Part I

Introduction

I. The scope and objective of this work

Immunities are generally granted to certain legal bodies in order to protect them from outside interference and to ensure that they can function effectively. Immunities may be identified as falling into two basic groups. The first one would contain those immunities which are introduced to fulfil obligations under public international law. These include State immunity, but also the immunity of Heads of State, foreign ministers, diplomats, consuls and other State officials, as well as international organisations and its staff members. The second group consists of immunities which are granted to legal bodies or persons at the domestic level. These may be Members of Parliament, judges or public authorities such as the police or the social services.

The term “immunity” is used primarily to denote an exemption from legal process. The aspect of immunity which is relevant to this work is immunity from suit, i.e. an exemption from jurisdiction of domestic courts with regard to civil proceedings. Immunity from suit means an attempt by a claimant to bring a claim against the holder of that immunity will prove to be unsuccessful. The suing person will be denied access to court because his or her claim is barred by immunity. This raises the question whether immunities are compatible with the fundamental rights and freedoms laid down in the European Convention on Human Rights (hereafter “the Convention”), namely the right of access to court under Article 6 (1). This work aims to investigate the conflict that arises between the right of access to court and immunities. The jurisprudence of the European Court of Human Rights in Strasbourg (hereafter “the Court”) on the above conflict has developed considerably in the past years, and the rising number of cases which have been brought before the Court suggests that there appears to be a current trend to challenge immunities under the Convention.

Although not expressly mentioned, Article 6 (1) includes the right of access to court which has been “read” by the Court into that provision ever since
the case of Golder v. the United Kingdom. The Court has however established that the right of access to court is not absolute and may be subject to limitations if the restriction pursues a legitimate aim, is proportionate and does not have the effect of extinguishing the applicant’s right of access to court altogether. That test is applied uniformly to all kinds of immunities.

The present work is divided into three parts. The first part gives a general introduction to the right of access to court under Article 6 (1) as relevant in the present context, and explains the applicability of Article 6 (1) and the different criteria which the Court applies in order to establish whether immunities violate the right of access to court.

The second part will then turn to international immunities. Starting with the law of State immunity, it will discuss the Court’s jurisprudence as well as alternative approaches suggested by international lawyers and judges. It attempts to suggest general criteria for dealing with the conflict between international immunities and Article 6 (1), a conflict which involves complex legal questions not only under the Convention, but also in general public international law.

The third and last part will then discuss the case-law on the conflict between domestic immunities and the right of access to court. Unlike international immunities, domestic immunities may be categorised into “immunity from liability” (a substantive limitation) or “immunity from suit” (a procedural limitation). Whereas the categorisation as a substantive limitation means that there is no “civil right” (with the consequence that Article 6 (1) of the Convention is strictly speaking not applicable), procedural limitations interfere with Article 6 (1) and need to be justified. The Court has based its jurisprudence on that distinction with – as will be argued – the consequence of a series of controversial judgments and a case-law which becomes increasingly inconsistent. The present work suggests an alternative approach which attempts to facilitate dealing with domestic immunities.

II. The right of access to court under Article 6 (1) of the Convention: the case of Golder v. the United Kingdom

The right to a fair trial (Article 6) occupies a central place in the Convention system and is a basic element of the notion of the rule of law. The first paragraph of this provision provides that:

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1 Jacobs and White, European Convention, p. 151. The right of access to court is also enshrined in other international human rights instruments such as Article 10 of the Universal Declaration of Human Rights of 1948, Article 14 of the International Covenant on Civil and Political Rights of 1966 and Article 8 of the Inter-American Convention on Human Rights of 1969.