

Reflections on the European Court of Human Rights' "Constitutional" Mission: Past, Present and Future

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The Group of Wise Persons (hereafter GWP) appointed by the Committee of Ministers, in 2005, to examine ways of securing the long-term effectiveness of the European Court of Human Rights (hereafter the Court) produced their final report at the end of 2006. The report¹ identified two major functions undertaken by the Court:

23 The right of individual application enshrined in Articles 34 and 35 of the Convention is the most distinctive feature of this control mechanism. The Court is the only international court to which any individual, non-governmental organisation or group of individuals have access for the purpose of enforcing their rights under the Convention. The right of individual application is today both an essential part of the system and a basic feature of European legal culture in this field.

24 This protection mechanism confers on the Court at one and the same time a role of individual supervision and a "constitutional" mission. The former consists in verifying the conformity with the Convention of any interference by a state with individual rights and freedoms and making findings as to any violation by the respondent state. Its other function leads it to lay down common principles and standards relating to human rights and to determine the minimum level of protection which states must observe.

What I intend to do in this paper is to offer some thoughts, based upon my research, on how the Court has, is and may in the future perform the latter role.

The Past

Under the original tripartite Strasbourg control system the part-time Court primarily focused upon the constitutional mission role and its jurisprudence (in leading judgments such as *Lawless v Ireland* (no3)² regarding derogations in times of

¹ CM(2006)203, 15 November 2006.

² A.3 (1961).

emergency and *Dudgeon v UK*³ concerning the criminalisation of homosexual relations) provided the foundations for the Court's contemporary adjudication. A significant achievement of the original Court was its development of a body of case law elaborating the obligations upon member states to establish and maintain democratic political systems.⁴ From a range of Convention Articles, including Article 3 of Protocol 1 (right to free elections), Article 11 (freedom of assembly and association) and Article 10 (freedom of expression), the Court refined the elements of an effective political democracy. These included, *inter alia*, the importance of pluralism in the political dialogue within member states and the crucial role of diverse political parties in promoting non-violent challenges to the governing party.⁵ The ability of persons to vote and stand for elected office.⁶ Together with the role of pressure groups in seeking to inform the public of their opinions.⁷ These important judgments represent classic examples of the original Court performing its constitutional mission in a jurisdiction formerly the preserve of national supreme courts.

The Present

Under the Protocol 11 control system it is the Court's seventeen member Grand Chamber that has the major responsibility for performing the constitutional mission.⁸

³ A.45 (1981).

⁴ See A. Mowbray, "The Role of the European Court of Human Rights in the Promotion of Democracy", [1999] *Public Law* 703.

⁵ *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121.

⁶ *Mathieu-Mohin and Clerfayt v Belgium* A.113 (1987).

⁷ *Bowman v UK* (1998) 26 EHRR 1.

⁸ See A. Mowbray, "An Examination of the Work of the Grand Chamber of the European Court of Human Rights", [2007] *Public Law* 507.

There are two ways in which cases raising such issues can be determined by the Grand Chamber. First, where a Chamber considers that it should relinquish jurisdiction over the case to the Grand Chamber because the litigation, “raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court”.⁹ Either party to the case may prohibit relinquishment. Chambers have been cautious in relinquishing cases with about five per year being sent to the Grand Chamber. However, these have raised questions of the utmost importance involving, *inter alia*, the overlapping obligations of many member states under the Convention and EU law and more broadly the relationship between the Strasbourg and Luxembourg courts¹⁰. This was clearly a monumental constitutional decision affecting the interaction of these two legal systems. Relinquishment cases have also encompassed highly sensitive disputes arising from the collapse of the former Union of Soviet Socialist Republics, such as *Slivenko v Latvia*¹¹, where the underlying problem was the tensions between the Latvian majority and minority Russian populations. Furthermore, the relinquishment process has enable the Grand Chamber to undertake the constitutional function of a legal system’s highest court to update jurisprudence in accordance with evolving social trends. Hence in *Christine Goodwin v UK*¹², a unanimous Grand Chamber departed from the approach of the original Court and held that contemporary

⁹ ECHR, Article 30.

¹⁰ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, (2006) 42 EHRR 1.

¹¹ (2004) 39 EHRR 24.

¹² (2002) 35 EHRR 18.

standards required member states to provide legal recognition of the new identities of post-operative transsexuals.

The second method by which the Grand Chamber can become seized of cases which raise, “a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance”¹³ is via the more controversial process of referral, by a party to the dispute, after a Chamber has given judgment on the merits. Both the original Court and the European Commission of Human Rights criticised the idea of a single court pronouncing judgment twice on the same case.¹⁴ But, states insisted that a referral mechanism be incorporated into the Protocol 11 reforms. Individual applicants have applied for referrals in more cases than states: 260 requests by individual applicants compared to 192 by states, between 2002-2005. The screening panels (of five judges including the President of the Court) have adopted a strict attitude towards the above eligibility criteria. Individual applicants have been successful in four and a half percent of their applications and states have achieved the higher success rate of seventeen percent. When a case is referred to the Grand Chamber the latter re-hears all aspects of the case, not just specific elements of the Chamber’s judgment.¹⁵ This can even extend to the Grand Chamber re-determining the (in)admissibility of the case.¹⁶ Therefore, the reality of the process is that the Grand Chamber is acting as an appellate court in respect of Chamber. A vivid example of this can be seen in *Hatton v UK*¹⁷, where the Grand Chamber held that the Chamber majority had failed to follow the established

¹³ ECHR, Article 43(2).

¹⁴ See, A. Mowbray, “A new European Court of Human Rights”, [1994] *Public Law* 540.

¹⁵ *K and T v Finland* (2003) 36 EHRR 18.

¹⁶ *Azinas v Cyprus* (2005) 40 EHRR 8.

¹⁷ Judgment of 8 July 2003.

approach to evaluating environmental pollution claims under Article 8 and had instead adopted an impermissible stance which accorded special status to environmental rights.

A concern I have about the institutional arrangements governing referrals is the presence of the Chamber President and respondent state national judge on the Grand Chamber which re-hears the case.¹⁸ The Rules of Court ensure that judges sitting in Chambers¹⁹ and as members of screening panels²⁰ have not had any prior involvement with the cases they are determining. As we have seen the re-hearing of cases under Article 43 is an appellate activity. Therefore, I believe that the membership of the Grand Chamber should be entirely free from any prior involvement in the litigation. The presence of the relevant national judge on the Chamber will have ensured that any special insights he/she may have will have been reflected in the judgment of the Chamber (or any separate opinion he/she may have delivered²¹). Furthermore, the removal of these two judges from the Grand Chamber will avoid them being placed in the embarrassing position of having to reconsider their own judgment in the Chamber. As Judge Costa, now President of the Court, observed in regard to the dilemma these two judges face:

Must they adhere strictly to their initial opinion (which moreover is now only of historical value, since the Chamber's judgment, as *res judicata*, is invalidated with retrospective effect)? Or must they, with the benefit of hindsight, depart from or even overturn their previous opinion? Here again, everything depends on the specific features of the case... and on each judge's greater or lesser degree of stubbornness (or ability to reconsider his or her previous conclusions)...²²

¹⁸ As mandated by ECHR, Article 27(3).

¹⁹ Rule 28.

²⁰ Rule 24(5)(b).

²¹ Under ECHR, Article 45(2).

²² Partly Dissenting Opinion of Judge Costa in *Kyprianou v Cyprus*, Judgment of 15 December 2005.

The Future

As is well known the major challenge to the Court over recent years has been the growing numbers of individual applications and associated backlog of cases. Protocol 14 seeks to make the Court more efficient through measures such as the creation of single-judge formations.²³ But the final report of the GWP contained the ominous prediction that:

32. It will not be possible to make a final assessment of the effects of the entry into force of Protocol No. 14 until it has been in operation for some time. However, it can already be anticipated that the reforms it introduces will not be sufficient to enable the Court to find any long lasting solution to the problem of congestion. According to estimates produced within the Court, the increase in productivity resulting from the implementation of this Protocol might be between 20 and 25%.²⁴

The major institutional reform advocated by the final report was the creation of a “Judicial Committee”, a separate judicial filtering body, to undertake the functions of determining the admissibility of applications and the merits of manifestly well-founded applications (which do not raise novel questions of law).²⁵ The GWP believed that the establishing of such a body would facilitate the determination of individual applications by a judicial decision whilst enabling the Court to “focus on its essential role”²⁶ (presumably its constitutional mission). The final report proposed that the members of the Judicial Committee “would be judges enjoying full guarantees of independence.”²⁷ But, implicitly, the GWP considered them to be of

²³ See, A. Mowbray, *Cases and Materials on the ECHR 2nd ed.*, (OUP, Oxford, 2007) pp.48-57.

²⁴ Above note 1.

²⁵ See, A. Mowbray, “Faltering Steps on the Path to Reform of the Strasbourg Enforcement System”, 7(3) *Human Rights Law Review* 609 (2007).

²⁶ Above note 1 at para. 52.

²⁷ *Ibid.* at para. 53.

lower status than Judges of the Court as the final report suggested that the qualifications for being appointed to the Judicial Committee should include having “high moral character and possess[ing] the qualifications required for appointment to judicial office.”²⁸ Whereas, nominees to the Court are required to have “the qualifications required for appointment to *high* judicial office”²⁹ (my emphasis). The Court would also have a formal role in assessing the professional qualifications and linguistic knowledge of candidates nominated for the appointment to the Judicial Committee.³⁰ The final report recommended that the number of members of the Judicial Committee should be less than the number of states party to the ECHR. The Committee of Ministers would decide on the size of the Judicial Committee and the number could be varied by the Committee of Ministers acting on a proposal from the Court. Nominations from states of members of the Judicial Committee would alternate via rotation, but the Judicial Committee would reflect “a geographical balance as well as a harmonious gender balance”.³¹ The Judicial Committee would be a subordinate body to the Court and come under the latter’s “authority”. Consequently, the Chair of the Judicial Committee would be a member of the Court, appointed by the latter for a specified period.³² Also, the Court would have a “special power”, of its own motion, to review any decision adopted by the Judicial Committee.³³ Additionally, the Judicial Committee could refer a case to the Court if it

²⁸ Ibid. at para. 54.

²⁹ ECHR, Article 21(1).

³⁰ Above note 1 at para. 54.

³¹ Ibid. at para. 53.

³² Ibid at para. 57.

³³ Ibid at para. 64.

considered that the case merited determination by that body.³⁴ But, in order to prevent the Court being overburdened, no appeals should be allowed against the decisions of the Judicial Committee.³⁵

Given that the Judicial Committee would take over the merits decision-making function of Committees of three judges, to be exercised under Protocol 14, together with the admissibility responsibilities of single-judge formations, the role of being a member of the Judicial Committee could be more interesting than solely determining the question of admissibility. By removing these categories of decisions from the Court there should be a great freeing up of judicial resources for use in complex admissible cases addressing the Court's constitutional mission.

The final report considered that it was "necessary" to change the system of determining the amounts of just satisfaction to be paid to successful applicants under Article 41 of the ECHR. Both the Court and the Judicial Committee ought to be relieved of the burden of assessing how much compensation should be paid.

...[I]t is proposed that the general rule should be that the decision on the amount of compensation is referred to the state concerned. However, the Court and the Judicial Committee would have the power to depart from this rule and give their own decision on just satisfaction where such a decision is found to be necessary to ensure effective protection of the victim, especially where it is a matter of particular urgency.³⁶

Member states would be under a duty to inform the Committee of Ministers which national judicial body had been designated to perform this task. Undue formalities and unreasonable costs/fees must not be imposed by the relevant national judicial bodies. These bodies would be obliged to follow the Court's jurisprudence governing just satisfaction and victims would be able to apply to the Court or Judicial Committee

³⁴ Ibid at para. 61.

³⁵ Ibid. at para. 63.

³⁶ Ibid. at para. 96.

where the national judicial authority failed to comply with the Court's case-law or deadlines set for resolving the calculation of compensation. Given the frequently widely differing views of successful applicants and respondent States as to the appropriate amount of compensation due, for example in the *Case of the Former King of Greece and Others v Greece*³⁷ the applicants claimed 472 million euros in respect of pecuniary damage whilst the Government contended that the applicants' ancestors had benefited from fiscal and other privileges worth 579 million euros, allied to the far from coherent jurisprudence of the Court³⁸ it seems highly likely that many national just satisfaction determinations would be challenged at Strasbourg unless the Court and Judicial Committee were to adopt a restrictive approach to such petitions. The GWP's recommendation of devolution of responsibility for calculating just satisfaction awards will be welcomed by the Court as it has already made clear its view that this function is not a high priority. In *Salah v The Netherlands*³⁹, a unanimous Chamber held that:

...the awarding of sums of money to applicants by way of just satisfaction is not one of the Court's main duties but is incidental to its task of ensuring the observance by States of their obligations under the Convention.⁴⁰

Intriguingly the GWP had canvassed the idea, in its interim report⁴¹ of enabling the Court to give "judgments of principle" that would be binding upon all member states. Where a case involved an issue of principle that affected more than the respondent state all member states would be invited to participate in the

³⁷ Judgment of 28 November 2002.

³⁸ See, A. Mowbray, "The European Court of Human Rights' Approach to Just Satisfaction", [1997] *Public Law* 647.

³⁹ Judgment of 6 July 2006.

⁴⁰ *Ibid.* para. 70.

⁴¹ CM(2006)88 and see, A. Mowbray, "Beyond Protocol 14", 6(3) *Human Rights Law Review* 578 (2006).

proceedings. According to the interim report enabling the Court to deliver such judgments would enhance its constitutional role and also reduce the need for separate judgments in cases involving different states. However, by the time of the final report the GWP had rejected the notion:

68 After discussing the matter in greater depth, the Group believes that it would be difficult to arrive at a precise definition of this category of judgments. Furthermore, it is not always possible to identify in advance all the cases that might give rise to judgments of principle.

69 The Group therefore does not make any proposal as to a specific procedure for dealing with such cases. It merely recommends that judgments of principle-like all judgments which the Court considers particularly important- be more widely disseminated.⁴²

The final report did support the idea of the Court being empowered to provide advisory opinions on the interpretation of the ECHR to national supreme courts as, “[t]his is an innovation which would foster dialogue between courts and enhance the Court’s “constitutional” role.”⁴³ National courts would have the option to request an advisory opinion. Interestingly, the final report proposed that, “...to enhance the judicial authority of this type of advisory opinion, all the State Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested.”⁴⁴ The ability of all member states to participate in this new form of proceedings echoes the interim report’s advocacy of a similar involvement of all States in “judgments of principle”. The GWP considered that, “...providing such opinions would not be the Court’s principal judicial function.”⁴⁵ Also, to prevent requests for advisory opinions from creating a new wave

⁴² Above note 1.

⁴³ Ibid. para 81.

⁴⁴ Ibid. para. 84.

⁴⁵ Ibid. para 85.

of proceedings to further overwhelm the Court they should be subject to stringent limitations:

- (a) only constitutional courts or courts of last instance should be able to submit a request for an opinion;
- (b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto;
- (c) the Court should have a discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal.⁴⁶

Professor Greer has expressed strong criticism of the idea of conferring such a jurisdiction on the Court. He believes that, "...since advisory opinions can only be expressed in vague and general terms, they are unlikely to add anything of substance to the future of the Convention system."⁴⁷ I am also cautious in that the Court has no significant heritage of expertise regarding this type of proceedings.⁴⁸

The unresolved question is the extent of the willingness of all member states to support major institutional reform of the Strasbourg control system in order to enable the Court to have sufficient resources to perform its constitutional mission without being drowned by the torrent of individual applications.

⁴⁶ Ibid. para. 86.

⁴⁷ Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge: Cambridge University Press, 2006), p.192.

⁴⁸ The Court has only given one decision under its existing (very narrow) Article 47 advisory jurisdiction: *Decision on the Competence of the Court to Give an Advisory Opinion*, 2 June 2004; for commentary see A. Mowbray above note 8.