# Protocol 11 to the European Convention on Human Rights

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## I. Historical background

Since the adoption of the European Convention on Human Rights in 1950 the world has changed and Europe has changed even more. During centuries the highest authority had been vested in the states. International law was a legal system between states in which equals coordinated their policies but which contained little law to which the states were subjected. Conflicts between states could be brought before the International Court of Justice only when each of the parties to a dispute had expressly accepted the jurisdiction of the Court. Supranational organisations did not exist, sovereign powers above the level of the state were not accepted.

In 1950 the Western European states agreed upon a binding treaty for the protection of fundamental human rights. They accepted that such a treaty could be effective only when a special organ would be created for supervision. In line with international law at that time this supervision was attributed to the Committee of Ministers of the Council of Europe, a political organ in which all participating states were represented. A special Commission was to look into the cases first and was empowered to establish the facts and to try and reach a friendly settlement, but it would not have any power of decision.

The first proposals provided for a right of all individuals within the participating states to lodge complaints to that Commission. However, especially the United Kingdom, strongly supported by the Netherlands and Greece, objected to such a right of individual petition. This was seen as an infringement of national sovereignty because it would mean that the state would no longer be the supreme authority. So far it had been generally accepted that persons were subjected to no other authority than that of their own states. A possibility of launching complaints concerning their own state to an international body was seen as an unacceptable interference in the domestic affairs of states.

Both in the United Kingdom and in the Netherlands historical research has been made with respect to the preparation of the Convention[1]. This research shows that in both countries considerable opposition existed against the Convention as a whole and especially against a right of individual petition and the

[1] Respectively Anthony Lester, Fundamental Rights: the United Kingdom isolated?, Public Law, Spring 1984, pp. 46-72. and by Y.S. Klerk and L. van Poelgeest, Ratificatie à contre coeur: de reserves van de Nederlandse regering jegens het Europese Verdrag voor de Rechten van de Mens en het individueel klachtrecht, R.M. Athemis 1991, pp. 220-246, at p. 224.

creation of any kind of a supranational court which was proposed by some delegations to decide on legal questions in stead of the Committee of Ministers.

As an illustration I offer you a few quotations from the records.

(1) With respect to the UK[2]

The Colonial Secretary stated in July 1950:

> "The introduction of such a system of appeal to an international authority is likely to cause considerable misunderstanding and political unsettlement in many Colonial territories. The bulk of the people in most Colonies are still politically immature and the essence of good government among such people is respect for one single undivided authority which they are taught to recognise as responsible for their affairs. The right of petition to an international body would obscure this principle and would suggest to Colonial peoples either that the ultimate authority in the affairs of their territory is not the Crown or that there is more than one ultimate authority. This confusion would undoubtedly be exploited by extremist politicians in the Colonies in order to undermine the authority of the Colonial Government concerned. Loyalty would be shaken: administration would be made more difficult and agitation more easy."

Now you may expect that a Colonial Secretary takes an extreme position because of his duties. However, the Lord Chancellor, who is the highest judicial officer in the United Kingdom, wrote in August 1950, that almost all

> "came to the conclusion that we were not prepared to encourage our European friends to jeopardise our whole system of law, which we have laboriously built up over the centuries, in favour of some half-baked scheme to be administered by some unknown court."

In October 1950 the Lord Chancellor wrote:

> "It completely passes the wit of man to guess what results would be arrived at by a tribunal composed of elected persons who need not even be lawyers, drawn from various European States possessing completely different systems of law, and whose

[2] All quotations are taken from Anthony Lester's article, mentioned above.

> deliberations take place behind closed doors..... Any student of our legal institutions ..... must recoil from this document with a feeling of horror.....
> ..... I cannot view with equanimity a still further appeal to a secret court, composed of persons with no legal training, possessing the unfettered right to expound the meaning of 17 Articles which may mean anything, or - as I hope - nothing."

The British Cabinet then agreed that the Government should:

> "maintain its opposition to the grant of a right of appeal to a supranational authority."

Once the Convention had entered into force the Lord Chancellor blamed the Foreign Office for accepting a text which had "seriously altered the law of this country for the worse".

The situation in the Netherlands was not much better[3]. The instruction to the Dutch member of the Committee of Experts contained drastic restriction of the machinery proposed by the Consultative Assembly for the supervision of the Convention. Even the conciliatory task of the Commission should be limited "as it could only lead to intervention in the internal affairs of the States concerned and to pressure on Governments to take measures to which they are not bound under the Convention". Within the Cabinet the Prime Minister especially objected against any possibility of a right of individual petition.

No records have been found of the discussion in other Member States of the Council of Europe. Other governments may have been less reluctant. Still, one may wonder how the Convention ever came into being against such opposition. One explanation may be that the Consultative Assembly of the Council of Europe had so strongly supported the project. It would also have been inconsistent to object against the Convention after the strong support to internationalisation of human rights given by the European countries in the United Nations. The British representative in the Committee of Experts wrote to his Dutch colleague that he came in a difficult position as he had to avoid any impression that the UK would sabotage the Convention[4]. The opposing delegations succeeded in making both the right of individual petition and the jurisdiction of the Court optional. After that success participation became inevitable. In October 1950 the British Foreign Secretary, Ernest Bevin wrote in a memorandum to the Cabinet:

> "We must sign the Convention of Human Rights, which is the only positive achievement of the Council of Europe to date. The compromise reached on this with the

[3] The data are taken from the article by Klerk and van Poelgeest, mentioned above.

> Committee of Ministers was agreed in order to attain our adherence, and a retreat on our part at this stage would put us in a most embarrassing position."[5]

It may be submitted that the opposition mentioned above was not against the protection of human rights. Both the United Kingdom and the Netherlands take individual rights seriously. Far more it should be seen as opposition against international involvement in domestic matters. Traditionally, states had been fully sovereign in their internal affairs. Supranationality had not conquered Europe yet. Still in 1957 when explaining the British position the Foreign Secretary explained:

> "The position which Her Majesty's Government have continuously taken up is that they do not recognise the right of individual petition, because they take the view that States are the proper subject of international law and if individuals are given rights under international treaties effect should be given to those rights through the national law of the States concerned."[6]

Neither could the British Government accept a European Court having jurisdiction over the Convention. In the same speech Foreign Secretary Selwyn Lloyd explained:

> "The reason why we do not accept the idea of the compulsory jurisdiction of a European Court is because it would mean that British codes of common and statute law would be subject to review by an international court. For may years it has been the position of successive British Governments that we should not accept that status."[7]

The Netherlands Government also objected against the right of individual petition and the creation of a European Court on the ground that they preferred interstate supervision. In their opinion, the Convention was not in the first place meant for the protection of individual interests, but rather to ensure democracy in the Member States of the Council of Europe. "This is a political, rather than a legal function"[8].

The Dutch Government considered a court premature. In their opinion that did not fit in the stage of development in Europe:

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[4] Klerk & Van Poelgeest, p. 222.
[5] C.P. (50) 236, dated 19 October 1950, CAB 129/42 37644, quoted by Lester, p. 53.
[6] H.L. Deb., Vol. 574, cols. 867-868, July 29, 1957, quoted by Lester, p. 58.
[7] Idem.
[8] Klerk & Van Poelgeest, p. 224.

> "At the present stage all powers should remain in the hands of governments. The transfer of powers involved in the establishment of the Court could only be the last chapter in European integration"[9].

As the right of individual petition as well as the jurisdiction of the Court could only be incorporated in the Convention on a optional basis, the general supervision was attributed not to a supranational organ but to the intergovernmental Committee of Ministers of the Council of Europe. The Commission which was to receive complaints with respect to the application of the Convention would have no power of decision other than to declare cases inadmissible. When it considered a case admissible it could try to achieve a friendly settlement and it could render an opinion to the Committee of Ministers of the Council of Europe. That Committee would then decide, unless the States concerned had expressly accepted the jurisdiction of the Court.

Still, it was expected that the Commission could be of great influence. By declaring too many cases admissible it could embarrass the national Governments. The Member States took care to appoint a Commission which would have sufficient political experience not to embarrass the States. In the first Commission they appointed three legal advisors to ministries of Foreign Affairs, three Members of Parliament, three former cabinet ministers and only seven people who had no link to the national government (four members of the judiciary, one from the bar, three law professors).

II. Development

The Commission operated carefully. Of the first 195 complaints 178 were immediately rejected [10]. Still, several countries were reluctant to accepted the right of individual petition. They feared a stream of querulous people or abuse of the right of petition by extremist groups. The Netherlands accepted the right of individual petition only after the Commission had rejected the first claims of the German communist party. Only then, the Dutch Government was convinced that the Commission would accept only serious and justified complaints.

Gradually, the Commission gained confidence and finally all States accepted the right of individual petition.

Also the objections against a supranational court generally weakened. The most influential States became used to a supranational court in the European Community. Even though the word was banned

[9] Collected edition "Traveaux Préparatoires", Vol IV. 128, also 114 and 168, quoted by Klerk & Van Poelgeest, p. 225.

after the establishment of the Coal and Steel Community, supranationality became accepted in Europe. The idea that a court largely composed of foreigners can overrule national laws and national court decisions is no longer repulsive.

Most influential was the Costa-ENEL Case in which the Court of Justice held:

> "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."[11]

The United Kingdom, Ireland and Denmark, when adhering to the Community, expressly accepted the case law of the Court of Justice as binding law. The surrender of sovereignty was no longer strange to them.
Gradually, all Member States of the Council of Europe also accepted the jurisdiction of the European Court of Human Rights.

It is interesting to note that the United Kingdom which so strongly resisted the right of individual petition and the jurisdiction of the Court accepted both in 1966, whilst France, one of the strongest advocates of both clauses, adopted the right of individual petition only fifteen years later, in 1981, after having accepted the competence of the Court in 1974.

Since the early years of the Council of Europe the law in Europe has considerably developed. Not only are supranational courts and international petitions against one's own Government accepted institutions, but also the composition and working habits of the Commission changed. It now operates in the same way as a court. Apart from Mr. Ermacora, who is a law professor, a member of parliament and an individual expert at the same time, there are no parliamentarians member any more, nor are there legal advisors of ministries or former cabinet ministers. The largest present contingent are the law professors, eleven of whom are members of the Commission, followed by seven national judges and three members of the bar. Two members are Deputy-Attorney-General in their home country, a position which may have some link to the government but as a whole the Commission can no longer be seen as an organ with

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[10] Klerk & Van Poelgeest, p. 243.
[11] Costa v. ENEL (6/64), judgment of 15 July 1964, [1964] ECR 585, at 593.

political roots. In practice, the political role of the Committee of Ministers also diminished. Usually it confirms the opinion of the Commission.

Time has come to adapt the structure found as a political compromise in 1950 to the possibilities and experiences of today. A number of suggestions for amendment have been made.

III. Proposals for change.

The basic structure of the Convention should be changed. No longer is it acceptable that 90 % of the cases is decided by a Commission which is concealed from the public eye. Neither can it be accepted that final judicial decisions are taken by the Committee of Ministers of the Council of Europe. Both rules have been weakened in practice. With the permission of the Committee of Ministers the Commission publishes most of its important decisions. Important legal questions are referred to the Court and on most other questions the Committee of Ministers follows the basically legal decision of the Commission. Still virtually all parties to the Convention agree that the system should be changed. Only on the way how to change its opinions differ.

A proposal which obtained a great amount of support was the suggestion to transform the Commission into a Court of First Instance. Its opinions which are now sent to the Committee of Ministers or to the Court could then become judgements. The present Court would then be a court of appeal. The role of the Committee of Ministers of the Council of Europe could be reduced to supervising the compliance of the Courts' judgments. No drastic changes in the Convention would be needed but the supervisory structure would become more legal. Even though the Committee of Ministers usually follows the opinion of the Commission, it occasionally happens that it does not accept that opinion for political reasons.

The question arose, however, whether there would be a need for two instances for judging an application which also had been judged by the national judiciary, usually in three instances. Another proposal, therefore, was to merge the present Commission and the present Court into one court of human rights. This would be faster, cheaper, simpler and more easy to understand for the European people. On the other hand two courts would require less change in the present structure and would guarantee a more thorough review of the most important cases. When the negotiations on the 11th Protocol started the participating states could not agree on either of these alternatives. The dispute between the supporters of one court and those of two courts delayed the negotiations for a considerable time.

There were other proposals for change. These were, however, less urgent as they could to a large extent be met under the present Convention.

(1) The right of individual petition should be made compulsory. This does not require any drastic change. In practice all participating states have accepted the right of individual petition and to new parties it is made a condition for their adherence.

(2) The same applies to the compulsory jurisdiction of the European Court of Human Rights. At present all parties to the Convention also accept this jurisdiction.

(3) Something should be done to cope with the increasing numbers of participating states. Can a Commission and a Court still operate efficiently with more than thirty members?
Again, practice has adapted to the situation to a large extent. Since 1990 the Commission decides the majority of its cases in committees of only three members and most of the remaining ones in chambers of 13 members. These committees and chambers are formed in a balanced way in order to obtain a fair and equal distribution of the cases and to have at the same time experienced and less experienced members deciding.
The Court has always operated in chambers, but their composition was by lot and therefore at random and not always fortunate. Both the chambers of the Commission and those of the Court may relinquish jurisdiction to the plenary when they consider a case of great general importance. They quite often do so.
In 1993 the membership of the Court had increased so far that discussion in the plenary Court became too difficult. The Court then created a Grand Chamber of 19 judges to which the smaller chambers can relinquish jurisdiction[12]. Only in exceptional cases may the Grand Chamber relinquish jurisdiction to the full Court.
As increased membership also means an increase in man-power the larger number of members also helps in coping with the work. So far it has not caused any great problems.

(4) Related to the increasing number of participating States is the rapid growth of the number of cases brought before the Commission. During the first 20 years of the Convention the Commission never received more than 400 applications in one year. Thereafter the number grew continuously. The limit of 1000 cases a year was passed in 1988. Five years later (in 1993) the 2000 mark was passed and most likely more than 3000 cases a year will be registered as from 1995 (in 1994 some 2800 cases will be registered).
The Commission adapted its working methods and increased its production accordingly, but its adaptation always came later than the increase of the case-load. After more than 1000 cases had in 1988,

[12] Rule 51 of the Court.

the Commission managed to decide more than 1000 cases a year later, in 1989. Again, a year after the year in which more than 2000 cases were received (1993) the Commission decided more than 2000 cases (in 1994). Having received extra staff, a further increase of production may be expected. However, this increase always comes later than the increase in applications. Therefore, there is an ever growing backlog of cases. By the end of 1994 some 3500 cases were pending before the Commission. Something drastic had to be done to cope with this ever increasing backlog.

Therefore it was proposed to create at least one permanent organ, in stead of the Commission and the Court which only work part-time. This need strengthened the position of those who wanted one court rather than two as the creation of two permanent organs might be too great a burden for the Council of Europe.

IV. The 11th Protocol[13].

After long negotiations the 11th Protocol was signed on 11 May 1994. As much as possible all wishes for modernization have been met. The right of individual petition and the jurisdiction of the Court were made compulsory and a permanent Court will be created. To avoid court sessions with more than thirty judges the permanent Court will operate in committees of three and in chambers of seven, following the experience of the present Commission.

Between those who wanted one court and those who wanted a court of appeal as well a compromise was reached. As is often the case with compromises this compromise looks worse than either of the alternatives. There will be one Court which will normally operate in chambers of seven judges. When a case has been decided in a chamber an internal appeal will be possible to a Grand Chamber of seventeen judges. This Grand Chamber will be composed of the President, one or two Vice-Presidents, four of five presidents of chambers and some ten other judges.

Governments have the (often mistaken) idea that a court is more supportive of their position if it contains a judge of their own nationality. Therefore they provided in the 11th Protocol that the national member of the state concerned will sit both in the chamber of seven and in the Grand Chamber handling the appeal. As the president of the chamber will also be a member of the Grand Chamber two of the latter's members will have judged upon the case before it comes in appeal. At first sight this would be contrary to fair proceedings. The human rights institutions have held national rules in breach of Article 6 of the Convention if the same judge sat both in first instance and in appeal. The appeal judge can then no longer be seen as completely independent and impartial. The drafters of the 11th Protocol held, however,

[13] Henry G. Schermers The European Court of Human Rights after the Merger, 18 European Law Review, pp. 493-505 at pp. 502, 503.

that the Grand Chamber would only continue the discussions of the new Court and should not be seen as a new instance.

We may hope that in practice a solution can be found on the basis of the present rules of procedure of the Commission (Rule 20) and of the Court (Rule 24). These rules provide that a judge may not sit in a case in which he has previously acted as member of a tribunal. On this ground both the president of the chamber concerned and the national judge might consistently be exempted. The national judge may then be replaced by a judge *ad hoc*.

Because of the enormous work load the new Court will have to handle many cases at the same time. Use of judges *ad hoc* may then be rather difficult.[14] For the Grand Chamber, however, he may be a useful substitute for the national member. The Grand Chamber will have three different tasks[15]. (1) It will decide cases in first and only instance when a Chamber has relinquished jurisdiction. (2) In exceptional cases it may rule in appeal (Art. 43). (3) It may render advisory opinions at the request of the Committee of Ministers[16]. The need for replacing the national member will arise only under the second of these three tasks. As the present Commission will be replaced by the regular Chambers of the Court all decisions will in future be Court judgments. It may therefore be expected that less cases will be referred to the Grand Chamber than presently cases are referred to the Court. For bringing a case before the Grand Chamber leave to appeal is required. According to the 11th Protocol such leave will be granted only in exceptional cases. We may therefore expect that the Grand Chamber will meet relatively rarely in its capacity of a court of appeal. It might decide to have only three of four sessions a year for which *ad hoc* judges might be required. Such sessions will fully concentrate on a relatively low number of cases. These cases will be thoroughly discussed in much the same way as in the present Court. Judges *ad hoc* may then fully participate in much of the session.

Protocol 11 will enter into force when it is ratified by all parties to the European Convention on Human Rights. This may take still a considerable amount of time. According to reasonable estimates the Protocol may enter into force around 1998. This means that special arrangements should be made with the Members of the Commission which will be elected or re-elected in 1996 and with the Members of the Court who are to be elected or re-elected in 1995 and 1998. The Members of the Commission elected in 1993 (until 1999) and the Members of the Court elected in 1992 (until 2001) were aware of the negotiations of the 11th Protocol when they were appointed. In any case no Member of the Commission

[14] Henry G. Schermers: The 11th Protocol to the European Convention on Human Rights, 19 European Law Review, pp. 367-382.
[15] New text of the Convention, Article 31.

or of the Court has any vested right to stay for the period for which he was elected. The fixed term of office is guaranteed to protect the independence of the persons concerned. No such protection is needed when the organ itself is abolished. When they are advised many years ahead of time the office of these persons may be terminated at the dissolution of the present Commission and Court. As the new Court would be a continuation of the present institutions and in particular of the present Commission, it seems desirable that at least a number of present Court Members and Commissioners will be appointed to the new Court.

[16] New text of the Convention, ARt. 47 which reproduces the present second Protocol to the Convention.