



EUROPEAN SUPREME COURTS

A PORTRAIT THROUGH HISTORY

Edited by A.A. Wijffels and C.H. van Rhee

Foreword by Baron Neuberger of Abbotsbury,
President of the Supreme Court of the United Kingdom



Court of Justice of the European Union, Luxembourg.

European Supreme Courts: A Portrait through History

2013 © Third Millennium Publishing Limited

First published in 2013 by Third Millennium Publishing Limited,
a subsidiary of Third Millennium Information Limited.

2-5 Benjamin Street, London
United Kingdom EC1M 5QL
www.tmltd.com

ISBN: 978 1 906507 40 4

British Library Cataloguing in Publication Data
A CIP catalogue record for this book is available
from the British Library.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any storage or retrieval system, without permission in writing from the copyright owner concerned.

Editors	Alain Wijffels and C.H. (Remco) van Rhee
Project management	Joel Burden and Christopher Fagg
Language revision	Randolph Davidson
Picture research	Neil Burkey and Joel Burden
Design	Matthew Wilson
Production	Bonnie Murray
Consultant	Maarten Koning
Reprographics	Studio Fasoli, Verona, Italy
Printing	Gorenjski Tisk, Slovenia

Contents

Contributors	3	5	The Holy Roman Empire: the Imperial Courts' System and the <i>Reichshofrat</i>	86
Foreword – <i>Baron Neuberger of Abbotsbury, President of the Supreme Court of the United Kingdom</i>	6		<i>Eva Ortlieb</i>	
Timeline	8	6	The Holy Roman Empire: the <i>Reichskammergericht</i>	96
			<i>Anette Baumann</i>	
SECTION ONE		7	The Holy Roman Empire: the Court of Wismar	104
			<i>Nils Jörn</i>	
Introduction: European Legal History and the Diversity of Supreme Judicatures	14	8	The Scandinavian Supreme Courts	114
<i>Alain Wijffels</i>			<i>Kjell Å. Modéer</i>	
• The Case of Arnold the Miller / <i>A. Wijffels</i> / 35		9	Germany and Austria in the 19th and 20th Centuries	120
1 Italy from Medieval Times to 1800	38		<i>Werner Ogris</i>	
<i>Mario Ascheri</i>			• Public-law Jurisdiction / <i>W. Ogris</i> / 121	
• The Legal System of Venice / <i>M. Ascheri</i> / 42			• The St Paul's Church Constitution (1849) / <i>W. Ogris</i> / 123	
• Stating the Judgment's Reasons / <i>M. Ascheri</i> / 48		10	Switzerland	138
• The Courts of the House of Savoy / <i>M. Ascheri</i> / 51			<i>Michele Luminati</i>	
2 Italy since 1796	52	11	Spain and Portugal until the 18th Century	142
<i>Paolo Alvazzi del Frate</i>			<i>Ignacio Czeguhn and Antonio Sánchez Aranda</i>	
3 Late-Medieval and Early-Modern France	62	12	Spain and Portugal after 1800	150
<i>Alain Wijffels</i>			<i>Alvaro Pérez-Ragone and Matthew C. Mirow</i>	
• The <i>Parlement</i> of Flanders / <i>A. Wijffels</i> / 72		13	Poland-Lithuania	160
4 France from the Revolution to the Present	74		<i>Wacław Uruszczak</i>	
<i>Alain Wijffels</i>		14	Russia	166
• The Judiciary in the French Written Constitutions / <i>A. Wijffels</i> / 79			<i>Vladimir Yarkov</i>	

15	The English Common Law and Chancery Jurisdiction, Late Middle Ages and Early-Modern Times	172		
	<i>Anthony Musson</i>			
16	The Restructuring of the Superior Courts in England during the 19th Century	182		
	<i>Chantal Stebbings</i>			
17	Scotland: the Court of Session from its Foundation to 1800	190		
	<i>Mark Godfrey</i>			
18	The Scottish Court of Session in the 19th and 20th Centuries	198		
	<i>John Blackie</i>			
19	The Low Countries until 1800	204		
	<i>C.H. (Remco) van Rhee</i>			
	• A Lawyer's Office / <i>A. Wijffels</i> / 209			
20	Belgium, the Netherlands and Luxembourg since 1800	218		
	<i>Georges Martyn</i>			
21	Southeastern Europe, 1526–1820	228		
	<i>Marko Petrak</i>			
22	The Ottoman Empire and Turkey	234		
	<i>Ruth A. Miller</i>			
			SECTION TWO	
			<hr/>	
	Introduction: Supreme Judicature in the 20th and 21st Centuries			240
	<i>C.H. (Remco) van Rhee</i>			
	• Legal Studies at the College of Europe / <i>E. Muir</i> / 248			
23	20th-Century International Courts and Peaceful Dispute Settlement			250
	<i>Raymond Kubben</i>			
	• Iron Rhine Arbitration / <i>R. Kubben</i> / 252			
	• Solid as Two Groups of Rocks / <i>R. Kubben</i> / 255			
	• Limits at Sea / <i>R. Kubben</i> / 255			
	• The Disintegration of Yugoslavia / <i>R. Kubben</i> / 260			
24	The Court of Justice of the European Union			262
	<i>Hildegard Schneider</i>			
	• The Relationship Between the Court of Justice of the European Union and National Courts / <i>H. Schneider</i> / 273			
25	The European Court of Human Rights			274
	<i>Alan Uzelac</i>			
	• Sample Cases / <i>A. Uzelac</i> / 278			
	• In Prison, but with Access to Justice / <i>F.J. Fernhout</i> / 280			
			Bibliography	285
			Picture Acknowledgements	288

The European Court of Human Rights

ALAN UZELAC

The European Court of Human Rights in Strasbourg is probably the best-known European court today, at least from the perspective of most European citizens. It developed as one of the by-products of the attempts to (re)unify Europe in the aftermath of World War II. In the very beginning, the court was conceived as only a secondary, part-time element of the enforcement mechanism of the European Human Rights Convention. Yet, during its half-century of existence it has gradually become much more visible, important, and occupied by a greater influx of cases than its founding fathers (and almost anyone else) could have ever expected. At present time, the court has become both the champion of international judicial institutions, and the victim of its own success. Ever more people resort to its jurisdiction on an ever-growing number of issues. However, at the same time, the last two decades of its work have been marked by a continual struggle for reforms that will enable the court to cope with its ever-growing caseload. It is so far an open-ended process, with an uncertain final result.

The European Court of Human Rights was established as a body under the European Human Rights Convention, in order to 'ensure the observance of the engagements' undertaken by members of the Council of Europe to protect human rights and fundamental freedoms. In the preamble of the Convention, it is reiterated that one of the principal aims of the Council of Europe is the achievement of greater unity between the European states. The maintenance and further realisation of human rights and fundamental freedoms are regarded to be one of the methods of pursuing this aim, *inter alia* because 'those fundamental freedoms ... are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy

and on the other by a common understanding and observance of the human rights upon which they depend'. As such, both the Convention and the court (as an implementing body of the Convention) have to enforce the main underlying idea of the common heritage of political traditions, ideals, freedom and the rule of law on which European countries are (or should be) rooted.



The International Council of the European Movement held its inaugural session from 25–28 February 1949, in Brussels. European activists called for the adoption of a Charter of Human Rights along with a Court of Justice to examine allegations of violation of the Charter. This image shows Winston Churchill, former British Prime Minister (seated to the right), waiting to make a public speech. Also present is Paul-Henri Spaak, Belgian Prime Minister (seated to the left).



The Convention on Human Rights was opened for signature on 4 November 1950 at the Barberini Palace in Rome.

Yet both the idea of the European unity and that of the common heritage are not uncontroversial. So, as emphasised by Professor Simpson (the author of a major study on the history of the Convention), ‘the European Convention and its First Protocol were the product of conflicts, compromise, and happenstance’. In fact, the current role of the court would not be imaginable without the lucky trade-off that took place when the initial Convention was drafted, when two groups of countries entered into an agreement: one group (led by the United Kingdom) won a concession in favour of a more narrowly defined catalogue of human rights, but in return accepted the two concepts of the other group of countries: the individual petitions system and the permanent existence of the European Court of Human Rights.

The Council of Europe, the framework organisation within which the court operates, often refers to the 800 million people in 47 countries that are the current members of the Council of Europe. At present, all of the states on the European continent (with the notable exception of Belarus and the Vatican State) have ratified the Convention. After the Treaty of Lisbon, it is also expected that the European Union will accede to the Convention

as an international organisation, as provided by article 59/2 of the Convention text (after the most recent amendments). The territorial jurisdiction of the court can extend beyond the European borders, as some member states, such as Russia or Turkey, stretch to two continents, while other states, such as the UK and the Netherlands, have extended the territorial validity of the Convention to the overseas territories under their jurisdictions. In rare cases, the court has exceptionally also extended the application of the Convention to cases where the acts of the contracting states were performed, or have produced effects, outside the territories under the effective jurisdiction of the member states. So, for example, the court has admitted the cases of human rights violations committed in the territory of Northern Cyprus, or in the territory of Transdniestria (both at the time under the control of separatist forces, but with the support of other states – Turkey and Russia respectively).

In the minds of many applicants, the European Court is a kind of European supreme court. Ever more often, the parties who fail with their claims in domestic judicial institutions, promise their opponents to see them before the Strasbourg court. However,

the court itself has an established ‘no fourth-instance doctrine’ according to which it is not its function to either re-examine the evidence on which the domestic courts have relied, nor act as a court of cassation that considers particular legal grounds and, in case it finds that law is not applied correctly, quashes the decision, remitting the case to the ‘lower’ court. While it is true that the main thrust of the Convention is specific, limited to establishment of human rights violations, the sheer volume of cases handled annually by the Strasbourg court may contribute to the public misperception about the court as the ‘regular’ court of the last resort. What is, however, undisputable, is that the Convention – as noted by its commentators – ‘evolved in a kind of a European bill of rights, with the European Court of Human Rights having a

role akin to that of a constitutional court in a federal legal system’ (Harris/O’Boyle/Warbrick).

It was not always like that. When the European Convention on Human Rights was signed in 1950, it was intended that its enforcement mechanisms would serve principally to avoid the repetition of the most serious human rights violations which had occurred during World War II. With this intention, the founding members of the Council of Europe (France, Great Britain, Ireland, the Netherlands, Belgium, Luxembourg, Denmark, Sweden, Norway and Italy), signed the Treaty of London in 1949, and, in Rome a year later, the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention came into force in 1953, but the bodies that were at that time meant to



1977 hearing before the court in *Ireland v. United Kingdom*.

enforce the Convention were formed only later: the European Commission of Human Rights came into existence in 1954, and the Court of Human Rights in 1959. However, the first case (*Lawless v. Ireland*) was decided only in 1961, the second case in 1962, and the next one five years later.

According to the initial design, the main function of these bodies was to deal with the applications made by member states against other member states. The right of the individuals to submit their applications and claim to be victims of the violation of human rights was until the 1990s only optional, and had depended on the acceptance of such jurisdiction by the individual member states. However, in practice, the individual applications soon became a rule, while inter-state cases happened only on rare occasions. So far only about 15 applications (or eight applications, if multiple applications between the same states are disregarded) have been lodged with the court, including the case brought by Ireland against the United Kingdom (concerning the treatment of suspected terrorists in Northern Ireland); the case of Austria against Italy (a criminal trial connected with events in South Tyrol); the case in which four states instituted proceedings against Greece in 1967 (wide-scale violations of human rights under the Greek dictatorship), and several cases which Cyprus initiated against Turkey (all related to the consequences of the Turkish military operations in Northern Cyprus in July and August 1974). At the same time, the number of cases brought by individuals – private persons, non-governmental organisations or groups of individuals – started to grow at a very fast pace. In the beginning of the 1980s, there were about 400 applications annually, but in the 1990s this number rose to several thousands. Already by 1995, the court had received more cases on an annual basis than the total number of cases received in the first 20 years of its existence.

The expansive growth of cases was largely due to three different factors: wider recognition and popularisation of the court among citizens of the member states; the accession to the Convention of the many countries of central and eastern Europe, including large jurisdictions such as Poland and Russia, and the massive inefficiency of certain national justice systems, which brought an avalanche of cases invoking violations of the human right to a fair trial within a reasonable time.

A further driver of popularity was the increasing visibility of the court's jurisprudence, which was publicised equally among the new and the old members of the Council of Europe. The law of the

Human Rights Convention, as well as the court's judgments that enforced that law, caused decisive development of legal concepts and practice in practically all of the member states, comprising *inter alia* changes in sensitive social and political areas such as those relating to the death penalty, rights of sexual minorities, the functioning of national courts and the judiciary, freedom of speech and so on. In the second half of the 1990s, the right of individual petition was gradually recognised as a regular part of the Convention, which cannot be waived by the individual members. The court itself had a proactive role, not only in its case law, but also in its methods of operation, which were frequently reformed. Some international visibility was also caused by the expansion of the court's services and erection of the new, representative Human Rights Building in Strasbourg, designed by the British architect Richard Rogers in 1994.

The number of countries ratifying the Convention began to grow rapidly after the fall of the Iron Curtain in 1989. The accession of the countries of the former Communist bloc was strongly encouraged by the Western nations, the more so because it had a strong symbolic dimension. The Convention, with its many references to 'values and principles that are necessary in a democratic society', was also viewed as providing a bulwark against the spread of communism. Entry to the Council of Europe (and the corresponding acceptance of the Strasbourg courts' jurisdiction), was thus viewed as a key factor in the spread of democracy to the east of Europe.

The adherence to the standards of protection of human rights and the rule of law embodied in the Convention were also viewed as an indispensable ingredient on the road of further European integration, so that submission to the system of enforcing the joint human rights standards was a requirement for the development of stronger economic integration through membership of the European Union. Thus, while at the end of 1980s the Council of Europe had jurisdiction over some 23 countries, in the 1990s and 2000s its membership more than doubled. The cases from the east of Europe also became a large portion of the court's work, which can be illustrated by the fact that, in 2010, from ten states with the largest portion of pending applications, only two (Turkey with 12 per cent and Italy with 6.5 per cent) were old Council of Europe members, while the rest were new (led by Russia with 28.1 per cent, Romania with 8.5 per cent, and Ukraine with 8.1 per cent).

Sample Cases

SCORDINO V. ITALY (NO.1) (29 MARCH 2006)

In 1980 several plots of land in Reggio di Calabria were expropriated. The local authorities offered the owner, Mr Scordino, an advance on the compensation payable for the expropriation, pending the enactment of the new law which would finally determine the compensation criteria for building land. The offer was refused by Mr Scordino, who asked the court to determine the market value of the expropriated land. The proceedings lasted until 1998. During the course of the proceedings, legislation had changed, which had negative impact on the amount awarded. In the meantime, Mr Scordino died and the case was taken over by his heirs, who launched in 2002 the proceedings at the court of appeal in Calabria, complaining about the excessive length of the proceedings. The Italian Court awarded them €2,450, but ordered them to pay €1,500 for the costs of proceedings.

The case concerned both the effectiveness of the 'Pinto Act', which introduced the possibility of lodging a complaint with the Italian courts in respect of excessively long proceedings, and the right to receive compensation for expropriation. The Grand Chamber of the Strasbourg Court found that the amount of compensation for expropriation was inadequate, which violated the applicants' right to property from article 1 of Protocol no.1. It also found that the retrospective application of law to their case was an unfair interference of the Legislature in the judicial process and thereby violated the right to a fair trial. Finally, it was found that the amount of just compensation for the length of proceedings

received from local courts in the 'Pinto' proceedings was not adequate, since it was only ten per cent of what the European Court of Human Rights would have awarded in Strasbourg proceedings.

In addition to ordering the Italian government to pay the applicants various sums for pecuniary and non-pecuniary damage, the court invited Italy to take all measures necessary to ensure that the domestic decisions were not only in conformity with the court's case law but were also executed within six months of being deposited with the registry.

RAMSAHAI AND OTHERS V. THE NETHERLANDS (15 MAY 2007)

The case concerned the applicants' relative who, after stealing a motor scooter by threatening its owner with a pistol, was shot dead by a police officer who was trying to arrest him. After this incident, there was an investigation by the authorities. The essential part of the investigation (forensic examination of the scene, door-to-door search for witnesses and the initial questioning of witnesses, including police officers) had been carried out by the same police force to which the police officers who participated in the shooting belonged. The way the investigation was conducted was also controversial: several forensic examinations which one would normally expect in such a case had not been carried out. No attempt had been made to determine the precise trajectory of the bullet; the hands of police officers had not been tested for gunshot residue; no report of any examination of officers' weapons and ammunition or of the spent

With the entry of many new states, the type of work that the Strasbourg courts had to deal with was largely transformed. Many new member states had to undergo a long and difficult process of transition, and problems specific to certain countries or groups of countries began to accumulate. Among them, the most visible issue related to the inability of the judiciaries of the many new members (but also of some old ones, such as Italy) to process cases in an efficient and timely manner. As a result, applications complaining about the length of judicial proceedings became by far the most frequent type of cases, leading to literally thousands of established human right violations (for example 1,095 judgments

were entered against Italy on these grounds alone in the 1959–2009 period).

The steady rise of the number of cases received was among the main reasons for the reform of the Strasbourg system in 1998 for determining applications under the Convention, when Protocol no. 11 to the Convention came into effect.

According to the original system of protection of human rights, the determination of the applications was divided between two bodies: the European Commission of Human Rights, and the court itself. The Commission was a body composed of a number of members equal to the number of states that were parties to the

cartridge was contained in the investigation file; the autopsy report, as filed, did not comprise any drawings or photographs showing the entry and exit wounds caused by the fatal bullet; and there had been no reconstruction of the incident. Lastly, police officers who participated in the incident had not been questioned until several days after the fatal shooting, during which time they had had the opportunity to discuss the incident with others and with each other.

Although not contesting that the act of shooting might have been absolutely necessary under the circumstances, the court found that there had been a violation of the right to life under article 2 of the Convention in that the investigation into the death had been inadequate and not sufficiently independent.

ILAȘCU AND OTHERS V. MOLDOVA AND RUSSIA
(8 JULY 2004)

The applicants were accused of anti-Soviet activities and illegally combating the legitimate government of the state of Transnistria, under the direction of the Moldovan Popular Front and Romania. Ilie Ilașcu was sentenced to death and the confiscation of his property was ordered, while the other applicants were sentenced to terms of 12 to 15 years' imprisonment, together with the confiscation of their property. The court held, among other things, that the applicants came within the jurisdiction of both Moldova and Russia, and found several human rights violations, including violations of article 3 (prohibition of torture).

MIKULIĆ V. CROATIA (4 SEPTEMBER 2002)

The applicant was an illegitimate child born in 1996, who, represented by her mother, sought to establish paternity by a civil

suit filed against the alleged father before the Zagreb Municipal Court. However, during a period of about five years, the national courts were unable to decide on the claim, largely due to the fact that the alleged father had repeatedly ignored appointments for DNA tests and failed to attend court hearings.

Examining this case, the Strasbourg court reiterated that in cases concerning civil status and capacity particular diligence is required. For the first time it found that the right to eliminate uncertainty regarding the identity of the natural father of a child born out of wedlock is a part of the right to respect for 'private and family life' set forth in article 8 of the Convention, because private life includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity. Respect for 'private life', so the court held, must also comprise to a certain degree the right to establish relationships with other human beings.

On this basis, the court established that the inefficiency of the national courts left the applicant in a state of prolonged uncertainty as to her personal identity. The lack of any procedural measure to compel the alleged father to comply with the court order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity claim speedily. Therefore, three violations were found: of the right to a trial within a reasonable time under article 6; of the right to respect for private life under article 8; and of the right to an effective remedy in respect of the length of court proceedings for establishing paternity under article 13.

Alan Uzelac

Convention, whereby no two members could be nationals of the same state. The individual members were elected by the Committee of Ministers from a three-person list submitted by the Parliamentary Assembly of the Council of Europe. Although the members of the Commission were composed of independent persons elected from persons of recognised competence in national or international law, it was a part-time body which, during its final years, met for about eight two-weekly sessions each year. The Commission had to make a preliminary examination of all the applications, and reject those that were not admissible under the Convention. Inadmissible cases included those that were anonymous; those that did not deal with a

matter within the court's competence; cases in which the application was submitted too late, or in which the applicant did not exhaust available legal remedies in national courts. Inadmissible also were applications that were considered to be manifestly ill-founded, or to be an abuse of the applicant's rights. In respect of the admissible applications, the Commission would draw up a report, establishing the facts and expressing a non-binding opinion on the merits of the case. If the parties could not reach a friendly settlement, the case could be referred to the court (or to the Committee of Ministers) for a final and binding adjudication. Until Protocol no. 11 came into force, the court, too, was a part-time body, which held sessions each month.

In Prison, but with Access to Justice

In the 1960s, Parkhurst Prison on the Isle of Wight had developed into a top-security prison. It lodged Britain's most reputed and dreaded criminals, like 'Mad' Frankie Fraser and the Kray twins. The treatment of the inmates of the Special Security Block was in accordance with their reputation. Rules were very tight and visitors were practically not allowed.

When protest at this regime by family members had proved fruitless, on 24 October 1969, at 7pm, an unprecedented prison riot came about. More than a hundred prisoners barricaded themselves in an association room, taking seven prison officers hostage. The uproar was put down with the use of brute force (according to Mad Frankie even the prison board took advantage of the occasion to give the inmates a tough beating), leaving many officers and prisoners severely injured.

Several prisoners were accused of assaulting prison officers. One of them was professional burglar Syd Golder, serving a 15-year sentence for an armed robbery (the only crime he was convicted for which he didn't commit, he would later say). One of the prison wardens had mentioned him in his statement as one of the persons who could have attacked him, together with Mad Frankie and others. Some weeks later, it became clear from the statements of other wardens that Golder had been in the TV room during the disturbances and therefore was not involved. Nevertheless, his prison record still mentioned the former charges, along with the remark 'charges not proceeded with'.

When he was not recommended for parole in 1970, Golder linked this with the statement in his prison record regarding the charges of having assaulted a prison warden. In his view, a civil action for libel against the warden could remedy his situation. However, as one of the restrictions imposed on prisoners, Rule 34(8), of the Prison Rules 1964, stipulated that 'a prisoner shall not be entitled to communicate with any person in connection with any legal business, except with the leave of the Secretary of State'. Golder asked leave to get in contact with his solicitor for the purpose mentioned, but the answer he received politely informed

him that the Secretary of State had considered his petition but had found no grounds to take any action.

In 1953, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) had entered into force. It instituted a European Court of Human Rights, which was based in Strasbourg (France). This court was empowered to rule on violations of the ECHR by the member states, but only if a complaint was filed by another state. This in itself was already unique, since normally in international law states are sovereign and do not recognise any higher power having the right to give a judgment on their acts or on rulings of their domestic courts. Nonetheless, this very power had been vested in the Strasbourg court.

Even more revolutionary was the right of individual persons who claimed to be victim of a violation of the ECHR by one of the member states to address a petition to the Commission attached to the ECHR 'provided that the High Contracting Party against which the complaint has been lodged had declared that it recognised the competence of the Commission to receive such petitions'. Initially, most member states were reluctant to recognise the competence of the Commission, but the United Kingdom had eventually taken this step in 1965.

Syd Golder was a criminal, but an educated one, so he was well aware of his rights. 'He was determined to seek redress', his goddaughter, actress Katherine Kastin, would write after his death.

History does not reveal (until now) how he did it, but although he was refused leave to contact his solicitor, he managed to file a complaint with the Commission against the United Kingdom for unduly interfering with his correspondence and for refusing him permission to consult a lawyer. For him personally this was very effective, since the Commission found both complaints to be admissible and the UK government decided during the proceedings to clear Golder's prison record. He was released on parole in 1972.

However, the UK government did not want to recognise the correctness of the findings of the Commission, in particular that article 6(1),



.....
Syd Golder.

ECHR had been violated. This article provides for the right to a fair trial in civil and criminal proceedings with the following words:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The United Kingdom could not see any violation of this right. After all, the British Government argued, there had not been a trial, so it was impossible that it had been unfair! For that reason, it decided to bring Golder's case before the European Court itself, convinced that the court would overrule the Commission.

On 21 February 1975, the European Court of Human Rights gave its decision. It became by far the most cited case of its entire case law and has caused major changes in all jurisdictions of all states party to this treaty. The Netherlands, for instance, saw itself forced to create new procedures for a vast number of cases overnight as the outcome of a development that was started by the Golder case.

The problem submitted by the UK government was based on a strict reading of the wordings of article 6(1). This paragraph, taken literally, presupposed proceedings already pending and could not be applied to a situation in which proceedings still had to be started, as in Golder's case. The court solved the problem in a genuinely European way, by paying regard to the French text of the provision and by falling back on legal principles shared by all European nations, and on reason, that fine human characteristic that brought us the rule of law. In the French wording, as official as the English text, the meaning of article 6(1) ECHR encompasses not only the right to a trial being fair, but also the right to a trial on its own. This is what the French drafters made of the same sentence:

Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle.

Here it is not only the right that a trial be fair, but also the right that a case be heard, that there be – as the phrase is nowadays – a right of access to justice.

Resorting to legal principles and reason gave the same result. The court argued: 'The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law. It would be inconceivable, in the opinion of the court, that article 6(1), should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.'

The concept of access to court is rather abstract, but it has many direct implications for law in practice. In the first place, if rights are of a civil nature or if accusations are of a criminal character, national law should provide for a procedure before a court that is in accordance with the requirements of article 6 ECHR. For instance, leaving the determination of fines in criminal cases to the public prosecutor might be practical and expeditious, but every citizen should still have the right to contest his decision before an impartial and independent court.

As another consequence of the right of access to justice, courts have to be careful when deciding on procedural questions. If a number is missing on a complaint form, whereas law requires this number being mentioned, it might be tempting to declare the complaint inadmissible for this reason alone. However, elaborating on the right of access to justice, the Strasbourg court ruled that this would impose restrictions that would impair the right of access to justice in its essence, not pursuing reasonable objectives and not proportionate to these objectives. In short, formalism becomes excessive if it injures the substance of the right of access to justice.

Golder's actions thus changed the legal landscape in Europe considerably. It might be good to mention that an equally significant change took place in his own life. Leaving prison in 1972, Golder by chance took a job as a handyman at the Royal Academy of Dramatic Art in London. This job brought about a sincere passion for the theatre and the stage. Golder became a law-abiding citizen and set up his own company, the Elephant Theatre. As producer, director and actor, he staged more than 300 productions. He remained active as a man of the theatre until his death in 2007 at the age of 83.

Fokke J. Fernhout

Technically, under the original Convention, the states recognised the jurisdiction of the court voluntarily, but from the beginning it was expected that all members would accept its compulsory jurisdiction.

After 1 November 1998, the Commission was abolished and the two institutions were replaced by a single, full-time European Court of Human Rights, to which the applicants were entitled to submit their cases directly. The court, as a regular judicial body, became entrusted with all the elements of determination, deciding both on admissibility and merits of the applications. It was also charged with seeking to secure friendly settlements in the pending cases. Judges of the 'new' court were elected from each state party to the Convention, for a term of six years, with a possibility of re-election. The upper age-limit for judges' retirement was previously the age of 70, but a decision taken in 2012 reduces this upper-age limit for new judges to 65. The election of judges has to be made by the majority vote of the Parliamentary Assembly of the Council of Europe, from a list of three candidates having 'high moral character' and recognised legal competences, nominated by each state.

The restructuring of the control machinery of the Convention was the end of a process that lasted over a decade, in which a lively debate about the benefits and disadvantages of the merger took place. The new system of protection further strengthened the role of the court, and contributed to its visibility and authority in the eyes of the European citizens. But, in terms of its main intention – the desire to facilitate greater efficiency in the determination of the increasing number of complaints – the mechanism of Protocol no. 11 turned out to be 'too little, too late'. Simultaneously with the introduction of the new system, the membership of the Council of Europe doubled, leading to a huge multiplication of the caseload, and a consequent increase in the length of processing of the incoming applications. At the end of 1990s, the average time needed to determine an application was about five years, which led to criticisms that the court itself violates the right to a trial within a reasonable time – the human right that it had found to be violated so often in the national courts of the member states. As stated by the Public Relations Unit of the court, due to the increase in caseload, '90 per cent of the court's judgments since its creation in 1959 have been delivered between 1998 and 2009'. Barely ten years after the reform, the court has delivered its 10,000th judgment. While the court officially received in 1999 about 8,400 cases and issued 177 judgments, in 2009 it allocated to a judicial formation 57,100 cases, and delivered 1,625 judgments. Although these data

demonstrate a significant growth in capacity and efficiency of the court, it was obvious that it is still not enough to keep pace with the developments. On 1 January 2010, another record was reached with almost 120,000 cases pending before the court.

The explosive growth of its caseload forced the court to search for new ways of dealing with the disputes. Faced with cases which were often very similar in nature (and sometimes even so similar that they were considered to be 'clone cases'), the court increasingly tried to focus on the roots of the problem. In its judgments, the court made an attempt to identify those 'systemic problems' which were causing the influx of a large number of cases connected to the same issue. So, for example in the Broniowski case (against Poland) and the Scordino case (against Italy), the court identified 'a widespread problem arising out of a malfunctioning of the [national] legislation which has affected ... a large number of people' related to insufficient compensation for specific types of property. Together with the Committee of Ministers (a body charged with the monitoring of the implementation of the court's judgments) the Strasbourg judgments increasingly began to point to structural and general deficiencies in national law or practice, and recommend the setting up of effective national remedies which would avoid the bringing of a series of repetitive cases before the court. This procedure was named 'the pilot judgment procedure', as the first judgment that was issued in the case had to give clear indications to the respective governments as to how they can eliminate the dysfunction, and provide a national mechanism of dealing with all other similar cases, including those already pending before the court. Such procedure also enabled all other related cases to be adjourned or 'frozen' for a certain period of time, awaiting the decision in the pilot case. The underlying idea of the pilot procedure is that, where a large number of applications all relate to the same problem, should an effective remedy be put in place at a national level, redress may be obtained more speedily than if the cases are processed on an individual basis in Strasbourg.

Another reform of the court, initiated in 2001, adopted Protocol no. 14, which came into force after the long-awaited ratification by Russia in February 2010. The new protocol has the intention of further optimising the screening and processing of applications. The main changes in the court functioning relate to the introduction of the single-judge procedure for the simplest cases (accompanied by new case *rapporteurs*), reduction in the number of judges in specific panels and related to specific issues, and a new admissibility criterion (the existence of 'significant

disadvantage' for the applicant). In most of the cases, the court can opt to decide on admissibility and the merits of the application at the same time. Another change introduced by the new Protocol was that the term of office for the judges was changed from a renewable six-year to a non-renewable nine-year term of office.

It was apparent, however, that these were all only short-term measures that might alleviate the situation, but could not provide a long-lasting solution. New reforms are already in the pipeline. As an initial step to a further reform, a Wise Persons' Report was submitted to the Committee of Ministers in 2006. A conference on the future of the European Court of Human Rights was organised by Switzerland in February 2010 in Interlaken, with a brief to draw up a roadmap for future development. A number of possible measures were discussed. It has been pointed out that a high number of repetitive applications before the court

is an indication that the subsidiarity principle does not operate adequately, and that the protection of human rights has to be better shared between national authorities and the court. On the other hand, various filtering mechanisms were discussed, as well as the possibility of delegating decision-making in certain types of cases to legal secretaries (*référéndaires*). Since many cases are the result of inadequate execution of the court's judgments, some reforms may move in the direction of enhancing effectiveness and transparency of the process of enforcing the court's judgments, which is in the competence of the Committee of Ministers.

In any case, it will almost certainly be necessary to revise the Convention (*inter alia* by simplifying the procedure for amending its organisational provisions or by giving the court more autonomy in changing its practice by internal rules). It is expected that new changes in the organisation and procedure of the court will at least

The Committee of Ministers of the Council of Europe is entrusted with ensuring that the respondent government found to be at fault complies with the European Court of Human Rights' judgment.



be agreed in principle ahead of its 60th anniversary in 2019. The new single-judge procedure has at least begun to have an impact on the caseload of the court. At the end of 2012 the number of pending cases stood at around 128,000, a decrease of 16 per cent compared with the caseload at the end of 2011. This was the first time since the establishment of the new court in 1998 that the number of cases pending before it at the end of the year was lower than that of the previous year.

Despite the difficulties, the European Court of Human Rights has in the half-century of its existence achieved a remarkable success. It is the final arbiter in the issues of human rights and fundamental freedoms in virtually all countries on the European continent, and its jurisprudence, as a source of inspiration, has an important impact also beyond the frontiers of Europe. As a guarantor of democratic standards and the rule of law, the court has contributed to peace and stability in a significant part

of the world. The court's judgments have helped to strengthen democracy, especially in countries where formerly authoritarian regimes had given way to democracy, and its jurisprudence has been an important element of standard-setting in the transition countries. Currently, it is still playing an important social and political role – its case law is closely studied when preparing new national legislation, or when assessing the constitutionality of various domestic or regional Acts. As a proactive institution, the court also takes part in the initiatives in the field of training, translation and study of the law and practice of the Human Rights Convention, occasionally receiving high state and judicial officials from various European countries. Constantly striving to modernise and improve its operation, the European Court of Human Rights secures both continuity and change in the interpretation of the Convention, which is conceived, in the spirit of the needs of contemporary societies, as a 'living instrument'.



An aerial view of the European Court of Human Rights building which has been home to the Court since 1995. The building is sited on the bank of the river Ill, a tributary of the Rhine which forms the border between France and Germany.