COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF DELCOURT v. BELGIUM

(Application no. 2689/65)

JUDGMENT

STRASBOURG

17 January 1970

In the Delcourt case,

The European Court of Human Rights, sitting, in accordance with the provisions of Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and Rules 21 and 22 of the Rules of Court, as a Chamber composed of the following judges:

Sir Humphrey WALDOCK, *President*
H. ROLIN
T. WOLD
M. ZEKIA
A. FAVRE
J. CREMONA
G. WIARDA

and also Mr. M.-A. EISSEN, *Registrar* and Mr. J.F. SMYTH, *Deputy Registrar*,

Decides as follows,

PROCEDURE

1. The Delcourt case was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission"). The case has its origin in an Application lodged with the Commission under Article 25 (art. 25) of the Convention on 20th December 1965 by a Belgian national, Emile Delcourt, against the Kingdom of Belgium.

The Commission's request, to which was attached the Report provided for in Article 31 (art. 31) of the Convention, was lodged with the Registry of the Court on 5th February 1969, within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47). Reference was made in the request to Articles 44 and 48 (art. 44, art. 48) and to the declaration by the Kingdom of Belgium recognising the compulsory jurisdiction of the Court (Article 46) (art. 46).

2. On 4th March 1969, the President of the Court drew by lot, in the presence of the Registrar, the names of six of the seven Judges called upon to sit as members of the Chamber, Mr. Henri Rolin, the elected Judge of Belgian nationality, being an ex officio member under Article 43 (art. 43) of the Convention; the President also drew by lot the names of three substitute Judges. One of the members of the Chamber was subsequently unable to take part in the consideration of the case; he was replaced by the first substitute Judge.

3. On 10th March 1969, the President of the Chamber instructed the Registrar to invite the Commission to produce a number of documents which were added to the file on 19th March 1969.

4. On 20th March 1969, the President of the Chamber ascertained the views of the Agent of the Government of the Kingdom of Belgium (hereinafter referred to as "the Government") and of the Delegates of the Commission on the procedure to be followed. By an Order made the same day he decided that the Commission should file a memorial within a time-limit expiring on 31st May 1969 and that the Government should have until 21st July 1969 for its memorial in reply. The respective memorials of the Commission and the Government reached the Registry within the time-limits allowed.

5. After having consulted, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President of the Chamber decided, by an Order of 31st July 1969, that the oral hearings should open on 29th September 1969.

6. On 24th September 1969, the Court held a meeting to prepare the oral proceedings. On this occasion, it decided to invite the Agent of the Government and the Delegates of the Commission to produce certain documents and supplementary information which were made available to it in the course of the public hearings.

7. The public hearings opened at Strasbourg, in the Human Rights Building, on 29th September 1969 in the afternoon and were resumed on 30th September.

There appeared before the Court:

- for the Commission:
  Mr. M. SØRENSEN, *Principal Delegate*, and
  MM. C. T. EUSTATHIADES and T. BALTA, *Delegates*;
- for the Government:
  Mr. J. DE MEYER, Professor
  at Louvain University, Assessor to the Council of
  State, *Agent* and *Counsel*, assisted by
  Mr. J. FAURÈS, Bâtonnier
  at the Court of Cassation, *Counsel*.

The Court heard the addresses and submissions of MM. Sørensen, De Meyer and Faurès. On 30th September 1969, the Court asked the representatives of the Government a number of questions to which they replied on the same day. The hearings were then declared provisionally closed on 30th September at 5.25 p.m.

8. After having deliberated in private, the Court gives the present judgment.

AS TO THE FACTS

9. The purpose of the Commission's request is to obtain a decision from the Court as to whether the facts of the case do or do not disclose a violation by the Kingdom of Belgium of the obligations binding on it under Article 6 para. 1 (art. 6-1) of the Convention.

10. The relevant facts of the case as they appear from the Commission's Report and memorial, the Government's memorial, the documents produced and the addresses of the representatives appearing before the Court may be summarised as follows:

11. Emile Delcourt, a Belgian citizen, born on 28th December 1924, and a company director, has his residence at Waterloo. At the time of lodging his Application with the Commission (20th December 1965), he was imprisoned in the central gaol at Louvain.

12. Proceedings having been instituted against him by the Procureur du Roi at Bruges for obtaining money by menaces, fraud and fraudulent conversion, the Applicant was arrested on 23rd November 1963 and subsequently charged with a number of offences of fraud, fraudulent conversion, forgery and uttering forged documents, issuing uncovered cheques and fraudulent bills as well as obtaining credit by false pretences.

On 21st September 1964, he was found guilty by the Bruges Court of Summary Jurisdiction on thirty-six out of forty-one counts and sentenced to a year's imprisonment and a fine of two thousand Belgian francs.

On 17th March 1965, the Court of Appeal in Ghent modified this judgment against which both Delcourt and the prosecution had appealed on 25th and 26th September 1964. It found all the charges to be established including those on which Delcourt had been acquitted at first instance, stressed the seriousness of the offences and referred to his previous convictions. It accordingly increased his principal sentence to five years' imprisonment and further decided that on serving his sentence he should be "placed at the disposal of the Government" for ten years thus granting an application by the prosecution which had been rejected by the Bruges Court.
On 17th and 23rd March 1965, the Applicant appealed to the Court of Cassation against the judgment of the Court of Appeal and against that of the Court at Bruges. He lodged a memorial on 20th May 1965. The Procureur général's department (parquet) at the Court of Appeal did not avail itself of its right to file a counter-memorial. A public hearing took place before the second chamber of the Court of Cassation on 21st June 1965; the Applicant himself was present at that hearing but not his counsel. The Court of Cassation heard the report of Judge De Bersaques, its rapporteur, and then the submissions of the Avocat général, Mr. Dumon, to the effect that the two appeals should be dismissed. In its judgment delivered the same day, after deliberations held in private the Court dismissed the two appeals.

13. In the Application which he lodged with the Commission on 20th December 1965 (No. 2689/65), Delcourt complained of the judgment of 21st September 1964 and the judgments on appeal of 17th March and 21st June 1965. Protesting his innocence and alleging the violation of Articles 5, 6, 7 and 14 (art. 5, art. 6, art. 7, art. 14) of the Convention, he presented numerous complaints almost all of which were declared inadmissible by the Commission on 7th February and 6th April 1967. On this last date, however, the Commission accepted one complaint which related to the question whether the presence of a member of the Procureur général's department at the deliberations of the Court of Cassation was compatible with the principle of "equality of arms" and hence with Article 6 para. 1 (art. 6-1) of the Convention.

In fact, the Advocat général, Mr. Dumon, was present at the Court's deliberations in accordance with Article 39 of the Prince Sovereign's Decree of 15th March 1815 which provides "... in cassation proceedings the Procureur général has the right to be present, without voting, when the Court retires to consider its decision". It may be observed that this Decree has recently been replaced by certain provisions of the new Judicial Code (Act of 10th October 1967) which was not yet in force when the Belgian Court of Cassation dismissed Delcourt's appeals. The above-mentioned provision of the 1815 Decree has been re-enacted, in substance, in Article 1109 of this Code.

14. Following the decision of 6th April 1967 declaring this complaint admissible, a Sub-Commission ascertained the facts of the case.

15. Before the Commission and the Sub-Commission, the Applicant maintained that the presence of a member of the Procureur général's department at the Court of Cassation at the deliberations of 21st June 1965 had violated Article 6 para. 1 (art. 6-1) of the Convention. Without disputing that there is a considerable difference between the respective functions of the Procureur général's department at the Court of Cassation and the Procureur général's department at the courts below, he stressed that in accordance with the law the former does sometimes appear as a party even though this did not happen in this case. Furthermore, the Procureur général's department at the Court of Cassation does, in the view of the Applicant, exercise supervision over the Procureurs généraux at the Court of Appeal (section 154 of the Act of 18th June 1869); a very strong statutory tie, therefore, links him with them, his subordinates, even if in practice the supervision in question is nowadays rather discreet. Again, the Procureur général's department at the Court of Cassation was, in the great majority of cases, the opponent - at any rate potential - of the convicted persons who appealed to the highest court in Belgium: the Procureur général usually submitted that their appeals should be dismissed and his opinion was nearly always adopted - as in this case - by the judges. Then the Applicant stressed that the Procureur général, after having developed his submissions at the

end of the hearing in open court, also participated in its private deliberations from which the parties are excluded. This caused a violation of the rights of the defence and, particularly, of the principle of "equality of arms", as it was defined in the opinions given by the Commission in the Ofner, Hopfinger, Pataki and Dunshirn cases (Applications Nos. 524/59, 617/59, 596/59 and 789/60, Yearbook of the Convention, Vol. 6, pp. 696 to 706 and 730 to 732). The Applicant specified that he did not mean, however, to raise the slightest doubt as to the absolute conscientiousness with which the Court of Cassation fulfils its function or to suggest that the Procureur général's department might attempt unduly to influence the court in any direction other than that of strict justice. In other words, Delcourt was not criticising persons but rather the institution which gave an advantage to the Procureur général's department. Admittedly, the legislation in issue dated back for more than a century and a half and the Belgian Parliament had decided on two occasions that it did not need to amend it. The legislation, however, dated from a time of absolute monarchy and carried that stamp; furthermore, the incorporation of the Convention into the domestic law of a Contracting State necessarily "kept bringing to light new controversial points which had not been noticed by the national legislature".

In his observations of 8th December 1967, almost two years after the lodging of the Application, Delcourt further complained that he had not been able to reply to the submissions of the Procureur général's department at the Court of Cassation: he had not been informed of this submission before the hearing of 21st June 1965 nor did he have the right to the last word at that hearing.

The Applicant applied for the repeal of the legislation under attack and claimed pecuniary damages.

16. On the failure of the attempt made by the Sub-Commission to arrange a friendly settlement, the plenary Commission drew up a Report as required under Article 31 (art. 31) of the Convention. This Report was adopted on 1st October 1968 and transmitted to the Committee of Ministers of the Council of Europe on 5th December 1968. The Commission expressed therein, by seven votes against six, the opinion that Article 6 para. 1 (art. 6-1) of the Convention was not violated in the present case. Two members of the majority expressed a joint concurring opinion and the six members forming the minority expressed their dissent in a joint opinion.

17. After the case was referred to the Court, the Applicant returned to and developed some of his earlier arguments in a document which the Commission appended to its memorial. As regards his main complaint, the Applicant stated that he associated himself with the opinion of the minority of the Commission.

Arguments of the Commission and the Government

18. Unlike the Government, the Commission considers unanimously that Article 6 para. 1 (art. 6-1) of the Convention is applicable in the present case to the proceedings in cassation.

In the view of the majority of the Commission, however, the presence of a member of the Procureur général's department attached to the Court of Cassation at the deliberations of 21st June 1965 was not incompatible with this text. In actual fact, this highest court in Belgium does not deal with the merits (fond) of cases (Article 95 of the Constitution and Section 17 of the Act of 4th August 1832); save in certain exceptional matters, irrelevant to this case, the Court of Cassation's sole function is to decide questions of law. The Procureur général's department is confined to assisting the Court in the exercise of its functions. That department does not, ordinarily, conduct prosecutions and it has not the character of a party (Article 37 of the Prince Sovereign's Decree of 15th March 1815). In almost all cases it is completely independent of the Minister of Justice and has no right of direction over the Procureur général's department which is attached to the courts of first instance and appeal and which is the prosecuting authority in normal cases. The participation of the Procureur général's department at the deliberations of the Court of Cassation does not, therefore, conflict with the principle of "equality of arms", even when it is examined in the light of the precedents set by the Commission (Ofner, Hopfinger, Pataki and Dunshirn cases).

The Delegates of the Commission brought to the attention of the Court the joint dissenting opinion of six members of the Commission: these members of the Commission were of the opinion that the participation of the Procureur général's department at the deliberations of the Court of Cassation did not comply with the requirements of Article 6 para. 1 (art. 6-1).

The Commission did not deem it necessary to express an opinion on the "new" complaints which appeared in Delcourt's above-mentioned observations of 8th December 1967 (paragraph 15 above); in the Commission's view, the Applicant presented them only as special aspects of the principle of "equality of arms" which the majority of the Commission did not consider to be violated.

In its memorial of 22nd May 1969 and at the hearing held on 29th September 1969, the Commission requested the Court:

> "to decide whether or not, in the course of the proceedings before the Belgian Court of Cassation in the Delcourt case on 21st June 1965, there was a violation of Article 6 para. 1 (art. 6-1) of the Convention, insofar as this provision requires a fair trial, by reason of the participation of the representative of the Procureur général's department in the deliberations of the Court of Cassation".

19. The Government does not dispute that a member of the Procureur général's department at the Court of Cassation, after submitting in open court that the Applicant's appeals should be refused, was present in a

consultative capacity at the deliberations of 21st June 1965, but maintains that this did not involve any violation of the right guaranteed by Article 6 para. 1 (art. 6-1) of the Convention.

That highest court in Belgium does not deal with the merits of cases (Article 95 of the Constitution and Section 17 of the Act of 4th August 1832). In spite of its judicial nature, which has been developed through a long evolution, the Court of Cassation fulfils a function which has never ceased to have some relation with the work of the legislature. Established in the interests of the law itself, the Court of Cassation judges judgments and not persons, save in certain exceptional matters which are irrelevant to the present case. It is not therefore the function of that Court to decide disputes concerning civil rights and obligations or to determine criminal charges (décider, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale) within the meaning of Article 6 para. 1 (art. 6-1), as that provision has been interpreted in a series of decisions by the bodies set up to ensure the observance of the Convention.

As regards the Procureur général's department at the Court of Cassation, it must be distinguished fundamentally from the Procureur général's department attached to the courts below. As a general rule, it has not the character of a party (Article 37 of the Decree of 15th March 1815); in the very rare cases where under the relevant law the department assumes the position of a party and institutes prosecutions the Procureur général is not present at the deliberations (Article 39 of the Decree of 15th March 1815). As the Procureur général is not concerned with the question of the guilt of the accused, he is neither their adversary nor the tool of the prosecution. For example, there is nothing to prevent him from submitting to the Court that an appeal in cassation brought by the Procureur général's department at the Court of Appeal should be dismissed or from putting forward on his own initiative grounds for setting aside a conviction; and there are statistics to show that this is often the case. The Procureur général's department attached to the Court of Cassation is not, therefore, in alliance with the Procureur général's department attached to the courts below; besides, the Procureur général at the Court of Cassation exercises, in practice, over that department supervision of a purely doctrinal and scientific nature without the least power of direction (Section 154 of the Act of 18th June 1869). Furthermore, the Procureur général at the Court of Cassation is entirely independent in his relations with the Minister of Justice.

In short, the role of the Procureur général is of the same kind as the functions of the Court of Cassation itself: it consists, ordinarily, in no more than giving technical and objective assistance to the Court in order to ensure the observance of the law, consistency in judicial precedent and good drafting of the judgments. To sum up, the Procureur général attached to the Court of Cassation "forms part of, and is identified with", the Court like the

judges. In these circumstances, the presence of one of the members of the Procureur général's department at the deliberations did not upset the "equality of arms" to the detriment of the Applicant. There was some inequality in this case but it worked to the advantage of Delcourt; unlike him, the Procureur général's departments attached to the lower courts whose decisions were challenged in cassation did not have an opportunity to put forward their arguments in open court on 21st June 1965 (Article 34 of the Decree of 15th March 1815); those departments did not even avail themselves of their right to reply in writing to the memorial filed by the appellant on 20th May 1965. In the Government's view, the Delcourt case cannot be compared with the Pataki and Dunshirn cases; the present case is closer to the Ofner and Hopfinger cases in which the Commission and the Committee of Ministers did not find any violation of Article 6 (art. 6).

For the rest, the legislation in dispute is more than a century and a half old, in which time it has never been subjected to criticism in Belgium by writers or the Bar who are, however, most attentive to everything which relates to the rights of the defence. On two occasions, Parliament decided explicitly to maintain this legislation, the first time without any change (at the time of the passing of the Act of 19th April 1949), the second time in substance and after examination of the question from the point of view of the Convention (Article 1109 of the 1967 Judicial Code). These circumstances raise something like a presumption in favour of the compatibility of the legislation in question with Article 6 para. 1 (art. 6-1); they also show that the participation of the Procureur général's department at the deliberations of the Court of Cassation does not open the door to abuse.

As to Delcourt's "new" complaints, they are inadmissible because they were not included in the original Application. The Government considers that they are in any event unsustainable; in its view, it is just because the Procureur général's department is not a party that its submissions are made at the end of the oral proceedings without being communicated in advance to the parties.

In its memorial of 17th July 1969 and at the oral hearing held on 30th September 1969, the Government asked the Court:

> "to hold that, having regard to the role which Belgian law confers on the Procureur général attached to the Court of Cassation and to his special position in Belgian judicial procedure, his presence in a non-voting capacity at the Court's deliberations as expressly provided for in that legislation is not of such a nature as to violate the principle of 'equality of arms' where, as in the present case, the Procureur général is not himself a party to the proceedings as applicant;
>
> to decide in consequence that, in the proceedings which took place in the Delcourt case before the Court of Cassation of Belgium on 21st June 1965, there was no violation of Article 6 para. 1 (art. 6-1) of the Convention by reason of the presence of the representative of the Procureur général's department, Mr. Dumon, Avocat général, at the deliberations of the judges".

AS TO THE LAW

20. In its decision of 6th April 1967, the Commission declared the Application of Delcourt to be admissible on one point only, that is, whether the participation of a member of the Procureur général's department at the deliberations of the Court of Cassation in Belgium, on 21st June 1965, violated the rights and freedoms guaranteed by the Convention.

In the course of the examination of the merits of the case by the Commission, the Applicant has further complained that he had not been made aware, before the hearing, of the submissions of the Procureur général's department at the Court of Cassation and that he did not have the right to the last word at the hearing.

The Court will rule first on the Applicant's original complaint. It will then see if there is occasion to consider the two "new" complaints made by Delcourt and, if so, whether they should be upheld or dismissed.

21. Only one provision of the Convention requires examination for the purpose of deciding the present case. This is Article 6 para. 1 (art. 6-1) which provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

I. AS TO THE APPLICABILITY OF ARTICLE 6 PARA. 1 (Art. 6-1) OF THE CONVENTION

22. At the oral hearings held on 29th and 30th September 1969, the representatives of the Belgian Government maintained, in substance, that, where the Court of Cassation gives judgment, as in the present case, on an appeal in cassation by one of the parties to the case challenging a judicial decision it does not make a determination either of civil rights or obligations or of a criminal charge against him within the meaning of the text quoted above.

The Commission, on the contrary, was unanimously of the opinion that Article 6 para. 1 (art. 6-1) is applicable for reasons explained to the Court by its Principal Delegate.

23. The Court recognises that it may be difficult to define exactly the field of application of paragraph 1 of Article 6 (art. 6-1). The Commission has delivered on this point a number of decisions in various particular cases - decisions which the Government invoked in its arguments but on which it is not incumbent on the Court to express an opinion in the present case. The Court, too, has had occasion to advert to certain aspects of the problem. It has ruled that Article 6 para. 1 (art. 6-1) does not apply to the procedure which regulates in Austria the examination of applications for provisional release (Neumeister judgment of 27th June 1968, "As to the Law"

paragraphs 22 and 23; Matznetter judgment of 10th November 1969, "As to the Law" paragraph 13). In another case the Court considered, but did not find it necessary to decide, the question whether cassation proceedings ought to be taken into account in appreciating the duration of a hearing for the purpose of applying the provision in Article 6 para. 1 (art. 6-1) requiring a hearing within a "reasonable time" (Wemhoff judgment of 27th June 1968, "As to the Law" paragraphs 18 and 20; see also Neumeister judgment, "As to the Law" paragraph 19). Now, however, the Court is called on to rule on the applicability of Article 6 (art. 6) to proceedings in cassation, though in a different context.

24. The Government's arguments are based, essentially on the words "bien-fondé de toute accusation" ("in the determination of any criminal charge against him") which delimit the scope of the application of Article 6 para. 1 (art. 6-1) in criminal cases. Article 95 of the Belgian Constitution provides that the Court of Cassation "does not deal with the merits of the cases submitted to it". Accordingly, in the Government's view there is not, strictly speaking, a prosecution or a defence before that Court: prosecution and defence cease to exist the moment that the judges dealing with the merits give judgment in final instance, subject to the possibility of their being reborn in the event of the Court of Cassation referring a case back to a lower court after quashing the decision attacked. For the rest, the Court of Cassation does not go into the substance of the offences alleged against accused persons and judges not persons but judgments in regard to which it confines itself to supervising their validity. That Court does not therefore determine criminal charges ("bien-fondé de toute accusation"). This is always the position save only in certain exceptional matters which are irrelevant to the present case.

25. The Court cannot accept this view. Judicial decisions always affect persons. In criminal matters, especially, accused persons do not disappear from the scene when the decision of the judges at first instance or appeal gives rise to an appeal in cassation. Although the judgment of the Court of Cassation can only confirm or quash such decision - and not reverse it or replace it - that judgment may rebound in different degrees on the position of the person concerned. He loses his status of a convicted person or, as the case may be, the benefit of his acquittal, at any rate provisionally, when a decision is set aside and the case is referred back to a trial court. A judgment in cassation sometimes has even more direct repercussions on the fate of an accused. If the highest court dismisses the appeal in cassation, the acquittal or conviction becomes final. If the Court of Cassation allows the appeal without ordering the case to be sent back, because, for example, the facts which led to the conviction do not constitute an offence known to the law (see Article 429 of the Code of Criminal Procedure and the judicial decisions given thereon), then by its own sole decision it puts an end to the prosecution.

Furthermore, the term "bien-fondé", which is found in the French text of Article 6 para. 1 (art. 6-1), refers not only to the accusation being well-founded in fact but also to its being well-founded in law. Thus, the supervision of validity which the Court of Cassation undertakes may lead it to hold that the lower courts, when examining the facts on which the charge was grounded, have acted in breach either of criminal law or of forms of procedure which are of an essential nature of are laid down on pain of nullity of the decision (see, for example, Section 17 of the Act of 4th August 1832); at least in the first of these cases the prosecution proves to be undoubtedly unfounded. Even the literal interpretation put forward by the Government cannot, therefore, produce the result that proceedings in cassation lie completely outside the scope of Article 6 para. 1 (art. 6-1).

Besides, the Court notes that, in fact, the English text of Article 6 (art. 6) does not contain any term equivalent to "bien-fondé"; it uses the much wider expression "determination of ... any criminal charge" (décision sur toute accusation en matière pénale). Thus, a criminal charge is not really "determined" as long as the verdict of acquittal or conviction has not become final. Criminal proceedings form an entity and must, in the ordinary way terminate in an enforceable decision. Proceedings in cassation are one special stage of the criminal proceedings and their consequences may prove decisive for the accused. It would therefore be hard to imagine that proceedings in cassation fall outside the scope of Article 6 para. 1 (art. 6-1).

Article 6 para. 1 (art. 6-1) of the Convention does not, it is true, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (art. 6) (see, mutatis mutandis, the judgment of 23rd July 1968 on the merits of the case "relating to certain aspects of the laws on the use of languages in education in Belgium", page 33, in fine). There would be a danger that serious consequences might ensue if the opposite view were adopted; the Principal Delegate of the Commission rightly pointed to those consequences and the Court cannot overlook them. In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision (see, mutatis mutandis, the Wemhoff judgment of 27th June 1968, "As to the Law" paragraph 8).

26. Therefore, Article 6 para. 1 (art. 6-1) is indeed applicable to proceedings in cassation. The way in which it applies must, however, clearly depend on the special features of such proceedings. Thus, in order to determine whether Delcourt has been a victim of a violation of Article 6 (art. 6), it is necessary to examine what are, both in law and in practice, the

functions exercised in a case of this kind by the Belgian Court of Cassation and by the Procureur général's department attached to that Court.

II. AS TO THE PRINCIPAL COMPLAINT OF THE APPLICANT

27. The Applicant complains in the first place of the fact that a member of the Procureur général's department attached to the Court of Cassation, having made his submissions in open court, took part in its deliberations on 21st June 1965. It is beyond doubt that this participation was in conformity with the legislation in force in Belgium at that time; for under Article 39 of the Prince Sovereign's Decree of 15th March 1815 "in proceedings in cassation, the Procureur général (had) the right to be present, but without voting, when the Court (retired) to consider its decision". The Court is therefore called upon to judge, in the first place, the compatibility of Article 39 of the Decree of 15th March 1815 with Article 6 para. 1 (art. 6-1) of the Convention.

28. In the course of their respective submissions, the Commission and the Government referred mainly to the principle known as "equality of arms". The Court, however, will examine the problem by reference to the whole of paragraph 1 of Article 6 (art. 6-1). The principle of equality of arms does not exhaust the contents of this paragraph; it is only one feature of the wider concept of fair trial by an independent and impartial tribunal (see Neumeister judgment of 27th June 1968, "As to the Law" paragraph 22).

29. In the present case, the two appeals to the Court of Cassation were both instituted by Delcourt; under Belgian law, the respondent party was not the Procureur général's department at the Court of Cassation but the Procureur général's departments at whose behest the lower courts had pronounced the decisions under appeal, that is, the Procureur du Roi at Bruges and the Procureur général attached to the Court of Appeal at Ghent. The Applicant could thus claim, under Article 6 para. 1 (art. 6-1) of the Convention, full equality of treatment as against the Procureur général's departments at those courts. In fact the undisputed information given to this Court shows that the Applicant did not suffer from any discrimination in this respect. Indeed, the Procureur général's departments at the Court of First Instance and the Court of Appeal did not even avail themselves of their right to reply in writing to Delcourt's memorial - and the relevant legislation did not even permit them to appear at the hearing before the Court of Cassation - still less be present at the deliberations.

In contrast to the Procureur général's department at the courts below, the Procureur général's department at the Belgian Court of Cassation does not ordinarily conduct public prosecutions, nor does it bring cases before that court, nor does it either have the character of respondent and it "cannot", therefore, "be considered as a party" (Article 37 of the Decree of 15th March 1815). This situation only changes in certain exceptional matters

which are irrelevant to the present case, and in those instances the Procureur général's department at the Court of Cassation is not present at the deliberations of the judges of the court.

Yet it does not, however, necessarily follow from what precedes that Delcourt's complaints are unfounded. The Court must therefore make a careful examination of the real position and functions of the Procureur général's department attached to the Court of Cassation.

30. A series of elements allows one to understand the point of view of the Applicant and the opinion of the minority of the Commission.

First, the clear distinction which must be drawn, according to the Belgian Government, between the Procureur général's department at the Court of Cassation and the Procureur général's department at the lower courts, does not always appear very evident from the legislative texts. The same names, such as Procureur général's department (ministère public), are used to designate different institutions - which easily causes confusion. Moreover, the departments attached to the courts of first instance, of appeal and of cassation seem to constitute, in certain aspects, one single corps. Thus, Section 154 of the Act of 18th June 1869 (replaced recently by Article 400 of the 1967 Judicial Code) provides that the Procureur général at the Court of Cassation "shall exercise supervision over the Procureurs généraux attached to the courts of appeal", and it is only an examination of the practice which reveals that this supervision does not involve any power to intervene in the conduct of given cases but merely to give general opinions on matters of doctrine.

On a superficial glance at the situation, one might go so far as to wonder if the above-mentioned distinction really reflects the true position. The Procureur général's department at the Court of Cassation sometimes acts as the moving party: the task, for example, falls to it sometimes to institute a prosecution or disciplinary proceedings against judges (see also Article 90 of the Constitution concerning the indictment of ministers on impeachment). Furthermore, its members are sometimes recruited from among the members of the Procureur général's department at the courts below. Therefore, some litigants may quite naturally be inclined to view as an adversary a Procureur général or an Avocat général who submits that their appeals in cassation should be dismissed. They may be all the more inclined to do so when they find themselves deprived of any real debate before the highest court because the Procureur général's department at the Court of Appeal only very rarely makes use of the right of reply – in any event restricted - which the law confers on it in proceedings in cassation. And one may imagine that such litigants can have a feeling of inequality if, after hearing a member of the Procureur général's department at the Court of Cassation make, in open court, final submissions unfavourable to their pleas, they see him withdraw with the judges to attend the deliberations held in the privacy of chambers.

On this last point, Belgian legislation may well appear at first sight to be "unusual" - to recall a term used by one of the representatives of the respondent Government - and it does not seem to have any equivalent to-day in the other member States of the Council of Europe, at least in criminal cases. It may be noted, moreover, that the Avocat général at the Court of Justice of the European Communities, even though there are analogies between his functions and those of the Procureur général at the Belgian Court of Cassation, does not take part in the deliberations.

31. The preceding considerations are of a certain importance which must not be underestimated. If one refers to the dictum "justice must not only be done; it must also be seen to be done" these considerations may allow doubts to arise about the satisfactory nature of the system in dispute. They do not, however, amount to proof of a violation of the right to a fair hearing. Looking behind appearances, the Court does not find the realities of the situation to be in any way in conflict with this right.

32. First, it is established that the Procureur général's department at the Court of Cassation functions wholly independently of the Minister of Justice, save in the exceptional matters which are irrelevant to this case. Thus, the Minister has no power to compel the Procureur général to make his submissions one way or the other, while he has the power to direct the institution of prosecutions by the Procureur général's departments attached to the courts of first instance and appeal.

Furthermore, as has already been observed, the Procureur général at the Court of Cassation exercises supervision over the officers of the Procureur général's departments at the courts of first instance and appeal only in regard to matters of doctrine and does not give them injunctions or instructions. Thus, he is not entitled to instigate, or prevent the institution of, a prosecution before the lower courts or to intervene at any stage in the conduct of a case already brought before them, or to order the Procureur général's department at a court of appeal to lodge or withdraw an appeal in cassation.

33. Nor is the Procureur général at the Court of Cassation the virtual adversary of the accused whose conviction or acquittal may lead to an appeal in cassation; nor does he become their actual adversary when he submits in open court that their arguments should not be accepted. No doubt it is equally true that the officers of the Procureur général's department at the courts of first instance and appeal do not have the character of public accusers; indeed, Article 4 of Section VIII of the Decree of 16th-24th August 1790 so states expressis verbis. They also are bound to serve the public interest in all objectivity and, in particular, to ensure the observance of the laws concerned with public order; and they are to be considered parties only within the formal procedural meaning of the term. Their task, however, is in no way to be confused in criminal matters with that of the Procureur général's department at the Court of Cassation. Their task, in

effect, is, before all else, to investigate and prosecute criminal offences in order to protect the safety of society (see, for example, Articles 22 and 271 of the Code of Criminal Procedure). The Procureur général's department at the Court of Cassation, on the other hand, upholds a different interest, that which is concerned with the observance by the judges of the law and not with the establishment of the guilt or innocence of the accused.

Incidentally, the Procureur général attached to the Court of Cassation exercises in civil matters functions close to those which he exercises in criminal matters. Yet no one could ever seriously suggest that he becomes the opponent of a litigant with whose case his submissions do not agree.

34. Admittedly, even in the absence of a prosecuting party, a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage. A close examination of the legislation in issue as it is applied in practice does not, however, disclose any such result. The Procureur général's department at the Court of Cassation is, in a word, an adjunct and an adviser of the Court; it discharges a function of a quasi-judicial nature. By the opinions which it gives according to its legal conscience, it assists the Court to supervise the lawfulness of the decisions attacked and to ensure the uniformity of judicial precedent.

Examination of the facts shows that these considerations are not abstract or theoretical but are indeed real and actual. The statistics cited at the hearing on 30th September 1969 are very striking on this point; they show that the Procureur général's department at the Court of Cassation frequently either submits that appeals in cassation against a decision of acquittal brought by the Procureur général's department at the courts of first instance or appeal should be dismissed or an appeal by a convicted person should be allowed, or even raises, ex officio, grounds which a convicted person has not relied on, has put forward out of time or has not formulated with sufficient clarity.

35. Nor could the independence and impartiality of the Court of Cassation itself be adversely affected by the presence of a member of the Procureur général's department at its deliberations once it has been shown that the Procureur général himself is independent and impartial.

36. One last point is that the system now challenged dates back for more than a century and a half. While it is true that the long standing of a national legal rule cannot justify a failure to comply with the present requirements of international law, it may under certain conditions provide supporting evidence that there has been no such failure. The Court is of the opinion that this is the case here. In this connection, the Court notes that on two occasions a parliament chosen in free elections has deliberately decided to maintain the system, the first time unchanged (preparatory work to the Act of 19th April 1949), the second time in substance and after studying the question in the context of the Convention (preparation of the new Judicial Code). Furthermore, the propriety and fairness of the rule laid down in

Article 39 of the Decree of 15th March 1815 and then in Article 1109 of the 1967 Judicial Code - as it operates in practice - appears never to have been put in question by the legal profession or public opinion in Belgium. This wide measure of agreement would be impossible to explain if the independence and impartiality of the men on whose shoulders fell the administration of this institution at the Court of Cassation were doubted in Belgium, if the worth of their contribution to the body of decisions of the highest court were disputed or if their participation at the deliberations of the judges had been thought in any single case to open the door to unfairness or abuse.

37. The Court therefore arrives at the conclusion that the system provided for in Article 39 of the Decree of 15th March 1815 as applied in practice was not incompatible with Article 6 para. 1 (art. 6-1) of the Convention.

38. So far as concerns the application of that system in the present case, the Court finds that there are no grounds for holding that the Procureur général's department at the Court of Cassation failed to observe, to the detriment of Delcourt, at the hearing or at the deliberations, the duty to be impartial and independent which is inherent in its functions.

III. AS TO THE "NEW COMPLAINTS" OF THE APPLICANT

39. The Applicant does not confine himself to attacking the participation of an avocat général at the deliberations of the Court of Cassation; he further complains that he had no opportunity to reply to the final submissions of the Procureur général's representative because they were not communicated to him before the hearing of 21st June 1965 at which, moreover, he did not have the right to say the last word.

40. The Belgian Government contests the admissibility of these "new complaints" stressing that Delcourt failed to raise them before the examination of the merits of the case by the Commission.

This objection must be set aside. While these grounds were doubtless not mentioned explicitly in the Application or the first memorials of the Applicant, they had an evident connection with those contained therein. From the very beginning, Delcourt claimed that the presence of a member of the Procureur général's department at the deliberations of 21st June 1965 had violated Article 6 para. 1 (art. 6-1) of the Convention. His "new complaints", which were formulated later, concerned the submissions of that same member immediately prior to his participation in the deliberations. These complaints thus also related to the role of the Procureur général's department attached to the Court of Cassation and are intimately linked with the matters which formed the subject of Delcourt's original complaint accepted by the Commission in its decision of 6th April 1967; indeed, they were adduced by him essentially in support of that complaint. Moreover, the

Commission itself so interpreted the "new complaints" in its Report. Accordingly, the Court considers that it would be unduly formalistic and therefore unjustified not to take account of these elements in the case.

41. The Applicant's "new complaints" must, on the other hand, be rejected as ill-founded. The fact that the Procureur général's department at the Court of Cassation expresses its opinion at the end of the hearing, without having communicated it in advance to the parties, is explained by the very nature of its task as already described by the Court in pronouncing upon Delcourt's principal complaint. Article 6 (art. 6) of the Convention does not require, even by implication, that an accused should have the possibility of replying to the purely legal submissions of an independent official attached to the highest court in Belgium as its assistant and adviser.

42. Having regard, therefore, to the nature of the proceedings before the Belgian Court of Cassation, it has not been established that the Applicant did not receive a fair hearing before that court.

FOR THESE REASONS, THE COURT

Holds, unanimously, that in the present case there has been no breach of Article 6 para. 1 (art. 6-1) of the Convention.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this seventeenth day of January, one thousand nine hundred and seventy.

Sir Humphrey WALDOCK
President

M.-A. EISSEN
Registrar