

Judge's Empire? - Interview with Rudolf Bernhardt

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Prof. Dr. Rudolf Bernhardt is the former President and Vice-President of the European Court of Human Rights, Strasbourg (France) and former Director of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany). The interview was held at the European University Institute, Florence (Italy) in German and English.

I. Introduction

The role of the judge has probably been subject to discussion since the need of dispute resolution was first identified. In developed legal systems, adjudications nowadays are accepted as an integral part of society. On an international level, recent legal treaties provide a powerful position for the judge: Art. 220 § 1 EC states that the EC Courts ensures “that in the interpretation and application of this Treaty the law is observed”. Art. 32 § 1 ECHR describes the role of jurisdiction as to “extend to all matters concerning the interpretation and application of the Convention and the protocols thereto”. But not one of the international treaties empowers the judge to make or even develop law.¹ Nevertheless, there is no doubt that adjudications are an integral part of the law making process, though critics continuously argue that international judges exceed their limits.²

The legal philosopher Dworkin defines the role of the judge through the image of Hercules, an omniscient judge: “When [Hercules] intervenes in the process of government to declare some statute or other act of government unconstitutional, he does this in service of his most conscientious judgement about what democracy really is and what the Constitution,

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¹ **R. BERNHARDT**, “Rechtsfortbildung durch internationale Richter, insbesondere im Bereich der Menschenrechte”, in **HOCHSCHULLEHRER DER JURISTISCHEN FAKULTÄT HEIDELBERG**, *Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg*, Heidelberg, C.F. Müller, 1986, pp. 527-540, at p. 530.

² The former and current German Minister of the Interior Wolfgang Schäuble, for example, stated in a debate on the governmental policy statement sarcastically that the European Court of Justice is an “Integrationsorgan der Europäischen Union“ [integration organ of the European Union]; see also, very critically on the role of the ECJ: **W. HUMMER and W. OBERWEXER**, *Vom “Gesetzesstaat zum Richterstaat” und wieder Retour?*, *Europäische Zeitschrift für Wirtschaftsrecht*, 1997, pp. 295-305.

parent and guardian of democracy, really means”.³ However, Dworkin sees Hercules as a server of the law; that is why his book, where this statement was made, was called *Law’s Empire*. If judges exceed their limits and step out of the legal framework provided, we head to a ‘Judge’s Empire’ beyond the law; or, in German terminology, the *Rechtsstaat* would emerge to a *Richterstaat*.⁴ We had the opportunity to ask Prof. Dr. Bernhardt about his opinion on whether the international system had already emerged as such a ‘Judge’s Empire’. With a twinkle in his eye, he replied that we ought to take caution, because agreeing with Dworkin’s doctrine would mean perceiving that “any judge’s opinion is itself a piece of legal philosophy”.⁵

II. Interview

A. The role of the judge in the European Union

1. EJLS: Mr. Bernhardt, is the European Union a ‘Judge’s Empire’ [Richterstaat]?

Bernhardt: Firstly, I have to clarify that I have been only a member of the European Court of Human Rights (ECHR). Therefore, my personal experience with the Court in Luxembourg is limited; this Court has to face completely different situations. Nonetheless, I have reviewed the judgements and the development of the European Court of Justice (ECJ), but I find it extraordinarily difficult to adequately answer your question. It is unquestionable that the ECJ has played a major role in the process of European integration. Thus, the Court is prevalently referred to as the engine of European integration. Indeed, we can say nowadays that a large number of decisions have paved the way for a strong integration of the European Union and Community, for instance concerning the absolute precedence of Community law over national law. Whether this process will continue in this way in the future is a question I could only answer if I had visionary abilities. However, to me there seems to be one difficulty. With the current reforms of the European Union it is likely that the principle of subsidiary will be emphasised more strongly. That means, in general, that the possibility of national rather than European decision-making will be emphasised much more. To come back to your

³ R. DWORKIN, *Law’s Empire*, Fontana, 1986, p. 399.

⁴ See: R. MARCIC, *Vom Gesetzesstaat zum Richterstaat*, Wien, Springer, 1957; A. ROSAS, “The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue”, *European Journal of Legal Studies*, 2007 [available at www.ejls.eu].

⁵ R. DWORKIN, *Law’s Empire, o.c.*, p. 90.

question, I do think that the ECJ will still play a major role in integration process. Nevertheless, we will have to wait and see if the process will evolve with the same verve and speed as it did in the past. I cannot imagine, however, that there will be a standstill or even a regression.

2. EJLS: The ECJ has without doubt issued path-breaking decisions. You mentioned the judgement on the supremacy of EC law and we would like to add the whole case law on the creation, or finding of, European basic rights. Taking into account their normative basis, the decision was mainly based upon Art. 220 § 1 EC, which obliged the ECJ to ensure that “the law is observed”. This formulation gave reason to the ECJ to find or create basic rights. Can this still be called interpretation of law or does it warrant the terminology of ‘creation’? Was the ECJ exceeding its interpretatory limits? Or, to ask in more general terms, is there any borderline between interpretation and creation? When do we have a Judge’s Empire [Richterstaat] rather than a Law’s Empire [Rechtsstaat]?

Bernhardt: Again you have addressed an extraordinary difficult question. I have contested in many occasions that there is a clear line between the creation and interpretation of law. It always means to walk a tightrope. Each judicial decision combines the interpretation and the knowledge of law with, to a certain extent, the creation of law. But one should avoid what Americans call ‘Judicial Activism’. A very important question is whether the judge contains himself within the limits of interpretation and application of the law in the sense, that he develops law only step by step, or if he sees himself as the engine of the development. In this case it might become problematic where the judge is too much convinced of his role as a law creator and just labels his personal goals and opinions as jurisprudence. This is a thin line that the judge has to draw. Personally, I have the opinion that a certain reticence of the judge often is the better way. But he will never avoid creating law, even though he shows the most reluctance possible.

B. The role of the judge in international law

1. EJLS: In international law the borderline between interpretation and creation might even be more vague than in EU law. For instance, new notions are discussed, for example in humanitarian law, that seem to provide judges with a more powerful role in terms of

establishing new norms at the international level. Is the role of a judge changing at the international level? And, if the answer is yes, how is it changing?

Bernhardt: Again, I am a little bit reluctant to give a very clear answer. Let us take two international courts with quite different tasks. The International Court of Justice (ICJ) in The Hague and the other example is the ECHR in Strasbourg. The ICJ still only decides interstate cases and I do not see that the ICJ really tries to develop the law. I think it still is to a great extent reluctant to do so.

I follow the case law of the ICJ carefully but nevertheless it is extremely difficult to answer your question in relation to this court and I still do not think that it really plays an outstanding role in the creation of international law as part of interstate law. The situation in the ECHR is to a certain extent different. The ECHR can be more usefully compared to a national constitutional court. It has to decide cases in which people are asking for a judgement against their own state. And the ECHR is always in the extremely difficult situation where it has to decide not only many cases of minor importance but also extremely difficult cases. Take for instance the cases concerning the Russian activity in Chechnya. Here you have the first judgements of the Strasbourg court 'condemning' Russia, but nevertheless I am sure that the Russian government still thinks that the Strasbourg court is going much too far. But in the area of human rights I think that an international court cannot behave otherwise than, to a certain extent, apply and create the law in respect of extremely difficult situations. The same is not only true for Russia and Chechnya, but also for the Turkish situation in the Kurdish area. So, coming back to your starting question, whether the international judge is really more or less promoting international law I would say again there is a certain medium situation. In international law I generally think that the judge does not play an outstanding role. In terms of matters concerning European human rights, things are different: If we consider that we do have not only the ECHR but also the Inter-American Court of Human Rights, we have to admit that the judges of the Inter-American Court are sometimes going further than the ECHR would do. Accordingly they may be a promoter of international human rights law. But one must see the general danger that international courts are still dependant on the co-operation of national governments and if an international court is pronouncing judgements which seem to be unacceptable to governments, it might well be that they are no longer willing to accept or to follow their respective judgements.

2. EJLS: Let us switch the perspective to the role of the judge from the view of the individual. What is, generally speaking, the role that the individual has gained on an international level? Does this new role of the individual have any effect on the role of judges and the function of international law? How are those dynamics reshaping the role of judges in their relationship with the other states and other powers within the state?

Bernhardt: Again one must probably differentiate. In the last fifty years the ECHR has decided more and more cases concerning human rights and the individuals have always been the applicants in these disputes. Until now I think one can say that the judgements of the human rights courts had great influence on the development of the national legal orders. In most western European states considerable changes in law have taken place as a consequence of the Strasbourg case law. And the same might be true for the Western hemisphere, America included, except for the United States which never took part in all these judicial activities. I think that the role of international human rights courts and the judges of these courts have gained much importance in relation to the legal orders of Europe in general concerning human rights. But again I am a little bit afraid that this might change if I look to the difficulties in Strasbourg and the fact that the court in the near future will not be able really to handle all the cases. At present there are 100 000 applications in Strasbourg pending and 19,000 of these cases against Russia. I see a certain danger that the whole system may break down under this burden. To come back to your question this could result in the human rights judge no longer playing a decisive role.

3. EJLS: If we focus on your thesis that judgements of international courts have substantially influenced legal orders, a number of questions arise. Firstly, how can you define the role of the international judge in establishing a hierarchical structure on the international law level? Ius cogens, for example, has a normative content but not a specific normative source. Thus, it is up to the judge to define the normative content. Does this possibility increase the power of judges? We have, for example, the Yussuf case in mind; where the EU Court of the First Instance used ius cogens to review the legality of a Security Council's decision.

Bernhardt: First it is still too early to say whether this decision is really accepted. We will see what happened when the case has been through the ECJ. I think it is an interesting aspect that this Luxembourg Court has found that normally the decisions of the Security

Council are sacrosanct more or less except where *ius cogens* is involved. Now you see the notion is itself very controversial. I would agree that the prohibition of torture is one example of *ius cogens*, which is widely recognised. But let us ask whether access to a court can be considered *ius cogens*. It is clear that such access must exist but if we get more concrete, things become difficult: Take for example the case of Guantanamo Bay. Is what was and is practiced there a violation of *ius cogens*? I am to a certain extent inclined to say that it is.

It is interesting that the Court in Luxembourg decided that the Security Council's decision cannot be reviewed in principle. I think this is correct if you look into Art. 103 UN Charter. But, as for whether the *ius cogens* exception is the best solution, we will see! Whether international law and the judges in general will play a more important role cannot be said without a doubt, since it is still the governments of the states that decide what should happen. I am afraid that at some point Luxembourg or any other international court will decide a case in which the government is against the decision and ignores it. I can hardly imagine that, for instance, the Chinese government would follow an international judge.

4. EJLS: Coming back to more general issues. Do you think that recent political developments influenced the role of an international judge as such? For we have an increasing number of permanent jurisdictions that have been established by the Security Council through Chapter 7 powers in the last fifteen years. Can you identify a reason for that phenomenon and do you think that it might have an effect on the role of the international judge?

Bernhardt: One thing is quite clear: During the last ten, fifteen years the role of the judges has grown in importance. This is clearly one consequence of the disappearance of the East and West clash. It is true that in so many different areas we now have judges deciding cases. We should mention the criminal tribunals for former Yugoslavia and Rwanda. This would have been impossible before 1990 when the East-West Confrontation was still in full swing. Nowadays, international Criminal Courts exist and are active. The general international criminal court under the so-called Rome-Statute, for example, has been accepted by a great number of states. We will see in the future how far this court can be active. Then take other international judicial bodies like the WTO-institutions. They also decide more and more cases. Activities of the ECHR have been mentioned already. Its success became possible only through major reforms of the Strasbourg machinery in the late 1980s. Now all 47

member states of the Council of Europe have accepted the jurisdiction of the Strasbourg court. And so you find a good number of examples for the increasing role of the international judge and the usual consequence is that the international judge becomes more inclined to accept his new role. He has to decide cases and thereby influences the development of the international legal order. So we are on new ground and it should be that in the future the judge plays a more important role in the development of the international law. Nonetheless I am not always convinced that the larger states are prepared to accept this role and I do not exclude counter developments.

B. Dialogue of Judges

1. EJLS: Let us switch the perspective to another issue concerning the interaction and communication between judges. Do you think that an increasing number of legal orders and courts at the international level are changing the role of the judge? Do they have to overcome this multiplication of legal orders and should they do to prevent dissenting judgements? Does the judge have to serve as a parenthesis to ensure the unity of the international law system? What policies can judges develop if there are no normative instruments?

Bernhardt: I have heard several times in the past that there are too many international jurisdictions nowadays. If you look to the law of the sea, then you will see that according to the Law of the Sea Convention there are three different possibilities: The ICJ, the Law of the Sea Tribunal and arbitral tribunals of different kinds can all hear cases. I must say that in my opinion it is better to have a greater number of courts even with concurring jurisdictions. If we compare this to the situation in the past where there have not been any judges available for many cases, the current situation is preferable. Additionally, I do not think that it is a difficult or dangerous situation that we have these concurring jurisdictions. Firstly I would say that as far as I can see, until now, contradictions in the jurisprudence of different courts are very seldom. Although I, of course, cannot be familiar with everything that has been decided, I would state that there are very few cases where different international courts have rendered decisions which are incompatible with each other. So to better emphasise this, we need more judges and more judicial settlement or judicial disputes than to have political decisions in judicial questions!

2. EJLS: Does this also apply to the relationship with national courts? We have in mind the ongoing dispute between the ECHR and the German Federal Court where there has recently been some movement, in our opinion in the right direction. Do you not think -from a national perspective- that the principle of legal certainty might be in danger if they have to comply with more, sometimes even dissenting decisions on an international level?

Bernhardt: My first answer is: I hope that at some point in the future international courts are no longer necessary for the protection of human rights because national courts will be deciding such questions better than they did before. As we all know, it is a clear principle of international law that an international court can only be involved when national remedies have been exhausted. It would be regrettable if there was a clear contradiction between the jurisprudence of an international court and a national court, especially a national constitutional court like the German Constitutional Court. The better solution would be, and I think you indicated this development implicitly, that national courts should more frequently take into account what international law and international judges decide. And they should accept that in the interpretation of international norms the international courts have some priority and one should follow this. Accordingly, the solution is not only a dialogue between international and national judges but that national courts accept and follow the case law of international courts.

3. EJLS: Taking this very desirable harmony between national and international courts into account and switching the perspective to a more practical one: How does language influence the acceptance of international jurisdiction? Do you see any effect on the judicial function caused by linguistic diversity?

Bernhardt: You know that under the Strasbourg system the official languages are only English and French, but applications in other languages are at least accepted. What remains is that from a certain point onwards the proceedings take place only in English or French. Now comes a very simple but practically important question: The European human rights system in Strasbourg has not only 47 judges but also more than 500 staff members. I do not know the exact number of languages but nevertheless, it ranges from Russian to Icelandic, from German to Greek or Turkish. I think the whole system would not function if there were more than two languages spoken in the practice of the court. If you had more languages the risk of more misunderstandings among the judges is greater. Then the role of the interpreters becomes more important. So, I think in a court of law two languages are nearly the maximum. What is

also very interesting to see is that in the ICJ there are Russian and Chinese judges, both very important states, and they accepted French and English as the only official languages of the Court. This indicates that states accept this if this is the only solution that makes the system workable.

4. EJLS: The decisions of the ECHR for example are only officially published in English and French. Would it aid in gaining the acceptance of national courts if the official decision were provided in more languages, at least in the language of the country involved in the case?

What is very important is that the judgements of the Strasbourg courts are translated as soon as possible into all languages, in the countries concerned; because one weak point in the whole system is that the national judges normally do not know what has been decided in Strasbourg. This could not be changed by introducing new official languages but only by making decisions accessible in other languages for the judges at the national level. Translations of judgements into the national language of the defending State concerned are absolutely necessary and indispensable in all cases; judgements finding a breach of the Convention by Germany or Russia should be immediately available in German or Russian translations.

Other judgements should be also available in translations if they are of general importance. Given the great number of judgements adopted each year in Strasbourg -at present more than 1000- it would be impossible to translate them all, but a selection of the most important decisions should be available in all languages of the member States of the Council of Europe.

EJLS: Prof. Bernhardt, thank you very much for the interview.