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Does the Strasbourg European Court protect all human rights equally?

Abstract: The text opens with a recollection of St John Paul II's historic visit to a mosque in 2001, highlighting the cultural respect manifested the event. The text then delves into St John Paul II's early fascination with literature and drama, emphasizing his resistance to Nazi occupation through cultural means. The author quotes St John Paul II's statement that faith must become culture in order to be fully embraced and lived. The author urges the audience to approach Catholic culture wisely and quotes St John Paul II's encouragement not to be afraid of the future, emphasising the capacity for wisdom and virtue in individuals. The text then moves on to a critical analysis of the European Court of Human Rights, pointing out instances of procedural irregularities and dissenting views on judgements related to issues such as abortion and the recognition of civil marriage. The author then develops his argument by utilizing the format of a play, metaphorically titled 'Abdi Ibrahim v Norway', as a case study illustrating the impact of Islam on Europe, political correctness and social unrest.

Keywords: Human right, European Court of Human Rights,

St John Paul II was the first pope to ever enter a Muslim Mosque, in 2001 in Damascus. The Pope, received in the Umayyad Mosque by Sheik Ahmad Kuftaro, respected the tradition and took off his white sandals, specially made for the memorable occasion. He stopped before the Qibla and before the pulpit, where sermons are preached on Fridays.

The Pope and the mufti were supposed to pray together over the remains of John the Baptist, which tradition situates at the centre of the said mosque, but due to the opposition of some Muslim groups, the Pope had to pray alone.

Let us live our Catholic culture with WISDOM, for as Jesus said that “the children of this world are wiser in their generation than the children of light” (Luke 15, 8 [RHE]).

Saint JPII thus also exhorted us: “*We must not be afraid of the future. We must not be afraid of man.* (...) We have within us the capacities for wisdom and virtue”.⁴

The interpretation by the Strasbourg-based European Court of Human Rights regarding the rights, protected by the European Convention for the Protection of Human Rights and Fundamental Freedom, has been incorrect at times.

I will explain my dissenting view, not with a judgment issued, but with the process of producing a judgment, starting with a question and answer.

Why does the court issue strident judgments?

For procedural reasons and out of desire to increase the court’s visibility. To that end, for instance, the court has appointed to itself the power to decide the “legal characterization of the facts”.

For instance, the European Court has examined abortion not under Article 2 of the Convention (right to life), but under Article 8, respect for private and family life (*Tysiac v. Poland*).⁵

But the Court also determines itself its own procedure.

For instance, a lawsuit would normally not be accepted before all the domestic remedies have been exhausted. But sometimes, arguing that the case is of interest because it would increase the court’s visibility, a matter where domestic remedies have not been fully used and facts have not been proven before domestic courts will be examined by the Court regardless (e.g., *A, B, C v. Ireland*,⁶ among others).

-ii_mes_19781221_xii-world-day-for-peace.html.

⁴ *Address of His Holiness John Paul II, United Nations Headquarters (New York), 5 October 1995*, 18, https://www.vatican.va/content/john-paul-ii/en/speeches/1995/october/documents/hf_jp-ii_spe_05101995_address-to-uno.html.

⁵ *Tysiac v. Poland*, Appl. No. 5410/03, Council of Europe: European Court of Human Rights, Strasbourg 20 March 2007, <https://www.refworld.org/cases,ECHR,470376112.html>.

⁶ *Case of A, B and C v. Ireland* (Application no. 25579/05), European Court of Human Rights, Judgement, Strasbourg 16 December 2010, <https://hudoc.echr.coe.int/eng#%7B%22app-no%22:%7B%2225579/05%22%7D,%22itemid%22:%7B%22001-102332%22%7D%7D>.

The conclusion was clearly expressed by a Dutch Judge, Egbert Myjer, in his dissenting opinion in the case of *Muñoz Díaz v. Spain*, which gave civil recognition to a marriage performed under the gypsy rite: “the Court’s jurisdiction cannot extend to the creation of rights not enumerated in the Convention, however expedient or even desirable such new rights might be. In interpreting the Convention in such a way, the Court may ultimately forfeit its credibility among the Contracting States as a court of law”.⁷

And I would go further by narrating a theatrical play, as if I were the actor, from my experience as a Strasbourg court judge.

The play, divided into acts, is called *Abdi Ibrahim v. Norway*, decided by the Grand Chamber judgment on 10 December 2021.⁸ It illustrates the power and influence of Islam in Europe, the lukewarmness of some, and anxiety over what is “politically correct”.

ACT I

Introduction to the play’s characters

Abdi Ibrahim is a Somali citizen. In her village, she was impregnated at the age of 16 by a man who did not assume paternity. She moved to Kenya and, in traumatizing conditions, gave birth to a boy.

At 17, she moved to Norway, where she was granted refugee status. She moved into a shelter for parents and children. A week later, the shelter staff express concern for the baby and determine that his life is in danger if left under his mother’s care. The baby is immediately placed in the home of a family protection worker and is then placed in a foster home. The baby cries, does not sleep when he is visited by his mother. He is placed with a Norwegian Christian family, after unsuccessful efforts to find him a Muslim family.

The mother accepted the foster family, gave up her request that it be a Muslim family and showed agreement with the visits, but insisted that the boy be circumcised, educated in a Koran school and that he does not eat pork.

⁷ Case of *Muñoz Díaz v. Spain* (Application no. 49151/07), European Court of Human Rights, Judgement, Strasbourg 8 December 2009, <https://hudoc.echr.coe.int/tkp197/view.asp?%22itemid%22:%22001-96100%22>}.

⁸ Case of *Abdi Ibrahim v. Norway* (Application no. 15379/16), European Court of Human Rights, Judgement, Strasbourg 10 December 2021, <https://laweuro.com/?p=17577>.

Child protection staff and Norwegian tribunals:

All along, the mother was heard, as were expert witnesses. The work of the state was detailed, attempting to satisfy the mother's wishes and the best interests of the child.

The mother's Supreme Court appeal was rejected.

The five-judge Bench and the Grand Chamber

Three European Court bodies intervene in the play, in the first place, the Second Chamber, which issues the first judgment.

The Second Chamber's five-judge bench authorized the submission of the matter to the Grand Chamber (17 judges). The judgment does not state which judge voted in favour of the said submission, what the allegations were, or why the submission had to be confidential.

The Grand Chamber re-examines the case. Its composition is well-known: a Danish president and 16 other judges from Andorra, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Hungary, Ireland, Lithuania, Monaco, the Netherlands, Norway, Romania, Slovakia, and Ukraine.

Act II

In Strasbourg

First judgment:

The mother, represented by counsel, files suit before the European Court at 23 years of age, her boy is six. The mother argues a violation of her right to privacy (Art. 8) and religious freedom (Art. 9).

Admitted within a year, the lawsuit is communicated to the government of Norway. The Czech government intervenes and argues that the best interests of the child in adoptions may not be used to ignore the happiness of biological parents.

In September 2019, the Court invites the parties to formulate observations on another adoption and termination of parental rights case, *Strand Lobben and*

Others v. Norway.⁹ On 17 December 2019, the Court finds Norway guilty of violating a parent's rights and authorizing a child's adoption without weighing the interests of the plaintiff.

The transfer:

On the same day that the judgment came out, the court issued a press release on the *Abdi Ibrahim* judgment and another against Norway, indicating that the court would examine the plaintiff's arguments only under Article 8, under the heading "adoption placement in foster care and adoption authorization without the mother's consent: a violation of the Convention".

Is the issue resolved? No.

The plaintiff, on 17 March 2020, the last day of the three-month deadline, requests submission to the Grand Chamber on the grounds that the matter raises a serious issue of general interest, under Art. 43 of the Convention, or a serious issue on the interpretation of the Convention and its protocols.

This provision comes from Protocol 11,¹⁰ which I helped draft, along with the Turkish and British representatives. The protocol took away the need for the European Commission. Review of judgments that did not fit within the convention was deemed justified. The Grand Chamber would not include any of the judges from the lower chamber, with the exception of the chamber's president and the national judge in question.

The First Chamber president here requested not to be a part of the Grand Chamber. He was then replaced by the Court's Vice-President, a Danish judge.

Why did the bench grant the requests not to hear the case from the five judges within a period of one month since the resubmission request was made by the plaintiff? It is unknown.

⁹ *Strand Lobben and Others v. Norway* [GC] (European Court of Human Rights), Information Note on the Court's case-law 232, 22 November 2019, <https://laweuro.com/?p=10098>; Case of *Strand Lobben and Others v. Norway* (Application no. 37283/13), Judgment, Strasbourg 10 September 2019, <https://laweuro.com/?p=10073>.

¹⁰ *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, Strasbourg, 11.05.1994, <https://www.refworld.org/docid/42ef8c812.html>.

Does a plaintiff that obtained a favourable ruling often seek review by the Grand Chamber?

No, because they would be risking a new unfavourable judgment.

In the well-known case of *Navalny v. Russia*, however, the plaintiff had obtained a favourable ruling on some of his complaints, but not all. Both he and the Russian government requested submission to the Grand Chamber, and in its judgment, the Grand Chamber expanded the number of violations found against the plaintiff.¹¹

Act III

The Grand Chamber

Part I

The Grand Chamber reviews the case and holds an on-line hearing on 27 January 2021. They read the Second Chamber's judgment, the plaintiffs' arguments, the Norwegian government's filing, the filings by other governments, by the child's adoptive parents, all authorized by the Chamber President to intervene.

The plaintiff asks that her Article 8 claim be expanded to include Article 9 on religious freedom, and Article 2 Protocol 1 on the right to education. She argues that the child's baptism in a missionary church that allegedly resembled a cult, and which does not belong to the mainstream Christian church in Norway, violated her rights.

This argument was not examined by the Great Chamber, however, although it did cite the Norwegian Constitution which established that the Church of Norway is a Lutheran Evangelical church, supported by the State. The judgement of the chamber does not reflect the fact that the foster family, which became the adoptive family, are members of the Mission Covenant Church of Norway and the Norwegian Missionary Society. The judgement of the Great Chamber reflects this fact.

The Norwegian Government held that there was no violation of Article 8 and that the matter lay in the national margin of appreciation. It argued that the religious freedom complaint should be based on Article 9 instead of Art. 2, Protocol 1.

¹¹ Case of *Navalny v. Russia* (Applications no. 29580/12 and 4 others), Judgement, Strasbourg 15 November 2018, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-187605%22%7D>.

Third-party interveners argued; the Government of Denmark argued that the Second Chamber gave too much weight to the biological parent's rights, against the best interest of the child, in line with Norway.

The Czech Republic Government argued in favour of the biological parents and of raising the child in line with their beliefs and traditions. The Government of Turkey argued a violation of Articles 8 and 9, and Art. 2 Protocol 1, and added another violation of Art. 14 on discrimination. The AIRE, "Centre Advice Individual Rights Europe", a British human rights organization, argued that the child should have participated in the adoption process. It stressed that adoption is not authorized by Islam and is prohibited by the Quran, and indicated that in the Muslim world, apostasy is a crime.

Lastly, the adoptive parents asked the Grand Chamber to keep in mind the child's best interest and family bonds, and "private life" within his adoptive family.

Part II: The Hearing Aftermath

In the aftermath of the hearing, held on-line on 27 January 2021, the Grand Chamber immediately convened to deliberate. What could have happened in that deliberation? We can imagine that it is a play, which does not necessarily reflect reality.

We can imagine a tie between those in favour of analysing Art. 9 not separately, who form the majority, and the rest, a discrete [important] minority, who wanted to analyse the provision on religious freedom separately. The alleged violation of the right to education and the right to non-discrimination were rejected. Some in the Grand Chamber thought they should have one section that would essentially copy the Second Chamber's judgement and add their own religious freedom analysis. The Grand Chamber President decided to do so and appointed one judge to re-examine the Lower Chamber's judgement and another to carry out the religious freedom analysis. On 15 September 2021, the Grand Chamber convened to deliberate over both parts of the opinion.

Seventeen judges of the Grand Chamber sat at a long U-shaped table, with some benches for the Court staff in the back of the room, and the interpreters were in their cabins. Out of the seventeen judges, eleven are professors, i.e., law academics, and six are professional judges. The academics turned judges tend to talk a great deal, focus mostly on the "ought to" than the "is", and lack courtroom practice.

They tend to intervene either too soon or too late, whereas experienced judges know their colleagues and can guess their interventions, and will ask to speak if the contrary opinion is likely to come up soon in order to present their reasoning.

What happens in the deliberations?

They all agree that the Convention has been violated, with some discrepancy and separate analyses regarding religious freedom. There is unanimity on the issue of violation of private life, religious freedom, which would lead to a controversial and complicated judgement.

The judges then agree on focusing on the violation of Article 8, including clear references to religious freedom in the majority opinion. This is not what the Bench wanted when admitting the appeal, but they chose to focus exclusively on Article 8 with more references to religious freedom.

Deliberations continued for three weeks. On the last day of the deliberations, the majority opinion was approved. After the English and French translation on 3 December 2021, the press release on the judgement was issued on 10 December, under the heading “Child adoption without taking account of the mother’s wishes breached her human rights”.¹²

For the first time, a press release described the submission. It literally states that the plaintiff sought a decision under Articles 8 and 9, that the Second Chamber examined her claim only under Article 8, and that the Grand Chamber accepted her claim, which indicated why there was an appeal, adding suspense to the announced judgement.

Part III: The Grand Chamber Judgement

The Tribunal stressed that the 11-year-old child is not a plaintiff and is not represented before the Court. It is proper to examine the complaint on religious freedom and the right to education under Article 8 on privacy and family life. With regard to Article 8, the judges reiterated that this article must be interpreted and applied in light of Article 9. They cite the UN Treaty that provides that the child’s ethnic and religious background must be taken into account.

¹² Press Release issued by the Registrar of the Court, “Child adoption without taking account of the mother’s wishes breached her human rights”, ECHR 384 (2021), 10.12.2021, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22003-7207340-9793676%22%5D%7D>.

The judgement condemns the actions taken by the Norwegian authorities based on the child's best interests instead of balancing the interests of the biological child and the biological mother.

Even though the Court can only examine the termination of parental rights and the authorization for adoption, the judgement laments that in foster care placement, the child's cultural and religious background was not carefully weighed, even though the Norwegian Government made several unsuccessful efforts to find a Muslim family for the child. Interestingly, the domestic Appeals Court indicated that "We cannot conclude that the adoption of Muslim children is prohibited in Norway".

The judgement then concludes, unanimously, on the violation of Article 8, stating that "the decision-making process leading to applicant's ties with X being definitely cut off, was not conducted in such a way as to ensure that all of her views and interests were duly taken into account".

On Damages

Since the plaintiff had not requested moral damages before the Second Chamber, but did so before the Grand Chamber, the Grand Chamber rejected awarding any amount for moral damages.

The plaintiff requested EUR 30,000 in legal fees, and the Grand Chamber awarded 30,000 euros.

There were two dissenting opinions on the judgement, relating only to the subject of equitable remedies; the Belgian and Romanian judges argued that the mother should have been awarded moral damages. The judge from Cyprus also held that a certain amount should be given for moral damages, without providing the amount.

On Article 46: The Binding Nature of the Judgement and Execution

The plaintiff requested the Grand Chamber, the first-time precedent in Strasbourg, that the Court grant her with the possibility to reopen the adoption process. The Grand Chamber, in the best interest of the Child, concludes that there are no grounds to grant such an individual request for a measure to be taken at the domestic level.

Conclusion:

The Grand Chamber judgement is an example of certain types of decisions taken in Strasbourg. On its face, it appears to properly interpret the Convention, but a careful reading and comparison to the Lower Chamber's judgement reveals that the Grand Chamber's is a judgement with argumentative inconsistencies and difficult to implement in subsequent decisions. It leaves the door open for future decisions in which a biological Muslim parent, in a different situation from the young Somali mother here, may overturn an adoption by arguing a right to religious freedom.

In conclusion, this is a judgement that is a product of a weakness in the application of the Convention. Let us remember the example of Saint John Paul II and let us not be afraid of the future, and let us act with wisdom and courage in our faith.