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Judicial Deliberations in the European Court of Human Rights

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1 Introduction

In his book *Judicial Deliberations*, Professor Mitchel Lasser has created an intriguing framework for the comparative analysis of judicial discourse. An important finding of the book is that judicial legitimacy is relative in character.¹ Courts use a wide range of argumentative methods and techniques, varying from highly formalistic and oracular ways of reasoning to extremely open-textured and rather rhetoric modes of argumentation. Lasser shows that each of these methods can attribute to the legitimacy of a court, providing that the methods are embedded in a legal culture and institutional context which can logically explain and justify their use. Lasser seems to argue that legitimacy requires a court to model its modes of reasoning in such a way as to provide a proper and effective response to its own particular institutional or constitutional “problematic”.² Indeed, he even explains the contextual character of legitimacy by the fact that the courts’ “problematic” will vary for each legal system. The French courts, for example, “need to maintain legislative supremacy while simultaneously encouraging and controlling judicial interpretive authority”, whereas the American judicial system “has to solve the problem of engaging publicly in a comprehensive mode of argument that both legitimates and controls judicial lawmaking”.³

Lasser’s hypothesis of the contextual character of judicial legitimacy is fascinating and attractive, but it is also controversial. In legal theory, after all, there is a strong conception that something more can be said about judicial legitimacy than that it is fully determined by the response the court is able to give to its “problematic”.⁴ Other contributors to this book have paid close attention to the legal-theoretical questions raised by Lasser’s hypothesis, explaining a number of approaches that legal science has taken towards the issue of judicial legitimacy. Perhaps, thus, it is possible to criticise Lasser for his judicial relativism. And yet, it is interesting to take the contextual approach seriously and to further explore the hypothesis that the legitimacy of a court can be explained by the extent to which it is able to respond to its problematic. This part of the present book does attempt to do so by taking the European Court of Human Rights as a case study. The paper by Garlicki, judge to the ECtHR, pro-

¹ Lasser 2004, especially ch. 10.

² This is a rather different point of departure than that of voluntary compliance; in this definition, a court has the power of legitimacy if it has “the ability to command acceptance and support from the community so as to render force unnecessary” (Helfer/Slaughter 1997, p. 278). Lasser’s definition seems to reach further than this, and explains by means of his definition of legitimacy how such voluntary compliance is attained.

³ Lasser 2004, p. 300.

⁴ Lasser places a strong focus on the creation of legitimacy by means of judicial discourse. It is questionable whether his definition sufficiently includes institutional factors that determine legitimacy, such as the independence and impartiality of the court, and procedural factors such as equality of arms, the public nature of court hearings, and the right to be heard (on these factors, see e.g. Sturm 1991, pp. 1390-1409). Nonetheless, the fact that Lasser attempts to apply the legitimising factors he has found for France and the US to a third legal system, the European Community, would seem to indicate that he finds that at least some factors could have more general significance. Particularly revealing in this regard is the surprise that Lasser shows when he finds that the ECJ, though not showing all the particular characteristics of either the French or the American judicial discourse, still manages to function effectively and authoritatively: “The ECJ has forged a distinctive mode of judicial argument, one whose force and legitimacy may well lie not only in its semiotic allusions to its elite republican French foundations, and not only in its gestures towards a more American mode of democratically argumentative discussion, but also, and quite simply, in its shorthand acknowledgement of the dizzyingly complex and controverted institutional and systemic dilemmas that are routinely placed before it” (p. 359).

vides a general overview of a number of interesting contextual factors that might explain the particular mode of argumentation that is chosen by his Court, and which may contribute to our insight in the general relation between such contingencies and judicial legitimacy. An interesting question is, however, whether the argumentative and institutional elements discussed by Judge Garlicki really and adequately respond to the Court's problematic, and to what extent these elements are sufficient to guarantee the Court's legitimacy. Michiel van Emmerik and Tom Barkhuysen argue in their paper that this may be doubted for a number of institutional issues. In this paper, I will argue the same as regards a selection of argumentative techniques employed by the ECtHR. In discussing these techniques, I will build on Judge Garlicki's description of the problematic of the Court, which I will summarise and in some respects add to in § 2. In § 3, I will pay attention to the highly flexible "case-by-case"-approach which characterises the ECtHR's judicial discourse, and to the methods the Court has developed to pay respect to the position of the individual complainant. In § 4, I will explore a number of specific principles and methods of interpretation used by the ECtHR. In both sections, I will discuss whether the Court has successfully used the respective argumentative techniques to respond to its problematic, paying particular attention to the developments in its case-law. Finally, in § 5, I will raise the question if any conclusions may be derived from this discussion about the legitimacy of the European Court of Human Rights.

2 The problematic of the European Court of Human Rights

2.1 *The position of the European Court of Human Rights: supranational or constitutional?*

The European Court of Human Rights is, in many respects, a special court. In principle, and from a purely legal perspective, the ECtHR must be regarded as a supranational court. The Convention does not have direct effect and its status in the State Parties depends on their constitutional systems and legislative choices.⁵ The State Parties to the European Convention have recognised the ECtHR's power to give binding judgments regarding individual complaints or interstate applications indeed, yet each judgment is only legally binding for the State Party that is a party to the case.⁶ The states themselves decide how they will execute the Court's judgments.⁷ Although there certainly is some legal debate regarding the presence of *erga omnes* effect, and some authors even have stressed that the interpretations given by the ECtHR are incorporated in the text of the Convention, the legal effect of the Strasbourg case law is thus formally limited to the concrete circumstances of one single case.⁸ Thus, the legal impact of the Court's decisions on the member states would seem to be rather limited.

⁵ Cf. Ress 2005, p. 374.

⁶ See Article 46 ECHR.

⁷ The Court may only give declaratory judgments, concluding whether or not a state has violated the Convention. Cf. Ress 2005, p. 372; see, however, the case of *Papamichalopoulos / Greece*, in which the Court provided some minimum requirements that a state has to meet when executing the judgment (ECtHR, judgment of 24 June 1993, Series A, Vol. 260B). In several more recent cases, moreover, the Court has stated clearly what action was required; see e.g. ECtHR, judgment of 8 April 2004, *Assanidze / Georgia*, Reports 2004-II and ECtHR, judgment of 8 July 2004, *Ilaşcu and Others / Moldova and Russia*, Reports 2004-VII. However, the Court has often stressed that it is the primary responsibility of the states to implement the guarantees provided by the Convention, and this responsibility is accompanied by the freedom to do so in a way that is suitable to the circumstances in each particular country. See already ECtHR, judgment of 23 July 1968, *Belgian Linguistics Case*, Series A, Vol. 6, on p. 31 ("... the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention"). To that extent, the obligations under Article 46 of the Convention are similar to the obligations arising from Article 1.

⁸ If a state refuses to accept a judgment or interpretation given in a case to which it was not a party, there are no means to force the state to accept it. The only way is that an individual citizen lodges an application regarding the same matter, thus triggering the Court to hand down a judgment that is binding for the state in question. On the incorporation of interpretations

It is equally true, however, that it is the Court that will decide if a certain state action or legislative rule is compatible with the Convention.⁹ In practice, the status of the Court's case-law reaches far beyond the individual case at hand.¹⁰ As will be explained in the following sections, the Court has by now created an impressive body of case-law in which the rights contained in the Convention are interpreted and applied in an authoritative manner.¹¹ Even though the ECtHR lacks a number of essential characteristics of national constitutional courts, such as the possibility to decide cases about the division of powers between the branches of government, several scholars have therefore argued that the ECtHR can by now be characterised as a constitutional or at least a semi-constitutional court.¹² This classification is of great importance. As has been explained by Claes with respect to the ECJ, the characterisation of a supranational court as a constitutional court has an immediate complicating effect on the dialogue with national constitutional courts.¹³ The "new" constitutional court may be regarded as a rival court, and the natural reaction of the national constitutional court may be to resist any debatable judgments the newcomer hands down.¹⁴ In addition, a "new" court such as the ECtHR is not logically embedded in the national constitutional systems and it has no organically and historically developed, natural function. Rather, it is forced upon the State Parties as an alien body, and it may therefore be difficult to fit in their legal and constitutional structures. It is not surprising, for that reason, that national legal systems often have difficulties to cope with judgements handed down by the Court. Conversely, it may be difficult for the ECtHR to find approaches and methods that will guarantee that its judgments become a logical and natural part of each of the legal systems that come under its jurisdiction.

These difficulties are of particular importance, as in recent years a certain resistance by national courts has become visible with respect to the ECtHR. In Germany, the *Bundesverfassungsgericht* has decided in 2004 that, in principle, the European Convention of Human Rights as explained and interpreted by the ECtHR forms part and parcel of German Law and has to be placed on about the same level as the German Basic Law.¹⁵ However, the *Bundesverfassungsgericht* stressed in the same judgment that it still considers the German Basic Law to be of higher order than the Convention, which means that in situations of real conflict between a Strasbourg interpretation of the Convention and one of the rights guaranteed by the Basic Law, the Basic Law will prevail.¹⁶ Although the judgment is of-

of the ECtHR and the *erga omnes* effect of the Court's interpretations, see in particular Beljin 2005, p. 558/559; Ress 2005, p. 374; Martens 2000, p. 756; and Hey/De Lange/Mevis 2005, p. 6.

⁹ See e.g. ECtHR, judgment of 7 December 1976, *Handyside / UK*, Series A, Vol. 24, § 49 ("The Court, which ... is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision").

¹⁰ See the references in footnote 8 *supra*.

¹¹ Cf. Ost 1992, p. 284.

¹² Cf. Wildhaber 2002, p. 161; Greer 2006, p. 172/173.

¹³ Claes 2006, p. 401.

¹⁴ *Id.*

¹⁵ Order of the German Constitutional Court, BVerfG, 2 BvR 1481/04 of October 14, 2004, especially §§ 49/50; cf. also Papier 2006, p. 1 and Beljin 2005, p. 557. On the importance and far-reaching character of this judgment for the German constitutional order, see e.g. Schaffarzick 2005, p. 861.

¹⁶ Cf. e.g. § 35 (English translation provided by the German Constitutional Court): "The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted." German scholars have commented that this judgment may not be as revolutionary as it seems. Schaffarzick has stressed, for example, that conflicts between the interpretation by the ECtHR and the national law will be rare, and that, moreover, Article 53 of the Convention leaves sufficient scope for "a higher level of protection" of fundamental rights on the national level. Since the Constitutional Court decided that deviations from the ECtHR's case-law would only be permissible if such would be necessary to protect constitutional rights in Germany, there would be no real conflict between the Convention and the national law (Schaffarzick 2005, p. 863). Dörr has argued that the issue of a different national interpretation or application will in fact only occur if the facts of the case have changed (Dörr 2006, p. 1097). Furthermore, the president of the German Constitutional Court, Hans-Jürgen Papier, has

ten read in a favourable manner, underlining that the *Bundesverfassungsgericht* attributed a higher status to the Convention than could be expected from a constitutional perspective, this still means that the Convention is accorded lower status than the national constitution. This is important, since the German decision appears to have raised the question in other states whether the decisions of the Court should really always be implemented.¹⁷ The superior status of the Court's judgments is thus far from firmly established, which clearly distinguishes the position of the Court from that of national constitutional courts. Hence, an important part of the Court's problematic is that it will have to deal with a constant tension between its own, insecure position as a highest court in the field of fundamental rights, and the more or less reluctant acceptance of its interpretations by the various State Parties. Unsurprisingly, this situation has strongly influenced the ECtHR's judicial discourse.¹⁸

2.2 Admissibility criteria: exhaustion of domestic remedies

An additional formative factor is provided by the admissibility criteria included in the Convention. These criteria mirror the supranational and subsidiary function of the European Court of Human Rights and the primary role that is played by the State Parties.¹⁹ The ECtHR can only admit cases if the applicant has exhausted all (effective) national remedies available.²⁰ This has the important result that all cases that have to be decided by the Court already have been discussed extensively on the national level, often even on the level of a constitutional court. The facts of the cases usually have been well established (although there are notorious exceptions in cases relating to torture and inhuman or degrading treatment) and all relevant legal arguments have been exchanged. This particular element has two major repercussions for the Court's judicial position. Firstly, it means that the Court will often be confronted by mature cases on which a rich body of national judgments, briefs and reports of oral arguments is available. This makes it rather easy for the Court to distinguish national particularities and sensitivities, and to make sense of the legal intricacies disclosed by the individual case. To this extent, the subsidiary position, combined with its status as a supranational court, facilitates the Court's decision making role. Secondly, however, it may also prove to be difficult for the Court to distance itself from the national judgments and opinions and to take a fresh look at the case. Especially if a case is elaborately and carefully decided on the national level, there does not seem to be much room left for the Court to deviate from the national highest court's findings. One might even expect that the Court would mostly respect the national decisions, except for those cases where the

stated that the judgment has resulted in "a considerable increased effect of the Convention as compared with previous practice", rather than the opposite (Papier 2006, p. 2; cf. also Dörr 2006, p. 1092). Such arguments notwithstanding, it may be remarked that the result of the judgment still is that real interpretive clashes between the German Constitutional Court and the ECtHR will not be solved in favour of the supranational court, but in favour of the (lower) national court. As Papier puts it: "... the Basic Law ... has theoretically the final say" (Papier 2006, p. 2; see also Hartwig 2005, p. 875). For this reason and to this extent, the judgment discloses potential rivalry between the two highest courts.

¹⁷ See "Das tut mir weh", interview with the president of the ECtHR, Luzius Wildhaber, *Der Spiegel*, 15 November 2004, p. 52, disclosing that Turkey and Poland have actually approached the ECtHR with this question. It is also important to note that the Convention, different from EC law, does not have direct effect in the State Parties. See also Ress 2005, p. 376, who mentions that the Austrian Constitutional Court has stated that "there is still a difference between the Convention as a part of the constitution and the Convention as an international treaty interpreted by the ECtHR. Within the domestic legal order, the Convention is only one element in the mosaic of different constitutional provisions and its interpretation in that context may differ considerably from an interpretation based on the Convention alone".

¹⁸ See in this respect also Helfer/Slaughter 1997, p. 313/314, stating that it is important for the legitimacy of a supranational court to demonstrate its independence from national political authorities, and to find against governments in big cases, but members of such courts may feel that their authority and legitimacy depends on not antagonising those governments on which their power ultimately depends – in their view, accommodationist pressures are likely to be particularly strong.

¹⁹ See, in particular with regard to the requirement of exhaustion of domestic remedies, ECtHR, judgment of 16 September 1996, *Akdivar / Turkey*, Reports 1996-IV, § 65.

²⁰ Article 35 § 1 of the Convention and ECtHR, judgment of 18 June 1971, *De Wilde, Ooms and Versyp / Belgium*, Series A, Vol. 12, § 50.

national procedure appears to be evidently flawed or ineffective.²¹ This is not entirely true in practice, as the Court will always review the (substantive) reasonableness of an interference with a fundamental right.²² Nonetheless, the exhaustion requirement does seem to have the effect that the Court's review is often as much (or even more) directed at procedural as at substantive issues.²³ Thus, the Convention's admissibility criteria, as an expression of the Court's subsidiary role, clearly influence the ECtHR's judicial discourse.

2.3 Differences between the States Parties

Closely related to the problematic constituted by the Court's supranational role, is the need for the Court to take account of a wide variety of legal and cultural particularities of the State Parties. The forty-six states that are members of the Council of Europe are far from homogeneous, and will each sport a problematic of their own.²⁴ The eastern European states still wrestle with their communist past, which brings about fundamental rights claims that are hardly conceivable in western European states – varying from the design of lustration to problems regarding the ownership of nationalised property.²⁵ In a state such as Turkey, difficulties with regard to the position of religion in a secular state will occur which will not be visible in most other member states.²⁶ Finally, even between western European states, there are important differences, for example with regard to the societal and legal role that is attributed to labour unions. In addition to such cultural, social and historical differences, there are also clear legal differences between States Parties. The Court has been confronted with complaints about the way the highly specific French court system functions, for instance as regards the role and opinions of the government commissioner or the independence of members of the *Conseil d'Etat*,²⁷ but it has also had to judge about UK cases regarding the power of the Secretary of State to decide

²¹ Wildhaber finds that the Convention has a strong procedural bias – practically all the Convention guarantees contain an implied positive obligation to set up and use procedures that make it possible to effectively address and repair violations at the national level (2002, p. 161). Nevertheless, Wildhaber explains that even in cases where fundamental flaws are visible, the ECtHR is confronted with a dilemma: “should it examine the substantive complaint at the root of the application, or confine itself to establishing a procedural violation?”

²² The intensity of this review depends on the margin of appreciation that is left to the states. As the margin of appreciation doctrine is elaborately discussed in the contribution of Judge Garlicki to this volume, no further attention will be paid to the doctrine in this paper.

²³ Exemplary for the approach adopted by the Court is the case of *Maurice / France*, which concerned the highly sensitive issue of the award of damages in wrongful life cases (ECtHR, judgment of 6 October 2005, Reports 2005-IX). In this case the Court did only lightly touch on the substantive issue whether the specific French regulation of the issue complied with the right to respect for private life; instead, it focused on the fact that the issue had been thoroughly debated in the French Parliament, and account had been taken of all relevant legal, ethical and social considerations. The Court found that “Parliament based its decision on general-interest grounds, and the validity of those grounds cannot be called into question by the Court” (§ 121). Finally, it held: “It is certainly not for the Court to take the place of the national authorities in assessing the advisability of such a system or in determining what might be the best policy in this difficult social sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation ... Consequently, there is no serious reason for the Court to declare contrary to Article 8, in either its positive or its negative aspect, the way in which the French legislature dealt with the problem or the content of the specific measures taken to that end. ...” (§§ 123/124). A similar approach is visible in ECtHR, judgment of 10 April 2007 (GC), *Evans / UK*, not yet published, appl. no. 6339/05, §§ 86 ff.

²⁴ See in particular Greer 2006, p. 78ff. Some commentators have argued, however, that the success and effectiveness of the European Court of Human Rights can partly be explained by the relative homogeneity among the European states (e.g. Bernhardt 1987, p. 299/300). It should be stressed, however, that Bernhardt wrote this before the strong expansion of the Council of Europe to the former communist states and Turkey (cf. Helfer/Slaughter 1997, p. 336). Even leaving this issue aside, however, it seems true that there are many issues on which opinions between the various states diverge.

²⁵ Cf. Wildhaber 2002, p. 163 and Greer 2006, p. 105ff. For illustrations of the way the Court deals with cases which obviously stem from the situation of transition in which many eastern European states find themselves, see e.g. ECtHR, judgment of 24 April 2007, *Matyjek / Poland*, not yet published, appl. no. 38184/03 (regarding lustration proceedings); ECtHR, judgment of 15 March 2007, *Velikovi and Others / Bulgaria*, not yet published, appl. no. 43278/98; and ECtHR, judgment of 11 January 2007, *Mkrtchyan / Armenia*, not yet published, appl. no. 6562/03 (concerning the lack of a legal basis for restrictions of the freedom of peaceful assembly).

²⁶ Cf. ECtHR, judgment of 10 November 2005, *Leyla Sahin / Turkey*, Reports 2005-XI, § 114ff.

²⁷ See e.g. ECtHR, judgment of 31 March 1998 (GC), *Reinhardt and Slimane-Kaïd / France*, Reports 1998-II and ECtHR, judgment of 9 November 2006, *Sacilor-Lormines / France*, not yet published, appl. no. 65411/01.

about the release of persons convicted to discretionary life sentences.²⁸ It thus had to develop an adequate framework to discuss cases arising from both civil law and common law systems, supplemented with all kinds of legal and constitutional variations that are visible in the eastern European states, Germany or Turkey.

Once again, it will be clear that it is an enormous challenge for the Court to frame an adequate response to deal with complaints from such divergent states and to develop sufficient knowledge and understanding of each of the different legal systems and legal cultures to place a particular claim in context.

2.4 The lack of co-equal constitutional partners

Fourthly, the problematic of the European Court of Human Rights is shaped by its institutional setting. At least from the perspective of some observers, the exercise of judicial discretion is only legitimate if sufficient external controls are built into the system, such as a possibility for appeal or the presence of co-equal branches that may correct the effects of improper judgments.²⁹ On the national level, such controls are usually available in the shape of institutional separation of powers and the presence of a hierarchy of courts with various possibilities for appeal. On the level of the Council of Europe, the situation is different, even though Protocol No. 11 has provided for a system of internal appeal. The ECtHR does not have any real constitutional counterparts, functioning on the same level, that may (albeit temporarily) mitigate the effects of unfavourable or unacceptable judicial decisions, or that it has to respect because of the democratic legitimacy of their decisions. After all, even though the Council of Europe structure does provide for a Parliamentary Assembly and a Committee of Ministers, these bodies do not have any legislative or executive powers comparable to those of national parliaments and governments. It is important to note, however, that the lack of co-equal branches does not mean that there are no external controls at all. The ECtHR will often engage in a “transnational dialogue” with *national* legislatures and, in particular, national constitutional courts.³⁰ Indeed, the effectiveness of the ECtHR’s judgments depends on the willingness of these courts to accept the Court’s interpretation and application of the Convention.³¹ Furthermore, the lack of control by co-equal branches may have stimulated the Court to develop additional, internal controls, such as the limitation of the intensity of its review in highly sensitive and morally tinted cases.³²

Beside this constitutional issue, a practical result of the lack of co-equal branches is that there are no coercion mechanisms to compel the states to compliance. In national legal systems, government branches may be empowered to collect fines or penalties imposed by the courts, or even use force to ensure compliance. As is well known, no such mechanisms exist on the level of the Council of Europe. The Committee of Ministers only has the power to adopt resolutions in which it criticises a certain state for its lack of compliance with the Court’s judgments or, when Protocol 14 to the Convention would enter into force, to bring a renewed case before the Court.³³ This means that the compliance with the Court’s judgments depends on such factors as the perceived strength of international

²⁸ E.g. ECtHR, judgment of 26 September 2002, *Benjamin & Wilson / UK*, not published, appl. no. 28212/95.

²⁹ Cf. Fletcher 1982, p. 642.

³⁰ See in particular, in Dutch, *Hey/De Lange/Mevis* 2005, p. 4 and *Heringa* 1996a, p. 26.

³¹ See *supra*, § 2.2.

³² Cf. also Fletcher 1982, p. 642.

³³ See *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies (applicable with the exception of Rules 10 and 11; see CM/Del/Dec(2006)963/4.1bE, 5 May 2006). See also Article 16 of Protocol 14 (CETS No. 194, not yet entered into force), adding sections 3-5 to Article 46 of the Convention. The effectiveness of such mechanisms remains problematic; on this, see in particular the report of the Steering Committee for Human Rights (CDDH), *Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels*, CM(2006)39 Addendum, 13 April 2006, paras. 23 ff.

obligations and legal rules, and the quality and persuasiveness of their judgments.³⁴ Once again, this will clearly have repercussions for the Court's judicial discourse.

2.5 *The aims and text of the Convention*

Another factor that is evidently of importance to the Court's judicial reasoning is constituted by the aims and goals of the Convention system. The primary aim of the Convention is to protect individual fundamental rights, to respect human dignity and enhance the rule of law.³⁵ It is furthermore clear from the Preamble to the Convention that the founding states considered it essential that individual rights be guaranteed by democratic means.³⁶ The importance of the concept of "democracy" to the Convention is also visible in various justification clauses, stipulating that interferences with individual rights are only accepted if they are "necessary in a democratic society".³⁷ Thus, the ECtHR has been provided with two important guidelines to the interpretation of the Convention: the need to effectively guarantee fundamental rights and the need to guarantee the successful operation of a democratic system.³⁸ It is not surprising that the Court constantly refers to these guidelines in its judgments, as will be further explained in § 4 of this paper.

An additional factor that has proven of great importance in shaping the Court's approaches and methods can be found in the text of the Convention. Fundamental rights provisions are notoriously vague and often seem to amount to expressions of democratic aspirations, rather than to constitute clear legal texts that can be easily applied by the courts.³⁹ The given that "everyone has the right to freedom of expression" or "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination", for example, does not provide clear indications about the exact meaning of the freedom of expression, nor about the circumstances in which a case of prohibited discrimination may be established. As a result, the ECtHR has much freedom to interpret and explain the contents of the Convention.⁴⁰ This is not only true with regard to the interpretation of specific terms contained in the text of the Convention, but also with regard to the possibilities for justification. The Convention does offer the Court some guidance in this respect, especially in those cases where express limitation clauses have been included. The text of the second paragraph to Articles 8-11, for example, provides a relatively clear framework that may structure the Court's review of the arguments advanced by a State Party. The exact meaning of the necessity clause is rather unclear, however, just like the meaning of aims such as the "rights and freedoms of others" or "the protection of morals". Moreover, such guidance as to the criteria for the review of a justification is fully absent with regard to many of the provisions contained in the Convention. This means that the Court in many cases needs to establish its own framework of interpretation.⁴¹

³⁴ See Helfer/Slaughter 1997, p. 285, who also stress that, in practice, reliance on such mechanisms has been problematic.

³⁵ Cf. Greer 2006, p. 196. For the effect of this on the Court's case-law, see e.g. Ress 2005, p. 364.

³⁶ "Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend."

³⁷ See further Marks 1995, p. 211 and Mowbray 1999, p. 704.

³⁸ See in particular ECtHR, judgment of 10 November 2005, *Leyla Sahin / Turkey*, Reports 2005-XI, § 104. These guidelines are highly important, but also notoriously vague – as Marks has stated, a "democratic society is no technical matter, no fixed archetype" (1995, p. 231), and the same holds true for the protection of fundamental rights in general. Although the text provides important points of reference to the Court, it will therefore still be difficult to use it in a structured and convincing manner. In addition, as Greer has stressed, a central question is how conflicts between the underlying principles should be solved (Greer 2006, p. 203).

³⁹ An additional difficulty in the text of the Convention is, furthermore, that it is vague on some points, while it is highly detailed and technical on others. This sometimes makes it possible for the ECtHR to rely on textual interpretation quite easily, while the text provides no help at all in other cases. See specifically Gearty 1993, p. 95.

⁴⁰ See also Prebensen 2000, p. 1125.

⁴¹ Cf. also Gearty 1993, p. 97, explaining that a coherent theory of judicial intervention would be essential to the acceptance of the Court's judgments.

2.6 The judicial powers of the European Court of Human Rights; case-load

Finally, the design of the procedure before the ECtHR is formative to its judicial discourse. Although initially there has been some resistance to the individual complaints procedure, which is apparent from the fact that no direct access for individuals to the ECtHR was provided for in the original Convention, it was clearly established by Protocols No. 9 and 11 that the primary task of the Court is to decide about individual applications and to provide human rights protection in concrete cases. There is no system for case selection, as is visible with constitutional courts such as the German *Bundesverfassungsgericht* or the US Supreme Court, so the ECtHR will have to deal with all complaints that are brought to its attention.⁴² In addition, the ECtHR does not have the power to nullify national legislation or national decisions, but it does have the possibility to award the individual applicant compensation for the material or immaterial damages it has suffered.⁴³ As a result, the European Court of Human Rights will focus on the specific circumstances of the individual complainant, rather than that pay attention to the general legal situation in a particular State Party. Once again, this is an element that gives shape to the environment in which the ECtHR will have to render its judgments, and thus forms part of the problematic that inspires and directs the Court's judicial discourse.

Finally, the availability of the individual complaints procedure has inspired an increasing number of alleged victims to lodge an application with the Court. As is well-known, the number of applications has rocketed to a figure of 50,000 registered complaints per year, and this may even increase in the future.⁴⁴ As the Court only counts 46 judges and disposes of a minimal staff and budget,⁴⁵ it is essential for it to deal with these applications in a highly efficient and effective manner, throwing out less important or hopeless cases as quickly as possible.⁴⁶ This particular aspect of the Court's problematic has absorbed almost all of its attention in the last years, and its judicial methods and approaches have undergone radical changes in order to let it cope with the increasing caseload.⁴⁷ One of the greatest risks in this regard is that the Court's increased focus on productivity and efficiency affects the quality and coherence of its case law.⁴⁸ The Court thus faces the essential challenge to avoid this risk, while still dealing with all individual applications in a satisfactory manner.⁴⁹

2.7 Conclusion

In the preceding sections, it has been shown that the Court's problematic is highly specific and complex. The Court carefully has to position itself vis-à-vis the State Parties, navigating between the Scylla of providing too little protection to individual rights and the Charibdys of pronouncing judg-

⁴² For the US Supreme Court, see the *Rules of the Supreme Court of the U.S.* (2005), Rule 10. The German *Bundesverfassungsgericht* does not officially have a selection mechanism, but it uses its admissibility criteria in such a way as to filter out all cases that are not considered to be of constitutional relevance ("Verfassungsrechtliche Bedeutung"); see Schlaich/Korioth 2004, p. 177ff.

⁴³ See Article 41 of the Convention and Ress 2005, p. 371.

⁴⁴ Cf. Ress 2005, p. 365/366, pointing to the fact that the present Council of Europe covers a potential of 800 million applicants. For recent statistical information see *Survey of Activities 2006*, Council of Europe 2007, p. 38, available at www.echr.coe.int (see "reports"). This survey shows that 50,500 applications were lodged in 2006 and that 89,900 applications are still pending. In 2006, the Court managed to dispose of almost 30,000 complaints, which certainly is a high number, but still constitutes only 60% of the total number of applications lodged. See further Lord Woolf et al. 2005.

⁴⁵ See specifically Greer 2006, p. 137 and *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court (2001)1, 27 September 2001, §§ 16-21.

⁴⁶ Cf. Ress 2005, p. 366/367.

⁴⁷ See in particular Lord Woolf et al. 2005, p. 10ff, stressing that the amendments are still insufficient to cope with the Court's workload and problems.

⁴⁸ Address by Luzius Wildhaber to the Liaison Committee, 20 October 2005, p. 5; see for the relevant quote Lord Woolf et al. 2005, p. 11.

⁴⁹ The report by Lord Woolf et al. (2005) provides some important starting points in this regard.

ments that are not compatible with fundamental views and legal or institutional constructs existing in a certain state. In addition, the Court has to deal with an increasing amount of case-law, without sufficient budget and means, and it has to decide on basis of a legal text that does not offer much guidance as to the exact contents and meaning of the rights protected. It may be added to this that the ECtHR has now been in existence for 55 years only and the steep raise in the number of State Parties and cases is of relatively recent date. Different from some national highest courts, such as the French Cour de Cassation and the US Supreme Court analysed by Mitchel Lasser, the ECtHR is thus no mature court that has had sufficient time to model its judicial discourse to provide an adequate response to its own problematic. The ECtHR's approaches and methods must really be regarded as "work in progress" and may show faults and flaws that may be gradually be repaired and corrected. This only makes it the more important and interesting to closely study the ECtHR's judicial discourse.

3 Generalised or individualised approach?

3.1 *The case-by-case approach of the Court*

In this paper, two related aspects of the Court's judicial discourse will be exposed that may be regarded as important facets of its response to the problematic described in § 2. It has been shown that the primary aim of the Convention is to provide effective protection to individual fundamental rights, and that the procedure provided by the Convention is organised to protect individual fundamental rights in an effective manner. The European Court of Human Rights has closely geared its judicial techniques and modes of argumentation to this particular aspect. In this regard, a central aspect in all the Court's cases is its acknowledgement that each individual case is different and should be judged entirely on its own merits.⁵⁰ As a result, one of the most distinctive characteristics of the Court's jurisprudence is its case-by-case character.⁵¹ In developing its case-based approach, the Court was helped by the admissibility criteria laid down in the Convention, which effectively keep out *actiones populares* or cases in which the applicant is not a victim of a concrete fundamental rights violation.⁵² The Court has consistently interpreted this to mean that it is not possible for an individual to complain in general about a legislative act, as long as he has not been individually harmed by the application of such legislation.⁵³ As a result of this, the Court will only rarely have to pronounce itself on the general compatibility of legislation with the Convention.⁵⁴ It will mostly limit itself to examining whether the concrete application of the legislative rule amounted to a violation of an individual right. It does not seem to matter, in this regard, whether it is the act itself that brought about the individual harm, or the way the act was applied by an administrative body. In addition, the Court hardly seems to

⁵⁰ Cf. ECtHR, judgment of 29 March 1979, *Sunday Times / UK*, Series A, Vol. 30, § 65: "... the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it"; see also in particular ECtHR, judgment of 13 August 1981, *Young, James and Webster / UK*, Series A, Vol. 44, § 53: "The Court emphasises once again that, in proceedings originating in an individual application, it has, without losing sight of the general context, to confine its attention as far as possible to the issues raised by the concrete case before it."

⁵¹ Cf. Ost 1992, p. 284 and Matscher 1993, p. 63.

⁵² See Article 34 of the Convention and EComHR, decision of 12 December 1974, *X / Italy*, DR 1/79; cf. also ECtHR, judgment of 18 January 1978, *Ireland / UK*, Series A, Vol. 25, §§ 239/240 and ECtHR, judgment of 6 September 1978, *Klass and Others / Austria*, Series A, Vol. 28, § 33.

⁵³ Well-known exceptions are the cases of *Dudgeon* (in which the Court accepted the victim status because, "[i]n the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life ...: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution" (ECtHR, judgment of 22 October 1981, *Dudgeon / UK*, Series A, Vol. 45, § 41)) and *Klass* (where the Court stated that the effectiveness of the Convention mechanism would be materially weakened if "an individual ... owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him"; *supra*, § 34). These cases have remained rare exceptions, however – the main rule is still that a concrete interference with a right must be demonstrated.

⁵⁴ See for a notable exception ECtHR, judgment of 29 March 2005, *Ukrainian Media Group / Ukraine*, not published, appl. no. 72713/01, § 62.

be concerned with considerations of legal certainty – even if a legislative act deliberately lacks a hardship clause, the Court will still find a violation if the concrete application interferes with a fundamental right in a disproportionate and unjustifiable manner.⁵⁵

Thus, the test applied by the Court is concrete rather than abstract and focuses on the individual rights violation in question rather than on the general compatibility of a legal situation with the Convention. Each case will be decided on its own facts and merits, and, as the Court put it in its important *Sunday Times* case of 1979, “... the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the case before it.”⁵⁶ The result of this highly concrete approach is a flexible and highly individualised jurisprudence, which clearly offers individual relief and which enables the Court to send the message to both the states and their citizens that individual fundamental rights really matter.⁵⁷ An additional value is that judgments or interpretations that appear to be difficult to accept for certain State Parties, or that are closely geared to a national situation or a specific set of facts, may easily be distinguished in later cases.⁵⁸ This allows the Court to use a tailor-made approach, taking account of all specific national circumstances that will enhance the acceptability of its judgments by the states.⁵⁹ Thus, the highly individualised approach effectively seems to respond to a variety of demands and problems that have been described in §2.

3.2 Modes of argumentation: multi-prong tests or flexible balancing?

The Court’s case-by-case approach has resulted in a specific mode of argumentation. It has been shown in §2.5 that the Convention text itself stimulates the application of “multi-prong tests” in a way that is similar to that which is visible in the United States.⁶⁰ The Court seems to make good use of these formulas and it even seems to have created new tests where they did not exist before.⁶¹ The best example of the Court’s approach may be found in the elaborate case-law it has developed with respect to Articles 8-11 of the Convention. The text of these Articles suggests a two-stage test, in which context it must first be established whether there is an interference with a right protected by the Convention (which in itself implies two distinct tests), and, if this condition is met, whether a justification can be provided for such an interference under the second paragraph. Within the context of the justification test, the Convention text suggests a further multi-prong test, stipulating that a justification must (a) be prescribed by law, (b) serve a legitimate aim and (c) be necessary in a democratic society to attain the legitimate aim in question.

The Court has explained and developed the meaning of these three requirements in a long line of judgments. The element of “necessity in a democratic society” is thereby of particular interest.⁶² In its

⁵⁵ See e.g. ECtHR, judgment of 3 October 2000, *Camp and Bourimi / the Netherlands*, Reports 2000-X, § 39 and ECtHR, judgment of 2 June 2005, *Znamenskaya / Russia*, not published, appl. no. 77785/01, § 31.

⁵⁶ ECtHR, judgment of 26 April 1979, *Sunday Times / UK*, Series A, Vol. 30, § 65.

⁵⁷ This is a factor that is considered by Helfer and Slaughter as an important element in successful supranational adjudication (1997, p. 311/312).

⁵⁸ Cf. Callewaert 1993, p. 728 and Matscher 1993, p. 64.

⁵⁹ See Helfer/Slaughter 1997, p. 322/323.

⁶⁰ The use of multi-prong tests by the American Supreme Court is elaborately discussed and analysed by Lasser 2004, p. 78ff.

⁶¹ An example of this can be found in the case-law relating to Article 14 of the Convention, which does not contain a specific justification clause. In a number of cases, the Court developed a set of criteria that are frequently (although not entirely consistently) used to decide discrimination cases; see ECtHR, judgment of 23 July 1968, *Belgian Linguistics*, Series A, Vol. 6, p. 34; ECtHR, judgment of 13 June 1979, *Marckx / Belgium*, Series A, Vol. 31, § 32; and, for a recent summary of the various criteria, ECtHR, judgment of 31 May 2007, *Grande Oriente d’Italia di Palazzo Giustiniani (no. 2) / Italy*, not yet published, appl. no. 26740/02, §§ 44-47). See further Gerards 2005, p. 121ff.

⁶² Remarkably enough, the Court only rarely refers to the test of a legitimate aim. The test is mentioned in each single case, but there are hardly any cases in which the Court does not find a legitimate aim to be present. Furthermore, the Court has not really developed the test, e.g. by explaining what the various aims mentioned in the relevant Convention provisions mean. With respect to the test of legality, the Court does seem to take this more seriously. Moreover, it really does seem to have

judgment in the *Handyside* case of 1976, the Court already explained how this element should be understood, but the multi-prong test was set out more clearly in its *Sunday Times* judgment (1979):

“The Court has noted that, whilst the adjective ‘necessary’, within the meaning of Article 10 (2), is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ and that it implies the existence of a ‘pressing social need’
....
... It must ... be decided whether the ‘interference’ complained of corresponded to a ‘pressing social need’, whether it was ‘proportionate to the legitimate aim pursued’, [and] whether the reasons given by the national authorities to justify it are ‘relevant and sufficient under Article 10 (2)’”⁶³

It may be derived from these considerations that the Court favours a well-structured approach, the necessity test being subdivided in different tests which can be further developed and applied. However, even a superficial analysis of the Court’s subsequent case law would reveal that its use of this kind of multi-prong test rhetoric is not indicative of the way in which it really decides its cases. Firstly, a clear division between the establishment of an interference and the examination of its justification is not always visible. Especially in cases about positive obligations, the Court has consciously merged the two stages into one general test: the “fair balance test”.⁶⁴ In order to establish whether the Convention entails a positive obligation for the State, and whether the State has failed to meet this obligation, the Court will examine whether the State has struck a reasonable or fair balance between the individual right at stake and a number of conflicting general or individual interests.⁶⁵ The Court has often stated that, in scrutinising the balance struck by the State, it must also have regard to the requirements inherent in the justification clause of the right at stake.⁶⁶ Thus, the Court often merges the distinct stages of rights interpretation and examination of the justification for an interference.⁶⁷

Furthermore, the Court does not seem to pay equal attention to the various parts of the justification test as it was established in *Sunday Times*. In particular, it hardly ever examines if the requirement of a legitimate aim was met, often just casually accepting that the state has advanced a certain general aim for its interference (e.g. the protection of the rights of others) and that this is one of the aims mentioned in the Convention.⁶⁸ In practice the Court principally relies on the test of necessity in order to establish the reasonableness of an interference,⁶⁹ and, once again, in applying this test, it does not use the steps defined in *Handyside* and *Sunday Times* as a strict framework for argumentation. It is clear from many analyses of the Court’s case law that there is no logical order between the various elements of the test, and that hardly any explanation can be given for the use of the “relevant and suffi-

developed some useful tests and criteria in this regard, for instance requiring that legislation be sufficiently foreseeable and accessible. Cf. Schokkenbroek 1996, p. 184ff.

⁶³ *Sunday Times*, §§ 59 and 62.

⁶⁴ The distinction is not always as sharply made in cases concerning negative obligations either. In many cases the Court only vaguely indicates the meaning and scope of a certain right in the interpretation stage of its test, elucidating its interpretation only in the framework of its justification test; see e.g. ECtHR, judgment of 18 January 2001, *Chapman / UK*, Reports 2001-I or ECtHR, judgment of 15 February 2005, *Steel & Morris / UK*, Reports 2005-II.

⁶⁵ See further Mowbray 2004, p. 186/187.

⁶⁶ See e.g. ECtHR, judgment of 16 November 2004, *Moreno Gómez / Spain*, Reports 2004-X, § 55.

⁶⁷ Only in exceptional cases the Court first examines if the claimed right comes within the scope of one of the Convention rights (interpretation), and only then investigates if this right entailed specific, positive obligations for the government (application). See e.g. ECtHR, judgment of 13 February 2003, *Odièvre / France*, Reports 2003-III and ECtHR, judgment of 9 June 2005, *Fadayeva / Russia*, Reports 2005-IV. See also e.g. ECtHR, judgment of 27 September 1995, *McCann / UK*, Series A, Vol. 234; ECtHR 28 October 1998, *Osman / UK*, Reports 1998-VIII; and ECtHR, judgment of 23 September 1998, *A / UK*, Reports 1998-VI.

⁶⁸ Cf. Van Dijk c.s. 2006, p. 340. See for exceptions e.g. ECtHR, judgment of 25 January 2007, *Vereinigung Bildender Künstler / Austria*, not yet published, appl. no. 68354/01, § 31 and ECtHR, judgment of 23 October 1990, *Darby / Sweden*, Series A, Vol. 187.

⁶⁹ Cf. Schokkenbroek 1996, p. 189.

cient”-clause in some cases, and the use of the “proportionality”-test in others.⁷⁰ In fact, in the largest part of cases the Court just plunges into a general test of balancing. Indeed, the language of balancing would seem to explain its case-law much better than the use of multi-prong tests would seem to do.⁷¹ In applying its balancing test, the Court mostly mentions a variety of aspects which would seem to stress the importance and weight of the interests at stake, and then it considers that one or the other tips the scale.⁷² It is also interesting to note that the ECtHR has only rarely made use of any alternatives to balancing, such as a method of categorisation. Categorisation would mean that the Court would formulate a rule to decide a certain type of case, which would avoid the need for balancing in later cases.⁷³ Although the Court sometimes makes use of a categorisation approach,⁷⁴ it has made expressly clear in other cases that it prefers the flexible balancing approach over such an approach of judicial rule-making.⁷⁵ In other ways, too, it is clear that the Court places high value on the concrete balancing approach. It does not consistently make use of a test of suitability or necessity, whereby it would have to decide whether the interference constituted an effective means to attain the aim pursued, or whether there were any alternatives available to the national legislature which would attain the aim with less harm to the individual fundamental right concerned.⁷⁶ The only balancing-avoiding method it sometimes uses is the control of the quality of the national decision-making process. In some cases, the Court strongly relies on the national decisions that have been rendered, especially if it finds that a certain case has been discussed carefully by the national judiciary, or if the legislation which caused a specific interference is the result of elaborate national and parliamentary debates. It then sometimes finds no cause to engage in a balancing exercise of its own, although even then it often at least mentions the interests at stake and gives some opinion on their weight and importance to the individual or to society in general.⁷⁷

The Court’s omnipresent balancing test may partly be explained by its typical case-by-case approach, which requires it to take account of all circumstances of the case at hand. In this respect, it may be argued that the balancing approach fits well in the highly individualised and case-based jurisprudence

⁷⁰ See in particular Schokkenbroek 1996, p. 193ff; cf. also Van Dijk c.s. 2006, p. 341, explaining that both tests are often closely intertwined.

⁷¹ See in particular ECtHR, 7 July 1989, *Soering/VK*, Series A, Vol. 161, § 89, where the Court stressed that “... inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.” Cf. also Matscher 1993, p. 78.

⁷² For some recent examples, see ECtHR, judgment of 25 January 2007, *Vereinigung Bildender Künstler / Austria*, not yet published, appl. no. 68354/01; ECtHR 27 February 2007, *ASLEF / UK*, not yet published, appl. no. 11002/05; ECtHR, judgment of 22 March 2007, *Maslov / Austria*, not yet published, appl. no. 1638/03.

⁷³ For example, in defamation cases the Court would not revert to balancing the interests at stake in the concrete case, but it would rather define a number of factual and legal circumstances in which defamation can be established. This method is especially described and favoured by American legal scholars; see e.g. Sullivan 1992 and Scalia 1989; for a concrete example of its use in US case law, see the Supreme Court’s decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁷⁴ See e.g. ECtHR, judgment of 25 January 2005, *Enhorn / Sweden*, Reports 2005-I, § 44. It is not entirely clear why the Court sometimes chooses a categorisation approach instead of a balancing method, but this may be explained by the text of the relevant provision. Article 5 of the Convention contains, for example, a relatively clear and limited list of exemptions, which can easily be refined by means of categorization. On this, see also Greer 2006, p. 209/210.

⁷⁵ A good example of this is the case of *Von Hannover / Germany* (ECtHR, judgment of 24 June 2004, Reports 2004-VI). The case concerned the right to privacy of the Princess of Monaco, which had been interfered with by the publication of a number of photographs in the tabloid press. In the national procedure leading up to the complaint before the Court, the German *Bundesverfassungsgericht* made use of a categorisation strategy. In case of pictures of “absolute Personen der Zeitgeschichte” (translated by the ECtHR as “figures of contemporary society ‘par excellence’”), publication would be unlawful if the persons in question “have retired to a secluded place with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public” (see § 22 and the original judgment: BVerfG, judgment of 15 December 1999, 1 BvR 653/96, § 79 and § 112). The ECtHR considered this spatial category too vague, and favoured a classical balancing approach, taking account of a wide range of factors that determined the importance and weight of the interests at stake. It did not, however, provide a clear and guiding standard that could provide guidance in striking a balance between these interests; see critically on this e.g. Nohlen 2006, p. 199.

⁷⁶ These methods are frequently used by the European Court of Justice and the German *Bundesverfassungsgericht*; the European Court of Justice even seems to be reluctant to apply an actual balancing test and clearly favours the tests of necessity and suitability. See on this in particular Tridimas 1999, p. 91/92 and Koch 2003, p. 54ff.

⁷⁷ See e.g. the cases of *Maurice* and *Evans*, discussed *supra*.

of the Court. In addition, the test may help the Court to reconcile strongly opposed interests, or to make a well-informed choice between such interests. The flexibility of the test enables the Court to accommodate the need to effectively protect fundamental rights, while visibly paying attention and respect to the specific legal or cultural circumstances in the respondent state.

3.3 *Developments in the Court's case law*

Thus, it has been shown that the Court's case-law is characterised by an individualised, case-based approach, which is structured by "multi-prong tests" only to a limited extent. The Court's argumentative approach is usually open-textured, and the Court constantly refers to the need to search for a fair balance between all interests concerned. Such a flexible approach clearly responds to a number of aspects of the Court's problematic. However, it should be stressed that the picture sketched in the preceding sections is rather incomplete. Due to a variety of factors, the Court's case-law is less consistently case-based than it has been suggested. Although the Court often stresses the individualised character of its judgments, it has not accepted the final consequence of the consistent application of such an approach, which would be that no general conclusions may be drawn from the interpretations and criteria provided in its case-law. Indeed, the Court admitted already in 1978 that the aim of its judgments

"... is not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention."⁷⁸

More recently, the Court formulated this even more expressly in the case of *Karner*:

"Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States."⁷⁹

To facilitate such extensive conclusions, the Court has even taken to formulating lists of general criteria, distilled from its extensive body of case-law, that may be used as guidance in later cases, either by the Court itself or on the national level.⁸⁰ Although it is clear that such lists of criteria have limited predictive value – the way in which they are applied or balanced still depends on the factual circumstances of the case – this clearly demonstrates that the Court pays more attention to the coherence and consistency of its case-law than a purely individualised approach would seem to suggest.⁸¹ Recently, the Court has even gone one step further by accepting that some of its interpretations are by now so clearly established that a different legal approach in an individual case would amount to overruling of precedent and would need a justification surmounting the facts of the case at hand.⁸² The strictly indi-

⁷⁸ ECtHR, judgment of 18 January 1978, *Ireland / UK*, Series A, Vol. 24, § 154.

⁷⁹ ECtHR, judgment of 24 July 2003, *Karner / Austria*, Reports 2003-IX, § 26.

⁸⁰ This is not a new development, but is already visible in relatively early case law. See e.g. ECtHR, judgment of 28 May 1985, *Ashingdane / UK*, Series A, Vol. 93, § 37. See, however, Matscher 1993, p. 64.

⁸¹ See already Merrills 1988, p. 12, who attributes the success of the Court's judgments partly to the consistency of its case-law, which in itself is brought about by its careful use of precedent. In more recent judgments, the Court has even made better use of its findings in earlier judgments, by adding a section to its judgment in which it sums up the various general principles; see e.g. ECtHR, judgment of 24 April 2007, *Lombardo / Malta*, not yet published, appl. no. 7333/06, § 51 (general principles Article 10).

⁸² A good example is the recent case of *Vilho Eskelinen / Finland* (ECtHR, judgment of 19 April 2007 (GC), not yet published, appl. no. 63235/00), in which the Court stated: "While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement" (§ 56). It then provided an elaborate overview of its earlier case-law and its setbacks, and it explained the need to opt for an

vidual approach thus seems to have been made secondary to the need to create legal certainty and consistency, and to develop interpretations of a more general character.⁸³

The development towards a more general approach is further illustrated by the recent creation of so-called “pilot-judgments”. In these judgments, the Court not only limits itself to finding a violation of the Convention, but it also indicates with some precision which measures should be taken on the national level to compensate, repair, or, if possible, end a violation.⁸⁴ The Court especially makes use of the method of pilot judgments if it finds that there is a state practice or rule which will probably result in a large amount of individual cases that would have the same outcome.⁸⁵ In that case, it prefers a general ruling about the regulation or practice at issue, over the need to scrutinise each individual (but similar) complaint on its own merits.⁸⁶ In this respect, too, the Court relies on a general rather than an individualised approach.⁸⁷

These particular “general” aspects of the case-law of the Court can only partly be explained by the Court’s original problematic as described in §2 of this paper, which would primarily seem to ask for the case-by-case approach previously employed by the Court. A better explanation is perhaps to be found in the changes that the problematic of the Court seems to have undergone over the last decade. For example, part of the explanation may be found in the amendments that have been made to the Court’s methods by Protocol No. 11.⁸⁸ This Protocol resulted in the creation of a Grand Chamber, which may decide cases that give rise to important questions to the interpretation of the Convention, or that might cause inconsistencies in the Court’s case-law.⁸⁹ As a consequence, the Grand Chamber is principally asked to decide cases which would seem to disclose legal inconsistencies, in which difficult interpretative questions have been raised, or which touch on national or political sensitivities.⁹⁰ It is clear that the case-law of the Grand Chamber will therefore not be less strictly limited to the cir-

entirely new criterion for interpretation. Thus, it not only effectively decided the individual case before it, but it also constituted an important general rule that can be used in all future cases dealing with similar problems. For a similar example, see ECtHR, admissibility decision of 6 July 2005 (GC), *Stec and Others / UK*, Reports 2005-X, § 47. This is a relatively new development in the Court’s case-law. In the past, the Court sometimes corrected earlier findings of a general nature (see e.g. ECtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt / Belgium*, Series A, Vol. 113, § 48; see also Merrills 1988, p. 14), but even that was rare.

⁸³ ECtHR president Wildhaber has even contended that “... the place of individual relief has become secondary to the primary aim of raising the general standard of human rights protection and extending human rights jurisprudence throughout the community of the Convention States” (2002, p. 163).

⁸⁴ See e.g. ECtHR, judgment of 22 June 2004 (GC), *Broniowski / Poland*, Reports 2004-V; ECtHR, judgment of 6 October 2005, *Lukenda / Slovenia*, Reports 2005-X; ECtHR, judgment of 19 June 2006 (GC), *Hutten-Czapska / Poland*, not yet published, appl. no. 35014/97.

⁸⁵ See in particular the *Broniowski* judgment (*supra*), § 193.

⁸⁶ In this case, the Court did not limit itself to finding a violation in the individual case, but it also indicated (in general terms) which measures should be adopted on the national level to bring the national situation in compliance with the Convention (§ 194). It also decided to adjourn its consideration of applications deriving from the same general cause (§ 198).

⁸⁷ It is evident, however, that the Court will not provide clear indications as to the way in which the violation should be repaired on the national level – in the case of *Hirst*, for example, the Court found that “... it must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1” (ECtHR, judgment of 6 October 2005 (GC), *Hirst / UK* (No. 2), Reports 2005-IX, § 84). The Court thereby takes a reactive rather than a proactive stance, deciding *post hoc* whether a certain national measure is compatible with the Convention, rather than stating in advance exactly which requirements the Convention entails.

⁸⁸ Cf. also Ress 2005, p. 262ff.

⁸⁹ Whether such aspects are present is decided either by a Chamber of the Court, which then can relinquish jurisdiction, or, after a Chamber has rendered judgment, by a panel of five judges on request of one of the parties (see Articles 30 and 43 of the Convention). Thus, the Grand Chamber to some extent does have a selection mechanism, which makes its position rather similar to that of the US Supreme Court or the German *Bundesverfassungsgericht*.

⁹⁰ This situation did not exist before Protocol No. 11 came into force. Although the “old” Court did also have a plenary chamber that could decide important questions of interpretation (see Rule 48 (old)), neither the Convention nor the Rules of Court did envisage a system of internal appeal.

cumstances of the case at hand, but will rather contain general statements about the proper interpretation and general application of the Convention.⁹¹

The more general approach of the Court can further be explained by the simple need to cope with its ever-increasing workload. It has been concluded by legal experts that it is almost only possible to reduce the number of incoming applications by improving the protection of fundamental rights at the national level.⁹² Simultaneously, it is clear that it is sometimes difficult for national courts to decide fundamental rights cases, precisely because the case-law of the Court is highly individualised. Indeed, it would seem hardly reasonable to expect inexperienced national judges to distil general criteria from the Court's case law that it can apply in its own case-law, if the Court itself uses a purely case-based approach. For that reason, some legal scholars have pleaded for more general case-law, "with a clear indication of the constitutional limits provided by Convention rights upon the exercise of national public power".⁹³ It might be precisely because of the call for clarity and predictability that the Court now pays more attention to general criteria, and developed the method of handing down pilot judgments.⁹⁴

However, even though these new developments may certainly explain the efforts of the Court to try out new methods and approaches, the consistency of the Court's approach has not benefited from this. The Court now sometimes uses a general approach, while in other cases it still reverts to highly specific review of the case placed before it; perhaps surprisingly, this is even true for the Grand Chamber.⁹⁵ The balance between a purely individualised, case-by-case approach and a more general, "constitutional" case-law is clearly not easy to be found.⁹⁶ Indeed, the Convention legal system still departs from a system of individual rights protection, and the text of the Convention still demands a concrete choice to be made in each single case between individual fundamental rights and other important rights or interests. Thus, the Court will have to search even further for practical methods of argumentation to bring together the need for general interpretation and the desire for individual relief.

4 Methods of interpretation

4.1 Guiding principle: "evolutive and dynamic interpretation"

In his book *Judicial Deliberations*, Mitchel Lasser has well explained that the European Court of Justice often makes use of a "meta-teleological" mode of argumentation to justify its judgments, meaning that it frequently refers to the effectiveness of the EU legal order and the necessity of uniformity and

⁹¹ See e.g. ECtHR, judgment of 6 July 2005 (GC), *Nachova and Others / Bulgaria*, Reports 2005-VII; ECtHR, judgment of 11 July 2006 (GC), *Jalloh / Germany*, not yet published, app. no. 54810/00; and ECtHR, judgment of 19 April 2007 (GC), *Vilho Eskelinen and Others / Finland*, not yet published, appl. no. 63235/00.

⁹² Cf. Resolution 1226 (2000) of the Parliamentary Assembly, *Execution of Judgments of the European Court of Human Rights*, 28 September 2000, para. 11B and Resolution Res (2004) 3 of the Committee of Ministers on judgments revealing an underlying systematic problem, 12 May 2004, 114th session.

⁹³ Greer 2006, p. 171.

⁹⁴ The need to do so has been stressed by a number of scholars and even by former judges of the ECtHR; see e.g. Wildhaber 2002, p. 164. In addition, both the Parliamentary Assembly and the Committee of Ministers has adopted recommendations to the effect that the ECtHR should ensure a clear and coherent case-law and identify possible systemic problems; see Resolution 1226 (2000), *Execution of judgments of the European Court of Human Rights*, Parliamentary Assembly, 28 September 2000, para. 11B and Resolution Res (2004) 3 on judgments revealing an underlying systemic problem, Committee of Ministers, 12 May 2004 (114th Session). See also the draft report of the Drafting Group on the Reinforcement of the Human Rights Protection Mechanism, 5 March 2004, CDDH-GDR(2004)005, paras 15ff.

⁹⁵ One recent example is the case of *Ramsahai / the Netherlands*, in which the Grand Chamber reviewed the decision of the Chamber in a highly case-specific manner, and without providing any new general or interpretive principles which could be of use to the development of a jurisprudential doctrine (ECtHR, judgment of 15 May 2007 (GC), not yet published, appl. no. 52391/99).

⁹⁶ In practice, no complete transition is envisaged from an individualised approach to a constitutional case-law; see the report of the Steering Committee on Human Rights (CDDH), *Guaranteeing the long-term effectiveness of the European Court of Human Rights*, CM(2003)55, 8 April 2003, § 11 and cf. Greer 2006, p. 165.

coherence as a basis for its (sometimes far-reaching) interpretations.⁹⁷ By doing so, the Court has created a coherent body of case-law that appears to be sufficiently persuasive and appealing to satisfy the Member States, even if they would favour a different approach for their own legal systems and even if they do not generally agree with certain aims of EU law. Against the background of Lasser's findings, it would be interesting to investigate whether the European Court of Human Rights has made similar use of a "meta" principle of interpretation, and, if so, whether it has done so to the same effect as the ECJ. Indeed, the development of a meta-teleological principle by the Court would seem to be well-possible, as the aims of the Convention are relatively clear, just like the aims of the European Community. The Preamble to the Convention mentions the protection of individual rights and human dignity as its main aims, next to the advancement and improvement of democracy and the rule of law. The Court clearly makes use of these general aims as guidance to its interpretation.⁹⁸ This is illustrated clearly by the *Soering* case, in which the Court repeated and reconfirmed its general principles of interpretation:

"In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'"⁹⁹

Thus, the primary aims of the Convention might seem to constitute guiding principles, and their use might seem comparable to the meta-teleological interpretation employed by the ECJ.¹⁰⁰ Interestingly, however, the Court has gone further than stressing the importance of the aims of the Convention. In its *Tyrer* case, it added that a teleological interpretation must always be given in the context of "present day conditions":

"The Court must ... recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."¹⁰¹

The combination of the principles as defined in *Tyrer* and *Soering* is generally said to constitute the "evolutive and dynamic" basis of interpretation of the Convention. The evolutive method may thus be summarised to mean that the provisions of the Convention must be interpreted in accordance with the primary aims as defined in the Preamble, taking account of recent developments in society and science.¹⁰²

Indeed, as would seem to be appropriate for a general "meta" principle, the evolutive and dynamic interpretation pervades the Court's entire jurisprudence. This does not mean, however, that the princi-

⁹⁷ Lasser 2004, p. 232ff.

⁹⁸ See Ost 1992, p. 192 and Prebensen 2000, p. 1131.

⁹⁹ ECtHR, judgment of 7 July 1989, *Soering / UK*, Series A, Vol. 161, § 87 (references omitted).

¹⁰⁰ Cf. Sudre 1998, p. 110.

¹⁰¹ ECtHR, judgment of 25 April 1978, *Tyrer / UK*, Series A, Vol. 26, § 31.

¹⁰² See also Prebensen 2000, p. 1127 and Mowbray 2005, p. 60, describing this as the Court's "key methodology". Some terminological confusion may arise when reading the case-law of the Court and the body of literature available on the Court's methods of interpretation. The term "evolutive and dynamic interpretation" is often used interchangeably with other notions, such as interpretation of the Convention as a "living instrument", or interpretation "in the light of present day conditions"; cf. the joint dissenting opinion to ECtHR, judgment of 7 August 2003 (GC), *Hatton and Others / UK*, Reports 2003-VIII, § 2. Furthermore, sometimes it is placed on the same line as the principle of effective and practical protection of fundamental rights, while it is also sometimes regarded as a different, yet complementary principle.

ple always provides a clear-cut answer in individual cases, nor that it always gives useful guidance to the proper interpretation of a certain right. The principle of evolutive and dynamic interpretation reflects the ambivalence of the Court's problematic as it has been described in § 2. On the one hand, the Court must protect fundamental rights to the highest degree possible and it must do so in a dynamic and progressive way. On the other hand, the Court must take due account of its position as a supranational court for 46 different states, whose opinions on fundamental issues may vary dramatically. Because of these national sensitivities and differences in (legal) culture, it is sometimes extremely difficult for the Court to advance a progressive interpretation of a certain fundamental right, even if this would be in accordance with the aims of the Convention. In addition, a far-reaching and strongly protective interpretation of one fundamental right may sometimes be to the disadvantage of another fundamental right, as may be true in cases of conflicting rights. If the right to freedom of expression clashes with the right to effective protection of privacy, for example, it will hardly be possible to guarantee the freedom of expression to the highest extent possible without doing injustice to the right to privacy. For these reasons, it is not surprising that the European Court of Human Rights has built in a number of checks on the teleological method, which are typical for the notion of evolutive-dynamic interpretation. The considerations in the *Tyrer*-case show that an evolutive interpretation may imply that the Court will take account of the "developments and commonly accepted standards in the policy of the Member States of the Council of Europe".¹⁰³ Such consideration of "new developments" may have the result of a progressive interpretation in line with the goals and aims of the Convention, as could be expected,¹⁰⁴ but it may also be used to take a rather conservative stance if the Member States appear to be too much divided on a certain subject, or if the protection of the right would be to the disadvantage of another right.¹⁰⁵ The "principle" of evolutive and dynamic interpretation thus would seem to adequately *describe* the Court's approach, rather than really serve as a guiding principle that may help to choose between effective rights protection and respect for the differences between the member states.¹⁰⁶ This may be illustrated even better if regard is had to the specific methods the Court has developed to give shape to its evolutive and dynamic interpretation: the common ground method and the method of autonomous interpretation.

4.2 *The consensus method of interpretation; autonomous interpretation*

The Court has used one main method to determine exactly what interpretation the "present day conditions" within the Council of Europe would require.¹⁰⁷ This is what is often termed the Court's "consensus method" or "common ground method", and which in fact is a method of comparative interpretation.¹⁰⁸ This method is applied in almost all of the Court's important cases, but a notorious example may be found in a series of cases regarding the judicial recognition of gender transformation. The Court was first confronted with a case on this subject in the 1980's, where an individual claimed that recognition of his new gender formed an aspect of the right to respect for his private life. In its well-known *Rees* decision of 1986, the Court held that no such right could be recognised under the Convention, since there was no consensus in the European States as regards the legal consequences of gender transformations.¹⁰⁹ In several later cases the Court noted a growing agreement on the subject

¹⁰³ *Tyrer*, § 31.

¹⁰⁴ Cf. e.g. Ost 1992, p. 293.

¹⁰⁵ Cf. Carozza 1998, p. 1225/1226 and Matscher 1993, p. 69.

¹⁰⁶ See also Letsas 2004, p. 299.

¹⁰⁷ See, however, Rigaux 1998, p. 41/42, who is opposed to the equalisation of the method of comparative interpretation and the principle of evolutive interpretation. His opposition seems to stem primarily from the notion that "evolution" should normally be taken to mean "progressive", which is a kind of interpretation that is not always visible in cases in which the comparative method is employed.

¹⁰⁸ See e.g. Mahoney 2004, p. 139.

¹⁰⁹ ECtHR, judgment of 17 October 1986, *Rees / UK*, Series A, Vol. 106, § 37.

throughout the Council of Europe, but it insisted that there was still no sufficient consensus to justify a new interpretation of the right to respect for one's private life.¹¹⁰ Only in 2002, in the case of *Christine Goodwin*, the Court noted that the views and legal situation in a large number of states had sufficiently advanced to justify a new interpretation of the Convention.¹¹¹ Thus, the Court used the method in a rather ambivalent manner – on the one hand, it made use of the rhetoric of “present day conditions”, but it did not for a long time do so to justify a progressive interpretation in accordance with the principle of “practical and effective” protection of fundamental rights. Simultaneously, the Court's use of the method is understandable from the perspective of respect for the legal differences in the State Parties.¹¹²

An even more distinct example of the use of the comparative approach to appease the Member States, is the 2004 case of *Vo / France*.¹¹³ This case essentially concerned the question when life begins, the answer to which would determine the scope of the right to life as protected by Article 2 of the Convention. Article 2 is an almost absolute provision that allows for hardly any exceptions to be made. If life were considered to begin at the moment of conception, this would imply that Article 2 would apply from that very moment, which would mean that all instances of abortion were impermissible under the Convention. This would be different if the Court would hold that life begins at birth, but it was clear at the moment of decision that such a judgment would be hardly acceptable to at least some of the State Parties.¹¹⁴ The case of *Vo* thus left the Court with a quandary – in cases such as these, it is almost impossible to adopt an acceptable interpretation that would simultaneously provide adequate protection to all fundamental rights and interests concerned. The Court finally found a way out by stating that the practice of the various State Parties showed such fundamental differences that it was neither desirable nor possible to provide a uniform definition of the right to life.¹¹⁵ Each State should decide for itself when the right to life begins, and how much protection should be offered to unborn life. Thus, the Court did not provide a uniform and progressive new fundamental rights interpretation, but it did respect the differences between the states.

The approach of the Court in the cases of *Vo* and *Rees* demonstrates that the comparative approach may be used to refuse the recognition of new aspects of fundamental rights, or even the provision of a uniform interpretation at all.¹¹⁶ Only if there is a sufficient degree of convergence between the states, as in *Christine Goodwin*, the Court will accept a new interpretation.¹¹⁷ The Court thus seems to use the consensus method primarily to search for an acceptable middle road between the desire to effectively protect individual rights, and the need to pronounce judgments which would be acceptable to a wide number of Member States.¹¹⁸ Having regard to the Court's problematic, such use of the principle seems reasonable, even though the outcome in individual cases may be subject to debate.¹¹⁹

However, there are some puzzling elements in the Court's case-law. From the examples of *Christine Goodwin* and *Vo*, it might appear that the Court only adopts a new, progressive interpretation of the Convention if the national legislations and practice show clear convergence. Thus, the Court would seem to take an attitude of restraint, rather than one of proactive judicial protection of fundamental

¹¹⁰ ECtHR, judgment of 27 September 1990, *Cossey / UK*, Series A, Vol. 184; ECtHR, judgment of 25 March 1992, *B / France*, Series A, Vol. 232-C; ECtHR, judgment of 30 July 1998, *Sheffield and Horsham / UK*, Reports 1998-V.

¹¹¹ ECtHR, judgment of 11 July 2002, *Christine Goodwin / UK*, Reports 2002-VI.

¹¹² Cf., critically, Letsas 2004, p. 305.

¹¹³ ECtHR, judgment of 8 July 2004, *Vo / France*, Reports 2004-VIII.

¹¹⁴ In its judgment, the Court stressed that there is no consensus at all within the Council of Europe, nor in science, about when life should be considered to begin; see §§ 83/84.

¹¹⁵ § 85.

¹¹⁶ Cf. also Carozza 1998, p. 1225/1226.

¹¹⁷ Cf. Prebensen 2000, p. 1128.

¹¹⁸ Cf. Carozza 1998, p. 1232.

¹¹⁹ See also Costa 2004, p. 89, but cf. Letsas 2004, p. 305.

rights. This attitude is hardly reconcilable with the Convention's rhetoric of the need for effective protection of fundamental rights, or with the general idea that the principle of "evolutive and dynamic" interpretation implies a proactive stance. Indeed, these judgments may be contrasted with the many cases in which the Court has adopted a far more active attitude and where it has adopted a uniform or "autonomous" interpretation of notions that are central to the Convention, such as the notions of "criminal charge", "civil rights and obligations" or "property".¹²⁰ Interestingly, the Court has used the method of autonomous interpretation precisely if it perceives important differences in the legislation and practice of the State Parties.¹²¹ In its *Pellegrin* case, for example, the Court expressly stated that there was a need for uniform and autonomous interpretation of the notion of "civil rights and obligations" and the related applicability of Article 6 to civil servants.¹²² Early case-law of the Court generally excluded civil servants, as a group, from the procedural rights guaranteed by Article 6.¹²³ However, it soon became clear that the class of "civil servants" was defined very differently in the various states of the Council of Europe and, as a result, the scope of protection provided by Article 6 could vary between the different states.¹²⁴ In *Pellegrin*, the Court stressed that an autonomous definition was needed exactly because of these differences:

"... an autonomous interpretation of the term "civil service" which would make it possible to afford equal treatment to public servants performing equivalent or similar duties in the States Parties to the Convention, irrespective of the domestic system of employment and, in particular, whatever the nature of the legal relation between the official and the administrative authority."¹²⁵

The existence of diverging practices here provided an important motive for the Court to offer strong and autonomous protection, rather than a reason to step back and refuse to give a uniform interpretation, as in *Vo*.¹²⁶ It is difficult to explain these differences in approach. It might be expected that the Court is willing to use an autonomous interpretation in cases which concern relatively "neutral" legal constructs, such as "property" or "rights", where it is relatively easy to find a common denominator that would be acceptable to all states.¹²⁷ Likewise, one might suppose that the Court would rather use its careful common ground method in morally tinted cases where there is a large and deeply seated difference of opinion.¹²⁸ The moral issues at stake in the cases of *Vo* and *Christine Goodwin* would

¹²⁰ Cf. Ost 1992, p. 305 and Letsas 2004, p. 282/283. Importantly, it is not entirely clear if the term "autonomous concepts" is limited to a number of Convention notions to which the Court has expressly given the term, or whether the term "autonomous interpretation" can also be used to describe other Convention notions which have been given a specific Convention interpretation, such as family life or private life. See further Sudre 1998, p. 96-98. This paper will use the term in the second understanding, i.e. in an extensive meaning.

¹²¹ Cf. Mahoney 2004, p. 138 and Sudre 1998, p. 118. In addition, the Court has used autonomous interpretation to avoid that states, by means of a different interpretation, are able to remove a certain group, procedure or situation from the scope of protection of the Convention; this might lead to results incompatible with the object and purpose of the Convention. See ECtHR, judgment of 29 April 1999 (GC), *Chassagnou and Others / France*, Reports 1999-III, § 100; cf. Letsas 2004, p. 285.

¹²² ECtHR, judgment of 8 December 1999 (GC), *Pellegrin / France*, Reports 1999-VIII; cf. also ECtHR, judgment of 19 April 2007 (GC), *Vilho Eskelinen / Finland*, not yet published, appl. no. 63235/00, in which the Court overruled *Pellegrin*, but only did so to define a new, autonomous criterion for the applicability of Article 6.

¹²³ See e.g. ECtHR, judgment of 24 August 1993, *Massa / Italy*, Series A, Vol. 265-B.

¹²⁴ See the Court's judgment in *Pellegrin (supra)*, § 62.

¹²⁵ § 63.

¹²⁶ In other cases, the Court has used similar arguments to give an autonomous interpretation. In the admissibility decision in the *Stec* case, for example, it held that there was a need for a uniform interpretation of the notion of "property" to avoid inequalities of treatment based on distinctions which appeared to be illogical or unsustainable (ECtHR, admissibility decision of 6 July 2005, *Stec and others / UK*, Reports 2005-X, especially §§ 49ff). Once again, it was chiefly the existence of national differences which led the Court to accept a uniform definition. It may not be derived from this, however, that the consensus approach and the autonomous method are completely opposed. In many cases, the Court will choose an autonomous meaning precisely by searching for a "common denominator" between the states; cf. Sudre p. 121. This illuminates the different uses to which the method of autonomous interpretation can be put.

¹²⁷ Even then, however, there may be debate on the use of the method; see e.g. the dissenting opinion of Judge Matscher to ECtHR, judgment of 28 June 1978, *König / Germany*, Series A, Vol. 27.

¹²⁸ Cf. Ost 1992, p. 306.

indeed seem to illustrate this, especially if compared to the relatively technical issues concerned in cases such as *Pellegrin*. This difference in the type of cases does not suffice, however, to explain all differences in the Court's approach. Firstly, even a relatively technical case such as *Pellegrin* may have far reaching and important legal consequences, as some states will need to radically alter their domestic legal systems to accommodate new categories of procedural or property rights.¹²⁹ This may cause resistance in the states, and it may at least trigger a debate about on whether a judgment from Strasbourg should really determine the design of the national legal system. Moreover, the Court does not appear to be consistent in its approach of these issues. There are at least some cases where highly difficult and hotly debated moral or ethical questions were at stake, but where the Court still relied on an autonomous interpretation.¹³⁰ An example may be found in the case of *Pretty*, which concerned the question whether the "right to die" could be brought under the scope of the right to respect for one's private life as guaranteed by Article 8 of the Convention.¹³¹ Although opinions on the issue are extremely divided, the Court did not pay attention to this in determining the scope of application of Article 8. Rather, it relied on a teleological approach, stressing the basic principles of the Convention:

"The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity. ...

...

The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 par. 1 of the Convention."¹³²

In the end, the Court did seem to respect the diversity of opinions in deciding whether the alleged violation of the right to respect for one's private life were justifiable and legitimate, taking due account of the particular reasons the national authorities had advanced in justification of the restriction.¹³³ It is important to note, however, that the Court did not decide the *interpretive* issue by reliance on the existence or lack of a common ground, nor did it refer to the principle of evolutive and dynamic interpretation in this context. In this case, a teleological interpretation, geared to the primary aims of the Convention, seemed to have been decisive.¹³⁴

Thus, the Court shows a certain inconsistency in its interpretative approaches, sometimes using the comparative method to justify progressive interpretations, sometimes refusing to do so, and some-

¹²⁹ See Costa 2004, p. 88/89. Of course, the Court's judgments are only binding to the parties to the case (see Article 46), but it has already been stressed in § 2.1 that there is at least some kind of *de facto* binding effect of the interpretations given by the Court. This may have the effect that states will feel obliged to change their national legislation and procedures after the Court has rendered judgment, even if they were not a party to the relevant case.

¹³⁰ Conversely, as Heringa has demonstrated, the Court does not always adopt an autonomous interpretation in "technical" cases, concerning, for example, Articles 5 or 6; as examples, he mentions a case such as *Sutter / Switzerland* (ECtHR, judgment of 22 February 1984, Series A, Vol. 74, §§ 27/28); see Heringa 1996b, p. 112/113. Evidently, the existence of differences between the procedural norms in the State Parties does not always constitute a reason for autonomous interpretation.

¹³¹ ECtHR, judgment of 29 April 2002, *Pretty / UK*, Reports 2002-III.

¹³² ECtHR, judgment of 29 April 2002 (GC), *Pretty / UK*, Reports 2002-III, §§ 65 and 67. In § 66 the Court referred to Canadian case law, but it seems that it did not do so to find support for its decisions in comparable developments in the world, as well as to find confirmation of its own arguments.

¹³³ In particular §§ 74, 76 and 77.

¹³⁴ In itself, this would seem to illustrate the inconsistency and ambivalence of the Court's interpretative theory; on this, see also Letsas 2004, p. 297, explaining that in a number of cases the Court has moved away from consensus towards the moral truth of the protected rights.

times even relying on completely different methods to justify a “moral reading” of the Convention.¹³⁵ Even though all of these approaches can certainly be described by the flexible meta-principle of “evolutive and dynamic interpretation”, it is clear that this does not yet imply the existence of a set of well-structured and principled methods of interpretation.¹³⁶

4.3 Conclusion

To attain the often contrary goals of protecting fundamental rights in an effective way and showing sufficient respect for the diversity and differences, the Court appears to make good use of a variety of interpretive principles. Just like the meta-principle of teleological interpretation is rather effectively used by the European Court of Justice to respond to its problematic, the European Court of Human Rights makes use of the principle of evolutive and dynamic interpretation. Importantly, however, the ECtHR’s meta-principle is highly flexible and adaptable and is often used as a rhetoric tool, either to justify an interpretation that is highly protective and progressive, but contrary to the wish of certain member states, or to justify an interpretation that is conservative in character, but clearly respects the European divergence of opinions. Having regard to its particular problematic, the Court’s pragmatic and flexible use of the principle is understandable and perhaps even reasonable. At the same time, it is clear that the Court’s meta-principle lacks force, to the extent that the Court’s judgments do not derive persuasive and legitimising power from its use. In practice, the Court will have to make up for the meaninglessness of the evolutionary method by providing elaborate substantive arguments, which will be difficult under the extreme pressure of the ever-increasing case load. In addition, the inconsistent use of interpretive principles makes the Court’s case law quite unpredictable. Seemingly without good reason, the Court sometimes adopts an attitude of reserve, waiting for a natural convergence of national case law to occur, while in other cases it is far more activist and may force new and progressive definitions and methods upon the states. Thus, there is considerable risk that the Court gets entangled in its own ambiguous and inconsistent case law, without there being any directing principles that may help it to untie the knots.¹³⁷ This is problematic indeed, as it also means that it will be ever more difficult for national authorities to decide how they should comply with the requirements of the Convention.

5 Conclusion

In their important 1997 article on supranational adjudication, Laurence Helfer and Anne-Marie Slaughter stated that “supranational adjudication in Europe is a remarkable and surprising success”, and that it is clear that the ECtHR “ha[s] convinced national governments, individual litigants, and the European public to endorse and participate in frequent and often high-stakes adjudication at a level above the nation-state”.¹³⁸ Taking this conclusion as a starting point, one would be inclined to believe that the ECtHR has effectively overcome the difficulties of being a supranational court and modelled its judicial discourse in such a way as to meet its own particular problematic. This paper, however, has attempted to shed a different light on the ECtHR’s judicial discourse. Focussing on a few characteristic features of the Court’s jurisprudence, it has shown that the Court has searched for workable solutions and responses, which hardly seem to be adequate and sufficient in practice. The Court’s highly casuistic case-law and individual balancing approach would seem to be a good choice from the perspective of effective protection of fundamental rights and respect for the position of the national authorities, but it has also appeared that this approach does not fit in well with the growing demand

¹³⁵ Cf. Letsas 2004, p. 305.

¹³⁶ See Warbrick 1989, p. 710.

¹³⁷ Cf. Mowbray 2005, p. 71, stating that “a greater judicial willingness to elaborate upon the application of the doctrine in specific cases would help to alleviate potential fears that it is simply a cover for subjective ad-hockery”.

¹³⁸ Helfer/Slaughter 1997, p. 276.

for clarity and predictability. The Court itself has responded to this by developing a more general, constitutional approach in some areas, but the balance between offering individual relief and playing the role of a constitutional court appears to be a highly difficult one to be struck.

Likewise, the Court appears to have searched for a persuasive and workable meta-principle of interpretation, which might help it to reconcile contradictory requirements of fundamental rights protection within the highly diverse Europe. The principle of evolutive and dynamic interpretation may seem to have been helpful in this regard, but it is clear from the Court's case law that the principle is too flexible and empty in fact to provide real guidance. In some cases, the Court's case law shows harmonising tendencies and aims to offer a uniform definition of essential Convention notions, but this stands in marked contrast to the application of the common ground method and the respect the Court frequently pays to the differences between the State Parties.

It has been stressed already that these ambiguities in the Court's approach entail considerable risks for its position as an influential and authoritative supranational court. Since voluntary acceptance of the Court's case law is the main avenue for the Court to work changes in national law and practice, it is of great importance that it makes clear and acceptable choices and applies a coherent and well-reasoned set of interpretive principles. If the Court's case-law would continue to show inexplicable differences in approach, this poses a danger indeed for the effectiveness of the Court's efforts. This means that there is good reason to improve the Court's judicial techniques and argumentative approaches and to discuss the fundamental basis of its interpretation of fundamental rights.

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