Mads Andenas

ADVOCATES IN THE ENFORCEMENT AND DEVELOPMENT OF HUMAN RIGHTS (*)

We are seeing the full impact of due process standards as part of modern rule of law and *stato di diritto* ideals. One dimension is the new Europe of rights challenging old dichotomies of the national and the supranational, and of the public and the private.[1] The interest of the unprivileged and the privileged in well defined and enforceable rights are meeting at the crossroads of predictability and social justice. This presents a great professional challenge to advocates. How can one develop what is a new practice area, not only for the advocate representing traditionally underprivileged such as employees, criminal defendants, refugees and minorities, but also the commercial advocate at the other end of the scale of privilege.

The role of individual advocates in cases is both in obtaining remedies and developing the law. Behind every "overreaching" new rights pronouncement by a court, there are the submissions of the advocate in the case. In judicial lawmaking, the role of the advocate is central. A court will depend on the arguments presented to it. In giving full effect to due process standards, courts and advocates are very much on their own. Legal doctrine is struggling to keep up, and the same applies to law making and parliamentary scrutiny. Neither offer much assistance to the advocates preparing their cases.

I have three areas I want to discuss with you. The first is how advocates bring cases from their own countries to international

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[1] See the example in the inclusion of rights and principles in the Draft Common Frame of Reference (DCFR) for European private law.

and European courts and other human rights bodies. The second is how advocates make use of European and UN sources of authority in support of the cases before national courts. A third is the role advocates play as part of the wider civil society, in human rights monitoring, assistance to the bars of other countries, bringing cases from other countries, or assisting with this. At the end, I will add some points about the UN Working Group on Arbitrary Detention of which I am a member.

Turning first to bringing cases to international and European courts and other human rights bodies. Much of the important advancement of international human rights is in bringing complaints from one's countries to the supranational human rights courts and other bodies. I would like to pay particular tribute to the advocates who have brought cases before European and UN human rights courts and other bodies, and I know that considerable costs for the individual advocate can be involved.[2] In most countries major steps forward can be ascribed to individuals who as advocates have brought break-through cases on behalf of clients they may even have sought out with this in mind. The system of human rights courts and other bodies is developing, and there is a need for competent advocates who can make use of the different bodies to protect a client or to promote a wider cause. States are concerned about cases brought against them before different tribunals and claim *lis pendens* and *ne bis in idem*. This should not restrain the advocate searching for ways of protecting the interests of a client. Let me also add that there is limited effort and cost in bringing cases before European courts and UN human rights bodies compared to most domestic systems. Human rights law is becoming a body of law which demands much of the practitioner. But the threshold for bringing a case is low. If the alternative is not bringing the case, it may be that an advocate not confident in the discipline still should bring it. If it prevails through the filtering mechanisms that apply, it may be wise to seek more competent counsel. Many of the great human rights lawyers of our time have learned their skills this way.

[2] In some countries advocates bringing cases to the European Court of Human Rights are subjected to attacks from politicians. It is important that the bar and civil society defend such advocates, and this obviously applies also when we do not agree with their case, or the arguments they submit on behalf of their clients.

Let me interject that the two last weeks have seen some remarkable judgments by the European Court of Human Rights.

In *Taxquet v Belgium* the Court last week required reasons in certain judgments where the guilty verdict was made by a jury. The requirement of reasons for court decisions is developed by the European Human Rights Court and the UN Human Rights Committee. The requirement is fundamental but its application gives rise to difficult questions. In retrospect this jurisprudence seems obvious, such as in *Taxquet* where the Court holds that a convicted person should know what his conviction is based on. The UN Human Rights Committee has developed the right to reasons in other areas, such as the right to reasons for decisions to refuse to hear appeals. In *Moulin v France* this week the European Human Rights Court held that a prosecutor could not replace a judge in making certain decisions about detention in a criminal case as the new politically motivated French legislation had done. The Human Rights Court found a violation of article 5-3 of the Convention on the ground that a prosecutor is not an "officer authorised by law to exercise judicial power". In advance of this judgment, the French Cour de cassation referred to the Conseil Constitutionnel the question of the legality of article 803-3 of the Criminal Code of Procedure allowing police custody of up to seven days. Me France Moulin is a lawyer in a commercial cabinet in Toulouse and obviously not the right person to pick on in this manner. This decision is also reflecting the development of fair trial and judicial independence in the UN human rights system, and has a side to the UN mandate of my colleague Gabriela Silva[3] who will speak after me. The obvious question now is how could this French legislation pass through? Not only Italians with Article 1 of the Constitution and the 48 hours rule in the Criminal Procedure Code but any observer will today ask why a constitutional review was not undertaken which would have shown that the new French legislation never could pass muster.

These two weeks have also seen important human rights decisions of national courts. Let me just mention the German Constitutional Court with its review of new genetic technology legislation, which upholds the constitutionality of the legislation after a

[3] Gabriela Carina Knaul de Albuquerque is the UN Special Rapporteur on judicial independence.

detailed proportionality review. International and European human rights arguments featured prominently in the argument before the court. Professor Rodotà who spoke just before me can say more about the network of lawyers – professors, advocates and judges – in this field, who keep one another informed so that a decision as this is fed back, in real time, to the different international and domestic law arenas.

I now turn to the second topic, how advocates make use of European and UN sources of authority in support of their cases before national courts. The rights decisions of the European Court of Human Rights and European Court of Justice are cited in front of, and applied by, national courts. In Italy, the superior courts would not cite or discuss decisions from the European Human Rights Courts just some very few years ago. Today they all do so, and not very unlike the way in which they consider domestic authorities.

Different UN bodies such as the Human Rights Committee, the Torture Committee, the Economic and Social Rights Committee and the Working Group on Arbitrary Detention are the next set of authorities to establish themselves in national courts. Submissions by advocates will lead the way.

I am now turning to the third point which is the work of the bar outside the court room. There is an important role for advocates and bar associations and other groups of lawyers in promoting access to justice and rule of law. One is in promoting the representation of underprivileged and refugees. Another is in taking part in law reform, putting pressure on the authorities. Yet another is monitoring the compliance with European and international human rights, and taking part in the different mechanisms that are developed under several human rights conventions. National bars and groups of advocates make important contributions to the reporting to European and UN bodies which provide good opportunity to review national practices and hold national authorities to account. There is also interaction with parliamentary mechanisms which are in need of authoritative submissions.

One current problem in the reform of the European Court of Human Rights. There is too limited participation of European bars,

with State agents[4] and ministries at home with a stake in the matter of a certain kind dominating for instance at the recent Interlaken conference about the future of the Court. Neither will promote the development or enforcement of the rights of the individual as their first priority. There was limited civil society involvement. National bars have more influence on European company law reform than on fundamental rights in the EU, the Council of Europe or for that matter the UN.

European bars also need to increase their involvement in the selection of judges and members of different supranational courts and other human rights bodies. There is improvement in the selection process to improve quality and independence have taken place. But there is still too much of a diplomatic paradigm: sending people "to fight one's corner", preferring the "safe pair of hands", "somebody to be relied upon". Once appointed, many of the judges in this category prove more independent ("go native") than their supporters would have wanted, but the process should still be improved.

Let me add some words about "technical assistance" to the bar in other countries. This is directed at different levels: basic infrastructures of the profession, independent defence that can assert itself against prosecution and judges who in too many countries see themselves as two arms of the state with the same purpose, joining forces against the defence. There is a need to support human rights defenders. But also just doing the job as a defence counsel as criminal procedure and professional ethics require can provide dangerous in many countries. Here we need to provide support to the individual members of our profession who risk personal safety for professional ideals we all share.

There are a number of programmes where advocates assist non governmental organisations in other countries with cases before the European Court of Human Rights. Many of these cases have become important authorities, and also play an important role in the transition to system which protects rights through a judicial mechanism.

[4] The legal agent of a state which represents it before the European Court of Human Rights. It will typically be a representative of the diplomatic legal service or of the legal service of the home civil service.

And finally turning to arbitrary detention: The UN Working Group on Arbitrary Detention was the first international human rights body to make clear that although much changed with Sept 11, the law was not suspended. The Working Group challenged the US internment of a large number of individuals in Guantanamo Bay. It rejected the argument that a *lex specialis* humanitarian law regime (laws of war) applied, which the US then contended did not offer protection for "unlawful combatants". The right to go before a judge, and the prohibition of arbitrary detention, are *jus cogens* rules of international law and cannot be derogated from or restricted. This view on the law is shared by the UN Human Rights Committee.

The Working Group with some of the other UN human rights rapporteurs earlier this year produced a study on secret detentions. This looked into the complicity of many other states in secret rendition and other practices where the purpose would be to find a jurisdiction where arbitrary detention, regularly involving torture, often beyond the water boarding that some have defended[5] could take place without making remedies available to the victim. The Italian prosecution of foreign agents kidnapping a suspect, was regarded with approval.

In the Working Group's recent cases we have dealt with detentions in countries with states of emergency and laws which today are rebranded "anti-terrorist" laws (Egypt, Syria). We have cases from occupied territories where a state tries on the same black hole argument we know from the previous US administration's defence of Guantanamo Bay: the human rights regime of international law is replaced by humanitarian law (laws of war) as *lex specialis*, and by the way, the latter offers the detained no protection (Israel).

The references to Italian and German opera are not to trivialise the issues: A morning in the Working Group is like sitting through Tosca and Fidelio, all at once. But whereas we can cry and go home, most of the detainees do not get out. The current decade has been a bleak one for human rights protection against arbitrary detention and torture. Here lies one challenge to the law, and to

[5] Former President Bush has continued to defend "enhanced interrogation methods" such as "waterboarding" with a reference to "the lawyers said it was not against the law".

advocates who not only assist their clients in obtaining remedies but play a part in making the law.

Treating migrants as criminals, and disregarding international refugee law and national laws, is another issue which is fighting its way to the top of the international human rights agenda.

And let me end with the recurring theme of "overreaching" international and European courts and "activist" judges. Defenders of national autonomy and sovereignty, and even some law professors and students, would open the discussion with such statements. In any legal system there can be disagreement about individual cases, and we need open and free discussion about such matters. But the pressing problems of international human rights law lie elsewhere: in the violations of the core rights of the individual. Advocates who know the field would agree. And again: the last decade has set us far back in terms of arbitrary detention and torture and we now need to set it right. This is where the focus should be.