

PROBLEMS OF LEGITIMACY REGARDING  
THE EUROPEAN CONVENTION ON HUMAN RIGHTS:  
FORMALISM, FUZZINESS, OR LACK OF THEORY ?

by

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## ABSTRACT

This paper inquires into *legitimacy* problems regarding the European Convention on Human Rights, in particular the European Court's own idea or theory of its legitimate practice. I argue that even if the Court's jurisprudence shows some flexibility - and the interpretive work integrates to some extent three dimensions of *legitimacy* and law, *normativity, formality and efficacy* - the prevailing method of the Court is marked by a positivistic formalist legal tradition, seeing law predominantly as a formal and self-legitimizing system of norms. The positivistic claim of the subjectivity of meaning becomes problematic however in the application of an international human rights' document. The Court's reliance on normative elements turns out to be in constant tension with the positivistic conception of consent as a basis for obligation. This tension is, I argue, manifested in the Court's confusing *consensus* methodology, as well as in its dichotomy methodology of "autonomous interpretation" and "margin of appreciation". I criticize the Court's consensus methodology, whether in the form of drawing consensus from the international community, or from the domestic legislation of member states of the Council of Europe.

I argue that the prevailing positivistic formalist approach to the European Convention is based upon assumptions found in general legal theory and international law theory. To underpin my analysis of the Court's case law, I draw on critical approaches to both legal theory and international legal discourse that attempt to be *external* to the assumptions of theory, scholarship and practice. A theme pursued throughout the paper is the importance of an external perspective to legal theory and practice. As a part of my analysis, I look at new approaches to law and legal reasoning as "fuzzy", and conclude that, as applied to the European Convention, these approaches tend to draw upon a formalist conception of law.

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## INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "European Convention" or the "Convention"), signed in Rome in November 1950, established a European regime for international human rights' protection, within the ambit of the Council of Europe.<sup>1</sup> From that time until 1990, thirteen new Western European countries became members of the Council, some of which had already signed the European Convention. The preceding three years, from 1990 to 1993, some nine Central and Eastern European countries became members of the Council, and nine others applied for membership.<sup>2</sup> It is now implicit that a state applying to become a member of the Council of Europe must agree to signing and ratifying the European Convention as a prerequisite for being accepted as a member of the Council.<sup>3</sup>

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<sup>1</sup> The Council of Europe was established in May 1949 by 10 European states, its aim being "to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress", as stated in the Statute of the Council of Europe, Article 1. See *European Treaty Series* (hereinafter *ETS*), No. 1 at 2. The Convention entered into force 3 September 1953.

<sup>2</sup> See Jean-Francois Flauss, "Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe" (1994) 5 *European Journal of International Law* 401, at 401. As of 28 July 1994 30 states out of 32 member states had ratified the Convention. Lithuania and Estonia had signed Protocol No. 11, although not signatory parties to the Convention as yet. See a chart of signatures and ratifications of the European Convention on Human Rights in (1994) 15 *Human Rights Law Journal* (hereinafter *H.R.L.J.*) at 114-115.

<sup>3</sup> See Jean-Francois Flauss, *ibid.* at 408, describing the procedure when Liechtenstein, Saint-Marin and Finland applied for membership in the 1970s and 1980s. When the former socialist countries of Eastern Europe made their move to apply for membership, it was a "customary rule" of the Council of Europe to require acceptance of the European Convention.

Apart from this territorial expansion, the Convention system is currently under formal and substantive evolution and expansion. In May 1994 a new Protocol to the Convention was opened for signature, stipulating the establishment of a permanent Court of Justice with compulsory jurisdiction in cases brought before it by individuals or states. Substantive provisions have gradually been added to the original Convention through protocols, and the scope of the Convention provisions has expanded through the interpretive work of the European Court of Human Rights.<sup>4</sup>

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<sup>4</sup>For the full text of the Convention see Ingo von Munch & Andreas Buske, *International Law. The Essential Treaties and Other Relevant Documents* (Berlin: Walter de Gruyter, 1985) at 439; ETS No. 149 for the text of the Convention, as amended by Protocols No. 3, No. 5 and No. 8, and completed by Protocol No. 2). Of the protocols that have been added to the Convention, Protocols No. 1, No. 4, No. 6 and No. 7 add substantive provisions to the Convention, while other Protocols, No. 2 - No. 11, amend the procedural and structural elements of the original Convention. Of these, Protocol No. 11 will apply by far the most changes to the enforcement mechanism of the Convention. The rights and freedoms protected in the Convention are classical civil and political rights: Article 2 of the Convention poses on the contracting states an obligation to guaranty to everyone the right to life; article 3 prohibits torture and degrading and inhuman punishment; article 4 prohibits slavery and forced labour; article 5 guaranties the right to liberty and security of person and article 6 regards the right to fair trial. Article 7 prescribes that punishment shall not be imposed without law and article 8 guaranties that everyone has the right to respect for his private and family life, home and correspondence. Article 9 guaranties freedom of thought, conscience and religion; article 10 freedom of expression; article 11 freedom of assembly and association, and article 12 prescribes the right to marry and found a family. Article 13 stipulates a right to an effective remedy, and article 14 contains a provision prohibiting discrimination, as regards the enjoyment of the rights and freedoms set forth in the Convention. Of the protocols that add substantive provisions to the Convention, Protocol No. 1 stipulates the right to peaceful enjoyment of possessions, as well as the right to education and the right to free elections (see *International Law*, at 448 ); Protocol No. 4 prohibits imprisonment on ground of inability to fulfil a contractual obligation, expulsion of nationals and collective expulsion of aliens, as well as stipulating freedom of movement ( see *International Law*, at 452 and ETS No. 46); Protocol No. 6 prescribes the abolition of the death penalty (see ETS No. 114). Protocol No. 7 grants procedural safeguards relating to expulsion of aliens, the right of appeal in criminal matters, and right not to be tried or punished twice as well as stipulating that spouses shall enjoy equality of rights and responsibilities of a private law character between them and in their relations with their children (see *International Legal Materials (ILM)* 24 at 435 and ETS No. 117). The texts published in ETS are reproduced in the series *European Conventions and Agreements* (Strasbourg: Council of Europe).



Described as an innovation in international law, when signed, the European Convention established an enforcement mechanism consisting of a Commission, a Court of Justice and a Committee of Ministers. A limited possibility of *individual petition* was granted, which was a definite innovation in international law.<sup>5</sup> The *European Commission of Human Rights* constitution and competence, which is laid down in Section III of the Convention, contains mandatory competence regarding inter-state complaints and an optional jurisdiction with regard to petitions from persons, groups of persons and non-governmental organizations.<sup>6</sup> The *European Court of Human Rights*, competent to hear complaints referred to it by the Commission, is dependent on the recognition of its jurisdiction by each of the member states.<sup>7</sup> Finally, if a case is not referred to the Court,

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<sup>5</sup>See on these as innovations in international law Juan Antonio Carrillo Salcedo, "The Place of the European Convention in International Law" in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 15 at 16.

<sup>6</sup>See Articles 24 and 25 of the European Convention. The European Commission has played an important role in formulating the Convention jurisprudence, by acting both as a filter for the cases that come to be decided by the Court; arguing cases before the Court, and by the written reports on the merits of a case, that then is sent to the Committee of Ministers for decision. It is also worth noticing, that in deciding on the merits of a case, the Committee usually follows the report of the Commission, without further elaboration or justification. See P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers, 1990) at 204-205

<sup>7</sup>See Articles 44 - 48 as to the jurisdiction of the Court, and generally Section IV for the composition and competence of the Court. As of 28 July 1994 30 of the 32 member states had made declarations under article 46, accepting the compulsory jurisdiction of the European Court, for periods of either 3 or 5 years or for an indefinite period, see Chart of signatures and ratifications as of 28 July 1994 in (1994) 15 H.R.L.J at 114-115. The same 30 states had accepted the right of individual petition under article 25 of the Convention, regarding the jurisdiction of the Commission. Protocol No. 9, signed 6 November 1990, was enacted to improve the situation of individuals, granting the right to an individual who had submitted a petition under article 25 to bring the case before the Court. However, In July 1994, only 13 out of 32 states had agreed to be bound by Protocol no 9.

the Committee of Ministers of the Council of Europe, is competent to decide upon alleged violations of the Convention.<sup>8</sup>

As may be inferred from the number of declarations binding states to the jurisdiction of the Commission and the Court, both institutions have increasingly gained respectability within the legal systems of the member states of the Council of Europe. As a consequence, the workload of the Convention institutions has increased considerably. Protocol No. 11, signed 11 May 1994 by all member states to the Convention except one, is meant as a response to increased workload and the increasing number of member states to the Convention. The Protocol stipulates that a permanent European Court of Human Rights replaces the existing Commission and Court as well as the Committee of Ministers in its adjudicative functions. The merger of the Commission and Court means, in practice, that the Commission will be abolished and a permanent Court will oversee the member states' compliance with the Convention.<sup>9</sup>

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<sup>8</sup>See Article 32 of the European Convention. The Committee of Ministers is one of two organs of the Council of Europe, the other being the Consultative (now Parliamentary) Assembly, see C. Ravaud, "The Committee of Ministers" in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *supra*, note 5, 645.

<sup>9</sup> See a proposed new Section II of the Convention in Article 1 of Protocol No. 11, see *ILM* 33 at 943 and *ETS* No. 155. The full text of Protocol No. 11 is also published in (1994) 15 *H.R.L.J.* 86, and the new text of the European Convention, inclusive of changes envisaged when the Protocol comes into force, *ibid.*, at 102. As the Protocol is an amending protocol, but not an optional one, a consent must be expressed by all the member states to the Convention before it can enter into force. The Protocol is to enter into force on the first day of the month following the expiration of one year after the date on which all parties have expressed their consent (Protocol No. 11., Article 4). The prognosis is that the process of ratification will be brought to an end, latest in 1996, see Andrew Drzemczewski and Jens Meyer-Ladewig, "Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994" (1994) 15 *Human Rights Law Journal* 81, at 86. See also, for an overview of the number of cases the Court has decided from 1960 through 1993, (1994) 15 *H.R.L.J.*

Given the current jurisdiction of the European Commission and Court and the apparently accepted practice of the Convention Organs inquiring into problems of *legitimacy* may seem awkward. In other words, the Court's authority to make binding decisions seems to be accepted by those states to which decisions are addressed.<sup>10</sup> Furthermore, when Protocol No. 11 comes into force, full and irrevocable compulsory jurisdiction will be granted to the European Court of Human Rights by the member states. On the surface, there does not seem to be any *legitimacy* problems to deal with.

While some scholars accept the authority of the Court as sufficient condition for the *legitimacy* of the Court's practice, others are more openly critical as to the substantive outcomes and the overall methodology of the Court. These latter authors question the *legitimacy* of the practice and claim a lack of legitimating theory in the practice of the Court and Commission. The problem is defined in terms of lack of coherence,<sup>11</sup> or analysis is taken to show lack of both overarching themes and underlying principles in the Convention jurisprudence.<sup>12</sup> The variety of views is striking. Rating from openly

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<sup>10</sup>As pointed out by Richard S. Kay, the increased respect for the Convention institutions seems not to be because of widespread agreement on the general standards of the substantive provisions of the Convention, that have, as he points out, long been incorporated into the political morality, and in fact mostly in the states' constitutions as well: neither can it be attributed to the "often quite disputable results, nor to the sometimes uneven logic of the reasons..." Kay concludes that the Court's judgments are accepted, simply because the Court has earned acceptance as the authoritative interpreter of the Convention. See Richard S. Kay, "The European Convention on Human Rights and the Authority of Law" (1993) 8 Connecticut Journal of International Law 217, at 219-220.

<sup>11</sup>For recent assessments of the Court's overall methodology see C.A. Gearty, "The European Court of Human Rights and the Protection of Civil Liberties: An Overview" (1993) 52 Cambridge Law Journal 89 and Colin Warbrick, "Coherence and the European Court of Human Rights: The Adjudicative Background to the *Soering* Case" (1990) 11 Michigan Journal of International Law 1073. See also Colin Warbrick, "'Federal' Aspects of the European Convention on Human Rights" (1989) 10 Michigan Journal of International Law 698 at 710 and Laurence R. Helfer, "Consensus, Coherence and the European Convention on Human Rights" (1993) 26 Cornell International Law Journal 133.

<sup>12</sup>C.A. Gearty, *ibid.*

decorative rhetoric, such as the Convention and its enforcement mechanism being referred to as "the jewel in the crown of international efforts to protect human rights",<sup>13</sup> to blatant expressions of the Court's lack of theory, or the Court's reluctance to engage in theory,<sup>14</sup> most scholarly approaches fall somewhere between the extremes.<sup>15</sup>

However varied, I contend that the majority of theoretical approaches to the Convention and Convention jurisprudence suffer, in one or another way, from being *internal*. By *internal* I mean within the theoretical framework of international theory, which then arguably draws on general legal theory in many respects. I will make a working distinction between scholarly approaches and theory. For both scholarly work and

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<sup>13</sup>Jens Meyer-Ladewig, "Reform of the Control Machinery" in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *supra*, note 5, 909 at 910.

<sup>14</sup>See i.a. C.A. Gearty, *supra*, note 11, and Colin Warbrick, *supra*, note 11.

<sup>15</sup> An amazing amount of work on the Convention and Convention institutions originates from authors literally working within the system itself, writing all from commentaries, to dogmatic texts on the Convention and its application. Often published as a contribute to persons or institutions, the aim of this type of work is usually neither criticism nor deconstruction, but positively oriented assessment as to the system's operation. These works are thus usually helpful for the student and the practitioner, but the methodological framework does not offer deeper analysis than a dogmatic account. The most recent work of this type is a work composed of forty articles regarding procedural and substantive aspects of the Convention, published in 1993, 40 years after the Convention came into force, see R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht, Martinus Nijhoff Publishers 1993), see *supra*, note 5. See also various articles in Franz Matscher & Herbert Petzold, eds., *Protecting Human Rights: The European Dimension. Studies in honor of Gerard J. Wiarda* (Köln: Carl Heymanns Verlag KG, 1988). Apart from this particular type of literature, systematic general textbooks on the European Convention have been published regularly providing overview of the system and traditionally some analysis of case-law, see for example Francis G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975) and P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer: Kluwer Law and Taxation Publishers, 1990). Increasing are thematic approaches to the Convention such as Andrew Clapham's *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) focusing on the rights and duties of individuals under the Convention. For a different thematic approach see Mireille Delmas-Marty, ed., *The European Convention for the Protection of Human Rights. International Protection versus National Restrictions* (Dordrecht: Martinus Nijhoff Publishers, 1992). Specific thematic approaches, as to either formal aspects of the Convention and its implementation in the member states, or substantive provisions are however the most common in the literature on the Convention.

theoretical approaches, however, I stress the importance of *external perspectives*. By external perspectives I mean approaches that distance themselves from the assumptions made in practice and in theory respectively. In particular, I find it important that theorists and scholars are aware of the assumptions made in approaching legal analysis and application.

Theories about *legitimacy* and of law have consciously focused on different dimensions of *legitimacy* and legal validity, stressing respectively *formal*, *normative* and *empirical* aspects. The most recent approaches propose an understanding that integrates all three dimensions. In some regards the European Court of Human Rights can be said to apply an integrated approach, in that case-law reflects the different dimensions in different measures. From a less sympathetic perspective, the Court's case-law is arguably evolving towards the edge of chaos. The Court's method is a case-to-case based method, deliberately not construing the rights of the Convention "in the abstract". When the Court's output rated from no to two or five judgments each year, the chaos-coherence dichotomy was generally not invoked. In recent years, when the Court decides number of cases each year, scholars look for the general principles and underlying rationales. And sometimes, apparently in vain.

The most appropriate framework to analyze the jurisprudence of the European Court of Human Rights seems to be the framework from constitutional theory relating to the *legitimacy* of judicial review. However, I contend that this approach assumes

similarities between constitutional theory and international law, that are not necessarily justified. In scholarly work, this problematic seems to a large extent ignored.<sup>16</sup>

The importance of being aware of the assumptions modeling both application of law and legal analysis, leads to an approach that ultimately has more to do with legal theory than the subject matter, here the European Convention itself. My aim is to inquire into the Court's jurisprudence from a distanced perspective, but one that remains sensitive to both the Court's methods and theoretical approaches to the Convention jurisprudence. Contending that the Court's record is often disappointing from a progressive human rights perspective, and that the reasoning of the Court is marked by methods drawn

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<sup>16</sup>It isn't easy either to spot the distinction in the Court's case law between arguments about formal grounds of legitimacy of judicial decisionmaking in general, and the judicial power of an international Court. Arguments supporting restricted review do thus draw on arguments from constitutional theory, sometimes invoking the additional factor of state sovereignty. See for example a dissenting opinion in the Case of *Kroon and Others v. The Netherlands*, Eur. Court H.R., Series A, Vol. 297-C, where Judge Morenilla referred to scholarly opinion in addressing the Court's "difficult dilemma: that 'of guarding against the risk of exceeding its given judicial role of interpretation by overruling policy decisions taken by elected, representative bodies who have the main responsibility in democratic societies for enacting important legislative changes, whilst not abdicating its own responsibility of independent review of governmental action'". Judge Morenilla quote is taken from Paul Mahoney and Sören Prebensen's "The European Court of Human Rights" in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *supra.*, note 5 at 638-640. Already in the Court's *Golder* judgment of 21 February 1975 Judge Fitzmaurice's forceful criticism, arguing from a traditional international law position, did draw on the "judicial activism" notes. In opposing the conclusion, that Article 6 of the Convention guaranteed the right to access to a Court, Fitzmaurice stated: "Finally, it must be said that the above quoted passages from the Judgment of the Court are typical of the cry of the judicial legislator all down the ages - a cry which, whatever justification it may have on the internal or national plane, has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact. It may, or it may not be true that a failure to see the Human Rights Convention as comprising a right of access to the courts would have untoward consequences - just as one can imagine such consequences possibly resulting from various other defects or lacunae in this Convention. But this is not the point. The point is that it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. See *Golder* case, Eur. Court H.R., Series A, Vol. 18, separate opinion, paragraph 37c.

from formalism, my hypothesis is that this is to be understood both by reference to the overarching formalist and positivistic trends in legal theory and legal thought within the member states of the Council of Europe and the modeling of human rights norms into a system of legal norms.

I contend that the idealistic project of human rights' protection is adjusted to prevailing conceptions of law and translated into the prevailing thinking of law (or international law), and that application of the norms is affected by this. How this modeling is completed, through theory and practice, is to me more interesting than any attempt to define in abstract the meaning and application of human rights.

As regards the formalist conception of law, my contention is that the legal tradition of the member states of the Council of Europe affects the interpretation and implementation of the Convention, even on the level of adjudication in Strasbourg. I am not claiming that the European Court of Human Rights is in its methods caught up in blatant formalism and premises drawn from positivistic formalism. I argue, however, that there are leftovers of formalism in the Court's methodology, and moreover, that assumptions that underlie the Court's theory of adjudication are basic assumptions from liberal theory, as they translate through both legal theory and international legal discourse. The Court's reliance on consensus as a legitimating factor for its interpretation is, in my view, the clearest example of the force of assumptions from liberal theory.

While I argue that a practice manifesting formalism can be explained in terms of its overemphasizing particular theories of law - or eventually translating epistemological assumptions about the systematization of law into practice, ironically, I argue, that this is also discernible in theory. I will thus examine recent theoretical approaches to the European Convention, arguing that the Court operates with a "third conception" of logic - that is fuzzy logic, and that the Court's practice has to be read in this light. I argue, however, after examining these theoretical approaches, that they are bound up in the same framework from formalism as is discernible in the Court's practice, albeit closer to their epistemological premises.

My aim is not to come up with, find or otherwise create a legitimating theory regarding the European Convention of Human Rights. Rather, it is my aim to analyze the case law of the European Court of Human Rights in a search of a "theory" or even only an operating "idea" of the legitimate practice. Inherent in my approach is a skepticism as to the merger of descriptive and prescriptive analysis that seems to prevail in legal scholarship, and I will refrain from prescribing a theory based on the description of the Court's practice. I will also try to refrain from a purely descriptive analysis by taking a distanced perspective to the Court's case law. If an external approach to the practice allows some critical insights into the assumptions that prevail in the Court's jurisprudence, and in the related scholarly discourse, then my immediate aim will be achieved.



## 1. THE IMPORTANCE OF THEORY

"If theory in its broadest sense may be characterised as openness to context, dialectic or dialogue, then legal doctrine is the antithesis of theory and may be represented as the most stringent of contemporary closures of knowledge, as a disciplinary mythology seeking to bind canonically legal sign to legal meaning in a series of fixed and intransigent equations."<sup>17</sup>

Approaching the jurisprudence of the European Court of Human Rights in the way I propose to approach it has eventually more to do with *legal theory* than it has to do with the Convention itself. But my perspective is that *theory* is important for practice. Already in formulating the inquiry, as relating to aspects of the *legitimate application* of the European Convention, the importance of theory - or eventually theoretical assumptions - becomes clear. What does the concept *legitimacy* mean and how and when can we say that a practice is *legitimate*?

Two ways of rephrasing the inquiry show different approaches and different basic assumptions. If I set out to draw up a legitimating theory for the application of the Convention, this implies that I believe that such a "grand theory" is possible and it implies further a particular understanding of the concept *legitimacy*. The belief rests on variety of assumptions about norms, rules and law: their essence and their function. If I draw a causal link between *authority* and *legitimacy* I will focus on the institutions that "issue" norms and rules, and the system of norms and rules that are existing by

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<sup>17</sup>Peter Goodrich, *Legal Discourse. Studies in Linguistics, Rhetoric and Legal Analysis* (London, Macmillan Press, 1987) at 207.

virtue of them being issued; I assume that authority grants *legitimacy*. Or, I contend that there is a necessary substantive element in the idea of *legitimacy*, i.e. that external *normative* criteria define the *legitimacy* of the rules.<sup>18</sup> In drawing up the legitimating theory my methods will, furthermore, vary in accordance with my assumptions. I can *prescribe* a theory, which I argue should be applied, based on some justificatory criteria, or I can *describe* a theory, which I argue is in fact applied.

An alternate way of formulating the inquiry is to ask if there can be a legitimating theory as regards the application of the European Convention. The question itself, and the adequate methods for this inquiry, are traditionally seen as more "deeply" theoretical or philosophical, as they directly involve questions usually addressed in legal theory and legal philosophy. The question is also referred to as atheoretical, or anti-theoretical, as it raises doubts as to the possibility of theory and knowledge, and doubts, in general, the premises and procedures of traditional theorizing.

### 1.1 The importance of theory and the internal and external approaches

It is an important aspect of my argument throughout this paper, that theory should not be undermined *in* law-application and *when analyzing* the application of law.

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<sup>18</sup>It will not be necessary for my purposes to elaborate here this much debated dichotomy between normativity and legality; morals and law and their contingent or necessary relationship. I will however come back to the importance of the assumptions, or preferred perspective in approaching law and the concept of legitimacy, see *infra*, chapter 1.4.

Furthermore, I contend, that it is necessary to distinguish legal theory and legal scholarship or doctrine.<sup>19</sup>

Formerly seen as equivalent to science, i.e. as an objective way of describing and explaining law and legal decisions, few would today contend that legal scholarship is objective in this way. The changed conception is to be explained by changed theoretical approaches to law throughout the century, based on changed ideas about knowledge and the possibilities of knowledge, in particular drawn from postmodernism.<sup>20</sup> On the other hand, the contention that the doctrinal approach to law is distanced from legal practice, i.e. external to the practice itself has retained its force. The contention is that legal scholarship is able to provide both an *external* description of the practice and a critique of the practice, with reference to some or another theoretical approach.

In his critical assessment of the status of legal scholarship Edward Rubin has drawn up a complex picture of prevailing scholarship. He argues that legal scholarship has freed itself from the rational formalism and assumptions rooted in positivist philosophy (i.e. the idea that objectivity is possible in legal science) and adopted a more relativist epistemology, accepting that all knowledge is in one way or another dependent on perspectives, theoretical constructions and language.<sup>21</sup> Rubin furthermore argues that

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<sup>19</sup>See for an interesting account of the status of contemporary legal scholarship, Edward L. Rubin "The Practice and Discourse of Legal Scholarship" (1988) 86 Michigan Law Review 1835.

<sup>20</sup>See Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 508 at 517. The title - "The Big Fear..." refers to the fear of nihilism associated with the knowledge-sceptical and relativistic postulates of postmodernism, see Hunt's discussion, *ibid.* at 523-533.

<sup>21</sup>See Rubin, *supra*, note 19 at 1839 *ff.*

"the most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decision makers."<sup>22</sup> However, he argues, in taking an allegedly distanced approach to legal practice, prescribing different normative solutions, the discourse of standard legal scholarship is still bound up in the assumptions prevailing in the discourse of the subject matter, i.e. the legal discourse itself. This unity of discourse, as Rubin calls it, he finds problematic on the following premises:

What renders unity of discourse problematic is that it is grounded in the ideology and attitudes of legal formalism the very doctrine that legal scholarship has apparently abandoned. In the formalist era, scholars and judges shared a vision of law as a system of rules that could be derived from fixed, enduring principles. The effort to understand these principles and derive the proper rule generated a unified discourse that was simultaneously interpretive, descriptive and prescriptive in its stance. It was interpretive because legal scholars, like judges, saw themselves as interpreting general principles that were filled with meaning and worthy of sustained attention. Being universal, these principles were accessible to scholars, judges and anyone else with the legal training necessary to perceive and understand them.<sup>23</sup>

The unity of discourse, in Rubin's terms, is what critical theory terms an *internal approach*, i.e. proceeding within the same conceptual and methodological framework as the practice it seeks to elucidate and explain. The importance of taking an *external* stance to the practice, is thus to try to approach it from different assumptions and premises, to understand it from premises and assumptions external to the practice itself.

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<sup>22</sup>Rubin, *ibid.* at 1847.

<sup>23</sup>Rubin, *ibid* at 1860.

This is what Rubin terms the necessity of self-awareness of the scholarly discourse, i.e. a constant awareness of the assumptions used in explaining law.<sup>24</sup>

The distinction is equally important for *legal theory*, from the point of view of critical studies, stressing the necessity of legal theory to distance itself from the assumptions, attitudes and closures in *internal theory*.<sup>25</sup> It is in my view important to realize both the distinction and the inter-relation between theory and practice, that is to say, how assumptions from theory and practice transmit into each others' field. To borrow an argument from critical insights to law and stress it to its extremes, theoretical constructions of law are absorbed into practice, and constitute there, something close to a factual element. What I have particularly in mind here is the prevailing *formalist construction* of law as a system of norms, a theoretical construction, that, when translated into practice seems to take on its own existence and become thought of as factual (objective) rather than a theoretical construction, or an idea.<sup>26</sup> When approached

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<sup>24</sup>Francois Ost and Van de Kerchove distinguish the 'radical' external point of view from the 'moderate' external point of view, the radically external point denoting a perspective denying completely the importance of the internal point of view. They opt for the moderate external point of view, which they explain as "giving an account, in descriptive and explanatory terms, of the internal point of view adopted by the actors in the legal system." Michel van de Kerchove and Francois Ost, *Legal System Between Order and Disorder* (Oxford: Oxford University Press, 1994) at 6-10.

<sup>25</sup>See Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) at 217-221. If critical theory has managed to reconstruct law and reconceptualize law to the point of the internal-external division in theory becoming irrelevant, remains debatable to me, and critical theory must in my view consciously avoid the conceptual and methodological closures it criticises general theory for showing, see *ibid* at 221.

<sup>26</sup>This is admittedly to take the idea of "reification" or "objectification" as far as possible. See however Peter Goodrich, *supra*, note 17, at 207: "To begin with, the very existence of the legal system as a system is, more than anything else, the product of educational practice." As to the idea "reification" as used in critical theory, see Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987) at 269-275.

from a scholarly, or theoretical point of view, the objectified idea is no longer an epistemological concept and used as such, but rather an "element" of the system.<sup>27</sup>

When it comes to theory, it is the importance of *awareness of the internal assumptions* that I want to stress, more than any assessment as to the substance of these assumptions. Awareness of the internal assumptions of legal theory is even more demanding, than awareness of assumptions of legal scholarship and legal practice.

## 1.2 Formalism in legal theory

Peter Goodrich's thesis, in *Legal Discourse. Studies in Linguistics, Rhetoric and Legal Analysis*, rests on a critical reading of the relationship of theorizing in linguistic theory and legal theory.<sup>28</sup> Goodrich's aim is to challenge the epistemology of legal positivism, a theory based on philosophical assumptions about knowledge and science, excluding

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<sup>27</sup>This is, I argue, even so in a conscious theoretical approach such as the approach of Ost and van de Kerchove, when they use the 'moderate' external point of view in analysing "law as a system", see *supra*, note 24 at 3-9.

<sup>28</sup>Goodrich, *supra*, note 17 at ix. For a critical account of the linguistic assumptions of "pure legal science" (positivistic formalism) *ibid.*, at 1-8 and 38-62. Goodrich's aim is to point out and criticize the prevailing construction of both language and law as structurally determined, easily subjected to scientific study that refers back to internal grammar or code. Goodrich draws parallels between the structuralist movement within linguistics (from Saussure onwards) and the positivistic formalism in legal theory. The crux of his argument is the following: "Both traditional linguistics and conventional jurisprudence have viewed their objects of study as being the 'systems' or 'codes' that govern, respectively, language usage and law application as potentialities rather than empirical actualities. In both disciplines, it has been the abstract imperatives of a notional system that forms the object of synchronic (static) scientific study; actual meaning, actual usage and the diachronic (historical) dimension generally, are largely ignored. Even the most superficial of historical surveys, however, will clearly indicate that such formalist accounts of language and of legal language are historically and geographically specific and limited". See Goodrich, *ibid.* at 3.

other norms (moral values, social values) from the system of valid legal norms. Drawing on linguistic and semantic theories, Goodrich's claim is that assumptions based on formalist theories of language and philosophical positivism have had prevailing effects on the theorizing of law and traditional legal theory. In Goodrich's own, provoking words:

I have been concerned, in other words, to challenge, from within the legal discipline itself, the manner in which the legal text is constructed or produced upon the pervasive privileging of its normative and formal features - features which, in the last instance, are the product of an obsessive jurisprudential concern with the logical validity of a notional system of legal rules and the epistemology of their source, ordered and personified in the concept and practice of a sovereign or some surrogate thereof.<sup>29</sup>

As Goodrich points out, the similarities and shared assumptions of legal formalism, as presented by Kelsen, and structural linguistics, are at the *level of epistemology*.<sup>30</sup> Goodrich stresses the hypothetical nature of Kelsen's basic norm and his pure theory as a manifestation of a particular epistemology: an epistemology that holds that cognition creates its object and that knowledge cannot be scientific without systematic unity (a premise drawn from Kant's philosophy).<sup>31</sup> Goodrich emphasizes that it was Kelsen's project to structure a theory of law - pure science of law - that he both acknowledged and argued was amenable to any subjective content. This is the dilemma formalism

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<sup>29</sup>Goodrich, *ibid.* at 7. Even if Goodrich describes his approach as "from within", his approach is critical, and his framework for analysis an *external* theoretical approach.

<sup>30</sup>Goodrich, *ibid.* at 70.

<sup>31</sup>Goodrich, *ibid.* at 36-38. The basic norm was a theoretical devise. "The process of cognition was thus to produce the object of legal science by means of the now celebrated presupposition of what law must be like for the science of law to be possible, namely the transcendental-logical presupposition of any legal system, the basic norm." As Goodrich further states: "In short, the epistemological precondition for a science of law, and with it the legitimation of the binding validity of legal norms, was contained in the axiomatic postulate of the logic and unity of the system of norms." *Ibid.* at 38-39.

faces: "On the one hand, it necessarily admits that values, and so also substantive questions of meaning, intrude upon and play a role in the history and realisation of the legal order. On the other hand, the methodological exigencies of a unified legal science virtually preclude the possibility of any rational examination of the actual manner in which such values and meanings affect the realisation of the system and so also, in a substantive sense, constitute that system as a practice."<sup>32</sup>

This is the dilemma, Goodrich argues, that is the heritage for legal positivism. Even if a shift of emphasis has occurred within positivist legal theory, from the emphasis on systemic unity and objective meaning of the normative order, towards an emphasis on legal meaning and language use (which within the theoretical framework of positivistic formalism is inevitably subjective) it is Goodrich's contention that this itself illuminates flaws within the positivist approach, in its persistent method of drawing on arguments from philosophy of ordinary language rather than open the discussion up to law's social and historical dimensions.<sup>33</sup>

The power of the assumption of a closed system of norms has, in Goodrich's view, led to constant undermining of historical and sociological considerations in the application of law, and he contends that even within a framework that claims to be sensitive to social aspects, the formulation of a "truth" contained within a rule is analytic and syntactic, and not empirical and semantic.<sup>34</sup>

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<sup>32</sup>See Goodrich, *ibid.* at 43.

<sup>33</sup>See Goodrich, *ibid.* at 44.

<sup>34</sup>See Goodrich's analysis of H.L.A. Hart's *Concept of Law*, *ibid.* at 44-62, arguing that Hart's theory draws on linguistic philosophy to the exclusion of semantic and empirical arguments.



It is not Goodrich's aim to refute the connection between law and language and his thesis rests on the premise that language and meaning are constitutive of law and legal meaning. Rather, Goodrich draws our attention to how legal theory rests on analyses and assumptions about language, without acknowledging or addressing these assumptions and without contemplating alternative theories of language and meaning. Goodrich proposes an alternative theory - or concept - of law, one that provides an account of law as a social and political discourse, and draws on newer developments in socio-linguistic theory.<sup>35</sup> I will not directly draw on the reconstructive part of Goodrich's work in my approach to the European Convention. However, I find Goodrich's critical thesis about the prevailing leftovers of legal formalism a useful theoretical background to rely upon in approaching the jurisprudence of the European Court of Human Rights. This is so, first, because it provides a method for analysis external to both theoretical approaches to the Convention jurisprudence and the practice of the Convention Organs. When it comes to assessing the relation between theory and practice, prevailing legal theory in the member states of the Council of Europe can easily be subjected to Goodrich's critical analysis. I contend, that legal theory in the member states has had constitutive effects on the way the Convention is constructed, as well as its application, and that an approach based on Goodrich's theory is therefore useful, when approaching the application of the European Convention.

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<sup>35</sup>See Goodrich's proposal of an alternative concept of legal discourse as political instrument for the analysis of legal relations or, as he terms it a materialist rhetoric of law, *ibid.*, chapters 6 and 7.

### 1.3 International law and critical theory

#### 1.3.1 The theoretical dilemma

Within the formalist positivistic theory of law, international law was placed either outside or at the margin of the legal discipline.<sup>36</sup> From virtual theoretical non-existence theory of international law has fought for its "existence", only to be officially determined as in a state of disarray. That very disarray has in fact been the subject of many recent approaches to international law doctrine, within what we, following Rubin and the critical scholars, can call the "self-awareness" approach.<sup>37</sup>

Proposing a critical approach to international law, the *New Stream* scholars draw on various methodological approaches, external to the legal tradition and epistemology that undermines objectivity. If there is a unifying point, however, it is the theoretical hostility towards political liberalism. The general contentions are: the conception of international life, based on liberal ethics, is incoherent; the structure of international legal discourse is constrained; international legal analysis is indeterminate; and finally, international law's authority is self-validated.<sup>38</sup> If the importance of theoretical

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<sup>36</sup>Austin's postulate, that international law is not law, has been international law's complex ever since. See also Kelsen's and Hart's theories of law, where international law is discussed as an appendix to their respective theories, a chapter in each work conferred to the discussion. See Hans Kelsen, *Pure Theory of Law*. Translation from the Second (Revised and Enlarged Edition by Max Knight) (Berkeley: University of California Press, 1967) 320-347 and H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). at 208-231.

<sup>37</sup>See *supra*, chapter 1.1. For a useful introductory account of the "New Stream" of international law scholarship, see Nigel Purvis, "Critical Legal Studies in Public International Law" (1991) 32 Harvard International Law Journal 81.

<sup>38</sup>See Nigel Purvis, *ibid.* at 92, and at 93-113 as regards each of the four points respectively. See also James Boyle, "Ideals and Things: International Legal Scholarship and the Prison-house of Language" (1985) 26 Harvard International Law Journal 327 at 347 summarizing some of the critical postulates and emphasizing the indeterminacy of meaning: "The scholars of the Western countries have modelled international law along the familiar lines of liberal state theory. Their utopian vision is that politics can

awareness is taken seriously, it is no less important on the level of international law theory. Indeed, it is arguably easier to analyze, and deconstruct, as it is not only based on general assumptions from liberal political theory, but on general theory of law as well. For my inquiry, two of the mentioned themes are important: the alleged indeterminacy of international legal arguments, and the tension between objectivity and subjectivity in international law application, an element identified before as a dilemma characteristic for formalism.

### 1.3.2 The structure of international legal argument

The power of assumptions in controlling international legal discourse has recently been the subject of an excellent critical study in Martti Koskenniemi's *From Apology to Utopia. The Structure of International Legal Argument*.<sup>39</sup> Koskenniemi's approach to international discourse is a "regressive analysis", i.e. an analysis aiming at showing the assumptions that the discourse is based on.<sup>40</sup> Labeling his approach "deconstructive", Koskenniemi situates himself within the post-structuralist current in linguistic and legal thought, explicitly drawing on structuralist method in approaching the "grammar" of international discourse.<sup>41</sup> Theoretical postulates and assumptions from structuralist

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somehow be constrained by (a-political rules). This vision leads them to attempt to show that language can somehow provide a neutral conduit for power. The state's consent is to something called "a rule".

<sup>39</sup>Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989).

<sup>40</sup>Martti Koskenniemi, *ibid.* at XVII.

<sup>41</sup>Koskenniemi, *ibid.* at XVII. See in particular footnotes 1 and 2, as to basic references regarding structuralism, deconstructive philosophy and structural-semiotic analysis in law. Even if Koskenniemi draws heavily on structural linguistics in his work, including ideas of general codes of meaning that underlie individual speech-acts, he makes clear his view, that it is ultimately impossible to find an "essence" or "deep-structure" for international law, into which all arguments could be reduced. For him, the "deep-structure" in international discourse refers to "a set of assumptions which, when explicated, most lawyers would probably recognize as very basic to the identity of their "legal" profession". See *ibid.*

methodology allow Koskenniemi to focus on the conceptual dichotomies and the dynamics of contradiction as a framework for analysis. This again enables a holistic approach to international discourse, and an approach that seeks to go beyond the dichotomy of theory and doctrine, and hence seeks to be external to the whole discourse. Koskenniemi himself describes his approach as holistic, formalistic and critical. He explicitly acknowledges the objections to the formal character of the approach (as it treats all arguments in a formal way, whether social "facts" or political "ideas"). The deconstructive part of the work is, however, very enlightening and useful in its attempt to uncover familiar assumptions. The critical value of the work lies in its attempt to unmask the claim of liberal theory, that it is objective and non-political, providing only a formal framework for substantive political choices.<sup>42</sup>

Another perspective, that Koskenniemi's approach bears on and which is intuitively accepted rather than argued, is that the assumptions that characterize social and political discourse are not different from those controlling legal discourse.<sup>43</sup> His argument goes

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at XIX, note 3. Throughout his work Koskenniemi uses a method that is sensitive to the ideas and professional self-images of international lawyers.

<sup>42</sup>See Koskenniemi, *ibid* at XVII.

<sup>43</sup>See Koskenniemi, *ibid* at XVII: "In a sense, the whole of international legal "talk" is an extended effort to solve certain problems created by a particular way of understanding the relationship between description and prescription, facts and norms in international life. My argument is that the persisting disputes within the realms of theory and doctrine result from the fact that these disputes bear a close relationship to controversial topics encountered beyond specifically "legal" discourses. The ideas of statehood, authority, legitimacy, obligation, consent, and so on which stand at the heart of international law are also hotly debated issues of social and political theory. In each of these realms the problems turn on the justifiability of assumptions about what the character of the present social world is and how it should be changed. It would be futile to assume that the assumptions which characterize modern social and political discourse are different, or separable from those which control legal discourse on these same matters. I have chosen to group those assumptions together under the label of *the liberal theory of politics*."

to show that it is from this effort not to lose its independence that "the legal mind fights a battle on two fronts. On the one hand, it attempts to ensure the *normativity* of the law by creating distance between it and State behavior, will and interest. On the other hand, it attempts to ensure the law's *concreteness* by distancing it from a natural morality."<sup>44</sup> From this initial two polar split, constant tension arises between apology (for state practice) and utopia (normative standards), and the structure of international argument consequently takes the form of either descending arguments or ascending arguments. Descending is a pattern of argument that takes its starting point in ideas or standards of justice, progress, common interests etc., that are anterior to State will and behavior. The ascending pattern takes actual State behavior and will as given and attempts to construct a normative order on the basis of these "facts".<sup>45</sup> Koskenniemi's premise is that the two patterns are mutually exclusive and that an argument cannot be both descending and ascending at the same time. The tension between the two is what structures international legal argument and the functioning of this basic contradiction is the focus of the analysis.

One of the more original hypothesis in Koskenniemi's work, is that within this formal structure of international legal argument "(n)o coherent normative practice arises from the assumptions on which we identify international law".<sup>46</sup> The power of the structure

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<sup>44</sup>Koskenniemi, *ibid.* at 2.

<sup>45</sup>See Koskenniemi, *ibid.* at 40 - 41. Koskenniemi takes the concepts "descending" and "ascending" from Walter Ullmann, preferring the less familiar terminology to the more familiar concepts "deductivism" and "inductivism", see *ibid.* at 41 note 141.

<sup>46</sup>Koskenniemi, *ibid.* at 50. This theoretical construction is identifiable as a formalist approach, that fits "Kelsenian" conception of a formal system of norms, see *supra* chapter 1.2 and Peter Goodrich, *supra*, note 17 at 35-44. The originality of Koskenniemi's argument lies rather in his critical hypothesis that the contradictions within the formal systems work as to avoid material solution.

itself, he claims, might on the other hand lead to an attempt to *avoid material solution* that would prefer either of the two opposites: concreteness or normativity. Koskenniemi presents the following hypothesis:

The argumentative patterns which can be extracted from the practice of the ICJ, for example, do not provide material justification for solutions to legal problems. The argumentative structure is there only to avoid openly political rhetoric. But alone, it leads nowhere but into the constant opposition, dissociation and association of points about concreteness and normativity of the law. There is no end to this, however. The discursive structure is only a form of making arguments. It is not one for arriving at conclusions. In order to be defensible, each argument (doctrine, position etc.) will have to appear as both concrete and normative. But as concreteness and normativity are conflicting notions, it is possible for anyone wishing to challenge the argument interpret it so as to be coherent and manifest only either one or the other. This will allow the critic immediately to come up with a point about its ultimately apologetic or utopian character. Here lies the dynamics of international legal argument.<sup>47</sup>

The identified structure of international legal argument is, in Koskenniemi's view, an expression of the liberal theory of politics.<sup>48</sup> His aim is to demonstrate that the practical problems of international law cannot be solved by standard (liberal) theory, because of the same problems that are inherent in liberal theory itself.<sup>49</sup>

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<sup>47</sup>Koskenniemi, *supra*, note 39 at 49. The bulk of Koskenniemi's work, where he analyses the functioning of the contradiction is extremely interesting, see chapter 2 on the doctrinal history of international law and chapters 4 through 7, where he analyses the impact on the doctrine of sovereignty, sources, custom and "World Order" respectively.

<sup>48</sup>"At a deeper level, this structure of argument expresses the liberal theory of politics. This is a theory which identifies itself on two assumptions. First, it assumes that legal standards emerge from the legal subjects themselves. There is no natural normative order. Such order is artificial and justifiable only if it can be linked to the concrete wills and interests of individuals. Second, it assumes that once created, social order will become binding on these same individuals. They cannot invoke their subjective opinions to escape its constraining force. If they could, then the point and purpose of their initial, order-creating will and interest would be frustrated." See Koskenniemi, *supra*, note 39 at 6.

<sup>49</sup>Koskenniemi, *ibid.* at 9.

There are, as stated before, postulates and assumptions from structuralist methodology that underpin Koskenniemi's work - presumptions that make the whole project possible and comprehensive. They are, however, assumptions from formalist theory and are therefore arguably situated within the theoretical paradigm of formalism. Koskenniemi's approach can thus be confronted with skepticism as to its alleged externality to the theory - doctrine dichotomy.

## 1.4 Legitimacy

### 1.4.1 Legitimacy - the concept

A final topic relating to the importance of theory has to be addressed - before I actually try to make some use of the methodological framework laid out. This topic furthermore calls for awareness as to my own approach: Why is it that I use the *legitimacy*-framework when approaching the jurisprudence of the European Convention on Human Rights? In Koskenniemi's terms, the notion of *legitimacy* itself "defies definition". Translated into his theoretical framework: "'Legitimacy' is an intermediate concept whose very imprecision makes it available to avoid the attacks routinely mounted against the formal (but too abstract) idea of legal validity and the substantive (but too controversial) notion of justness."<sup>50</sup> Even if we do not, as yet, accept or refute Koskenniemi's explanation of this imprecision, the duality of the conception towards

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<sup>50</sup>See Martti Koskenniemi, reviewing Thomas M. Franck's *The Power of Legitimacy Among Nations*, (1992) 86 American Journal of International Law 175 at 175.

formal and substantive elements, seems convincing.<sup>51</sup> It touches on the distinction between formal and substantive aspects of *legitimacy*, the former conception denoting authority and the latter one rightness or justness. Read through an approach, based on Goodrich's theory, *legitimacy*, on the other hand is merely a theoretical construction, that within the formalist framework is merely self-referential.

It is interesting how the complexity of the *legitimacy* concept is built into it by different *theoretical* approaches or perspectives.<sup>52</sup> From the perspective of a legal scholar, power and practices are legitimate when exercised in conformity with established law. This idea of *legitimacy* as legal validity is the core of the legal, or eventually legalistic, conception.<sup>53</sup> However, concerns about the justification for law itself measured against some external criteria, i.e. what law ought to prescribe, are also of importance to the legal scholar or legal philosopher. That is, though, more often seen as the prescribed field for moral and political philosophy. Here, the approach to *legitimacy* is motivated by the concern for criteria that are justifiable according to rationally defensible normative principles. The moral or political philosophers approach is thus more substantive, and more prescriptive, than the traditionally formal legal approach. The third, completely different approach to the concept, is the approach from the social sciences. Here, the method is empirical, and the interest is in consequences, rather than

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<sup>51</sup>Koskenniemi argues that the concept is a recent innovation in political theory, introduced in a liberal theory to "enable criticism of social institutions without relying on earlier routes of critical thought which had been travelled to the end...", *ibid.* at 175.

<sup>52</sup>See for a helpful explanatory account of the complexity of the concept *legitimacy* David Beetham, *The Legitimation of Power* (London: MacMillan, 1991). In the following I draw on his overview of the three dimensions of the concept of legitimacy, see *ibid.* at 3-6.

<sup>53</sup>This conception is identifiable in the aforementioned debate about democratic legitimacy of constitutional adjudication, where the norms of the constitution are equated to legal rules.



either forms or norms. Furthermore, the social scientist's interest lies in contextualizing the concept, and inquiring into *legitimacy* in given social contexts. This empirical, explanatory approach easily takes the form of defining legitimacy as *the belief in legitimacy*: power relations are legitimate when those involved believe them to be so. Within the last mentioned social sciences approach, the described Weberian conception of *legitimacy* is the prevailing one.

When addressing issues of *legitimacy*, this short account of the complexity of the concept elucidates the importance of theoretical precision. It is a common approach to give such overarching weight to one's privileged dimension that the other dimensions are excluded from the picture.<sup>54</sup> I agree with Beetham's contention that the "key to understanding the concept of *legitimacy* lies in the recognition that it is multi-dimensional in character".<sup>55</sup> The problem is how to understand and integrate the three dimensions - or the three different discourses of social science, moral - political philosophy and legal discourse. And, for my purposes, the most important aspect is the awareness of different theoretical constructions, given a particular preference as to the constitutive factors of *legitimacy*.<sup>56</sup>

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<sup>54</sup>An interesting point that Beetham raises, as both a social scientist and political philosopher, is the complete disjunction between the approach from political philosophy, and the approach from the social sciences, exemplified in the different curricula. If approaching legitimacy from the philosophical perspective, the readings consist of Hobbes, Locke, Rousseau, Hegel etc.; whereas the social science approach starts (and sometimes ends) with Max Weber. See *ibid.* at 7-8.

<sup>55</sup>See Beetham, *ibid* at 15. Beetham goes on to further elaborate on a three dimensional model of legitimacy, that entails all three elements: i) conformity to rules, ii) justification of the rules by reference to shared beliefs and iii) evidence of consent by the subordinate.

<sup>56</sup>Within the scholarly *legal* discourse, the three dimensional model for legitimacy is identifiable in different constructions and theories about *legal validity*. This again resonates in theories and ideas about *sources of law*. An overemphasis on one of the three dimensions is a common approach in legal thought. A crude distinction allows us to identify natural law theories as over-emphasizing the axiological

### 1.4.2 Legitimacy of judicial review

A theoretical framework with its tacit assumptions awaits the constitutional scholar who enters the debate about the *legitimacy* of judicial review. The framework is built within the discipline of constitutional law, around the *democratic argument*, that is, the traditional debate around the seeming lack of democratic *legitimacy* of judicial review. The argument thus boils down to the distinction between law-making capacity, invested in a legislature, and decision-making capacity (adjudication), traditionally conferred on courts.<sup>57</sup> The link to the problematic aspect of *legitimacy of power* is rarely made explicitly, in all its variations.<sup>58</sup> The discussion is about the scope of *judicial power* and

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dimension (the normative element), positivist theories of law as over-emphasizing the conceptual unity and authoritative elements of law, and legal realism as the incarnation of the overemphasis on the empirical or factual elements of law and legal practice. In Rubin's account of the typical prescriptions that characterize legal scholarship, the three dimensions of normativity, efficacy (instrumentalism) and authority (formalism) come again into play, as foundations for different prescriptions, see Rubin, *supra*, note 19, at 1851 ff. See furthermore an approach that uses the three-polar distinction in addressing judicial review and human rights in David Beatty, "Human Rights and the Rules of Law" in David Beatty ed., *Human Rights and Judicial Review. A Comparative Perspective* (Dordrecht: Martinus Nijhoff Publishers, 1994). I do, however, not agree with Beatty's easy resolving of the paradox. Beatty states: "It should now be clear why the paradox is more apparent than real. We have now considered the major theories about what law is and how it is best understood and we have found that notwithstanding the fact legal theorists employ quite different concepts to understand and define the law, in the area of constitutional review there is the possibility of substantial agreement about what bills of rights are all about and what role the courts can and should perform." *Ibid.* at 49.

<sup>57</sup>The debate has been the theme of American constitutional thought since the founding decision in 1803, in *Marbury v. Madison*. From the assertion of the constitution as "higher law" it followed, in Marshall's logic, that judges must be able to apply the constitution over ordinary law. Thus establishing a power of review, not established in the constitution itself, the remaining and persistent problems revolve around the scope of the legitimate power, or in Alexander Bickel's terms: "...it is one and the same inquiry to seek a justification for judicial review and an appreciation of the proper quality and reach of the process; the answers to the two halves of the inquiry determine each other." Alexander M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*. Second edition. (New Haven: Yale University Press, 1986) at 34.

<sup>58</sup>See however a reference to that theme in American constitutional theory, in particular between the legal realists and formalists, Christopher A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and "General Principles of Law" (1994) 5 *Duke Journal of Comparative & International Law* 35.

the arguments revolve around which branch of government is the right one or the best one to make political choices and interpret the constitution. It is thus a only an aspect of the *legitimacy* concept that is at issue.

It is an important aspect of *legitimacy*, however, and contingent not only upon a conception of law, but also underlying theories about political obligation and social organization. Arguments for limited power to review legislation are promoted by those who believe that only the legislature should make political decisions. Those who argue for extensive judicial power, justify their opinion with reference to fundamental individual rights and balance of power; the judiciary should guard the liberties and freedoms of individuals vis-à-vis the state. The most forceful argument, already present in Marshall's reasoning in 1803 *Marbury v. Madison*, is that the constitution is higher law and it thus restrains the legislature: the judiciary - a non political organ - decides its application in an objective way. All this is as forceful as it is simple,<sup>59</sup> and all is quite easily deconstructed as arguments from a conception of law based on formalist assumptions. Further, all this connects in a scheme of systematic reasoning and assumptions from constitutional theory. If contingent upon political philosophy, the debate is not directly related to subjective outcomes or theories of justice, but to formal grounds for the *legitimacy* of judicial review.<sup>60</sup>

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<sup>59</sup>See Mauro Cappelletti, *The Judicial Process in Comparative Perspective*. Ed. with the collaboration of Paul J. Kollmer and Joanne M. Olson (Oxford: Clarendon Press, 1989) at 150 on the reasoning in *Marbury v. Madison*.

<sup>60</sup>See Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall Law Journal 123, at 123 footnote 1. Bakan analyses arguments about the formal grounds for the legitimacy of judicial review in Canadian constitutional theory, and identifies two main strands of arguments: first, the argument that judges are constrained by the constitution to reach legally correct answers and therefore do not decide cases by reference to their

Even if it is beyond dispute that constitutional adjudication is "an ambiguous institution in any democratic state",<sup>61</sup> the translation of the argument is by no means self-evident on the international level. We can instead assume, and without great risk of theoretical manipulation, that the debate about the *legitimacy* of judicial review in a democratic society is but a part of a debate of the *legitimacy* of state power in general, and the detailed aspects of the debate are contingent upon constitutional arrangements and state politics. Furthermore, it is not theoretically risky to assume that the debates within different legal systems are likely to be context-bound and thus not necessarily subject to generalizations or generalized models of judicial review.<sup>62</sup>

To inquire in depth into the question, *why* the framework for constitutional adjudication translates into international law discourse, I believe that the methodology must take theory into account.<sup>63</sup> I contend that it is only on the level of theory that an approach

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own policy choices or values; second, arguments that openly accept the role of the judge as a policy-maker, and build a theory of legitimacy on trust in the judiciary. The trust is based on professionalism, impartiality and moral acumen. As Bakan points out, the arguments take the form of theories of interpretation, and rely themselves on theoretical assumptions about law and legal practice, most importantly the assumption of determinacy of meaning or the objectivity of legal language and impartiality of the adjudicator.

<sup>61</sup>See Mauro Cappelletti, *supra*, note 59 at XIV.

<sup>62</sup>Nowhere is this clearer than in the context of American constitutional law and its close relation to American history and politics, see Mark Tushnet, *Red, White, and Blue. A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988). See *ibid* at 2, stating that interest in grand theory in the United States is partly for political reasons, the theorists wishing either to support or oppose particular eras in the Supreme Court's history. See also *ibid.* at 108, footnote 3, for Tushnet's explanation of revival in grand theories of moral philosophy.

<sup>63</sup>This is why I will not rely on the methods of comparative law in approaching the jurisprudence of the European Court of Human Rights or draw on analysis of general models of judicial review. See for that kind of approach, termed a historic-comparative one, Mauro Cappelletti, *supra*, note 59. The methodology of comparative law seems to me even more so oblivious to its own assumptions, than general theory of law.

can be achieved, conscious of assumptions that found the theoretical and practical discourse.<sup>64</sup> Furthermore, I believe that an external approach to legal theory is necessary for the inquiry.

I will in the following chapters focus on the European Convention on Human Rights and argue that it is within the general theoretical framework on which the Court draws that the Court's idea of its legitimate power must be understood. To achieve some distance from this theoretical framework, an external assessment is required as to its inherent assumptions. I argue, that these assumptions are drawn from an overarching formal- positivist legal tradition in the legal systems of the member states to the Convention, and combined with the idealistic project of human rights protection and the goal of political integration. This framework will then serve as the methodological framework when later addressing specifically the methodology of consensus in the Court's jurisprudence, a methodology I argue, is mistaken in the context of the European Convention.

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<sup>64</sup>See interesting similarities in Tushnet's analysis of Constitutional theory in the United States of America, *supra*, note 62, and Martti Koskenniemi's analysis of international legal discourse, see as to the latter *infra*, chapter 2.2.

## 2. THE FORMALIST FRAMEWORK OF THE CONVENTION JURISPRUDENCE

"The most striking feature of the jurisprudence of the Court is the degree to which the cases are not so much about human rights in the abstract as they are about interpreting the European Convention as a legal document. The meaning of "human rights" as far as the European Court is concerned depends first and foremost on what the convention says the phrase means."<sup>65</sup>

The main thesis to be pursued in the following chapters is that the jurisprudence of the European Court of Human Rights is affected both by formalism and legal positivism. Furthermore, I argue that to the extent which the Court's practice is not seen as self-legitimated (by this framework) the Court seeks to legitimate its practice by invoking a method relying on consent - or "consensus". The construction of this "consensus" idea in the Court's case law merits attention as it is, arguably, of increasing importance in the Court's methodology, and, as I will argue, because the Court's somewhat artificial construction of "consensus" is, from a theoretical perspective, far from convincing.

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<sup>65</sup>See C.A.Gearity, *supra*, note 11 at 95.

## 2.1 The affects of formalism and legal positivism on the Court's jurisprudence

To argue that the Convention jurisprudence manifests both formalist and positivistic approaches seems to be to paddle against the current. It is commonly asserted that the Court adopts a "'flexible' and 'substantive' interpretation rather than a 'technical' and 'formal' one..."<sup>66</sup> or, that the Court's method is "forward-looking and contextual, rather than backward-looking and positivist".<sup>67</sup> When assertions like these are well founded as regards the interpretation of particular concepts and provisions of the Convention, I intend to argue for my thesis from a more distanced standpoint. I will not argue that the Court's method is one of logical deduction through formal syllogisms. Nor will I argue that the jurisprudence manifests the Court's idea of the Convention system as a *completely* closed and coherent system of norms. However, drawing on the background of the theoretical approaches described in the last chapter, I will argue that the overall picture of the Court's jurisprudence manifests elements of both formalism and positivism. I contend, that this is not only because of the Court's *conception of law*, which I claim is both formalist and positivistic but also because of the way ideas are modeled into the "legal system", through theoretical assumptions and analogies, and are from then on subject to the prevailing methods of law and legal theory.

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<sup>66</sup>See Francois Ost, "The Original Canons of Interpretation of the European Court of Human Rights" in Mireille Delmas-Marty ed., *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Dordrecht: Martinus Nijhoff Publishers, 1992) 283, at 311.

<sup>67</sup>See Andrew Clapham, *Human Rights in the Private sphere*, *supra*, note 15 at 178.

In the case of international human rights' protection this modeling of ideas arguably happens when an idealistic project is translated into the legal sphere and the concept of "human rights", a moral conception, construed to form legal norms. Furthermore, when it comes to implementation and application of human rights' norms, the norms are approached from the framework of methods and discourse that characterize international law as a discipline. It is important for my inquiry into the project of European human rights' protection to follow the pattern of "the power of assumptions" further back. It has been argued, and convincingly so, that international law as a discipline or as a discourse, is bound up in assumptions from general legal theory and legal practice of states - the traditional subjects of international law. This happens through direct transplantation of legal norms and principles from state law to international law, as manifested by the acceptance of *general principles of law* as a distinguishable normative source in international law.<sup>68</sup> To be able to operate with this construction within international law, a particular conception of law is called for, and the use and further construction of this source depends upon the conception that lies at the heart of

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<sup>68</sup>See the full reference to "the general principles of law recognized by civilized nations" in Article 38, section 1 (d) of the Statute of the International Court of Justice, see for example Ingo von Munch & Andreas Buske, *International law, supra*, note 4 at 23. For reasons obvious to us, in this time and age, the part that refers to recognition by civilized nations, is usually omitted when reference is made to this source of law. See *infra* chapter 2.2.3 as to the more subtle problems inherent in the acceptance of "general principles" in international law.



the system. I contend, that within the western legal world, the translation of "general principles of law" into the international sphere manifests a prevailing positivistic formalist conception of law. On a yet deeper level, or the level of theory analogies are made from philosophical constructions underpinning general legal theory to the sphere of international law. Thus, the idea of the autonomous individuals constituting a state is translated into theoretical stipulations of states as sovereign entities within the international legal system. On this very basic analogy, which Koskenniemi terms "the domestic analogy", many assumptions that characterize liberal individualism translate directly into the sphere of international law. The most basic of these analogies manifests how ideas about individual liberty resonate in the international doctrine of state sovereignty.<sup>69</sup> From the doctrine of state sovereignty, so construed, is to be derived the problematic doctrine of sources in international law, as well as the basic tension between international and domestic laws. It is not my subject matter to analyze in depth these important doctrines in international law, nor duplicate analyses thereof. However, of particular interest to me, is the reliance on *consent* or *consensus* in international law, as a source of state obligation. The reliance on consensus in international law is

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<sup>69</sup>See Koskenniemi, *supra*, note 39, at 192 *ff.* Even if the doctrine of sovereignty is to be traced back to the "sovereign" and the liberty of the sovereign, Koskenniemi demonstrates through his analysis, that the *liberal* preference itself is a matter of choice. He argues that in the pre-classical scholarship a normative code came before the sovereign (or the Prince) and the sovereign's sphere of liberty was derived from the normative code. A perspective that put the sovereign's liberty first was developed by classical lawyers. Koskenniemi, *ibid.* at 192.

arguably not only built on an assumption from liberal theory, but also manifests clearly the long prevailing legal positivist approach within international law.

## **2.2 Assumptions from liberal political theory**

### **2.2.1 The domestic analogy, sovereignty and sources in international law doctrine**

The doctrine of sovereignty and equality of states is traditionally presented as the basic doctrine of public international law.<sup>70</sup> As convincingly argued for by Koskenniemi, classical liberal doctrine did not specifically contain a theory or conception of international relations, but the classical liberal theorists did assume that the basic principles valid for inter-individual relations were applicable to inter-state relations as well.<sup>71</sup> A basic analogy between an autonomous individual and a sovereign state was made, and the collective entities of states treated simply as an accumulation of individuals. As the classical liberal doctrine is based on the idea of the consent of the individual to any interference with her or his freedom, so liberal theory of international law is based on the sovereignty and equality of independent states.<sup>72</sup>

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<sup>70</sup>See for example the general account of state sovereignty in Ian Brownlie, *Principles of Public International Law*. Fourth edition (Oxford: Clarendon Press, 1990) at 287: "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law." Brownlie furthermore presents three corollaries of the sovereignty and equality of states: an exclusive jurisdiction over the territory, a duty of non-intervention into other states and the dependence of obligation on the consent of the state. See Brownlie, *ibid.* at 286.

<sup>71</sup>See Koskenniemi, *supra*, note 39 at 68 ff., referring to Rousseau's Social Contract and Locke's Second Treatise. Koskenniemi argues that modern liberals, like Hart and Rawls, make the same assumption, in applying their overall theory to state relations, as well as to individuals.

<sup>72</sup>See further Koskenniemi, *ibid.* at 56-68 on the "break from medieval argument" in Hobbes' theory, denying transcendental normative ideas as legitimating social order. Furthermore, when Hobbes

This basic analogy has implications for the doctrine of obligation in international law, as well as the sources doctrine in international law theory. Thus, to follow the premises of liberal theory, obligation can only be created with the consent of states. This is the basic assumption of positivist theory of obligation in international law.<sup>73</sup> From this assumption follows the emphasis on consent, in determining binding sources of international law, i.e. that nothing can be binding on a state unless the state has consented to it, either expressly or tacitly.<sup>74</sup> The circularity of the *pacta sunt servanda* principle in international sources doctrine is manifest, i.e. the criticism goes: consent can not by itself create obligation, except if it is given on beforehand, as a matter of

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emphasised objective self-interest of the subjects, with his conception of tacit consent, Locke and Rousseau emphasised more the consensual strand, as an initial legitimation and a continuing constraint on the sovereign's power. Koskenniemi then reads the fundamental tension in liberal doctrine out of the attempt of the theory to distance itself from former medievalism (as to limitations of rational will). "The only legitimate social arrangement is one which provides for both: it must be ascending in that it is legitimized ultimately by reference to individual ends. It must be descending in that it contains a theory whereby some people's subjective ends can be overruled." (*ibid.* at 64). The fundamental rights' theory, however poses threats to liberal theory, consequence of which, Koskenniemi contends, is that liberalism presents its rights' theory as formal with the empty concept of liberty. Thus the distinction between material (subjective) morality and formal (objective) law.

<sup>73</sup>See for a short account of the two traditional, or classical, doctrines of obligation of states, the doctrine of "fundamental rights" and the doctrine of "positivism" J.L. Brierly, *The Law of Nations* (sixth edition, Waldock, 1963) at 49-56, here cited from Hugh M. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada*. Fifth edition (Canada: Emond Montgomery Publications Limited, 1993) at 4-9 and for a thorough analysis Koskenniemi's work, *supra*, note 39. It is central to Koskenniemi's analysis that all doctrines of international law, classical as well as modern, identify themselves partly by distinguishing themselves from older and opposite doctrines, and are identifiable as having both normative and positivist aspects. It is thus simplistic to refer to the classical doctrine as either normative (fundamental rights) or positivist, and yet that description captures the fundamental tension within doctrine, that of apology and utopia, and is commonly used in referring to classical doctrine, see Nigel Purvis, *supra* note 37, at 81-82.

<sup>74</sup>See for a doctrinal account of sources doctrine, Ian Brownlie, *supra*, note 70 at 1-31, referring to the positivist bottom line in discarding the traditional distinction between formal sources (procedures and methods) and material sources (evidence of existence of rules), stating: "What matters then is the variety of material sources, the all-important *evidence* of the existence of consensus among states concerning particular rules or practices." *Ibid.* at 2.

principle, agreement or otherwise, that a consent is binding upon the one consenting. It is thus not the consent that creates obligation, but something that comes before that. The line of reasoning is thus ultimately circular. Even if a fundamental doctrine in international theory, scholarly work usually satisfies itself by identifying the circularity, without further elaboration, and refers the discussion about obligation to political or legal philosophy to provide.<sup>75</sup> However, the importance of background assumptions, as assumptions about the foundations of binding norms, for standard setting, decision-making and application of international law can not be underestimated.<sup>76</sup>

### 2.2.2 The importance of consent in liberal theory of international law

As Koskeniemi demonstrates, the basic premise of liberalism, that consent of the individual is required for any form of governance and the related doctrine of consent of states, clashes with the quest for some normative values, independent of individual will or "state will". If a state's obligation - or the binding force of international law - is reducible to state will, as the positivistic view holds, that seems to lead to the conclusion that state conduct cannot be subjected to any normative criteria independent of criteria the state has consented to. Koskiennemi's term "apology" denotes this consequence in international legal theory. Koskeniemi draws up an overview of some of the various ideas and theories that emphasize *consent* as a basis for obligation in international law.

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<sup>75</sup>See Brierly, *supra*, note 73.

<sup>76</sup>The school of thought that explicitly rejected engaging in international legal theory, the so-called "unreflective pragmatism" did prove impossible, see Nigel Purvis, *supra* note 37, at 84, defining "unreflective pragmatism" as a subject specific doctrine, rejecting the need for theory. See further *infra* chapter 2.3. as to the power of theoretical assumptions on the application of international human rights' norms.

One version is that of a coherent, normative will, or a *consensus*, (*volonte generale*), as presented by Rousseau.<sup>77</sup> However, there is an obvious problem to adjust the normative element in the "Rousseausque" idea of the real interest of the individual or what he should will, with the liberal premise of liberty and autonomy. The same is to be said of the majoritarian version: that it is not the will of all that binds, but the will of the overwhelming majority.<sup>78</sup>

*Contract theories* of obligation and *theories of hypothetical contract*, of which Rawls's *Theory of Justice* is the most famous version, also get caught up in Koskenniemi's contradiction. In order to avoid apologism, consensualism must rely on premises from non-consensualist theories; it must assume a normative principle of justice, or fairness. Thereby, consensualism becomes non-consensualism. The *tacit consent* construction doesn't seem to solve the dilemma of obligation either. As the core of the tacit consent is past behavior, from this behaviour, consent can be inferred. Behavior then becomes subject to interpretation and a decision has to be made as to the binding force of past behavior. Is it binding because of subjective elements (consent to a norm) or because of

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<sup>77</sup>See Koskenniemi, *supra* note 39 at 276, with accompanying notes on the doctrine of international law. Once again the construction of a *volunte generale* among states seems to be based on an analogy from a real or hypothetical consent of individuals.

<sup>78</sup>See Koskenniemi, *ibid.* at 278. Needless to say, the problem of majority will and democracy, and the relation to the interests of the minority, is one of the most debated issues in political theory. When read in the light of Koskenniemi's structuralist dichotomies, of consent vs. normativity, a valid question to be asked, is: how can majority will bind non-consenting minority, if consent is the most basic premise? Or in Koskenniemi's conclusion: "This seems both utopian and apologist at the same time. It seems utopian as it is based on a (highly questionable) moral position according to which majority will shall always prevail. It seems apologist as it offers no standard for the majority." *Ibid.* at 278-279.

some non-consensual norms of justice? Again, the contradiction seems to bar any final and unequivocal solution as to the binding force of international law.<sup>79</sup>

The tension between consensualism and non-consensualism, as regards binding force of international law, is manifest as well in treaty interpretation. For those adhering to the subjective approach (consensualism), the binding force is drawn from express consent and the task of interpretation becomes to establish the subjective intent. From the objective approach (non-consensualism) the binding force originates in considerations of teleology, reciprocity or justice, which also guide interpretation. Koskenniemi argues that the hybrid of the two, the "normal" meaning, is a question-begging perspective and has no independent normative character. Furthermore, Koskenniemi argues for the deconstruction of interpretation based on liberal theory.<sup>80</sup>

### 2.2.3 General principles of law recognized by civilized nations

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<sup>79</sup>See Koskenniemi, *ibid.* at 284-291.

<sup>80</sup>See Koskenniemi, *ibid.*, at 291-302. At 294, Koskenniemi states: "The irony is, of course, that the system simultaneously denies there to be such a thing as an "objective normality" or any other non-subjective criterion by which the contractual relationship could be evaluated. It tells us only that we cannot proceed beyond our subjective views about such matters and that nobody has any duty to defer to another's subjective views. By this simple assumption - the rejection of natural law and intelligible essences - the liberal system of treaty interpretation deconstructs itself. It assumes that real (subjective) intent cannot be known and refers us to the external manifestations which it takes to be evidence of consent. But it lacks a theory about the evidentiary value of different possible manifestations. It refers back to subjective views (that behaviour, that teleology etc. counts which manifests intent) which, however, it already assumed to be unknowable independently of their external manifestations. By denying knowledge of *both* subjective and objective meanings, theories of treaty interpretation become a *perpetuum mobile* which allow challenging each proposed interpretation as "subjective"."

If the tension between the subjective (consensual) and objective (non-consensual) strands comes through in application and interpretation of *treaties* or conventions, and in the establishment of *custom* (manifested in the requirement of duration and generality vis-à-vis *opinio juris*), the third source of international law, hierarchically speaking in terms of Article 38 of the Statute of the International Court of Justice, is no less problematic than the other two, treaties and custom. In invoking Article 38 1 c of the Statute, scholars either refer to *general principles of law*, as a manifestation of natural law concepts, or emphasize the requirement of the *recognition* of (civilized) nations. This draws the basic tension to the forefront, and is still at issue in international law discourse. The nature or categorization of these "general principles of law" is still enigmatic and has been subjected to much dispute in international law doctrine.<sup>81</sup> Another interesting aspect in relation to the construction of this particular source of international law is the use of "general principles" to complete an idea of international law as a formal (closed) system of norms. The general principles of law are thus seen as "gap filling" or a solution to the problem of a lacunae within the international law system.<sup>82</sup> Those who construct the idea of international law so as to include general

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<sup>81</sup>See for an account of this doctrinal dilemma, Johan G. Lammers, "General Principles of Law Recognized by Civilized Nations" in Frits Kalshoven, Pieter Jan Kuyper & Johan G. Lammers eds., *Essays on the Development of the International Legal Order*. In memory of Haro F. Van Panhuys. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) 53, at 53. A doctrinal split between *comparatives*, determining general principles as those recognized in substance by all main systems of law, or the most representative systems of municipal law, and *categoricism*, that emphasizes the essence of the principles grounded in reason and forming a basis of all law, manifests again the same tension in international law scholarship. See Christopher A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and "General Principles of Law" (1994) 5 Duke Journal of Comparative & International Law 35, see in particular account of the two approaches at 65-84.

<sup>82</sup>See Johan G. Lammers, *supra* note 81, at 64, arguing that this was exactly the intention of the framers of Article 38 of the Statute of the International Court of Justice, and Christopher A. Ford, *supra* note 81, at 56.

principles of law for this purpose, do, in my view, draw a direct analogy between the formalist construction of the legal system as a closed system of norms and international law as a system of norms. The same tendency is obvious from the construction of Article 38 1 c of the Statute by some scholars, arguing that by "general principles of law" the reference is to principles of procedure, and legal reasoning operating on the level of domestic law.<sup>83</sup>

In the following I will, first, take a small detour around the jurisprudence of the European Court of Human Rights and briefly address the idea of international human rights' protection. How human rights are legalized within the United Nations, shows the power of assumptions, and equally the importance of theory when both construing and applying international legal norms (2.3.). Addressing the project of human rights' protection within the ambit of the Council of Europe, I will refer to the preparatory work on the Convention, which shows clearly the procedure of legalization of the project, and the tension between the allegedly distinct moral, legal and political aspects of the Convention (2.4.). Sketching an overview of the Court's interpretive methods, I will emphasize the formalist and positivistic aspects discernible in the jurisprudence, followed by a case-analysis, focusing on the same aspects.

### **2.3 Human rights protection as an idealistic project**

It is hardly to be contested that the "international protection of human rights", as manifested in documents such as the Universal Declaration of Human Rights, and

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<sup>83</sup>See Johan G. Lammers; *ibid.* at 59 ff.



conventions and declarations made under the ambit of the United Nations, is an idealistic project. The ideal is world peace and unity based on respect for human dignity and human rights. More commonly conceived though, the ideal is a vague conception of "human rights" as inalienable rights of individuals vis-à-vis entities such as states. The ideal is one that is widely shared in public opinion, political aspirations and theoretical approaches: the idea of human rights has become a basic reference of legitimate exercise of power, or, as one definition goes: "...the ultimate legitimate basis for a universal human community."<sup>84</sup>

Aspirations of defining the conception *human rights* differ in accordance with differing perspectives and philosophical views and approaches. Attempts to define and discuss human rights are perhaps primarily a philosophical matter and the idea of *human rights* (or the *rights of man* or *natural rights*) has roots in the history of ideas, back to the mythology preceding ancient Greek philosophy.<sup>85</sup>

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<sup>84</sup>See Alan S. Rosenbaum: "The Editor's Perspective on the Philosophy of Human Rights" in Alan S. Rosenbaum, ed., *The Philosophy of Human Rights. International Perspectives* (Connecticut: Greenwood Press, 1980) at 4 and 22, referring to the concept of human rights as a powerful concept to motivate juristic, social, political and philosophical thought. A cynical view of the success of the idea of human rights is expressed by Rolando Gaete, in his general attack on modernity and the enlightenment: "...human rights have become World History. At the twilight of all global ideologies of emancipation, the only modern ideology of emancipation that has not only kept its credibility but has been vindicated by conquering the last Western frontier, Eastern Europe. Human rights are the new site of the sacred." See Rolando Gaete, *Human Rights and the Limits of Critical Reason* (Aldershot: Dartmouth, 1993) at 2.

<sup>85</sup>See, for a condensed but rich account of the history and development of the idea of human rights since Greek philosophy Alan S. Rosenbaum, *supra* note 84, at 3-37. Because of how the idea evolved, and manifested itself within the western tradition, the development is traced through the natural law tradition, from the idea of a normative ethical concept through religious theories and then secularization, and

With the so-called "revival" of human rights doctrine in the twentieth century post war western world, there has been a disciplinary shift: human rights thinking is now found mainly within the domains of law and politics rather than philosophy.<sup>86</sup> There is also an identifiable shift within philosophical approaches to human rights, from metaphysical/theological frameworks toward frameworks that emphasize rights as being essential to justice or an ideal human community.<sup>87</sup>

When I state that human rights protection is an idealistic project, I am partly referring to the development of the concept of human rights as a normative concept, as an idea and as an ideal. The philosophical background is, in my view, bound to affect understanding and application of the concept. However, idealism does not have to be understood as referring to ethical normative theory, or abstract, ascending norms. As Koskeniemi identifies "idealism" within contemporary international law, it is a conception of law as a reflection of society (and thus factual, or sociological in his terms) and yet critical of structure of international dominance, referring to some idea of the ideal (and thus

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finally rationalization and legalization, when natural rights doctrine was constructed as a basis for individual natural rights, or legal rights, in particular in the work of John Locke.

<sup>86</sup>Alan Rosenbaum, *ibid.* at 23.

<sup>87</sup>Alan Rosenbaum, *ibid.* at 31. However different approaches maintain their appeal in some aspects, and the whole picture gets constantly more complicated.

normative in nature).<sup>88</sup> Not surprisingly, Koskenniemi concludes that whatever innovations idealism accounts for in international law, such as the demolition of *de lege lata* and *de lege ferenda* distinction (extending the scope of international law considerably), this will be undermined by the very contradiction, lying at the core of the structure of arguments. "Everywhere, the idealist argument will either dissolve in contradiction or turn out to be a rule-approach or a policy-approach argument in disguise."<sup>89</sup>

The long history of the making of the United Nation's "international bill of rights", i.e. the Universal Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, along with the Protocol to the Covenant on Civil and Political Rights, manifests this tendency.<sup>90</sup> Another example of the difficulties in implementing ideals of human rights protection within the United Nations structure, is the long story of efforts to draw up norms for protection of minorities.<sup>91</sup>

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<sup>88</sup>See Koskenniemi, *supra*, note 39, at 179.

<sup>89</sup>See Koskenniemi, *ibid.* at 186.

<sup>90</sup>It is commonly explained by the divergence of the views of states, that the intended "international bill of rights" turned out to be not one document, but several documents of different "legal" character. The same divergence, manifested itself in the disagreement about enforcement mechanism. Agreement was not reached as to the same enforcement mechanism for the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Only as regards the former Covenant was individual petition granted. See for a short account of this Hugh M. Kindred et al., *supra*, note 73 at 589-592.

<sup>91</sup>Even if "minority" rights do not fall under the category "human rights" as conceptually conceived, the problem of protection of minorities touches on rights, that usually are categorized as such, right to

For over forty years attempts were made to draft a convention for the protection of minorities, ending in 1992, when the General Assembly of the United Nations adopted the Resolution and Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>92</sup> The work was inspired by the provisions of Article 27 of the International Covenant on Civil and Political Rights, concerning the rights of *persons* belonging to minorities. Referring in the preamble to various instruments, relating to minority rights,<sup>93</sup> the focus of the Declaration was however, Article 27 of the Covenant on Civil and Political Rights, and the theoretical and institutional heritage, the Article carries with it in its implementation.

A reading of the drafting history of Article 27 shows the force of the underlying assumptions from liberal theory. Whereas the provision was arguably intended as a

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equality, non-discrimination etc. See Rosenbaum, *supra*, note 84 at 25 on the "human rights" concept being confined to what is due to a person, by virtue of being human. On this basis human rights are distinguished from special rights, such as for example minority rights. In international law, minority rights are discussed under the rubric of "human rights".

<sup>92</sup>Resolution 47/135, see 32 *ILM* 911 (1993).

<sup>93</sup>These were documents such as the Charter of the United Nations; the Universal Declaration of Human Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and the Convention on the Rights of the Child, as well as other relevant international and regional instruments.

group protection, or a hybrid of individual and group protection,<sup>94</sup> the term "minorities" was substituted by the formulation "persons belonging to" minorities. The reason for this reconstruction was the view that minorities as such were not subjects of law, whereas persons could be determined in legal terms.<sup>95</sup> This was a manifestation of traditional legal doctrine, premised on individuals as legal and moral actors. The provision seems furthermore to be premised on the classical liberal view of states as non-interfering entities, vis-à-vis individuals, as it formulates "rights" in the negative. Thus, the provision does not lay down any positive obligations on states to protect, ensure or promote minority rights, existence or identity of minorities.

Despite various theoretical attempts to reconstruct the standard-setting project as found within the international field of human rights' protection, the New Declaration on National or Ethnic Religious and Linguistic Minorities bears more similarities to the construction of Article 27 of the International Covenant of Civil and Political Rights than any innovation of progressive idealism.<sup>96</sup> Those who address this particular project

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<sup>94</sup>See Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) at 173.

<sup>95</sup>See Thornberry, *ibid.*

<sup>96</sup>See for critical assessment of the Declaration, in its former state as a Draft Declaration, Isse Omanga Bokatola, "The Draft Declaration of the United Nations on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities" (1991) 46 *The Review. International Commission of Jurists* 33 and on the final product, Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observation". An Occasional Paper from Minorities Rights Group (1993). For an interesting theoretical approach to the protection of ethnic minorities, mediating between the liberalist and the communitarian

in the United Nations forum, do not predict a quick move to "hard law", i.e. a binding convention on minority rights, as a next step after the adoption of the Declaration. The flaws in the Declaration's construction are far too obvious. Minimalist, although supposedly "universal"; individually oriented, although a purported "group protection" declaration, and narrow as to the obligations of states towards ethnic, religious and linguistic minorities within their borders, the declaration is bound up in theoretical constructions of formal equality and non-discrimination, not showing any sensitivity to the actual context of protection of minorities. The important issues for minorities, such as effective right to use, develop and promote their distinctive cultures, languages or religions, are poorly ensured, and responsibilities of states for ensuring and promoting minority interests almost ignored. A comparison to another effort to protect minorities, the work on minority rights within the human dimensions of the OSCE (Organisation (before Conference) of Security and Co-operation in Europe) shows how different

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approaches, see Adeno Addis, "Individualism, Communitarians, and the Rights of Ethnic Minorities" (1991) 66 Notre Dame Law Review 1219. Drawing on the general criticism on individualism and formal liberalism, Addis modifies the communitarian critique, and proposes "critical pluralism" as a theoretical approach to minority rights. Having recourse to newer ideas of law as "dialogue" and perspectives of law being best described as "narratives", Addis proposes an idea of society and legal discourse, as contests of narratives, where no narrative is the right one and the majority and minority engage in dialogue, based on their respective narratives. From the theoretical construction from critical pluralism, and the theoretical debate about the individual and the group as a unit of agency, flow the implications of critical pluralism, that groups can have rights. Furthermore, in Addis' contention, a right to a culture is constructed as a right to have necessary conditions to make choices, including i.a. access and control of land; preservation of language and cultural heritage; access to the media; and right to education. This construction has radically different consequences than the construction based on formal individualism, and, as is clear from Addis' theoretical premises, the whole construction depends on premises about who can be a moral and a social agent; premises that are not easily proven or refuted, but merely taken for granted as a basis for theoretical construction.

premises are built into a legal document, that is not all that differently construed.<sup>97</sup> Finally, the draft declaration on the rights of indigenous peoples, completed in 1993 by the United Nations' Working Group on Indigenous Populations, provides an interesting theoretical comparison. Even if it regards highly sensitive issues within the international community, such as the right of indigenous peoples to self-determination, the draft declaration is a remarkable innovation, granting rights to indigenous peoples as a group and spelling out the necessary conditions for the rights' protection to be effective<sup>98</sup> Furthermore, through the participation of non-governmental organizations in the drafting process and the work of the Working Group on the rights of indigenous peoples, a formerly unknown openness in the institutional forum of the United Nations

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<sup>97</sup>See Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension (June 29, 1990), 29 *ILM*:1305 (1990). (Part IV regards minority rights, *ibid.* at 1318-1320). The Copenhagen Document is much more promising towards development of minority rights than is the United Nations Declaration. In addition to asserting the right of minorities to exercise and develop their own cultures, discursive means are asserted to both include minority groups in decision making, and specially mentioning the historical and territorial circumstances of particular minorities. Even if this document defines minority rights as rights of "persons" belonging to minorities, it spells out more carefully these rights, as well as being more sensitive to the actual interests and situations of persons belonging to minorities (including their relation with other members of the group). It is thus for example asserted that persons belonging to minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity, and be free of any attempts at assimilation. In particular, the document stipulates that they have the right to use freely their mother tongue in private as well as in public; to profess and practice their religion; and to conduct religious educational activities in their mother tongue. Furthermore, the right is granted for minorities to establish and maintain their own educational, cultural and religious institutions.

<sup>98</sup>The draft declaration is published in (1994) 1 *Canadian Native Law Reporter* 40 along with commentaries at 48 and 50. Whereas the draft declaration can be described as a manifestation of newer approaches and openness to rights discourse that takes indigenous rights discourse seriously, it must be kept in mind, that the draft, now completed by the expert working group, through a notorious drafting process, has to pass the official discourse of the United Nations organisation, before even reaching the "soft-law" declaration form, that the declaration of minorities possesses.

has occurred. At the World Conference on Human Rights in Vienna in June 1993, the idea of a permanent forum for indigenous peoples within the United Nations was presented, the idea being that the permanent forum would include indigenous people in its membership and manifest new visions of "dialogue" and exchange of narratives, as means to standard setting and dispute resolution. If successful, the idea could provide new possibilities for the inspirations of both standard setting and effective protection within the sphere of international minority protection

## **2.4 The European Convention - construction and application**

### **2.4.1 The drafting of the European Convention**

There is ample evidence from the drafting history of the European Convention on Human rights, that the complexity of the project of international human rights' protection in the European context was clear to the representatives of the member states and experts preparing the draft of the Convention.<sup>99</sup> The idealism was colored by the recent history of human rights' violations in the second world war, which also made the project urgent. The project had a particular orientation, however, if compared to the aspiration of the "human rights" standard-setting of the United Nations. The recourse to *traditions* had a central place in discussing human rights protection on the European level. The Consultative Assembly stressed, in particular, the common, democratic

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<sup>99</sup>Documents and reports from meetings are published in the series *Collected Edition of the "Travaux Préparatoires"* (The Hague: Martinus Nijhoff 1975) Volumes I-VIII. See in particular reports of discussions of the Consultative Assembly of the Council of Europe, its first session, when meeting to start implementing the aim of human rights protection as laid down in the Statute of the Council of Europe, Volumes I and II.



traditions of the member states and the importance of democratic ideals as goals for collective protection.<sup>100</sup> The Committee of the Consultative Assembly (Committee on Legal and Administrative Questions), working on the first draft of the Convention, agreed that it could only be proposed that essential rights and fundamental liberties defined and accepted after long usage by the democratic regimes of Europe, could be guaranteed. "These rights and liberties are the common denominator of our political institutions, the first triumph of democracy, but also the necessary condition under which it operates. That is why they must be the subject of the collective guarantee."<sup>101</sup> Apart from the emphasis on fundamental *democratic principles*, another main theme in the work of the Consultative Assembly was that the collective guarantee (Convention) should evolve around, and be interpreted with reference to, the *general principles of law recognized by civilized nations*, as laid down in Article 38 1 c of the Statute of the Permanent Court of International Justice. This was further elaborated by some representatives as an aim to *unify* legislation, or to manifest a requirement, that member states would conform national legislation with these general principles.<sup>102</sup>

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<sup>100</sup>The Consultative Assembly, from the very beginning, stressed the importance of political integration and that the ideals of a democratic political organization should be integrated into the Convention, among other things through a provision guaranteeing free elections. Furthermore, the Consultative Assembly insisted on a provision on property rights. When the European Convention was finally adopted by the Council of Ministers in November 1950, it was to the expressed disappointment of the Consultative Assembly, that criticized the omission of certain fundamental rights and principles, in particular the mentioned rights of free elections and property rights. See *Collected Edition...*, *supra* note 99, Volume VII at 46 ff as to the acceptance of the text by the Committee of Ministers, and *ibid.* at 88 ff for the critical views presented in the second session of the Consultative Assembly. The work of the Consultative Assembly was later carried on, and the rights that the Assembly insisted on were taken up in Protocol No. 1 to the Convention, signed in March 1952. See on this in general, *ibid.* Volume VIII.

<sup>101</sup>See the Report of the Consultative Assembly (Committee on Legal and Administrative Questions), *Collected Edition...*, *supra* note 99, Volume I, at 192-214; quote at 194.

<sup>102</sup>See *ibid.*, at 200 ff.

It was only after the Consultative Assembly had prepared a draft of a human rights' convention and recommended it to the Committee of Ministers, that the particular *legalizing turn* in the history of the Convention became blatantly clear.<sup>103</sup> After the draft Convention had been sent to the Committee of Ministers, the Committee of Ministers instructed a Committee of Experts from the member states to review the Consultative Assembly's draft and to independently draw up a draft Convention. The work of the experts resulted in a proposal of two preliminary draft Conventions, one based on enumeration of rights, similar to the former draft of the Consultative Assembly, the other laying down protected rights.<sup>104</sup> The Committee of Experts concluded that a choice between the two proposals was *a political - and not legal - consideration*.

The Committee of Experts criticized the method of enumerating rights, and the method, preferred by the Consultative Assembly, of referring to the Universal Declaration of Human Rights. Referring to the intention of the member states manifested in their selection of rights protected in the Universal Declaration, the argument went: "They considered that there was a very important difference between the United Nations Declaration and the planned Convention. *The United Nations Declaration is not a text of positive law. It expresses the common ideals, which are the goal of all peoples and*

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<sup>103</sup>In drawing up the draft Convention, the Committee chose to enumerate rights in the Convention, without defining them, and to rely on the provisions of the United Nations' Universal declaration of Human Rights for this purpose, by reason of the "moral authority and technical value of the document in question". See *ibid.*, at 194. In this sense the Committee relied on the formulation on human rights as universal norms, as laid down in the Universal declaration.

<sup>104</sup>See on the documentation of the Secretariat General for the Committee of Experts, and for the documentation of the meetings of the legal experts, Volume III. For the proposal of the two draft Conventions see *ibid.* at 312 ff.

*all nations. The aim of the draft Convention is quite different. It is to form part of the positive law of the States adhering to it.*"<sup>105</sup> It was in particular the emphasis of the government of the United Kingdom, that it was necessary to define the protected rights to be drawn up in the Convention, so that it would be clear, "what was the nature and extent of the obligations to be assumed by the States party to the proposed Convention".<sup>106</sup> This turn in the drafting history, and the expressed view of the Committee of experts, that the choice between the different proposals was a political matter, led to a conference of Senior Officials (state officials) from the member states with the objective of making a decision about the two proposals.<sup>107</sup>

The two "schools of thought" referred to in the preparatory work on the Convention manifest both different aims and understanding of the Convention and Convention system, and different conception of law. One manifests aspirations about the *political integration* of Europe. The other manifests a traditional international law approach to *state sovereignty*. The former approach is a constant theme the political context of the Council of Europe.<sup>108</sup> It has been present since the drafting of the document and is still

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<sup>105</sup>See for the documentation of the meetings of the Committee of Experts, *Collected Edition...*, *supra*, note 99, Volume III at 180 ff. The quote is from a communication from the expert of Luxembourg, recommending amendment to Article 2 of the previous draft of the Consultative Assembly. Emphases are mine.

<sup>106</sup>*Ibid.*, at 254. For the division between the "legal" approach and the approach, closer to the one proposed by the Consultative Assembly, see documentation of the meetings of the Committee of Experts, Volume III at 179 ff and the text of the different proposals, *ibid.* at 312 and 320. See furthermore, Volume IV, at 3-80, and a summary of the "two schools of thought" *ibid.* at 82.

<sup>107</sup>See the report of the Conference of Senior Officials, Volume IV at 242- 272, with a new (amalgamated) draft Convention annexed to the report, *ibid.* at 274 ff. See furthermore the second session of the Consultative Assembly, Volume III. at 172 ff.

<sup>108</sup>This is again most clearly presented in the work of the Consultative Assembly, and with most enthusiasm in initial discussion, in the first session of the Assembly. See *Collected Edition...*, *supra*, note 99, Volume I. See *ibid.* at 192 ff, the Report of the Assembly, where i.a. this is stated in the Preamble:

to be found in the rhetoric around the Convention, even increasingly, as the goal of European economic integration is materialized through the European Communities and now the European Union.<sup>109</sup> The latter emphasis, on the other hand, prevailed when the European Convention was drafted. This is the approach that emphasized more the legal character of the rights protected in the Convention, in its construction drawing on general theory of law and traditional, positivistic international law doctrine. In the latter phases of the drafting the ideas and ideals of political integration were less discussed, as the emphasis had shifted from the "political democracy" ideals towards the idea of protection of legal, individual rights. The necessity of *defining* the rights to be included in the Convention was emphasized, and the provisions laid out both as to the right guaranteed and the legitimate limitations to that right.<sup>110</sup>

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"On the preliminary question of the usefulness of such a collective guarantee, the Committee replied in the affirmative, considering that this guarantee will demonstrate clearly the common desire of the Member States to build a European Union in accordance with the principles of natural law, of humanism and of democracy; it will contribute to the development of their solidarity; it will fulfil the longing for security among their people..., *ibid.* at 192. See further in the debate about the Report, *ibid.* Volume II, at 10 ff, where opposing views were presented as to political integration and uniformity of legislation. The role of a proposed Court of Justice, with compulsory obligation, to promote such integration, was also heavily debated.

<sup>109</sup>See for example recent reference to the Convention as an "embryo of a European Constitution" by the Court's President, Rolf Ryssdal, see reference to this in Juan Antonio Carrillo Salcedo, *supra*, note 5, at 19. Overlapping on the territory of continental Europe, the dreams of European integration through economic co-operation on the one hand and through human rights protection on the other, have resulted in two different projects within the ambit of the Council of Europe - that of the European Union and that of the human rights and cultural co-operation manifested in the European Convention for the Protection of Human Rights, as well as other Conventions, such as the Economic and Social Charter. Only a part of the member states of the Council of Europe are members of the European Union - and the expansion to the east within the Council of Europe, has not taken the same speed within the European Union. Under the umbrella of OSCE (The Organisation on Security and Co-operation in Europe), however, the dream of integration is extended to include the former socialist states in Eastern Europe. It is increasingly common to see full European integration proposed, in the political context.

<sup>110</sup>This is in particular evident in the latter phase of the drafting history of the Convention, after the Committee of Experts had redrafted the Convention and formulated the project as a legal project.

On the theoretical - or doctrinal - level, the ideas observable in the drafting history of the Convention are presented in an amazingly similar manner, whether the discussion takes the idealistic route or turns to formalism. Thus the idea of political integration through fundamental rights, loosens itself from "traditional legal discourse" to state that, "the Convention will contribute to European integration by nurturing the development of a pan-European conscience."<sup>111</sup> On a less idealistic level, the theoretical approaches become no less curious. When focusing more on the "legal aspects" of the Convention, the theoretical formulation takes the form of proclaiming a "special nature" of the Convention, or the "sui generis" nature of the European Convention on Human Rights. The Convention is seen as imposing *legal principles* upon the member states that they are obliged to comply with.<sup>112</sup> Furthermore, the Convention is described as being neither fully an international treaty nor a constitutional law document, but a combination of the two.<sup>113</sup> The claim is that the European Convention transcends the boundaries between international and domestic law, and finally becomes some kind of a constitutional legal order:

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<sup>111</sup>See Jochen Abr. Frowein, "European Integration Through Fundamental Rights" (1984) 18 Journal of Law Reform 5, at 11. Drawing on a sociological idea of law, Frowein takes notions like fundamental rights to reflect public opinion, or the general "Zeitgeist", and finds that the identification of a population through a catalogue of fundamental rights "will help to improve the legitimacy of the system as a whole". See *ibid.* and at 26. See also Jochen Abr. Frowein, "Fundamental Human Rights as a Vehicle of Legal Integration in Europe" in Mauro Cappelletti, Monica Secombe & Joseph Weiler eds., *Integration Through Law. Europe and the American Federal Experience*. Vol. 1 Book 3 (Berlin: Walter de Gruyter, 1986) 300.

<sup>112</sup>See Andrew Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study* (Oxford: Clarendon Press, 1983) at 22, stating: "Unlike the 1948 Universal Declaration of Human Rights upon which it was founded, the European Convention represents more than a 'common standard of achievement'. It imposes upon the contracting states a certain body of legal principles to which they are obliged to conform. In specific cases compliance with this law is ensured by the use of the Convention's enforcement machinery."

<sup>113</sup>Andrew Drzemczewski, "The Sui Generis Nature of the European Convention on Human Rights" (1980) 29 International and Comparative Law Quarterly, 54-63.

The Convention has thus created a new form of law. It is a treaty in form rather than in substance. This instrument is not a simple contract based on reciprocity; it is a treaty of a normative character, developing an evolving notion of "Convention law" which interpenetrates and transcends both the international and domestic legal structures. Its organs have the rather delicate and difficult task of interpreting this "common law". This interpretation must in turn be made in such a way as to uphold and guarantee certain established principles in broad outline and - simultaneously - its specific effect must be varied in particular cases. Whether or not its organs hold certain legislative or administrative action as being in violation of the provisions of the Convention is not necessarily as important as *the fact that they can do so*, and as the fact that in so doing they - in particular the Commission and the Court - may be transforming a multinational arrangement into a novel form of a common constitutional order.<sup>114</sup>

The curiosity of this approach is the total lack of considerations about the legitimacy of the described structure, or of any attempt to take an external point for observation. The overarching formalist - and realist - framework seems to assume that inquiry into this particular "sui generis" nature is unnecessary. For an observer, that does not share a belief in that framework, the very aspects that are believed to constitute the special nature of the Convention, are the aspects that most need justification.

#### **2.4.2 The interpretation of the European Convention**

The tension between the differing views in the drafting history of the European Convention is as well present in the interpretive work regarding the Convention. As will be seen, a reference to the *democratic traditions* of the member states is an important theme in the Convention jurisprudence, in particular where it comes to balancing

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<sup>114</sup>Drzemczewski, *ibid.* at 61. Emphasis added.

interests of the individual rights and the general, societal, interest. The overall framework is however, in my view, if not legalistic, then marked by a formalist emphasis. It is a framework for *interpreting text* - and in particular for interpreting an international legal document, a method the Court laid down in one of its early judgments, the *Golder* case.<sup>115</sup>

The framework for treaty-interpretation laid down in Articles 31-33 of the Vienna Convention stipulates that, "(a) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In the second paragraph it is further elaborated what is meant by "context": a concept that refers to textual surroundings:

2. The 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 connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

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<sup>115</sup>See Eur. Court H.R., *Golder* case, judgment of 21 February 1975 Series A, Vol. 18, where the European Court laid down a framework for interpretation, relying on the Vienna Convention on the Law of Treaties. Acknowledging that the Vienna Convention had not yet entered into force, the Court found it however justifiable to rely on Articles 31 to 33 of the Convention, as the provisions "enunciate in essence generally accepted principles of international law...", *ibid.* paragraph 29. See for a general overview of the Court's interpretative methods, Francois Ost, *supra*, note 66, differentiating between the canons of interpretation laid down in the Vienna Convention of the Law of Treaties, and methods "outside" the Vienna Convention, see for the former at 288-303 (textual; contextual or systemic; and teleological interpretation) and for the latter 303-309. The canons of interpretation, not established in the Vienna Convention, are, in Ost's submission, the "flexible" and "non formal" interpretation of the provisions; the *reductio ad absurdum principle* and the methods termed "autonomous" interpretation and "margin of appreciation".

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.<sup>116</sup>

In interpreting the European Convention, arguments and constructions that rely on the "ordinary meaning" of the provisions are common as a starting point, although it is argued that textual interpretation and the recourse to preparatory documents is never decisive.<sup>117</sup> The systematic and teleological interpretation are however of central importance in the Court's case law; interpretation based on the construction of the *objective* or purpose, to be read out of the Convention provisions individually and "in context". In context is here to be read as "systematic interpretation" within the framework of the Convention and its protocols.<sup>118</sup> The relevant context can, in Ost's submission, vary, from being only the Article under consideration to the whole Convention, its Preamble and protocols, and sometimes, even including other treaties. The main problem of defining the "context" is however, in Ost's view, "the extent to

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<sup>116</sup>The hierarchy of text (objective meaning) over intention (subjective meaning) is clear from article 32 of the Vienna Convention, stipulating that "(r)ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable". Yet, the fundamental importance of state consent (substantive intention) is discernible in Article 31. See on the "nature of compromise" inherent in Article 31 of the Vienna Convention, Koskenniemi, *supra*, note 39 at 292, footnote 89. Koskenniemi contends that the article refers to virtually all thinkable interpretative methods and tries to reconcile views, that in Koskenniemi's view are in an irresolvable tension.

<sup>117</sup>See Francois Ost, *supra*, note 66 at 288.

<sup>118</sup>See *ibid.* at 290-292.



which the Court interprets the Convention in an autonomous manner with sole reference to the logic of the legal order it establishes."<sup>119</sup>

It is in this methodological framework that I argue that an overarchingly formalist perspective is to be found in the Court's jurisprudence. It is manifested in the systematic construction of written norms, as well as the idea of "autonomous" construction within the framework of the norm system. The prevailing positivistic trend comes through, when subjective meaning has to be given to a provision, as the meaning of a provision has to rely, in some way or another, on state consent.

On the background of Goodrich's analysis, I argue that the leftovers of formalism loom behind and direct the interpretation of the Court. It seems to be assumed that it is possible to establish an interpretation of a particular provision in a concrete case, relying on the logical coherence of the system. Yet, the formalist framework doesn't say anything definite about content. How is it then possible to establish and interpret the content of norms, be they norms embodying public policy or fundamental individual rights? In the Court's practice, the content of norms seems to be dependent upon meaning, or practice, in international law or in the member states of the Council of Europe. To draw on Koskeniemi's analysis of international legal discourse, the

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<sup>119</sup>Ost, *ibid.*, at 290. The problem is further presented by Ost in the following way: "The Convention is a normative treaty setting out an incipient European public policy and thus it cannot accommodate as many interpretations of its terms as it has Contracting Parties." (*ibid.* at 305). However, as to relating this normative element to the consent of the member states, Ost argues: "The inevitable tension between "autonomous" and "national" meanings could easily be resolved if it were clear that the concepts used in the Convention had largely uniform meanings in the Council of Europe Member States: in which case the interpretation would not be autonomous but "common" and reference would be made to the common core of the member's legal systems." *Ibid.* at 305.

interpretive work of the Court seems to strive to combine the normative and the concrete, the substantive content of the norm and the factual acceptance of the norm, relying on consent or consensus.

I will, in the following, try to use some of the insights from the methodological framework described in previous chapters. I will focus on what I argue are the formalist aspects in the Court's jurisprudence, and how they are discernible in the Court's case law. In this I will rely on the theoretical insights provided by Goodrich's analysis. The method of the Court to "autonomously" interpret the concepts and provisions of the Convention is often stressed and the systematic (or contextual) interpretation of the Court is one of its most important overall methodologies. Yet, if understood as the sole reference to systematic and conceptual unity, drawn from the Convention system as a whole, this seems sometimes to be supported and sometimes defeated in the Court's practice. Other methods seem to oppose the methods of "autonomous" and systematic interpretation; reference is made to the *common legal traditions* of the member states and the *general principles of law* discernible in their legal systems. This sometimes takes the form of reference to the *sum of legislation* on a particular matter in the member states. Finally, the Court allows for a certain discretion to the member state under scrutiny, under the doctrine of "*margin of appreciation*".

### 3. AUTONOMOUS AND SYSTEMATIC INTERPRETATION

#### 3.1 "Autonomous interpretation" and "margin of appreciation".

The method of "autonomous" interpretation is usually referred to as a device of the Court, to ensure its independence in interpretation vis-à-vis the "meanings" of concepts in the member states<sup>120</sup> Some scholars relate the term "autonomous" in particular to *legal terms* and define the problem of interpretation as particularly complicated when revolving around legal concepts.<sup>121</sup> The most common use of the concept "autonomous", denotes furthermore only that the Court in its interpretive work relies on an "autonomous" interpretation, in relation to the member state which legislation or practice is under scrutiny in a particular case. If the "autonomous" interpretation is a method aimed at distancing the European Convention system from the legal systems of the member states, another, albeit opposing methodology is to be drawn from the

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<sup>120</sup>See *supra*, chapter 2.4.2 on Ost's emphasis on the necessity of an autonomous interpretation. Ost, however, asserts: "On the other hand, a totally autonomous interpretation could be seen as illegitimate for does not the Convention, according to its Preamble, build upon the 'common heritage of political traditions, ideals, freedom and the rule of law'?" See Ost, *supra*, note 66 at 305.

<sup>121</sup>See e.g. F. Matscher, "Methods of Interpretation of the Convention" in R.St.J. Macdonald, F. Matscher and H. Petzold, eds., *supra*, note 5 at 70, where he distinguishes legal terms from "ordinary language" and "technical" terms, and states: "A more complicated problem is presented by the interpretation of the legal terms. Must their meaning be taken from the law of the State in question, or do these terms have, for Convention purposes, their own autonomous import, independent of the meaning given them in the law of that State?" See also Walter J. Ganshof Van Der Meersch, "Le caractere 'autonome' des termes et la 'marge d'appréciation' des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme" in Franz Matscher & Herbert Petzold, eds., *Protecting Human Rights: The European Dimension*. Studies in honour of Gérard J. Wiarda. (Köln: Carl Heymanns Verlag KG, 1988) 201.

international law - domestic law relation. This is the so-called "doctrine of margin of appreciation".

Few aspects of the Convention jurisprudence have been as much addressed as the margin of appreciation doctrine. Usually the scholarly approach is a combination of a descriptive and prescriptive one, describing the Court's methods discernible in its case-law, and from there, the "appropriate" doctrine is read out of the practice.<sup>122</sup> From its origin in national law<sup>123</sup> the doctrine was (theoretically) translated onto the international plan, originating in the Court's jurisprudence under article 15, which article allows for derogation in case of emergency situations.<sup>124</sup> From there the doctrine has increasingly been relied upon in the Court's case law, in particular in interpreting Articles 8 - 14, which articles allow restrictions on protected rights. In arguing for the legitimacy of the limitations, the member states do have recourse to their *margin of appreciation*, or their

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<sup>122</sup>See for example Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 Human Rights Law Journal 57.

<sup>123</sup>See an account of the origin of the doctrine in the jurisprudence of the French Council d'Etat, as well as references in Howard Charles Yourrow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" (1987) 3 Connecticut Journal of International Law 111 at 118 and following footnote 20.

<sup>124</sup>See *ibid.* at 118 ff. and R. St. J. Macdonald "The Margin of Appreciation" in R.St.J Macdonald, F. Matscher & H. Petzold, eds., *supra* note 5 at 85-86. In the first cases, admitting a margin of discretion to the member states, the subject matter was the problematic relation between Ireland and United Kingdom and the situation in the Republic of Ireland, see the *Lawless* case, Eur. Court H.R., judgment of 1st July 1961, Series A; Vol. 3 and the case of *Ireland v. United Kingdom*, Eur. Court H.R., judgment of 18 January 1978, Series A, Vol. 25.

sphere of discretion, that should be immune from the supervision of the European Court of Human Rights.

It is thus common to see the doctrine referred to as illustrating the "delicate task of balancing the sovereignty of Contracting Parties with their obligations under the Convention"<sup>125</sup> drawing on the international law - domestic law relation. As an extension, or even an implication, of that argument, the formulation becomes more like the familiar argument about judicial power vis-à-vis legislative power, or the legitimacy of judicial review in a democratic society.<sup>126</sup>

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<sup>125</sup>See Macdonald, *ibid.* at 83 and Yourow, *supra*, note 123 at 118, referring to the doctrine as defining the breadth of deference granted from the international organs to the national authorities.

<sup>126</sup>Macdonald is closer to this version, where he states: "The dilemma facing the Court, evident in recent cases on the margin of appreciation, is how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognizing the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties." Macdonald, who is a judge with the European Court of Justice, proposes that the doctrine be dissolved, to the advance of more openly articulated reasons. His argument is that the doctrine easily obscures the difference between formal and substantive elements, i.e. that the Court is failing to articulate whether it is restricting its review on formal grounds - or whether it has reviewed the case fully and found it justifiable. See *ibid.* at 84-85. The problem with Macdonald's proposal is that he is offering a negative construction of the margin of appreciation (i.e. the amount of latitude granted national authorities when the Court has decided the appropriate scope of review) without proposing any grand theory of the legitimate power of the Court. He is thus in fact advocating a complete trust in the European Court of Human Rights, that again is to be restrained by "European standards". A pragmatic justification of this, is in Macdonald's words, "the gradual refining of an originally expansive margin of appreciation reflects the increasing legitimacy of the Convention organs in the European legal order". *Ibid.* at 123.

To address the autonomous and systematic interpretations, the margin of appreciation doctrine has to be kept in mind. I will take up again the discussion on the margin of appreciation in chapter 4. For the remainder of this chapter, I focus on the autonomous and systemic interpretation of the Convention, first as regards Article 6, the right to fair trial. It is in interpreting Article 6 that the Court can be said to have first coherently pursued the "autonomous" interpretation.

### **3.1.2 Autonomous interpretation and Article 6 of the Convention**

Article 6 of the European Convention guarantees the right to fair trial. The beginning of the provision reads:

In 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...

Both Convention Organs and scholars analyzing the practice point out, that an interpretation or construction of the terms "civil rights and obligations" and "criminal charge" in the respondent state cannot be decisive for the Court, but can merely be a starting point for its analysis.<sup>127</sup>

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<sup>127</sup> As further discussed in chapter 5, this construction of the European Commission and Court can be said to confuse the traditional understanding of law: How can "criminal charge" as a concept not mean the same in the national legal system, as in the international system? See further *infra*, chapter 5.

In a detailed analysis, a group of experts has put forward and analyzed the criteria used in the reasoning of the European Court of Human Rights (and other Convention Organs) as to the concept "criminal charge" in Article 6.<sup>128</sup> The three main criteria for determining if there is a "criminal charge" for the purpose of the Convention are defined as, first, how the offense is categorized in the legal system of the state concerned, second, the nature of the offense and, third, the severity of the penalty.<sup>129</sup> As pointed out in the analysis there are several under-criteria to each of the three criteria and a scheme of interrelated factors and gradual evaluation, which can be read out of the reasoning of the Convention organs, constituting a complex methodology.

As regards the first criteria, the classification of the conduct in the legal system of the respondent state, the Court established in the *Engel* case, that this provided no more than a starting point and had to be examined in the light of the "common denominator" of the respective legislation of the various Contracting States.<sup>130</sup> The Court's reference to the "common denominator" comes typically in to play when considering the two other main criteria - the nature of the offense and the severity of the penalty.<sup>131</sup> The

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<sup>128</sup>See "La matiere pénale" au sens de la Convention européenne des droits de l'homme, flou du droit pénal" par le Groupe de Recherche Droits de l'Homme et Logiques Juridiques (1987) 4 *Revue de Science Criminelle et Droit Pénal Comparé* 819.

<sup>129</sup>*Ibid.* at 823. This description is taken from the Court's case law, see the *Engel* case, Eur. Court H.R., decision of 1 October 1975, Series A, Vol. 22, paragraph 82.

<sup>130</sup>See *ibid.* See also case of *Campbell and Fell*, Eur. Court H.R., judgment of 28 June 1984, Series A, Vol. 80, paragraph 71; *Öztürk* case, Eur. Court H.R., judgment of 21 February 1984, Series A, Vol. 73, paragraph 52 and. *Weber* case, Eur. Court H.R., judgment of 22 May 1990, Series A, Vol. 177, paragraph 31, as to the national legislation as a starting point for analysis.

<sup>131</sup>See the *Öztürk* case. There the right to a free interpreter was at stake in proceedings that concerned a "regulatory offence" in Germany. In Germany certain violations of the Road Traffic Act were seen as "regulatory" but did not come under the criminal law, after a decriminalization of minor offences. After having considered the argument about decriminalization, the Court referred to the "ordinary meaning" of the term and then stated: "In addition, misconduct of the kind committed by Mr. Öztürk continues to be

"common denominator", as used in the Court's case law, rates somewhere between the legal situation in the member states and the more penetrating conception of common criminal law tradition - or if put in somewhat more systemic terms it can be said to manifest "reasoning within the whole of the criminal law traditions of the member states."<sup>132</sup>

If we see the reasoning in these cases as invoking some reference to *general principles of law*, in international law terminology, the further construction varies. It has, in my view, to be distinguished, if the idea of a common denominator refers to the sum of the relevant legislation in the member states - calling eventually for a comparative analysis of legislation - or if the reference is to the common legal traditions.<sup>133</sup>

The criminal law tradition in the member states of the Council of Europe, is a fairly solid ground for exercising the *general principles of law* method, as same main trends

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classified as part of the criminal law in the vast majority of the contracting States, as it was in the Federal Republic of Germany until the entry into force of the 1968/1975 legislation... *Ibid* paragraph 53. Similar reference is made in the *Weber* case, in evaluating disciplinary sanctions. "...in the great majority of the Contracting States, disclosure of information about an investigation still pending constitutes an act incompatible with such rules and punishable under a variety of provisions." see *supra*, paragraph 33.

<sup>132</sup>See "La Matiere Penal" *supra*, note 128 at 837.

<sup>133</sup>See an interesting dissenting opinion of Judge Matscher in the *Weber* case, *supra*, note 33, commenting on the comparative law method and its use in that particular case: "Thus, to take one example, the present judgment seems to base its interpretation on the concept of 'criminal offence'... on; inter alia, the results of an analysis of the respective law of the Contracting States. ... However, a careful examination of comparative law data would show that there does not nowadays exist a 'common denominator' in the sense contemplated by the judgment: in the law of the Federal Republic of Germany - the State concerned- 'regulatory offences' lie outside the realm of criminal law; the same is true of Austrian law... and French law, Netherlands law (and possibly the legal systems of other European countries) are preparing to move in the same direction." See paragraph A 2. See in general on the possibility of "evolution" downwards, based on changing trends in national laws Paul Mahoney, *supra*, note 122 at 66-68.



or principles underlie the criminal law in the different states. When it comes to giving an "autonomous" meaning to the concept "civil law and obligations" the Court has been less successful in creating a framework for the "whole of the legal traditions" and the practice has called for criticism and requirements for the Court to clarify its line of reasoning.<sup>134</sup>

In the aforementioned *Golder* case the Court established in general the right to access to court.<sup>135</sup> Refraining from a technical interpretation, the Court construed Convention Article 6 as guaranteeing not only the right to fair trial in legal proceedings already pending, but the very right to a trial, i.e. the right to have access to a Court of Justice. Referring to Article 31:2 of the Vienna Convention, the Court read the provision in the light of the Preamble to the Convention, finding the Preamble to be an integral part of the context in which the provision had to be interpreted. In particular, the emphasis in the Preamble on the importance of the rule of law was decisive in the Court's argumentation. The Court did however further underpin its conclusion with reference to Article 31:3 of the Vienna Convention.<sup>136</sup> The Court held, that Article 31:3(c) included

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<sup>134</sup>In one of the leading commentaries on the Convention, van Dijk and van Hoof stated: "All in all it is evident that for the effective application of the extremely important Article 6(1), and for the required uniformity and legal certainty with respect to that application, it is of the greatest importance that the Strasbourg case-law here draws the line, and in doing so keeps the necessary distance with regard to the domestic law of the contracting States." See *supra*, note 6, at 296.

<sup>135</sup>See the *Golder* case, *supra*, note 16. It is somewhat ironic, that in the same judgment the Court laid down its method as based on the Vienna Convention on the Law of Treaties, the Court arguably also exceeded the scope of interpretation of an international treaty. In 1978 a British international law scholar referred to the case as "almost grotesque", criticizing the interpretation from the point of view of traditional international law, and in particular within the premises of the doctrine of "denial of justice" in international law. See F. A. Mann, "Britain's Bill of Right" in F. A. Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990) at 133 ff.

<sup>136</sup>Article 31:3 of the Vienna Convention reads: "There shall be taken into account, together with the context:...(c) any relevant rules of international law applicable in the relations between the parties".

"general principles of law and especially "general principles of law recognized by civilized nations..." and found that the principle whereby a civil claim must be capable of being submitted to a judge ranked as one of universally recognized principles of law, as did the principle of international law forbidding the denial of justice. Arguing that Article 6 of the Convention had to be read in light of these principles and with reference to both systemic and contextualized interpretation and precautions as to *reductio ad absurdum*, the Court held that the right of access to a Court constituted an inherent element in the right to fair trial provided in Article 6.<sup>137</sup>

Having construed Article 6 so, with considerable implications for the member states, the main focus of the Court's case law has since been that of defining the concepts "civil rights and obligations". Using similar methods as regards "criminal charge", i.e. referring both to the legislation in the respective state, and the nature of the matter as understood in the member states generally, the Court has however, fallen back on the importance of the classification in the legal system under scrutiny.<sup>138</sup>

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<sup>137</sup>See the *Golder* case, *ibid.*, paragraphs 34 - 36. The *reductio ad absurdum* argument was simply, and forcefully, that "(w)ere Article 6:1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government." See *ibid.*, paragraph 35, subparagraph 3.

<sup>138</sup>See as to the earlier case-law e.g. *Ringeisen* case, Eur. Court H.R., judgment of 16 July 1971, Series A, Vol. 13; *König* case, Eur. Court H.R., judgment of 28 June 1978, Series A, Vol. 27 and *Bentham* case, Eur. Court H.R., judgment of 23 October 1985, Series A, Vol. 97. In two judgments handed down in 1986 different approaches were articulated in the Court's majority and minority decisions. In the *Feldbrugge* case, Eur. Court H.R., judgment of 29 May 1986, Series A, Vol. 99, the question was whether health insurance allowance was to be classified as a "civil right" and in the *Deumeland* case, Eur. Court H.R., judgment of 29 May 1986, Series A, Vol. 100, a supplementary pension for a widow was at issue, and if the right to a pension was a civil right. The majority's detailed analysis of the public and private elements of the matters at issue, was met with the minority's argument, that there was no uniform European approach as to the civil characterization of these (public-law) benefits, and that evolutive interpretation could not "allow entirely new concepts or spheres of application to be introduced into the

## 3.2 Systematic and contextual interpretation

### 3.2.1 Freedom of association and the "contextual" approach

By "systematic interpretation" I refer to a method of interpretation that takes the "systemic unity" as its starting point. This is however, not an epistemological reference as used here, but refers to a methodology that examines "the provisions of the Convention and its Protocols...as a whole".<sup>139</sup>

In the first cases regarding Article 11, that guarantees freedom of assembly and association, the Court used systematic interpretation that extended to other international

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Convention..." See the joint dissenting opinion in the *Feldbrugge* case, paragraph 23 and 24. Francois Ost argues, that after these two cases, the Court reversed its reference to evolutive interpretation (Ost *supra*, note 66 at 302). Even if Ost's assessment doesn't hold any longer in general, the problem of the definition of the concept "civil right" was very much silenced in the Court's practice after this. From then on, matters that require interpretation of the terms, refer more than before to the situation in the legal system, presently under review, and not the "whole" of the legal systems, parties to the Convention. See for this as examples the *Powell and Rayner* case, Eur. Court H.R., judgment of 21 February 1990, Series A, Vol. 172, and the *De Moor v. Belgium* case, Eur. Court H.R., judgment of 23 June 1994, Series A, Vol. 292. Andrew Clapham has invoked these cases regarding the application of Article 6 of the Convention, in theorizing the human rights' protection in the private sphere (see Clapham, *supra*, note 15 at 208-211) invoking the public-private split in the Court's jurisprudence. This is however, quite different from critical theorizing about the public-private distinction and its consequences, see for the latter an interesting approach in Judy Fudge: "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall Law Journal 485.

<sup>139</sup> *Belgian Linguistic* case, Eur. Court H.R., judgment of 23 July 1968, Series A, Vol. 6, at 30. See Ost, *supra*, note 66, referring to the case, and several others, see *ibid.* at 291. As already mentioned, Ost defines different contexts, that serve as contexts for systematic interpretation. He furthermore draws a link between the systematic interpretation and the methods of teleological and evolutive interpretations, as "(s)ystemic interpretation leads, according to the logic of the Court, to teleological interpretation in keeping with the steps set out in Article 31 of the Vienna Convention." *Ibid.* at 292.

documents, completed under the ambit of the Council of Europe. The Court furthermore had recourse to the legislation and practice of the member states, drawing on the idea of *general principles of law*, as a source of international law. In the case of the *National Union of Belgian Police* the Court was called upon to decide if it was in breach of Article 11, that a Minister of the Interior did not consult the trade union on matters such as staff structures, conditions of recruitment, promotion, salary scales etc. The Court in construing Article 11:1 stated:<sup>140</sup>

The Court notes that while Article 11:1 presents trade union freedom as one form or a special aspect of freedom of association, the Article does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it. Not only is this latter right not mentioned in Article 11:1 but neither can it be said that all the Contracting States in general incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom. It is thus not an element necessarily inherent in a right guaranteed by the Convention, which distinguishes it from the "right to a court" embodied in Article 6..."

The negative construction of the reference to "general principles of law" is interesting - there are no general principles in the member states to fill in the meaning of Article 11:1. The Court's purposive reasoning lead to the construction that flowing from the right of individual members of a trade union to protect their right, there was a "right" that a trade union should be heard. However, it was held to be in the competence of each state to decide the means towards these ends. The facts in the case, that the minister did not consult the union, was not taken to constitute a breach of Article 11:1. The parallel with, and then distinction from "the right to a court" in Article 6 is interesting, as it

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<sup>140</sup> *National Union of Belgian Police* case, Eur. Court H.R., decision of 12 April 1975, Series A, Vol. 19, paragraph 38.

seems to imply an overall methodology in interpretation. It implies, that if the right had been seen as necessary or indispensable for the freedom of association, guaranteed in article 11, it would have been protected. What is not argued, however, is why the right was not indispensable for effective enjoyment of trade union freedom. The Court can be said to further rely on systematic analysis, although again almost in a negative way, referring to the European Social Charter of 18 October 1961.<sup>141</sup> As the matter under scrutiny did not constitute a protected right, it was not necessary to take into account Article 11:2.<sup>142</sup> In a case where employees complained of certain denials of retroactive benefits, the Court held, that Article 11:1 did not secure any particular treatment of trade union members vis-à-vis the state, as regarded their rights under collective agreements. "Such a right, which is enunciated neither in Article 11:1 nor even in the Social Charter of 18 October 1961, is not indispensable for the effective enjoyment of trade union freedom and in no way constitutes an element necessarily inherent in a right guaranteed by the Convention."<sup>143</sup>

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<sup>141</sup>The Court argued as follows: "Article 6:1 of the (European Social) Charter binds the Contracting States "to promote joint consultation between workers and employers". The prudence of the terms used shows that the Charter does not provide for a real right to consultation. Besides, Article 20 permits a ratifying State not to accept the undertaking in Article 6:1. Thus it cannot be supposed that such a right derives by implication from Article 11:1 of the 1950 Convention, which incidentally would amount to admitting that the 1961 Charter took a retrograde step in this domain." *Ibid.* paragraph 38, subparagraph 3.

<sup>142</sup>Identical reasoning is to be found in the *Swedish Engine Drivers' Union* case, Eur.Court H.R., decision 6 February 1976, Series A, Vol. 20, regarding the complaint of the Union as to the refusal by the National Collective Bargaining Office to enter into collective agreements with the union. See paragraph 39.

<sup>143</sup>See the *Schmidt and Dalström* Case, judgment of 6 February 1976, Eur. Court H.R., Series A, Vol. 21 paragraph 34.

When it came before the Court to decide whether a *freedom not to be a member* of an association is inherent in the right guaranteed by Article 11:1, the Court seemed to work with a definite idea of the substance of the right to freedom of association. In the first cases where this was argued, the Court found that the particular association was not an association within the meaning of the Convention.<sup>144</sup> In the long leading case on the negative aspect of the freedom of association, the case of *Young, James and Webster*,<sup>145</sup> the Court solved the interpretive dilemma by extensively relying on the "very substance of the right guaranteed". It was argued before the Court that a "negative right" not to be compelled to join an association was implied in the right guaranteed in Article 11:1. Against this, the Government relied on the travaux préparatoires, where a rule similar to Article 20:2 of the Universal Declaration was explicitly excluded, because of the "closed shop systems" in some of the member states. The Court stated: "(a)ssuming for the sake of argument that, for the reasons given in the above cited passage from the travaux préparatoires, a general rule such as that in Article 20:2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention".<sup>146</sup> This would, in the Courts reasoning, not lead to complete exclusion of the negative aspect of a person's freedom of association. "To

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<sup>144</sup>See the case of *Le Compte, Van Leuven and De Meyere*, Eur. Court H.R., decision of 23. June 1981, Series A, Vol. 43. The applicants argued that an obligation to join an association of doctors, *Ordre des médecins*, infringed on their right not to associate, and furthermore, the existence of the Ordre eliminated, in effect, freedom of association. The Court ruled that the Ordre that registered medical practitioners, was a public law institution, founded by the legislature for pursuit of aims for the general interest. Furthermore, the Court noted, that there were several associations of medical practitioners in Belgium, and the Ordre could thus not be seen as having the effect of limiting a right to associate. See also the case of *Albert and Le Compte*, Eur. Court H.R., decision of 10 February 1983, Series A, Vol. 58, regarding partly the same matter.

<sup>145</sup>*Young, James and Webster* case, Eur. Court H.R., decision of 25 November 1980, Series A Vol. 44.

<sup>146</sup>See *ibid.* paragraph 51-52.

construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee". Focusing more on the actual situation of the applicants, than the "closed shop system" as such, the Court found that the situation facing the applicants "ran counter to" the "concept of freedom of association in its negative sense".<sup>147</sup>

The systematic analysis in the *Young, James and Webster* case involves Articles 9 and 10, the freedom of thought, conscience and religion, and the freedom of expression. "Notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Articles 9 and 10...."<sup>148</sup> This analysis came only into play, however, after the Court had concluded that there was a breach of Article 11 in the case. Integrating Articles 9 and 10 into Article 11 in this context, the Court argued:

The protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly, it strikes at the very substance of this Article to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.<sup>149</sup>

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<sup>147</sup>*Ibid.* paragraph 52-55. The particular situation of the applicants involved their losing the job they then held. This was an important feature in the context of the case, and the Court noted, that "a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligations to join a particular trade union." *Ibid.* at 55. Striking at the very substance of the freedom guaranteed by Article 11, the situation amounted to interference with that freedom, or in the words of the Court, "for this reason alone"....

<sup>148</sup>*Ibid.* paragraph 57, subparagraph 1.

<sup>149</sup>*Ibid.* paragraph 57. This construction however held good only for two of three applicants, that had opposed membership on grounds of their convictions.

Having come to this conclusion, the Court next set out to evaluate if there had been a justification for the interference, in accordance with Article 11:2. Reiterating former case law, as to the pressing necessity of the interference, the Court found any argument about certain advantages of the closed shop system inconclusive. Invoking the argument about "pluralism, tolerance and broadmindedness" as hallmarks of a democratic society, the decisive point for the Court as to the legitimate aim of the restriction was, in the Court's words:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants' standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court.<sup>150</sup>

Paying only rhetorical respect to the doctrine of the margin of appreciation, the Court found that in these circumstances, the interference with the applicants' right was not proportionate to the aims pursued.

In the *Young, James and Webster* case, the method of interpretation of Article 11 must be said to manifest a rather "autonomous" construction, compared to both the legal system under scrutiny, and the other member states of the Council of Europe.<sup>151</sup> It is

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<sup>150</sup>*Ibid.* paragraph 63.

<sup>151</sup>It is worth noticing, that in this case, the Court did not have recourse to "general principles of law" or general legal trends in the member states of the Council of Europe, nor for that matter an international consensus. Reference to the substance of the right seems here to be the most important element - and yet the substance of the right was not articulated in the abstract.



interesting that the Court relies on both *formalist construction* of the "right" to freedom of association and almost a *metaphysical pre-existing essence* of that right. This method is combined with a very contextualized approach: contextualized here meaning sensitive to the particular facts of the case and the respect for the individual interests of the applicants. The Court construed Article 11:1 to include some negative aspects of freedom of association, without however, giving the Article a firm substantive meaning, or construing the provision in any final way.

When the negative aspect of freedom of association was again brought directly before the Court in the *Sigurður Á. Sigurjónsson* case, there was, I argue, a marked change in the reasoning of the Court.<sup>152</sup> Here the Court relied heavily on systematic interpretation, involving other international documents and practice, as well as relying on current *legal situation* in the member states of the Council of Europe, rather than arguing from a "substantive essence" of the right.

In the *Sigurður Á. Sigurjónsson* case, the Court decided that Icelandic legislation and practice of granting licenses to taxi-cab drivers, conditioned by the drivers membership in a particular association, was an infringement on the right to freedom of association, guaranteed by Article 11 of the Convention. Placing emphasis on the *travaux préparatoires* and referring to the Court's former judgment in the *Young, James and Webster* case, the Icelandic Government claimed that a negative right to freedom of association must be interpreted restrictively, and thus, that the applicant was not

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<sup>152</sup> *Sigurður Á. Sigurjónsson v. Iceland*, Eur. Court H.R., judgment of 30 June 1993, Series A, Vol. 264-A.

protected by Article 11.<sup>153</sup> In defining the scope of the right, the Court was confronted with its former dilemma regarding the *travaux préparatoires*, a dilemma the Court escaped by stating that in the *Young, James and Webster* case, the Court had merely used the preparatory documents as a "working hypothesis", not attaching decisive importance to them.<sup>154</sup> Still construing Article 11:1 on the very right at issue, the Court then referred to the fact that the applicant's membership in a particular association was imposed by law, and stated: "Compulsory association of this nature, which, it may be recalled, concerned a private-law association, does not exist under the laws of the great majority of the Contracting States. On the contrary, a large number of domestic systems contain safeguards which, in one way or another, guarantee the negative aspect of the freedom of association, that is the freedom not to join or to withdraw from an association".<sup>155</sup> Then, referring to a "growing measure of common ground" that had emerged in this area "also at the international level", the Court invoked in addition to Article 20:2 of the Universal Declaration, both the European Community Charter of the Fundamental Social Rights of Workers and the European Social Charter, as well as opinions released by the International Labor Office (ILO).<sup>156</sup> It was after this

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<sup>153</sup>The Icelandic Government also tried to draw parallels to the former case law of the Court, arguing that the association was not a trade union, nor even an association, but a "professional organisation of a public-law character", see *ibid.* paragraphs 30-32. The Court did not accept this line of argument.

<sup>154</sup>*Ibid.* paragraph 35.

<sup>155</sup>*Ibid.*

<sup>156</sup>The common grounds the Court referred to were "in addition to the above-mentioned Article 20:2 of the Universal Declaration..., Article 11:2 of the Community Charter of the Fundamental Social Rights of Workers, adopted by the Heads of State or Government of eleven member States of the European Communities on 9 December 1989, (that) provides that every employer and every worker shall have the freedom to join or not to join professional organisations or trade unions without any personal or occupational damage being thereby suffered by them." The Court further referred to a recommendation of the Parliamentary Assembly of the Council of Europe, to insert a sentence to this effect into the European Social Charter. See *ibid.* paragraph 35.

invocation, in the sequence of the argument, that the Court recalled that "the Convention is a living instrument which must be interpreted in the light of present-day conditions". "Accordingly, Article 11 must be viewed as encompassing a negative right of association".<sup>157</sup> When assessing the specific circumstances of the case, the Court ruled that the form of compulsion, as manifested in this case, did strike at the very substance of the right guaranteed by Article 11. In assessing the necessity of the limitation under Article 11:2 the Court again made a rhetorical reference to the margin of appreciation doctrine as to the proportionality of the interference. There could be no doubt that the limitation was in accordance with law, but the Court again stated, that this form of compulsion was rare within the community of Contracting States and "on the face of it must be considered incompatible with Article 11."<sup>158</sup>

The widening of the context for systematic interpretation in this case is theoretically interesting. It is also ironic, from a traditional international law perspective, given that Iceland was not at the time, and is not presently, a member of the European Community (now the European Union). The norms - or emerging norms - the Court relies on in its construction of the scope of the protected right, were thus not binding upon the Icelandic state, according to traditional international law doctrine. The argument referring to the legal situation in the other member states to the Convention is also interesting. It is not so much *general principles of law* that the Court refers to, but the actual legislation in the member states. This point will be taken up again in chapter 4.

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<sup>157</sup>*Ibid.* As a caveat, the Court then stated that it was not necessary to determine in this instance whether this right was to be considered on an equal footing with the positive right. See *ibid.* in fine.

<sup>158</sup>See *ibid.* paragraph 41.

### 3.2.2 "Private and family life" and the concept "respect"

In one of the first cases regarding Article 8 of the Convention, the *Marckx* case,<sup>159</sup> the European Court openly set out to "clarify the meaning and purport of the words "respect for...private and family life"" not elaborated on in the Court's earlier case-law. In a complex, and much debated judgment, the Court established that Belgian legislation on the civil status of children born out of wedlock and their relation to their mother and mother's families, violated article 8 and 14 of the Convention in conjunction. Under Belgian law an unmarried mother had to establish her motherhood and legal ties with her child, by voluntary declaration or a court declaration. Confronted by this situation, the Court approached the matter by asking whether the natural tie between mother and daughter gave rise to a family life protected by Article 8".<sup>160</sup> Having come to the conclusion that this was so, invoking Article 14 among other grounds, the Court however relied on "evolutive interpretation" in order to promote the legal situation of "illegitimate" children and hamper discrimination against them.<sup>161</sup> Taking as starting point the legal situation in the member states at the time of the drafting of the

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<sup>159</sup> *Marckx* case, Eur. Court H.R., decision of 13 March 1978, Series A, Vol. 31. Quote at paragraph 30.

<sup>160</sup> *Ibid.* paragraph 31. The Court had recourse to both a resolution of the Committee of Ministers of the Council of Europe and systematic interpretation of the Convention itself when deciding, that Article 8 did not distinguish between "legitimate" and "illegitimate" families; the word "everyone" in Article 8 and Article 14 in conjunction with Article 8 underpinned this finding.

<sup>161</sup> Preparing the ground for evolutive interpretation (or eventually working with some concept of "general principles of law") the Court stated (paragraph 41): "It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family. However, the court recalls that this Convention must be interpreted in the light of present-day conditions..."

Convention, the Court then proceeded: "(S)truck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "*mater semper certa est*" the Court referred further to the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children, and the European Convention of 15 October 1975 on the Legal Status of Children Born out of Wedlock. Recognizing the factual situation of limited adherence to these documents (only four states out of ten signatory states had ratified each Convention) that state of affairs was not to be relied on in opposition to the established method of "evolutive interpretation"<sup>162</sup>. The sole existence of these convention was taken as a clear measure of *common ground* in this area amongst modern societies.

Taking into consideration the strongly dissenting opinion of Judge Fitzmaurice, in the *Marckx* case, may help to explain the strong emphasis how much emphasis the majority places on the emerging common grounds in this area. In the dissenting opinion of Judge Fitzmaurice, a clear alternative is to be found, as to the interpretation and scope of the Article. Arguing from a traditional international law perspective, Fitzmaurice claimed that it was abundantly clear and conforming to "the whole background against which the idea of the European Convention on Human Rights was conceived" that regarding the

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<sup>162</sup>The method of "evolutive interpretation" was first referred to in a case preceeding the *Marckx* case by a year - the *Tyrer* case, handed down in 1978. The term is drawn from the consequence of the method, to evolve Convention law, i.e. to interpret the Convention provisions in line with changing situations and social changes. The evolutive interpretation is one of the most problematic method, when approaching the Convention jurisprudence within the framework of the legitimacy of judicial review debate.

protection of Article 8, "the sole object and intended sphere of application" was the "domiciliary protection" as contrasted to "internal, domestic regulation of family relationships".<sup>163</sup> When the innovation of the Court undoubtedly lay in its establishment of "positive obligations" inherent in the required respect for family life, the Court approached that part of the reasoning on a fairly autonomous ground. The requirement to state conduct was, that the state act in a manner that respects "family life". The means of this respect is up to the state, but "law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2."<sup>164</sup>

The three innovations in the *Marckx* case- the evolutive interpretation, the "autonomous" definition of "family life" and the positive obligation of the state to respect an individual's "family life" - have all been taken further in the Court's case law. The combination of the two last mentioned aspects, has in particular been much relied on by applicants. Expanding case law details the obligations of the state to respect "family life". Often only relying on its former precedents and autonomous interpretation of the conception "family life", the Court has managed to loose the conception from a very rigid construction, which would require formalities such as requirement of

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<sup>163</sup>See the *Marckx* case, *supra*, note 159, dissenting opinion of Judge Fitzmaurice, paragraph 7. In an amusing formulation, Fitzmaurice argued the intended scope of the Article to protect the individual so that "(h)e and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply... Such, and not the internal, domestic regulation of family relationships, was the object of Article 8, and it was for the avoidance of these horrors, tyrannies and vexations that "private and family life...home and...correspondence" were to be respected, and the individual endowed with a right to enjoy that respect..."

<sup>164</sup>*Ibid.* paragraph 33.

marriage.<sup>165</sup> This is increasingly done by relying on the guidelines of the Court's case law and less on "common grounds" or "legal consensus" in the member states. The relation between parents and their children is worthy of particular protection in the Court's view. A matter that has increasingly come under scrutiny is the procedural requirements in cases regarding public interference with parents and children.<sup>166</sup>

The Court's construction of "family life" seems to be one of its preferred constructions. When complaints have reached the Court regarding state practice of deporting "aliens", the Court has approached this matter by relying on its established case-law regarding respect for family life, to the exclusion of the respect of "private life" or other provisions of the Convention.<sup>167</sup> In both aforementioned cases, having found violation

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<sup>165</sup>See for example *Keegan v. Ireland* case, Eur. Court H.R., judgment of 26 May 1994, Series A, Vol. 290 where the Court recalled "that the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage" (paragraph 44). The Court found that an adoption of a child, without the consent and knowledge of the biological father, breached his right to respect for family life.

<sup>166</sup>See five separate cases brought against the United Kingdom in 1987 in Eur. Court H.R., series A, Vol. 120 and 121; see also *Olson* case, Eur. Court H.R., judgment of 24 March 1988, Series A, Vol. 130, and *Erikson* case, Eur. Court H.R., judgment of 22 June 1989, Series A, Vol. 156. In the last mentioned judgment, the Court stated that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life; furthermore, the natural family relationship is not terminated by reason of the fact that the child has been taken into public care" (paragraph 58).

<sup>167</sup>In the *Moustaquim v. Belgium* case, Eur. Court H.R., judgment of 18 February 1991, Series A, Vol. 193, the Court found a decision to deport Mustaquim, who had lived in Belgium since early age with his family, disproportionate to the aim pursued. In the *Beldjoudi v. France* case, Eur. Court H.R., judgment of 26 March 1992, Series A, Vol. 234-A, the Court similarly came to the conclusion that it would infringe the applicants right to respect for family life if deportation were carried out. Beldjoudi was born in France of French-Algerian parents and had lived in France all his life. He had been married to a French woman for over twenty years and lived in France for over forty years. He had no links with Algeria except for nationality. In evaluating the necessity of the infringement, the Court acknowledged that it was primarily for the member states to "maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty . obligations, to control the entry, residence and expulsion of aliens..." *Ibid.*, paragraph 74. However, in so far as the decision might interfere with a right protected under Article 8:1 of the Convention, the requirement of necessity and proportionality was held to come into play.

of the right to respect for family life, the Court found it unnecessary to consider the applicants submission that the decision of deport violated their right to respect for private life.

In the *Johnston and Others* case, where the prohibition of divorce under Irish law came under the Court's scrutiny, neither systematic interpretation (involving article 8) nor the evolutive method of interpretation turned out to be decisive. The Court took a conservative approach to the construction of Article 12, which was found to protect the *right* to marry, but not the *right* to divorce. Here, the Court fell back on the *travaux préparatoires*, and the intention of the contracting parties to leave the matter without the scope of the Convention. Article 8 was not found to change that conclusion, as to the cohabiting partners, Mr. Johnston and Miss Williams-Johnston.<sup>168</sup> The legal status of their mutual child was, on the other hand, found insufficient, and the respect for family life guaranteed in Article 8 was found to pose positive obligations on the state, as to recognition of illegitimate children, an obligation which Ireland was found to have violated.<sup>169</sup>

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<sup>168</sup>See the *Johnston and Others* case, Eur. Court H.R., judgment of 18 December 1986, Series A, Vol. 112. Relying on the "ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose" the relation to Article 12 was decisive for the Court in its decision. The method of "evolutive" interpretation was not, in this case, seen as being able to establish a right that was not included in the provision at the outset, and was, according to the *travaux préparatoires* deliberately omitted. The methodology is markedly different from the one found in the *Young, James and Webster* case and the *Sigurður Á Sigurjónsson* case regarding Article 11, see *supra*, chapter 3.2.1. Partly, the Court was further constrained in this case, by a then recent protocol to the Convention, Protocol No. 7, that added certain rights relevant to marriage to the Convention, but did not include the right to divorce, see *ibid.*, paragraph 53.

<sup>169</sup>*Ibid.* paragraphs 70-77.



The European Court of Human Rights has in general given a broader scope to the "right to respect for family life" than for which a traditional interpretation of the provision would account. An interesting aspect of the Court's interpretation is the sensitivity to the factual situation in each case, and the actual consequences that interference would have on established relations that count as family relations.<sup>170</sup>

The framework is however shifting and confusing. When a Swiss applicant complained over a state-imposed three-year prohibition on remarriage, this situation was found to violate his right under Article 12 of the Convention.<sup>171</sup> Carefully distinguishing the case from the *Johnston and Others* case on the point of the "right to divorce", the Court's method from there revolved around common grounds in the member states. The case

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<sup>170</sup>See, for example, case of *Kroon and others v. the Netherlands*, *supra*, note 16, where the majority of the European Court of Human Rights held that the right to respect for family life - guaranteed in article 8 of the Convention - imposed a positive obligation on a state to ensure by law the possibility for a married woman to refute her husband's paternity of her child, and thereby enable recognition of its biological father. Evaluating the state's legislation on status of children, the legal presumption that a child is the child of the mother's husband and the possibility of refuting this, the Court stated: "In the Court's opinion, 'respect' for 'family life' requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the 'respect' for their family life to which they are entitled under the Convention." *Ibid.* paragraph 40. Comparing this case to the 1984 *Rasmussen* case, Eur. Court H.R., judgment of 28 November 1984, Series A, Vol. 87, shows a considerable narrowing of the member states margin of appreciation. In that case a father argued discrimination under Article 14, because of different rules regarding refutation of paternity. Time limits were different for the child and the mother on the one hand and the mother's husband (the presumed father) on the other hand. The Court found that there was no breach of Article 14 and Article 8 taken together in the case, essentially referring to the state's margin of appreciation. The Court justified its conclusion in the following way: "The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States... Examination of the Contracting States' legislation regarding paternity proceedings shows that there is no such common ground and that in most of them the position of the mother and that of the husband are regulated in different ways." *Ibid.* paragraph 40 and 41.

<sup>171</sup>See *F v. Switzerland*, Eur. Court H.R. judgment of 18 December 1987, Series A, Vol. 128.

was argued only as a breach of Article 12 and no recourse was had to Article 8. Nor was there any reference made to other international instruments.<sup>172</sup> Invoking common grounds in the member states, the Court however found that this matter was so closely bound up with cultural traditions, that common standards could not be imposed.<sup>173</sup> After examination of the Government's arguments, and some assessments as to the "temporary prohibition of remarriage", in general and in the concrete case, the Court found that the disputed measure "affected the very essence of the right to marry" and was disproportionate to the legitimate aim pursued.<sup>174</sup> This was therefore a violation of Article 12.

As regards the right to respect for "private life" guaranteed in Article 8, the European Court of Human Rights has again given meaning to the "conception" on a fairly autonomous ground, not constrained by the "original intention" of the drafters of the Convention. In line with its decisions discussed above, the Court found a state in breach of its obligations under article 8, for not providing an effective remedy for a

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<sup>172</sup>Two aspects are curious, however. One is the Court's reference to the opinion of a "Study Group on the partial reform of family law" and "Committee of Experts on Family Law Reform" in Switzerland on the appropriateness of the restriction of remarriage for the aim of "stability of marriage". Another aspect is the Court's unusual method of speculation - contrary to its explicitly concrete approach. The Court thus invoked in its reasoning that "an unborn child may also be adversely affected by such a prohibition", a speculation that was not called for by the facts of the case. See *ibid.*, paragraph 36.

<sup>173</sup>See *ibid.* paragraph 33, subparagraph 2: "The Court notes that a waiting period no longer exists under the laws of other Contracting States ... In this connection, it recalls its case-law according to which the Convention must be interpreted in the light of present-day conditions... However, the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that aspect offends the Convention, particularly in a field -matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit".

<sup>174</sup>*Ibid.* paragraph 40.

victim of a sexual assault.<sup>175</sup> In this case the applicability of Article 8 was not disputed by the Government, and the Court established, in general terms, that "private life" was a concept "which covers the physical and moral integrity of the person, including his or her sexual life".<sup>176</sup>

In an earlier decision, the first case regarding "homosexual rights", the "autonomous" interpretation was not quite as "autonomous" as in the *X and Y* case. In the *Dudgeon* case, the argument for the existence of an interference with Article 8:1 seems somewhat circular, as the "right" seems already inherently limited by the relevant legislation. The Court referred to the conclusion of the Commission that, "the legislation complained of interferes with the applicant's right to respect for his private life guaranteed by Article 8:1, *in so far as it prohibits homosexual acts committed in private between consenting males*". The Court quoted the Commission's report and saw no reason to differ on the view that, "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life".<sup>177</sup> Thus, the Court's working conception of the notion "private life" includes sexuality, as "a most intimate aspect of private life" and "an essentially private manifestation of the human personality".<sup>178</sup> As the Court accepted the aim of the legislation as the protection of

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<sup>175</sup>See *X and Y v. The Netherlands*, Eur. Court H.R. judgment of 26 March 1985, Series A, Vol. 91.Y, a mentally retarded girl was sexually assaulted in a home where she resided. Criminal legislation required her to complain of the assault, but she didn't have standing because of her handicap. The "gap" in Netherlands' legislation, disclosed by the case, was found to constitute a breach of the state's obligation under Article 8 as regards "respect" for private life.

<sup>176</sup>*Ibid.* paragraph 22.

<sup>177</sup>See the *Dudgeon* case, Eur. Court H.R., decision of 22 October 1981, Series A, Vol. 45, paragraph 40 and 41. Emphases are mine.

<sup>178</sup>*Ibid.* paragraph 52 and 59.

morals in Northern Ireland, a margin of appreciation was established. However, a narrow margin was established because of the activities involved being such an intimate aspect of private life. Explicitly stating that the Court was not concerned with making any value-judgment as to "the morality of homosexual relations between adult males", the evaluation of the necessity of the legislation proceeded in a complex dialogue about common standards and lack of common standards. In re-examining the relevance of the Government's arguments, the Court had recourse to the context of Northern Irish society, stating:

The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland... Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities.<sup>179</sup>

The Court thus found moral climate to be relevant - but not sufficient. Comparing the time when the legislation was enacted to present day, the Court stated that there was "now a better understanding, and in consequence an increased tolerance of homosexual behavior 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".<sup>180</sup> Having recourse to this, and the actual situation in Ireland, where the legislation had not been enforced for some time, the Court's conclusion was that there was no "pressing social need" to make consensual

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<sup>179</sup>*Ibid.* paragraph 56.

<sup>180</sup>*Ibid.* paragraph 60.

homosexual acts criminal offenses, "there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects of the public."<sup>181</sup>

Whereas the Court gives substantial consideration to the inherently "private" aspects of one's sexual orientation, in the cases regarding rights of homosexuals, the same can not be said for the problematic sphere of lives of transsexual people. In the two well known cases against the United Kingdom, the *Rees* case and the *Cossey* case<sup>182</sup> the applicants claimed that through legislation and practice that hindered their full integration into social life, they were victims of United Kingdom's breach of Article 8. Under United Kingdom legislation changes or amendments in public registers were not possible. This led to a situation, where "legal" sex, in the case of *Rees* and *Cossey*, was different from their then actual (acquired) sex.

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<sup>181</sup>*Ibid.* Reiterating the general methodological framework, in the *Norris* case, Eur. Court H.R., judgment of 26 October 1988, Series A, Vol. 142, the conclusion was the same. Reference was again made to the actual situation and "private life" of homosexuals, in response to the Governments claim, that the Court should not substitute its judgment for the judgment of the national authorities (margin of appreciation). The Court held: "Applying the same tests to the present case (as in the *Dudgeon* case), the Court considers that, as regards Ireland, it cannot be maintained that there is a "pressing social need" to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that "such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved." *Ibid.* paragraph 46. In 1993 a case was brought before the Court, essentially the same, but against Cyprus. The Court merely referred to its former case law on that occasion, See *Modinos v. Cyprus*, Eur Court H.R., judgment of 22 April 1993, Series A, Vol. 259.

<sup>182</sup>See *Rees* case, Eur. Court H.R., judgment of 17 October 1986, Series A, Vol. 106, and *Cossey* case, Eur. Court H.R., judgment of 27 September 1990, Series A, Vol. 184.

The Court's method here was to refer to earlier case law regarding positive obligations of states to respect people's private and family life. The Court in particular focused on determining "whether or not a positive obligation exists" and what was inherent in "respect". No particular mention was made of the "autonomous" notion of "private life". The Court approached the interpretation in these cases through Article 8:1 and coming to the conclusion that there was no breach of Article 8 in the cases, a section 2 analysis of balancing the interests of the individual and the state, was not necessary. In finding that there was no breach of Article 8, the Court however drew on, first, lack of common grounds in member states' legislation,<sup>183</sup> and second, on detailed observation of the applicants situation.<sup>184</sup> If the reasoning in these cases is easily criticized, the situation became even more confused when the Court in a decision of 25 March 1992 on materially similar facts, ruled that France had breached its obligations under Article 8. The case was distinguished, however, on the fact, that France held an official civil status register which was not the case in the United Kingdom.<sup>185</sup>

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<sup>183</sup>In the *Rees* case, the Court observed, that several states had given transsexuals opportunity to change their personal status whereas others, had not. "It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage." See *Rees* case, *ibid.* paragraph 37. In the *Cossey* case, the Court seems pushed further into the extremely "concrete" line of reasoning as regards the common grounds, arguing: "There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989...and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe ...- both of which seek to encourage the harmonisation of laws and practices in this field - reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the *Rees* judgment. Accordingly this is still, having regard to the existence of little common ground between the Contracting States, and area in which they enjoy a wide margin of appreciation." See the *Cossey* case, *ibid.* paragraph 40.

<sup>184</sup>The methodology of the Court in assessing *Ree's* situation seems to proceed on some kind of formal discrimination analysis, where *Rees'* situation as to registration of personal information was compared to the situation of people in general, see the *Rees* case, *ibid.* paragraph 40.

<sup>185</sup>See *B v. France*, Eur. Court H.R., judgment of 25 March 1992, Series A, Vol. 232-C.

As pointed out by Laurence Helfer, not only does this trilogy of cases create confusion as to the scope of the right to respect for private life under Article 8 of the Convention; more serious confusion rises about the Court's methodology. The judgments in the trilogy cases seriously jeopardize the "margin of appreciation" doctrine, and the principle that the member states are primarily responsible for guaranteeing to everyone within their jurisdiction the protection of the Convention. In particular, Helfer's analysis is convincing, as he points out, that France had in fact taken some steps to improve the legal status of transsexuals, whereas the United Kingdom had not.<sup>186</sup>

In the next chapter I will take up in more details the Courts consensus-methodology as well as the relation between the doctrine of margin of appreciation and the "autonomous" interpretation. In reviewing my ideas and analyses so far, it might seem that I have been caught in my own methodology. Setting out to underpin my contention that the Court's jurisprudence is much affected by assumptions from formalism and positivistic conception of law, some cases have supported that contention. However, it is clear from other cases, that the Court is sensitive to the facts of each particular case,

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<sup>186</sup>See Helfer, *supra*, note 11, at 146-154. At 152 Helfer states, in assessing the case of *B v. France*: "Although this reference to a lack of consensus pays lip service to the Cossey and Rees precedents, the Court sharply undercut the analytical underpinnings that gave those judgments their jurisprudential force". The Court used the margin of appreciation terminology in its conclusion, arguing: "The Court thus reaches the conclusion, on the basis of the above-mentioned factors which distinguish the present case from the Rees and Cossey cases and without it being necessary to consider the applicant's other arguments, that she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual... has not been attained, and there has thus been a violation of Article 8." See *B. v. France*, *supra*, note 185, paragraph 63.

considering the effective protection of the rights guaranteed. These forms of reasoning, are more appropriately described as "practical reasoning" or "rhetoric" than as bound up in a formalist conception and rules of logic.<sup>187</sup>

The case law however manifests elements of formalist conceptions that are sometimes prevailing, sometimes not. And these are the elements I argue, that have to be observed and kept in mind, and may not be theoretically construed away in reading the jurisprudence of the Court in its case-to-case approach. The framework the interpretive work takes place within is a framework of the Convention as a system of norms. Reading the meaning into the "concepts", the Court, in its "autonomous" method, singles out the "concepts", such as "family life", "private life", "respect" etc., and the argumentative process revolves around the content of these concepts and their systematic relation to other "concepts" of the Convention. Sometimes we see logical - conceptual - formalist construction of the protected "rights" and limitations. An approach that is less frequently used in the last ten years than before, I would have argued has had lesser and lesser impact on the case law, if it were not for worrying reminders such as the recent decision in the *Otto-Preminger-Institut v. Austria* case<sup>188</sup>. Overall, the importance of this approach, which is traditional for the legal thought and practice of the member states of the Council of Europe, must not be undermined, if not

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<sup>187</sup>The most important work on alternative (and less formal) legal reasoning in European scholarship is the work of Chaim Perelman. See in general Ch. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation*. Translated by John Wilkinson and Percell Whaver (Indiana: University of Notre Dame Press, 1969).

<sup>188</sup>*Otto-Preminger-Institut v. Austria*, Eur. Court H.R., judgment 20 September 1994, Series A, Vol. 295-A.



for other purposes than to examine how the approach either reconciles - or rests in tension with - other methods used in interpreting the Convention.

In the *Otto-Preminger-Institut v. Austria* case, a non-profit institution intended to show a film called "Council in Heaven", based on a play from the year 1894. Allegedly blasphemous and offensive to the values of the Roman Catholic Church, the film was seized and later subject to forfeiture under the Austrian criminal code. Artistic freedom was, on the domestic level, seen as limited by the right of others to freedom of religion. The applicant association argued a violation of Article 10 of the European Convention. Referring to its recent judgment regarding proselytism,<sup>189</sup> the Court stated, that Article 9 of the Convention, guaranteeing freedom of thought, conscience and religion, was "one of the foundations of a "democratic society" within the meaning of the Convention."<sup>190</sup> "It is" the Court states, "in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life." Arguing from there, that the manner in which religious doctrines is opposed is a matter of which can engage the *responsibility* of the state in relation to the peaceful enjoyment of the rights guaranteed in Article 9, the Court, again referring to the *Kokkinakis* case finds that a state may legitimately take measures aimed at repressing certain forms of conduct - including expression - if incompatible with the respect for freedom of thought, conscience and religion of others. "The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in

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<sup>189</sup>See *Kokkinakis v. Greece*, Eur. Court H.R., judgment of 25 May 1993, Series A, Vol. 260. In this case, the Court did not find an interference in the form of a criminal sanction for proselytism justified, and accordingly there was a breach of Article 9 of the Convention.

<sup>190</sup>*Otto-Preminger-Institut v. Austria*, *supra* note 188, paragraph 47.

harmony with the logic of the Convention".<sup>191</sup> Engaging in its evaluation of the "necessity" of the seizure and forfeiture in a democratic society, the Court re-invokes the essential importance of freedom of expression as a foundation of democratic society; Granting freedom to utter and receive information and ideas, both inoffensive, and those that offend, shock and disturb; Those are the demands of tolerance and pluralism, without which there is no democratic society.

"However," the Court then went on to argue, "as is borne out in the wording itself of Article 10:2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs." This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the legitimate aim pursued..."<sup>192</sup>

As "the significance of religion in society" was found not to be a "uniform conception" the Court found it to be impossible to "arrive at a comprehensive definition" of what constituted a permissible interference with the right to freedom of expression, when this right clashed with religious feelings of others. Re-examining the Austrian decision of seizure and forfeiture of the film, and mentioning both the national margin of appreciation and that the Roman Catholic religion was the religion of overwhelming

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<sup>191</sup>*Ibid.* paragraph 47, subparagraph 3.

<sup>192</sup>*Ibid.* paragraph 49.

majority of Tyroleans, the Court was satisfied that the national authorities had not overstepped their margin of appreciation.<sup>193</sup>

Cases referred to in the foregoing analysis manifest as well the formalist problem of "subjectivity" of meaning. If the normative aspects of the "rights" defined in the Convention are not "there", in the core or essence of the right (which they curiously enough sometimes are), the methodology relied upon is to read into the norms a meaning, based on a consensus. The consensus or *common grounds* is either arrived at through an extended systematic method, involving either common grounds emerging from the international community through international or regional instruments, or simply common grounds drawn from the legal systems - or legislation of the member states of the Council of Europe. The consensus-methodology sometimes gaining an overarching weight in the Court's reasoning process, as for example the norm of gender equality recently has gained<sup>194</sup> this method of construction remains problematic. To draw on Koskeniemi's framework of the tension between the normative and the

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<sup>193</sup>Only three judges of nine raised concerns about the Court's decision, in particular noting, that a state's margin of appreciation should not be a wide one, in cases regarding freedom of expression, and stating that "it should not be open to the authorities of the State to decide whether a particular statement is capable of 'contributing to any form of public debate capable of furthering progress in human affairs'; such a decision cannot but be tainted by the authorities' idea of 'progress', see *ibid.*, Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, paragraph 3, subparagraph 2 and 3.

<sup>194</sup>See the *Abdulaziz, Cabales and Balkandali* case, Eur. Court H.R., judgment 28 May 1985, Series A, Vol. 94, where, in a case regarding immigrants, the important goal of gender equality turned out to be decisive for the Court in deciding state's due respect for family life. See also *Burghart v. Switzerland*, Eur. Court H.R., judgment of 22 February 1994, where the Court found a husband's complaint of not being able to put his surname in front of his wife's surname, as a joint family name, justified and found Switzerland in breach of its obligations under Article 8 of the Convention. The Court here stated: "The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention..." *Ibid.* paragraph 27.

concrete, the Court's work can be read as showing this tension, and in some cases, the approach can be criticized for taking the positivistic view to its extremes, as basically reading state will into the human rights norms to be applied. This is, I argue, particularly clear, in the Court's trilogy regarding rights of transsexuals.

In the following chapter, I will focus less on the formalist framework and discernible elements in the Court's case law and more on the elements, that I relate with positivistic legal tradition and positivistic approach in international law, such as the importance of consent - and the problem of moral relativism and distinction of the moral from the "legal". I will focus in detail on the Court's consensus methodology from a critical point of view. My approach is still to focus on the methodology of the Court as it manifests itself in the Court's case law, and try to discern the underlying assumptions.

An alternative to this approach would be to not loose the thread of practical reasoning, also found in the Court's case law and pursue analysis of the elements of the reasoning that can be categorized as manifesting that approach. There are two reasons for my not trying that approach. The first is inherent in my contention that the prevailing formalist positivistic traditions are more important in the Court's reasoning than sometimes held, and furthermore, that the Court's construction of consensus is much more affected by underlying assumptions from liberal theory of consent as basis for obligation, than relying on or manifesting a theory of argumentation based on communicative action, such as could be theoretically underpinned by reference to Perelman's work, and on a yet more theoretical level, by reference to the work of Jurgen Habermas. This, I argue, can be derived from the consensus-methodology of the Court, that boils down to require

state consent, that sometimes is taken to the formulation, that member states' consensus as read through legislation, is required. The second reason for not tracing the anti-formalist influence of the New Rhetoric on the jurisprudence of the European Court, is based on Goodrich's analysis. Goodrich argues convincingly, that Perelman's theory is itself bound up in formalist assumptions and the rationalist tradition of logic that it seeks to denounce.<sup>195</sup>

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<sup>195</sup>See Peter Goodrich's account of the history of rhetoric and its importance for legal thought, Goodrich, *supra* note 17 at 85-124. See in particular his assessment of the New Rhetoric, as based on formalist premises, at 111ff. Goodrich states: "It assumes the specificity and efficacy of the legal to be self-evident. It is concerned not with the political and institutional power that underpins and guarantees the authority of legal discourse, but rather with abstracting idealistically from the normative justificatory techniques of legal judgment and of the legislative process generally, the self-image or self-presentation of the law, to enumerate a generic list of the rhetorical, persuasive and argumentative mechanisms that permit the law to postulate that it is based upon and adequately reflects a consensus as to values and as to social justice." *Ibid.* at 111-112.

#### 4. THE CONSENSUS METHODOLOGY AND THE DOCTRINE OF MARGIN OF APPRECIATION

##### 4.1 The consensus methodology in the Court's jurisprudence

In a recent analysis of the European Court's current methodology, Laurence R. Helfer has drawn up a comprehensive description of the consensus-methodology operating in the Court's reasoning.<sup>196</sup> Helfer's critical point is made from a perspective that privileges *coherence*. His implied criticism is that the Court's jurisprudence is incoherent to the point of the Court losing both its credibility and legitimacy. Eventually, it is Helfer's point to argue for the necessity of the Court's articulation of its perspective - or to provide a theory underpinning its practice. Given that the Court does not see itself bound by the intention of the drafters, but imposes normative standards that are increasingly drawn from "uniformity" in legislation or practice - the so called "European consensus" - Helfer submits, that without "a consistent definition of the conditions under which emerging human rights' principles should be incorporated into the Convention, the tribunals risk judicial illegitimacy whenever they depart from an interpretation based on the intent of the Convention's drafters."<sup>197</sup>

There are assumptions in Helfer's framework that are based on traditional international law theory, approaches from formalism and formal arguments about the legitimacy of judicial review. Helfer doesn't try to break up this framework throughout his analysis.

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<sup>196</sup>Laurence R. Helfer, "Consensus, Coherence and the European Court of Human Rights" *supra*, note 11.

<sup>197</sup> Helfer, *ibid.* at 135.

His proposal, as to coherent jurisprudence based on consensus, turns out to be to diminish the weight of consensus-methodology in the jurisprudence, because of its ambiguity. His conclusion - and simultaneously prescription - is that the consensus methodology should come into play as an interpretive tool, only "after structural or textual approaches have been exhausted".<sup>198</sup> This method would again, in Helfer's view, limit the consensus inquiry to the human rights concepts, "explicit or implicit in the language of the Convention". Proposing a "consensus continuum" Helfer argues that reference could be made to the evolving regional trends in human rights, when defining the contours of the right, but only after defining the scope of the right, by more orthodox methods of interpretation.<sup>199</sup>

Even if I do not altogether agree with Helfer's proposal as to the pursuit and import of the consensus-methodology in the future, his descriptive account of the consensus-methodology is interesting. He distinguishes three factors that the Court and Commission rely on as evidence of consensus. These are: first, *legal consensus*, as

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<sup>198</sup>"Although the consensus inquiry is a vital aspect of Convention jurisprudence, the controversies created by its application argue in favour of using it as an interpretative tool only after structural or textual approaches have been exhausted. Construing the plain meaning of individual articles, their relationship to one another in the Convention as a whole, and where appropriate, writings and statements from the travaux préparatoires, may reveal a rights-inclusive or rights-limiting interpretation that, because it is grounded on widely accepted principles of treaty construction, will command large majorities on the Court and Commission. Yet even where the jurists disagree over whether the existence of a right can be implied from the Convention's object and purpose, proper application of a structural or textual methodology provides greater stability than application of the consensus inquiry." See Helfer, *ibid.* at 155.

<sup>199</sup>See Helfer, *ibid.* at 157: The proposal goes: "Rather than approach this analysis on an ad hoc basis, the Court and Commission should search for such trends along a structured continuum that recognizes the importance of the Convention's text, the extent of domestic law reforms, and the existence of international treaties and regional legislation in assisting the formation of a common European perspective. At each stage along this continuum, the Court and Commission can claim greater authority for accelerating the process of consensus formation and creating a uniform rule of rights protection."

demonstrated by domestic statutes in the member states, international treaties and regional legislation;<sup>200</sup> second, *expert consensus*,<sup>201</sup> and third, European *public consensus*, which refers to public opinion - alias public sentiment or feeling in a particular field. Further, Helfer states:

Although these elements appear with some regularity in Convention case law, the tribunals have yet to clarify the relative weight that they should be given in determining the presence or absence of an evolving European viewpoint. For example, the Court and the Commission have not specified what percentage of the Contracting States must alter their laws before a right-enhancing norm will achieve consensus status. Nor have they defined the degree to which international treaties and regional legislation are relevant to their analysis.<sup>202</sup>

Helfer's causal link between authority and legitimacy is obvious from his emphasis on the case law as it is. It is not to be questioned, but instead reiterated, established and explained by the Court. This comes through as well when he addresses the different evidence of consensus, accepted by the Court. The established method of simply recognizing the *de facto* legal changes in all member states and incorporating these changes into the Convention does thus, under this approach require "little theoretical reasoning and poses only a minimal threat to the Court's legitimacy", whereas the Court's more activist approach, of reading non-legal "emerging" norms and public opinion into the norms of the Convention, calls for a justification.<sup>203</sup>

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<sup>200</sup>See Helfer, *ibid.* at 139. By "regional legislation" Helfer refers to "the work product of the legislative and executive branches of the Council of Europe". *Ibid.* note 24. Emphases in the text are mine.

<sup>201</sup>Expert consensus can, in Helfer's analysis, be everything from expert opinion on mental disability, to an opinion of family law experts as to a member state legislation's compliance with the Convention, see further *ibid.*

<sup>202</sup>Helfer, *ibid.* at 140.

<sup>203</sup>See Helfer, *ibid.* at 142-143.



Even if Helfer's analysis proceeds arguably within the framework of the Court's jurisprudence and traditional international theory, his analysis draws attention to the core of the Court's legitimacy dilemma.<sup>204</sup> Helfer's reaction is to propose a principled basis for such a consensus inquiry, so that the Court may maintain its legitimacy. What interests me, on the other hand, is *why* and *how* the various formulations of consensus and the "evidence" thereof, such as legal consensus, international consensus, regional consensus, expert consensus and public consensus, is seen as having a legitimating weight in interpreting a document imposing human rights' standards on the signatory states.

As we saw in the case-analysis in chapter 3, when focusing on the "autonomous" and "systematic" interpretation of the Convention, the Court, reiterating its "autonomous" interpretation extensively drew on established or emerging consensus on the international and regional level, in particular referring to common (legal) traditions, practices or legal situation in the member states. Public opinion or consensus, in particular involving moral aspects, poses more difficulties to the Court's positivistic construction of consent, and, as will be seen, reference to moral consensus often turns out to be a moral consensus discernible through legislation.<sup>205</sup>

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<sup>204</sup>See Helfer's analysis of the "transsexual cases", the *Rees* case (Eur. Court H.R., Series A vol. 106), *Cossey* case (Eur. Court H.R., Series A vol. 184) and *B. v France* (Eur. Court H.R., Series A vol. 232), *ibid.* at 146-154, and *supra*, chapter 3.2.2.

<sup>205</sup>See the *Handyside* case, Eur. Court H.R., Series A, Vol. 24, see *infra*, chapter 4.2. Expert consensus is in the Court's case law relied on as a means to evaluate the development in opinion and changes in social circumstances. Expert opinion is then referred to, to underpin the Court's reasoning as to the necessity of interference with protected rights. See for example extensive reference to the "Wolfenden report" in the *Dudgeon* case, paragraph 49, and the *Weber* case, see *infra* chapter 4.2.

Referring back to the theoretical assessment of the alleged importance of consensus as a basis for political obligation, and the various constructions in political philosophy of the required hypothetical or factual consent, the jump from the described theories to the requirement of actual consensus of states and individuals is enormous. Further, it remains problematic, how this consensus can serve directly as a normative element. When translated from legal theory to legal practice, the positivist construction of consensus arguably becomes factual, and extremely narrow. Furthermore, because of the alleged impossibility to say something about morals, moral consensus is approached through legislation and legal consensus.

#### **4.2 Autonomous interpretation of freedom of expression and the doctrine of margin of appreciation**

To pursue the analysis of positivistic elements in the Court's reasoning, as manifested in its consensus-methodology, we find ourselves again in the framework of "autonomous" interpretation and the "margin of appreciation" doctrine. It is in particular interesting to analyze Article 10 from this perspective, as the Article lays down one of the fundamental aspects of democracy, the right to freedom of expression, and the right to impart and receive ideas.

It must be admitted that the European Court of Human Rights has approached the interpretation of Article 10:1, on a fairly "autonomous" ground, establishing the right to hold opinions, to receive and impart information and ideas, as laid down in Article 10:1. The common democratic traditions of the member states of the Council of Europe have

here, apparently, formed the interpretive framework, without much articulation of the essence of the right to freedom of expression. It doesn't often come to a "definition" of the concept "expression", per se, and most often, the interference with the right to freedom of expression is not contested and the actual decision-making regards the balancing of the necessity of the interference.

When artistic expression of a painter was at issue, the Court however, autonomously, established that such an expression of information and ideas fell under the ambit of Article 10.<sup>206</sup> In the same judgment, the Court established, that not only the person holding or uttering opinions and ideas is protected, but others promoting the ideas as well. Thus, in the *Muller and Others* case, Muller's expression in the form of paintings fell under Article 10:1 as well as the "expression" of the nine organizers of the exhibition, "giving him the opportunity to show (the paintings) in public".<sup>207</sup>

When the protection of article 10 was extended to other than persons this was as well done without much ado. When constructing the article so as to protect reception of television programs by means of an aerial, the company claiming to be victim of

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<sup>206</sup>See *Muller and Others*, Eur. Court H.R., judgment of 24 May 1988, Series A, Vol. 133, paragraph 27, subparagraph 2: "Admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds." Interestingly enough, the Court then had recourse to the International Covenant on Civil and Political rights to support this construction, referring to Article 19:2 of ICCPR, "which specifically includes within the right of freedom of expression information and ideas 'in the form of art'".

<sup>207</sup>See *ibid.* at paragraph 27, subparagraph 1. This is also clear from the cases regarding freedom of the press, and persons to impart information.

interference of its right, Autronic AG, was accepted as a victim by the Court, which reasoned, in the following way:

In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10. The Article applies to "everyone", whether natural or legal persons.<sup>208</sup>

It was in interpreting Article 10 that the Court first came to lay down in detail its doctrine of margin of appreciation. In a case regarding the United Kingdom's alleged breach of the applicant's right to freedom of expression, the Court first articulated the margin of appreciation method. This was in the *Handyside* case.<sup>209</sup> Handyside, a publisher in London, had a book by two Danish authors translated and adapted into English and published. The book, called "The Little Red Schoolbook", was a reference book for young people, discussing matters relating to education, relations between teachers and school-children, children and parents, and matters of sexuality, relationships and sexual behavior.<sup>210</sup> Following newspaper articles, where accounts of the book's contents were published, seizure warrants as well as summonses were issued against Handyside under the Obscene Publications Acts from 1959 and 1964. He was

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<sup>208</sup>See *Autronic AG* case, Eur. Court H.R., decision of 20 June 1989, Series A, Vol. 178, paragraph 47. The Court furthermore referred to its previous judgments, where profit making corporate bodies had argued breach of Article 10; i.e. the *Sunday Times* case, see *infra* note 216, the *Markt Intern Verlag GmbH and Klaus Beermann* case, Eur. Court H.R., Series A, Vol. 165 and the *Groppera Radio AG and Others* case, Series A, Vol. 173. In none of these judgments was the issue particularly discussed, see further *infra*

<sup>209</sup>See the *Handyside* case, Series A, Vol. 24

<sup>210</sup>See *ibid.* paragraph 20, for the description of the book. Out of 208 pages, a twenty-six page chapter was devoted to matters of sexual behaviour and sexuality.

convicted under the statute and the seized matrix and copies of the book subject to forfeiture. Before the Commission, Handyside complained that the actions taken by the United Kingdom were in breach of his right to freedom of thought, conscience and belief under Article 9; his right to freedom of expression under Article 10; and the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention. Furthermore, Handyside invoked Article 14, the non-discriminatory provision. It was only the alleged breach of Article 10 that came to be decided by the Court. It was not disputed that the measures taken by the authorities constituted an interference with Handyside's right to freedom of expression. The matter to be decided was if these infringements were justified under section 2 of Article 10.

The Court stressed the point that the Convention system left it primarily to the contracting states to secure the rights and freedoms of the Convention, under the supervision of the Convention Organs. The Court found these considerations, on its own subsidiary role, particularly relevant in applying Article 10:2, on the limitations on the right to freedom of expression. Furthermore, the argument went:

In particular, it is not possible to find in the domestic laws of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. ... (i) t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Consequently, Article 10:2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the

bodies, judicial amongst others, that are called upon to interpret and apply the laws in force..."<sup>211</sup>

The most straightforward reading of the Court's reasoning is reading it as an argument of *restricted scope of judicial review*. The line of reasoning is to be traced back to the *lack of legitimate power*, that again is equated with the lack of consensus in the member states on matters such as morals. Explicitly rejecting the possibility of a universal construction of morals (and thus normativity drawn from such a code), the Court's construction shifts between the formal (conceptual) and the factual. There is no uniform *conception* of morals to be found in the member states, and furthermore, it is not possible to find such a conception in the *domestic law* of the various contracting states. The operating idea of law seems to be highly positivistic. Norms regarding morals seem, in the Court's construction, to be empty of content; there is only relative meaning granted to them by each state, through legislation. Further, apparently drawing on positivist emphasis in international law, the Court finds that it is not for it to judge if the limitation on the right to freedom of expression is legitimate in this case, as the Court cannot draw on norms consented to by the member states.

There is, however, another possible reading of the Court's margin of appreciation doctrine. This argument is also rooted in observance of the practice of the Court itself, but sets out to look for a different conception of law, in the Court's interpretive work. This is the second proposed reading, one that is open to the Court's construction of law as a tradition. If we read the quoted paragraph from the *Handyside* case from this perspective, it reads as the view that conceptual uniformity is impossible, as regards

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<sup>211</sup>*Ibid.* *Handyside* case, paragraph 48.

moral views in different societies. The closeness of the national authorities to the actual tradition therefore guarantees the necessary sensitivity towards both the factual and the evaluative circumstances. This is again a conception that undermines universal normativity. This time, however, normativity is not reduced to state will or legislation, but is instead reduced to being constituted by and in the smallest thinkable unit in the international society, the immediate community. However, if we apply Koskenniemi's framework, this construction will easily lead to apology for state will. The reasons of the states for interfering and violating individual rights, are self-justificatory, and the Court applying universal standards or uniform concepts is illegitimate in its re-evaluation of the case. Yet, if we follow the reasoning of the Court throughout, the Court seems to finally decide the case with reference to what the protection of the morals of the young requires.

This dilemma is discernible in the judgment, where the Court re-establishes its legitimate power of review. This the Court does in the *Handyside* case, by establishing, that even if the member states have a margin of appreciation, it is not an unlimited power of appreciation, but under the Court's supervision.<sup>212</sup>

What then are the standards to which the Court measures state activity? At this stage, it was neither uniformity in member state legislation or practice,<sup>213</sup> nor the broad

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<sup>212</sup>See the *Handyside* case, paragraph 49. The Court thus established that it was "empowered to give the final ruling on whether a "restriction" or "penalty" (was) reconcilable with freedom of expression as protected by Article 10".

<sup>213</sup>The applicants argument, that translations of the "Little Red Schoolbook" circulated freely in the majority of the member states, did not persuade the Court to find a violation of the Convention.(see *ibid.* paragraph 57). Nor did the Court's reference to the importance of free circulation of information and

principles of freedom of expression as a basis for a democratic society, that turned out to be decisive for the Court. However, through a thorough re-evaluation of the expressed and tacit arguments of the national judges in the particular case, and the facts of the case, the Court came to the conclusion, that "(i)n these circumstances, despite the variety and the constant evolution in the United Kingdom of views on ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it." <sup>214</sup>

The doctrine of margin of appreciation has developed, and taken on many applications, since the *Handyside* case in 1976.<sup>215</sup> However, soon after the *Handyside* case. the

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ideas, for the purpose of pluralism, tolerance and broadmindedness, as necessary elements of a democratic society, prevail over the legitimate aim of protection of morals of young people (see *ibid.* paragraphs 48, 52 and 57).

<sup>214</sup>*Ibid.* paragraph 52. The different views prevailing within the respective member states as regards the protection of morals was again emphasized in paragraph 57. It is hard to avoid the immediate (cynical) reaction, that the Court is in this case doing both, allegedly restricting its review (because of lack of legitimate power) and re-evaluating the substantive decision of the national judges. This again begs the question: if the Court is re-evaluating the judicial choice of the national judge, without any universal (or uniform) conception of morals, on what ground can it do so? If, on the other hand, the Court is merely reinforcing the decision of the national judge, what is the use of supranational guarantees, manifested in the European Convention?

<sup>215</sup>Yourow argues that the decisions and judgments of Commission and Court prior to 1979 indicate static interpretation of the Convention through the margin of appreciation doctrine, and an inclination to grant broad discretion to state authorities. "This inclination, supported by the immaturity of the Strasbourg system and by the domination of older and more conservative commissioners and judges, manifested itself most clearly in the sensitive internal security area, where judicial deference to political discretion is often the norm in national and international systems. In the criminal and civil due process fields the judicial organs did not turn to the margin doctrine." See Yourow, *supra*, note 123 at 121. Yourow furthermore reads the margin of appreciation doctrine as contributing to restraint in the Court's supervision (*ibid.* at 127). The turning point is in his submission the *Sunday Times* case, Eur. Court H.R., judgment 1979, Series A, Vol. 30 and he argues, that in the period after 1979, the use of the margin of appreciation doctrine has become more flexible, and has been used to *restrain* national discretion in stead of broadening it as before, (*ibid.* at 159). Less definite is the analysis of Macdonald, referred to before, when he presents the doctrine, as now, more superficial (or rhetorical) than of methodological



Court's decision in the *Sunday Times* case seemed to reinforce the reading of the *Handyside* case as manifesting a relativist view of morals. The *Sunday Times* case concerned a court injunction against publication of articles on the drug thalidomide, while litigation relating to the producer's liability was still pending. An injunction was granted by the House of Lords whereupon a complaint was lodged with the European Commission, arguing breach of the right to freedom of expression. The European Court of Human Rights found it clear, that there was an interference with the applicants' freedom of expression and the case came to be decided on the requirements in Article 10:2, on legitimate limitations on that right. On the evaluation of the necessity of the interference the Court reiterated the line of reasoning from the *Handyside* case. In particular, that it was initially for the member states to secure the rights and freedoms of the Convention, and to evaluate the necessity of interference, but that the Court was, however, empowered to give the final ruling, and that it would evaluate not only the good faith and reasonableness of the respondent government, but also the compatibility of the conduct with the engagements undertaken under the Convention.<sup>216</sup> However, the Court distinguished the cases, with reference to the *aims* of the limitations, stating that the "authority" of the judiciary was a far more objective notion than the conception "protection of morals".<sup>217</sup>

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importance. His contention is though, as well, that the doctrine of margin of appreciation is "more a principle of justification than interpretation", see Macdonald, *supra* note 124, at 123.

<sup>216</sup>See *Sunday Times* case, *ibid* at paragraph 59.

<sup>217</sup>See *ibid.* paragraph 59, subparagraph 7: "Again, the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10:2. The *Handyside* case concerned the "protection of morals". The view taken by the Contracting States of the "requirements of morals", observed the Court, "varies from time to time and from place to place, especially in our era"... Precisely the same cannot be said of the far more objective notion of the "authority" of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6, which have no

The very assertion of the objectivity of the notion "authority" of the judiciary, has been criticized<sup>218</sup>. I argue that this is a good example of assumptions from formalist and positivist tradition translating through, and becoming the pillar of the justification, although not justified themselves in the decisions. The objective notion of the authority of the judiciary was here subjected to common grounds to fill in the meaning. The notion of "morals" on the other hand can never be objective, in a positivist construction, as it is a conception that remains without the closed legal system.

If the *Sunday Times* case, so soon after the *Handyside* case undermines the reading of the Court's jurisprudence, which admits the importance of traditions, preferring a more formal/conceptual approach, then there is another interesting issue in the *Sunday Times* case reasoning, that deserves mentioning. This again seems to contradict the positivistic formalist trend, just pointed out.

In defining the legitimacy of the interference under Article 10:2 in the *Sunday Times* case, the European Court distinguished between the three requirements to be read out of the limitation clause in section 2, i.e. that the interference was "prescribed by law", had "legitimate aim" and was "necessary in a democratic society". If even the third requirement, necessity, seemed to be construed in legalistic terms by the Court, then the other two (in particular the basic requirement of the rule of law ideal that interference be

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equivalent as far as "morals" are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation."

<sup>218</sup>See Yourow, *supra*, note 123, at 130-131.

"prescribed by law") seem to lend themselves to a positivistic formalist construction. Further, as orthodoxically pointed out by the Court in the *Sunday Times* case, the requirement of the conception "prescribed by law" entails that law must be adequately accessible and formulated with precision, so as to enable the citizens to regulate their conduct.<sup>219</sup>

However, as pointed out by Rolando Gaete, the Court did not take the requirement of legality to its extremes, but took notice of empirical assessment of the impossibility of full legal certainty.<sup>220</sup> In subsequent cases the Court has reiterated this basic methodological framework and sometimes put even more emphasis on the actual balancing of interests under the "necessity" criteria.<sup>221</sup>

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<sup>219</sup>See *Sunday Times*, *supra*, note 215, paragraph 49.

<sup>220</sup>See Rolando Gaete, *supra*, note 84 at 60-63, discussing the *Sunday Times* case, from this point of view. In the words of the European Court, the "realist" trend infiltrating the formalist conception of legality, is so worded, as regards the foreseeability of the consequences of an action: "Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." In subsequent cases, the Court has reiterated this basic methodological point. See, for example case of *Silver and Others*, Eur. Court H.R., Series A, Vol. 61 and *Malone case*, Eur. Court H.R., Series A, Vol. 82.

<sup>221</sup>See, as an illustration, the *Thorgeir Thorgeirsson* case, Eur. Court H.R., judgment of 25 June 1992, Series A, Vol. 239. It was convincingly argued by the minority of the Supreme Court of the domestic level, that the "defamation" for which Thorgeir Thorgeirsson was sentenced did not fall under the criminal law provisions as his statements were general statements about the "police force" and not individual members. The offence was thus, arguably, not prescribed by law. The European Court reiterated its method, that it was usually not in its power to second guess the application of law in the member states, but proceeded with a detailed analysis of the necessity of the infringement in a democratic society.

To further draw to the forefront seemingly contradictory - or inconsistent - decisions, two cases regarding criticism of politician and lay judges respectively are interesting. In the *Lingens v. Austria* case,<sup>222</sup> the European Court in particular stressed the importance of the press, and the possibility of open discussion of matters of public concern. Lingens, a journalist, had openly criticized the newly elected Federal Chancellor for sympathetic views towards opinions of other politicians inclined to Nazi ideology. Lingens was found guilty of defamation by the Austrian courts and took his case to the European Commission of Human Rights. Relying strongly on the method set out in the *Handyside* case and the *Sunday Times* case the Court stressed both the national margin of appreciation and its own supervision; furthermore, it was stressed that the Court had to consider the facts of the case as a whole. In evaluating the necessity of the interference, the Court recalled that the freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment."<sup>223</sup> Freedom of the press, granting freedom of political debate, was furthermore found to be "at the very core of the concept of a democratic society".<sup>224</sup>

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<sup>222</sup> *Lingens v. Austria*, Eur. Court H.R., judgment of 8 July 1986, Series A, Vol. 103.

<sup>223</sup> See *ibid.* paragraph 41. The Court referred to the *Handyside* case as regards this formulation, reiterating as well, that ideas and information that "offend, shock or disturb" had to be accepted in a democratic society of pluralism, tolerance and broadmindedness. See *ibid.*

<sup>224</sup> *Ibid.*, paragraph 42. After a detailed evaluation of the case, and drawing on the view, that evaluation of the "rights and freedoms of others" had to be construed in light of the necessity of open political debate, the Court found the interference by Austrian courts not to be justified in the case and accordingly a violation of Article 10. See also, for a similar matter and similar reasoning *Oberschlick* case, Eur. Court H.R., decision of 22 November 1990, Series A, Vol. 204.

Again, following the same methodology in the *Barfod* case, the Court found no violation of Article 10 in the case of criticism of composition of, and a decision of, the Greenland High Court.<sup>225</sup> In his article, Barfod doubted the impartiality of the Court, which in a particular case had two lay judges that were employees of the local government, deciding on a matter that directly involved the local government. The decisive point for the Court, in its detailed analysis under Article 10:2, seemed this time to have been Barfod's allegations about the impartiality of the two lay judges. He thus infringed on the "rights and freedoms of others".<sup>226</sup> If the objective notion of the "authority of the judiciary" affected the Court's conclusion, this was not articulated in the judgment. The view of one dissenting judge, conforms more to the line laid down in *Lingens v. Austria*, arguing that the same principles should apply to criticism of public institutions, such as Courts, as was formerly established regarding politicians and matters of public interest.<sup>227</sup>

### 4.3 Normative requirements in a democratic society

While the case-law of the Court doesn't elaborate on the autonomous meaning of "freedom of expression", some overarching themes are obvious. These themes come

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<sup>225</sup>See *Barfod* case, Eur. Court H.R., judgment of 22 February 1989, Series A, Vol. 149.

<sup>226</sup>See *ibid.* paragraph 32: "The basis of the Greenland High Court's judgment was its finding, made in the proper exercise of its jurisdiction, that "the words of the article to the effect that the two...lay judges did their duty - namely their duty as employees of the Local Government to rule in its favour - represent a serious accusation which is likely to lower them in public esteem". Having regard to this and to the other circumstances of the applicant's conviction, the Court is satisfied that the interference with his freedom of expression did not aim at restricting his right under the Convention to criticise publicly the composition of the High Court in the 1981 tax case. Indeed, his right to voice his opinion on this issue was expressly recognised by the High Court in its judgment of 3 July 1984..."

<sup>227</sup>See the aforementioned *Thorgeir Thorgeirsson* case, *supra*, note 221, where particularly strong allegations were made as to the conduct of police officers, but interference in the form of sanction was not justified in a democratic society.

into play when assessing the legitimacy and necessity of the interference with the described freedom. One is the overarching emphasis on the free circulation of ideas and information in a democratic society, and in particular what this implies for the "freedom of the press" and its importance for democracy.<sup>228</sup> However, when the issue became to distinguish this democratic core function from the mere utterance of information, among other commercial utterances, the Court took on an "autonomous" guise, establishing that to analyze the issue in the case only as a matter of commercial advertising was to restricted and infringed a right to freedom of expression. In the *Barthold* case,<sup>229</sup> a veterinary surgeon criticizing the lack of night surgery and advertising his practice was thus protected by Article 10. In the case of *Markt Intern Verlag*,<sup>230</sup> a publishing firm aiming at defending the interests of small retail businesses published an article by Klaus Beermann, criticizing the products and services of a mail order firm. The applicants claimed that a prohibition on their publishing the article, under German competition legislation, infringed upon their right to freedom of expression. Whereas the Government argued before the European Court of Human Rights that the case fell at the extreme limits or outside of the scope of Article 10, the Court found that Article 10 was applicable. The Court found, that even if it was "clear that the contested article was addressed to a limited circle of tradespeople and did not directly concern the public as a whole; however, it conveyed information of a commercial nature. Such information

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<sup>228</sup>In *Lingens v. Austria* judgment, the idea of the press as a public watchdog is stressed, and the argument proceeded along the lines of the public being granted the "best means of discovering and forming an opinion of the ideas and attitudes of political leaders", paragraph 26. In the context of a political debate, the Court argued, forceful reactions against expressed opinions could hamper the press in performing its important function.

<sup>229</sup>See the *Barthold* case, Eur. Court H.R., judgment of 25 March 1985, Series A, Vol. 90.

<sup>230</sup>*Markt Intern Verlag GmbH and Klaus Beermann*, Eur. Court H.R., decision of 30 March, Series A, Vol. 165.

cannot be excluded from the scope of Article 10:1 which does not apply solely to certain types of information or ideas or forms of expression."<sup>231</sup>

As stated, the Court's autonomous interpretation of Article 10:1 relies on a broad conception of the common democratic traditions of the member states of the Council of Europe. Even if reference is made to different, and detailed criteria of "democratic" society, this is mostly in defining the scope of legitimate limitations. Reference is not often made to member state legislation, or a common denominator read through state legislation. Following the *Handyside* case, when the limitations argued for by the responding government are "for the protection of morals", the lack of uniformity is however, again invoked.<sup>232</sup> In the *Muller and Others* case the Court thus accepted the

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<sup>231</sup>See *ibid.* paragraph 26. In a dissenting opinion of two judges, this point was not doubted, "(t)he socio-economic press is just as important as the political and cultural press for the progress of our modern societies and for the development of every man". See *ibid.*, dissenting opinion of Judge Martens, approved by Judge Macdonald, paragraph 1. For the analysis of the margin of appreciation doctrine as such, the case is interesting in that the majority of the Court refined the margin of appreciation doctrine, so as to increase the discretionary power of the respondent state, at least in commercial matters. Thus, referring to its "consistently held" view of margin of appreciation and European supervision, the majority argued that such a margin was "essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition". See *ibid.* paragraph 33. Further, the majority argued: "Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate." In accepting the evaluation of the national courts, the majority stated, that "the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary." *Ibid.* at paragraph 37. In a minority decision of eight judges, a concern was voiced as to the "margin of appreciation" reasoning of the majority, which was found to eschew the task of carrying out European supervision. In the opinion of the minority, it is the exceptions, and not the principles that are to be interpreted narrowly, in the field of human rights, see *ibid.*, joint dissenting opinion of Judges Gölcuklu, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos. In the case of *Jacobowski v. Germany*, Eur. Court H.R., judgment of 23 June 1994, Series A Vol. 291-A, the "wide" margin of appreciation, in commercial matters, was re-established.

<sup>232</sup>See *Muller and Others* case. Evaluating the necessity of the interference, the Court actually referred to, both the essential foundation that freedom of expression constitutes for a democratic society and that

evaluation of the Swiss authorities of the paintings of Muller, involving conviction of the applicants and confiscation of the paintings. No reference was made to specially vulnerable groups, but with reference to the circumstances of the case and the paintings themselves (depicting "in a crude manner sexual relations, particularly between men and animals")<sup>233</sup> both conviction and confiscation of the paintings were found to be justified.

If the Court works with a clear vision of the requirements of democratic society, this vision seems to be more formal than drawing on substantive views about an ideal democratic society. This can be illustrated by contrasting two recent cases regarding Article 10, the case of *Otto-Preminger-Institut v. Austria*,<sup>234</sup> where a restriction on artistic expression was justified by the "protection" of the religious freedom of others, and the case of *Jersild v. Denmark*, where sanctions for dissemination of racist statements were not justified in a democratic society. In the case of *Jersild v. Denmark*, the Court considered the case of a Danish television journalist who had been convicted and sentenced for aiding the dissemination of racist statements.<sup>235</sup> The Danish criminal code made it punishable to disseminate to a wide circle of people, degrading statements, communications, threats or insults to a group of persons, on account of their race, color, national or ethnic origin. The Danish government pointed out that the provision of the Penal Code had been enacted to comply with the United Nations

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"those who create, perform distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society." *Ibid.* at paragraph 33.

<sup>233</sup>*Ibid.* at paragraph 36

<sup>234</sup>Eur. Court H.R., Series A Vol. 295-A, see *supra* chapter 3.2.2.

<sup>235</sup>See the case of *Jersild v. Denmark*, Eur. Court H.R., judgment of 23 September 1994, Series A, Vol. 298.



Convention on the Elimination of All Forms of Racial Discrimination. Emphasizing the part of the editing of the journalist of grossly offensive opinions, expressed by a group of young, unemployed people, the Government argued that the applicant had failed to fulfill the duties incumbent on him as a television journalist.

The Court, emphasizing at the outset "that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations" <sup>236</sup> and stating that Denmark's obligation under Article 10 of the Convention must be interpreted so as to be reconcilable with obligations under the United Nations Convention, reiterated the importance of the freedom of expression and the freedom of the press. Finding that news reporting based on interviews was an important means for the press to act as a "public watchdog", the Court stated that responsibility of a journalist for the statements of others could hamper the contribution of the press on important matters. Furthermore, finding it undisputed that the purpose of the journalist could not have been said to be racist, the European Court, evaluating the Danish decision, came to the conclusion, that:

Having regard to the foregoing, the reasons adduced in support of the applicant's conviction and sentence were not sufficient to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was "necessary in a democratic society"; in particular the means employed were disproportionate to the aim of protecting "the reputation or rights of others". Accordingly the measures did not give rise to a breach of Article 10 of the Convention.<sup>237</sup>

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<sup>236</sup>*Ibid.* paragraph 30.

<sup>237</sup>*Ibid.* paragraph 37. The only point at issue before the Court was, if the interference was "necessary in a democratic society".

The method of the Court does not seem to fit the Court's interpretation framework of not acting as a "fourth instance" in re-evaluating and second guessing the member states' Courts. Here, it seems the Court thoroughly re-evaluated the factual situation as well as the judgment of the Danish Courts. On a more general level, the comparison of these two judgments, both handed down in the autumn of 1994, raises questions as to the values the Court is concerned about protecting. It is possible to read the judgment in *Jersild v. Denmark* from the main premise of the importance of the freedom of the press for a democratic society. It is however difficult to see the overarching weight that premise is stated to have in *Jersild v. Denmark*, when considering the different result as to the "rights of others"; it is hard to see how religion can be constitutive of persons' personality in a way that race is not. Or is the explanation to be found in the "factual" bases of the judgments, that the *majority* of Tyrolians adhered to the Roman-Catholic Church, whereas racial minorities in Denmark constitute a societal minority?

Public opinion or conventional morality as an evidence for consensus is referred to by the Court - in the contextualized surroundings (contextualized here meaning sensitivity to the factual and not the conceptual circumstances), i.e. usually when deciding the necessity and proportionality of the measured complained about, and re-evaluating the conclusion on a national level. As we saw, already in the *Handyside* case, conventional morality may come into play as legitimating the decision on the national level. This could be read as the European Court's conception of law sensitive to traditions; a reading that then needs to be modified, when the Court exercises its supervision, in all its details. To conclude, in a fashion accredited to Koskenniemi, the whole method of

autonomous interpretation and margin of appreciation seems to go back and forth on the dichotomy scale, between normativity and concreteness. Whereas the method of autonomous interpretation is meant to retain normative distance from the member states, the Court however draws on member states' legislation and state consensus for the intent of the norms. Creating a method for allowing each state to measure the necessity of interference in a final way, the Court on the other hand then re-evaluates that measure, by contrasting them to normative standards. Further, consent or consensus has to come into the picture at any cost, in particular, as I argue, because of the positivist trend in the Convention jurisprudence. The jurisprudence reveals endless contradiction; endless fluctuation between concreteness and normativity. It is, on this background, not surprising, that in scholarly approach, contradicting statements are offered, as to the nature of the margin of appreciation. One of the judges of the Court, who is a leading scholar, states that the margin of appreciation doctrine "is not susceptible of definition in the abstract",<sup>238</sup> while other scholarly approaches strive to define the doctrine and describe - in the abstract.

It has not been my concern to analyze the *conventional morality argument*, in the Court's case law, as a manifestation of consensus methodology. It has been of more concern to me to point out the construction of "consensus of states" in the international law setting, the Court operates within, and how that construction shows a positivistic (and simplified) method of reading state consensus out of state legislation.<sup>239</sup> It is not

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<sup>238</sup>See R.St.J Macdonald, *supra*, note 124 at 85.

<sup>239</sup>See however for a thorough account of the problems inherent in the "conventional morality" approach as a standard for judicial review, Wojciech Sadurski, "Conventional Morality and Judicial Standards" (1987) 73 Virginia Law Review 339. See also on reference to both systematic moral philosophy and

common to see a grand theory of the jurisprudence of the Court proposed that is based on moral philosophy.<sup>240</sup> It is, as a matter of fact, not common to see grand theories proposed as regards the jurisprudence of the European Court of Human Rights. A descriptive account, then taking a prescriptive turn, on the background of the very analysis and eventually some fragments of a theory, is, as stated before, a more common approach to Convention jurisprudence.

#### **4.4 Grand theories and lesser theoretical approaches. A political theory of democracy or a liberal theory of justice.**

##### **4.4.1 A procedural grand theory**

In a recent analysis of Convention jurisprudence, C.A. Gearty provides a legitimating theory which is essentially procedural.<sup>241</sup> The theory is built around the concept of "due process" and Gearty states that the majority of the Convention provisions do not invoke substantive values but guarantee fairness in the adjudicative process or effective remedies, as well as non-discrimination in the enjoyment of the rights guaranteed. Gearty submits that the Convention is a procedural document and at its best when operating as a charter for procedural fairness.<sup>242</sup>

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specific moral philosophy (of the community) as a legitimating theory in American constitutional theory, Mark Tushnet, *supra* note 62 at 108-146.

<sup>240</sup>Specific themes may on the other hand be pursued, that draw on some or another theory of moral philosophy, see for example A. M. Connelly, "Problems of Interpretation of Article 8 of the European Convention on Human Rights." (1986) 35 International and Comparative Law Quarterly 567.

<sup>241</sup>See C.A. Gearty, *supra*, note 11.

<sup>242</sup>Gearty, *ibid.* at 98. See, further, as to the first category Gearty, *ibid.* at 99-108; as to the protection of domestic minorities at 108-115 and for the discussion of Civil Liberties see 115-125.

Through analysis of case-law, Gearty establishes three levels of generality regarding the "due process" criteria. First, the "technical due process" cases, concerned with fairness in an adjudicative forum, expressed in Convention Articles 5, 6 and 7. Second, the procedural safeguards implemented in order to protect individuals belonging to minorities. This is done, Gearty argues, through application of Convention Articles 5 and 8 to cases that concern prisoners' rights, rights of mentally ill persons and rights of children and their parents in child custody disputes. Gearty submits that these cases establish procedural guaranties more effectively than substantive rights. Finally, a broader conception of procedural fairness is introduced, the Court then seen as acting as a guarantor of political freedom in general. Under the last category fall cases concerning freedom of expression, assembly and association, in Articles 10-11 and to some extent the right to privacy, guaranteed in Article 8 of the Convention.

This third category identified in Gearty's analysis, the category of civil liberties, is the least obviously procedural. For the elaboration of this category, a reference is made to the work of the American constitutional scholar, J.H. Ely, and his procedural theory of judicial review of legislation.<sup>243</sup> On that background, Gearty draws up his sharpest

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<sup>243</sup>See Gearty, *ibid.* at 116-117 and John Hart Ely, *Democracy and distrust. A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980).

critique on the jurisprudence of the European Court of Human Rights, when the focus is not on privileging civil liberties for the purpose of promoting openness and fairness within the political process, but in Gearty's submission an open-ended approach to the protected rights "as rights".<sup>244</sup>

Even if proposed as a legitimating theory, Gearty's method manifests clearly the merge of a descriptive and a prescriptive approach. He thus concludes his analysis in the following way:

These various aspects of the Court's jurisprudence (the three levels of analysis) include almost all of the decided cases; we would expect them to since we have built the theory out of the document and the record rather than the other way round. But the categories of due process we have set out here are not merely generalised summaries of the case-law. They also provide a set of criteria by which we can judge the legitimacy of judicial activism. To this extent these categories of due process are prescriptive as well as descriptive; they denote the sort of judicial activism that is appropriate whilst at the

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<sup>244</sup>See Gearty's account of cases regarding freedom of expression, that evolve around political speech, and fit his theory, *ibid.* at 117-120, and his further criticism on the Court's acceptance of government arguments, eventually undermining the right to freedom of expression as a civil (political) rights. This is, in Gearty's view, in cases where the freedom of expression is applied as a right in itself, regardless of what is being said, as well as when applied to artificial persons, such as corporations. See Gearty, *ibid.* at 122-123, and the cases regarding freedom of expression referred to in this chapter.

same time describing the sort of judicial activism that has in fact occurred. This is not to say that the decisions of the European Court have always been in accordance with one of our three categories of procedural fairness. The great value of having an underlying theory is that it enables us to say whether we believe a decision to be right or wrong; it allows us to fill the void of judicial discretion with ideas as to how it should be exercised.<sup>245</sup>

Even if Gearty is openly skeptical as to the legitimacy of judicial activism,<sup>246</sup> the merging of descriptive and prescriptive approaches seems to present a methodology relying on the Court's practice as itself a basis for a legitimating theory, emphasizing the Court's authority to interpret the Convention provisions, rather than demanding any "grand theory" of legitimacy.

However, acknowledging the obvious objection to his procedural theory, that the Convention itself invites broader interpretation than is allowed by the provided procedural theory, Gearty explains his inherent premise: The judicial power the Court imposes requires a theoretical justification.<sup>247</sup> When it comes to theoretically justifying legitimate judicial review as based on other elements than the Court's own practice (i.e.

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<sup>245</sup> Gearty, *ibid.*, at 98.

<sup>246</sup> Gearty, *ibid.* at 126.

<sup>247</sup> Gearty, *ibid.* at 120-125.

in Gearty's theory on procedural fairness) Gearty stops short of any attempt to convince the reader or underpin his theory, save a short reference to the work of J.H. Ely.

There are further theoretical assumptions in this step. Not elaborating on Ely's theory in any details, Gearty reads the Court's practice into Ely's scheme. That is, until the point where practice and theory depart. How this theory is directly relevant, or can be of use as a legitimating theory for the European Convention is not elaborated upon, nor the contingency of Ely's theory upon American constitutional history.<sup>248</sup> Gearty doesn't provide any further account of the philosophical and eventually political preference a procedural theory of judicial review is based on, in its allegedly neutral mitigation role in a pluralistic society. Critical scholars do not have a problem, however, identifying the assumptions of liberal political theory in a procedural theory such as Ely's theory<sup>249</sup>.

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<sup>248</sup>See Gearty, *ibid.* at 116-120. For reasons that are to be criticized less, Gearty doesn't mention the criticism of Ely's theory in American constitutional theory; a reaction that seriously undermined Ely's theory soon after its publication. See Mark Tushnet, *supra*, note 62 at 70-107 and same: "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory" (1980) 89 Yale Law Journal 1037. See also for a critique of the theory Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories (1980) 89 Yale Law Journal 1063 and a series of articles from Symposium on Judicial Review and Democracy, (1981) 42 Ohio State Law Journal.

<sup>249</sup>See Mark Tushnet, *supra*, note 62 at 70 ff, opening his overview and criticism of Ely's theory by reference to the assumed neutrality of the liberal tradition: "The liberal tradition insists that, in the making of public policy, no one's view of the good take priority over anyone else's view. If public policy is to be made it must result from the aggregation of individual preferences. That aspect of the liberal tradition generates an approach to constitutional law that John Hart Ely calls "representation reinforcing review"."



If it is Gearty's aim to argue for a liberal procedural theory because of the contents of such a theory, his argument is subtle. Rather, his argument seems to be to analyze the Court's case-law, describe some trends- or themes - and then ask the Court to show *coherence* and *consistency* in its application of the Convention, by not extending the scope of the Convention provisions. In this argument, his "procedural theory" of the Convention comes into play.

Interestingly enough, I am in agreement with much of Gearty's descriptive analysis of the Court's case law. His conclusions as to the Court's interpretation resulting in establishment of procedural rights and guarantees rather than substantive rights is convincing and well grounded.<sup>250</sup>

When it comes to Gearty's shift from the descriptive to the prescriptive, however, his project becomes in my view less convincing. Instead of analyzing *why* the case-law of the Court manifests procedural aspects, he takes this for granted and builds a legitimating theory on top of the Court's practice. A theory providing further criteria for

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<sup>250</sup>This can, for example, be seen in the cases regarding "respect for family life" that require positive obligations of a state to guarantee remedies and judicial control of administrative decisions. See cases mentioned *supra*, chapter 3.2.2. Gearty's immediate critical assessments of this development are also strikingly convincing. From a United Kingdom perspective, Gearty asks, for example, what progress there is in the European Court of Human Rights deciding that a prisoner has a "right to court"; when the actual situation of prisons in the United Kingdom is worse than ever

the Court's judgments. From my approach to the practice of the European Court in the foregoing, aspects that Gearty builds into a grand legitimating theory of the Court's practice are discernible and definable, as drawn from the Court's assumptions and the general formalist positivistic framework that applies to the Court's practice and the assumptions from liberal political theory and philosophy. The "rights" approach to the interpretation of Article 10, that Gearty criticizes for its openness, is a typical argument from the liberal aspirations to neutrality, and the formalist dilemma of giving meaning to an indeterminate norm. And, the very avoidance of substantive elements that are built into procedural theories, arguably manifests itself the liberal dilemma of content neutrality.

Furthermore, the very aspect of the procedural theme in the European Court's jurisprudence is, in my view, rather to be approached critically, instead of by providing a theory of justification for it. It is thus a provoking question how a grand theory of legitimacy based on democratic views, can provide justification for extensive judicial review of legislation and administrative action. This is, I argue, the effect of a procedural theory for the European Convention, when considering how the Convention affects the member states. The broader dilemma of the European Court of Human Rights striving to guarantee the democratic traditions of the member states of the Council of Europe and simultaneously absorbing more judicial power on a pan-

European scale, will be left as an open - and highly interesting - dilemma that, admittedly, could be subjected to discussion similar to the legitimacy debate in constitutional law theory, as well as approached from a more theoretical point of view.<sup>251</sup>

#### 4.4.2 Communitarianism and libertarianism

It falls outside the scope of this paper to assess legitimating theories on the level of the fundamental dispute between libertarianism and communitarianism, a highly theoretical (even metaphysical) background approach to problems of social organisation.<sup>252</sup> True to my somewhat descriptive, somewhat critical and somewhat legal theoretical approach to the reasoning of the European Court of Human Rights, I will in the last chapter revisit some of the ideas about theory that I touched on in the foregoing. The motivation for this, is my belief that approaches providing "grand theories" of the interpretation of the European Convention will become more common in the future, in particular, if and when the Court gains a binding jurisdiction over the majority of European states. The

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<sup>251</sup>See, for an interesting political-philosophy account of the shift of power from democratic institutions to institutions such as Courts, that are meant to be insulated from the democratic process, Michael J. Sandel "The Political Theory of the Procedural Republic" in Allan C. Hutchinson and Patrick Monahan, *The Rule of Law. Ideal or Ideology*. (Toronto: Carswell, 1987) 85. Sandel, a leading communitarian scholar, traces this trend to the fundamental debate between rights-based liberalism and its communitarian or "civic republican" opposition.

<sup>252</sup>I am here referring to the ongoing debate between the "libertarian" and "communitarian" philosophies, underlying recent disputes in political philosophy, sociology, law, etc.; disputes that proceed within the philosophical discourse, what an individual is (as a basic constituent - or constituting idea for society). The debate revolves around the idea of an individual being an atomic unencumbered self (a free autonomous being) as in liberal theory; or a self, constituted by society and community (as the communitarian approach stresses). See for a short account of communitarian critique on liberalism, with special reference to the concept and application of human rights, and a defense of the liberal conception of society as a basis for fundamental human rights, Carlos Santiago Nino, *The Ethics of Human Rights* (Oxford: Clarendon Press 1991).

unity of the discourse between scholarly approach and practice, and in particular how constitutive theory (scholarship) is of practice and vice versa, is therefore highly interesting.

## 5. THEORY AND JURISPRUDENCE

...a ratio of the Buddha over Aristotle, a balance of the Buddha's A AND not-A and Aristotle's A OR not-A.<sup>253</sup>

### 5.1 A three polar jurisprudence?

Looking back on the account of the jurisprudence of the European Court of Human Rights, and my analysis thereof, the focus has been on the formalist and positivistic aspects of the Court's case law. The argument is, that these aspects are important in the Court's jurisprudence, and constitutive of the Court's reasoning. However, it has also been assessed, that apart from formalist trends, the Court sometimes works with a substantive content of a particular provision, albeit often in a very inarticulate - and incoherent - way. Increasingly, the third aspect is discernible in the Court's case law, an aspect that refers to the actual context of the case (the facts) and seeks an effective protection of the guaranteed rights. I have approached the Court's jurisprudence so as to draw to the forefront both the structural indeterminacy, and shifting emphasis and

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<sup>253</sup> Bart Kosko, *Fuzzy thinking. The New Science of Fuzzy Logic* (New York: Hyperion 1993) at 126.

contradiction between the concrete and the normative. Furthermore, I have tried to elucidate some basic liberal trends that translate through general legal theory and international law into the application of a "legalized" document of human rights, such as is the European Convention.

Again, referring to the outline drawn up when assessing the concept "legitimacy", the Court's practice seems to involve all three dimensions: the axiological (normative), the formal and the empirical. I have argued that the formal dimension is the one that affects the jurisprudence the strongest. Others argue from a formalist perspective, criticizing the Court's empirical approach; or from an empirical approach, criticizing the formalist and axiological approach! Theory does not seem to easily spread itself in the different directions, to incorporate all three aspects at the same time.

Without falling into the trap of the descriptive-prescriptive approach that I have criticized, the question arises: is the Court beating theory to a new understanding of law? Is the Court more progressive, more able, than all theories assessing its practice - both in a positive and a negative way?

A strand of scholarly work has in recent years approached the Convention jurisprudence in a way that seems to accept all three dimensions of legitimacy at once, and more, a theory focusing on "fuzziness".

## **5.2 A fuzzy approach to the reasoning of the European Court of Human Rights**

### **5.2.1 What is fuzziness?**

In writings on the jurisprudence of the European Court of Human Rights, recourse is sometimes had to the "logic of fuzziness". It is claimed that the Court has taken to adopting flexible and substantive interpretation, balancing conflicting interests and using variable content concepts.<sup>254</sup>

Fuzziness is, in this context, used to describe the *capacity to take into account at the same time conflicting interests and values*.<sup>255</sup> The science of fuzzy logic is aimed at disputing the bivalence of formal logic, the Aristotelian definition that a statement is either true or false, but it cannot be both. Fuzzy logic disputes the bivalence of true or false, 0 or 1, and sees everything in terms of multivalence and degrees, sometimes

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<sup>254</sup>Francois Ost, "The Original Canons of Interpretation", *supra* note 66, at 311-312. The "fuzzy principle" connotes that everything is a matter of degree, see on the definition of the principle, as well as a comprehensive account of fuzzy thinking and its evolution Bart Kosko, *ibid*.

<sup>255</sup>See Kosko, *ibid*.

measured on a continuum from 0% to 100%, where in the middle (50%)  $A$  equals  $\neg A$  ( $A = \neg A$ ).<sup>256</sup> The claim is, that the axioms of bivalent logic do not hold.

Fuzzy thinking opposes the constructed simplicity of formal logic: the defined bivalence and exclusion of multivalence. Fuzzy thinking has its starting point in the acceptance of vagueness. Indeed, the idea of fuzziness was originally put forward under the concept "vagueness".<sup>257</sup> In 1965, Lofti Zadeh published a paper called "Fuzzy Sets", giving a prevailing name to the vagueness, defining the basic elements - the "fuzzy sets", and presenting a formal math system of fuzzy sets.<sup>258</sup>

Fuzzy logic works with fuzzy sets and words stand for these sets. The word "house" stands for a set of houses: different houses are signified by the word house.<sup>259</sup> The

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<sup>256</sup>See Kosko, *ibid.* at 33.

<sup>257</sup>Quantum philosopher Max Black published in 1937 a paper called "Vagueness: An Exercise in Logical Analysis" defining, what later came to be called "fuzzy sets". See Bart Kosko, *ibid.* at 135 ff.

<sup>258</sup>Bart Kosko, *ibid.* at 135 and 140. Whereas proponents of formal logic are not oblivious to the possibility of vagueness, the idea of formal logic is precisely to avoid this vagueness. The technical (clean) language is then seen as a powerful tool for analysis and deduction - for formal proof of validity of statements. Reference is not made to the outer world and to the absolute truth of statements, but to the truth-value (true or false) of the premises and the conclusions, and the validity of the argument depending upon the truth-value of the premises and the conclusion respectively. See Irving M. Copi, *Introduction to Logic* (New York: MacMillan Publishing company ) at 266 and 269.

<sup>259</sup>"House stands for a set of houses, a list of houses, a group or collection of things, and each thing we can point to and call "house". But which structures are houses and which are not? You can point out some things as houses more easily than you can point out others. What about castles and trailers and mobile homes and duplexes and time-share condos and teepees and yurts and lean-tos and caves and tents and cardboard boxes in alleys? It's a matter of degree. Some structures are more "a house" than others are. They are to some degree a house and not a house. Exceptions blur the boundary between house and



uncertainty or disorder, that applies to everything, in the fuzzy theory approach, is measured as fuzzy entropy.<sup>260</sup>

The elements of fuzzy thinking are the fuzzy sets. When words are put together in a sentence - and many sentences - we have a *fuzzy system*.<sup>261</sup> Understood in this manner, the way the system works is how it relates its fuzzy sets - how it "reasons". According to fuzzy theory, how fuzzy systems work comes down to how it reasons with Fuzzy Approximation Theorem (FAT).<sup>262</sup>

The mechanisms that mediate different systems, and the deeper similarities between them, have caught attention and led to a common grouping under the name of *complex adaptive systems*.<sup>263</sup> The study of complex systems is trans-disciplinary, including

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nonhouse. So A and not-A holds. So fuzziness holds: The noun *house* stands for a fuzzy set of houses." See Bart Kosko, *supra*, note 253 at 122.

<sup>260</sup>Bart Kosko defined the measure of fuzzy entropy in 1985, *ibid.* at 126. See further, *ibid.* 126 ff., for an illustration of fuzzy entropy, as the geometry of fuzzy sets. The fuzzy entropy theorem says that fuzziness "equals a ratio of the Buddha over Aristotle, a balance of the Buddha's A AND not-A and Aristotle's A OR not-A". As an illustration of fuzzy sets being "real" Kosko refers to an imagined audience, asked: "How many of you are happy? Or young? Or rested? Or liberal? Or thin? Or tall? Or smart? Or honest? Raise your hands. Now the hands do not go up all the way or stay down all the way. No law draws a fake line for us between happy and not happy, young and not young, honest and not honest. Our fuzzy logic does not draw hard lines between opposites. We live with a mix of happiness and unhappiness, fit and fat, honesty and dishonesty. You can see that in the crowd as the hands bob up and down and come to rest between the extremes of total yes and total no." *ibid.*, at 126.

<sup>261</sup>Bart Kosko, *supra* note 253, at 155.

<sup>262</sup>*Ibid.*, at 156-176.

<sup>263</sup>See John H. Holland, "Complex Adaptive Systems" reproduced in J.C. Smith & Daphne Gelbart, eds., *Readings for Legal Reasoning and Artificial Intelligence* (University of British Columbia 1993) at 17. See also Stuart A. Kauffman, "The Sciences of Complexity and 'Origins of Order'"; Murray Gell-Mann,

mathematicians, computer scientists, physicists, biologists, psychologists, economists and linguists among many others<sup>264</sup>. The study of complexity has inspired scientists, again in an inter-disciplinary or trans-disciplinary fashion. New approaches that draw on research on complexity, as well as the background of revolutionary changes in epistemology appear even in the traditional and sometimes conservative area of law and jurisprudence.<sup>265</sup>

But what are the alleged relations between theories of chaos, complexity, fuzziness - and law?

It is proposed that both society and law are complex adaptive systems. Furthermore, complex adaptive systems are seen as a special type of chaotic systems, being emergent or spontaneous, yet distinguished from other emergent systems by encapsulating knowledge. "The structure of the component parts of a complex adaptive system are somehow exploited to capture the regularities of the system's experience in the environment in a highly compressed form as a schema. The system's schema unfolds

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"Complexity and Complex Adaptive Systems"; and regarding economic theory W. Brian Arthur, "Self-Reinforcing Mechanisms in Economics", all reproduced in J.C. Smith & Daphne Gelbart, eds., *Readings for Legal Reasoning and Artificial Intelligence* (University of British Columbia 1993).

<sup>264</sup>Murray Gell-Mann, *supra* note 263, at 58.

<sup>265</sup>See Murray James Braithwaite, "Prolegomena To A Postmodern Theory of Law" a masters thesis, University of British Columbia 1993 (unpublished).

into system behavior that contains implicit predictions about the future impact of the environment on the system and of the system's behavior on the environment. The schema is approximate (fuzzy or probabilistic)."<sup>266</sup>

Within system theory legal reasoning is seen as "schema building" in an evolving complex system. On these schemes, Murray Braithwaite comments:

Evolving schema start with rules based on concepts so fuzzy they barely outperform randomness. The schema evolves more exceptions, and the fuzzy rules can become more complicated and precise. This strategy can be very successful. It has been proven that a system of fuzzy concepts and if-then rules can be made to uniformly converge to any continuous function. This means that for systems where knowledge optimism is possible, a fuzzy schema can home in to a solution within any desired degree of accuracy. The possibility of uniform convergence implies that an evolving schema can accomplish the task. It also implies that rival, incompatible fuzzy schema can evolve down different pathways toward the same solution.<sup>267</sup>

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<sup>266</sup>*Ibid.*, at 56.

<sup>267</sup>*Ibid.*, at 68.

Even if ideas about law behaving as a complex adaptive system are interesting, they are new and not fully elaborated. "Whether law is a complex adaptive system cannot be proven at least until a detailed mathematical model is created that identifies the rules of the actors and shows how the legal order spontaneously emerges as a result of interactions. ..." <sup>268</sup> To date, research has aimed at showing that law behaves as a complex adaptive system, in particular, that schema used in legal reasoning construct and improve knowledge in an evolutionary manner.

The aforementioned thesis, describing law as behaving as a complex adaptive system, does not claim to be anything but descriptive. It does not, itself, propose any normative solutions. Actually, its relation to post-modern theories, makes its premises those of relativity, truth- and knowledge skepticism. As Murray Braithwhite puts it:

More than two thousand years of moral philosophy has not resolved the problem of mediating clashing fitness functions for individuals, classes, and social orders. If a clear moral theory were required for legal reasoning there would be no legal reasoning. Since the deep structure of law is a complex adaptive system, the solution is to start with vague strategies that are little better than random, and then improve by increasing complexity. We decide obvious cases, then proceed to refine our approach through

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<sup>268</sup>*Ibid.*, at 119.

incremental experimentation and empirical observation of the effects that are obviously good or bad.<sup>269</sup>

In all its generality the idea of law as a complex adaptive system does seem to fit our description and analyses of the incoherent and complex jurisprudence of the European Court of Human Rights. When ideas drawn from "fuzzy logic" are used for analyzing the jurisprudence of the European Court of Human Rights, the outcome has in my view proved to be disappointing.

### **5.2.2 Fuzzy approaches to the European Convention on Human Rights.**

In analyzing the legal reasoning of the European Court, Mireille Delmas-Marty points out both the extreme diversity of the provisions of the Convention, and the relation between national and "European" rules and the Europe-State relationship in the application of the Convention.<sup>270</sup> Regarding the first, the diversity of provisions, she quotes opinions on these variations as distorting normally accepted legal concepts. Delmas-Marty states:

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<sup>269</sup>*Ibid.*, at 179.

<sup>270</sup>See Mireille Delmas-Marty, "The Richness of Underlying Legal Reasoning" in Mireille Delmas-Marty (ed.) *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff Publishers, Dordrecht 1992) 312, at 319-320.

Recourse is had to traditional logic - i.e. formal bivalent logic - when applying prohibitions or exceptions expressly defined in the Convention: depending on whether the national rule is identical or - on the contrary conflicts with the Convention it is deemed to conform or not to conform with the Convention.

As to the Europe-State relationship, formal bivalent logic does not apply, as partial conformity is accepted, and the same norm can thus both confirm and not-confirm to the Convention provisions.

Hence the hypothesis - inspired by contemporary research on non-standard forms of logic - of "another logic" (*autre logique*) which, by reason the principle of "partial belonging" (*appartenance partielle*) and that of "gradual introduction" (*concept de gradation introduite*), is commonly designated as "fuzzy logic".<sup>271</sup>

She qualifies her approach and distinguishes it from the above mentioned, involving the idea of "fuzziness of the legal system".<sup>272</sup> Thus she distinguishes "fuzzy logic" from "nonlogical fuzziness", to make it possible for a decision of a binary nature be made in a fuzzy environment.<sup>273</sup>

### **5.2.3 The fuzziness of "criminal charge" and of "democratic necessity"**

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<sup>271</sup>*Ibid.* at 319-320.

<sup>272</sup>Delmas-Marty refers to Jerzy Wroblewski on this point, see Jerzy Wroblewski, "Fuzziness of Legal System" in *Essays in Legal Theory in Honour of Kaarle Makkonen* (1983) Oikeus ja oikeusperinne at 314.

<sup>273</sup>Mireille Delmas-Marty, *supra* note 270, at 320-321.

It is interesting to see approaches from "fuzzy logic" in analyzing of the jurisprudence of the European Court (and Commission) of Human Rights. I will here address two different analyses of the Convention jurisprudence. First, the analysis of the Commission and Court's criteria of "criminal charge", as set forth in Article 6 of the European Convention, as referred to *supra*, in chapter 3.<sup>274</sup> Second, I will address Delmas-Marty's analysis of the "multiple criteria" of "Democratic Necessity".<sup>275</sup>

The "autonomous" method of the Court, to distance its interpretation from the meaning of a concept in the legal system that is under scrutiny, has provoked some questions about the logic involved in the Court's reasoning. If a "criminal charge" in the Convention system is not a "criminal charge" in the national system, that seems to contradict the main theorems in formal logic, that of identity: A is A; (criminal charge = criminal charge), and that of the third possibility being impossible (*tiers exclu*): If B is not A, then B is not-A (if an offense is not a criminal offense, then it is a non-criminal act).<sup>276</sup> Instead, as we saw, the Commission and Court use three main criteria for determining if an accusation is a "criminal charge", *first* how the offense is categorized

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<sup>274</sup>See "La "matière pénale", *supra*, note 128, at 819-862.

<sup>275</sup>See Mireille Delmas-Marty, *supra* note 270.

<sup>276</sup>See "La "matière pénale", *supra*, note 128, at 821.

in the legal system of the state concerned, *second*, the nature of the offense, and *third*, the degree of severity of the penalty that the person risks incurring.<sup>277</sup>

For each of these criteria the Commission and Court take other sub-criteria into account. Thus for the first criteria, the categorization in the respective national legislation, the Convention institutions look to the legislation, both its prescriptions and its context (history, aim etc.), the practice and the doctrine. In assessing the nature of the offense, the institutions take into consideration both the norms prescribing the offense and how serious the offense is. As to the third criteria, the severity of the penalty, the Commission and Court take into consideration all elements, i.e. the prescribed sanction for the respective offense, the pronounced sanction and the executed sanction.<sup>278</sup>

Interpreting the case-law of the Commission and Court from the fuzzy perspective, the working group points out that the Convention institutions do not necessarily respect the principle of "tiers exclu", and that they use the idea of proximity (or partial belonging).<sup>279</sup>

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<sup>277</sup>*Ibid.* at 823. See also Eur. Court H.R., *Engel* case, Series A Vol. 22, that lays down these criteria, paragraph 82.

<sup>278</sup>*Ibid.* at 827-835.

<sup>279</sup>*Ibid.* at 836. See also in *Campell and Fell* (Series A, Vol. 80) were disciplinary rules regarding prisoners came to be evaluated, as to the requirements of Article 6. "The Court considers that these factors, whilst not of themselves sufficient to lead to the conclusion that the offences with which the applicant was charged have to be regarded as "criminal" for Convention purposes, do give them a certain colouring which does not entirely coincide with that of a purely disciplinary matter." (Paragraph 71). The



The working group then sets out to theorize, or to put forward a "hypothesis of interpretation" of article 6 as regards "criminal charge", having regard to some conditions of fuzzy logic. The first condition is that there is to be found a basic reference or a signified (référentiel de base). The second condition is that there be a notion of a reference that is specific (unambiguous) enough to reduce the risk of arbitrariness. The third condition is that this specific reference be used to decide the degree of compatibility.<sup>280</sup> From there, the hypothesis presented is that the Convention institutions use the traditional distinction between repressive and restitutive sanctions, and that the basic reference (signified) is the whole of repressive sanctions. The notion of specifiable reference that has to have a precise semantic content is on the other hand, in the working-group's proposal, the "common denominator" or the *common criminal law tradition* of the member states of the Council of Europe.<sup>281</sup>

In her fuzziness approach to the legal reasoning of the European Court of Human Rights, Mireille Delmas-Marty aims at analyzing the "democratic necessity" of

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Court thus examined the third criteria (the severity of the penalty), and concluded, that "taking into account, therefore, both the "especially grave" character of the offences with which Mr. Campbell was charged...and the nature and severity of the penalty that he risked incurring - and did in fact incur - the Court finds that Article 6 is applicable to the Board of Visitors' adjudication in his case." (Paragraph 73).

<sup>280</sup>See "La "matière pénal""... *supra* note 128, at 837.

<sup>281</sup>As to the former see *ibid.* at 837-841, and as to the latter at 841 ff.

legitimate limitations of rights by the respective states. Subject for analysis are the rights guaranteed in Article 8 through Article 11. These are the rights that have been the subject for my inquiry and analysis in the foregoing, resulting in the tentative conclusion, that the jurisprudence of the Court is incoherent, complex and manifesting no more than a lack of theory. But is it, after all, perhaps *fuzzy*?

Although dealing with much broader and vaguer conceptions<sup>282</sup>, Delmas-Marty refers to the same criteria as used in the work of the above mentioned working group. In Delmas-Marty's words:

Such as it appears to us, in view notably of the work conducted by a multidisciplinary team, fuzzy logic (*la logique floue*) is distinguishable from nonlogical fuzziness (*flou non logique*) on the basis of three criteria, the combination of which allows a decision of an ultimately binary nature to be made in a fuzzy environment:

- 1. the requirement of a "specifiable notion of reference" (*notion de référence spécifiable*), i.e. non-fuzzy concept which forms the basis for establishing a relation of belonging, which relation, in turn, determines whether or not a given situation may be classified within a specific legal category. This requirement is best expressed by the phrase "fuzzy upon fuzzy is invalid" (*flou sur flou ne vaut*);
- 2. the evaluation of a degree of belonging which - as opposed to the principle of strict identity under formal logic - characterises a relationship of proximity which is evaluated by way of comparison with the notion of reference using quantitative or, in many cases, qualitative scales;

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<sup>282</sup>In his analysis of the Convention jurisprudence, Francois Ost, points out some of the criteria of "democracy" that he finds to guide the Court in its interpretive work, inter alia, the need to guarantee the right to a fair hearing; the need to control the executive by objective and democratic means; the importance of tolerance and open mindedness; the importance of the freedom of expression, in particular as regards the press; the need to preserve democratic pluralism in the trade union movement as well as in education and teaching; the obligation on a democratic legislature to eradicate social injustice, see Ost, *supra* note 66, at 301-302.

- 3. the determination of a threshold of "compatibility" above which legal classification is made, as it is in formal logic when "conformity is attested."<sup>283</sup>

In Delmas-Marty's analysis, she works out of the case-law of the Convention institutions, criteria, as well as the sub-criteria, of "democratic necessity", in particular those laid down in the provisions themselves. The first criterion is *legality* (that a restriction be prescribed by law). That criterion is further divided into sub-criteria, into a broad criteria that includes common-law regulation as well as a narrow one, which requires clear legislative provisions that are formulated with precision, accessible and foreseeable. The second criterion, that of *legitimacy*, is the requirement that the aim of the limitation is legitimate, given the legitimate objectives enumerated in the text.<sup>284</sup> The third criterion is that of *necessity* (in a democratic society); a criterion that Delmas-Marty divides into simple and reinforced necessity. A reinforced necessity is again described as falling on a continuum, somewhere between "indispensable" or "absolutely necessary" down to being "reasonable" or "acceptable". Delmas-Marty acknowledges

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<sup>283</sup>Mireille Delmas-Marty, *supra* note 270, at 320-321.

<sup>284</sup>*Ibid.* at 323-326. As to the criterion of "legitimacy" Delmas-Marty states: "The extremely broad list of legitimate purposes allowed could indeed cast doubt on whether they constitute usable legal criteria, were it not for the fact that the requirements of necessity and proportionality of the restrictive measure in relation to the objective invoked combine with the criterion of legitimacy so as to introduce the basis for legal reasoning." *Ibid.* at 325. The themes are, broadly, order, i.e. prevention of national security and public safety; protection of health and morality; protection of the rights and freedoms of others; the guarantee of the authority and impartiality of the judiciary and protection of the general interest, or the well-being of the country.

that there is a relation between that "necessity" (and the degree of the necessity) and the objective, i.e. the relation usually described as "proportionality". The fourth definable criterion is that of the "democratic spirit", involving i.a. the idea of "the rule of law" and tolerance in democratic society.<sup>285</sup>

Delmas-Marty defines as well "a heterogeneous space" of the dual jurisdiction, of both national jurisdiction and international jurisdiction. In her approach, she also describes the system, including the margin of appreciation doctrine, as an evolutionary system, where the threshold of compatibility varies according to the characteristics of the case (the actual situation) and the time of the decision.<sup>286</sup>

However, the first mentioned criteria, those of "democratic necessity", are the ones, Delmas-Marty takes as an indication of a "basic reference".

Thus one can say that this combination of the criteria (and indeed sub-criteria indicated above) is in some sense the start of a "definable notion of reference" which would allow an assessment, from the perspective of "fuzzy logic" referred to above, of the degree of belonging (or proximity) of a national practice in relation to the European rules.<sup>287</sup>

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<sup>285</sup>*Ibid.* at 327.

<sup>286</sup>See here also an analysis of the case-law of the European Court of Human Rights, proposing that the conception "morals" is a fuzzy one, and has both a time and a space factor, in Renee Koering-Joulin, "Public Morals" in Mireille Delmas-Marty ed., *supra* note 270, 83-98.

<sup>287</sup>Mireille Delmas-Marty, *supra* note 270, at 330.

### **5.3 Assessment of theories of "fuzziness" of the European Convention on Human Rights**

In light of the foregoing survey of ideas and theories of fuzziness, and the importance of those new ideas for the analysis of law and legal thinking, an approach from fuzziness to the jurisprudence of the European Court of Human Rights seems worthwhile. However, there are several objections that I have to the described approach to the jurisprudence of the European Court and Commission of Human Rights. First, both approaches are descriptive, and when they take a prescriptive turn that seems to be grounded in their descriptive account and without sufficient theoretical background. Second, as far as the prescriptive elements are founded on "theories of fuzziness", what seems to be understood by "theories of fuzziness" is "to take conflicting interests and values into account". I question if this can be called "fuzzy", unless the approaches use theories of law as "fuzzy systems" in their analysis. This does not seem to be the case. Third, and most importantly, I doubt that a theory based on "fuzzy logic" can claim "non-fuzzy" concepts to be a basis in the reasoning process. And fourth, using new paradigms, such as "fuzzy logic" is claimed to be, without a thorough theoretical underpinning, might serve to play the same role in the mythology of law, as the formal paradigm of binary logic arguably has. Especially in the case of the European Court of Human Rights, where the skepticism and criticism of the case-law is that it is complicated and incoherent, an explanatory theory involving "fuzziness", without justifying how that "fuzziness" comes into play, can, in my view, do more to obscure

the criteria that are used in the jurisprudence of the Court than to explain them. To call what is complicated "fuzzy", in this respect, is thus not convincing, at least if we are concerned about the legitimacy and ultimately the criteria for legitimate application of the Convention. Finally, I submit, that the mentioned approaches to the case-law of the European Court of Human Rights manifest a *formalist* understanding of, and theorizing about, law.

### **5.3.1 A descriptive approach**

My first objection to both approaches is that they seem purely descriptive. Both set out to analyze criteria used in the Court's case-law. Thus the legitimacy of the outcome seems to be obvious (or given) in the analysis, by the mere assertion of the authority of the Court. If we take a critical approach to the Court's jurisprudence, especially to the legitimate application of the Convention provisions, a description of the criteria used does not in and of itself suffice to justify those criteria. For a purely explanatory approach, however, the analyses are interesting. In particular, the analysis of the construction of the conception "criminal charge" in Article 6. It seems, on the other hand, that there is a further purpose to the analysis than simply providing an explanatory approach.

### **5.3.2 A prescriptive approach based on "fuzziness"**

In further theorizing about the legal reasoning of the European Commission and Court of Human Rights, and thus coloring their explanatory approach with a legitimating (prescriptive) one, the scholars have recourse to their analysis (the descriptive or explanatory approach to the existing body of case-law), and theories of "fuzziness". How use is made of "fuzziness" is, in my view, debatable, and at a minimum not very clear. In particular this is so in Delmas-Marty's approach to the fuzziness of the conception of "democratic necessity". She describes the fuzziness as taking into account conflicting interests and values, more than focusing on "confused concepts". Is a fuzzy approach to a conception like "democratic necessity" justifiable, if it does not provide for some reconstruction or theorizing about the Convention system, as a complex system, or, more likely, as a complex system interacting with other complex systems (the national legal systems)? No accounts or references are given, as to how these systems work in interaction with each others. Instead the analysis boils down to creating a "non-fuzzy" concept as a basic reference, and that basic reference is found in the case-law of the Court itself, without making any references to normative elements.

The analysis of "criminal charge" in Article 6 focuses more on the fuzziness of that "conception", showing clearly some elements of "fuzzy thinking" in the Convention jurisprudence. The same idea of a fixed basic reference is however used in the analysis,

without explanation of how such a concept is possible from the point of view of "fuzzy thinking".



### 5.3.3 The non-fuzzy basic reference

Is it possible, from the point of view of "fuzzy thinking", that complicated and vague conceptions such as "European denominator" and "democratic necessity" are non-fuzzy, i.e. have firm and unambiguous meaning, when concepts like "house" and "tree" are fuzzy ones? To me, this seems extremely unlikely.

Relying on "fuzzy thinking" in a theory of legal reasoning, and proposing at the same time that there is a basic reference which is a non-fuzzy concept, seems to be self-contradictory. Furthermore, it does not seem to fall under the "fuzzy" logic itself as a self-resolving paradox or a case where A and -A meet. It seems to attack at the roots of the very basis of "fuzzy thinking" and fuzzy theorizing, that holds that *everything* is a matter of degree. There are no concepts, that are non-fuzzy. As both approaches rest on this rather brave premise, it is interesting that no attempt is made to justify how this construction is possible. As far as both approaches rest on Wroblewski's theory, that theory assumes that there are extra linguistic semantic rules that do not belong to the rules of meaning. This is assumed. And no matter how unconvincing this is, in its theoretical guise, when it comes to highly complex and multivalued conceptions, such as "democratic necessity" and "European denominator of criminal charge, it can hardly be convincing, that these have either fixed meaning, nor serve as extra linguistic rules of interpretation.

#### 5.3.4 The new "myth" - the "myth" of fuzziness

From a critical approach, the idea that an adjudicator has to take into account conflicting interests and values in his or her decision-making is not a matter of "fuzziness" or mathematics. It is a matter of politics. How this is done is also a matter of politics, personal preferences and ideologies. Where a comprehensive theory is proposed, that relates social and legal values, and value-ranking, and describes the relation as behaving as a complex adaptive system, that theory is interesting and has a power of persuasion. This is so as regards some deep-structure theories of common law application.<sup>288</sup> Nothing similar to that approach is proposed in the analysis of the jurisprudence of the European Court of Human Rights. Where complexity that provokes allegations of illegitimate and unsound practice, is, through theoretical devices reduced to "fuzziness" without further elaborating what that fuzziness means, that reduction can be compared to the paradigm of decision-making through "formal syllogism". As even fuzziness is fuzzy, and the lawyer has no comprehension of fuzzy entropy, the paradigm of "fuzziness" can as much serve as a myth of correct or "objective" decision-making as the paradigm of "formal logic".

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<sup>288</sup>See J.C. Smith, "Action Theory and Legal Reasoning" in J.C. Smith & Daphne Gelbart, eds., *Readings for Legal Reasoning and Artificial Intelligence* (University of British Columbia, 1993) 86-102, and J.C. Smith and Cal Deedman, "The Application of Expert Systems Thechnology to Case-based Law, also in J.C. Smith & Daphne Gelbart eds., 103-112.

### **5.3.5 The formalist framework**

My objections to the theoretical approaches to the European Convention, described in the foregoing, can be summarized by arguing, that the theories rely heavily upon assumptions, that are drawn from formalism, and that they take it as given that the practice of the European Court of Human Rights is legitimate, as the Court is designed to interpret the Convention. These approaches are thus clearly situated within the formalist framework of legal thought, that they themselves set out to refute. The theorizing is similar to and draws on structural linguistics, and the theorizing of the Convention system into a "system of norms" is obvious. Even if the application and evolution of these norms, is then supposed to follow "fuzzy" logic, the relation to "external" elements is predominantly described from within the system itself. This is, in my view, clearest, in Delmas-Marty's analysis of "democratic necessity" as a basic reference or signified. To construct a conception like "democratic necessity" to fit a conceptual system of (fuzzy) norms, ignores the political, moral, value laden elements of the norms. Theoretically, it reinforces the distinction between the conceptual/formal, and the empirical, as well as reiterating the importance of the conceptual/formal emphasis for legal analysis.

## **5.4 The need for a new approach**

If scholarly approaches to the Convention jurisprudence are more affected by formalism than the Court's jurisprudence itself, what does this tell us about the Court's practice and the status of legal scholarship as regards the European Convention? Is this a manifestation of the "unity of discourse", where theory is bound up in the same premises as the practice, and scholarship and practice reinforce each other? Or is scholarship more backwards than practice? Is the European Court of Human Rights working with a highly complex conception of law and the relation between law, morals, societal changes and politics? Is the Convention system one that we can term a complex adaptive system?

On the background of the foregoing analysis, we can hardly come to that conclusion. I have argued, that a prevailing trend in the Convention jurisprudence is its formalist positivistic approach, and that even if the Court's reasoning is somewhat richer than formalist positivistic approach allows for, the additional perspective in the Court's jurisprudence are undermined by the persisting formalist framework. Work of scholars and theorists that criticize the Court's jurisprudence - even from the same premises and assumptions that prevail in the Court's approach - indicates as much as that.<sup>289</sup>

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<sup>289</sup>See for example Coin Warbrick, "Coherence and the European Court of Human Rights: The Adjudicative Background to the *Soering* Case, *supra*, note 11, criticizing the Court's lack of theory, and Kathleen M. Dillon, "Divorce and Remarriage as Human Rights: The Irish Constitution and the European Convention on Human Rights at Odds in *Johnston v. Ireland*" (1989) 22 Cornell International Law Journal 63, criticizing the outcome of the *Johnston* case.

Approaches that work with more critical perspective to law, and apply those perspectives to the Court's jurisprudence do point out the shortcomings, even in the Court's most progressive areas, as the area of rights of homosexuals. In an interesting article Susan Millns thus points out, that since the *Dudgeon* case, the Court has not developed the area, but merely repeated the line laid down in *Dudgeon*.<sup>290</sup> As she convincingly points out, the issue resolved in *Dudgeon* is merely the tip of the iceberg, and questions that involve contextualized (social) approach, that again involve questions of morals, (gender) equality and discrimination, loom behind. All these questions are more than just a matter of degree; all call for more deeply contextualized approaches and alternative ways of constructing and implementing human rights' norms.

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<sup>290</sup>See Susan Millns, "Homosexual Rights and Wrongs Under the European Convention on Human Rights: A Question of Privacy or Equality?" in B.S.Jackson & D. McGoldrick, *Legal Visions of the New Europe* (London: Graham & Trotman/Martinus Nijhoff, 1993) 225.

## CONCLUSION

At this time of a construed consensus-ideology in European politics (the European Union), the much redeemed European Court of Human Rights has increasingly had recourse to finding a discernible consensus in the member states of the Council of Europe. This has arguably become a constitutive normative element in the Court's case law. Often the requirement of consent takes the form of a "European denominator" or consensus in "member state legislation". This rather curious construction of a human rights' document was the incentive for my further inquiry into the jurisprudence of the Court.

If the background for this construction is to unify the standards and practices regarding fundamental human rights in the various European states that are party to the Council of Europe, and if the aim is *unification* from below, so to speak, i.e. not from construed universal rights, but from inter-individual or inter-state consensus, the timing for such a reconstruction is chosen badly. It is happening at the same time as the Convention system is expanding to the former socialist countries in Central and Eastern Europe; these are countries that have had a manifestly different approach to human rights' standards, than are prevailing in the civil-libertarian approach in Western Europe.

I have not addressed in particular the idea of unified legislation as reflecting the best means for human rights' protection, nor the possibility of the conception "European integration" being seen as a normative element in constructing a human rights' document. Yet, this would be warranted, given the scholarly and practical arguments around the European Convention of Human Rights. I hope, however, that my argument throughout the paper has managed to show, albeit indirectly, the simplicity of arguments like the ones indicated.

My main focus has been on the formalist and positivistic trends in the Convention jurisprudence, discernible in practice, and resonating on the level of theory. The case analysis proceeded within a particular, critical, framework, showing both a formalist emphasis, in the interpretive work and construction of the Convention, and not less indeterminacy and incoherence that, through a particular theoretical framework, can be described as avoiding material solution. The cases that I have elaborated on are not the whole of the Court's case law. Neither did I analyze the work of the European Commission of Human Rights, that holds an important role in the Convention jurisprudence. But the analysis has shown, that criticism on the Court's interpretative work is warranted; the difficulty lies in finding an appropriate approach.

Approaching the Convention jurisprudence through the concept of legitimacy is admittedly, to make a complicated subject even more complicated. It opens up theoretical questions as to how we define legitimacy and if inquiring into a legitimating theory of the European Convention is appropriate or even possible. It also indirectly opens up a comparative perspective, vis-à-vis constitutional theory and the debate about the legitimacy of judicial review. For interrelated reasons, I chose not to draw on a comparative approach in analyzing the jurisprudence of the European Court of Human Rights - not to compare the jurisprudence of the Court to the constitutional practice in the United States of America, Canada, nor any of the European Countries, that have judicial review in their national legal structure. Instead I chose to approach the Court's jurisprudence through theory, and through questioning both theory and practice. Three dimensions found in theorizing about and defining the concept legitimacy - i.e. an axiological (normative) dimension, a formal (authoritative) dimension, and an empirical (factual) dimensions - were also found important in theorizing about law, and traditional theorizing of the concept of law, what law is, how it works, etc. explained as overemphasizing one - or two - of these dimensions. This again served as a reminder to be wary of the assumptions that control both legal scholarship and legal practice, and for that matter legal theory as well. For this purpose, an external point of view was found necessary in approaching legal theory, and in approaching the practice of the European Court of Human Rights.



It was surely never mentioned, that my project of approaching the European Convention jurisprudence might be ridiculous; that to approach the European Convention on Human Rights, which is literally shaped around the concepts of rule of law, legal certainty, objectivity and liberal individualism, from a critical approach, whose sacred aim and firm belief is to attack all manifestations of liberal political theory, might be futile or ridiculous. But if my project seems ridiculous, this is possibly so because of it being external to the premises that form the European Convention, the jurisprudence and the scholarly work, and not because it doesn't merit attention.

Thus my approach throughout the paper has been to draw on critical insights to both legal theory and international legal discourse. Critical insights to legal theory showed that traditional theorizing about law is bound up in assumptions from rationalist formalism and positivistic philosophy, translating into the theory of law from theories and philosophy of language. The system of norms (and language) and the structure of law (and language), originally thought of for the purpose of theorizing, and thus an epistemological premise, rather than a factual element, has, arguably, translated into theory and practice as something real, from there on shaping the framework of legal argumentation. In Peter Goodrich's analysis of traditional legal theory, the line is drawn from the premises of formalism (closed objective system of norms) to legal positivism,

that admits relativism, but can't escape the dilemma of subjectivity and meaning in an objective system of legal norms. On this theoretical background my analysis proceeded, to show that the jurisprudence of the European Court of Human Rights was bound up in assumptions from formalism and legal positivism, translated into the Convention system through prevailing legal theory in the member states of the Council of Europe - and through the theoretical assumptions made in theorizing about international law. In particular, I found the elements of formalism and positivism in the Court's systematic interpretation of the concepts of the Convention, approaching the task as interpretation of a text, and often arguing from systematic unity and relative closure of the system of norms.

Where the Court breaks out of its formalist positivistic paradigm, as here outlined, either having recourse to constructions such as "essence" of a protected right, or the effective protection of the individual, the jurisprudence manifests different dilemmas. Drawing on Martti Koskenniemi's deconstruction of international legal argument, I have read the case-law of the Court so as to sadly confirm to Koskenniemi's caricature of the tension between concreteness and normativity (apology and utopia). In particular, this is easily read out of the Court's methods of "autonomous" interpretation vis-à-vis the states' "margin of appreciation", as well as the problematic consensus-methodology of the Court itself. Thus, the Court strives to impose some normative standards of human

rights protection on the member states, which is after all the aim and purpose of the Convention. However, to fill these normative standards with meaning, the Court refers back to the meaning in state legislation and to any consensus in the member states of the Council of Europe. The procedure seems self-refuting. In Koskenniemi's term, the basic contradiction leads rather to avoidance of a conclusion than anything else; a thought that often comes into mind as regards the jurisprudence of the European Court.

Now, apart from being itself based on formalistic assumptions and premises from structuralism, Koskenniemi's approach might be subject to deconstruction - or rethinking - if we were to propose, that the fundamental contradiction and, in his terms, irresolvable tension, was not irresolvable after all, but a matter of dialectics, flux, continuum rather than contradiction; equilibrium rather than paradox. This is a thinkable argument from newer approaches to law, that refute the bivalence of formal logic (and structural dichotomies for that matter) and hold that everything is a matter of degree: fuzzy, vague, both A and its opposite (not A) at the same time.

Theories of complex adaptive systems and their application to law are both too recent - and at present too complex - to help us much in understanding law and legal practice. Further, I tried to show that the scholarly approaches to the European Convention on Human Rights that invoke "fuzziness" as a theoretical premise, are themselves bound up

in the assumptions from formalism that they set out to refute. They are thus of little help in approaching the European Convention from a different theoretical perspective.

What was then the point of this paper? I have perhaps gone a long and unorthodox way to agree with some of the critical contentions about the Convention jurisprudence: the jurisprudence shows nothing more than a lack of theory. The critique of formalism and positivism in the application of a human rights' document serves as a (semi) external critic - and it aims to elucidate the lack of theoretical approach that takes into consideration more than the formal, legal aspects of the rights' protection. A document as is the European Convention has, and should have, in my view, more to do with political philosophy - a substantive theory of justice, fairness, organization of society, social relations, distribution and politics, than it has to do with construing concepts in a framework of conceptual unity. The discussion of the Court's reference to the requirements of democracy, that often takes the form of a technical application of different criteria of democratic necessity rather than elaborating on the contextualized consequences of its constructions, is meant to stress the necessity of some theory of a just society - and the role of both human rights' norms and law in such a society.

Needless to say, I do not prescribe a legitimating theory for the Court to follow: I do not have a prescription for the just society, the balance between individual rights and the

general interest; the ways of constructing these rights. If there is a "prescriptive" element in my paper, it is on a lesser level - i.e. addressed to scholars and theorists, to be aware of the assumptions underlying scholarship and theory, and to start from different premises than their subject matter. In this paper, I hope, I have at least achieved as much as that.

## BIBLIOGRAPHY

Adeno Addis, "Individualism, Communitarians, and the Rights of Ethnic Minorities" (1991) 66 Notre Dame Law Review 1219.

Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 508.

Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993).

Alan S. Rosenbaum: "The Editor's Perspective on the Philosophy of Human Rights" in Alan S. Rosenbaum, ed., *The Philosophy of Human Rights. International Perspectives* (Connecticut: Greenwood Press, 1980).

Alexander M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*. Second edition. (New Haven: Yale University Press, 1986).

Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993).

Andrew Drzemczewski and Jens Meyer-Ladewig, "Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994" (1994) 15 Human Rights Law Journal 81.

Andrew Drzemczewski, "The Sui Generis Nature of the European Convention on Human Rights" (1980) 29 International and Comparative Law Quarterly 54.

Andrew Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study* (Oxford, Clarendon Press 1983).

C. Ravaud, "The Committee of Ministers" in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 645.

C.A. Gearty, "The European Court of Human Rights and the Protection of Civil Liberties: An Overview" (1993) 52 Cambridge Law Journal 89.

Ch. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation*. Translated by John Wilkinson and Percell Whaver (Indiana: University of Notre Dame Press, 1969).

Christopher A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and "General Principles of Law" (1994) 5 Duke Journal of Comparative & International Law 35.

Colin Warbrick, "'Federal' Aspects of the European Convention on Human Rights" (1989) 10 Michigan Journal of International Law 698.

Colin Warbrick, "Coherence and the European Court of Human Rights: The Adjudicative Background to the *Soering* Case" (1990) 11 Michigan Journal of International Law 1073.

*Collected Edition of the "Travaux Préparatoires"* (The Hague: Martinus Nijhoff, 1975).

David Beatty, "Human Rights and the Rules of Law" in David Beatty ed., *Human Rights and Judicial Review. A Comparative Perspective* (Dordrecht: Martinus Nijhoff Publishers, 1994).

David Beetham, *The Legitimation of Power* (London: MacMillan, 1991).

Edward L. Rubin "The Practice and Discourse of Legal Scholarship" (1988) 86 Michigan Law Review 1835.

F. A. Mann, "Britain's Bill of Right" in F. A. Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990).

F. Matscher, "Methods of Interpretation of the Convention" in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993).

Francis G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press 1975).

Francois Ost, "The Original Canons of Interpretation of the European Court of Human Rights" in Mireille Delmas-Marty ed., *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Dordrecht: Martinus Nijhoff Publishers, 1992).

Franz Matscher & Herbert Petzold, eds., *Protecting Human Rights: The European Dimension. Studies in honor of Gerard J. Wiarda* (Köln: Carl Heymanns Verlag KG, 1988).



H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

Hans Kelsen, *Pure Theory of Law*. Translation from the Second Revised and Enlarged Edition by Max Knight (Berkeley: University of California Press, 1967).

Howard Charles Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" (1987) 3 Connecticut Journal of International Law 111.

Ian Brownlie, *Principles of Public International Law*. Fourth edition (Oxford: Clarendon Press, 1990).

Ingo von Munch & Andreas Buske, *International Law. The Essential Treaties and Other Relevant Documents* (Berlin: Walter de Gruyter, 1985).

Isse Omanga Bokatola, "The Draft Declaration of the United Nations on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities" (1991) 46 The Review. International Commission of Jurists 33.

Hugh M. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada*. Fifth edition (Toronto: Emond Montgomery Publications Limited 1993)

James Boyle, "Ideals and Things: International Legal Scholarship and the Prison-house of Language" (1985) 26 Harvard International Law Journal 327.

Jean-Francois Flauss, "Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe" (1994) 5 European Journal of International Law 401.

Jens Meyer-Ladewig, "Reform of the Control Machinery" in in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 910.

Jochen Abr. Frowein, "European Integration Through Fundamental Rights" (1984) 18 *Journal of Law Reform* 5.

Jochen Abr. Frowein, "Fundamental Human Rights as a Vehicle of Legal Integration in Europe" in Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., *Integration Through Law. Europe and the American Federal Experience* Vol. 1 Book 3 (Berlin: Walter de Gruyter 1986) 300.

Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 *Osgoode Hall Law Journal* 123.

Johan G. Lammers: "General Principles of Law Recognized by Civilized Nations" in Frits Kalshoven, Pieter Jan Kuyper & Johan G. Lammers eds., *Essays on the Development of the International Legal Order*. In memory of Haro F. Van Panhuys. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) 53.

Juan Antonio Carrillo Salcedo, "The Place of the European Convention in International Law" in R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 15

"La matiere pénale" au sens de la Convention européenne des droits de l'homme, flou du droit pénal" par le Groupe de Recherche Droits de l'Homme et Logiques Juridiques (1987) 4 *Revue de Science Criminelle et Droit Pénal Comparé* 819.

Laurence R. Helfer, "Consensus, Coherence and the European Convention on Human Rights" (1993) 26 *Cornell International Law Journal* 133.

Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987).

Mark Tushnet, *Red, White, and Blue. A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988).

Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989).

Martti Koskenniemi. Book review: Thomas M. Franck, *The Power of Legitimacy Among Nations*, (1992) 86 *American Journal of International Law* 175.

Mauro Cappelletti, *The Judicial Process in Comparative Perspective*. Ed. with the collaboration of Paul J. Kollmer and Joanne M. Olson (Oxford: Clarendon Press, 1989).

Michel van de Kerchove and Francois Ost, *Legal System Between Order and Disorder* (Oxford: Oxford University Press, 1994).

Mireille Delmas-Marty, ed., *The European Convention for the Protection of Human Rights. International Protection versus National Restrictions* (Dordrecht: Martinus Nijhoff Publishers, 1992).

Nigel Purvis, "Critical Legal Studies in Public International Law" (1991) 32 *Harvard International Law Journal* 81.

P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers, 1990).

Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observation". An Occasional Paper from Minorities Rights Group (1993).

Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991).

Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 *Human Rights Law Journal* 57.

Peter Goodrich, *Legal Discourse. Studies in Linguistics, Rhetoric and Legal Analysis* (London, Macmillan Press, 1987).

R.St.J. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers 1993).

Richard S. Kay, "The European Convention on Human Rights and the Authority of Law" (1993) 8 Connecticut Journal of International Law 217.

Rolando Gaete, *Human Rights and the Limits of Critical Reason* (Aldershot: Dartmouth, 1993).

Walter J. Ganshof Van Der Meersch, "Le caractere 'autonome' des termes et la 'marge d'appréciation' des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme" in Franz Matscher & Herbert Petzold, eds., *Protecting Human Rights: The European Dimension*. Studies in honour of Gérard J. Wiarda (Köln: Carl Heymanns Verlag KG 1988).

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