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HOW CAN PROTECTION OF HUMAN RIGHTS BE PREVENTED FROM BEING ABUSED?

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By its Resolution 467 of 21 January 1971, the Consultative Assembly of the Council of Europe decided to convene a Parliamentary Conference on Human Rights for the purpose of determining the essential items of an outline programme for the years ahead. Among the main subjects to be dealt with by the Conference, the question of protection against abuse of human rights and freedoms is likely to occupy a special place. As stated in the report which Mr. Prélot submitted to the Consultative Assembly, "more and more frequently the extension of the legal protection afforded to man operates less to the advantage of those entitled thereto than of those who are clever at claiming benefit from the measures designed to protect freedom in order to

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cover up their reprehensible acts, unscrupulousness, correctional or even criminal offences. A person who abuses a right should not be allowed to claim benefit thereof."

It is true that often, for many reasons, the intentions of the authors of human rights texts will not be fulfilled; the texts will be applied according to their letter but their spirit will be distorted. It can be seen how assessments of instruments that are binding upon the members of a community will vary as a result either of gaps in the instruments or of different conceptions of human rights. Moreover, efforts to prevent rights from being exceeded and ensure that obligations are fulfilled will sometimes be hampered by the fact that the complex and delicate issues involved are obscured by terminological confusion; however, these issues will need to be resolved if effective action is to be taken against anti-social behavior. These remarks also apply to the subject of this paper. Before trying to enter the heart of the problems raised by abuse, it will be as well to define the paper's scope. However, the title given by the Conference's organizers is itself somewhat confusing.

(a) In the first place, the expression "protection" has several meanings. It can be taken to mean all the various measures that are aimed at protecting the enjoyment of human rights and fundamental freedoms (legislative measures, administrative measures and implementation procedure, including action by the responsible, organs and by individuals). In a more restricted sense, the expression simply denotes Implementation measures.

However, judging from Mr. Prélot's report and the debate held in the Consultative Assembly, what is meant is not protection in these senses but something else, namely the exercise of the various rights and freedoms recognized to individuals. This exercise, use or enjoyment of a subjective right may be abusive. For that reason, I shall confine my attention in this paper to problems concerning the abuse of subjective rights. I shall thus leave aside the other aspect of abuse, viz. abuse by officials responsible for supervising the enjoyment of human rights and fundamental freedoms, an aspect which would need to be studied in order to obtain a full picture of the problem of abuse.

(b) The other point concerns the formal sources of law. When speaking of human rights in Europe, one usually has in mind the rights and freedoms embodied in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the Protocols thereto. That is quite natural; nevertheless, the countries of Europe are bound by many other human rights instruments, concluded at bilateral, regional or world level. The problem of the abuse of human rights arises in general terms (at both national

and international level), and it ought not to be confined to a particular category of rights or a particular convention.

In this connection, it should be noted that not all the Council of Europe member States are legally bound by all the human rights instruments in existence, though in practice they also respect the rights to which they have not formally subscribed and the problem of abuse also arises in regard to such rights. From a theoretical standpoint this is not important, and I shall not of course take it into account, pending the entry into force of the texts in question. This approach seems to me preferable as our Conference is also dealing with the question of widening the protection of human rights.

The same applies to each country's systems. I am sure that the law is not abused to the same extent in all countries, though it is true of most States that abuse of the law is nowadays a predominant legal concept. For the reasons already mentioned, I shall not take this into account either. My approach will be guided by these considerations. Consequently, I shall not refer to the practice of individual States but shall discuss these problems in as general terms as possible, in anticipation of contributions from each country's representatives.

I - ABUSE OF THE LAW AS A CONCEPT

Misunderstandings arise even over the concept of abuse of the law. It is not my purpose to examine whether or not such a concept is legally justified. As is well known, there was a time when it was not part of the law. Subsequently, however, it was - at first, hesitantly - brought into internal legal systems, by case-law, abuse of the law being expressly prohibited in private relations. Some scholars have strongly criticized the concept, saying (e.g. Planiol) that an act cannot be both consistent with and contrary to the law. Not wishing to enter into this discussion, I shall simply say that it is essential that the concept of abuse should be clearly defined, as it is often confused with other concepts, such as unlawful act, illicit act, good faith and equity. In Mr. Prélot's report, reference is made to reprehensible acts, correctional offences and crimes.

Legislative texts are not clear because they relate to all these concepts. In some countries the concept of abuse of the law is based on a case-law interpretation of statutory provisions concerning "fault", whilst in others it is one of the general legal principles.

In countries where the sense of individual tradition is strongest there are merely restrictions expressly prescribed by law. Here doctrine has tried to

establish a general theory of abuse. I do not wish to go into this in detail, but I would like to make some general comments to serve as a guide.

Nor do I intend to discuss whether the concept of abuse arose from the concept of law itself or whether it is a technical means, a device, to enable the exercise of a right to be condemned without the right itself being affected.

In its broadest sense, abuse denotes any misuse of something. On this basis, any act deemed wrong, disagreeable, undesirable, unjust, offensive or blameworthy may be regarded as an abuse.

In everyday parlance, we come across such expressions as "abus de confiance" (fraudulent misuse) or "resiliation abusive du contrat" (wrongful termination of contract).

In legislative texts, the expression "abuse" is used to denote certain malpractices or excesses.

But in law it has a more restricted meaning. It means abuse of the law in circumstances where the exercise of a right, lawful in itself, produces results that are regarded as socially undesirable. Abuse of the law signifies the manifestly disagreeable use of a right, either the act itself or its results being disagreeable.

Society possesses several remedies against excesses in the exercise of the law. In the first instance, there are prohibitions; but this method will sometimes be inadequate and some undesirable acts will succeed in evading this form of control. Then there are various general remedies - viz. moral or legal concepts such as public policy, the principles of equity and good faith, and abuse of the law itself - of which authorities may avail themselves when Juridical rules prove deficient.

Hence the conclusion that even individualistic systems recognize the concept of abuse, at least in substance. But this applies to abuse in the ordinary sense; it does not concern the restricted concept of abuse. In fact, although the concept of abuse in the ordinary sense is inherent in each system, it does not automatically imply abuse of the law.

In this paper, the expression "abuse of the law" will be construed in its strictly legal sense. An abusive act is any act which, in its motives or its aim, runs counter to the spirit of the law. A distinction needs to be drawn between an act of this kind and an unlawful act.

(a) Abusive acts and unlawful acts.

An unlawful act is an act performed without any entitlement and hence in breach of the law a legislative provision or a regulation. It automatically involves the liability of the person who committed it. A person will be acting unlawfully when he oversteps the law's limits; in such cases, he will be violating the law, departing from it, acting outside it, and he will no longer have any entitlement.

By contrast, an abusive act has the appearance of lawfulness, of the proper exercise of subjective rights. Intrinsically, such acts are blameless. A person exercises a prerogative which belongs to him, he does not overstep the limits objectively laid down by the law, he acts in the exercise of a right which the legal system has conferred on him. He may therefore claim to be entitled to act as he sees fit. However, if he exercises his right in a manner calculated to harm others or if he derives excessive advantages from it, then he will be pursuing an aim that is different from the one which the creator of the right had in mind; it will be a case of the right being diverted from the proper purpose for which it was established.

For that reason, violation of the law and abuse of the law should not be equated, even though they may have the same practical consequences. One precludes the other; if a person is violating the law in performing an act, it is impossible for him to be abusing the law as well. This was what was at the heart of the criticism of Planiol and his supporters. However, they did not distinguish between the two meanings of "law", namely subjective law (i.e. rights) and objective law (i.e. the legal system). The former may be abused, the latter violated. That is why there may be both abuse and violation, but there will not be any contradiction as different categories will be involved. It can thus be seen how objective law, or the legal system, can prohibit abuse of the law.

The effect of this distinction is that only a subjective right, conferring a certain power on its holders, may be abused. The problem of the abusive exercise of a right therefore arises in relation to generally recognised rights and freedoms whose exercise is subject to little or no control or restrictions. The holders of such rights are free to exercise them for whatever reasons they see fit, without being accountable to anyone. And so the concept of abuse arose precisely in private law and acquired its importance in the field of human rights.

As just mentioned, this distinction disappears when it comes to the reaction of the community, anxious not to allow clever people to gain advantages from abuse of the law; but the penalties belong to the civil sphere and do not relate to the prohibition of such acts.

b) Abuse of the law and good faith.

Some writers regard abuse as a moral corrective to strict legality. That is why the concepts of abuse of the law and good faith overlap or merge; they result from the same moral considerations underlying the law. Some writers believe abuse to be a consequence of good faith applied to the exercise of rights. But, despite these affinities, the two concepts need to be clearly differentiated.

Any manifestly disagreeable exercise of a right where the aim is solely or mainly to injure others is abusive. In fact, this is also a violation of the most elementary rule of good faith.

However, not every case of abuse is necessarily a breach of the obligation to comply with the rules of good faith. And if abuse is not automatically a violation of good faith, not every case of bad faith is necessarily abusive. Good faith is broader in scope than abuse and, unlike abuse, may be invoked in the case of most illicit acts.

The criteria are not altogether identical. It is a violation of good faith to transgress what society considers a minimum of fairness, integrity or morality. On the other hand, it is abusive to exercise a right in a manifestly excessive manner or thereby achieve unjust results.

Good faith is generally concerned with the way in which obligations are discharged, whereas abuse is connected with the exercise of subjective rights.

In practice, it is good faith rather than abuse that is invoked in cases where the two concepts overlap.

c) Abuse of the law and equity.

There are similarities between abuse and equity, as both seek to overcome the law's defects. However, despite these similarities stemming from the same moral considerations, the two concepts should not be inter-changed.

According to one approach, "abuse of the law should be regarded as a consequence of the idea of equity, which is a means whereby certain unjust or offensive effects of the strict enforcement of juridical rules may be mitigated". The difference resides in the fact that the application of abuse does not require any consent from the parties involved.

However, this difference results from the fact that equity is recognised as a source of law, which is not the case with abuse. For that reason the application of abuse always takes place within the purview of the law, whereas equity mainly operates outside the law, i.e. it supplements the law

("praetor legem") or replaces it ("contra legera"). Equity ("Infra legem"), serving to interpret the law (like abuse), is very rare.

These observations were necessary to show that abuse obtains where, without there being any prohibitions, acts are performed that are consistent with the letter of the law but not with its spirit. According to one writer, "abuse consists in using in an anti-social way a right that is not fully defined by the law". In other words, the elements of abuse will need to be sought in each individual case. These elements should now be briefly indicated.

II ELEMENTS OF ABUSE

As just stated, the statutory definitions of abuse are incomplete and inadequate. However, statute law is not the: only source of law; for that reason, use has been made of case-law and doctrine to establish some criteria for determining abuse.

For the purpose of defining abuse, the first consideration, in both doctrine and case-law, was the intention to injure others in performing an act that was legally permissible in itself (the expression "others" means both individuals and the community). It is very hard to say in abstract terms when this purely subjective element exists. That will be the task of a court. The basic idea is that the members of every society or community are to some extent inter-dependent. As a result, rights and freedoms are recognized to individuals not only in their own interests but also in the community's interests. Here is the limit to subjective rights; their holders are not entitled to cause any harm to others. This conception has been applied in relations amongst neighbors, but it is also applicable in social life in general. This element will often overlap with bad faith, particularly when it comes to using certain rights for the purpose of wrangling with someone. Since, however, the exercise of subjective rights is Involved, it will be better, for the reasons already stated, to use the term "abuse".

In this way elements of morality and of law will be mixed together, and it is not by chance that certain moral concepts, such as trust or fairness, or concepts pertaining to customs (traditional standards of proper behavior) are mentioned amongst the elements of abuse.

There are however objective criteria which have been increasingly invoked in recent decades, such as the spirit of the law, the general or communal interest or the distortion of society's aims.

According to a school of thought already mentioned, subjective rights are conferred on individuals in the general interests as well as in their own

interests. Consequently, such rights should be exercised in conformity with the general interest. This interest may be defined as "a co-ordination, a harmony, a balance of individual interests. However, individual interests are often in conflict. The advantages which a person derives from the exercise of his rights may be, indeed often are, offset by disadvantages for others. To some extent these disadvantages will be the necessary corollary to the exercise of a right, and will remain so until they begin to upset the balance of interests".

The expression "anti-social" means "the prejudicial consequences of the exercise of a right which give it that character... For it would be anti-social to allow an individual to derive advantages from a general abstract power to the detriment of others, where such detriment seemed unjustified. The individual would in fact be exceeding the real substance of his right. It is therefore important to reduce his power to proper limits and determine its substance"; this will be the duty of a court in each individual case.

Clearly, It would be wrong to accept either the subjective or the objective criteria by themselves, for they all have, their own sphere of application. Everything depends on the nature of a right, or rather on its substance. There are rights which may be abused without it being intended to harm others. Such acts will be consistent with the principles governing social life but their result may be offensive to others. Nevertheless, these acts will be seen to be abusive if account is taken of the spirit of the law. Furthermore, there are freedoms whose utilization is offensive to morality or good taste and hence intolerable to society (e. g. undressing in public). Lastly, it will be abusive if the advantages derived from a right are excessive. Thus, the elements of abuse may be either subjective or objective. Anything which is contrary to the rules of behavior accepted by a society will provoke a reaction, and when that reaction reaches a certain strength some measures will be essential to appease the public. In the last resort, society is the real judge - the most impartial and democratic one - of the behavior of individuals, and in forming its opinion it will use the most appropriate criteria.

III RIGHTS AND FREEDOMS OPEN TO ABUSE

Abuse of the law is possible because of the division which occurs between the collective consciousness and the strict observance of legal rules designed to safeguard individual freedoms. Abuse is possible in cases where the law allows individuals considerable freedom of action. That was why the theory of abuse first arose in private law; but since then it has constantly been widening its sphere of application and now pervades almost the whole legal

field, both the private and the public sphere, and is becoming one of the fundamental principles of law.

As I have already said, it is subjective rights and individual freedoms that are open to abuse. This, I feel, is highly significant, for human rights instruments contain several rights and freedoms which cannot be abused by their holders (e.g. the right to life, the right to humane treatment, the right to freedom and security, the prohibition of certain forms of discrimination). Moreover, the European Convention and other human rights instruments guarantee certain freedoms which may be exercised in a way that is contrary to the general interest. Some of these rights and freedoms may be abused to the detriment of individuals, others to the detriment of society as a whole; but all such cases of abuse will be prejudicial to the general interest.

The protection of human rights is aimed at guaranteeing individual rights and freedoms vis-a-vis public authorities rather than vis-a-vis other individuals. That is why one speaks of public freedoms. These rights and freedoms may be abused regardless of whether the resulting advantages accrue to the person who abuses them or to some group or community.

This is the case, for instance, with freedom of expression, freedom of peaceful assembly and freedom of association. True, the second, paragraphs of Articles 10 and 11 of the European Convention"/ authorize States to take such steps as may be necessary in the interests of national security, territorial integrity, public safety, the prevention of disorder, the protection of health or morals, the protection of the reputation, rights and freedoms of others or the prevention of crime. States are also authorized to prevent "the disclosure of information received in confidence" and to maintain "the authority and impartiality of the Judiciary". Apart from such restrictions, however, these provisions leave individuals free to abuse their freedoms: for instance, by using a meeting for the purposes of incitement to the destruction of property, an act which could not be termed a crime or a breach of national security or public order.

More problems arise with regard to the right to freedom of expression. Paragraph 2 of Article 10 of the European Convention allows States to restrict the exercise of this right in the manner just described. But this text calls for one or two remarks. It is right to guarantee freedom of speech and freedom to express any opinion. On the other hand, it would be right to prevent this freedom from being exercised for the purpose of prejudicing national security or inciting others to criminal activities. It is also right to protect the reputation of others, but great care needs to be taken in this respect. If one goes too far, there will be a danger of preventing free political, scientific, literary or artistic criticism, for any unfavorable criticism is likely to be

harmful to the reputation of the person concerned. Nor is it clear what "information received in confidence" means. Does it mean information of an official, professional, economic kind etc., or does it mean private information? Would it be a breach of secrecy to reveal confidential information to third parties in the interests of the person concerned unless it was a question of protecting health or morals? I have in mind, in particular, the responsibilities of parents and teachers. The question is a very difficult one, for nowadays it is very hard to say what information is really confidential and whether the label "confidential" is justified. We live in an age where the greatest discoveries are withheld from publication and the greatest scientists remain anonymous, whereas the others are celebrated throughout the world. The same applies to civil servants and the personnel of international organizations and firms. What a paradox! Those who are in the know dare not write or speak. Instead it is others who write, on the basis of such documents as are published. Almost everyone is entitled to label a piece of information secret. As a result it is impossible nowadays to talk about anything serious, even about one's friends or neighbors. The clandestine nature of everything that goes on around us condemns us to silence. A sociological study of these problems would be very useful and might, it is to be hoped, lead to a review of legislation on the subject. In any event, this freedom must be protected from abuses that are socially reprehensible. It should also be borne in mind that freedom of expression has other limits, resulting from habits, morality or courtesy.

Restrictions are also authorized in paragraph 2 of Article 9 of the European Convention which is concerned with freedom of thought, conscience and religion. Naturally, the problem arises in connection with freedom of religion. The grounds on which this freedom may be subjected to restrictions are practically the same as those mentioned earlier. The question that arises is whether abuses are possible outside any such restrictions. It is not really possible to enumerate the forms which abuse of this freedom may take. Is it being abused if workers stay away from work or children stay away from school on religious holidays (in accordance with their religious beliefs)? May school children refuse to sit examinations on such days? Does Article 9 cover every religion?

What about the right to respect for one's private and family life, one's home and one's correspondence? The restrictions provided for in paragraph 2 of Article 8 of the European Convention relate almost entirely to the right to respect for one's correspondence. This is the field where interference from society is reduced to the minimum required by the general interest. Of course, intervention by public authorities or others in private and family life is not desirable, but it is nevertheless possible to raise the question of limits to

this."independence" of individuals and families, or to the powers of parents. Without wishing to be accused of paternalism, I believe that parents have the greatest responsibility for the education of their children. Article 2 of the First Protocol provides that the. State shall respect the right of parents to ensure the education of their children in conformity with their religious and philosophical convictions. But nothing is said about what such a. right covers. Does it cover the choosing of a school? Are parents abusing the right when they decide on their children's education without their consent, particularly as Article 2. of the First Protocol stipulates: "No person shall be denied the right to education"? Are they abusing their powers when they forbid their children to read literature which they consider harmful? May they forbid their children to go to the cinema and see a film which has been passed by an increasingly liberal censorship? Are they entitled to lock their children up at home? Would this be a case of arbitrary arrest, contrary to Article 5 of the Convention? May they forbid their children to change their political views or religion or to engage in political activities, etc.?

The decisions given by the European Commission of Human Rights provide another example of the abuse of parents rights. This concerns the right of access to a child after divorce. According to the Commission, this right may be restricted if the child's psychological well-being and mental equilibrium so require. But it is not said whether visits may be prohibited if their aim is to cause the other parent harm.

There are many texts permitting free movement within and between the countries of Europe, together with various restrictions which are well known and do not need to be repeated here. The question that arises, as with all other treaty or legislative provisions, is whether abuses are possible beyond these restrictions. Are frequent crossings of frontiers abusive? The same question applies to movements within a country. In my opinion, a person will be abusing this right if he changes his domicile in order to secure privileges or evade civic obligations. As is well known, the public is sensitive to excessive aggrandisement, and therefore the right to free movement will be abused if it is exercised to obtain undue advantages.

The many economic and social rights are also open to countless abuses.

But when one speaks of abuse of rights, one often has a particular category of rights in mind, namely rights concerning the status of individuals in proceedings for the protection of their rights, freedoms and interests. The various human rights instruments, particularly the European Convention, contain several provisions on this subject.

Article 6 of the European Convention guarantees the right to a fair hearing, not only in criminal but in all cases. Abuses are particularly possible in civil

cases, brought by private individuals. I need only mention cases that are brought out of malice, for a person's own pleasure, in order to wrangle with the other party and not to obtain justice. But there is another point: every party to a case has an unlimited right to ask for witnesses to be heard and for evidence to be sought indefinitely. The parties and their lawyers can invoke any number of things on the pretext of ensuring "a fair hearing" but in fact in order to gain time so as to mobilize public opinion and build up pressure on the judges in the hope that the situation will change in their favor. Hence the steps already taken to prevent the judicial system from being abused.

The same problem arises in regard to Article 13 of the European Convention, which guarantees an effective remedy before a national authority for the protection of the rights embodied in the Convention. There is no mention of abuses, perhaps because this is a matter falling within the jurisdiction of each State.

This would account for the opposite course being taken in regard to the right to submit petitions to the European Commission of Human Rights (Article 25 of the Convention) Article 27 of the Convention stipulates that the Commission shall declare inadmissible any petition which it regards as "manifestly ill-founded or an abuse of the right of petition". This is the only treaty provision dealing with the abusive exercise of a right. Unfortunately the expression "abuse" has not been defined. Nor do the Commission's decisions throw any light on the concept. The Commission has rejected petitions on the ground of abuse even when one of the other grounds provided for in Article 27 was involved (e.g. the petition was formulated in very general terms; the facts had already been considered by the Commission; or the rights invoked were not recognized by the Convention) - a practice which has been criticized by doctrine.

I believe that - like the other points mentioned - this provision of Article 27 ought to be studied in greater detail, in the light of judicial experience in this field.

IV CAUSES AND FORMS OF ABUSE

If effective action is to be taken against abuse, the various causes and forms of abuse need to be known. This, however, is very difficult, for nowadays the concept of abuse underlies the law as a whole and examples of abuse are numerous and varied. It is not therefore possible to give a list of the forms in which abuse may occur. The list will vary according to each category of rights and freedoms and according to each country or region. This is a matter which calls for thorough research.

Individual rights and freedoms cover a wide range, and any generalization would be misleading. Not all rights and freedoms offer the same scope for abuse, as a study would show.

This variety is all the greater when it comes to different countries or regions. Obviously, not all peoples have the same attitude towards legal rules: attitudes will vary from one country or region to another. The question arises as to whether temperament, self-discipline, individualism or collective consciousness depend on the conditions (climatic, economic, cultural, legislative, etc.) prevailing in each country or region. A study of various aspects (sociological, economic, etc.) of this phenomenon is, I feel, important if we are to form conclusions on the observance not only of the letter but also of the spirit of the law. It would be interesting to know where the highest incidence of abuse occurs and what rights and freedoms are involved. We could then consider what preventive measures might be taken.

Specialized institutes are, of course, best qualified to carry out such a study - above all, the International Institute of Human Rights (Rene Cassin Foundation). This would in no way preclude work being done by national institutes, for each country or region (e.g. the Mediterranean area, Central Europe, Scandinavia). In any event, the work would demand a uniform methodology and an identical questionnaire covering the relevant points (principal, secondary, common and specific), having regard to the different categories of rights and freedoms, forms of abuse, causes of abuse, attitudes towards legal provisions, national measures to prevent abuse, etc.

V MEASURES TO PREVENT ABUSE

The above-mentioned study would show what the most appropriate measures for preventing abuse of human rights and freedoms were. These measures may well show a different pattern, but at present it is customary to distinguish between preventive and punitive measures.

(a) Preventive measures are designed to prevent abuse. States have already taken some such measures but not, it would seem, systematically.

First and foremost, there are statutory measures. However, as already mentioned, many of the acts to which these relate are prohibited acts and not abusive ones. Few laws deal with abuse in general terms. The fact is that this method has some drawbacks.

In the first place, when the legislature adopts the theory of abuse as a general principle, it automatically makes the law as a whole subject to it. This allows

authorities to supervise the exercise of a right in any way they deem fit, which of course means considerable powers of discretion.

Secondly, if on the other hand the law prohibits abuse in specific cases, this may be inadequate and represent an exception. Hence another drawback which is almost even worse than the previous one: if abuse is an exception, it will always be necessary - given the principle that specific rules take precedence over general ones - to consider beforehand whether an act constitutes abuse. In other words, any procedure will begin with a doubt.

Thirdly, national laws provide for the forfeiture of fundamental freedoms and rights by persons who abuse them for the purpose of combating the constitutional system. Here, the aim is, I feel, not so much to prevent cases of abuse as to preserve existing political systems. It may be wondered whether such provision implies restrictions on the activities of the opposition.

Nor is the situation any better at international level. As already pointed out, the European Convention contains only one clause dealing with abuse (viz. Article 27), though in practice Article 17 has been interpreted in this way too.

As can very easily be seen, this latter article means that the rights and freedoms recognized by the Convention do not imply the authorization of activities "aimed at the destruction of any of the rights and freedoms" set forth in the Convention. This is almost a replica of the provision in Article 30 of the Universal Declaration of Human Rights. According to one opinion, the provision prohibits the abusive exercise of rights and freedoms, and this is also the view of the European Commission. I do not altogether agree.

I have already several times mentioned certain possible restrictions whose purpose is to prevent rights and freedoms from being exercised in a manner harmful to national interests. What these restrictions imply is that Contracting Parties to the Convention may expressly prohibit certain acts. According to my conception of abuse, persons who commit such acts will be outside the law; they will be breaking the law, not abusing it, for abuse presupposes a lawful act.

At the same time, the article provides for the prohibition of activities of a highly dangerous kind. It remains to be seen whether activities that are not aimed at "destruction" constitute abusive acts.

Lastly, it is very curious that there should be controversies over the legal purport of Article 17. The European Commission took the view that the article was mainly concerned with such abuses of the rights recognized in Articles 10 and 11 of the Convention as were aimed at the destruction of the democratic system, as well as the other substantive rights of individuals. In the De Becker case, however, it said that Article 1? was fairly limited in scope

and did not apply to Article 10. Perhaps in this particular case Article 17 could not be invoked, but in general it can properly be applied to Article 10. Moreover, it is worded in general terms and has a general, though not of course a uniform validity.

But what is particularly noteworthy is the last part of Article 17, which states that nothing in the Convention may be interpreted as implying the right to engage in any activity or perform any act aimed at the limitation (of the rights and freedoms set forth in the Convention) to a greater extent than is provided for in the Convention". It is easy to understand the motives of the Convention's authors in not allowing restrictions that are not expressly provided for in the Convention. But, in that case, is it possible for measures to be taken to deal with abuse? Apparently not, but everything depends on what construction is placed on the expression "limitation". Now, whenever the Convention refers to limitations, it mentions the most serious kinds of act, which often constitute offences under national law. This is also the case with Article 17. Consequently, abuse has been left out of the article and States are entitled to take steps to deal with it.

On the subject of the spirit of the European Convention, it is relevant to refer-to Article 60, which reads as follows:

"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting State or under any other agreement to which it is a Party."

The motives are clear, for the European Convention represents a minimum standard and any improvements on it will be desirable. That being so, it should be considered whether this article does not make for greater freedom in the exercise of certain rights and perhaps facilitate abuse. Conceptions of freedom are not identical throughout Europe and the same provisions may be given differing interpretations by national courts. For instance, the Convention leaves it to each State to determine the meanings of such expressions as "democratic society", "national security", "health" and "morals"; it thus leaves the door open to abuse. And so it is impossible to say whether or not artistic freedom is being abused by the growing output of obscene works that is prohibited by international conventions.

As I am aware, the law plays a secondary role in social life, and hence the methods offered by the law are not the answer. Legislating against abuse will not provide a complete solution, though it will eliminate the more serious consequences of rights and freedoms being exercised to an extent that may be prejudicial to the rights and freedoms of others. Concern to ensure effective protection of such rights results in the limits of permissible acts being

widened. But this may be offensive to others, and there is no reason to protect one person at the expense of another. Accordingly, thought should be given to the possibility of revising the European Convention and other human rights instruments so as to bring them into line with present-day needs.

Faced with these deficiencies in the law, I incline in favor of preventive measures of another kind, namely educational measures. It is a long-standing axiom that parents cannot always keep abreast of life and its development, for they carry the ideas of their youth throughout their lives. Even so, they can provide their children with a sound upbringing. It is a question not of details but of general principles. What is needed is that young people should be brought up not in a spirit of selfish individualism but in one of community membership. Hence my view that there is no contradiction between the different generations, between society and the individual. Individuals make up society, whose essential aim is the well-being of its members. To that end, society must protect individual rights and freedoms, which should serve the interests of the whole community. This implies that the exercise of such rights and freedoms should be guided by a sense of solidarity. The consequence of such a conception is a duty to respect the rights and freedoms of others. The answer should be sought in the integration of the individual in the community, where unity exists alongside variety and even opposition. An upbringing in a spirit of fraternity is in my view the most effective remedy for abuse of rights. It should not be forgotten that the theory of abuse is designed to prevent excesses of individualism. It is "a reaction against the mechanical application of the law and represents an instrument for making the law more flexible and adjusting it to social and economic realities"; it is an instrument for reconciling freedom and justice. The Latin maxim "neminem laedit qui jure suo utitur" was abandoned long ago to reality.

(b) The purpose of punitive measures is not so much to prohibit abusive acts as to eliminate their effects. National laws provide for various penalties (annulment of acts, compensation of victims, confiscation of gains etc.), and it may be noted that these penalties belong to the civil sphere; this is in line with the view that the main aim in combating abuse is to prevent any advantages arising from an abusive act from being enjoyed rather than prohibiting abusive acts themselves or preventing rights and freedoms from being exercised. In this way, of course, society is indirectly combating forms of behavior that are prejudicial to others. It is for each society to provide for the most appropriate measures.

To this end, I would propose that a study be made of the problems raised by the various forms of abuse of man's fundamental rights and freedoms mentioned in this paper. By and large this will be a matter for experts and specialists of various kinds, but I am convinced that the representatives of the

nations of Europe will be fully able to make a real contribution towards this joint task.

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All references to the European Convention concern its original text before amendments mad by subsequent protocols.

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KAKO SPREČITI ZLOUPOTREBU LJUDSKIH PRAVA?

Rezime

Širenje zaštite ljudskih prava sve češće može da služi za prikrivanje antidruštvenog ponašanja nego svojoj svrsi. Slovo zakona ostaje nedirnuto ali su njegov cilj i duh izopačeni. Striktnim vršenjem prava se, na jednoj strani, stiče nesrazmerna dobit a na drugoj nanosi šteta" U svakom slučaju se svrha zakona ne postiže" Stvar nije u volji zakonodavca već u ponašanju pojedinca koji zloupotrebljava ovlašćenja koja mu zakon daje. To olakšava rešavanje problema jer je moguća samo zloupotreba subjektivnih prava. Otuda se ovaj opšti pravni problem najčešće javlja u oblasti ljudskih prava i sloboda.

Ne ulazeći u to da li je ovo pitanje dobro postavljeno ili ne, jasno je da je ono rezultat novijeg razvoja prava u koje ga je stidljivo uvela sudska praksa u oblasti privatnog prava. Zato je pojam zloupotrebe prava poistovećivan s protivpravnim aktom a njegova se zabrana izvodila iz načela javnog poretka, savesnosti ili pravičnosti. Zakonodavstva i praksa država različito prilaze tom problemu dok se doktrina trudi da utvrdi bar neka rukovodna načela počev od samog pojma zloupotrebe prava.

Zloupotrebu prava predstavlja svaki čin koji je po svojim pobudama ili posledici protivan duhu prava. Zbog toga se ne smeju izjednačavati kršenje ili povreda prava i zloupotreba prava. U prvom slučaju je protivpravnost očigledna i automatski je praćena propisanim sankcijama dok u drugom slučaju postoji privid savršene zakonitosti. Razlika je teorijski jasna ako se ima u vidu da se objektivno pravo može prekršiti, a subjektivno zloupotrebiti.

Zato je lako razumeti da se objektivnim pravom može zabraniti zloupotreba prava kao što se daju sva subjektivna prava, to važi kako za unutrašnje, tako i za međunarodno pravo. Kršenje norme kojom se zabranjuje zloupotreba prava predstavlja povredu objektivnog prava. Time se kršenje i zloupotreba prava međusobno približuju u meri u kojoj se približuju objektivno i subjektivno pravo. Praktične posledice i reagovanje društva mogu da budu iste ali se moraju razlikovati jer je reč o različitim kategorijama.

Do zloupotrebe prava dolazi zbog nepotpunosti objektivnog prava, odnosno pravnog poretka u kome nedostaje zabrana antidruštvenog ponašanja. Zato jedan određeni postupak pojedinca može da bude formalno saglasan pravu ali suštinski protivan njegovom duhu. Zbog toga subjektivna prava moraju da se zadrže u granicama koje će biti dovoljne za ostvarivanje pojedinih prava i sloboda bez štete po interese društva. Zloupotreba prava je moguća kada pravo ostavlja pojedincu široke mogućnosti za delovanje. Stoga je ponikla u privatnom pravu, ali je vremenom zauzela dobar deo javnog prava.

Zloupotreba prava je vezana za vršenje subjektivnih prava, ali to ne znači da sva subjektivna prava mogu da budu zloupotrebljena. Neka najvažnija individualna prava ne mogu da budu zloupotrebljena (na pr. prava na život, čovečno postupanje, sigurnost, nediskriminaciju. Mogu se zloupotrebiti prava i slobode čije vršenje proizvodi posledice prema drugim licima ili prema društvu (slobode izražavanja, mirnog okupljanja, udruživanja, veroispovesti, privatnog i porodičnog života, prepiske, mnoga svojinska, ekonomska i socijalna prava, sloboda kretanja, prava u krivičnom i građanskom postupku i sl.). Evropska konvencija o pravima čoveka sadrži mnoga ograničenja u pogledu uživanja pojedinih prava i sloboda, ali se zloupotreba nalazi izvan njih, u vršenju onoga što je dozvoljeno. Evropska konvencija pominje zloupotrebu samo kada propisuje da će se odbaciti peticije koje predstavljaju očigledni zloupotrebu prava na peticiju. U praksi taj pojam nije objašnjen jer su peticije odbacivane iz drugih razloga, što je naišlo na kritiku u doktrini.

Mnoštvo prava i sloboda koji mogu da budu zloupotrebljeni, kao i različiti uslovi u pojedinim zemljama onemogućavaju da se stvori opšta slika o uzrocima i oblicima u kojima se zloupotrebe mogu pojaviti. To zahteva posebno proučavanje sociooloških, ekonomskih i drugih okolnosti koje utiču na pojavu zloupotreba prava u svakoj sredini ili regionu, ali po istoj metodologiji da bi se mogli izvući opšti zaključci. Na osnovu tih zaključaka se mogu preduzimati odgovarajuće mere za sprečavanje zloupotreba ili otklanjanje njihovih posledica. Te mere se obično dele na preventivne (zakonodavstvo, obrazovanje) i prinudne. To je zadatak kako stručnjaka tako i političara.