THE 'CONSCIENCE OF EUROPE?'

Navigating Shifting Tides at the European Court of Human Rights

Foreword by PROFESSOR WILLIAM BINCHY

Edited by ROBERT CLARKE

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Preface

The European Court of Human Rights (ECtHR) has sometimes been a friend, and sometimes a foe to those fighting for marriage, the family, life, and religious freedom in Europe. Its jurisprudence has not always been consistent and the "consensus" model seems to be the antithesis of the proper role of human rights in protecting all – and, in particular, minorities. Nevertheless, there are ways for interested parties to use the European Convention on Human Rights (ECHR) mechanisms to effect positive change – and areas in which this is more likely to be successful than others.

This targeted manual was prepared in advance of a meeting of lawyers, NGO leaders, politicians, and others to consider the contribution of the Council of Europe system, and in particular the ECtHR, to these areas. The final collection has benefited from robust debate and dialogue during this day-long symposium held in Strasbourg in 2016. As a result, this book in reality has many more contributors than are listed as authors. Particular thanks therefore goes to all of the named contributors, as well as to Alexandra Tompson for her research assistance, and Elisabeth Gudenus for her technical work. I hope it will be a valuable resource to those seeking to deploy ECHR jurisprudence at a national level, and those seeking recourse to the ECtHR in Strasbourg.

Robert Clarke, Vienna, 2017

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Foreword

The Editor of this book, Robert Clarke, and the several contributors, are to be congratulated for having produced a work that is meticulously researched, fair-minded in analysis and provocative of further reflection by readers who care about the work of the ECtHR.

The Court has a formidable task: to protect the human rights of more than 800,000,000 human beings living in forty-seven States whose political and social cultures vary widely. The Convention is now well over half a century old. Attitudes today on such matters as marriage, procreation, abortion, and euthanasia are far less cohesive than in 1950. There is substantial disagreement between, and within, different States. No court could provide answers that will accommodate such conflict to the satisfaction of everyone. The question, therefore, is: how should the ECtHR deal with these irreconcilable differences?

The ECtHR might have adopted a philosophical and normative approach that sought to ensure core protection of human rights consistent with extending to States a generous margin of appreciation. This was indeed the approach favoured by the ECtHR for many years. Recently, however, the ECtHR has taken a quite different stance. It still adheres to the margin of appreciation doctrine but in a way that, in effect, tends to advance secularist values at the expense of religious freedom. More ominously, it has used the notion of consensus to damage

the position of those States that do not subscribe to attitudes and values that have gained currency in the laws of many other States. The idea that a human right can depend on whether five or twenty five States have enacted a particular law should be abhorrent to anyone who understands that human rights are not the gift of legislators.

The contributions to the book carefully analyze the jurisprudence of the ECtHR and provide a critique that is respectful of the ECtHR's role but not reluctant to identify the underlying values, political compromises and political agendas. The level of scholarship is formidably high; the concern for human rights and for respect for freedom of religion is palpable.

Professor William Binchy[1]

1. BA BCL LLM (NUI) MA (DUBL) FTCD (1995), Barrister-at-Law, Honorary Bencher (King's Inns). William Binchy is Regius Professor of Laws. He was formerly a special legal adviser on family law reform to the Irish Department of Justice and Research Counsellor to the Law Reform Commission. He was a Commissioner with the Irish Human Rights Commission for two terms, from 2000 to 2011. He was Visiting Fellow at Corpus Christi College, Cambridge (Michaelmas Term 2002) and Visiting Fellow at the Institute of European and Comparative Law, Oxford (June 2011). He has authored and co-authored books on private international law, torts, and family law, and sits on the ADF International Advisory Council

Strategic Litigation at the ECtHR – By the Numbers

Robert Clarke[1] *and Laurence Wilkinson*[2]

Statistical thinking will one day be as necessary a qualification for efficient citizenship as the ability to read and write.[3]

I. Introduction

In this chapter, rather than applying the usual legal analysis to isolated judgments or thematic areas, we want to take a macro approach and look at the numbers overall, not just for the sake of numbers, but for the sake of learning more about the ECtHR, its caseload and how the ECtHR processes cases, with

1. Director of European Advocacy with ADF International in Vienna. Clarke has been involved in more than 15 cases before the ECtHR. He is a Barrister, admitted to the bar of England and Wales. Before joining ADF International, he practiced criminal and regulatory law in London.
2. Legal Counsel, Europe with ADF International in Strasbourg. Wilkinson is a qualified solicitor in England and Wales, conducting litigation at the ECtHR and advocating for life, marriage and religious freedom at the Council of Europe. Prior to joining ADF International, Wilkinson was a Commercial Solicitor in London.
3. H. G. Wells.

a particular focus on some of the thematic areas covered in this book.

While that may seem like a somewhat blunt approach to the practice of law, there is an increasing body of scholarship which deals in such analysis with a view to gaining greater insight into the functioning of courts and the legal reasoning of judges. One of the most well-known pieces is the 2004 "Supreme Court Forecasting Project."[4] In that piece of research, the authors obtained predictions of the outcome of every case argued at the US Supreme Court during the 2002 term using two methods. The first method was a statistical model that relied on general case characteristics and the second was a set of independent predictions by lawyers and law professors. The statistical model predicted the Supreme Court's affirm/reverse results in 75% of cases. The experts scored only 59.1%. More recently, a similar study tackled the ECtHR with the machine correctly predicting the outcome in 79% of cases.[5]

The aim of this contribution is slightly more modest: to look at both the ECtHR's workload as a whole and the way in which it has dealt with cases concerning three select articles of the ECHR (2, 8 and 9) in order to derive insights into the way the ECtHR operates.

4. Theodore Ruger and others, "Supreme Court Forecasting Project: Legal and Political Science Approaches to Supreme Court Decision-Making" (2004) *Faculty Scholarship*, Paper 672.
5. Nikolaos Aletras and others, "Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective" (2016) *PeerJ Computer Science* 2:e93.

II. The ECtHR by Numbers

The ECtHR's workload is tremendous. In 2015,[6] the ECtHR allocated 40,650 new applications to a judicial formation of which 27,050 were identified as Single-Judge cases (likely to be declared inadmissible).[7] The ECtHR dealt judicially with more cases (45,576) than it received, thus reducing the backlog in that period. The stock of allocated applications decreased from 69,000 to 64,850.

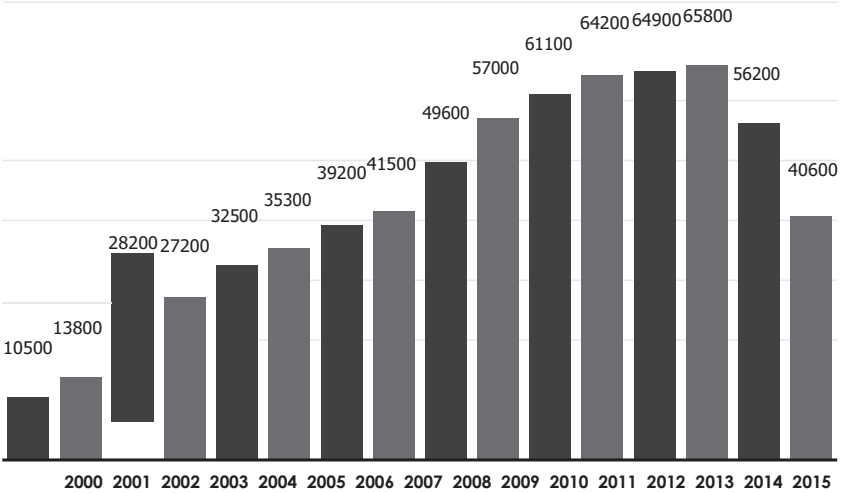
As of 31 December 2015, there were 10,000 cases pending at a pre-judicial stage. During the course of the year, 45% of all files were disposed of administratively under Rule 47 (which prescribes the content of an individual application) amounting to a total of 32,400 files.

	2014	2015
Pending at pre-allocation stage	19,050	10,000
Disposed of administratively	25,100	32,400
Inadmissible (or struck out)	83,680	43,135
Application communicated	7,895	15,965
Judgment	2,388	2,441
Interim measures (granted / requests)	216/1939	161[8]/1458

6. Statistics collected from the HUDOC database and published Court data in ECHR, "Analysis of statistics 2015" (2015). <http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf>. This is the most up to date data set available at the time of going to print.
7. *Ibid*.
8. The ECtHR notes that 39% of the requests for interim measures granted are linked to the conflict in Ukraine.

Turning next to the ECtHR's activity during the course of the year, we can see, below, that the ECtHR allocated 40,600 to a judicial formation in the last year. There is a clear drop off in allocations after 2013 and particularly into 2015:

Applications allocated to a judicial formation per year



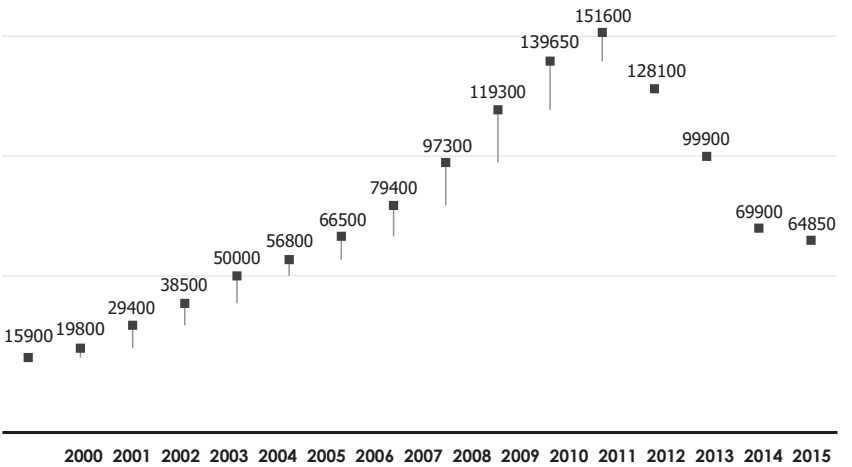
Source: echr.coe.int

The explanation for the recent drop off is a new approach to Rule 47 – that is to say, a somewhat stricter approach. But it also mirrors, at least in part, a decrease in the number of applications filed.

Having seen the number of applications allocated to a judicial formation falling, it is interesting to note that the number of pending cases before judicial formations continues to likewise fall. This has been dropping since 2011 as the ECtHR has sought to address what was then an increasing number of applications

with a surge of activity. While the current 64,850 pending cases is not something to aspire to, it is certainly a step forwards from the 151,600 pending cases at the peak in 2011 (with more than 40,000 of them against Russia alone).

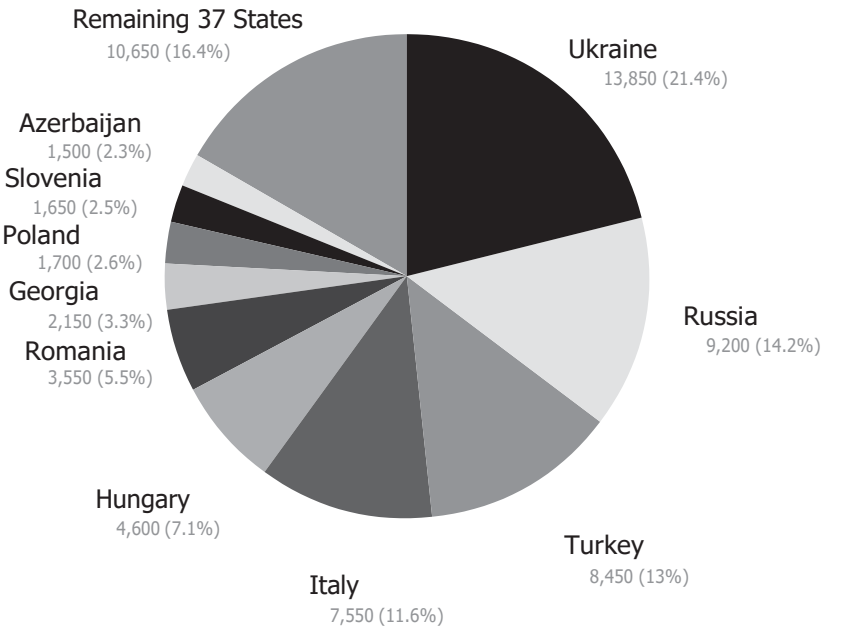
Applications pending before a judicial formation



Source: echr.coe.int

Taking those 64,850 pending cases as a snapshot of the ECtHR's current workload; it can be further split in two ways. Firstly, in relation to the state in question:

Total number of pending applications



Total number of pending applications 64,850

Source: echr.coe.int

The top three States are Ukraine (21.4%), Russia (14.2%) and Turkey with (13%). Somewhat surprisingly, Italy is dangerously close to the top three accounting for 11.6% of pending cases. If an analysis of all judgments against Italy in the last 10 years is an appropriate yardstick, then 75% of those will include an alleged violation of Article 6, particularly as applied to the length of proceedings.

To refine that measure a little more, if the totals are controlled for population of the country then none of the top three remain in the top three. Instead, we see in 2015: Hungary (4.3 pending

applications per 10,000 population), Liechtenstein (3.51) and Moldova (2.84). These show notably high deviations from the Council of Europe region average of 0.49 allocated cases per 10,000 inhabitants.

Finally, despite the very high numbers of applications allocated to judicial formations over the last couple of years, it is interesting to note how many judgments were actually delivered by the Court. There were only 823 judgments delivered in 2015, down almost 50% from the 1625 judgments delivered in 2009.

In practice we can draw two conclusions from this data. Firstly, the ECtHR is seeking to dispose of cases in a much more exacting way. It does not want to become the ICC of human rights whose reputation is one of its slow pace and relative ineffectiveness. That has translated into a strict application of the demanding requirements under Rule 47 even before an application is reviewed by a Judge. Secondly, even assuming an application passes that first administrative hurdle, there is a need to advise realistically on the prospects of success at a tribunal that is overburdened. In 2015, only 5% of cases processed resulted in a judgment (and not all of those resulted in a violation being found.)

III. Life, Marriage, and Freedom at the ECtHR

For the purpose of examining specific articles, a specific date period has been selected to give a consistent data set in which we can have clarity on the completeness of the data available. The date period surveyed is from 1 January 2006 – 31 December 2015 representing a ten year period. The accuracy of the data depends entirely upon the accuracy with which metadata is recorded against judgments entered into the ECtHR's case law database, HUDOC. The ECtHR's own statistics note, in part, that they were "generated automatically using the conclusions recorded in the metadata for each judgment contained in HUDOC" and so the same resource is relied upon here.[9]

Within the data set there are 12,610 judgments including 192 from the Grand Chamber.

During that period, the most "popular" articles in respect of which to claim a violation were article 6 (n = 6,849), P1-1 (n = 2,213) and Article 3 (n = 2,001).

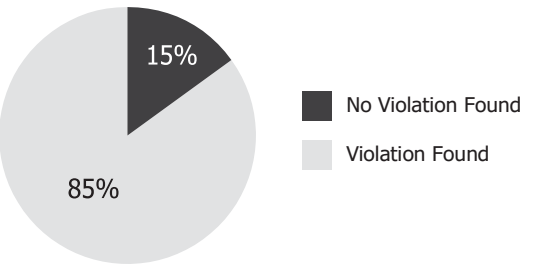
a. Article 2

In the sample range, there were 680 judgments that considered Article 2, and of those, the ECtHR went on to find 580 violations

9. ECHR, "Violations by State" (2015). Available at <http://www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf>, n 1.

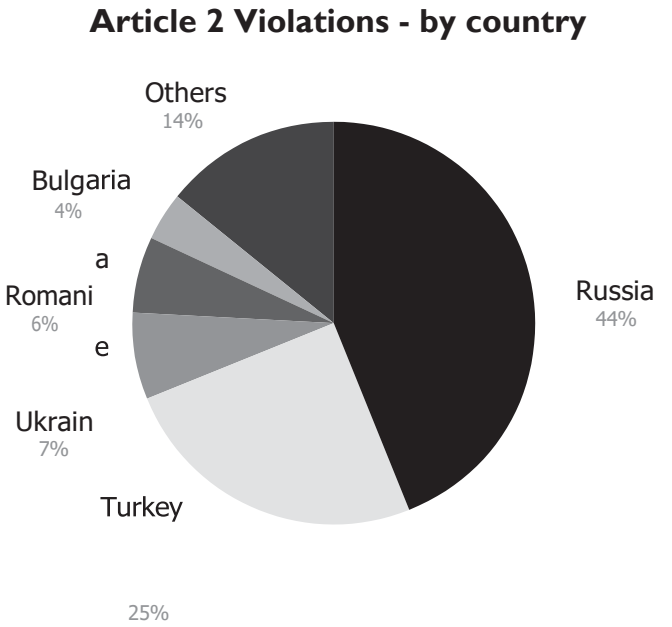
– representing an 85% success rate.[10] The large majority of the violations (44%) were committed by Russia (n = 253).

Article 2 - Success Rate



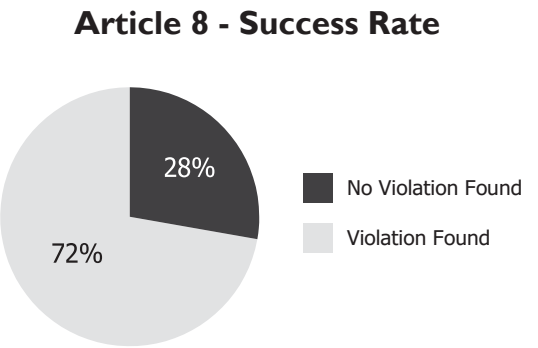
Interestingly, 218 of the judgments (just over 1 in 3) that found a violation of Article 2 also found a violation of Article 3. A typical example of these judgments is *Luluyev And Others v. Russia*[11] where the ECtHR held Russia responsible for the kidnap and murder of citizens in Chechnya, or *Ciorcan and Others v. Romania*[12] where the ECtHR held Romania responsible for the shooting and injuring of twenty five Roma people.

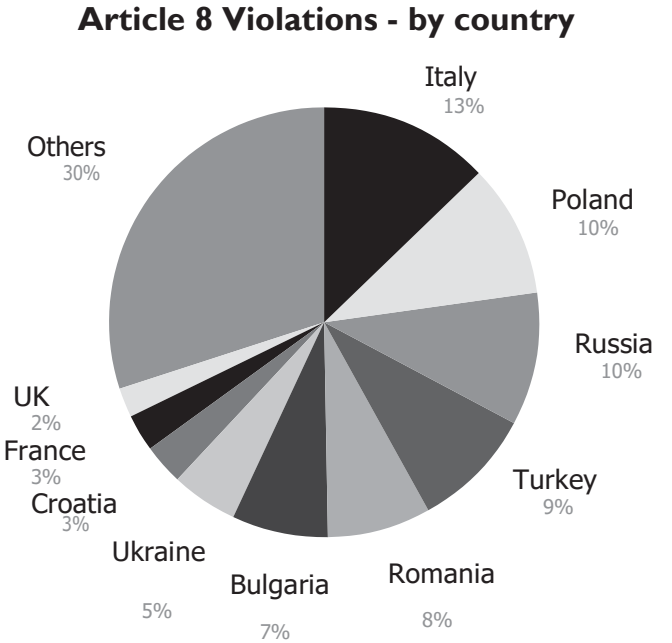
10. Though recalling that cases at this stage have already passed a number of preliminary hurdles.
11. *Luluyev and Others v. Russia*, no. 69480/01, 9 February 2007.
12. *Ciorcan and Others v. Romania*, nos. 29414/09 and 44841/09, 27 January 2015.



b. Article 8

Article 8 is the sixth most common Article to be considered in the ECtHR's judgments during the sample time-frame. It was considered in 1,169 judgments, with 845 violations being found – a 72% success rate.





Of the violations found, it is noteworthy that while there was a fairly even spread of Member States that were found to violate Article 8, 7% of the total violations (a total of 58) were found against Bulgaria, a relatively small State with a population of around 7 million people. The violations against Bulgaria include judgments detailing intimidation of politicians by the police[13] and the unlawful eviction of Roma citizens.[14]

Although often argued together, surprisingly, only 5% of the judgments finding a violation of Article 8 also found a violation of Article 14 (prohibition of discrimination) and of those, seven judgments were on the grounds of sexual orientation, and only one was specifically found to be a violation on grounds of

13. *Gutsanovi v. Bulgaria*, no. 34529/10, 15 October 2013.
14. *Yordanova and Others v. Bulgaria*, no. 25446/06, 24 April 2012.

religious belief. The judgment concerning religious belief was a case that concerned a father whose access rights to his son were removed because the father had spoken to him about his religious convictions.[15]

c. Article 9

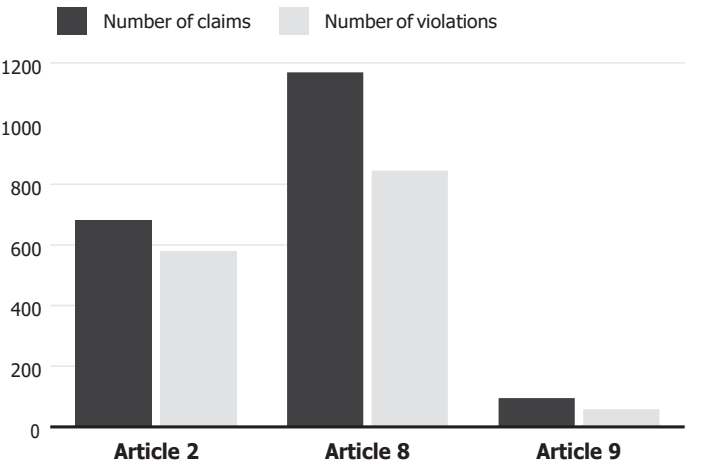
Article 9 is relatively infrequently relied upon. Within the data period, Article 9 was relied upon 95 times averaging just under 10 judgments per year. So, in addition to it being a "precious asset", it would appear it is also a rare one. A violation was found in 58 of those cases amounting to a 61% success rate. Among the Articles of interest (and the ECHR in general), that is a relatively low success rate for cases which have already passed a number of preliminary hurdles. It is also noteworthy given that a violation was found in 86% of all cases that reached judgment meaning that claims under Article 8 and 9 are significantly less likely to result in a violation than those pleaded under other Articles, including Article 2. The relative breadth, and the aggressive attempts to further expand Article 8 may account for its poor performance, but the same cannot be said of the "rare" Article 9 claims.

The Articles most frequently pleaded alongside Article 9 were Articles 3, 6 and 11. Perhaps unsurprisingly, the central issues most commonly ruled upon included manifestation of religion

15. *Vojnity v. Hungary*, no. 29617/07, 12 February 2013.

or belief (40% of cases), and the justifiability of interferences (33%).

Comparison of claims and success rates across Articles 2, 8, and 9



	Article 2	Article 8	Article 9
Number of claims	680	1169	95
Number of violations	580	845	58
Percentage success	85%	72%	61%

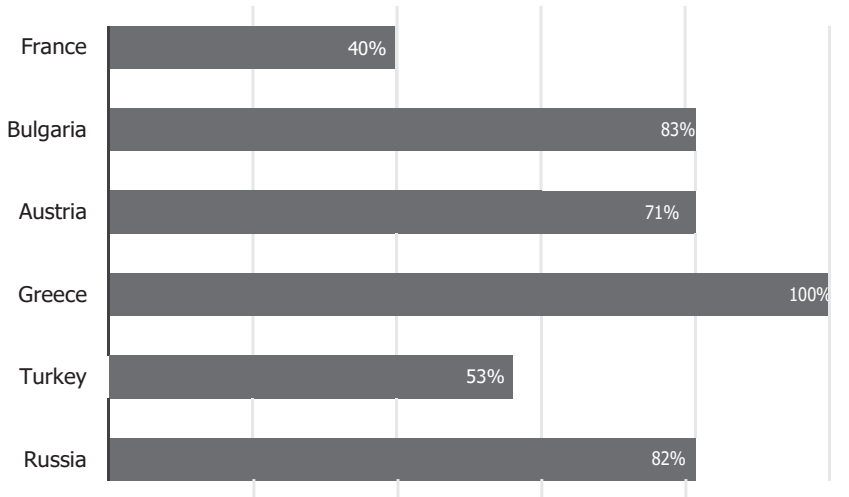
In seeking to rely on the exceptions set out in Article 9 (2), respondent States most frequently relied on the "rights and freedoms of others."

The right was asserted a disproportionately high number of times against France (10 cases out of 95 in total), perhaps explained by the strictness of the laïcité doctrine. France is surpassed only by Russia and Turkey, both of which have a higher rate of application and larger population. Representative cases within this category include the Grand Chamber decision

in *SAS v. France*[16] on the ban on face coverings in public, and the case of *Dogru v. France*[17] on the operation of a headscarf ban in physical education classes.

When you narrow the success rate of the Article 9 cases down to the more common target countries (N>5), the variance is interesting to note (though the sample size is, by this point, still quite small).

Success rate of Article 9 cases (States with > 5 cases)



The strikingly low success rate in respect of claims against France could be explained by the Court's unwillingness to disagree with the strident French secularism as advanced in cases like *SAS* and *Dogru*.

16. *SAS v. France*, no. 43835/11, 1 July 2014.
17. *Dogru v. France*, no. 27085/05, 4 December 2008.

Finally, the chances of *a* violation being found increase where Article 14 is argued alongside Article 9. While this approach does not affect the chances of success of the base Article 9 claim (this remains constant), it does give a second angle in which the Court has shown a willingness to find a violation in 50% of cases, albeit within a very small sample set. Such cases include *Gutl v. Austria*[18] in which Article 9 was argued in conjunction with Article 14 in a case concerning military service in respect of Jehovah's Witnesses. The Court emphasized that Article 14 enjoyed no independent existence, but quickly determined that:

> As the privilege at issue is intended to ensure the proper functioning of religious groups in their collective dimension, and thus promotes a goal protected by Article 9 of the Convention, the exemption from military service granted to specific representatives of religious societies comes within the scope of that provision. It follows that Article 14 read in conjunction with Article 9 is applicable in the instant case.[19]

The Court went on to find no separate issue under Article 9 but a violation of 14 read in conjunction with 9. So pleading Article 14, where appropriate, is to be highly recommended.

18. *Gütl v. Austria*, no. 49686/99, 12 March 2009.
19. *Ibid*., § 33.

IV. Strategically Litigating with Effective Interventions

Having understood the particular capacity difficulties facing the ECtHR, and the breadth of cases with which it is seized, this section will consider the ways in which the possibility of third party intervention can be most effectively deployed. NGOs that have appeared before the ECtHR in this way generally consider the opportunity to be a valuable one to highlight issues or considerations which may not have been fully explored or contemplated by either party to proceedings, and some commentators have noted the impact of direct NGO contribution, and of indirect NGO co-ordination and support on the outcome of cases at the ECtHR.[20]

Strategic litigation has been described by one commentator as the "continuation of politics before the courts by elements of civil society."[21] That position makes sense if we start from a view of human rights which counts among their purpose the protection of minorities against the possible tyranny of the majority. Strategic litigation involves recourse to the courts to effect change when other organs – legislature, or executive – are unwilling or unable to act. In that sense, it is somewhat anti-majoritarian and yet, at the same time, democratic precisely

20. JURISTRAS, "State of the Art Reports: Strasbourg Court Jurisprudence and Human Rights in United Kingdom" (2007); Gabriel Swain, "Who uses the European Court of Human Rights, and Who wins? Evidence from new studies" *EJIL: Talk!* (27 July 2009).

21. Aidan O'Neill, "Strategic Litigation before the European Courts" *ERA Forum* 16, no. 4 (1 December 2015) 495–509.

because it is based on the idea of securing rights which are inherent and inalienable.

Third party interventions before the ECtHR are themselves something of an oddity. They have more value than a mere *amicus curiae* brief given that the arguments are routinely reproduced in the judgment and there are specific and stringent rules governing permission. Moreover, the briefs submitted by interveners are forwarded to the parties for comment, and those comments relayed back to the third party. On the other hand, a third party remains distinct from the principal parties to the case.

In a short article on third party interventions before the ECtHR, a UK lawyer working for the registry indicated that "the Court has generally been well served by third party interventions." The caveat to this general statement is that interveners either expressly or implicitly flout the rule not to comment on the facts or merits. Ultimately, he concludes that "however sincere and well intentioned such interventions are, they often leave the impression that the intervention has been made, not out of a desire to assist the Court, but so that the intervener can be seen to have intervened."[22]

Nevertheless, it is clear that third party intervention is becoming a more frequent occurrence. This is particularly the case in relation to the Grand Chamber which has accepted third

22. Paul Harvey, "Third Party Interventions before the ECtHR: a rough guide" *Strasbourg Observer* (24 February 2015).

party briefs in 21% of its cases.[23] Anecdotal suggestions on the acceptance rate of interventions vary wildly. NGO JUSTICE reports that leave is "almost always granted"[24] and, by contrast, former Registrar, and now Judge of the Court, Paul Mahoney, wrote in a 2005 commentary that a lot of requests are refused.[25]

Turning specifically to cases concerning "sensitive ethical issues", one commentator considers that "some [third parties submissions] provide relevant comparative or international law" and their usefulness is contrasted with those which "rely almost exclusively on philosophical or religious arguments."[26] Further examples given of helpful briefs include "scientific information…or so called 'Brandeis briefs' setting out statistics and other studies [or] international and comparative law."

Such comparative studies have been favorably cited by the ECtHR. In *I v. United Kingdom*,[27] the ECtHR made explicit reference to an intervention by Liberty in which it reviewed the laws of 37 European countries in relation to "gender reassignment." Examples equally exist where the ECtHR has come to a different view than the third party, but it is clear

23. Laura Van den Eynde, "An empirical look at the amicus curiae practice of human rights NGOs before the European Court of Human Rights" (2013) 31 (3) *Netherlands Quarterly of Human Rights* 271.
24. JUSTICE, "To assist the court: third party interventions in the public interest" (2016).
25. Paul Mahoney, "Commentaire" in Hélène Ruiz Fabri and Jean-Marc Sorel (eds.), *Le Tiers à l'Instance devant les Juridictions Internationales* (Pédone 2005) 155.
26. Laura Van den Eynde, "An empirical look at the amicus curiae practice of human rights NGOs before the European Court of Human Rights" (2013) 31 (3) *Netherlands Quarterly of Human Rights* 271.
27. *I v. United Kingdom*, no. 25680/94, § 40, 11 July 2002.

that the contribution was helpful to the Court. In *Sheffield and Horsham v. United Kingdom,* for example, the ECtHR had:

> examined the comparative study which has been submitted by Liberty…However, the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems…[28]

In other cases, the ECtHR has recited at length the submissions of an intervener, demonstrating that they have been reviewed in the judicial decision making process. In *M.C. v. Bulgaria*,[29] the ECtHR summarized a third party intervention across 21 paragraphs, dedicating more space to the arguments of the intervener than the principle parties.

Equally, there are many cases in which no specific reference is made to the one or many interventions before the ECtHR, but that is not to say that they were unhelpful or unpersuasive.

An area in which further attention is invited is a review of relevant jurisprudence on the topic at issue: "Of just as great assistance, but not done nearly often enough, is providing relevant precedents from other courts around the world."[30] It is therefore clear that third parties can play a significant role in litigation at the ECtHR and can be most effective by providing

28. *Sheffield and Horsham v. United Kingdom*, nos. 22985/93 and 23390/94, 30 July 1998.
29. *M.C. v. Bulgaria*, no. 39272/98, 4 December 2003.
30. Paul Harvey, "Third Party Interventions before the ECtHR: a rough guide" *Strasbourg Observer* (24 February 2015).

submissions that truly seek to assist the Court in its decision-making task.

V. Conclusion

The ECtHR is fighting what appears to be a winning battle against a burgeoning caseload. The proportion of applications which ultimately result in judgments is very small and even within that small number, the areas of life, marriage and the family, and religious freedom account for a relatively small area for the ECtHR.

In order to increase its legitimacy, and given the breadth of the ECtHR's operation, it has a relatively liberal practice of accepting third party interventions. These can be most strategic when highlighting comparative experiences and presenting expert material on the issue at hand. However, caution should be exercised when undertaking any exercise in comparative jurisprudence given the ECtHR's increasing and troubling reliance on the "consensus" approach, unsuited as it is to human rights adjudication. The purpose of comparative analysis should be limited to demonstrating sound legal approaches and novel concepts, rather than simply reinforcing the idea that whatever is most common should prevail.

One area in which the ECtHR would be able to increase transparency and thereby increase its legitimacy is in relation to recording and reporting on third party interventions. The

Rules of Court regulate intervention and place the decision on whether or not permission should be granted with the President of the section in question. The President must decide whether the proposed intervention is in the interests of the "proper administration of justice." Unsuccessful requests to intervene are not mentioned in the judgments and so it is difficult to know precisely what number or proportion of requests this accounts for.

About the Editor

Robert Clarke serves as legal counsel and Director of European Advocacy for ADF International at its office in Vienna, Austria. He specializes in religious freedom issues and cases before the ECtHR as well as leading efforts across Europe in defence of life, family, and religious freedom. Prior to joining ADF International, Clarke was seconded counsel for the Nursing and Midwifery Council in London, prosecuting cases of medical misconduct. He qualified as a barrister at 2 Bedford Row in London, specializing in criminal and regulatory law.

During his time at ADF International, Clarke has been involved in more than 15 cases before the ECtHR. These cases include *Wunderlich v. Germany*, which is challenging Germany's criminal ban on homeschooling, and *Altinkaynak and Others v. Turkey* which challenges Turkey's refusal to legally register churches.

Clarke earned his LL.B with American law from the University of Nottingham with honours in 2012, having spent one year at the University of Virginia School of Law. He also completed the Bar Professional Training Course at Nottingham Law School. Clarke completed the ADF leadership development program to become a Blackstone Fellow in 2011. He is qualified as a barrister and is admitted to the Bar of England and Wales.

He is available on Twitter at @Rob_ADFIntl.

The European Court of Human Rights has the monumental task of protecting the most foundational freedoms of more than 800 million citizens across 47 States. That's a significant challenge given that the Court is asked to reconcile substantial disagreements between these States on controversial issues—and views on marriage, family, sanctity of life, and religious freedom are far less cohesive now than when the European Convention on Human Rights was drafted.

The 'Conscience of Europe?' examines the Court's sometimes unpredictable jurisprudence in these increasingly controversial areas. With a palpable concern for human rights and religious freedom, the contributors provide an objective critique of the Court's role, while exploring the changes recent years have brought to the complex legal landscape of Europe.

ADF International is an alliance-building legal organization that advocates for the right of people to freely live out their faith. With headquarters in Vienna, and offices in Brussels, Geneva, Strasbourg, London, New York City, Washington DC, and Mexico City, we are at the forefront of defending religious freedom, the sanctity of life, and marriage and family around the world.

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