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Knowledge in Ferment

Knowledge in Ferment

Dilemmas in Science, Scholarship and Society

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Preface

Dilemmas, fundamental controversies, basic oppositions between methods and approaches, occur in all fields of science and scholarship. Often dilemmas arise at the interface where science and society meet, or whenever several sciences or disciplines clash. The paradox of dilemmas is that although one might prefer to do without them, they are nevertheless indispensable. Without dilemmas progress in science and scholarship would be unthinkable. New paradigms come into existence and compete with the old for acceptance. Thus, by inciting researchers to make new efforts and pose new questions, dilemmas reveal new insights and sustain the ferment of knowledge.

As the Rector Magnificus of Leiden University for six years, from 2001 to 2007, Professor Douwe Breimer devoted his great talents and his best endeavours to developing and improving teaching and research inside and outside Leiden. As Professor of Pharmacology in Leiden from 1975, of Pharmacology and Pharmacotherapy from 1981, Breimer was the architect of, first, the Center for Biopharmaceutical Sciences (1983), then the Center for Human Drug Research (1987) and finally the research school, the Leiden/Amsterdam Center for Drug Research (1992). In 1984 he became Dean of the Faculty of Mathematics and Natural Sciences. Breimer's meritorious services to scientific research and to the organisation and development of science have been recognised in the seven honorary doctorates which he has received from universities all

over the world. But as Rector Magnificus, Douwe Breimer has been much more than the champion of the natural and life sciences, for he has also upheld Leiden's pre-eminence in the humanities, jurisprudence and the social and behavioural sciences. As a scientist, an administrator and especially as Rector Magnificus Breimer has been accustomed to act with circumspection, but also with decisive vigour. He has always shown himself to be one of the *esprits préparés* of Louis Pasteur's dictum, 'Le hasard ne favorise que les esprits préparés', a saying very dear to his heart. But he is also the embodiment of a proverb in his own mother-tongue, Frisian, 'Sizzen is neat, mar dwaen is in ding' (talk is nothing, but doing is something). He always was, and is, a man with style.

During his rectorship Douwe Breimer has enjoyed the deep respect and warm sympathy of the whole University. The University continues to regard him with pride and admiration. On his retirement as Rector Magnificus his friends and colleagues wished to demonstrate their gratitude by offering him this volume of studies. They have chosen as its theme 'Knowledge in ferment: dilemmas in science, scholarship and society'. In the word 'ferment' one may detect an allusion to a phenomenon in Breimer's own field of study; but it also refers to the catalytic role that dilemmas play in the development of science and scholarship. Colleagues from all Faculties and many departments of the University have contributed with enthusiasm to this volume. Authors and editors offer it to Douwe Breimer as a tribute of their gratitude, respect and friendship.

Leiden, 8 February 2007

Adriaan in 't Groen
Henk Jan de Jonge
Eduard Klasen
Hilje Papma
Piet van Slooten
Editors

To Douwe Breimer

on the occasion of his retirement as Rector Magnificus
of Leiden University
after a six-year term of office (2001-2007).
During these years he has inspired the University through
the example of his exceptional scientific achievements and his ideal
of the university
as promoter of welfare, well-being and culture.

He has exercised his office with unflagging energy, uncontested authority,
a rigorous insistence on the highest academic standards,
the wisdom of his judgement and experience,
his profound humanity
and grand style.

8
'Hard cases' in the law

Janneke Gerards

In 2001, Mrs. D became pregnant with twins. Following some tests in a hospital in Ireland, it transpired that one of the twins had stopped developing at eight weeks old and that the second foetus had a severe chromosomal abnormality. The hospital doctor explained to Mrs. D that this abnormality was a lethal genetic condition and that the median survival age of children affected with it was approximately six days. Mrs. D was devastated by the loss of her twins and dismayed by the prospect of carrying the pregnancy to term. She felt unable to bear the burden of a further five months of pregnancy with one foetus dead and the other dying. She considered an abortion. When she explained her wish to the hospital doctors, they were, as she said, 'very guarded' in their responses and they 'appreciated that she was not eligible for an abortion in Ireland'.[1] Indeed, abortion is prohibited by the Irish Constitution and even though a few exceptions to the prohibition have been accepted, the circumstances in which Mrs. D found herself are not covered by any of these.

Mrs. D did not consider it useful to start legal proceedings in Ireland in order to be allowed an abortion, as she did not think it likely that the Irish courts would be willing to interpret the Constitution and the accepted exceptions in such a way as to permit an abortion in her situation. She was also afraid that such proceedings would be time-consuming and she found it intolerable to have to wait for an abortion until the proceedings were concluded. Instead, she made arrangements to travel to the United Kingdom, where she underwent an abortion by medical induction.

Having travelled back to Ireland directly after the abortion, she experienced various physical difficulties which she did not dare to explain to her family doctor, nor to the hospital she attended for the complications; there, she contended that she had had a miscarriage. She also suffered from psychological difficulties which caused her and her partner to separate.

As she felt that the strict Irish abortion regulations had caused her strong personal suffering, Mrs. D decided to bring proceedings before the European Court of Human Rights in Strasbourg (ECtHR or Court). In her opinion, the Irish legislation violated her fundamental rights as protected by the European Convention on Human Rights.

The case of Mrs. D provides an excellent example of a so-called 'hard case': a case brimming with difficult moral and legal controversies, which cannot simply be decided by the application of clear legal norms.[2] The moral dilemma in the case is clear: should an abortion be permitted in a case such as Mrs. D's, where the foetus has a very low life expectancy, or should religious and ethical views regarding the right to life prevail? The moral aspect of this case brings about a number of other dilemmas, such as the question of whether it is up to a court to decide about such moral issues or whether it is preferable for such issues to be decided by the legislature after long and extensive public debate. Though this dilemma is present in many court cases, it is even more distinct in cases brought before a supranational court such as the ECtHR. After all, if the ECtHR were to decide that an abortion should be allowed in such circumstances as present in Mrs. D's case, this might upset a highly delicate and sensitive national balance. On the other hand, if the ECtHR were to find that the national authorities should decide on these issues, it would fail in its duties as a court of last resort for the protection of fundamental rights. The case of Mrs. D thus constituted a dilemma for the ECtHR. More properly said, it constituted at least three distinct legal dilemmas: the question how moral issues can be solved by judicial means; the relation of the courts to the democratically elected bodies; and the position of supranational courts vis-à-vis national legislation, traditions and cultural and religious choices.

Each of these dilemmas has been extensively dealt with by the most famous of legal scholars. Many valuable solutions to the dilemmas have also been supplied by the courts themselves, which is the result of judicial practice simply requiring 'hard cases' to be decided. However, most

solutions have evoked as many new questions as they have answered in the first place, and many of them show important shortcomings. This is problematic, as the dilemma of deciding 'hard cases' has become even more relevant in recent decades – the growing importance of fundamental rights and the increasing complexity and 'multi-levelness' of modern legal orders has resulted in ever greater numbers of 'hard cases' to be brought before the courts.[3] For this reason, it seems valuable to provide an overview of the legal debate about the three dilemmas indicated and of the gaps in legal theory and practice which are still widely open. The sad case of Mrs. D will thereby serve as a guideline.

The dilemma of deciding moral issues

In her statements before the European Court of Human Rights, Mrs. D invoked two fundamental individual rights: the right not to be subjected to inhuman and degrading treatment, and the right to respect for her private life. Both of these rights are contained in the European Convention of Human Rights, but their content and meaning have not been defined with any precision or clarity. To a large extent this means that it is up to the courts, in particular the ECtHR, to decide what kind of behaviour constitutes 'inhuman and degrading treatment', or when there is an unacceptable interference with the right to respect for private life. Such decisions often require value judgments to be made. This is true in particular for judgments regarding the right to protection of private life which Mrs. D invoked. The Court will there have to answer the question of whether the choice for abortion, or, more specifically, the interest in having an abortion performed in one's own country without the need for being secretive and anxious about it, forms part of an individual's 'private life'.

In deciding whether Ireland has violated Mrs. D's privacy rights, the Court will also need to take into account that the right to protection of one's private life is not absolute; this means that the state does not have to respect this right at all costs, but that it may restrict the right if there are convincing arguments to do so.

However, if the government has interfered with privacy rights because it wants to protect other fundamental rights or interests, such as the right to life of unborn children, the courts face a quandary. They will then have to decide whether the government has struck a fair balance between such

incommensurable values as the desire to protect the right to life and the need to respect an individual's autonomous choices. Such a choice can hardly be made on the basis of purely rational, legal and neutral criteria. In deciding 'hard cases', even the most honest judges will be inspired to some extent by personal, political or religious convictions and stereotypes. This is clearly true if a case relates to the right to live or die, but it is also relevant with respect to many other issues arising in modern, multicultural states, whether it concerns the case of an employer who has dismissed an employee who refuses to shake hands with men, or the case of a newspaper publishing a cartoon which offends the religious feelings of Muslims or Jews, or the case of a political party that excludes women from the possibility of exercising public functions.

The fact that moral considerations of judges will unavoidably influence judicial decision-making in 'hard cases' is widely recognised by legal scholars. Simultaneously, the idea of a judge taking personally-tinted decisions about highly delicate issues is one that is hardly reconcilable with the ideal of rational legal decision-making by an impartial and independent judiciary. It is exactly this ideal which has led legal scholars and legal professionals not to accept the unavoidability of value judgments as a final conclusion. If no theoretical solutions can be found, there might be practical solutions that can help to reduce the influence of the personal element in judicial decision-making. Such solutions have been found, for example, in such relatively simple rules as the one that 'hard cases' may never be decided by a single judge. Indeed, the ECtHR decides controversial cases always in Chambers of seven judges and the hardest cases may even be referred to a Grand Chamber constituted of seventeen judges, as happened in the case of Mrs. D. The obvious value of this rule is that the opinions and personal convictions of one single judge can never be decisive. Moreover, the requirement to decide unanimously or at least by a majority creates the need for debate, which in itself constitutes a test for the pertinence and value of all arguments exchanged.

A more substantive instrument to limit the influence of subjective opinion on judicial decision-making can be found in the requirement to hand down well-reasoned judgments which can stand scrutiny by higher courts, legal professionals and the general public. This requirement induces a court to select only those arguments which, taken together, form a legally sound, logical, convincing and objective basis for their conclusions. Even if a court were to arrive at a certain outcome on

irrational and intuitive grounds in the first place, it will need to reconsider the outcome if no such rational arguments can be found. The process of deciding a 'hard case' is thereby to some extent objectified.[4] Case-law analyses reveal, however, that the ideal of transparent and rational judicial argumentation is still far from being satisfied. Many judgments are poorly or obscurely reasoned, containing overly rhetorical arguments, empty formulas or improper references to earlier case-law, or even defying the demands of logic.[5] Unfortunately this is not only true for lower court judgments, but also for cases decided by national supreme courts or even the European Court of Human Rights.[6]

An important solution to the dilemma of deciding 'hard cases' may thus be found in an improvement of the quality of judicial argumentation. Some efforts have already been made to draft decision models which may provide structure to the courts' argumentation.[7] Legal scholars have identified various aspects of cases which can be decided by the courts on purely factual grounds and which may be conclusive for the whole case.[8] For example, if a legal measure affects fundamental rights with the purpose of protecting important social interests, but appears to be ineffective and unsuitable, such a measure is clearly unacceptable. Such a judgment as to the effectiveness of a certain measure can be given on purely factual grounds. If a case is decided in this way, there is no need for the court to address the actual balance of interests that underlies a certain measure or decision, which means that the need for giving value judgments is strongly reduced. Much is still to be gained here – many roads to rational decision-making lie relatively unexplored. To further investigate the possibilities for improvement of judicial argumentation is thus an important assignment for both legal scholars and legal professionals.

The dilemma of the 'counter-majoritarian difficulty'

The second dilemma faced by a court having to decide a 'hard case' concerns the position of the judiciary vis-à-vis democratically elected bodies. In the case of Mrs. D, for example, the ECtHR mentioned that, at the relevant time, an amendment to the Irish Constitution had been proposed to permit an abortion in the situation where it was necessary to prevent a real risk of loss of the woman's life.[9] The proposal was defeated in a referendum held in 2002, albeit only just (50.42% against and

49.58% in favour) and in a very low turnout (42.89% of the electorate). This meant that a slight majority of the Irish population was still in favour of the very strict abortion rules contained in the Constitution. Of course, it is not entirely predictable how the Irish would vote on an amendment permitting an abortion in the situation where the foetus would not survive to term or live outside the womb, as would be relevant in Mrs. D's case. Nevertheless, the strong division of votes in the Irish abortion referendum makes clear that the fundamental issue of abortion is highly controversial and subject to intense debate. May a court, such as the Irish Supreme Court or the European Court of Human Rights, then simply cut the Gordian knot by deciding to prohibit or permit a certain type of abortion? Or should this type of decision be left to the elected representatives of the people?

The dilemma here at issue is known in legal theory as the 'counter-majoritarian difficulty' and relates to the question of whether the courts, notwithstanding their lack of a democratic mandate, are permitted to give an interpretation of fundamental rights which conflicts with the wishes of the majority of the population. The counter-majoritarian difficulty is often invoked in legal theory to oppose the possibility of 'judicial review', which is the competence to test the compatibility of legislation with the Constitution, international treaties and the like. One of the most eloquent antagonists of judicial review has voiced his criticism as follows:

'... When the Supreme Court declares unconstitutional a legislative act ..., it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens .... [I]t is the reason the charge can be made that judicial review is undemocratic'.[10]

Regardless of this criticism, many legal systems have accepted the possibility of judicial review. Interestingly, the ECtHR's decision in the case of Mrs. D discloses that it clearly accepts judicial review, regardless of the counter-majoritarian difficulties attached to it. An important conclusion reached by the ECtHR was that the case should have been decided by the Irish Supreme Court in the first place. After all, Mrs. D had not attempted via the Irish courts to obtain permission for an abortion, as she did not expect them to decide in her favour. This meant,

according to the ECtHR, that she had in fact deprived the Irish Supreme Court of the opportunity to give a fresh interpretation of the Constitution. The ECtHR considered that there would certainly have been a chance of success, as the Irish Supreme Court in two earlier cases had decided in favour of a woman requesting an abortion. In both cases it had done so without there being a clear consensus about the desirability of the accepted exceptions, which meant that there was no reason why it should not do so in Mrs. D's case. From these considerations it can be derived that the ECtHR regards judicial review as a feasible and well-accepted way of arriving at constitutional reform, and that it even accepts that a court may hand down a judgment which seems contrary to the majority's opinions. In itself this is a revolutionary statement, as it means that an important and influential court such as the ECtHR does not take the counter-majoritarian difficulty really seriously.

The acceptance of judicial review by the ECtHR does not mean, however, that the dilemma is non-existent. The objections of the opponents of judicial review are real and cannot be swept aside simply by stating that the courts in practice accept the possibility of judicial review. More relevant to solving the dilemma may be the many theories which have been advanced to reconcile the notion of judicial review with the notion of representative government.[11] One of the most convincing of these is the argument that representative government and majoritarian decision-making are not the only important elements of a state governed by the rule of law (or *Rechtsstaat*). Equally important is the protection of the interests of minority groups and fundamental rights, in particular if it seems likely that the democratically elected bodies will neglect or even thwart these rights and interests. Indeed, the value of guaranteeing such rights and interests may sometimes be considered greater than that of satisfying the desire of the majority.[12] It is this argument that seems to lie at the heart of the US Supreme Court's famous decision to declare unconstitutional the American policy of segregation of schools, even though it was clear that the policy was still supported by a majority of the American population (at least in the South).[13] The same argument was used by the ECtHR to uphold a Turkish judgment dissolving the Welfare Party – in spite of strong support for the party in Turkey (polls indicated that the Welfare Party would obtain an absolute majority of the votes at the next elections), it held that the party's ideas and opinions were contrary to the notion of the rule of law and constituted a danger to the

individual rights and freedoms guaranteed by the Convention.[14]

Although this justification for counter-majoritarian judgments generally seems to be rather convincing, it does not entirely solve the problem. In the cases of racial segregation and the Welfare Party, the reasonableness of the counter-majoritarian judgments may seem obvious – indeed, racial segregation evidently frustrates the rights of persons of a certain skin colour, while it is relatively clear that the Turkish Welfare Party would have used the power of government to impose forceful religious legislation to the disadvantage of the rights and interests of religious minorities. In a case such as that of Mrs. D, the situation is less clear-cut. Although Mrs. D evidently holds a highly important and valuable interest in self-determination and human dignity, the interest of the protection of the life of unborn children (even if they have a low life expectancy) and the respect for religious convictions can be considered at least as weighty and legitimate. Whatever decision were taken by the Court, some fundamental and social interest would have to be sacrificed. The argument of the protection of the rule of law thus provides hardly any direction as to how to decide such a case.

How should the ECtHR then deal with such a case? It cannot, after all, simply leave the case undecided as this would amount to denial of justice. What it can do, however, is to respect as much as possible the choices made by the legislature, as long as it is clear that the contested legislation is the result of open and extensive social and political debate, the outcome of which seems to be well-balanced and representative, even if it is unacceptable and harsh in the opinion of some. On the other hand, a court may reasonably be expected to intervene in cases where there has been no such careful process of decision-making, where the debate seems to have been one-sided or where the majority seems to have neglected important interests of minority groups. In such cases, according to procedural democratic theory, it may be justified for the courts to restore the balance in the democratic system by favouring the interests of the minority over those of the majority, or at least by ascertaining that the minority has a proper voice in the decision-making process.[15]

The ECtHR has shown itself to be very careful indeed in its relations towards the other powers of government, its counter-majoritarian judgment in the case of the Welfare Party being a rare exception. In many cases, it will respect the choices made by the national legislature, especially if they are well-considered.[16] It seems not far-fetched to

suppose that the ECtHR is, to some extent, influenced by the procedural theory of democracy, taking an activist stance in cases where the democratic system wreaks havoc, while showing restraint where it produces acceptable (albeit controversial) measures.

The dilemma of deciding hard cases in a multi-level legal system

This brings us to the third dilemma which is connected with the judicial decision of 'hard cases'. The ECtHR is a supranational court, established by the member states of the Council of Europe (CoE). The CoE itself was erected by a number of member states directly after the Second World War with the primary aim to defend fundamental rights, democracy and the rule of law. It presently groups together 46 European countries, including such non-EU states as Russia, Ukraine, Turkey and Azerbaijan. All of these states are signatories to the European Convention of Human Rights and have accepted the individual right to complain before the ECtHR about violations by the state of their fundamental rights, or about a state's failure to protect these rights in an effective way. By considering and deciding these complaints, the ECtHR has been able to elucidate the meaning of the various rights protected by the Convention, each judgment providing more clarity about the exact obligations and prohibitions arising from the Convention provisions.[17] This has had important consequences for almost all the states falling under the Court's jurisdiction; the Netherlands, for example, has had to change its entire system of administrative procedure because the system showed, according to the ECtHR, important deficits from the perspective of procedural rights.[18]

It is important to realise that such fundamental changes have been brought about by a judgment of an independent international body, constituted by judges from 46 different states and, importantly, lacking a police force to help it enforce its judgments. Indeed, the ECtHR can be considered to be highly successful: by far the majority of its judgments have been followed up by the states against which they were directed.[19] It is difficult to explain the reasons why states have been willing to comply with so many of the ECtHR's judgments, but to some extent this seems to be due to the authoritative and convincing character of the Court's judgments. Some researchers have even stated that the quality of the Court's legal reasoning and its moral integrity form its main legitimating

assets.[20] It is highly probable that, if the ECtHR's arguments were to lack power of persuasion, the member states would be much less willing to implement them in their legal systems.[21] The ECtHR therefore constantly has to safeguard the quality of its judgments, which is a task that is growing more and more difficult given the rapid increase in its workload – whereas the ECtHR had to deal with only 404 applications in 1981, some 41,000 applications were lodged in 2005.[22] Even though the number of judges also rose during this period, their number did not keep pace with the increasing number of cases. This means that it is becoming ever more difficult for the judges to elaborately discuss each individual case and to deliver consistent, carefully drafted and well-reasoned decisions. Indeed, there have been signs that case-law is showing problematic inconsistencies and lack of clarity.[23] A variety of measures have been introduced to solve this, including the introduction of a 'Case-law Conflict Prevention Group' and a 'Conflict Prevention Board', but it is questionable whether this is sufficient.[24]

The preservation of consistency and quality of argumentation of supranational decisions is a highly important topic, but it constitutes only a small part of the conundrum of deciding 'hard cases' in a 'multi-level' legal order. National legal systems have increasingly become part of larger regional or global jurisdictions with their own powers of decision and judgment. The interaction between the various 'levels' of jurisdiction (national, European, global) and the co-operation between the relevant authorities is highly complicated.[25] For example, as regards fundamental rights protection, important work is not only done by the ECtHR and the national legal orders, but also by the Court of Justice of the European Communities, which is competent to decide on fundamental rights issues arising from European Union law.[26] In addition, there are many international human rights treaties containing specific requirements that have to be met by the states.[27] It is obviously very difficult for both the national and European courts to navigate between the specific and sometimes conflicting requirements set by each of these levels. Stronger co-operation between the various levels is essential to create concordance between the various requirements and to enable both the national and the European courts to operate in an effective way, but there are still many political and practical obstructions that hamper the development of successful solutions.

For the ECtHR, one of the most pressing multi-level problems relates

to the diversity that the CoE members show in their approaches towards fundamental rights. Even if the ECtHR wished to provide a uniform level of human rights protection, this would seem hard to attain in the CoE as it presently stands. After all, fundamental rights issues are close to the individual, but also to national and cultural traditions: the way these rights are protected often reflects deep-seated social choices.[28] The example of abortion and the right to life of unborn children, which is central to the case of Mrs. D, may help to illustrate this. One of the questions that is relevant to deciding abortion cases is concerned with the point in time as from which someone is protected by the Convention's 'right to life' – does such protection start at the moment of conception, at birth, or somewhere in between? It is clearly highly difficult for the ECtHR to decide this for all 46 member states of the CoE, especially because certain states have not even reached internal agreement on the question. Similarly, it is hardly possible for a European court to decide whether the right to protection of private life contains a right to self-determination which is sufficiently strong as to allow a pregnant woman to choose whether to carry her child to full-term. Such decisions not only involve highly difficult moral choices, but they may also thwart national sensitivities or upset a delicate political balance. This may not be acceptable to some states and might even result in a refusal to execute the ECtHR's decision.[29] As the protection offered by the ECtHR is very much dependent on voluntary compliance, this constitutes a dilemma indeed.

Hence, 'multi-levelness' means that the ECtHR will have to respect national differences in interpreting the Convention, while simultaneously providing a high and uniform level of protection of fundamental rights that is not out of pace with international and European Community requirements. In its case-law the ECtHR has been trying various approaches and methods to meet these differing demands. A well-established method is the use of the doctrine of the 'margin of appreciation'. According to this doctrine, each state has a certain amount of discretion which it may use to take decisions it considers important and necessary, even if such decisions interfere with the exercise of fundamental rights. In principle, the states thus remain free to strike a balance between competing interests, as long as the minimum level of protection of a fundamental right is guaranteed.[30] The scope of the margin of appreciation differs, however, according to the circumstances of the case. If a case concerns a sensitive or highly technical policy area, such as

planning policy or national security, the states will be given much room indeed to determine the necessity and suitability of certain restrictive measures.[31] The ECtHR will only superficially scrutinise the national measures, merely controlling whether the balance struck by the state is not manifestly unreasonable or arbitrary. By contrast, the ECtHR will leave a far more narrow margin of appreciation in those cases where the 'core' of a fundamental right seems to be affected (*e.g.* the freedom of the press), or where the complaint concerns a serious interference (*e.g.* censure) – it is then that the uniform protection of the Convention really matters. In those cases, the Court will apply rigorous scrutiny and it will accept only very important general interests as a justification. Interestingly, the ECtHR uses such a strict test primarily in cases where there is a high degree of consensus within the CoE as to the importance of the right concerned; indeed, it is then made easier for a supranational court to accept a certain application of fundamental rights.[32]

Normally, the ECtHR uses the 'margin of appreciation' doctrine only to decide whether an interference with a certain Convention right can be *justified*, *i.e.* if good reasons can be given to restrict a certain individual right. A new development is that it also uses the doctrine in *interpreting* the rights contained in the Convention. Until recently, it was considered to be one of the Court's main tasks to provide an authoritative and uniform explanation of the meaning and scope of the various rights contained in the Convention. Such difficult interpretive questions as whether assisted suicide or legal recognition of a change of gender are covered by the right to respect for one's private life, were willingly answered by the Court.[33] The result of this has been that, throughout the Council of Europe, an identical definition has been given to the Convention rights, even though the margin of appreciation doctrine implies that there will be differences as regards the extent to which restrictions of these rights can be considered acceptable. In the case of *Vo v. France*, however, the Court adopted a controversial new approach.[34] The case concerned in essence the question of when life begins, or, more specifically, as from what moment one's life is protected by the 'right to life' contained in the Convention. If life is considered to start at conception, even unborn life would be protected by the Convention. As the right to life is considered to be absolute – which means that interferences cannot in principle be justified – this would be a highly important decision.[35] An interpretation of 'life' as encompassing 'unborn

life' would imply, after all, that national acceptance of abortions would be in violation of the right to life as protected by the Convention, which would probably have been unacceptable for those member states that permit abortions on principled grounds. If the Court had ruled, on the other hand, that 'life' starts at birth, this would have run counter to the views of other member states. The case of *Vo* thus left the ECtHR with a quandary, but it found a way out by considering that opinions are so much divided that the question of when life begins should be left to the relevant state's margin of appreciation.[36] This decision has been widely criticised, as it is not in conformity with the Court's perceived role as final interpreter of the Convention.[37] It is clear, though, that the ECtHR considered this a lesser evil when compared to the problems that might be caused by accepting a uniform definition.

One last solution to the dilemma of deciding 'hard cases' in a multi-level legal system can be found in the case of Mrs. D. It may be recalled that Mrs. D had passed over the Irish courts because of her lack of confidence in their ability to reach a favourable decision. In fact, she thereby asked the ECtHR to decide on a controversial and sensitive issue which had not yet been discussed by the national courts. For the ECtHR this implied that there was no possibility of tracing relevant arguments, views and sensitivities in national judicial decisions which could help it to take a reasonable and acceptable decision. In addition, it meant that the national authorities themselves had not been given the opportunity to 'remedy' any possible fundamental rights violations. For these reasons, the Court decided that it would not pronounce a substantive judgment in the case, declaring the case inadmissible because of a failure to exhaust all available national remedies.

The ECtHR's decision not to pronounce judgment in this case may be considered as a disregard of Mrs. D's interests, as it means that the Court did not reach the substantive question of whether the Irish anti-abortion legislation violated her fundamental rights. A substantive decision might have been considered the more reasonable because of Mrs. D's understandable lack of confidence in the willingness of the national courts to accept a change of the widely-supported Irish anti-abortion policy. Nonetheless, the Court's decision seems to be an acceptable way out of a difficult dilemma, as it places the primary responsibility to decide on moral issues and 'hard cases' with the national authorities. Indeed, it may well be contended that the national courts are more suited to deal with

such issues than a distant Court constituted of judges who will hardly know and understand local difficulties and opinions.

Conclusion

Drawing the lines together, it is clear that judicial decision-making in 'hard cases' discloses important dilemmas: such cases require difficult value judgments and moral choices, which are difficult for the courts to make. The dilemma is even more distinct when account is being taken of the need for the courts to respect the decisions of representative bodies and, where relevant, the differences between states. During recent decades, these dilemmas have become even more important because of the increasing complexity of multi-level and multi-cultural societies, where conflicts of fundamental rights and interests seem to occur with ever greater frequency.

The dilemmas inherent to deciding hard cases will probably never be completely resolved. Nonetheless, it is essential to endeavour to make visible and, wherever possible, to reduce the impact of subjective opinions on judgments; to find an acceptable balance between courts and elected bodies; to create closer co-operation between the various 'levels' of jurisdiction; and to find a middle ground between the need for uniform European protection of fundamental rights and the need to respect diversity and national traditions. To do so will be one of the great challenges for both legal scientists and legal professionals, preferably in close co-operation.

Notes

1 See the description of the facts of the case in: ECtHR, admissibility decision of 28 June 2006, *D v. Ireland*, not yet published, § 4. All unpublished ECtHR cases can be found via http://www.echr.coe.int/ECHR/.

2 Cf. A. Bhagwat, 'Hard Cases and the (D)evolution of Constitutional Doctrine', in: *Connecticut Law Review* 921 (1998), p. 966 and J. Bomhoff and L. Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights', in: *European Constitutional Law Review* 424 (2006), at p. 429.

3 See e.g. T. Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge: Cambridge University Press 2002), ch. 10.

4 See L. Epstein and J.F. Kobylka, *Supreme Court & Legal Change. Abortion and the Death Penalty* (Chapel Hill/London 1992) p. 13ff.

5 See e.g. J.H. Gerards, *Judicial Review in Equal Treatment Cases* (Leiden/Boston 2005), in particular with respect to equal treatment cases (which often qualify as 'hard cases').

6 Cf. J.H. Gerards, 'Rechtsvinding door het Europees Hof voor de Rechten van de Mens', in: T. Barkhuysen, R.A. Lawson, *et al*. (eds.), *55 Jaar EVRM*, *NJCM-Bulletin (special*) 2006, p. 106/107.
7 E.g. Gerards 2005 (*supra*, note 5).
8 See e.g. F.T. Groenewegen, 'In hoeverre schrijft het evenredigheidsbeginsel iets voor?', in: A.J. Nieuwenhuis, B.J. Schueler and C.M. Zoethout, *Proportionaliteit in het publiekrecht* (Deventer 2005) p. 18/19.
9 See in particular §§ 43-45 of the ECtHR's admissibility decision.
10 A.M. Bickel, *The least dangerous branch. The Supreme Court at the Bar of Politics*, 2d Ed. (New Haven/Londen 1962) p. 16/17.
11 See in particular Federalist Paper No. 78, *The Judiciary Department* (1788), H. Kelsen, *Reine Rechtslehre*, Vienna: Franz Deuticke 1960, p. 271ff, J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge (Mass.) 1980) and R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Cambridge (Mass.) 1996).
12 See in particular Ely (*supra*, note 12) and cf. J.H.H. Weiler, *The Constitution of Europe* (Cambridge1999) p. 103.
13 *Brown v. Board of Education*, 347 U.S. 483 (1954). For the history of the case, see e.g. H.J. Abraham and B.A. Perry, *Freedom and the Court. Civil Rights and Liberties in the United States* (New York/Oxford 1998) p. 342ff.
14 ECtHR, Grand Chamber judgment of 13 February 2003, *Refah Partisi and Others v. Turkey*, Reports 2003-II, § 11.
15 See in particular Ely (*supra*, note 11).
16 See *e.g. Maurice v. France*, Grand Chamber judgment of 6 October 2005, not yet published, and ECtHR, Chamber judgment of 7 March 2006, *Evans v. UK*, not yet published, § 42.
17 See further e.g. J. Polakiewicz, 'The Execution of Judgments of the European Court of Human Rights', in: R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe* (Oxford 2001) p. 72/73.
18 See ECtHR, judgment of 23 October 1985, *Benthem v. The Netherlands*, Series A, Vol. 97; further T. Barkhuysen and M.L. van Emmerik, 'A Comparative View on the Execution of Judgments of the European Court of Human Rights', in: Th. Christou and J.P. Raymond (eds.), *European Court of Human Rights. Remedies and Execution of Judgments* (London 2005) at p. 11ff.
19 See Polakiewicz (*supra*, note 17), p. 74; see, however, E. Bates, 'Supervising the Execution of Judgments Delivered by the European Court of Human Rights: the Challenges Facing the Committee of Ministers', in: Th. Christou and J.P. Raymond (*supra*, note 18) p. 55 ff.
20 E.g. Bates (*supra*, note 19), at p. 53; see also Epstein & Kobylka (*supra*, note 4) p. 21/22.
21 See in particular L.R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* 273 (1997) p. 318ff.
22 See the statistical information at www.echr.coe.in; see also *Reform of the European human rights system. Proceedings of the high-level seminar, Oslo, 18 October 2004* (Strasbourg 2004).
23 See Gerards 2006 (*supra*, note 6), p. 93-122 and Bates (*supra*, note 27) p. 70.
24 See E. Myjer, 'Straatsburgse Myj/meringen: CLCP en CPB', 31 *NJCM-bulletin* 1067 (2006).
25 M. Mayer, 'The European Constitution and the Courts. Adjudicating European constitutional law in a multilevel system'. *Jean Monnet Working Paper* 9/03 (2003) p. 36ff.
26 See D. Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities', in: Ph. Alston (ed.), *The EU and Human Rights* (Oxford 1999) p. 757ff.
27 See e.g. R. Holtmaat and Ch. Tobler, 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination', in: *Maastricht Journal of European and Comparative Law* 399 (2005).

28 See J.H.H. Weiler, *The Constitution of Europe* (Cambridge 1999) p. 102ff.

29 See e.g. M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford 2006).

30 See Weiler (*supra*, note 28) p. 106/107.

31 E.g. ECtHR, Chamber judgment of 2 November 2006, *Giacomelli v. Italy*, not yet published, § 80 and ECtHR, admissibility decision of 29 June 2006, *Weber and Saravia v. Germany*, not yet published, § 106. For other factors, see Gerards 2005 (*supra*, note 5) p. 165ff.

32 See Gerards 2005 (*supra*, note 5) p. 171 ff. and Weiler (*supra*, note 28) p. 114.

33 E.g. ECtHR, Grand Chamber judgment of 29 April 2002, *Pretty v. UK*, Reports 2002-III, §§ 61-63 and ECtHR, Grand Chamber judgment of 11 July 2006, *Christine Goodwin v. UK*, Reports 2002-VI, §§ 89-93.

34 ECtHR, Grand Chamber judgment of 8 July 2004, *Vo v. France*, Reports 2004-VIII.

35 Cf. T. Goldman, '*Vo v. France* and Fetal Rights: The Decision Not To Decide', 18 *Harvard Human Rights Law Journal* 277 (2005) at p. 281.

36 § 85.

37 E.g. J.A. Bomhoff in his case-note in *European Human Rights Cases* 2004/86; see also the separate opinion of Judge Ress, § 3ff.

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