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**'The rights and freedoms of others': The ECHR and its peculiar category of conflicts between individual fundamental rights.**

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**‘THE RIGHTS AND FREEDOMS OF OTHERS’:  
THE ECHR AND ITS PECULIAR CATEGORY  
OF CONFLICTS BETWEEN INDIVIDUAL FUNDAMENTAL RIGHTS**

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Abstract

Conflicts between individual fundamental rights are both *pervasive* and *problematic* in the system of the European Convention on Human Rights. This paper is an attempt to illuminate these two dimensions, as well as a plea for taking conflicts of rights more seriously within the Convention legal order.

The paper uses a comparative law perspective to demonstrate that the Convention system operates with an exceptionally broad category of ‘conflicts between individual fundamental rights’. The size and location of this category are attributable, at least in part, to the Convention system’s exclusive reliance on a rights-based perspective and the corresponding absence of any ‘division of powers’ jurisdiction for the European Court of Human Rights. This institutional set-up, unique among (quasi)-constitutional courts, coupled with the absence of a ‘thick’ understanding of democracy at the European level, pushes the Court towards framing a large proportion of conflicts between individual and collective interests before it as conflicts between individual fundamental rights.

Although current institutional arrangements significantly limit possibilities for the Strasbourg Court to modify its approach, the paper does propose a number of ways in which the ECHR could take conflicts of fundamental rights more seriously. These suggestions focus on situations in which framing a conflict as a clash between individual rights may be *suboptimal*, *suspicious*, or both. The situations identified are those in which (1) individuals are opposed to the ‘rights’ of majorities, (2) individuals are opposed to the ‘rights’ of public officials, and (3) cases in which the distribution of, or access to, public resources is a central issue.

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# **‘THE RIGHTS AND FREEDOMS OF OTHERS’: THE ECHR AND ITS PECULIAR CATEGORY OF CONFLICTS BETWEEN INDIVIDUAL FUNDAMENTAL RIGHTS**

Jacco Bomhoff\*

## **1. Introduction: Conflicts of Fundamental Rights and the European Convention**

The theme of ‘conflicting rights’ has an apparent naturalness to it; the rights of different individuals are obviously bound to clash, at least on some occasions and under some circumstances. This aura of inevitability often comes with the recognition that conflicting rights constitute a subject of extraordinary difficulty. We may be able to devise moral or political theories to arbitrate between individual rights and the public interest, the argument often goes, but conflicting individual fundamental rights pose special problems that these broader theories do not cover.<sup>1</sup>

These two impressions - inevitability and special difficulty - are confirmed in the case law of the European Court of Human Rights (‘the Court’). In the Court’s case law we find a wide array of cases in which individual rights are pitted against each other.<sup>2</sup> Famous cases have dealt with conflicts between, for example, a right to wear a headscarf in public institutions and a right not to be threatened by others’ manifestation of religion,<sup>3</sup> the right to freedom of expression and the right to freedom of religion,<sup>4</sup> or the right to freedom of expression and a right to be free from racial discrimination.<sup>5</sup>

The key doctrinal device for dealing with conflicting individual rights under the European Convention on Human Rights (‘the Convention’) is the exception-clause ‘the rights and freedoms of others’, attached to the rights enshrined in the Articles 8 to

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<sup>1</sup> Two important contemporary theories of fundamental rights, Dworkin’s rights as trumps-theory and Rawls’ understanding of absolute priority for the family of basic liberties as a whole, have special difficulties in dealing with conflicts of fundamental rights. For Dworkin, “competing rights” are “the least well understood” of all grounds that may be invoked to justify overriding or limiting rights. R. Dworkin, *Taking Rights Seriously*, 193 (London: Duckworth, 1977). Rawls has insisted on priority for the basic liberties as a group. J. Rawls, *Political liberalism*, 356 (New York: Columbia University Press, 1993) “*First, it needs to be emphasised that the basic liberties constitute a family, and that it is this family that has priority and not any single liberty by itself (...)*”. This view puts conflicts *between* basic liberties in a special category of difficulty. In his book *Political Liberalism* Rawls explicitly acknowledges the force of Hart’s criticism that in *A Theory of Justice* “no satisfactory criterion” had been given “for how the basic liberties are to be further specified *and adjusted to one another*.” (290, my emphasis).

<sup>2</sup> Note: Because of the way the Strasbourg system of rights protection is set up, procedures always oppose an individual litigant with a defending State (except in the case of inter-State complaints, see Art. 33 of the Convention). ‘Direct’ horizontal litigation between individuals, therefore, is impossible before the Strasbourg Court. See Art. 34 of the Convention: “The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”.

<sup>3</sup> ECtHR 10 November 2005, *Leyla Sahin v. Turkey*.

<sup>4</sup> ECtHR 20 September 1994, *Otto Preminger v. Austria*, Series A, vol. 295-A; ECtHR 25 November 1996, *Wingrove v. The United Kingdom*, Reports 1996-V.

<sup>5</sup> ECtHR 23 September 1994, *Jersild v. Denmark*, Series A, vol. 298.

11 of the Convention. This clause allows governments to limit the exercise of individual rights such as privacy, freedom of expression and free exercise of religion, when the limitations imposed are for the benefit of the protection of ‘the rights and freedoms of others’.<sup>6</sup> These rights of others are often themselves rights protected under the Convention.<sup>7</sup> So, for example, in the well-known case of *Otto-Preminger-Institut v. Austria*, the Court accepted that the Government’s purpose in prohibiting the screening of the film *Das Liebeskonzil*, was to protect “the rights of citizens not to be insulted in their religious feelings by the public expression of views of other persons”.<sup>8</sup> And in the case of *Éditions Plon v. France*, a ban on the publication of a book on the late President Mitterand, including details of his medical condition, was accepted to have been instituted “to protect the late President’s honour, reputation and privacy”.<sup>9</sup>

It is important to note that not all applications of the clause ‘the rights of others’ involve opposing fundamental rights, that is; rights themselves protected under the Convention - or even under other fundamental rights instruments. An example of a case opposing a Convention right and a non-Convention, non-fundamental right can be found in *Barthold v. Germany*. In that case, a veterinary doctor could be disciplined for violating a ban on advertising as the measure was imposed “in order to prevent the applicant from acquiring a commercial advantage over professional colleagues”; a justification that was found to come within the category of ‘the rights and freedoms of others’.<sup>10</sup>

At the same time, not all cases involving conflicting fundamental (Convention) rights are dealt with exclusively through the exception clause ‘the rights of others’. The Court has, for example, consistently held that when it comes to States’ *positive obligations*, the limitation clauses of the Articles 8 to 11 - including the ‘rights and freedoms of others’ clause - are not directly applicable but of “a certain relevance”

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<sup>6</sup> The clause is worded slightly differently in the various relevant provisions: Art. 8 (private life and family life: “for the protection of the rights and freedoms of others”); Art. 9 (freedom of thought, conscience and religion: “for the protection of the rights and freedoms of others”); Art. 10 (freedom of expression: “for the protection of the reputation or rights of others”); Art. 11 (freedom of assembly and association: “for the protection of the rights and freedoms of others”).

<sup>7</sup> The Court’s seminal statement on the treatment of conflicting Convention rights under ‘the rights of others’ can be found in the *Chassagnou v. France* judgment: ECtHR 29 April 1999, *Chassagnou v. France*, Reports 1999-III, para. 113 (“*In the present case the only aim invoked by the Government to justify the interference complained of was “protection of the rights and freedoms of others”. Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”. The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a “pressing social need” capable of justifying interference with one of the rights guaranteed by the Convention. It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right*”).

<sup>8</sup> *Otto-Preminger-Institut v. Austria*, *supra* note 4, para. 48.

<sup>9</sup> ECtHR 18 May 2004, *Éditions Plon v. France*, Reports 2004-IV, para. 34.

<sup>10</sup> ECtHR 25 March 1985, *Barthold v. Germany*, Series A., vol. 90, para. 51. See also ECtHR 24 February 1994, *Casado Coca v. Spain*, Series A, vol. 285-A, para. 44-46.

only.<sup>11</sup> In cases where the Convention infringement pleaded by the applicant involves the non-fulfilment of a positive obligation, the Court will therefore not apply the clause ‘the rights of others’ directly, although it may of course look at the clause for guidance. In other cases, the Court seems to prefer talk of duties not to harm others attached to the exercise of a Convention right to an extended discussion in terms of the limitation clause ‘the rights of others’.<sup>12</sup>

While the clause ‘the rights of others’ therefore *neither exclusively* involves conflicting fundamental rights *nor covers all cases* of conflicting Convention rights, it would seem that analysis of the use of this clause offers an important and fairly representative picture of the way the Convention system deals with conflicting fundamental rights. And that picture is of a system in which conflicts of fundamental rights are pervasive. It is also, as the next Section will go on to argue, a picture of a system that has had great difficulty in finding consistent and convincing ways of dealing with cases of conflicting rights.

These difficulties may be assessed in their own right, through the development of an internal critique of the use of the clause ‘the rights of others’ in Strasbourg case law (Section 2 of this paper). It could be, however, that the weaknesses identified are mere instances and reflections of a more fundamental problem in the way the Convention system conceptualizes and ‘solves’ cases of conflicting fundamental rights. This paper will use a comparative law perspective to argue that the Court’s difficulties in this area stem from the Convention’s reliance on an all encompassing ‘rights-based’ approach, to the exclusion of any *structural perspective* that would combine a focus on individual rights with an analysis of governmental powers or of relations between majority and minority groups in society.

In order to make this argument, I will try to show, first, the contingency of any category of cases of ‘conflicting fundamental rights’ (Section 3). This contingency implies that the basic jurisprudential move of understanding a case as turning upon a conflict of rights is - at least to some extent - a matter of institutional choice or design on behalf of those framing or applying the guarantees of a rights order.<sup>13</sup> This contingency is important, because if conflicts of rights are - again at least to some extent - not a timeless, universal, unavoidable phenomenon, but, at least partly, a matter of choice, then this choice, like any other aspect of the design of rights orders, may be analyzed and evaluated in its own right, on the basis of separate normative criteria. These criteria, it is important to emphasize, will not necessarily have to be identical to those involved in assessing the desirability of substantive outcomes in individual cases. Such an assessment and critique of the Convention system’s specific institutional design is the subject of the remainder of the paper.

Section 4 argues that the Convention system’s institutional design is special from a comparative perspective in that it is *exclusively rights-based*. This all encompassing focus on rights, it is argued, makes the category of cases potentially involving *a conflict* of such rights much larger than in other systems. By contrast, in systems that couple conceptualizations in terms of rights with perspectives based on (limits to)

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<sup>11</sup> See for example ECtHR 17 October 1986, *Rees v. The United Kingdom*, Series A, vol. 106, para. 37; ECtHR 7 July 1989, *Gaskin v. The United Kingdom*, Series A, vol. 160, para. 42; ECtHR 18 April 2006, *Dickson v. The United Kingdom*, para. 32 (case referred to the ECtHR’s Grand Chamber).

<sup>12</sup> See for example ECtHR 13 September 2005, *I.A. v. Turkey*, para. 24 (“*a duty to avoid expressions that are gratuitously offensive to others and profane*”).

<sup>13</sup> I use the term ‘institutional’ as including doctrinal conceptualizations.

governmental powers, far fewer cases tend to be seen as involving such conflicts. Section 5 offers a number of examples that show how this exclusive focus on rights under the Convention has contributed to a number of weaknesses in the Court's case law. Many of these cases, it is argued, are better understood as turning upon a normative assessment of a desirable structure for the regulation of clashes between individual and collective interests. In these cases, importing elements of a *structural perspective* - involving both individual rights and governmental powers - would be beneficial in directing the Court's attention to what is really at stake.

Against this background, Section 6 returns to an internal perspective and asks what the Court can do to remedy some of the weaknesses in its case law on 'the rights of others', given the present institutional arrangements and constraints to the Convention system. Here, I offer a number of practical guidelines that may be helpful in detecting cases in which the use of the clause 'the rights of others' may be suboptimal or suspicious. Section 7 concludes by putting the critique of the Court's use of 'the rights of others' in the context of broader debates on the Court's role.

## 2. 'The Rights and Freedoms of Others': Elements of an Internal Critique

### 2.1. Introduction

Several related weaknesses are visible in the Court's use of 'the rights of others'-clause. The Court (a) is not clear about the kinds of rights that could qualify for inclusion under 'the rights of others', (b) is often vague about which of those rights precisely is at issue in specific cases, and (c) does not apply a consistent category to who can qualify as rights holders - i.e. who can be 'others' for the purposes of the clause.<sup>14</sup>

The first problem has already been alluded to above: the Court's case law offers no coherent category of interests that may receive protection as 'rights of others'. This is perhaps most clearly evinced by the wide range of economic interests the Court has included in the category. Government action designed to prohibit an applicant from damaging "the business" of a commercial organization by raising "unjustified suspicions" concerning its commercial policy qualified under the clause, for example, in *Markt Intern Verlag v. Germany*.<sup>15</sup> The Court has also allowed protection of the interests of creditors,<sup>16</sup> competitors<sup>17</sup> and business associations<sup>18</sup> under the clause. Finally, a range of much more diffuse interests, such as the "social protection of tenants" and "the economic well-being of the country" have been held to qualify.<sup>19</sup>

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<sup>14</sup> An additional point of critique could be that the Court is not clear on the relationship between the clause 'the rights and freedoms of others' and other limitation clauses, especially in cases where there is a confluence of potentially applicable grounds of limitation.

<sup>15</sup> ECtHR 20 November 1989, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, Series A, vol. 165, para. 31. In his Dissenting Opinion, Judge De Meyer was critical of the Court's approach on this point. See also J.G.C. Schokkenbroek, *Toetsing aan de vrijheidsrechten van het Europees Verdrag tot bescherming van de rechten van de mens 187* (Zwolle: W.E.J. Tjeenk Willink, 1996).

<sup>16</sup> ECtHR 17 July 2003, *Luordo v. Italy*, Reports 2003-IX, para. 76.

<sup>17</sup> *Barthold v. Germany*, *supra* note 10, para. 51.

<sup>18</sup> *Casado Coca v. Spain*, *supra* note 10, para. 44-46.

<sup>19</sup> ECtHR 21 November 1995, *Velosa Barreto v. Portugal*, Series A, vol. 334, para. 25.

It is difficult to see what binds this wide range of socio-economic interests together, not only to other socio-economic interests found to qualify, but also, and especially, to the Convention rights - such as privacy or religion - themselves also included in the category of 'the rights of others'. At the current state of the case-law, it is hard to think of any individual interest or 'right' that might not be accepted as a legitimate ground for the limitation of fundamental rights.<sup>20</sup> And yet, the specific use of the term *rights* rather than *interests* in the limitation clause, and the presumption in favour of fundamental rights protection inherent in the whole set-up of the Convention suggest that this limitation clause cannot simply encompass *all* individual interests great and small. Perhaps even more importantly, in a Convention system that emphatically does not allow abrogation of the rights contained in the Articles 8 to 11 in function of an unspecified general 'public interest',<sup>21</sup> such a wide and diffuse understanding of this specific clause arguably undermines the integrity of the 'legitimate aim'-test as a whole.

## 2.2. Confusion about relevant rights in specific cases

A second criticism concerns those cases in which the Court does not make clear what specific 'right of others' the government's action is found to have legitimately protected. A prime example is the case of *Leyla Sahin v. Turkey*.<sup>22</sup> In this case, the 'legitimate aim' of the interference - a prohibition on the wearing of headscarves in public universities - was found to be, amongst other things, the protection of the rights of others.<sup>23</sup> As this point was not in issue between the parties, the Court did not find it necessary to elaborate on what kinds of rights of what sorts of individuals were concerned. The decision reveals, however, that what was relevant for the Court was the need to prevent other students from feeling threatened in their religious sentiments because of the wearing of headscarves by people like the applicant.<sup>24</sup> The judgment offers no discussion of either the factual urgency or normative value of this aim, where such discussion would seem to be altogether required. Who are these other students? How many of them were there? In what ways and how seriously were they threatened in the free exercise of *their* religious beliefs by seeing other students wear a headscarf? And, more fundamentally, was concern for *these specific students* really the crucial issue in this case?<sup>25</sup> However one feels about these questions, it is clear

<sup>20</sup> The only case I've been able to find in which an aim professed by a respondent government was found *not* to qualify as the legitimate protection of the rights of others is *F. v. Switzerland*. This case, however, concerned Article 12 (right to marry) of the Convention; a provision which does not provide a limitative list of limitation clauses. While the Court rejected the argument that a temporary prohibition of remarriage was "designed to preserve the rights of others, namely of those of the future spouse of the divorced person", the Court was nevertheless still able to accept "the stability of marriage" as "a legitimate aim which is in the public interest". ECtHR 18 December 1987, *F. v. Switzerland*, Series A, vol. 128, para. 36. The case is discussed *infra*, in Section 5.2.

<sup>21</sup> The limitation clauses to the Articles 8 to 11 do not contain a possibility of limiting fundamental rights 'in the public interest'. The situation is different for Convention provisions that do not follow the 'paragraph 2' construction, such as Article 12 (right to marry) and Article 3 of the 1<sup>st</sup> Protocol (right to free elections). See the discussion of the cases *F. v. Switzerland* (Art. 12) and *Hirst v. The United Kingdom* (Art. 3, P1) *infra* note 85 in Section 5.2.

<sup>22</sup> ECtHR *Leyla Sahin v. Turkey*, *supra* note 3.

<sup>23</sup> *Id.*, para. 99.

<sup>24</sup> *Id.*, see especially para. 111 and para. 115.

<sup>25</sup> It will be argued below that a structural perspective on the case indicates that the main concern was not and should not have been the rights of groups of individuals but the very structure of

that they would have merited a more extensive treatment by the Court than an unqualified assertion that ‘the rights of others’ - as agreed between the parties - was the legitimate aim pursued.

### 2.3. Who may be ‘others’?

The Court, thirdly, does not seem to adhere to a clear definition of who can qualify as rights holders in the abstract and precise identifications of who the relevant holders are in individual cases. The case law offers a broad panorama, ranging from cases in which individuals whose rights are said to conflict with those of the applicant are specifically named - a child called Kimberly in the *Venema* case,<sup>26</sup> President Mitterand and his relatives in *Éditions Plon* - through various forms of closed or open groups of individuals - “the Christian community” in *Giniewski*,<sup>27</sup> the applicant’s neighbours in *Connors*<sup>28</sup> and his creditors in *Luordo*<sup>29</sup> - to society at large - “the public” in *Casado Coca*,<sup>30</sup> “road users” in *Buck*<sup>31</sup> and anyone affected by street crime in *Peck*<sup>32</sup>. The definition of the class of ‘others’ is rarely a point of contention before the Court. Whenever parties actually do disagree on the extent of the relevant class, as was the case, for example, in *Open Door and Dublin Well Woman v. Ireland*, where it was argued that “the unborn” could qualify as ‘others’ under Article 10 para. 2, the Court is generally quick to opt for an alternative ground for limitation.<sup>33</sup>

One important problem these differences in class size and makeup contribute to is the correct aggregation of interests in individual cases.<sup>34</sup> Take the *Luordo* case - just mentioned - as an example. When identifying the ‘others’ for the purposes of the protection of ‘the rights of others’ as a limitation on Article 10, the Court refers only to *the applicant’s* creditors, but it seems likely that the interests of *all creditors* of individuals in similar circumstances as the applicant would be affected by the Court’s

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Turkish (secular) society. If Leyla Sahin would have been privately instructed in one-on-one seminars conducted by university teachers on university grounds, with no other students present, this structural question would not have gone away and government objections should arguably still have carried the same force as in the original setting.

<sup>26</sup> ECtHR 17 December 2002, *Venema v. The Netherlands*, Reports 2002-X, para. 73.

<sup>27</sup> ECtHR 31 January 2006, *Giniewski v. France*, para. 40.

<sup>28</sup> ECtHR 27 May 2004, *Connors v. The United Kingdom*, para. 69.

<sup>29</sup> *Luordo v. Italy*, *supra* note 16, para. 76.

<sup>30</sup> *Casado Coca v. Spain*, *supra* note 10, para. 46.

<sup>31</sup> ECtHR 28 April. 2005, *Buck v. Germany*, para. 41.

<sup>32</sup> ECtHR 28 January 2003, *Peck v. The United Kingdom*, Reports 2003-I, para. 67.

<sup>33</sup> ECtHR 29 October 1992, *Open Door and Dublin Well Woman v. Ireland*, Series A, vol. 246-A, para. 63. The Court opted for the clause “the protection of morals”.

<sup>34</sup> The *locus classicus* of discussions on the importance of a proper aggregation of interests in judicial balancing, is C. Fried, Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing test, (755) *Harvard Law Review* 763 (1963). (“One thing is perfectly clear, that under no circumstances should the Court formulate the conflict in a particular case, or identify the elements of the balance to be struck, in such a way that the statement itself prejudices the decision. It would, indeed, be begging the question to purport to balance some highly generalized and obviously crucial interest, such as the right of the legislature to inform itself of matters bearing on national security, against some rather particular and narrowly conceived claim such as the right of a particular individual to withhold a particular, perhaps trivial, item of information from a committee on this occasion. Any such formulation, of course, seems to require only one answer, but it does so at the expense of ignoring the fact that the claim of the witness may be stated in equally generalized form, and therefore may perhaps take on equally impressive proportions”). See also M. Tushnet, Anti-Formalism in Recent Constitutional Theory 83 *Michigan Law Review* 1502, (1985), 1514 for additional discussion.



decision. The Court's reasoning offers no clues as to whether these other interests were taken into account, making an evaluation of its justification based on a weighing of interests very difficult.

A second striking aspect of the Court's case law on rights holders is the inclusion of public authorities in this category. In the famous case of *Rees v. The United Kingdom*, for example, the Court, in the context of an analysis of positive obligations under Article 8, referred to "the position of third parties, including public authorities" when assessing countervailing "interests of others".<sup>35</sup> Public authorities also figured in the 'rights of others' context in cases such as *Connors v. The United Kingdom* (a local government body)<sup>36</sup> and *Nikula v. Finland* (a public prosecutor)<sup>37</sup>. These cases are problematic, if only for the simple reason that important questions with regard to, for example, the extent to which these public authorities can be considered holders of *individual* rights, receive no explicit consideration from the Court.

## 2.4. Internal critique and structural weaknesses

This Section has offered a number of criticisms of the Court's treatment of the limitation clause 'the rights of others'. These criticisms were formulated from an internal point of view, by reference to benchmarks of principled doctrine, coherence and consistency. The remainder of this paper will argue that many of the weaknesses in the Court's case law stem from a more fundamental problem in the way the Convention system conceptualizes cases in terms of rights alone, rather than in terms of rights and powers. As a prelude to this argument, the next Section will consider the contingency of any category of 'conflicts of fundamental rights'.

## 3. The Contingency of the Category of 'Conflicts of Fundamental Rights'

### 3.1. Introduction

Discussion of the topic of 'conflicts of individual fundamental rights' would seem to imply that these conflicts are in some way, as a category, distinguishable from other types of legal-institutionalized social conflicts. Conflicts between individual fundamental rights should, on this assumption, be recognizably different from, for example, conflicts between a fundamental right and some public or collective interest or between a fundamental right and an individual interest not protected by a fundamental legal right.<sup>38</sup> And even where a conflict would, on its face, seem to

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<sup>35</sup> *Rees v. The United Kingdom*, *supra* note 11, para. 43-44. Note that this case was not decided under the 'the rights of others' limitation clause. In his comment on the case, professor Alkema has noted that not only the interests of other private parties were at stake, but "also, and especially, those of the state itself". See E.A. Alkema, *The European Convention as a Constitution and its Court as a Constitutional Court* 41 and onwards, in: P. Mahoney, F. Matscher, H. Petzold and L. Wildhaber (eds.), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Köln: Carl Heymans Verlag KG, 2000).

<sup>36</sup> *Connors v. The United Kingdom*, *supra* note 28, para. 69.

<sup>37</sup> ECtHR 21 March 2002, *Nikula v. Finland*, Reports 2002-II, para. 38. Public authorities were arguably also among the rights holders identified by the Court in ECtHR 11 December 2003, *Yankov v. Bulgaria*, Reports 2003-XII (extracts), para. 126-128.

<sup>38</sup> For a detailed discussion with regard to the Convention system, see A. McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 *Modern Law Review* 671 (1999). For

implicate two opposing fundamental rights, it should still be possible, on the same assumption, to differentiate between ‘real’, ‘actual’ or ‘direct’ conflicts between such rights, on the one hand, and conflicts that are ‘hypothetical’, ‘remote’ or that only ‘indirectly’ involve these rights, on the other.<sup>39</sup>

This Section aims to show that any category of ‘conflicts of individual fundamental rights’ will be highly contingent upon factual circumstances, the scope and focus of rights guaranteed, substantive standards of protection adhered to, and the acceptance of rival conceptualizations, for example in terms of duties or governmental powers. The purpose of this part is not to deny the existence of ‘conflicts of individual fundamental rights’ altogether, but rather to show that (a) the location and scope of such a category will differ from one rights order to the other, and (b) that any definition of a category of ‘conflicts of individual fundamental rights’ will have to include a far more precise and longer list of elements than merely those of opposing fundamental rights claims by two or more individuals. The discussion of contingency in this part forms a prelude to the development, in the remainder of the text, of the thesis that the ECHR system operates with a comparatively large category of conflicts of individual fundamental rights.

### 3.2. Factual contingency and the ‘true conflict’/non-conflict boundary

Conflicts of individual fundamental rights are, self-evidently, contingent upon factual circumstances. A true conflict of individual rights may be present only when it is factually impossible to satisfy the requirements of both rights. When it comes to law, rights and entitlements, however, *the realm of the factually possible* is bound up with political, institutional, cultural background considerations to such an extent as to make analytical separation almost impossible. The problem of conjoined twins, often used as an example in discussions on conflicts of rights, may serve as an illustration.<sup>40</sup> Where conjoined twins share one or more vital organs, saving both individuals may be absolutely impossible - given the current, obviously historically contingent state of medical knowledge - or may be prohibitively expensive. At some point on a scale of operation costs, what used to be a conflict between the individual rights of the two twins on the one hand and societal interests on the other, becomes a conflict between the individual rights of the different siblings that cannot both be satisfied.<sup>41</sup> The

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the United States see, for example, D. Faigman, Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice, 78 *Virginia Law Review* 1521 (1992).

<sup>39</sup> Cf. O. DeSchutter in this volume.

<sup>40</sup> A discussion of this problem - based on a case from the United Kingdom - can be found in J. Alder, The Sublime and the Beautiful: Incommensurability and Human Rights, 2006 *Public Law*, 697-721, 711.

<sup>41</sup> It is, in my view, entirely legitimate to argue that the fact that we are *today* unable to save two individuals born conjointly with only one heart to share, stems not only from immutable facts of nature - the fact that humans cannot live without a constant flow of oxygenated blood - but also from a long range of implicit and probably often unconscious decisions to direct public resources to other areas of need - a strong public preference to spend on research into cancer, for example. This does, of course, not diminish the tragic nature of the conflict between the rights of the two individuals concerned as it presents itself *here and now*. Thinking about this kind of ‘translation’ of conflicts between rights and collective interests into conflicts of individual rights is complicated significantly, however, by differences in perspectives on the relevant ‘transactional frames’. In a paradigm of individual rights versus collective interests it is at least theoretically possible to broaden the relevant ‘transactional frame’ in such a way as to include not merely the harmful state action complained of, but also a range of facilitating or beneficial state actions that occur before or

location of this point of transformation will vary from time to time and place to place, significantly complicating the task of defining what is and what is not a conflict of individual fundamental rights.<sup>42</sup>

A second complicating factor is the fact that the assessment of what is factually possible is generally made *locally*, within a single legal and economic order. Thinking about conflicts of fundamental rights becomes much harder, however, when a multi-jurisdictional perspective is adopted. What if, again in the context of conjoined twins, saving both individuals is not possible within their own specific jurisdiction, but is factually possible in at least one hospital in at least one jurisdiction on earth? The conflict may, in that case, well be fundamental to the local rights order then, but this is clearly not universally so.

The aim of this paragraph, once again, is not to deny the existence of inescapable dilemmas or conflicts between fundamental rights in general, or their presence in concrete cases. The defamation by one individual of another (private) individual, for example, cannot be translated into a conflict between individual rights and collective interests in the way that the rights of conjoined twins can. The argument so far merely serves to emphasize three points. First: any definition of ‘conflicts of fundamental rights’ will have to include a precise description of *factual circumstances* and their influence on the (im)possibility of satisfying both rights involved. Second: when determining the realm of the factually possible courts must be conscious of the extent to which the ‘merely factual’ is bound up with a wide variety of normatively coloured background considerations. And finally: given these two earlier observations, the category of ‘true’ conflicts of individual fundamental rights within any rights order is likely to be, in fact, smaller than perhaps commonly thought.

### 3.3. Institutional contingency and the comparative perspective: Introduction

Differences between legal orders assume an even more direct, critical importance once we begin to consider the scope, form and content of their systems of rights protection. As different legal orders grant *different rights*, have *divergent understandings* of what these rights are supposed to protect, adopt *different substantive standards* for the protection of these rights or use *alternative conceptualizations* to frame similar conflicts of interests and values, the proportion of conflicts between interests and/or values expressed in terms of ‘conflicts of fundamental rights’ will vary as between them.<sup>43</sup> This paragraph aims at giving an overview of some of these dimensions of possible divergence, using comparative references from a number of Western legal orders.

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after the alleged rights infringement. This ‘broadening’ of the relevant frame is not possible within the individual right versus individual right model. See on the topic of ‘framing’ generally, D.J. Levinson, Framing Transactions in Constitutional Law, 111 *Yale Law Journal* 1313-1317, 1311 (2002).

<sup>42</sup> The scope for conflicts between absolutely irreconcilable wants and interests is likely to differ significantly between legal orders in different states of economic development or with vastly different levels of economic redistribution. While these levels may be broadly comparable for Western legal orders, wider comparative studies of conflicts of rights, including African or South-Asian rights orders, for example, should clearly take this variable into account.

<sup>43</sup> More precisely; not only the proportion of these cases, but also their *location* as a group within the total range of possible conflicts of interests, may change as a result of these different conceptualizations.

### 3.4. Institutional contingency (1): Understandings of rights

The contingency of conflicts between rights upon *the scope of rights protection* in particular rights orders is self-evident. No rights, no conflicts between rights. Of course conflicts between underlying values and interests will not go away upon merely withholding recognition of the status of ‘fundamental right’; it is merely the case that if these interests have not received fundamental rights protection in a particular rights order, any conflict between these interests and other interests will, necessarily, not take the form of a conflict between fundamental rights.

This form of contingency is visible most clearly where one legal order grants certain rights that are not known in other legal orders. Environmental protection, for example, has, at least partially, been given fundamental rights status in Europe through the European Court’s interpretation of Article 8 of the Convention.<sup>44</sup> As such a status is unknown in the United States, conflicts involving individual and collective interests in a healthy living environment can never find expression as conflicts of fundamental rights there.

Even when the same fundamental right is known in different rights orders, variations in substantive doctrines used for the interpretation and application of this right may show a similar effect. In United States constitutional law on freedom of expression, for example, an ‘incitement to violence or imminent lawless action’ standard provides a baseline for the permissibility of governmental action.<sup>45</sup> Application of this standard meant that in the famous case of *Brandenburg v. Ohio*, a clear clash between the *interests* of Neo-Nazi’s wanting to conduct a march and the *interests* of Holocaust survivors not wanting to be confronted with manifestations of Nazism, was not understood to involve a conflict of fundamental *rights*. The Court’s test in this case turned only on an assessment of the likelihood of violence; the degree to which the manifestation would be hurtful to bystanders was only relevant insofar as potentially contributing to such violence, not as a measure of a violation of any of these bystanders’ fundamental rights.<sup>46</sup>

The ‘same’ fundamental right may, finally, have a different focus or a different principal object of protection in different legal orders, in ways that will similarly affect the location and scope of the category of ‘conflicts of fundamental rights’ cases. By way of a very crude distinction, many fundamental rights may be understood as either being principally *protection devices against governmental action*, or as being predominantly *attributes of individuals* in their quality of human beings.<sup>47</sup> The

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<sup>44</sup> Cf. ECtHR 9 December 1994, *Lopez Ostra v. Spain*, Series A, vol. 303-C; ECtHR 7 August 2003, *Hatton v. The United Kingdom*, Reports 2003-VIII. See for a more extensive overview of the relevant case-law the contribution of Janneke Gerards to this volume.

<sup>45</sup> United States Supreme Court, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>46</sup> For criticism of the Supreme Court’s neglect to ‘look at the Constitution as a whole’, however, see J.E. Fleming, *Securing Deliberative Democracy*, 72 *Fordham Law Review* 1435, 1467 (2004).

<sup>47</sup> See on the distinction J. Raz, *Liberty and Rights*, in: J. Raz, *The Morality of Freedom* 257 (Oxford: Oxford University Press, 1986): “[g]iven the widespread assumption that the special status of constitutional rights must be explained by their special moral force, it is worthwhile pointing out that there are well-known alternative arguments in favour of entrenched constitutional rights, namely arguments based on institutional considerations”, my emphasis. See also R.H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 *Hastings Law Journal* 711, 724 (1994). Pildes distinguishes between rights as “recognitions of the essential elements of the person in the way that contemporary liberalism conceives individual dignity, autonomy or freedom” (the ‘individualistic paradigm’) and rights as “mechanisms

practice around most rights in most legal orders is built on elements of both conceptions, but differences in emphasis may have important implications for the category of ‘conflicts of fundamental rights’. An *instrumentalist* conception of fundamental rights - rights as primarily protective against governmental action - is likely to occasion a more narrow category of ‘conflicts of fundamental rights cases’ than an *individualistic* conception that sees potential threats to fundamental rights coming from both governments and other individuals.

In a number of articles, Professor James Whitman, has argued that conceptions of the fundamental right to ‘privacy’ differ fundamentally as between Germany - or Europe more broadly - and the United States, in a way closely related to the basic difference just discussed.<sup>48</sup> According to Whitman’s influential view, a ‘dignity’ or ‘honour’ focused perspective is prevalent in German - European - legal culture, while the American view has tended to concentrate on the ‘liberty’ dimension of privacy.<sup>49</sup> Comparing the histories of litigation on this right in Germany and the US bears out this distinction and its effect on the category of ‘conflicts of fundamental rights’; the proportion of privacy cases pitting one individual’s privacy rights against another individual’s fundamental right - generally of freedom of expression - is far greater in Germany than in the US, where cases tend to concern *governmental* invasions of privacy. Many of the most famous freedom of expression and right to privacy cases in Germany, therefore, present conflicts of fundamental rights in ways that simply do not arise in the United States.<sup>50</sup>

### 3.5. Institutional contingency (2): Alternative conceptualizations

A conflict with *another fundamental right* is only one out of several possible ways in which a limitation on a fundamental right may be understood. To the extent that a legal order frames these limitations in alternative ways, the same clashes between fundamental rights and countervailing private and societal interests will, again, not be seen as involving a conflict between fundamental rights. Two important examples of such alternatives are ‘duties’ and ‘powers’.

Reference was made in the Introduction to the way the Strasbourg Court sometimes limits individual rights by appending duties not to harm others to the rights contained in the Convention. In the *I.A. v. Turkey* case, for example, the Court spoke of a “duty

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through which the differentiation of political authority is maintained” (the ‘structural paradigm’). On the structural paradigm, see further *infra* section 5.

<sup>48</sup> J.Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 *Yale Law Journal* 1151 (2004). See also J.Q. Whitman, ‘Human Dignity’ in Europe and the United States: the Social Foundations, in: G. Nolte (ed.), *European and US Constitutionalism* 108 and onwards (Cambridge: Cambridge University Press, 2005).

<sup>49</sup> See for example J.Q. Whitman (2004), *supra* note 48, 1161 (“*Continental privacy protections are, at their core, a form of protection of a right to respect and personal dignity. (...) The prime enemy of our privacy, according to this continental conception, is the media (...). By contrast, America, in this as in so many things, is much more oriented towards values of liberty, and especially liberty against the state.*”).

<sup>50</sup> See, for example, the famous *Mephisto* case of 1971 (30 BVerfGE 173). More recently claims brought by Princess Caroline of Monaco against a number of German newspapers have led to decisions from both the German Constitutional Court and the European Court of Human Rights. See ECtHR 24 June 2004, *Von Hannover v. Germany*, Reports 2004-VI.

to avoid expressions that are gratuitously offensive to others and profane”.<sup>51</sup> Use of the category of *duties* will self-evidently limit the proportion of conflicts of interests and values conceptualized as involving conflicts between fundamental *rights*.

Professor George Fletcher has used the example of ‘flag-burning’ to emphasize the different ways in which the same basic social conflict might be conceptualized in different legal systems and to show the role ‘duties’ may play in this respect. Flag-burning, as an instance of symbolic speech, opposes societal and individual interests in freedom of expression on the one hand, and societal and individual interests in public order and the protection of social cohesion on the other. According to Fletcher a German lawyer might well formulate the relevant conflict in the ‘language of duties’.<sup>52</sup> At the same time, Fletcher argues, “it is doubtful that an American lawyer could be brought to conceptualize the problem of flag burning as a matter of civic duty rather than of conflicting rights and interests. The grooves in the American legal mind lead one toward identifying the rights of the individual and the opposing interests of the state or community. There is no slot for duty (...)”.<sup>53</sup> Flag-burning specifically is not especially likely to be seen by any legal order to involve *conflicting individual rights*, but Fletcher’s observation may easily be extended to such cases. Moreover, the European Court, in its case-law on expression deemed hurtful by many in the relevant population, has spoken of a conflict between Article 10 rights of applicants and “the rights of citizens not to be insulted in their religious feelings by the public expression of views of other persons”.<sup>54</sup> Cases involving very similar factual constellations to flag-burning have, therefore, actually been treated as ‘conflicts of fundamental rights’ by the Strasbourg Court.

A final alternative conceptualization of conflicts between the interests of - or values held by - individuals that needs to be discussed here, proceeds on the basis of the concept of *powers*. The strong emphasis on fundamental rights as constraining devices on majority (governmental) powers in many liberal constitutional theories suggests that rights and governmental powers are importantly interconnected. In many views of the role of fundamental rights, these rights serve to limit, and may themselves - at least in some cases - be limited by, governmental powers.<sup>55</sup> Professor Richard Fallon has been an especially forceful promoter of the view that it is not possible to think about constitutional rights without an idea of “what powers it would be prudent or desirable for government to have”.<sup>56</sup> This conceptual connection, Fallon suggests, is reflected in United States Supreme Court practice. “Seldom if ever”, he writes, “does the Supreme Court say that one constitutional right - such as speech - must leave off because another constitutional right - such as privacy - begins. Rather, the Court says that the constitutional speech right leaves off because the government’s

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<sup>51</sup> *I.A. v. Turkey*, *supra* note 12, para. 24 (with reference to *Otto-Preminger-Institut v. Austria*, *supra* note 4, para. 49 and ECtHR 10 July 2003, *Murphy v. Ireland*, Reports 2003-IX (extracts), para. 67).

<sup>52</sup> G.P. Fletcher, Constitutional Identity, 14 *Cardozo Law Review* 737, 741 (1993).

<sup>53</sup> *Id.*, 742.

<sup>54</sup> See for example *Otto-Preminger-Institut v. Austria*, *supra* note 4, para. 48.

<sup>55</sup> See for example R.H. Fallon, Individual Rights and the Powers of Government, 27 *Georgia Law Review* 343 (1993). Frederick Schauer, while criticizing elements of Fallon’s view of the interconnectedness of rights, interests and powers, still conceptualizes rights as “shields against governmental interests”, thereby allowing the relevant (for our purposes) connection between rights and governmental powers to stand. See F. Schauer, A Comment on the Structure of Rights, 27 *Georgia Law Review* 415, 429 (1993).

<sup>56</sup> R.H. Fallon, *supra* note 55, 344.

*power* to define and protect a non-constitutional right - such as privacy - should begin. The conceptual limit of the constitutional right is not, in other words, another right, but a power of government, supported and identified by reference to underlying interests".<sup>57</sup> To the extent that the US constitutional order indeed conceptualizes conflicts as involving rights and powers rather than opposing fundamental rights, its category of 'conflicts of fundamental rights' is, again, bound to be smaller.

#### 4. Convention exceptionalism and the missing structural perspective

##### 4.1. Introduction

The discussion in the preceding paragraphs gives rise to three basic questions: (1) how do different legal orders 'rank' when it comes to the *relative size* of their category of 'conflicts of fundamental rights cases', (2) *why* do these differences arise, and (3) *how can we evaluate* the institutional choices made by different rights orders with regard to their category of 'conflicts of fundamental rights'? The remainder of this paper will argue that the Convention system works with an exceptionally wide category by comparative standards (*ad* 1) and that this approach has a number of serious drawbacks (*ad* 3). Before discussing these drawbacks in the next two Sections, the next paragraph briefly elaborates upon the existence of, and reasons for, this form of *Convention exceptionalism* (*ad* 1 and 2).

It is impossible within the scope of this paper to offer anything like an exhaustive assessment of the relative scope of the category of 'conflicts of fundamental rights cases' in a number of different rights orders. The material presented so far, however, contains a number of indices that the Convention systems' category might indeed be rather broad, in comparison to US theory and practice, for example.<sup>58</sup> Two of these factors stand out, it seems, in terms of their explanatory force for the question of why the Convention system operates with an extremely wide category of 'conflicts of fundamental rights'. The first is the complete absence of any 'powers'-based alternative conceptualization of conflicts under the Convention system. The second is the lack of a thick, richly substantive notion of a 'democratic society'. The next paragraphs discuss these two factors in turn.

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<sup>57</sup> R.H. Fallon, *supra* note 55, 362 (my emphasis).

<sup>58</sup> Factors that I would like to posit without being able to argue them here are: (1) the comparative extent of rights proliferation in Europe and the US, and (2) the effects of the 'human rights' dimension of the fundamental rights guaranteed in the Convention. *Ad* (1) It would seem that rights proliferation has generally been stronger in Europe than in the United States. The Convention, as do most Continental constitutions, simply contains significantly more rights than the US Bill of Rights, and the European Court's practice has given many of these rights a far broader interpretation than the US Supreme Court has been willing to do for its system. More rights interpreted more broadly means more potential scope for conflicts between rights (*cf.* E. Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 *Human Rights Quarterly* 294 (2005) for a similar argument). *Ad* (2) The specific background of Convention rights may provide another reason. These rights' origins in the *human rights* tradition suggest that they will be dependent on dignity-focused, non-consequentialist, non-instrumentalist accounts of rights, to a greater extent than fundamental rights in other constitutional systems such as, for example, the US. In such accounts, threats to the exercise of rights are more easily thought to come from other individuals as well as from governments, increasing the scope for potential 'conflicts of fundamental rights'.

#### 4.2. Convention exceptionalism (1): No division of powers jurisdiction

The Convention system was set up as, and still retains crucial features of, an *international enforcement system* for the protection of *human rights*.<sup>59</sup> Over time, however, actors from within this system have increasingly sought to emphasize the development of the Convention into a *constitution* for Europe, and of the Strasbourg Court into a European *constitutional* court. In the famous *Loizidou* case, the Court affirmed that the Convention constituted a “constitutional instrument of European public order”.<sup>60</sup> Former President Wildhaber of the Court has similarly invoked the ‘constitutional’ dimension of the Convention mechanism, alluding to the role of the Strasbourg Court as a “European quasi-constitutional” court and to the human rights enshrined in the Convention as “anchored (...) in the concepts of constitutionalism”.<sup>61</sup>

Among constitutional orders and constitutional courts, however, the Convention system stands out markedly. Modern constitutional courts generally have two functions; they supervise the division of powers that their constitution instituted and they have some form of jurisdiction over fundamental rights.<sup>62</sup> Both the French Constitutional Council and the German Federal Constitutional Court are examples of this type. Very often, as for example with the Belgian Constitutional Tribunal and the French Constitutional Council, these courts are originally set-up primarily for reasons of power division - upon federalization (Belgium) or upon a move towards dualism between executive and legislative powers (France) - and only develop a rights jurisdiction afterwards.<sup>63</sup> As Martin Shapiro has argued, the policing function of

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<sup>59</sup> For a general discussion of the Convention’s origins, see C. Ovey and R.C.A. White, *The European Convention on Human Rights* (4th ed.), 1-6 (Oxford: Oxford University Press, 2006) with references.

<sup>60</sup> ECtHR 23 March 1995, *Loizidou v. Turkey*, Series A, vol. 310, para. 75.

<sup>61</sup> Speech by Mr. L. Wildhaber on the occasion of the opening of the Judicial Year, 20 January 2006. (<http://www.echr.coe.int/NR/rdonlyres/227A68E9-89EA-46DF-A10C-1E81422C3E6E/0/2006OpeningofthejudicialyearWildhaberTugcuEnglish.pdf>, last accessed 22 March 2007). See also President Wildhaber’s speech at the inauguration of the new building for the Constitutional Court of South Africa, 20 March 2004: ‘Judging in a modern constitutional democracy. Employing the comparative law method in constitutional decision-making’ ([http://www.echr.coe.int/NR/rdonlyres/2738F4D8-C03C-4E94-BF6E-CD8E83D9C6DC/0/2004\\_Johannesburg\\_Constitutional\\_Court.pdf](http://www.echr.coe.int/NR/rdonlyres/2738F4D8-C03C-4E94-BF6E-CD8E83D9C6DC/0/2004_Johannesburg_Constitutional_Court.pdf), last accessed 22 March 2007). Before President Wildhaber, President Rolv Ryssdal had also, on more than one occasion, referred to the European Court of Human Rights as a (future) constitutional court for Europe. See E.A. Alkema, *supra* note 35, 41 for references.

<sup>62</sup> See for an overview M. Shapiro and A. Stone Sweet, *Constitutional Judicial Review*, in: M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization* 136 (Oxford: Oxford University Press, 2002).

<sup>63</sup> Commenting on developments in France since the pivotal *Association Law Case* (1971), James Beardsley wrote of the Constitutional Council: “the Council’s powers of constitutional review have been regarded as a device for the maintenance of the limits imposed on Parliament’s legislative competence by the 1958 Constitution and not as a mechanism for the protection of the liberties of the citizen, against legislative limitation”. J. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 *American Journal of Comparative Law* 431 (1972). In the *Association Law Case*, the Constitutional Council invalidated legislation on the grounds of infringement of fundamental rights for the first time. See Constitutional Council, Decision of July 16<sup>th</sup> 1971, CC 71-44. For Belgium, the website of the *Cour d’Arbitrage* itself offers a very concise overview of the relevant developments: “The Court of Arbitration owes its existence to the development of the Belgian unitary state into a federal state. (...) In the constitutional amendment of 15 July 1988, the competence of the Court was extended to include the supervision of the observance of Articles 10, 11 and 24 of the Constitution guaranteeing the principles of equality, non-discrimination and the rights and liberties in respect of education. (...)”. Later legislation -



division of powers jurisdiction tends to provide these courts with at least one strong basis of legitimacy; legitimacy capital that they may choose to, or need to, expend on controversial rights cases.<sup>64</sup>

This background of division of powers jurisdiction to any activity in protecting fundamental rights is important not only for legitimacy reasons. The business of demarcating powers provides constitutional courts with a conceptual apparatus and vocabulary that can be extended to the rights cases. For the United States Supreme Court, *all* its constitutional cases are, in an important way, directly about limitations to powers. One case may be about limits to the federal government's power to impose rules on states, another may be about limits to the president's power *vis-à-vis* Congress and a third about the limits of any of these authorities' powers with regard to individual liberties. It is against this background that the 'alternative conceptualization' in terms of rights and powers, discussed above, must be understood.

The European Court of Human Rights does not fit this model. Alone among constitutional courts - if that is what it is -, its jurisdiction is *exclusively rights based*. All the Court has to work with are the enumerated rights in the Convention and its Protocols.<sup>65</sup> The Court simply has no jurisdiction to directly engage in the assessment of normatively desirable structures of government; all it can say on issues of structure and power is by way of *indirect* means, through its exegesis of Convention rights. This absence of 'division of powers' jurisdiction makes it that much harder for the Court to conceive of conflicts as involving opposing rights and powers. Adopting a 'rights versus rights' perspective in situations where other legal orders - containing both 'pillars' of constitutional law - might not do so, correspondingly becomes all the more natural.

#### 4.3. Convention exceptionalism (2): Visions of a 'democratic society'

This missing 'leg' of ordinary constitutional court jurisdiction<sup>66</sup> goes hand in hand with a more substantive observation: the Convention system works with comparatively *thin* notions of democratic order and democratic society.<sup>67</sup> Where ordinary constitutional courts or supreme courts with constitutional jurisdiction may base their assessments of the relationship between individual rights and governmental

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based on the same constitutional amendment of 1988 - has extended the rights-jurisdiction of the Court even further. See: <http://www.arbitrage.be/en/common/home.html>, last accessed 28 March 2007).

<sup>64</sup> M. Shapiro, The Success of Democracy and Judicial Review, in: M. Shapiro and A. Stone Sweet, *supra* note 62, 182.

<sup>65</sup> Cf. E.A. Alkema, *supra* note 35, 42 ("*The Convention is specific about a few and silent about most powers of government*"), and 46 ("*At this juncture we can conclude that the ECtHR, rather than a constitutional court, is a court sui generis. The 'dramatis personae', its cast, is incomplete and so are the 'parts' in the absence of a comprehensive constitutional text*").

<sup>66</sup> Note: this understanding of the Convention system as 'one legged', is not identical to the reference made in E.A. Alkema, *supra* note 35, 45 (in terms of actors able to elicit a Court ruling).

<sup>67</sup> S. Marks, The European Convention on Human Rights and its 'Democratic Society', 66 *British Yearbook of International Law* 234, 237 (1996), also uses the term 'thin' conception to describe the Convention understanding of 'democratic society'. On the notion of a 'democratic society' in the Court's case-law, see also G. Van der Schijff, Het Concept van Democratie in het EVRM, 547-574 and P. Vanden Heede, Het Europees Hof voor de Rechten van de Mens en het partijverbod: dansen op een slap koord, 193-232, both in: M. Adams and P. Popelier, *Recht en Democratie: de Democratische Verbeelding in het Recht* (Antwerp: Intersentia, 2004).

powers on thick, substantive, historically and culturally contingent conceptions of democracy,<sup>68</sup> the Strasbourg Court has to contend itself with an amalgamated, narrow, compromise-based understanding. Despite frequent allusions to the ideal of a ‘democratic society’, a concept explicitly mentioned in the Convention itself, the Court has been unable, it is submitted, to fashion a clear picture of what this ‘democratic society’ may be thought to encompass, other than that it should be “tolerant”, open, and “broadminded”,<sup>69</sup> should allow for the resolution of problems through “dialogue” rather than through violence,<sup>70</sup> and be a “neutral and impartial organizer of the exercise of various religions, faiths and beliefs” so that “public order, religious harmony and tolerance” may be achieved.<sup>71</sup> What more can the Court say about the State’s role in the free exercise of religion than that Member States have a general “duty of neutrality and impartiality”,<sup>72</sup> when among these members are counted states with such highly divergent understandings of state-church relations as France, Sweden, Italy and Turkey?

Faced with the tremendous difficulty of building a coherent, substantive, Europe-wide ideal of democracy out of the multitude of divergent traditions among Member States, it is understandable that the Court has centred its conceptual apparatus around what may count as the safe, central element of its mandate; the definition of individual rights. If accurate, this assessment has important implications for our topic of ‘conflicts of fundamental rights’. For if the elaboration of the ‘public’-side to conflicts between *individual* and *public* interests runs into difficulty, the conceptual move of understanding this ‘public’-side as an aggregation of individual rights becomes highly attractive.

## 5. The Missing Structural Perspective in Convention Case-law

### 5.1. Introduction

The heavy reliance on ‘rights’ in the peculiar institutional setting of the Convention system may not dictate outcomes in individual cases. But divergences in conceptual approaches do direct judges’ attention *to* particular aspects of cases and *away* from others. I have argued that the Convention mechanism’s institutional set-up has directed the Court’s gaze away from questions of *power and structure*, and placed it

<sup>68</sup> For Germany, see, for example, the discussion in Chapter 5 of D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 166 (Durham and London: Duke University Press, 1997), with references to further sources in German. The literature on democracy conceptions in US constitutional law is immense. Classic references are J. H. Ely, *Democracy And Distrust* (Cambridge MA: Harvard University Press, 1980) And B. Ackerman *We the People: Volume 1, Foundations* (Cambridge MA: Harvard University Press, 1991).

<sup>69</sup> ECtHR 12 December 1976, *Handyside v. The United Kingdom*, Series A, vol. 24, para. 49.

<sup>70</sup> ECtHR 30 January 1998, *United Communist Party of Turkey v. Turkey*, Reports 1998-I, para. 57 (“*The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome*”).

<sup>71</sup> ECtHR 13 February 2003, *Refah Partisi (The Welfare Party) v. Turkey*, Reports 2003-II, para. 91 (“*in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected*”). See also ECtHR 27 June 2000, *Cha’are Shalom Ve Tsedek v. France*, Reports 2000-VII, para. 84.

<sup>72</sup> *Refah Partisi v. Turkey*, *supra* note 71, para. 91; *Cha’are Shalom Ve Tsedek v. France*, *supra* note 71, para. 84.

firmly on issues of *rights*. This Section offers three examples of the practical effects of this approach.

## 5.2. The missing structural perspective (1): Difficult aims

The exclusively rights-based set-up of the Convention mechanism shows strains whenever the Court is confronted with rights limitations imposed in the name of objectives not specifically enumerated in the limitation-clauses to Articles 8 to 11. The Court's frequent resort to the 'the rights and freedoms of others'-clause in such cases, is a principal reason for the inconsistent nature of the case-law regarding this clause, mentioned above.<sup>73</sup> More important for our present discussion, however, is the fact that framing these cases in terms of conflicting individual rights deforms the issues at stake and diverts the Court's attention away from crucial questions. I will give two brief examples of such cases in this paragraph.

A first example is the case of *Colombani v. France*. In this case, the applicants, two journalists, were convicted of publishing, in France, articles that insulted the King of Morocco. As their conviction clearly constituted an interference with the journalists' exercise of their right to freedom of expression, the question arose as to whether this interference could be justified under one of the limitation grounds attached to Article 10 of the Convention. For the Court, such a legitimate aim could be found in "the protection of the reputation and rights of others, in this instance the reigning King of Morocco".<sup>74</sup> The Court went on to hold that shielding foreign heads of State from criticism in this way:

*"amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained".*<sup>75</sup>

The Court's approach in this case reveals both dimensions of the Convention's overall characteristics just described. First, the exclusively rights-based jurisdiction of the Court leads it to conceptualize the case as involving a conflict between fundamental rights: the journalists' right to freedom of expression and the King of Morocco's right to protection of his reputation. Clearly, however, this case is not in any important way *about* the King of Morocco as an individual in need of privacy protection, to be guaranteed to him by the French State.<sup>76</sup> The fundamental issue in the case is instead about the desirable limitations to the French government's *powers* to conduct its foreign relations. The conflict at the heart of the *Colombani* case, I would submit, is one between fundamental rights (to expression) and governmental powers (in foreign relations matters), not between the fundamental rights of different individuals.

The final part of the Court's reasoning, quoted above, reveals the second characteristic described earlier: the absence of a thick, substantive understanding of

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<sup>73</sup> See *supra*, Section 2.

<sup>74</sup> EctHR 25 June 2002, *Colombani v. France*, Reports 2002-V, para. 62.

<sup>75</sup> *Id.*, para. 68.

<sup>76</sup> By way of a technical aside: it is not at all clear under current Convention case-law whether an individual in the situation of the King of Morocco in this case would even come within the 'jurisdiction' of one of the Convention States, as would be necessary for such an individual to claim a violation of Convention rights before the Court.

the structure, needs and goals of a ‘democratic society’. All the Court is able to invoke in its decision is an undefined vision of “modern practice and political conceptions” and an abstract, utterly de-contextualized “obvious interest” in friendly relations between States.

A second poignant example can be found in the case of *Groppera Radio v. Switzerland*.<sup>77</sup> In this case, the Swiss government had refused a broadcasting license to a station broadcasting into Switzerland out of Italy. The government submitted that this interference with the applicants’ right to freedom of expression was for the protection of the rights of others “as it was designed to ensure pluralism, in particular of information, by allowing a fair allocation of frequencies”.<sup>78</sup> This submission was accepted by the Court. In this case again, the underlying conflict of interests and values was conceptualized by the Court as one involving conflicting fundamental rights; those of broadcasters and those of listeners.<sup>79</sup> It is submitted, however, that this conceptualization does not capture the most important dimension of the case. At the heart of the *Groppera* case we find, not a conflict between the rights of two distinct (groups of) individuals, but *a conflict between two perspectives on freedom of expression and on the structures* - within the media and between the media and government - required by, and for the support of, each of these perspectives. The argument that (all) individuals have *individual fundamental rights* in media pluralism is not, I would submit, easy to maintain. Outside of the technical Convention context, however, such an argument would not be necessary to make the more fundamental point that media pluralism is *an important value* in liberal societies.<sup>80</sup> But because the Convention does not ‘think’ in terms of structures but relies so heavily on ‘rights’, this latter way of framing the case is hard to fit in. And because the Court has only a ‘thin’ conception of a democratic society to work with, engaging in a debate on what a pluralistic, democratic society should look like will be fraught with difficulties.<sup>81</sup>

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<sup>77</sup> ECtHR 28 March 1990, *Groppera Radio v. Switzerland*, Series A, vol. 173.

<sup>78</sup> *Id.*, para. 69.

<sup>79</sup> Radio-listeners in general; evidently not those that listened to the applicant’s station!

<sup>80</sup> This assessment of *Groppera Radio* may be compared with Professor Richard Pildes’ discussion of the US Supreme Court judgment in *Board of Education v. Pico* (457 U.S. 853, 1981). In *Pico*, a number of parents challenged the decision of a local school board to remove nine books from the school’s public library. The Supreme Court held that this decision was unconstitutional, paying special attention to the Board’s motivation behind removing the books. The dissenters raised a host of objections, including the claim that any ‘right’ of the students to have certain books included (or not removed) from the library was unintelligible. For Pildes, “*Pico is vulnerable to these criticisms not because it is wrong, but because the Court conceptualized the problem in conventional terms that obscure the important issues. (...) Once the Court framed the asserted rights in (...) individualistic terms, it generated the subsequent problems*”. In Pildes’ view “*the structural conception of rights, on the other hand, can make sense of this kind of conflict. The case is not about respecting the discrete interests of specific individuals, but about upholding the differentiation between politics and education*” (732-733).

<sup>81</sup> It is true that the Court’s interpretation of some Convention rights, in particular of Article 10, relies at least to some extent on structural objectives. See for example the classic *Handyside* judgment (“Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress”), *Handyside v. The United Kingdom*, *supra* note 69, para. 49, and, more recently the judgment in the *Karatas*-case (“Art. 10 of the Convention] affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (...). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society”), ECtHR 8 July 1999, *Karatas v. Turkey*, Reports 1999-IV, para. 49. These statements in the case law do not, however, detract fundamentally from the more general argument in this paper as (a) they do not change the fact that the Court’s conceptual apparatus remains uniquely focused

The strained character of the use of the ‘rights of others’-clause in these cases is underlined by an analysis of cases involving *not* the Articles 8 to 11 with their ‘paragraph 2’-structure, but other Convention rights that do not have a similar limitative list of limitation-grounds, such as the right to marry and the right to free elections. Let me give two examples.

The Court’s leading case with regard to the right to marry, *F. v. Switzerland*, concerned a temporary ban on remarriage imposed after a divorce.<sup>82</sup> According to the Swiss government, the system of temporarily prohibiting remarriage was justified “by the legislature’s determination to protect not only the institution of marriage but also *the rights of others*”.<sup>83</sup> Scrutinizing the government’s defence under Article 12 of the Convention, the Court said the following:

*“The Court recognizes that the stability of marriage is a legitimate aim which is in the public interest. It doubts, however, whether the particular means used were appropriate for achieving that aim. (...) In any event, the Court cannot accept the argument that the temporary prohibition of remarriage is designed to preserve the rights of others, namely of those of the future spouse of the divorced person”.*<sup>84</sup>

The cited paragraph forms a striking contrast with the Court’s statements in cases such as *Colombani* and *Groppera Radio*. The ‘stability of marriage’ is here accepted as a legitimate aim ‘in the public interest’, *while at the same time*, justification in terms of the protection of the ‘rights of others’ is explicitly rejected. The Court could only make this distinction, of course, because Article 12 does not present the same constraints as do the Articles 8 to 11 with their limitative lists of limitation-grounds. It is interesting to note, however, that in this case the Court jumps at the opportunity of justifying a limitation to a fundamental right ‘in the public interest’ while going out of its way to reject justification in the name of ‘the rights of others’.

Because of the clear connections between a right such as freedom of expression and the right to free elections, the Court’s case-law on this latter right offers an even stronger illustration of the effect of the constraints of the ‘paragraph 2’-framework, applicable to Article 10, but not to Article 3 of the 1<sup>st</sup> Protocol (Art. 3-P1). In the recent case of *Hirst v. The United Kingdom*, the government argued that disenfranchisement of prisoners “pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law”.<sup>85</sup> In its reaction, the Court made explicit reference to the absence of a ‘paragraph 2’ construction in Art. 3-P1, saying:

*“The Court would recall that Article 3 of Protocol No.1 does not, as other provisions of the Convention, specify or limit the aims which a measure must pursue. A wider range of purposes may therefore be compatible with Article 3.”*<sup>86</sup>

A wider view of such permissible purposes was indeed taken in *Hirst*, but also in earlier election cases such as *Podkolzina v. Latvia* (imposition of Latvian as sole working-language in the Latvian Parliament, brought under “the interest of each State

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on rights with no attention to powers, and (b) as argued earlier, the structural objectives invoked build on notions of a democratic society that are ‘thinner’ than those of most legal orders.

<sup>82</sup> *F. v. Switzerland*, *supra* note 20.

<sup>83</sup> *Id.*, para. 35 (my emphasis, JB).

<sup>84</sup> *Id.*, para. 36.

<sup>85</sup> ECtHR 6 October 2005, *Hirst v. The United Kingdom*, para. 50.

<sup>86</sup> *Id.*, para. 74.

in ensuring that its own institutional system functions normally”<sup>87</sup> and *Mathieu-Mohin v. Belgium* (legitimate aim “to defuse the language disputes in the country by establishing more stable and decentralized organizational structures”)<sup>88</sup>.

The Court’s oblique reference in *Hirst* to the difference in formulation between Art. 3-P1 and ‘certain other rights’, in my view, bypasses a crucial question: are the differences between the fundamental right to *cast a vote* and the right to *express an opinion* really so great as to justify entirely the differences in approach under the Convention? I would argue that they are not, and that the Court’s analysis of a much ‘wider range of purposes’, in its own words, under Art. 3-P1, without any effort to cast important societal aims in terms of opposing individual fundamental rights (the *individual fundamental right* of Belgians to live under more stable and decentralized organizational structures? the *individual fundamental right* of Latvian MP’s not to be addressed in another language?) is a powerful reminder of the artificiality of much of its approach to the clause ‘the rights and freedoms of others’.

### 5.3. The missing structural perspective (2): Neglected aims

The previous paragraph has discussed cases in which the Court uses the clause ‘the rights and freedoms of others’ in order to suit grounds for limiting fundamental rights that would otherwise be hard to square with the Convention. This approach, I have argued, both denatures the clause itself and contributes to misunderstandings of the fundamental issues in actual cases. This ‘translation process’ of a wide range of objectives into the accepted limitation ground ‘the rights of others’, sometimes causes important aspects of cases to get, as it were, lost in translation. This paragraph offers an example of such loss.

The Strasbourg Court, like many other courts involved in fundamental rights protection, has been confronted with the issue of ‘hate speech’; the question of whether and to what extent racist or extremist speech should be entitled to protection under the freedom of expression. It is instructive to compare the approach of the European Court in its seminal *Jersild v. Denmark* case, with the approach of the Supreme Court of Canada in its case of *R. v. Keegstra* (1990), on the question of the justification of imposing limits on ‘hate speech’.<sup>89</sup> For the European Court in the *Jersild* case, it was simply “uncontested that the interference pursued a legitimate aim, namely, the ‘protection of the reputation or rights of others’”.<sup>90</sup> The relevant portion of the Supreme Court of Canada’s judgment offers a striking contrast. The Court held:

“Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. (...) A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large”.<sup>91</sup>

The second element in the Supreme Court’s reasoning - an element of “pressing and substantial concern” - is entirely absent from the Strasbourg Court’s explicit reasoning. This is, I would submit, because the objective of countering hate speech’s

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<sup>87</sup> ECtHR 9 April 2002, *Podkolzina v. Latvia*, Reports 2002-II, para. 34.

<sup>88</sup> ECtHR 2 March 1987, *Mathieu-Mohin v. Belgium*, Series A, vol. 113, para. 57.

<sup>89</sup> *Jersild v. Denmark*, *supra* note 5. Canada, Supreme Court 13 December 1990, [1990] 3 S.C.R. 697, *per* Dickson J.

<sup>90</sup> *Jersild v. Denmark*, *supra* note 5, para. 27.

<sup>91</sup> *R. v. Keegstra*, *supra* note 89, 53.

“influence upon society at large” cannot be fitted in the limitation clauses attached to Article 10 of the Convention as easily as the “harm done to members of the target group”. But limiting the accepted justification of measures against hate speech to the protection of the rights of members of the target group significantly undervalues the importance of these measures to society at large. Funnelling the wider range of objectives legitimately pursued by such governmental action into the narrow channel of the protection of ‘the rights of others’ mischaracterizes the case as involving a fundamental conflict between *the rights of distinct groups of individuals*, instead of primarily raising crucial questions of broader structural design *of relevance to all* in a democratic society.

#### 5.4. The missing structural perspective (3): Aims and Effects

The Convention’s exclusive focus on *rights* to the neglect of *structures* contributes, finally, to an overvaluation of the importance of *effects* on individuals in specific cases and to an undervaluation of critical scrutiny of the wider *aims* pursued by, and of effects to be expected from, governmental action.

The case of *Wingrove v. The United Kingdom*, a blasphemy case, may be adduced as an example of this point.<sup>92</sup> In this case, the United Kingdom authorities had acted against the distribution of a film - *The Ecstasy of Saint Theresa* -, which was deemed pornographic and blasphemous. One of the objections of the applicants was that the English legislation used was only applicable to blasphemous expressions with regard to the Christian faith. The Court was unfazed:

*“It is true that the English law of blasphemy only extends to the Christian faith. However, (...) the extent to which English law protects other beliefs is not in issue before the Court which must confine its attention to the case before it. The uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practiced in the United Kingdom does not detract from the legitimacy of the aim pursued in the present context”.*<sup>93</sup>

A Court with a broader, structural perspective on rights protection would, I suggest, have unhesitatingly condemned the United Kingdom’s patently discriminatory legislation.<sup>94</sup> Such discrimination on grounds of religion is precisely the sort of danger that many courts see as their primary duty to protect against. For the Strasbourg Court, however, the aim pursued by the legislation of protecting against the treatment of a religious subject in such manner “as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic” “undoubtedly” corresponded to that of the protection of the rights of others within the meaning of paragraph 2 of Article 10 of the Convention; an observation that settled the legitimacy of the government’s measure in principle.<sup>95 96</sup>

<sup>92</sup> ECtHR 25 November 1996, *Wingrove v. The United Kingdom*, Reports 1996-V.

<sup>93</sup> *Wingrove v. The United Kingdom*, *supra* note 92, para. 50.

<sup>94</sup> Comparison with the United States Supreme Court’s approach in the case of *R.A.V. v. St. Paul* is instructive in this regard. 505 U.S. 377 (1992). In this case, it was precisely the fact that the relevant legislation singled out *racially motivated* offences that formed the main reason for the Court to find a violation of the First Amendment.

<sup>95</sup> Note: the discussion on the lack of a structural perspective is related, but not identical, to discussions on the difference between concrete and abstract review. While the extreme concreteness of the Court’s review, by comparative standards, may make it harder to engage in the

## 6. Taking ‘Conflicts of Fundamental Rights’ Seriously

### 6.1. Introduction

The preceding Sections have presented a critique of the Convention’s use of a wide category of ‘conflicts of fundamental rights’, against the background of the claim, elaborated in Section 2, that legal orders have at least some degree of leeway in choosing whether to frame basic conflicts in terms of opposing fundamental rights or through alternative conceptualizations. The question that remains for this last Section is the following; how can this largely external critique be effectively applied within the context of current Convention theory and practice? It is easy to argue for a ‘structuralist perspective’ or for the elaboration of a thicker notion of ‘democratic society’, but what good are such arguments under present circumstances, given present institutional and political constraints? This Section will argue, in reply, that a great deal can actually be learned from an awareness of *Convention exceptionalism* with regard to ‘conflicts of fundamental rights’; insights that can be applied directly to achieve better practical results in concrete cases.

This argument is built-up as follows. I will first try to show that the Court’s choice for a wide category of cases involving ‘conflicts of fundamental rights’ can be seen as partially motivated by a desire to further the aim of *de-politicization through micro-management*, but that the possibility of actually achieving this goal is - to a large extent - an illusion. To the extent, therefore, that the Convention’s wide category is not merely a product of institutional constraints but a matter of conscious design, this effort would seem to rest, at least partially, on misguided assumptions.

The next paragraph presents four practical suggestions on how to identify cases in which a narrower conception of the category of conflicts of rights would be desirable. These suggestions focus on cases in which (a) the relevant ‘others’ form a majority of the relevant population, (b) ‘the others’ are state institutions or public officials in a public capacity, and (c) in which it is arguable that the case contains an element of redistribution of public resources.

### 6.2. Illusions of micro-management, juridification and de-politicization

An important part of the reason for the Convention’s comparatively wide category of ‘conflicts of fundamental rights’ must be found in factors related to institutional constraints; constraints to a large extent imposed by the Convention’s framers, especially through their choice for the ‘paragraph 2’-framework for certain important Convention rights. Some element of this wide category, however, does seem attributable to conscious design on behalf of the modern Court. The point can only be developed schematically in the context of this paper; a fuller statement would require

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broader kind of analysis suggested here, such an approach would by no means be impossible under current institutional constraints. See E.A. Alkema, *supra* note 35, 60 for a discussion of concrete vs. abstract review in the Court’s practice.

<sup>96</sup> This assessment of the Court’s approach to aims and effects of governmental action finds a comparative parallel in Professor Ashutosh Bhagwat’s analysis of ‘purpose scrutiny’ in US Supreme Court practice. According to Bhagwat, the Supreme Court’s “*failure to develop a coherent framework for analyzing government interest*” has moved it to employ difficult and controversial balancing tests in cases where such an approach was unnecessary. See A. Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 *California Law Review* 297, 311 (1997).



a much longer analysis. On a very basic level, however, it seems the Court may be enamoured by the idea of the possibility of *micro-managing* conflicts - and thus *de-politicizing* them - by framing them as conflicts of individual rights rather than as opposing individuals and majorities. It may be that the absence of a structural perspective on questions of normative and institutional design and the lack of a thick notion of democratic society are all - at least partially - due to conscious choices on behalf of the Court not to get drawn into the most contentious contemporary debates precisely over majority/minority relations in pluralist societies. By limiting the politically overwhelming *public interest* to the '*rights*' of a few '*others*' concerned, the Court may want to limit the potential implications and impact of litigation before it. The fewer sections and concerns of society implicated, the '*smaller*' the conflict becomes.

Framing conflicts in terms of opposing rights may be thought by the Court to have the additional benefit of '*juridifying*' them; a conflict between individual *rights* is clearly the business of law and of courts rather than that of politicians, much more so than a conflict where an individual's rights are seen to thwart important majority preferences. Micro-management and juridification, in turn, are appealing avenues for an international court interested in *de-politicizing* as much as possible the questions before it.

It has to be emphasized, however, that the strategy of de-politicization through technical conceptualizations can only work to a certain extent. As has been mentioned several times before; whether a conflict is framed in terms of conflicting rights or not, the underlying basic questions and dilemmas will not go away. Protecting important individual interests in the face of majority preferences will still be as potentially costly or cumbersome. Member States will still feel the impact of the European Court's decisions, whether they are reasoned on the basis of rights-conflicts or otherwise.

### 6.3. Taking 'conflicts of fundamental rights' seriously: Suspicious and suboptimal conceptualizations

In *Taking Rights Seriously*, professor Ronald Dworkin offers an important suggestion on how to deal with cases presented as involving a conflict between individual rights. He writes:

*"We must recognize as competing rights only the rights of other members of the society as individuals. We must distinguish the 'rights' of the majority as such, which cannot count as a justification for overruling individual rights, and the personal rights of members of a majority, which might well count".<sup>97</sup>*

One does not have to agree with Dworkin's strong position on the trump-like nature of rights *vis-à-vis* the public interest, to agree with his insistence on the importance of making a qualitative distinction between cases involving a conflict between the rights of different individuals *as individuals* and conflicts between individual rights and the *interests of majorities expressed in terms of 'rights'* of their members. In this way, Dworkin's suggestion serves as an important reminder of the dangers of too broad a conception of the category of 'conflicts of individual rights'.

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<sup>97</sup> R. Dworkin, *supra* note 1, 194.

The fundamental question then becomes, or rather: remains: how are we to distinguish between cases involving ‘true’ conflicts of fundamental rights held by individuals *qua* individuals and cases involving conflicts between individual rights and the public interest, *expressed in the language of rights*? Dworkin himself does not offer clear guidelines on how to make this distinction and the discussion so far in this paper has merely underlined the difficulties involved in conceptualizing a ‘hard’ line of separation between the two types of cases.<sup>98</sup> Given these problems, the most we may be able to achieve at this time could be the elaboration of a list of factors indicating when use of the category of conflicts of fundamental rights would be *suspect* or *suboptimal*. Building on Dworkin’s formulation, these factors should help us single out those cases where the interests of those seen as ‘others’ are not distinguishable to a sufficient degree from the general interests shared by all members of society.

Where these interests are insufficiently distinguishable, one or both of two dangers may surface, rendering conceptualization as a ‘conflict of individual rights’ suspicious, suboptimal or both. Such conceptualization may be *suspicious* wherever the understanding of cases as involving a conflict of rights carries a danger of *pro-majoritarian bias* in rights adjudication. This danger is one of *systematic under-protection of individual fundamental rights* by way of an excessive valuation of the opposing ‘public interest’ itself understood in terms of fundamental rights.<sup>99</sup> Conceptualization in terms of conflicting rights may be suboptimal whenever there is a risk that such an understanding of the case will not place the Court’s focus on the most important questions to be resolved, without there necessarily being a danger of structural bias one way or the other.

The presence of one or more of these factors would not mean that conceptualization as a conflict between rights is *per se* undesirable, but should give cause to reconsider a way of framing perhaps thought to be natural or self-evident within a given legal order.

#### 6.4. (1): Majorities as ‘others’

The first type of cases in which conceptualization as a conflict between individual fundamental rights may be suspect involves cases in which the ‘others’ in ‘the rights of others’ constitute *a majority* of the relevant population. Whenever there is a clear conflict between the *interests* of one or more individuals - not yet expressed in terms of fundamental rights - and those of the general population, allowing the general population to assert their - relatively uniform - interest in terms of a multitude of individual fundamental rights will be especially risky. This first guideline suggests that the way the Court has dealt with cases such as *Otto-Preminger-Institut*, where the ‘others’ constituted a whopping 87% of the relevant population, and *Wingrove* has been suspicious.<sup>100</sup>

The Court’s decision in the famous case of *Dudgeon v. The United Kingdom* shows how the relevant distinction *could* be made in specific instances.<sup>101</sup> In this case, the Court thought a legitimate aim for the continued criminalization of adult homosexual

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<sup>98</sup> See *supra*, Section 3.

<sup>99</sup> This is the danger Dworkin is concerned about. See *supra* note 97 and accompanying text.

<sup>100</sup> See *supra*, Section 2.4. Confirmation of the fears aroused by this suspicion might, many would claim, be found in the material outcome in *Otto-Preminger v. Austria*, *supra* note 4 and *Wingrove v. The United Kingdom*, *supra* note 92: insufficient protection for freedom of expression.

<sup>101</sup> ECtHR 20 October 1981, *Dudgeon v. The United Kingdom*, Series A, vol. A45.

relations could, in principle, be found in both the government's interest in "safeguarding the moral ethos or moral standards of *society as a whole*" and in "the safeguarding of the moral interests and welfare of *certain individuals* or classes of individuals who are in need of special protection".<sup>102</sup> The Court found it "somewhat artificial (...) to draw a rigid distinction" between safeguarding the morals of society and protecting the rights of others, as the protection of moral standards could encompass the protection of certain groups or classes of weaker individuals and therefore took both aims into consideration.<sup>103</sup> Applying Dworkin's distinction, and the perspective defended in this paper, however, suggests that precisely the distinction between safeguarding a general interest in moral standards and the rights of (groups of) vulnerable individuals, was in no way 'artificial', but rather crucial to the resolution of the case. In the perspective of this paper, then, the Court's classification of *Dudgeon* as involving a 'conflict of fundamental rights' was suspicious.

With regard to the practical application of this factor, it is important to note that failure to identify precisely who the 'others' are for the purposes of application of the clause 'the rights and freedoms of others', may result in confusion as to whether these others do in fact constitute a majority or a relatively large segment of the population and as to whether these 'others' have any special interests distinguishable from those of all other members of society.<sup>104</sup>

#### 6.5. (2): Public bodies and officials as 'others'

A second type of cases in which conceptualization as a conflict between individual fundamental rights may be suspicious, concerns cases in which the 'others' concerned are *public bodies* or individuals who (also) have *an official capacity* that has at least some relation to the claimed rights infringement. The Court's case-law reveals a number of cases in which the interests of public authorities or public officials were dealt with under the 'rights and freedoms of others' clause. Particularly problematic are those cases in which public bodies - local governments, agencies *etc.* - are brought within the category of 'others' for the purposes of the limitation clause to the Articles 8 to 11.<sup>105</sup> Without wanting to go into complex discussions on whether governmental authorities can ever themselves be holders of fundamental rights, it seems clear that allowing governments to assert *their own* interests - and interests defended *on behalf of society generally* - as 'rights' in the context of limiting the fundamental rights of individuals, deforms the conflict in precisely the way warned against by professor Dworkin.

More difficult are cases in which the 'others' are *individuals with an official capacity*. Here, the distinction between limiting fundamental rights for the protection of the individual rights of public officials *qua* individuals and limiting fundamental rights for the protection of the functioning of government will be hard to make in some cases. Presence of this factor should, therefore, again be treated merely as an indication that conceptualization as a 'conflict of fundamental rights' is suspect, not as conclusive evidence against use of the category 'the rights and freedoms of others'.

<sup>102</sup> *Dudgeon v. The United Kingdom*, *supra* note 101, para. 47 (my emphasis, JB).

<sup>103</sup> *Id.*, para. 47.

<sup>104</sup> This criticism of the Court's current approach was formulated *supra* in Section 2.

<sup>105</sup> See for example *Connors v. The United Kingdom*, *supra* note 28, para. 69. The applicant and the respondent State were in agreement as to the legitimacy of the aim pursued.

Even for these difficult cases involving public officials or individuals with an official capacity, some guidelines may be given. As the relevant cases tend to concern freedom of expression - Article 10 of the Convention - I will develop these guidelines with reference to this specific fundamental right.

A basic distinction may be made as follows. Where, as for example in the case of *Lingens v. Austria*, the interference with an individual's freedom of expression is based upon provisions of general criminal or civil law that accord no special status to public officials, the case is more likely not to differ fundamentally from an ordinary (defamation) case.<sup>106</sup> In these cases there should be, accordingly, less ground for suspicion.<sup>107</sup> Where, on the other hand the interference with the right to freedom of expression is based upon special legislation - or on an interpretation of general legislation tailored to the 'needs' of protecting public officials -, there will be extra cause for alarm. This perspective suggests that the Court may have erred in accepting the 'rights of others' justification ground in cases such as *Colombani v. France* - concerning the two French journalists' defamation of the King of Morocco -<sup>108</sup> and *Castells v. Spain* - regarding the conviction of Mr. Castells for the specific crime of damaging 'the Government's honour'.<sup>109</sup>

A special category of cases concerns expression critical of judicial authorities, including prosecutors. Such cases occupy a peculiar position as the judiciary as a whole benefits from one of the few structural aims explicitly allowed for by the Convention: the limitation ground "maintaining the authority and impartiality of the judiciary", attached only to Article 10. Given the inclusion of this specific structural concern, it could be thought that the question of whether a particular governmental measure actually furthers *this* aim or not - as distinct from merely protecting the 'rights of others' generally - would be an important one. However, in the key case of *Nikula v. Finland*, where a public prosecutor brought a private action for defamation allegedly having occurred in the course of judicial proceedings, the Court found that it did not have to decide whether these private proceedings served the legitimate aim of protecting the judiciary, as it could accept "that the interference in any case pursued the legitimate aim of protecting the reputation and rights" of the individual prosecutor involved.<sup>110</sup> The perspective adopted in this paper suggests, however, that just like the distinction between morals and 'rights of others' deemed "artificial" in *Dudgeon*, the difference between protecting the *rights of others* and protecting *the judiciary as a whole* may have been an issue that would have merited more attention from the Court than it actually received.

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<sup>106</sup> ECtHR 8 July 1986, *Lingens v. Austria*, Series A, vol. 103, para. 36 and 20 (conviction for defamation of a member of parliament based on the general Article 111 of the Austrian Criminal Code).

<sup>107</sup> The danger of pro-institutional bias on the Member State level, however, would indicate that there remains some ground to treat these cases carefully.

<sup>108</sup> See *supra*, Section 5.2.

<sup>109</sup> ECtHR 23 April 1992, *Castells v. Spain*, Series A, vol. 236, para. 39 (given the volatile situation in Spain in 1979, "the proceedings instituted against the applicant were brought for the 'prevention of disorder' within the meaning of Article 10 para. 2, and not only for the 'protection of the reputation ... of others'", my emphasis, JB).

<sup>110</sup> *Nikula v. Finland*, *supra* note 37, para. 38.

## 6.6. (3): Redistribution and access to public resources

A final factor, indicating that conceptualization as a ‘conflict of rights’ may be suboptimal, builds on the earlier discussion of factual contingency, above in Section 3.2. This factor holds that conceptualization as a ‘conflict of rights’ may be inadequate whenever the case has some relation to decisions over *the redistribution of, or access to, public resources*. Whenever questions concerning the allocation of public resources - money, institutions, jobs, licences - are involved, the whole of the public interest will be implicated to such an extent that framing cases as turning upon an essentially ‘local’ or ‘private’ conflict between two (groups of) individuals, will leave out of focus a crucial dimension of the basic conflict. This perspective suggests that cases such as *Groppera Radio* - concerning access to Swiss radio spectrum - were probably sub-optimally classified as constituting ‘conflicts of rights’.<sup>111</sup>

Deciding when an element of redistribution of public resources is sufficiently implicated in a case for this factor to have significant weight will not be an easy matter. This factor may, however, be quite easily and profitably applied *negatively*, suggesting that cases involving not a hint of redistribution or access to resources - conflicts between children’s rights and parents’ rights,<sup>112</sup> or defamation cases in purely private settings - may safely be understood as constituting genuine conflicts of individual fundamental rights.

## 7. Conclusion: The future of conflicts of rights before a *quasi*-constitutional court

The argument in this paper has been constructed on the implicit basic premise that the way conflicts are framed before and by courts *matters*. Framing is important for reasons such as argumentative integrity, coherence in case-law, and - especially significant in fundamental rights cases - avoiding pro-majoritarian biases. The basic problem faced by courts and commentators, however, is that it is often not at all self-evident what any given fundamental rights case exactly is *about*. And although it may, therefore, often be surprisingly difficult to determine whether a case should be understood as either a conflict between fundamental rights of discrete individuals or as a conflict between an individual fundamental right and a general societal interest, the paper has shown that precisely this determination often will have important implications.

Against this theoretical background, the paper has argued that the Convention mechanism specifically is dependent on an extremely wide - by comparative standards - category of ‘conflicts of fundamental rights’. This dependency has several causes, among which are the framers’ choice for limitative lists of ‘legitimate aims’ attached to the important Articles 8 to 11, the Strasbourg Court’s lack of ‘division of powers’-jurisdiction and the absence of a ‘thick’ conception of a ‘democratic society’ at the European level. I have argued, however, that at least a proportion of cases currently brought within this wide category of ‘conflicts of rights’ by the Court, would be better dealt with through alternative conceptualizations. Understanding

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<sup>111</sup> See *supra*, Section 5.2. Note: Many cases involving the distribution of public resources will be classified as ‘positive obligations’-cases. As the limitation clauses of the Articles 8 to 11 of the Convention do not apply directly to positive obligations, the Court will have more possibilities for avoiding use of the clause ‘the rights and freedoms of others’. See for example: *Dickson v. The United Kingdom*, *supra* note 11, para. 32-33.

<sup>112</sup> See for example *Venema v. The Netherlands*, *supra* note 26 and accompanying text.

these cases as *being about* conflicts of individual fundamental rights is liable to direct judicial attention away from what is really at stake and may in some cases carry a danger of pro-majoritarian bias.<sup>113</sup> To avoid these dangers, the Strasbourg Court should take all care to make sure conflicts of fundamental rights are taken seriously.

*Taking conflicts of fundamental rights seriously* primarily implies, the paper has argued, *a better use of the legal category* ‘the rights and freedoms of others’. The Court should be more explicit about ‘whom’ others are, what their ‘rights’ are, or about what the effect is of the use of this specific category on other aspects of its analysis, such as the margin of appreciation.<sup>114</sup> These criticisms are all part of a more general critique of the stringency of the ‘legitimate aim’ test in the Court’s case law.

Taking conflicts of rights seriously also implies a preference for *alternative conceptualizations* in at least some cases. Cases opposing individuals to majorities or to public officials and authorities and cases involving some element of redistribution of public resources, should not be seen, the paper has argued, as conflicts of individual rights but as conflicts over powers and over structure.

This last suggestion may sometimes be difficult to incorporate in practice, at least for as long as the Articles 8 to 11 of the Convention maintain their ‘paragraph 2’-construction. But even where institutional constraints preclude direct application of the suggestions offered here, this paper’s argument should not be without relevance. Awareness of the dangers of bias and misdirected focus can always be helpful, even if the Convention’s set-up does not allow for certain cases to be technically framed in another way. On a more general level; calling attention to the contingency of the Court’s approach and to elements of *Convention exceptionalism* may ultimately serve to counteract perhaps overenthusiastic pleas for the Strasbourg Court to be seen as *a constitutional court* and for the Convention to be taken as a constitution for Europe. Regardless of one’s views on the direction in which the Convention system *should* ultimately develop, the paper’s argument has underlined that essential steps in such a transition may at this point in time be impossible to take *given the Convention’s current institutional set-up*. It would clearly be a heartfelt loss if the Convention system’s amazingly successful history as an international subsidiary enforcement mechanism for human rights would in any way be jeopardized by perhaps overly hasty constitutional ambitions.

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<sup>113</sup> It is important to note that the plea for a smaller category of conflicts of rights is not identical to an argument for ‘less’ rights protection; not for the original applicant, nor for the opposing interests.

<sup>114</sup> See for a discussion of the Court’s divergent answers to this question the contribution of Peggy Ducoulombier in this volume.