

Laudatio: Rudolf Bernhardt – Leben und Werk

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When I was invited to offer the *Laudatio* for Rudolf Bernhardt on this occasion, I could not refuse for at least two reasons: first, there is our friendship and my admiration and affection for him as the very special human being he is and, second, my profound respect for him as scholar and judge, and as an individual committed to human rights. I am most grateful, therefore, that I have been given this opportunity to participate in today's happy event.

Our friendship goes back to the latter part of the 1960s when I first met Rudolf Bernhardt at the railroad station here in Heidelberg. What impressed me about him at that moment was his personal modesty and his youthful enthusiasm. What is even more impressive today is that, despite all he has accomplished in his life since then, he continues to radiate that same endearing modesty devoid of all arrogance and pretension. He has also never lost that youthful enthusiasm for life, for ideas, for scholarship. That is not something one can say of many who have reached that grand old age of 80.

Rudolf Bernhardt and I have spent many hours and days together in many parts of the world, giving speeches, participating in conferences, debating the future of international law, comparing the effectiveness of international human rights tribunals and conventions, in editorial meetings of the *Encyclopedia of Public International Law* and Kuratorium meetings of this Institute. In the process, and frequently over good meals and fine wines – how could it be otherwise in our profession? – I developed great affection for him, no doubt also influenced by the fact that his years as prisoner of war and mine in a concentration camp have given us a shared appreciation of the joy of being alive and a profound belief in the need to promote laws and institutions capable of contributing to a world in which future generations are spared the suffering our generation and that of our parents had to endure. His professional life in its different aspects has been devoted in one way or another to the achievement of these objectives.

Rudolf Bernhardt's scholarly renown and the admiration of his former students and colleagues in many parts of the world are reflected in the *Festschrift* for him that bears the very appropriate title of "Recht zwischen Umbruch und Bewahrung", published on the occasion of his 70th birthday.¹ That we are today – ten years later – holding this colloquium in his honor, testifies to the fact that our honoree has not rested on his laurels in the time that has elapsed since then; in fact, he has continued to write with his well-known lucidity and to make significant

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¹ Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst Ulrich Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung*, Berlin/Heidelberg/New York 1995.

contributions to the scholarly literature. I shall come back to that subject in a minute. First, though, I would like to deal with some other important milestones in Rudolf Bernhardt's professional life.

Over the years, I have come to realize that most of what we international legal scholars write has a relatively short shelf life, if I may be permitted to use an expression employed in stores selling perishable goods. That is to say, our books and our articles, with some notable exceptions, tend to lose their contemporary relevance, at least in the eyes of the consumers, within a relatively brief period, say ten to at most fifteen years. Thereafter, they are rarely cited except by the authors themselves. It can be safely assumed, however, that Rudolf Bernhardt, as the general editor of the *Encyclopedia of Public International Law*, will not have that problem: his *magnum opus* will continue to be cited and relied upon for many years to come in its current form or updated versions, and that for good reason.

The *Encyclopedia*² project itself, of course, spanned more than two and a half decades, with the initial publication of the twelve "Instalment" volumes, followed by the five hard-cover volumes, the first appearing in 1992 and the fourth in 2000, with the Index volume some time thereafter. In retrospect, this two-stage publication process of the *Encyclopedia*, which was no doubt motivated by practical publishing considerations, proved to be truly inspired. It permitted account to be taken in the permanent four volumes of the dramatic political and legal changes that the demise of the Soviet Union and the end of the Cold War ushered in and to assess their impact on international law and the law of international organizations.

The *Encyclopedia* is more than an outstanding public international law reference work, although it certainly is that on a grand scale. By insisting on producing an English-language work unlike its predecessor, the *Strupp/Schlochauer Wörterbuch des Völkerrechts*, a decision that was not looked upon with favor in some professional quarters in Germany, Rudolf Bernhardt and his colleagues at this Institute showcased the emerging younger German international legal scholars at a time when these scholars were not all that well known outside the German-speaking world. Although the reintegration of German international legal scholars into the wider community of scholars would have happened, of course, even without the *Encyclopedia*, I have no doubt that its publication in English hastened that process.

More important though, while still conceived during the Cold War, the *Encyclopedia*, drawing on authors from many parts of the world, including some from behind the Iron Curtain, was able to present international law as the universal legal system it is, thus reinforcing its continuing unity at a time when that unity

² For Rudolf Bernhardt's description of the background and policy considerations relating to the publication of the *Encyclopedia of Public International Law*, see Rudolf Bernhardt, *Experience and Problems Connected with an Encyclopedia of Public International Law at the End of the 20th Century*, 14 *Chinese Yearbook of International Law and Affairs* 1 (1996).

appeared to be at risk from political and ideological conceptions and pressures threatening its fragmentation. Rudolf Bernhardt's strong commitment to preserving and promoting the unity of international law was not reflected only in the policies he pursued as general editor of the *Encyclopedia*, but also as Director of this Institute. In that latter capacity, he played an important role in helping to build bridges to scholars in different parts of the world. Here his pioneering efforts of organizing meetings at the Institute that brought colleagues from the Soviet Union together with their counterparts from the West deserve special praise. The same was true also of his willingness to cultivate scholarly relations with colleagues from behind the Iron Curtain who hungered for such contacts. All this seems now so very natural, but at the time it required a great deal of political creativity and, above all, the conviction that such contacts were important and needed to be nurtured.

Rudolf Bernhardt's belief in the unity of international law and his ability to ensure the high quality of the individual contributions to the *Encyclopedia* have made it, as I have already noted, the premier reference work for our field. It is therefore not surprising that I find myself frequently reaching first for the *Encyclopedia* before turning to any other sources. I know that colleagues around the world do the same. The *Encyclopedia* will continue to perform this task for years to come, enhanced by the periodic updating that is now being undertaken. To me the *Encyclopedia* is a monument to Rudolf Bernhardt's vast knowledge of and love for our field, his wisdom, his person skills and, above all, his enviable patience with the many contributors who were frequently late and not always willing or able to follow editorial instructions.

Let me now turn to our honoree's other important achievements. Here I am referring, in the first place, to his long tenure on the European Court of Human Rights. Rather than review his significant contribution as judge to the jurisprudence of the Court, which would take much more time than has been allotted to me, I would like to focus instead on his role as President and Vice President of that institution. As is well known, Rudolf Bernhardt was the last President of that Court before it was transformed by Protocol 11 into the permanent institution it now is. He served as President for little more than half a year, but that simple fact hides another reality: not only did he serve for many years as the Court's Vice President but, more importantly, for some time prior to becoming President, Rudolf Bernhardt exercised the functions of that office in all but name because of the incapacity of the titular holder of the post. Thus, as President, and for quite some time before as Vice President, Rudolf Bernhardt was able to lay the foundation for the smooth transition from the old to the new Court, with all the legal, political and administrative problems this entailed. That task was not as easy as his diplomatic and person skills made it appear. Scholars are rarely called upon and are usually not very good at exercising a combination of judicial, administrative and diplomatic functions of the type that fell on Rudolf Bernhardt's shoulders and which he had to discharge in an environment driven, to a greater or lesser extent, by the ambitions of different personalities seeking, for selfish or altruistic reasons,

to undermine, delay or hurry the adoption and implementation of the governmental policies that eventually led to the establishment of the new Court. He managed to perform these functions effectively and admirably while ensuring that the protection of the rights of the individual was not weakened as the institutional structure of the Convention system was being very significantly transformed. I believe that the important role Rudolf Bernhardt played in guiding the transition from the old to the new Court is not sufficiently well known. It has also been inadequately appreciated, in part, because he discharged his responsibilities so well and in his usual self-effacing manner. His was a major achievement that deserves to be recognized and hailed, and I am delighted to be able to do so on this occasion.

Rudolf Bernhardt's impressive scholarly output since the publication of the *Festschrift* in his honor ten years ago demonstrates that age has not impeded his scholarly creativity and productivity. Here we have further proof that the practice of retiring individuals who have reached an arbitrarily fixed age limit makes little sense, particularly now that the pension systems in many of our countries are increasingly being depleted by the disproportion between pensioners and the active work force and when people live longer, stay healthier and remain productive long after they are forced to retire.

On perusing Bernhardt's major writings over the past decade, I was struck by the fact that a good number of his publications appeared in *Festschriften*. This is a phenomenon that many of us increasingly share: first we contribute to the *Festschriften* of our teachers, then of our retiring friends and colleagues and, if we live long enough, to the *Festschriften* of our former students. That can have both negative and positive consequences for the quality of our own scholarly output. The negative aspect, apart from the fact that writing these essays is time-consuming, is that the nature or subject of one's contribution to any given *Festschrift* tends of necessity to be determined in part at least by the academic interests of the honoree. That may force the contributors to address topics in which they have only a tangential interest, if any, and as a result, very little of value to say on the subject. But there are positive aspects to this task as well: they offer the opportunity for reflection on a discrete topic or problem without the usual formal trappings of a full-sized article. The result can be a valuable "think piece", but that in turn depends on the author and on whether he or she really has something to say.

Rudolf Bernhardt has produced a significant number of such think pieces in the past ten years, in addition to other important publications, and he has always had something of value to say. A good example is his "*Völkerrechtliche und verfassungsrechtliche Aspekte konkludenter Vertragsänderungen*", which appeared in the *Festschrift für Walter Rudolf*.³ Another, more recent example, is his "'*Verfassungen*' und '*Verfassungsgerichtsbarkeit*' internationaler Organisationen" in the *Liber*

³ Hans-Wolfgang Arndt/Franz-Ludwig Kneemeyer/Dietrich Kugelmann/Werner Meng/Michael Schweitzer (eds.), *Völkerrecht und Deutsches Recht: Festschrift für Walter Rudolf*, München 2001, 15.

Amicorum Tono Eitel.⁴ Equally interesting is his piece in the *Liber Amicorum Judge Shigeru Oda*,⁵ which deals with “*Vorbehalte bei völkerrechtlichen Verpflichtungserklärungen und die gerichtliche Kontrolle derartiger Vorbehalte*”. What these and a number of other essays have in common is their focus on legal problems that have arisen or are likely to arise in situations where national constitutional law and international law interact, overlap or collide. This is a theme that reflects one of Rudolf Bernhardt’s longstanding scholarly interests. In these pieces, he analyzes the different aspects of this theme in a clear and intellectually balanced way. Bernhardt usually begins this analysis by presenting all sides of the problem and the arguments relating to it before offering his own conclusions in a sound and in his characteristically understated manner. The essays are extremely well crafted and demonstrate Rudolf Bernhardt’s profound grasp of the imperatives of the relevant national and international legal systems.

It will probably not surprise you, given my own judicial experience, particularly as human rights judge, that I found Rudolf Bernhardt’s article “*Anmerkungen zur Rechtsfortbildung und Rechtsschöpfung durch internationale Gerichte*”, which appeared in the *Festschrift für Karl Zemanek*,⁶ of particular interest. In the final paragraph of that article, Bernhardt writes:

Schließlich kommt der internationale Richter auch bei der Auslegung und Anwendung völkerrechtlicher Verträge nicht daran vorbei, rechtsschöpferisch tätig zu werden. Das wurde oben an einigen Beispielen aus der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte gezeigt, es gilt auch sonst. Selbstverständlich hat jeder Rechtsbereich und jeder Vertrag seine Eigenheiten ... Aber wann immer ein Vertrag keine über jeden Zweifel erhabene Antwort bereit hält und ein internationaler Richter einen Streit zu entscheiden hat, sind rechtsschöpferische Elemente mit im Spiel.⁷

The notion that judges apply the law but do not make it, had considerable support at one time, although I doubt that it ever reflected the reality of the work judges are called upon to perform. Certainly, as far as international human rights law is concerned, Rudolf Bernhardt puts that notion effectively to rest. He develops the argument further in an article, published in the German Yearbook of International Law under the title of “*Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*”.⁸ Here he asks whether certain conventions, particularly human rights conventions, should be interpreted and applied as understood at the time of the conclusion of the treaty, or whether the treaty is a

⁴ Jochen Abr. Frowein/Klaus Scharioth/Ingo Winkelmann/Rüdiger Wolfrum (eds.), *Verhandeln für den Frieden / Negotiating for Peace: Liber Amicorum Tono Eitel*, Berlin/Heidelberg/New York, 2003, 281.

⁵ Nisuke Ando/Edward McWhinney/Rüdiger Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda*, The Hague/London/New York 2002, 369.

⁶ Konrad Ginther/Gerhardt Hafner/Wilfried Lang/Hanspeter Neuhold/Lilly Sucharipa-Behrmann (eds.), *Völkerrecht zwischen normativem Anspruch und politischer Realität: Festschrift für Karl Zemanek*, Berlin 1995, 11.

⁷ *Ibid.*, at 24.

⁸ German Yearbook of International Law, Volume 42 (2000), 12.

“‘living instrument’ which changes its meaning in accordance with developments in State and society”?⁹

This question has gained increasing relevance in an era that has witnessed the adoption of a large number of international and regional human rights instruments and the establishment of various human rights tribunals and quasi-judicial bodies called upon to interpret and apply these treaties. But the problem is not unique to the international plane. Thus, in the United States, as you know, a comparable debate still continues to rage in terms of the pros and cons of the search for the “original meaning” of constitutional provisions, particularly those of the U.S. Bill of Rights. The challenge is the same both on the international and national plane because the problem is the same. For the international plane, Rudolf Bernhardt provides the to me only possible answer, when he says: “human rights treaties in particular intend an effective and not only theoretical protection of the individual, and this aim can only be reached if the interpretation takes account of changing conditions in State and society”.¹⁰ It cannot be otherwise, and we would not want it to be otherwise. In this connection, it is worth noting that Justice Ruth Bader Ginsburg of the U.S. Supreme Court advocated a similar position with regard to American constitutional law in her keynote address, delivered at the 2005 annual meeting of the American Society of International Law.¹¹

Rudolf Bernhardt has devoted much of his life to the effective protection of human rights and to the strengthening of international law and institutions. He has pursued these objectives with an energy and enthusiasm that puts all of us, particularly his younger friends and admirers, to shame. We know and hope that he will remain active in the years to come and continue on the path that has enabled him to bring so much wisdom and personal warmth to the tasks confronting our profession and the world we live in. Above all, we wish him and Dagmar, his magnificent life’s companion, much happiness and good health for many more years.

⁹ Ibid., at 12.

¹⁰ Ibid., at 23.

¹¹ See Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, to be found in <<http://www.asil.org/events/AM05/ginsburg050401.html>>.