived in Strasbourg, I was advised that there were 146 applications, pending before the Court, which had been found admissible by the Commission on Human Rights, and that I could indicate which of those applications I would like to examine. I gave no indication leaving the matter to the discretion of Mr Herbert Petzold, then the Registrar of the Court. Among those 146 cases, «Turkish cases» prevailed. In my opinion, it was the first time when the Court faced mass «clone» cases (if not counting cases of violations of the «reasonable time» requirement as regards court proceedings).

Today the Court faces mass «clone» cases concerning enforcement of court judgments in Russia and in Ukraine. However, «clone» cases from Turkey were far more serious: they were the result of activisation of the Kurds' fight in the 1990-s for the independence of Kurdistan, and the fight was often of armed nature. Kurds' actions were severely suppressed by the Turkish authorities, and applications regarding flagrant violations of Articles 2, 3, 5, and 6 of the Convention by the Turkish authorities started to arrive to Strasbourg on a mass scale. The applications met all necessary requirements and were, as a rule, well-founded. The preparation of those applications was monopolised by two British law offices.

Particular circumstances of these cases were basically identical: Turkish forces were entering a village, were dealing shortly with villagers, were destroying households, were taking away family members, many of whom never returned back home, were subjecting suspects to torture, etc. Investigative authorities were investigating such violations intentionally without any diligence or were not investigating them at all. There is apparent analogy with «Chechen cases», which are a good many pending before the Court, I assume.

Vitaly A. Portnov: There are about two hundred of them, but the applications were lodged five to six years ago.

Vladimir A. Toumanov: Turkey has suffered much from examination of those cases in Strasbourg, both from the moral and pecuniary points of view. The Strasbourg Court in its old composition was unable to cope fully with the flow of «Turkish cases», having left considerable legacy in that sense to the post-reform Court.

I participated in examination of several «Turkish cases»; the issue of impartiality of a domestic court in the light of Article 6 of the Convention occupied prominent place in those cases. The European Court clearly and consistently refused to recognise as impartial Turkish so-called national security courts, which were handling Kurdistan cases. In those courts, a military judge presided. In that connection, the European Court once and for all reiterated its legal approach expressed in the notion of «objective impartiality».

There was another significant category of cases of my judgeship in the Court; they concerned Article 10 of the Convention. In that regard, I shall only refer to my book published in 2000, «Европейский Суд по правам человека. Организация и формы деятельности» [«*The European Court of Human Rights. Organisation and Forms of Activity*»], which contains a separate chapter on the jurisprudence of that provision.

In 1998, the Court has summed up the results of its activity during preceding 40 years in a sizeable book, which contains many statistical and other details. It seems to me that the most important result of that activity is the formation of the jurisprudential basis, upon which the Court operates today both in procedural and substantive aspects.

In Russia, this basis is represented in two-volume book «Европейский Суд по правам человека. Избранные решения. – М., 2000» [«*The European Court of Human Rights. Selected decisions*». *Moscow, 2000*], which contains over 90 basic precedential judgments and decisions selected for this book in the Strasbourg Court itself. The book gives a good chance to judge, what voluminous work has been carried out by this leisurely, but thorough, reasoning, highly qualified Court. It has been working at a different pace than it is working now; quantitative indicia of the Court's activity then and now are incomparable.

However, retrospectively it is especially evident, what voluminous work has been done by the European Court of Human Rights in the past.

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