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THE DEVELOPMENT OF
INTERNATIONAL LAW BY THE
EUROPEAN COURT OF HUMAN
RIGHTS, BY J.G. MERRILLS,
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*Reviewed by Dr. Rane K.L. Panjabi**

J.G. Merrills is Professor of Public International Law at the University of Sheffield, England. In this lucid, well-researched book (a contribution to the Melland Schill Series of monographs in international law), he analyzes the contribution made by the European Court of Human Rights to the development of the principles of international law by examining in detail its jurisprudence as well as its methods. The relevance of such analysis is obvious. As Merrills reminds the reader: "the Strasbourg system remains the most developed scheme of international human rights protection and the Court the most active judicial organ in the field."¹

In a world which is increasingly aware of human rights and more receptive to their implementation, there has inevitably been a spate of literature on this subject. The implementation of the European Convention has generated world-wide interest largely because it is universally regarded as one of the most comprehensive human rights systems in existence and because the decisions of the European Court have a global persuasive significance.

The fact that so many European nations have come together in mutual agreement render their human rights records open to outside scrutiny is itself a positive indication of the willingness of nations to yield some of their sovereign powers in favor of a wider interest. The protection afforded to individual citizens by a supra-national legal

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1. J. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* (1988) [hereinafter J. MERRILLS].

system is also proof of a realization that the post-war European world shares a broader outlook. While academics and international lawyers may disagree over the extent of protection offered by the European Court, the fact that such machinery exists is itself a remarkable achievement. Merrills believes that "when taken as a whole the jurisprudence of the Court has set an inspiring example not only to those who may serve at Strasbourg in the future, but also to those responsible for deciding human rights issues elsewhere."²

This positive approach manifests itself through much of his book. Merrills' discussion of the composition and work of the Court, its judgments and its methods of interpretation would be useful background information for students of international law and human rights. His detailed analysis of the Court's application of principles of law and some of the clauses of the Convention could assist legal scholars, international lawyers, and students. His exploration of the topic of competing judicial ideologies in the Court is likely to generate some controversy. The section on ideology and international human rights is, however, one of the most interesting in this book.

To elucidate his point concerning the positive contribution made by the Strasbourg system and the European Convention, Merrills explains the fundamental benefits of having international instruments to guarantee human rights:

the fact that a State is a party to a human rights treaty means that there is a legal yardstick against which its practice can be measured, while politically the issue of rights will be more prominent than might otherwise be the case. If a human rights treaty contains enforcement machinery the effect is even more pronounced. When governments know that policies must be justified in an international forum an additional element enters their decision-making. Thus, with the State's obligations to the individual as a constant background to official deliberations, the impact of a treaty such as the European Convention is likely to be out of all proportion to the number of cases in which conduct is actually challenged.³

The European Court consists of as many judges as there are State members in the Council of Europe. The divergence of opinion has been reflected in its judgment. Merrills believes that "the ability of the Court to contribute to human rights law in general is helped when it is seen to have access to a range of different views."⁴ While the judges must be qualified, they need not be experts in interna-

2. *Id.* at x.

3. *Id.* at 1.

4. *Id.* at 6.

tional law.⁵

The jurisdiction of the Court is quite wide. As Merrills states: "there is no matter of domestic law and policy which may not eventually reach the European Court."⁶ The very range of such jurisdiction guarantees an impact both on the development of international law and on the formulation of national legislation by Member States. What is at issue is "the impact of human rights law on national sovereignty and the role of international adjudication in establishing and enforcing uniform standards."⁷ As an adjudicator on human rights, the Court must also frequently consider the rival claim for individual justice and weigh this against the traditional interest of the sovereign State. Inevitably, so wide a frame of reference can lead the Court to inquire into the appropriateness of domestic law.

Merrills believes that the Court's contribution to "changes in domestic law and practice" provides the most significant evidence of its impact.⁸ The same comment could be made of the Convention generally. P. van Dijk and G.J.H. van Hoof, scholars from The Netherlands, wrote a detailed study in Dutch on the theory and practice of the European Convention.⁹ Van Dijk and van Hoof mentioned the impact of the Convention on domestic law in specific terms, highlighting the Austrian directives and amended laws concerning the treatment of sick and wounded prisoners in public hospitals, the introduction of free legal aid, and reforms governing the right of appeal in criminal cases. Belgium's reaction to the Convention was to reform its criminal laws, its legislation concerning vagrancy, and its laws on the use of languages in its school system. The Federal Republic of Germany framed regulations dealing with detention pending judicial proceedings. The United Kingdom reformed its immigration systems. Sweden introduced greater religious freedom in allowing for exceptions to compulsory religious education. Norway, by Constitutional amendment, guaranteed religious liberty. Switzerland granted suffrage to women.¹⁰ These are just a few examples of the impact.

Writing a few years after the Dutch study, Merrills also notes with satisfaction that the European Court is no longer under-utilized as is the International Court of Justice:

5. *Id.*

6. *Id.* at 9.

7. *Id.*

8. *Id.* at 12.

9. For the English translation of this book see P. VAN DIJK & G. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Netherlands: Kluwer Law and Taxation Publishers, 1984) [hereinafter P. VAN DIJK & G. VAN HOOF].

10. *Id.* at 458-59.

After a very slow start in which for the first decade of its existence cases averaged only one a year, business doubled in the next five after that. Even so, up to the end of 1979 the Court had given only thirty-six judgments. Since then, however, there has been a dramatic acceleration with no less than fifty-eight judgments in the next five-year period. The hundredth judgment of the Court was given in May 1985 and the annual output of decisions can now sometimes be more than twenty.¹¹

The importance of the judgments of an active, supra-national European Court on global perceptions and opinions concerning human rights cannot be over-estimated. The decisions of the European Court have ramifications and consequences which extend beyond the geographic domain over which it exercises its jurisdiction, mainly because it is regarded as one of the most developed of such systems. A more in-depth assessment of this facet of the Court's impact would have enhanced Merrills' book. The addition of such analysis could have been justified by the relevance and significance of the issue. Theodor Meron in his recent study, *Human Rights and Humanitarian Norms as Customary Law*, referred to the European Court, among other human rights bodies to make the point that:

the decisions of such organs are frequently and increasingly invoked outside the context of their constitutive instruments and cited as authoritative statements of human rights law. Interpretations of human rights conventions by quasi-judicial or supervisory bodies affects the internal and external behavior of states. They shape the practice of states and may establish and reflect the agreement of the parties regarding the interpretation of a treaty Cumulatively, the practice of judicial, quasi-judicial, and supervisory organs has a significant role in generating customary rules.¹²

It should not be assumed that Merrills' analysis avoids any criticism of the Court. His tone is generally restrained and his critique reasoned. For example, he points to "[T]he tendency of the Court to build its judgments around certain almost ritualistic formulae"¹³ Merrills believes that this arises from a "need to reconcile divergent points of view . . ."¹⁴ and concludes that this "not only makes the Court's judgments less interesting than they might be, but also ensures that they rarely display either the forcefulness or the depth of juridical analysis characteristic of the best individual

11. J. MERRILLS, *supra* note 1, at 16.

12. T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 100 (1989) [hereinafter T. MERON].

13. J. MERRILLS, *supra* note 1, at 31.

14. *Id.* at 24.

opinions."¹⁵

To some extent, the emphasis on ritualistic consensus is incapable, given the problem of individual vs. State interests generated by so many of the cases presented to the Court. Van Dijk and van Hoof explain the dilemma facing the various institutions which comprise the Strasbourg system, stating:

The Strasbourg organs may . . . find themselves in a serious predicament. If they lean too much towards one side, this entails the risk that they may arouse the distrust of the States, with the attendant dangers of regression. In the opposite case the danger is imminent that the individuals may lose confidence in and their actual protection from the system of the Convention.¹⁶

According to these scholars, the evolving case law suggested that the European Convention was increasingly being implemented with individual rather than State interests in mind.¹⁷ Merrills goes further in assuming a commitment by the Court "to a conception of its own role in which the function of the Convention in protecting individual rights takes priority over jurisdictional and procedural objections reflecting the traditional attitudes of governments"¹⁸

The ideological leaning of the Court assumes considerable significance in relation to its perception of its role in preserving a balance between the interests of individuals and those of States. As its judgments are not subject to appeal,¹⁹ and are binding on the Contracting States which are parties to the dispute,²⁰ there is considerable reason for the Court to weigh its opinions with care. Merrills feels that the Court has implemented its mandate by emphasizing "practical and effective" interpretations of the Convention in contrast to upholding "theoretical or illusory" rights.²¹ The Court has also affirmed its desire to interpret the Convention with modern conditions in mind,²² an affirmation which could enhance its reputation and generate more public recognition of its significance in the everyday lives of the individuals who come under its jurisdiction.

Merrills underlines the positive contribution of the Court in quoting from various judgments to demonstrate its commitment to human rights. For instance, the Court stated in the *Handyside* case: "Freedom of expression constitutes one of the essential foundations of (a democratic) society, one of the basic conditions for its progress

15. *Id.* at 25.

16. P. VAN DIJK & VAN HOOF, *supra* note 9, at 478.

17. *Id.*

18. J. MERRILLS, *supra* note 1, at 44.

19. *Id.* at 58.

20. *Id.* at 11-12.

21. *Id.* at 89-92.

22. *Id.* at 93.

and for the development of every man;"²³ it suggested in the *Lingens* case: "freedom of political debate is at the very core of the concept of a democratic society" ²⁴ In the *Young, James and Webster* case concerning a closed shop agreement, the Court opined:

Although the individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.²⁵

However, Merrills is careful to avoid giving the impression that the Court is aggressively assertive in implementing human rights to the point where it infringes on state sovereignty. This is clearly not the case. Indeed, other scholars like Meron have noted the degree of "judicial restraint characteristic of the Strasbourg Court" and contrasted it with the "assertive jurisprudence of the Luxembourg Court."²⁶

The Court's development of the concept of the "margin of appreciation"²⁷ which allows States a considerable area of discretion has generated some controversy.²⁸ Where a State pleads that a public emergency requires resort to measures derogating from human rights, the "margin of appreciation" could be used to justify the State's position. In *Ireland v. United Kingdom* the issue concerned the use of measures which would in a normal situation be considered violations of the Convention. The Court determined that "the national authorities are in principle in a better position than the international judge to decide . . . on the nature and scope of derogations necessary . . ."²⁹ The Court was careful, however, to circumscribe the range of a State's powers by qualifying the preceding statement: "the States do not enjoy an unlimited power in this respect . . . The domestic margin of appreciation is thus accompanied by a European supervision."³⁰ In his recent book, *Rule of Law in a State of Emergency*,³¹ Subrata Roy Chowdhury criticized the Court's judgment in this case with respect to its determination that interrogation techniques used in Northern Ireland did not amount to torture. As Chowdhury explained: "The approach of the European Court in determining whether acts amount to torture seems to have introduced a

23. *Id.* at 122.

24. *Id.* at 124-25.

25. *Id.* at 129.

26. T. MERON, *supra* note 12, at 146.

27. J. MERRILLS, *supra* note 1, at 136.

28. *Id.*

29. *Id.* at 139.

30. *Id.*

31. S. CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY* (1989).

subjective element capable of being abused in particular cases."³²

Merrills appears sympathetic to the Court's dilemma in attempting to strike a "fair balance," particularly when positive obligations are involved.³³ As the Court explained in the *Rees* case:

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.³⁴

The concept of the "margin of appreciation" enables this balance to be effected with a modicum of fairness. If the ensuing judgment is likely to be criticized by some authors, it is also likely to be praised by others. Merrills explains the Court's plight, stating:

If the Court is too conservative it will be accused of failing to uphold the objectives of the Convention. If it is too radical it will be accused of improper judicial legislation. The function of the margin of appreciation is not to supply a pat answer to the problem, but to provide part of the conceptual framework necessary for thinking about it.³⁵

While the "margin of appreciation" has been criticized by various writers and while this concept could be construed as an overly-easy answer to highly complex problems, Merrills, on the other hand, believes this,

is a way of recognizing that the international protection of human rights and sovereign freedom of action are not contradictory but complementary. Where the one ends, the other begins. In helping the Court to decide how and where the boundary is to be located, the concept of the margin of appreciation has a vital part to play.³⁶

In view of the fact that Merrills' approach to his subject is logical, reasonable and objective, it is not easy to criticize his analysis. It is obvious that he has considered opposing views carefully before framing his own conclusions. When he generalizes, he admits to doing so. Such generalization tends to prevail in the most interesting and possibly most controversial part of the book — his discussion of ideology and international human rights law. In this, the final chapter of the book, Merrills distinguishes between two ideologies: judicial restraint and judicial activism,³⁷ defines the philosophy of the

32. *Id.* at 196.

33. J. MERRILLS, *supra* note 1, at 151.

34. *Id.*

35. *Id.* at 157.

36. *Id.*

37. *Id.* at 207.

proponents of these two ideologies,³⁸ associates judicial activism with "benevolent liberalism" and judicial restraint with "tough conservatism,"³⁹ cautiously concedes to "the qualifications which must attend all large generalisations,"⁴⁰ and concludes that "the Court, with varying degrees of emphasis, has generally adopted an activist approach towards the Convention"⁴¹ and that "the evidence points to a tendency towards activism guided by benevolent liberalism" where some of the judges are concerned.⁴² This rather provocative thesis is, however, qualified by his statement that "[a]ctivism and restraint, like conservatism and liberalism, are useful, but not self-evidence categories, and therefore should not be thought of as more precise than they really are."⁴³

No one could dispute Merrills' conclusion "that the law of the convention is still developing. In studying the Court's work we are therefore dealing with a process as much as a product."⁴⁴ This process is vital to the evolution of human rights not only in Europe but throughout the world. To the extent that one believes that all men and women are entitled to respect for their human rights, the system developing daily in Strasbourg may contribute eventually to the realization of this ideal throughout the world.

38. *Id.* at 208-11.

39. *Id.* at 220-21.

40. *Id.* at 225.

41. *Id.* at 211.

42. *Id.* at 225.

43. *Id.* at 226.

44. *Id.* at 228-29.