

 PROFILE

John Hedigan,
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*Judge of the European Court
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Beyond His Borders

John Hedigan has always been what he calls “an internationalist,” someone deeply interested in what is happening in the world and a believer in the community of nations.¹ This perspective led him to become involved in human rights early on, during his years of education in his native Ireland. His first awareness of such issues was inspired by events occurring across the Atlantic in the United States.

The American civil rights movement was the first way in which I ever remember human rights coming into my consciousness. I was very big into debating societies in Belvedere College, where I went to school. The movement was really beginning to impinge on our consciousness in 1962–63. We used to see on TV all these terrible pictures of dogs attacking black demonstrators and incredible things like that, and the civil rights bill became the topic for discussion in our debating societies.

This introduction resulted in Hedigan’s engagement with human rights at university, this time in a way that went beyond speech-making:

When I went to university, a few of us resurrected a branch of Amnesty International, which is still going strong now. I represented the university on the National Executive Committee, and we were doing all sorts of the work that Amnesty still does, taking up the

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case of pretty much forgotten people. One man for whom we campaigned was a dissenter in the Soviet Union. He was imprisoned in a psychiatric hospital. This was not uncommon in those days. The theory appeared to be that one had to be mad to disagree with the great Soviet dream!

During his early years as a barrister in Dublin, Hedigan continued his connection to Amnesty International, eventually becoming the national director of the international campaign against torture. Its motto was “Torture—as unthinkable as slavery!”

When he considers his career as a judge at the European Court of Human Rights, he is gratified by how directly this work has satisfied his lifelong interests.

I find myself in the kind of job I really could scarcely have ever hoped to end up in because of where my interests lie. Practicing as a barrister in Ireland, I had a certain practical experience in the area of human rights, but only on a national level. Then in the 1980s, my wife, who worked in the legal division of Foreign Affairs, became the agent for Ireland at the [European] Court of Human Rights. I started to take a deep interest in Strasbourg because of its international dimension. The court embodies both aspects of the line of interest I had always had—international affairs and human rights. When my wife attended Strasbourg for meetings, I came out here myself whenever I had some free time to study what was going on at the court. I soon developed the idea that I would like to act as counsel in cases on behalf of Ireland before the Court of Human Rights. That’s really what I had in mind at that stage. I never thought I would end up here as judge!

But Hedigan did eventually end up on the bench of the ECHR. He now decides cases brought against the forty-six member states of the Council of Europe, including, if rarely, his native country.

Hedigan considers his appointment to the ECHR as, to a certain extent, a matter of being in the right place at the right time. In 1998, the ECHR changed its status from a part-time to a full-time court, and the Irish judge who had been serving for many years was retiring.

The Irish government, in October 1997, if my memory serves me correctly, advertised the job within the legal profession and the judiciary. That was the first time they had ever done so. They advertised within the profession because judges in Ireland are only appointed from among the ranks of practicing lawyers. The government was obliged to submit to the Council of Europe a list of three names as candidates for the post of judge of the new court. In the

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end, they picked three people and they put the list in order of preference, which was the way they used to do it then—they're not supposed to do it that way now—and I was the first preference. The candidates had to appear in Paris in January 1998 before the Ad Hoc Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. The committee, having interviewed the three Irish candidates, recommended my name and I was elected subsequently by the Parliamentary Assembly. So that's how I ended up here.

In addition to his full-time work on the bench, Hedigan has worked tirelessly to change the conditions of work for ECHR judges so that they have more security. Unlike many international judges, those of the ECHR do not receive a retirement pension or the other benefits normally accompanying a professional position. Thus, there may be little incentive for a supreme or high court judge to abandon a secure position on a national bench and venture into the uncertainties of such a judgeship. This is particularly true for judges and other legal professionals who are years away from retirement age.

The conditions of work here are extremely poor for the judges, despite the fact that, like most people at international level, they get a fairly high salary. Unlike all other persons working in the Council of Europe, ECHR judges have no social protection at all. Indeed, they are treated almost as though they are nonpersons! This has been a major issue for the court since its creation. The president of the court has repeatedly and publicly called for the rectification of this state of affairs, but to no avail. As chair of the Committee on the Status and Condition of Judges, together with my colleagues, I have worked to ameliorate this deplorable state of affairs. Unfortunately we have not, despite strenuous effort, been able to persuade the Council of Europe governments to meet these basic obligations to their judges. It is an extraordinary and anomalous situation.

The lack of security attached to his position was daunting for Hedigan, who had to essentially close down his practice as barrister upon his appointment to Strasbourg. He thus had to forego the opportunity of advancing his lifelong profession, with only the certainty of a six-year term as an international judge in return.

It was a little intimidating because I was required to give up my practice. Most people who practice at the bar in Ireland have had much the same experience of practically starving for the first few years when they have little or no work. So, having survived that period and been in practice for twenty-two years, it was a little bit

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intimidating to just pull the shades down on it all and say goodbye, because God only knew what was around the corner. Still, it was an irresistible opportunity.

Hedigan was reelected for a second six-year term in 2004.² He is unsure about what he will do when he eventually leaves the court. His decision to leave Ireland for Strasbourg was a definitive moment in his professional life, probably eliminating the possibility of his ever practicing again as a barrister.

I think it's very unlikely that somebody in my position could go back to Ireland and take up his practice. Time moves on, and so do the main actors in the legal profession. In our system, a barrister depends upon solicitors for work. Those who are away, like myself, are quickly forgotten and replaced by others. Normally, people who become judges in our system remain so for the rest of their lives, so they are not looking for work after serving on the bench.

Human Rights in the "New Europe"

Like many of his fellow judges, Hedigan feels that the importance of the work he performs at the ECHR outweighs the many disadvantages that come with professional insecurity. The last fifteen years have seen momentous changes in Europe, and the court feels them firsthand. The expansion of the European human rights regime to include most of the countries of the former Soviet Union has, in particular, been both encouraging and challenging for the ECHR. When the court became a permanent body in 1998, the European Human Rights Commission, which had functioned alongside the court as a body for filtering cases, was abolished. The rationale for this move was that the commission was no longer necessary, since the shift from part time to full time would allow the court itself to handle all types of human rights complaints in the future. This has since proved to be far from true.

The commission and the part-time [European Court of Human Rights] were to be replaced and one full-time, permanent [ECHR] was to be established in their place. Some of the reasons that were advanced at the time were that it would save a great deal of money. This was quite unrealistic. It was not credible that it would cost less money to process the cases that were already increasing in number by quantum leaps. Throughout the 1980s, the workload was increasing at an extraordinary rate. And then the Berlin Wall fell in 1989 and suddenly there was a vast new reservoir of potential violations.

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All these East European countries, former Soviet countries, all wanted to join the Council of Europe. In practical terms, it was probably unwise to allow them in, or at least to require them to ratify the convention immediately. But for political reasons, which I think were correct, it was very important to get them all inside the democratic tent, to grasp this moment in history and not to let it slip away. It was probably the right thing to do.

But allowing this, I think the process should have paused in relation to the negotiations for the creation of a permanent court. The impact of absorbing so many countries with little protective mechanisms for protecting human rights was likely to be enormous on the workload of the new court. Instead of just abolishing the commission in order to avoid duplication of work with the court, according to the rather dubious logic of the time, it would have been better had they reformed the commission and provided that its function would be to decide on the admissibility of the cases—no opinion to be produced, just to decide admissibility. The new, full-time court might then have been established to do the kind of work that had made its reputation earlier: the production of important judgments of high jurisprudential value, well reasoned, well researched, and accurate in factual matter. In the context of the current vast caseload, this is a real challenge for the court now: how to maintain the highest standards in its case law while dealing with an unmanageable caseload.

The court continues to campaign for the creation of a separate, quasi-judicial filtering body. I would like all who apply to Strasbourg to have an answer, even if for 90 percent of them it will be “no”—that is, their cases will be deemed inadmissible. But it is totally unacceptable that tens of thousands must wait in an unending queue to receive this answer.

There are currently two other regional human rights courts in the world, the Inter-American Court of Human Rights, whose first judges were elected in 1979, and the African Court of Human and Peoples' Rights, whose first judges were elected in 2006. Both of the regional bodies that created these courts decided, unlike the Council of Europe, to preserve their human rights commissions. The Inter-American Commission of Human Rights works as a screening body for the IACHR, which then only receives those cases that are most significant. Hedigan bemoans the fact that his own court has no such screening body, the result being an ongoing caseload of daunting proportions:

Last year the court delivered 30,000 decisions, and 1,560 judgments. Consider that the United States Supreme Court has never, if I am correct, exceeded 100 cases a year. It puts things in perspective.

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Moreover, these numbers are increasing inexorably year by year. The fact that the vast majority of those decisions are decisions of inadmissibility doesn't matter. Cases don't all come with a big sign on them saying, "Inadmissible." Someone has to read them. Some judicial formation here has to decide.

Despite the breadth of its geographic jurisdiction and the wide cultural and historical differences among its member states, the ECHR has an excellent record of compliance with its decisions. One reason is that membership in the European Union is now linked with compliance, and countries that are anxious to come under the umbrella of the European Union make great efforts to implement the court's judgments. Hedigan points out that the issue of compliance is not the responsibility of the judges:

The judgments are notified to the Committee of Foreign Ministers of the Council of Europe countries or, in reality, to the Committee of Ambassadors here in Strasbourg, who are their deputies. Once a judgment against a country is notified to them, it goes onto their agenda and it keeps coming back up with a request to explain what action has been taken to comply with the judgment. Perhaps the most classic example would be Turkey. You know that Turkey is very anxious to join the European Union, and the European Union has indicated that it is prepared to talk to them about it. It's a very controversial issue in Europe as to whether they should or should not be allowed to join. Among many other different things, they have to comply with the judgments of the Court of Human Rights. Consequently, they have been implementing the judgments with considerable vigor for a number of years, and this has helped Turkey to meet perceived European standards in relation to human rights protection and the rule of law.

There are inevitably problems with some of the "newer recruits." However, it is not just countries of the "New Europe" that may have difficulty in implementing judgments of the court. Hedigan recalls the difficulty that Ireland had in complying with one of the ECHR's judgments.

In Ireland, when the Norris v. Ireland judgment was produced—which condemned Ireland for not having decriminalized the laws against homosexuality—I think there was a kind of broad consensus that it was predictable. But there was also a very strong sense that nothing was going to happen for quite a long time, if ever, because no one in Ireland, no politician, was going to introduce a bill in the parliament decriminalizing homosexuality. And so about five years passed, if I'm not mistaken. Norris even threatened to bring another action against the country. Then, finally, a very formidable woman

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was made the minister for justice. Perhaps there was a sense that a woman might do what a male politician dared not. In any event, she introduced the bill and Ireland ended up in compliance with the judgment of this court.³ In every other respect, however, Ireland's record of compliance with our judgments has been very good.

Another country of the “Old Europe” that has run afoul of the ECHR repeatedly is Italy. Most of the judgments against it are for violations of article 6 of the European Convention of Human Rights, which guarantees the right to a trial within a reasonable time. Despite considerable political pressure, the Italian government has not made the judicial reforms necessary to bring its trial system into line with its peer nations.

Italy is coming under great pressure from the Committee of Ministers, and from the court as well, and there has been much criticism of their apparently clogging up the caseload of the court. Italy is one of the most successful countries in Europe, so this problem should be solvable. Action has been taken by Italy in this regard—they have introduced a law, called the “Pinto Law,” which provides a domestic remedy, in Italy, whereby persons who are the victims of delay in proceedings, which would be a violation of article 6, may sue in the Italian courts for their damages. The court here has held that that is now a domestic remedy that must be exhausted before parties can come to Strasbourg.⁴ Unfortunately, the implementation of this law by the Italian courts has caused some difficulty, but hopefully this problem is on its way to resolution.

The Wisdom of an International Regime

It might be asked why a regional judicial body is better suited to consider and rule on issues of human rights than a domestic court. Why should the bench of an international court make difficult decisions about the way a society conducts itself—such as how it balances freedom of religion with freedom of expression when it comes to wearing the Islamic veil in public schools, or balances the right to individual privacy with freedom of the press—rather than the judges who are members of that same society? Hedigan has thought deeply about this issue, outlining both the rationale for and his personal vision of the international human rights regime.

The whole system is based on the proposition that the protection of human rights at the national level doesn't work. World War II and apartheid were the two most convincing proofs of that. You have to have collective responsibility. A domestic government under threat

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may be tempted, indeed even terrorized, by attacks against its people to take action that is inappropriate in a democracy and contrary to the rule of law. In such a situation, everyone loses—the government loses its moral authority, the people lose precious rights that took decades, if not centuries, to achieve. A domestic government attempting to subvert the democratic order may also be unrestrainable at the national level, for many reasons. In these circumstances, an international supervision may be the only forum to which the citizen may go to claim his government is violating standards to which his country is committed.

That is the idea that gave birth to this court. It is worth noting that no part of the world has had to struggle more against terrorism than Europe in the last fifty years. Many times, this court has been obliged to condemn governments for their actions in trying to meet these threats. To their credit, governments have abided by these decisions, and the terrorist threat has largely been successfully met. Think of Ireland, the United Kingdom, France, Germany, Italy. In the agony of these terrible threats, no institution is more valuable than an independent court to adjudicate on the actions of governments. It provides a forum for the victim and both guidance and support for the governments. Central to this function is the creation of universal standards of human rights protection. If you ask whether domestic courts could not come to proper decisions in relation to some of these matters, yes, I have no doubt that they could. But in relation to matters that are quite specifically set for our court, where we are trying to establish a common standard for forty-six countries, how could one of the individual countries achieve that? How could the Irish Supreme Court decide what was correct for forty-six countries? It couldn't; it could only decide for itself. So if you want to set an across-the-board standard for forty-six countries, which is what we are doing, you have by definition got no alternative but to have an international court of some sort. At the moment, it happens to be us.

But I think that going towards a more global solution to human rights issues would be the ideal. A global human rights court, to which people would have a right of individual petition and whose judgments would be complied with, would be ideal. It's unfortunately not going to happen anytime soon. We have hopes for the new African Court of Human and Peoples' Rights. The Inter-American Court of Human Rights has its limitations, at the moment because it doesn't have U.S. backing. Asia apparently is showing no signs of having a court of human rights. That just about covers everyone. So the prospects for a global court are not great right now.

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But who would have thought about a European Court of Human Rights sixty years ago? Sixty years from now, the world will be a very different place. Hopefully, it will be a better place and maybe there will be a place for a global court of human rights. As far as human rights protection is concerned, it is already a considerably better place as a result of the institutions that have been established.

The idea that the rights of individuals can best be protected through international efforts is, indeed, a recent development, one that has emerged from a complex dynamic between historical events and reactions to those same events. Hedigan sees this development as unquestionably positive and is proud of the role his court plays in ensuring the centrality of human rights in both the thinking and behavior of European states.

I think that the individual is the most precious form in society. The relationship between the state and the citizen—the individual—lies at the very heart of civilization. That they're treated with decency and respect, can stand up and say their piece whenever they want, that they're not going to be tortured, or abducted, or imprisoned for their views or their religion—these are precious and vulnerable rights. I think the court is spreading those standards all over Europe. The things that are happening in this regard, and that have happened in Europe over the last half a century, are remarkable.

The European Court of Human Rights has contributed to rising expectations regarding the protection of rights across the continent. John Hedigan finds himself torn between pride in the accomplishments of his court and frustration with its inability to reach its full promise.