#

#

17 November 2016

**In the Context of the Common Law:
The European Court of Human Rights in Strasbourg**

Boštjan M. Zupančič

## Introduction

A few months ago, when I first conceived of the title for this lecture, I had no idea that the comparison between the Common Law on the one and the Continental legal tradition on the other hand would become as topical and relevant as it did – because of Brexit. Theresa May said it in 2013, i.e., that the withdrawal from the European Union will also have as its consequence the departure from the Council of Europe and from the European Court of Human Rights in Strasbourg (ECtHR).

Consequently, the comparison between the customary Common Law and the Continental legal tradition gives jurisprudential substance to the political dilemma of getting, *vel non*, from under the jurisdiction of the Strasbourg court. Of course, the politicians will not (be able to) explain the legal and the comparative details of the choice; they follow their political intuition and the reaction of the media and the populace.

Nevertheless, the question being tested here is whether the political decision is or will be on the right side of history. Given that the Common Law goes back to 13th century, as does the English idea of the rule of law, the fair trial etc., and given that England is considered to have been the cradle of liberty, the simple question is whether the jurisdiction by the mostly Continental judges in Strasbourg is up to the standard of the 800 years old Anglo-Saxon, as the French put it, cultural and legal tradition. It goes back to Magna Carta (1215).[[1]](#footnote-1)

When we say "cultural tradition" we imply that the decision to exit from under the Strasbourg jurisdiction is not merely a legal and political question. The question is determined by cultural differences between an island nation with its own glorious history and the Continental of traditions in which law and democracy were sometimes two different things. For example, the English notion of "the rule of law" goes back to 13th century; the Continental conception of "the state governed by law" (*Rechtstaat*, *l’état du droit*) goes back only to the 19th century.[[2]](#footnote-2)

Moreover, the European Convention on Human Rights (ECHR) is clearly modelled on the American and the British legal system. This is the logical consequence of the time, after World War II, when the Convention was drafted. It was written as a reaction to the German atrocities during the war as well as a reaction to the Nuremberg trial.

It makes sense, therefore, that the English (and the Americans) were not inclined to learn about the rule of law and about democracy from those who had trampled upon them during the war. The Convention was also a showcase reaction to the lack of democracy and the rule of law during the reign of Communism in Eastern Europe.

However, the whole idea was American; the American State Department and the CIA provided the covert funding for the establishment of the Convention. Ambrose Evans-Pritchard in The Telegraph had made it public a few years ago but other media have, somewhat surprisingly, not made much of it.[[3]](#footnote-3)

We shall not deal with this in more detail. As the title of the lecture suggests we shall keep to the narrower legal theme, hopefully giving more substance to the distinction between the two legal traditions.

# The Common Law and the Continental Legal Tradition

### Judge-made vs. the Law Developing from the Legislature

The essential characteristics of the Common Law are as follows.

*First*, the Common Law is a judge-made law. Through the ages, different judges have endeavoured to resolve all kinds of disagreements between different people by pronouncing judgments based on logic and experience — and above all else by a pronounced sense of justice.[[4]](#footnote-4)

Some of these judgments, not all of them, were then "reported" by judicial reporters and printed. It is curious, therefore, that whether a particular judgment would become a precedent had been determined by persons who were neither judges, nor often, even lawyers.[[5]](#footnote-5)

### The Like Cases Should be Decided Alike (*Stare Decisis*)

*Second*, once published, the judgments became binding precedents. The consistency in the application of precedents (*stare decisis*) led to future calculability (predictability) of judgments and to legal certainty, essential for the economically secure and otherwise working legal order.

How the continuity of the law by the judges was (is) being maintained?

The doctrine of precedents proposes that each case is to be seen as

(1) *facts* (fact pattern);

(2) the legal *issue* presented in the adversary context of the case;

(3) the *ruling* (the holding) in the case.

The *ruling* is the law being created, but it applies only insofar as the *facts* of the case present an *issue* that is similar (analogous) to the one embedded in the precedent.

But while this is a very general prescription, one must keep in mind that the lawyers in the traditional adversary process typical of the Common Law are meticulously arguing the applicability of particular precedents.[[6]](#footnote-6) Thus a “natural selection” is made between those that apply and those that do not apply.

### Calculability (Foreseeability) of the Law

*Third*, the calculability of Common Law judgments depends on the motto “the like cases should be decided alike” (*stare decisis*), i.e., on the similarity between the precedent and the case at hand. Since by choosing randomly any criterion, anything may become similar to anything else, the system would seem as not predictable. Indeed, Max Weber[[7]](#footnote-7) considered it as “substantively rational” but with a low generality of legal norms.

The opposite is nevertheless true –, precisely due to the *specificity* (concreteness) of analogies drawn in the traditional law finding. In the adversary procedural context, as we said, the lawyers are to bring up the relevant precedents. The success of their case depends on it. The judge will then decide whether the purported analogy is relevant.

In the Common Law system the law is difficult to find, but easy to apply; in the Continental legal system, the law is easy to find, but difficult to apply. In the Continental law there is a large gap between the abstract norm and the fact pattern at hand. This also makes the Continental law less predictable. Paradoxically, the system based on formal logic and syllogism is often less calculable than the one based on similarity, i.e., on analogy.

Moreover, in contrast to Max Weber’s theory, the modern artificial intelligence (A.I.) finds, albeit in a different context, that reasoning by analogy is superior to reasoning by syllogism.[[8]](#footnote-8)

### *Ex Ante* and *Ex Post* Formation of the Law

*Fourth*, the Continental law is not only abstract but is largely written in advance (*ex ante*) of any specific litigation that may arise in the future.[[9]](#footnote-9) At worst, the abstract norms fashioned by the national legislature have unintended results, especially in combination with other norms.[[10]](#footnote-10) To be fair, modern legal codes are intended as a vast number of re-combinations of codified norms. The fathers of the Code Napoléon explicitly referred to it.

In principle, the Continental law does not admit of precedents (in French *la jurisprudence*). The reason for this was the constitutional doctrine of the “separation of powers”: the promulgation of legal norms is strictly reserved for the legislative branch of power. Thus even recently in Italy, the lower instance judges refused to be bound by the decisions of their own Constitutional Court, let alone of the one in Strasbourg. This goes back to Montesquieu (1689 – 1755) who considered the judges to be simply the mouthpieces of law (*les bouches de la loi*). Due to the aristocratic abuses during the *Ancien régime*, the French are even now afraid of the authority of the judges (*le gouvernement des juges*).[[11]](#footnote-11)

Inversely, the judge-made Common Law is strictly empirical, written *ex post facto*. Once the case presents a particular problem, just like it was in Roman law before Justinian, the judge will endeavour to render a new logical, i.e., just solution.

The case may accordingly become a precedent, a model for future similar decisions of other judges. The Common Law law-making is confined to particular litigations from which it arises. However, the Common Law law making is not well adapted to the non-litigable areas of social life, for example for the tax laws, etc.[[12]](#footnote-12)

### Do the judges create the law or do they simply discover it?

One of the recurrent (mostly American) dilemmas is whether the Common Law judges are *creating* the law –, or whether they are merely *discovering* it.

The answer, however, is simple. Where the case presents a logical question to be resolved – once the problem has been identified – the judge will “discover” the pre-existent logical and the just outcome.

Contrariwise, in cases where the balancing of values is in play or a particular policy is being considered – as is often the case in the U.S. Supreme Court – the judges are imposing their own subjective views, making their own value choices. I venture to say that in the ECtHR the latter is often the case.

The creation (or “discovery”) of new law at the ECtHR is always accompanied with the refrain that “the Convention is a living instrument”, i.e., that it must change with the passage of time and with the arrival of new cases. Whenever the phrase is being used in Strasbourg, it means that the Court feels obliged to explain why it (1) cannot derive the new precedent directly from the Convention nor (2) from a previous precedent.

The expression was first used in the case of *Tyrer v. the U.K.* (1978) where it was said: “*The Court must also recall that the Convention is a living instrument which […] must be interpreted in the light of present-day conditions.”* The phrase is thus an indication of a substantial change in the interpretation of the Convention. Until the writing of this lecture it has been used at least 151 times; out of this the phrase was used in 28 cases concerning the United Kingdom.[[13]](#footnote-13) The change of the case law is supposed to be incremental (see *infra*). One hundred and fifty one legal innovations by a single court in 38 years are hardly “incremental”: so much for *stare decisis*.[[14]](#footnote-14)

The U.K. political reaction to this has been that the Court must leave more legitimate freedom to the signatories of the Convention, i.e., that it must leave them alone. The catchphrase here has been “the margins of appreciation”.

### The Incremental vs. the Instant Creation (Discovery) of the Law

*Fifth*, the evolution of the law of precedents is incremental, whereas the legislative law making (especially by the code and the restatement) grows by leaps and bounds –, and is thus also superabundant.[[15]](#footnote-15) This is not specific to Continental law as nowadays the Common Law jurisdictions, too, legislate profusely.[[16]](#footnote-16)

When we say that the Common Law grows incrementally we are pointing to the step-by-step, from one litigation to another, creation of the precedents –, each of one firmly embedded in a particular fact pattern at issue. This process and this continuity took centuries to produce a body of the law and the English reverence for tradition helped preserve the recollection of previous cases.[[17]](#footnote-17)

By contrast, the judgments in the Continental courts have in principle no enduring value and are not remembered.[[18]](#footnote-18) The Continental legal system thus behaves as a person with no memory of its actions. The system is unable to learn from its previous mistakes and learning also from the successful resolution of the problem by preceding judges. In terms of the systems theory and cybernetics we have here the software capable or incapable of learning.[[19]](#footnote-19)

A silent revolution, however, is happening in the Continental jurisdictions. With notable exceptions we now have constitutional courts practically everywhere in Europe from Russia to Turkey, from Italy to Malta, from Spain to Germany, etc. The judgments of these constitutional courts are now mostly (and indiscriminately) published; they represent their *acquis,* as it is often called, i.e., their bodies of precedents. Lawyers may cite them, but this process of anglicisation of Continental law is now only in the stage of *status nascendi*. The same holds true, as we shall see, for the ECtHR.

# The European Convention on Human Rights and the European Court of Human Rights in Strasbourg

## The Convention

The European Convention on Human Rights (ECHR) was ratified by a sufficient number of countries and was thus established on January 21, 1959. The final draft was previously approved in Rome on November 4, 1950. It is now 66 years old and has been operative for 57 years. The Convention is composed of 59 Articles and the additional six Protocols. Together with the Protocols the ECHR only about 11.000 words, which is, as we shall see, significant. The Convention has been ratified by 47 European countries, initially of Western and after the 1990’s also of Eastern Europe, including Russia.

## The European Court of Human Rights (ECtHR)

Since each of the ratifying countries is entitled to have one “national” judge, the ECtHR has 47 judges. The national judge sits in all the cases where the application (the appeal to the ECtHR) is against his or her own country. There are five “first instance” Chambers, each of them composed of 9 judges and sitting in 7-judge formations. These are called Sections. The Grand Chamber is a kind of appellate court within the court[[20]](#footnote-20), sitting in a 17-judge formation.

Initially, the going was slow. The individual applications were not forthcoming; in the Registry they were literally waiting for the postman to bring in a new application. The assumption was that the Court would deal mostly with interstate cases.

We shall leave aside the technical details in order to focus on one ascertainment: the ECtHR uses the method of the Common Law.

## ECtHR and the Common Law

The 11.000 words of the Convention (and all of its later Protocols) were not enough to cover the issues arising from all of these human rights.[[21]](#footnote-21) Obviously, the Court started *ab ovo* because the Convention is simply – like any Constitution – a hierarchy of values. There were no lower order laws and regulations to refer to, no codification etc.[[22]](#footnote-22)

The point here is that the bare text of the Convention, except in rare cases, did not provide direct guidance to the judges. The major premises were simply not there.[[23]](#footnote-23)

This legal void at the beginning was very quickly outdone as the accumulation of the case law permitted the judges to refer to their own previous decisions – the nascent precedents. How was it thus possible for the first judges to interpret the Convention's meagre provisions?

Obviously, each judge came to the Court with his own legal knowledge, which came into play whether he was conscious of it or not. Since in the initial stages of the Strasbourg Court its legal reasoning was wholly undetermined (by the precedent), how was it possible for it to be, in Max Weber's terms, »rational law making« and »law finding«? What did these judges rely upon? Were they Montesquieu's mouthpieces of law (*les bouches de la loi*)? Or did they arbitrarily make new laws?

When I came to the Court in 1998, I was pleasantly surprised to be able to participate in its Sections’ and in its Grand Chamber’s coherent legal discourse – across all cultural and legal barriers. The U.K.’s judge was able to converse with the Russian judge, the Scandinavian judge was able to converse with the one from Azerbaijan etc. There was a common understanding among the jurists that ought to be astounding. Because it has been taken for granted nobody has ever written about this. Remarkably too, there was no communication barrier, and there still is not, between the judges from the Common Law jurisdictions and those hailing from the Continental law.

I suspect this convergence is also at the origin of the singular plenitude of the intellectual references of the first judges ECtHR – with no case law to refer to.[[24]](#footnote-24) In any event, these judges were making, not discovering, the law. But they were making it from the precipitate of hundreds of years of legal reasoning solutions imparted to them through legal education and subsequent practice. It was fascinating again to observe that a judge from Armenia was completely on a par, for example, with a judge from France.[[25]](#footnote-25)

In the contemporary Strasbourg Court, is it possible to maintain there is a determinative impact of (its own) case law? Yes, in minor cases of the so-called “well established case law” (wecl), the rule of the precedents is completely determinative. But such cases the Court mostly leaves to be dealt with by the Court’s lawyers. Even the Sections, let alone the Grand Chamber, tackle the legal problems that a priori cannot be resolved by reference to the already decided previous cases, although they are abundantly cited.

The advancement had been progressive to the point where the ECtHR cases today cite ever more profusely – the Court’s own case law. The case law situation today is saturated; the Court is fast becoming self-referential.

## The Exceptional situation in the Continental law

The issue here is not the challenging situation at the beginning of the functioning of the ECtHR. The initial launch of the Court is simply the proof that the whole operation originated with a method “in the context of the Common Law”.

The mere 11.000 words and the 36 human rights forced the judges and the ECtHR to rely, practically from the very beginning, on their own pronouncements in previous cases. The number of these cases now stands at 51,673. Many are repetitive iterations of previous cases etc., but a large number of them are indeed oft-cited precedents.

The Common Law accumulated its case law over a period of around seven hundred years; the ECtHR accomplished this in mere 57 years (of existence of the ECtHR). Needless to say, the quality of the accumulated case law in both contexts cannot be the same. Law requires wisdom and wisdom cannot be rushed.

Given the massive creativity of the ECtHR, it has now become impossible to even track the new case law as assiduously as before –, assuming that every new development is *de facto*, if not *de jure*, binding on all 47 signatories of the ECHR. The American Supreme Court produces about 100 binding judgments a year. These precedents trickle down from the tip of the judicial pyramid; they bind every federal and state court as well as many other state bodies. The system is adapted to this compliance and it functions well.

By contrast, the ECtHR – although also at the tip of an imagined pyramid –, is actually on top of 47 different pyramids. The communication of the precedent is transformed every time the message is delivered in Strasbourg; it falls each time on a different legal ground and is, if at all, each time interpreted differently.

The irony again is that the Common Law jurisdictions (the U.K., Ireland, Malta and Cyprus) are well adapted to this vertical verbal interaction. As a consequence they take it seriously and are at least able to digest these legal messages from Strasbourg and assimilate them into their own legal systems (jurisdictions). As a consequence, they are, and especially so the U.K., critical to the “living instrument“ doctrine, i.e., vis-à-vis the Strasbourg hyperactivity. The rest of the 43 countries largely ignore the Strasbourg developments except inasmuch as the lawyers will have argued Strasbourg cases before their constitutional courts: the process is slow in progressing.

Be that as it may, the ECtHR in Strasbourg is decidedly not the European Supreme Court (although it was initially foreseen as such). If it were, it would play the role of the European Constitutional Court. But in that case, too, its minimal human rights standards would be differently interpreted in all of the 47 different jurisdictions.

If this were to transpire, however, although right now it is difficult to imagine, the amalgamated European jurisdictional conglomerate would have to behave exactly as it ought to – in the Common Law fashion.

# Conclusion

The purpose of this short excursus was to point out the silent “Common Law revolution”– taking taking place in the European Continental law.

Its development since the introduction of the European Court of Human Rights in Strasbourg in 1959 implies the rejection of Montesquieu’s doctrine of the strict separation of powers (the legislative, the executive and the judicial). The French (and many others) may be in denial of the simple fact that it is now also the judges who create (discover) the law. But the reality repudiates this denial and the denial itself yet varies from one Continental country to another. Moreover, all countries with a real Constitutional Court[[26]](#footnote-26) mimic the Common Law method of law making and law finding.

For Edmund Burke “human rights” did not exist; he only acknowledged the “rights of the English”. For him the rights are a heritage, a patrimony inherited from our ancestors. The man of human rights is for him an abstraction: disaffiliated, uprooted, and deprived of his religion and his land. This was Burke’s critique of the French Revolution of 1789 as opposed to the Glorious Revolution of 1688.[[27]](#footnote-27)

Insofar as the abstract human rights of the European Convention on Human Rights are the outgrowth of the French revolution and inasmuch as the process of assimilating and concretizing them in Strasbourg is in the manner of the English Common Law – we may recognise Burke as historically vindicated.

Whether the abstract human rights will survive we do not know, but if the English depart from them it is less likely they will survive.

© Professor Boštjan M. Zupančič, 2016

1. In fact, the idea of the rule of law goes back to William the Conqueror, after 1066. See generally André Maurois, L’Histoire d’Angleterre (1934); (1960) *"Legal History: Origins of the Public Trial,"* Indiana Law Journal: Vol. 35: Iss. 2, Article 8. Available at: <http://www.repository.law.indiana.edu/ilj/vol35/iss2/8> (last accessed November 2, 2016)

 [↑](#footnote-ref-1)
2. The term »*Rechtstaat*« was invented by Robert von Mohl in 1798; it was popularised in his textbook Die deutsche Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates ("German Policy Science according to the Principles of the Constitutional State") (1832–33). [↑](#footnote-ref-2)
3. »*Euro-federalists financed by US spy chiefs”* by Ambrose Evans-Pritchard, The Telegraph, September 19, 2000. See also Evans-Pritchard, “*The European Union always was a CIA project, as Brexiteers discover”,* The Telegraph, April 27, 2016 (last accessed 4 November 2016) [↑](#footnote-ref-3)
4. Oliver Wendell Holmes is reputed to have said that law is not logic, that it is experience. However, the “sense of justice” is a highly differentiated *cognitive* - not emotional! - function that combines logic, experience and the knowledge of the law. *“The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”* Holmes, Oliver Wendell*, The Common Law (1881), p. 1*

 On the other hand, the sense of justice is not based on empathy: Freud knew of it, but Piaget and after him Lawrence Kohlberg developed the theory of moral development. The teaching is based on perceiving (in)justice. See Piaget, Jean (1932). *The Moral Judgment of the Child*. London: Kegan Paul, Trench, Trubner and Co.; Kohlberg, Lawrence (1981). *Essays on Moral Development, Vol. I: The Philosophy of Moral Development*. San Francisco, CA: Harper & Row [↑](#footnote-ref-4)
5. This was before the sophisticated A.I. projects, akin to Google, such as Lexis and Westlaw. In the European Court of Human Rights this role is played by the much less nimble »HUDOC «.

 Still, the computer programme produced an avalanche of copy-paste self-serving citations of the ECtHR's own case law to the point where the whole enterprise is fast becoming self-referential. [↑](#footnote-ref-5)
6. Professor Jack Hamson (1905 – 1986) of Cambridge University gave (in his lecture in 1968) the following simile between the Common law and the Continental (French) approach: in the Continental Law, the dog is defined (in the abstract) as a furry animal with a tail and on four legs. So, a Martian encoutering a cat will say: *»Ha, this is a dog...«* Inversely, the Common Law does not define the dog, it simply points out the dog out (ostensive definition) and the Martian will inuitively be able to distinguish the dog from a cat. [↑](#footnote-ref-6)
7. See, Trubek, David M., *"Max Weber on Law and the Rise of Capitalism"* (1972). Faculty Scholarship Series. Paper 4001. <http://digitalcommons.law.yale.edu/fss_papers/4001> (last accessed on 17 October 2016) [↑](#footnote-ref-7)
8. See, generally, Domingos, Pedro, The Master Algorithm: how the quest for the ultimate learning machine will remake our world, Basic Books, 2015 [↑](#footnote-ref-8)
9. However, this is not a black and white contrast. There are shades of grey in between the extremes.

 One must keep in mind that (1) much legislation in the Common Law system today is of the same *ex ante* nature and (2) that even Justinian's Roman law was a restatement of the previous case law, its reorganisation (into a code, *Corpus Juris Civilis*). This holds true for many of the Continental codifications. A good example of this is Napoleon's *Code civil* (1789-1794) as well as the American *Model Penal Code* (1962 – 1981). [↑](#footnote-ref-9)
10. A code is intended just as such a source of combinations. It is a kind of normative alphabet where different provisions (from the special and from the general part of the code) recombine – just as an alphabet of letters recombine into a word –, to yield any number of major premises. In cybernetics, this is called “strategic simplification”; it is akin to the hypothetical switch from Chinese characters to a phonetic alphabet.

 However, a code of 100 articles in the general part and 200 articles in the special part is capable of about 50 billion combinations (where combinations of 2, 3, 4, and 5 norms are taken as possible major premises for future syllogisms).

 The consequent choice of the combined major premise is the so-called *qualification juridique*. Obviously, the combinations cannot always be foreseeable (calculable). So much for Max Weber's theory. See, Zupančič, The Owl of Minerva, Eleven Publishing, 2008, p. 315 *et seq*. [↑](#footnote-ref-10)
11. Needless to say, this is precisely what is now happening all over Europe not only due to the precedential activity of the ECtHR in Strasbourg but primarily due to the judge-made law issued by their own constitutional courts. For this reason the French do not have an ordinary constitutional court (*Conseil Constitutionnel*); it only has the power of an a priori *in abstracto* review of the legislation – before it comes into power. [↑](#footnote-ref-11)
12. But see *Burden and Burden* v. the U.K., ECtHR (220) at <http://hudoc.echr.coe.int/eng?i=001-86146> (last accessed on October 17, 2016) [↑](#footnote-ref-12)
13. This number gives substance to the allegations that the Strasbourg Court is an *activist* court, which in legal jargon means that the Court is not conservative. The number is an indication of legal innovations on the one and the number of departures from the literal interpretation of the Convention and from previous cases (precedents) on the other hand. The large proportion (28) of the U.K. cases actually means, as most of the ECtHR judges will agree, that the U.K. cases are among the most interesting ones. [↑](#footnote-ref-13)
14. The last case, dated October 20, 2016, is *Muršić v. Croatia.* [↑](#footnote-ref-14)
15. The French *Code de Travail* has 3000 pages and is growing by about 100 pages a year; see at <http://www.lefigaro.fr/vox/economie/2015/06/16/31007-20150616ARTFIG00261-non-le-code-du-travail-ne-compte-pas-3000-pages.php> (last accessed 17 October 2016). However, the length of the U.S federal tax code and regulations have grown steadily over the past sixty years. In 1955, the two documents were 1.4 million words in length. Since then, they have grown at a pace of about 144,500 words a year. Today, the federal tax code is roughly six times as long as it was in 1955, while federal tax regulations are about 2.5 times as long. See at <http://taxfoundation.org/blog/federal-tax-laws-and-regulations-are-now-over-10-million-words-long> (last accessed on 17 October 2016) [↑](#footnote-ref-15)
16. We live in an era of *hyper-normativisme*, see generally Gori, Roland, La fabrique des imposteurs, Paris, éditions Les Liens qui Libèrent, 2013. Woe to the society of too many rules; it is likely to fall apart. Paradoxically, too many rules spell *anomie*, the absence of morals and ethics. [↑](#footnote-ref-16)
17. *»The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.”* Holmes, "Learning and Science", reported in Speeches by Oliver Wendell Holmes (1896) p. 67-68 [↑](#footnote-ref-17)
18. The judgments are archived, they are lost to the memory of contemporaries and of the future generations –, even if they be ingenious solutions to particular legal problems. Of course, there have been exceptions to this, as pointed out by Professor Hamson (see *supra*, n. 6) , most notably in the French administrative law. Elswhere on the Continent the precedents are referred to as »judicial practice«; only a few of these cases are published, notably by the Supreme Courts. [↑](#footnote-ref-18)
19. A good example of this is the new DragonDictate program capable of transforming sounds (spoken words) into the written text on the screen of the PC. This program is capable of learning from mistakenly transformed words once the author will have corrected them on the screen. If it was incapable of this, obviously, the efficacy of the program would be greatly diminished. [↑](#footnote-ref-19)
20. This is not entirely true. The Section cases are adopted for Grand Chamber reconsideration on the basis of Art. 30, *Relinquishment of jurisdiction to the Grand Chamber*: »Where a case pending before a Chamber [1] raises *a serious question affecting the interpretation of the Convention* or the

Protocols thereto or [2] *where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court* [...]« (emphasis added)

 This language implies the criteria for the case to rise to Grand Chamber. Therefore, the alleged error by the Chamber (the Section) is not sufficient. [↑](#footnote-ref-20)
21. What are »human rights«? Initially and in the abstract, human rights were those enumerated in the Universal Declaration the Convention; by a conservative count there were about 36, from the right to life and freedom from torture to the right of appeal in criminal matters and the protection of one's possessions. [↑](#footnote-ref-21)
22. The first case at the ECtHR was *Lawless v. Ireland (No.1)*, of November 14, 1960; it dealt with unlawful detention of the applicant between 13th July and 11th December 1957, in a military detention camp situated in the territory of the Republic of Ireland. This was almost exactly 56 years ago. The Convention, Art. 5(1) provided the exact major premise for the finding of violation by Ireland. In later cases, however, there was no such directly applicable rule in the Convention. [↑](#footnote-ref-22)
23. Thus in the very second case already the Court decided to take the easy way and struck the case out of the Court's list. At that time, and with no case law to refer to, this was the line of least resistance. See, *DeBeker v. Belgium*, 1962 at <http://hudoc.echr.coe.int/eng?i=001-57433> (last accessed on 18 October 2016). See also the dissenting opinion of the world-famous Danish legal philosopher Alf Ross. [↑](#footnote-ref-23)
24. As for Alf Ross, obviously, it would be ridiculous to reduce him to a few citations of the presumably decisive precedents; his frame of reference was far wider and he was in no straits to identify juridical parameters. [↑](#footnote-ref-24)
25. I am not certain all this has to do only with legal education. If not, the hypothesis might be advanced to the effect that the »autonomous legal reasoning« simply has its own built-in parameters, irrespective of the culture it hails from. The discussion about it, however, would take us beyond the circumference of this lecture. [↑](#footnote-ref-25)
26. By the »real« constitutional court we mean a court, such as the one in Strasbourg, which is empowered to consider appeals from individuals (constitional complaint, *amparo, Verfassungsbeschwerde*). The French Conseil Constitutionnel, for example, does not have this authorisation. [↑](#footnote-ref-26)
27. See *Eric Zemmour : «L'homme qui n'aimait pas notre Révolution»*, Le Figaro, 3 November 2016 at <http://premium.lefigaro.fr/vox/politique/2016/11/02/31001-20161102ARTFIG00248-eric-zemmour-l-homme-qui-n-aimait-pas-notre-revolution.php> (last accessed 4 November 2016) referring to Edmund Burke, Réflexions sur la Révolution en France, new edition : “Les belles lettres”, 803 p., Index, Commentaires, Notes, Paris 2016  [↑](#footnote-ref-27)