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EDITORIAL

THE TOTALITARIAN TEMPTATION DELIVER US FROM EVIL

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On 19 February 1934 Erna Häbbich, residing at Neue Stuttgarterstrasse, 48, Stuttgart-Botnang, petitioned the head of state for the safety of her son, Walther Häbbich, who, it seems, had disappeared.

On 18 January 1935, she was informed by letter from the commandant of the political police that her son had been shot under martial law on 1 July 1934.

The letter concluded by saying that since her son had been executed for reasons of national self-defence (*Staatsnotwehr*), no further explanations were called for.[1]

Sixteen years later the ECHR was signed.

In 2005, in the aftermath of 9/11, the German Parliament adopted the Luftsicherheitsgesetz (Aviation Security Act), Article 14(3) of which permitted the state to shoot down civilian aircraft if it could be assumed that an aircraft was being used as a weapon in a crime endangering life on the ground, all other methods of preventing such use having failed.

The logic behind Article 14(3) was clear: if life was going to be lost anyway, it was best to minimise the number of deaths. A common sense approach, one might say.

However, although the taking of life is permissible in certain emergency situations under German law[2], Article 14(3) was seen as raising a constitutional issue. Thus, on 15 February 2006 the Constitutional Court annulled Article 14(3). It ruled that Article 14(3) was incompatible with the "*fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime. By the state's using their killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her sake.*"[3]

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1 Reinhard Rupp (Hrsg.) *Topographie des Terrors*, Verlag Willmuth Arenhövel, 1987, Berlin, page 53.

2 For example, §32 StGB (Criminal Code) presents a defence (self-defence) that exceptionally justifies the commission of a crime, including homicide, if this is done in order to avert an imminent and illegal attack and this is necessary and proportionate.

3 This is the Court's own translation. The passage is more powerful in the original. However, by translating the judgment, the Court indicates the importance of the case for non-German jurisdictions.

The Constitutional Court was saying that the life of the individual and human dignity are absolute values. They are inviolable under all circumstances.[4]

This is not to say that life must at all times be preserved in order to uphold human dignity. Hannah Arendt famously asserted that there *"exist many things worse than death"*[5] and indeed euthanasia, if freely and knowingly accepted or chosen by a suffering individual, may be the supreme act of human dignity, demonstrating that in some situations there may be more dignity in death than in life.[6]

The point is, however, that the state may not turn individuals into objects and thereby deny their intrinsic and inviolable worth as human beings.

This is a powerful judgment. It is significant that it came from Germany. The German courts are acutely sensitive to the need for strict adherence to fundamental rights and of the dangers of not enforcing human rights strictly and consistently. The Constitutional Court has one task and one task only, to protect the constitution, because by protecting the constitution it protects the state. The German Constitution puts human dignity at the forefront and indeed where it is most visible, in Article 1. So it is the duty of the state, guided where necessary by the Constitutional Court, to promote and protect human dignity.[7]

The need to resist *"la temptation totalitaire"*[8] is understood nowhere better than in Germany. Take for example the postulated return, by way of a resurrection, of the Führer in the best-selling satirical novel by Timur Vermes, '*Er ist wieder da*' (literally: he is back again)[9], which was so successful that it has now been adapted for the cinema and was released in 2015. That is something of a phenomenon, but arguably less of a phenomenon than the reaction of many to the title: on being told that he is back many ask if he ever left in the first place.

It is, to take up the prayer, precisely because the evil of totalitarian rule is ever, if latently, present that we have a fundamental rights convention in Europe and a court to enforce these rights against states in general and it is because the holocaust was caused by that particular evil taking root in Germany that the German Constitutional Court is so vigilant.

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4 For a slightly longer treatment of this topic see: Crosby, *Counter-Terrorism and Human Rights – A Short Sequel on Human Dignity*, Journal of European Criminal Law, Volume 3, Issue 4, 2009, pp 25 to 29.

5 Arendt, *Eichmann in Jerusalem*, The Viking Press, New York, 1963 (first publication); Penguin Books, New York, 2006, page 12.

6 This is a complex and emotive issue of course. Safeguards are necessary to prevent abuse. For a brief comment on the *Englaro* case in Italy see Crosby, *Euthanasia – An Ethical Issue for the Federal Legislator*, Journal of European Criminal Law, Volume 3, Issue 4, 2009, pp. 1–3.

7 What the Minister would do if ever an aircraft were to be used in Germany in the way postulated remains to be seen. The Constitutional Court may in the result only have added to the burden of office (die Last des Amtes).

8 Title of the essay by Jean-François Revel, Robert Laffont, 1976.

9 Translated in the English language version as 'Look who's back.'

It is also because the peer group of every state comprises other states that the ECHR is based on the concept of collective enforcement.[10] In Austria v Italy[11] the (then) Human Rights Commission observed that "*the purpose of the High Contracting Parties in concluding the convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but (…) to establish a common public order (…) with the object of safeguarding (…) freedom and the rule of law*".[12]

There shall, therefore, be a common public order, ensured by collective enforcement.

The official and declared policy of the party currently in power in the United Kingdom is to reject the European Court of Human Rights and make the British courts the ultimate arbiters of human rights in the UK.[13]

The government party is succumbing to the totalitarian temptation for two reasons:

i) by no longer accepting the binding nature of the judgments of the ECtHR, the government is withdrawing from collective enforcement, and
ii) since the UK courts have no power to annul legislative acts of the British Parliament the policy will not make the courts the ultimate arbiters of human rights in the UK but will give that power to parliament, and therefore, in effect, to the government of the day.[14]

Since the UK does not have any constitutionally entrenched and protected fundamental rights[15] and does not have a constitutional court, it needs the ECtHR arguably more than most if not all other Member States of the Council of Europe. The moment that safeguard is removed, the moment collective enforcement is rejected, the UK will have reinforced the power of the state over the individual and removed the protective mantle of the ECtHR. Where that step may ultimately lead is not known, but it must not be forgotten that when the totalitarian temptation is strong, governments take control of the courts.

The totalitarian temptation is growing in Europe.

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10 See the fifth recital of the Convention and the recitals to the first, fourth and seventh protocols.

11 Application N° 788/60.

12 Note the Preamble of the French *Déclaration des droits de l'homme et du citoyen*, 1789, where it is declared that "*l'oubli ou le mépris des droits de l'Homme sont les seules causes des malheurs publics et de la corruption des Gouvernements* (…)".

13 See Conservative Party Manifesto 2015 (https://www.conservatives.com/manifesto).

14 See further www.ecba.org, where under 'projects' there is a human rights section, where the need to resist the planned UK withdrawal from the jurisdiction of the ECtHR is criticised in more detail; note that in terms of the Human Rights Act a breach of human rights law by the British Parliament does not result in the act in question being annulled. Bringing the offending act into line is for Parliament. Until Parliament acts, the act stands.

15 The Human Rights Act is not in any way protected constitutionally; the doctrine of parliamentary sovereignty prevents the legal entrenchment of any Act of the British Parliament, including the act restoring the Scottish Parliament.

In Poland, the Government is engaged in reducing the powers of the constitutional court, apparently on the basis that *"the good of the nation is above the law."*[16]

In Hungary the constitutional court has also been stripped of power, with an attendant reduction in human rights protection from state intolerance, which is well documented.[17]

In Turkey all dissent is suppressed, journalists are jailed in large numbers for reporting and lawyers are jailed for defending. Some are killed whilst protesting.[18]

As regards Russia, Reuters report[19] that Russia has adopted a law allowing the Russian Constitutional Court to disregard judgments of the ECtHR if it deems them unconstitutional. Despite a statement by the President of Russia's Constitutional Court saying, according to Reuters, that there is no problem with this law, its purpose is regarded by external observers as being to reduce human rights protection in Russia.[20]

The UK government is therefore not alone in its efforts to put itself above human rights law. But this is no justification; the UK it is merely joining the camp of intolerance.

It is not too late for the UK to resist the temptation. It could help turn the tide by dropping its anti-Convention policy.

If it does not resist, the slide away from the rule of law in general and rights protection in particular will, if anything, quickly accelerate and broaden.

In any event the growing disrespect for and the threatened demise of rights protection in general and the ECHR in particular must be opposed, lest Europe loses what it took centuries to achieve.

The aphorism attributed to Edmund Burke that all that is required for evil to prevail is for good men to do nothing, is as valid today as it was in the eighteenth century.

Only collective opposition to the erosion of our rights can deliver us from evil.

16 Jan Cienski, Politico, 24 December 2015.

17 See for example The Human Rights Watch Report, *Wrong Direction on Rights*, 16 May 2013.

18 See the ECBA website for examples, www.ecba.org.

19 Reuters, 15 December 2015.

20 See the statement of the Chairperson of the OSCE Parliamentary Assembly on 17 December 2015:www.oscepa.org/news-a-media/press-releases/2015/2425-osce-pa-human-rights-chair-expresses-concern-about-law-in-russia-on-international-rights-rulings#sthash.Nc7yaAzK.dpuf.