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Entre déférence et activisme : la CEDH, Cour des Etats ou Cour des Droits ? Explorer les outils d'interprétation de la CEDH

Francesca PIROLA

Laboratoire LADIE - UPR 7414

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Dirigée par : Anne Millet-Devalle / Stefania Ninatti
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Devant le jury, composé de :
Anne Millet-Devalle, Professeur, Université Côte d'Azur
Stefania Ninatti, Professeur, Université de Milan-Bicocca;
Antonello Tancredi, Professeur, Université de Milan-Bicocca;
Alessia Ottavia Cozzi, Professeur Associé, Université d'Udine;
Jules Lepoutre, Professeur, Université de Corse-Pascal-Paoli;
Maria Elena Gennusa, Professeur, Université de Pavia.

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Rapporteurs :
Jules Lepoutre, Professeur, Université de de Corse-Pascal-Paoli
Maria Elena Gennusa, Université de Pavia

Examinatrice:
Alessia Ottavia Cozzi, Professeur Associé, Université d'Udine

Directrices :
Anne Millet-Devalle, Professeur, Université Côte d'Azur
Stefania Ninatti, Professeur, Université de Milan-Bicocca

Titre

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Résumé

Une lecture exhaustive de la jurisprudence de la Cour Européenne des Droits de l'Homme révèle l'existence d'un certain nombre de particularités concernant cette Cour dans le domaine du droit international. L'objectif de cette recherche est donc de comprendre en quoi consistent ces particularités. Plus précisément, le travail cherche à répondre aux questions relatives à leur nature et, d'autre part, à leurs implications systémiques. Sur le plan méthodologique, le thème de l'interprétation sera le paradigme qui permettra d'aborder les questions susmentionnées. Dans le contexte spécifique du droit conventionnel, l'interprétation des droits de l'homme et des libertés fondamentales consacrés par la CEDH est au cœur des compétences à la fois judiciaires et consultatives de la juridiction strasbourgeoise. Son extraordinaire activité herméneutique a contribué à la mise en place d'un système avancé et efficace de protection des droits de l'homme et a eu des répercussions transformatrices sur les systèmes juridiques nationaux, à tel point qu'aujourd'hui elle ne représente plus quelque chose de structurellement étranger au travail effectué par les interprètes nationaux, et dont la pertinence n'est pas strictement confinée au niveau international. Dans ce contexte, le présent travail vise à mettre en lumière les problèmes spécifiques que l'interprétation de la Convention est appelée à résoudre et qui, par conséquent, distinguent cette opération de l'exercice herméneutique portant sur un traité international classique. Ces problèmes dépendent tout d'abord de la spécificité de ce pacte et, plus précisément, de sa nature, de son contenu, de son objet et de sa finalité. L'encadrement exact de la Convention est donc central pour comprendre toute la complexité de l'activité interprétative que la Cour européenne des droits de l'homme est appelée à exercer. En effet, le résultat de cette activité dépend précisément de l'effort de définition de ces "particularités" qui déterminent la spécificité du texte de la Convention dans le domaine du droit international et qui expliquent le large degré de discrétion judiciaire dont dispose l'interprète. Une fois ces notions acquises, le travail se poursuit par l'examen de la méthodologie herméneutique spécifique développée par la Cour et caractérisée par une tendance à osciller entre deux pôles opposés, à savoir la déférence et l'activisme ; l'objectif est notamment d'encadrer certains des principaux outils herméneutiques que la Cour de Strasbourg utilise dans une politique opérationnelle unitaire, cohérente et rationnelle qui puisse leur donner un sens et une justification solide. L'examen de l'"écosystème juridique et social" dans lequel la Cour opère vise ainsi à montrer quels sont les facteurs qui poussent à une plus grande déférence envers les États ou, au contraire, à une approche évolutive qui élargit le champ des droits de l'homme. Enfin, le travail cherche à évaluer la réponse nationale à la méthodologie innovante de la Cour mentionnée ci-dessus, en se référant en particulier à ce que l'on appelle le processus d'Interlaken ; il s'agit d'une série de conférences ministérielles convoquées depuis 2010 pour accroître l'efficacité de la Cour européenne et assurer son fonctionnement à l'avenir, et dans le contexte duquel l'autorité interprétative de Strasbourg a été remise en question par une série de déclarations politiques qui ont exprimé des critiques sévères et des propositions de changements structurels. L'analyse des aspects les plus critiques et des zones d'ombre de ce processus de réforme est d'ailleurs un préalable nécessaire pour comprendre l'incroyable travail de la Cour pour sortir victorieuse d'un climat hostile et défavorable. En effet, une évaluation approfondie de certaines prises de position récentes et de certains avis consultatifs émis en application du Protocole 16 montre la tendance générale de la Cour à interpréter sa fonction - et donc sa nature - de manière créative.

Mots clés

CEDH, interprétation, droits de l'homme, subsidiarité

Title

Between Deference and Activism: The ECtHR as a Court on States or a Court on Rights? Exploring the ECtHR interpretative tools

Abstract

A comprehensive reading of the jurisprudence of the European Court of Human Rights reveals the existence of a number of peculiarities concerning this Court in the field of international law. The aim of this research is therefore to understand what such peculiarities consists of. More specifically, the work seeks to answer questions about their nature and, secondly, their systemic implications. Methodologically, the theme of interpretation will be the paradigm by which to address the afore-mentioned issues. In the specific context of conventional law, indeed, the investigation of the hermeneutic rules developed and refined by the judicial body of the regional safeguard system established by the European Convention is of great interest: the interpretation of human rights and fundamental freedoms enshrined in the ECHR is at the core of both the judicial and advisory competences of the Strasbourg jurisdiction. Not only has its extraordinary hermeneutic activity resulted in a far-reaching political impact on the lives of millions of people in forty-six different countries, but it has also contributed to the introduction of an advanced and effective system of human rights protection and exerted transformative repercussions on domestic legal systems, to the extent that today it no longer represents something structurally foreign to the work carried out by national interpreters, and whose relevance is not strictly confined to the international level. Against this background, the present work seeks to shed light on the specific issues that the interpretation of the Convention is called upon to resolve and that, therefore, distinguish this operation from the hermeneutic exercise involving a classic international treaty. These problems depend first of all on the specificity of this covenant and, more precisely, on its nature, content, object and purpose. The exact framing of the Convention is therefore central to understanding all the complexity of the interpretative activity that the European Court of Human Rights is called upon to perform. Indeed, the outcome of that activity depends precisely on the effort to define those 'special features' that determine the specificity of the Convention text in the field of international law and that explain the wide degree of judicial discretion available to the interpreter. Having acquired these notions, the work goes on to examine the specific hermeneutic methodology developed by the Court and characterised by a tendency to oscillate between two opposite poles, namely deference and activism; the aim, in particular, is to frame some of the main hermeneutic tools that the Strasbourg Court uses in a unitary, coherent and rational operational policy that can give them meaning and a solid justification. The consideration of the 'legal and social ecosystem' in which the Court operates is thus intended to show what factors are driving a greater deference to states or, on the contrary, an evolutionary approach that broadens the scope of human rights. Ultimately, the work seeks to assess the national response to the Court's aforementioned innovative methodology, referring in particular to the so-called Interlaken Process; this consisted of a series of ministerial conferences convened since 2010 to increase the efficiency of the European Court and ensure its functioning in the future, and in the context of which Strasbourg's interpretative authority was challenged by a series of political Declarations that voiced harsh criticism and proposals for structural changes. An analysis of the most critical aspects and grey areas of this reform process is, moreover, a necessary prerequisite for understanding the Court's incredible work to emerge victorious from a hostile and adverse climate. Indeed, an in-depth assessment of some recent pronouncements and advisory opinions issued in application of Protocol 16 shows the Court's general tendency to interpret its function - and thus its nature - in a creative way.

Keywords

ECHR, interpretation, human rights, subsidiarity

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Introduction

A comprehensive reading of the jurisprudence of the European Court of Human Rights (hereinafter "the Court", "the Strasbourg Court", or "the ECtHR") reveals the existence of a number of peculiarities concerning this Court in the field of international law. The aim of this research is therefore to understand what such peculiarities consists of. More specifically, the work seeks to answer questions about their nature and, secondly, the systemic implications flowing from them. Methodologically, the theme of interpretation will be the paradigm by which to address the afore-mentioned issues.

In fact, the interpretation of the human rights and fundamental freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention", or "the ECHR") is at the heart of both the adjudicative and consultative competences of the Strasbourg jurisdiction: whether it is a question of balancing of individual fundamental rights with each other or with national public interests, of determining the nature of the obligations flowing from States' membership to the regional system of human rights protection, of specifying the type of subjective rights recognised to individuals, or even of establishing the degree of initiative of European bodies in promoting human rights, the problem *always* comes down to a question of interpretation of the text of the European Convention.[1]

It has been affirmed that legal interpretation is the foundation of law: the concrete appliance of this latter would in fact depend on the consistent recourse to a set of techniques, tools and methods through which any activity of clarification, explanation and elucidation becomes possible[2]. It follows that hermeneutic processes are never an end in themselves: on the contrary, they represent a delicate attempt of *persuasion*, concealing the interpreter's effort to convince that a determined interpretative outcome is the most – if not the only – suitable to adopt in the light of the given hermeneutic rules.[3]

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[1] As argued by OST F., *Originalità dei metodi di interpretazione della Corte europea dei diritti dell'uomo*, in DELMAS-MARTY M. (ed. by), *Verso un'Europa dei diritti dell'uomo*, Padova 1994, 277, also cited by LONATI S., *Metodi d'interpretazione della Corte EDU e equo processo*, in 1 GIURISPRUDENZA COSTITUZIONALE 2015, 248.

[2] The current definition is given in MAFTEI J., COMAN V.L., *Interpretation of Treaties*, in 8 Acta Universitatis Danubius. Juridica, 2012, 17 ff.

[3] The idea to qualify the interpretative exercise as an "act of persuasion" is taken by TOBIN J., *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, in 23 Harvard Human Rights Journal, 2010.

In the specific context of the Convention law, the inquiry of such hermeneutic rules is of great interest: their evaluation can give a privileged spot to investigate more on the nature of one of the most influential and active regional Courts.[4] As a matter of fact, ever since its first judgement,[5] the European Court has been an active promoter of the achievement of a «greater unity between [the Council of Europe] members for the purpose of safeguarding and realising the ideals and principles which are their common heritage»[6], its significant contribution especially coming from its specific jurisprudential techniques employed to introduce an advance and effective human rights protection system as well as to exercise transformative repercussions on domestic legal orders.[7]

Let's consider a few examples. In the Eighties, Mr David Norris challenged the Irish legislation penalising certain homosexual activities; due to such legislative restrictions, he had suffered from deep depression, loneliness and anxiety attacks. When the case came before the the latter ruled that the law criminalising homosexual acts had no proper justification; it therefore breached Mr Norris' right to a private life guaranteed under Article 8 of the ECHR. Accordingly, the Irish law was changed in 1993.[8]

Almost in the same historical period, in Ukraine, Natalya Grimkovskaya's family home became uninhabitable on the grounds of the local authorities' decision to re-route a motorway through the quiet street where she lived with her parents and her minor son; following this change in the routing of traffic, hundreds of lorries began to pass by every hour of the day, the air became thick with car fumes, vibrations caused the furniture in the house to shake, and the plaster fell off the ceiling and walls. Moreover, Natalya's young son started to suffer from frequent breathing problems and he was found to have high levels of copper and lead in his body. The case was brought before the European Court, which ruled that the local Government had failed to carry out an environmental impact study before turning the street

[4] KARVATSKA S., ZAMORSKA L., *Human Rights Principles Interpretation in the Context of the ECHR*, in 5 European Journal of Law and Public Administration 2, 2018; MOWBRAY A. R., *The Creativity of the European Court of Human Rights*, in 5 Human Rights Law Review 1, 2005.

[5] ECtHR, Judgment of 14 November 1960, Appl. No. 332/57, *Lawless* v *Ireland (n. 1).*

[6] Statute of the Council of Europe, Article 1.

[7] On this topic see *ex plurimis*, KELLER H., STONE SWEET A., *The Reception of the ECHR in National Legal Orders,* in KELLER H., STONE SWEET A. (ed. by), *A Europe of Rights*, Oxford 2008; GERARDS J., *The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"*, in GERARDS J., FEUREN J. (ed. by), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis*, Cambridge 2014; GERARDS J., *The paradox of the European Convention on Human Rights and the European Court of Human Rights' Transformative Power*, in 4 Kutafin Law Review, 2017.

[8] ECtHR Judgment of 26 October 1988, App No 10581/83, *Norris* v *Ireland.*

into a motorway. In particular, no efforts were made to reduce the road's harmful impact and no stake-holders were included in the decision-making process, thus causing a violation of Article 8 of the Convention. Nowadays, the street where Natalya and her beloved live is no longer a motorway.[9]

In 2013, in Sweden, a new provision on the issue of "intrusive photography" was made law after the European Court decided on a case concerning the secret filming of people in private places, such as bathrooms and changing rooms, without their permission. On that occasion, the Strasbourg judge found that the act of concealing a video in the laundry basket of a bathroom, putting it a recording mode and directing it towards the spot where the applicant used to take a shower infringed the individual's integrity protected under Article 8 of the Convention.[10]

These above are only three of the more than sixteen thousands of judgments delivered by the European Court since its creation back in 1959. They all concern only one disposition (Article 8) but at the same time they pave the way for the recognition and the protection of three different rights: the right to sexual determination, the right to a healthy environment and the right to privacy. This operation of translation of a rather abstract clause to three different rights has been made possible by a rather extra-ordinary hermeneutic activity performed by the "judicial crown" of the regional system of safeguard set up by the European Convention, resulting in a far-reaching political impact on the lives of millions of people in forty-six different countries.

In this way, the ECtHR interacts with Member States' constitutional framework and, in particular, with those criteria governing the hermeneutic of constitutional guarantees to the extent that nowadays its interpretation represents no more something structurally alien to the activity carried out by national interpreters, and whose relevance is not strictly confined at the international level.

Hence, the works intend to assess both the legal framework that gives the perimeter (*i.e.* the limits) within which the Court can perform its hermeneutical task and the jurisprudence giving substance to the same. As for the normative basis, no discourse can ignore the text of the Convention: this is therefore the starting point for any examination. Not only that, specific relevance will be given to the 1969 Vienna Convention on the Law of Treaties and, especially,

[9] ECtHR, Judgment of 21 July 2011, App No 38182/03, G*rimkovskaya* v *Ukraine*.

[10] ECtHR Judgment of 21 June 2012, App No 5786/08, *E.S.* v *Sweden*; see also Judgment of 12 November 2013, App No 5786/08, *Söderman* v *Sweden*.

to the general principles of interpretation codified in Article 31 to 33, albeit their study is prodromal to the emphasise of the peculiarities of the Convention as a human rights treaty. Moreover, the last part of the research will focus on the recent adoption of two binding Protocols, Nos 15 and 16, which introduces relevant novelties concerning the Court's interpretative authority.

With regard to the study of the European case-law, this research intends to shed some light on the peculiar method of interpreting the Convention developed and refined by the ECtHR: after a general overview of the main instruments developed *ad hoc* by the Strasbourg judge, the research goes on to investigate the resilience of this entirely innovative methodology to the test of the most recent changes introduced by the two Protocols mentioned above. The assessment of a large case-law as well as of the advisory opinions issued in execution of the preliminary mechanism of Protocol No 16 will therefore represent a significant part of the thesis.

As for the research outline, the work is divided in four Chapters.

Chapter 1 intends to shed light on the specific questions that the interpretation of the Convention is called upon to resolve and which, therefore, distinguish such an operation from the hermeneutical exercise involving a classic international treaty. These are problems that depend first of all on the specificity of this covenant and, more precisely, on its nature, content, object and purpose. The exact framing of the Convention is therefore central to understanding all the complexity of the interpretative activity the ECtHR is called upon to perform, and thus to justify it. Indeed, the result of that activity depends precisely on the effort to define those special features that mark the peculiarities of the convention text in the field of international law and which explain a broad degree of judicial discretion at the interpreter's disposal.

Equipped with this knowledge, Chapter 2 examines how such discretion has been translated into a unique interpretative methodology capable of expanding the meaning and the scope of the conventional rules, just as in the examples above: if one thinks of Article 8, this merely states that «[e]veryone has the right to respect for his private and family life, his home and his correspondence»; yet, the Court has progressively derived from it general standard of protection that cover a wide range of individual interests, some of them were mentioned at the beginning of this work. Albeit focus on the creativity of the ECtHR is not a foreign topic in legal scholarship, what is innovative in this work is mostly the attempt to analyse how it interacts and counter-balances with the judicial self-restraint the Court has shown on multiple occasions.

Most precisely, this research aims at studying the main hermeneutical tool oscillating between deference and activism, by framing them in a unified, coherent and rational operational policy strategically designed to persuade the various actors whom the Strasbourg court interacts with – *i.e.* individuals and Member States, these latter being responsible of diligently endorsing the Convention, first, and giving execution to the ECtHR's ruling, then. Due consideration of the «legal and social ecosystem»[11] where the Court operates will then show such factors as those prompting a wider deference to States or, on the opposite, an evolutive approach expanding human rights' scope.

Against this background, Chapter 3 intends to evaluate the national response to the Court's innovative methodology. In order to increase the efficiency of the European Court and ensure its functioning in the future, a number of ministerial conferences have been convened since 2010: this is the so called Interlaken Process, in the context of which the Strasbourg interpretative authority has been challenged by a series of political Declarations giving voice to harsh criticism and proposals for structural changes. In was in particular the High-Level Conference held in Brighton under the British Chairmanship which not only encourage a new array of measures to tackle the Court's overwhelming workload, but also manifested more clearly the patent hostile attitude towards the ECtHR's power and influence.

The analysis of the most critical aspects and shadowy areas of this reform process is the necessary premise for the Chapter 4, which is dedicated to the incredible work carried out by the Court to emerge victorious from a hostile and adverse climate. In fact, an in-depth evaluation of some recent pronouncements as well as of the advisory opinions issued in application of Protocol 16 shows a Court that is capable of instrumentalising a fundamental principle of the conventional system and on which the entire reform process has rested its foundations, namely that of subsidiarity, and manages to fill it with a new content that betrays its original premises. If, indeed, the principle in question enucleates a criterion of distribution of competences expressing a preference for the lowest level (in this case the national one), the Court's more recent hermeneutic activity, on the other hand, is indicative of an increase in responsibility to the advantage of the highest level (the international one) and, more generally, of the Court's general tendency to interpret its function - and therefore its nature - in a creative and dynamic manner.

[11] TZEVELEKOS V. P., DZEHTSIAROU K., *The Judicial Discretion of the European Court of Human Rights: The Years of Plenty, and the Lean Years*, in 3 European Convention on Human Rights Law Review 3, 2022, 288.

1.

Interpreting the ECHR:
A Preliminary Overview

"[W]hat basically divides the parties is not so much a disagreement about the meaning of terms as a difference of attitude or frame of mind.
The parties will then be working to different co-ordinates;
they will be travelling along parallel tracks that never meet ..."
(Sir Gerand Fitzmaurice,
dissenting opinion in *Golder v. the United Kingdom*)

CONTENT: 1. What does "interpreting the ECHR" mean? – 2. The object of the ECtHR's interpretation: the protection of human rights – 3. The "materially constitutional" relevance of the object of interpretation – 4. The 1969 VCLT framework – *4.1. The "general rule" under Art. 31 VCLT* – *4.2. The recourse to "supplementary means of interpretation"* – *4.3. The interpretation of pluri-lingual treaties* – 5. The Strasbourg judge stirs the «primordial soup of principles of interpertation» – *5.1. The Court's general theory of interpretation:* Golder *and* Ranstev – *5.2 The rejection of textualism – 5.3 The supplementary role reserved to the historical approach – 5.4 The prioritisation of the teleological interpretation – 5.5 The prominence attached to evolutive interpretation – 5.6. The systemic interpretation: international law as a source of inspiration* – 6. The peculiarity of the interpretation of the ECHR in the field of international law

1. What does "interpreting the ECHR" mean?

Under Article 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, «all *matters concerning the interpretation* […] of the Convention and the Protocols thereto» fall within the jurisdiction of the European Court of Human Rights established pursuant to Article 19. As a first step towards precisely defining both the perimeter (*i.e.* the limits) as well as the content of such a jurisdictional competence exercised by the judicial body of the Council of Europe, it is necessary to identify the tools necessary to address the aforementioned "*matters concerning the interpretation*".

In this respect, it is clear that a specific type of interpretation is concerned, which is legal interpretation: the act attributable to the human will (the Strasbourg judges) by which a meaning is given to a legal document (the ECHR) following a given number of rules.[1]

Though trivial in one sense, it is nevertheless significant to remark that the original text of the ECHR does not provide for any clear indication aimed at guiding the judges of Strasbourg in such hermeneutic activity.[2] In the silence of the Convention, the acknowledgment of the *context* may seem the first step to take, as the European Court does not operate in a legal vacuum:[3] since the ECHR is a multilateral treaty, a primary source of inspiration to the Court has to be detected in the international customary rules codified in Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "VCLT").[4] The Strasbourg judge itself has underlined its clear intention to anchor its exegetical approach to the dispositions codified in «…Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties [which] enunciate in essence generally accepted principles of international law»[5].

The Convention was adopted at the UN Conference on the Law of Treaties conducted in Vienna in 1969 and attended by delegates of more than one hundred States (as well as by observers from specialised Agencies) sharing the belief that treaties were to play a fundamental role «in the history of international relationships» as «a mean of developing peaceful cooperation among nations»[6].

In particular, Articles from 31 to 33 are meant to provide for a minimum universal denominator for treaty interpreters in order «to speak a common language»[7].Their use thus is considered to bolster the legitimacy of the exegetical work taken into consideration, regardless

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[1] MODUGNO F., *Interpretazione giuridica*, Padova, 2015, 1.

[2] Only recently, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms has introduced a new recital to the Preamble citing explicitly one of the interpretative tool applied by the Court. The Protocol entered into force from 1 August 2021, after Italy had deposited its instrument of ratification on 21 April 2021.

[3] The Court has referred to such an expression in a number of rulings so as to take into due account the relevant principles of international law; see for example: ECtHR, Judgment of 21 November 2001, App no 35763/97, *Al-Adsani* v *the United Kingdom*, para 55; Decision of 3 June 2004, App no 69338/01, *Calheiros Lopes and Others.* v *Portugal*, para 5; Decision of 16 January 1995, App no 21072/92, *Gestra* v *Italy*.

[4] On the guiding role of the Vienna Convention for the interpretation of the European Convention of Human Rights, see among others: HAECK Y., *How to interpret the European convention on human rights?,* in 3 Constitutional Law Review, 2011; ULFSTEIN G., *Interpretation of the ECHR in the light of other international instruments*, in 15 PluriCourts Research Paper, 2005; DOTHAN S., *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, in 141 iCourts Working Paper Series, 2018.

[5] ECtHR, Judgment of 21 February 1975, App no 4451/70, *Golder* v *the United Kingdom*, para 29.

[6] Preamble to the Vienna Convention on the Law of Treaties.

[7] Albeit referred to a partially different context, the expression mirrors that repeatedly used in WAIBEL M., *Uniformity Versus Specialisation: A Uniform Regime of Treaty Interpretation,* in 54 University of Cambridge Faculty of Law Research Paper, 2013.

of the specific *milieu* in which it is carried out: the very same criteria embraced by the European judge can therefore be fitted within the Vienna Convention architecture and, consequently, connected to the traditional schools of thought – *id est,* the textual, intentional and teleological theories.[8]

At the same time, one must caution on the flexible and not-unequivocal nature of such general international framework; indeed, the parameters set therein are broad and vague of nature, representing more the «essential infrastructure»[9], than a close-listed spectrum of clear and precise instructions; in fact, they do not provide clear-cut solutions to all problems relating to treaty interpretation, thus leaving a space of manoeuvre in respect of the peculiarities related to the specific treaty concerned.[10]

As regards the specific case of the ECHR, its diversity does not so much concern its nature as its *object*: it is the first Council of Europe's convention and the cornerstone of all its activities. The treaty was adopted in 1950 and entered into force in 1953, and represents the first instrument to give effect and binding force to certain of the rights stated in the Universal Declaration of Human Rights: indeed, it enshrines basic human rights and fundamental freedoms representing the minimum standards to be secured within the jurisdiction of any Member State.

Two fundamental qualifications come necessarily into query: firstly, the Convention is a *human rights* treaty; secondly, on the basis of the consideration that the provision of a comprehensive catalogue of fundamental freedoms is the very basis of the existence of the constitutional state, the ECHR can then be said to contain provisions that can be qualified as "materially constitutional" in their nature, in the sense that they present a material identity with a number of constitutional norms relating to human rights and freedoms, even if formally framed in the context of international treaty law.[11]

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[8] KILLANDER M., *Interpreting Regional Human Rights Treaties*, in 7 SUR. Revista Internacional de Direitos Humanos, 2010, 146; on the same topic see VANNESTE F., *General international law before human rights courts. Assessing the Specialty Claims of International Human Rights Law,* 2010; CHRISTOFFERSEN J., *Impact on general principles of treaty interpretation*, in KAMMINGA M. T., SCHEININ M., *The impact of human rights law on general international law*, Oxford 2009.

[9] GARDINER R., *Treaty Interpretation*, Oxford, 2008, 6. See also WAIBEL M., *Uniformity Versus Specialisation: A Uniform Regime of Treaty Interpretation?*, in 54 University of Cambridge Faculty of Law Research Paper, 2013.

[10] See for example PAUWELYN J., ELSIG M., *The politics of treaty interpretation: variations and explanations across international tribunals*, in DUNOFF J.C., POLLACK M.A. (ed. by), *Perspectives on International Law and International Relations: The State of the Art*, 2012 New Yok.

[11] The "materially constitutional nature" of the ECHR, as well as its relevance as a significant tool for building the foundations of the protection of human rights in European constitutional law is discussed by LEVINET M., La Convention Européenne des Droits de l'Homme socle de la protection des droits de l'homme dans le droit constitutionnel européen, in Revue française de droit constitutionnel 86, 2011/2, 227-229.

It follows that interpreting the ECHR means first and foremost to interpret it in the light of the Convention itself or, better, of its object of constitutional relevance; in the words of Carell Alexis, «the method of research is imposed by the object», in the sense that the method of interpreting the object is dictated by the object itself.

This being clarified, the critical question becomes whether or not international principles of interpretation can constitute a valid instrument at the disposal of the European Court.

2. The object of the ECtHR's interpretation: the protection of human rights

By way of assessment of the European Court's «interpretative *ethos*»[12], it is first necessary to evaluate the specific object of its interpretative work. More specifically, it must take into consideration the «special nature»[13], of the European Convention. As already stated, the ECHR is not only a multi-lateral treaty. It is also – and foremost – one of the human rights charters which have seen the light after the horrors and the tragedy of the second global conflict.

Indeed, the Second World War represented a crucial turning point for the permeation of the international and supra-national layers by «constitutionalism's principles …. that are basically universal»[14], first among others that of the guarantee of fundamental rights every individual has inherited from his or her nature of human being.[15]

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[12] The expression is used in LETSAS G., *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, in 21 EJIL, 2010.

[13] Frédéric Vanneste advocates that the meaning of the "specific" or "special" nature of the hermeneutic principles used by human rights *fora* (such as the European Court and the Inter-American Court) in no way concerns the alleged intention to derogate from the general rules on treaty interpretation; so much so that they have contributed to a better understanding of what is enshrined in Articles 31 to 33 of the Vienna Convention. More properly, the theories these Courts apply can be said to be special insofar as they refer to a « specific objective of interpretation» (see : VANNESTE F., *Interpréter la Convention européenne des droits de l'homme et la Convention américaine des droits de l'homme : comment réconcilier les pratiques divergentes avec la théorie générale*, in Revue québécoise de droit international, 2016, 85).

[14] ONIDA V., *La Costituzione del 1948, ieri e oggi,* Accademia Nazionale dei Lincei, Roma, 9–10 gennaio 2008 (video available at: https://www.radioradicale.it/scheda/244053/la-costituzione-ieri-e-oggi).

[15] In this respect, Carozza observes the similarity existing between fundamental rights and human dignity: just as the former exist independently of States' discretion, so does the latter. It is not coincidence that the authors point out the function of human dignity «as the single most widely recognized and invoked basis for grounding the idea of human rights generally, and simultaneously as an exceptionally widespread tool in judicial discourse about the content and scope of specific rights» (See CAROZZA P.G., *Human dignity and judicial interpretation of human rights: A reply*, in 19 European Journal of International Law, 2008, 931–932).

The idea of the ECHR itself took shape to «protect the individual against the threats of the future, as well as the threats of the past»[16], thus helping to fulfil the promise of "never again": in particular, it was during the Congress of Europe held in The Hague (May, 1948)[17] that an international movement – bringing together political leaders, delegates from civil society and the academic world, members of business and religious groups – gathered around the idea of framing a new charter of human rights «guarded by freedom and sustained by law»[18]; in their view, the main purpose of the new pact was to prevent national governments from violating the fundamental freedoms of their citizens with impunity.[19]

Its qualification as a human right treaty has various implication on the subject matter of interpretation:[20] it requires due consideration of some specific characteristics, among which the Inter-American Court of Human Rights expressly enlisted the inspiration «by higher share values (focusing on protection of the human being)»; the provision for «specific oversight mechanisms»; the treaty application «according to the concept of collective guarantees»; the embodiment of reciprocal engagements between contracting States through «essentially objective» obligations and the normative scope associated with these obligations.[21]

With particular regard to the first element mentioned, *i.e.* the "universal" aspiration of the European Convention, this is certainly reflected in the object and purpose pursued by the treaty as made explicit by the Preamble. In fact the latter does not only takes stance on the openly-stated relationship with the Universal Declaration of Human Rights, but also declares that the ECHR was framed to pursue the fundamental aim of achieving a *greater unity* between Member States. At the same time, the claim of universality – typical of the "project of human

[16] OVEY C., WHITE R.C.A., *The European Convention on Human Rights*, Oxford 2006, 47.

[17] After only two years, in November 1950 the European Convention of Human Rights would be signed in Rome

[18] Council of Europe, *Address given by Winston Churchill at the Congress of Europe*, The Hague, 7 May 1948, available at: https://www.cvce.eu/obj/address_given_by_winston_churchill_at_the_congress_of_europe_in_the_hague_7_may_1948-en-58118da1-af22-48c0-bc88-93cda974f42c.html.

[19] In this regard, Lauterpacht wrote that «fundamental human rights are rights superior to the law of the sovereign State» and that «[t]he recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous» (LAUTERPACHT H., *International law and human rights*, New York 1950, 61).

[20] There is no consensus among international legal scholars in respect of the "classification" of human rights treaties, that is whether or not they constitute a separate category of treaties. For a further discussion on whether or not human rights treaties comprise a separate category of treaty constituting a broad, "self-contained" regime subject to a uniform *lex specialis* see FITZMAURICE M., *Interpretation of human rights treaties*, in SHELTON D. (ed. by), *The Oxford Handbook of International Human Rights Law*, Oxford 2013.

[21] Inter-American Court of Human Rights, Judgment of 15 September 2005, *Mapiripán Massacre* v *Colombia*, para 104;

rights" – must be carefully balance with particularities contended by sovereign domestic legal systems, the cooperation and collaboration of which being crucial for the implementation as well as the enforcement of the very same regional regime.

A due consideration of the tension existing between these two "opposite poles" is a long-standing *leitmotif* of human rights studies,[22] but it acquires here a more "concrete" relevance by shaping the very definition of "interpretation": if one accepts that the interpretive exercise is nothing more than an act of persuasion, it must agree that, in order to persuade its interlocutors to comply with a common standard guaranteed by the Convention at the benefit of the individual, the interpreter cannot lead to "that extra step" causing backlash or criticism from those called upon to implement its *dicta*. This means that the interests proper to the recipients of the interpretation (the States) enter fully into the hermeneutic process and guide it, as long as the common ("universal") standard is not undermined in its essence.

Among those afore-mentioned, another feature of ECHR playing a decisive role in the interpretative process shall be highlighted: parties to the human rights treaty pursue neither individual advantages nor the accomplishment of mutual benefits, but a common interest; as explained by the European Commission of Human Rights, «the obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements […] than to create subjective and reciprocal rights for the High Contracting Parties themselves»[23].

Similarly, already in 1982 the Inter-American Court had recognised that «[m]odern human rights treaties …are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the States can be deemed to submit themselves to a

[22] On the subject see *ex plurimis:* VILJANEN J., *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, in 16 European Journal of International Law, 2005; DONNELLY J., *The Relative Universality of Human Rights*, in 29 Human Rights Quarterly, 2007; DONNELLY J., *Human Rights: Both Universal and Relative (A Reply to Michael Goodhart)*, in 30 Human Rights Quarterly, 2008.

[23] *Austria v. Italy, cit.*; see also European Commission of Human Rights, Decision of 6 December 1983, App Nos 9940-9944/82, *France, Norway, Denmark, Sweden, Netherlands* v *Turkey*, paras 41-42.

legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction [...]»[24].

Thus, as a human rights treaty, the ECHR tends to encompass a set of "non-reciprocal" obligations in favour of third-party beneficiaries' rights and freedoms, whose enjoyment is attached in principle to the sole quality of human being (so-called «*ordre publique* feature»[25] of human rights treaties). [26] Put it in different terms, rather than representing a mere exchange of inter-State commitments, the ECHR ensures a system of common interests, the respect of which is imposed only by reason of the commitment made towards the beneficiaries, namely the individuals.[27]

Therefore, the ECHR diverges from other ordinary international treaties mainly due to its «universal vocation» to represent «an instrument of objective defence» of human rights,[28] to the effect that it sets up a system of guarantees which comprises «more than mere reciprocal engagements between contracting States», as it «creates, over and above a network of mutual, bilateral undertakings, [that is to say] objective obligations»[29],which limit the power of States with respect to the individual. Accordingly, the hermeneutic approach which is the most coherent with such characteristic is therefore a "human right-focused" one, that is to say one entailing a rather expansive attitude to the exegesis of the fundamental freedoms guaranteed under the international instrument and which is sufficiently favourable to their effective protection.[30]

But there is another corollary flowing from the States' voluntary submission to a collective system of protection that provides for obligations that are comprehensive and objective in nature:[31] through the "picklock" of the protection against unjustified infringements of the

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[24] Inter-American Court of Human Rights, Advisory Opinion of 24 September 1982 requested by the Inter-American Commission on Human Rights, OC-2/82, *The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, para 29.

[25] FITZMAURICE M., *op. cit.*, 2;

[26] See Icelandic Human Rights Centre, *Interpretation of Human Rights Treaties*, available at: https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-rights-treaties.

[27] SUDRE F., *Droit Européen Et International Des Droits De L'homme*, Paris 2016, 50-57.

[28] The expression is used by MANES V., ZAGREBELSKY V. (ed. by), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Milan 2011, 69.

[29] ECtHR, Judgment of 18 January 1978, App no 5310/71, *Ireland* v *the United Kingdom*, para 239; ECtHR, Decision of 11 January 1961, App no 788/60, *Austia* v *Italy*, para 138.

[30] See for example ECtHR Judgement of 9 October 1979, App no 6289/73, *Airey* v *the United Kingdom*, para 33.

[31] On the issue see GIANNOPOULOS C., *L'autorité de la chose interprétée des arrêts de la Cour européenne des droits de l'homme*, RDLF 2018, thèse n°02, www.revuedlf.com. In his analysis, the author describes the concept of *res interpretata* of the Court's judgments under two different representations: that of "jurisprudential authority" and

fundamental rights the individual is entitled to under the Convention, the exercise of interpretation can be used by the Strasbourg judge to the purpose of introducing into the domestic legal systems new relevant obligations, the violation of which exposes national authorities to international responsibility.

As a matter of fact, reasoning on Articles 1, 19 and 32 of the Convention, it can be argued that the interpretation of the covenant dispositions issued by the European Court are indeed part of the treaty text, with the further consequence States must abide by it. In the words of the Court, it is the only body responsible for providing the «final authoritative interpretation of the rights and freedoms»[32] as defined in the Convention, its judgments have the same legal value and their interpretative authority do not depend on the formation by which they are rendered.[33]

Even more specifically, by means of reference to its «eminent interpretative function»[34], the ECtHR is able to provide general standards to determine the scope of application of the fundamental freedoms guaranteed under the Convention so as to identify the exact content of the commitments binding all the Contracting States: conventional guarantees manage to interact with national legal and constitutional frameworks, imposing themselves as a «compulsory point of reference»[35], which domestic authorities must adapt to.

Therefore, if respect for the Convention entails the obligation to follow the Strasbourg jurisprudence, aimed at clarifying the scope of States' obligations of conduct, this means that the interpretation of a given article, developed by the ECtHR in a series of individual cases, arguably transcends the particular facts of these cases and becomes an integral part of that provision, thus acquiring the same binding force as the provision in question.[36] Consequently, the interpretative exercise becomes the way to establish generally applicable substantive

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that of "interpretative authority". The former describes the body of abstract and general solutions provided by the Court to a specific question, while the latter aims at illustrating the legal weight of the interpretative elements contained in the prescriptive part of the reasoning mobilised by the Court; the two declinations are thought to be materially interdependent, hence enabling the Court to carry out its assigned task of progressively harmonising national systems in the field of human rights. See also DRZEMCZEWKI A., *Quelques réflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg*, in 11 Revista do Instituto Brasileiro de Direitos Humanos, 2011.

[32] ECtHR, Judgment of 9 June 2009, App no 33401/02, *Opuz* v *Turkey*, para 162.

[33] ECtHR, Judgment of 28 June 2018, App Nos 1828/06; 34163/07; 19029/11, *G.I.E.M. S.r.l. and others* v *Italy*, para 252.

[34] Italian Constitutional Court, Judgment of 24 October 2007, No. 348.

[35] MANES V., *La lunga marcia della Convenzione europea ed i "nuovi" vincoli per l'ordinamento (e per il giudice) penale interno*, in MANES V., ZAGREBELSKY V. (ed. by), *op. cit.*, 16.

[36] Council of Europe, *Between "Res Judicata" and "Orientierungswirkung" – ECHR Judgments Before National Courts*, Statement by Mr Jörg POLAKIEWICZ, Director of Legal Advice and Public International Law, Bro, 19-21 June 2017, available at: https://www.coe.int/en/web/dlapil/-/between-res-judicata-and-orientierungswirkung-.

content of fundamental rights as well as the minimum level of protection to be guaranteed in all the States of the Council of Europe.

We therefore speak of *res interpretata* to indicate the function of the Court's jurisprudence to elucidate, safeguard and further develop the covenant rules with *erga omnes* effects, thereby contributing to the observance by Contracting States of the engagements entailed by their participation in an international treaty.[37] Borrowing the reasoning of the German Federal Constitutional Court, it can be stated that *«*… the case-law of the European Court of Human Rights has at all events a *de facto* function of orientation and guidance for the interpretation of the European Convention on Human Rights, even beyond the specific individual case in a decision … »[38]; not dissimilarly, the German Federal Administrative Court held that « the ECHR has the status of an authentic interpreter of the European Convention on Human Rights»[39].

In conclusion, the nature of the interpretative task carried out by the European Court cannot be considered of a merely conceptual nature: it does not only aids clarifying the exact meaning of the terms and the notions of the various Convention provisions: lying on the premise that the rules of the ECHR "live" in the interpretation given to them by the Court of Strasbourg, this latter has a relevance in shaping and defining fundamental guarantees domestic judges will have to enforce within their respective domestic legal systems.

3. The "materially constitutional" relevance of the object of interpretation

With the national constitutions, the ECHR shares first and foremost its vocation to endure in time, proving itself to the test of the more or less sudden transformations occurring in the factual context. Indeed, the Preamble to the Convention clearly identifies the aim of the Council of Europe in «the achievement of greater unity between its members [by means of] the maintenance and *further realisation* of Human Rights and Fundamental Freedoms». Such a statement echoes what previously proclaimed in the Statute of the Council of Europe, according to which for the maintenance and further realisation of such ideals as the spiritual

[37] See for example ECtHR, Judgment of 5 July 2016, App No 44898/10, *Jeronovičs* v *Latvia*, para 109.

[38] Federal Constitutional Court of Germany, Judgment of the Second Senate of 4 May 2011, 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, BvR 571/10, para 89.

[39] Bundesverwaltungsgericht (BVerwG) 2 C 1.13, Judgment of 27 February 2014.

and moral values which are the common heritage of the people, there is a need of a closer unity between like-minded countries of Europe.

At the linguistic-structural level, such resemblance to national constitutional charters translates into the arrangement of clauses characterised by a certain «vagueness, porosity, conciseness or ellipticity»[40]; thus, in the drafting of the ECHR provisions, preference for the "open-ended" linguistic technique is explained in the light of the objective of guaranteeing the Convention capacity to evolve and survive the wear and tear of time.[41] As a matter of fact, in such areas of law, such qualities as concreteness and precision would prevent the take into consideration the multitude of factual conditions behind the daily application of human rights rules, while openness more easily paves the way to an interpretation capable of driving the metamorphosis of the rule throughout different spatial and temporal context.[42]

It follows that the exegesis of conventional clauses necessarily involves a spectrum of such concepts as "safety", "morals", "public order", "democracy", "freedom" that are inevitably surrounded by a certain degree of uncertainty: provided their intention to have generalised application, they nevertheless imply a multiplicity of possible senses potentially divergent in different contexts. This means that this broadly-worded provisions do not place strict boundaries to them interpreters, limiting themselves to codifying generally shared fundamental principles and values, while a merely textual approach cannot but be applied in a less rigid way.[43] In the work of translating the proclaimed right and freedom into a concretely applicable norm, the interpreter's discretion plays a major role: its main task consists in the enucleation of the fundamental principles flowing from the ECHR, followed by their transition into contemporary norms that can fit in the specific case being tried, while ensuring the compatibility of the solution with the conventional legality.

In other terms, in performing its adjudicative role under Articles 33-34 of the Convention,[44] the Strasbourg judge is constantly called upon to look at the ECHR as a place for setting the

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[40] MODUGNO F. *Interpretazione costituzionale*, Lectio magistralis delivered at the Università di Camerino on 10 April 2019 and published in *Annali della Facoltà Giuridica dell'Università di Camerino* 8, 2019, 60.

[41] ROSSI L., *L'elasticità dello Statuto italiano*, ora in *Scritti giuridici in onore di Santi Romano*, 1940, 28.

[42] TZEVELEKOS P. V., DZEHTSIAROU K., *The Judicial Discretion of the European Court of Human Rights: The Years of Plenty, and the Lean Years*, in *ECHR Law Review* 3, 2022, 2-3

[43] CAROZZA P.G., *op. cit.*, 931-932.

[44] The Court is charged with adjudicating individual disputes raised ; in such cases, its rulings are limited to establishing whether or not the claim is well-founded – i.e. whether or not a violation of the Convention occurred – by assessing all aspects and all details of the facts set out by the applicant in relation to the relevant right or freedom; consequently, the need to offer redress to individual' rights infringement requires the interpretation and the application of the relevant conventional provisions which operate by reference to the specific nature of the case at hand.

minimum standard of protection to be guaranteed to the rights provided for therein, but at the same time also to ensure their maintenance and development according to the changing socio-political needs of the reference *milieu*. Two main considerations can be drawn from the above.

If, as stated by Modugno, «human, cultural and social contexts [...] enter the normal interpretative circuit, orienting the interpreter's search for meaning»[45], the context affecting the role of the European Court equates with a multi-varied «interpretive community»[46] which brings together a large range of interests and prerogatives; more precisely, the ECtHR's interpretative task is largely affected by the fact that, «[it] is not only a two-faced Court, dealing with two totally different subjects, but also a kind of tightrope walker, since it has to carefully weigh both sides of this original process: State sovereignty on one side, and individual citizens (acting against their State) on the other side»[47].

On the one hand, the interpretation functional to the decision of the concrete case has to be instrumental to the ultimate objective of the actual and effective protection of the rights of individuals. On the other hand, the interpretation of the ECHR has to be oriented by the dutiful consideration of national singularities in line with the fundamental principle of subsidiarity the whole regional mechanism is enrooted on:[48] indeed, the ECHR was not conceived as an instrument for replacing national law by imposing any absolute uniformity, since it intends to build a common standard in the field of human rights without erasing the particularities of domestic law.[49]

At the same time, it appears that the European Convention represents a common baggage of fundamental rights and freedoms from which its interpreter can – and must – draw a wide spectrum of common standards of protection delimiting an increasingly integrated public order within the specific geo-political *milieu* of like-minded European countries;[50] thus, it represents a primary source for the elaboration of a sort of "common European law" in the

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45 MODUGNO F., *Interpretazione costituzionale*, op. cit., 62.

46 TOBIN J., *op. cit.*, 4.

47 ARCARI M, NINATTI S., *Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights' Case Law*, in 1 ICL Journal, 2017, 26.

48 ECtHR, Judgment of 7 December 1976, App No 5493/72, *Handyside* v *the United Kingdom*, para 48.

49 ECtHR Judgement of 26 April 1979, App No 6538/74 , *Sunday Times* v *the United Kingdom*, para 61.

50 TZEVELEKOS V. P., *Use of Article 31 (3)(C) of the VCLT in the case law of the ECtHR: An effective anti-fragmentation tool or a selective loophole for the reinforcement of human rights teleology-between evolution and systemic integration*, in 31 Michigan Journal of International Law, 2009, 627 as cited by POPA L.E., *Patterns of Treaty Interpretation as Anti-Fragmentation Tools. A Comparative Analysis with a Special Focus on the ECtHR, WTO and ICJ*, Cham 2018.

field of human rights.[51] In other terms, the ECHR is the pivotal source for the consolidation of a sort of "pan-European" system of human rights protection. Such a special character is well crystallised in a famous mantra consistently recurring in the Court's case-law, by which the ECHR has been resorted to as a «constitutional instrument of European public order (*ordre public*)» [52] in the field of human rights, which put an end to the «time of constitutional parochialism in Europe»[53].

The first case where the Strasbourg judge relied upon the formula above is *Loizidou v. Turkey*;[54] the judgment originated from the petition of a Greek Cypriot citizen complaining that she had been deprived of access to her property in Northern Cyprus as a consequence of the occupation of that region by Turkish Troops and the establishment there of the "TRNC" (Turkish Republic of Northern Cyprus).

Faced with the claim submitted by the Turkish Government, according to which the allegations made by the applicant lied outside the jurisdiction of Turkey on the grounds of both territorial and temporal limitations, the Court recognised that a system where «Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances», or even where they could «qualify their consent under the optional clauses», would not merely jeopardise the role of the Commission and the Court in the discharge of their functions, but would also «diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)»[55].

The case *Al-Skeini and Others v. the United Kingdom*[56] is also worth mentioning, where the Court found a violation of Article 2 of the Convention stemming from the British authorities' failure to perform an adequate investigation into the deaths of five Iraqi civilians who had been killed during British security operations; on that occasion, the paradigm above was used to uphold the argument that «the importance of establishing the occupying State's jurisdiction […] does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States».[57]

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[51] LONATI S., *Metodi d'interpretazione della Corte EDU e equo processo*, in 1 GIURISPRUDENZA COSTITUZIONALE 2015, 247.

[52] On the definition of "public order" refer to DE LANGE R., *The European Public Order, Constitutional Principles and Fundamental Rights*, in 1 Erasmus Law Review, 2007.

[53] *G.I.E.M. S.R.L.*…, *cit.,* para. 79.

[54] ECtHR, Judgment of 23 March 1995 (Preliminary Objections), App No 15318/89, *Loizidou* v *Turkey*.

[55] *Ibid.*, para 75.

[56] ECtHR, Judgment of 7 July 2011, App No 55721/07, *Al-Skeini and Others* v *the United Kingdom*.

[57] *Ibid.*, para 142.

In both cases, the qualification of the Convention as an instrument of European public order aided to expand the extent of the undertakings binding the Contracting States, either by averting the reservations formulated by a State could result in a *vulnus* in the full effectiveness of the human rights protection system, or by extending the scope of application of the covenant under Article 1.[58]

Moreover, the formula at hand closely links to the mission of the system set up by the Convention to determine issue of public policy in the general interest, thereby raising the standards of protection of human rights throughout the community of the Convention States.[59] In this respect, the Court significantly emphasised the Convention's role as a constitutional instrument of European public order in the field of human rights so as to outweigh the interest of international cooperation where, in the circumstances of a particular case, it is considered that the protection provided by international organisation is manifestly deficient.[60]

Furthermore, in a recent case dealing with a potential norm-clash between the obligations stemming from a UN Security Council Resolution and the protection offered by the ECHR,[61] the Court expressly reiterated that «the Convention being a constitutional instrument of European public order […], the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order», a fundamental component of which is to be found in the rule of law.[62]

This case-law cannot mislead to the wrong conclusion that a "strong" constitutional connotation for the ECHR is to be figured. The ECHR *is* an international treaty. Yet, the increasing adherence to typically constitutionalist paradigms and concept shown by the Strasbourg jurisprudence represents a clear sign of the "constitutional" potential of the ECHR

[58] Rather sparingly, the same formula has been resorted to by the Strasbourg Court so as to restrict its jurisdiction; for instance in the *Banković and Others* case, it held that «[t]he Court's obligation […] is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties […]. It is therefore difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that system» (ECtHR, Decision of 12 December 2001, App No 52207/99, *Banković and Others* v *Belgium and Others,* para 79)

[59] ECtHR, Judgment of 22 March 2012, App No 30078/06, *Konstantin Markin* v *Russia*, para 89.

[60] ECtHR, Judgment of 30 June 2005, App No 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v *Ireland,* para 156.

[61] ECtHR, Judgment of 21 June 2016, App No 5809/08, *Al-Dulimi and Montana Management Inc.* v *Switzerland.*

[62] *Ibid.*, para 145

to build a pan-European public order in the field of human rights: this potential must be referred to its ability to furnish constitutional fundamentals common to the plurality of national systems and to represent the minimum threshold of protection to be secured within any Member State by setting the «limitation of the exercise of public power by a set of justiciable "constitutional" rights found in the ECHR» and being backup by «a Court to settle complaints about their alleged violation…»[63].

By way of example, one may reflect on the ECtHR consideration of democracy: as «a fundamental feature of the European public order», whose ideals and values (hermeneutically identified with those of pluralism, tolerance and broadmindedness)[64] the Convention was conceived to maintain,[65] its guarantee has been translated into a specific commitment binding all member states to recognise and respect the fundamental guarantees enshrined in the ECHR; consequently, the observance of such obligation became the picklock for assessing the impact of the core principle of democracy on the strengthening – or, conversely, the restriction – of individual rights and freedoms within domestic legal systems.

Under this perspective, therefore, the ECHR is instrumental in defining a body of fundamental principles around which the entire European space is organised and which influence the public policies of the contracting States,[66] in the sense that individuals can legitimately expect the latter to protect them in the light of these principles, regardless of the legal system to which they belong;[67] principles, the latter, which are set out by the hermeneutic activity of the Strasbourg jurisdiction.

But the constitutional relevance of the object of interpretation must not be understood "only" in the sense the Strasbourg judge has to address the question of what a given conventional right mean, including its relationship with opposing rights or interests; it must also be intended as referred to the «quintessentially constitutional question […] of which

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63 GREER S., WILDHABER L., *Revisiting the Debate about Constitutionalising the European Court of Human Rights*, in 12 Human Rights Law Review 4, 2012, 685.

64 ECtHR, Judgment of 7 December 1976, App No 5493/72, *Handyside* v *the United Kingdom*, para 49; Judgment of 8 July 1986, App No 9815/82, *Lingens v. Austria*, para 41; ECtHR, Judgment of 23 May 1991, App No 11662/85, *Oberschlick* v *Austria*, para 57.

65 ECtHR, Judgment of 30 January 1998, App No 133/1996/752/951, *United Communist Party of Turkey and Others v. Turkey*, para 45.

66 DZEHTSIAROU K., *European consensus and the legitimacy of the European court of human rights*, Cambridge 2015, 75.

67 GRYNCHAK A.A., GRYNCHAK S.V., LATYSH K.V., SMORODYNSKYI V.S., TAVOLZHANSKA Y.S., *Convention for the Protection of Human Rights and Fundamental Freedoms as a Constitutional Instrument of European Public Order*, in Public Organization Review, 2022, doi: 10.1007/s11115-021-00583-9 PMC8736302.

institution – judicial/non-judicial, national/European – should be responsible for providing the answer»[68].

As a matter of fact, the creation of a new network of mutual and objective obligations by the transformative power of the ECHR brings with it a further consequence in the European landscape: it ends up enriching national tools of interpretation of the sources of law.[69] This last assertion must be understood in the following terms.

From a "vertical" perspective, it can be noticed that the Convention law – as interpreted by the Court of Strasbourg – has gained increasing potential within the constitutional framework of Member States insomuch as it manages to delimitate the prerogatives of the Member States. In this respect, it is argued that the systemic function of the ECHR – and in particular the constraint it places on domestic authorities, judicial and otherwise – justifies its diversity on the level of the hermeneutic choices to adopt if compared to other international treaties.

The actual impact of the Convention at the domestic level mainly depends on two main factors: firstly, the rank of this instrument in the national legal system and, secondly, the domestic referral procedure. While different countries adopt different solutions, normally the Convention has supra-legislative rank so that a conventionality review can be exercised in parallel with the constitutionality review.

The consequence is that there is a considerable overlap in the process of implementing the Convention, on the one hand, and the Constitution, on the other: in such systems, the Convention provisions and the ECtHR's legal arguments are to be taken into account as supplementary elements to shed light on the constitutionality issue. More broadly, the domestic judge is called upon to bear in mind that the local conclusion must avoid being in flagrant contradiction with the Convention law in the meaning provided by the Court's case law.

As a result, in one way or another, the question of conventionality is constantly present in the workings of most European courts and the Strasbourg jurisprudence is progressively absorbed by the national-constitutional ones.[70] In other terms, the Convention law ends up

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[68] GREER S., *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation*, in 3 Human Rights Review, 2010, 6.

[69] ARCARI M, NINATTI S., *Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights' Case Law*, in 1 ICL Journal, 2017, 14.

[70] GARLICKI L., *Le contrôle de constitutionalité et contrôle de conventionalité sur le dialogue des juges*, in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa*, Paris 2011, 279-280.

orientating domestic rules and principles of interpretation and application of (constitutional) fundamental rights.

For instance, The Czech Constitutional Court acknowledged that «[p]ublic authorities, and primarily the courts, are […] under an obligation to take into account the ECtHR's jurisprudence in cases in which the Court ruled in the proceedings against the Czech Republic, as well as in cases concerning other States».[71] Not dissimilarly, in the United Kingdom, it was emphasised that «[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less».[72] Significantly, the Slovak Constitutional Court recognised that «…the Convention and the related case law constitute for domestic authorities, which apply laws, binding interpretation regulations for interpretation and application of legislation concerning fundamental rights and freedoms […] and thus they determine the framework that cannot be exceeded by these authorities in concrete cases».[73]

Another enlightening example is the Italian one. Since the approach outlined in the two twin judgments of the Italian Constitutional Court (Nos 348 and 349 of 2007), by virtue of the reference to the "international obligations" legislative powers shall comply with,[74] the European Convention has been elevated to a parameter for judging the constitutionality of the domestic rules, albeit in the form of the so called "interposed norm"; roughly explained, under the model drawn up by the judgments mentioned above domestic rules colliding with the conventional standards are to be considered null and void on the grounds of violation of the Constitution itself.

The incorporation of the ECHR as an interposed parameter in the judgment of constitutionality has then led to the extension of the criterion of interpretation in line with the Convention binding the ordinary judges: these latter would therefore necessary have to make an attempt to carry out an interpretation of the domestic law "orientated" to the ECHR, that is to say in conformity with the covenant standards; only where this operation is not possible, the judge would have to raise a question of constitutionality. In this way, the covenant rights

[71] Constitutional Court of the Czech Republic, Judgement of 15 November 2006, File no. I. ÚS 310/05. See also judgment of 30 June 2015, File no. II. ÚS 1135/14.

[72] UK Appellate Committee of the House of Lords, R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323.

[73] Slovak Constitutional Court, finding file no. I. ÚS 67/03 of 11 March 2004.

[74] Art. 117, para 1 of the Italian Constitution.

and freedoms manage to enter the domestic system and «find new inspiration for [their] own legitimacy»[75].

The qualification as interposed norm implies, however, the Convention's "sub-constitutional" rank in the Italian hierarchical system of the sources of law, *i.e.* subordinate to the Constitution: it is therefore necessary a preliminary verification of the compatibility of the ECHR rules with those of the national Constitutional Charter, in order to avoid the violation of the latter through the respect of the former.[76] At the same time, the primacy of the Constitution is counterbalanced by the recognition of the Strasbourg Court's monopoly on the interpretation of the text of the Convention: the domestic legal system would therefore have to comply with the international obligations assumed by Italy in the exact meaning specifically attributed by the only judicial body competent to guarantee its uniform application, namely the ECtHR.

Hence, it is not possible to imagine a European jurisdiction overlapping with that of the Italian judicial bodies, since the contracting States are bound by the eminent hermeneutic function of the Strasbourg Court, in whose interpretation the exact sense of the Convention rules lives and can be found.[77] The obligation to comply with the interpretation provided by the judges of Strasbourg is peremptory and looms over all domestic judges, the Constitutional Court included.[78] This latter, in particular, is precluded from any sort of reviewing of the exegesis of the conventional rights given by the ECtHR.[79]

Regardless of any assessment on the constitutional jurisprudence aimed at "softening" and attenuating the aforementioned obligation, it is interesting here to underline how national judges are not at all merely passive "receptors" of international rules flowing from the Convention, and they interact actively with the European Court in a constructive way so as to embrace a consistent interpretation and to avert any violation of their obligations previously undertaken.

More correctly, they operate as member of a «two-way legal enterprise» which has constitutional features, «in the sense that the ECtHR and national […] organs, including

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[75] The expression is used in NINATTI S., *Domesticating the Convention? Diritto interno e Convenzione europea di fronte al giudice costituzionale*, in PUMA G. (ed. by) *Diritto internazionale e sistema delle fonti. Tra modello accentrato e modello diffuso del controllo di costituzionalità*, Bari 2020, 79 (the translation is mine).

[76] *Ibid.*, 76.

[77] Italian Constitutional Court, Judgment of 22 October 2007, No 348/2007.

[78] Italian Constitutional Court, Judgment of 16 November 2009, No 311/2009; Judgment of 30 November 2009, No 317/2009.

[79] Italian Constitutional Court, Judgment of 25 February 2008, No 39/2008.

national courts, have defined mutual functions in the common transnational legal protection of human rights»[80]. Nevertheless, in such a construction, it is patent that any interaction can easily become the harbinger of considerable frictions between different layers of human rights protection. It is precisely in the potential clashes raised «between the (mainly) more individualistic and reactive tenets of the "model of rights" assumed by the [Convention] and the (mainly) more social and proactive function of national rights»[81] that the core of the issue concerning the constitutional relevance of the interpretative relevance of the ECHR in domestic legal systems can be identified.

The possible collision between individual rights and national public interests raises constitutional questions: on the one hand, it «involves recasting the basic value-premises that define the image of the "public good" and of society as enshrined in a Constitution»[82] and that would necessarily have to comply with new standards under the Convention; on the other hand, the risk of any potential clash between levels of protection shapes and redesigns the model of interpretative authority that the ECtHR intends to gain, inducing this latter to give priority to certain hermeneutical instruments rather than others and, consequently, to reassess the organisation of the whole internal architecture of the regional system of human rights protection.

4. The 1969 VCLT framework

Since early in its mandate, the European Court has declared itself prepared to lean towards the reception and recognition of customary rules of treaty interpretation, hence individuating the starting point of its examination in the «constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties».[83] As a matter

[80] As defined by ULFSTEIN G., *The European Court of Human Rights as a Constitutional Court?,* in PluriCourts Research Paper No. 14-08, 2014, 7.

[81] REPETTO G., *Introduction. The ECHR and the European constitutional landscape: reassessing paradigms*, in REPETTO G. (ed. by), *The constitutional relevance of the ECHR in domestic and European law: an Italian perspective*, Cambridge 2013, 9.

[82] *Ibid.*

[83] See for example: ECtHR, Judgment of 07 January 2010, App No 25965/04, *Rantsev* v *Cyprus and Russia*, para 273; Judgment of 16 September 2014, App No 29750/09, *Hassan* v *the United Kingdom*, para 100; *Al-Dulimi*…, *cit.,* para 134, Judgment of 15 March 2018, Appl. No. 51357/07, *Naït-Liman* v *Switzerland*, para 174. Since the Vienna Convention of 23 May 1969 has not yet entered into force when the European Court was created and started its activity, due to the lack of retrospective effects of the VCLT (Article 4), the appliance of rules reflected

of fact, despite its «specific character as a human rights instrument»[84], the Convention remains first of all an international treaty, whose exegesis must be guided by all the relevant concepts and factors traditionally recognised to be essential in the field of treaty interpretation.

More recently, the Copenhagen Declaration adopted by the Committee of Minister's High-Level Conference on 13 April 2018 emphasised the need for the Court to carry out its role «in accordance with relevant norm and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties»[85], while the Council of Europe Steering Committee for Human Rights recalled the importance of interpreting the Convention taking into due consideration Member States' commitments under customary international law.[86]

Such standpoints of the Court of Strasbourg and, generally speaking, of the organs of the Council of Europe, clearly evidence the possibility to accommodate issues concerning the exegesis of the ECHR within the general framework set up by the Vienna Convention and, more specifically, to anchor the European Court's canons of interpretation to the traditional hermeneutic approaches reflected in the provisions codified therein.

There is a one catch: those canons and those principles have in fact been resorted to by the European Court for basing its approach to interpretation, even though its decisions «have been influenced very much by certain characteristics of the European Convention»,[87] and the international principles on treaty interpretation have been applied «with caution in view of the special features of the Convention».[88] In a nutshell, the general rules set forth by the VCLT have progressively yield for interpretative choices reflecting the peculiar policy that is intrinsic to the regional system of human rights protection in the light of the special nature of the ECHR as outlined in the previous pages.

As show below, reference to the general international rules under the Vienna Convention demonstrated to be insufficient in the European jurisprudence, leading the Court of

in Articles 31-33 was upheld on the basis of the argument they «enunciate in essence generally accepted principles of international law to which the [Strasbourg] Court has already referred on occasion» (*Golder*, *cit*., para 29).

[84] ECtHR, Judgment of 12 May 2014 (Just Satisfaction), App No 25781/94, *Cyprus* v *Turkey*, para 23.

[85] Council of Europe, Copenhagen Declaration, Copenhagen 2018, available at: https://rm.coe.int/copenhagen-declaration/16807b915c, paras 26, 27 and 29.

[86] Council of Europe, *The Longer-Term Future of the System of the European Convention on Human Rights*, Report of the Steering Committee for Human Rights (CDDH), Strasbourg: Council of Europe, 11 December 2015, para 187.

[87] MERRILLS J.G., *The development of international law by the European Court of Human Rights* Manchester 1990, 69, as cited by MAROCHINI M., *The interpretation of the European Convention Human Rights*, in 51 Zbornik radova Pravnog fakulteta u Splitu, 2014, 66.

[88] RAINEY B., WICKS E. et. o., *The European Convention on Human Rights*, Oxford 2014, 67.

Strasbourg to temper them with other factors in order to ensure a constructive and persuasive approach. In this concern, it stressed that the principles set forth in the VCLT of 1969 «must be applied with caution in view of the special features of the Convention»[89] and that «the special characteristics of the Convention may justify a different weight to be given to some of the interpretative principles of the Vienna Convention as compared to others».[90]

In a nutshell, this "special" features justify if not a deviation from the general rules of the VCLT, at least the development of interpretative tools striving for implementing such general principles within the peculiar regional context of the Council of Europe.

Hence, an overall overview – even if not fully comprehensive[91] – of the interpretative principles reflected in Articles 31-33 of the VCLT may highlight a certain degree of inappropriateness of the general rules on treaty operations *per se* to adequately capture the special nature of human rights instruments.[92]

Traditionally, three main approaches have played a significant role in the field of treaty interpretation. According to the historical (or subjective) method, interpretation should aim at ascertaining the real intention of the drafters, hence encouraging recourse to the preparatory material of the treaty (*travaux préparatoires*). The textual (or grammatical) approach upholds the primacy of the text and – more broadly – of the language, while the teleological (or functional)

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[89] *Ibid.*

[90] GERARDS J., *General Principles of the European Convention of Human Rights,* Cambridge 2019, 50.

[91] For a comment of the provisions of the Vienna Convention see in particular: MAFTEI J., COMAN V.L., *Interpretation of Treaties*, in 8 Acta Universitatis Danubius. Juridica, 2012, 23 ff.; POPA L. E., *op. cit*., 79 ff.; FITZMAURICE M., *op. cit.*, GERARDS J., *op. cit.*, 78 ff., MECHLEM K, *Treaty Bodies and the Interpretation of Human Rights*, in 42 Vanderbilt Journal of Transnational Law, 2009; GARDINER R., *op. cit*; AYAL R. S., *Interpretation of Treaties: Law and Practice*, 2003; BEDERMAN D.J., *Classical Canons: Rhetoric, Classicism and Treaty Interpretation*, Aldershot, Hampshire 2001; MCLACHLAN C., *The Principle of Systemic Interpretation and Article 31(3)(c) of the Vienna Convention*, in 54 ICLQ, 2005, 279 ff.

[92] In reference to the application of the general rules codified by the VCLT to human rights treaties, Scheinin maintains that they contain hidden assumptions that are not justified with respect to human rights; he also writes that they are «insufficient and inadequate for capturing the operation of human rights treaties, which are most than just treaties between states as they have "an embryonic form of global constitution"» (SCHEININ M., *Impact on the law of treaties*, In KAMMINGA M. T., SCHEININ M., *op. cit.*, 27). In this respect, McDougal points out that the vagueness and imprecision of the VCTLT formulation inevitably renderd the interpretation of the human rights treaty even more difficult (MCDOGAL M.S., *The International Law Commission's draft articles upon interpretation: Textuality redivivus*, in 61 American Journal of International Law, 1967, 998). Furthermore, Letsas writes that the appropriateness of the interpretative methodology applied necessarily « depends on the nature of the treaty in question and the moral value in play» (LETSAS G., *The ECHR as a living instrument: Its meaning and its legitimac*y, 2012, available at SSRN: https://ssrn.com/abstract=2021836 or http://dx.doi.org/10.2139/ssrn.2021836 2012, 18). Moreover, Vagts suggests that human rights treaties «attract[e] a style of interpretation that has drawn away from traditional treaty reading, [wherby]… These courts also feel that they have tacit permission from the parties to the agreement to develop a body of jurisprudence that sacrifices fidelity to a text . . . in order to develop internal consistency and to keep pace with the perceived necessities of changing times» (30. See VAGTS D.F., *Treaty Interpretation and the New American Ways of Law Reading*, 4 EUR. J. INT'L L., 1993, 499).

one seeks to place a decisive emphasis on the object and the purpose of the treaty, identifying them beyond the confines of the literal element. Also noteworthy is the systemic method of interpretation, which appreciates the meaning of terminology within the broader context in which it is placed.

While the approaches above have weighted differently and in varying degrees on the course of discussion of the Vienna Convention, eventually they all have been accepted as valid elements and patently incorporated in the final version in 1969.

4.1. The "general rule" under Art. 31 VCLT

Art. 31 of the Vienna Convention attempts to reconcile the three afore-mentioned methods into a single "General rule" as illustrated by its heading. As for the order chosen in enumerating these principles, albeit the first paragraph contains a certain inherent structure that may seem to accord primacy to textualism, the wording is not mandatory in this respect and the principles cannot be said to be bound by a strictly hierarchical relationship.[93]

Accordingly, by presenting Article 31 as the basic rule of interpretation, the various elements of interpretation incorporated therein (e.g. text, *travaux préparatoires*, object and purpose, context, etc.) as well as those embedded in the following disposition (Art. 32) must be considered to have equal value and none is of an inferior character.[94]

In this context, two particular consequences can be drawn: first of all, not every mean of interpretation will come into play in the process of exegesis, being the interpreter free to select only some of them, depending on which one yields a result as to the interpretation of the clause under scrutiny. Secondly, all hermeneutic means must necessarily be weighted not in a sequential order but rather in a «single combined operation» and if «thrown into the crucible, … their interaction would give the legally relevant interpretation»[95].

This is also evident in the fact that, at the core of the application of the General Rule there can be found the basic concept of good faith (*bona fides*); the principle is consecrated in the opening sentence of Article 31, which reads that «[a] treaty shall be interpreted in good faith»,

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[93] International Law Commission, *Draft articles on the law of treaties with commentaries*, in II *Yearbook of the International Law Commission*, 2006.

[94] AUST A., *Modern Treaty Law and Practice*, Cambridge 2013, 185, also cited by MECHLEM K, *Treaty Bodies*…, *op. cit.*, 2009, 911.

[95] *Report of the International Law Commission on the Work of Its Eighteenth Session*, in Year. ILC, 1966, Vol. II, 172 ff., 219-220. See also GARDINER R., *op. cit.*, 10; FITZMAURICE M., *op. cit.*, 11, 24.

and requires any hermeneutic activity to establish the exact meaning of the treaty clauses, with loyalty, honestly, fairness and reciprocal confidence so as to honour legitimate expectations held by the other parties.[96]

At the same time, Article 31 is formulated following a structure which «appears to be that of logic, proceeding from the intrinsic to the extrinsic, from the immediate to the remote».[97] Hence, the necessary starting point of any process of interpretation is detected in the textual model, in light of which «[a] treaty shall be interpreted … in accordance to ordinary meaning to be given to the terms of the treaty»,[98] that is to say according to the common, regular sense to be attributed to the covenant terms.

Literal meaning is nevertheless relative and frequently inconsistent if considered in isolation: account must be given to the context of the treaty terms as defined by the second paragraph, the formulation of which implies the necessary combination of both textual and systemic approaches as remarked above.

Hence, the second paragraph lists additional means serving together with those enumerated in the previous paragraph to establish the meaning of a particular treaty term.[99] In particular, the context is constituted by those materials related to the conclusion of the text – namely the Preamble and annexes of a treaty – but also by any agreement stipulated between the parties and by any instrument which was made by one or more of them in connection to the conclusion of a treaty.

Finally, relativity of the treaty terminology is reflected in the fourth and last paragraph of Article 31, which provides that «[a] special meaning shall be given to a term if it is established that the parties so intended». Despite the "special meaning" does not coincide with the

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[96] The legal concept of "good faith" represents «one of the basic principles governing the creation and performance of legal obligations» (International Court of Justice, Judgment of 20 December 1974, *Nuclear Tests (Australia v. France)*, para 46). Its enucleation in the opening sentence of Article 31 is in line with the Preamble, where it is noted that «… the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized»; it is also referred to in Article 26 of the VCLT ("Pacta sunt servanda"), pursuant to which «[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith». Adherence to the principle of "good faith" must prevail throughout the whole process of interpretation so as to avert an excessively literal interpretation of the treaty wording: it in fact requires to take into due evaluation the context as well as other means of interpretation – i.e. object and purpose, the subsequent practice, supplementary means (VILLIGER M. E., *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, 426).

[97] *Ibid.*, 436.

[98] Art 31, para 1 VCLT.

[99] According to the second paragraph of Article 31 of the VCLT, «[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty».

apparent ordinary sense in so much as it can be found, for example, in technical or specialised contexts, the former must be established in the same manner and following the same methodology provided for the latter.[100]

Next, the ordinary meaning assigned to the treaty terms shall be determined «in the light of [the treaty's] object and purpose»[101], namely its nature and the aims it pursues. The object and purpose test combined with the principle of good faith serves to ensure the doctrine of effectiveness enucleated in the Latinism "*maximum ut res magis valeat quam pereat*" which literally means that "the construction of a rule should give effect to that rule rather than destroying" it, *i.e.* «[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, [it is demanded to adopt] the former interpretation …» which ensures the provision to have a definite force and effect (*effect utile*).[102]

Purposive interpretation then reflects a teleological approach aimed at avoiding a merely literal meaning; more broadly, it seeks to discard and reject the sense resulted from the interpretative exercise whenever «incompatible with the spirit, *purpose* and context of the clause or instrument in which the words are contained».[103]

A certain level of criticality must nevertheless be bore in mind: the case where a treaty aspires to different objectives is not hypothetical and consideration must be granted to such various aims of the treaty at hand. Such operation is not always simplistic and straightforward, especially on the grounds that the VCLT is silent on the subject matter of definition of the concept in question and its determination in practice.

Besides, an insurmountable limit met by the interpretation in the light of the object and purpose is to be detected in the ordinary meaning of the text itself, since that an extreme functional interpretation would fall within the field proper of the legislative activity.[104]

The third paragraph of Article 31 expands further the scope of the elements to be taken into account in the hermeneutic process, by giving relevance to such means originated after the conclusion of the treaty as «any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions»[105], as well as «any subsequent

[100] VILLIGER M. E., *op. cit.*, 434.

[101] Art. 31, para 1 VCLT.

[102] FITZMAURICE M., *op. cit.*, 7.

[103] International Court of Justice, Judgment of 21 December 1962, *South West Africa (Liberia v. South Africa)* - Preliminary objections, 336.

[104] *ILC Report* 1966, *YBILC* 1966 II 219, paras. 6, 11.

[105] Article 31(3)(a) of the VCLT.

practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation».[106]

As discussed below, especially in the field of human rights protection, reference to such provision has often contributed to the development of a rather dynamic type of interpretation aimed at giving the text of the treaty a meaning that is not necessarily the one envisaged by the original framers, but one that suits and accords with the normative environment of the "present day" and in the light of changing social-cultural and legal circumstances.

Moreover, by laying on the premise that treaty shall be interpreted within a broader context, Article 31(3)(c) also requires to take into consideration «any relevant rules of international law applicable in the relations between the parties», as such meaning both customary international norms and international covenants. In affirming so, the provision represents an attempt - typical of a systemic/integrative approach to interpretation – to construct and promote a fully cohesive system in which normative conflicts may found harmonisation and reconciliation.

It is nevertheless true that such rule is rather vague, offering little if no assistance in determining its correct temporal and subjective content. This explains why, for instance, the list of the elements pertinent to the systemic interpretation of the treaty cannot be considered restricted and exhaustive; moreover, it does not specify how to solve potential conflicts flowing from the use of different means of interpretation.

4.2. The recourse to "supplementary means of interpretation"

As for Article 32, it contemplates the interpreter's faculty to have recourse to "supplementary means of interpretation" including the preparatory work for the treaty and the circumstances of its conclusion.

On the one hand, the former - the *travaux préparatoires* - are undoubtedly the most important ones, consisting in all those documents generated by the parties during the process of drafting the forthcoming pact (e.g. memoranda, government statements and observations, diplomatic exchanges between the parties, negotiation acts, minutes of drafting commissions, etc.); on the another, the "circumstances of the conclusion of the treaty" refer to the political, social and cultural environment in which the text was concluded. Having said that, it should also be bore in mind that the list in Article 32 is not exhaustive; in particular, the use of the term

[106] Article 31(3)(b) of the VCLT.

"including" suggests that those enumerated are merely examples of supplementary tools of interpretation that do not exclude recourse to other and further instruments, though.[107]

Moreover, their use is not meant to be obligatory, but rather discretionary, their relevance and applicability being subject to a number of factors, *i.e.* for instance their accessibility and publicity, the consistency among the means found, the number of parties involved in the evolution of the particular means, and the reactions of other parties thereto.[108]

Turning to the extent to which these interpretive tools may legitimately be used, it can be held that their application can aid the hermeneutic procedure under different circumstances; more precisely, the interpreter may invoke one or more of them in order to confirm the meaning resulting from the application of article 31, even though their use could never prevail over the solutions suggested by the use of primary interpretative means. Alternatively, Article 32 permits to employ the supplementary means in the situation where the exegesis of the treaty disposition according to Article 31 either «leaves the meaning ambiguous or obscure» or «leads to a result which is manifestly absurd or unreasonable».[109]

As already mentioned, the relevance of the instruments under Article 32 varies according to the different approach to interpretation; in particular, it is the subjective-historical method which calls the greatest attention to them in order to reconstruct and evaluate the "real" intention of the drafters;[110] despite no reference to this latter has been included during the course of the elaboration of the Vienna Convention, it still remains an important factor relating to the exegesis of a treaty dispositions and the drafting history is to be considered as an «integral part component of interpretation»; «a careful and textually grounded resort to» such material represents a further evidence of the common understanding regarding the meaning of the treaty wording», albeit "only" in addition to other tools and in a supplementary way.[111]

4.3. The interpretation of pluri-lingual treaties

[107] Among other supplementary means included but not listed in Article 32, it may mention: *travaux préparatoires* of an earlier version of the treaty; interpretative declarations made by treaty parties; documents not strictly qualifying as *travaux préparatoires*; agreements and practice among a subgroup of parties to a treaty not falling within the ambit of authentic interpretation in Article 31, para. 2 and sub-paras 3(a) and(b) (q.v., N. 15–23); non-authentic translations of the authenticated text (VILLIGER M. E., *op. cit.*, 445 ff.).

[108] *Ibid.*

[109] *Ibid.*

[110] VILLIGER M. E., *op. cit.*, 421.

[111] POPA L.E., *op. cit.*, 131 ff.

Finally, Article 33 concerns the interpretation of "pluri-lingual" treaties introducing the rule of the equal authority of the text in all the authenticated versions: this means that the interpreter must proceeds from the consideration of all the authenticated texts as conveying on the same meaning, and as amounting to a united, single treaty; conversely, a version in a language other than one of those in which the text was authenticated is not to be considered authoritative. Such rules are nevertheless refutable, namely where «the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail».[112]

Moreover, it cannot be excluded that multi-language treaty may contain some divergences among the various linguistic versions; discrepancies and clashes could rise, for instance, due the involvement of terms implying different legal concepts according to different legal systems, or even on the account of the different political sensitiveness of the parties which may prefer one term compared to others.[113]

In such cases, by adopting specifically a teleological approach paragraphs 3 and 4 of Article 33 dictate the rules for bringing any difference in meaning into harmony, or making them compatible. In particular, after reiterating the principle of equality of all authenticated versions as set forth in the opening paragraph,[114] the disposition introduces a three-step-way of "reconciliation": firstly, the interpreter is called upon to investigate the possibility to remove differences through the application of Article 31 and 33; if this method does not help, he should establish whether the treaty provides, or the parties agree that in case of divergence, a particular text prevails. Lastly, in the in the event that this operation has also proved inadequate, «the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted»[115].

As mentioned, this solution is based on a typically teleological model and serves to ensure fully the treaty's effectiveness: as discussed further below, this requires the interpreter to take into consideration only such meaning as that which pursues the treaty purpose in the best way.

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[112] Art. 33 of the VCLT.

[113] VILLIGER M. E., *op. cit.*, 423

[114] Art 33(3) of the VCLT reads «[t]he terms of the treaty are presumed to have the same meaning in each authentic text».

[115] Art 33(4) of the VCLT. See: LINDERFALK U., *On the interpretation of treaties: The modern international law as expressed in the 1969 Vienna Convention on the law of treaties*, Dordrecht 2007, 356 ff.

5. The Strasbourg judge stirs the «primordial soup of principles of interpretation»[116]

While general rules set by the VCLT have been accepted by the ECtHR as customary international law regulating several aspects of treaty interpretation,[117] they have been applied more as the essential foundations on which to build up a peculiar expansive hermeneutic approach. As a matter of fact, the interpretative *ethos* elaborated by the Court strictly relies on the "special" features of the Convention identified above, being thus anchored in deliberate choices to give greater weight and specific emphasis to those methods of interpretation mentioned in the Vienna Convention that can best suit its nature as a human rights treaty with a "materially constitutional substance".

The analysis of some of the most relevant cases thus intends to show how the Court of Strasbourg has been willing to re-arrange the «primordial soup of principles of interpretation» stemming from the VCLT, and to re-structured them in line with the Convention's peculiarities. The following pages then furnishes some examples of the different approaches the Court has orientated to, by eventually showing how their use has been – to some extent – «a matter of choice and appreciation»[118] in the light of its operation of "persuasion" faced with its interlocutors.

5.1. The Court's general theory of interpretation: Golder *and* Ranstev

The ECtHR took a stance on what should be the general theory of interpretation of the Convention quite early, in the rather long-standing ruling in the *Golder* case,[119] where for the first time it laid the foundations for the hermeneutic methods it intended to adopt. The case had its origin in the application against the United Kingdom lodged with the European Commission of Human Rights by a British citizen, Sidney Elmer Golder, complaining that the hindrance to his faculty to consult a solicitor during his permanence in prison violated,

[116] GREER S., *op. cit.*, 7.

[117] Some controversies still exist among scholars on this particular point: for instance, Letsas considers that the VCLT has not played a very significant role in the interpretation of the ECHR (LETSAS G., *Strasbourg's Interpretive Ethic*…, *op. cit.* 509). Similarly, Sinclair contends ECtHR reserves a rather scarce service to the VCLT rule of contextual interpretation (SINCLAIR I., *The Vienna Convention on the Law of Treaties, Manchester* 1984, 131).

[118] POPA L.E., *op. cit.*, 228.

[119] *Golder*…, *cit.*

inter alia, his right guaranteed under Article 6, para 1 of the Convention ("Right to a fair trial").[120]

As to the facts, the applicant was serving a 15-year-sentence in the notorious Parkhurst Prison on the Isle of Wight due to a conviction of robbery with violence. After a turbulent disturbance from a group of prisoners, Golder attempted to contact a solicitor with a view to bringing a civil action for liber against the prison officer who named him as one of the participants to the rebellion; nevertheless, his petition was refused by the Secretary of State for the Home Department in the exercise of his powers conferred to this latter by the Prison Rules 1964.

Because consultation to a solicitor represented not only a preliminary step in itself but also an essential condition for the purpose to take civil action on account of Golder's imprisonment, by forbidding the applicant to make such contact the launching of the contemplated action was impeded *de facto*, even without formally denying the right to institute proceedings before a court. Since Article 6 does not state any right of access to the courts or tribunal in express terms, the Court was hence called upon to ascertain a difficult alternative: whether such disposition was limited to guaranteed in substance the right to a fair trial in legal proceedings already pending or, in addition it secured a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined.

To this purpose, the Court first postulated that «[i]n the way in which it is presented in the "general rule" in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation» where «the various elements enumerated in the four paragraphs of the Article» are placed «on the same footing»[121]; on this premise, the judges of Strasbourg referred to the principle of good faith (Article 31 para. 1 of the Vienna Convention) so as to attach a determinative significance to the "object and purpose" of the Convention, as construed by the Preamble to the Convention pursuant to Article 31(2) VCLT.

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[120] Under Article 6, para 1 of the ECHR «[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice».

[121] *Golder...*, *cit.*, para 30.

More precisely, the application of such a interpretative criterion was crucial to exclude that the reference to the "rule of law" made by the Preamble was one of a mere rhetorical importance, mainly on the ground that it was exactly the profound belief in such a principle shared by the like-minded Governments of European Countries which encouraged the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.[122]

Moreover, the Court referred to Article 31, para 3(c) of the Vienna Convention so as to read Article 6 of the Convention in light of those relevant rules of international law recognising the fundamental principle whereby a civil claim must be capable of being submitted to a judge, as well as forbidding the denial of justice.[123]

Following to the preceding considerations, the European judges concluded that the right of access indeed constituted an element which is "inherent"[124] in the rights stated by Article 6, para 1, and which grants the applicant the un-enumerated right to institute proceedings before courts in civil matters the original drafters had omitted.[125]

At the same time, in order to avert any backlash, they made it clear that theirs was not «an extensive interpretation forcing new obligations on the Contracting States»,[126] but rather a reading of the terms of the Convention demanding to achieve its object and purpose; that is, by using a well-known expression, a reading that would render the expressly-guaranteed fundamental rights practical and effective and not merely theoretical or illusory.

More recently, the Court summarised its hermeneutic methodology in the case *Rantsev v. Cyprus and Russia*[127] dealing with the application lodged by a Russian national, Mr Nikolay

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[122] *Ibid.*, para 34.

[123] *Ibid.*, para 35.

[124] In his dissenting opinion, Sir Gerald Fitzmaurice mounted an originalist attack on the typically intentionalist method of interpretation on the footing of which the majority judgment has proceeded; this latter was criticised not only because «contrary to sound principle» but also because it «[gave] insufficient weight to certain features of the case that are very difficult to reconcile with the conclusion» reached (para 24). More precisely, on the premise that the effect of Article 1 of the Convention is to exclude from that obligation anything not so defined, the Judge argued that a right or freedom that is not even mentioned, indicated or specified, but merely implied could not be said to be "defined" in the Convention (para 26). Accordingly, he concluded that «the parties cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves - indeed is not defined at all because (in so far as it exists) it rests on an implication that is never particularized or spelt out» (para 30).

[125] From a methodologic point of view, the Court noted that it reached the conclusion that Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal without needing to resort to "supplementary means of interpretation" (para 36); what the Court did was to recognise the existence of such instruments, albeit excluding their concrete relevance in the specific case, in line with their "supplementary" nature.

[126] *Golder*…, *cit.*, para 36.

[127] *Rantsev*…, *cit.*

Mikhaylovich Rantsev, who complained, *inter alia*, about the failure of the Russian and the Cypriot authorities to investigate into the circumstances of his daughter's trafficking and subsequent death, as well as to punish those responsible for her ill-treatment.

The part of the reasoning which is of most interest here is where the Court states that under the Vienna Convention of 23 May 1969 on the Law of Treaties, «the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn […]. The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions. Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which its forms part. Finally, the Court emphasises that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that is provisions be interpreted and applied so as to male its safeguards practical and effective»[128].

The passage is rather significant, as it points out distinctively all the hermeneutic approaches delineated by the rule of Article 31 of the Vienna Convention; at the same time, it combines them with the special characteristics of the ECHR as a human right treaty so as to trace the specific methodology intended to be followed.

This will be further discussed and analysed in the following sub-paragraphs.

5.2. The rejection of textualism

A primary aspect related to human rights treaty interpretation which has clear significance for the elaboration of the Court's methodology is the undisputed challenge to elaborate well-shared "ordinary meaning" pursuant to Article 31 VCLT from the vague concepts and the general terminology in which the Convention is formulated: as repeatedly stated already, its

[128] *Ibid.*, para 274.

provisions are characterised by a certain degree of vagueness and openness, resembling more those of a national constitutional charter than those of an international treaty.[129]

On the one hand, the basic rule under Article 31 VCLT imposes logic priority on the textual model, according to which the common meaning to be attributed to words is the necessary starting point of the interpretative process. Consequently, the European Court declared itself bound by the «clear wording»[130] of the text. On the other, it appears from the above than an exclusively textual method is not sufficient *per se* to provide a thorough and persuasive interpretation of the Convention, requiring to make use of the other hermeneutic approaches to corroborate the judges' findings: since the Vienna Convention demands to ascertain the literal meaning of the text in the light of such elements as the "context", the "object and purposes" or "complementary means" in order to confirm or rebut the primary result obtained, the ECtHR has focused principally on these factors so as to identify the ordinary meaning of the conventional words and not only on the original meaning of the text its framers has originally intended.[131]

As a matter of fact, since the *Golder* judgment, the insistence on the substance of conventional right has been crucial for inaugurating and establishing a fully legitimised jurisprudence endorsing a dynamic-characterised interpretative approach overcoming the reference to "ordinary meaning" of the conventional dispositions.[132]

Therefore, textualism has been sidestepped by the Court's tendency to attach a prominent importance to an interpretation aimed at rendering conventional rights practical and effective and giving account to social-cultural and legal changes occurred within Member States;[133]

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[129] Moreover, the formulation in two linguistic versions (English and French) «which are equally authentic [under Article 33 VCLT] but not exactly the same» lead to the necessity to interpret them «in a way that [would] reconcile them as far as possible» (see: ECtHR, Judgment of 27 June 1986, App No 2122/64, *Wemhoff* v *Germany*, para 8; see also ECtHR, Judgment of 26 April 1979, App No 6538/74, *Sunday Times* v *the United Kingdom*, para. 48; Judgment of 29 November 1988, App No 11209/84; 11234/84; 11266/84; 11386/85, *Brogan and Others* v *the United Kingdom*, para 59.

[130] ECtHR, Judgment of 12 April 2005, App No 36378/02, *Shamayev and Others.* v *Georgia and Russia*, para 333.

[131] See GONZALO C., *Interpretation of Regional Human Rights Convention and Originalism: Different Context, Same Myths,* in 3 Saggi – DPCE online, 2017.

[132] See for example ECtHR, Judgment of 27 July 1987, App No 8562/79, *Feldbrugge* v *the Netherlands*; ECtHR, Judgment of 29 May 1986, App No 9384/8, *Deumeland* v *Germany*. Two noteworthy exceptions to such "expansive" tendency are represented by the Court's judgments in *Johnston and Others v. Ireland* (ECtHR, Judgment of 18 December 1986, App No 9697/82, *Johnston and Others* v *Ireland*) and *Banković and Others v. Belgium and Others* (*Banković…, cit.)* cases, where reference to the VCLT and to preparatory works served to restrict the relevant rights' interpretation.

[133] ECtHR, Judgment of 23 July 1968, App Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* v *Belgium;* Judgment of 4 February 2005, App No 46827/99, *Mamatkulov and Askarov* v *Turkey,* para 121.

throughout its hermeneutic activity, the Court has shown to repudiate the idea that the Convention rights must be interpreted in the light of their original meaning back in the Fifties, hence opening a door to the consideration that the meaning of the covenant clauses are not immutable and may be subject to the evolution of law.[134]

Borrowing the Court's words, unarguably the interpretative process must «start from ascertaining the ordinary meaning of the terms of a treaty», *but* «in their context and in the light of its object and purpose, as laid down in paragraph 1 of Article 31[of the VCLT]»[135]; this is the only possible solution on the account that a «purely grammatical interpretation… would not conform to the intention of the High Contracting Parties»[136].

Besides, the ECtHR's anti-textualist orientation has crucially contributed to adhere to an autonomous interpretation of the treaty provisions, according to which the wording of the Convention is not to be interpreted solely in the light of the meaning and the scope of the corresponding terminology in the legal systems of the Contracting States, but reference has to be made to the specific objectives and scheme of the Convention.

Such interpretative choice aims at abstracting a single legal notion from the relevant domestic system so as to guarantee a spectrum of uniform standards of interpretation of the covenant guarantees inspired by the "common heritage of traditions and ideals" of Member States and capable of responding peculiarities and requirements of the regional system of protection of individuals' fundamental freedoms: this is the so-called "doctrine of autonomous concepts". [137]

5.3. The supplementary role reserved to the historical approach

The Strasbourg general inclination to refuse a strictly originalist reading of the conventional human rights and fundamental freedoms is in line with the nature of the ECHR as a "law-making treaty" in the meaning illustrated above: the substance of its dispositions is in fact

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134 LETSAS G., *A theory of interpretation of the European Convention on Human Rights*, Oxford 2007, 59. See also LETSAS G., *Intentionalism and interpretation of human rights*, in FITZMAURICE M., ELIAS O. A., MERKOURIS P. (ed. by), *Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on*, Leiden 2010, 267.

135 ECtHR, Judgment of 4 April 2000, App No 26629/95, *Witold Litwa* v *Poland*, para 59.

136 *Wemhoff…, cit.,* paras 4-5.

137 KILLANDER M., *op. cit*., 48; LONATI S., *op. cit*., 265 ff.; HAECK Y., *op. cit*., 7 ff.; among various rulings of the ECHR dealing with issue of "autonomous interpretation" see for instance ECtHR, Judgment of 8 June 1976, App Nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel and Others* v *the Netherland*; Judgment of 8 December 1999, App No 28541/95, *Pellegrin* v *France*.

statutory more than contractual,[138] to the extent that they formulate integral objective obligations towards all the parties rather than towards particular ones.[139]

In the words of the Court, «[g]iven that [the Convention] . . . is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties»[140]. Put it differently, the ECHR is to be interpreted by taking into account its object and purpose, rather than with reference to the preparatory work preceding it, on the grounds that «[law-making] conventions are distinct from that work and have acquired a life of their own; … These conventions must be interpreted without regard to the past, and only with regard to the future»[141].

In short, the so called "historical approach" has been reserved a merely supplementary role. As a matter of fact, the Court has tended to resort to the preparatory works of the ECHR ("*Travaux Préparatoires*") very rarely, mainly to sustain the interpretation resulted by means of other methods or interpretation, or to determine the meaning when the hermeneutic activity carried out still left the meaning ambiguous or obscure.[142]

A first example is the he *Lawless* case;[143] in such occasion, the Commission referred the case of G.R. Lawless – an Irish citizen who was a member of the Irish Republican Army ("IRA") – to the Court so as to decide whether or not the circumstance of the applicant's detention without trial in a military detention camp situated in the territory of the Republic of Ireland

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[138] BRÖLMANN C., *Law-Making Treaties: Form and Function in International Law*, in 74 Nordic Journal of International Law, 2005, 384.

[139] Second Report on the Law of Treaties by Sir Gerald Fitzmaurice, UN Doc. A/CN.4/107, YILC 1957, Vol. II, p. 54.

[140] *Wemhoff*…, *cit.,* para. 8. See also ECtHR, Judgment of 8 November 2016, App No 18030/11, *Magyar Helsinki Bizottság* v *Hungary*, para. 138.

[141] Dissenting Opinion Judge Alvarez, 53 attached to the International Court of Justice, Advisory Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

[142] Repetto maintains that the idea according to which the link between the literal criterion and the reference to preparatory may operate as a brake on the Court's activism counters against certain fundamental ideas of the conventional system. The author finds a first evidence upholding his argument in the very preparatory work of the Convention, from the study of which it appears that the positions aimed at limiting the future expansion of the jurisdiction of the European Court and the identification of unwritten rights were by no means shared by the majority of the original framers; secondly, in the author's opinion, the elastic and unresolved nature of the conventional text mirrors the existence of a clear disagreement amongst the Signatory States on its basic objectives, which resulted in the freezing of certain lines of conflict that emerged during the preparatory work and whose resolution was postponed to the future activity of the Court (REPETTO G. B., *Premesse ad uno studio sull'interpretazione evolutiva tra Costituzione e Convenzione Europea dei Diritti dell'Uomo*, in CASSETTI L. (ed. by), *Diritti, principi e garanzie sotto la lente dei giudici di Strasburgo*, Napoli 2012., 33-34).

[143] ECtHR, Judgment of 1 June 1961, App No 332/57, *Lawless* v *Ireland (No. 3)*.

could amount to the Irish Government's failure to fulfil its obligations under Articles 5-7 of the Convention.

In its judgment, after recalling the well-established rule concerning the interpretation of international treaties, according to which «it is not possible to resort to preparatory work when the meaning of the clauses to be construed is clear and unequivocal»[144], the Court utilised the subjective approach «as a confirmatory test»[145], that is to say to seek confirmation of the hermeneutic result adopted; consequently, it held that «even reference to the preparatory work [could] reveal no ground for questioning the Commission's interpretation of Article 5»[146] and that such provision « [left] no room for doubt about the intention of the authors of the Convention…»[147]; not only, in the same ruling, the Court relied on the preparatory work as a mean to confirm the interpretation resulted under customary rule codified in Article 22 of the VCLT and, more specifically, to find that both the authentic versions of the Convention were in line with each other.[148]

Moreover, in the case *James and Others v. the United Kingdom,* faced with the disagreement on the interpretation of Article 1 of Protoco1 to the Convention,[149] the Court «considered it proper to have recourse to the *travaux préparatoires* as a supplementary means of interpretation (Article 32 of the Vienna Convention 1969)»[150].

In another case concerning the alleged violation of the applicants' rights to found a family, enjoy their privacy, practice their religion, and be free from discrimination on the account of the national constitutional ban of divorce,[151] the Court made reference to the preparatory works of the Convention so as to disclose the fact that «the foregoing interpretation of Article 12 … [was] consistent with its object and purpose»[152], and to deduce from them the impossibility to read the right to divorce into the provision above.

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144 *Ibid*., para 11.

145 POPA L.E., *op. cit*., 231.

146 *Lawless...*, *cit*., para 11.

147 *Ibid*., para 12.

148 *Ibid*, para 11.

149 Article 1 of Protocol 1 to the Convention protects the right of property. It states that «[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties».

150 ECtHR, Judgment of 21 February 1986, Appl. No. 8793/79, *James and Others* v *the United Kingdom*, para 64.

151 *Johnston…*, *cit.*

152 *Ibid*., para 52.

In the *Banković and Others v. Belgium and Others*[153] decision of admissibility, the Grand Chamber expressly made use of few extracts from the *travaux préparatoires* as a clear indication of the intended meaning of Article 1, by the way excluding its intention to interpret such disposition «"solely" in accordance with the *travaux préparatoires* or finding those *travaux* "decisive"; rather [the] preparatory material [constituted] clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969)»[154].

Similarly, in the case of *Witold Litwa v. Poland*, the judges of Strasbourg relied on the basis of the commentary on the preliminary draft of the relevant Article under discussion (Article 5) in order to conclude that the *ratio legis* permitting applicant's detention fell within the confines of the Convention.[155]

On some other occasions, reference to the preparatory material has been made by the dissenting judges embracing a more restrictive interpretation. A clear example is the case *Sigurdur A. Sigurjónsson v. Iceland*, originated from the application of Icelandic citizen who was a taxi driver resident in Reykjavik, complaining that the refusal by the relevant authorities to grant him a licence violated his right not to join an association in breach of Articles 11, 9, 10 and 13 of the Convention; in his dissenting opinion, Judge Thór Vilhjálmsson «voted with a minority that did not find a violation of [the relevant Article] of the Convention» on the grounds that «the *travaux préparatoires* [shown] that those responsible for drafting the Convention [had not been] prepared to include the negative freedom of association in it»[156], despite the majority of the judges of Strasbourg included it by means of interpretation.

On the whole, with a few exceptions, it can be affirmed that ever since the *Golder* case the Court has set on the view that legal interpretation is neither an empirical search about the intentions of the drafters, nor an inquiry «into the linguistic meaning of words»; instead, that of the Court has been akin an evaluative exercise of «the substance of the human right at issue and the moral value it serves in a democratic society»[157]. In this way, drafters' primary intention to protect the fundamental rights individuals has been combined with the Court's

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[153] *Banković…, cit.*

[154] *Ibid.*, para 65; See also ECHR, Judgment of 7 December 1976, App Nos 095/71; 5920/72; 5926/72, *Kjeldsen, Busk Madsen and Pederson* v *Denmark*, para 50; Judgment of 23 June 1981, App No 6878/75; 7238/75, *Le Compte, Van Leuven and De Meyere* v *Belgium*, para 65.

[155] *Witold Litwa…*, *cit.*

[156] Dissenting opinion of Judge Sorensen, joined by Judge Thór Vilhjálmsson in ECHR, Judgment of 30 June 1993, App No 16130/90, *Sigurdur A. Sigurjónsson* v *Iceland.*

[157] LETSAS G., *Strasbourg's Interpretive ethos, op. cit.*, 520.

consistent consideration of the changing social, cultural and judicial circumstances of the specific case under scrutiny.[158]

5.4. The prioritisation of the teleological interpretation

By virtue of clear prioritisation of the "context" and the "object and purpose" of the Convention as critical factors to be considered in its interpretative activity, the Court has embraced a purposive approach to interpretation; the latter conceptualises the Convention as an instrument specifically created to be read in a way that maximises human rights protection and that must ensure the effectiveness of its terms. In other words, the teleological method demands to read the Convention as a whole, so that its clauses are not narrowly construed.[159]

In particular, it is the reference to the special characteristics of the Convention anticipated in the previous pages which requires a particular emphasis on the interpretation of the text in the light of the object and the purpose, as well as taking into account its context.

For instance, in the case *Wemhoff,* the Court recognised that the "law-making" nature of the Convention warrants and interpretation «that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties»[160].

Moreover, in the *Soering*[161] judgment, the judges of Strasbourg shown to have great regard to the Convention's special character «as a treaty for the collective enforcement of human rights and fundamental freedoms», so as to conclude that «…the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective» as well as in a way which is «consistent with the general spirit[162] of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society»[163].

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158 JACOBS F.G., WHITE R.C.A., *The European Convention on Human Rights*, 2012,74

159 GONZALO C., *op. cit*., 598.

160 *Wemhoff*..., *cit*., para 8.

161 ECHR, Judgment of 7 July 1989, Appl no.14038/88, *Soering* v *the United Kingdom*.

162 In this regard, Gerards enumerates a variety of general principles and values, namely "human rights dignity", "autonomy", "democracy and pluralism", that the Court has progressively «distinguished as part of the "general spirit of the Convention» and that «together, make up the ideals and values of a democratic society» (GERARDS J., *op. cit*, 61).

163 *Soering*…, *cit*., para 87; see also ECtHR, *Kjeldsen, Busk Madsen*…, *cit.,* para 53.

On this issue, a paramount component of the context of the treaty comprised under Art. 31(2)) has been found in the Preamble to the Convention: based on the words of the Court, this latter «forms an integral part of the context» and represents a «very useful» instrument.[164] As a matter of fact, the statements of the Preamble according to which «the aim of the Council of Europe is the achievement of greater unity between its members» and that one of the methods by which that aim is to be pursued is the «maintenance and further realization of human rights and fundamental freedoms» serve as a fundamental source to construe the definition of "object and purpose", filling it with concrete sense.

Then, as already stated on several occasions, the final objective to provide an effective protection of fundamental rights (*effect utile*) has inevitably informed the exegesis of the Convention, giving preference to such interpretation as the one which ensures not only the best guarantees for the applicant in each dispute under scrutiny but also a reasonable minimum level of protection of fundamental rights throughout Europe.

As to the applicability of the "object and purpose" in the ECtHR's jurisprudence, the concept has received different uses: for instance, the Court resorted to it in order to adjust the literal definition of a conventional term within the specific ECHR context; as already argued, the Convention is characterised by vague and open clauses, and while the "ordinary meaning" of a term cannot prove to be sufficient, the context must be granted a great importance.

This has been emphasised, for example, in the judgment *Soering v the United Kingdom*.[165] In order to evaluate whether or not developments and commonly accepted standards in the penal policy of the Member States had the effect of bringing the death penalty *per se* within the prohibition of ill-treatment under Article 3, the Court started by recognising that «[t]he Convention is to be read as a whole»[166], so that each disposition can be construed in harmony with the other provisions. On this basis, it was evident that Article 3 could have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would have nullified the wording of Article 2.[167]

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164 ECtHR, *Soering*, *cit*., para 34.

165 *Ibid.*

166 *Ibid*., para 103.

167 At the same time, the Court demonstrated to take into due consideration the «[p]resent-day attitudes in the Contracting States to capital punishment» so as to assess «whether the acceptable threshold of suffering or degradation has been exceeded». More specifically, the Court held that «[s]ubsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3). However, Protocol No. 6

Not differently, in the *Johnston* case, the Court expressly stated its intention to «seek to ascertain the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose»[168]; more specifically, the Court agreed with the Commission that the literal sense of the right to marry protected under Article 12 was to be read in a context that «include[d] an express reference to "national laws"», in the light of which the disposition did cover the formation of marital relationships but not their dissolution.[169]

Rarely, adherence to the teleological orientation has served as limitation to the imposition of certain solutions upon Member States; for instance, in the 2010 case *Taxquet v. Belgium*, the Grand Chamber noted that the «State's choice of a particular criminal justice system is in principle *outside the scope* [emphasis added] of the supervision carried out by the Court at European level, provided that the system chosen [did] not contravene the principles set forth in the Convention» and that it was not the Court's role to standardise the plurality of such legal systems existing in Europe.[170]

More generally, the interpretation of the Convention in the light of its object and purpose has been reflected in the long-standing principle of effectiveness already mentioned, whereby the ECHR «is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective»[171]. Hence, the effectiveness rule requires that the Convention must

(P6), as a subsequent written agreement, show[n] that the intention of the Contracting Parties […] was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention […] Article 3 (art. 3) [could not] be interpreted as generally prohibiting the death penalty». Although, such elements as the manner in which a death sentence is impose is executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution amounted all to factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (para 103-104).

168 *Johnston*…, *cit*., para 51.

169 *Ibid.*

170 ECtHR, Judgment of 16 November 2010, App No 926/05, *Taxquet* v *Belgium*, para 83.

171 Judgment of 24 June 1993, App No 14556/89, *Papamichalopoulos and Others* v *Greece*, para 42. The Court has also connected the principle of effectiveness to the obligation in Article 1 of the Convention to «secure to everyone within their jurisdiction the rights and freedoms defined in the Convention and its Protocols»: see for example *Airey*…, *cit*., para. 24; ECtHR, Judgment of 28 October 1998, App No 23452/94, *Osman* v *the United Kingdom*, para. 116. The principle of effectiveness is also the driving force behind the doctrine of the so called "positive obligations"; these latter demand the authorities to take reasonable and appropriate measures to safeguard individual's rights and freedom. On the subject, refer to MOWBRAY A.R., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart 2004. Among the Court's judgments recognising the existence of positive obligations upon the respondent State see for example: ECtHR, Judgment of 13 May 1980, App No 6694/74, *Artico* v *Italy*; Judgment of 13 August 1981, App Nos 7601/76; 7806/77, *Young, James and Webster* v *the United Kingdom*. More recently: ECtHR, Judgment of 26 November 2002, App No 33218/96, *E. and Others* v *the United Kingdom*; Judgment of 20 March 2008, App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, *Budayeva and Others* v *Russia*; Judgment of 26 March 1985, App No 8978/80, *X and Y* v *Netherland,* para 23.

be interpreted so as to give its full meaning and to enable the system of human rights protection entrusted to the ECtHR so as to unleash all its potential.

In other terms, the crucial emphasis accorded to the object and purpose of the Convention, namely the safeguard of fundamental rights of individuals, compels a hermeneutic approach requiring an exegesis of human rights provision not only in a consistent manner but also giving application to the principle of effectiveness so as to ensure the active safeguard of the Contracting States' inhabitants.

At the same time, in pursuing the common objective of the guarantee of the conventional rights and freedoms, the ECtHR operates within and its action is influenced by a political context where the first and foremost responsibility for safeguarding human rights rests within national authorities, since they are in a "better position" to adopt the most suited course of action necessary to face internal exigencies.[172]

As a matter of fact, it must recall that one of the main fundamental principles on which the whole regional system of human rights protection is created is that of priority, pursuant to which the primary responsibility to secure to everyone the rights and the freedoms pertains to the domestic authorities' jurisdiction,[173] while the mission of the Court is to supervise whether or not these latter comply with their obligations under the Convention.[174] Being the domestic authorities the first-instance guardian of the protection of the covenant rights, it derives, on the one hand, the international machinery of collective enforcement established by the Convention is subsidiary by its very nature; on the other, the compliance and cooperation of Member States become essential to the full-functioning operate of the Strasbourg jurisdiction; this one cannot but take into due account the plurality of different national interests perpetuated by each national legal system and cannot «disregard those legal and factual features which characterise the life of the society in the State which […] has to answer for the measure in dispute»[175].

This explains why the Convention's interpreter must be sensitive to the European landscape diversity; more specifically, the European jurisprudence shows a certain tendency to balance the principles of effectiveness with national prerogatives of Member States, *i.e.* to acknowledge the fact that if «in cases of doubt it may not be improper to rely on the rule of effectiveness so as to promote the operation of general principles of law and of the rule of

[172] GREER S., *op. cit.*, 3.
[173] Article 1 ECHR.
[174] Article 19 ECHR.
[175] *Case "relating to certain aspects of the laws …, cit.*, para 10.

law in international society», it is also true that «as within the state, that quasi-legislative function ought not to be so deliberate or so drastic as to give justifiable ground for the reproach that the tribunal has substituted its own intention for that of the parties»[176].

The preservation of such delicate «fair balance»[177] between the Court's primary goal to protect the autonomy of individuals against the majoritarian interest of their State, on the one hand, and the safeguard of national prerogatives is at the origin of one of the most successful doctrine developed by the European jurisprudence, the study of which will be object of the next Chapter: the margin of appreciation.

5.5. The prominence attached to evolutive interpretation

It is common ground that evolutionary interpretation occupies a prominent place amongst the various hermeneutic approaches employed by the Strasbourg Court. In consonance with it, the ECHR is to be interpreted the Convention dynamically, that is in the light of developments in social and political attitudes.

As already mentioned, a crucial factor giving a particular weight to the evolutive method of interpretation is to be detected in the consequences the European Court deduced from the "object and purpose" pursued by the Convention, and more specifically from the effectiveness rule installed at the very centre of the whole system of human rights protection.

This last requirement is in fact employed to update the conventional guarantees with respect to the dynamic meaning arisen in each case under the Court's scrutiny so as for responding to the imperative of a constant adjustment of the level of protection of fundamental freedoms as well as for ensuring them efficiency and validity.

Precisely, the Court's departure from the covenant guarantees' sense attributed by the original framers reflects the nature of the Convention as an instrument for the protection of human rights which takes into attentive account those changes in contemporary normative realities of the Contracting States.

In this way, the Court shows to favour a flexible rather than a more formalistic approach which eventually «[permits] an extension of interpretative parameters, [and] encourages active

[176] LAUTERPACHT H., *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, in 26 British Year Book of International Law, 1949, 74.

[177] ECtHR, Judgment of 23 September 1982, App Nos 7151/75; 7152/75, *Sporrong and Lonnroth* v *Sweden*, para 73.

protection of human rights»[178]; on the opposite, inability to develop an evolutive interpretative approach could constitute an unjustified limitation of the freedoms above, this latter turning to mere theoretical enunciation with no prospective to progress.[179]

Such dynamic method of exegesis of the conventional rights and freedoms finds reflection in the so called doctrine of the "living instrument" which postulate the Convention must be interpreted in accordance with present-day conditions and which entails that account must be given to those «evolving norms of national and international law»[180] able to «[make] it possible to assess the variable and changing concepts already contained in the Convention in the light of current living conditions» without nevertheless permitting the introduction of entirely new notions or matters into the Convention falling in the scope of the «legislative function that belongs to the member States of the Council of Europe»[181].

Ever since the first occasion where the doctrine was theorised in the case *Tyrer v. the United Kingdom*[182] this principle has been found applicable in countless subsequent cases[183] hence turning to be one of the main features of the ECHR, whose analysis will be one of the objects of study of the next Chapter.

Suffice it to mention here that the Strasbourg Court appealed to the living nature of the Convention so as to read into it new rights implied from time to time in the wording of the provisions, but also some that the original authors had not imagined;[184] on other occasion, the formula of the "living instrument" has been resorted with the purpose to create or enhance new legal standards of protection by overturning the previous case-law.[185]

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178 PEGORIER C., *Ethnic cleansing: A legal qualification*, New York 2013, p. 29.

179 ECtHR, Judgment of 8 May 2002, App No 46295/99, *Stafford* v *the United Kingdom*, para 68; Judgment of 11 July 2002, App No 28957/95, *Christine Goodwin* v *the United Kingdom,* para. 74.

180 ECtHR, Judgment of 12 November 2008, App No 34503/97, *Demir and Baykara* v *Turkey*, para. 68; Judgment of 8 July 2004, App No 53924/00, *Vo* v *France*, para 82; *Mamatkulov*…, *cit*., para 121.

181 These expressions are used by the joint dissenting opinion of Judges Ryssdal, Bindschedlerrobert, Lagergren, Matscher, Sir Vincent Evans, Bertnhardt and Gersing, in *Feldbrugge*…, cit., para 24.

182 ECtHR, Judgment of 25 April 1978, App No 5856/72, *Tyrer* v *the United Kingdom*.

183 See for instance ECtHR, *Mamatkulov*, *cit*., para 121; ECtHR, Judgment of 22 October 1981, App No 7525/76, *Dudgeon* v *the United Kingdom*, para 60.

184 *Demir and Baykara*…, cit.; ECtHR, Judgment of 7 November 2013, App No 10441/06, *Pichkur* v *Ukraine*; *Young, James and Webster*…, cit.; *Sigurdur A. Sirgurjónsson* v *Iceland*…, *cit*.; Judgment of 18 February 1999, App No 24833/94, *Matthews* v *The United Kingdom*.

185 In his dissenting opinion, Judge Wojtyczek explicitly states that «[t]he Court has insisted many times that the Convention is "a living instrument". In my understanding, this phrase means that legal questions which arise under Convention always remain open and may be revisited» (Dissenting opinion of Judge Wojtyczek in ECttHR, Judgment of 12 April 2016, App No 64602/12, *R.B.* v *Hungary*, para 7).

Nevertheless, such a use of evolutionary interpretation calls for specific circumstances to justify it:[186] the most problematic issue for the Court was not that it favoured a more progressive reading of the Convention, but rather that it had to identify the criterion by which to legitimise such a reading, and to what extent.[187]

To this purpose, a first limit the ECtHR has offered was based on what deemed as those "common grounds" emerging either from the practice amongst Member States or in the form of international instruments; in a nutshell, on what is known under the famous label of "doctrine of emerging European consensus", whose use and development in the European case-law will be analysed in the next Chapter. In particular, by reference to Article 31(3)(c) the European Court has shown to rely on developments in domestic law of the Member States as a basis for stating the existence of «a clear measure of common ground in [the relevant] area amongst modern societies»[188]. More specifically, the concept of "emerging consensus" has met great fortune in the European case-law, especially due to the consideration it represents a great tool of legitimation of the Court's operate, this latter being able to rely on more objective standards rather than on merely subjective discretionary assessments when engaging in the dynamic interpretation of the Convention.

On few occasions, in interpreting the covenant text dynamically, the ECtHR took also in consideration the subsequent practice showing the agreement of the parties regarding its interpretation pursuant to Article 31(1)(b). For instance, in *Hassan v. the United Kingdom* case[189], the Court remarked that «[t]he starting point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969» and that « a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify

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[186] *Stafford* …, *cit.*

[187] In this respect, the position of the judges of the Court has not always been unequivocal; the separate opinion of Judge Sir Gerald Fitzmaurice in the *Tyrer* case is emblematic as it insists on the need for strict observance of textual limits. Generally speaking, Repetto advocates that the opinions expressed by a number Judges mirrors the resistance of a more "traditional" approach to treaty interpretation opposed to the doctrine of the Convention as a living instrument so as to limit as far as possible the expansion of conventional rights to the detriment of States' volition; the author argues that under such construction there can be read the ideal of Contracting States to provide adequate safeguards from being deprived of more autonomy in the matter of rights than can be deduced from a literal interpretation of the Convention. In their opinion, then, any doubts as to interpretation that cannot be resolved on the basis of the literal criterion, they must refer to the original intention of the Contracting States, in line with the principles of interpretation formalised in the articles of the Vienna Convention on the Law of Treaties (REPETTO G. B., *op. cit.*, 33).

[188] ECtHR, Judgment of 13 June 1979, App No 6833/74, *Marckx* v *Belgium*, para 41.

[189] *Hassan...*, *cit.*

the text of the Convention»;[190] similarly, in *Al-Saadon and Mufdhi v. the United Kingdom*, the subsequent established practice within the Member States was of a fundamental evidential character in order to give rise to an amendment of the Convention on the subject of death penalty.[191]

It is nevertheless true that, in order to interpret the Convention norms in accordance with present-day conditions, rather than asking whether there is an agreement among the States parties on an interpretation based on Article 31(3)(b), the ECtHR has based its activity more frequently either in accordance with interpretation based on the treaty's object and purpose, or seeking interpretive guidance under Article 31(3)(c) of the Vienna Convention 1969.[192] This last aspect is analysed in the following sub-paragraph.

5.6. The systemic interpretation: international law as a source of inspiration

Equipped with the knowledge that the evolutive character of the ECHR interpretation is based on a constant work to adjust, modify and reshape the scope and meaning of the Convention's rights, it is interesting to investigate on the specific aspect as that represented by the regard to relevant international law instruments the Court has been willing to give pursuant to Article 31(3)(c): as a matter of fact, in determining the "living" nature of the Convention, account has been taken of «evolving norms of national and international law»[193].

More precisely, already in the *Golder* case mentioned above, the ECtHR noted that the Convention is not to be interpreted in a legal vacuum, but according to other parts of international law of which it forms part; more precisely, the Strasbourg Court recalled the necessity to take account, together with context, of «any relevant rules of international law applicable in the relations between the parties».[194]

In its subsequent case-law, the Court didn't lost the chance to confirm its systemic methodology: so, for instance, in the 2008 case of *Demir and Baykara v. Turkey,* the judges of Strasbourg observed that «[it] has never considered the provisions of the Convention as the

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[190] *Ibid.*, paras 100-101.

[191] ECtHR, Judgment of 2 March 2010, App No 61498/08, *Al-Saadoon and Mufdhi* v *the United Kingdom*, paras 119-120.

[192] ULFSTEIN G., *Interpretation of the ECHR…, op. cit.*, 5.

[193] *Demir and Baykara...*, *cit.*, para 68

[194] *Ibid.*, Para 35. On this point, the Legal Committee of the Consultative Assembly of the Council of Europe urged the Commission and the Court to necessarily apply such principles in the execution of their duties. (Consultative Assembly, *working papers of the 1950 session*, Vol. III, no. 93, p. 982, para. 5).

sole framework of reference for the interpretation of the rights and freedoms enshrined therein» and that «in defining the meaning of terms and notions in the text of the Convention, [the Court] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the *practice of European States reflecting their common values* [emphasis added]»[195].

In the *Tanase* ruling,[196] the Court said that it «must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs»[197]. An express reference to Article 31(3)(c) was present in *National Union* judgment,[198] where the Court underlined its relevance particularly in relation to «the rules concerning the international protection of human rights»[199]; moreover, in *Hassan* case the ECtHR patently stressed how it should «endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice»[200].

This was conformed in the *Naït-Liman* case, where the Grand Chamber held that «account should be taken, as indicated in Article 31, para (3)(c), of any relevant rules of international law applicable in the relations between the parties», and especially those concerning the international protection of human rights.[201]

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[195] *Demir and Baykara*…, *cit.,* para 51. See also for example, ECtHR, Judgment of 13 December 2007, App No 39051/03, *Emonet and Others* v *Switzerland*, para 65.

[196] ECtHR, Judgment of 27 April 2010, App No 07/08, *Tanase* v *Moldova*.

[197] *Ibid*., para 176.

[198] ECtHR, Judgment of 8 April 2014, App No 31045/10, *National Union of Rail, Maritime and Transport Workers* v *the United Kingdom*.

[199] *Ibid*., para 75. See also ECtHR, Judgment of 6 July 2010, App No 41615/07, *Neuilinger and Shuruk* v *Switzerland*, para 131; Judgment of 26 November 2013, App No 27853/09, *X* v *Latvia*, para 92.

[200] *Hassan*..., *cit.,* para 102.

[201] *Naït-Liman*…*, cit.,* para 174. See also ECtHR, Judgment of 12 September 2012, App No 10593/08, *Nada* v *Switzerland*, para 169. By virtue of the systematic approach, in some cases the Court relied upon customary international norms to determine the scope of its jurisdiction and, more precisely, to affirm State responsibility. On this point, reference goes to the analysis of the ECtHR's jurisprudence delineated by Ulfstein. The author mentions, for instance: ECHR, *Al-Adsani*…, *cit*.; ECtHR, Decision of 11 June 2013, App No 65542/12, *Stichting Mothers of Srebrenica and Others* v *the Netherlands*; Decision of 02 May 2007, App Nos 71412/01; 78166/01, *Behrami and Saramati* v *France and Others*; *Hassan*… *cit*.; in this last case, in particular, the interpretation of the ECHR was restricted in line with the Court's attempt to realign it with the international humanitarian law regime, that is to say to balance systemic interpretation with the effectiveness rules. Eventually, the result did not converge the consensus of every Judge: in his separate opinion Judge Spano significantly wrote: «[t]he Court does not have any legitimate tools at its disposal, *as a court of law*, to remedy [the] clash of norms. It must therefore give priority to the Convention, as its role is limited under Article 19 to "[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". By attempting to reconcile the irreconcilable, the majority's finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the Convention, as reflected in its purpose and its historical origins in the atrocities of the international armed conflicts of the Second World War» (Partly dissenting opinion of Judge Spano joined by judges Nicolaou, Bianku and Kalaydjieva, para 19). Not only, Ulftein points out clashes between the ECHR and such international organisations as the EU and the UN Security Council: these are cases were the Strasbourg Court cannot ignore the presence of other international

Broadly speaking, there is a clear tendency of the Court to detect interpretative guidance in an open-ended list of sources, both binding and not,[202] especially from human rights materials. Hence, for instance, account has been given to normative positions, of the Council of Europe organs representative of all States Parties,[203] and reference has been made to various "standards" and guidelines drafted by other Council of Europe supervisory and expert bodies.[204] Another relevant source of inspiration has been European Law (the EU Charter of Fundamental Rights, EU Directives, etc),too.[205] Sporadically, the Court's reasoning has even been based on a reference to judgments of the international judicial bodies or treaties.[206]

A detailed analysis of the ECtHR case-law giving application to Article 31, para (3)(c), of the VCLT falls without the scope of this research. Yet, an important consideration can be drawn to the purposes of the current discourse. In line with the Court's evolutive tendency, a strict reading of Articles 19 and 32 of the Convention was never encouraged by the judge of Strasbourg, which accordingly has rejected the view that the covenant text shall be the only reference material to be rely upon in its reasoning. On the contrary, the interpretation of the ECHR dispositions has been progressively enriched by numerous contributions outside the treaty text itself and endowed with the most diverse legal status.

These latter have therefore served as a precious "source of inspiration" for the Court's hermeneutic activity, attesting the existence of common developments in the view of the Contracting States as well as of continuous evolution in norms and principles applied at

organizations of which States Parties to the Convention are members, too. In particular, case-law shows the Court's consistency in retaining States' liability under the Convention in relation to treaty commitments subsequent to the entry into force of the ECHR. See for instance: ECtHR, Judgment of 18 February 1999, App No 26083/94, *Waite and Kennedy* v *Germany*; *Bosphorus…, cit.;* ECtHR, Judgment of 06 December 2012, App No 12323/11, *Michaud* v *France*; Judgment of 23 May 2016, App No 17502/07, *Avotiņš* v *Latvia* (See UFSTEIN G., *op. cit*., 9 ff.).

[202] On the topic see in particular TULKENS F., *Le soft law des droits de l'Homme est-il vraiment si soft? Les développements de la pratique interprétative récente de la Cour européenne des droits de l'Homme*, in Liber Amicorum Michel Mahieu, Brussels 2008, 505 ff.

[203] E.g. ECtHR, Judgment of 30 November 2004, App No 48939/99, *Öneryıldız* v *Turkey*; Judgment of 9 June 2005, App No 42191/02, *Sejdovic* v *Italy*, para 126; ECtHR Judgment of 23 May 2006, App No 24379/02, *Kounov* v *Bulgaria*, para 59.

[204] E.g. ECtHR, Decision of 18 March 2004, App Nos 55066/00 and 55638/00, *Russian Conservative Party of Entrepreneurs, Aleksandr Zhukov and Vicotr Vasilyev* v *Russia*, paras 70-73; Judgment of 13 December 2005, App No 15250/02; *Bekos and Koutropoulos* v *Greece*, paras 33-36; Judgment of 12 April 2007, App No 52435/99, *Ivanova* v *Bulgaria*, paras 65-66; Judgment of 4 December 2003, App No 35071/97, *Gündüz* v *Turkey*, para 23; Judgment of 18 May 2004, App No 57383/00, *Seurot* v *France*, paras 7-8.

[205] E.g. *Christine Goodwin*…, *cit*., para 100; ECtHR Judgment of 19 April 2007, App No 63235/00 *Vilho Eskelinen and Others* v *Finland*, para 60.

[206] E.g. *Soering*…, *cit.*

international levels. As a matter of fact, this «globalising»[207] interpretation can only be understood as yet another expression of the "modernist" conception of rights pumping the whole regional engine.

Yet, the question remains as to what extent such legal instruments (binding or not) may be taken into consideration in the interpretive exercise. On this aspect the Court appears to be laconic: the choice to rely upon the interpretative technique enrooted in customary international norm codified in Article (3)(1) does not say enough about the true ideal behind it, that is that of "advancing rights"[208] and, eventually, that of ensuring an ever-widening scope for human rights and, by the same token, to multiply the obligations which the Convention places on States.

6. The peculiarity of the interpretation of the ECHR in the field of international law

The current Chapter intends to equip the reader with a general knowledge of the ECtHR' main hermeneutic trends, so as to furnish the necessary framework in order to investigate on the specific interpretative tools elaborated throughout the European jurisprudence. More specifically, it is maintained that the latter are totally coherent with the "special characteristics" of the ECHR as a human rights charter with a "materially constitutional" substance

On the one hand, reception in the ECtHR interpretative practice of the general rules set forth in the VCLT of 1969 is not only in line with the nature of the Convention as a multilateral treaty, but it is also consistent with the Court's inclination to read the covenant text «in harmony with that general law and without an *a priori* assumption that the Convention rights would be overriding»[209] as well as «in the light of….[a]ny relevant rules of international law…».[210] On the other hand, the general overview of the provisions codified in Articles from 31 to 33 serves to reveal how the guiding rules enshrined therein were drafted in a rather flexible way; indeed, they leave a margin room of manoeuvre for varying constructions, in this

[207] The term is taken by WACHSMANN P., *Réflexions sur l'interprétation « globalisante » de la Convention européenne des droits de l'homme*, in TITIUN P., DUMAINE P., *La Conscience Des Droits Mélanges En L'honneur De Jean-Paul Costa*, Paris 2011, 667 ff.

[208] *Ibid.*

[209] International Law Commission, 2006. *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*. Geneva: United Nations, para 86.

[210] Article 31(3)(c) VCLT.

case justified by the object of the interpretation. In fact, the particular features of the ECHR, which justify a certain amount of discretion in the interpretative practice embraced by the judges of Strasbourg.

Among these "special characteristics", the Chapter points out that the Convention's object and purpose does not concern the relationships between States, but rather the relationship between these latter and «everyone within their jurisdiction»[211], namely individuals entitled of fundamental rights domestic authorities are called upon to conform to and respect. In this respect, the centrality teleological (purposive) approach has been underlined and explained; closely related to this, the Chapter highlights the Court's general tendency to interpret the rights embodied in the Convention rather dynamically in light of the developments in international and regional normative environments, of the changing social-cultural and normative trends, and even of the subsequent practices characterising the realities of the States Parties.

As a matter of fact, in the Court's view, an evolutive-type exegesis of the conventional guarantees appears to be necessary particularly for the reason of the pursuit the Convention's object and purpose, that is the upholding of fundamental timeless rights, so that these remain practical and effective.

Conversely, originalism has played a very limited role in the Court's case-law: the *prima facie* literal meaning of the text has represented more of a starting point and, of course, an important limit aimed at preventing averting the transformation «by judicial fiat [of] the meaning attributed by the Contracting States to […] procedural or structural provisions, or [the addition] to these provisions [of] a meaning which does not find explicit support in the text»;[212] as to intentionalism, reference to preparatory works of the Convention has been applied very rarely, mainly to sustain the interpretation resulted by means of other methods or interpretation, or to determine the meaning when the hermeneutic activity carried out still left the meaning ambiguous or obscure.

Consideration of such hermeneutic choices is relevant whereby the guarantees set forth in the Convention in order to pursue the object of establishing a system of human rights protection common to all Member States of the Council of Europe become now a fundamental element of national constitutional architectures: they in fact permeate domestic

[211] Article 1 ECHR.

[212] GOLSONG H., *Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties* in RONALD St., MACDONALD J., PETZOLD H. (ed. by), *The European System for Protection of Human Rights*, Dordrecht; Boston 1993,150.

systems of sources of law by introducing new obligations stemming from the Convention as extensively interpreted by the ECtHR.

An example can aid in clarifying the point at issue. In one of its early judgments, related to the *Marckx v. Belgium* case, the Strasbourg judge interpreted the conjunction of the prohibition of discrimination with the right to respect for family life within the meaning of Article 8 so as to infer the principle that no distinction between the "legitimate" and the "illegitimate" family can be made, and consequently that children born out of wedlock cannot be discriminated on account of their "birth". Such a principle has been consistently applied more than twenty years later, in another case to which not Belgium but France was the Respondent party: in *Mazurek v. France*,[213] the Convention prohibition discrimination was not satisfied by French law providing a child of adulterous marriage with half the inheritance portion of a legitimate child.

This general effect characterising the European case-law is referred to as *res interpretata* ("interpretative authority"[214]); it appertains to the general obligation envisaged by Article 1 of the Convention, requiring States to «secure to everyone within their jurisdiction the rights and freedoms defined [in the ECHR]»: the exhaustive accomplishment of such a primary task requires, *inter alia*, to diligently apply the standards of protection derived from the ECtHR's case-law taken as a whole, and to apply them invariably whenever the same problem of principle exists within their own domestic legal system; it also transpires from the final authority on the interpretation and application of the conventional rights and freedoms the Strasbourg jurisdiction is entrusted with under Articles 19 and 32, pursuant to which, the latter is expected to carry out its hermeneutic exercise coherently and consistently when confronted with the same issue although *vis-à-vis* different States.[215]

It also appears from the above that any analysis of the ECHR cannot disregard the body of case-law gradually built up by the Strasbourg Court in its quality of authoritative interpreter of the former, giving concrete form to the text of the treat.[216] In this respect, it can be concluded that as overall the Court practice does not embrace just one interpretative

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213 ECtHR, Judgment of 1 February 2000, Appl No 34406/97.

214 This effect is not to be confused with the binding force of the Court's final judgement, which formally binds the High Contracting Parties only in cases to which they are parties (Article 46, para 1). More correctly, the principle of *res interpretata* prompts Member States to "take into account" the interpretative authority of judgments delivered against other countries in the fulfilment of international commitments under the ECHR.

215 ARNARDOTTIR O. M., Res Interpretata, Erga Omnes *Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights*, in 28 European Journal of International Law 3, 2007, 823-824.

216 COHEN-JONATHAN G., *Quelques considérations sur l'autorité des arrêts de la Cour européenne des droits de l'homme*, in Liber Amicorum M.-A. Eissen, Brussels 1995, 53.

approach; on the contrary, the Court has occasionally demonstrated to follow not only one-directional path but rather to prefer unpredicted solutions influenced by alternative considerations or different policy.

Yet, it would be incorrect to label such a variable interpretative practice merely as a frailty of the Court's *modus operandi* at the expenses of the whole system of human rights protection; quite the opposite, it reflects what has been defined as a «moral reading»[217] of the rights embodied in the Convention by the ECtHR, this type of evaluation entailing the task to identify which values States seek to pursue on the international scenario; under such definition, interpretation strictly depends on what the project in question is, on the premise that «different projects require different means of pursuit»[218] which are necessary and more appropriate in order to facilitate them. In the case of the conventional system, such project can be identified in the promotion of common standards of human rights protection.

As one can easily guess, such operation is "evaluative" by its own nature rather than anchored to a fixed set of rules, hence implying a certain margin of discretion by the Court in the choice of the interpretative tools depending on the circumstances of the concrete case and the interests at stake and which is only partially shaped and influenced by the VCLT general principles.

It follows that the acceptance of the dependency to the general approaches "borrowed" by international customary rules on treaty interpretation served only as the methodological foundations for the legitimate development of the Court's own interpretative *ethos* and its own hermeneutic "tools".

At the same time, pursuant to the general rule under the VCLT (Art. 31), the overall coherence of its interpretive activity requires the Court to reason in good faith, hence making the effort to «discover the principles that underline and justify human rights and apply them to the case at hand» as well as «to justify its decisions according to a scheme of principles that represent an intelligible and coherent vision of justice»[219].

In conclusion, if interpretation is nothing but an "act of persuasion", to be truly so it must rely on a legal reasoning able to provides States and individuals predictability: in this way, the legitimacy as well as the role of the Court as "the guardian of human rights" are not at risk,

[217] LETSAS G., *Strasbourg's Interpretive Ethic*…, *op. cit.*, 510.
[218] *Ibid.*
[219] LETSAS G., *The ECHR as a living instrument*…, *op. cit.*, 23.

on the one hand, and better compliance with its decisions can contribute to achieve widespread acceptance of its *dicta* within national systems, on the other.[220]

Vice versa, un uncertain breadth of the method of interpretative adopted may be seen by Contracting States as a risk of intrusion in the national domain:[221] a perceived judicial activism could easily lead to criticism, upholding the idea of an international body responsible for an excessive encroachment on national sovereignty at the expense of national democratic process.[222]

The next Chapter will therefore investigate on the use of some of the main hermeneutic tools elaborated specifically by the European Court throughout its jurisprudence: an attempt will be made to better understand whether or not the Court has been able to provide sufficient justifications for choosing one or the other interpretative approaches, as well as to detect which the main problematic issues raises from the lack of clear standards as to when and how the Court will use the various interpretative principles.

[220] KILLANDER M., *op. cit.*, 63.
[221] FITZMAURICE M.., *op. cit.*, 16.
[222] ULFSTEIN G., *Interpretation of the ECHR…, op. cit.*, 1.

2.

The Interpretative "Arsenal" of the ECtHR

"… L'harmonie est un « résonner ensemble » et le « résonner ensemble» est un « dire ensemble », […]. Pour harmoniser des ensembles juridiques, il faut en effet, au-delà du simple dialogue, fonder sur la raison quelque chose en commun, une commune mesure»."
(Mireille Delmas-Marty, *Les forces imaginantes du droit. Le pluralisme ordonné*)

CONTENT: 1. The judicial policy of the ECtHR – 2. The European Convention as a living organism – *2.1. The principle of "the living instrument" – 2.2. The limits of the growing tree – 3.* The search for common trends – *3.1. Consensus: a boost of the Court's legitimacy and a break to its discretion – 3.2. The consensus put in action* – 4. The margin of appreciation as a room for discretion – *4.1. The rationales behind the tool – 4.2. The margin of appreciation in action – 4.2.1. Areas of discretion – 4.2.2. The intensity-determining factors* – 5. Is the ECtHR's judicial policy persuasive?

1. The judicial policy of the ECtHR

«It is a new concept of space»[1]. Like Lucio Fontana, the Strasbourg judges have demonstrated to be capable of engraving the Convention as if it were a blank canvas, so that this is no longer regarded as a flat surface: the latter becomes an "element of passage" through space, by means of which evolution becomes possible: on the one hand, the rights and freedoms enshrined in the text of the treaty represent the "loopholes" through which the European environment penetrates and diffuses extensively into the conventional system of human rights protection; on the other hand, the spatial and temporal context is influenced by the Convention as interpreted by the European Court, whose standards are able to pierce through national borders and impact domestic systems of human rights protection.

[1] The statement is by the Italian artist Lucio Fontana.

The realisation of such a "persistent dialogue" between two spatial dimensions – *i.e.* the formal textuality of an international treaty and the constantly changing reality in which the ECHR is implemented – is the great work of art of the European Court of Human Rights as being the authoritative interpreter of the Convention. It is possible to further unravel the implications of the allegation above by taking into due consideration two different profiles of research.

The first aspect concerns the "spreading" and the "stretching" of the conventional guarantees (Fontana's canvas) within the regional context of human rights protection (the space beyond the cuts) as a whole. Scholarship agrees over the progressive consolidation and reinforcing of the European Court's interpretative authority in reviewing the human rights practices of all Council of Europe Member States.[2] Such leap forward of the institutional and political role of ECtHR – which is significantly highlighted by two fundamental moments, namely the internal reforms introduced by 1998 Protocol No. 11 and the geographical enlargement of the Council of Europe towards the former Communist block since the Nineties – has been made possible by taking the initiative to interpret the Convention dynamically and extensively as a "living instrument".

As will be further discussed, such an approach has contributed to keep the guarantees set out in the ECHR abreast of the times and, ultimately, to ensure effective and efficient protection for individuals claiming the victimhood; moreover, it has eventually resulted in the promotion of higher standards of protection. In such a way, far from denying its international nature, it is not less true that the Court has managed to "cut" the traditional boundaries of the human rights safeguard system, thus producing constitutional effects within domestic legal systems. More specifically, predilection for an evolutive interpretation has favoured the «"human rights" dimension over the "international treaty" one»[3], thus contributing to the «qualitative development» of conventional guarantees Member States are bound to, even without a formal amendment of the text.[4]

But just as Lucio Fontana has inflamed a lively academic debate over his series of repeatedly cut canvases, the Strasbourg jurisdiction has not convinced all parties. There have been criticisms from all sides, whether political, legal or academic, but also notes of appreciation

[2] YILDIZ E., *A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights*, in 31 European Journal of International Law 1, 2020, 74-79.

[3] SUDRE F., *L'interprétation dynamique de la Cour Européenne des Droits de l'Homme*, *L'office du juge*, Paris, Palais du Luxembourg les 29 et 30 septembre 2006available at https://www.senat.fr/colloques/office_du_juge/office_du_juge11.html.

[4] *Ibid.*

and approval of his work. Such "rivers of ink" testify to the relevance of the topic under discussion, but inevitably make it difficult to write something truly new about it. Hence the idea of approaching the subject from a different and more systematic perspective, which, instead of analysing individual interpretative tools, prefers to identify the interconnections between them.

Unlike the famous Italian artist, there is no a manifesto[5] explaining the *rationales* behind the Court's hermeneutic preference and the ideals inspiring a certain interpretative choice rather than another, though. The answers to these questions must therefore be sought in the text of the Convention itself, as well as in the case-law of the Court. This is certainly a task that is not always easy and quick to solve, especially since the Court sometimes seems to operate without any real underlying plan.

The second profile of investigation to examine is the relativism in temporal and spatial terms (the cuts) the Court's activity is inevitably subject in interpreting the Convention (the canvas). Not only is it true that judges sitting in Strasbourg are «creatures of their times»[6], the historical background being a determining characteristic in the interpretative process and, more precisely, in shaping the sensitivity, the training and the culture of the members of the Court.[7] The reference to the regional *milieu* also plays an important role, as the nature and interaction of those who share interpretative strategies with the Court becomes a key element that the interpreter must take into account.[8]

The Court's hermeneutic function is in fact modelled by a variety of influences flowing through its area of jurisdiction, deriving from the structure of the judicial system in which it is exercised.[9] The following pages thus will argue that the supervision by the Court of the

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[5] In 1954, Lucio Fontana and other artists from Latin America wrote a Manifesto (the so-called Manifesto Blanco) explaining the new movement of "Spatialism" and the ideals behind it. After that, two other manifestos followed.

[6] DUBOUT E., *Interprétation téléologique et politique jurisprudentielle de la Cour Européenne des Droits de l'Homme*, in 73 Revue trimestrielle des Droites de l'Homme 2008, 401.

[7] In addition to the context, part of the doctrine also tends to give relevance to the "subjectivity" of the judges sitting in the judicial Chamber, *i.e.* their personality and personal ideals influencing their final decision. In this regard, however, it has also been argued that «judges are not the sole locus of agency. Rather, the agency within the Court is diffuse. The entire case-processing system is conducted mostly behind the scenes under the cloaks of anonymity by many hands. Judgments […] are drafted through a rather complex procedure with the involvement of the Court's permanent staff. They are signed in the name of the whole chamber under the ownership of the Court. They are therefore the products of the entire Court – not only of the individual judges sitting on the bench. They are "the public documents" that embody the Court's collective vision for how the ECHR rights should be understood» (YILDIZ E., *op. cit.*, 80).

[8] FERRERO J., *L'interprétation évolutive des conventions internationales de protection des droits de l'homme. Contribution à l'étude de la fonction interprétative du juge international*, *Thèse de doctorat*, Paris 2019, 31-34.

[9] DUBOUT E., *op. cit.*, 403-404

safeguarding of the conventional fundamental rights and freedom appears to be an operational policy[10] strategically instrumental to the «protection of the interests of the institution [using] them»[11], namely a number of political-natured calls the Court has to face consistently – among others: the persuasion of the public opinion, the need of self-legitimation, the enduring resistance of the conventional system of human rights protection, the respect of pluralism within the Council of Europe and the promotion of human rights standards across the European continent without setting against Member States.[12]

However dull and repetitive this may sound, there is no mystery that the geo-political, social-cultural context does have an influence over law, whether national or international. What is interesting here to underline is how the opposing concerns above do require divergent «modes of operation and character traits such as proactiveness, pragmatism or evasiveness»[13]. The debate concerning the Court's interpretive power thus goes through the analysis of different "characters" assumed by the ECtHR within its jurisdiction in order to pursue a number of different objectives.

As shown in the previous Chapter, it is clear that the European Court makes use of the classical interpretative techniques codified in international law, but it is also true that it adopts its own instruments developed in case-law, based on which of the character trait prevails in the case under dispute. At the same time, it is argued that the ECtHR's various «behavioural patterns»[14] do not represent a discretionary invention and a certain systematicity behind the Court's choices can be traced; in particular, its interpretative instruments constitute one of the ways in which the powers (and excesses of power) of the Court are (also) regulated: although they perform different and not always coinciding functions, they all aim to "regulate" the hermeneutic exercise of an international treaty with a materially constitutional substance. More broadly, the coexistence of the Strasbourg judge's «seemingly incongruous roles»[15] may be

[10] *Ibid.* In this concern, the expression "judicial policy" appeared in the anglo-saxon doctrine of the Fifties under the expression of "judicial politics" (DAHL R., *Decision-Making in a Democracy: the Supreme Court as a National Policy-Maker*, in 6 Journal of Public Law, 1975).

[11] *Ibid.*, 386

[12] *Ibid.*, 388-390,418.

[13] YILDIZ E., *op. cit.*, 81.

[14] *Ibid.*, 75.

[15] Yildiz distinguishes between three different types of characters the Court can assume. The first one is that of "the arbitrator", in the light of which the Court tends to adopt a rather restrictive approach, delivering judgments that are precisely tailored to the specific case, leading to an incremental and sometimes inconspicuous development of the rules. Otherwise, when the Court adopts a predominantly "entrepreneurial" character, it tends to clearly define the direction of the development of the norm and, therefore, to establish the standards applicable to future cases. Finally, when the "delineator" character prevails, the Strasbourg judge tends to issue evasive judgments and refuses to fully address the complaint or to venture into new understandings. In this way,

explained and legitimised if accommodated in a more general framework labelled as the general judicial policy pursued.

Interestingly, former judge Matscher wrote extra-judicially that «the interpretation of the Convention is a very complex hermeneutical process, which is not always carried out in a linear manner, with the result that the Court's case law sometimes seems to lack consistency»[16]. Instead, this study is characterised by the attempt to providing for a «syncretic technique permitting to fuse together a number of different techniques» of interpretation,[17] as well as to frame them into a coherent policy so as to contextualise the main interpretative tools undertaken, with the ambition to give what *prima facie* seems to appear as a "magmatic chaos" a certain degree of rationality.[18]

In this spirit, the Chapter will investigate on the technique underpinning a more active role of the Court, namely the principle of the "living instrument", or on the contrary which appears to show greater deference *vis-à-vis* Member States, that is to say the margin of appreciation. More specifically, it intends to shed light on the relationships between them and how the Court finds a middle way between opposing interpretative approaches in tension with each other: a useful tool for this purpose can be found above all in the so-called consensus.

2. The European Convention as a living organism

It must have seemed as arduous as it was imperative to rebuild Europe from the ashes of the Second World War, of which our continent was undoubtedly the privileged theatre. Yet, the post-World War II period was marked by a great constituent ferment, with the flourishing of fundamental charters, as well as international treaties and – more generally – a renewed awareness of safeguard of human rights and fundamental freedoms by States.

In this context, the Council of Europe policy grounded on the "*never again*" motto vigorously promoted the ideal of economic and social *progress* as well as that of a distancing from the recent past by means of the *further realisation* of those spiritual and moral values which

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the contours of a standard can be outlined and peripheral regulatory development generated (YILDIZ E., *op. cit.*, 84 ff).

[16] MATSCHER F., *Les contraintes de l'interprétation juridictionnelle - Les méthodes d'interprétation de la Convention européenne*, in SUDRE F., *L'interprétation de la Convention européenne des droits de l'homme*, Brussels 1998, 40 (my translation).

[17] DUBOUT E., *op. cit.*, 386.

[18] *Ibid.*, 418.

are the *common heritage* of European States: these ideals would thus form the foundations on which to build a genuine democratic rule opposing the totalitarianisms of the 20th century.[19]

As «an instrument designed to maintain and promote the ideals and values of a democratic society»[20], the European Convention of Human Rights evidently reflects the consensus of the aftermath of the Second World War: its Preamble expressly refers both to the «maintenance» but also to the «further realisation of Human Rights and Fundamental Freedoms».

In particular, the former requires the Court to interpret the rights in a manner that renders them relevant and effective also in circumstances unforeseen by the drafters, and not merely theoretical and obsolete;[21] the latter entails a certain degree of judicial activism in order to develop the conventional clauses' meaning and scope of application in accordance with developments in state societies.[22] Both entails the idea of "development", which is in turn intrinsically linked to that of "change": the search for the meaning of the first term indeed leads to the following definitions: «the action of someone or something changing» and «something new that happens and changes a situation»[23].

In accordance with the object and purpose of the ECHR mentioned above, the Court's interpretative task is thus one of "adaptation", in order to keep the Convention a competing and valid instrument for an indefinite period of time: while it has contributed to broaden the

[19] See Article 1(b) of the Statute of the Council of Europe. As stated by the European Court, «any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic" society» (ECtHR, Judgment of 07 July 1989, App No 14038/88, *Soering* v *the UK*, para 87). Democracy is «the only political model envisaged by the Convention and therefore the only one compatible with it» (ECtHR, Judgement of 30 January 1998, App No 19392/92, *United Communist Party of Turkey Party of Turkey* v *Turkey*, para 45) and it undoubtedly represents «a fundamental feature of the European Public Order» (*ibid*., para 86). The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued (ECtHR, Judgment of 7 December 1976, App No 5493/72, *Handyside v the United Kingdom*, para 49): accordingly, "necessity in a democratic society" constitutes the pre-condition for the compatibility of any type of interference with the right at hand. For further analysis of the concept of democracy in the European Court case-law see for instance: VAN DER SCHYFF G., *The concept of democracy as an element of the European Convention*, in 38 The Comparative and International Law Journal of Southern Africa 3, 2005, doi: http://www.jstor.org/stable/23252623. SUDRE F., *L'interprétation dynamique…, cit*.

[20] *Soering…, cit.*, para 87; see also e.g.: ECtHR, Judgment of 06 September 1978, App No 5029/71, *Klass and Others* v *Germany*, para 34.

[21] CIOBANU R., *The Evolutive Interpretation of the European Convention of Human Rights and the Development of the Right to a Fair Trial*, in 8 Conferinţa Internaţională de Drept, Studii Europene şi Relaţii Internaţionale, 2020, 335.

[22] On the judicial activism of the Court related to its evolutive interpretative approach see: BERNHARDT R., *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, in 42 German Y.B. International Law, 1999.

[23] Definition found at: https://dictionary.cambridge.org/it/dizionario/inglese-italiano/development.

Convention's reach to some extent, the jurisprudence of the Court has also acted as a catalyst for new and concomitant developments in the European regional context.[24]

Borrowing a concept familiar to modern constitutionalism, the Convention can be described as a living organism evolving over time,[25] meaning that the rights and the freedoms enshrined in the ECHR are not to be considered static or frozen, and should inevitably undergo a progressive transformation so as to mirror and address challenges posed by a rapidly mutable environment "asking" to be taken it into account when interpreting the treaty.[26]

Such element of resemblance with modern Constitutions was also underlined in occasion of the annual seminar held to mark the official opening of the Judicial Year at the European Court of Human Rights in 2020,[27] where Professor Rick Lawsonan interestingly evoked that jurisprudence of the Supreme Court of Canada portraying the Canadian Constitution as a «*living tree* [emphasis added] which, by way of progressive interpretation, accommodates […] the realities of modern life»[28]: just like the Canadian constitutional charter, the ECHR amounts to a growing tree, whose roots are well anchored to a «common heritage of political traditions, ideals, freedom and the rule of law», thus ensuring the necessary firmness of its founding principles; at the same time, it has branches, which are capable of extending and lengthening, *i.e.* of ensuring a certain degree of flexibility and adaptation to accommodate the new challenges of contemporaneity.[29]

The idea of Convention as a "living tree" is relevant at least under two different profiles: the first one – already underlined at the opening of this Chapter – concerns the impact of the surroundings, from which the Court cannot disregard, except to the detriment of the efficiency of the whole system of protection. As expressly stated, a failure by the Court to maintain a dynamic and evolutionary approach would in fact amount to an obstacle to reforming or improving the system of protection of fundamental rights and freedoms.[30]

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[24] VILJANEN J., *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, in 16 European Journal of International Law, 2005, 249-250.

[25] LETSAS G., *The ECHR as a living instrument: Its meaning and legitimacy*, Letsas, available at SSRN: doi:https://ssrn.com/abstract=2021836, 2012, 1.

[26] On the issue see for instance: VAN DROOGHENROECK S., *Retour sur l'interprétation « involutive » de la Convention européenne des droits de l'Homme,* available online at: https://books.openedition.org/pusl/23712?lang=it 2/28 1 2 3;

[27] Council of Europe, *The European Convention on Human Rights: living instrument at 70 – Dialogue between Judges* 2020, available at: https://www.echr.coe.int/Documents/Dialogue_2020_ENG.pdf.

[28] Supreme Court of Canada, Judgment of 12 September 2004, Case No. 29866, [2004] 3 SCR 698, para 22.

[29] LAWSON R., *Introduction: the* Tyrer *case and the origins of the evolutive doctrine,* in Council of Europe, *The European Convention*…, *cit*., 7.

[30] ECHR, Judgment of 28 May 2002, App No *46295/99, Stafford* v *the United Kingdom,* para 68.

In this regard, sub-paragraph 2.1. will investigate the interpretative technique displayed by the ECtHR (namely, the principle of "the living instrument") for responding to any changing condition in Contracting States as to the standards to be achieved in line with the effectiveness rationale.

The second profile poses the question of the extent to which «courts should interpret entrenched rights and how far they may or should depart from the [text] original understanding»[31]: judicial activism is not always possible or desirable, as it can turn into a pretext for criticism of the arbitrariness of the hermeneutic activity of an international court, far beyond the limits placed on its function: sub-paragraph 2.2. will evaluate whether the living tree meets any limit which preventing any "uncontrolled growth".

2.1. The principle of "the living instrument"

«The Court must […] recall that the Convention is a *living instrument* [emphasis added] which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions»[32]. This well-known extract from the *Tyrer v. the United Kingdom* judgement has become a sort of *mantra* to be repeated in its own case-law whenever the Strasbourg Court intends to depart from the established understanding of a rule of the Convention so as to give it a new or wider meaning which is more in line with the evolving social and moral values of European realities.[33]

The "living instrument" principle has not been invented from nowhere: from a constitutional perspective, scholars believe that it is most likely inspired by the theory of "living constitution",[34] while from an internationalist point of view the living instrument approach to interpretation represents the temporal dimension of the principle of effectiveness:[35] since the Convention is first and foremost a system for the protection of human rights, regard to the changing conditions in the Member States is of paramount

[31] LETSAS G., *op. cit.,* 1.

[32] ECtHR, Judgment of 25 April 1978, App No 5856/72, *Tyrer* v *the United Kingdom*, para. 31.

[33] SONNLEITNER L., *The Democratic Legitimacy of Evolutive Interpretation by the European Court of Human Rights*, in 33 Temple International and Comparative Law Journal, 2018, 287-288.

[34] On the issue see, among others: REHNQUIST W., *The Notion of a Living Constitution*, in 54 Texas Law Review*,* 1976; KAVANAGH A., *Idea of a Living Constitution*, in 16 Canadian Journal of Law and Jurisprudence, 2003; ACKERMAN B., *The living Constitution*, in 120 Harvard Law Review 7, 2007; BALKIN J.B., *The roots of the living Constitution*, in 92 Boston University Law Review 4, 2012.

[35] BERNHARDT R., *op. cit*., 23.

importance; thus, the requirement of rendering the conventional guarantees practical and effective – even when the surroundings change – leads the Court's hermeneutic choices to be driven by evolutive and dynamic principles[36] as guiding factors for the adoption of the interpretative outcome relevant at the time of the case under dispute, that is to say in the light of present-day conditions.[37]

As Judge Siciliano wrote in his concurring opinion to the Grand Chamber ruling in the *Magyar Helsinki Bizottság v. Hungary* case, there's nothing innovative in the "living instrument" doctrine and the underlying evolutive method of interpretation as, in reality, they must be seen as reflecting the presumed intention of the Contracting states who are also living entities: as much as these former would evolve, only an evolutive approach intended to respond changes in legal and social concepts must represents the prerequisite for the survival of the substantive provisions of the Convention and its Protocols.[38]

In other terms, due to its potentiality to continuously adapt the Convention to "present-day conditions" without the need for a formal amendment procedure, the "living instrument" principle can be considered the condition *sine qua non* for the Convention's survival over time;[39] for the same reasons, it is an important instrument to pursue the ECHR object and purpose, since it will enable it to promote the normative development necessary for the permanence of the conventional system of protection of human rights and fundamental freedoms.

Recognition of such a prerogative for Strasbourg judges could, however, lend itself to the criticism of the Court's lack of democratic legitimacy to amend the Convention through progressive interpretation, thereby circumventing domestic decision-making processes.

Following such a view, by means of evolutive interpretation an international judicial body would be able to externalise the decision-making centres of main political issues, weaken elected representative bodies and – consequently – undermine the full-functioning political participation.[40] Such censure of the role of the Strasbourg Court does show a flaw, though: it

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[36] To be precise, the two concepts of "dynamic interpretation" and "evolutionary interpretation" do not exactly coincide. Indeed, the latter refers to the hermeneutic process through which to interpret new facts emerging in practice that have never before been considered by the Court. The former, on the other hand, represents the new interpretative result, different from the one previously reached by the Court itself in relation to the same facts.

[37] SONNLEITNER L., *op. cit.,* 286.

[38] Concurring opinion of Judge Siciliano joined by Judge Klølbro in ECtHR, Judgment of 8 November 2016, App No 18030/11, *Magyar Helsinki Bizottság* v *Hungary*, paras 5-9.

[39] BURES P., *Human dignity: an illusory limit for the evolutive interpretation of the ECHR?*, in 110 Amicus Curiae, 2017, 20.

[40] In this concern, British Supreme Court Judge Lord Sumption expressly stated that national authorities are in a better position to take decisions in matters of social policy, which require a political debate in correspondence

does not entirely grasp and appreciate the "living instrument approach" for a number of reasons.

First of all, unlike in domestic legal systems, the Strasbourg judge cannot delegate this task to a legislature: yet, it cannot leave legislative action purely to the Member States, for the obvious reason that it is highly unlikely that they will act quickly enough to respond to the new challenges of modernity, at least when changes are at odds with public, national interests or values.[41]

Secondly, the Court's judicial review does not aim at replacing democratic deliberations at domestic level; on the contrary, by deciding on claims brought by individuals ("anyone") within the jurisdiction of the Contracting Parties the Court gives «a voice to those people who are easily barred from effective political participation», or who claim that their rights have been unlawfully violated. In such a way, it aids «raising awareness for contemporary human rights concern»[42].

Finally, from a methodological point of view, if a certain degree of innovation on the part of the Court seems to be irreducible, it is nevertheless contained within the limits necessary to pursue the aim and objective of the Convention and must always comply with them.[43]

2.2. The limits of the growing tree

with national traditions and needs (Lord Sumption, *The Limits of Law*, in in BARBER B.W., et al (edited by), *Lord Sumption and the limits of law*, 2016, 15, 20). By the same tokens, Finnis argues that all moral questions at the core of human rights claims should be decided only by people in the respective national legal systems, while the Court's supervision is only aimed at ascertain the conformity with these rights and not to substitute its view point to domestic decisions (FINNIS J., *Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR*, in BARBER B.W., *op. cit.*, 85).

[41] HELGESEN J.E., *What are the limits to the evolutive interpretation of the Convention?, The European Court of Human Rights Strasbourg*, Speech delivered on 28 January 201, available at https://www.jus.uio.no/smr/om/aktuelt/aktuellesaker/2011/docs/helgesen_speech.pdf.

[42] SONNLEITNER L., *op. cit.*, 279. This is sufficient to counter Judge Wojtyczek's claim, according to whom «the Convention guarantees freedom from primary legal rules concerning fundamental societal issues where such rules emanate from any other body that has not been elected for the purpose of exercising norm-making power. Primary legal rules may be enacted in the form of statutes adopted by national parliaments or in the form of international treaties ratified with the consent of national parliaments. Norm-making power in respect of fundamental societal issues cannot be exercised by a judicial body, be it the European Court of Human Rights» (Dissenting opinion attached to *Fedotora and Others*… *cit.*, para 1.1.).

[43] POPOVIC D., *Prevailing of judicial activism over self-restraint in the jurisprudence of the European Court of human rights*, in 48 Creighton Law Review, 2008, 367.

While it appears that the "living instrument" principle has taken firm root in the case-law of the Court of Strasbourg, it is less clear of to what extent it can and will expand.[44] In a nutshell, the question is whether it respects some kind of limit and, if so, what the identity of the latter is.

In this concern, a primary natural restraint is of a textual nature: it can agree that the ECHR letter is a limit *per se* to the evolutive approach, in the light of which the Court cannot, «in order to meet present-day needs, conditions, views or standards, extract [from the Convention] rights not originally included therein, rework existing rights or create "exceptions" or "justifications" not expressly recognised in the Convention»[45].

Such a limitation appears better understood when applied to the specificity of the concrete case. To this purpose, a clear example is the *Johnston and Others v. Ireland* ruling.[46] The case concerned the impossibility of obtaining a dissolution of the marriage under the Constitution of Ireland and it consequences, namely: the absence of any legal right to be maintained by former partner and of any potential rights of succession in the event of intestacy and the legal situation of an illegitimate child born of one of the former spouses with the new partner in the absence of any means of recognition. More specifically, the applicants alleged that the central issue was not whether the Convention guaranteed the right to divorce but rather whether the fact that they were unable to marry each other was compatible with the right to marry or re-marry and with the right to respect for family life, enshrined in Articles 12 and 8.

As regards the former, the judgment is emblematic in the Court's use of the ordinary meaning to be given to the terms of the provision, not so much to interpret it as to *limit* any evolutionary interpretation.

It first observed that «the ordinary meaning of the words "right to marry" is clear, in the sense that they cover the formation of marital relationships but not their dissolution»[47]. Furthermore, it noted that «[i]t is true that the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate»[48]. Accordingly,

[44] BERNHARDT R., *op. cit.*, 20.

[45] ECtHR, Judgment of 15 March 2012, App Nos 39692/09, 40713/09, 41008/09 *Austin and Others* v *the United Kingdom*, para 53.

[46] ECHR, Judgment of 18 December 1985, App No 9697/82, *Johnston and Others* v *Ireland.*

[47] *Ibid.,* para 52.

[48] *Ibid.,* para 53

the applicants could not derive a right to divorce from Article 12 and that provision was to be considered inapplicable in the case.

Such a conclusion reached by the Court may, however, be contradicted by subsequent case law: indeed, it is true that some rights not explicitly enshrined in the text have been identified,[49] as well as new guarantees that the original drafters had not foreseen or imagined;[50] nevertheless, such divergences have been highly criticised also from inside the Court; for instance, in his dissenting opinion Judge Nicolaou wrote that «no judicial interpretation, however creative, is entirely free of constraints. What matters above all is not to overstep the bounds set by the provisions of the Convention [...]»[51]. By the same token, in the *Bayatyan* case Judge Gyulumyan noted that «the role of [the] Court is to protect human rights already enshrined in the Convention, not to create new ones. It can be argued that the evolutionary approach of the Convention allows the Court to broaden the scope of the rights protected. However, [...] the Court has [not] the legitimacy to do so when the Convention itself leaves the recognition of particular rights to the discretion of the Contracting Parties»[52].

The literal limit as applied in the *Johnston and Others* case should therefore be construed as follows: far from the conception of the judicial function solely as a "*bouche de loi*", it must be admitted that the ECtHR necessarily has a certain amount of discretion and creative power, like any other interpreter;[53] then, it must be able to determine the content of the obligations binding Contracting States having in consideration the time when the conduct of the State has been put in place, regardless of what was meant to be acceptable at the moment of the entry into force. In this way, legal objects and concepts falling outside the original scope of the Convention can be fully and efficiently addressed.[54]

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[49] ECtHR, Judgment of 21 February 1975, App No 4451/70, *Golder* v *United Kingdom*.

[50] ECtHR, Judgment of 18 February 1999, App No 24833/94, *Matthews* v *United Kingdom*.

[51] Party dissenting opinion of Judge Nicolaou, joined by Judges Bratza, Lorenzen, Jočiené, Villiger and Sajò related to the ECtHR, Judgment of 17 September 2009, App No 10249/03, *Scoppola* v *Italy*.

[52] Dissenting opinion of Judge Gyulumyan attached to the ECtHR, Judgment of 7 July 2011, App No 23459/03, *Bayatyan* v *Armenia*, para 2.

[53] L'office du juge - Sénat *Des techniques d'interprétation aux fins de « développement » des droits de l'homme,* L'Office du juge, Paris, Palais du Luxembourg, 29-30 Septembre 2006, available at : https://www.senat.fr/colloques/office_du_juge/office_du_juge12.html.

[54] In light of this, the Judge Wojtyczek's assertion in his dissenting opinion attached to the Grand Chamber's Judgment *Fedotova and Others v. Russia* (ECtHR Judgment of 17 January 2023, App Nos 40792/10, 30538/14 and 43439/14) cannot be accepted. In it, he states that « [t]he High Contracting Parties have not undertaken to protect undetermined rights whose precise content could change in time and could be adapted without their clear consent» and that «the Court's mandate is limited to the application and interpretation of the existing treaty in observance of the applicable rules of treaty interpretation and does not encompass treaty adaptation or amendment» (see paras 1.1 and 1.2).

It is equally true, however, that hermeneutic activity is not one of arbitrary character and that the Strasbourg judge cannot venture into the field of legislative competence by reading into the Convention of entirely such new concepts or matters as that of "divorce". In other terms, while the Court may sometimes fill in what are perceived to be "gaps in the text" so as to promote an innovation in the protection of rights and fundamental freedoms, it cannot go so far as to formulate an interpretation that directly contradict the letter of the treaty (interpretation *contra legem*).[55]

Besides the literal one, another limitation also imposes itself on the principle of "the living instrument". This result from such features as "fluidity" and "flexibility" entailed in the evolutionary approach, which inevitably threaten – or, at least, diminish – the predictability of any interpretative results, leading to the situation where States Parties struggle to predict the exact content of obligations stemming from the Convention.[56] Hence, if the hermeneutical exercise cannot exclude a certain degree of flexibility which is necessary to keep the whole mechanism effective in changing times, it is nevertheless true that legal certainty is another factor to be taken into due consideration. The latter is particularly relevant for the identification of the nature and the scope of the obligations incumbent on States, even though it is still a *certainty* characterised by a distinctly dynamic nature, as it is constructed on a case-by-case basis.[57]

Reasons of consistency and predictability lie behind the Court's inclination not to divert its own jurisprudence. More specifically, the Grand Chamber illustrated its approach in the *Scoppola (No. 1)* ruling, where it held that: «"[w]hile the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases […]».[58]

There is more. In order to address the matter at issue (the limits of the principle of "the living instrument"), reference should be made to the relationship between the ECHR and Member States, which is not one of mere hierarchical obedience: on the one hand, the

[55] For other examples where the literal limit played an important role see: ECtHR, Judgment of 29 April 2002, App No 2346/02, *Pretty* v *the United Kingdom*; Judgment 5 June 2015, App No 46043/14, *Lambert* v *France*.

[56] *Ibid.*

[57] GARAPON A., *The limits to the evolutive interpretation of the Convention*, in Council of Europe, *What are the limits to the evolutive interpretation of the Convention? – Dialogue between Judges 2011*, available at: https://www.echr.coe.int/documents/dialogue_2011_eng.pdf, 37.

[58] *Scoppola…, cit*., para 104. See also: ECtHR Judgment of 11 July 2002, App No 28957/95, *Christine Goodwin* v *the United Kingdom*; Judgment of 4 February 2005, App No 46827/99, *Mamatkulov and Askarov* v *Turkey*.

Strasbourg Court is entrusted with the responsibility of ensuring compliance with the Convention, this latter aimed at laying the foundations for a set of permanent common rules;[59] on the other hand, in line with the fundamental principle of subsidiarity, States play a crucial role in the enforcement of conventional guarantees, first, and in the execution of the Court's judgments, second.

It follows that the judges of Strasbourg cannot afford to step outside what States consider to be the legitimate boundaries of its role and function.[60] The focal point thus becomes the above-mentioned pact of commitment to human rights protection made between a plurality of States in the aftermath of the horrors of the Second World War, of which the Court still stands as guarantor and depositary:[61] the Convention reflects such a pact in so far as it establishes common minimal rights and freedoms, the violation of which enfranchises the individual to complain to an international Court. Yet, it should be assessed what degree of relevance is attributed to such a pact and, consequently, whether it operates as a limit to frame judicial innovation.

While the evolutive approach – through the "living instrument" principle – allows to update the pact above, it also shall respect different ways of pursuing and satisfying the original commitment, without adopting any paternalistic view: in the words of the Court itself, «[b]eing the domestic authorities the first-instance guardian of the protection of the covenant rights, […] the Strasbourg jurisdiction […] cannot but take into due account the plurality of different national interests perpetuated by each national legal system»[62]. In short, as former Judge Myjer wrote, the Court cannot turn into a purely academic church of human rights believers.[63]

Hence the need to develop an *ad hoc* instrument necessary to curb the Court's excesses and regulate the boundaries of its interpretative powers: it is referred to as "European Consensus"; this relates to the search for commonality by the Member States in terms of the current standards of protection and, conversely, to the tendency not to assign crucial relevance to what the respondent State considers as to what the most appropriate standard should be in

[59] SUDRE F., *L'interprétation dynamique*…, *cit.*

[60] States' compliance to their international obligations largely relies on their «confidence that the Court will decide cases consistently, in a manner that respects the nature of both the Convention (as a human rights instrument) and its jurisdiction (as subsidiary and limited), and by reference to appropriate materials considered within a methodologically sound framework» (DE LONDRAS F., DZEHTSIAROU K., *Managing judicial innovation in the European Court of Human Rights*, in 15 Human Rights Law Review 3, 2015, doi: https://doi.org/10.1093/hrlr/ngv020, 526).

[61] GARAPON A., *cit.*, 32.

[62] ECtHR, Judgment of 23 July 1968, App Nos 1474/62 and others, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* v *Belgium,* para 10.

[63] DE LONDRAS F., DZEHTSIAROU K., *op. cit.*, 529.

the particular case at hand insofar as its practice falls out of line with the commonly accepted conditions in the other States.[64]

The limit posed to innovative interpretation by this interpretative tool should be acknowledged as followed: need to opt for the "living instrument" approach shall not depend merely on the imperative to keep the Convention «capable of responding to contemporary rights challenges across the … member states of the Council of Europe», but solely where a relationship between potential dynamism in interpreting the Convention and the development in socio-legal concepts within domestic systems can be discerned.[65] In other terms, in order to avert any criticism of illegitimately expanding the Convention substance – and consequently, the obligations binding the States – far beyond the original meaning of the text, the interpretative effort assessing the existence of the "current living conditions" cannot disregard due considerations of the evolving State practices and developments in the normative surroundings of the ECHR.

Such a perspective (relating to self-restraint on the part of the Court) helps to understand and justify the reliance upon States' widespread support in the view of managing judicial innovation, even if individual rights holders might interpret the Court's will as dependent on majority opinion. The analysis of the European consensus is the object of investigation of the next paragraph.

3. The search for common trends

3.1. Consensus: a boost of the Court's legitimacy and a break to its discretion

The logic of subsidiarity inherent in conventional system requires that the evolution of the context in which the Court operates should pre-exist judicial innovation, that is to say that it should accompany, or even channel, changes in legal concepts or moral values, without preceding them or even less seeking to impose them.[66] In a nutshell, progressive interpretation should be well anchored in «the present-day conditions, not [in] those which might prevail in

[64] CIOBANU R., *op. cit.,* 336;
[65] DE LONDRAS F., DZEHTSIARIOU K., *op. cit.*, 522.
[66] ECtHR, Judgment of 19 February 2013, App No 19010/07, *X and Others* v *Austria*, para 23.

the future»[67]. An immediate question arises, though: what are the "present-day conditions" to be evaluated?

In his concurring opinion, Judge Spano wrote that «the role of [the] Court is not to imbue every positive development in the field of European human rights with the binding force of law by incorporating such developments into the Convention, irrespective of the limits laid down by the Convention's text and structure. The Court's role is rather to determine whether the Convention can be interpreted so as to include a particular right claimed by applicants who bring their cases to the Court».[68]

To this end, the Court tends first of all to align itself with the positions of the Member States by virtue of the "common denominator" criterion, showing that it takes into account those social and legal changes around which the majority of them converge: in other terms, *vis-à-vis* emerging factual conditions requiring for higher standards of protection,[69] the Court may embrace an evolutionary interpretative approach, for the reason that a common ground, *i.e.* a positive trend can be detected within the various domestic laws, such as to trigger "innovation".[70]

Therefore, the comparative exercise is pursued by the Court in order to «anchor the evolutive interpretation in legal norms existing outside the Convention itself»[71] and is referred to with a vast plethora of variable nomenclature recurring in the European case-law in order to define the presence (or, *vice versa*, the absence) of a common consent among Contracting States: the Court has referred to it, *inter alia*, as «emerging consensus»[72], «general trend»[73], «certain tendency»[74], «common ground»[75] , «international consensus»[76], «European consensus»[77], «common standards»[78].

While it may be true that such terminological pluralism is potentially intended by the Court in order not to crystallise a predefined and comprehensive conceptualisation, it is equally

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[67] Concurring opinion of Judge Siciliano joined by Judge Klólbro, in ECtHR, Judgment of 8 November 2016, App No 18030/11, *Magyar Helsinki Bizottság* v *Hungary*, paras 10-17.

[68] Concurring opinion of Judge Spano joined by Judge Klólbro in *Magyar…*, *cit.,* para 2.

[69] See for instance the ECtHR, Judgment of 12 January 2016, App No 37138/14, *Szabó and Vissy* v *Hungary*.

[70] LAWSON R., *cit*., 9.

[71] KOCH E., VEDSTED-HANSEN J., *International Human Rights and National Legislatures – Conflict or Balance?*, in 75 Nordic Journal of International Law 1, 2006, 12.

[72] ECtHR, Judgment of 3 November 2011, App No 57813/00, *S.H. and Others* v *Austria*, para 96.

[73] ECtHR, Judgment of 16 November 2004, App No 48616/99, *Ünal Tekeli* v *Turkey*, para. 62.

[74] ECtHR, Judgment of 16 December 1999, App No 24888/94, *V*. v *the United Kingdom*, paras 73,77,87.

[75] ECtHR, Judgment of 28 November 1984, App No 8777/79, *Rasmussen* v *Denmark*, para 15.

[76] ECtHR Judgement of 18 January 2001, App No 25289/94, *Lee* v *the United Kingdom*, para 95.

[77] ECtHR, Judgment of 10 April 2007, App No 6339/05, *Evans* v *the United Kingdom*, para 45.

[78] ECtHR, Judgment of 16 December 1999, Appl. No. 24724/94, *T* v *United Kingdom*, para 72.

evident that the whole range of definitions employed share such a common constituent factor as the following: that of the existence (identified through comparative analysis[79]) of some degree of homogeneity from the signatories parties' national human rights practice as well as in international and supra-national materials, on the subject of legal and moral.[80]

Explained differently, all the terms above rely on the premise that the human rights of the ECHR imitate and reinforce those which pre-exist in the majority of national legal systems, or which are stated elsewhere in international or European (binding or non-binding) documents; in line with this, the Court curbs the "disruptive" effects of its evolutionary interpretation by adhering to a rebuttable presumption in favour of the interpretative solution adopted by that majority: this is derived from the existence of some kind of agreement – or at least an emerging trend – concerning a determined human rights issue (the extent of protection of a given right, the scope of applicability of its limits and derogations, etc.) within the legal-political reality taken into account by the Court.[81]

As to the discernment of consent, the European case-law shows a certain degree of flexibility in the Court's strategy. Indeed, the search seems to be based on a wide range of the most diverse indicators: object of the judges' attention may be municipal legislations,[82] values

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[79] To help the Court in assessing the existence or non-existence of a consensus, a Research Unit has been established at the Registry; it is entrusted with the task to carry out comparative analysis on the request from the Judge Rapporteur, who prepares the questions. More specifically, its task is to provide legal and administrative support to the Court in the exercise of its judicial functions by preparing a comparative analysis of the laws in all, or at least most of, the countries in Europe. The comparative report normally includes a short description of the law in the European countries taken under observation. Then, it addresses the questions framed by the Judge Rapporteur: in this concern, all the questions are forwarded to national lawyers working in the Court, who prepare a report summarising the law and practice in their countries. This report should be signed by the national judge. After that, the report is returned to the Research Division. These national reports are put together by the Research Division. The full and final report is then sent to the Judge Rapporteur and other judges of Chamber or Grand Chamber respectively. (FOLLESDAL A., *A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine*, in KAPOTAS P., TZEVELEKOS P., TSEVELEKOS V., (ed. by) *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond,* Cambridge 2018, electronic copy available at: https://ssrn.com/abstract=3018772, 5; SHAI D., *Judicial Deference Allows European Consensus to Emerge*, in 18 Chicago Journal of International Law, 2018, 399; DZEHTSIAROU K., Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights, in Public Law, Available at SSRN:https://ssrn.com/abstract=1944920, 2011, 7 ff.).

[80] The word "consensus" is of Latin origin and the contemporary English dictionary defines it as the "agreement in opinion; the collective unanimous opinion of a number of persons". Unanimity in this definition suggests that consensus can be found only if everyone agrees on a certain point. (DZEHTSIAROU K., *Does Consensus Matter?...*, *op. cit.,* 5).

[81] DZEHTSIAROU K., *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, in 12 German Law Journal 10, 2011, 1733; BASSOK O., *The European Consensus Doctrine and the ECtHR Quest for Public Confidence*, in KAPOTAS P. & TZEVELEKOS V. (ed. by), *op. cit.*, electronic copy available at: https://ssrn.com/abstract=3193545, 11.

[82] ECtHR, Judgment of 24 June 2010, App No 30131/04, *Schalk and Kopf* v *Austria*; ECtHR, Judgment of 25 November 1996, App No 17419/90, *Wingrove* v *the United Kingdom*; ECtHR, Judgment of 27 September 1990, App No 10843/84, *Cossey* v *the United Kingdom*.

(e.g. public morals),[83] recommendations,[84] international reports or treaties (whether or not ratified by the respondent State),[85] *etc.* By way of further clarification, it can recall the division into four types of consent distinguished, among others, by Dzehtsiarou: the author argues that, although with different weights, the Court has shown recourse to each of them, sometimes even in the same case.[86]

The first one is ascertained between the domestic legislations and legal practices of the Contracting Parties, although the Court is not unequivocal in indicating the precise number of States required to determine a majority on which to rely.[87]

The second type of consensus can be found by interpreting the Convention in the light of international law, whether customary or covenantal. With reference to the latter, if the State has indeed ratified a particular treaty,[88] the reason given for the Court's reasoning is that «if a State has underwritten certain detailed obligations in one text, the interpretation of a more general text can be oriented in that sense»[89].

Thirdly – but not without criticism – consent may consist in an internal agreement around a certain subject matter within the State under supervision.[90] Lastly, the fourth kind of consensus is that among experts assessing the occurrence of technological or scientific developments a certain interpretative choice depends on.[91]

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[83] ECtHR, Judgment of 7 December 1976, App No 5493/72, *Handyside* v *the United Kingdom*.

[84] ECtHR, Judgment of 6 October 2005, App No 74025/01, *Hirst* v *the United Kingdom (No. 2)*.

[85] ECtHR, Judgment of 13 November 2007, App No 57325/00, *D.H. and Others* v *Czech Republic*.

[86] DZEHTSIAROU K., *Does Consensus Matter?..., op. cit.*, 542 ff.

[87] For instance, in the case *Sheffield and Horsman v. the United Kingdom*, the Court detected common trends in 23 out of 37 States but this did not result decisive (ECtHR, Judgment of 30 July 1998, App Nos 31–32/1997/815–816/1018–1019, *Sheffield and Horsman* v *the United Kingdom*); in A*, B, C v. Ireland* consensus on abortion was shared by 43 out of 47 States, yet Ireland was not condemned (ECtHR, Judgment of 16 December 2010, App No 25579/05, *A, B, C* v *Ireland*).

[88] ECtHR, Judgment of 22 May 2012, App No 126/05, *Scoppola* v *Italy (no. 3)*, paras 40-44 and 95.

[89] BREMS E., *Human Rights: Universality and Diversity*, The Hague 2000, 421.

[90] For instance, in the *Stafford v. the United Kingdom* case the Court held: «[i]t is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. Similar considerations apply as regards the changing conditions and any emerging consensus discernible within the domestic legal order of the respondent Contracting State» (ECtHR, Judgment of 28 May 2002, App No 46295/99, *Stafford* v *the United Kingdom,* para 68). By contrast, in *Tyrer* internal consensus was challenged by the Court, which stated: «[t]he Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island. However, even assuming that local public opinion can have an incidence on the interpretation of the concept of "degrading punishment" appearing in Article 3 (art. 3), the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves» (*Tyrer…*, *cit.*, para 31).

[91] For example, in the *L and V v. Austria* ruling, the Court referred to the «recent research according to which sexual orientation is usually established before puberty in both boys and girls and to the fact that the majority of

The accommodative nature of the instrument in question is reflected in its optional identification, too: sometimes it can be equated with a clear and long-established trend among Member States (or internationally), other times with a tendency that is only emerging and not yet stabilised (so called emerging consensus).[92] Not to mention the fact that, on some occasions, the Court even digresses from its findings and decides otherwise. Some authors have drawn attention to the elusive extent of application of those operational rules dictated by the Court, as well as to the patent uncertainty and lack of clarity in the judge's *modus operandi*. These criticisms[93] should not be underestimated, but they can be overcome – or at least

member States of the Council of Europe have recognised equal ages of consent, […]» (ECtHR, Judgment of 9 January 2003, App Nos 39392/98 and 39829/98, *L and V* v *Austria,* para 47). Another relevant example is the case-law related to transsexualism, where the Strasbourg judge noted «in the light of the relevant studies carried out and work done by experts in this field, that there still remains some uncertainty as to the essential nature of transsexualism and that the legitimacy of surgical intervention in such cases is sometimes questioned. The legal situations which result are moreover extremely complex: […]» (ECtHR, Judgment of 25 March 2002, App No 13343/87, *B* v *France*, para 48). It also observed that «…the state of medical science or scientific knowledge [does not provide] any determining argument as regards the legal recognition of transsexuals» (*Christine Goodwin*…, *cit.,* para 83).

[92] For example, the Court noted «an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there [was] not yet a majority of States providing for legal recognition of same-sex couples» (ECtHR, Judgment of 24 June 2010, App No 30141/04, *Schalk and Kopf* v *Austria*, para 105).

[93] From a substantial point of view, it was claimed that the mechanism of consensus would be at odds with the Convention's fundamental purpose of the protection of human rights and fundamental freedoms. (REGAN D., *European Consensus: A Worthy Endeavour for the European Court of Human Rights*, in 51 Trinity C.L. Rev. 14, 2011, 66 ff; In the opposite direction, Paolo Carozza maintained that comparative interpretation stretches universal framework of the human rights safeguard (CAROZZA P. G., *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, in 73 Notre Dame L. Rev. 1217, 1998, 1235-1236). Another issue underlined concerns the retard of the normative development of human rights determined by the ongoing lack of a certain degree of agreement at the detriment of individuals' claim falling outside of the consensus on a particular issue (REGAN D., *op. cit.*, 52 ff). Another concern raised is that the consensus argument would turn into an instrument of retrogression which could reverse progress as it appears to favour the status quo over progress, running the risk of letting States guide the development of a common legal order, of letting their lowest common denominator prevail, on the sole condition that one can be found, without examining the reasons for the consensus, which may relate to conformism, egoism or greed on the part of States (WILDHABER L., HJARTARSON A., DONNELLY S., *No consensus on consensus? The practice of the European Court of Human Rights, in* 33 Human Rights Law Journal, 2013, 251). But one of the main fears voiced by some scholars is related to the so called "anti-majoritarian argument", that is to say the argument that, given the anti-majoritarian nature of human rights, appeals to the view shared by the majority of European countries would appear to be problematic (KAPOTAS P., VASSIL P., TZEVELEKOS P., *op. cit.*, 132–133, 252–255, 329-330, 293-310). One can argue, for example, that countries are ruled by political majorities that serve the interests of some parts of society at the expense of the rights of minorities. Nevertheless, scholars who analysed the actual application of emerging consensus by the ECHR suggest that this doctrine is in fact often used to protect minorities. In particular, it was stressed out that the Court sometimes used emerging consensus to justify intervention and enforcement of higher standards of minority protection; moreover, when the European consensus violates the rights of minorities, the ECtHR will often use its discretion and decide not to follow emerging consensus. (SHAI D., *op. cit.,* 402 ff). Finally, legal scholarship has underlined some procedural frailties inherent to the consensus-based activity: among others, the lack of procedural transparency was pointed out, especially stressing the consequent inconsistency and uncertainty about the methodology used by the Court. For instance, in the case of *Rasmussen v. Denmark* the Court stated that «[e]xamination of the Contracting States'

mitigated – bearing in mind the very nature of consensus as it is, namely a supportive instrument at the disposal of the Court with no necessarily decisive or determinative character: Strasbourg judges might in fact rely their legal reasoning upon it or, alternatively, may favour another tool which better suits their own policy.

Moreover, since the Convention does not provide for the general regulation of the tool in question, the adoption of one type of consensus rather than another can be conditioned by a preliminary choices of value in light of which elaborating strategic definitions aimed at answering problems surrounding the Court.

Although it could be argued that the picture is not entirely free of inconsistencies, these are not sufficient to deny the legitimising nature of consent. If anything, they concern a misuse that sometimes characterises the jurisprudence of the European Court, but one can hardly say that the issue of comparative procedure is an irrelevant idea in the current discourse on human rights. Such a hypothesis would be immediately contradicted by the recent so-called Interlaken political process which, as will be explored in the next Chapter, insists on a strengthened role of States within the conventional system. From this point of view, their consent does not appear to be a marginal issue at all; on the contrary, it is capable of guiding the Court's choices and reinforces the constitutional idea of the conventional system as a «shared enterprise»[94] among a plurality of agents.[95]

It is evident though that the lack of clarity concerning the relevant methodology to detect consent can and should be counterbalanced by a solid justification of the tool as such. In particular, as for the reference to international sources, it can definitely be argued that the consideration of the international trend certainly contributes to the coherence of human rights matters beyond the European legal context. As a matter of fact, it enables to "systematically

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legislation regarding paternity proceedings shows that there is no such common ground and that in most of them [emphasis added] the position of the mother and that of the husband are regulated in different ways» (ECtHR, Judgement of 28 November 1984, App No 8777/79, *Rasmussen* v *Denmark*, para 41). In using the expression "in most of them" the Court failed to clarify the precise number of domestic legal system it took into consideration. Not differently, in *Dudgeon v. the United Kingdom*, the Strasbourg judge wrote that «[a]s compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the *great majority* of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States […]» (ECtHR, Judgment of 22 October 1981, App No 7525/76, *Dudgeon* v *the United Kingdom*, para 60). Although, no clear indication on what "great majority" meant was specified.

[94] FOLLESDAL A., *op. cit.,* 12.

[95] However, while the consensual approach of the European Court of Human Rights can prevent political backlash, it is equally true that this effect takes place in the context of cases involving real individuals, who see their expectation of protection frustrated.

integrate" the conventional rules into the wider context, where the relevant international law norms prove more useful to the case, even at the cost of the consistency of its own jurisprudence.[96]

With regard to the role of consensus based on Member States' choices in human rights matters, the basic assumption here can be defined as follows: if a large number of independent actors have opted for the same legal practice or policy, the latter is probably the best solution to ensure true symmetry with current European values;[97] under this perspective, consensus operates so as to harmonise rather than to set pan-European standards that are binding under its jurisdiction.[98]

In other terms, following the idea that consensus is meant to represent a «signpost for a path» chosen by the larger group of States leading to «the better, best or even correct way for other[s]»[99], such instrument becomes an important tool in the hands of the Court to engage in a fruitful dialogue with national States, *i.e.* by which to persuade its interlocutors that it is merely reflecting those changes taking place in Europe and is not dictating *how* Europe should change, leaving this latter task to internal democratic decision-making processes;[100] in a nutshell, to convince them that a given meaning ascribed through evolutionary exegesis is the *correct* one without, however, challenging the Court's subsidiarity in addressing new questions (or addressing old questions in a new way).

After all, the respect (and the development) of those Fundamental Freedoms referred to by the Preamble can be best maintained only «by a *common understanding and observance* of the Human Rights upon which they depend» by «the governments of European countries which are *like-minded* and have a *common* heritage of political traditions, ideals, freedom and the rule of law»: it follows the idea that Member States' common heritage of political traditions and ideals lay the foundation for the entire international architecture of human rights protection and represents its source of legitimacy.[101]

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[96] VILJANEN J., *op. cit.,* 251 ff. FOLLESDAL A., *op. cit.*, 5, 8.

[97] BASSOK O., *op. cit.*, 11 ff.

[98] DZEHTSIAROU K., *Does Consensus Matter? ..., op. cit.*, 6.

[99] FOLLESDAL A., *op. cit.,* 2.

[100] BASSOK O., *op. cit.,* 7 ff.

[101] European consensus has at its heart a strong emphasis on commonality between States, thereby reflecting the traditional approach of international law. European consensus is the mechanism used to assess post-drafting consent, which avoids burdensome international negotiations over new Protocols. Therefore, it can be argued that European consensus provides the ECtHR with the evidence that the Contracting Parties have accepted a particular rule in their own law and practice (DZEHTSIAROU K., *European Consensus and the Evolutive Interpretation*…, *op. cit.,* 1745.

In such a construction, the role of the Strasbourg judge is one of subsidiary character, lacking the ability (but, even before that of the function) to empower the «best possible human rights policy» within domestic legal systems.[102] More correctly, this may be eventually the consequent effect, but it must bear in mind that an "effect" is something rather different to the "function" pursued. Under this perspective, further developments of the Convention are made dependent on the evolution of those «primary mechanisms of implementation and realisation of the human rights standards», that is to say national rules and policies.[103] Hence, where the Court perceives a certain agreement between the Member States on a certain topic of interest for the interpretation of the Convention, it feels entitled to bring the development of the rules into line with this legal-factual situation; on the contrary, the absence of common tendencies supports the Court's refusal to recognise the new claim.[104]

In conclusion, the Court tends not to act as opposed to the traditions and experiences of States in interpreting the Convention on the ground that, when embodying the view adopted at the national level by taking it as common ground to be abide by, the States that are part of the consensus can be seen as giving their updated consent to a particular exegetical choice, thus legitimising the judgement in question.[105] In this sense, comparative reference plays a significant role in legitimising the Strasbourg activity.

As a matter of fact, since the interpretative exercise is anchored to such «external and verifiable»[106] factors as normative choices of democratic bodies (either within national legal systems or at the international level), it creates a degree of foreseeability about evolution in the Court's case-law, thus avoiding confrontation and backlash.[107] Moreover, as repeatedly stated, it acts as a curb on the power – or the possible excesses of power – of the Court: while

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[102] KAPOTAS P. & TZEVELEKOS V., *op. cit.,* 50.

[103] Domestic law and politics are considered to be the primary mechanisms of implementation and realisation of the human rights standards of the Convention, while international supervision only comes into play at a secondary level. Since virtually all of the details of actual implementation of the Convention norms will thus be effected through national legal systems, the only way to adequately assess the compliance of any one domestic order is by reference to other domestic legal systems (CAROZZA P. G., *op. cit.,* 1226-1227).

[104] *Ibid.,* 1225-1226.

[105] BASSOK O., *op. cit.,* 12; As wrote by Regan: «The Convention is a regional system drafted in light of the common traditions of the European states that founded it and is best described as a relativist system within the international order. Thus, there is less leverage for the Court to take a relativist position within the system, as the rights enshrined in the Convention are already relative to the common culture of the Member States of the Council of Europe. They are rights that have been accepted as morally valid by the Member States» (REGAN D., *op. cit.*, 69).

[106] DZEHTSIAROU K., *European Consensus and the Evolutive Interpretation …, op. cit.,* 1744.

[107] In this concern, Dzehtsiarou argues the consensus possesses legitimising potential and, even more specifically, that its persuasive character derives from the fact it is based on the decisions that are made by democratically elected bodies. (DZEHTSIAROU K., *Does Consensus Matter? ...*, *op. cit.*, 11).

the mandate to safeguard individual guarantees requires the Convention to evolve in the light of current conditions, consensus makes it possible to reconcile «the maintenance and further realisation» of the ECHR guarantees with the original consensus around which states converged at the time of the ratification of the international treaty; it in fact shows that they agree on the evolution of standards of protection or, in short, that «dynamic interpretation is necessary»[108] as reflected in the common positions of national actors.[109]

3.2. The consensus put in action

By way of evaluation of the comparative study of the developments in Member States, it is interesting to illustrate some exemplary cases which show its operationalisation in the context of the Court's judicial policy: case-law shows that if there is a consensus against the conduct of the Respondent State in the case before the Court, the latter normally tends to rely on it to compel the former to bring its conduct in line with the required standard. Conversely, the absence of consensus acts as an obstacle to the imposition of a higher standard of protection, limiting the Court's power.

This does not mean that the ECtHR would necessarily embrace the solution the consensus argument seems to suggest. Dangerous automatisms must be avoided, bearing in mind that there is no direct consecutiveness between consensus and evolutionary interpretation, *i.e.* there is no automatism in the conclusions to be drawn from the comparative exercise.[110] Indeed, the element of consent is not the only reason for a ruling, as it intersects or even clashes with other variables that the Court takes into account in its hermeneutic activity and which may play a decisive role on the final decision.[111]

It is nevertheless true that the instrument of consensus can play a pivotal role for legitimising the conclusions reached in cases submitted for analysis. The number of judgments that could be cited in support of such a role is indeed high. Here are just a few of these rulings,

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[108] DZEHTSIAROU K., *European Consensus and the Evolutive Interpretation…, cit.,* 1743.

[109] HELGESEN J.E., *cit.,* 2.

[110] As demonstrated, among others by: *A, B, C v Ireland*, *cit*., para 234; ECtHR, Judgment of 9 September 2009, App No 33401/02, *Opuz* v *Turkey*, para 164. On the issue see also: MAHONEY P., *The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law*, in Comparative Law Before the Courts, 2004; SENDEN H., *Interpretation of Fundamental Rights in a Multilevel Legal System. An Analysis of the EurCourtHR and the CJEU*, Cambridge 2011.

[111] WILDHABER L., HJARTARSON A., DONNELLY S., *op. cit.,* 250.

which concern the areas in which the Court has most frequently found an infringement against a State on the basis of the existence of a consensus at European level.

The first case to be examined is *Fabris v. France*,[112] which originated from the complaint of the applicant alleging a difference of treatment regarding inheritance of his mother's estate, based on his preclusion from obtaining an abatement of the *inter vivos* division and a reserved portion on grounds of his status as a child "born of adultery", in breach of the principle of non-discrimination proclaimed by Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No 1.[113]

As a starting point, the Court took the occasion to underling the link existing between the search for "common standards" and its evolutive interpretation, by reiterating that «[s]ince the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved»[114]. On this premise, the Grand Chamber observed that «common ground between the member States of the Council of Europe regarding the importance of equal treatment of children born within and children born outside marriage has been established for a long time, which has, moreover, led to a uniform approach […] by the national legislatures on the subject […] and to social and legal *developments* [emphasis added] definitively endorsing the objective of achieving equality between children»[115].

It appears very clearly that the tool of the consensus does not translate into a passive adherence of the ECtHR to the will of the majority: more correctly, the Strasbourg Court shows to take into account the shared practice of the majority on the issue related to the principle of equality and the elimination of the concepts of "legitimate children" and "children born outside marriage" insomuch as evolutionary interpretation comes into play, *i.e.* when an "extension" of the original scope or meaning of the Convention's provisions is pursued. In line with the enhanced standard of protection, the Court expressly required the respondent

[112] ECtHR, Judgement 7 February 2013, App No 16574/08, *Fabris* v *France*.

[113] Article 1 of Protocol No 1 reads as follow: « "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties».

[114] *Fabris*…, *cit.*, para 56.

[115] *Ibid.,* para 58.

State to put forward very weighty reasons to uphold the compatibility of a distinction on grounds of birth outside marriage with the Convention.[116]

Other two clarifying examples of the function of consent are two judgments of the early 2000s, that is *Unal Tekeli v. Turkey*[117] and *M.C. v. Bulgaria*[118].

In the first case, the impugned situation allegedly amounted to a difference of treatment on grounds of sex in contrast with Article 8, read alone and in conjunction with Article 14, resulting from the applicant's inability to use both her maiden name and her legal surname on official documents after her marriage. In its reasoning, he Court largely relies on the consensus: on an international level, it highlighted the developments in the United Nations towards recognition of the right of each married partner to keep his or her own surname or to have an equal say in the choice of new family name; moreover, the Court noted the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing, while Turkey represented the only country legally imposing the husband's name as the couple's surname and thus the automatic loss of the woman's own surname on her marriage.[119]

As regards the question of whether family unity had to be reflected by a joint family name and whether, in the event of disagreement, one partner's surname could be imposed on the other, the Court observed that the current systems applicable in Europe supported the finding according to which it was perfectly conceivable that family unity would be preserved and consolidated where a married couple chooses not to bear a joint family name.[120]

The second case aforementioned arose from the application of a Bulgarian national, who alleged to have been raped by two man, although the ensuing investigation had come to the conclusion that there was insufficient evidence that the woman had been forced to have sexual intercourse due to the lack of physical resistance. In her view, a legal framework and practice that required such a proof by the victim, and thus left unpunished certain acts of rape, were inadequate under Articles 3 and 8 of the Convention.

Once again the Court abundantly took stance of the commonality of conception of the elements defining the crime of rape. For instances, it observed a «clear and steady trend in Europe and some other parts of the word towards abandoning formalistic definitions and

[116] *Ibid.*., para 59.
[117] ECtHR, Judgment of 16 November 2004, App No 29865/96, *Unal Tekeli* v *Turkey*.
[118] ECtHR, Judgment of 4 December 2003, App No 39272/98, *M.C.* v *Bulgaria*.
[119] *Unal…*, *cit.,* paras 60-61.
[120] *Ibid.,* para 66.

narrow interpretation of the law» applicable in rape cases; accordingly, it noted, the «requirement that the victim must resist physically is no longer present in the status of European countries» and that «lack of consent, not force, is seen as the constituent element of the offence of rape». The Court also noted that the Member States of the Council of Europe, through the Committee of Ministers, have agreed that penalising non-consensual sexual acts, including in cases where the victim does not show signs of resistance, is necessary for the effective protection of women against violence and have urged the implementation of further reforms in this area.[121]

In the light of the contemporary standards and trends within domestic legal systems, the Court was persuaded that any rigid approach to the prosecution of the crime at issue was not in line with the evolution of societies towards effective quality and respect for each individual's sexual autonomy; accordingly, it clarified the current content of the member States' positive obligations as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

Case presentation completed, it can be seen that in both circumstances consensus was deployed as a justifying factor in the hands of the Court to rise the standard of protection in fields of area – family law and criminal law – which are jealously claimed by the State. As a matter of fact, by anchoring those changes progressively incorporated in the Convention's *acquis* to the existence of certain uniformity in the States' policies, consensus becomes the threshold beyond which judicial innovation is acceptable:[122] it allows the Court to interfere in domestic matters (like the definition of a offence or the regulation of family name) in order to establish further standards of protection uniformly applicable, without being arbitrary. From this point of view, consensus operate as a checking factor to restrain the discretion of the Court, on the grounds that its dynamic interpretation is reflected by trends shared by European countries.

4. The margin of appreciation as a room for discretion

"Diversity" and "flexibility" are the two pillars around which the Strasbourg Court builds and conducts its interpretative activity. In particular, "flexibility" refers to the balancing

[121] *M.C.*…, *cit.,* paras 156-162.
[122] FOLLESDAL A., *op. cit.,* 3.

operation inherent in the Court's judicial policy, which is characterised by a dual dimension: on the one hand, the Court's hermeneutic exercise is to be adapted on a case-by-case basis to a variety of competing interests at stake, *inter alia*, the effectiveness of individuals' rights and the creation of further standards of protection in line with the "present-day conditions", but also self-legitimation and avoidance of domestic backlash.

On the other hand, the entire conventional system is deep-rooted on the principle of subsidiarity requiring a clear distribution of responsibilities among different levels of competence in order to translate abstract rights and freedoms into a practical and effective reality: this may entail the need to give sufficient relevance to States, and, at the same time, to ensure that their actions are in any case in accordance with the ECHR's rules. In such a picture, national actors must be granted a certain latitude of discretion to choose the measure which they consider the most appropriate in those matters which are governed by the Convention depending on peculiar legal and factual features characterising domestic systems.[123]

"Diversity", on the other hand, pertains to «the rampant values-pluralism and variations in natural and social conditions across States» underlying a multiplicity of different systems of interpreting and promoting human rights and fundamental freedoms.[124] Due consideration of such a pluralistic *milieu* where the Court finds itself to operate gives rise to the need for granting Member States a leeway to implement their obligations under the Convention in line with their historical, legal and constitutional traditions while remaining immune to the international body's full scrutiny under Article 19.[125]

In fact, this latter is not part of a single domestic system but, on the contrary, exercises its supervision over the respect of a «coherent body of human rights rules» applying indiscriminately in a large number of States, each characterised by its own legal and constitutional order.[126] Consequently, the "living instrument" principle shall only lead to the accomplishment as well as the preservation of a certain degree of unification of domestic mechanisms of human rights protection, not being able under any circumstances to aim for a complete standardisation of the pluralistic European context.[127]

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[123] GERARDS J., *Pluralism, Deference and the Margin of Appreciation Doctrine*, in 17 European Law Journal 1, 2011, 104.

[124] FOLLESDAL A., *Appreciating the Margin of Appreciation*, in Human Rights: Moral or Political? Adam Etinson, ed. Oxford University Press, 2017, Available at SSRN: https://ssrn.com/abstract=2957070, 1-2.

[125] MUHAMMAD N., *A Comparative Approach to Margin of Appreciation in International Law*, in 7 The Chinese Journal of Comparative Law 1, 2019, https://doi.org/10.1093/cjcl/cxz008, 212.

[126] LETSAS G., *op. cit.*, 23.

[127] DUBOUT E., *op. cit.*, 414.

Respect for pluralism thus operates as a further constraint on the evolutionary approach in the sense that by virtue of the latter national legal systems can only be harmonised and not standardised around common standards set forth by the Convention.[128.]

Such a concept was illustrated, for instance, in the *Sunday Times* case, where the Court held that «the main purpose of the Convention is "to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction". This does not mean that absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws».[129]

On the one hand, the Court establishes fundamental international "parameters" binding for domestic legal systems, and it can even further innovate them consistently with the constantly changing normative environment of the Convention.[130] On the other hand, it cannot impose a unique jurisdictional paradigm such as to eradicate those national measures that are not in line with them.

The judicial translation of the two characteristics described above is the well-known margin of appreciation, which operates both as an instrument of adjudication and of interpretation: with it, the Court demonstrates its endorsement of the principle of subsidiarity by showing to take into due account of the contextual considerations suggesting the desirability for an international body to exercise self-restraint as well as to recognise a certain degree of discretion on the part of States in the implementation of their international commitments.[131]

The margin thus allows the Court to defer to diverging national fundamental rights standards when it comes to the concrete realisation of ECHR rights and freedoms at domestic level and the obedience to national fundamental interests or to constitutional values requires the introduction of some sorts of restrictions or limitations.[132]

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[128] L'office du juge – Sénat, *Des techniques d'interprétation*…, *cit.*

[129] ECtHR, Judgment of 26 April 1979, App No 6538/74, *Sunday Times* v *the United Kingdom*, para 61.

[130] LETSAS G., *op. cit.*, 1.

[131] «In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State's margin of appreciation; the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint» (Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka, attached to the ECtHR, Judgement of 8 July 1999, App No 23168/94, *Karatas* v *Turkey*).

[132] GERARDS J., in CLAES M., DE VISSER M. (ed. by), *Constructing European Constitutional Law,* 2014, 6,19.

Contextually, the margin afforded to States introduce a certain «normative flexibility»[133] permitting different interpretations depending on national circumstances and conditions:[134] this creates a room of "lawfulness", where a spectrum of varying outcomes can exist without there being any violation of the Convention.[135] The power of the appreciation does not entail any «reserved domain»[136] that can be unrestrictedly exploited by national authorities, though; on the contrary, and by express jurisprudential recognition, it «goes hand in hand with a European supervision»[137] prodromal to the control of the maintenance of State action within an "acceptable" margin of appreciation.[138] Scrutiny of the appropriateness, necessity and reasonableness of the challenged domestic measure thus aims at ascertaining whether its adoption complies with the requirements embodied in the ECHR norms as well as its good faith.[139]

Therefore, if the contact with the local peculiarities existing at the domestic level enables the national authorities to assess the circumstances in which any restrictions on the Convention freedoms are permissible, it is incumbent on the Court to review the manner in which that assessment is made, thus ultimately ensuring the primacy and integrity of the content of the Convention.[140]

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133 ODDNY MJOLL A., *Rethinking the Two Margins of Appreciation*, in 12 EuConst, 2016, Available at SSRN: https://ssrn.com/abstract=2781604, 37.

134 This is particularly true when the Convention wording is not univocal or the obligations flowing from it don't have a shared definition. For instance, the Court held that «[t]he boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation» (ECtHR, Judgment of 13 February 2003, App No 42326/98, *Odièvre* v *France*, para 40).

135 L'Office du juge – Sénat, *Des techniques d'interprétation…, cit.* Macdonald puts it in these words: to «avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention» (MACDONALD R. St J., *The Margin of Appreciation*, in MACDONALD R. St J, MATSCHER F., PETZOLD H. (ed. by), *The European System for the Protection of Human Rights*, The Hague 1993, 123).

136 SPIELMANN D., *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*?, in 14 Cambridge Yearbook of European Legal Studies, 2012, doi:10.5235/152888712805580570, 417.

137 *Handyside*…, *cit.,* para 49.

138 ECtHR, Judgment of 27 August 2015, App No 46470/11, *Parrillo* v *Italy*, para 197. See also: CALLEWAERT J., *Quel avenir pour la marge d'appreciation?,* in MAHONEY P., MATSCHER F., WILDHABER L. (ed. by), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal*, Berlin 2000, 149.

139 *Sunday Times*…, *cit.,* para 59 reads as follow: «This does not mean that the Court's supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention».

140 VOICULESCU N., BERNA M.B., *Theoretical difficulties and limits of the margin of appreciation of States in European Court of human rights case-law*, in 8 Law Annals Titu Maiorescu U., 2018, 24.

Not surprisingly, the margin of appreciation has been defined to be the «primary tool of the Court' in the application of the European Convention on Human Rights»[141]: the subjects of its application as well as its jurisprudential development,[142] have been abundantly discussed by the most authoritative legal scholarship, not always with concordant results, and raising more than one criticism [143]. Insofar as it is of interest here, the following pages will focus on the nature of the interconnections existing between the margin and the rest of the interpretative arsenal the Strasbourg Court uses in its exegetical task. To this end, it is first necessary to be clear about the rationales behind the doctrine itself. Secondly, it is appropriate to give a brief overview of the mechanism in action: in particular, it will be argued that, when applied, the margin of appreciation introduces a (rebuttable) presumption in favour of the consonance and the domestic act under the Court's scrutiny.[144] It will be also shown how the width of the power of discretion granted may vary depending on a number of different factors. These considerations may in fact aid at answering the question of whether or not the margin can be considered a useful tool to accommodate institutional needs and prerogatives within the judicial policy of reference.

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[141] MUHAMMAD N., *op. cit.*, 215.

[142] As for the origin of the margin of appreciation, it can be traced back to the French administrative concept of "marge appreciation and to the German mechanism of "Beurteilungsspielraum", which refer to a method of deference to administrative bodies taken in conjunction with that of reviewing the legality of administrative actions taken in the exercise of discretionary powers. For an historical analysis of the margin of appreciation see among others: BORN G., MORRIS D., FORREST S., *"A Margin of Appreciation": Appreciating Its Irrelevance in International Law*, in 61 Harvard International Law Journal 1, 2020; SHANY Y., *All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee*, in 9 Journal of International Dispute Settlement 2, 2018, doi:https://doi.org/10.1093/jnlids/idx01; ANRO I., *Il margine di apprezzamento nella giurisprudenza della Corte di giustizia dell'Unione europea e della Corte europea dei diritti dell'uomo*, in ODENNINO A., RUOZZI E., VITERBO A. (ed. by). *La funzione giurisdizionale nell'ordinamento internazionale e nell'ordinamento comunitario: atti dell'Incontro di studio tra i giovani cultori delle materie internazionalistiche*, Napoli 2010.

[143] Legal scholarship is almost unanimous in recognising that the application of the margin of appreciation has been demonstrated to be erratic, unpredictable, and inconsistent in the ECtHR case-law, thus underpinning non-uniform or relativist applications of the Convention and allowing States to elude or sidestep their international obligations (see, e.g.: BENVENISTI M., *Margin of Appreciation, Consensus and Universal Values*, in 31 New York University Journal of International Law and Politics,1999; BESSELINK L.F., *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union,* in 35 Common Market Law Review 3,1998; MAHONEY P., *Marvellous Richness of Diversity or Invidious Cultural Relativism?,* in 19 Human Rights Law Journal 1, 1998. As for its nature, some authors converge on the nature of the margin as a proper doctrine, while others disagree. For instance, Greer argues that it is questionable if it is really a "doctrine" at all since it could be said to lack the minimum theoretical specificity and coherence which a viable legal doctrine requires. (GREER S., *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, 2000). Similarly, Paul argued that the margin of appreciation was used more as a "flexible tool" than on a principled basis and that it lacked any coherence or comprehensiveness typical of a doctrine (PAUL S., *Governing from the Margins: The European Court of Human Rights' Margin of Appreciation Doctrine as a Tool of Global Governance*, in 12 Croatian Yearbook of European Law & Policy 1, 2016).

[144] BORN G., MORRIS D., FORREST S., *op. cit.*, 79, 108.

4.1. The rationales behind the tool

Given the multi-faceted nature of the margin of appreciation, several arguments can be put forward to explain its functions in the context of the European Court's judicial policy.

As an instrument of adjudication, the margin of appreciation refers first and foremost to the systemic co-operation between different levels of competence within the scheme of the Convention, postulating a «division of labour»[145] based on the underlying (rebuttable) presumption that local actors are better suited to perform the task than the international one, unless proven otherwise:[146] the Member States would have all the interest to ensure effective protection to ECHR rights in order to avoid the scrutiny by the Court, while the latter would activate the entire international architecture only where the former are not able or willing to abide by their international undertakings.

In this regard, the new recital of Preamble added by Protocol No 15[147] consecrated a well settled case-law which, starting with a series of rulings in the 1970s, had already connected the margin of appreciation to the principle of subsidiary as being «the very basis of the Convention».[148] In accordance with the «subsidiary nature of the international machinery of

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[145] SHANY Y., *Toward a General Margin of Appreciation Doctrine in International Law?*, in 16 European Journal of International Law 5, 2005, doi:https://doi.org/10.1093/ejil/chi149, 922.

[146] ARNADOTTIR O. M, *Rethinking the Two Margins of Appreciation*, in BRIBOSA E., RORIRE I. (ed. by) *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation*, Brussels 2018, 39.

[147] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (entry into force: 1 August 2021).

[148] ECtHR, Judgement of 15 March 2012, App Nos 39692/09 and Others, *Austin and Others* v *the United Kingdom*, para. 61. Prior to the entry into force of Protocol 15, the legal scholarship has tried to formulate a textual reference to the principle of subsidiarity. In particular, it was derived from the conjunction interpretation of articles 1, 13, 41 and 53 of the Convention. It follows from Article 1 (according to which «[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention») that States have international responsibility for the rights and freedoms guaranteed by Title II of the Convention. In other words, if the High Contracting Parties recognise the rights and freedoms protected by the Convention for every person within their jurisdiction and if the violation of these rights and freedoms occurs due to the national legislature, State responsibility will apply. Article 13 reads: «[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity». It follows that, in the event of a violation of the rights and freedoms provided for in the Convention, the first competent authorities are those located at national level; the individual must therefore be recognised as having a subjective procedural right to an effective remedy before a national authority: only in the event that the victim's requests are denied domestically – therefore in a subsidiary manner – and once domestic remedies have been exhausted (Article 35), does the victim have the possibility of turning to the European Court which will examine the alleged violation of the right protected by the Convention. Pursuant to Article 41, «If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party

collective enforcement established» by the ECHR,[149] the new amendment expressly recognised States' primary responsibility to secure the rights and freedoms defined therein and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court, whose task of ensuring compliance with their international obligations is only of a secondary nature.

In this way, States are clearly entrusted with the task that the Court had already acknowledged to them in its judgments: that of decentralised application of the Convention, subject to compliance with the Convention's minimum standard,[150] based on the grounds of their direct and continuous contact with the vital forces of their countries, which places them in a "better position" than an international body[151] to assess the necessity and appropriateness of a given measure related to national interests and constitutional values.[152]

In this sense, the margin of appreciation pursues a constitutional function, namely that of managing *institutional pluralism*,[153] by embodying the criterion through which «multi-layered regimes allocate the exercise of powers between overlapping levels of government» and «temporise the tensions that exist between the demands of the lower [level of authority] for self-rule and identity and the pressure of the higher-tier jurisdiction toward shared-rule and equality».[154]

Not only. The margin of appreciation allows for *interpretative pluralism*, giving relevance to the contextual variables– national practices and traditions, constitutional values and principles,

concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party»; the application of Article 41 is subsidiary in nature, in that the Court cannot grant equitable satisfaction by means of the mere violation of a right enshrined in the Convention or its Additional Protocols: its application is indeed subject to the concurrence of two prerequisites, namely the absence under domestic law of full reparation for the harmful consequences of the violation, in the first place, and its necessity, in the second. Lastly, Article 53 states that «[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party». It thus appears that the conventional standards express the minimum level of guarantees that must be respected in the field of human rights protection so that national actions would not become abusive, without this preventing domestic systems from providing a higher level of protection or additional guarantees not provided for in the Convention.

149 *Case "relating to certain aspects*…, *cit.,* para 10.

150 SUDRE F., *Droit européen et international des droits de l'homme*, 2021, 188-189.

151 *Handyside, cit*., para 48. See also: ECtHR, Judgement of 1 July 2014, App No 43835/11, *S.A.S.* v *France*, para 129; Judgement of 21 June 2006, App No 1513/03, *Draon* v *France*, para 106–08; Judgement of 36 May 1983, App Nos 14553/89 and 14554/89, *Brannigan and McBride* v *the United Kingdom*, para 43; Judgement of 18 January 1978, App No 5310/71, *Ireland* v *United Kingdom*, para 207.

152 GERARDS J., *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, in 18 Human Rights Law Review 3, 2018, doi:https://doi.org/10.1093/hrlr/ngy017, 498.

153 FABBRINI F., *The Margin of Appreciation and the Principle of Subsidiarity*, in ANDENAS M., BJORGE E.M BIANCO G. (ed. by), *A Future for the Margin of Appreciation?*, 15 iCourts Working Paper Series, 2015 Available at SSRN: https://ssrn.com/abstract=2552542, 8.

154 *Ibid*., 6.

local needs, etc. – which domestic authorities have a closer acquaintance of in order to make complex socio-political assessments or to adopt the most appropriate course of action to achieve the most desirable balance between individuals' rights and collective interests.[155]

Besides, the value of pluralism associated with the idea that there may exist different – but equally valid – ways of implementing the same conventional guarantees is enhanced by the deference shown to national self-determination and self-governance, the respect of which is pushed forward by the argument of domestic authorities' direct democratic legitimacy.[156] As a matter of fact, the European Court recognises that it has a more limited decision-making capacity than its national collaborators; this reduces – or at least weakens – the legitimacy of its decisions when the very actors called upon to implement them believe that they contain the setting of unrealistic legal standards.[157]

Hence, in such cases as those involving divisive sensitive issues,[158] or complicate technical and specialist expertise,[159] or where peculiar local circumstances may justify certain restrictions to individuals' rights and freedoms,[160] the Strasbourg judge normally pays deference to national view, hence renouncing an evolutionary interpretation of the Court that may imply the establishment of a uniform binding standard of protection for all Member States.

Even then, the supervision of the Court is not entirely annihilated for the very simple reason that States Parties to the Convention have voluntarily consented to subject themselves to the Court's scrutiny with no exceptions contemplated whatsoever.[161] Moreover, as will be investigated later on, any latitude of appreciation recognised remains strictly dependent on the inherent characteristics of internal decision-making processes.[162] It is worth mentioning from the outset that only inclusive, transparent and impartial processes in domestic institutions can

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[155] GERARDS J., *Pluralism, deference…, op. cit.,* 110. See also: ECtHR, Judgment of 19 December 1989, App Nos 10522/83, 11011/84, 11070/84, *Mellacher and Others* v *Austria*, para 45; Judgment of 25 September 1996, App No 20348/92, *Buckley* v *the United Kingdom*, para 74; Judgment of 27 May 2004, App No 66746/01, *Connors* v *the United Kingdom*, para 82; Judgment of 30 June 2005, App Nos 46720/01, 72203/01, 72552/01, *Jahn and Others* v *Germany*, para 91; Judgment of 29 April 2006, Appl. No 13378/05, *Burden* v *the United Kingdom*, para 60; Judgment of 7 July 2011, App No 37452/02, *Stummer* v *Austria*, para 89.

[156] ARNADOTTIR O., *op. cit.,* 39.

[157] SHANY Y., *Toward a General Margin…*, *op. cit.*, 911.

[158] ECtHR, Judgment of 22 April 1997, App No 21830/93, *X, Y and Z* v *the United Kingdom*, para 44; Judgment of 26 May 2002, App No 36515/97, *Fretté* v *France,* para 41; Judgment of 17 January 2006, App No 61564/00, *Elli Poluhas Dödsbo* v *Sweden,* para 25; Judgment of 10 January 2008, App No 35991/04, *Kearns* v *France*, para 74.

[159] ECtHR, Judgment of 27 August 1997, App No 20022/92, *Anne-Marie Andersson* v *Sweden*, para 36.

[160] ECtHR, Judgment of 20 May 1999, App No 25390/94, *Rekvényi* v *Hungary*, paras 46 and 48; Judgment of 17 March 2007, App No 43278/98, *Velikovi and Others* v *Bulgaria*, paras 179–180.

[161] FOLLESDAL A., *op. cit.,* 10.

[162] ECtHR, Judgment of 22 April 2013, App No 48876/08, *Animal Defenders International* v *the United Kingdom*, para 116; Judgment of 4 December 2007, App No 44362/04, *Dickson* v *the United Kingdom*, para 83.

provide States with room for manoeuvre,[163] being the latter the result of the Court's scrutiny on the quality of the national processes of examination and debate of the human rights standard to ensure,[164] among others: the guarantee of representation of all stakeholders' view must be secured;[165] political debate is expected to reflect and take into due consideration the sensitivity of a given issue;[166] a satisfying balancing exercise in conformity with the *criteria* laid down in the ECtHR' case law should be undertaken between relevant competing individual and public interests.[167]

Accordingly, deference to national authorities is destined to succumb where faults in the democratic rule are proved:[168] as already argued, the tool of the margin of appreciation implies an adjustable conjecture that Member States have the ability and willingness to «secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention»,[169] but in any case the State cannot be considered to be in a better position than the Court to address conflicts flowing from impartiality of any distortions of the majoritarian rule.[170]

4.2. The margin of appreciation in action

4.2.1. Areas of discretion

It has already emerged that the jurisdiction of the Strasbourg Court extends to the definition and interpretation of uniform standards of protection, which may possibly evolve and progress in line with the "present-day conditions". However, the definition of predefined and fixed rules valid for every and each case is impossible if not inappropriate. The margin of appreciation doctrine illustrates exactly the approach of the ECtHR to the delicate task of balancing the vigilance over States' commitment to abide by conventional standards, on the one hand, and the imperative to respect pluralism, on the other one.[171]

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[163] *Odièvre…*, *cit*., para 49; *Animal Defenders..., cit*., para 108.

[164] TRIPKOVIC B., *A New Philosophy for the Margin of Appreciation and European Consensus*, in 42 Oxford Journal of Legal Studies 1, 2022, doi:https://doi.org/10.1093/ojls/gqab031, 20.

[165] *Evans v the United Kingdom, cit*., para 63.

[166] ECtHR, Judgment of 10 July 2003, App No 44179/98, *Murphy* v *Ireland*, para 73.

[167] *Dickson…, cit*., para 83; Judgment of 20 May 2010, App No 38832/06, *Alajos Kiss* v *Hungary*, para 41.

[168] DOTHAN S., *Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies*, in 9 Journal of International Dispute Settlement 2, 2018, doi:https://doi.org/10.1093/jnlids/idx019, 149-150.

[169] Art. 1 ECHR

[170] VILA M.I., *Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights*, in 15 International Journal of Constitutional Law 2, 2017, doi: https://doi.org/10.1093/icon/mox035, 24.

[171] GERARDS J., *Margin of Appreciation and Incrementalism…*, *op. cit*., 498.

On the judicial level, the consideration of the latter translates into the recognition of certain areas of discretion in relation to which domestic authorities are considered to be better suited than the ECtHR.[172] To better understand the point at issue, some judgments will be examined on the following pages. Due to the considerable case-law that could be cited, it must warn the reader that only a few illustrative cases will be recalled, without any exhaustive intent.

A first area concerns the application of law to the specific factual circumstances of the State; within the margin of appreciation afforded, States are allowed to evaluate whether a concrete set of facts fits in any of the conventional rights and whether any of the limitations contemplated therein can operate in practice: this means that States are deferred to ascertain the proportionality of the measure taken as well as its conformity to a social need.[173]

The Courts itself expressly held that questions concerning the assessment of facts fall in the first place within the province of the domestic authorities, notably the courts of first instance and appeal, since, as a general rule, it is for these courts to evaluate the evidence brought before them,[174] and to apply the domestic law to them.[175] This principle applies as much to domestic legislation, as to private instruments Courts are occasionally called upon to interpret in the light of local legal traditions and conditions. [176] The role of the ECtHR is therefore confined to evaluate the reasonableness, the arbitrariness and the conformity to the Convention of the assessment carried out by the domestic courts. An example will help to better understand.

In the Grand Chamber ruling related to the *Mouvement raëlien suisse v. Switzerland* case,[177] one of the issues to be ruled on brought up the margin of appreciation recognised in favour of Contracting States assessing the *need* for and *extent* of an interference in the freedom of expression protected by Article 10.

The Strasbourg judge's point of departure was the reference to its well-established case-law recognising that the breadth of this margin depends on the *type of speech* at issue: whilst there is little scope for restrictions on political speech, a wider margin of appreciation is

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[172] SHANY Y., *Toward a General Margin* …, *op. cit.*, 919.

[173] KRATOCHVIL J., *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, in 29 Netherlands Quarterly of Human Rights 3, doi:https://doi.org/10.1177/016934411102900304, 2011, 329-330.

[174] See, *inter alia*, ECtHR, Judgment of 17 December 1992, App No 9146/07, *Edwards* v *the United Kingdom*, para 34; Judgment of 28 October 1992, App No 12351/86, *Vidal* v *Belgium*, paras 33-34; Judgment of 21 February 1986, App No 8793/79, *James* v *the United Kingdom*, para 46.

[175] ECtHR, Judgment of 24 October 1979, App No 6301/73, *Winterwerp* v *the Netherlands*, para 46; Judgment of 29 April 2003, App No 56673/00, *Iglesias Gil and AUI* v *Spain*, para 61; Judgment of 9 October 2003, App No 48321/99, *Slivenko* v *Latvia*, para 105.

[176] ECtHR, Judgment of 19 February 1999, App No 26083/94, *Waite and Kennedy* v *Germany*.

[177] ECtHR, Judgment of 13 July 2012, App No 16354/06, *Mouvement raëlien suisse* v *Switzerland*.

generally available in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Similarly, States have a broader space of manoeuvre in the regulation of speech in commercial matters or advertising.

In the case under observation, the Court took the view that the type of speech in question (the applicant association's poster campaign) sought mainly to draw the attention of the public to the ideas and activities of a group with a supposedly religious connotation; in fact, they were trying to convey a message claimed to be transmitted by extra-terrestrials, referring for this purpose to a website address.

Since the management of public billboards in the context of poster campaigns may vary from one State to another, or even from one region to the others, authorities have a certain discretion in examining the question of whether a poster satisfies certain statutory requirements as well as in granting authorisation in this area. Accordingly, the Court concluded that it could not interfere with the choices of the national and local authorities, since they were closer to the realities of their country and that only serious reasons could lead it to substitute its own assessment for that of the national State.[178]

A second area of discretion concerns norm-balancing in law-application, *i.e.* the resolution of those conflicts that may arise between competing individuals' rights or interests. A case which may aid in clarifying is *Leyla Şahin v. Turkey.*[179] In this, the applicant contested the

[178] *Ibid.*, 59-66. See also: ECtHR, Judgment of 13 February 2003, App Nos 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others* v *Turkey*, para 132 («[i]n view of the fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a "pressing social need"»); *Schalk and Kopf*…, *cit.,* para 96; Judgment of 19 February 2009, App No 3455/05, *A* v *the United Kingdom*, para 173 («[b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities […] The Court reiterates that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency»).

[179] ECtHR, Judgment of 10 November 2005, App No 44774/98 *Leyla Şahin* v *Turkey*. On the issue see also: *Dudgeon…, cit.*, para 54 («the Court's task is to determine on the basis of the aforesaid principles whether the reasons purporting to justify the "interference" in question are relevant and sufficient under Article 8 para. 2»); Judgment of 7 February 2012, App No 40660/08, *Von Hannover* v *Germany (No 2)*, paras 106–07; *Lambert*…, *cit.*, para 148; Judgment of 15 October 2015, App No 37553/05, *Kudrevičius* v *Lithuania*, para 169 («[t]he Court further sees no reason to doubt the domestic courts' findings to the effect that the applicants were aware that the moving of the demonstration from the authorised locations onto the highways and the parking of the tractors on the carriageway of the Kaunas-Marijampole-Suvalkai highway would provoke a major disruption to traffic . . . It is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them»); *A, B and C…, cit.*, paras 239–240 («[f]rom the lengthy, complex and sensitive debate in Ireland. . . as regards the content

banning of headscarves issued by the Istanbul University, claiming it had violated, *inter alia*, her freedom of thought, conscience and religion as well as her right to education by denying her to wear the headscarf according to her religious beliefs.

With regard to the right set out in Article 2 of Protocol No. 1, the European Court held that it is not absolute, but may be subject to limitations, permitted by the very nature of the right of access to educational institutions, which necessarily calls for regulation by the State. Admittedly, the regulation of educational institutions may vary in time and in place, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently, the Contracting States enjoy a certain margin of appreciation in this sphere.[180]

Moreover, as far as Article 9 is concerned, the Court reiterated that, while the freedom of thought, conscience and religion is one of the foundations of a pluralistic democratic society, in those where several religions coexist within one same population, it may be necessary to place some sorts of restrictions in order to reconcile the interests of the various groups, so that everyone's belief is respected.

Hence, a *balance* must be achieved which ensures the fair and proper treatment of peoples from religious minorities, and democracy must be based on a spirit of compromise necessarily entailing various concessions on the part of individuals in order to maintain the ideals of pluralism.

In other terms, it must be accepted that the need to protect rights and freedoms guaranteed by the Convention may lead States to restrict other rights of freedoms likewise enshrined in the ECHR. Accordingly, where questions concerning the relationship between State and religions are at stake (e.g. when it comes to regulating the wearing of religious symbols in educational institutions) the Court agrees that the role of the national decision-making body must be given considerable relevance in view of the different approaches which may be taken by national authorities on this issue according to, among others, domestic context and traditions, the requirement imposed by the need to protect the rights and freedoms of others and the need to protect religious pluralism.[181]

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of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons …, the option of lawfully travelling to another State to do so . . . It is with this choice that the first and second applicants take issue. However, it is equally to this choice that the broad margin of appreciation centrally applies»).

[180] *Leyla Şahin …, cit.*, paras 152-156.

[181] *Ibid.*, paras 104-110.

Lastly, discretion granted to States may govern norm-balancing in law-interpretation, especially when divisive sensitive ethical and moral issues are at stake, on which there is no common denominator among States. A clear example is represented by the notion of "beginning of life" dealt with by the Court in the well-known *Vo v. France* ruling.[182]

The case arose from an incident involving a French doctor who unadvisedly pierced a pregnant woman's amniotic sac when he mistook her for another patient who was not pregnant, making a therapeutic abortion necessary. Relying on Article 2, the central question raised by the application was whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of the Convention.

The Court considered that the issue of when the right to life begins was a question to be decided at national level: firstly, because the issue had not been decided within the majority of the States which had ratified the Convention, in particular in France, where the issue has been the subject of public debate; and, secondly, because there was no European consensus on the scientific and legal definition of the beginning of life.

More specifically, the question of defining the legal, medical, philosophical, ethical or religious dimension of the human being was variously addressed at the national level; consequently, it was considered that the issue fell within the margin of appreciation that States should enjoy in this sphere.[183]

By way of partial conclusion, it may be noted that it is clear from the above examples that behind the instrument of the margin of appreciation lie pre-eminent considerations of "closeness to the context" in which the Convention is to be applied: direct contact with the factual circumstances to be assessed in the concrete case, the need to weigh up different and conflicting interests, the "technically" or morally complex nature of the question to be decided are all reasons militating in favour of the margin granted to States, because they are closer to the context of application of the Convention. These are ultimately considerations that the Court shows to take into account by adapting its hermeneutic effort. The same will be seen shortly with regard to the variables determining the scope of the margin.

[182] ECHR, Judgment of 8 July 2004, App No 53924/00, *Vo* v *France*. For a similar approach by the Court, see for instance: ECHR, Judgement of 9 April 2013, App No 13423/09, *Mehmet Şentürk and Bekir Şentürk* v *Turkey*, paras 107-109; *Evans*…, *cit.,* paras 54-56.

[183] *Vo*…, *cit.*, para 82.

4.2.2. The intensity-determining factors

Given the background above, it is necessary to address the question concerning the extent of the margin of appreciation. In this regard, the European Court has expressly numbered a list of factors relevant in affecting the width of the margin and, as further discussed below, the intensity of its scrutiny.

By way of introduction to the examination of these «intensity-determining factors»[184], it should be noted, however, that it is impossible to define exactly and universally the scope and the exact limit marked by the margin, beyond which the presumption of "legality" in favour of the States does not operate. As a matter of fact, the limit set by the margin in question is "mobile" of nature, being conditional on factors pushing in opposite directions as well as on the right or freedom under discussion; consequently, its configuration may vary from case to case.[185] In a nutshell, depending on which variable prevails in the dispute, the Court's scrutiny entails a different standard of review.

First, the Court shows to have due regard for the nature of the Convention right alleged to have been violated: the latitude of discretion granted to States can only decrease if the «very essence» of the right is affected.[186] More specifically, the more a certain aspect of the right in question is related to the main concepts underlying the entire convention system – *i.e.* the preservation and promotion of the ideals and values of a democratic society,[187] and human dignity and human freedom[188] – the narrower the margin, due to the need for strict control by the Court of the proper pursuit of the fundamental objectives of the Convention.

By way of illustration, in the context of Article 8,[189] the Court has distinguished between aspects of the right to respect for private life regarded as more intimate or sensitive in relation to a person's identity or personal dimension,[190] on the one hand, and those connected to more

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184 GERARDS J., *Margin of Appreciation and Incrementalism* …, *op. cit*., 503.

185 WISNIEWSKI A., *On the Theory of Margin of Appreciation Doctrine,* in Polish Review of International and European Law, 2012, 73, 78 ff.

186 *Evans…, cit*., para 77; *Dickson…, cit.,* para 78; *S and Marper…, cit.,* para 102.

187 ECtHR, Judgment of 3 May 2007, App No 1543/06, *Bączkowski and Others* v *Poland,* paras 61 ff. («the Convention was designed and aimed to promote and maintain the ideals and values of a democratic society»).

188 ECtHR, Judgment of 29 April 2002, App No 2346/02, *Pretty* v *the United Kingdom*, para 65 («[t]he very essence of the Convention is respect for human dignity and human freedom»).

189 Art. 8: «1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

190 See in particular: *Dudgeon…, cit*., para 52; ECtHR, Judgment of 29 September 1999, App Nos 33985/96, 33986/96, *Smith and Grady* v *the United Kingdom*, para 89; Judgment of 17 February 2005, App Nos 42758/98 and

general individual interests, on the other: it is clear that national measures affecting the former are closely scrutinised,[191] while any limitation of the latter is subject to less stringent review.[192]

It must also recall the Court's tendency to tighten the margin allowed to States when it comes to rights of prime importance to the well-functioning political participation process as intimately linked to the democratic rule: among others, the freedom of political expressions,[193] the freedom to form and to join political parties,[194] the freedom of peaceful demonstrations.[195]

The assessment of the importance of the right in question may also include considerations that relate more primarily to the historical context, such as whether the Respondent State is going or has gone through a phase of democratic transition (in which case the margin tends to widen),[196] or whether the transition has been sufficiently consolidated (and, consequently, the margin narrows).[197] The Court may also take into account the fact that a particular minority group has historically been subject to discrimination, prejudice or exclusion from the social life of a certain community, thus restricting the State's margin of manoeuvre.[198]

Another factor examined by the Court in the assessment of the scope of the margin of appreciation is the aim pursued by the State measure. For instance, it has been repeatedly stated that: «… it [is] natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature's judgement as to what is "in the public interest"» and that «[b]ecause of their direct

45558/99, *KA and AD* v *Belgium*; Judgment of 8 January 2009, App No 29002/06, *Schlumpf* v *Switzerland,* para 104; ECtHR Judgment of 13 July 2006, App No 58757/00, *Jäggi* v *Switzerland*, para 37; *Dickson …, cit.* para 77–78; Judgment of 18 December 2006, App No 21987/93, *Aksoy* v *Turkey*, para 68 («exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation»).

[191] For instance, see: ECtHR, Judgment of 25 February 1997, App No 22009/93, *Z* v *Finland,* paras 95–96; Judgment of 24 November 1986, App No 9063/80, *Gillow* v *the United Kingdom,* para 55.

[192] GERARDS J., *Pluralism, Deference …*, *op. cit*., 113.

[193] For example, see: *Sunday Times…, cit.*; ECtHR, Judgment of 26 November 1991, App No 13585/88, *Observer and Guardian* v *the United Kingdom*, para 59; Judgment of 9 June 1998, App No 22678/93, *Incal* v *Turkey*, para 46; Judgment of 27 February 2001, App No 26958/95, *Jerusalem* v *Austria*, para 36; Judgment 8 July 2008, App No 33629/06, *Vajnai* v *Hungary*, para 51; Judgment of 14 April 2009, App No 37374/05, *Társágág A Szabadságjogokért* v *Hungary*, para 26.

[194] *United Communist Party of Turkey*…, *cit.,* para 57; Judgment, *Refah Partisi and Others* v *Turkey, cit.*, para 86.

[195] ECtHR, Judgment of 20 October 2005, App No 74989/01, *Ouranio Toxo and Others* v *Greece*, para 36; Judgment of 26 July 2007, App No 35082/04, *Makhmudov* v *Russia*, para 63.

[196] ECtHR, Judgment of 20 May 1999, App No 25390/94, *Rekvdnyi* v *Hungary*, paras 44-50.

[197] ECtHR, Judgment of 8 July 2008, App No 33629/06, *Vajnai* v *Hungary*, paras 48-58.

[198] ECtHR, Judgment of 24 April 1985, App Nos 9214/80; 9473/81; 9474/81, *Abdulaziz, Cabales and Balkandali* v *the United Kingdom*, para 78; Judgment of 13 November 2007, App No 57325/00, *DH and Others* v *the Czech Republic*, para 182; Judgment of 22 January 2008, App No 43546/02, *EB* v *France*, para 94; Judgment of 20 March 2010, App No 38832/06, *Alajos Kiss* v *Hungary*, para 42.; Judgment of 27 March 2008, App No 44009/05, *Shtukaturov* v *Russia*, para 95.

knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest"»[199].

Moreover, importance is attached to domestic policies that are considered to reflect the deep moral values held by the majority of the local society, or that concern issues related to the requirements of morality: in these cases, the margin of appreciation tends to be wider.[200]

A further key indicator Strasbourg judges steadily more direct their attention to is the effectiveness of national procedures providing for the requested balancing of opponent interests at stake.[201] Broadly speaking, the Court usually recognises a wide margin where States have to weigh up competing private and public interests or opponent rights enshrined in the ECHR.[202] However, as mentioned above, the national authorities are expected to carry out a balancing exercise of all parties' demands in accordance with the criteria laid down by the case-law of the Court: only when this prerequisite is met does the ECtHR not substitute its own point of view for that of the national actors, unless required by valid reasons.[203]

Put differently, the Court's self-restraint presupposes the existence and operation of an effective legal system for the protection of rights and is also conditional on whether local authorities have exercised due diligence in applying the Court's *dicta* to the facts of the case. Conversely, where effective procedural safeguards against arbitrary interference are not ensured at the national level, very strict limits on discretionary power are called for.[204]

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[199] ECtHR, Judgment of 6 July 2005, App No 65731/01, *Stec and Others* v *the United Kingdom*; Judgment of 12 November 2002, App No 46129/99, *Zvolsky and Zvolska* v *the Czech Republic*, para 67.

[200] *A, B, and C…, cit*., para 226. See also: ECtHR, Judgment of 22 January 2004, App No 46720/99, *Jahn* v *Germany*, para 80 («the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation»); *Stubing…, cit.,* para 61.

[201] ECtHR, Judgment of 15 January 2009, App No 28261/06*, Ćosić* v *Croatia*, para 21-23; Judgment of 22 October 2009, App No 3572/06, *Paulić* v *Croatia*, para 45; Judgment of 12 June 2014, App No 56030/07, *Fernandez-Martinez* v *Spain*, paras 123-153.

[202] *Evans…, cit*., para 77; see also: ECtHR, Judgment of 15 January 2013, App Nos 48420/10, 59842/10, 51671 /10 and 36516/ 10, *Eweida and Others* v *the United Kingdom*, para 109; Judgment of 19 February 2015, App No 53495/09, *Bohlen* v *Germany*, paras 45-60.

[203] ECtHR, Judgment of 7 February 2012, App No 39954/08, *Axel Springer AG* v *Germany*, para 88; *Von Hannover…, cit*., para. 107; Judgment of 12 June 2012, App No 39401/04, *MGN* v *the United Kingdom*, para 150; Judgment of 12 September 2011, App Nos 28955/06, 28957/06, 28959/06 and 28964/06, *Palomo Sánchez and Others* v *Spain*, para. 57.

[204] ECtHR, Judgment of 16 December 1997, App No 21353/93, *Camenzind* v *Switzerland*, para 45.

Lastly, the existence of a consensus plays a significant role in determining the width of the margin of appreciation:[205] hence, reference to the existence or non- existence of common grounds between national legal frameworks (or even at international level)[206] on a particular issue may affect the level of review by the European Court.[207]

Without having to repeat what has already been said in the consent examination, let it suffice to underline here that consensus and margin of appreciation are affirmed to operate in inverse proportion:[208] while the absence of common trends may justify a wide margin, a strong commonality of legal instruments and practices tends to narrow the margin.[209]

Not only that, since consensus is not a temporally fixed concept, the Court can gradually align the margin to the new consensus emerging at a given moment,[210] thus penalising those states that "lag behind" and do not follow the pace of evolution of the majority of domestic legal systems.[211] If one takes into account the latent objective inspiring the Court's entire work, namely the gradual and progressive promotion of ever-higher standards of protection, it follows that the margin may be reduced as a given jurisprudence on certain controversial issues consolidates and takes into account socio-economic and scientific development within or between States.

However, if consensus is relevant in terms of defining the margin perimeter, it is not necessarily decisive or determinative: it should therefore come as no surprise that a large consensus may not conclusively narrow the margin, at least where other factors are concluded to be pivotal in the case at hand.

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[205] Concurring opinion of Judge Malinverni attached to the ECtHR, Judgment of 16 April 2009, App No 34438/04, *Egeland and Hanseid* v *Norway*, para 6; *Bayatyan…, cit.,* para 122; Judgment of 12 April 2012, App No 43547/08, *Stübing* v *Germany*, paras 28-30.

[206] See e.g. ECtHR, Judgment of 11 December 2008, App No 21132/05, *TV Vest AS & Rogaland Pensjonistparti* v *Norway*, para 67; Judgment of 28 May 2009, App No 3545/04, *Brauer* v *Germany*, para 40.

[207] See ECtHR, Judgment of 11 September 2007, App No 59894/00, *Bulgakov* v *Ukraine*, para 43; Judgment of 12 November 2008, App No 3453/97, *Demir and Baykara* v *Turkey*, paras 65–86.

[208] BENVENISTI E., *Margin of appreciation, consensus, and universal standards*, in Journal of International Law and Politics, 1999, 851.

[209] *Stubing…, cit.*, paras 58-61; *A, B and C…, cit.*, paras 229-241. See also: ECtHR, Judgment of 10 January 2008, App No 35991/04, *Kearns* v *France*, paras 74 and 83.

[210] ECtHR, Judgment of 31 March 2009, App No 44399/05, *Weller* v *Hungary*, ECtHR («[s]ince the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieve»).

[211] Council of Europe, *The margin of appreciation*, in *The Lisbon Network*, available at: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#:~:text=The%20term%20%E2%80%9Cmargin%20of%20appreciation,Rights%20(the%20Convention)1.

Although, the Court's methodology is not exactly shining with clarity on this issue.[212] Suffice to mention, for instance, the *S and Marper v. the United Kingdom* ruling,[213] where the Court outlined its assessment of most of the relevant variables mentioned above without nevertheless concluding whether the margin should be broad or narrow in that particular case. More specifically, it held that «[t]he breadth of [the] margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted [...].Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider».[214]

This reiterated, no clear indications concerning the scope of the margin were given, leaving the reader to task to derive them.

Generally speaking, it can be argued that if a wider latitude of discretion is afforded to States the Court's supervision is normally limited to a test of manifest unreasonableness or arbitrariness of the measure adopted at national level and the burden of proof to demonstrate the lack of any reasonable justification is normally placed with the applicants. By contrast, the

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[212] Clarity is lacking, for example, where the Court mentions that there is "a certain" margin of appreciation, without explaining the reasons for this (For example, ECtHR, Judgment of 7 June 2016, App No 26012/11, *Enver Aydemir* v *Turkey*, para 81), where it mentions the margin of appreciation without specifying its scope (Judgment of 4 October 2016, App Nos 37871/14 and 73986/14, T.*P. and A.T.* v *Hungary*, paras 44–45; Judgment of 6 October 2016, App No 33696/11, *K.S. and M.S.* v *Germany*, para 42), or where it mentions that in its case-law on a certain issue the margin of appreciation "has been narrowing", without explaining any consequence for the case under scrutiny (see, for instance, Judgment of 7 March 2017, App Nos 35090/09 and Others, *Polyakova and Others* v *Russia* para 89). There are cases where a diversion between the scope of the margin afforded and the intensity of the Court's review can be detected. Examples of cases where a wide margin was matched by rather strict supervision are: ECtHR, Judgment of 29 January 2013, App No 11146/11, *Horva´th and Kiss* v *Hungary*; Judgment of 2 May 2013, App Nos 25143/08 and 25156/08, *Panteliou-Darne and Blantzoura* v *Greece*; Judgment of 17 January 2017, App No 42079/12, *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi* v *Slovenia*; Judgment of 7 February 2017, App Nos 57818/09 and Others, *Lashmankin and Others* v *Russia*, paras 417–418.

[213] ECtHR, Judgment of 4 December 2008, App Nos 30562/04 and 30566/04, *S and Marper* v *the United Kingdom*. Other cases where the Court lists some possibly relevant factors without deciding what the actual scope of the margin of appreciation are: Judgment of 25 October 2012, App No 71243/01, *Vistiņš and Perepjolkins* v *Latvia*, paras 113 and 119; Judgment of 14 March 2013, App No 24117/08, *Bernh Larson Holding AS and Others* v *Norway*, para 159; Judgment of 13 November 2012, App No 7678/09, *Van Colle* v *the United Kingdom*, para 93; Judgment of 17 May 2016, App Nos 33677/10 and 52340/10, *Fürst-Pfeifer* v *Austria*, paras 39– 40; Judgment of 14 June 2016, App No 35214/09, *Aldeguer Tomás* v *Spain*, paras 81–82, 90; Judgment of 15 September 2016, App No 44818/11, *British Gurkha Welfare Society and Others* v *the United Kingdom*, para 81; Judgment of 24 January 2017, App Nos 60367/08 and 961/11, *Khamtokhu and Aksenchik* v *Russia*, paras 78–79.

[214] *S and Marper…, cit.*, para 102.

allowance of a narrow margin of appreciation entails a more rigorous assessment by the Court of the interests at stake in order to decide for itself where the balance between the conflicting interests should be found as well as to evaluate the exhaustiveness and reasonableness of the justifications for the restriction advanced by the Respondent State government.[215]

When a particular interference concerns several aspects and, consequently, competing factors come into play, it is also possible for the Court to grant a margin of appreciation that varies depending on the aspect considered.

One may argue that these are only approximations and that the lack of consistency in the use of those factors above to establish the scope of the margin is problematic. There is no doubt in that.[216] However, the (undeniable) inconsistencies in the Court's use of it cannot be considered sufficient to discard a tool, such as the one at hand, which, when well used, has proven to be very useful in ECHR's judicial policy: it allows the Strasbourg judge to "adjusting the focus", *i.e.* modulating the intensity of its supervision based on reasons that give relevance to the context of application of the Convention.

Thus, depending on the factual circumstances, European review may be intensified or, on the contrary, judicial self-restraint may be preferred. It is submitted then that this is a very attractive mechanism which ensures to reflect democratic pluralism as an indefectible feature of the regional *scenario*,[217] which the Court cannot afford to overlook in its exercise of interpretation, that is to say of persuasion of Member States.

5. Is the ECtHR's judicial policy persuasive?

More than sixty years after the establishment of the "natural judge" of the European Convention on Human Rights, the main characteristic of the Strasbourg Court's interpretative activity is still its tendency to be casuistic and inconsistent. Attempting a "systematisation" of it, the Chapter places a privileged focus on the context in which this interpretive exercise takes place: indeed, the latter is part of a process of mutual influence with the textual dimension of the rights and freedoms guaranteed by the Convention, by virtue of which the latter are progressively extended through dynamic interpretation, thus "penetrating" the domestic

[215] GERARDS J., *Margin of Appreciation and Incrementalism*…, *op. it*., 499.
[216] GERARDS J., *Pluralism, Deference* …, *op. cit*., 114.
[217] VILA M. I., *op. cit*., 18.

domains in the field of human rights; on the other hand, the inevitable temporal and spatial relativism puts a brake on the Court's creative activity.

In this regard, the Chapter intends to shed light on what has been called the Court's judicial policy: nothing more than an attempt to organise the interpretative instruments into a more comprehensive and pragmatic scheme aimed at building a multi-level system of human rights applicable to as many as 46 States and millions of people. The preceding pages have therefore examined some of the hermeneutic tools developed by the ECtHR, showing how they are aimed at pursuing different but mutually consistent goals and, as such, are clearly in tension with each other.

First, it has been pointed out that the "lifeblood" of the Convention is the so-called principle of the "living instrument", according to which the rights and freedoms enshrined therein can and must evolve over time, adapting to current circumstances without the need to be formally modified. Their dynamic and evolving interpretation represents a safeguard not only for the maintenance but also for the further realisation of those same rights and freedoms, as a method expressly provided for in the Preamble to achieve greater unity among Member States. To this end, the Court elaborates and embraces progressively higher standards which apply uniformly to all national systems, while sanctioning those States who still "lag behind".

At the same time, the Strasbourg jurisdiction tends to adopt an evolutionary interpretative approach mainly for the reason that a common ground, *i.e.* a positive trend, can be detected within the majority of domestic legal systems, such as to trigger innovation. Following this perspective, the evolutive interpretation of the Convention is anchored to a comparative exercise of the legal and factual reality of States pursued by the Court itself, commonly referred to as "consensus".

Moreover, the Court may find itself in the position of having to show regard «to self-determination of the national authorities»[218] whenever the need to preserve the multiplicity of systems of fundamental rights protection prevails over the objective of establishing a uniform set of rights and values: indeed, the entire legal framework derives its legitimacy and its potential from the agreement of the Member States, and the fulfilment of international obligations under the Convention ultimately depends on their good faith and firm cooperation.[219]

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[218] HWANG S. P., *Margin of Appreciation in Pursuit of Pluralism? Critical Remarks on the Judgments of the European Court of Human Rights on the 'Burqa Bans'*, in 20 Human Rights Law Review, 2, 2020, doi: https://doi.org/10.1093/hrlr/ngaa014, 368.

[219] Council of Europe, *The margin of appreciation* …, *cit.*

To this purpose, it is suggested that the margin of appreciation granted to States establishes a limit, among other things a mobile one, which marks the extent to which a variety of solutions, all equally lawful and in conformity with the Convention, can be deployed; likewise, it provides the Court with an adaptable tool at its disposal to modify the intensity of its review depending on whether the need for harmonisation or, on the contrary, the need to maintain a multiplicity of human rights protection systems corresponding to «national and regional particularities and various historical, cultural and religious backgrounds»[220] prevails.[221]

From this viewpoint, the margin of appreciation can only be said to be an instrument of respect for pluralism. The latter is to be understood as a democracy-oriented pluralism:[222] since the ECHR outlines an initial inventory of abstract human rights, which is necessary but insufficient to transform them into practical and effective reality, this transformation necessarily takes place only through their incorporation at the national level.

In this sense, a uniform implementation of the Convention is not only undesirable, but even impossible:[223] the *de facto* application of conventional standards is made through the internal organisation of States and is the product of democratic decision-processes reflecting national constitutional norms, which in turn are an expression of the most fundamental set of values and principles shared by a certain political community.[224]

In this way, the ECHR is endowed «with contents that correspond to the nation's spirit confirming [its open character] to the cultural heritage of the various State Parties [...] or, wider, to the richness of the pluralism of European societies».[225]

But there is more. The margin of appreciation is intended not only to respect but also, quoting Delmas-Marty, to *order* pluralism. According to the French author, in fact, it could

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[220] Vienna Declaration and Programme of Action adopted on 25 June 1993 by the World Conference on Human Rights in Vienna, point 5.

[221] GERARDS J., *Pluralism, Deference* …, *op. cit.*, 104. Such a recognition of the local and regional particularities of States does not amount to a denial of the universal vocation of the rights and freedoms guaranteed by the Convention, as some have argued. Universality does not in fact mean predefined and total uniformity and, as argued elsewhere, «the possible fragmentation of uniformity is not a sign of undermined universality, but a safeguard against over-reliance on a specific conception of human rights. The best view, therefore, is that the European Court of Human Rights should not conceive of itself as a universal voice of reason and morality, but should play its global role through engagement with other institutions in order to work out what the common and global practice of human rights requires» (TRIPKOVIC B., *op. cit.,* 27-28).

[222] HWANG S.P., *op. cit.*, 371.

[223] DELMAS-MARTY M., *Le Relatif et l'Universel. Les Forces imaginantes du droit*, 2009, 64-65.

[224] MORELLI M. R., *Sussidiarietà e margine di apprezzamento nella giurisprudenza delle Corti europee e della Corte costituzionale*, speech delivered on 20 September 2013 at the Presidency of the Council of Ministers of Italy meeting "*Principio di sussidiarietà delle giurisdizioni sovranazionali e margine di apprezzamento degli Stati nella giurisprudenza della Corte europea dei diritti dell'uomo*".

[225] WISNIEWSKI A., *op. cit*., 69.

serve to structure diversity, and organise it within a comprehensive scheme in which, however, each element – namely, the national systems – preserves their own identity. They are separated yet integrated into a whole: as in the creation of a mosaic, each piece represents the fundamental unit of a bigger harmonious drawing and preserves its own specificity, without simply overlapping with the others: there must be a material that binds them together, organises them, while at the same time keeping them apart. However, the margin between different pieces cannot be too loose, otherwise the single elements will not be tight enough for the overall scheme to be coherent and congruous.[226]

It appears that the objective of achieving greater unity among the members of the Council of Europe in order to guarantee their common heritage of ideals and principles within a single framework does not *per se* exclude "diversity": indeed, the conventional system of human rights protection does not constitute a supranational legal order requiring a comprehensive process of harmonisation between the different national systems.

On the one hand, the Court's case-law has constitutional effects in the sense that it has the potential to "seep through" national legal systems of the whole Member States (rather than the sole Respondent States) impacting their autonomy; its function of developing and promoting a progressively uniform application of common standards obviously entails the power to transcend national boundaries in order to guarantee individuals fair and equal treatment of their rights, on the same footing and with the same emphasis.

On the other hand, in performing such a task, the Court could decide to resolve the question in favour of the interpretation of the State, by showing deference to domestic standards and decisions of democratically elected bodies.[227] In different terms, the margin of appreciation does not lead to any sort of abdication of the Court's interpretive role under Article 32; by contrast, it can be applied for substantiate and support a cooperative conception of the regional system of human rights protection, in which depending on the divisive nature or constitutional relevance of the subject matter or, conversely, the need for harmonisation, the Court, on the one side, and the domestic authorities, on the other side, agree to voluntarily accept the interpretative outcomes of their respective counterparts.[228]

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[226] DELMAS-MARTY M., IZORCHE M.L., *Marge nationale d'appréciation et internationalisation du droit. Réflexions sur la validité formelle d'un droit commun pluraliste*, in 52 Revue internationale de droit comparé 4, 2000, 764-765.

[227] PARRAS F. J. M., *Democracy, diversity and the margin of appreciation: a theoretical analysis from the perspective of the international and constitutional functions of the European Court of Human Rights*, in 29 Revista Electrónica de Estudios Internacionale, 2015, doi: 10.17103/reei.29.10, 3,12-15.

[228] GERARDS J., *Pluralism, Deference…, op. cit.*, 115.

Given this background, it can be claimed that the interpretative activity of the Court cannot simply be described as being totally dynamic or, conversely, static of nature. By the same token, it does not merely ground on judicial activism rather than judicial self-restraint. This would indeed be too simplistic an assessment. More correctly, one can understand the case-law of the ECHR as the constant search for the fairest choice between the two different poles of a more nuanced scale, which ultimately depends on which objective proves to be superior in each case. This is the strength of its interpretative methodology:[229] considered as a whole, «the interpretive tools of the European Court of Human Rights permit it to conduct all battles, and in the way it wants».[230]

Another important point which has been stressed is that all techniques elaborated by the Court take the historical and political context into consideration: the incorporation of the ECHR within the domestic legal system does not translate into the Strasbourg predominance over law and practices; on the opposite: the search for consensus shows how evolutive interpretation still depends on due consideration of the legal reality existing within the Council of Europe in a given historical moment, by inevitably tying the updating of common standards of protection to the different interpretative choices made by the majority of States.

If the application of the comparative approach makes the exegesis of conventional rights subject to practice-dependent requirements, that is to say it is based on external common practices, the margin of appreciation gives weight to divergent practices among States in interpreting the Convention:[231] the Court shows deference to the evaluative choices made by those who are closer to factual elements of the case, and who can best appreciate them; this allows greater openness for the recognition of specific local social-legal and cultural circumstances and, consequently, leads to the acceptance that different interpretations of conventional rights, all equally legitimate, may coexist – within specific limits – depending on the particular national and constitutional traditions.[232]

In the final analysis, it cannot be said that the consideration of the context constitutes a breach of its judicial policy. On the contrary, it can be considered a very attractive and useful factor in strengthening the persuasiveness of its arguments, at least when employed coherently and consistently.

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[229] SONNLEITNER L., *op. cit.*, 287.

[230] CAROZZA P. G., *op. cit.,* 1221.

[231] TRIPKOVIC B., *op. cit.,* 17-20.

[232] MACIOCE F., *Cultural Rights and the Margin of Appreciation Doctrine: A Legal Tool for Balancing Individual Rights and Traditional Rules*, in 13 Law, Culture and the Humanities 3, 2017, doi:.https://doi.org/10.1177/1743872117732846, 458.

First of all, a fully comprehensive examination of present-day conditions is instrumental to bring conventional rights and freedoms to life in a highly-developing reality; in order to really be practical and effective and not just an abstract political agenda, conventional rights and freedoms need constant adjustment and updating, even beyond (or even against) what originally drafted by the Convention framers in the Forties.

As for consensus, it cannot be said to avert evolutive interpretation of the Convention: the promotion of fundamental rights remains the core object and purpose of the Convention, the effectiveness of which may require an evolution of further standards uniformly applicable to the States as a whole. Yet, consensus curbs judicial discretion involved in such a dynamic interpretative approach by tying developments to those changes and preferences the majority of democratic States show in their legal reality. In other terms, consensus can be used as an indicator of the renewed consent the Court's legitimacy is derivative to.

On the other hand, the margin of appreciation introduces a presumption in favour of the domestic assessment, not in relation to the substantive content of the right – which remains firmly in the Court's interpretation – but in relation to whether a limitation or restriction may be possible in the concrete case because of the sensitivity of the issues, or because a fair balance has to be struck with public interests or even other individual rights protected under the ECHR.[233]

Deference to national systems does not entail any idea of abdication from the Court's task, though. After all, as clearly stated in the Preamble, the Convention represents the first steps for the *collective enforcement* of certain of the rights stated in the Universal Declaration: the rights and the freedoms defined in the covenant must be secured by High Contracting Parties to everyone within their jurisdiction (Art. 1), and everyone can activate the international architecture to hold Government authorities accountable for any violation or infringement occurred.

In this framework, the ultimate authority to interpret the Convention lies in the Court's power of scrutiny. Nevertheless, it should be borne in mind that the task of the ECHR is only to correct, supplement and strengthen the protection of democracy and human rights at national level rather than to introduce any standardisation of domestic legislations and practices.[234]

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[233] FOLLESDAL A., *op. cit.*, 14.

[234] MCGOLDRICK D., *A defence of the margin of appreciation and an argument for its application by the Human Rights Committee*, in 65 The International and Comparative Law Quarterly 1, 2016, 37.

When States are deemed to be in a better position than an international body to assess the factual circumstances and interests at stake, and provided that the minimum core values established by the Court are respected, there is no reason not to defer to the national criterion, except at the cost of losing credibility. Conversely, when the deficits in the domestic system of human rights protection are evident, there is no reason to exercise any deference and the Court is vested with the responsibility to "fill the gap" represented by the inactivity or inability of States to comply with their cooperative commitments.[235]

Finally, one last observation can be drawn from the analysis of the interpretative tools carried out in this Chapter. The latter are, on closer inspection, interpretative instruments *lato sensu*, in the sense that they are used by the Court in its hermeneutic activity but, rather than telling us something about the meaning of the provisions, they actually regulate the relationship between the interpretative authority of the ECtHR and that of domestic legal order. They govern, in other words, the relationship between the Court and the States. This is consistent with the definition of interpretation which focuses more on the act of persuasion than on the operation of attributing certain meanings to a written text such as convention.

It only remains to ask what kind of relationship emerges from such regulation. This is also of particular interest in the light of the recent political process of reform of the conventional system, culminating with the adoption of Protocol No. 15 mentioned above: since its entrance into force, the margin of appreciation doctrine represents the only interpretive approach to be explicitly mentioned in the text.[236] Does this entail a strengthened deference to the human rights conception embraced and applied at domestic level? Does it hamper evolutive interpretation?

Moreover, recent structural reforms – such as the extension of the ECtHR's jurisdiction to give advisory opinions on questions of principle relating to the interpretation or application of the Convention or its Protocols – seems to underpin the picture of the conventional system as a collaborative project shared by States and the Court.[237] One may wonder what the role of the applicant is in this changing framework. If, in other terms, considerations related to the joint process of applying the Convention prevails over the imperative to respond to individual claims of human rights violation. The following Chapter intends exactly to analyse if – and in

[235] VILA M. I., *op. cit.*, 409.

[236] SONNLEITNER L., *op. cit.*, 280-281.

[237] TSARAPATSANIS D., *The margin of appreciation doctrine: a low-level institutional view*, in 35 Legal Studies, 4, 2015, 684.

the affirmative, how – such changes to the conventional architecture influence the Court's interpretative methodology, and, consequently, the relationship with its interlocutors.

3.

The ECtHR's Interpretative Authority in the "Age of Subsidiarity"

"*Se vogliamo che tutto rimanga come è,*
bisogna che tutto cambi"
(Giuseppe Tomasi di Lampedusa, *Il Gattopardo*)

CONTENT: 1. The new "Age of Subsidiarity" – 2. The future of the Court to the test of the "Interlaken process" – *2.1. The perfect antidote to cure the conventional system's frailty: the principle of subsidiarity* – 3. The (symbolic) impact of Protocol No. 15 on the interpretative methodology of the Court – *3.1. Art 1 of Protocol No. 15: nothing new under the sun?* – 4. The new "Dialogue Protocol" – *4.1. The principle of "shared responsibility" as implemented by Protocol No 16* – 5. Final observations.

1. The new "Age of Subsidiarity"

Around ten years ago, numerous Member States, *in primis* by the United Kingdom, raised the criticism that the Strasbourg judge "has gone too far" from its conventionally established tasks under Articles 19 and 32. Nostalgia for an alleged traditionalism in the European jurisprudential practice in the field of human rights became then the basis for a new emphasis on the principle of subsidiarity, on which the foundations of a reform process of the Court were built, starting in 2011 and culminating with the adoption of two Protocols, Nos. 15 and 16.

As for the first one, it incorporates the content of the political Declarations adopted at the various High-Level Conferences on the future of the European Court of Human Rights, all of which converged around the cardinal principle of subsidiarity; in particular, the latter has been understood as a fundamental characteristic of the regional protection mechanism to be further strengthened in order to limit the powers of its judicial body and, conversely, to widen the room for manoeuvre of national actors.

To this purpose, Article 1 of Protocol No. 15 has added a new recital in the Convention Preamble reading: «… the High Contracting Parties, in accordance with the *principle of subsidiarity* [emphasis added], have the primary responsibility to secure the rights and freedoms

defined in this Convention and the Protocols thereto, and that in doing so they enjoy a *margin of appreciation* [emphasis added], subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention».

On the other hand, Protocol No. 16 intends to enhance the dialogical interaction between the Court and national judicial authorities by means of the extension of the Court's competence to give non-binding advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto. The analysis of the *travaux préparatoires* of the Protocol reveals how, in the national perspective, such a new consultative procedure is meant, if not to confine at least to erode the adjudicative role of the ECtHR, by entrusting it with the new competence to provide States with the necessary hermeneutic guidance, while the latter retain the final decision of the concrete case, thus giving full application to the principle of subsidiarity.

At this point, it appears clear why former President of the Court Robert Spano wrote extra-judicially that the Court has entered a new phase referred to as the "Age of Subsidiarity"[1], characterised by States' attempt to encourage a «more robust and coherent»[2] concept of subsidiarity as well as by «the Court's engagement with empowering the Member States to brings rights home»[3], *i.e.* at national level, where they truly belong.

Attention dedicated to this last principle requires a brief but necessary clarification: subsidiarity is a multi-faceted and transversal principle characterised by an elastic nature and vague content, born of political philosophy and developed in the social doctrine of the Catholic Church. Translated into legal language, one could adhere to the following definition: subsidiarity is a criterion according to which a specific action is primarily the responsibility of a given subject of a lower level than another, and can be carried out by another subject, in place of or in addition to the former, if and only if the result of such substitution is better (or is expected to be better) than what would have been or has been achieved without such substitution.[4]

A typical constitutional law perspective is adopted here, as it perfectly captures the relationship between the Court and national authorities. The "hard core" of subsidiarity in fact resides in the idea that an organisation or institution of a higher order (the ECtHR) than

[1] SPANO R., *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, in 14 Human Rights Law Review 3, 2014, doi: https://doi.org/10.1093/hrlr/ngu021.

[2] *Ibid.,* 490 ff.

[3] *Ibid.*, 491.

[4] RESCIGNO G. U., *Principio di sussidiarietà orizzontale e diritti sociali*, in 1 Diritto Pubblico 2002, doi: 10.1438/7446, 14.

an inferior one (domestic actors) should not interfere, by restricting it, in the activity of the subordinate one when the latter is capable, on its own, of adequately carrying out its tasks (the protection of the conventional human rights and fundamental freedoms), but should rather intervene in case of need, to help and support it, thus pursuing the common good.[5] More specifically, the object of subsidiarity is the national obligation to respect rights in an effective and efficient manner, on the one hand, and the international competence of the complementary control of the respect of this obligation, on the other.

Ultimately, this is a relational principle insofar as it concerns relations between different entities, the paradoxical nature of which has, moreover, been rightly pointed out:[6] relations between the different levels of competence are characterised on the basis of decisions of preference,[7] in the sense of favouring the abstention of direct intervention by the superior level in favour of that which acts in the sphere closest to the interested parties; at the same time, the same criterion is valid to justify the intervention of the superordinate authority in the event of the inadequacy of that of the subordinate one.

Its codification by Protocol No. 15 and in Protocol No. 16 has given rise to new problems regarding its application; although, in principle, it is certain that subsidiarity is intended to express a preference in favour of the Member States, it is not so easy to determine *whether* and *how* this preference can be realised. In fact, subsidiarity is an elastic clause: uncertainty and vagueness of its scope affects its legal implementation, requiring an active operation on the part of the interpreter to fill it with content within the given context where the latter operates.

The full analysis of its application in the conventional system is far from falling within the scope of investigation of the current work.[8] Instead, the Chapter aims at pointing out some of the main criticalities of the Interlaken Process, where the principle at issue has found new life. The ultimate goal is thus to evaluate the content of such principle emerging from

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[5] FROSINI T. E., *Sussidiarietà (principio di)(dir.cost.),* in Enciclopedia del Diritto, Annali II – t. 2, 2008, 1133-1134.

[6] VANONI L. P., *Federalismo regionalismo e sussidiarietà. Forme di limitazione al potere centrale,* Torino 2009, 6.

[7] D'ATENA A., *Costituzione e principio di sussidiarietà,* in 1 Quaderni costituzionali, 2001, doi: 10.1439/4806, 17 ff.

[8] For further analysis of the topic see among others: CAROZZA P. G., *Subsidiarity as Structural Principle of International Human Rights Law*, in 97 American Journal of International Law 1, 2003; BESSON S., *Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?*, in 61 The American Journal of Jurisprudence 1, 2016; FOLLESDAL A., *Subsidiarity to the Rescue for the European Courts? Resolving Tensions Between the Margin of Appreciation and Human Rights Protection*, in HEIDEMANN D., STOPPENBRINK K. (edit. by), *Join, or Die – Philosophical Foundations of Federalism*, Berlin/Boston 2016; MOWBRAY A., *Subsidiarity and the European Convention on Human Rights*, in 15 Human Rights Law Review 2, 2015.

the current historical context and, more specifically, whether it brings with itself any sort of restriction of the interpretative power the Court is entitled under Article 32. In short, it intends to investigate on whether or not any change of the Court's hermeneutic authority has occurred.

To address the issue, a brief overview of the political background in which the institutional debate on the reform of the European Court took place is presented, although an exhaustive analysis of the various topics discussed on all the Conferences is beyond the scope of this Chapter. In order to evaluate the impact of such a reform process over the interpretative activity of the Court, the Chapter goes on by assessing the relevance of the amendment of the Preamble by Protocol No. 15. Whilst it is too early to provide a complete picture of its repercussions on the *modus operandi* of the European judge, the Protocol having only entered into force last year, it is already possible to draw some general considerations from the literal wording of the new Preamble recital, which may help to foresee its future influence on the interpretative activity.

As regards the new consultative mechanism, the last part of the Chapter argues that the new "Dialogue Protocol" embraces such a concept of subsidiarity which may enhance the Court's capacity to set *erga omnes* standards. As a matter of fact, under Protocol No. 16 the Strasbourg judge is empowered to give preventive guidance by illustrating in a clear way the principles elaborated in its case-law, thus indirectly supporting and facilitating the task of domestic authorities in comply with their obligations: the Court's advisory opinions guide the way so that nobody is left «wandering in deserts of uncharted discretion», while national judges can follow the direction which is clearly indicated to them: «compatibility with the ECHR»[9].

2. The future of the Court to the test of the "Interlaken process"

If one thinks of the early Court, its hermeneutic task immediately appears to be rather simple and complicated at the same time. There were no precedents to follow (or, conversely, to depart from) and its authority was to be built up from the very scratches of a Europe

[9] NUSSBERGER A., *Comments on Sabino Cassese's paper "Ruling indirectly – judicial subsidiarity in the ECHR"*, in Subsidiarity: a two-sided coin?, held to coincide with the ceremony marking the official opening of the judicial year of the European Court of Human Rights, 30 January 2015, Strasbourg, available at: https://www.echr.coe.int/Documents/Dialogue_2015_ENG.pdf, 21.

leaking its injures. Conversely, its full functionality largely relied on the acceptance of Member States.

In a rather gradual manner, the Strasbourg judge managed to substantiate the rules of the Convention in such a way as to create the solid pillars of the entire institutional structure of collective enforcement of the conventional legal norms, by which domestic authorities are bound.[10] Called upon to formulate general principles for the interpretation of the ECHR, the Court has developed its own hermeneutic arsenal – such as the one analysed in the previous Chapter – so as to progressively extend the definition and elaboration of uniform standards of protection common to all Member States: in this way, the conventional provisions come alive in the Court's jurisprudence and become an instrument of the European constitutional order, as stated in the first Chapter.

The year 1998 definitely marked a change of paramount importance in the original two-tier structure comprising both the Court and the Commission on Human Rights, replacing it with a full-time operational body to which individual applicants could finally submit their complaints directly.[11] Protocol No. 11 hence lies at the foundations of the development of an international Court entrusted with more evident constitutional functions, underlying its peculiarity amongst the international human rights *fora*: the Strasbourg jurisdiction shows itself to be a fundamental guarantor in the system of safeguarding the individual against any illegitimate interference by the State. Reversing the perspective, one can say that individuals have become a key "cog" necessary to ensure the functioning of the entire international machine rooted in States' compliance with their Convention commitments.

Nevertheless, as repeatedly pointed out by scholars, the Court has remained victim of its own success: due to the considerable increase of the applications and, consequently, of the backlog to be processed, the year 2010 saw the entry into force of Protocol No. 14: this introduces some technical novelties, among others new judicial formations for the examination of the simplest cases, as well as a new admissibility criterion (*i.e.* that of "significant disadvantage")[12] with the main goal to address manifestly inadmissible complaints and the growing volume of well-found applications.[13] Without any intention of entering into

[10] ARNARDOTTIR O. M., *The Brighton Aftermath and the Changing Role of the European Court of Human Rights*, in 9 Journal of International Dispute Settlement, 2018, doi: 10.1093/jnlids/idx002, 223.

[11] See: Council of Europe, *History of the ECHR's Reforms*, available at: https://www.echr.coe.int/Documents/Reforms_history_ENG.pdf, 1.

[12] *Ibid.*

[13] The Preliminary Opinion of the Court in preparation for the Brighton Conference, adopted by the Plenary Court on 20 February 2012 reads as follow: «8. Following on from Interlaken and the subsequent entry into

the merits of these changes, what is interesting to emphasise is the acceptance of the changing nature of the conventional system as a fundamental feature necessary to ensure its viability. Such a combination between "reform" and "progress" is endorsed by the Court itself.

As a matter of fact, in 2009 former President Costa urged the need to start a long-term process of reform by bringing together State actors in order to discuss a roadmap for the evolution of the European Court of Human Rights, as an essential component of the international protection mechanism.[14] More specifically, he had publicly called upon national authorities to better clarify their relationship with the Court, as well as the role that both sides are expected to play in pursuing the common goal of securing the rights guaranteed under the Convention and its Protocols.

As far as States are concerned, the ultimate goal of ensuring the Court's ability to deal effectively and with sufficient speed with serious allegations of human rights violations was linked to domestic actors' commitment to acquire the necessary ownership of the Convention before and after a violation occurs, *i.e.* by establishing effective remedies and ensuring the enforcement of the Court's judgments. As for the Court, States were asked the following questions: «what sort of Court of Human Rights do they want for the future? What sort of machinery are they prepared to finance? What should it deal with?»[15].

What was expected to create an unprecedented political arena in which to discuss the fragilities affecting the quality and effectiveness of the regional human rights mechanism, and to propose measures of change, eventually turned out to be something quite different: what we first faced in the mid-2010s was in fact the questioning of the very role of the Court, its practice and its hermeneutic methodology. From 2010 to 2018 several High-Level Ministerial meetings discussing reform of the conventional system have been held, each of them concluded with the adoption of a joint Declaration: it is the so-called "Interlaken Process". It is argued that over the course of the meetings series, a gradually increasing emphasis was

force of Protocol No. 14, the Court has in particular sought to achieve the maximum effect for the Single Judge mechanism, under which a Single judge assisted by a Registry rapporteur carries out the filtering function […] 9. As regards the other innovations of Protocol No. 14, the new competence of three-judge committees under Article 28 § 1 (b) has begun to produce its effects. Committees are progressively taking the place of Chambers in deciding repetitive cases […] 10. The significant disadvantage admissibility criterion provided for in Article 35 § 3 (b) of the Convention has yet to achieve the impact foreseen by the drafters of the Protocol».

[14] ECtHR former President Costa, *Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference*, 3 July 2009, available at: https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform.

[15] *Ibid.*, 3.

placed on a more radical critique of the Court's own position, reaching its climax at the Brighton meeting in 2012.

The conferences have been composed of the Ministers of Justice of the Member States: this means that all proposals, suggestions and reflections developed at these meetings must then be concretised into operational decisions of the Committee of Ministers, which, according to Article 15 of the Statute of the Council of Europe, «[o]n the recommendation of the Consultative Assembly or on its own initiative, shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters».

The first meeting was convened in early 2010 in Interlaken under the Swiss Chairmanship of the Committee of Ministers. This entailed the launch of a new working method: the intention was in fact to bring together representatives of the different Member States «capable of engaging the responsibility of their country at the political level», as well as «to reaffirm the commitment of the States to the protection of human rights in Europe»[16].

As already underlined, the main intention behind the reform process was to initiate a lasting discussion on the future of the European Court of Human Rights. To this purpose, the first Conference saw the adoption of the so-called "Action Plan", *i.e.* a set of measures to be taken progressively to provide political guidance to the process towards the long-term effectiveness and sustainable functioning of the control mechanism of the Convention.[17]

One year later, the High-Level Conference on the Future of the European Court of Human Rights was organised in Izmir, Turkey. This represented an opportunity to take stock of the progress achieved up to that moment and to consider the further steps to be taken in the pursuit of the objectives and the expectations expressed at the previous Conference.[18] In addition to the usual deflationary intent, there was particular concern about the increase in appeals related to the application of provisional measures in the area of immigration, which exposed the Court to the risk of turning into an «immigration Appeals Tribunal or a Court of fourth instance»[19].

The true turning point was represented by the Brighton Conference held in 2012: it is in fact the United Kingdom that has played the pivotal role of the spokesperson for the

[16]ECtHR former President Costa, *op. cit.*, 1.
[17] Interlaken Declaration: Action Plan (11) and Implementation (6).
[18] Izmir Declaration, para. 14.
[19] *Ibid.*, para 3 of the Follow-up Plan.

instances of change concerning the European Court. In particular, what was understood as an illegitimate intrusion by the latter into such highly sensitive national political issues as those concerning the prisoners' right to vote,[20] the deportation of radical Islamic terrorists,[21] and the chance of appealing life sentences,[22] provoked the British reaction in defence of the superiority of the decision-making power vested in democratic elected bodies.[23]

More generally, the Strasbourg judges were reproached for going too far in using the canon of evolutionary interpretation by reading the ECHR as a "living instrument", thus risking distorting its role by making it a kind of subsidiary legislator; consequently, the perceived judicial activism of the international judge triggered the assumption especially voiced by the UK that a modification of the conventional system was necessary to bring about a more severe judicial self-restraint in the activity of the Court in favour of the priority role of States in ensuring the full implementation of the ECHR.

It should come as no surprise then that the main focus of the Conference convened in the framework of the British Chairmanship was the restriction of the ECtHR's powers: in contrast to the two previous ones, the concluding Declaration was not merely concerned with the usual technical-legal issues, but intended to question the «fundamental role and nature of the Court»[24] by targeting the quality and consistency of its jurisprudence,[25] as well as its supervisory powers towards Member States.[26] As further discussed later, it mainly intends to

[20] See for instance the ECtHR, Judgment of 6 October 2005, App No 74025/01, *Hirst* v *The United Kingdom (No. 2)*, para 79; Judgement of 23 November 2010, App Nos 60041/08 and 60054/08, *Greens and MT* v *United Kingdom*, paras 73–79.

[21] See for instance: ECtHR, Judgement of 17 January 2012, App No 8139/09, *Othman* (*Abu Qatada)* v *the United Kingdom.*

[22] *See* for example: ECtHR, Judgment of 9 July 2013, App Nos 66069/09; 130/10; 3896/10, *Vinter and Others* v *The United Kingdom.*

[23] On this topic see: LORD PHILLIPS, *European Human Rights: A Force for Good or a Threat to Democracy?*, Centre of European Law Lecture, The Dickson Poon School of Law, King's College London, 17 June 2014, 7, available at: https://www.kcl.ac.uk/archive/news/law/newsrecords/2013-14/european-human-rights; HOFFMANN L. *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009, available at: www.judiciary.gov.uk; PINTO-DUSCHINSKY M., *Bringing Rights Back Home. Making Human Rights Compatible with Parliamentary Democracy in UK*, 2011, available at: www.policyexchange.org.uk; RAAB D., S*trasbourg in the Dock: Prisoners Voting, Human Rights and the Case for Democracy*, 2011, available at: www.civitas.org.uk; On 25 January 2012, former Prime Minister David Cameron addressed the Parliamentary Assembly of the Council of Europe arguing that it was "the right time to ask serious questions about how the Court works", complaining in particular that democratic decisions by national parliaments were not sufficiently taken into account and that the Court should not see itself as an immigration court (see: https://www.gov.uk/governments/speeches/speech-on-the-european-court-of-human-rights).

[24] Brighton Declaration, 31

[25] *Ibid.*, 25(c).

[26] GLAS L. R., *From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?*, in 20 Human Rights Law Review, 2020, 127.

transform the Strasbourg jurisdiction into a Court entrusted to deal only with cases concerning serious interpretative issues as well as severe breaches of the Convention.

Finally, the last two Conferences took place respectively in Brussels in March 2015 and in Copenhagen three years later. The focal point of the first one concerned the question of the effective implementation of the Convention and the execution of the Court's rulings at national level, as evidenced by the very same title of the meeting, this being: "High-Level Conference on the Implementation of the European Convention on Human Rights, our shared responsibility". As for the last one, it mainly reviewed the positive developments in European practice, welcoming the efforts to clear the backlog, but without adding any new relevant proposals.[27]

The interest of the topic is evident: although the previous pages discussed declaratory documents of a soft-law nature, these eventually converged into the two legally binding Protocols Nos. 15 and 16. The real question then becomes whether or not these new Protocols have had any real impact in the interpretative methodology as in the manifested intentions of the States Declarations.

2.1. The perfect antidote to cure the conventional system's frailty: the principle of subsidiarity

It must first of all be stressed that the *fil rouge* holding together the various reform proposals is undoubtedly the emphasis on the subsidiary nature of the supervisory mechanism established by the Convention and, notably, the fundamental role which national authorities must play in guaranteeing and protecting human rights at the national level.

The prominence of the fundamental principle of subsidiarity was already invoked before; in the specific context of the ECHR, it translates as follows: «the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court», while «the latter's jurisdiction is strictly confined to supervising States' conduct»: its power of intervention is thus limited to those instances characterised by domestic institutions' unwillingness or incapacity to ensure effective protection of the conventional rights and freedoms, following a "complementary subsidiary" model of action.[28]

[27] *Ibid.*, 128.
[28] *Interlaken Follow-up. Principle of Subsidiarity*, Note by the Jurisconsult, 2.

This was, on the other hand, reiterated by the Court, according to which «… the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities»[29]; due to the reason that it is in the interest of the overall efficacy of the conventional system that the case is to be investigated and resolved in so far as possible by domestic authorities, who are best placed to do so,[30] «the Court… cannot assume the role of the competent [national institutions], … [which] remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention»[31].

Against this background, the relevance of the Interlaken Process is dual. Firstly, it lies in the fact that, at the multiple Conferences held from 2010 to 2018, the Member States not only reaffirmed the importance of respecting the subsidiary logic of the conventional mechanism, but also manifested a clear willingness to *amend* the ECHR in order to have it declared in black and white. Hence, the reform process appropriates a concept that is not new in European practice, seeing in it the best means to reinforce the *autonomy*[32] of national legal systems in adjudicating human rights controversies. In their view, the inclusion of the concept of subsidiarity in the text of the covenant would amount to a wider margin of *deference* in favour of the lower layers in the multi-level system of protection.

The objective of strengthening the principle at issue is set out in clear terms in every Declaration: suffices it to consider that the Court is expressly cautioned to take rigorously into account its subsidiary role in the interpretation of the Convention and to conduct its review following the guide of the fundamental and transversal principle of subsidiarity, as if to suggest an inconsistent practice, up to that point, which have not respected this imperative.[33] Moreover, the Conferences Participants did not miss the chance to send the message that, in order to enhance the authority and the credibility of the Strasbourg jurisdiction, re-examination of issues of fact and national law decided by national authorities should be strictly avoided,[34] and the practical manifestation of the substantive aspect of the

[29] ECtHR, Judgment of 26 March 2006, App No 36813/97, *Scordino* v *Italy (no. 1)*.

[30] ECtHR, Judgment of 18 September 2009, App Nos 16064/90 et al., *Varnava and Others* v *Turkey*.

[31] ECtHR, Judgment of 23 July 1968, App No 1474/62 et al., *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* v *Belgium (merits)*, para 10.

[32] *Interlaken Follow-up…, op. cit.,* 4.

[33] Interlaken Declaration, 9(b); Izmir Declaration, 5; Copenhagen, 28.

[34] Interlaken Declaration, 9(a) Izmir Declaration, 2(c).

principle of subsidiarity – represented by the margin of appreciation – shall be given greater prominence.[35]

On this last point,[36] the Brighton Declaration distinctly stated that a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case-law should be included in the Preamble to the Convention.[37]

It is no coincidence that this proposal was made at a time when the climate of mistrust towards the Court's work was at its height. It has rightly been written that «the Brighton Conference spoke not only of more subsidiarity but also of *more robust* [emphasis added] subsidiarity»[38]: such a concept was in fact instrumentalised to invoke a more radical review of the role of the Court that, while retaining its task as «final arbiter of European human rights»[39] would inevitably see the scope of its jurisdiction shrink: among other measures, a procedural expedient[40] was elaborated with the aim of bringing fewer and fewer cases under the Court's control, while the intended amendment of the Preamble would strengthen national institutions by recognising a wider margin of manoeuvre in their favour.[41] As a side

[35] Brighton Declaration, 12(a); Brussels Declaration, 7; Copenhagen Declaration, 31.

[36] The margin of appreciation is a notable but not the only manifestation of the principle of subsidiarity. The analysis of the ECtHR case-law shows in fact some references to subsidiarity with no connection to the margin of appreciation. In terms of procedural subsidiarity see for instance: ECtHR, Judgment of 28 July 1999, App No 25803/94 *Selmouni* v *France*, para 74; Judgment of 26 October 2000, App No 30210/96, *Kudla* v *Poland,* para 152; Judgment of 28 April 2004, App No 56679/00, *Azinas* v *Cyprus*, para 38; Judgment of 29 March 2006, App No 65075/01, *Cocchiarella* v *Italy*, para 43; Judgment of 8 June 2006, App No 75529/01, *Sûrmeli* v *Germany,* para 97; Judgment of 29 April 2008, App No 13378/05, *Burden* v *the United Kingdom*, para 42; Judgment of 29 June 2011, App No 34869/05, *Sabeh El Leil* v *France*, para 32; Judgment of 14 April 2015, App No 24014/05, *Mustafa Tunc and Fecire Tunc* v Turkey, para 113; Judgment of 20 October 2016, Appl. No. 7334/13, *Muršić v. Croatia*, para 71; Judgment of 2 November 2017, App No 21272/03, *Sakhnovskiy* v *Russia,* para 67; Judgment of 19 December 2017, App No 56080/13, *Lopes de Sousa Fernandes* v *Portugal*, para 131. In other cases, subsidiarity is referred to by the Court in support of self-restraint on behalf of the Strasbourg Court. See for instance: ECtHR, Judgment of 8 March 2006, App No 59532/00, *Blecic* v *Croatia*, para 90; Judgment of 13 December 2012, App No 22689/07, *De Souza Ribeiro* v *France*, para 84; Judgment of 23 March 2016, App No 43611/11, *FG* v *Sweden*, paras 117-118; Judgment of 23 August 2016, App No 59166/12, *JK and others* v *Sweden*, para 84.

[37] Brighton Declaration, 12(b); Copenhagen Declaration, 7.

[38] MADSEN M.R., *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, in 9 Journal of International Dispute Settlement, 2018, 204

[39] *Ibid.*, 201.

[40] «The Conference … [a]ffirms that an application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia*, to the extent that the Court considers that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of the Convention; and encourages the Court to have regard to the need to take a strict and consistent approach in declaring such applications inadmissible, clarifying its case law to this effect as necessary». (Brighton Declaration, 15(d)).

[41] *Ibid.*, 11-12.

effect, this would have resulted, *inter alia*, in an easing of the Court's workload, although the primary intent appears to be to downsize the Court's role.[42]

The Interlaken Process is relevant in another aspect: in spite of the clear intentions of the national representatives, the concept of subsidiarity emerging from it seems to move away from the essential idea of this legal principle as outlined in the opening of the Chapter. More precisely, it tends to move away from the classical definition of the same as a *criterion of distribution* of competences that vertically favours the "lower" level but also serves to legitimise, only where necessary, the "upper" one. On the contrary, the reform process formulates a concept of subsidiarity that ends up approaching, in a completely new and innovative way, a *criterion of cooperation* between levels of competence, *i.e.* between the Court and national authorities.

This transformation of the principle of subsidiarity is made evident first and foremost by the notion of "shared responsibility" embraced by both States and the Court. Interestingly, although the narratives used by the two parties appeared to be slightly different, they are not irreconcilable with each other.

On the one side, States stressed that the notion at stake «aims at achieving a balance between the national and European levels of the Convention system»[43]; by fully applying it, they are «determined to work in partnership with the Court […], drawing also on the important work of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe as well as the Commissioner for Human Rights and the other institutions and bodies of the Council of Europe, and working in a spirit of cooperation with civil society and National Human Rights Institutions»[44]. Once again, the intention seems clear to emphasise, through political declarative means, the privileged role of the domestic actors within the conventional system.

[42] The Brighton Declaration states that «[t]he full implementation of the Convention at national level require States Parties to take effective measures to prevent violations […] in a way that gives full effect to the Convention. […] Collectively, these measures should reduce the number of violations of the Convention. They would also reduce the number of well-founded applications presented to the Court, thereby helping to ease its workload» (point 7); moreover, it reads: «[t]he admissibility criteria in Article 35 of the Convention […] should provide the Court with practical tools to ensure that it can concentrate on those cases in which the principle or the significance of the violation warrants its consideration. It is for the Court to decide on the admissibility of applications. It is important in doing so that the Court continues to apply strictly and consistently the admissibility criteria, in order to reinforce confidence in the rigour of the Convention system and to ensure that unnecessary pressure is not placed on its workload» (point 14).

[43] Copenhagen Declaration, 6 and 9.

[44] Brighton Declaration, 3-4.

On the other side, in the Court's view, the notion of the "shared responsibility" for the protection of human rights was regarded as «one of the basic principles of the reform of the Convention system …. [holding] out the prospect of a new, more stable equilibrium in the Convention system, making for a stronger human rights regime in Europe, to the greater benefit of all those who are protected by it»[45]. If in the aforementioned memorandum published in 2009, former President Costa expressly identified the sharing of responsibilities between States and the Court as one of the objectives to be included in the reform process,[46] in the Court's perspective the idea of cooperation was not akin to any «shifting responsibility»[47]; quite the opposite, it entailed the States' undertaking to put in action positive measures to uphold conventional standards of protection in order to ensure «that the Court's case-load is of a manageable size and consists of cases raising important Convention issues»[48].

It appears that the priority of the Court was to reform the conventional system primarily on the grounds of organisational and deflationary reasons: on this understanding, cooperation was to be considered as a useful instrumental in improving the functioning of the European Court, the latter being strained by the increasing workload,[49] with a consequent widening of the notorious gap between appeals lodged and appeals disposed of, and the effectiveness and credibility of the regional control mechanism being called into question.[50] Hence, for the sake of preventing future violations of human rights (and, consequently, further applications), the collaboration with Member States should entail the obligation of the latter to ensure that their law and judicial practices remain in conformity with the principles developed in the European case-law.[51]

Although, as is evident, the two versions adopted by the two parties do not coincide in every respect, it is nevertheless true that the enucleation of concept of "shared responsibility" brings an undeniable element of novelty in the conventional system which shall not be under-

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[45] ECHR, *Contribution of the Court to the Brussels Conference*, 25 January 2015, available at: https://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf, point 3.

[46] MOWBRAY A. R., T*he Interlaken Declaration—The Beginning of a New Era for the European Court of Human Rights?*, in 10 Human Rights Law Review 3, 2010, 520.

[47] LAFFRANQUE J., Intervention at the Seminar on "*Subsidiarity: a double sided coin*…, *op. cit.*, 8.

[48] ECHR, *Preliminary opinion of the Court in preparation for the Brighton Conference,* adopted by the Plenary Court on 20 February 2012, available at: https://www.echr.coe.int/Documents/2012_Brighton_Opinion_ENG.pdf, 25.

[49] Suffices it to mention that at 31 December 2021 approximately 70,150 applications were pending before a judicial formation. During the same year, about 44,250 applications were allocated to one of the Court's judicial formations. Of the total number of judgments delivered, the Court found at least one violation of the Convention by the respondent State in 84% of the cases (for further information see ECHR, Facts & Figures 2021, available at: https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf).

[50] Declaration of Interlaken, 7-8.

[51] ECHR, *Contribution of the Court*…, *cit.*, point 5.

estimated. In fact, its open and uncertain scope – which lends itself to readings that are not entirely coincidental but which can accommodate the expectations of all parties – prevents a clear division of competences in favour of a preference for the national level. From this point of view, the Interlaken process certainly represents a failure.

The intended outcome of the reform process entailed the ideal of a «structural change within the European human rights space»[52], by rebalancing the whole conventional architecture in favour of national levels of laws and politics:[53] it was a matter of "regulating" the growing discontent in an well-consolidated instrument - namely, the principle of subsidiarity - capable of limiting the innovative power exercised by the Strasbourg judges in favour of greater room for manoeuvre for State institutions. What has not been duly taken into account, however, is that subsidiarity is certainly not a "magic spell", the mere evocation of which makes it possible to clearly and definitively define a boundary between two levels of competence; on the contrary, it is an elastic principle, the definition of which always leaves a wide room for discretion.[54]

In this concern, with a view to better understand its content emerging from the context of the Interlaken Process, as well as its impact over the interpretative authority of the Court, the following pages aim at analysing the legal framework giving application to it.

3. The (symbolic) impact of Protocol No. 15 on the interpretative methodology of the Court

A first element to examine in order to better understand the content of the principle of subsidiarity as resulting from the reform process is that of "compromise". In the website of Oxford Learners' Dictionaries, the noun is defined as «an agreement made between two people or groups in which each side gives up some of the things they want so that both sides are happy at the end»[55]. Far from having a negative connotation, the term rather refers to an act of settlement among two or more different perspectives enabled by the ability of each party to give up part of its demands so that all can be satisfied. If one keeps such a definition

[52] MADSEN M.R., *op. cit.*, 200-201.

[53] MADSEN M.R., *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, in 79 Law and Contemporary Problems, 2016, 169.

[54] For a similar analysis on subsidiarity see VANONI L. P., *op. cit.,* 4-8.

[55] See on https://www.oxfordlearnersdictionaries.com

in mind, it is possible to easily find each of its characterising elements in Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms: the agreement, the renunciation, the happy ending.

In this paragraph, it is argued that whilst the Protocol is not an agreement *per se*, it is nevertheless the product of a long negotiation process in which the position of Member States often clashed with that of the Court on various aspects. A literary analysis of the text indeed shows how the more daring proposals have been abandoned in favour of a more nuanced amendment of the Convention, so that the final version of the Protocol can satisfy every party.

In this regard, one must necessarily refers to Article 1 of Protocol No. 15, pursuant to which a new recital has been added at the end of Preamble of the ECHR stating that «the High Contracting Parties, in accordance with the *principle of subsidiarity*, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a *margin of appreciation*, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention».

Nevertheless, it should not be overlooked that further significant innovations have been introduced in the Convention system, namely: the adjustment of the "significant disadvantage" test;[56] the reduction of the time-limit for making an application from six months to four months;[57] the removal of the parties' veto over the relinquishment of a case to the Grand Chamber;[58] the repeal of the compulsory retirement age.[59] These last three have been suggested by the Court itself. However interesting, the analysis of such novelties does not fall within the scope of this research, as not strictly relevant to the theme of investigation. Article 1 will therefore be the privileged object of the examination of the next sub-paragraph.

3.1. Art 1 of Protocol No. 15: nothing new under the sun?

Little over a year after the adoption of the Brighton Declaration, the Steering Committee for Human Rights (CDDH) was charged with the supervision of the preparation of a draft amending protocol to the Convention. The task was to design a legal instrument

[56] Protocol No. 15, Article 5.
[57] *Ibid.*, Article 4.
[58] *Ibid.*, Article 3.
[59] *Ibid.*, Article 1.

which could translate into normative terms the political message conveyed by the experience at Brighton,[60] without nevertheless putting in jeopardy the core objectives of the Convention as expressed by the Plenary Court in its Preliminary opinion in preparation for the Brighton Conference in February 2012, as well as in the interventions of the many NGOs.

On 17 January 2013 the draft version was submitted to the Parliamentary Assembly, which expressed its positive opinion on the adoption of the text with no amendment to be included, thus endorsing, among others, the insertion in the ECHR's Preamble of a reference to the principle of subsidiarity and the doctrine of the margin of appreciation, «as developed in the Court's case law»[61]. Finally, Protocol No. 15 was examined and adopted by the Committee of Ministers at its 123rd Session on 16 May 2013 and opened for signature the following month.

The link between the Protocol and the Declaration of Brighton becomes immediately evident when looking at the Explanatory Report.[62] The claim contained therein that the direct reference to the principle of subsidiarity and the doctrine of the margin of appreciation is intended to «enhance the transparency and accessibility of these characteristics of the Convention system»[63] echoes the Declaration proposal suggesting that the visibility of remedies at the national level should be intensified.[64]

Moreover, the Report reproduces exactly the point 11 of the Declaration when it stated «[t]he jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The [...] role of the Court is to review whether decisions taken by

[60] The CDDH directed the Drafting Committee responsible for drafting Protocol 15 to «stay within the consensus of the Brighton Declaration, respect the balance of the existing preamble and be comprehensible to the general public» (CDDH Report, 75th Meeting, CDDH(2012)R75, para 6.i.).

[61] PACE Opinion 283 (2013), *Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, 2.1.

[62] The Explanatory Report forms parts of the *travaux preparatoires* of the Protocol and therefore is relevant to its interpretation (see DDH, 'Opinion of the Court and of the Parliamentary Assembly on Draft Protocol No 15 to the European Convention on Human Rights' 7 June 2013, CDDH(2013)015).

[63] ECHR, *Explanatory Report*, 7.

[64] VOGIATZIS N., *When "reform" meets "judicial restraint": Protocol 15 amending the European Convention on Human Rights*, in 66 Northern Ireland Legal Quarterly 2, 2015, 131.

national authorities are compatible with the Convention, having *due regard* [emphasis added] to the State's margin of appreciation»[65].

It is also no coincidence that the main spokesperson for the process of change, and organiser of the aforementioned conference, *i.e.* the United Kingdom, signed the Protocol on the same day it was open for signature, also communicating its great attachment to it, as well as its exception that «all States Parties [would] sign and ratify it as soon as possible so that the measures agreed in the Brighton Declaration may be rapidly implemented»[66].

Well, while it is immediately clear that the hostile political attitude wielded in Brighton succeeded in gaining consensus on the amendment of the Convention's Preamble, it is also true that the impact of this change is actually more modest than the British government's proposals aimed at achieving. This appears immediately evident if one considers the *part* of the covenant impacted by such an amendment.

As a matter of fact, if one bears in mind that the addition of the new recital affects the Preamble, it becomes essential to recognise the function of the latter; this in fact proclaims the fundamental aims, values and principles in the light of which the Convention is interpreted in line with the teleological hermeneutical approach, the Court has shown to give prominence to. Accordingly, it seems very likely that the new references to the principle of subsidiarity and the margin of appreciation can and will be referred to by the Court so as to respect the ECHR's object and purpose and not to lower protection standards developed throughout its jurisprudence.[67]

Furthermore, from the point of view of the Court's previous practice, the amendment of the Preamble does not bring any clarification as to its application: albeit not previously incorporated in the covenant text, the principle of subsidiarity already lied at the very core of the mechanism of protection established under the ECHR as a fundamental rule, and the Court itself welcomed the direct mention of the principle in the new paragraph of the Preamble.[68] Nevertheless, its codification is not accompanied by general clauses setting out

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[65] ECHR, *Explanatory Report*, 9.

[66] VOGIATZIS N., *op. cit.*, 133.

[67] Also of this opinion are NALIN E., *I Protocolli n. 15 e 16 alla Convenzione europea dei diritti dell'uomo*, in Studi sull'integrazione europea IX, 2014, 128. See also: DUMONT L., *Le protocole 15 à la Convention européenne des droits de l'homme : renforcement ou affaiblissement de la garantie des droits fondamentaux?*, in La Revue des droits de l'homme . Revue du Centre de recherches et d'études sur les droits fondamentaux Actualités Droits-Libertés, 2021, doi: 10.4000/revdh.12980.

[68] ECHR, *Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights*, adopted on 6 February 2013, available at: https://www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf, 5.

the general conditions for its application, leaving a *de facto* wide discretion to the interpreter (*i.e.* the Court) in filling it with content.

Likewise, the margin of appreciation already represented a guiding hermeneutic tool for the Court, which enters into relationship with the others developed by European jurisprudence, as largely discussed in the previous Chapter. Suffices it to recall that, its operation must be counterweighted with a second "pillar" the conventional system rests on, namely the principle that rights must be effective (*effect utile*), as well as with the evolutive interpretation of the Convention; by virtue of this, the Court's position regarding the scope of a particular Convention right may evolve over the years or decades, with the result that a specific matter hitherto left entirely to States' discretion may be called into question by the Court.[69] These considerations may aid shedding some light on the unease expressed within the Court at the time of the Brighton Conference facing the States' attempt to legislate for the margin of appreciation in the Convention, «any more than for the many other tools of interpretation which have been developed by the Court in carrying out the judicial role entrusted to it»[70].

Analysis of the wording of the text provides insightful considerations to demonstrate the lack of clarification as regards the use of this interpretative instrument due its ambiguous formulation. As a matter of fact, the phrasing used in the new recital is somewhat vague, thus giving rise to a certain amount of uncertainty as to its intended meaning. If one examines the Explanatory Report in search of some clarification, it is possible to read that the direct reference to the principle of subsidiarity and the margin of appreciation is intended to *be consistent with* the doctrine developed by the Court in its jurisprudence; an addition, the latter, that the Court had suggested in order to further develop the text, and that inevitably entails a necessary comparison with the practice of the Strasbourg jurisdiction itself in order to fill the new paragraph with a more precise meaning.[71]

Moreover, it is noteworthy that the final formulation departs from the UK's draft proposal, which would have preferred to dictate expressly that State Parties enjoy «a *considerable* margin of appreciation in how it applies and implements the Convention» and that «national authorities are in principle *best placed* to apply the Convention rights in the national context»; the original proposal would have also stated that «the margin of appreciation

[69] ECHR, *Interlaken Follow-up…, op. cit.,*15.

[70] Sir Nicolas Bratza, *opening address at the Brighton High-level Conference*, available at: https://www.echr.coe.int/Documents/Speech_20120420_Bratza_Brighton_ENG.pdf.

[71] ECHR, *Opinion of the Court*…, *op. cit.*, 4.

implies, among other things, that it is the *responsibility of democratically elected national parliaments* to decide how to implement the Convention in reasoned judgments»[72]: reference to the "considerable" nature of the States' leeway, as well as that of domestic institutions has disappeared.

The fact remains that the margin of appreciation has now effectively entered into the text of the convention, with the consequent potential risk that States may activate it as an open invitation to the Court to grant greater leeway.[73] Hence, following to the entry into force of Protocol No. 15, the margin of appreciation cannot be considered anymore only a jurisprudential principle, since it has been included in all respects in the language of the Convention.[74]

Yet, the possibility of its potential activation by States must not be overestimated: even if national authorities claim to have the primacy in guaranteeing the rights and freedoms as defined by the ECHR, this contention would inevitably go hand-in-hand with the assertion of their first-rank responsibility for the fulfilment of their obligations stemming from the regional protection mechanism; obligations, the content and fulfilment of which remain firmly under the Court's control pursuant to Article 19.

As a matter of fact, the Strasbourg judge made it clear that, despite its importance, the margin of appreciation is never unlimited, and that the task of deciding whether or not there has been a violation always lies with the Court, as the supreme guardian of the Convention.[75] Not to mention that the complexity and the variability of such a valuable tool as that of the margin of appreciation make it strictly dependent on the Court's accurate assessment of the circumstances of the case:[76] it is the latter that defines «what to accept and what to reject» and how to reformulate the criteria regulating the appropriate level of discretion to be afforded.[77]

After all, it is the very same recital which expressly recognises that the margin of appreciation accorded to States is «subject to the supervisory jurisdiction of the European

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[72] UK Government, *Draft Brighton declaration on the future of the European Court of Human Rights* - Second version, available at: http://adam1cor.files.wordpress.com/2012/02/2012dd220e.pdf.

[73] CASSESE S., *Ruling indirectly judicial subsidiarity in the ECtHR*, Paper for the Seminar on "*Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities*", held to coincide with the ceremony marking the official opening of the judicial year of the European Court of Human Rights, 30 January 2015, Strasbourg, available at: https://www.echr.coe.int/Documents/Dialogue_2015_ENG.pdf, 14

[74] BESSON SAMANTHA, *L'Évolution du contrôle européen : vers une subsidiarité toujours plus subsidiaire*, in TOUZE S., *La Cour européenne des droits de l'homme : une confiance nécessaire pour une autorité renforcée*, Publications du Centre de recherche sur les droits de l'homme et le droit humanitaire, 2016, 978-2-233-00810-7. ffhal-02516348f, 59.

[75] ECHR, *Interlaken Follow-up*…, *op. cit.*, 51-52.

[76] See for instance Sir Nicolas Bratza, *cit.,* 5.

[77] NUSSBERGER A., *op. cit.,* 20.

Court of Human Rights»: in line with the principle of "shared responsibility", the ECtHR's "surveillance" over domestic practice in the application of the margin is thus reinforced, as for the first time it imply that the confined character of the latter stems directly from the covenant text.[78] Instead, the formulation of the Brighton Declaration, stating that the Court is encouraged to *give great prominence* and apply *consistently* the principle of subsidiarity and the margin of appreciation in its case-law is abandoned.[79]

In this way, one of the reform proposals that would have had a stronger impact on the ECtHR's interpretative authority ended up being scaled down, failing to lead to a real weakening of the Court"s activity. On the contrary, not only the margin of appreciation, but also its limits are now imposed by a source of law different from the judge-made law. Put in different terms, the last recital can now serve as a safeguard at the Court's disposal not only to «hold firmly the status quo, namely its maintenance of the final word on states' discretion»[80], but also to potentially enhances its competence enrooted on the principle of shared responsibility" for guaranteeing conventional rights.[81]

Indeed, if the principle of subsidiarity in Protocol No. 15 insists on the primacy of the obligations of national authorities, the Court can concentrate its efforts on the determination of these obligations and their content through its own hermeneutic activity: as has already been reiterated, the conventional provisions live on in the Court's jurisprudence and thanks to it they are filled with concrete and current content. However, by this route, the Court could be less and less dedicated to the complementary control of measures of protection and restriction of fundamental rights at the national level when the minimum standard of protection established at the conventional level is not respected, and more and more it could arrogate to itself a shared responsibility with the States to be exercised in a general way: by invoking the principle of subsidiarity with a view to reinforce conventional obligation at the domestic level, the Court could take the chance to define the actual content of the obligations above, with effects that fall outside the concrete case. In short, the complementarity that should characterise subsidiarity as a fundamental principle of the ECHR system is being replaced by that of competitiveness, which, moreover, contravenes the essential core of subsidiarity.

[78] VOGIATZIS N., *op. cit.*, 144.
[79] Brighton Declaration, 12(a).
[80] VOGIATZIS N., *op. cit.*, 144.
[81] O'MEARA N., *Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR*, in 31 iCourts Working Paper Series, 2015, 18.

In the light of the above, it can be inferred that no concrete changes have been brought into the Court's interpretive practice: the concept of subsidiarity as codified in Protocol No. 15 has in fact the potential to foster the continuity of the current practice of the European Court of Human Rights, while at the same time it can be used as a tool that the Court can potentially rely on strategically to strengthen its control over the diligent compliance of States with their primary responsibility.

4. The new "Dialogue Protocol"

The transformation of the principle of subsidiarity is also made evident by the new preliminary mechanism envisaged by Protocol No. 16, pursuant to which the Court's competence has been extended to deliver advisory opinions[82] under request of Member States on the interpretation of the Convention in the context of a specific case at domestic level.[83]

The theme of "dialogue" between the Court and the domestic judicial authorities has been taken in high consideration throughout the whole reform process in order to « foster the implementation of the Convention, in keeping with the subsidiarity principle»[84]; more precisely, the express encouragement to engage into «a constructive and continuous»[85] interaction between the national and European levels was meant to accentuate and

[82] Such a new competence would be in addition to that accorded to the Court under the 1970 Protocol No. 2, by which the Court has been entitled of the power to «give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto». (Art. 47, para 1 ECHR) on the request of two-thirds of the Committee of Ministers. This competence is nevertheless subjects to the restrictions laid down in the second paragraph of Article 47, pursuant to which the Court's «opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in […] the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention». Given such a limited scope both from a subjective and an objective point of view, the Court has been requested only three times and it has issued only two advisory opinions, both concerning the candidatures submitted for the election of the ECHR judges. The first one was delivered on 12 February 2008 and was aimed at answering the question whether a list of candidates for the position of a judge at the ECtHR can be refused solely on the basis of gender-related issues. In this regard, the Strasbourg judge found that a list which fails to include at least one candidate of the sex under-represented in the Court is not compatible with Article 22. The second advisory opinion was issued on 22 January 2010, in which the Court addressed several procedural issues, *inter alia*, the question whether the withdrawal of a list of candidates was compatible with the Convention and whether the Parliamentary Assembly of the Council of Europe should consider the initial list. The opinions are available at: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/advisoryopinions&c.

[83] Izmir Declaration - Section D "Advisory opinion"; Brighton Declaration, 12(d).

[84] GLAS L.R., *op. cit.*, 138.

[85] Copenhagen Declaration, 33.

consolidate national authorities' primary responsibility, making them able to settle human rights disputes domestically, without the need to activate the international machinery.[86]

On the one hand, the role of national institutions as the primary guarantors of the conventional rights and freedoms has been fully acknowledged by the European Court, which has underlined how the prospective of a reinforced dialogue between Strasbourg and national courts was to be encouraged.[87] On the other hand, States have recognised that the assistance from the Council of Europe could help to disseminate good practice and, consequently, to raise standards of human rights observance in Europe.[88]

Already in 2006, for the first time, the so-called Committee of Ministers of the Group of Wise Persons – established one year earlier by the Third Summit of Heads of State and Government of the Member States of the Council of Europe – proposed to «foster dialogue between courts» by introducing « a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto»[89]. The Group of Wise Persons' proposal was consequently discussed at length during the series of High-level Conferences from the one convened in Izmir onwards.[90]

In particular, following the Brighton Conference, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to draft a first version of a text in which proposals on the advisory opinion mechanism could converge. On the invitation of the Committee of Ministers, the Parliamentary Assembly adopted an opinion, where it expressed its support for Draft text on the grounds of its potential to facilitate the application of the Court's jurisprudence by creating a platform for judicial dialogue; it also welcomed the

[86] BULTRINI A., *The Future of the European Convention on Human Rights after the Brighton Conference*, in 1223 IAI Working Papers, 2012, 3-6.

[87] Preliminary opinion of the Court in preparation for the Brighton Conference adopted by the Plenary Court on 20 February 2012, points 3 and 27.

[88] Brighton Declaration, point 8. Interaction between the ECtHR and domestic courts have been intensified after the official launch of the new Superior Courts Network in October 2015. The Network is aimed at exchanging the information concerning both the Convention case-law as well as the domestic judicial practice applying the Convention. Moreover, it makes available to Network members reports on comparative and international law prepared by the Research Division on specific legal issues under the Court's observation. By providing such information, the Network is aimed at facilitating systemic exchanges of knowledge regarding human rights legal and judicial practice both at international and national level (The Interlaken Process and the Court (2015 Report)).

[89] Ministers' Deputies CM Documents, CM(2006)203 15 November 2006, 979bis Meeting, 15 November 2006, Report of the Group of Wise Persons to the Committee of Ministers, p. 81.

[90] For a more detailed analysis see the ECHR, *Explanatory Report of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, available at: https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

proposed mechanism due to its capacity to faster decisions of cases on the domestic plane by helping to shift, from *ex post* to *ex ante*, the resolution of a number of questions of interpretation of the Convention's provisions in the domestic forum.[91]

After receiving the *placet* of both the Court and the Parliamentary Assembly of the Council of Europe, the draft was adopted as Protocol No. 16 to the Convention at the Ministers' Deputies' 1176th meeting, and has been open for signature and ratification by the Member States since late 2013.

What the following pages intend to show is that the "Dialogue Protocol", as defined by former President Dean Spielmann,[92] has established a new model of interaction between national supreme jurisdictions and the European Court aimed at "modulating" the interpretation and application of the ECHR in line with a new concept principle of subsidiarity which equates with that of "shared responsibility".

In this respect, Zagrebelsky has framed the new mechanism outlined by the Protocol No. 16 in what he defined the «correct terms of subsidiarity», with this last expression referring to the current and concrete attempt to fill with content the obligation of Member States enshrined in Article 1 in the light of the authoritative interpretation of which the Court has a monopoly under Article 32. But, in speaking of "correct terms", the author also refers to a new concept of subsidiarity which the consultative competence of Protocol 16 is grafted on,[93] and which is based on the idea of loyal cooperation between institutions fully entitled to participate, each in its own role, in the application of the Convention law.[94] In this way, the Protocol fails to address the original intention of States.

4.1. The principle of "shared responsibility" as implemented by Protocol No 16

[91] Opinion 285 (2013) of the Parliamentary Assembly adopted on 28 June 2013 - Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms - Parliamentary Assembly, 2.1-2.2.

[92] SPIELMANN D., Opening Remarks at the International Conference *"Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges"* held in Baku on 24-25 October 2014, 2.

[93] V. ZAGREBELSKY., *Parere consultivo della Corte europea dei diritti umani: vera e falsa sussidiarietà*, in LAMARQUE E. (ed. by), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prima riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo*, Torino 2015, 92-93.

[94] The expression "loyal collaboration" is derived from CONTI R., *La richiesta di parere consultivo alla Corte europea delle alte corti introdotta dal Prot. 16 CEDU e il rinvio pregiudiziale alla Corte di Giustizia dell'Unione europea. Prove d'orchestra per una nomofilachia europea*, in LAMARQUE E. (ed. by), *op. cit.*, 131.

The new conception of subsidiarity becomes apparent from the analysis of the key parameters of the new procedure as displayed in Article 1 of the Protocol.[95] As a matter of fact, the entire procedure, its "voluntary" nature and its outcome are intended to be a concrete manifestation of the principle at issue; not surprisingly, the new mechanism established under Protocol No. 16 has been called «a child of its time»[96], that is to say of the "Age of Subsidiarity".[97]

In accordance with the provision above-mentioned, the request to issue an advisory opinion is optional and can be formulated only by courts and tribunals at the apex of the domestic judicial system, previously designated by Member States by means of a declaration addressed to the Secretary General of the Council of Europe.[98] This means that the decision to activate the "judge-to-judge procedure" rests with the supreme judicial authorities of States, which therefore are considered to be the only ones capable of assessing whether the opinion delivered by the Court could be useful in resolving the dispute submitted to them.[99]

Concurrently, provided that the ultimate decision of the case is left to the highest national courts and tribunals in accordance with the binding means offered by domestic law, the implementation of the ECtHR's case-law is facilitated,[100] and the harmonisation of the case-law at national level is accelerated.[101]

Furthermore, precisely for the reason that the purpose of the mechanism is not to relocate the human rights dispute to the "international level", but rather to give national judicial actors the proper *guidance* on hermeneutic issues, the nature of the consultative system is incidental: the advisory opinions issued by the Grand Chamber of the Court[102] cannot but

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[95] Art. 1 reads: «1. *Highest courts and tribunals of a High Contracting Party*, as specified in accordance with Article 10, *may* request the Court to give advisory opinions on *questions of principle relating to the interpretation or application* of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion *only in the context of a case pending before it*. 3 The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case».

[96] LAVRYSEN L., *The mountain gave birth to a mouse: the first advisory opinion under Protocol No. 16*, in *Strasbourg Observers*, published on 24 April 2019.

[97] ECHR, *Reflection Paper on the proposal to extend the Court's advisory jurisdiction,* available at: https://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf, 16.

[98] France, for example, indicated the Court of Cassation, the Council of State, and the Constitutional Council.

[99] BENOIT-ROHMER F., *Le Protocole 16 ou le renouveau de la fonction consultative de la Cour européenne des droits de l'Homme*, in *Revue des droits de l'Homme* 16/19 - in *Les défis liés à l'entrée en vigueur du Protocole 16 à la Convention européenne des droits de l'Homme, Actes de la Journée d'étude de l'Institut de Recherche Carré de Marré de Malberg*, 25 janvier 2019, 6.

[100] *Ibid.*, 5

[101] BIANKU L., *La Cour Européenne des Droits de l'Homme et le Protocole 16*, in *Les défis liés… op. cit.*, 18.

[102] The procedural aspects of the new preliminary mechanism are set out in Articles 2-4. In particular, the first of these provisions states that the decision on whether or not to accept a request for an advisory opinion must be taken by a panel of five judges of the Grand Chamber and must be reasoned. While at first the Court spoke out against the inclusion of such a requirement in the Protocol, it later expressly recognised that it could

be related to a specific case pending before the requesting judge, the latter being expected to provide evidence of the necessity and the utility of the procedure.[103] Hence, the Court's interpretation is strictly correlated to the legal and factual background of the pending dispute provided by the domestic jurisdiction.

By giving interpretative guidance to national judges before whom disputes are still pending, it is also true that the Grand Chamber of the Court is able to elucidate the rules instituted by the Convention which are necessary to settle the case already at national level. In doing so, it does not take the domestic judiciaries' place in the final decision of the dispute submitted to them;[104] the complementary nature of the Court's hermeneutic guidance thus clearly underlines the national primary task in the implementation of the conventional principles and standards. At the same time, it is nevertheless true that the ECtHR can *assist* national judges to reconstruct conventional general rules, which otherwise would have to be extrapolated from specific European case-law. As rightly pointed out, the clarification of points of Convention law would enable the Court not so much to establish new principles; rather, it could *reiterate* them to national judges within the framework of a non-confrontational judicial forum and, in time, discourage the filing of appeals that could be resolved in such "judicial dialogue".[105]

While it has long been used to thinking of the interventions of the European Court of Human Rights as something that intervened *afterwards* and *from outside*, there is now a Court that intervenes *during* and *from within*;[106] as a matter of fact, the new mechanism encourages

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be useful as it would strengthen the objective of creating a constructive dialogue with national courts (ECHR, *Opinion of the Court on Draft Protocol No. 16*…, *cit*., para. 9). As for the decision of the panel, its examination is focused essentially on whether the request submitted to the Court concerns a question of principle which relate to the rights and freedoms defined in the Convention and the Protocols thereto and whether it meets the procedural requirements established in Article 1, para 3 of the Protocol (ECHR, *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention*, 7). In case of acceptance, the advisory opinion is delivered by the Grand Chamber.

[103] ECHR, *Explanatory Report*..., *cit*., 10-12. As for this requirement, the Court held that «it should not be for the Strasbourg [judges] to have to work out for itself in which respect the national court requires its opinion. For the procedure to function properly, the relevant issues of Convention law should be adequately identified and discussed at the national level. […] in the Court's view, [...] the need to allow the Court to focus on the question of principle brought before it [must be stressed]. The Court should not be called upon to review the facts or the national law in the context of this procedure. Nor is it for the Court to decide the case pending before the requesting court» (ECHR, *Opinion of the Court on Draft Protocol No. 16*…, *cit*., 8).

[104] In this respect, Vincenzo Cannizzaro speaks of a kind of «funzione maieutica» (maieutic function) that Protocol No. 16 would configure (see CANNIZZARO V., *Pareri consultivi e altre forme di cooperazione giudiziaria nella tutela dei diritti fondamentali: verso un modello integrato?*, in LAMARQUE E. (ed. by), *op. cit*., 83).

[105] CRIVELLI E., *op. cit*., 721-722.

[106] SQUAZZONI A., *Qualche suggestione. Se un ponte tra giudici si fa diretto*, in LAMARQUE E. (ed. by), *op. cit*., 135. On the topic see also RUGGERI A., *Ragionando sui possibili sviluppi dei rapporti tra le Corti europee e i giudici*

national judges to develop a deeper knowledge as well as to consistently conduct a full reconnaissance of the advisory opinions issued by the European Court in order to avoid intervention by the international judge. But the downside is that the latter would then be able to develop the underlying general principles of law «in a manner that [would] speak to the legal systems of *all* [emphasis added] the Contracting Parties»[107].

In fact, the new procedure cut out the Court's consultative competence exclusively in cases concerning *questions of principle* relating to the interpretation or application of the rights and freedoms defined in the Convention. In such a category, the "Reflection paper on the proposal to extend the Court's advisory jurisdiction" has included only those considered as «essential cases» affiliated to questions of general interest relating to the interpretation of conventional dispositions. Among these, it mentioned the cases related to the existence of a structural or systemic problem in the internal order, as well as those raising an issue with regard to the compatibility with the Convention of legislation, a rule or an established interpretation of legislation by a court.[108]

More generally, the "question of principle" has been defined as such a contentious issue as the one concerning points of law, the resolution of which is sufficiently open-ended to serve as a guide to the court making the request, as well as to other courts called upon to deal with similar cases.[109] Not only the very fact that these are "questions of principle" makes it possible to ensure that, once the opinion has been delivered, its content is then concretely "filled in" by the States in accordance with the principle of subsidiarity.[110] But it is precisely the fact that it deals with "questions of principle" that allows the Court to render "open-ended" opinions, transcending the individual case.

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nazionali (con specifico riguardo all'adesione dell'Unione europea alla CEDU e all'entrata in vigore del Prot. 16), in 1 AIC, 2014.

[107] ECHR, *Reflection Paper*…, *cit.,* 5. Furthermore, Article 3 opens the channel for a broader judicial forum, as it regulates that «[t]he Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing».

[108] The Reflection paper mentions some examples and more specifically: the question of the compatibility of denying a suspect access to a lawyer while in police custody, provided for by the relevant legal provisions of domestic law, with the right to a fair trial and to legal assistance under Article 6 , para 1 and 3(c) of the Convention; the question of compatibility with the Convention of the expulsion of an asylum seeker to Greece in application of the EU Dublin II Regulation; that of the refusal to allow a homosexual person to contract marriage or the issue concerning the denial of access to court on grounds of State immunity (paras 27-31).

[109] ALBANESI E., *Corte costituzionale e parere della Corte EDU tra questioni di principio e concretezza del giudizio costituzionale*, Torino 2021, 31.

[110] *Ibid.*, 34.

In this way, the *erga-omnes* impact the Court's jurisprudence is enhanced.[111] In fact, the authoritative reading of the standards of the ECHR, greatly facilitated by the new advisory competence, provides *all* High Contracting Parties with generalised application guidelines on essential questions concerning the interpretation of the ECHR.[112] But this means that the Court takes a far more active role than would result from the application of the classically understood principle of subsidiarity and which is more in line with the principle of shared responsibility.

On the contrary, an image emerges of a Court that cooperates with States for the common purpose of protecting fundamental rights, its hermeneutic activity not being merely prodromal to the resolution of contentious cases: more correctly, it operates as a fundamental instrument of connection – as well as of coordination – between different legal systems of the various Member States, thus strengthening a uniform (though not unitary) European "constitutional" space under the prospective of human rights safeguard.

It must bear in mind that a way for individual redress after the conclusion of national procedure still remains: as a matter of fact, the consultative procedure does not hinder the possibility for the individual to exercise his or her right of application under Article 34 of the Convention, with the only limitation being the declaration of inadmissibility or the deletion of those elements of the complaint that are closely related to those already addressed by the Court. It follows that individual application still stand at the core of the Convention system and that individuals still retain their individual right to petition before the Court (provided that the admissibility conditions are met) in the event that the non-binding advisory opinions are not fully complied with.[113]

At the same time, whereas the entitlement of the Court with a new preventive «nomophylactic»[114] function does not call into question individual justice, it undoubtedly contributes to the centralisation in the interpretation of fundamental rights enshrined in the ECHR in the hands of the ECtHR.[115]

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111 ALBANESI E., *op. cit*., 33-34.

112 GRIECO C., *Il Protocollo N. 16 allegato alla CEDU e la funzione consultiva della Corte Europea dei diritti dell'uomo anche alla luce della futura e ancora incerta ratifica italiana*, in 14 CUADERNOS DE DERECHO TRANSNACIONAL 1, 2022, 321.

113 *Reflection paper*, *cit.,* para 45.

114 DE SENA P., *Caratteri e prospettive del prot. 16 CEDU nel prisma dell'esperienza del sistema interamericano di protezione dei diritti dell'uomo*, in LAMARQUE E. (ed. by), *op. cit.*, 13.

115 For an investigation of the impact of Protocol No. 16 on the activity of domestic judges and on the power of Constitutional Courts to review domestic legislation see: DICOSOLA M., FASONE C., SPIGNO I., 6 *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A*

Even the provision that, more than any other, makes the link with the principle of subsidiarity most obvious, must also be brought under the principle of shared responsibility. According to Article 5, advisory opinions are not to be considered binding:[116] it is for the designated domestic tribunal or court to resolve the issue raised by the dispute before it and to draw, as appropriate, the conclusions flowing from the opinion delivered by the ECtHR for the outcome of the case.[117] It appears that the preventive interpretative advice could play a guiding role *vis-à-vis* the national authorities, ensuring that they comply with the Convention on their own, without resorting to the external control entrusted to the European Court.[118]

In parallel, one must consider that it is expressly stated that advisory opinions «form part of the case-law of the Court, alongside its judgments and decisions» so that «[t]he interpretation of the Convention …. contained in them would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions».[119] This means that they are likely to have an interpretative value comparable to that of the ECtHR rulings, *i.e.* to have force of *res interpretata*, with the inevitable corollary that these opinions are expected somehow to affect legally all Contracting States to the ECHR.[120] On the other hand, the

First Comparative Assessment with the European Union and the Inter-American System, in 16 German Law Journal, 2015, doi:10.1017/S2071832200021192.

116 This last fundamental aspect is among those distinguishing the mechanism in question from the one provided for in the Euro-Union sphere of competence by Article 267 TFEU. As a matter of fact, while the two consultative procedures may bear some similarities, and that the preliminary ruling mechanism provided for in Article 267 TFEU was cited as the inspiration for the new advisory procedure, they are nevertheless profoundly different in that they respond to two mutually incompatible logics: the Strasbourg Court is in fact an international court external to the system in which the interpretative clarification will be applied, which was established to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto (Art. 19 ECHR). In contrast, the Court of Justice of the European Union is the supreme guarantor of compliance with EU rules, whose rulings are binding on all Member states. In this concern, the Group of Wise Persons expressly recognised in its Report that «In this connection, the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted» (para 80). For more on this subject, see, *ex plurimis*: CRIVELLI E., *Il protocollo n. 16 alla CEDU entra in vigore: luci ed ombre del nuovo rinvio interpretativo a Strasburgo,* in 3 Quaderni costituzionali, 2018, doi: 10.1439/90910; GIANNOPOULOS C., *Considerations on Protocol N°16: Can the New Advisory Competence of the European Court of Human Rights Breathe New Life into the European Convention on Human Rights?,* in 16 German Law Journal 2, 2015, doi:10.1017/S2071832200020873; VOLAND T., SCHIEBEL B., *Advisory Opinions of the European Court of Human Rights: Unbalancing the System of Human Rights Protection in Europe?,* in 17 Human Rights Law Review, 2017, doi: 10.1093/hrlr/ngw034; CRIVELLI E., *Il contributo dei protocolli nn. 15 e 16 CEDU al processo di riforma della Corte di Strasburgo*, Torino 2021.

117 ECHR, *Guidelines on the implementation*…, *cit.,* 5.

118 SORRENTI G., *Un'altra cerniera tra giurisdizioni statali e Corti sovranazionali*, in LAMARQUE E. (ed. by), *op. cit.,* 149.

119 ECHR, *Explanatory report*, 27.

120 O'LEARY S., EICHE T., *Some Reflections on Protocol No. 16*, Extended version of the presentation at the opening of the judicial year on 25 January 2019. It was previously published in (2018) EHRLR, 37. On the *de*

European Court itself has made it clear that, despite the non-compulsory nature of opinions, they will nevertheless have «undeniable legal effects»[121].

While the issue will be exhaustively addressed in the next Chapter, suffice it to underline that the "binding" nature of the Court's advisory opinions can be considered of a "mediated" kind,[122] in the sense that the Strasbourg consultative activity can be taken as a "conventional warning", the subsequent failure to comply with which by *any* State – and not just the State to which the requesting court or tribunal belongs – could be sanctioned in the context of a contentious procedure; it follows that national judges are indirectly *induced* to comply with the interpretation provided by the Strasbourg jurisdiction, even if they had not ratified the optional Protocol.[123]

In short, the advisory competence is likely to have a persuasive authority in the sense that the Court's opinions would be followed «because it is in everyone's interest … not because it is mandatory to do so»[124]: States would avoid a conviction which may give rise to controversy with the Strasbourg judge and sometimes even to political difficulties related to the ruling execution, while the prevention of violations would reduce the number of individual complaints for the Court to deal with.

In this way, the consultative competence of the Court fosters the "horizontal effects" of its authoritative interpretation, and it instils new life to its "quasi-constitutional" function. In the words used by the Group of Wise Persons, the "institutionalisation"[125] of the link between the Court and the highest courts in the Member States enhances the former's constitutional role evidenced by its potentiality of laying down common principles and standards transcending the single case at hand, and determining the minimum level of effective protection to be observed in the legal systems of all Contracting Parties.[126]

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facto binding effect of the advisory opinions see in particular: ALBANESI E., *The European Court of Human Rights' Advisory Opinions Legally Affect Non-ratifying States: A Good Reason (From a Perspective of Constitutional Law) to Ratify Protocol No. 16 to the ECHR*, in 28 European Public Law 1, 2018, doi: https://doi.org/10.54648/euro2022001.

121 ECHR, *Reflection Paper*, 44.

122 ASTA G., *Il Protocollo n. 16 alla CEDU: chiave di volta del sistema europeo di tutela dei diritti umani?*, in, LA COMUNITÀ INTERNAZIONALE*.,* ISSN 0010-5066, 2013, 784.

123 MASCIOTTA C., *Il Protocollo n. 16 alla CEDU alla prova dell'applicazione concreta e le possibili ripercussioni sull'ordinamento italiano*, in 1 Diritto pubblico comparato ed europeo, 2020, doi: 10.17394/96307, 203.

124 GIANNOPOULOS C., *op. cit*., 342.

125 The mechanism envisaged by Protocol No 16 introduces for the first time a formal and structured channel of dialogue between the ECHR and national courts, while collaboration between judges has hitherto taken diplomatic and informal forms. It is former President Raimondi who made this clear when he stated that « Protocol No. 16, …will institutionalise our relationship» (see RAIMONDI G., *Opening address*, in *Dialogue between judges 2018*, 53.

126 Ministers' Deputies CM Documents, CM(2006)203 15 November 2006, 979bis Meeting, 15 November 2006, Report of the Group of Wise Persons to the Committee of Ministers, 24, 79, 81.

Most notably, through the path of dialogue, the authority of the *res interpretata* of the Court's jurisprudence is increased, in the sense that the clarification of questions of principle relating to the interpretation or application of the covenant rights and freedoms tends to consolidate and impose the meaning of the ECHR provisions as living law which can be taken to be applicable across the different legal systems.[127] A competence, this, that certainly does not "marginalise" the Court as was the original expectation of the States but, on the contrary, makes it a frontline player alongside the States.

5. Some final observations

At the end of the Chapter, it is possible to draw some conclusive remarks in order to evaluate the interpretive role of the European Court in what has been defined as the "Age of Subsidiarity".

The analysis in the previous pages revolves around two recently adopted legal instruments: Protocol No. 15 amending the European Convention on Human Rights and Protocol No. 16. The first one mentioned was adopted in 2013 and entered into force on Sunday 1 August 2021, after being ratified by all the member States of the Council of Europe. This Protocol amended the Preamble to the Convention, which now includes a reference to the subsidiarity principle and to the margin of appreciation doctrine.

As regards Protocol No. 16, it came into force on 1 August 2018 after 10 Member States signed and ratified it:[128] it enables the Highest national courts and tribunals, as designated by the Member States concerned, to request the Court to give non-binding advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto. Requests can be made in the context of cases pending before a national court or tribunal, with the Court having the discretion to accept a request or not.

The previous pages argue that these two Protocols are actually part of a single reform process aimed at increasing the role of national actors and – specularly – to limit the authoritative role of the European Court in the interpretation and application of the

[127] NALIN E., *op. cit.*, 141-145.

[128] Namely: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine. Ten more countries have signed the Protocol but have yet to ratify it: Andorra, Bosnia and Herzegovina, Greece, Italy, the Republic of Moldova, the Netherlands, Norway, Romania, Slovakia, and Turkey.

Convention. More specifically, the Chapter investigates the political-institutional terrain that fostered the adoption of the two Protocols by examining the so-called "Interlaken Process":[129] this has consisted in a number of Ministerial meetings initiated in 2010 and terminated with the High Level Conference held in Copenhagen on 12 and 13 April 2018. While it has been mainly intended to be a political response to the notorious problem caused by the Court's struggle to process the growing caseload, States' intention to advance a more structural modification of the ECtHR role has very soon prevailed.

As a matter of fact, the soft-law Declaratory documents adopted at the end of each Conference patently encapsulate the widespread political wish to emphasise States' first-instance role within the conventional system, converging around the fundamental principle of subsidiarity. The latter is an organisational-structural principle that acquires a plurality of meanings depending on the referential context, and whose scope is to be understood as limited to what is of interest here, *i.e.* to a criterion regulating the "division of labour" between different layers of competence: the lower one – national level – entrusted with the front-line task to guarantee individual human rights and fundamental freedoms, and the upper one – the international level – supervising on the diligent observance of the engagements undertaken by the former (Art. 19 ECHR).

Despite the primary reform objective to implement a most robust and coherent concept of subsidiarity, the principle at stake takes on more symbolic significance than anything else and «to this function as a symbol we must eventually bow down»[130]. The broad and uncertain nature of this principle ends up here as an obstacle to a clear definition of the division of labour; on the contrary, despite of the political proclaims, it deviates from the essential meaning of the legal principle and ends coinciding with a new principle, that of the "shared responsibility".

According to this one, the lowest level is not privileged at all, while the highest level is placed on an equal footing with the former in a spirit of cooperation. This is a total novelty that expressly emerges from the political Declarations, and which finds a fertile ground in both the Protocols, albeit not in a similar way.

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[129] See the ECHR Publication "The Interlaken Process" available at: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/-/the-interlaken-process#:~:text=The%20Interlaken%20Process%2C%20initiated%20in,protection%20to%20remain%20truly%20effective.

[130] BERTI G., *Principi del diritto e sussidiarietà*, in Quaderni fiorentini XXXI – t.1, Milano 2003, 399 (my translation).

With regard to Protocol No. 15, it is argued that the addition of the explicit reference to the principle of subsidiarity and its substantive translation (the margin of appreciation) suffers from a rather vague and uncertain wording, which inevitably opens the way to a wide discretionary space for the interpreter who has to fill it with content, *i.e.* the European Court: it is thus the highest authority that decides the most appropriate level in the system of human rights protection, and it can be expected that it will continue to do so according to its established judicial policy.

In these conditions, the space of discretion accorded to States will continue to act as a «shock absorber» between the two sets of values that enter into competition when national systems adhere to the general principles of the conventional system, under the firm control of the external judicial authority of the Strasbourg Court: on the one hand, respect for local norms and diversity and, on the other, respect for the common standards binding national sovereignty.[131]

In short, it can be concluded that after the entry into force of Protocol No. 15, the margin of appreciation will have a different *status*, but not necessarily a different *content*.[132] This is all the more so since the Preamble to the Convention now also mentions the express limitation to the recognition of the margin of appreciation, expressly mentioning the supervisory jurisdiction of the European Court on the subject of the margin accorded to States. Consequently, while explicitly stating that national actors retain the primary power, *i.e.* the primary responsibility, to ensure the proper application of the conventional standards domestically, the new amendment at the same time (and in the same recital) ensures to preserve the value of the authoritative guidance provided by the Strasbourg court, more in line with the principle of "shared responsibility" than with that of subsidiarity, at least in its essential constitutional meaning.

The principle of the "shared responsibility" has also resulted in more intensive cooperation between human rights defenders *via* judicial dialogue. The analysis of the parameters of the new procedure as displayed in the Protocol's wording reflects and confirms the idea that the new advisory-prejudicial procedure enables the Strasbourg judge to play effectively the role of authoritative point of reference in the hermeneutic exercise of the ECHR.

[131] CASSESE S., *op. cit.,* 16.
[132] NUSSBERGER A., *op. cit.*, 21.

As a matter of fact, what the Court is being asked to do is not to apply the principles of the Covenant to a specific fact, but to argue on a question of principle that is posed by a national High jurisdiction;[133] on the contrary, the assessment of the factual circumstances at issue in the individual case is no longer of central importance, being expressly excluded by the Court.

In this way, its interpretative authority is by no means limited, but rather strengthened: it becomes more and more akin to the nomophilatical function, providing uniform interpretative guidelines which transcends the single case and bind all Member States so as to ensure the unity, exact observance and uniform interpretation of the Convention law.

[133] CRIVELLI E., *Il contributo*…, *op. cit.*, 100-101

4.

The Principle of "Shared Responsibility" and its Impact on the Interpretation of the ECHR

"To emerge better from a crisis, the principle of subsidiarity must be implemented, respecting everyone's autonomy and capacity to take initiative, especially that of the least. All the parts of a body are necessary, [....] and we build this future together, aspiring to greater things, broadening our horizons. Either we do it together, or it will not work. [...] If everyone does not contribute, the result will be negative".

(Pope Francis, General Audience in San Damaso courtyard, 23 September 2020)

CONTENT: 1. The application of the principle of "shared responsibility": what consequences? – 2. The "procedural turn" in the ECtHR hermeneutic approach – *2.1.* Animal Defenders International *v.* the United Kingdom: *where the Court shows how to embrace its role in the multi-level system of human rights protection* – *2.2.* Von Hannover *v.* Germany (2): *an example of procedural guidance* – *2.3. The Court's stricter scrutiny in the case* Lindheim and Others *v.* Norway – 3. The definition of the new ECtHR's methodology by the analysis of the advisory opinions – 4. The effects of the preliminary advisory mechanism explained from the first advisory opinion – *4.1. The indirect legal effect in the vertical relationship between the Court and the State of the requesting judicial authority – 4.2 The precedential value of the advisory opinions and their "conformative" effects – 4.3 The force of res interpretata of the advisory opinions in the case of Italy*.

1. The application of the principle of "shared responsibility": what consequences?

With its codification in Protocols Nos. 15 and 16, the principle of subsidiarity has led to the emergence of new problems regarding its application in European jurisprudence. In particular, the new way of understanding it as a "shared responsibility" between Member States and the Court, rather than as a criterion for the distribution of competences, seems to be an obstacle to a stronger preference for national actors. Rather than operating as a device for limiting the jurisdiction of the European Court, in defence of domestic prerogatives, its vague and elastic nature risks turning it into a mechanism that legitimises the progressive expansion of the ECtHR's responsibility.

In order to understand how, the present Chapter intends to analyse the jurisprudence concomitant to the reform process so as to show how the focus expressed at the institutional-political level on the principle of "shared responsibility" has actually been translated into a new judicial approach. More precisely, the following pages aimed at examining the procedural approach increasingly adopted by the ECtHR to evaluate the embedding process of its standards of protection within domestic legal systems.

Under this approach, the Court limits its scrutiny only to the procedural aspects of the decision-making and judicial processes at national level in order to ascertain to what extent the human-rights discourse has been taken into due consideration. In particular, the analysis of some emblematic cases will show that the more national procedures are integrated with conventional principles, the wider the margin of appreciation and, more generally, the more lenient the review of the Court is. As much as it may seem that, by omitting a thorough substantive examination, the Court may be abdicating its role, the opposite is argued: that is, it is intended to show that this new approach not only does not entail any risk of fragmentation of the growing minimum standards of protection of human rights and fundamental freedoms established by European jurisprudence, but also results in a general strengthening of the Court's jurisdiction.

On the one hand, the increasing attention devoted, through the abstract-procedural scrutiny, to the diligent incorporation of the conventional principles at domestic level can be considered the new trait of a unique *parabola* that began with the Court's past efforts to provide national authorities with indications on the merits of the concrete case; on the basis of such indications elaborated at the hermeneutic level, the new approach is potentially aimed at triggering a more active commitment to the Convention on the part of national actors, that would now have more tools at their disposal to fulfil their task under Article 1.[1]

On the other hand, the Strasbourg judge is no way hindered from continuing to perform its fundamental role of analysing substantive findings at the national level. The relevance of process-based review thus lies in the «shift of the Court's primary methodological focus from its own independent assessment of the "Conventionality" of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-makers in conformity with already embedded principles and the States' obligations to secure

[1] SPANO R., *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity,* in 14 Human Rights Law Review 3, 2014, doi: https://doi.org/10.1093/hrlr/ngu021, 474; BREMS E., *Positive subsidiarity and its implications for the margin of appreciation doctrine,* in 37 Netherlands Quarterly of Human Rights 3, 2019, 12 ff.

Convention rights to peoples within their jurisdictions»[2]. In this way, the (good) quality of the domestic processes is made strictly dependant on their diligent application of the Court's *dicta*.

The second part of the Chapter goes on to present a general picture of the advisory opinions rendered by the Grand Chamber under Protocol No. 16. Most notably, the main objective pursued is to demonstrate that the Court has so far shown its willingness to abide by the conceptual premises of its new consultative competence in order to enhance its capacity to establish general standards binding for all Member States.

Moreover, it is interesting to note that the idea of subsidiarity (or, better, that of "shared responsibility") embodied in Protocol No. 16, has been defined as «*pro persona*»[3] in the sense that it would be centred on a new institutionalised collaboration via judicial dialogue between national and international actors aimed at averting human rights in favour of the individual. In other terms, such a collaboration would ultimately aim to strengthen the protection of conventional rights and freedoms secured at the national level, where it could be ensured in the timeliest and effective manner, thanks to the interpretative guidance provided by the European Court in preventive and more general terms.

2. The "procedural turn" in the ECtHR hermeneutic approach

What stated in the previous Chapter should not lead to the erroneous assumption that the amendment under Protocol No. 15 is of merely rhetorical significance. As correctly explained by Spielmann: «under the Vienna Convention on the Law of Treaties, the Preamble to a treaty is an integral part of the instrument and thus is relevant to its interpretation. [....] Let it not be overlooked that the new paragraph also brings the term subsidiarity into the Convention, a fact that the Court has welcomed»[4]. This insertion is significant not only because it innovates a text that has remained unchanged since 1950, but also because the principle has finally a

[2] SPANO R., *The Future of the European Court of Human Rights-Subsidiarity, Process-Based Review and the Rule of Law*, in 18 Human Rights Law Review, 2018, doi: 10.1093/hrlr/ngyO1S,480.

[3] TANCREDI A., *I pareri resi dalla Corte Europea dei Diritti dell'Uomo ai sensi del Protocollo N. 16 nella recente giurisprudenza costituzionale*, in ANNONI A., FORLATI S., FRANZINA P. (a cura di), *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, 2021, 594.

[4] SPIELMANN D., *Allowing the Right Margin:the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, speech delivered for Max Planck Institute for Comparative Public Law and International Law, Heidelberg, on 13 December 2013, available at: https://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf, 8.

legal basis, so that the margin of appreciation has definitely entered into the official covenant language. But there is more.

Whilst the Protocol has only recently entered into force (1 August 2021) and it is still too early to assess its real impact, the analysis of the jurisprudence of the European Court concomitant to the Interlaken process seems to go precisely in the direction of a quantitatively more incisive and robust application of the margin of appreciation, thus giving the impression of a Court which is receptive of the political appeal made by national actors in the context of the very same reform *iter* giving birth to Protocol No. 15.[5] It thus appears clear why former President Spano wrote extra-judicially that the ECtHR has finally entered into a new "Age of Subsidiarity".[6]

Hence, if the Court's reform process can be said to have some impact, it was definitely on the political level: interpretation is an act of persuasion, and if the interlocutors transmit a clear signal that the interpreter is not persuasive, the latter should show active recognition of this message in order to fully re-establish his authority: in this spirit, it can be detected a new jurisprudential trend of the Strasbourg Court, which is more willing to rely upon the domestic institutions' assessment of their conventional obligations.

Yet, it is submitted that such renewed attempt to bolster the margin of appreciation does not mutate radically the interpretative practice of the Court. More specifically, the analysis of the ECtHR case-law below will emphasise the Court's latest tendency to "operationalise"[7] the principle of subsidiarity and its substantive manifestation of the margin of appreciation in order to elaborate what was defined as a «qualitative, democracy-enhancing approach»,[8] which could enhance its authority. To understand what this approach consists of, the following considerations must be made.

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[5] Dothan argues that in the context of an increased political hostility towards excessive intervention by the part of the European Court, a more intensive application of the margin of appreciation has become a "political necessity" (DOTHAN S., *Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies*, in 9 Journal of International Dispute Settlement 2, 2018, 150). His argument is upheld by Madsen's empirical investigation of ECHR's case-law prior to and after the adoption of the Brighton Declaration. Most notably, the author shows clear evidence of a rise in the percentage of cases that refer to the margin of appreciation, so as to strategically project restraint when such restraint is politically needed: such an increase especially concerns cases where controversial rights are at stake and the risk of backlash is higher, as well as with regard to the procedural requirement to exhaust domestic remedies (See MADSEN M.R., *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, in 9 Journal of International Dispute Settlement 2, 2018)

[6] SPANO R., *Universality or Diversity*…, *cit.,* 491.

[7] The term is borrowed by GLAS L. R., *From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?*, in 20 Human Rights Law Review, 2020, 135.

[8] SPANO R., *Universality or Diversity…, cit.*, 497-499.

First of all, it already emerged that the concept of subsidiarity should be characterised by an immediate "negative" connotation, as it refers to a rule of allocation of power in favour of the member units *at the expense of* the centralised authority.[9] In this respect, former President Spielmann held that the Protocol embraces the view where «the centre of gravity of the Convention system can be lower than it [was before], closer in time and in space to all Europeans, and to all those under the protection of the Convention».[10] Following this line of thought, an international body – as the Court of Strasbourg – cannot just limit democratic institutions unnecessarily when these are sufficiently responsive to the best interests of individuals or at least they are equipped with mechanisms of self-correction.[11]

At the same time, insistence on the primacy of the national responsibility goes hand-in hand with the affirmation of their obligations under the Convention: as a matter of fact, States' first-line responsibility does not amount to centrality *per se*, being instrumental to the promotion and the guarantee of individual rights and fundamental freedoms.[12]

Reference to the principle of subsidiarity can therefore be strumentalised by the Court to concentrate its efforts on the on the determination of these obligations and their content through its own hermeneutic activity. More specifically, it is a matter of verifying States' compliance with their general and active duty to organise themselves in such a way that they can exercise their legislative, executive or judicial activities to respect and protect the human rights as dictated by the European jurisprudence.[13]

As a matter of fact, it can be noticed that in the Court' most recent case-law that has shifted to the determination of the content of duties on the part of States, seems to focus more on the faithful observance of and full compliance with conventional principles as manifest signs testifying the maturity of the domestic legal system, thus making it unnecessary

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[9] For the analysis of subsidiarity as a fundamental principle in International Law see: CAROZZA P. G., *Subsidiarity as Structural Principle of International Human Rights Law*, in 97 American Journal of International Law 1, 2003; FOLLESDAL A., *The Principle of Subsidiarity as a Constitutional Principle in International Law*, in 2 Global Constitutionalism 1, 2013, doi:10.1017/S2045381712000123; FOLLESDAL A., *Squaring the Circle at the Battle at Brighton: Is the War between Protecting Human Rights or Respecting Sovereignty Over, or Has it Just Begun?*, in ARNARDOTTIR O.M., BUYSE A. (edit by), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders*, 2013, London 2016, also available in *PluriCourts Research Paper* No. 15-10, 2013.

[10] SPIELMANN D., *Whither the Margin of Appreciation?,* UCL – Current Legal Problems (CLP) lecture on 20 March 2014, 12.

[11] FOLLESDAL A, *Squaring the Circle…,op. cit.,* 20.

[12] Such a concept is framed in what Føllesdal defined as a «person-centred» version of the principle of subsidiarity. The author opposes this version of subsidiarity to the "State-centric" one, which is argued to be rather problematic (see FOLLESDAL A, *Squaring the Circle…, op. cit.*,11 ff.).

[13] BESSON S., *Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?*, in 61 *The* American Journal of Jurisprudence 1, 2016, doi:10.1093/ajj/auw009, 69–107

to activate the entire international machinery in the second instance.[14] Conversely, any failure by a Respondent State to take the necessary measures necessarily places the whole mechanism under greater strain.[15]

The issue before the Court then turns to the assessment of the quality of domestic procedures in the case under observation: such an evaluation entails the scrutiny of the procedural elements of the decision-making process, the administrative or judicial procedure leading to the adoption of the contested measure. Scholarship defined such a review as "procedural" on the grounds that, in performing it, the Court does not put forward arguments of a substantive nature.

Hence, the ECtHR examines whether or not the disputed legislative act, the administrative or judicial measure can be said to be described as the result of a fair, transparent and reasonable balancing of all the interests at stake, diligently surrounded by adequate procedural safeguards: on the contrary, it does not directly examine the interests or rights themselves;[16] by assessing the way of enactment of a legislative act or the manner in which individual decisions of the domestic judiciaries were reached, the Strasbourg judge focuses on «whether the impact of a proposed measure on Convention rights has been expressly and extensively discussed, whether the reasons invoked to justify interference with a Convention right are among those that the Court accepts, and whether and how the proportionality of such interference was assessed».[17]

Under procedural review, consideration of the (good) quality of national decision-making processes becomes a key element for the Court's evaluation which is nonetheless external to the merits of the right in question:[18] once appraised that compliance with obligations under the Convention has been correctly ensured within domestic processes, the Court can evade a «full substantive review under which [it engages] normatively with the applicant's complaint and [rules] on the merits»[19] in favour of a more lenient scrutiny of the national measure.[20]

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[14] BESSON S., *Subsidiarity in International Human Rights Law…, op. cit.*, 105.

[15] ECtHR, Judgment of 28 September 2005, App No 31443/96, *Broniowski* v *Poland*, paras 34-36.

[16] POPELIER, P., VAN DE HEYNING, C., *op. cit.*, 10; KLEINLEIN T., *Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control*, in 28 European Journal of International Law 3, 2017, doi:https://doi.org/10.1093/ejil/chx055, 874.

[17] BREMS E., *The "Logics" of Procedural-Type Review…, op. cit.,* 6.

[18] See ARNARDOTTIR O. M., *The procedural turn under the European Convention on Human Rights and presumptions of conventional compliance*, in 15 International Journal of Constitutional Law 1, 2017, 15-20.

[19] ARNARDOTTIR O. M., *Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation*, in *European Society of International Law*, Conference Paper No. 4/2015, 4.

[20] BREMS E., T*he "Logics" of Procedural-Type Review…*, *op. cit.*, 7; ARNARDOTTIR O.M., *Organised Retreat? …, op. cit.,* 19-20.

But such formal-procedural control cannot but also affect the substance of rights. For it is clear that if the Court monopolises the determination of the content of State obligations, it is in fact also shaping the content of the rights corresponding to those obligations. It is clear, however, that in doing so, we move away from the classical-constitutional concept of subsidiarity and enter the realm of "shared responsibility". In fact, the job of States is limited to the active engagement in fulfilling their commitment under Article 1 as defined by the Court; in other terms, the recognition of a broader room for manoeuvre is made dependent to the respect of the ECtHR's *dicta*, completely overturning the idea of subsidiarity: in situations of diligent compliance, there is no reason why the Court should conduct a further substantive review for determining whether the State has violated the ECHR. According to this view, such examination is also superfluous if the evaluation of the domestic procedure, which should have dealt with claims based on Convention rights, shows serious deficiencies in the process of incorporation of the conventional standards at this level.[21]

Differently, as argued by Carozza, the diligent application of subsidiarity would require the system to rely in the first instance on the most local bodies capable of giving *meaning* and effectiveness to human rights, and attribute authority and responsibility to broader and more comprehensive bodies to take action to help realise human rights. Indeed, a subsidiarity-oriented understanding of human rights questions whether their protection can be achieved locally and, if not, what assistance is needed from an external authority (such as the Strasbourg Court, for example) to enable the smaller unit to fulfil its role: subsidiarity, therefore, does not exclude, but itself envisages the need to provide for reservations or at least limits to the primary responsibility of States, albeit in a complementary manner and with the ultimate purpose of ensuring the protection of the individual.[22]

Ultimately, there is no doubt that the principle of "shared responsibility" can act as an incentive for domestic actors to «optimise the quality of their human rights» practice in line with their international undertakings. [23] At the same time, it confirms the image of a Court

[21] BREMS E., *The "Logics" of Procedural-Type Review by the European Court of Human Rights*, in GERALDS J., BREMS E. (edit. by), *Procedural Review in European Fundamental Rights Cases*, 2016, available at SSRN: https://ssrn.com/abstract=2891280, 5.

[22] See the analysis "Sovereignty vs Subsidiarity" carried out by CAROZZA P. G., *op. cit.,* pp. 63 ff.

[23] BREMS E., *The "Logics" of Procedural-Type Review…, op. cit.,* 5. Brems qualifies as "the positive dimension of subsidiarity" the idea that from the perspective of the Court, the subsidiarity principle requires not only an emphasis on the need for restraint, but may also entail a responsibility to act. Under such a perspective, the Court shall encourage States in carrying out the first-line responsibility to secure Convention rights and freedoms by setting uniform standards akin to authoritative guidelines on the existence and the width of States' leeway. In particular, Brems maintains that there are at least three relevant dimensions to the guidance that may be offered

committed to actively construct an elaborate human rights edifice, both substantively and methodologically, strategically capable of acquiring more and more responsibility, even at the expense of the main actors: States.[24]

The following sub-paragraphs will illustrate some examples which may help to alleviate any doubts.

2.1. Animal Defenders International *v.* the United Kingdom*: where the Court shows how to embrace its role in the multi-level system of human rights protection*

One paradigmatic judgement in which the assessment of the quality of domestic processes at the basis of a general legislative measure has been referred to in order to concretise a deeper concept of "shared responsibility" is *Animal Defenders International v. the United Kingdom*.[25] This represents a significant example of the Court's consideration of the parliamentary process[26] as an element of the proportionality review of the State's restriction to a right within the margin of appreciation afforded to it.[27]

The case originated from the complaint of a non-governmental organisation campaigning against the use of animals in commerce, science and leisure, which in 2005 sought to screen a television advertisement as part of a campaign concerning the treatment of primates. However, its request to clear the advert was rejected by the Broadcast Advertising Clearance Centre on the grounds that the advertisement had objectives of a clearly political nature and, as such, fell within the scope of the prohibition established by the 2003 Communications Act.

The latter in fact prohibits political advertising in television or radio services, the aim being to maintain impartiality in the broadcast media and to prevent powerful groups from buying influence through airtime. The prohibition applies not only to advertisements with a political content but also to bodies which are wholly or mainly of a political nature, irrespective of the content of their advertisements.

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by the Court in a positive subsidiarity framework, notably, substantive, procedural, and discursive dimension (see BREMS E., *Positive subsidiarity…, op. cit.*, 218 ff.).

[24] SPANO R., *The Future of the European Court…*, *op. cit.*, 477-478.

[25] ECtHR, Judgment of 22 April 2013, App No 48876/08.

[26] For an analysis of the Court's concept of "parliamentary process" see: SAUL M., *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments*, in 15 Human Rights Law Review 4, 2015.

[27] On this topic see also: SAUL M., *Matthew, Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights*, in The International Journal of Human Rights, 2016, Forthcoming, PluriCourts Research Paper No. 16-12, Available at SSRN: https://ssrn.com/abstract=2856968.

That decision above was upheld by the High Court and the House of Lords, with the latter judicially stating that the prohibition of political advertising was justified by the aim of preventing Government and its policies from being distorted by the highest spender. Before the Strasbourg Court, the NGO alleged that the statutory prohibition of paid political advertising on radio and television amounted to an unproportioned interference with its freedom of expression in breach of Article 10 of the European Convention. The question to be confronted with was then related to the adoption at the legislative stage of a blanket ban on an activity protected under the ECHR, in relation to which the Court has previously shown to grant a narrow margin of appreciation.

The Court, for its part, preliminarily remarked how in the previous case-law it appears that the assessment of the legislative choices underlying the general measure at stake and, in particular, that of the quality of the parliamentary and judicial review is of paramount importance in order to determine its proportionality. Hence, in spite of what applicants suggested, the central issue was whether, in adopting the general measure and striking a proper balance between the different interests at stake, the legislature acted within the margin of appreciation afforded to it.[28]

Having premised that, the Strasbourg judge noted that before becoming law, the British legislation was the subject of a detailed review and consultation process before the High Court and the House of Lords, in the light of the Convention case-law and principles and, in particular, of the judgement in the case of *VgT Verein gegen Tierfabriken v. Switzerland*, in which a ban on political advertising had been found to violate Article 10 of the Convention. The prohibition was therefore to be considered «the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom and all bodies found the prohibition to have been a necessary interference with Article 10 rights».[29]

Consequently, the Court manifested its willingness to attach «considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest

[28] *Animal Defenders...*, *cit.*, paras 108-110.
[29] *Ibid.*, paras 114-115.

debates and, thereby, the undermining of the democratic process».[30] It appears that, in the case under scrutiny, the procedural approach was used as a tool to modulate the review of the Court: more specifically, any substantial consideration on the merit of the prohibition impact on the applicant was considered to be superfluous because outweighed by States' convincing justifications for the general measure,[31] this latter concerning the protection of the electoral process and the maintenance of a truly pluralist debate on public matters.

In short, the good quality of the decision-making process as well as of the domestic judicial review was considered to be enough to recognise a significant level of deference to be accorded to Member States. It is clear that, in this way, the focus of the Court inevitably moves from the evaluation of the *de facto* impact of the general measure[32] on the individual to the assessment of the general justifications provided by the national authorities *in abstracto*.[33] As a matter of fact, when the decision-making process carried out by the national authorities in accordance with the criteria laid down in European case-law, and by carefully weighing the contrasting interests according to the principle of proportionality, the Court relegates its own assessment to a secondary status.[34]

At the same time, it becomes evident that the new procedural approach does not simply lead to complete deference on the behalf of the Court to the benefit of States; rather, it connects to the principle of "shared responsibility" embodied in the Interlaken Process[35]: the implementation and specification of human rights must certainly take place within the democratic context of national systems, but these are necessarily subject to the provision of an "external guarantee" in the form of the international protection of these rights.[36] As written somewhere else, «[i]nternational judicial institutions share their authority with domestic institutions on the basis of an allocation of power that is defined, *inter alia*, by the procedural

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[30] *Ibid.*, para 116.

[31] *Ibid.*, paras 109 and 124.

[32] Further case-law on general measures: ECtHR, Judgment of 7 May 2013, App No 19840/09, *Shindler* v *UK*; Judgement of 8 April 2014, App No 31045/10, *National Union of Rail, Maritime and Transport Workers* v *UK*; Judgement of 27 August 2015, App No 46470/11, *Parrillo* v *Italy*; Judgement of 23 February 2016, App No 43494/09, *Garib* v *the Netherlands*.

[33] KLEINLEIN T., *The procedural approach of the European Court of Human Rights: between subsidiarity and dynamic evolution*, in 68 International and Comparative Law Quarterly 1, 2019, doi:10.1017/S0020589318000416, 96-97. ARNARDOTTIR O. M., *Organised Retreat? …, op. cit.*, 14 ff.

[34] ARNARDOTTIR O. M., *Organised Retreat? …, op. cit.,* 12.

[35] KLEINLEIN T., *op. cit.*, 102-104.

[36] BESSON S., *L'Evolution du contrôle européen : vers une subsidiarité toujours plus subsidiaire*, in TUOUZE S., *La Cour européenne des droits de l'homme : une confiance nécessaire pour une autorité renforcée*, Pedone, 2016, Publications du Centre de recherche sur les droits de l'homme et le droit humanitaire, 978-2-233-00810-7. ffhal-02516348f, 64 ff.

criteria applied in international judicial review as part of the standard of review. This gives rise to a new flexibility and complexity in the interaction of international and domestic institutions in the realisation of human rights»[37].

On the one hand, the new abstract-procedural review presupposes States' capacity and willingness to put in place an effective legal system and operating for the protection of the rights; on the other hand, the existence and functionality of such a system is duly examined by the Court itself, which would modulate the width of the margin to afford on the grounds of the quality of national processes in the light of the principles resulting from its well-established case-law.[38]

In other terms, any failure to sufficiently engage with the general principles of the Convention on the part of national authorities lead to a consequent contraction of the degree of margin of appreciation.[39] Ultimately, such a focus on the quality of domestic procedures can be a fundamental incentive to set up and reinforce more efficient decision-making and judicial processes that take due account of the Convention as "read" by its authoritative interpreter.[40]

Equipped with this knowledge, it can appear more easy to understand the reason why the procedural approach does not entail *per se* the threat of a lowering or deterioration of the standards of protection established by established European case-law.[41] Rather, it is based on the fundamental premise of assessing whether those standards have been properly embedded and integrated in the respondent State and whether any domestic review of conventionality has taken place.[42]

2.2. Von Hannover *v.* Germany (2*): an example of procedural guidance*

[37] KLEINLEIN T., *op. cit.,* 110.

[38] ECtHR, Judgment of 15 March 2012, App Nos 4149/04 and 41029/04, *Aksu* v *Turkey*, paras 67-68.

[39] ECtHR, Judgment of 21 October 2014, App No 73571/10, *Matúz* v *Hungary*, para 35.

[40] KLEINLEIN T., *op. cit.,* 104.

[41] The Court is therefore open to criticism when no violation is found despite the fact that the domestic balancing exercise has been conducted with reference to national law rather than the requirements of ECHR, which represents the pre-requisite to show major deference to the domestic actors. This happened, for instance, in the recent case *Otite v the United Kingdom* (Judgment of 27 September 2022, App No 18339/19).

[42] The new procedural approach is not without criticism even within the Court. See for instance: Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano attached to the ECtHR, Judgment of 22 April 2013, App No 48876/08, *Animal Defenders International* v *the United Kingdom*, para 9; Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Sajó, in the ECtHR, Judgment of 4 April 2018, App No 56402/12, *Correia de Matos* v *Portugal*, para 41.

Another relevant case which is particularly helpful to understand how the Court's procedural approach operates is *Von Hannover v. Germany (2).*[43] It is a clear demonstration of the procedural-based review of the Court in cases requiring an examination of the fair balance that has to be struck between two conflicting human rights protected by the ECHR.

The case concerned the publication in the press of photos about the private life of the elder daughter of Prince Rainier III of Monaco and her husband from the early 1990s. In particular, two series of photos published in three German magazines had already been subject to different sets of proceedings before the German Courts, which systematically dismissed the princess's claims. Subsequently, those proceedings fell under the ECtHR's lenses, which, in the *Von Hannover v. Germany* judgement[44] held that the domestic court decisions had infringed the first applicant's right to respect for her private life guaranteed by Article 8 of the Convention. More in detail, the Strasbourg judge considered that the criteria upon which the domestic authorities had based their decision were not sufficient to effectively protect the applicant's private life, especially due to their vague and undetermined nature.

Relying on the Court's judgement, the applicants thus brought several sets of civil proceedings seeking an injunction against any further publication of photos that had appeared in German magazines. The results were adverse, though. Consequently, their complaint lodged before the ECtHR took an issue of the refusal by domestic courts to any restraining order against any further publication of the photo that had publicly appeared, on the grounds it infringed their right to respect for their private life. In the case under observation, the central issue was therefore related to alleged inadequacy of the protection offered by the national courts to the private life of the claimants.

Since the case required balancing the applicants' right to respect for private life with the magazine journalists' right to freedom of expression, the Court reiterated that, in principle, these rights deserved equal respect and that it had to take into consideration the balancing exercise carried out by the national authorities in order to decide: if this had been carried out in accordance with the criteria established by the Court's case-law, the Court would have needed strong reasons for substituting its viewpoint for that of the national courts.[45] On this

[43] ECtHR, Judgment of 7 February 2012, App Nos 40660/08 and 60641/08.
[44] ECtHR, Judgment of 24 June 2004, App No 59320/00.
[45] *Ibid.*, para 107.

subject, it expressly set out the criteria laid down by the European case-law which are to be taken into consideration in performing the weighting exercise.[46]

So much clarified, the ECtHR eventually observed that the national judges had carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life by explicitly undertaking a detailed analysis of European Court's relevant case-law. Accordingly, and having regard to the margin of appreciation enjoyed by the domestic authorities when balancing competing interests, the Court concluded that «the latter have not failed to comply with their positive obligations under Article 8 of the Convention» and that no violation has occurred.[47]

What is noteworthy to emphasise here is first of all the fact that in developing a procedural review of the quality of domestic procedure, the Strasbourg judge also provides competent domestic authorities with guiding criteria for the substance of domestic conventionality control, *i.e.* with factors and elements to take into consideration in the relevant assessment.[48] In this way, the application of procedural-type review can have more general consequences transcending the particular case: such general effects depend on the procedural standards set up by the ECtHR the domestic authorities are required to endorse.[49]

More precisely, the case under scrutiny shows well how the Court can converge its established jurisprudence into generally applicable procedural criteria for the assessment of proportionality: by doing so, the Strasbourg judge expects that national judicial authorities will apply these principles in similar cases, making them all active agents and, ultimately, greatly enhancing the *res interpretata* effect of its own case-law.[50]At the same time, its interpretative authority *vis-à-vis* national actors is strengthen, as the procedural approach

[46] *Ibid.*, paras 108 ff. These are: the contribution made by photos or articles in the press to a debate of general interest; the role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo; the conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication; the way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report; the context and circumstances in which the published photos were taken.

[47] *Ibid.*, paras 124-126.

[48] BREMS E., *Positive subsidiarity …, op. cit.,* 221 ff.

[49] HUIJBERS L., P*rocedural-Type Review: A More Neutral Approach to Human Rights Protection by the European Court of Human Rights?*, in Conference Paper No. 6/2017, ESIL Research Forum "The Neutrality of International Law: Myth or Reality?" , Granada, 30-31 March 2017.

[50] On this aspect, see in particular: ARNARDOTTIR O. M., *The Brighton Aftermath and the Changing Role of the European Court of Human Rights*, in 9 Journal of International Dispute Settlement, 2018, doi: 10.1093/jnlids/idx002.

definitely helps the Court to justify its increasing capacity of setting uniform procedural standards to control the conventionality of a given measure or policy.[51]

Another important element to stress out is the fact that the connection between the Court's procedural review and the margin of appreciation is not entirely new: Chapter 2 already underlined how the Strasbourg judge, among others, carries out an analysis of domestic processes in order determine the extent of the leeway to be granted to the States, especially when confronted with cases in which divergent individual rights or conflicting interests are at stake.[52] What is new here, however, is the institutional context in which it operates: faced with harsh critics of activism, the Court utilises the procedural approach to the margin of appreciation as an attempt of strengthening its legitimacy, by limiting open challenge to State decisions only when democratic institutions fail to comply with their obligations flowing from the Convention.

2.3. The Court's stricter scrutiny in the case Lindheim and Others *v.* Norway

A final interesting ruling worthy of mentioning is *Lindheim and Others v. Norway*.[53] The case originated in two applications against the Kingdom of Norway lodged with the Court by six Norwegian nationals between 2008 and 2009. They owned plots of land that had been let prior to 1976 underground-lease contracts for permanent or holiday homes for periods of between 40 and 99 years. In their applications to the European Court they complained that by virtue of the legislation as amended in 2004, their lessees had been able to demand an indefinite extension of their leases on the same conditions as before. Accordingly, they complained about the interference with their possessions, resulting in a violation of Article 1 of Protocol No 1.

The Norwegian Parliament's view was that there was a legitimate need, on grounds of social policy, to protect the interests of leaseholders, who were financially unable to exercise

[51] TZEVELEKOS V. P., DZEHTSIAROU K., *The Judicial Discretion of the European Court of Human Rights: The Years of Plenty, and the Lean Years*, in 3 European Convention on Human Rights Law Review 3, 2022, doi: https://doi.org/10.1163/26663236-bja10049, 290-292.

[52] Among those cases which point to such a procedural approach to the use of the margin of appreciation see in particular: ECtHR, Judgment of 8 July 2003, App No 36022/97, *Hatton and others* v *the United Kingdom*, para 128; Judgement of 10 May 2001, App No 29392/95, *Z and Others* v *the United Kingdom*.

[53] ECtHR, Judgment of 12 June 2012, App No 13221/08.

their statutory right of redemption. The interference could therefore be deemed to be in accordance with the general interest.

As for the latter notion – *i.e.* that of "public" or "general" interest – the Court recognised that it is necessarily extensive, in particular in spheres such as housing, which modern societies consider a prime social need of paramount importance in the welfare and economic policies; that is to say, spheres where the choice of measure for securing the needs of the community as well as of the timing for their implementation necessarily involve pondering and deliberation of complex social, economic and political issues. Consequently, the Court found it natural that the margin of appreciation available to the legislature should be a wide one in line of principle.[54]

Nonetheless, in finding a violation of the Article 1 of Protocol 1, a key role was played by the assessment of the (bad) quality of the decision-making process as an element of the evaluation of the proportionality of the interference. In this regard, the Court recognised that the Norwegian Parliament had to deal with the particularly complex task of trying to reconcile competing interests that were markedly different in nature: on the one hand, the lessor's interest in negotiating rent that reflected market values and, on the other, the lessee's interest in continuing the lease at the end of the term in view of his or her financial investment in the constructions on the land. In view of the very large number of ground-lease contracts in Norway, it thus found understandable that the legislative process should have emphasised the need to have clear and foreseeable solutions and to avoid costly and time-consuming litigation on a potentially massive scale.[55]

Nevertheless, the Court was not satisfied that the respondent State, notwithstanding its wide margin of appreciation, had struck a fair balance between the general interest of the community and the applicants' property rights. In this connection, it noted that no specific assessment had been made of whether the legislative amendment achieved such a balance between the interests of the lessors, on the one hand, and those of the lessees, on the other hand. There were indeed some critical issues encountered; these included the indefiniteness in time of the extensions and the increase in rent only on the basis of the consumer price index, and not on the value of the land, but also the exclusive prerogative granted to the lessee

[54] *Ibid.*, para 96.
[55] *Ibid.*, para 125.

to terminate a lease agreement, either by rescinding the contract, or by redeeming (purchasing on preferential terms) the plot of land.[56]

Accordingly, the Court unanimously faulted a disproportionate burden had been placed on the applicant lessors and that a violation of Article 1 of Protocol 1 had occurred.

Ultimately, the above case confirms that the greater emphasis that the Court shows through its procedural approach on the principle of subsidiarity should not necessarily be understood as a jurisprudential development in favour of greater deference to national actors; on the contrary, subsidiarity becomes a device at the disposal of the Court to be used for emphasising and even strengthening the obligation to diligently abide by the Court's established case-law.

More correctly, a procedural review of the kind described in the preceding pages reflects a view of the Court's role willing to rely on the national assessment only when domestic authorities have taken their responsibility to the Convention seriously in line with the principle of "shared responsibility".[57] *Vice versa*, the failure to embed the principles developed in the Strasbourg case-law into domestic legal systems nothing but leads to a stricter review by the ECtHR.[58]

The advantage of such an approach is that the international judge can rely on such a democratic body as the Parliament which has the prerogative of incorporating human rights guarantees in accordance with the Convention into general national rules that prevent future violations from occurring. Besides, when domestic judiciaries are able and willing to deliver a diligent scrutiny of legislative and administrative acts by taking into due account the ECtHR's

[56] *Ibid.*, paras 128-134.

[57] GLAS L. R., *op. cit.*, 134-136.

[58] For other cases where the new approach has facilitated a stricter scrutiny see, for example, the case of *Ristamäki and Korvola v. Finland*, where the Court observed that the «domestic courts did not, in their analysis, attach any importance to the applicants' right to freedom of expression, nor did they balance it in any considered way against [clashing interests]. It is not clear in the reasoning of the domestic courts what pressing social need in the present case justified protecting [certain other rights] over the rights of the applicants. Nor is it clear whether, according to the domestic courts, the interference [...] was proportionate to the legitimate aim pursued» (ECtHR, Judgment, of 29 October 2013, App No 66456/09, para 56); see also the *Ivanova and Cherkezov v. Bulgaria* (ECtHR, Judgement of 21 April 2016, App No 46577/15), where the Court held that «if [...] the national courts have regard to all relevant factors and weigh the competing interests in line with the principles [set up by the set up by the Court's well-established case-law], the margin of appreciation allowed to those courts will be a wide one, in recognition of the fact that they are better placed than an international court to evaluate local needs and conditions, and the Court will be reluctant to gainsay their assessment» (para 53); in the case under observation, it nonetheless noted that the proceedings conducted by domestic authorities did not meet the procedural requirements in order to ensure due respect to the interests protected under Article 8 of the Conventio in the context of the assessment of the necessity of the interference in cases concerning the loss of one's home for the promotion of a public interest (para 56).

case-law, the sustainability of the conventional system is assured without the need of any intervention of the international judge, if not to provide further guidelines for improving the domestic jurisprudence, as shown above.[59] On the contrary, the Court feels more legitimate to intervene and perform a more stringent review when the case under observation shows the existence of domestic incompatible procedural deficits that make a given act or measure inappropriate.

In conclusion, it can be inferred that, when applied, the principle of "shared responsibility" can have a "constructive" nature, in the sense indicated by the former judge of the European Court of Human Rights, Julia Laffranque: the whole conventional mechanism is strictly bound to its ability to enable *everyone* «to contribute to building a stronger human rights regime in Europe, to the greater benefit of those who are protected by it».[60] In such a system, Member States are certainly at the forefront in the application of the Convention, but in the sense that they are obliged to diligently apply it in the light of the ECtHR interpretation, not in the sense that the European Court should give them *carte blanche* in their choices on regarding convention obligations.[61]

Formulated differently, domestic authorities are not given priority simply on grounds of their sovereignty, but rather on the fundamental premise of their engagement with conventional principles as elaborated by the Strasbourg judge: in this spirit, national actors are incentivised to fulfil their role as primary guarantors of the Convention law, thereby contributing to the general reinforcement of the overall level of human rights protection in the European context.[62] Consequently, the comprehensive and convincing acknowledgment and implementation of the relevant Convention case-law and principles drawn therefrom, become the premise on which the Court tends to show deference to the conclusions reached by national actors.[63]

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[59] BREMS E., *The "Logics" of Procedural-Type Review…, op. cit.,* 6.

[60] LAFFRANQUE J., Intervention at the Seminar on "*Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities*", held to coincide with the ceremony marking the official opening of the judicial year of the European Court of Human Rights, 30 January 2015, Strasbourg, available at: https://www.echr.coe.int/Documents/Dialogue_2015_ENG.pdf, 8.

[61] ZAGREBELSKY V., *La Conferenza di Interlaken per assicurare l'avvenire della Corte europea dei diritti umani. La crisi è più seria dei rimedi che i governi ipotizzano*, in Diritti umani e diritto internazionale, 2010, 312.

[62] POPELIER P., VAN DE HEYNING C., SPANO R., *Subsidiarity Post-Brighton: Procedural Rationality as Answer?*, in 30 Leiden Journal of International Law 1, 2017, doi:10.1017/S0922156516000674, 8 ff.; SPANO R., *The Future of the European Court of Human Rights-Subsidiarity, Process-Based Review and the Rule of Law*, in 18 Human Rights Law Review, 2018, doi: 10.1093/hrlr/ngyO1S, 492.

[63] ECtHR, Judgement of 19 October 2005, App No 32555/96, *Roche* v *the United Kingdom*, para 120; Judgement of 18 January 2011, App No 39401/04, *MGN Limited* v *the United Kingdom*, para 150.

3. The definition of the new ECtHR's methodology by the analysis of the advisory opinions

Following the deposit of the instrument of ratification by France, the condition for the entry into force of Protocol No. 16 was finally fulfilled in summer 2018.[64] By the way, it is significant that the last country to ratify the Protocol was also the first one to make it operative in practice: France was, in fact, the first State to activate the procedure to request an advisory opinion.[65] Since then, other four advisory opinions have been issued, two of them requested by Armenia,[66] another one on the request of the Supreme Administrative Court of Lithuania,[67] while the last one has been issued in reply to a request submitted by the French *Conseil d'État*.[68] Moreover, one request presented by the Supreme Court of the Slovak Republic was rejected,[69] and another one is currently pending.[70]

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[64] As explained by Benoit-Rohmer, on the occasion of his official visit to the European Court of Human Rights on 31 October 2017, President Macron admitted that France had resolutely embarked on the process of ratifying this protocol, "with the secret hope of being the tenth State to ratify, the one that will allow this protocol to enter into force"; as a matter of fact, the French courts have made a point of being the first to use the new mechanism and to submit a request for an advisory opinion to the European Court of Human Rights (See BENOIT-ROHMER F., *Le Protocole 16 ou le renouveau de la fonction consultative de la Cour européenne des droits de l'Homme*, in *Les défis liés à l'entrée en vigueur du Protocole 16 à la Convention européenne des droits de l'Homme*, Actes de la Journée d'étude de l'Institut de Recherche Carré de Marré de Malberg, 25 janvier 2019, 1). Provided that it is an optional protocol, its provisions only apply to states that have decided to ratify it, listed here: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214.

[65] ECtHR, Advisory opinion of 10 April 2019 "*Concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*", Request No P16-2018-001.

[66] ECtHR, Advisory Opinion of 29 May 2020 "*Concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*", requested by the Armenian Constitutional Court, Request No P16-2019-001; Advisory opinion of 26 April 2022 "*Concerning the statute of limitations and torture*" requested by the Court of Cassation of Armenia, Request No P16-2021-001.

[67] ECtHR, Advisory Opinion of 8 April 2022 "*On the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings*" requested by the Lithuanian Supreme Administrative Court, Request No P16-2020-002.

[68] ECtHR, Advisory Opinion of 13 July 2022 "*On the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date*" requested by the French *Conseil d'État*, Request No P16-2021-002.

[69] The ECtHR ruled that this request for an advisory opinion did not meet the requirements of Article 1 of Protocol No. 16 (See the Decision of the Panel of the Grand Chamber of the 14 December 2020 "*On a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention*", Request No P16-2020-001).

[70] As for the last one, suffice it to state that on 7 November 2022 the Panel of the Grand Chamber of the European Court has accepted the request (No P16-2022-001) for an advisory opinion under Protocol No. 16 received from the Supreme Court of Finland on 10 October 2022: at this stage, only the question of the admissibility of the request, as such, was examined. In its request, the Supreme Court of Finland has asked the

A full examination of all these is beyond the scope of this work. Rather, what the following pages intend to investigate is more correctly the methodological approach adopted by the Strasbourg Court in issuing the above-mentioned opinions, being conceptually different from that characterising its judgments. It must first be taken into account that the principle of "shared responsibility" shapes the whole advisory mechanism, this later taking the form of a new hermeneutic exercise by the Court that is not only prior to the decision of the concrete case, but also independent from it.

As repeatedly stated by the Court itself, the object and purpose of the procedure set up by the "Dialogue Protocol" is not adjudicative in nature, being rather related to the enhancement and the interaction with the national authorities.[71] More specifically, «[t]he aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court guidance on Convention issues when determining the case before it» within as short a time frame as possible.[72] It follows that when the Court is called upon to delineate the perimeter of its new consultative mandate, it tends to do so in accordance with the premises above, *in primis* when it comes to determine the criteria governing which questions do or do not amount to "questions of principle relating to the interpretation or application of the rights and freedoms". Interestingly, the advisory opinions issued up to this moment give us some fruitful indications in this concern.

In particular, as regards the purpose the Court recognises to its opinions, it has been underlined that the question raised must present a certain utility for the adjudication of the case,[73] and - consequently - be related to points that are directly connected to proceedings pending at domestic level.[74] Most notably, it shall concern an issue on which, on account of

European Court of Human Rights to provide an advisory opinion on the procedural rights of a biological mother in proceedings concerning the adoption of her adult child (see: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/advisoryopinions&c).

[71] ECtHR, Decision No. P16-2020-001, *cit.*, para 11; Advisory opinion No. P16-2021-001, *cit.*, para 53; Advisory opinion No. P16-2020-002, *cit.*, para 61; Advisory opinion No. P16-2019-001, *cit.,* para 43.

[72] ECtHR, Decision No. P16-2020-001, *cit.*, para 11; Advisory opinion No. P16-2018-001, *cit.*, para 25; Advisory opinion No. P16-2019-001, *cit.*, para 43; Advisory opinion No. no. P16-2021-001, cit., para 53.

[73] ECtHR, Decision No. P16-2020-001, *cit.*, para 17; Advisory opinion No. P16-2021-002 , *cit.*, para 57.

[74] ECtHR, Decision No. P16-2020-001, *cit.*., para 19; Advisory opinion No. P16-2018-001, *cit.*, para 26; Advisory opinion No. P16-2019-001, *cit.,* para 44; Advisory opinion No. P16-2020-002, *cit*., para 62; for a critical analysis see: LAVRYSEN L., *The mountain gave birth to a mouse: the first Advisory Opinion under Protocol No. 16*, published on Strasbourg Observers, on April 24, 2019 available at: https://strasbourgobservers.com/2019/04/24/the-mountain-gave-birth-to-a-mouse-the-first-advisory-opinion-under-protocol-no-16/; in the author's view, while the Article 1 of the Protocol expressly requires the requesting Court or Tribunal to seek an advisory opinion only in the context of a case pending before it, there would be no textual element compelling to restrict the Court's response to such a context; following this line of though, the authors conclude that the choice of the Court to privilege only the context of the pending case would

its nature, degree of novelty and/or complexity, the requesting judicial authority would need the Court's guidance by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it.[75] *Vice versa*, the Grand Chamber's opinion cannot amount to a merely abstract review of the domestic legislation,[76] so much so that where the question appears to be of an abstract and general nature, it cannot but be considered to fall outside the scope of the procedure envisaged by the Protocol.[77]

Against this background, the Grand Chamber has recognised itself as having the power to reformulate the questions submitted by the requesting judiciary, having regard to the specific factual and legal circumstances implicated in the domestic proceedings;[78] it can also refuse to answer one or more questions, regardless of the previous decision of the Panel, at least when the request does not fulfil the requirements delineated in Article 1 of Protocol No. 16 on the basis of the original material submitted, the observations received and all other element presented before it.[79]

Furthermore, the analysis of the advisory opinions shows careful consideration of the conceptual premises of the preliminary procedure in issue also when it comes to the extent to which the Court examines and takes into account the factual circumstances of the case pending before the national high jurisdiction; as in the judgments, the Court establishes the background and the domestic procedure giving rise to the request of the opinion, but it does not go so far as to assess them or to evaluate the outcome of the proceedings.

Indeed, its role is qualified as «limited to furnishing an opinion in relation to the questions submitted to it», while «[i]t is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusion which flow from the opinion delivered

be at odds with the more general objective of Protocol No. 16 to provide guidance on questions of principle relating to the interpretation or application of ECHR rights. Such criticism cannot be accepted: choices made by the Strasbourg Court, concerning the delimitation of the subject matter of the opinions by reason of the relationship between the questions put to it and the respective proceedings pending before the requesting national courts, appear on the whole acceptable in view of the preliminary ruling nature of the procedure established by Protocol No. 16. In line with the principle of subsidiarity, it must bear in mind that the advisory procedure is intended as an instrument of dialogue that does not seek to impose any preventive first word from the Strasbourg Court, but rather to guide the domestic courts in correctly applying the European case law of the Strasbourg Court, the language and scope of which are not always easy to understand and use.

[75] ECtHR, Decision No. P16-2020-001, *cit.*, para 23; Advisory opinion No. P16-2019-001, *cit.*, para 51; Advisory opinion No. P16-2018-001, *cit.*, para 25.

[76] ECHR, *Explanatory Report*, para 10.

[77] ECtHR, Decision No. P16-2020-001, *cit.*., para 18; Advisory opinion No. P16-2019-001, *cit.*, para 55.

[78] ECtHR, Advisory opinion No. P16-2018-001, *cit.,* paras 27-33; Advisory opinion No. P16-2019-001, *cit.*, para 45.

[79] ECtHR, Advisory opinion No. P16-2019-001, *cit.*, paras 46-47.

by the Court for the provisions of national law invoked in the case … ».[80] Consequently, the Grand Chamber takes into consideration the facts of the case as presented by the national authority, but does so only to make an analysis *in concreto* of the question raised, *i.e.* an analysis that is related to the proceedings pending at the national level..[81] In short, the Court's advisory opinion is necessarily framed by the factual circumstances underlying the legal question raised in the request.[82]

Conversely, it does substitute itself for the domestic courts or tribunals as regards the evaluation of the facts and their legal classification as it would do if it were a contentious case.[83] Instead, it restricts its task to the reiteration of the principles elaborated in its case-law related to the issue involved specifically, as well as on others relevant for the opinion,[84] while it is left to the national judicial authorities to determine how to apply those principles within the peculiar context of domestic proceedings.

Taking these limitations into account, it appears clear that the advisory-opinion procedure «cannot be used in the context of execution nor to rule in adversarial proceedings on contentious applications by means of a binding judgement but rather to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it».[85] In the Court's view, «such an approach is in line with the principle of subsidiarity on which Protocol No. 16, like the Convention itself, is based».[86] But it should be borne in mind that under the label of subsidiarity, the principle of "shared responsibility". In fact, the advisory mechanism is envisaged as an instrument to be used for *informing* the domestic judge's *own* interpretation of the domestic provisions relevant for the case to be solved at national level, in the light of the conventional principles as reiterated in the Grand Chamber's opinion.[87]

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[80] ECtHR, Advisory opinion No. P16-2018-001, *cit.*, para 25; Advisory opinion No. no. P16-2021-001, *cit.*, para 53; Opinion No. P16-2020-002, *cit.*, para 61.

[81] BIANKU L., *La Cour Européenne des Droits de l'Homme et le Protocole*, in *Les défis liés…, op. cit.*, 20.

[82] On this last aspect, compare ECtHR, Advisory opinion No. P16-2019-001 (paras 49 ff.) with ECtHR, Advisory opinion No. P16-2018-001 (paras 27-33): while in the former the advisory opinion proceeded on the basis of the facts as provided by the Constitutional albeit in the knowledge that those facts may be subject to subsequent review by another Court, in the latter all relevant facts were available to the Grand Chamber.

[83] LAVRYSEN L., *The mountain gave birth to a mouse…, cit.*

[84] See for example ECtHR, Advisory opinion No. P16-2021-001, *cit.*, paras 58 ff. and 67 ff.; Advisory opinion No. P16-2020-002, *cit.,* paras 94 ff.

[85] ECtHR, Advisory opinion P16-2018-001, *cit.*, para 34; Advisory opinion No. P16-2020-002, *cit.,* para 55

[86] ECtHR, Advisory opinion No. P16-2018-001, *cit.,* para 34.

[87] ECtHR, Advisory opinion No. P16-2019-001, *cit.,* para 50.

In turn, in a "shared responsibility"- oriented perspective, the highest courts and tribunals become crucial actors in contributing to the elaboration and development of a uniform reading of the ECHR standards within the different national systems. If the recapitulation of the relevant case-law by the Grand Chamber is necessary but also sufficient to enlighten the conventional requirements national jurisdictions will have to take a stance on, its value lies mostly in its potential to provide guidance on questions of principle relating to the Convention applicable in different but analogous cases.[88]

Ultimately, the dissemination of generalised application guidelines definitely valorises the role of the domestic actors called upon to give them full application in every concrete human rights dispute pending before them, thus contributing to increasing the standard of protection of human rights. At the same time, the role of the Court as the authoritative interpreter of the Convention is enhanced, too. As a matter of fact, by means of the preliminary opinion, the Court clarifies and specifies the scope of the relevant provision of the ECHR. The substantive value of the interpretation of the convention provision resulting from the opinion, is, by the way, the maximum that can be expressed by the ECHR system, provided that it will always be adopted by the Grand Chamber, *i.e.*, by the broadest and most qualified judicial formation of the conventional system (Art. 2 Protocol No. 16).[89]

By means of the hermeneutic exercise carried out by the Grand Chamber, the opinion merges with the interpreted provision of the Convention and, indirectly, radiates its effects over the entire objective scope of that provision. In other terms, it ends up being substantially relevant to all domestic situations identical to the one at issue in the proceedings pending before the requesting authority, and must therefore be taken into account by all jurisdictions to which those situations are submitted.[90]

Hence, as will be better discussed in the next paragraph, the opinion is characterised by an efficacy that transcends the individual case from which the request originates, to extend to all cases in which the same hermeneutic problem arises before the national judges: it has a patent capacity of "circulating" in all Member States - (regardless of the circumstance they have or have not yet formally ratified Protocol No. 16) made clear by it potential to favour the

[88] ECtHR, Advisory opinion No. P16-2021-001, *cit.*, para 54; opinion No. P16-2020-002, cit., para 62.

[89] PIRRONE P., *I primi pareri pregiudiziali della Corte europea dei diritti umani: aspetti procedurali*, in 2 Diritti umani e diritto internazionale, 2020, 535.

[90] *Ibid.*

development of principles of law dialoguing with and within the heterogeneous legal systems of the different Member States.[91]

4. The effects of the preliminary advisory mechanism explained from the first advisory opinion

Since the entry into force of the Protocol in 2018, the advisory procedure has been activated seven times and it is certain that there will be further requests for opinions in the coming years; within this framework, the ECHR opinions will begin to circulate, followed by the consequential decisions of the national judges solving the concrete case, as well as those of the Strasbourg Court itself, transposing the previously enunciated principle of law. As has been pointed out, such case-law will be produced by encompassing not only Strasbourg rulings but also the quasi-contextual efforts of national judges to "reconcile" them with the domestic legal fabric; more specifically, the new jurisprudential *corpus* will be linked to legal problems of the historical moment raised directly by the States, whereas hitherto there have been long time lapses separating Strasbourg decisions, first, and the subsequent national adaptations, then.[92]

And, therefore, the national jurisdictions will become the pivotal protagonists, privileged by the institutionalised dialogue with the Strasbourg judge, being able to make their own contribution to ensuring the conventionality of domestic legislation, under the hermeneutic guidance of the Court. This, both insofar as the home country has ratified the Protocol No. 16 and otherwise, in that national judicial authorities cannot be indifferent to the effects, of a non-binding nature, resulting from the advisory opinions rendered pursuant to Protocol No. 16.

In fact, the interpretation contained in the advisory opinion is relevant not only for the resolution of the case by the requesting court or tribunal, but also - and more broadly - in any case where the same convention provision is to be applied in domestic proceedings posing the same legal problem resolved by the opinion, regardless of the specific judicial authority

[91] GRIECO C., *Il protocollo N. 16 Allegato alla Cedu e la funzione consultiva della Corte Europea dei diritti dell'uomo anche alla luce della futura e ancora incerta ratifica italiana,* in 14 CUADERNOS DE DERECHO TRANSNACIONAL 1, 2022, doi: https://doi.org/10.20318/cdt.2022.6687, 321.

[92] SABATO R., *Sulla ratifica dei Protocolli N.15 e 16 della CEDU*, published in *Sistema Penale* on 16 December 2019, available at: https://www.sistemapenale.it/it/documenti/sabato-riflessioni-ratifica-protocolli-15-e-16-cedu.

requiring it. Preliminary rulings are thus also recognised as having the same *erga omnes* effects already widely manifested in the ECHR's contentious system, as illustrated several times in the course of this work.[93] Suffice it to recall that the Court does not operate exclusively as the judge of the case in question, but also as the judge of the general legal problems, with regard to which it has been argued that the Court plays a "quasi-constitutional" role.

This is all the more so since, as already established, advisory opinions have a value comparable to that of judgments and, as such, are likely to produce «undeniable legal effects»[94] that can also impact countries other than the requesting State, thereby strengthening the principle of res *interpretata* permeating the ECtHR's case-law.

The actual impact of the new advisory procedure is best assessed by taking the first advisory opinion by way of illustration. In particular, what is intended to be emphasised in the following pages is not the legal reasoning supported by the Grand Chamber in rendering the opinion, but rather its consequences: in short, what happened next. A brief overview of the background as well as of the opinion's content is nonetheless necessary so as to provide the reader with the framework within which to place the subsequent analysis.

In this respect, it must be recalled that the first advisory opinion under Protocol No. 16 was delivered on 10 April 2019 in response to the request submitted by the French Court of Cassation six months earlier. The reason prompting the national judiciary to activate the preliminary mechanism is to be found in the ECtHR's previous ruling issue in regard to the *Mennesson and Labassee* case,[95], where the Strasbourg judge examined, from the standpoint of Article 8 of the Convention, the inability of two children born in California through a gestational surrogacy arrangement, and their intended parents, to obtain recognition in France of the parent-child relationship legally established between them in the United States.

On that occasion, the Court had concluded that there had been an infringement of the children's right to respect for their private life, on the grounds that the latter' right to establish the substance of their identity – including the legal parent-child relationship – had been substantially affected by the non-recognition in French law of the legal parent-child relationship with their intended parents.

As for the issue of the legal parent-child relationship (*lien de filiation*) between the two children and the intended father, who was also the biological parent, the Court had also added

[93] PIRRONE P., *op. cit.*, pp. 533- 536.
[94] ECHR, *Reflection Paper*, para 44.
[95] ECtHR, Judgment of 26 June 2014, App No 65192/11.

that it could not be said to be in the best interest of the child to deprive him or her of a legal relationship of such a nature as that where the biological reality has been established; accordingly, in the light of non-recognition of the relationship above at the time of the registration of the details of the birth certificates, as well as of the consequences of this serious restriction on the identity and right to respect for private life of the children, the Respondent State had been found to overstep the permissible limits of its margin of appreciation.[96]

In the process of reviewing the domestic ruling conflicting with the ECtHR's judgement, the *Assemblée plénière* of the French Court of Cassation formulated its request for an advisory opinion,[97] in which it pointed out that its case-law had evolved in the wake of the *Mennesson* judgement. Registration of the details of the birth certificate of a child born through surrogacy abroad was currently possible in so far as the certificate designated the intended father as the child's father where he was the biological father. It continued to be impossible with regard to the intended mother, though; where the intended mother was married to the father, however, she had the option of adopting the child if the statutory conditions were met and the adoption was in the child's interests, resulting in the creation of a legal mother-child relationship.

In this respect, given the requirements of the child's best interests and the reduced margin of appreciation accorded to States, the Court was of the opinion that, in a situation such as that referred to by the Court of Cassation in its questions, the right to respect for private life of a child born abroad through a gestational surrogacy arrangement required that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother".[98]

Nonetheless, the Court recognised that the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; given the margin of appreciation available to States, alternative means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.[99]

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[96] *Ibid.*, paras 96, 99-100.
[97] Cour de cassation, Assemblée plénière, Judgement of 5 October 2018, No 10-19.053.
[98] ECtHR, Advisory opinion No. P16-2018-001, *cit.,* para 46.
[99] *Ibid.,* para 54

In sum, the Grand Chamber was mindful of the fact that, when, according to the assessment of the circumstances of each case, the relationship between the child and the intended mother has become a practical reality, an effective mechanism should exist enabling that relationship to be recognised.[100] At the same time, the opinion expressly reads that «it is not for the Court to express a view in the context of its advisory opinion on whether French adoption law satisfies» the condition above, and that «is a matter for the domestic courts to decide», taking into account the factual circumstances involved in the adoption proceedings that are pending.[101]

It can therefore be inferred from the above that the Court shows its full and conscious acceptance of the task entrusted to it, considering the preliminary ruling procedure to be aimed at realising the principle of cooperation with the national courts: it thus recognises its preliminary opinions to have only an interpretative guidance function for the national judge.[102] This however does not mean that the opinion is free of legal effects. On the contrary.

4.1. The indirect legal effect in the vertical relationship between the Court and the State of the requesting judicial authority

First of all, it must consider the response of the Court of Cassation. Shortly after the above-mentioned opinion, the Plenary Assembly of the French Court ruled in the *Mennesson* case: its judgement[103] emphasised that it must be inferred from Article 8 of the Convention that, with regard to the best interests of the child, the fact that the birth of a child abroad stems from a surrogacy agreement, prohibited by French law, cannot, in itself, prevent the transcription of the birth certificate drawn up by the authorities of the foreign State as regards the child's biological father, nor the recognition of the relationship already established in respect of the intended mother mentioned in the foreign act, unless giving rise to a disproportionate interference with the child's right to respect for private life. Consequently, by cancelling the transcription of the foreign birth certificate of the Mennesson children on the grounds that they had been born as a result of a surrogate motherhood agreement, the

[100] *Ibid.*
[101] *Ibid.*, para 58.
[102] PIRRONE P., *op. cit.*, 547.
[103] Cour de Cassation, Assemblée plénière, Judgment of 4 October 2019, No 10-19.053.

Court of Cassation concluded that the Court of Appeal had violated Article 8 of the Convention.

Ruling on the merits, the French Court noted that, with regard to the position of the intending mother, in its advisory opinion the Grand Chamber had clearly stated the principle that Contracting States are not obliged to opt for the transcription of birth certificates, since the choice of the means to be implemented to enable the recognition of the filiation relationship falls within their margin of appreciation. Moreover, according to the advisory opinion, adoption met the requirements of Article 8 provided that its procedures allowed for a rapid decision, so as to avoid the child being kept for a long time in legal uncertainty as to his or her parentage in relation to his or her mother of intention.

On the premises of the excessive length of the pending proceedings coupled with the absence of other ways of recognising the filiation in conditions that did not disproportionately violate the appellants' children's right to respect for their private life, the transcription of their foreign birth certificates in the civil-status registers could not be annulled. Consequently, the Court set aside the judgement on appeal, without referral, and dismissed the request for annulment of the transcription of the foreign birth certificates submitted by the public prosecutor.[104]

This outcome therefore saw the French judges closing the case with a solution – the transcription of the birth certificate of a child born abroad by surrogacy – that was warmly welcomed by the ECtHR, as underlined by the words of former president Sicilianos, who referred to it as a «perfect example of the dialogue-based approach established under Protocol No. 16»[105]; more specifically, it stands out as a successful instance of the application of the principle of "shared responsibility" as it highlights how the European Court authoritatively exercises its task as "final interpreter" of the ECHR, on the one hand, while the domestic court can fully play its role of domestic guarantor of conventional rights, conforming without delay to the principle of law enunciated by the Court, making it its own and resolving the case in the light of the same.

In this respect, it is symptomatic that the same principle of law has been embedded in the subsequent domestic jurisprudence: for example, the opinion was cited by two rulings of the

[104] MASCIOTTA C., *Il Protocollo n. 16 alla CEDU alla prova dell'applicazione concreta e le possibili ripercussioni sull'ordinamento italiano*, in 1 Diritto pubblico comparato ed europeo, 2020, doi: 10.17394/96307, 198-199.

[105] SICILIANOS L-A., Opening Address at the Opening of the Judicial Year 2020, in *Dialogue between Judges 2020 "The European Convention on Human Rights: living instrument at 70"*, available at: https://www.echr.coe.int/Documents/Dialogue_2020_ENG.pdf, 27.

French Court of Cassation of 18 December 2019 relating to the refusal to transcribe foreign birth certificates of children born of surrogate motherhood insofar as they designated the father's spouse as the «*parent*»[106]; on these occasions, the First Civil Chamber relied upon Article 8 of the Convention as interested by the European Court in its advisory opinion of 10 April 2019 to decide that, unless they are irregular, falsified or the facts declared therein do not correspond to reality, the birth certificates of children born abroad of surrogate motherhood, made in a foreign country and drawn up in the forms customary in that country, may be transcribed into French civil status registers both insofar as they concern the father of intention, the biological father, and the spouse of the latter.[107]

In the final analysis, the aforementioned French jurisprudence upholds the idea that, despite the fact that the Grand Chamber's advisory opinions are not formally binding on the domestic courts, where the situation is similar to that in issue in the proceeding giving rise to the preliminary question, national judges tend to follow the terms of the opinion, so as the same principle of law apply consistently and the standard of protection established by means of the consultative mechanism is secured.

4.2. The precedential value of the advisory opinions and their "conformative" effects

The aforementioned "persuasive" effect is understandable if one takes into account a further one of a horizontal nature,[108] in that the advisory opinions form part of the case-law of the Court, along with its judgments and decisions, as such having value for *all* Member States: the latter must conform to the principle of law enunciated in the advisory opinion if they don't want to be singled out for overstepping their margin of appreciation; in the terms used by the Reflection Paper, «the Court itself should consider [the advisory opinions] as valid

[106] Cour de Cassation, Judgment of 18 December 2019, Nos. 18-11815 and 18-12327.

[107] *Ibid*., paras 8-14. Eventually, the *Loi n° 2021-1017 du 2 août 2021 relative à la bioéthique* has completed the French Civil Code in order to specify that the recognition of filiation abroad is assessed with regard to French law. This subject, which was not present in the initial text, was the subject of an amendment to unify the case law. The Civil Code was supplemented to specify that recognition of filiation abroad is "assessed in the light of French law". For children born of GPA, the transcription of a foreign civil status record is thus limited to the biological parent alone (the second "intended" parent will have to go through an adoption procedure).

[108] The distinction between "vertical" and "horizontal" effects of the advisory opinions is borrowed by ALBANESI E., *Un parere della Corte EDU ex Protocollo n. 16 alla CEDU costituisce norma interposta per l'Italia, la quale non ha ratificato il Protocollo stesso?,* in Consultaonline 29 March 2021, available at: https://www.giurcost.org/contents/giurcost//studi/albanesi4.pdf.

case-law which it would follow when ruling on potential subsequent individual applications».[109]

Once again, the example given by the first opinion is emblematic. First of all, it has become a "precedent" followed by the Court in its subsequent case-law, where it systematically refers to the principle of law formulated therein. More specifically, the first opinion issued in 2019 has been relied upon in five different contentious cases, where the Respondent State was not necessarily that of that of the original requesting High judicial, and the issue was similar but not necessarily coincident with that giving rise to the Grand Chamber's pronouncement.

The first case concerned the rejection of the request for the transcription into the civil status registers of the birth certificate of a child born abroad of surrogate motherhood insofar as it designated the mother of intention as his mother.[110] Moreover, France found itself under the Court's attention in a second case shortly afterwards, where the applicants complained that the impossibility of obtaining recognition of a parent-child relationship between a child and the former partner of the biological mother as a result of the French courts' refusal infringed their right to private and family life.[111]

In both judgments, the Strasbourg judge concluded that a fair balance between the interests at stake was preserved and no disproportionate interference with the applicants' right to respect for private life was taken by the Respondent State, which consequently remained within its margin of appreciation as delineated in the advisory opinion.[112] More specifically, the Court recognised that the parent-child relationship could be legally established through legal means alternative to the legal recognition of the filiation relationship (*i.e.* sharing the exercise of parental authority with her partner or ex-partner, the decision of the family court in the event of separation and disagreement between the former spouses, to establish the conditions of her relationship with her mother's ex-partner, and of course adoption), which could therefore be considered compatible with the content of the obligations flowing from Article 8 as interpreted in the advisory opinion.[113]

That the balancing had been meticulously carried out by the national authorities and, consequently, that they had reached a result within the margin of appreciation afforded to them was also the conclusion reached by the Court in the third case,[114] concerning complaints

[109] ECHR, *Reflection Paper*, para 44.
[110] ECtHR, Judgement of 16 July 2020, App No 11288/18, *D.* v *France.*
[111] ECtHR, Judgement of 24 March 2022, App Nos 29775/18 29693/19, *C.E. and Others* v *France.*
[112] *C.E. and Others*…, *cit.,* para 85.
[113] *D. v. France*, *cit.,* paras 54, 64-67; *C.E. and Others*…, *cit.*, paras 100-101.
[114] ECtHR, Judgement of 24 March 2022, App No 30254/18, *A.M.* v *Norway.*

related to proceedings between the applicant and her ex-partner, and proceedings against relevant administrative decisions in Norway. Relying on Articles 8 and 14 the applicant lamented the domestic authorities' refusal to grant her contact rights in respect of the child born by surrogacy in the United States of America or recognising her as his mother, either by acknowledging the birth certificate issued in the United States or by approving her requests for parenthood.

As regards the right to private life, the Strasbourg judge concluded that no violation had occurred, in particular on the basis that it was not an intervention by the Respondent State that had brought to an end the applicant's relationship with the child; on the contrary, the domestic court had diligently carried out a more thorough examination of whether any rights belonging to the applicant under the Convention required that the domestic legislation not be applied to the particular circumstances of that case, also taking into account the principles established by the European relevant case-law: the result was that the Court found no basis for setting such an assessment aside.[115]

As regards the fourth case,[116] the ECHR held that there had been a violation of the Art. 8 ECHR, by the Swiss authorities in respect of a child – born through surrogacy techniques, prohibited in Switzerland, already legally recognised as the applicants' child by court order in California – for having left him, deprived of the possibility of obtaining recognition of his relationship with the intended parent for seven years and eight months, due to the absence of specific provisions in Swiss legislation. The Court noted that such a significant period of time had to be considered to have placed the child in a condition of legal uncertainty regarding his social identity, depriving him of the opportunity to live and develop in a stable environment, thus being incompatible with the principles already affirmed by the Court in its advisory opinion as well as in its well-established case-law.[117]

Finally, in the last case,[118] the first applicant complained about the refusal to adopt two twins as a "stepmother" in Denmark; the children were born to a surrogate mother in Ukraine who was paid for her service under a contract concluded with the first applicant and her partner, the biological father of the children. Nevertheless, under Danish law, adoption was not permitted in cases where payment had been made to the person who had to consent to the adoption.

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[115] *Ibid.*, para 126 ff.
[116] ECtHR, Judgment of 22 November 2022, App No 58817/15 et 58252/15, *D.B. and Others* v *Switzerland.*
[117] *Ibid.*, paras 79-82, 85, 87.
[118] ECtHR, Judgment of 6 December 2022, App No 25212/21, *K.K. and Others* v *Denmark.*

In its ruling, the Strasbourg judge emphasised how the domestic authority's evaluation had concentrated on the right to respect for private life in respect of the twins, taking it for granted that the first applicant's right to personal development through her relationship with the children, and continuing that relationship with them – was outweighed by the public interests at stake. On the grounds that this had been in line with the Court's reasoning in the relevant advisory opinion,[119] the Court saw no reason to hold otherwise.

Wanting to draw some general conclusions from this jurisprudence, it can be highlighted that the advisory opinion produces a "precedent" effect within the European jurisprudence, from which the Court tends not to depart from « such a course being in the interests of legal certainty and the orderly development of the Convention case-law … [unless] it is persuaded that there were cogent reasons for doing so»[120]. The consequence is that all Member States that are judged on cases similar to those dealt with by an advisory opinion, must be considered to be subject to the same standard of protection already set by the Court in its consultative, first, and then contentious proceedings.[121]

Such an effect eventually can contribute to strengthen the Court's role as a hermeneutic guide with regard to the illustration of the established principles of Convention law and, parallel, that of national authorities as paramount guarantor of the "conventionality" within domestic legal system: it is no coincidence that, in the aforementioned cases, where the Respondent State has shown to adhere to conventional law in the balancing exercise of the interests and rights at stake, the Court has not found any breach. On the contrary, lack of compliance led to the conclusion of State's accountability.

An examination of the case-law of the ECtHR also shows that advisory opinions can potentially produce a "conformative" effect, too: this refers to the fact that parties can rely on the advisory pronouncements of the Grand Chamber to uphold the conventionality of a certain national measure or, on the contrary, to challenge it, in light of the principles developed by the Court. In short, acting in accordance with the opinion allows you to benefit from a presumption of lawfulness.[122]

For instance, in the case *D. v France*, the Government referred to the above-mentioned advisory opinion insofar as it states that the choice of means falls within their margin of

[119] *Ibid.*, paras 52-77.
[120] ECtHR, Judgment of 27 September 1990, App No 10843/84, *Cossey* v *the United Kingdom*, para 35.
[121] TANCREDI A., *op. cit.,* 599-600.
[122] *Ibid.*, 603-605.

appreciation,[123] while the applicants in the *D.B. and Others v. Switzerland* case contended that the domestic procedure was not compatible with the said opinion, since the child's right to respect to his or her private life was insufficiently protected in the light of the standards of safeguard established by the European Court therein.[124]

It is clear, then, that if the interpretation of the Convention contained in the advisory opinions is to be considered analogous in its effects to the hermeneutic elements set out by the Court exercising its adjudicative role, this means that even in absence of binding effect, the exegetic guidance provided therein is nevertheless an authoritative one[125]: it expresses and clarifies general principles applicable in a broader context of the individual case, which on the other hand risk being obscured in the context of a contentious case focused more on their application in the circumstances of the individual petition.[126] In this way, it certainly helps to develop the actual content of conventional obligations to conform with.

4.3. *The force of* res interpretata *of the advisory opinions in the case of Italy*

Lastly, the fact that the advisory opinions are characterised as a «constituting element of the jurisprudence of the European Court»[127] entails a further consequence: like the judgments and decisions rendered in litigation, they have force of *res interpretata* that the national authorities of *all* Member States must take into account when giving application to the Convention law. In this way, the non-binding determinations contained in the advisory opinions end up circulating also within those countries that have not ratified the Protocol.

To better understand this last observation, the following pages will take into examination different rulings of the Italian Constitutional Court as the "authoritative interpreter" of the Constitution: this latter, at Article 117, paragraph 1, states that « [l]egislative powers shall be vested in the State and the Regions in compliance with … international obligations». Such a reference would make it possible to descend a "conformation constraint" from the

[123] *D. v. France*, *cit.,* para 34.

[124] *D.B. and Others*…, *cit.,* paras 32-33.

[125] O'LEARY S., EICKE T., *Some reflections on Protocol No. 16*, Extended version of the presentation at the opening of the judicial year on 25 January 2019, available at: https://www.echr.coe.int/Documents/Speech_20190125_O_Leary_Eicke_JY_ENG.pdf, 9.

[126] *Ibid.*, 8

[127] ALBANESI E., *op. cit.,* 235.

conventional rule as it is interpreted by the ECtHR, at least in the event a «well-established case-law» can be detected, as the Italian Constitutional Court has recently specified.[128]

The question to start from is therefore whether or not it is possible to trace in the Constitutional Court the indication of such a conformative constraint deriving from the force of *res interpetata* also in the case of opinions rendered according to the Protocol n. 16. In particular, the intention is not so much to ascertain whether or not the principles contained in the opinion are respected by the Constitutional Court, but rather whether or not the Court of a State that has not ratified the Protocol deals with it.[129]

The first judgement to look at is the Court's ruling No. 230 of 2020: it addressed the issue of constitutionality raised in the course of the rectification of birth certificates proceedings initiated by two women united in civil partnership, who were seeking a declaration of the unlawfulness of the refusal made by the civil registrar to their joint request to indicate their child – born abroad through medically assisted procreation techniques (PMA) – as the child of both of them and not of the sole birthing mother.

In the referring judge's view, the limitation of the protection of same-sex female couples united civilly to only the rights and the duties arising from the civil partnership as combined with the impossibility to indicate in the birth certificate the women who have had recourse to medically assisted procreation abroad would undermine such inviolable rights of the person as the rights to parenthood and the right to procreation in the context of a civil partnership legally recognised; it would also discriminate against citizens on account of their sexual orientation and on account of the property conditions of couples; lastly, it would introduce an unreasonable prohibition based on discrimination on the grounds of the sexual orientation of the members of the couple.[130]

With no intention to jump into an in-depth examination of the reasoning of the ruling, it is however interesting to note how, in rejecting the claims of unconstitutionality, the Constitutional Court expressly relied on the principle elaborated by the Grand Chamber's opinion of 10 April 2019, *i.e.* that States are not obliged to record the details of the birth certificate of a child born through surrogacy abroad in order to establish the legal parent-child relationship with the intended mother: adoption may also serve as a means of recognising such a relationship, provided that the procedure established by national law

[128] Italian Constitutional Court, Judgment of 14 January 2015, No 49/2015.
[129] The affirmative answer is given by Tancredi in TANCREDI A., *op. cit.,* 611 ff.
[130] Italian Constitutional Court, Judgment of 20 October 2020, No 230/2020, p. 1 in fatto.

ensures its timely and effective implementation, while respecting the best interests of the child.[131]

In the two judgments issued the following year, Nos. 32 and 33, the technique of recalling the opinion has changed. As regards the first one,[132] it originated from a case started by the intended mother of twins, born following the use of PMA – to which her then partner had undergone – in order to obtain, principally, the authorisation to declare to the registrar of civil status that she was the parent.

The referring court pointed out that the instruments identified in similar cases to protect the interests of minors, consisting in the transcription of the birth certificate drawn up abroad, and in adoption "in particular cases", could not be used in the present case because they depended on the consent of the biological and legal mother, which had instead been denied. Interestingly, the referring judge also took the chance to emphasise that the alleged lack of protection would result in the infringement of constitutionally and conventionally guaranteed right, including Article 8 as interpreted most recently by the European Court in the advisory opinion rendered on 10 April 2019.[133]

A similar doubt of constitutional illegitimacy, again with reference – *inter alia* – to Article 8 as interpreted in the advisory opinion, also arose in the proceeding pending before the Court of Cassation and giving rise to the second ruling of the Italian *Consulta* under review here. The case concerned the refusal opposed by the Italian authorities to the rectification of the birth certification of a child born in 2015 in Canada by means of PMA, insofar as it only mentioned the biological father, while making no reference to the latter's partner, nor to the surrogate mother who had given birth to the child and the egg donor.

Consequently, the prohibition of recognition would inevitably infringe the child's right to respect for his private life guaranteed under the Convention, this latter requiring that national law to offer the possibility of an effective and rapid recognition of the parent-child relationship with the intended parent.[134] Even more explicitly than in the previous case, the referring judge took into account the advisory opinion, by qualifying it as an «interpretative instrument that the national court cannot ignore, having been pronounced unanimously by

[131] *Ibid.*, p. 6 in diritto.
[132] Italian Constitutional Court, Judgment of 28 January 2021, No 32/2021.
[133] *Ibid.*, p. 1.2. in fatto.
[134] Italian Constitutional Court, Judgment of 28 January 2021, 33/2021, pp. 1-1.3. in fatto.

the Grand Chamber and constituting codification of 'settled law' relating to the Convention».[135]

As for the Constitutional Court, it also – albeit in a more indirect way[136] – relied upon the ECtHR's principle of law illustrated in the advisory opinion rendered under Protocol No. 16 by reference to the subsequent case-law reiterating and upholding the same principle. In this way, the Court sought to reconstruct the conventional approach at the basis of Article 8 of the Convention giving origin to States' positive obligation to guarantee the full protection of the child's right to respect of his private life: in the Court's words, the clarifications provided by this case-law «add clarity to the ECtHR's finding of each element aimed at strengthening the protection of children within a perimeter of concretely enforceable rights, which are translate into obligations of states to intervene if the protection is not effective»:[137] obligations, thus, that the very advisory opinion – through the subsequent following case-law – contributes to authoritatively interpreted.

In the following judgement, reference to the European Court's case-law takes on an even greater significance: as a matter of fact, the Italian Constitutional Court expressly recognises that «[o]n the other hand, there is no doubt that the advisory opinion rendered by the ECHR … is not binding, as expressly provided for in Article 5 of Protocol No 16 to the ECHR… neither for the State to which the requesting court belongs, nor *a fortiori* for other States, even less so for those - such as Italy - that have not ratified the Protocol in question. *Nevertheless* [emphasis added], this opinion has flowed into subsequent rulings adopted in contentious cases».[138]

The use of the adverbial conjunction "nevertheless" seems exactly to suggest what has already been stated in the preceding paragraphs, namely that an indirect persuasive effect concerning the relationship between the Court and the requesting domestic judge is matched by horizontal *erga omnes* effects deriving from its precedential value; by virtue of the latter, the principle of law flows into the case-law of the Court, which has unquestionable force of *res interpretata,* thus binding *all* Member States, Italy included.

If one then wants to argue that, in line with the previous constitutional jurisprudence, what binds the Italian ordinary judge is exclusively the "well-established case-law" of the European

[135] *Ibid.*, p. 6.2. in fatto.
[136] On the indirect reference operated by the Constitutional Court see: TANCREDI A., *op. cit.,* 589-594.
[137] Italian Constitutional Court, No 32/2021, p. 2.4.1.2. in diritto (my translation).
[138] Italian Constitutional Court, No 33/2021, p. 3.1. in diritto (my translation).

Court of Human Rights,[139] it can be easily replied that, in the judgement under scrutiny, the same Constitutional judge explicitly qualified the cases in which the non-binding opinion was flowed as «well-established jurisprudence of the ECHR» affirming the necessity, under Article 8 ECHR, that children born through surrogacy, even in States Parties that prohibit the use of such practices, obtain legal recognition of the *lien de filiation* with both members of the couple that intended their birth and then actually took care of them.[140]

The precedential value of the opinion is also evident if one examines a further ruling of the Constitutional Court[141] on the censure of constitutionality affecting the Italian Law regulating the right of the minor to a family, in that it does not induce any civil rights between the adopted child and the adoptee's relatives in the stance of the so-called adoption "in special cases".[142]

In its examination of the distinctive features of the institution concerned emerging from the original legislative drafting and the evolutionary path traced by the most recent legal framework, the Constitutional judge did not hesitate to rely upon the principles established by the ECHR on the subject matter, *i.e.* the necessary legal recognition of the filial relationship in order to protect the child's identity. Even more specifically, in order to identify the limit of the margin of appreciation States are normally afforded, the *Consulta* interestingly recalled – or, better, juxtaposed – his previous ruling No. 33 of 2021, the ECtHR's contentious jurisprudence and the Grand Chamber's first advisory opinion, all of them enucleating the same principle of law.[143] In this way, the Italian Court came to state that the censured provision, by contrasting with Article 8 of the Convention, infringed the international obligations under the Italian Constitution (Art. 117, para 1).

It therefore seems to be concluded in the sense that by virtue of its precedential value, the opinion will produce *erga omnes* effects binding on the Member States, including Italy, although not a party to Protocol No. 16, to the extent that one traces the opinion back to the jurisprudence of the European Court of Human Rights, and, most specifically, it can be considered consolidated case-law.[144]

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[139] Italian Constitutional Court, No 49/2015.
[140] Italian Constitutional Court, No 33/2021, p. 5.4. in diritto
[141] Italian Constitutional Court, Judgment of 23 February 2022, No 79/2022.
[142] Article 55 of Law No 184 of 4 May 1983, which refers to Article 300 (2) of the Civil Code.
[143] Italian Constitutional Court, No 79/2022, p. 9 in diritto.
[144] ALBANESI E., *op. cit.,* 235-236.

Conclusions

«We are not museum curators but actors»[1]: with these few words, the former judge and Vice-President of the European Court described the role of the judicial body of the Council of Europe. In her view, the work of the latter has nothing to do with the preservation or exhibition of objects from the *past*, but rather with the active participation in a *future*-oriented process. Such a short definition encapsulates the key issue to be addressed here so as to evaluate the nature of one of the most (if not the most) productive international judges some sixty years after its establishment in Strasbourg: the element of *change*.

A brief terminological premise is in order: when we speak of "change" something different from "development" is meant; in fact, it is argued that what the Court has gone through is in no way equivalent to any constant growth aimed at becoming more advanced than it originally was, as the concept of "development" would suggest,[2] but can instead be described as a process of mutation that betrays its original premises and transforms the subject in question into something new.

Hence, an inevitable question raises: change from what? A reading of the *Travaux Préparatoires*[3] and the Preamble of the ECHR[4] shows that the maintenance and further realisation of human rights and fundamental freedoms is considered to be one of the methods to achieve *greater unity* among the members of the Council of Europe in the interests of security and stability: the ECHR is an international treaty adopted in defence of the stability and integrity of European democratic systems «through the medium of human rights [emphasis added]»[5].

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[1] TULKENS F., *Judicial Activism v Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights*, in 3 European Convention on Human Rights Law Review, 2022, 299.

[2] See the definition available on: https://www.oxfordlearnersdictionaries.com/definition/english/development?q=development,

[3] See Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, vol. I- II, 1975.

[4] Preamble to the ECHR, third recital.

[5] GREER S., WILDHABER L., *Revisiting the Debate about Constitutionalising the European Court of Human Rights*, in 12 Human Rights Law Review 4, 2012, 665.

The codification of human rights established by the ECHR is then complemented by the establishment of a judicial body responsible for ensuring the observance of Contracting States' engagements (Article 19), and whose jurisdiction extends to all matters concerning the interpretation and application of the Convention (Article 32). It appears that the international oversight the ECtHR is entrusted with to assure the unity of European countries is instrumental to both the preservation of democratic States sovereignty and its limitation.[6] These two purposes are strictly inter-dependent: while the latter relates to the protection of the individual against any illegitimate infringement by means of a system of collective enforcement, the former is perceived as necessary for the preservation of peace and security in Europe, as well as for the domestic stability of the Member States.[7]

Put it in different terms, Convention law is aimed at establishing minimum standards to be respected in order to fully guarantee the establishment and further development of the democratic rule, thus representing «a way to supplement and reinforce, not substitute for, the domestic institutions of constitutional democracy»[8]. It follows that the role of the European Court of Human Rights is *legitimised* by the aim of preserving unity among European countries around the commitment to human rights, the rule of law and democracy.

Yet, what the Court seems to be rather a developer of human rights law, *i.e.* a promoter of legal doctrines on human rights, exploring new frontiers and piercing old boundaries in such area of law.[9] In fact, the Strasbourg jurisdiction seems to focus more on the protection of human rights and fundamental freedoms, which, from being instrumental means to the pursuit of a specific objective, have become the real ends of its intervention. But then, the title of this work could be partially reworded to better frame the issue. The question must be asked, that is, whether the European judge is a Court on the *unity* of States or a Court on *rights*, resolving this dilemma in the following terms: it was certainly born as in the first sense indicated, it has changed, it has become the second.

In this respect, it is maintained that the ECtHR has deduced the authority to teleologically change its role by means of interpretation. As illustrated in Chapter 1, the silence of the

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[6] MORAVCSIK A., *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, in 54 International Organization 2, 2000, 238.

[7] DEMIR-GURSEL E., *For the sake of unity: the drafting history of the European Convention on Human Rights and its current relevance*, in AUST H, DEMIR-GURSEL E. (edit. by), *The European Court of Human Rights*, Cheltenham 2021, 111.

[8] COHEN J. L., *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge 2012, 168.

[9] VILJANEN J., *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, in 16 European Journal of International Law, 2005, 249-250.

Convention coupled with the overall inadequacy of the international framework codified in Articles from 31 to 33 of the 1969 Vienna Convention on the Law of Treaties, has lead the ECHR's authoritative interpret to elaborate its own hermeneutical methodology in the light of the interpretation object, *i.e.* a human rights treaty.

More specifically, back in the Sixties, the early Court found itself working in "virgin territory", having first and foremost to respond to the need to *settle* and *develop a* new language of human rights that would be uniform for the different European countries which had accepted the obligations arising from the new regional safeguards system. But the language of human rights is open and abstract in nature, requiring an active role by the part of the interpreter entrusted with the task to translate it into concretely enforceable guarantees, through an operation of contextualisation of the conventional norms: a task that inevitably entails a considerable degree of discretion for the benefit of the interpreter.

In fact, the act of adapting the general code of human rights into specific norms allows the interpreter to elucidate by a case-by-case approach existing common standards of protection. In the Court's words, the ECHR represents a "constitutional instrument of European public order", meaning that it has the potential to establish and develop a «body of law which encompasses "common European standards" by which States […] are bound»[10], and its interpretation amounts to pointing national authorities in the Convention-compatible direction to follow in the field of human rights.

Consequently, the use of the language of human rights has resulted in the creative elaboration of a human-rights based approach in interpreting the ECHR, which suggests a commitment to placing priority on human rights over the original objectives. Better, human rights become objectives *per se*. The collateral effect is the creation by the Court of a self-serving judicial policy fuelled by anything instrumental to enhance its "standard-setting" function without losing its legitimacy in the eyes of its privileged interlocutors, *i.e.* Member States.

If in fact, in principle it is the realisation of a greater unity of States that justifies the international intervention to safeguard the maintenance or further development of human rights and fundamental freedoms, when the protection of latter becomes prevalent, imposing itself on the former, it is itself that justifies the interpretative jurisdiction of the Court. The

[10] PACE, Committee on Legal Affairs and Contribution to the Conference on the Principle of Subsidiarity, Skopje 1-2 October 20101, "*Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice*", adopted on 25 November 2010 and available at: https://assembly.coe.int/committeedocs/2010/20101125_skopje.pdf.

very need for protection thus strengthens the Court's function to define a coherent *corpus* of common standards which give content to the States' obligation under Article 1 of the Convention.

In this way, the Court's human-rights approach has influenced the criteria of allocation of competences between different layers of human rights protection (international and national), by leading to an overall enhancement of the Court's authority over national systems in a field traditionally reserved to the domestic domain – namely the relationship between the sovereign State and the individual. At the same time, a progressive reordering of the ECHR's system internal architecture is implied: [11] far from representing a classic inter-States Court driven by the members of its organisation of affiliation, the Court has consolidated its prerogative «to hold the States Parties to legal instruments beyond their control»[12].

Its role and competence is not justified by the need to support States when they risk to put in danger the commonality around democracy rule, stability and security. Instead, it is legitimised by the need to fulfil States' commitment with concrete content with those *dicta* flowing from its interpretive activity. In other terms, domestic actors would comply with their obligations under Article 1 only where they took stance of the evolving case- law of the Court, being the latter the authoritative interpreter of the Convention. In the words of the ECtHR itself, its judgments «serve […] to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties»[13], as well as «to determine issues on public-policy grounds in the common interest, thereby *raising* [emphasis added] the general standards of protection of human rights»[14] (the so-called principle of *res interpretata*).

On the premise that the essential grammar of the Court's interpretative activity is composed of the progressively established standards of protection, enucleated in the concrete case but valid irrespective of it, it follows that the hermeneutical tools elaborated thought the European case-law and analysed in Chapter 2 are constructed mainly to range between "activism" and "deference",[15] so as to address the twofold function of justifying (but also

[11] ARATO J., *Constitutional transformation in the ecthr: Strasbourg's expansive recourse to external rules of international law*, in 37 Brooklyn Journal of International Law, 2012, 351.

[12] *Ibid.*, 353.

[13] ECtHR, Judgment of 18 January 1978, App No 5310/71, *Ireland* v *United Kingdom*, para. 154; Judgement of 24 July 2003, App No 40016/98, *Karner* v *Austria*, para. 26.

[14] ECtHR, Judgment of 7 January 2010, App No 25965/04, *Rantsev* v *Cyprus and Russia*, para. 197.

[15] In this concern, it is argued that multifaceted purpose pumping the functioning of the entire international structure requires the European Court to range between opposing values and objectives, without its interpretative activity being contradictory or inconsistent for this reason alone; hence, "judicial activism" and "judicial

promoting) the international intervention within domestic domains coupled with the imperative to avoid backlash and fallouts.

First of all, focus on the "*effet utile*" theory as «a fundamental cornerstone for the protection of Convention rights and freedoms»[16] has operated as a justification of a strengthening of the role of the Court as a guarantor of the effectiveness of the ECHR guarantees, that is to say to secure «rights that are not theoretical or illusory, but practical and effective»[17]. Besides, the temporal dimension of the principle of effectiveness, *i.e.* the evolutive interpretation,[18] has paved the way for an exegetical exercise which insists on the element of change: since as "present-day conditions" evolve, so does the conception of the conventional rights, their limits or their implementation; the ECHR adapts to these changes, lives through them, becomes one: it is interpreted, that is, first and foremost as a catalogue of "living rights", which require a constant work of adjustment by its authoritative interpreter.

At the same time, the full establishment of its long-lasting role requires strategic evaluation of the "perfect timing" to pursue a gradual development of uniform standards for the entire Council of Europe, with the consequence that adopting the maximalist approach is not always the best option for the Court, whereas the recognition of a certain operational space in favour of national actors would be more in line with the demand of States to respect their own values, norms and constitutional principles.[19] In other words, if the judicial policy of the European Court of Human Rights is hinged on a typical human rights approach that justifies its active role, at the same time it does not imply on the part of the judge the power to impose "from outside" and "from above" a standardised threshold of protection, except at the cost of losing its legitimacy.

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deference" are per se insufficient to describe the European hermeneutic ethos, the inaccurate dichotomy above conceals a more complex reality, and "activism" and "self-restraint" are nothing but contradictory and unsatisfactory terms of alternative positions of the parties in separate camps, *i.e.* traditionalism and conservatism, on the one hand, and liberalism and progressivism, on the other hand (TULKENS F., *Judicial Activism…, op. cit.,* 293-294).

[16] LETSAS G., *A Theory of Interpretation of the European Convention on Human Rights*, Oxford 2007, 61.

[17] ECtHR, Judgment of 13 May 1980, App No 6694/74, *Artico* v *Italy*, para 33.

[18] TULKENS F., *Different standards of judicial review. The nature and object of the judgement of the European Court of Human Rights*, Paper presented at the Conference "Judicial activism and restraint theory and practice of constitutional rights" organised by the Constitutional Court of Georgia in partnership with the Public Defender's Office of Georgia, the Centre for Constitutional Studies of Ilia State University, the European Commission for Democracy Through Law (Venice Commission) and the German Technical Cooperation, held in Batumi (Georgia) on 13-14 July 2010, 37.

[19] GERARDS J., *Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights*, Forthcoming in CLAES M., DE VISSER M. (ed. by), *Constructing European Constitutional Law,* Oxford: Hart 2014, 2

These considerations urge the need for *ad hoc* interpretative tool which can limit discretion by the part of the Court so as to legitimise it within the European «cultural and moral environment»[20]. In this vein, the so-called "consensus" is to be regarded as a useful tool in the search for a "lowest common denominator" in the practices and legislation of Member States to fill its expansive interpretations of the ECHR with a content that is attentive to the context of reference and does not upset the legal systems that are the source of its legitimacy.[21] Under this perspective, evolutive interpretation is to be described as the method by which the ECtHR anchors the concrete meaning to be attached to conventional rights to the *specific* development of European socio-legal concepts.[22]

Moreover, persuasiveness of the Court's work relies on due respect of a strict "distribution of labour and of responsibilities" between different layers of safeguard in accordance with the principle laying at the core of the conventional system: that of subsidiarity. In line with the latter, the primary responsibility for securing the rights and freedoms set out in the European Convention on Human Rights lies with the domestic authorities. As its substantive translation, the margin of appreciation is a useful tool at the disposal of the Court, by which it can afford national authorities a space for manoeuvre in fulfilling their obligations under the European Convention. The margin of appreciation thus provided for the flexibility needed to avoid damaging confrontations between the Court and the Member States, enabling the former to balance the sovereignty of the latter with their international commitment.[23]

To better understand its functioning, it could be described as a *friction*. In mechanics, this is defined as the force of attrition between the contact surfaces of two bodies moving at different speeds, thus making it possible to change speeds by modulating the transmission of motion. To use the metaphor of the car, whenever the Court ventures into divisive and highly-sensitive subjects, simply "stepping on the accelerator" may prove to be the wrong choice lending itself to criticism of judicial activism.

Accordingly, «[t]he margin of appreciation doctrine could serve as a lubricant on the wheels of change, insisting less when tensions are particularly high».[24] It emerges that the

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[20] PETMAN J., *Human Rights Between Sovereign Will and International Standards: A Comment' in Definition and Development of Human Rights and Popular Sovereignty in Europe*, 2011, 134.

[21] DEMIR-GURSEL E., *op. cit.,*127

[22] LETSAS G., *op. cit.,* 65.

[23] FENWICK H., *Civil Liberties and Human Rights,* London 2005, 34-37

[24] BENVENISTI E., *The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy*, in 2 *Journal of International Dispute Settlement* 9, 2018, doi: https://doi.org/10.1093/jnlids/idy005, 243.

margin's usefulness lays in its use as a tool for reconciling two different speeds, that of the Court and that of the States, whenever "like-minded" countries of Europe move and develop with no complete synchrony. More specifically, the margin could be used as an indicator of when the Strasbourg judges should and could legitimately "meddle" in domestic affairs in order to promote higher standards of protection (and, consequently, States must move at the speed of the Court), and when they should refrain from it (and the Court respects the speed of States).[25]

In the final analysis, the Court's human rights approach has resulted in in the gradual extension of the scope of States' obligation under Article 1 of the Convention; more specifically, besides the negative obligation not to interfere with the incompressible space of freedom of the individual, national actors are expected to take positive or even preventive actions in order to fulfil their international commitment; this eventually leads to the consequence that the Court requires States to take efficient and effective measures to prevent future violation of the Convention.

The reaction of States to the gradual expansion of their commitment under the Convention has resulted in the so-called Interlaken Process. As stated in Chapter 3, it initiated in 2010 within the framework of the Swiss Chairmanship of the Committee of Ministers, and consisted in a series of ministerial conferences on the future of the European Court, designed to first outline and then implement a roadmap of efficiency-improving-structural changes to the conventional system, so as to enable the regional system «to remain truly effective».[26] It is nevertheless true that it quickly turned into a political arena where to take stance on the "activist" twist of the Court which had been perceived as an illegitimate intrusion into highly sensitive national political issues at the expense of the superiority of the decision-making power vested in democratic elected bodies.

On the one hand, the reform process takes over the fundamental principle of subsidiarity as the best tool to reinforce domestic primacy over the international Court when it comes to human rights protection: clear manifestation of signs of friction between States translated into the political intent to formally amend the ECHR so as to have the principle at hand written black and white.

[25] DOTHAN S., *Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies,* in 9 Journal of International Dispute Settlement 2, 2018, 148.

[26] Council of Europe, The Interlaken Process, available at: https://rm.coe.int/processus-interlaken-eng/1680a059c7.

As a matter of fact, the latter has been codified in two new legally binding Protocols. Protocol No. 15 amending the European Convention on Human Rights modified the Preamble to the Convention, which now includes a reference to the subsidiarity principle and to the margin of appreciation doctrine, while Protocol No. 16 enables the Highest national courts and tribunals, as designated by the Member States concerned, to request the Court to give non-binding advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention so as to enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity.

On the other hand, the analysis of the most recent jurisprudential trends as well as of the advisory opinions issued up to date delineate a picture which patently contradicts these premises. As shown in Chapter 4, the most recent jurisprudence shows the Court intent on modulating the intensity of its scrutiny in the light of the quality of national decision-making and judicial processes assessed when examining the State performance. More specifically, the Court has developed a procedural-review based scrutiny assessing the quality of domestic procedure, this latter been strictly dependent on the success by national actors to incorporate within the domestic system of the parameters enucleated by the ECtHR's case-law as well as to take them into due consideration when adopting a given measure under observance.

Indirectly, the Strasbourg judge has the opportunity to delineate clear guiding criteria supporting domestic conventionality control. In this way, the application of procedural-type review can have more general consequences transcending the particular case, provided that the Court can converge its established case-law into generally applicable (i.e. *erga omnes*) procedural criteria for the assessment of proportionality national authorities are expected to apply in analogous cases.

Not only that, the new channel of privileged dialogue with the Highest courts and tribunals of the ratifying Member States which has been institutionalised under Protocol No. 16 contributes to correct domestic practices contrary to the Convention law "from within" (i.e. while a case is pending before the national authority) and "in advance" (i.e. before an actual recourse to the international court).

Not only the Court is able to perform its supervisory power in a preventive way, but also in a more "abstract" one: provided that the preliminary mechanism allows the Court to clarify the normative scope of the relevant provisions of the ECHR, it tends to satisfy the expectation of national authorities to have clear and precise rules derived from the open

textures of the Convention, which can be susceptible of uniform application in the European area. States can thus conform their conduct to them in a coherent and harmonious manner, in order to avoid infringements that would expose them to international liability.

In this way, although not binding (Article 5), the opinions end up combining with the provision interpreted, thus radiating their effectiveness vis-à-vis all relevant domestic situations that are to be resolved in application of the same provision, irrespective of the domestic judge before which a particular dispute is pending.

In short, they are characterised by an efficacy that transcends the individual case from which the request originates, to extend to all cases in which the same hermeneutic problem arises before the national judges. This *erga omnes* effect is further strengthened by the fact that advisory opinions are a constituent element of the case-law of the European Court of Human Rights, which means that they automatically acquire precedential value that the Court will follow in future similar cases, as well as a conformative effect *vis-à-vis* national authorities, which are subject to the duty to take European case-law into account.

One wonders how, in a context of open defiance of the Strasbourg Court, an overall stretching of the human-rights approach characterising has been even possible. To address such issue, it must bore in mind the framework represented by the Interlaken Process. As argued in Chapter 3, this has been characterised by undeniable symbolism and ambivalence and the principle of subsidiarity was relied upon more as a "magic spell" to gather political consent than a clear-cut solution to limit the Court's creativity.

Proof of this is the fact that in the various joint Declarations adopted at the conclusion of each High-Level Conference, subsidiarity has been translated by the concept of "shared responsibility". As argued at length, not only do the two principles above have nothing to do with each other, but their (incorrect) equation even ends up reinforcing the responsibility - and thus the power - of the Court in spite of that of the States.

On the one hand, subsidiarity is a relational criterion that links different levels (national and international) of competence, privileging the lower one (national) and – at the same time – legitimising the intervention of the higher one (international) as complementary to the former. More precisely, subsidiarity is a criterion on the basis of which a given action is primarily the responsibility of the lower-level entity than another, and can be carried out by another subject, replacing the first, if and only if the result of that replacement can be better achieved.

On the other hand, the principle of "shared responsibility" introduces the ideal that between national and international actors there is a clearly common responsibility in the field of human rights.[27] In other terms, it does not allocate the first-line responsibility to States, but splits it among different actors in the context of a single operation for the benefit of human rights protection.

If, from a national perspective, the insistence on such "sharing" was mainly aimed at claiming a more active role, the Court was able to exploit its open and rather ambiguous character to win even more responsibility, also in light of the undeniable inconsistencies on the part of domestic actors.

In accordance with this, the Court operates less and less as a complementary body and more and more as a co-operator "guiding" Member States step-by-step in fulfilling their obligations under Article 1.[28] This is made evident, first, by the enhanced "procedural duty" upon domestic authorities to diligently take into account the standards set in the evolving European jurisprudence when interpreting and applying national law which results from the Court's latest case-law.[29]

More broadly, the aforementioned effect must therefore be referred to the interpretative authority of the Court's judgments, the latter having to be translated by national actors into

[27] TULKENS F., *Different standards…, op. cit.,* 33.

[28] It is argued that the increasing attention devoted by the Court to the diligent incorporation of the conventional principles at the domestic level can indeed be seen as a new and at the same time necessary phase in the Court's work, previously focused on the specification of indications on the merits of the concrete case and now aimed at triggering a more active commitment to the Convention on the part of domestic actors. Equipped by the standards delineated by the well-established European case-law, the latter would in fact have all the instruments to avoid future violations. Moreover, such modus operandi allows for a more systematic approach on the part of the Court, careful to avoid future violations of human rights in a broader way, i.e. in a way that does not necessarily focus only on the violation that occurred in the specific case. It must also consider that, while the "justice" provided by the Court in adjudicative capacity is purely declaratory in nature, the new approach of the "constitutionalised" judge can contribute to the most immediate satisfaction coming directly from within, in the light of a more effective national response. In conclusion, provided that the purpose of the ECHR is the maintenance and further realisation of human rights and fundamental freedoms, the model based on individual petition is one but not the one: is centrality is undoubtedly due to the entry into force of Protocol No. 11, but over time it has shown its limitations and grey areas. While it is very likely that it will continue to be the core element of the conventional system, this does not mean that it cannot be complemented by another, which may prevail in the future, especially in light of its potential, at least if properly applied, to improve the standard of protection. In other words, «[w]hile the principle of individual petition is likely to remain central to the Court's future, the systematic delivery of individual justice was never a credible goal for the Convention system and is even less so now. By refusing to acknowledge the need for radical change, those who remain wedded to this echo of an imagined past jeopardise the right to individual petition, the very thing they claim to hold most dear» (GREER S., WILDHABER L., *op. cit.,* 664).

[29] ARNARDOTTIR O. M, Res Interpretata, Erga Omnes *Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights,* in 28 The European Journal of International Law 3, 2007, 830.

judicial practice in line with Convention law as well as into legislative activity aimed at the adoption of new rules based on the Convention and the decisions of the European Court of Human Rights and the revision of any inconsistencies.[30] In short, domestic authorities «must pay attention to the unique authoritative role of the Court in the legal landscape of Europe»[31] as well as they «must respect [its] final word»[32] in order to modulate their future behaviour in line with the Convention law and avert the reiteration of further violations in the context of the Council of Europe.[33]

In conclusion, it can be said that that of the States appears more like a clumsy attempt to curb the creativity of a Court that has in fact filled its function with content contrary to the premises on which it rests. The forthcoming case-law and the more consistent application of the preliminary mechanism institutionalised by the "Dialogue Protocol" will show to what extent the Court intends to exploit the advantage gained in the Interlaken Process. For the time being, one can only agree that, once again, the direction in which a system moves and develops ultimately depends on the will of its interpreters.[34]

[30] GRYNCHAK A. A., TAVOLZHANSKA Y.S., GRYNCHAK S.V. et. al., *Convention for the Protection of Human Rights and Fundamental Freedoms as a Constitutional Instrument of European Public Order*, published online in Public Organization Review 22, doi: https://doi.org/10.1007/s11115-021-00583-9.

[31] ECtHR, Judgement of 28 June 2018, App Nos 1828/06 and Others, *G.I.E.M. S.R.L. and Others* v *Italy*, para 93.

[32] ECtHR, Judgement of 3 February 2015, App No 57592/08, *Hutchinson* v *the United Kingdom*, para 45.

[33] ECtHR Judgement of 9 June 2009, App No 33401/02, *Opuz* v *Turkey*, para 163.

[34] VANONI L. P., *Federalismo regionalismo e sussidiarietà. Forme di limitazione al potere centrale,* Torino 2009, 7.

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