

## IOI-EUROPE CONFERENCE THE OMBUDSMAN IN AN OPEN AND PARTICIPATORY SOCIETY

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### THIRD-PARTY INTERVENTIONS BY INDEPENDENT PUBLIC INSTITUTIONS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

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#### **I. The European Convention on Human Rights and the functioning of a democratic society**

1. The preamble to the European Convention on Human Rights refers to an “effective political democracy” (and according to the European Court of Human Rights, democracy is the only system envisaged by the drafters of the Convention, and the only one that is compatible with the Convention). Moreover, according to various provisions of the Convention an interference with a fundamental right is acceptable only when it is “necessary in a democratic society”.

2. For the purpose of the present paper, some elements of a democracy are particularly relevant:

. *Participation of the citizen*: especially through elections of parliament (Art. 3 Protocol No. 1 to the Convention); indirectly: equal access to public service.

. Democratic institutions, in particular *public institutions*:

- It is necessary to set up public institutions, in order to allow the State to fulfill its positive obligations (e.g. the protection of the right to life requires not only a normative framework, but also public bodies with competence to prevent violations and to react to them).
- Public authorities are expected to show respect for citizens and to be neutral vis-à-vis citizens (cf. discussions about religious signs displayed by civil servants).
- A public service is at the service not of the rulers, but of the citizens: this implies transparency (incl. scrutiny by media and public opinion; access to information) and accountability (political and legal).
- The decision-making by public authorities (rulemaking and individual measures) should provide for procedural safeguards for the persons concerned. When public authorities have a discretionary power, they should allow the individuals concerned to present their point of view, so that the authorities can weigh the competing interests and strike a fair balance.

## II. Third-party interventions before the European Court of Human Rights: the relevant texts

### *Article 36 of the Convention*

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant [in French: “toute personne intéressée autre que le requérant”] to submit written comments or take part in hearings.
3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

### *Rule 44 of the Rules of Court*

1-2. (...)

3. (a) Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.

(b) *Requests for leave* for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 *not later than twelve weeks after notice of the application has been given to the respondent Contracting Party*. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.

4. (a) *In cases to be considered by the Grand Chamber*, the periods of time prescribed in the preceding paragraphs shall run from the notification to the parties of the decision of the Chamber under Rule 72 § 1 to relinquish jurisdiction in favour of the Grand Chamber or of the decision of the panel of the Grand Chamber under Rule 73 § 2 to accept a request by a party for referral of the case to the Grand Chamber.

(b) The time-limits laid down in this Rule may exceptionally be extended by the President of the Chamber if sufficient cause is shown.

5. Any invitation or grant of leave referred to in paragraph 3 (a) of this Rule shall be subject to any *conditions, including time-limits*, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.

6. Written comments submitted under this Rule shall be *drafted in one of the official languages* as provided in Rule 34 § 4. They shall be forwarded by the Registrar to the parties to the case, who shall be entitled, subject to any conditions, including time-limits, set by the President of the Chamber, to file written observations in reply or, where appropriate, to reply at the hearing.

7. The provisions of this Rule shall apply *mutatis mutandis* to proceedings before the Grand Chamber constituted to deliver advisory opinions under Article 2 of *Protocol No. 16* to the Convention. The President of the Court shall determine the time-limits which apply to third-party interveners.

Some elements deserve special attention:

- “any person concerned who is not the applicant”: can be the other (winning) party in the domestic proceedings; NGO’s; independent public institutions, national or international.
- The Council of Europe Commissioner for Human Rights has *a right* to intervene; she can cooperate with national bodies such as ombudspersons.
- There is a deadline for filing a request to intervene. Interested organisations should regularly consult the Court’s website (HUDOC – in particular communicated cases)!
- English or French.
- Protocol No. 16 (requests for advisory opinions by domestic supreme courts): possibility to intervene indirectly, via a third-party intervention in Strasbourg, in a case pending before a domestic supreme court.

### III. Practice of third-party interventions

. Third parties can intervene “in the interest of the proper administration of justice”. They are (should be) parties not directly *interested*, but “*interesting*” for the Court (to use the words of my colleague Pere Pastor Vilanova). Requests are generally *not* granted when the applicant (third party) merely wants to support the position of one of the parties. A third-party contribution should be of a more general nature.

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. Third-party interventions, by British or world-wide NGO’s, are popular in cases against the United Kingdom (Human Rights Watch, Amnesty International, International Commission of Jurists, Liberty, ...). NGO’s have also intervened in certain cases against other States (Helsinki Foundation for Human Rights (Poland), European Roma Rights Centre, ...). Some public institutions have also intervened (e.g. the UK Equality and Human Rights Commission).

. Most third-party interventions take place in cases before the Grand Chamber of the Court, especially in cases that raise new issues. Good interventions can enhance the quality of the Court’s judgments.

. On some occasions there have been joint interventions by several third parties.

### IV. Usefulness of a third-party intervention

The following ideas are based on studies by Laura Van den Eynde (“An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights”, *Netherlands Quarterly Human Rights*, 2013, (271), 274-275; “NGOs Before the European

Court of Human Rights: Discreet Partners in Effectiveness”, *European Journal Human Rights*, 2018, (84), 93-101).

*a. From the point of view of the European Court of Human Rights*

- A third party can provide *information*:

. Explanation about domestic law and practice.

. The wider context (an isolated case or a general problem? - statistics - structural reasons for the situation complained of - possible consequences of the Court’s ruling).

. Existence of a consensus in Europe (comparative analysis)?

- A third-party can represent the *general interest* (especially where the case concerns the conflicting rights of various categories of people).

N.B.: an ombudsperson can defend a point of view that is different from the one adopted by the Government of his or her State (see Laurence Burgorgue-Larsen, “Les interventions éclairées devant la Cour européenne des droits de l’homme ou le rôle stratégique des amici curiae”, *La conscience des droits. Mélanges en l’honneur de Jean-Paul Costa*, Dalloz, Paris, 2011, (67), 71).

*b. From the point of view of the intervening party*

- An intervener can raise the attention of public opinion to the situation that is the object of the case.

- An intervening party can remind the public that it is acting as a watchdog (public relations function).

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## **V. Examples of interventions by ombudspersons and national human rights institutions**

*a. Interventions by ombudspersons*

(Cf. : report by David Renders and Luca Ceci for the present session of the Conference; see also Dagmara Rajska and Zuzanna Rudzinska-Bluszcz, *Ombudsperson institutions in Europe before ECtHR and CoE – examples of Poland, Sweden and Montenegro*, Key editore, Vicalvi, 2016)

Examples of cases in which an ombudsperson intervened:

. *Okitaloshima Okonda Osungu v. France* (decision of 8 September 2015, nos. 76860/11 and 51354/13): about a refusal to grant family allowances for foreign children who had joined their parents. Intervention by the “Défenseur des droits”.

. *R.K. and Others v. France* (judgment of 12 July 2016, no. 68264/14): on administrative detention of migrant minors. Intervention by the “Défenseur des droits”.

- . *Dubská and Krejzová v. Czech Republic* (Grand Chamber judgment of 15 November 2016, nos. 28859/11 and 28473/12): about home birth assisted by midwives. Intervention by the Public Defender of Rights.
- . *Trunk v. Slovenia* (decision of 13 November 2018, no. 60503/15): about an allegedly retroactive change of a penalty. Intervention by the Slovenian Human Rights Ombudsman.
- . *A.S. and G.S. v. France* (decision of 29 January 2019, no. 4409/16): about an expulsion to Hungary. Intervention by the “Défenseur des droits”.
- . *Khan v. France* (judgment of 28 February 2019, no. 12267/16): about the provision of care to an unaccompanied migrant minor. Intervention by the “Défenseur des droits”.

#### *b. Interventions by national human rights institutions*

##### *a. Individual national human rights institutions*

Some examples:

- . *Brannigan and McBride v. United Kingdom* (judgment of 26 May 1993): about counter-terrorism actions. Intervention by the Northern Ireland Standing Advisory Commission on Human Rights.
- . *Hugh Jordan, Kelly and Others, McKerr and Shanaghan v. United Kingdom* (judgments of 4 May 2001, respectively nos. 24746/94, 30054/96, 28883/95 and 37715/97): about investigations relating to IRA operations. Intervention by the Northern Ireland Human Rights Commission.
- . *Greens and M.T. v. United Kingdom* (judgment of 23 November 2010, nos. 60041/08 and 60054/08): about voting rights for prisoners. Intervention by the Equality and Human Rights Commission.
- . *Bah v. United Kingdom* (judgment of 27 September 2011, no. 56328/07): about social housing. Intervention by the Equality and Human Rights Commission.
- . *Redfearn v. United Kingdom* (judgment of 6 November 2012, no. 47335/06): about racial discrimination by civil servants. Intervention by the Equality and Human Rights Commission.
- . *Eweida and Others v. United Kingdom* (judgment of 15 January 2013, nos. 48420/10, 36516/10, 51671/10 and 59842/10): on wearing of religious symbols by private individuals and civil servants. Intervention by the Equality and Human Rights Commission.
- . *Catt v. United Kingdom* (judgment of 24 January 2019, no. 43514/15): about the collection and retention of personal data in a police database for domestic extremists. Intervention by the Equality and Human Rights Commission.
- . *Khan v. France* (judgment of 28 February 2019, no. 12267/16): about the provision of care to an unaccompanied migrant minor. Intervention by the national advisory commission on human rights.

b. European Network of National Human Rights Institutions

Only a few cases

. *D.D. v. Lithuania* (judgment of 14 February 2012, no. 13469/06): about involuntary placement in psychiatric institutions. Intervention by the European Group of National Human Rights Institutions.

. *Gauer and Others v. France* (decision of 23 October 2012, no. 61521/08): about the involuntary sterilisation of women with a handicap. Intervention by the Irish Human Rights Commission on behalf of the European Group of National Human Rights Institutions.

. *Big Brother Watch and Others v. United Kingdom* (nos. 58170/13, 62322/14 and 24960/15, pending before the Grand Chamber): about mass surveillance by a secret service. Intervention by the European Network of National Human Rights Institutions.

## VI. Conclusions

- Third-party interventions by ombudspersons would no doubt be welcomed by the Court.
- There is a strategic decision to be taken by ombudspersons: how can they reinforce their domestic action by defending position on the international forum?