Separation of Powers and Alternative Dispute Resolution before the European Court of Human Rights

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Alternative dispute resolution procedures before the European Court of Human Rights – The state agent, a member of the executive branch, tasked with representing the respondent state – Judicial and legislative branches of the respondent state limited or bound by concessions by the state agent – Convention framework effectively increases the power of the executive branch to the detriment of the other branches of government in the respondent state – Tension with national separation of powers – Possible solutions on a national and international level

Introduction

Alternative dispute resolution has been at the forefront of legal scholarship for many decades now.[1] Negotiation, mediation, and arbitration have seeped through the legal profession and educational system to a degree previously unimaginable. Studies on alternative dispute resolution have traditionally focused on the benefits and downsides of using extra-legal means to resolve a situation of conflict from the standpoint of the parties.[2] Moreover, public lawyers, in particular, have increasingly been evaluating the effects of alternative dispute resolution on the deciding body that would have otherwise resolved the dispute if not for the alternative

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[1]For a general overview *see* D. Dragos and B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) p. 605.

[2]For example, *see* T. Nabatchi and A. Stanger, 'Faster? Cheaper? Better? Using ADR to Resolve Federal Sector EEO Complaints', 73 *Public Administration Review* (2013) p. 50.

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pathway.[3] The perspective can be broadened even further by studying the impact of alternative dispute resolution on the overall institutional equilibrium.

It might be helpful to illustrate this three-pronged approach with an adaptation of one of the most famous negotiation technique allegories. In *Getting to Yes*, Fisher and Ury used the following fable to illustrate the importance of seeking options that deliver mutual gains. Two children (the parties to a dispute) were quarrelling over an orange. Their father eventually decided, arbitrarily, to split the orange in two; one part for each child. One child threw out everything but the flesh of its half to make orange juice. The other child threw out everything but the peel of its half to bake a cake.[4] If the father had paid closer attention to the children's interests rather than their positions, one child might have ended up with the flesh of the whole orange to make juice and the other would have had the peel of the whole orange for the cake. A decision preceded by more negotiation would thus have led to benefits for both parties. In a second step, such a decision would also have been more beneficial for the father (as the deciding body) since it would have arguably led to a quicker resolution – without the headache of dealing with two partially disappointed children. In a third step, it is crucial to recognise the impact of the deciding body's verdict on the overall institutional equilibrium. Suppose the child who only wanted the orange peel was, with a group of classmates, trying to decide what to make for a fundraising project: orange cake or orange juice. Let us furthermore suppose that the child was strongly in favour of cake and unilaterally declared for the orange peel. If the father had listened to his own child's personal preferences and given him the peel of the entire orange, he would have also *de facto* decided on orange cake as a product for the group project. He would thus have influenced the balance of a relationship that, at first sight, had no bearing on the dispute between his two children.

After this introduction, we apply this three-pronged analysis to the European Convention on Human Rights. The Convention's most apparent examples of alternative dispute resolution are the friendly settlement and unilateral declaration procedures before the European Court of Human Rights. In these procedures, the respondent state is represented by its government (or state) agent, who is a member of the executive branch. The judicial and legislative branches might find themselves (*de facto*) limited or bound by concessions made by the executive within the Convention's dispute resolution framework. For example, if the executive of a respondent state explicitly recognises a violation of a human right by the state's

[3]For example, *see* P. Urwin, et al., 'Quantitative evidence in the evaluation of ADR: the case of judicial mediation in UK Employment Tribunals', 23 *The International Journal of Human Resource Management* (2012) p. 567.

[4]R. Fisher and W.L. Ury, *Getting to Yes. Negotiating Agreement without Giving In* (Houghton Mifflin Company 1991) p. 56–57.

judiciary and the Court rubberstamps that admission, how could the judiciary of that respondent state ultimately decide otherwise? How does this influence the independence of the judiciary? By allowing the executive of the respondent state to negotiate case outcomes, the Court effectively increases the power of the executive branch to the detriment of the other branches of government in the respondent state, thereby shifting the national balance of powers. Therefore, the aim of this paper is to examine how alternative dispute resolution procedures before the Court impact the separation of powers principle in the contracting states of the Council of Europe.

This article is structured as follows. In a first substantive section on the theoretical framework, we offer an overview of the benefits and downsides of these modes of alternative dispute resolution for the parties (the applicant and the respondent state) and the deciding body (the Court). In the ensuing section, we analyse the third step of overall institutional equilibrium in the context of the Convention by indicating the separation of powers issues that can arise as a result of these alternative dispute resolution procedures. In the final section, we offer a number of concrete solutions at the national and international levels to safeguard the protection of human rights, cost efficiency as well as the separation of powers principle within respondent states.

Theoretical framework

In this section, we qualify the various types of alternative dispute resolution available in the European Convention on Human Rights as it applies after the amendments of Protocol 14. Next, we evaluate the advantages and downsides of those alternative dispute resolution methods.

The first method to resolve a dispute in an alternative fashion is by means of a friendly settlement between the applicant and the respondent state. Friendly settlements have especially been promoted to efficiently resolve repetitive and pilot cases.[5] Before the entry into force of Protocol 11 in 1998, the European Commission of Human Rights would itself assist in negotiations and could even occasionally issue a provisional decision to the parties to incentivise a friendly settlement.[6] That practice was discontinued due to concerns about independence

[5]Explanatory report to Protocol 14 ECHR, §93.

[6]E. Myjer, 'It is Never Too Late for the State – Friendly Settlements and Unilateral Declarations', in L. Caflisch (ed.), *Human Rights – Strasbourg views* (Engel Verlag 2007) p. 309 at p. 315; F. Ang and E. Berghmans, 'Friendly Settlements and Striking Out of Applications', in P. Lemmens and W. Vandenhole (eds.), *Protocol No. 14 and the Reform of the European Court of Human Rights* (Intersentia 2005) p. 89 at p. 92; J. Vande Lanotte and Y. Haeck, *Handboek EVRM. Deel 1* [*Handbook ECHR. Part 1*] (Intersentia 2005) p. 369–397.

and objectivity. The Court now acts principally as a 'post box'.[7] Article 62 of the Rules of Court stresses that the Registrar – acting on the instructions of the Court – enters into contact with the parties with a view to securing a friendly settlement. In practice, however, it appears that the Registry is often so burdened by its caseload that it cannot optimally fulfil this function, i.e. bringing both parties together for an alternative resolution of their dispute.[8] Nevertheless, the number of friendly settlements has soared in recent years and the Court is increasing its efforts to streamline the process.[9] Article 39 of the Convention declares that the Court may accept a friendly settlement of the parties at any stage of the proceedings.

At the least, a friendly settlement will generally involve a transfer of indemnities to the applicant. The respondent state may also offer other redemptive measures to strike a deal. Such a measure can, for instance, involve the promise to change problematic legislation or executive regulation.[10] A crucial feature of friendly settlement negotiations is their confidentiality.[11] The applicant and the respondent state are not allowed to share any communications exchanged with the aim of reaching a friendly settlement.[12] The Court only accepts a friendly settlement after it has verified that the settlement was reached 'on the basis of respect for human rights as defined' by the Convention.[13] It will thus, at least *prima facie*, verify violations of Convention rights and take (an implicit) position on the merits of the case. However, a majority of legal scholarship deems the review of friendly settlements by the Court to be markedly meek.[14] After the Registrar informs the

[7]P. Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press 2012) p. 63; H. Keller, et al., *Friendly Settlements before the European Court of Human Rights. Theory and Practice* (Oxford University Press 2010) p. 162.

[8]Y. Haeck and C. Burbano Herrera, *Procederen voor het Europees Hof voor de Rechten van de Mens* [*Litigating before the ECtHR*] (Intersentia 2011) p. 341.

[9]In 2018, 3,048 applications were 'struck out' in decisions following friendly settlements and unilateral declarations. *See* Analysis of Statistics 2018, ⟨www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf⟩, visited 28 January 2019; C. Dubois and E. Penninckx, *La procédure devant la Cour européenne des Droits de l'Homme et le Comité des Ministres* (Wolters Kluwer 2016) p. 267. *See* the press release of 18 December 2018, in which the Court announced a new practice to facilitate the use of friendly settlements: ⟨www.dirittoegiustizia.it/allegati/Cedu_comunicato.pdf⟩, visited 17 April 2019.

[10]Dubois and Penninckx, *supra* n. 9, p. 276.

[11]Art. 62, 2 Rules of ECtHR; Dubois and Penninckx, *supra* n. 9, p. 271; Keller et al., *supra* n. 7, p. 39–40; G. Weber, 'Who Killed the Friendly Settlement – The Decline of Negotiated Resolutions at the European Court of Human Rights', 7 *Pepp. Disp. Resol. L. J.* (2007) p. 215 at p. 225; Vande Lanotte and Haeck, *supra* n. 6, p. 373.

[12]Explanatory report to Protocol 11 ECHR, §93.

[13]Art. 39, §1 ECHR and Art. 62, 1 Rules of ECtHR. European Court of Human Rights, *Unilateral declarations: policy and practice* (September 2012) p. 2.

[14]Keller et al., *supra* n. 7, p. 38; Haeck and Burbano Herrera, *supra* n. 8, p. 341.

Court that the parties have agreed to a friendly settlement, it strikes the case out of the Court's list. The Committee of Ministers monitors the respondent state's diligent compliance with the friendly settlement.[15]

A second, increasingly important method of alternative dispute resolution is the unilateral declaration made by the respondent state vis-a-vis the applicant.[16] In principle, a declaration can only be made after attempts to reach a friendly settlement have failed. Such a declaration contains an express acknowledgement of a human rights violation and specifies which individual or general measures will be taken to provide appropriate redress. Remarkably, the Convention itself makes no mention of unilateral declarations. According to Article 37 of the Convention, the Court can strike an application out of its list of cases if it finds that: (a) the applicant does not intend to pursue his application; or that (b) the matter has been resolved; or (c) 'for any other reason established by the Court'. The Court itself has derived the possibility for unilateral declarations from this residual category. Nowadays, most unilateral declarations are made in the context of Article 6 ECHR complaints.[17]

The Grand Chamber of the Court first clarified the standards to be used by the Court to ratify a unilateral declaration by a respondent state in *Acar* v *Turkey*.[18] It must take the following factors into account: the nature of the complaints made; the relationship to prior cases; the impact of the measures proposed by the respondent state to prior cases; the certainty surrounding the facts; the admission of the government of the human rights violation and the scope and method of the proposed redress.[19] This list is not exhaustive.[20] While the Court had thus introduced the unilateral declaration of its own initiative, it proved robust[21] in the application by not accepting it in *Acar* v *Turkey* itself. In that case, the admission and undertaking for redress proved unsatisfactory.[22] After its praetorian conception, the Court then formalised some of the standards for unilateral declarations within Article 62A of its own Rules of Court. According to that provision, unilateral

[15]Art. 39, §4 ECHR. *See*, inter alia, B. Rainey et al., *The European Convention on Human Rights* (Oxford University Press 2017) p. 57–59.

[16]Dubois and Penninckx, *supra* n. 9, p. 281; D. Bychawska-Siniarska, 'Unilateral Declarations: The Need for Greater Control', *European Human Rights Law Review* (2012) p. 673 at p. 673; Keller et al., *supra* n. 7, p. 103 and 111.

[17]L. Glas, 'European Convention on Human Rights', 30 *NQHR* (2012) p. 495 at p. 497.

[18]ECtHR 6 May 2003, Case No. 26307/95, *Tahsin Acar* v *Turkey*, §76; Leach, *supra* n. 7, p. 72.

[19]*See*, for a discussion of these factors, L. Glas, 'Unilateral declarations and the European Court of Human Rights: Between efficiency and the interests of the applicant', 25 *Maastricht Journal of European and Comparative Law* (2018) p. 607 at p. 612–613.

[20]*Tahsin Acar* v *Turkey*, *supra* n. 18, §77.

[21]A. Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (Oxford University Press 2012) p. 51.

[22]*Tahsin Acar* v *Turkey*, *supra* n. 18, §85.

declarations need to contain a clear acknowledgement that there has been a violation of the Convention in the case at hand and an intention to provide redress and remedial measures.[23] Moreover, the respondent state needs to make unilateral declarations in an adversarial and public proceeding, without infringing on the confidentiality of any previous negotiations regarding a friendly settlement.

A respondent state may file a request to strike the application from the list of cases if it has offered the applicant a friendly settlement which the applicant has refused. As Lord Woolf noted in his *Review of the Working Methods of the European Court of Human Rights*, applicants sometimes unreasonably refuse a generous friendly settlement offer as a symbolic gesture against the respondent state.[24] This type of applicant behaviour undermines the objective of alternative dispute resolution before the Court and its procedural economy in general. The unilateral declaration serves as a back-up option by which the respondent state recognises its shortcomings and offers compensation. In 'exceptional circumstances', the Court can even accept a unilateral declaration if no previous attempt has been made to conclude a friendly settlement.[25] Unfortunately, the Court often fails to mention in its acceptance of a unilateral declaration whether the state had attempted to conclude a friendly settlement.[26]

It is crucial to note that friendly settlements are legally binding internationally. Article 39 of the ECHR states that decisions on friendly settlements are transmitted to the Committee of Ministers, 'which shall supervise the execution of the terms of the friendly settlement as set out in the decision'. In the same vein, unilateral declarations may also be considered binding or, at any rate, to have legal consequences. Admittedly, when applications are struck out of the list of cases, this usually occurs via a decision, which is not supervised by the Committee of Ministers. However, an absence of enforcement does not exclude binding force or legal consequences. For it is established case law that 'should a respondent state fail to comply with the terms of a unilateral declaration in a case which has been struck out, the application may be restored to the Court's list of cases in accordance with Article 37, § 2 of the Convention'.[27]

[23]Art. 62A, §1 Rules of Court. *See* previous case law, e.g. ECtHR 20 October 2005, Case No. 37930/02, *Bazhenov* v *Russia*, §38; Dubois and Penninckx, *supra* n. 9, p. 288.

[24]Lord Woolf, 'Review of the Working Methods of the European Court of Human Rights', 26 *Human Rights Law Journal* (2005) p. 447 at p. 458; Ang and Berghmans, *supra* n. 6, p. 102.

[25]Art. 62A, §2 Rules of ECtHR.

[26]Glas, *supra* n. 17, p. 496.

[27]For example: ECtHR (Dec) 24 November 2015, Case No. 18453/09, *Ivashchenko* v *Ukraine*; ECtHR 17 January 2008, Case No. 75025/01 a.o., *Aleksentseva and others* v *Russia*, §§15–17. *See also* Rule 43, §5 of the Rules of Court.

After describing the general framework, this section briefly examines the scholarly evaluation of friendly settlements and unilateral declarations.[28] We first look at three main advantages and then discuss three main downsides of these alternative dispute resolution mechanisms.

Many academics have embraced the advantages of alternative dispute resolution in the context of the European Convention on Human Rights, in the first place because it has proved to be an effective way to deal with certain types of cases quickly, thereby lightening the Court's caseload. Second, it interrupts the cycle of winners and losers.[29] An applicant is better off because he or she will ordinarily[30] receive higher compensation than would have been awarded under the terms of a judgment.[31] It is also to the applicant's advantage, specifically in the case of a unilateral declaration, that there is an explicit acknowledgement of the human rights infringement.[32] The respondent state benefits because it suffers less international ignominy than it would if the Court had issued an unfavourable judgment. It is advantageous for both parties that the procedure does not drag on any longer than necessary; the difference can occasionally be measured in years.[33] Third, respect for human rights is ensured since the Court still has a final say in rectifying any continued infringement of Convention rights.

However, the use of alternative dispute resolution procedures also entails risks. Even in the milestone case *Acar* v *Turkey*, judges Bratza, Tulkens, and Vajiç warned, in a joint concurring opinion, that the choice for the unilateral declaration procedure 'should be an exceptional one'.[34] Responding states must not abuse it as a means of bypassing the friendly settlement procedure. Especially following the four Turkish cases in which the Court first actively accepted unilateral declarations against Turkey

[28]For a succinct yet clear evaluation of the friendly settlement procedure, *see* C. Rozakis, 'Unilateral declarations as a means of settling human rights disputes: a new tool for the resolution of disputes in the ECHR's procedure', in M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution Through International Law. Liber amicorum Lucius Caflisch* (Martinus Nijhoff 2007) p. 1003 at p. 1004–1005.

[29]Dubois and Penninckx, *supra* n. 9, p. 283; Myjer, *supra* n. 6, p. 313.

[30]Occasionally, the Court expressly accepts lower compensation. For example, ECtHR (Dec) 9 June 2015, Case No. 75187/12, *Zarkovic and others* v *Croatia*, §20.

[31]Keller et al., *supra* n. 7, p. 65; Myjer, *supra* n. 6, p. 317; Weber, *supra* n. 11, p. 250 and 253.

[32]Unilateral declarations always contain an explicit acknowledgment of a human rights violation. Friendly settlements usually have an implicit acknowledgment of a human rights violation. Nevertheless, even friendly settlements' acknowledgments are sometimes made explicitly. Keller et al., *supra* n. 7, p. 44 and 105.

[33]Weber, *supra* n. 11, p. 251; M.-B. Dembour, 'Finishing Off Cases: The Radical Solution to the Problem of the Expanding ECtHR Caseload', *European Human Rights Law Review* (2002) p. 604 at p. 618.

[34]*Tahsin Acar* v *Turkey*, *supra* n. 18.

(*Akman*,[35] *Haran*,[36] *Toğcu*[37] and *T.A.*[38]) many legal scholars were sceptical of unilateral declarations.[39] Three main downsides of alternative dispute resolution in general arise. First, the applicants in cases likely to end in a friendly settlement or a unilateral declaration are usually 'one-shot players', whereas the respondent states are experienced 'repeat players'.[40] The factual power that respondent states have in friendly settlement negotiations is even enhanced by the existence of the unilateral declaration procedure; during negotiations for a friendly settlement, applicants are constantly aware of the Sword of Damocles – the unilateral declaration – dangling over their heads.[41] Second, by virtue of a unilateral declaration, applicants are forced to accept a solution that they had previously rejected in the course of the friendly settlement procedure, without any possibility to appeal the decision;[42] by contrast, applicants may always lodge appeals with the Grand Chamber of the Court against ordinary judgments of a Chamber.[43] Third, the use of unilateral declarations and friendly settlements is not restricted to repetitive cases. Sometimes they even appear in contentious or unclear cases.[44] In this kind of case the risk exists that governments use alternative dispute resolution as a tool to quietly resolve difficult cases and to prevent a possible precedential judgment by the Court.[45] Moreover, repetitive cases often involve the most deep-rooted structural human rights violations and may thus be more in need of an actual judgment by the Court.[46]

[35]ECtHR 26 June 2001, Case No. 37453/97, *Akman* v *Turkey*.

[36]ECtHR 26 March 2002, Case No. 25754/94, *Haran* v *Turkey*.

[37]ECtHR 9 April 2002, Case No. 27601/95, *Toğcu* v *Turkey*.

[38]*Tahsin Acar* v *Turkey*, *supra* n. 18.

[39]Ang and Berghmans, *supra* n. 6, p. 94–96; O. De Schutter, 'Le règlement amiable dans la Convention européenne des droits de l'homme: entre théorie de la fonction de juger et théorie de la négociation', in M. Verdussen, et al. (eds.) *Les droits de l'homme au seuil du troisième millénaire mélanges en hommage à Pierre Lambert* (Bruylant 2000) p. 225 at p. 226.

[40]M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', 9 *Law & Society Review* (1974) p. 95 at p. 97.

[41]Keller et al., *supra* n. 7, p. 145–146.

[42]Bychawska-Siniarska, *supra* n. 16, p. 675. Contra: Keller et al., *supra* n. 7, p. 68.

[43]Art. 43 of the ECHR. However, it is highly exceptional for a case to be referred to the Grand Chamber since referral is contingent upon the acceptance by a panel of five judges.

[44]Keller et al., *supra* n. 7, p. 51.

[45]For a similar argument *see* Bychawska-Siniarska, *supra* n. 16, p. 673 and 677. Sometimes the Court does refuse a declaration because of the contentious nature of the case. For example: ECtHR (Dec) 11 April 2013, Case No. 20372/11, *Vyerentsov* v *Ukraine*, §45.

[46]Glas, *supra* n. 17, p. 499. A good example of this is the case of *Basra* v *Belgium*. In it, several organisations submitted a third-party intervention explaining the structural problems concerning Belgian migration law that had been brought up by this case; yet it was ultimately settled with a unilateral declaration. For the third party intervention *see* ⟨https://hrc.ugent.be/wp-content/uploads/2019/02/tpi-Basra.pdf⟩, visited 3 June 2019.

Friendly settlements or unilateral declarations and the separation of powers

The prevailing criticism on friendly settlements and unilateral declarations before the European Court thus pertains to their use as political tools or to their possible negative impact on the protection of human rights. However, these alternative dispute resolution techniques also raise a question of an entirely different nature that has so far not been the subject of thorough reflection. The actions of the government agent in either a friendly settlement procedure or by way of unilateral declaration[47] can upset the national system of separation of powers.[48]

Famously described by Montesquieu as a way to prevent tyrannical rule,[49] the separation of powers is a doctrine that is concerned with power allocation and the institutional design of a state. It recommends that 'state institutions are assigned government tasks [which] they are fit to perform by virtue of their composition, capacities, and decision-making process and that they check each other's performance to avert abuse of power and correct mistakes'.[50]

In this era of multilevel constitutionalism, the predominantly national nature of the separation of powers doctrine increasingly gets put under pressure,[51] due to the ability of international actors like the European Court to influence a country's separation of powers system.[52] Before these international actors, contracting states

[47]The unilateral declaration is more problematic than the friendly settlement in light of the separation of powers doctrine; in the former case, the respondent state must make a strong recognition of the human rights violation in a public and adversarial judicial procedure. Admittedly, however, during negotiations in a friendly settlement procedure, an applicant can, for example, also obtain commitments to change legislation. However, given the confidential nature of the procedure, this puts less pressure on the other branches of government.

[48]Similarly, the report of the written comments by the Helsinki Foundation of Human Rights for the Grand Chamber case of *Jeronovic* v *Latvia*, ⟨www.hfhrpol.waw.pl/precedens/images/Amicus_unilateral_declarations.pdf⟩ 7, visited 17 April 2019. The notion of separation of powers as used in this article is not the same as the 'balance of powers' between the respondent state and the applicant, which is also important in the field of alternative dispute resolution. *See* Keller et al., *supra* n. 7, p. 96.

[49]*See* Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *L'Esprit des Lois* (A. Belin 1817), book XI, chapter VI, 130. Here he declared that 'All would be lost if the same man or the same body of principal men [. . .] exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals'.

[50]D. Kyritsis, *Where Our Protection Lies* (Oxford University Press 2017) p. 211.

[51]In recent doctrine, scholars increasingly examine whether the separation of powers doctrine can usefully be transposed to the international or European level. On this topic *see* J. Mendes and I. Venzke (eds.), *Allocating Authority Who Should Do What in European and International Law?* (Hart 2018).

[52]*See*, for example, D. Kosar, 'Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights shapes domestic judicial design', 13 *Utrecht Law Review* (2017) p. 112 at p. 113; N. Le Bonniec, *La procéduralisation des droits substantiels par la Cour européenne des*

are represented by state agents. The domestic status of state agents operating on the international stage is an opaque and under-researched topic.

On the one hand, it could be argued that a state agent cannot interfere with the separation of powers in his or her contracting state because he or she represents the entire state.[53] For example, Rule 35 of the Court clearly mentions that the state agent represents the 'contracting party', meaning the state in full.[54] Moreover, this argument fits best with the general tenets of international law by which government agents represent the state.[55]

On the other hand, there are convincing arguments to qualify state agents as a part of the executive. In essence, this idea can be traced back to the federative power as described by John Locke. The federative power was the branch of government that engaged the public 'as one body in the state of nature' towards other states or persons. Although this was a distinct power according to Locke, it would make sense to allow federative and executive power to rest in the same hands.[56] From a contemporary national constitutional point of view – the level at which separation of powers issues arise – the state agent must still be seen as a part of the executive branch. Indeed, the sparse legal scholarship on this topic mentions that government agents appearing before the European Court work under the auspices of either the Ministry of Justice or the Ministry of Foreign Affairs.[57] State agents, therefore, qualify as a part of the executive branch.

droits de l'homme (Nemesis 2016) p. 359–362; I. Ziemele, 'Conclusions', in I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge University Press 2016) p. 491 at p. 494; X. Souvignet, *La prééminence du droit dans le droit de la Convention européenne des droits de l'homme* (Bruylant 2012) p. 349–353.

[53]Similarly, *see* Council of Europe, *The role of government agents in ensuring effective human rights protection. Seminar organised under the Slovak chairmanship of the Committee of Ministers of the Council of Europe*, ⟨rm.coe.int/16806f151b⟩, visited 17 April 2019, p. 81, reference 29. Here, a government agent mentioned that it might be better to start using the term state agent, rather than government agent, because it better encapsulates the fact that it is the duty of all the state's bodies to rectify a Convention violation. *See also* Rozakis, *supra* n. 28, p. 1014. Here he mentions that '[The unilateral declaration] is part and parcel of the exercise of the *state's sovereign power* to redress a wrong done to an individual through its own means' (emphasis added).

[54]In the general scholarly work on this topic, this idea is never put into question. For example, *see* Dubois and Penninckx, *supra* n. 9, p. 97; B. Aurescu, 'Organizational and Procedural Aspects of the Institution of State Agent before the ECHR and ICJ: Some Romanian Perspectives', 6 *Chinese Journal of International Law* (2007) p. 363 at p. 368.

[55]C. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 1998) p. 126.

[56]J. Locke, *The Second Treatise on Government* (Awnsham Churchill 1689) §§145–147.

[57]*See* Dubois and Penninckx, *supra* n. 9, p. 97; Aurescu, *supra* n. 54, p. 371. *See also* E. Lambert-Abdelgawad, 'General Overview of Member States' Practices' in *Enhancing national mechanisms*

Consequently, the executive branch always has primary competence on the international level, for competences ranging from treaty-making to alternative dispute resolution concerning human rights violations. However, whereas the legislative branch still has to assent to the terms of a treaty as negotiated and accepted by government representatives,[58] such a subsequent check is absent in alternative dispute resolution procedures before the European Court. There, the state agent, acting as an entity of the executive, negotiates the case outcome and can thus make decisions that potentially limit the legislature and the judiciary.[59] In doing so, he or she can upset the national system of separation of powers.

This disturbance can occur on three levels. Supposing that such an action by the agent leads to a directly effective obligation under international law, this is first and foremost problematic in monist countries like Belgium, France and the Netherlands, where the judiciary is required to comply with obligations deriving from international law that have direct effect.[60] The executive's admission as presented by the state agent thus provokes a direct conflict between international and national law. In dualist countries, like Germany or the United Kingdom, this problem would appear to be less acute because the national interpretation of Convention rights does not necessarily have to correspond with the European Court of Human Rights' interpretation.[61] Second, however, even dualist countries are factually confronted with considerable political pressure to comply with the Court's case law, as demonstrated by the famous *Hirst* saga on prisoner's voting rights in the United Kingdom.[62] Third, even if a contracting state were immune

for effective implementation of the European convention on human right, ⟨rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId+0900001680598bd8⟩, 9, visited 17 April 2019.

[58]*See*, more elaborately on this, A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2007) p. 183–195.

[59]Qualitative data reveals the autonomous power of state agents despite their being theoretically subordinate to the executive: Keller et al., *supra* n. 7, p. 169. Here, the Polish state agent held: 'In my opinion, it is not a policy of the State to conclude friendly settlements. It is rather a choice of the Government Agent. In my country, politicians are only interested in very important cases. I have an important margin of discretion in the resolution of routine cases: I can either wait for the judgment or conclude a friendly settlement'.

[60]More broadly, *see* C. Jenart, 'The Binding Nature and Enforceability of Hybrid Global Administrative Bodies' Norms Within the National Legal Order: The Case Study of WADA', 24 *European Public Law* (2018) p. 411 at p. 418–419.

[61]Still, in Germany the ECtHR will principally be followed: Bundesverfassungsgericht 14 October 2004 (Az.: 2 BvR 1481/04, § 30) and in the United Kingdom a court or tribunal *must take into account* the ECtHR (Human Rights Act 1998, s 2(1)(a)).

[62]*See*, inter alia, ECtHR 6 October 2005, Case No. 74025/01, *Hirst* v *United Kingdom*. The UK succumbed to this pressure to a certain extent: Committee of Ministers 2 November 2017, no. DH-DD(2017)1229, *Execution of Judgments of the European Court of Human Rights*.

from international pressure, the diverging position of the state representative and another national branch of government creates an unmistakable, substantive tension between the *Trias Politica* in that state.

This discretionary power of the executive, as represented by the state agent, is not always problematic in light of the separation of powers principle. No issue arises with the separation of powers when the state agent merely acknowledges long-standing case law. If a judge has already authoritatively ascertained a violation in a previous case, such an admission would not raise any issue concerning the separation of powers. In other words, if a court – either a national court or the European Court of Human Rights itself –[63] has already ruled with force of *res judicata* that a certain legal provision violates a fundamental right enshrined in the Convention, the government agent can without problem make the same assessment in a unilateral declaration or friendly settlement in subsequent, similar cases before the European Court.[64] Similarly, a declaration or settlement acknowledging a human rights violation by the judiciary does not disregard any separation of powers considerations if the acknowledgement is in accordance with established and authoritative case law on the national and international levels.[65]

[63]It is ordinarily not the task of the European Court to review national legislation *in abstracto* but rather to examine the manner in which the legislation was applied to the applicant in the particular circumstances. For example, *see* ECtHR (GC) 4 December 2015, Case No. 47143/06, *Roman Zakharov* v *Russia*, §164; ECtHR (GC) 8 July 2003, Case No. 30943/96, *Sahin* v *Germany*, §87. However, sometimes the Court does provide such an abstract review. *See* ECtHR 29 May 2017, Case Nos. 57818/09 and 14 others, *Lashmankin and others* v *Russia*, §430.

[64]Several examples of such cases can be cited: ECtHR (dec) 11 October 2011, Case No. 50648/10, *Hemlich* v *Poland*. In this case, the Polish government declared that the national practice of using assessors in courts was in violation of the right to an independent judge. Before, the Polish Constitutional Court had been critical about the use of assessors and the European Court had already found a violation of Art. 6 in this respect in ECtHR 30 November 2010, Case No. 23614/08, *Henryk Urban and Ryszard Urban* v *Poland*. For other examples *see* ECtHR (Dec.) 26 March 2013, Case Nos. 25714/04, 1057/07, 48342/06 and 876/06, *Petrescu and others* v *Romania*. Here, the unilateral declaration concerned a Romanian law that placed an excessive burden on landlords in terms of their ability to dispose of their property. The Court had already found that this law violated Art. 1 Protocol 1 in ECtHR 2 November 2006, Case Nos. 71351/01 and 71352/01, *Radovici and Stanescu* v *Romania*; ECtHR 8 March 2007, Case No. 27086/02, *Popescu and Toader* v *Romania*; ECtHR (Dec.) 27 March 2012, Case No. 38508/06, *Plakhov* v *Ukraine*. In this case, the Ukrainian government declared that the Code on Administrative Offences violated the Convention because it did not provide for a right to appeal. Such a violation had already been found in ECtHR 6 September 2005, Case No. 61406/00, *Gurepka* v *Ukraine*. For further examples, *see* ECtHR (Dec.) 8 June 2010, Case No. 11367/06, *Popescu* v *Moldova*; ECtHR (Dec.) 1 December 2009, Case No. 67300/01, *Helsinki Committee for Human Rights Moldova* v *Moldova*; ECtHR (Dec.) 24 June 2008, Case Nos. 61878/00 and others, *Heron* v *UK*.

[65]It should be noted that, in this situation, the state agent must make sure that the existing case law can scrupulously be applied to the case at hand. Even a minor factual discrepancy between the pending case and the case law can make the former unsuitable for a friendly settlement or unilateral declaration.

The same principle applies when the legislature, having already acknowledged that a certain piece of legislation is not in conformity with certain human rights standards, changed it, yet the case governed by the previous law still reaches Strasbourg. In such hypotheses, the government agent does not execute his or her own form of constitutional or conventional review but rather follows the interpretation given by the court or the legislature. In this way, he or she acts in accordance with the idea of separation of powers.

However, in what follows, we discuss how the separation of powers principle can still be affected within respondent states with respect to all three branches of government.[66]

The judiciary

A recent unilateral declaration made by the Belgian State provides a clear example of the issue discussed here. In *Goyens and Robben*, two Belgian citizens had brought a case before the Court of Cassation (Supreme Court) concerning a fine imposed for building without a permit. Their lawyer, however, had neglected to clearly state her capacity (i.e. as a lawyer) on the application. This led the Court of Cassation to declare the case inadmissible.[67] The two applicants were of the opinion that this declaration of inadmissibility was overly formalistic and lodged an application with the European Court, complaining that they had been deprived of their right, enshrined in Article 6 of the Convention, to access to a court.[68]

Instead of submitting a brief defending the decision of the Court of Cassation, the Belgian State filed a unilateral declaration acknowledging that a violation of the right to a fair trial had occurred. In the declaration, it held that 'the rejection by the Court of Cassation of the appeal as inadmissible on the grounds that the signature did not mention her capacity as a lawyer did not respect the right of access to a court provided for in Article 6 of the Convention'.[69] This conclusion by the state agent was far from self-evident, certainly since Belgium is a monist country. The Belgian Court of Cassation, having given direct domestic effect to

[66]Because of the admissibility criteria in Art. 35 of the Convention and the obligation for the applicant to exhaust the effective domestic remedies, there will virtually always be a national court involved in the procedure that leads to the case before the European Court. However, depending on the case at hand, it is possible that the legal question for the Court pertains to the competence of either of the political branches of government.

[67]Court of Cassation (Belgium) 1 April 2008, P.07.1829.N/1, not published. Copy on file with authors.

[68]ECtHR (dec.) 13 March 2018, Case No. 47739/08, *Goyens and Robben* v *Belgium*.

[69]Ibid., §9. Translation by authors.

the Convention, would thus have taken Article 6 ECHR directly into account in its opposite decision.[70]

The implications of this declaration are more far-reaching than would appear at first glance. In essence, the state agent maintains that the Belgian Supreme Court has misapplied the rules of criminal procedure and in doing so had violated the right to a fair trial.[71] As mentioned above, the state agent is a part of the executive branch.[72] It is clear that there are potential implications for the separation of powers. Because the Court accepted the violation of Article 6 ECHR as conceded by the state agent, the Belgian Court of Cassation is now essentially prevented from interpreting the rules of criminal procedure this way in future cases. It is, however, the task of the judiciary, and not the executive, to interpret rules laid down by law and to apply them to the facts of a given dispute.[73]

Goyens and Robben is not an isolated case. Similar examples can be found in cases concerning the length of proceedings,[74] the right to liberty,[75] and the duration of pre-trial detention.[76] In all of these cases, the government agent admitted to a violation of the Convention by the judiciary of his or her country. In doing so, the agent exerts pressure on those national courts, infringing upon their independence.[77]

[70]Court of Cassation (Belgium) 27 May 1971, *N.V. Fromagerie Franco-Suisse Le Ski*, *Arr. Cass.* (1971) p. 959.

[71]The term 'rules of criminal procedure' is used in its broadest possible sense here. From the text of the judgment, it remains unclear whether the Court of Cassation had relied on the Belgian code of criminal procedure or on its own internal rules of procedure. It should be noted, however, that in both instances it is up to the Court of Cassation to decide on how these rules should be applied, rather than the state agent.

[72]The Belgian government agent is a functionary under the authority of the Minister of Justice. *See supra* n. 57.

[73]J. Raz, *The Authority of Law* (Oxford University Press 2012) p. 10; D. Smilov, 'The judiciary: the least dangerous branch?', in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 859 at p. 866.

[74]By way of recent examples: ECtHR (dec.) 17 April 2018, Case Nos. 53321/11 and others, *Keloyev and others* v *Russia*; ECtHR (dec.) 12 April 2018, Case No. 67393/17, *Sekeres* v *Slovakia*; ECtHR (dec.) 10 April 2018, Case No. 5860/09, *Trutko* v *Russia*; ECtHR (dec.) 13 March 2018, Case No. 57715/13, *Sikmanovic* v *Montenegro*

[75]ECtHR (dec.) 16 January 2018, Case No. 42249/15, *Jedruch* v *Poland*; ECtHR (dec.) 11 July 2017, Case No. 16103/15, *Zelawski* v *Poland*; ECtHR (dec.) 8 November 2016, Case No. 49424/12, *Skomorochow* v *Poland*.

[76]ECtHR (dec.) 12 December 2017, Case No. 10034/09, *Flis* v *Poland*.

[77]It is longstanding case law of the Court that for a tribunal to be independent, it should be free of outside pressure, in particular from the other branches of government. *See* for example: ECtHR (GC) 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98 and 46664/99, *Kleyn and others* v *the Netherlands*, §190; ECtHR 26 February 2002, Case No. 38784/97, *Morris* v *UK*, §58.

Even more notable are the declarations issued in cases concerning the traditional relative fundamental rights enshrined in Articles 8 to 11 of the Convention. According to the second paragraph of those provisions, restrictions are only justified if they are necessary in a democratic society. In essence, this condition requires national courts to balance all the interests involved in a given case.[78] Yet multiple examples can be found of government agents acknowledging human rights violations via unilateral declarations.[79] One noteworthy example is the case of *Piotrowicz* v *Poland*. There, a local journalist had written an editorial that was critical of the local mayor and the municipality. In reaction, the latter started civil proceedings, claiming a breach of their right to reputation. Two lower courts ruled in favour of the journalist. The Polish Supreme Court, however, allowed the municipality's claim, after which the journalist brought the case before the European Court of Human Rights.[80] This is a textbook example of a conflict between freedom of expression and the right to protection of an individual's reputation. Such a conflict between two relative fundamental rights requires a balancing of these competing interests, with attention to the specific facts of the case.[81] In a concrete case, such a balancing exercise can only be performed by the judiciary. However, the Polish government submitted a unilateral declaration in which it acknowledged a violation of the freedom of expression, essentially performing this balancing exercise itself and warping the balance between executive and judiciary.[82] By accepting the unilateral declaration, the European Court of Human Rights endorsed and rubberstamped the interpretation of the Polish government, as one branch of the national *Trias Politica*.

[78]L. Lavrysen, 'System of restrictions', in P. Van Dijk, et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2018) p. 307 at p. 316; A. Stone-Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008) p. 68 at p. 75.

[79]By way of example, concerning Art. 8: ECtHR (dec.) 6 October 2015, Case No. 78306/12, *Cirillo* v *Germany*; Concerning Art. 9: ECtHR (dec.) 21 April 2014, Case No. 72874/01, *Union of Jehovah's Witnesses and others* v *Georgia*; Concerning Art. 10: ECtHR (dec.) 14 June 2017, Case No. 69775/11, *Ilaslan* v *Turkey*; concerning Art. 11: ECtHR (dec.) 2 November 2010, Case No. 32118/06, *Asociatia Pentru Lichidarea Consecintelor Pactului Molotov-Ribbentrop* v *Moldova*.

[80]ECtHR (dec.) 20 February 2018, Case No. 1443/11, *Piotrowicz* v *Poland*.

[81]O. De Schutter and F. Tulkens, 'Rights in conflict: the European Court of Human Rights as a pragmatic institution', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Intersentia 2008) p. 169 at p. 169.

[82]Again, other examples can be found as well: ECtHR (dec.) 26 September 2017, Case No. 32418/11, *Rzadzinski* v *Poland*; ECtHR (dec.) 12 November 2013, Case No. 60551/11, *Swiech* v *Poland*; ECtHR (dec.) 13 December 2011, Case No. 38005/03, *Gazda* v *Poland*.

The legislature

It is not only the balance between the executive and the judiciary that is upset by these alternative forms of dispute resolution. Even though a majority of cases pertain to the relationship between those two branches of government, the same issue also arises between the executive and the legislature.

The first example of this, that can be found vis-à-vis several different countries, is provided by friendly settlements and unilateral declarations concerning Article 13 of the Convention. That article requires contracting states to provide for effective remedies to address arguable claims of violations of Convention rights.[83] In general, this provision compels contracting states to introduce a legislative framework for those domestic remedies.[84] It is, therefore, generally, the task of the legislature to make sure that the requirements of Article 13 of the Convention are complied with. Despite this predominantly legislative nature, several friendly settlements and unilateral declarations can be found in which government agents have conceded a violation of this Convention right.[85] However, the competence to review the legality of a statutory rule does not ordinarily reside with a member of the executive. Rather, it is incumbent upon the legislature or the judiciary to assess whether the legislation in question is in accordance with higher ranking norms – be it constitutional or treaty-based. By conceding that the legal framework is in violation of Article 13 of the Convention, the state agent disturbs the balance of power between the executive and the legislature as well as between the executive and the judiciary.

Second, pressure on the legislature is not always the result of the concessions made by a government agent but can also stem from general measures that are part of certain friendly settlements and unilateral declarations. According to Rule 62A, such a declaration shall contain an undertaking to provide remedial measures. Sometimes, this will require a change in legislation or the adoption of a new law. Even though legislative proposals can be submitted by the government in many parliamentary systems, they still have to be enacted by a democratically

[83]*See* more elaborately: T. Barkhuysen and M. Van Emmerik, 'Right to an effective remedy', in Van Dijk et al., *supra* n. 78, p. 1035.

[84]Art. 13 ECHR can be seen as a 'structural human right'. *See* O. Varol, 'Structural Rights', 105 *The Georgetown Law Review* (2017) p. 1001.

[85]*See*, for recent examples involving unilateral declarations: ECtHR (dec.) 3 July 2018, Case No. 2122/16, *Navrotki* v *The Republic of Moldova*; ECtHR (dec.) 7 June 2018, Case Nos. 73626/16 and others, *Barinov and others* v *Russia*; ECtHR (dec.) 24 May 2018, Case Nos. 31164/15 and 31193/16, *Spridonov and Mikhaylov* v *Russia*; ECtHR (dec.) 7 September 2017, Case No. 45037/14, *Isupov* v *Ukraine*; ECtHR (dec.) 17 September 2013, Case No. 13143/03, *Van Galen and others* v *The Netherlands*; ECtHR (dec.) 16 June 2009, Case No. 10470/07, *Mol* v *The Netherlands*; ECtHR (dec.) 3 March 2009, Case No. 28692/06, *Voorhuis* v *The Netherlands*. For an example of a friendly settlement: ECtHR (dec.) 27 September 2018, Case Nos. 6244/15 and others, *Szomolya and others* v *Hungary*.

elected parliament.[86] A problem arises when a state agent proposes a legislative amendment at the international level and leaves parliament with little choice but to accept it.[87] In such instances, the government agent essentially creates legislation via the general measures proposed within the alternative dispute resolution framework, once again upsetting the balance of powers between the executive and the legislature.

Similarly, several cases concerning Cyprus are worth mentioning.[88] Here, the state agent accepted by way of unilateral declaration that the Cypriot legal system did not provide an effective remedy for length of proceedings cases. In this declaration, the agent pointed out that the Cypriot government had introduced a legislative amendment in the legislature to remedy that situation. One could question whether the Cypriot legislature was left with much of a choice other than to accept the government's legislative proposal after it had been used as a bargaining chip during the alternative dispute resolution procedure before the Court.

The executive

The previous paragraphs show that the separation between either the executive and the judiciary or the executive and the legislature can be infringed upon by issuing a unilateral declaration or a friendly settlement. The question then arises as to whether a similar problem can arise concerning the executive branch itself. At first glance, there does not appear to be any problem in such cases. In principle, no issue regarding separation of powers arises when the government agent declares that another member of the executive, or an actor that falls under that person's authority, has violated a Convention right with his or her actions. In this way, the state agent can legitimately declare that specific detention

[86]A. Bradley and C. Pinelli, 'Parliamentarism', in Rosenfeld and Sajo, *supra* n. 73, p. 650 at p. 666.

[87]For an example, *see* Keller et al., *supra* n. 7, p. 177. In an interview, a state agent mentioned that he discusses draft legislation with the Registry of the Court. When the interviewer mentioned that there was a risk that the draft legislation might be amended by parliament and asked how he dealt with that risk, the government agent answered that he then tells parliament that he already has an agreement with the Court and that it would constitute a scandal if parliament were to break it.

[88]*See* ECtHR (dec.) 23 September 2010, Case No. 20364/07, *Marangos* v *Cyprus*; ECtHR (dec.) 9 September 2010, Case No. 45463/08, *Vassilas* v *Cyprus*; ECtHR (dec.) 27 May 2010, Case No. 9095/08, *Facondis* v *Cyprus*; ECtHR (dec.) 27 May 2010, Case No. 59571/08, *Kyprianou* v *Cyprus*; ECtHR (dec.) 27 May 2010, Case No. 29512/08, *Televantou* v *Cyprus*; ECtHR 25 March 2010, Case No. 29373/08, *Makrides* v *Cyprus*. In all these cases, the unilateral declaration was made before the law had been passed by the Cypriot legislature.

conditions,[89] a heavy-handed police action,[90] or a lack of effective investigation[91] have violated Article 3 of the Convention.

However, three caveats can be formulated. First, the question arises as to whether the state agent is competent under the delegation doctrine of the respondent state to sign off (*de facto* autonomously) on a decision as important as a Convention right violation, or whether this could only be done by a minister or the executive as a whole.[92] Second, there is the distinct possibility that the government agent will acknowledge a human rights violation in a field of competence of another minister. State agents are usually part of either the Ministry of Foreign Affairs or the Ministry of Justice.[93] However, the declaration could relate to e.g. a police action, which is the responsibility of the Ministry of the Interior. The political consequences might be far-reaching. Ministers are accountable to parliament and an express acknowledgement of a human rights violation could lead to a loss in confidence.[94] Third, issues could arise in federal states that are characterised by an exclusive division of competences between various levels of government.[95] In such states, the government agent, who is a member of the central federal government, can acknowledge a human rights violation relating to a matter for which the federal government lacks competence. This closely resembles the critiques expressed above, albeit that in this instance the declaration infringes upon the vertical division of competences, rather than the horizontal separation of powers.[96]

We can conclude that express acknowledgements of a human rights violation in a friendly settlement or unilateral declaration can jeopardise the separation of powers in relation to the judiciary, the legislature and the executive.

[89]ECtHR (dec.) 2 February 2016, Case Nos. 9230/09 and 40732/10, *Yemelyanov and Bushmanov* v *Russia*.

[90]ECtHR (dec.) 30 September 2014, Case No. 39726/04, *Molashvili* v *Georgia*.

[91]ECtHR (dec.) 12 January 2016, Case No. 77029/12, *Duminica* v *The Republic of Moldova*.

[92]A. Le Sueur et al., *Public Law: Text, Cases and Materials* (Oxford University Press 2016) p. 474–479.

[93]*See supra* n. 57.

[94]Bradley and Pinelli, *supra* n. 86, p. 664.

[95]D. Halberstam, 'Federalism: Theory, Policy, Law', in Rosenfeld and Sajo, *supra* n. 73, p. 576 at p. 597.

[96]*See also* EComHR (dec.) 9 July 1992, Case No. 14093/88, *Moosmann* v *Austria*. In this case, the Austrian state agent (a member of the federal Ministry of Foreign Affairs) reached a friendly settlement which held that one of the *Länder* had to pay part of the compensation. Similarly, one could also imagine a situation in which the state agent, under the auspices of the national executive, admits to a Convention violation by a local authority or a non-public body that exercises public authority. Here, it is also possible that the agent concedes a violation in the field of competence of either another national minister or – in federal states – another level of government.

Solutions

The previous section demonstrates that the current practice of friendly settlements and unilateral declarations before the Court puts a strain on the national principle of separation of powers. In what follows, we propose a number of concrete solutions at the national and international levels that could safeguard the protection of human rights and promote cost efficiency as well as honour the separation of powers principle within respondent states.

National level

Perhaps the first and most essential step to remedy the issues set forth in this article is for executives themselves to become aware of them. If state agents were to take national separation of powers constraints into consideration when contemplating possible settlements or declarations, many issues would be avoided. This can materialise at three different aspects of the alternative dispute resolution process: the cases which the agent selects for these procedures; the formulation of the admission; and the remedial measures which the agent proposes during this process.

First of all, increased awareness might make it more likely that state agents will choose more carefully cases in which to pursue a friendly settlement or unilateral declaration. If they conclude that an acknowledgement of a human rights violation in a given case might impede the legislature or judiciary from exercising one of their competences, it would be preferable to avoid alternative dispute resolution altogether and let the European Court reach a judgment on the merits as an objective deciding body.

Second, separation of powers considerations might compel agents to phrase settlements or declarations in a way that shows deference to the prerogatives of the other governmental branches. An example of this can be found in the first-ever friendly settlement made within the framework of the European Convention; that settlement contained a clause stating that 'the validity of the [national] judicial opinion was not called into question'.[97] Even though such statements cannot fully prevent any strain on the separation of powers principle, the inclusion of similar clauses in alternative dispute resolution proceedings would at least testify to the respect due to the national judiciary.

Third, state agents should also be more aware of how the individual or general measures they propose can influence the separation of powers. In doing so, the state agent should phrase measures with sufficient deference. For example, an agent could undertake to improve existing legal measures via parliamentary procedure rather than by submitting actual substantial legislative amendments in the

[97]EComHR 17 February 1965, Case No. 1727/62, *Boeckmans* v *Belgium*.

text of the settlement.[98] For the European Court, such promises of legislative amendment appear to be sufficient.[99]

As a second step, at the national level, it is of utmost importance that alternative dispute resolution proceedings be characterised by more transparency and deliberation. The focus should be placed on increased collaboration between the different branches of government during these proceedings. Many of the issues flagged here could have been prevented if the competent authority had taken part in the process.[100] In a similar sense, Donald and Leach have rightly opined that, 'given that the conclusion of friendly settlements or the proffering of unilateral declarations may involve, in some cases, the adoption of policy positions which might be politically contentious, a case could be made for parliamentary involvement in the formulation of the positions taken by governments in the course of their interventions before the Court'.[101] Each contracting state will have to find an internal mechanism to synchronise its *Trias Politica* with the specific procedures that exist in the Convention.[102]

International level

From a theoretical point of view, the institutions at the national level are best suited to structurally solve the issues set forth in this article. Every state has its unique constitutional structure and a distinct system of separation of powers,[103] making national authorities best-suited for identifying potential existing problems and solutions in their own countries. In that sense, the European Court has

[98]For example: ECtHR (dec.) 20 June 2017, Case Nos. 53491/10 and others, *Zaluska, Rogalska and others* v *Poland*, §25; ECtHR (dec.) 13 February 2007, Case No. 30357/03, *M.* v *UK*; ECtHR 20 June 2002, Case No. 35076/97, *Ali Erol* v *Turkey*, §20; ECtHR 3 May 2001, Case No. 32438/96, *Stefanov* v *Bulgaria*, §14.

[99]In all cases referred to in the previous reference, the Court accepted the settlement or declaration.

[100]For example: ECtHR (dec.) 15 October 2013, Case No. 36398/08, *Romana de Televiziune* v *The Republic of Moldova*. Here, the friendly settlement was concluded between 'the Government of the Republic of Moldova and the relevant authorities of the Republic of Moldova, taken as a whole and individually' and the applicant.

[101]A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press 2016) p. 30.

[102]Sweden provides a good example of one kind of measure that could be taken to prevent separation of powers issues within the executive. Sweden's friendly settlements contain a clause that holds that the 'settlement is dependent upon the formal approval of the Government at a Cabinet meeting'. For example: ECtHR (dec.) 4 December 2012, Case No. 49801/08, *Lönn* v *Sweden*. Think, also, of a duty for the executive to report (yearly) to the legislature on any friendly settlements and unilateral declarations: Donald and Leach, *supra* n. 101, p. 30.

[103]V. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010) p. 67.

recently declared, on a unilateral declaration in *Basra* v *Belgium*, 'that in the light of the Convention, only the international responsibility of the State as such is at issue, irrespective of the national authority responsible for the breach of the Convention in the internal system'.[104] It would, therefore, seem to disregard issues concerning the separation of powers in its judgments.

However, it should be noted that the Court's reasoning in the *Basra* case is not exempt from criticism. The sole precedential authority for the cited consideration in *Basra* concerned a legal question about a state party's jurisdiction as enshrined in Article 1 ECHR rather than the relationship between the different branches of government in the context of the state party's observance of Convention rights.[105] Moreover, this precedential authority did not concern a unilateral declaration procedure, but rather an ordinary judgment, in which the possible problems concerning the separation of powers as set forth in this article are much less apparent. In those two ways, the Court's analogy is flawed. Rather, the European Court should not put its head in the sand while it endorses clear violations of the separation of powers principle. In this connection, it is important that the Court does not grant the respondent state any type of 'inversed margin of appreciation' if that state proposes a friendly settlement or a unilateral declaration. This implies that if a respondent state acknowledges or admits to a human rights violation, it would be easy for the Court to ratify the admission without much thought in order to respect the discretion of the respondent state to face the human rights violation. However, it may very well be that by blindly accepting this admission, the Court reinforces an infringement of the separation of powers within the nation state. Bearing in mind the aforementioned subsidiarity concerns, there are a number of measures that the Court could itself (continue to) adopt, provided no adequate solutions have been implemented at the national level.

As a first measure, when the Court scrutinises alternative dispute resolutions brought before it, it should focus more on its reasoning and motivation in those decisions; this is a frequent point of criticism.[106] In this sense, it would be good if the Court introduced transparent and precise rules for the application of unilateral declarations or friendly settlements that went beyond a restatement of existing practice as specified in Article 62A of its Rules of Court.[107]

As a second measure, the Court could, in turn, decide to be more diligent in its contemplation of the effects of a proposed settlement or declaration on the national system of separation of powers. If the Court notices that the settlement

[104]ECtHR (dec.) 7 July 2018, Case No. 47232/17, *Basra* v *Belgium*, §13.

[105]ECtHR (GC) 8 April 2004, Case No. 71503/01, *Assanidze* v *Georgia*, §§146–147.

[106]Bychawska-Siniarska, *supra* n. 16, p. 675; Weber, *supra* n. 11, pp. 234–235.

[107]Bychawska-Siniarska, *supra* n. 16, p. 674. In a similar sense: Glas, *supra* n. 17, p. 498; Ang and Berghmans, *supra* n. 6, p. 96.

or the declaration might potentially impede on the competences of the other branches of government – either because of the acknowledgement of the violation itself or because of the measures proposed – it should reject the settlement or declaration and deal with the case by means of an ordinary judgment.[108] A procedural decision to accept or decline alternative forms of dispute resolution is completely independent of the existence of a conflict between the contracting state and the applicant. The Convention itself has set boundaries for the acceptance of alternative dispute resolution. Both friendly settlements and unilateral declarations can only be accepted by the Court if they are predicated on the basis of 'respect for human rights' as defined by the Convention.[109]

For three reasons, it is not merely academic, but practical, to suggest this reticent approach to the Court towards alternative dispute resolution procedures out of respect for the principle of separation of powers.

First, the treaty-based limits on alternative dispute resolution of continued 'respect for human rights' can be said to incorporate aspects of the separation of powers principle.[110] This is because certain Convention rights are closely connected to the separation of powers principle. For example, if a friendly settlement or unilateral declaration impedes the independence of the judiciary as enshrined in Article 6 of the Convention, the Court can rely on Article 37, §1 *in fine* ECHR to reject the alternative dispute resolution proposed by the state agent and, consequently, rule on the merits of the case itself.[111] Moreover, the constitutional principle of separation of powers within a respondent state is intertwined with the legality test of relative human rights and may thus not be ignored by the Court. According to the Court, transfers of powers that do not 'give the individual adequate protection against arbitrary interference' and thus transgress the

[108]This would imply that the Court structurally excludes certain matters from alternative dispute resolution. By analogy, the Inter-American Court of Human Rights rejects alternative dispute resolution in cases regarding the right to life. Ang and Berghmans, *supra* n. 6, p. 96.

[109]*See*, respectively, Art. 39, §1 ECHR and Art. 37, §1 *in fine* ECHR.

[110]*See* A. Roblot-Troizier, 'Un concept moderne: séparation des pouvoirs et contrôle de la loi', *Pouvoirs* (2012) p. 89 at p. 101. She holds that 'the separation of powers is consubstantial to the safeguarding of rights because no right can be guaranteed without separation of powers'.

[111]When alternative dispute resolution encroaches upon legislative rather than judicial competence, it is less clear whether the Court can rely on this provision. Because of this, it might be advisable to amend Art. 37 to enable it to continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto *or other shared European constitutional principles or values* so require. This way, the Court can explicitly take constitutional principles such as the separation of powers into account when deciding whether to accept a unilateral declaration. In a recent press release, a possibility has been created to take constitutional principles such as the separation of powers into account. The press release states that the registry will not propose a friendly settlement in cases '*where for any specific reason it may be inappropriate to propose a friendly settlement*'. *See supra* n. 9.

separation of powers are not foreseeable and thus fail the quality of law test.[112] Given this connection between human rights and the separation of powers, the Court should arguably take stock of the potential implications for the separation of powers arising from proposed settlements or declarations.

Second, over time, the Court will increasingly be forced to take a position on issues that relate to the separation of powers, given current developments in contracting states such as Poland and Hungary. Likewise, the European Court of Justice has ruled on and will continue to rule on such matters.[113] By showing incremental respect for the separation of powers in procedural matters such as the acceptance of alternative dispute resolution procedures, the Court might be able to pragmatically counter the pressure to develop a substantive separation of powers test.

Third, a (structural) refusal of the European Court to accept friendly settlements or unilateral declarations could send necessary shockwaves at the national level, forcing the cooperation of all branches of government. For example, various countries required a genuine judgment of the Court – and not an alternative dispute resolution decision – to reopen the case in criminal proceedings.[114] Likewise, in Belgium, Article 442*bis* of the Belgian Criminal Procedure Code had previously stated that the Belgian Court of Cassation could only reopen a criminal procedure following a 'definitive judgment' of the European Court of Human Rights. This provision thus excluded the decision with which the European Court usually ratifies friendly settlements or unilateral declarations.[115] Belgian authors had criticised this limitation in light of the non-discrimination principle. Article 442*bis* purportedly treated defendants unjustifiably unequally based on whether their human rights violations had been established by a judgment or a decision.[116] The European Court refused to accept alternative dispute resolutions in a number of Belgian criminal cases since it was thus impossible for the applicants to receive full legal redress.[117] The Advocate-General of the Belgian Court of Cassation and the Belgian Executive strove to ease the requirement, mainly basing themselves on legal efficiency, the

[112]ECtHR 13 September 2018, Case Nos. 58170/13, 62322/14 and 24960/15, *Big Brother Watch and Others* v *the United Kingdom*, § 306 and cited cases.

[113]*See*, for the most recent examples: Order of the Vice-President of the Court in Case C-619/18 R *Commission* v *Poland*; CJEU 25 July 2018, C-216/18, *LM*.

[114]ECtHR (GC) 5 July 2016, Case No. 44898/10, *Jeronovičs* v *Latvia*, §25.

[115]Court of Cassation (Belgium) 9 April 2008, *Journal des Tribunaux* (2008) p. 403.

[116]S. Van Drooghenbroeck, *Le droit international et européen des droits de l'homme devant le juge national* (Larcier 2014) p. 337–353.

[117]ECtHR 29 June 2010, Case No. 665/08, *Hakimi* v *Belgium*; ECtHR 25 July 2013, Case No. 504/08 *Castellino* v *Belgium*.

workload of the Court, and the need to have an effective respect for human rights.[118] Belgium's federal legislature listened to these pleas; since 2016, Article 442*bis* of the Criminal Procedure Code also allows for friendly settlements and unilateral declarations to serve as the basis for reopening criminal procedures.[119]

Conclusion

Since their introduction, friendly settlements and unilateral declarations have been evaluated with a sole focus on the parties (applicant or respondent state) and the deciding body (the European Court). They have been characterised by a tension between efficiency and justice.[120] On the one hand, alternative dispute resolution is a safe way to bring parties to a reasonable middle ground while chipping away at the European Court's backlog of cases. On the other, it has threatened the procedural equality of parties and diminished the authority of the European Court.

With this article, we have broadened the scrutiny of these alternative techniques of dispute resolution and focused on an aspect that has so far not been thoroughly examined: their impact on the institutional balance within respondent states. Friendly settlements and unilateral declarations give the government agent of a contracting state the ability to infringe the national system of separation of powers. This is because, by acknowledging human rights violations in certain cases, the agent substitutes his own judgment for that of the (often highest) national court. The European Court's subsequent acceptance of such a settlement or declaration affords it with a certain institutional legitimacy and precedential effect. In this way the independence of the judiciary is threatened. Similarly, a state agent can also acknowledge that a national law is in violation of the Convention, or can even go as far as to dictate the content of new legislation as a general measure in these alternative procedures.

Thus far, neither state agents nor the European Court have seemed to pay any real attention to such institutional considerations when deciding whether to propose or accept a settlement or declaration. Given the increased and continuing

[118]Belgian Parliamentary Preparation, *Verslag van de procureur-generaal bij het Hof van Cassatie aan het Parlementair Comité belast met de wetsevaluatie Overzicht van de wetten die voor de hoven en de rechtbanken moeilijkheden bij de toepassing of de interpretatie ervan hebben opgeleverd* (17 October 2014, Chamber: 0435/001; Senate: 6-39/1) p. 29–30; Belgian Parliamentary Preparation, *Wetsontwerp houdende wijzigingen van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie* (23 October 2015, Chamber 1418/001) p. 105–107.

[119]Art. 116 Belgian federal statute of 5/11 February 2016.

[120]Glas, *supra* n. 19, p. 607–630; Keller et al., *supra* n. 7, p. 96–97.

focus on these procedures,[121] it is important that the separation of powers principle is at least given sufficient attention. The principal aim of this contribution is to do just that. Furthermore, this article proposes a number of concrete steps that could be taken at the national as well as at the international level to avoid future problems. From a national perspective, cooperation between the three branches of government should be stimulated when admissions of Convention violations are at play. From an international perspective, the European Court should inform itself on the separation of powers principle within the respondent state. Moreover, it should remain cognisant of and respect this constitutional principle when endorsing any manner of alternative dispute resolution proposed by the respondent state. And finally, in contentious cases, the European Court should state the reasons why a specific friendly settlement or unilateral declaration might safeguard the separation of powers in the respondent state.

We wish to conclude by once again referring to the allegory of the father, his children, and the orange, as described in the introduction. Just as it would not have been right for one child to decide for the entire class that they would be selling orange cake, or for the father to endorse that choice, it might not be the place of the executive of a respondent state to acknowledge a human rights infraction or for the Court to endorse that acknowledgement. If the Court renders a judgment without allowing room for negotiated deal-making, the decision is based on the law and not on a – potentially distorted – representation of the respondent state's interests by the executive. In other words, if the children's father (the Court) merely cuts the orange in two because that is the correct decision (judgment) without listening to the interests (alternative dispute resolution) of his children (private party applicant and executive), the class (a combination of legislature, executive, and judiciary) still has the option of choosing to make either orange juice or orange cake (human rights compliance with respect for the national separation of powers). With friendly settlements and unilateral declarations, the European Court thus has a useful tool at its disposal. It must, however, be careful not to disturb the institutional balance of powers in the respondent state by blindly accepting alternative dispute resolution offers.

[121]Paragraph 54, b) of the Copenhagen Declaration, ⟨rm.coe.int/copenhagen-declaration/16807b915c⟩, visited 17 April 2019. The Court itself seems to be positive about this, as well. *See* paragraph 25 of the Court's opinion on the draft Copenhagen Declaration, ⟨www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf⟩, visited 17 April 2019. *See also* the press release 'ECHR is to test a new practice involving a dedicated non-contentious phase', *supra* n. 9.