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DUDGEON V. THE UNITED KINGDOM: ANALYZING THE EUROPEAN COURT OF HUMAN RIGHTS FROM A PROCEDURAL PERSPECTIVE

DUDGEON V. THE UNITED KINGDOM: UMA ANÁLISE DE CASO DA CORTE EUROPEIA DE DIREITOS HUMANOS SOB A PERSPECTIVA PROCESSUAL

DUDGEON CONTRA EL REINO UNIDO: UN ANÁLISIS DEL CASO DEL TRIBUNAL EUROPEO DE DERECHOS HUMANOS DESDE UNA PERSPECTIVA PROCESAL

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SUMMARY:

ABSTRACT:

This article analyses an important case of the European Court of Human Rights revealing, in addition to its peculiarities from the perspective of human rights, procedural aspects of the European Court, similarities with procedures of domestic jurisdiction of the countries and more relevant procedural acts. In addition, the work shows the evolution of procedures from the time of the trial in 1981 to the present, highlighting the main procedural changes, the justification for them and the impact of the decisions

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before other human rights courts, especially the Inter-American Court of Human Rights. Using an inductive methodology, the article aimed to describe in detail the Court's procedural functioning through a case study, exposing the main procedural phases and methodologies of judgment adopted by the Court from its establishment to the present. The research, although containing elements of material and international public law, primarily analyses procedural aspects that allow the reader to draw comparatives in the field of procedural law.

RESUMO:

O presente artigo procura analisar um importante caso da Corte Europeia de Direitos Humanos revelando, além de suas peculiaridades materiais sob a perspectiva dos direitos humanos, aspectos procedimentais da Corte Europeia, similaridades com procedimentos de jurisdição interna dos países e atos processuais mais relevantes. Somado a isso, o trabalho demonstra a evolução dos procedimentos a partir da época do julgamento, em 1981, até a atualidade, destacando as principais alterações processuais, a justificativa para elas e o impacto das decisões perante outras cortes de direitos humanos, especialmente a Corte Interamericana de Direitos Humanos. Utilizando de metodologia indutiva, o artigo teve como objetivo descrever em detalhes o funcionamento processual da Corte mediante estudo de caso, expondo as principais fases procedimentais e metodologias de julgamento adotadas pela Corte desde sua instauração até o presente. A pesquisa, apesar de conter elementos de direito material e internacional público, analisa primordialmente aspectos procedimentais que permitem ao leitor traçar comparativos no campo do direito processual.

RESUMEN:

La investigación analiza un importante caso del Tribunal Europeo de Derechos Humanos, revelando, además de sus peculiaridades materiales desde la perspectiva de los derechos humanos, los aspectos procesales del Tribunal Europeo, las similitudes con los procedimientos de la jurisdicción interna de los países y los actos procesales más relevantes. Además, muestra la evolución de los procedimientos desde la época del juzgado, en 1981, hasta la actualidad, destacando los principales cambios procesales, la justificación de los mismos y el impacto de las decisiones ante otros

tribunales de derechos humanos, especialmente la Corte Interamericana de Derechos Humanos. Utilizando una metodología inductiva, el propósito de la investigación es describir detalladamente el mecanismo procesal del Tribunal a través de un estudio de casos, exponiendo las principales fases procesales y metodologías de juicio adoptadas por el Tribunal desde su instauración hasta la actualidad. La investigación, a pesar de contener elementos de derecho sustantivo y de derecho internacional público, analiza principalmente aspectos procesales que permiten al lector establecer comparaciones en el ámbito del derecho procesal.

KEYWORDS:
European court; Human rights; Procedural law.

PALAVRAS-CHAVE:
Corte europeia; Direitos humanos; Direito processual.

PALABRAS CLAVE:
Tribunal europeo; Derechos humanos; Derecho procesal.

1. INTRODUCTION

The idea of developing an article detailing the technique and the main characteristics of the procedural process before the European Court of Human Rights could be interesting merely from the perspective of procedural law; however, in order to privilege interdisciplinarity, we opted to broaden the approach and make the reading more attractive by detailing a specific and highly relevant judgment, uniting both issues of substantive and procedural law.

The case analysed demonstrates the importance of the procedural changes that have occurred in the European Court of Human Rights, which have allowed the direct participation of victims of violations in each phase of the proceedings, potentially culminating in a concrete mitigation of these violations.

It also points to the problem of courts that still do not allow the filing of individual claims, making it difficult for the parties suffering the violations to access a human rights protection system.

Another problem pointed out by the research is the lack of effectiveness of the measures adopted by the Court in relation to States convicted of human rights violations, especially due to their generic nature and also because of the difficulty of implementation.

It appears that the enormous structure of the European Court is not sufficient to guarantee that the measures taken are effective for the citizens who are victims of violations and do not always cause significant changes within the violating States

The choice to analyse a case that draws attention for its content intends to demonstrate the way that procedural changes related to wider access to international courts have the potential to establish new perspectives and even have a significant impact on member states' views on certain violations.

It is true that this international claim was successful. However, despite the success of the claim, it is worth pointing out that, even more important than the conclusion reached by the trial itself, or the proceedings and mechanisms employed to reach the result, is the impact of the decision before the European community for the protection of human rights, which is the most significant aspect of this analysis.

Other claims could be considered , such as Garçon and Nicot vs. France, in which the french state refused to provide the alteration of the registration of three french transsexual citizens, conditioning the rectification of the registration to sex reassignment surgery. (PIOVESAN, 2017)

Moreover, this judgment brought procedural changes that were instrumental in affirming the European Court of Human Rights in the European legal context and helped strengthen the notion of jurisdictional unity.

The idea is to demonstrate that, even if the application of the substantive aspect of human rights is the priority in claims brought before international courts of justice, it is equally important to prioritise the procedural aspects that facilitate the speedy and effective participation of the parties involved in litigation in this arena.

2. THE CASE DUDGEON v. THE UNITED KINGDOM[1]

Jeffrey Dudgeon, who was 35 years old when the trial took place in 1981, was a clerk and lived in Belfast, Northern Ireland.

Mr. Dudgeon was homosexual and, reportedly, became aware of his homosexuality from the age of 14. For a period of time, along with others, he campaigned to lower the so-called age of consent below 21, which would bring Northern Ireland law in line with neighboring English and Welsh law.[2].

In January 1976, the Belfast police went to Mr. Dudgeon's address and found evidence of his homosexuality, and took him to give a statement for over 4.5 hours, during which time he was asked - and answered - questions about his sexual orientation. The inquiry was conducted by the director of investigations, with the intention of instituting criminal proceedings against him for the crime of "gross indecency between males" [3].

A year later, in February 1977, the seized 'evidence' was returned to Mr. Dudgeon and the Attorney General, along with the Director of Investigations, decided that it was not in the public interest to continue the case and agreed not to pursue the investigation against Mr. Dudgeon.

On May 22, 1976, Mr. Dudgeon filed an application before the Human Rights Commission of the European Court claiming, in summary: a) that the existence of laws in Northern Ireland criminalizing homosexual activities between men, as well as the investigation conducted by the police in January 1976, constituted an "unjustified interference" with his right to privacy, guaranteed by Article 8 of the European Convention; b) that he had suffered discrimination, in accordance with Article 14 of the European Convention, related to sex, sexuality and residence. For these reasons, Mr. Dudgeon also claimed compensation.[4]

Mr. Dudgeon's claim before the Commission was that, although homosexuality itself is not considered a crime, sexual acts of any kind between men of any age, even if consensual, are nonetheless considered crimes under Northern Irish law. This undue criminalization, according to Dudgeon, goes against the guarantee of his right to privacy established by Article 8 of the European Convention.

The defendant (United Kingdom), argued that there is no incompatibility of the Northern Irish legislation with Article 8 of the European

Convention, and also claimed in its defense that the acts carried out by the police are justified by the legal provision of Article 8 itself, which establishes justified exceptions for interference in private life " when necessary in a democratic Society".

3. THE STANDARD PROCEDURE IN THE EUROPEAN COURT OF HUMAN RIGHTS CASES

The European Court of Human Rights was established on April 20, 1959, the same date as the 10-year anniversary of the Council of Europe, and issued its first decision a little over a year later, on November 14, 1960, in Lawless v. Ireland, which discussed the possibility of pre-trial detention in the case of the terrorist attacks related to the extremist group IRA (Irish Republic Army)[5]

The European Court was the first human rights court in the world. [6] Since the establishment of the European Court, until 2017, more than 20,600 (twenty thousand and six hundred) cases had been ruled on, [7] which was a determining factor in changing the lives of thousands of people, especially in the European community.

In addition, the influence of the European Court's decisions reaches other regional human rights courts around the world, such as the African court and the Inter-American Court of Human Rights, which gives even more weight to its decisions and its jurisdiction

The Court's jurisdiction is governed by Article 32 of the European Convention, and is mandatory for all disputes involving the interpretation of the Convention itself and its protocols, including disputes relating to its own jurisdiction.

> 1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47
>
> 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide

The European Court, like the Inter-American and African Courts, has both advisory and contentious jurisdiction. However, the advisory jurisdiction of the European Court, unlike the others, is quite limited due to the provisions of Article 47, paragraph 2 of which states:

> Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

This severe restriction contributed to the absence of advisory opinions issued by the court until 2005. Nevertheless, authors such as Antônio Augusto Cançado Trindade (2003, p.127) question the need for the prevalence of the Court's advisory function, which has virtually no practical use.

The issue of advisory opinions, which according to Article 31, paragraph b,[8] may be requested by the Superior Courts of the States Parties, and is performed by the Full Court of the European Court, must first pass through the admissibility sieve of a panel composed of five judges of the Full Court that, if the query is admitted, forwards the preparation of the opinion by the Full Court

The request for consultation must be duly substantiated and come from a court of a state party that is about to rule on a pending domestic case, and there must be reasonable doubt as to the opinion of the European Court (art. 1 and 2 of Protocol 16 to the European Convention). This requirement is a determining factor for the stability of a legal system such as the European one, especially when it comes to a body of law that has jurisdiction in several states, as is the case of the European Court. This normative provision, however, is not found in legal systems such as Brazil's, nor is it customary for Higher Courts to carry out this type of consultation with regional courts.

4. ACCESS TO THE EUROPEAN COURT OF HUMAN RIGHTS

In 1998, the European Court underwent an important change that directly and radically affected access to the analysis of the judgments, eliminating the existing division between two separate bodies that were responsible for performing both admissibility and merits examinations.

Until 1998, the Commission was responsible for examining the admissibility of the petitions presented, and then submitting (or not) the case to the Court for judgment on the merits.

With the enactment of Protocol 11, effective as of November 1 st, 1998, the Court now performs both functions, admissibility and contentious, directly receiving cases submitted by States, NGOs, individuals, and groups of persons.

According to Valério Mazzuoli (2015, p. 1008), with the absorption of the admissibility stage by the Court, not only was the Commission eliminated, but the ius standi guarantee was established at the European Court::

> Since the entry into force of Protocol 11, the then optional clauses of Arts. 25 and 46 (respectively, the right of individuals to petition the European Commission and the jurisdiction of the European Court to hear cases submitted by the Commission) have been abrogated by the now mandatory provisions of Arts. 34 and 32, respectively. The former (considered by the best doctrine as the "heart" of the Convention's system of protection) provides individuals (or non-governmental organizations or groups of individuals) with the right to petition the European Court directly268 in the event of violation by any State Party of the rights recognized in the Convention or its Protocols, with States being obliged not to create any obstacle to the effective exercise of this right.

In the perspective that emerged from the establishment of Protocol 11, the Commission, which until then was responsible for filtering the admissibility of individual petitions from individuals, no longer has this function, and the Court can receive petitions through direct access by individuals who allege rights violated by the States of origin, regardless of acceptance by the Commission.

With the establishment of Protocol 11, access to the Court has expanded, since the Court is now able to accept individual requests without the need for an admissibility decision by the Commission, in addition to the impact of the entry of new States Parties in recent decades[9].

For this reason, the Court had to act creatively and implemented a system of judgment called pilot judgment. This is the approach to a general problem by judging a specific case; to do so, it is necessary to go beyond the mere determination of whether or not the European Convention has been violated, as was done in the case

studied in this article (BUYSE, 2009, p. 2).

In other words, in the pilot judgment the Court should provide guidelines as to how the State party should internally solve the core problem, indicating, for example, legislative changes in case the domestic remedies are not considered sufficient.

The system apparently works in a similar way to the common law system of precedents in the internal legal system;[10] however, instead of an internal Court providing the standard case to be used as a mirror for the lower courts, it is the European Court that acts to guide the solution at the national level of the States. [11]

The first time the pilot judgment method was used by the European Court was in the case Broniowski v. Poland, [12] admitted for trial by the Court in 2002. From this judgment, the then presiding judge of the Court, Luzius Wildhaber, identified 8 different requirements that suited pilot judgment:

1- The plenary session (Grand Chamber) must find a violation by the State party that reveals a problem affecting a group of individuals;

2- A conclusion that such problem has caused or has the potential to cause increased demand before the European Court;

3- Providing the violating State with general measures to be taken to solve the problem;

4- Indicating that such measures may operate retroactively in order to resolve similar cases pending before the states;

5- The suspension by the Court of all similar pending cases;

6- Operationalizing the pilot judgment in order to reinforce the State's obligation to take legal and administrative measures to solve the problem presented;

7- Suspension of decision making in "just satisfaction"[13] matters until the state takes the necessary measures;

8- Keep the European Central Council informed about the evolution of the pilot case.[14]

Despite the fact that the European Court is constantly seeking adjustments in order to make its decisions more efficient within the States Parties, there are situations that show the need for further thought regarding the effectiveness of the interference promoted by the European

Court in relation to the States.

In this respect, it is interesting to analyze Lukenda v. Slovenia, [15] which the Court decided in 2005. Its context was the situation of very lengthy judicial proceedings in Slovenia, which apparently went beyond isolated situations and affected the rights of a considerable group of people, as stated in the judgment report:

> that the violation of the applicant's right to a Trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice. The problem continues to present a danger affecting every person seeking judicial protection of their rights.

The aggravating factor against Slovenia was that at that time there were approximately 500 cases[16] before the European Court involving the problem of lengthy justice in that country, which was duly considered at the time of the judgment. [17]

The Court has encouraged Slovenia to implement internal remedies to ensure the right of citizens to a speedy trial. While the cases were pending before the European Court, Slovenia took legislative measures to address the problem, which favorably affected cases that were pending before the European Court, which for this reason had become devoid of subject matter and were subsequently dismissed.

In a dissenting vote, Justice Zagrebelsky[18] pointed out that the European Court's requirements for the State party to take legal and administrative measures to solve the problem of delays are too general and difficult to comply with, and are not suitable to assist the State party's promotion of the measures or the Committee of Ministers' monitoring of their implementation.

Justice Zagrebelsky, thus aligning himself with the position of Justice Wildhaber, held that pilot judgments should be issued only by the Plenary of the Court (Grand Chamber). In addition to preserving the coherence of the case law system and better dealing with systemic problems, keeping the pilot judgments exclusively in the Plenary means that only the really important cases will be heard by this method (BUYSE, 2009, p. 6)[19].

In addition to solutions such as the pilot judgment presented here, the European Court of Human Rights has a physical infrastructure and personnel resources far superior to other Regional Courts of the same kind.

According to article 20 of the Convention, the European Court is composed of a number of judges equal to the number of States Parties, which is currently 48. [20] The Inter-American Court of Human Rights, on the other hand, according to art. 34 of the Convention, is composed of only seven judges.

The judges of the European Court are appointed by the Parliamentary Assembly of the Council of Europe from a list of three candidates nominated by each member state, for a 9-year term of office, without the possibility of re-election. The activity of the judges is not linked to the State of origin that nominated them.[21]

The jurisdiction of the European Court is the largest among regional human rights courts, with a territorial area of jurisdiction throughout Europe, whose population exceeds 875 million people.

The Court operates in the form of Sections internally. A Section is an administrative body, and a Chamber is the formation within a Section. The Court has 5 sections in which Chambers are formed. Each Section has a President, a Vice-President, and 6 to 8 Justices each.[22]

The Grand Chamber is composed of 17 judges: the President and Vice-President of the Court, the Presidents of the Sections, a National Judge, along with other judges chosen by lot. The day-to-day decisions of the single justices take the form of committees provisionally made up of 3 component justices of the sections (article 26).

Under articles 27, 28, and 29 of the European Convention, if a petition has not been declared inadmissible by the Committee unanimously, it is up to one of the Sections, composed of an average of seven judges, to rule on the admissibility and, after an attempt at conciliation, on the merits of the individual petition formulated.

5. ADMISSIBILITY REQUIREMENTS

The admissibility requirements, set in Article 35 of the Convention, are more extensive than those of the Inter-American Convention on Human Rights: a) all domestic remedies must have been exhausted, in ac-

cordance with the generally recognized principles of international law; b) the period of 4 months from the date of the final internal decision must be observed; c) the petition cannot be anonymous; d) the petition cannot be identical to another petition previously considered by the Court or already submitted to another international instance of inquiry or decision and does not contain new facts (requirement of absence of international identical earlier proceedings); e) the petition cannot be incompatible with the provisions of the Convention or its Protocols (ratione temporis, ratione personae and ratione materiae incompatibility); f) it is not manifestly groundless or abusive in nature.

In analyzing the claimant's petition, the court's decision to consider the initial petition inadmissible at this stage of the procedure cannot be appealed (PIOVESAN, 2006, p.78). The sentences are merely declaratory in nature; however, as will be explained later, the Convention provides, albeit abstractly, for compensation for the victim.

Prior to the extinguishment of the Commission's role, although it acted as a mediator in private cases, not all allegations of human rights violations brought before it by private parties were considered by the Court (PIOVESAN, 2006, p.73).

It is important to note that the European Court does not analyze abstract violations of human rights. This means that, both in cases of complaints initiated by individuals and by States, the need to demonstrate the occurrence of a concrete situation of violation prevails..

A reading of Articles 33 and 34 of the European Convention[23] reveals that the rules for the admission of cases are significantly different. For individuals, it is necessary that they prove the violation of a subjective right, that is, a personal harm, as can be seen from the reading of the case of Mr. Dudgeon, who alleged a harm to his privacy by reporting the seizure of personal documents in his home and long and embarrassing interrogations. For the States, on the other hand, it is enough to prove that one of them, by issuing/applying a law or even a judicial/administrative act, has violated the terms of the Convention.

Article 38, §1, 'a' of the Convention says that if the petition is

held admissible, the Court: "(a) shall conduct an adversarial examination of the petition together with the representatives of the parties and, where appropriate, shall hold an inquiry, for the effective conduct of which the States concerned shall provide all necessary facilities.".

However, both at the European Court and the Inter-American Court, the number of cases involving disputes between states is negligible.[24] This disparity between the number of inter-state cases and individual petitions is explained by the Court's vocation to be more focused on access by individuals (MAZZUOLI, 2015, p. 1010).

With regard to access to the Court, the innovation brought by Protocol No. 11 is important, since it consolidates the institutes of locus standi and ius standi. The locus standi guarantees that the victims, their relatives or legal representatives, participate in the proceedings at all stages. The ius standi allows the direct access of individuals to the Court.

In effect, these institutes place the European Court in a privileged position in relation to other courts, such as the Inter-American Court, which does not allow individual claims (art. 61, 1, of the American Convention on Human Rights).[25]

6. ANALYSIS OF THE MERITS AND IMPLEMENTATION OF THE DECISIONS

The sections of the European Court are responsible for analyzing the merits of the case, through a contradictory procedure that involves the presentation of oral arguments by the parties involved and a public hearing.

According to articles 28, 29, and 30 of the Convention, after the prior examination of the admissibility of the matter, the decision taken by the Committee of Judges becomes final and binding. In the event of a "serious question as to the interpretation of the Convention or its protocols" or if "the outcome of a dispute may lead to a contradiction with a judgment already delivered by the Court", the Section of the Court may, before giving its judgment, refer the decision in the dispute back to the full Court, unless one

of the parties objects.[26]

Another important aspect of the Court's decisions is that although they are declaratory in character, in certain cases the Court will "award the injured party a reasonable remedy, if necessary".[27](article 41 of the convention).

Flávia Piovesan (2006, p.78) argues that this provision is the target of severe criticism because of its lack of clear criteria regarding the hypotheses in which damages should be repaired/compensated, as well as how they would be measured.

In contrast to what occurs in the Inter-American[28] and African Human Rights Courts, [29] the European Convention does not establish the granting of temporary measures to preserve rights on the grounds of urgency or imminence of violation.[30].

According to Cançado Trindade, international courts have mechanisms to ensure the implementation of their decisions.

> Each of the three international human rights tribunals (European, Inter-American and African courts) has its own mechanism for monitoring compliance with its sentences. To this end, the ECtHR relies on the work of the Committee of Ministers of the Council of Europe. In Hornsby v. Greece (Judgment of 19.3.1997), the ECtHR highlighted the relevance of enforcement of the judgment to the very effectiveness of the right of access to a court under Article 6(1) of the European Convention on Human Rights. (TRINDADE, 2013, p. 61)[31]

In addition, according to Trindade, it is not only formal access, "but also the guarantees of due legal process and the due execution of the sentence, that integrate the right of access to justice lato sensu" (2013, p. 62). Other international courts, e.g., the Inter-American Court of Human Rights, have followed suit and have found ways to ensure the enforcement of their decisions.

The Council of Europe has a Committee of Ministers charged with monitoring the execution of the decisions of the European Court, specifically in relation to the measures taken by the States Parties to comply with the judgments.

This Committee of Ministers, which is usually formed by the Ministers of Foreign Affairs of each State Party, has no role in the actual enfor-

cement of the judgments, but only in supervising compliance by the State affected by the judgment. Once the State party has finished complying with the reparatory obligation or of another nature, the Committee of Ministers concludes its participation in the procedure (PIOVESAN, 2006, p.82).

7. PROCEDURAL CASE ANALYSIS OF DUDGEON V. THE UNITED KINGDOM

Dudgeon v. The United Kingdom was brought before the European Court of Human Rights in 1976, admitted in 1979, and decided in 1981. The trial of the case itself was not lengthy, although the admissibility hearing before the Committee of the Court took much time during the proceedings.

It is an application that Mr. Dudgeon brought against his home country, Northern Ireland. However, as Northern Ireland is part of the Sovereign State of the United Kingdom of Great Britain, both were defendants in this case before the European Court.

On May 22, 1976, the British citizen Mr. Dudgeon filed an application before the Committee of the Court, which until then was responsible for judging the admissibility of cases brought before the European Court[32].

7.1 Proceedings before the Commission

The motion for trial was filed by the Commission before the European Court only on July 18, 1980, with the Court questioning whether the situation presented by the petitioner constituted a violation of articles 8 and 12 of the European Convention on Human Rights, which, as already stated, deal respectively with the protection of privacy and the prohibition of discrimination.

In this stage of admissibility before the commission, administrative procedures and confirmation of requirements and conditions for the case to go to trial take place, confirming, for example, that the respondent State acknowledges its submission to the jurisdiction of the European Court and to the terms of the Convention and its protocols.

On March 3, 1978, the Commission declared the applicant's claims about the Northern Irish Act's prohibition of homosexual acts between

men admissible; however, the claims that the Northern Irish Act disregarded the Common Law were found to be groundless and inadmissible.

In a report of March 13, 1980, the Commission, following the procedure prescribed at the time by art. 31 of the Convention, decided as follows:

-By 8 votes to 2, that the prohibition of private and consensual homosexual acts between men under the age of 21 is not a violation of the applicant's right to privacy (article 8 of the Convention) or (in this case, by 8 votes to 1 - with one abstention) to the prohibition of prejudice (art. 8 combined with art. 14 of the Convention).

- By 9 votes to 1, that the prohibition of private, consensual homosexual acts between men over the age of 21 is a violation of the applicant's right to privacy (article 8 of the Convention).

7.2 The Trial

In January 1981, the Chamber[33] decided, on the basis of Article 48 of the Convention, relinquishing its jurisdiction, that the case should be heard by the Grand Chamber.

At a hearing held on April 23, 1981, the government maintained its claims in its memoranda that the Irish law did not violate Article 8 of the Convention on Human Rights and that it considered it unnecessary for the Court to examine questions concerning violations of Articles 8 and 14 of the Convention.

The Court, in judging the violation of the aforementioned articles, considered that the Commission found no reason to doubt the allegations that the applicant lived in a constant state of distress due to the existence of the aforementioned laws in his country. The government did not, therefore, deny these allegations.

The Court, concurring with the Commission's opinion, concluded that the maintenance of the legislation directly infringed on the applicant's right to privacy. The 1979 case of Marckx v. Belgium was used as partial precedente.[34]

In effect, the judges considered the Commission's report as an detached position of the Court itself, comparing the views highlighted by the Commission with the parties' own submissions.[35]

The Court held that while the government's arguments that

any relaxation of the Irish laws allowing homosexual conduct between men could erode moral standards were relevant, they were not sufficient to uphold the legislation incriminating the conduct described.[36]

The judges agreed that in a democratic society there should be some control of homosexual conduct in order to safeguard the exploitation of the vulnerable (referring to youth and children).[37]

The Court's final ruling was that Mr. Dudgeon had suffered (and was continuing to suffer) unjustified interference with his right to have his private life respected. Accordingly, it held that there had been a violation of Article 8 of the European Convention on Human Rights.

With regard to the alleged violation of Article 14 of the Convention, the Court held that the analysis in relation to Article 8 of the Convention, in the sense that there had been a violation of human rights, would render examination of Article 14 unnecessary, since the applicant's objective had already been achieved.

The plaintiff was represented by two barristers[38] and one solicitor. [39] The trial, held by the Grand Chamber, had the votes of 19 judges, with the winning thesis having 15 votes in favor and 4 against. [40]

The Commonwealth Government[41] was represented by a foreign affairs advisor and two lawyers, as well as a Home Office agent for the Commonwealth Council. For Northern Ireland, 2 councillors spoke. Also representing the Commission were 2 delegates, 2 lawyers, [42] and a paralegal.

However, the work of the lawyers and representatives of the Commission is done not exactly in favour of the applicant's plea, but in favour of what the Commission has decided regarding the application. Currently, with the extinction of the admissibility function by the Commission, the Court itself conducts this type of analysis, making access absolutely wide and the trial faster.

8. CONCLUSION

The purpose of this paper was, based on an iconic case that occurred in Europe before the advent of the new configuration of the Court, to de-

monstrate the functioning of the European Court of Human Rights from a procedural perspective.

Furthermore, the study pointed out the changes that have occurred in the Court since 1998 and the impact this has had on the expansion of access to the Court and, therefore, the enforcement of human rights. Thus, based on the data collected, it was possible to observe that with the changes introduced by Protocol 11, thousands of citizens from all over Europe were benefited and this also influenced other regional and human rights courts, giving greater visibility to the decisions of the European Court.

Dudgeon v. The United Kingdom describes the situation of a citizen who had his rights violated and had to submit his complaint to a prior admissibility examination before the Commission, which is not the trial court, and only after its admission could have his case tried before the Court.

In this last scenario, not only was access more limited, but it was the Commission that brought the case before the Court, and many aspects of the claim suffered limitations already at this stage, due to the inadmissibility of part of the claims.

However, individual access to the European Court of Human Rights, made possible by the implementation of the changes brought about by protocol no. 11, consolidated the principles of locus standi and ius standi, which allow the plaintiff and his representatives to accompany him at all stages of the procedure, as well as allowing citizens to report aggressions directly to the Court without the need to go through a prior admission process with severe restrictions of all kinds, which speeds up the procedure.

The problems arising from the increase in access to the Court and the main solutions found were also highlighted. In this sense, the implementation of a method of judgment, called pilot judgment, was emphasized, which allows the Court to decide recurring cases in a manner very similar to what occurs under the IRDR (Incidente de Resolução de Demandas Repetitivas) in Brazil, with the difference that the European Court uses the judgment of a case to influence (and even encourage) actions by member states to act, domestically, to seek to solve the problems that originated the claims.

The European Court of Human Rights continues to be one of the most important courts in the world, whether because of the issues it deals

with, the interest aroused by the cases that reach it, or the evolution that it has shown since its establishment in the middle of the last century in the effective protection of human dignity.

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LAWLESS v. IRELAND[1960], Application nº 332/57,*(European Court[Chamber] Of Human Rights).* Disponível em http://hudoc.echr.coe.int/eng?i=001-57518.

IRELAND V UNITED KINGDOM (1979-80) 2 EHRR 25, Application no. 5310/71, julgamento em 18 January 1978. Disponível em http://hudoc.echr.coe.int/eng?i=001-181585.

LUKENDA v. SLOVENIA, *Application nº. 23032/02, 6 October* 2005, para. 93. Disponível em http://hudoc.echr.coe.int/eng?i=001-70449.

BRONIOWSKI v. POLAND, *19 december 2002 (admissibility),* Appl.nº. 31443/96. 22 June 2004. Disponível em http://hudoc.echr.coe.int/eng?i=001-70326.

'End Notes'

1 ECtHR, DUDGEON v. THE UNITED KINGDOM, Application nº 7525/76, Strasbourg, 22 October 1981, European Court (Grand Chamber) Of Human Rights. Disponível em http://hudoc.echr.coe.int/eng?i=001-57473. Acess in feb 5 2019.

2 Available at http://ceere.eu/wp-content/uploads/2016/03/CASE-OF-DUDGEON-v.--THE-UNITED-KINGDOM.pdf. Acesso em 15 de out 2018.

3 In the original ¨gross indecency between males¨.

4 In the original : "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

5 Irish citizen Mr. Gerard Richard Lawless, a former member of the IRA, was arrested on July 13, 1957 as he was about to travel from Ireland to Great Britain, and remained detained until December 11 of that same year in an Irish military camp in compliance with the Minister of Justice's order under section 4 of the Crimes Against the State Act (1940). The detention was for "special powers indeterminate and without trial" on allegations of offences against the Irish state. Mr. Lawless, using his prerogative as an individual petitioner, brought an action before the European Court of Human Rights, claiming that the Irish State had violated articles 5, 6 and 7 of the European Convention on Human Rights, specifically the rights to liberty, security, fair trial and the principle of prohibition of punishment without a prior law defining an offence

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6 Prior to the European Court, there were "general purpose" Courts, such as the Central American Court of Justice, created by the Washington Treaty of 1907. However, the European Court was the first Court to deal exclusively with issues concerning human rights violations..

7 It is noteworthy that 40% of these cases refer to only 3 states parties combined, namely: Russia, Italy and Turkey. In 84% of the cases, the European Court found violations of some provision of the Convention by the State Party. See https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf. Acess jan 12 2019.

8 "The Grand Chamber shall: (…); b)) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and".

9 The increase in demand was so great that, in a statistical comparison, the new configuration of the European Court made in just two years of operation, 838 decisions, which is more than its old version ruled in 39 years of existence (837 decisions). See. PIOVESAN, Flávia. Direitos humanos e justiça internacional: um estudo comparativo dos sistemas regionais europeu, interamericano e africano. São Paulo: Saraiva, 2006. p.73.

10 In Brazilian law, it could be compared to the "Incidente de Resolução de Demandas Repetitivas", in which a controversy is chosen from several similar ones and the decision on it becomes applicable to all others in lower courts and in cases arising thereafter

11 For more details about the pilot julgament, see: Luzius Wildhaber, Pilot Judgments in Cases of Structural or Systemic Problems on the National Level', Berlin: Springer Verlag 2009 (pp. 69-75).

12 ECtHR, BRONIOWSKI V. POLAND, 19 december 2002 (admissibility), Appl.nº. 31443/96. 22 June 2004 (decisions on the merits) 28 September 2005 (friendly settlement). Disponível em http://hudoc.echr.coe.int/eng?i=001-70326. Acess dec 17 2019.

13 Just Satisfaction claims are practical instructions issued by the President of the Court in accordance with rule 32 of the Court's rule book, so as to relate the order to the remedy for damages provided for in article 41 of the European Convention. Available at https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf, acess jan 17 2019.

14 The Committee of Ministers should also be kept informed, as it is the body responsible for supervising the execution of the court's decisions, as well as the Parliamentary Assembly and the Commissioner for Human Rights.

15 ECtHR, LUKENDA v. SLOVENIA, Application nº. 23032/02, 6 October 2005. Available at http://hudoc.echr.coe.int/eng?i=001-70449. Acesso em 17 jan 2019.

16 According to Erik Fribergh, in May 2007, there were already 1700 claims with the same allegation of delay and violation of the right to a trial in reasonable time. See 'Pilot Judgments from the Court's Perspective' (Stockholm Colloquy, 9–10 June 2008, p. 86). Disponível em https://rm.coe.int/applying-and-supervising-the-echr-towards-stronger-implementation-of-t/1680695ac3. Acess jan 18 2019.

17 Id. Note 22, para. 93.

18 He is Vladimiro ZAGREBELSKY, judge at the European Court from 2001 to 2010, and older brother of Gustavo Zagrebelsky.

19 For more information about pilot judgments, see: Erik Fribergh, 'Pilot Judgments from the Court's Perspective' (Stockholm Colloquy, 9–10 June 2008). Disponível em https://rm.coe.int/applying-and-supervising-the-echr-towards-stronger-implementation-of-t/1680695ac3. Acesso 18 jan 2019.

20 Ver https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n13687182717l0_pointer. Acess jan 15 2019.

21 Idem.

22 Ibidem.

23 ARTICLE 33 Inter-State cases Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party. ARTICLE 34 Individual applications The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

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24 One of the most symbolic and relevant controversies involving states was the case of Ireland v United Kingdom (1979-80) 2 EHRR 25, Application no. 5310/71, judgment on 18 January 1978, which discussed both the possibility of the government, through the establishment of the so-called Demetrius operation, to detain terrorist suspects through extra-judicial procedures not authorized by the courts, as well as the limit separating the concept of cruel treatment from tortu-

re. Available at https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/Republic%20of%20Ireland%20v.%20United%20Kingdom.pdf. Acess jan 11 2019.

25 Only the States Parties and the Commission shall have the right to submit a case to the Court

26 Para outras possibilidades de devolução da questão para o Tribunal Pleno, estabelece o art. 43 da Convenção: 1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

27 In the original: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

28 article 63, §2º American Convention on Human Rights.

29 article. 27, § 2º, Protocol to the African Court on Human and Peoples' Rights

30 On Provisional Measures in the Inter-American System see Luiz Flávio Gomes e Valério de Oliveira Mazzuoli, Comentários à Convenção Americana sobre Direitos Humanos, cit., pp. 393-395

31 As explained in item 3 above, at that time the rule inserted by Protocol No. 11 was not yet in effect, allowing individual citizens access to the Court without the need for prior admission by the Commission.

32 As explained in item 3 above, at that time the rule inserted by Protocol No. 11 was not yet in effect, allowing individual citizens access to the Court without the need for prior admission by the Commission.

33 As already mentioned, the Chambers are responsible for judgments within the sections.

34 In this case, Mrs. Marckx, a Belgian citizen, journalist, not being married, tries to register her daughter, considered for this reason illegitimate under Belgian law. At the registration, the justice of the peace is called to inform her that in order to keep her property rights and achieve the rights of a legitimate daughter, she would have to adopt her. Available at http://hudoc.echr.coe.int/eng?i=001-57534. Acess jan 14 2019.

35 In this specific case, the Irish government claimed in its defense that the public opinion of the Northern Irish population is more conservative regarding customs and more religious than in Great Britain. For this reason the laws are more restrictive even regarding heterosexual conduct.. See. DUDGEON V. THE UNITED KINGDOM, Application nº 7525/76, Strasbourg, 22 October 1981, European Court (Grand Chamber) Of Human Rights (p.17).

36 ECtHR, DUDGEON V. THE UNITED KINGDOM, Application nº 7525/76, Strasbourg, 22 October 1981, European Court (Grand Chamber) Of Human Rights (p.20, para. 61).

37 Idem, p.20, para. 62.

38 Barrister is the term used to refer to lawyers in common law who appear before the courts and have great knowledge and experience in the legal field.

39 Solicitor is a lawyer who is responsible for outside court matters and does not act before the Courts..

40 One of the 15 votes, by Justice B. Walsh, was partially dissenting.

41 Term used to refer to the countries that have been, throughout the history, part of the United Kingdom.

42 Barristers.