

# The European Court of Human Rights and its Role in the European Legal Order

Mark E. Villiger\*

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## A. Introduction

At the outset I wish to thank the Europa-Institut for having invited me to this illustrious Alumni-meeting. Bearing in mind what the Europa-Institut is, does, and has achieved, it is a great honour for me to speak to you today.

My presentation this morning concerns the European Court of Human Rights and its Role in the European Legal Order. As you can see in my Abstract, I shall first speak about the creation of the Court as a pan-European institution. Subsequently I shall touch on the role of individual applications. A substantial part of my presentation concerns examples illustrating and demonstrating how Member States have complied with the Court's judgments. Finally, I shall dwell on the question whether one could call the Strasbourg Court a new Constitutional Court of Europe.

## B. Creation of the Court as a Pan-European Institution

The European Convention on Human Rights (the Convention, as I shall henceforth call it) was inspired by the Universal Declaration of Human Rights of 1948. It was adopted in 1950 and three years later it entered into force. It has since been expanded by 16 additional Protocols, containing both further substantive guarantees and reforms of the procedures.

\* Prof. Dr. iur. at the University of Zurich. Judge at the European Court of Human Rights in respect of Liechtenstein from 2006-2015, Section President from 2012-2015. The views expressed here are my own. The lecture form has been retained.

European States always intended for the Convention to set up a human rights area throughout Europe – a pan-European endeavour. A confirmation of this can be found in the sixth preambular paragraph where the European States proclaim:

“Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”

In 1953, when the Convention entered into force, there were ten member States. By 1989 there were 29, after the fall of the Berlin Wall in the same year numerous further European States from Central and Eastern Europe joined the Convention and today there are 47. Three European States are still missing: Belarus, a dictatorship, Kosovo, the statehood of which has not yet entirely been acknowledged, and the Vatican State whose highest authority lies elsewhere.

European States always had the aim that the Convention would be directly applicable in all European States and binding on all national authorities. This is indeed the case today in all 47 Member States. The result is today that anybody in any of the 47 Member States can invoke the human rights of the Convention towards any authority of that State. The Convention is directly applicable to all three powers of State, the legislative, the executive and the judiciary power – and at all levels of the State. In my view, this is a central achievement of the Convention, and of the European States behind it.

However, the Convention’s centre-piece is the establishment of a European Court of Human Rights (henceforth: the Court). It guarantees anybody the right to file an individual application to that Court.

### C. The Relevance of Individual Applications

The question arises: what were the reasons for the founding mothers and fathers of the Convention to enshrine a right to individual applications? I would mention three reasons. First, the basic idea behind this already in 1950 was the consideration that even impressive human rights guarantees may remain without effect if their application is not controlled. Second, this control should occur independently and objectively, hence the necessity of introducing a Court – and the right of individual applicants to accede to this Court. Third, the individual applications filed with and examined by the Court demonstrate and explain to national authorities how human rights should be protected – thereby implementing the principle of subsidiarity.

The Court’s statistics reflect the incredible success of the individual applications. After the first six months of 2016 – these are the latest statistics to date – 24.750 applications were filed; this would amount, if extrapolated, to some 50.000 applications for the whole year. This reflects an increase of 24 % compared with the same period in 2015. At the same time, in the past six months the Court dealt with 18.631 applications – which would mean about 37.000 decisions and judgments for the whole year. Altogether, the Court has currently 71.050 applications pending in its docket.

With these applications, individuals, mainly in Europe but in fact from all over the world, may complain that a domestic authority of one of the 47 member States has breached a human right guaranteed by the Convention. Naturally, the Convention sets up conditions for filing such applications – for instance that all competent national authorities, namely courts, must have previously had the opportunity to look at the complaint; and it sets up procedures how these complaints should be examined.

The Court is always at the heart of these procedures. It is strikingly a Court which decides applications filed by individuals.

I should add, by the way, that the Convention also envisages inter-State applications, i.e., by one State against another. There have been approximately only 20 such inter-State applications since 1950, though they are always big events before the Court. To mention but a few examples:

- the early case of *Austria v. Italy* concerning the situation of the inhabitants in South Tyrol;<sup>1</sup>
- the important case of *Ireland v. the United Kingdom* as regards the treatment of alleged IRA-members (Irish Republican Army) in Northern Ireland;<sup>2</sup>
- the case of *Cyprus v. Turkey* concerning Northern Cyprus;<sup>3</sup>
- and two cases currently pending: one of *Georgia v. Russia* concerning events in North Ossetia and Abchasia;<sup>4</sup> and the other of *Ukraine v. Russia* concerning Crimea.<sup>5</sup>

These inter-State cases may be quantitatively less relevant. They remain essential for European Member States who, by envisaging such inter-State complaints in the Convention, aim at ensuring a collective human rights guarantee in Europe.

Of course, the inter-State cases concern very important issues, often involving thousands of individuals. Still, also the individual applications may concern central matters, such as family life, the freedom of expression and religion, the conditions of detention, which may go far beyond the actual circumstances of an individual's situation.

In its extremely rich case-law, the Court has applied, when dealing with these cases, interpretative methods which enforce the dynamic, effective and evolutive character of the Convention. In other words, the Court will not look at the meaning of Convention terms as in 1950, when it was concluded, but in present-day terms to ensure the most effective application of the human rights guarantees.

At this stage, ladies and gentlemen, you might be thinking: all this is fine, but what about the effects of the judgments of the Court? To put it bluntly: what will an applicant get for his or her money. Mind you, the procedures before the Court are free of charge, and in the case of indigent applicants, the Court will even provide for free legal assistance.

1 ECtHR, no. 788/60, *Austria v. Italy*, decision of 11/1/1961.

2 ECtHR, no. 5310/71, *Ireland v. the United Kingdom*, judgment of 18/1/1978.

3 ECtHR, no. 25781/94, *Cyprus v. Turkey*, judgment of 10/5/2001.

4 ECtHR, no. 38263/08, *Georgia v. Russia (II)*.

5 ECtHR, no. 20958/14, *Ukraine v. Russia*.

Of course, the judgments of the Court have considerable authority: the case has been dealt with by various national courts and carefully considered by the European Court.

However, beyond this authority, the judgments of the Court are binding on States. While the Court cannot quash national judgments, it determines that a Member State has breached human rights. The State must then react to this judgment and in particular ensure that the violation will not occur again. The Member State will also have to report to the Council of Ministers, the Governing Body of the Council of Europe, what measures it has taken in regard to the judgment.

In addition, the Court may pronounce in its judgment on issues of material and immaterial damages: material damages for any losses occurred as a result of the human rights violation, and immaterial damages for the suffering of the applicant.

On the whole, it can be said that Member States regularly comply with the Court's judgments. This is not surprising: for they have taken on the obligation voluntarily by adhering to the Convention. If they do not wish to abide by the Court's judgments, they are free to leave the Convention. Of course there have been difficulties. In the United Kingdom and in Russia certain judgments have provoked much resentment.

Also, there have been difficulties in cases concerning Northern Cyprus,<sup>6</sup> Transnistria (a part of Moldova under Russian influence)<sup>7</sup> and Nagorno Karabakh (an area contested between Azerbaijan and Armenia).<sup>8</sup> But these are areas concerning world politics, and in my view it would be unfair to judge the implementation of the Court's judgments in the light of these cases.

Ladies and Gentlemen, let me now illustrate with a few examples how the Court has influenced the European legal order through its binding judgments on individual applications. Whilst I could mention thousands of judgments; I will refer just to a handful.<sup>9</sup>

#### D. The Court's Influence in National Legal Orders

Article 3 of the Convention prohibits torture and inhuman treatment. Based thereupon, the Court has often found that conditions in prison breached this provision. It did so for instance in an *Albanian* case in 2007.<sup>10</sup> As a result, Albania (as many other countries before it) enacted in 2014 a Law on the Rights and Treatment of Prisoners and Detainees, including the continuous training of medical staff in penitentiary hospitals.

Article 5 of the Convention ensures the right to liberty and security, in particular the detention of a person and also a person's preventive detention which may even be

6 ECtHR, no. 15318/89, *Loizidou v. Turkey*, judgment of 18/12/1996.

7 ECtHR, no. 48787/99, *Ilaşcu et al. v. Moldova and Russia*, judgment of 8/7/2004.

8 ECtHR, no. 13216/05, *Chiragov et al. v. Armenia*, judgment of 16/6/2015.

9 See on these cases Parliamentary Assembly of the Council of Europe, Impact of the European Convention on Human Rights in States Parties: selected examples, AS/Jur/Inf (2016) 04 of 8/1/2016.

10 ECtHR, no. 41153/06, *Dybeku v. Albania*, judgment of 18/12/2007.

for an unlimited time. In a number of judgments concerning Germany,<sup>11</sup> the Court prohibited the German practice of retrospectively ordering an extension of preventive detention. Rather, according to the Court's case-law, the sentencing judge should at the outset have decided on preventive detention. As a result, in 2010 Germany promulgated the Act to Reform the Law on Preventive Detention.<sup>12</sup>

Article 6 of the Convention guarantees the fairness of court proceedings, also of criminal proceedings. The Court established in its so-called *Salduz* case law a right to assistance by a lawyer during the first police interrogation – the so-called lawyer of the first hour.<sup>13</sup> Among the many countries who have taken over that case-law was Belgium, which did so by means of a law of 2011, generally called the *Salduz* Law, providing for assistance by a lawyer at the early stages of criminal proceedings.<sup>14</sup>

Article 6 also prohibits unduly lengthy court proceedings, be they criminal or civil. The Court has set up a catalogue of criteria to examine such length. Many member States have adopted these standards in their domestic legislation. To mention one example: in 2013 Germany introduced a law enabling redress for excessively long domestic proceedings – thus sparing the Court from having to decide in a particular case on this issue.

In respect of Italy the Court has for many years been confronted with a high number of cases concerning the undue length of proceedings.<sup>15</sup> As a result, Italy in 2001 adopted the so-called *Pinto* law setting out a right to compensation in cases of unduly lengthy proceedings. This law has twice been revised – once raising the amounts of compensation, and once providing a less complex procedure.

Article 8 of the Convention ensures, *inter alia*, the right to respect for private life. This includes the private sphere of same-sex couples. Following an extensive case-law,<sup>16</sup> Cyprus amended the Cypriot Criminal Code in 1998 and 2000, decriminalising male homosexual conduct in private between consenting adults. Ireland decriminalised homosexuality by virtue of the Criminal Law (Sexual Offences) Act of 1993. Since 2015 Greece has a new Civil Partnership Law which enables the legal recognition of same-sex couples.

Respect for private life includes the right to confidentiality. A judgment of the Court concerned the unjustified storage by the Swedish Security Service of information concerning the applicant's former political activities.<sup>17</sup> In 2008 Sweden set up a Commission to examine whether citizens have been subject to secret surveillance.

11 ECtHR, no. 19359/04, *M v. Germany*, judgment of 17/12/2009; ECtHR, no. 17792/07, *K v. Germany*, judgment of 13/1/2011.

12 BGBl. 2010 I, 976.

13 ECtHR, no. 36391/02, *Salduz v. Turkey*, judgment of 27/11/2008.

14 See the Loi modifiant le Code d'instruction criminelle et la loi du 20 juillet 1990 relative à la détention préventive afin de conférer des droits, dont celui de consulter un avocat et d'être assistée par lui, à toute personne auditionnée et à toute personne privée de liberté, published on 5/9/2011.

15 ECtHR, no. 44759/98, *Ferrazzini v. Italy*, judgment of 12/7/2001.

16 ECtHR, no. 7525/76, *Dudgeon v. United Kingdom*, judgment of 25/10/1981.

17 ECtHR, no. 62332/00, *Segerstedt-Wiberg et al. v. Sweden*, judgment of 6/6/2006.

Furthermore, Article 8 ensures the right to respect for family life. In the well-known case of *Marckx v. Belgium* (1979),<sup>18</sup> the Court found that children born out of wedlock have equal inheritance rights as children born within wedlock. Belgium in 1987 amended the Civil Code which now recognises a legal bond between an unmarried mother and her child resulting from the mere fact of birth. Similarly, in 1987 Ireland enacted the Status of Children Act which puts children born out of wedlock on a compatible footing with children whose parents are married to each other.

Following a judgment of the Court,<sup>19</sup> Austria in 2013 amended its Civil Code and promulgated the Registered Partnership Act, according to which adoption rules will apply equally to unmarried different- and same-sex couples.

Finally, in respect of family life, Germany reacted to the Court's case-law<sup>20</sup> by promulgating legislative changes aiming at strengthening the rights of biological, non-legal fathers in terms of contact with, and access to their children.

Article 9 of the Convention enshrines the freedom of thought, conscience and religion. Following the Court's case-law,<sup>21</sup> in Armenia, conscientious objectors need no longer serve in the army, according to the amended Armenian Law on Alternative Service of 2013. In Bulgaria, following a judgment of the Court,<sup>22</sup> a new Religious Denominations Act entered into force, putting an end to the State's interferences in the internal organisation of religious communities.

Article 10 of the Convention guarantees the freedom of expression and of the press. In view of a judgment of the Court in 1993,<sup>23</sup> Austria abolished its State monopoly on TV and radio broadcasting.

In France, following a judgment of the court,<sup>24</sup> French Parliament abolished the crime of insulting the Head of State. Similarly, in Georgia, until 2004, there was no standard in law with respect to criticism of politicians and public servants. Drawing guidance from the Court's case-law,<sup>25</sup> the Georgian Parliament adopted in 2004 a Law on Freedom of Speech and Expression, noting expressly that the law should be interpreted in accordance with the Convention.

Article 11 enshrines the freedom of assembly and association. Following various judgments of the Court concerning compulsory membership in a trade union,<sup>26</sup> Denmark introduced in 2006 the Act on Protection against Dismissal Due to Association Membership which prohibits closed-shop collective agreements. Similarly, in Iceland

18 ECtHR, no. 6833/74, *Marckx v. Belgium*, judgment of 13/6/1979.

19 ECtHR, no. 19010/07, *X. et al. v. Austria*, judgment of 19/2/2013.

20 ECtHR, no. 22028/04, *Zaunegger v. Germany*, judgment of 3/12/2009.

21 ECtHR, no. 23459/03, *Bayatyan v. Armenia*, judgment of 7/7/2011.

22 ECtHR, no. 30985/96, *Hasan and Chaush v. Bulgaria*, judgment of 26/10/2000.

23 ECtHR, no. 13914/88, *Informationsverein Lentia et al. v. Austria*, judgment of 24/11/1993.

24 ECtHR, no. 26118/10, *Eon v. France*, judgment of 14/3/2013.

25 See the Georgian Law on Freedom of Speech and Expression of 24/6/2004 which in Art. 2 states: "This Law shall be interpreted according to the Constitution of Georgia, international legal obligations undertaken by Georgia, including the European Convention on Human Rights and Fundamental Freedoms and case law of the European Court of Human Rights".

26 ECtHR, nos. 52562/99 and 52620/99, *Sørensen and Rasmussen v. Denmark*, judgment of 11/1/2006.

a new constitutional provision was introduced permitting both the right to establish and the right not to join associations. Finally, as regards Luxembourg, the Court's case-law brought an end to a situation whereby land owners could be forced to join a hunting association.

Article 14 of the Convention prohibits discrimination. In its case-law, the Court saw discrimination in Latvia in the pension rights of former Soviet workers in Latvia as compared to those of Latvian workers. Among many points, the former Soviet workers were expected to learn the Latvian language in order to obtain their pension.<sup>27</sup> As a result of the judgment, in 2011 Latvia and the Russian Federation entered into an agreement on Cooperation concerning Social Security which did away with this discrimination.

Article 1 of Protocol no. 1 to the Convention guarantees the right to property. In Poland, thousands of Polish farmers complained to the Court that they were provided insufficient compensation for property abandoned in the Eastern provinces of post-war Poland. Following a so-called pilot judgment of the Court,<sup>28</sup> Poland introduced a law in 2005 whereby these farmers could seek to obtain compensation.

Article 2 of Protocol no. 1 provides for the right to education. Following a judgment of the Court,<sup>29</sup> Croatia in 2010 amended its Law on Primary and Secondary School Education in order to improve opportunities for Roma children in education, in particular by offering them special assistance to learn Croatian.

Finally, having myself had the honour of being a Judge in respect of Liechtenstein for nine years, I would mention an example of the effectiveness of the Court's judgments in this country. The case of *Wille v. Liechtenstein*<sup>30</sup> concerned the applicant's freedom of expression, as curtailed by the Prince of Liechtenstein. When the applicant wished to file a constitutional complaint against the Prince before the Liechtenstein Court of State, he was told that the Prince enjoyed sovereign immunity. In this situation, the Strasbourg Court saw, *inter alia*, a breach of Article 13, concerning the right to an effective remedy. As a result, in 1999 Liechtenstein amended its Constitutional Court Act and removed the Prince's immunity in respect of the right to file a constitutional complaint.

This small selection of cases discloses the wide range of rights which the Convention guarantees. It demonstrates that the Court's judgments are binding, that all European States are concerned, and that all European States have reacted to the Court's judgments.

The main conclusion to be drawn here is that the Court's case-law has influenced the legal orders of all 47 European Member States.

27 ECtHR, no. 55707/00, *Andrejeva v. Latvia*, judgment of 18/2/2009.

28 ECtHR, no. 31443/06, *Broniowski v. Poland*, judgment of 22/6/2004.

29 ECtHR, no. 15766/03, *Oršuš et al. v. Croatia*, judgment of 16/3/2010.

30 ECtHR, no. 28396/95, *Wille v. Liechtenstein*, judgment of 28/10/1999.

### E. The Court as a Quasi-Constitutional Court?

Ladies and Gentlemen, so far we have established that:

- the Convention with its wide range of human rights applies directly in all member States;
- the right to individual application has proved to be highly successful all over Europe;
- the Court has handed down thousands of judgments which are largely complied with in all member States;
- the Court has influenced the legal order of all 47 member States.

The question remains whether with this background one may see in the Court a new European Constitutional Court. Of course, if it *were* that, it would only be in respect of the protection of human rights. I have explained to you how the Court deals mainly with individual applications (and a few inter-State cases). Would this be a hindrance? I do not think so. Also national constitutional courts are frequently called upon to deal with complaints by individuals as to the constitutionality of a particular domestic act. Also, while the Court subscribes to subsidiarity – namely that the protection of human rights falls first to member States – national constitutional courts, too, follow this principle, particularly in Federal States where the various entities enjoy some freedom in their decisions.

Still, there are differences. It follows from the principle of subsidiarity that the Court, and the Convention behind it, aim at setting a minimal standard of the protection of human rights: Member States should be free to go further in this protection in their national laws. Here, constitutional courts have more powers: they examine the constitutionality of individual acts on the basis of the constitution: the Constitution is never a minimal standard, it is *the* standard. In my view, the crucial difference between the Court and national constitutional courts is that the European Court can never examine legislation in the abstract. This is actually one of the main duties of national constitutional courts. Of course, the European Court can indirectly control national legislation when examining individual complaints – but that is not the same. Clearly, European States have so far not wished the Court to enjoy this abstract competence. If only for this reason, one cannot speak of the Strasbourg Court as a constitutional court of Europe.

Still, in view of its functions and effects, I believe that one can speak of the European Court of Human Rights as having become a quasi-constitutional court of Europe.

### F. Conclusion

At the outset I explained how the Convention was adopted in 1950. So in the year 2050 – that is in 34 years – it will celebrate its 100th anniversary. Will the Convention and the Court still be relevant, indeed will they still be around, for the hundredth birthday? I would wager any bet that this will be the case. Of course, always having due regard to the fact that its role in European civil society will again change. The only problem with this bet of mine is that I will not be around anymore in the year 2050 (I would be a hundred, then) to collect my money!