

CHAPTER 3

Fundamental Changes

Protocol No. 11

Fundamental changes to the protection machinery set up by the Convention were made by Protocol No. 11, which came into effect on 1 November 1998. The changes were:

- *The existing Commission and Court, both of which sat only on a part-time basis, were replaced by one institution, the European Court of Human Rights, which was to function on a permanent basis.*
- *The system of optional declarations by States accepting the right of individual petition and the jurisdiction of the Court was abolished. Henceforth, ratification of the Convention by any State meant that an application alleging a violation of the Convention could be lodged against it by an individual and that the Court was competent to rule on the case.*
- *A judge's term of office was reduced from nine to six years, with the possibility of re-election being retained. An age limit was introduced (the term of office expired when the judge reached the age of 70), and the rule that no two judges could be nationals of the same State was abolished. Judges continued to be elected by the Parliamentary Assembly of the Council of Europe.*

- *While the Committee of Ministers retained its function of supervising the execution of judgments of the Court, its power to determine the merits of cases was abolished. All future decisions on the merits were to be taken by the Court.*

The principal reason for the changes was that it had become clear by the end of the 1980s that the Court was not far short of the point at which, as a non-permanent institution, it would no longer be able to cope with a further increase in its workload. At that time it could take as long as five or six years to process a case, a situation that was totally at variance with the notion of the effective protection of human rights. It was also clear that the Commission was already in the same position even before Greece, Turkey and Malta recognized the right of individual petition in 1986 and 1987. Tinkering with the machinery was no longer sufficient, and a fundamental restructuring was required.

The Protocol was the object of passionate and often virulent controversy. This is demonstrated by the fact that concrete proposals for the reform were presented at a colloquy held in Neuchâtel, Switzerland, as early as March 1986 but that the text of the Protocol was opened for



signature only in May 1994 and did not take effect until the ratification by all Parties to the Convention in 1998.

The abolition of the system of optional declarations gave rise to little controversy. As has been noted, it had become the practice to require States wishing to join the Council of Europe to undertake to make those declarations. Few tears were shed – at least overtly – over the disappearance of the power of a political body, the Committee of Ministers, to rule on the merits of human rights cases, although there were those who argued that States might prefer to retain the possibility of inter-State cases being determined by the Committee. It was the replacement of the existing Commission and Court by a single body that gave rise to the fiercest arguments among all parties involved, both within and outside Strasbourg. It even got to the point at which some members of staff who held opposing views were scarcely on speaking terms with each other. Some of the parties involved, and some States, resorted to every possible means to oppose the reform. It is worth mentioning that the United Kingdom, which was among the strongest opponents, was reportedly irritated when it later sought

to be the first to ratify the Protocol but was beaten to it by Bulgaria, Slovakia and Slovenia.

A principal argument of those in favour of a single-court system was that the original system involved a duplication of work, and hence a waste of time, in that the same issues (the merits of applications and not infrequently their admissibility) were successively examined by two separate bodies, the Commission and the Court. Against this, it was contended that there was every advantage in having a second opinion on issues that could be difficult and controversial. There were also those who objected to the fact that the Court would be permanent on the grounds that a large number of the existing judges had professional activities at home, whereas judges living full time in Strasbourg would be closeted in an ‘ivory tower’, cut off from the realities of everyday life in their own countries.

Although not openly voiced, financial considerations no doubt also played a part. Existing judges received allowances for days of duty and travel and subsistence expenses, whereas members of a permanent body would have to be adequately remunerated. The influence in some quarters of this point may be deduced from the fierce debates that took place in the Committee of Ministers when it came to determine the terms and conditions of service of the judges of the new Court.

It also has to be recognized that the reform proposals also placed some members of the existing Commission and Court in a genuine dilemma. Although they were committed to the aims and purposes of the Convention, they could not, for perfectly valid personal or professional reasons, countenance moving to and settling in Strasbourg on a permanent basis.

Some ten years after the Protocol came into effect, there are different opinions about the benefits. Few would disagree with the proposition that the full judicialization of the Strasbourg procedure is a welcome development. On the other hand, it remains the case that the

new Court, to a far greater extent than the old one, is struggling to cope with an ever-increasing workload, to the extent that it may appear to be in danger of sinking. One reason for this is that requests for the inclusion in the reformed machinery of a separate filtering mechanism were not accepted, and as a result the Court itself now has, in addition to adjudicating on the merits, the filtering role previously carried out by the Commission, and this is an arduous task given that some 90–95 per cent of applications are declared inadmissible. It has also to be remembered that discussion and work on the Protocol began at a time when the Berlin Wall was still standing. Following the fall of the Wall in 1989, there was a substantial increase, potential and then actual, in the number of member States of the Council of Europe. There are those who maintain that, without this development, the Protocol would have sufficed. The fact is, however, that after its long period of gestation the infant Protocol had been overtaken by events by the time of its entry into force.

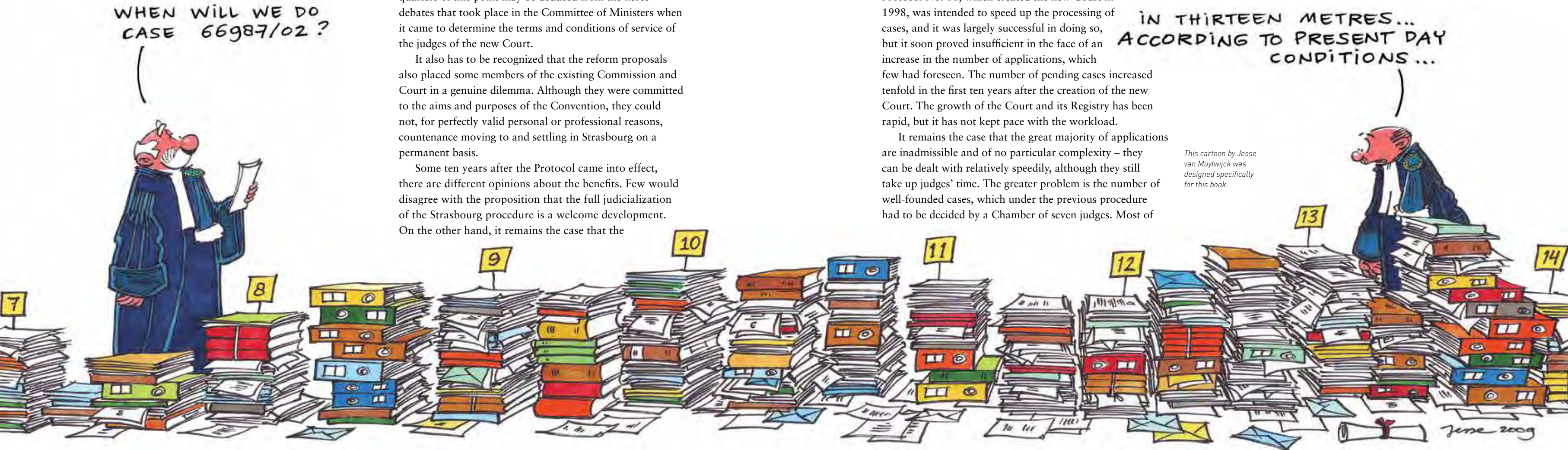
Protocols Nos. 14 and 14 bis

Protocol No. 11, which created the new Court in 1998, was intended to speed up the processing of cases, and it was largely successful in doing so, but it soon proved insufficient in the face of an increase in the number of applications, which few had foreseen. The number of pending cases increased tenfold in the first ten years after the creation of the new Court. The growth of the Court and its Registry has been rapid, but it has not kept pace with the workload.

It remains the case that the great majority of applications are inadmissible and of no particular complexity – they can be dealt with relatively speedily, although they still take up judges’ time. The greater problem is the number of well-founded cases, which under the previous procedure had to be decided by a Chamber of seven judges. Most of

these cases are of little interest from the Court’s perspective of developing and maintaining standards in that they amount to no more than the repetitive application of well-established case-law. The best known example is complaints about the length of proceedings in domestic courts.

The need for further reform became apparent shortly after the new Court took over, and work on revising the European Convention on Human Rights began afresh. In May 2004 a new amending Protocol, Protocol No. 14, was opened for signature. Its main thrust is directed towards case processing, and its aim is to augment the capacity of the Court and free up more judicial time to devote to cases of greater legal importance or urgency. To this end it empowers a Single Judge (instead of a three-judge Committee as before) to declare inadmissible applications suitable for summary decision and empowers a three-judge Committee (instead of a seven-judge Chamber) to declare admissible and give judgment in cases that can be easily decided on the basis of well-established case-law, notably repetitive cases. (See also ‘The Handling of Applications’ in Chapter 4, page 70.)



This cartoon by Jesse van Muylwijck was designed specifically for this book.

A further reform introduced by Protocol No. 14 has proved controversial. It is that of allowing the Court to declare applications inadmissible on the grounds that ‘the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal’.

Critics of this new admissibility criterion expect relatively few cases to fall within its ambit. Some people object to the very principle of allowing the Court to reject cases in which there has been a violation of the Convention without judgment on the merits, even if they be of little real importance either from a jurisprudential standpoint or for the applicants themselves. Supporters of the new criterion argue that the Court cannot and must not allow itself to be swamped by a flood of cases that do not raise important human rights issues. They say it must be able to stem the flood of incoming case work, even if that means disappointing a proportion of genuine victims. What effect the new criterion will have in practice remains to be seen. Protocol No. 14 has only recently come into force (on 1 June 2010). For the first two years the criterion can be applied only by Chambers and by the Grand Chamber, which will develop case-law on its interpretation before its application is entrusted to Committees and Single Judges.

Protocol No. 14 contains several other amendments to the Convention. In order to enhance judges’ independence it introduces a non-renewable term of office of nine years. Judges serving when the Protocol entered into force had their term of office increased to a total of nine years if they were then serving their first term or otherwise by two years.

The Protocol also allows the Court to ask the Committee of Ministers to reduce the size of Chambers from seven members to five for a fixed period. The Committee of Ministers is entitled to ask the Court for an interpretation of a judgment and request it to determine whether a respondent State has complied with its obligation to abide by a final judgment against it.

Finally, the Protocol provides that the European Union may accede to the Convention.

Protocol No. 14 was not an isolated reform measure but part of a wider package of interdependent measures adopted by the Committee of Ministers. Indeed, in a declaration adopted on 12 May 2004 the Committee of



An artist's impression of the Court's hearing in *Dikme v. Turkey* in February 2000. (Cartoon by Noëlle Herrenschmidt).

A major signal sent out by Protocol No. 14 is to be found in the new provision permitting the European Union to accede to the Strasbourg system. Along with the corresponding provision of the European Union Constitutional Treaty, it puts an end to several decades of discussions and hesitations over whether such a move was desirable and whether the nature of the Strasbourg review was compatible with the very essence of Community law. Even though the details of such an accession remain to be worked out, the answer now given in parallel and almost simultaneously by the Convention and the European Union Constitutional Treaty is clear: not only is accession by the European Union desirable, it has become a necessity if action by European Union authorities is to enjoy the same degree of human rights acceptability with the citizen as action by national authorities. It can only be for the good of European unity if there is an integrated overall framework for the development and implementation of human rights standards in Europe, whatever the legal source of the measure affecting the citizen.

[While] Protocol No. 14 will not ... itself reduce the volume of cases coming to Strasbourg ... ceaselessly raising judicial productivity has its limits, if only physical ones; nor can it be a dictat to which the Court should continue to yield at all costs, as this would amount not only to an interference with the Court's independence in organizing its judicial work, but would also be wrong in principle. Indeed, the main aim of the Convention is not to have as many applications as possible declared inadmissible, but rather to secure effective protection of human rights in the member States. Driving up the statistics of terminated cases every year can be achieved only by concentrating on the easier, more numerous inadmissible applications, which will inevitably be at the expense of the more complex, meritorious ones.

Luzius Wildhaber*
President of the Court, 1998–2007

education and professional training, the verification of the compatibility with the Convention of domestic laws and practices and the improvement of domestic remedies. The reasoning behind this coupling of measures was that no matter how efficient it might be, one court cannot be expected to resolve on its own all human rights issues arising in an area with a population of more than 800 million people. It was also argued that it will not be possible to reduce the increasing inflow and backlog of cases to and before the Court by procedural reforms alone;



Registrar Erik Fribergh.

instead, the member States themselves should secure the Convention rights at domestic level. In this way, the balance will be redressed, with the States assuming, as is stipulated in Article 1 of the Convention, the primary responsibility for securing the guaranteed rights so that the Court’s role will be subsidiary to that of the national authorities.

The importance of the Committee’s recommendations was re-affirmed at the Interlaken High Level Conference (see Chapter 14). Protocol No. 14 itself ran into difficulties. It had to be ratified by all the Contracting States to the Convention before it could take effect, and, in fact, in the two years after May 2004 it was ratified by all of them except Russia. The matter remained pending for several years in the Duma, which did not give its approval until 15 January 2010. As a result, Protocol No. 14 did not take effect until 1 June 2010, following ratification by Russia on 18 February 2010.

Since the Committee of Ministers had urged ratification of the Protocol within two years, it was clearly envisaged

that the question of procedural reforms would not be broached again before Protocol No. 14 came into force. However, the Court’s situation continued to deteriorate, with the backlog of pending cases growing by between 10 and 20 per cent each year and approaching 100,000 by the end of 2008. In October 2008 the President of the Court sounded the alarm and called on the Committee of Ministers to take urgent action. This request, supported as it was by a certain impatience on the part of States, led to action that was exemplary in its speed and creative in its use of public international law to overcome the stalemate relating to Protocol No. 14.

Following intense discussion among international lawyers, the Committee of Ministers, meeting in Madrid in May 2009, adopted measures designed to permit the rapid implementation of the procedural reforms contained in Protocol No. 14 (the powers of the Single Judge and of three-judge Committees). In short, those reforms would be applied in cases brought against States that:

- ratified a new Protocol, No. 14 *bis*, which was adopted in Madrid, repeated the provisions of Protocol No. 14 on those reforms and required only three ratifications to take effect; or
- accepted the provisional application of the new Protocol pending its entry into force; or
- accepted the provisional application of the relevant provisions of Protocol No. 14 itself pending its entry into force.

Although complex, these arrangements (the need for, and application of, which ceased when Protocol No. 14 took effect on 1 June 2010) proved to be a success. At the start of 2010 the new procedures were binding in 18 States Parties to the Convention, and in 2009 Single Judges decided 2,200 cases.

Jonathan L. Sharpe

General Editor

and

Peter Kempees

*Head of the Just Satisfaction Division
in the Registry of the Court*

Kostovski v. the Netherlands, 20 November 1989 (11454/85)

Fears for the Unknown: About Motes in One’s Brother’s Eye and Beams in One’s Own Eye

The Netherlands was among the first signatories to the European Convention. When it came to ratification, however, in accordance with Dutch practice much time elapsed. The Council of State had stated that it would expect the Convention, in view of its predominance over Dutch legislation, to cause ‘both legal insecurity and great difficulty in the enforcement of the law, as well as an undesirable thwarting if not disrupting of certain parts of our own legislation’. The Convention would, in its opinion, become ‘a source of legal conflict and a host of interpretative proceedings’. Finally, it was proposed to the Houses of Parliament to proceed with ratification of the Convention and bar the recognition of the individual’s right of petition. When fears were raised in Parliament about the impact for the Netherlands of the Convention and the international bodies that were to be set up, the Dutch ministers responsible for the Bill entitled Approval of the Convention for the Protection of Human Rights and Fundamental Freedoms Signed 4 November 1950 in Rome, as well as of the Protocol to the Convention Signed 20 March 1952 in Paris, made the reassuring remarks that ‘in their opinion, the contents of the Treaty do not derogate from the Constitution or any other legislation’ and that there was no reason to make further provisions in the Constitution or in the Criminal Code, as in their opinion ‘the complex of regulations of Dutch Law, criminal or other, contains sufficient guarantees for these principles to be respected in our country’. In other words, as far as they could see, the Netherlands would not be affected by the provisions of the Convention. The Convention came into effect for the Netherlands on its ratification on 31 August 1954.

Between 1960 and 1975 the Court delivered its first 12 judgments on the merits. It found violations in cases concerning Ireland, Belgium, Germany, the United Kingdom and Austria, and the reaction within Dutch legal circles went something like: ‘It is completely evident that the Court could find a violation. How come that these countries had not noticed this beforehand?’ It was not until 1976 that the Court delivered its first judgment against the Netherlands (*Engel and Others*) and made it

clear that even Dutch law and practice could fall short of the demands of the Convention. In the following years the same turned out to be the case in a series of other, still often-quoted cases, including *Winterwerp* (1979), *De Jong, Baljet and Van den Brink* (1984), *X and Y* (1985), *Bentham* (1985) and *Feldbrugge* (1986). Now the reaction at the national level was slightly different: the Netherlands had always done it that way. How come that some international judges dared to criticize that? And now the reaction abroad was: how come that the Netherlands had let that pass?

It showed how true the saying is about the ability to see the mote in one’s brother’s eye but not the beam in one’s own eye. It showed the importance of a fresh external look to recognize the deficiencies in one’s own system and traditions.

History shows that the Netherlands took its losses and adapted, where necessary, its national legislation or practice after a finding of a violation of the Convention.

This was also the case after the *Kostovski* judgment (1989). When Slobodan Kostovski had to stand trial, the decisive evidence came from an anonymous witness. Apparently in this case, involving serious organized crime, the witness wanted to remain anonymous and had not dared to testify in open court for fear of reprisals. The Court agreed with the applicant that his rights under Article 6 (fair trial) were violated:

Although the growth in organized crime doubtless demands the introduction of appropriate measures, the government’s submissions appear to the Court to lay insufficient weight on what the applicant’s counsel described as ‘the interest of everybody in a civilized society in a controllable and fair judicial procedure’. The right to a fair administration of justice holds so prominent a place in a democratic society (see the Delcourt judgment of 17 January 1970 ...) that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the government accepted that the applicant’s conviction was based ‘to a decisive extent’ on the anonymous statements.

Later, in the cases *Doorson v. the Netherlands* (1996) and *Van Mechelen and Others v. the Netherlands* (1997), the Court elaborated on the same right of ‘everyone charged with a criminal offence ... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’ (Article 6 § 3 (d)).

‘Eurocourt sets gangsters free’, was the headline of one of the leading Netherlands newspapers after the judgment in the case of *Van Mechelen and Others*. Apart from the fact that it was not even the Court that ordered that Hendrik van Mechelen be set free, it must be noticed that the Court did no more than its task under the Convention: to ensure the observance of the engagements undertaken by the High Contracting Parties – applying and interpreting the rights in the Convention by pointing out the motes and beams.

Egbert Myjer
Judge at the Court

Demicoli v. Malta, 27 August 1991 (13057/87)

Contempt of Parliament

Angel-faced Charles Demicoli was hardly the sort of person to take blows lying down. A police officer, who had obtained remarkable results professionally, he stuck out in a police force that obtained unremarkable ones by brutality. His competence earned him what he deserved: he was dismissed from the force for giving torture a bad name. Removed from his chosen calling, he edited a satirical weekly, *Not in the People’s Interest*, which targeted the rather bizarre democracy of the day. One article benignly made fun of the government and two pro-government Members of Parliament.

At the time the Constitution and the law enshrined the ancient British institution of contempt of Parliament or breach of privilege. Parliament claimed the right to transform itself into a criminal court to put on trial and imprison for up to 60 days anyone it found guilty of contempt of Parliament or of defaming any of its honourable Members. The government did not have to resort to frequent prosecutions. The ‘chilling effect’ of that law on the media made sure it did not have to. The Speaker of the House summoned the editor to stand trial for breach of privilege, and the prison van parked itself ominously in the yard of the House of Parliament.

Mr Demicoli came to me as a lawyer with some rather pertinent questions, or at least, so I thought. Was it right that he should be tried and condemned by those who claimed to be the victims of his defamation? Were his avowed political enemies the ‘independent and impartial tribunal’ prescribed by the Convention? Should he be deprived of his liberty by a court in which his accusers, prosecutors, witnesses and judges happened to be one and the same body? Was not that a kangaroo court composed of the Hon. Mr Kangaroo and the Hon. Mrs Kangaroo? I thought Mr Demicoli had a point. The Constitutional Court did not.

In 1987 when all this happened, Malta had ratified the Convention but was also the only member State of the Council of Europe that had persistently refused to recognize the jurisdiction of the Court or to accept the right of individual petition. This changed in June 1987 and, although the House of Representatives had condemned Mr Demicoli before the ratification of the right of individual petition, I introduced Mr Demicoli’s application all the same, relying on the six-month rule against a State that had ratified the Convention but not the right of individual petition.

It was the first Maltese case, and we had a field day both in the Commission and in the Court. Unlike the Constitutional Court, the Strasbourg Court did have problems with people being sent to prison or fined by a political and politicized body composed of the victims of an offence the author of which they had taken it upon themselves to judge. The Court established a violation of Article 6 – probably the first time the Court found a national constitution incompatible with the Convention.



Charles Demicoli.

For the victim and his lawyers this came as a gratification, though hardly as a surprise.

Contempt of Parliament and breach of privilege exist on paper in other member States that have followed the Anglo-Saxon parliamentary model – the United Kingdom, Ireland and Cyprus – but the practice had fallen into disuse over the last century. Only Malta persisted in applying it devoutly against political dissidents. That is, until the 1991 judgment threw some common sense at the parliamentary standing orders. Malta changed its law, and other States that still have breach of privilege on their statute books were given a gentle hint to forget about any temptation to see how it works in practice.

Giovanni Bonello
Judge at the Court, 1998–2010

López Ostra v. Spain, 9 December 1994 (16798/90)

Polluting Private and Family Life

The town of Lorca (Murcia) has a heavy concentration of leather industries. Several tanneries there had a plant for the treatment of liquid and solid waste built with a State subsidy on municipal land 12 metres away from the applicant’s home. Owing to a malfunction, it released gas fumes, noxious smells and other pollution, which immediately caused health problems and a nuisance to many of Lorca’s citizens, particularly those living in the applicant’s district. The town council evacuated the local residents and re-housed them free of charge in the town centre for the months of July, August and September 1988. In October the applicant, Mrs López Ostra and her family, returned to their flat and lived there until February 1992.

Mrs López Ostra applied to the European Commission of Human Rights on 14 May 1990. She complained of the Lorca municipal authority’s inactivity with respect to the nuisance caused by the waste-treatment plant, situated a few metres from her home. Relying on Article 8 § 1 and Article 3 of the Convention, she asserted that she was the victim of a violation of the right to respect for her home that made her private and family life impossible and made her the victim of degrading treatment.

On 8 July 1992 the Commission declared the application admissible. In its report of 31 August 1993 (Article 31) it expressed the unanimous opinion that there had been a violation of Article 8, but not of Article 3.

The Court considered that there had been a violation of Article 8 on the reasoning that ‘naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health’. Thus, despite the margin of appreciation left to the respondent State, the Court considered that the State had not succeeded in striking a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.

Based on this violation of Article 8 of the Convention, the Court ruled that the State should pay to the applicant 4,000,000 pesetas (about 24,000 euros) in damages and 1,500,000 pesetas (about 9,000 euros) for costs and expenses.

The judgment resulted in a redefinition in Spanish law (as interpreted in the case-law of the Spanish courts) of traditional concepts, such as ‘inviolability of domicile’ and ‘personal and family privacy’, guaranteed in Article 18 of the Spanish Constitution, which are now considered rights that may be affected negatively by environmental factors. Relevant examples of this redefinition can be found (as discussed extensively in legal literature) in the case-law of the Constitutional Court. Judgments 199/1996, 19/2001, 16/2004 and decision 37/2005 are often cited as such examples.

Luis López Guerra
Judge at the Court

Procola v. Luxembourg, 28 September 1995 (14570/89)

Milk Shakes Luxembourg’s Constitution

In my view, the *Procola* judgment is undoubtedly the most significant judgment concerning the Grand Duchy of Luxembourg. It deals with the consecutive exercise, by the same members of the *Conseil d’Etat*, of advisory and judicial powers in relation to the same decisions. It is the only judgment that has led to an amendment of Luxembourg’s Constitution.

Following the introduction of the ‘milk quota’ system in the member States of the European Community by EEC Regulations nos. 856/84 and 857/84 of 31 March 1984, Luxembourg adopted, in a Grand-Ducal Regulation of 3 October 1984, the provisions incorporating the Community

rules into domestic law. A number of ministerial orders were issued on 10 October 1984 allocating reference quantities for milk purchases (quotas) – that is, the quantities in excess of which an additional levy would be payable – based on the figures for milk collected in 1981, to the country’s four milk purchasers – one of which was the applicant, a dairy set up as an association under Luxembourg law.

The applicant association and two other milk purchasers appealed to the Judicial Committee of the *Conseil d’Etat* against the decisions fixing the reference quantities. In the light of the answers given by the Court of Justice of the European Communities, in response to a number of questions for a preliminary ruling, the Judicial Committee set aside the impugned decisions, in a judgment of 26 February 1987, finding that the choice of 1981 as the reference year for calculating the quotas had led to discrimination between purchasers, contrary to the EEC treaty. The case was referred to the Minister of State for Agriculture for a fairer apportionment of the reference quantities among the four dairies.

On 27 May 1987 the Minister of State submitted a new draft regulation on which the *Conseil d’Etat* gave its opinion on 2 July, proposing certain amendments and a bill giving the future regulation retrospective effect from 2 April 1984, the date on which the milk-quota system had come into force in the European Community countries. With certain amendments, the draft regulation became the Grand-Ducal Regulation of 7 July 1987 and the bill became the Act of 27 August 1987. Under that legislation the Minister of State issued four ministerial orders fixing the applicant association’s milk quantities for each of the four milk-production years from 2 April 1984 onwards.

The applicant association applied to the Judicial Committee of the *Conseil d’Etat* for judicial review of each of those orders, complaining in particular that the retrospective application of the 7 July 1987 Regulation was illegal. The Judicial Committee dismissed the applications in a judgment of 6 July 1988.

In their application of 22 November 1988 to the Commission, Procola and 63 of its members, all farmers, complained of violations of Article 6 § 1 and Article 7 of the Convention and Article 1 of Protocol No. 1.

In its judgment of 28 September 1995 the Court first had to examine whether Article 6 § 1 was applicable. Before the Judicial Committee of the *Conseil d’Etat* the parties had taken opposite views as to whether the

ministerial orders fixing milk quotas could be given retrospective effect. Procola had maintained that for the years from 1984 to 1987 no levy was payable, since the previous rules had been set aside and it was impossible to make the orders retrospective, whereas the delegate of the State had maintained that the orders were lawful. The applicant association’s case was sufficiently tenable, since the *Conseil d’Etat* had conducted a detailed examination of the conflicting arguments. There was therefore a dispute concerning the determination of a right.

The Court reiterated that Article 6 § 1 was applicable where an action was ‘pecuniary’ in nature and was founded on an alleged infringement of rights that were likewise pecuniary rights, notwithstanding the origin of the dispute and the fact that the administrative courts had jurisdiction. In order to satisfy itself that the proceedings were decisive for a civil right, the Court considered it necessary to look at the proceedings as a whole. In applying to the *Conseil d’Etat*, Procola had been using the only available means – an indirect one – of attempting to obtain reimbursement of the additional levies. In view of the close connection between the proceedings brought by Procola and the possible consequences of the outcome for one of their pecuniary rights, and for their economic activity in general, the right in question was a civil one. Moreover, payment of an additional levy to the national authorities could be construed as a deprivation of possessions within the meaning of the first paragraph of Article 1 of Protocol No. 1, and the right to the peaceful enjoyment of one’s possessions was undoubtedly a civil right. Article 6 § 1 was therefore applicable in the case (unanimously).

Had there been a violation? The Court considered that it was not necessary to determine whether the Judicial Committee was an independent tribunal, as the applicant association had not put in doubt the method of appointing the *Conseil d’Etat*’s members or the length of their terms of office nor had it questioned the existence of safeguards against extraneous pressure. The only issue to be determined was whether the Judicial Committee satisfied the impartiality requirement of Article 6, regard being had to the fact that four of its five members had to rule on the lawfulness of a regulation that they had previously scrutinized in their advisory capacity. The Court noted that four members of the *Conseil d’Etat* had carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg’s *Conseil*

d’Etat the mere fact that certain persons successively performed these two types of function in respect of the same decisions was capable of casting doubt on the institution’s structural impartiality. In this case Procola had had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given. That doubt in itself, however slight its justification, was sufficient to vitiate the impartiality of the tribunal in question, and this made it unnecessary for the Court to look into the other aspects of the complaint. Accordingly there had been a breach of Article 6 § 1 (unanimously).

Under Article 50 the Court found that only costs and expenses could be reimbursed and thus awarded the applicant association 350,000 Luxembourg francs (unanimously).

The *Procola* judgment led to a major institutional reform. First, the Law of 27 October 1995, amending the Law of 8 February 1961 (amended), providing for the organization of

the *Conseil d’Etat*, had a new paragraph 3 added to its section 22 prohibiting members of the Judicial Committee from sitting in cases concerning the application of rules that had been discussed in deliberations of the *Conseil d’Etat* in which they had participated. Subsequently, through a revision of the Constitution and amendments to legislation, administrative disputes were entrusted to administrative courts.

The photograph (below), which was taken at an exhibition on the *Conseil d’Etat* at the Museum of the City of Luxembourg in 2006–7, illustrates the major institutional reform triggered by the *Procola* judgment. It shows a hearing of the European Court of Human Rights (left), the robes worn by the members of the *Conseil d’Etat*’s Judicial Committee (centre) and milk-churns over which is projected *Justitia*, the Roman goddess of justice, brandishing her sword and scales (right).

Dean Spielmann
Judge at the Court

