***The European Court of Human Rights*** *– record and functioning,*

Evert Alkema[1]

Today we celebrate the 65th anniversary of the European Convention on Human Rights. I would, however, like to say a few words about its most important institution, the Court, that saw the light of day only 9 years later. I take this opportunity to look at the Court from a distance and make a few general observations about its record and its present and future functioning .

The Court's past is characterised by emancipation and anti-discrimination. Over the years it has fostered the legal position of children and mentally ill-persons and combatted successfully discrimination of women, aliens, homosexuals, transsexuals and Roma. It also elaborated the principles of fair trial and access to the courts, articulating in particular penal procedure.

The record shows more. Suffice it here to state that the Court efficiently - often making use of already existing consensus among the States - set essential common standards and thereby laid building bricks for *'un espace juridique européen'*. And yes, at the same time, the Court bolstered the position of the domestic courts at the expense of the domestic legislature and administration. But why should a court favouring the judicial branch come as a surprise?

The present Court started in November 1998 as a permanent institution. Also charged with the tasks of the former European Commission of Human Rights its functions increased considerably. At the same time it was faced with an enormously expanding workload owing to the increase of States Parties. Both this functional and organisational aspects merit our attention.

The Court is extraordinary in several respects: Its composition of 48 judges poses a problem with regard to unity and the judges' single term of office of 9 years poses further problems of continuity and consistency. Moreover the Court operates in relative isolation. In contrast to domestic courts it lacks proper counterbalancing powers comparable to the domestic legislature and administration. It are the Convention States which more or less assume the roles of those institutions, notably when they change the Convention through protocols and supervise, together with the Parliamentary Assembly, the implementation of Court judgments. It should be noted in passing that the very same States also act as the defendants in the proceedings before the Strasbourg Court, which makes them - as opposed to the individual applicants - very experienced procedural 'repeat-players'.

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The judgments are special and serve sundry functions. The bulk of them concern individual applications about purely individual disputes. Clearly this legal protection is most important to the individuals concerned to have their cases being decided by an impartial international instance without any - supposed or real - bias in favour of the State.

For the Court itself these cases are like oxygen. They enable it to develop and to perform the daily maintenance of the Convention; to keep the States alert and, if necessary, to prevent their gliding off when fundamental rights, the essential elements of the Rule of Law, are jeopardized.

Yet, the individuals' 'day in court' has its price: the just mentioned workload. Fortunately the Court recently succeeded in improving its working methods and now is able to keep abreast with the incoming cases. However further measures are indispensable to accommodate the still growing attraction of the Court.

In this context I would propose a change of policy: a shift from a factual approach to a more normative approach. Still and too often the Court is wasting time and resources on cases which do not merit such attention. This is particularly so where the dispute underlying the case in fact is a conflict of interests between private parties.[2] These 'horizontal' issues are most likely to occur with the right to privacy, the freedom of religion and the freedom of expression. They seem less apt for deciding by the Court for the following reasons: the State's responsibility is engaged only indirectly: the other private party is not the defendant in Strasbourg, which causes a procedural imbalance. Often these cases are further complicated by the freedom of contract of private parties, notably their right to waive fundamental rights when entering into a contract. The Court itself is confronted with the safeguard rule of Article 53 and has to choose between the devil and the deep blue sea: either defining strictly the rights and duties of the private parties *inter se* or leave the matter fully to the discretion of the State.

The factual character of these cases eases non-admissibility *a limine*. On the important condition that the domestic proceedings have met the Convention standards, the *de minimis* rule (of Art. 35 para 2 lit. b) that *'the applicant has not suffered a significant disadvantage'* or alternatively the rule that the Court refuses to act as a sort of *'fourth instance'*, can serve as non-admissibility grounds.

[2] A case in point is ECtHR 12 June 2014 Fernández Martínez v Spain (56030/07), a dispute about the employment as a teacher of Catholic religion between a former catholic priest and the Diocese of Cartagena in which neither the chamber nor the grand chamber found a violation or Article 8 (the right to privacy (to be published shortly in *Nederlandse Jurisprudentie*).

Some of the case law deals with the Court's own position in connection with other international bodies. Here too - it seems to me - is a world to win in terms of time and resources. I briefly mention:

a) a better division of labour with other supervisory bodies in the world and in Europe e.g. the UN Commission on Human Rights, the UNHCR and the European Committee on Social Rights of the revised Social Charter.
b) resolving the issue of hierarchy between the different international instruments on human rights, especially in connection with the already mentioned safeguard clause of Art. 53 ECHR.
c) settling the relationship with the European Union. The accession of the EU to the ECHR has been delayed or perhaps even been frustrated by the notorious Opinion of the Court of Justice of last December. The matter is related to the Union's legitimacy and the Convention's effectivity but raises also unaddressed questions about the proliferation of judges in Strasbourg and the possible development of factions among them.
The Strasbourg Court has a vital contribution to make to diversity since it does not require the Convention rights to be applied uniformly thanks to Convention's character as a minimum standard, the subsidiarity of the Court's supervision, the doctrine of the margin of appreciation and Article 53. But that also may lead to contradictions with the strive for uniformity dominant within the Union and therefore, eventually, call for more fine-tuning of the limitation clauses of the Convention.

This survey tried to illustrate that still important tasks lie ahead for the now 57 years old Court. We wish it on this occasion much wisdom and strength to fulfil its tasks, crucial for the Rule of Law in Europe, and to meet these new challenges.