The Prism of Fundamental Rights

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European Court of Human Rights – Suggestions for reducing case backlog and national criticism of the Court – Alternative to incremental case law and reasoning by analogy – Greater deference to national courts where individual interests, rather than fundamental rights are at stake – Guidelines to find objective criteria for the definition of fundamental rights – Sharper delineation of Convention rights – Procedural review preceding substantive review

Introduction

The European Court of Human Rights (henceforth: the ECtHR or the Court) is under serious pressure. In the Netherlands, for example, the role of the Court is heavily debated.[1] Many politicians and some scholars do not seem to be eager to accept that forty-seven judges in Strasbourg can decide on the content and meaning of fundamental rights, such as the right to life, the freedom of religion, or the right to property. Similar debates are visible in the United Kingdom, where the Court's judgments about voting rights for prisoners have caused great fury, just like, more recently, the judgment prohibiting the expulsion of a suspected terrorist to a state where he would risk a flagrantly unfair trial.[2] The British govern-

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[1] An overview of all contributions to the debate was given (in Dutch) in J.H. Gerards and A.B. Terlouw, 'Inleiding', in J.H. Gerards and A.B. Terlouw, *Amici Curiae. Adviezen aan het Europees Hof voor de Rechten van de Mens* [Amici Curiae. Advisory opinions to the European Court of Human Rights] (Nijmegen, Wolf Legal Publishers 2012) p. 8-9 (n. 26).

[2] The cases about the rights for prisoners are *Hirst* v. *UK* (ECtHR 6 Oct. 2005 (GC), No. 74025/01); *Frodl* v. *Austria* (ECtHR 8 April 2010, No. 20201/04); *Greens & M.T.* v. *UK* (ECtHR 23 Nov. 2010, Nos. 60041/08 and 60054/08) and *Scoppola (no. 3)* v. *Italy* (ECtHR 18 Jan. 2011, No. 126/05). *See* D. Nicol, 'Legitimacy and the Commons debate on prisoner voting', *Public Law* (2011) p. 683-685. In February 2011 the House of Commons accepted a motion stating that no action would be taken to execute the Court's judgment (HC Hansard, 10 Feb. 2011, cols 493–584). For an overview of the criticism, *see also* N. Bratza, 'The Relationship between the UK Courts and Strasbourg', 5 *European Human Rights Law Review* (2011), p. 505-512.

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ment has even introduced concrete proposals that would limit the role of the Court, such as a proposal for a new admissibility criterion, limiting the Court's review to national judgments disclosing a serious error of interpretation or application of fundamental rights.[3]

The criticism is not limited to the Netherlands and the United Kingdom. In Belgium, for example, the president of the Constitutional Court has shown scepticism about the Court's interpretative work.[4] Although some members of parliament share his criticism,[5] however, the Court's position and the value of its case-law generally do not seem to be an issue in Belgium. This is different for a state such as Russia. The ECtHR regularly corrects the Russian government in cases that often concern gross violations of human rights – one may think of the disappearances and deaths in the Chechen Republic or of politically motivated processes against members of the opposition and influential business people.[6] However carefully the Court operates in these cases, the judgments evidently concern sensitive issues and they appear to touch a Russian nerve.[7] This has resulted in proposals not to accept and execute each and every judgment of the Court, but to subject each judgment to review by the Russian constitutional court first.[8] Only if the constitutional court has decided that a Strasbourg judgment is constitutional could execution be considered. The Russian constitutional court would thereby effectively obtain the power to supervise the ECtHR's judgments.

Finally, it is important to recall the German constitutional doctrine on fundamental constitutional values. Even though the German *Bundesverfassungsgericht*

[3] *See* in particular the Draft Brighton Declaration: <www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft>. Other proposals are even more far reaching; *See*, e.g., M. Pinto-Duschinsky, *Bringing Rights Back Home. Making Human Rights Compatible with Parliamentary Democracy in the UK* (London, Policy Exchange 2011).

[4] M. Bossuyt, 'Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations', 28 *Human Rights Law Journal* (2007) p. 321-332; M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', *Inter-American and European Human Rights Journal* (2010) p. 47.

[5] A motion to the federal government has been submitted by three members of parliament, requesting the government to stop the transgression by the Court of its competences and of national sovereignty; *see Voorstel van Resolutie betreffende de bevoegdheidsoverschrijdende rol van het Europees Hof voor de Rechten van de Mens (Schoofs, Koolen en Logge)*, Belgische Kamer van Volksvertegenwoordigers, Doc. 53, 1949/01.

[6] *See*, e.g., ECtHR 19 May 2004, No. 70276/01, *Gusinskiy* v. *Russia*.

[7] In *Khodorkovskiy* v. *Russia* the Court held, for example, that there was not sufficient proof to find that the process against the dissident business man was politically motivated (ECtHR 31 May 2011, No. 5829/04). Likewise, the Court was careful not to find a violation of Art. 18 ECHR in the *Yukos*-case (ECtHR 20 Sept. 2011, No. 1409/04).

[8] *See*, e.g., Human Rights Watch, *World report 2012 – Russia* (<www.hrw.org/world-report-2012/world-report-2012-russia>).

has shown itself very willing to accept the Strasbourg judgments, which has recently resulted in some excellent examples of judicial dialogue,[9] such acceptance finds its limits in the German *Grundgesetz* and the fundamental rights protected therein.[10] This means that, in Germany, the ECtHR does not really have the final say about the interpretation and application of the European Convention on Human Rights (henceforth: the ECHR or the Convention) in national law. More generally, in fact, it is far from self-evident that all ECtHR judgments are executed and implemented in national law. Just like the Court of Justice of the EU, the ECtHR finds itself in a situation of constitutional pluralism in which its role as a final arbiter is not automatically accepted.[11]

It may be argued that these developments are not new. It is certainly true that the ECtHR has often been criticised before, and it has always survived.[12] Moreover, the legitimacy of the Court appears to be untouched – by far the most judgments are still executed relatively quickly.[13] Perhaps, thus, the question may be raised if we are not *creating* a legitimacy crisis by continuously stressing that there *is* such a crisis.

I do think, however, that the present criticism is of a different nature than what we have seen in the past. The aversion to the Court in certain states is real, even if certain media heavily exaggerate it. Sometimes the criticism has even found a translation in national policies and political debate, as is illustrated by the concrete proposals in the UK and Russia. The consequences of such policies and of the rhetoric used in politics and the media can be enormous, especially if the criticism

[9] On this, *see* the separate opinion of president Bratza to ECtHR 24 Nov. 2011, No. 4646/08, *O.H.* v. *Germany*. *See also* ECtHR 28 July 2005, No. 59320/00, *Von Hannover* v. *Germany*, and ECtHR (GC) 7 Feb. 2012, Nos. 40660/08 and 60641/08, *Von Hannover (no. 2)* v. *Germany*.

[10] *See* the case of *Görgülü*, German Constitutional Court 14 Oct. 2004, 2 BvR 1481/04; *see* further H.J. Papier, 'Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts', 27 *Human Rights Law Journal* (2006) p. 1 at p. 2 and M. Hartwig, 'Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights', 6 *German Law Journal* (2005) p. 869 at p. 875.

[11] *See* further N. Krisch, 'The Open Architecture of European Human Rights Law', 71 *Modern Law Review* (2008) p. 183-216; G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen: European Law Publishing 2010).

[12] In the nineties, for example, there was great fury over the Court's judgment in the case of *McCann*; *See*, e.g., <www.independent.co.uk/news/tory-anger-as-european-court-condemns-gibraltar-killings-1603179.html>. The former British ECtHR judge Sir Fitzmaurice was very critical about the extension of the scope of the Convention rights; *see* in particular his dissenting opinion in ECtHR 13 June 1979, No. 6833/74, *Marckx* v. *Belgium*.

[13] *See* B. Çalı, A. Koch and N. Bruch, *The Legitimacy of the European Court of Human Rights: The View from the Ground* (UCL: Strasbourg 2011), <ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf>.

comes from 'fundamental rights-friendly' states such as the UK and the Netherlands. For states where the Convention is already looked at with some disrespect and doubt, such criticism may form an easy justification of their own dislike of the Convention system and of their disregard of (some of) the Court's judgments.

It cannot be disregarded that the Court has to deal with all of this criticism in circumstances that are suboptimal, to put it euphemistically. Not only does the Court have to struggle with its ever-increasing caseload (at 31 Jan. 2012 there were 152,000 pending cases),[14] but its work is also made difficult by the continued existence of systemic and structural violations of fundamental rights in the legislation and policies of a limited number of states and by the lack of adequate (judicial) remedies in the same few states.[15] Given this situation, it is difficult *not* to be seriously concerned about the Court's future.

Such concern is all the more justified because of the importance of the Court's work. Empirical research into international protection of human rights demonstrates that international supervision really can contribute to the improvement of fundamental rights protection on the national level, either directly or indirectly.[16] It is from this perspective of the value and importance of European supervision on fundamental rights that I think that it is necessary to look for constructive solutions for the various threats to the Court's position and its work.

In searching for solutions, it is important to admit that the present system for protection of fundamental rights by the ECtHR discloses a number of weaknesses and shortcomings. Some of these problems can hardly be solved by the Court. This is true in particular for the incessant stream of complaints brought by applicants who feel that their fundamental rights have been interfered with; for

[14] <www.echr.coe.int/NR/rdonlyres/5E03F01F-E899-4C56-A6E0-9ED85F8FAB10/0/CMS_31012012_EN.pdf>.

[15] In 2006, a Group of Wise Persons pointed to the great problems of the Court in having to deal with its case load: 'If nothing is done to resolve the problem, the system is in danger of collapsing' (*Report of the Group of Wise Persons to the Committee of Ministers*, 10 Nov. 2006, SAGES (2006) 06 EN Def, para. 28); *see also* J.A. Frowein, 'The Interaction between National Protection of Human Rights and the ECtHR', in R. Wolfrum and U. Deutsch (eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Berlin/Heidelberg: Springer 2008) p. 51-54 at p. 52. Pourgourides has extensively researched the causes of the caseload; *see* his report 'Implementation of Judgments of the European Court of Human Rights', 20 Dec. 2010, Doc. 12455.

[16] *See*, e.g., D. Galligan and D. Sandler, 'Implementing Human Rights', in S. Halliday and P. Schmidt (eds.), *Human Rights Brought Home. Socio-Legal Studies of Human Rights in the National Context* (Oxford: Hart 2004) p. 23-55; Th. Risse and K. Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: An Introduction', in Th. Risse et al. (eds.), *The Power of Human Rights. International Norms and Domestic Change* (Cambridge: CUP 1999) p. 1; B.A. Simmons, *Mobilizing for Human Rights. International Law in Domestic Policies* (Cambridge: CUP 2009).

the lack of strong instruments to enforce the Court's judgments; and for the lack of resources (and sometimes the lack of willingness) of certain states to prevent or redress violations of fundamental rights. Large-scale and structural changes on various levels are needed to solve such problems. Introduction of filtering mechanisms, regional courts, systems of prioritisation and a procedure for advisory opinions, creation of the competence to impose fines or punitive damages to states that are unwilling to execute judgments – it is this type of far-reaching measures that is needed to combat the problems of caseload and of systematic non-compliance.[17] It is fortunate to see that such practical and procedural measures already appear to have encouraging results for the Court's backlog.[18]

Shortcomings and weaknesses, however, can also be found in the Court's own case-law approach. Many scholars have critically evaluated the argumentative techniques of the Court, finding inconsistencies in its interpretation, defective use of important doctrines and unfortunate application of Convention provisions in concrete cases. Clearly much can be improved in this respect.[19] Yet, improvement of existing techniques and doctrines will hardly suffice to meet the criticism that is currently directed at the Court. Something more is needed. Indeed, I think that there is a need for a new argumentative strategy for the Court.

It is such an alternative strategy of argumentation in fundamental rights cases that I would like to present in this article, as part of the response to the predicament that the Court faces. The alternative presented here is far from complete and definitive; it needs further reflection and further research. I am also aware of the gap between theory and practice and of the difficulties related to having to trans-

[17] For an overview of proposals, *See*, e.g., P. Leach, 'On reform of the European Court of Human Rights', 6 *European Human Rights Law Review* (2009) p. 725-735; H. Keller et al. 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', 21 *European Journal of International Law* (2010), p. 1025-1048; Report of the Committee of Minister's Steering Committee for Human Rights (CDDH) on measures requiring amendment of the European Convention on Human Rights (Strasbourg, Feb. 2012, CDDH(2012)R74 Addendum I).

[18] In particular the activities of the single judges appear to be effective; *see* CDDH, *supra* n. 17, para. 34.

[19] *See*, e.g., G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) at p. 705-732; P.G. Carozza, 'Propter Honoris Respectum: Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', 73 *Notre Dame Law Review* (1998) p. 1217; A.R. Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Human Rights Law Review* (2005) p. 57; S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights', 23 *Oxford Journal of Legal Studies* (2003) p. 405-433; J.H. Gerards and H.C.K. Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', 7 *International Journal of Constitutional Law* (2009) p. 619-653; J.H. Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law* (2012, forthcoming).

late theoretical perspectives to real, concrete cases. I am convinced, though, that theoretical reflection on judicial strategies and approaches can contribute to the solution of practical problems, even if this requires adjustment and modification.

I shall start my presentation of an alternative approach for the Court by introducing an important mechanism that presently determines much of the Court's case-law and which has much to do with the 'prism-like' character of fundamental rights. Subsequently, I shall discuss the very core of the alternative approach, i.e., the creation of objective criteria to sharply delineate the scope of fundamental rights and the introduction of procedural (rather than substantive) review. I shall then provide some suggestions as regards the improvement of the Court's substantive criteria for review and I conclude with a short résumé of the most important findings.

Mechanisms and factors determining the Court's decisions

The prism of fundamental rights

One of the most important causes of the Court's currently complex position, in my view, is the incremental and case-based approach that it has taken. As I will explain below, this approach has led to a significant expansion of the Convention and, thereby, to a sometimes questionable exercise of competence by the Court. Nevertheless, it can easily be understood that the Court has chosen this approach. Indeed, it is almost natural to do so because of the special character of the rights that the Court has to decide about – fundamental rights.

The special character of fundamental rights can be compared to that of a prism. As soon as light falls on a prism, a wide spectrum of colours becomes visible. All of these colours can be seen and named individually, yet they also run into one another. At both sides of the spectrum, moreover, there are colours that are not visible with the naked eye, but that are clearly there.

Fundamental rights, too, as they are codified in the ECHR or in a constitution, are transparent and clearly defined 'objects' on the face of it. As soon as light falls on these rights, however, they appear to cover a whole array of interests and values. All of these interests and values are clearly connected to the fundamental right, yet they are diverse and cannot be easily separated. Moreover, over time, new aspects of fundamental rights may be discerned or 'discovered', even if they are still hidden from our present powers of perception.[20]

[20] This is the ultraviolet of the spectrum of fundamental rights: we can only recognise fundamental rights if we have discovered the tools to perceive them. Cf. C. Wellman, 'Solidarity, the Individual, and Human Rights', 22 *Human Rights Quarterly* (2000) p. 639-657, showing that for

The prism-like character of fundamental rights can be illustrated with the example of the right to respect for one's private life, as protected by Article 8 of the Convention. If we would consider what this right entails in our own, personal view, we would probably end up with a whole range of associated rights and images. Depending on our own experience, knowledge and environment, we may think of the right not to be subjected to secret surveillance of our activities, the right to enter a relationship with person of our own choice, the right not to be evicted from our own house, the right to have our personal data protected, etcetera. Hence, if light is shed on the prism of the right to privacy it shows a many-coloured spectrum of rights and interests.

The value of fundamental rights claims

In practice, the fundamental rights prism continuously discloses new hues of colour: new individual interests are constantly recognised as elements of fundamental rights. This is a global development that is certainly not limited to the ECtHR and the ECHR.[21] An important explanation for this can be found in the opportunism that is typical for human behaviour. It may be very useful, after all, to qualify an individual interest as a fundamental right.[22] Over the centuries it has become accepted that fundamental rights are so important as to deserve additional, strong legal protection.[23] This is fully reasonable, yet it is clear that such heightened legal protection can lead to (strategic) litigation.[24] After all, a farmer

solidarity and group rights it is still debated if they can be recognised as a 'colour' within the spectrum created by the fundamental rights prism.

[21] A typical example can be found in the United States, where the acceptance of the notion of 'substantive due process' has led to the recognition of many fundamental rights, varying from the freedom to use contraceptives to the right to have an abortion (*see Griswold* v. *Connecticut*, 381 U.S. 479 (1965) and *Roe* v. *Wade*, 410 U.S. 113 (1973)); *See*, e.g., P.G. Kauper, 'Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case', 64 *Michigan Law Review* (1965) p. 235-258, at p. 239. Langford has demonstrated a world-wide tendency to recognise social rights as justiciable rights (M. Langford, 'The Justiciability of Social Rights: From Practice to Theory', in M. Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge: CUP 2008) p. 3-45 at p. 3 and 7).

[22] *See* J.H. Gerards, 'Fundamental Rights and Other Interests – Should It Really Make a Difference?', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia 2008) p. 655-690. *See also* J.W. Nickel, *Making Sense of Human Rights*, 2nd edn. (Malden: Blackwell 2007) p. 96; M.-B. Dembour, 'What Are Human Rights? Four Schools of Thought', 32 *Human Rights Quarterly* (2010) p. 1-20 at p. 4.

[23] Cf. G. Beck, 'The Idea of Human Rights between Value Pluralism and Conceptual Vagueness', 25 *Penn State International Law Review* (2007) p. 615-657, at p. 615; Nickel, *supra* n. 22, at p. 9. For some concrete examples, *see* Gerards, *supra* n. 22, p. 674 et seq.

[24] For the US in particular it has been demonstrated that the choice of arguments in strategic litigation can play an important role in legal change – *see*, e.g., L. Epstein and J.F. Kobylka, *Supreme Court & Legal Change. Abortion and the Death Penalty* (London: Chapel Hill 1992) p. 307. Cf. also Langford, *supra* n. 21, p. 9-10; Simmons, *supra* n. 16, p. 133.

whose cattle have to be put down because of a cattle plague can plead before the courts that his financial interests are thereby affected or that his business interests are harmed, but he probably stands a greater chance of success if he can demonstrate that his fundamental right to property has been violated. Similarly, someone who suffers from airplane noise can complain about reduction of the value of his house, but he may have a stronger case to make if he can show that his fundamental right to respect for his privacy or his home has been interfered with. Hence, the recognition of as many colours as possible in the fundamental rights prism is in the (potential) applicant's self-interest. In legal practice this has found its translation in a large number of cases in which individuals, happily assisted by their lawyers, argue that their interests should be regarded as elements of fundamental rights.[25]

It is rather easy to recognise such 'new' hues of colour in the prism of fundamental rights because of another characteristic of the colour prism: the colours run into one another without logical points of separation.[26] Within the colour spectrum made visible by a prism, it is very difficult to determine where a colour begins or ceases to be yellow, orange, or red. The colour transitions are fluid, even if the colours themselves can clearly be named and recognised. The same is true for fundamental rights.[27] If an individual interest has been accepted by a court as being covered by a fundamental right, a new case may be brought in which the set of facts is similar to the one just decided, even though it needs a slightly different interpretation of the fundamental rights provision to support the finding that it is applicable. The flowing character of the colours of the fundamental rights prism can thus easily result in a case-based argumentative approach that is strongly supported by analogical reasoning.

Examples of analogical reasoning in the Court's case-law

Indeed it is this type of reasoning that is clearly visible in the case-law of the ECtHR.[28] One of the best examples can be found in the case-law concerning the

[25] For the ECtHR, there are also some examples of strategic litigation, such as the case of *D.H.* v. *the Czech Republic*, in which the applicants successfully asked the Court to introduce the concept of indirect discrimination (ECtHR (GC) 13 Nov. 2007, No. 57325/00). Cf. also E. Palmer, 'Protection Socio-economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', 2 *Erasmus Law Review* (2009) p. 397-425 and *see* B.E.P. Myjer, *Straatsburg zit er niet voor zweetvoeten* [The Court is not there for smelly feet] (Nijmegen: WLP 2004).

[26] Cf. Langford, *supra* n. 21, p. 10.

[27] It is well-known, for example, that it is very difficult to draw sharp lines between classical and social rights; *See*, e.g., I.E. Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', 10 *International Journal of Human Rights* (2006) p. 405 et seq. and Palmer, *supra* n. 25.

[28] On the Court's combination of case-based reasoning and reasoning based on respect for precedents, *see* (in Dutch) J.H. Gerards, *EVRM – algemene beginselen* [ECHR – general principles]

recognition of social benefits as 'possessions' protected by the right to property of Article 1 of the Convention's First Protocol (Article 1 P1).[29] Until 1996, the Court held that Article 1 P1 only applied if there was a direct relationship between the payment of contributions to a social security scheme and the eventual benefit of being granted a pension or allowance.[30] This is understandable since the payment of the financial contributions or premiums creates a legitimate expectation that a tangible benefit is received in return.[31] In 1996, however, the Court was asked to decide on a slightly different situation. The case of *Gaygusuz* concerned a special regulation, according to which, on the face of it, the payment of an allowance was made out of accumulated premiums, but there was a also an element of social benefits that were not related to payment of contributions.[32] In its judgment in the case, the Court suggested a slightly different and slightly wider definition of the notion of 'possessions', even though it firmly held on to the position that the right to property only applied if there was a relation between the benefit and the financial contributions or premiums paid by the beneficiary. This slight and implicit extension, combined with a rather unfortunate lack of clarity in the Court's reasoning, triggered a multitude of new applications. These cases concerned increasingly hybrid social security schemes, such as a scheme providing for payment of benefits out of a combination of individual premiums and general taxation, or a scheme in which the group of beneficiaries did not fully match the group of contributors.[33] In many of these cases the Court held that the benefits disclosed some characteristics of a 'possession', oftentimes without providing for a very clear explanation, but mostly with a reference to the *Gaygusuz* case and to subsequent

(Den Haag: Sdu Uitgevers 2011) section 1.3.1; for examples of this, *see* ECtHR 27 Sept. 1990, No. 10843/84, *Cossey* v. *UK*, para. 35; ECtHR (GC) 11 July 2002, No. 28957/95, *Christine Goodwin* v. *UK*, para. 74.

[29] On the development of Art. 1 P1, *See*, e.g., (in Dutch) T. Barkhuysen and M.L. van Emmerik, *De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht: het Straatsburgse perspectief* [The protection of property by Article 1 P1 and Dutch civil law: The Strasbourg perspective] (Deventer: Kluwer 2005) p. 1-101 at p. 56).

[30] *See*, e.g., EComHR 18 Dec. 1973, No. 5763/72, *Mw. X.* v. *the Netherlands*, *Collection* 45, p. 76; EComHR 14 May 1984, No. 10094/82, *G* v. *Austria*, *D&R* 38, p. 84. *See also* Bossuyt 2007, *supra* n. 4, p. 321; K. Kapuy, 'Social Security and the European Convention on Human Rights: How an Odd Couple Has Become Presentable', 9 *European Journal of Social Security* (2007) p. 221-241 at p. 226.

[31] *See* F. Pennings, 'The Potential Consequences of the *Gaygusuz* Judgment', 1 *European Journal of Social Security Law* (1999) p. 181-201 at p. 183.

[32] ECtHR 16 Sept. 1996, No. 17371/90, *Gaygusuz* v. *Austria*, paras. 39-41. *See* further Pennings, *supra* n. 31, p. 185.

[33] ECtHR 26 Nov. 2002, No. 36541/97, *Buchen* v. *the Czech Republic*, para. 46; ECtHR 30 Sept. 2003, No. 40892/98, *Koua Poirrez* v. *France*; ECtHR 3 Oct. 2000 (dec.), No. 34462/97, *Wessels-Bergervoet* v. *the Netherlands*; ECtHR 16 Dec. 2003 (dec.), No. 44658/98, *Van den Bouwhuijsen and Schuring* v. *the Netherlands*.

cases in which it had given a similar judgment.[34] As a consequence of this line of reasoning, the Court's case-law on the topic became increasingly opaque and it was extremely unclear where the line between contributory and non-contributory social security systems should be drawn. In the end, the Court felt compelled to draw a firm conclusion. In its admissibility decision in the case of *Stec* it brought all social benefits and social welfare schemes within the scope of the right to property, even those in which the benefits were entirely paid out of general taxation and where there was no relationship whatsoever between payment of contributions and entitlement to an allowance or pension.[35]

This series of cases illustrates how the mechanism of reasoning by analogy and case-based argumentation works.[36] The flowing and multi-coloured character of fundamental rights and the value of recognition of individual interests as fundamental rights stimulate individual plaintiffs and applicants to bring new cases before the Court, acting out of self-interest and hoping for success.[37] The Court, endeavouring to arrive at consistent case-law, compares the facts and questions presented in the new cases to those in the cases it has decided before.[38] If the case discloses arguments and complaints that are comparable to arguments that the Court has already accepted, it tends to apply the Convention, even if the situation is slightly different, and even if the case is less clearly concerned with fundamental rights.[39] Step-by-step, ever more individual interests are thereby recognised as fundamental and as being covered by the Convention.[40]

The disadvantage of case-based decision-making

The Court's choice for this approach is easily understandable and justifiable, yet the result of the mechanism can be problematic, as is reflected by the expression

[34] *See* further Kapuy, *supra* n. 30, p. 227

[35] ECtHR (GC) 6 July 2005 (dec.), Nos. 65731/01 and 65900/01, *Stec and Others* v. *UK*, paras. 50-55; *see also* M. Cousins, *The European Convention on Human Rights and Social Security Law* (Antwerp: Intersentia 2008) p. 21.

[36] *See* S. Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy', 109 *Harvard Law Review* (1996) p. 923 at p. 934; C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York/Oxford: OUP 1995) p. 65; F. Schauer, 'Do Cases Make Bad Law?', KSG Working Paper No. RWP05-013 (2005), <http://ssrn.com/abstract=779386>.

[37] Cf. Myjer, *supra* n. 25, p. 17

[38] This is understandable from a perspective of individual protection of fundamental rights (cf. Sunstein, *supra* n. 36, p. 76) and from the desire to respect legal certainty and equality (*see* further Y. Lupu and E. Voeten, 'Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', APSA 2010 Annual Meeting Paper (2010) <http://ssrn.com/abstract=1643839>, p. 5).

[39] Cf. Myjer, *supra* n. 25, p. 17.

[40] Gradual widening of scope usually takes place without there being a clear idea about the actual meaning of the fundamental right at stake; *see* Sunstein, *supra* n. 36, p. 32.

that 'cases make bad law.'[41] Analogical reasoning is a good way to decide cases, yet it is relatively easy to make mistakes. Flawed, defective or non-prototypical precedents may be selected as a basis for the analogy; the comparison between cases may be affected by misunderstandings or misinterpretations; and the evaluation of the possible analogy may include hidden normative judgments.[42] Even if the analogy is correctly drawn, moreover, strongly case-based reasoning can have undesirable effects.[43] A step-by-step approach without a clear aim or a clear direction can unconsciously lead the judge to a place where he did not want to be, or it can lead to outcomes that the judge would not have reached if he would have been able to foresee the consequences.[44]

Conclusion: the expanding scope of the Convention

Scholarly attention in Europe has strongly focused on the creative methods of interpretation used by the Court, such as evolutive and dynamic interpretation and interpretation of the Convention as a living instrument, in the light of present day conditions.[45] Clearly, the determination of the scope of the Convention is strongly influenced by the use of these interpretative principles. However, I think the criticism that is often rendered on the Court's use of such methods misses the point. In my view, the extension of the scope of the Convention is first and foremost caused by the factors mentioned above.[46] I also think it is important to use this analysis as a basis for the development of an alternative argumentative approach.

[41] The American Supreme Court Justice Holmes wrote that '[g]reat cases, like hard cases, make bad law' in his famous dissenting opinion to *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400-401 (1904); Schauer has rightly indicated, however, that not only great or hard cases may make bad law, but also (perhaps even especially) 'normal' cases (Schauer, *supra* n. 36, p. 4).

[42] Cf. Sunstein, *supra* n. 36, p. 67 and 72.

[43] Schauer, *supra* n. 36, p. 34 and p. 40; for the ECtHR, *see* G. Ress, 'Die "Einzelfallbezogenheit" in der Rechtsprechung des Europäische Gerichtshofs für Menschenrechte', in R. Bernhardt *et al.*(eds.), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte – Festschrift für Hermann Mosler* (Berlin/Heidelberg: Springer Verlag 1983) p. 719-744 at p. 722.

[44] Cf. Sunstein, *supra* n. 36, p. 68 and Schauer, *supra* n. 36, p. 22.

[45] *See*, e.g., S.C. Prebensen, 'Evolutive Interpretation of the European Convention on Human Rights', in P. Mahoney (ed.), *Protecting Human Rights: The European Perspective* (Cologne: Heymanns Verlag 2000) p. 1123; Mowbray, *supra* n. 19, p. 60; Gerards 2011, *supra* n. 28, section 1.1.3; H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System. An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Antwerp: Intersentia 2011) section 4.4.1.1.

[46] Case-based reasoning is sporadically mentioned (e.g., F. Matscher, 'Methods of Interpretation of the Convention', in R. Macdonald et al. (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff: Dordrecht 1993) p. 63, but it is rarely regarded as an explanation for the expanding scope of the Convention.

Much of the current criticism directed toward the Court is closely related to the ever-extending scope of the Convention.[47] I think this criticism is, up to a certain point, well-founded. From a theoretical perspective, the high level of protection of fundamental rights can only be defended and justified if fundamental rights constitute a special, conceptually clearly delineated category of rights.[48] Such a clear category does not exist if the Court continues to use an incremental approach that implies that less clearly 'fundamental' interests can rather easily be included in the Convention's scope of protection.[49] In addition, there are institutional arguments to be made against the proliferation of the Convention.[50] If the cases before the Court do not clearly concern 'fundamental' rights, and especially if deciding these cases requires a kind of standard-setting and judicial regulation that cannot easily be related to the Convention, I think there is less reason for a decision on such cases by a *European court*.[51]

Role and function of the European Court of Human Rights

The ECtHR has always shown great awareness of its subsidiary role and of the fact that the primary task in securing fundamental rights lies with the national authorities.[52] Surprisingly, however, this awareness has not had much impact on the choice to accept a great many individual interests as being covered by Convention rights. In fact, however, the subsidiary role of the Court ought to have a real impact on its definition of fundamental rights. To explain this, it is useful to set out the three most important tasks of the Court first and relate them to its subsidiary role.[53]

Firstly, the Court exercises an important 'backup' role in the protection of individual fundamental rights. The Court has the major task to come to assistance of individuals that have been harmed by violations of their fundamental rights by the government, and to act if things have happened that all right-minded persons

[47] *See*, e.g., J.E. Goldschmidt, 'Mag het iets minder zijn? Hebben we een teveel aan mensenrechten?' [May it be a little less? Do we have a surplus of human rights?], Inaugural lecture Utrecht (2004) p. 4-5; Myjer, *supra* n. 25, p. 12; Bossuyt 2007, *supra* n. 4.

[48] Cf. Beck, *supra* n. 23, p. 616 and Nickel, *supra* n. 22, p. 53.

[49] Cf. Beck, *supra* n. 23, p. 643.

[50] Cf.B. Çalı, 'The Purposes of the European Human Rights System: One or Many?', *European Human Rights Law Review* (2008) p. 299-306 at p. 300.

[51] This holds true in particular for cases with a clear policy or financial dimension; cf. Palmer, *supra* n. 25, p. 401.

[52] *See* expressly its judgment in the *Belgian Linguistics* case, ECtHR 23 July 1968, No. 1474/62, para. 1.B.10. For a more recent confirmation of the principle, *see* ECtHR (GC) 1 March 2010 (dec.), No. 46113/99, *Demopoulos and Others* v. *Turkey*, para. 69.

[53] Of course there are more functions than the three mentioned in this section, but I will only address those that are of direct relevance to the Court's argumentative approach.

would agree are wrong.[54] As a completely external, independent and uninvolved institution, the Court is very well placed to decide if a state has failed to comply with its obligations under the Convention. Moreover, the specific competence to decide on individual complaints of fundamental rights violations serves certain additional objectives. Enabling individuals to bring complaints about violations of their rights on the supranational level may, for example, have the effect of stimulating national authorities to improve the level of protection in their own jurisdictions.[55] By exercising its essentially subsidiary role, the Court can thus actively contribute to the primary protection of fundamental rights on the national level.

Secondly, the Court has an important function in clarifying the minimum level of protection of fundamental rights that should be guaranteed in the Convention states.[56] Given the fundamental character of the Convention rights, it is not acceptable if their exercise depended on where the individual happens to live. Someone living in the Ukraine should have an equal right to remain free of torture or discrimination, or to express himself freely, as someone living in the Netherlands or in France.[57] Only a central institution such as the ECtHR will be able to uniformly establish the meaning of fundamental rights and to define a minimum level of fundamental rights protection that must be guaranteed in all the states of the Council of Europe.[58] For the Court this means that it has an essential role to play in standard-setting, even if states may always provide additional protection (Article 53 ECHR).

Thirdly, the Court has an important agenda-setting function. By assessing individual cases of fundamental rights violations, the Court can place certain topics on the regulative or policy agenda's of national legislatures and executive bodies, who will have to act in execution and implementation of the Court's judgments. In this way national legal change and even changes in the perception of rights can be effected.[59] The case may be, for example, that a state criminalises homosexual

[54] This is generally regarded as the most important function of the Court; most proposals for reform of the Court have respected this function (*see* the proposals mentioned *supra* n. 17).

[55] For explanations of this effect, *See*, e.g., Risse and Sikkink, *supra* n. 16, p. 5; Çalı 2008, *supra* n. 50, p. 301; Simmons, *supra* n. 16, p. 125, 129 and 135.

[56] Cf. J.H.H. Weiler, *The Constitution of Europe* (Cambridge: CUP 1999), p. 105; Nickel, *supra* n. 22, p. 36.

[57] Cf. Weiler, *supra* n. 56, p. 105; Galligan and Sandler, *supra* n. 16, p. 31; Nickel, *supra* n. 22, p. 36; Çalı, *supra* n. 50, p. 301.

[58] This function finds expression in the text of the Convention: the Preamble stresses the importance of a system of collective enforcement of important fundamental rights.

[59] *See*, in particular, L.R. Helfer and E. Voeten, 'Do European Court of Human Rights Judgments Promote Legal and Policy Change?' (2011) <http://ssrn.com/abstract=1850526>, p. 9; Simmons, *supra* n. 16, p. 127; Risse and Sikkink, *supra* n. 16, p. 5. *See also* Langford, *supra* n. 21, p. 40-41.

contacts, that it does not grant residence permits to HIV-positive immigrants, or that it does not provide for access to an independent court in all administrative matters. Moreover, the case may be that national authorities do not recognise such situations as problematic, especially if they stem from deeply-rooted cultural, traditional or legal phenomena; or the case may be that the national authorities do realise that there is a problem, but do not care to solve it.[60] As an outsider, i.e., as an external institutional that is far removed from daily political concerns and national traditions, the ECtHR can be very alert to such issues.[61] The Court's case-law may make it visible for national authorities that certain rights are indeed essential, or that fundamental rights have been interfered with on unacceptable grounds, and that something should be changed to protect these fundamental rights more effectively.[62] In the long run, such visibility and awareness might lead to change on the national level and in the strengthening of the primary protection of fundamental rights by the national authorities.[63] Again, thus, this function fits well with the subsidiary role of the Court.

Hence, even from a subsidiary position, the Court has important corrective and protective, standard-setting and agenda-setting functions. At the same time, guided by the Court's standards, it is up to the national authorities to guarantee the Convention rights and to protect these rights on a level that is at least equal to that provided by the ECtHR. After all, the Court has stated time and again that the national authorities are generally better placed than the Court to make policy choices and to protect fundamental rights in a way that fits well with national law and national constitutional traditions.[64] In addition, it is important to recall that the ECtHR is a *court* and, as a consequence, it has to work under the same constitutional restrictions as are in place for national courts.[65] This means, for example, that the notion of the separation of powers should be respected and that the rights and obligations under the Convention should not be stretched to an extent that *de facto* new norms are created.

[60] Cf. Çalı 2008, *supra* n. 50, p. 302.

[61] *Ibid.*

[62] Cf. Galligan and Sandler, *supra* n. 16, p. 43

[63] For the rights of homosexuals this has empirically been shown by Helfer and Voeten, *supra* n. 59.

[64] *See* further *infra*.

[65] *See* further *infra*; *see also* Ch. McCrudden, 'Judicial Comparativism and Human Rights', in E. Örücü and D. Nelken (eds.), *Comparative Law: A Handbook* (Oxford: Hart 2007) p. 371-398 at p. 376. Moreover, many technical or socio-economic issues are not only complex, but also polycentric; it is questionable if this can be sufficiently taken into account in the bipolar world of a court procedure; cf. L.L. Fuller, 'The Forms and Limits of Adjudication', 92 *Harvard Law Review* (1978) p. 353-409 at p. 394 and 400 and (critical) J.A. King, 'The Pervasiveness of Polycentricity', *Public Law* (2008) p. 101-124 at p. 107.

Conclusion

The mechanism of the fundamental rights prism has resulted in a strongly extended scope of the Convention. Although this clearly offers important remedies and legal protection for individual applicants, it may run contrary to constitutional and institutional principles governing the relationship between the Court and the national authorities. Given the Court's tasks in protecting rights, in standard-setting and in agenda-setting, and given the Court's subsidiary position, the Court's role can and should be limited if applications concern less essential or less fundamental rights. In many policy areas and in most cases the states can be trusted to respect and protect the interests of individuals, especially if these interests are clearly above the minimum level provided for by the Convention. Moreover, it is reasonable to accept some variation in the level of protection of individual interests, especially if they do not belong to the core of fundamental rights.[66] If an adequate level of fundamental rights protection is protected, other individual interests reasonably may be balanced against societal interests and objectives. There is no reason why such a balance could not be determined by what is considered desirable in a certain state on a certain point in time, nor is there reason to expect that the Court could provide for better protection then the national authorities can offer.[67]

Hence, it is beyond question that the Court should provide for a high level of protection of fundamental rights and that it is desirable that it continues to direct the national authorities' attention to blind spots in the protection of fundamental rights. However, if non-fundamental rights cases are concerned, there is no real need for uniformity, nor is there a good reason why the Court should be competent to set aside national decisions. Thus, I think that the Court should focus on deciding which cases are real fundamental rights cases, and which are about 'normal' individual interests.

Towards an alternative approach – delineating fundamental rights

The necessity of creating objective standards for the definition of rights

As explained in the previous section, the Court's current approach can be characterised as highly case-based, incremental and analogy-driven, which is mainly the result of the mechanism of the fundamental rights prism.[68] To develop an approach

[66] Cf. Galligan and Sandler, *supra* n. 16, p. 32; Weiler, *supra* n. 56, p. 105.

[67] Cf. Weiler, *supra* n. 56, p. 105.

[68] Much is to be said in favour of a case-based, minimalist and incremental approach, but there are also important disadvantages; *see* further C.R. Sunstein, 'Beyond Judicial Minimalism', Harvard

that fits better with the Court's main task and function, a different perspective on fundamental rights is needed. The starting point should not be the metaphor of the flowing colour spectrum created by the prism, but a metaphor that is sharper and cleaner. Indeed, it is possible to conceive of an image of the prism's colour spectrum in which the different colours are clearly defined: red, orange, yellow, green, blue, violet. Perhaps such a 'sharp' image is less realistic and precise, yet it is crisp and transparent and it still gives an adequate impression of the range of colours that is covered. And just as it is possible to give a sharp definition of the colours of the prism, it should be possible to define fundamental rights in a way that sharply delineates or demarcates the different interests that are covered.

Hence, the starting point for a new case-law approach is that the Court should be more precise in defining the scope of fundamental rights. Showing itself to be conscious of its function and its role *vis-à-vis* the states, it should only admit cases that really concern fundamental rights.[69] The Court's own cautious endeavours to develop general criteria for interpretation and definition of certain rights show that this is not impossible.[70] An example can be found in the case-law concerning the right to protection of the life and physical integrity of individuals and the right to protection against nuisance and health problems caused by environmental pollution.[71] Clearly these are rights with a potentially extensive scope, covering a wide spectrum of rights and interests. On one end of the spectrum, there are cases where serious health problems are caused by poisonous gas emissions of factories, by life-threatening levels of heavy metals, or by the lack of emergency plans in case of natural disasters.[72] In those cases, the right to physical integrity or even the right to life are obviously at stake. On the other end of the spectrum, there are cases such as one brought to an administrative court in the Netherlands concerning complaints about noise disturbance caused by children playing in a

University Law School Public Law & Legal Theory Research Paper No. 08-40 (2008), <http://ssrn.com/abstract=1274200>.

[69] Cf. Nickel, *supra* n. 22, p. 75.

[70] *See*, e.g., ECtHR 8 June 1976, Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel and Others* v. *the Netherlands*, para. 82;ECtHR 23 June 1981, Nos. 6878/75 and 7238/75, *Le Compte, Van Leuven and De Meyere* v. *Belgium*; ECtHR 23 Nov. 2006 (GC), No. 73053/01, *Jussila* v. *Finland,* paras. 32-38; ECtHR (GC) 19 April 2007, *Vilho Eskelinen* v. *Finland*, No. 63235/00, para. 62.

[71] This case-law has been developed partly under Art. 2 ECHR (the best known example probably being *Öneryildiz* v. *Turkey*, ECtHR (GC) 30 Nov. 2004, No. 48939/99), but also under Art. 8 (e.g., ECtHR 16 Nov. 2004, No. 4143/02, *Moreno Gómez* v. *Spain*). *See also* Palmer, *supra* n. 25, p. 408.

[72] E.g., ECtHR 9 Dec. 1994, No. 16798/90, *Lopez Ostra* v. *Spain*; ECtHR 20 March 2008, No. 15339/02, *Budayeva and Others* v. *Russia*.

schoolyard.[73] In such a case it requires real creativity to hold the right to respect for one's privacy applicable. Between these two ends of the spectrum, there is a wide range of other possible cases, each one being of slightly different seriousness and relevance. Again, therefore, there is a prismatic colour spectrum.

Interestingly, the Court has endeavoured to provide for some demarcation within the wide range of possibly admissible claims in this area by requiring a 'minimum level of severity' to have been attained and by stating that there must have been an actual interference with the individual's private sphere.[74] This is an interesting effort to keep certain cases off the Court's docket. It is clear, though, that thresholds such as that of the minimum level of severity are still rather vague and fluid.[75] In my view, it would be preferable for the Court to define stricter, well-defined criteria for the definition of Convention rights.[76] In the cases about environmental protection and nuisance, the Court sometimes seems to do so already. In a few cases the Court has required the nuisance to be of such a level as to cause actual physical or mental harm (to be proven by medical reports or expert opinions), and a causal link to be demonstrated between the nuisance and the health problems beyond reasonable doubt; also, the national authorities should have been aware of the (potential) harm and could have acted to prevent or limit such harm from occurring.[77] This line of case-law demonstrates that it is clearly not impossible for the Court to formulate substantive criteria or requirements of proof that make it easier to determine which complaints really should be considered by the Court, and which issues can be left to the states.

Guidelines to find objective criteria for the definition of fundamental rights

Clearly there is some risk in formulating sharp definitions of fundamental rights. All definitions require choices to be made that are – to a certain extent – arbitrary,

[73] *See* Administrative Law Division of the Council of State [*Afdeling Bestuursrechtspraak Raad van State*], 6 April 2011, No. 201006128/1/H1, LJN BQ0278.

[74] E.g., ECtHR 2 Dec. 2010, No. 12853/03, *Atanasov* v. *Bulgaria*, para. 75.

[75] The Court has dismissed several cases because the threshold of a sufficient level of severity was not met. *See*, e.g., ECtHR 22 May 2003 (dec.), No. 41666/98, *Kyrtatos* v. *Greece* and ECtHR 26 Feb. 2008, No. 37664/04, *Fägerskiöld* v. *Sweden*.

[76] It may at least define some general standards or guidelines, as it has done in respect to Arts. 5, 6 and 11 – *see* the examples given in n. 70 *supra*.

[77] Such criteria are already visible in *López Ostra* v. *Spain* (ECtHR 9 Dec. 1994, No. 16798/90). More recently, they were applied in cases such as *Atanasov* v. *Bulgaria* (ECtHR 2 Dec. 2010, No. 12853/03, paras. 67 and 76), *Dubetska and Others* v. *Ukraine* (ECtHR 10 Feb. 2011, No. 30499/03, para. 108) and *Grimkovskaya* v. *Ukraine* (ECtHR 21 July 2011, No. 38182/03). Unfortunately, the criteria are not consistently used; *See*, e.g., ECtHR 25 Nov. 2010, Nos. 43449/02 and 21475/04, *Mileva and Others* v. *Bulgaria*, para. 97 and ECtHR 10 Jan. 2012, No. 30765/08, *Di Sarno and Others* v. *Italy*, para. 108.

subjective and value-laden.[78] It may be even more dangerous to draw such lines in relation to fundamental rights, as the level of legal protection strongly depends on the classification of an interest as a fundamental right. If fundamental rights are defined too narrowly, individuals will suffer. For that reason it is important to provide guidelines to the Court to help it create clear and sharp, yet fully reasonable criteria to define the scope of Convention rights.[79]

Fundamental principles and values underlying the Convention

The rights protected by the Convention can be regarded as specifications of widely accepted general notions and principles. Almost everyone will agree that fundamental rights are closely connected to fundamental values such as respect for human dignity, individual autonomy and self-determination, equality and satisfaction of basic human needs.[80] In addition, some fundamental rights are essential to realise the basic values of a legal system governed by the rule of law. Such basic values include respect and tolerance, pluralism, democratic decision-making, procedural justice, legality and legal certainty.[81] These basic values can help to determine which interests really are 'fundamental rights', requiring European supervision.[82] As a rule of thumb, it may be said that the more directly and easily a certain interest can be connected to the basic values underlying the Convention, the more obvious it is that a fundamental right is at stake that ought to be protected by the Court.[83]

Consensus interpretation

Secondly, the Court can find guidance in a principle that has been defined by the Dutch legal scholar (later a judge in, then president of the ECtHR) Wiarda, who held that a judge should choose for interpretations that respond as much as possible to objective norms, principles and legal opinions accepted in the commu-

[78] E.g., Kauper, *supra* n. 21, p. 253.

[79] This approach can be criticised from the perspective that all fundamental rights notions are essentially contested concepts and therefore it is never possible to give a rational definition of the meaning of a fundamental right (cf. Beck, *supra* n. 23, p. 642-643). To a certain extent that is true, yet the alternative (not giving a definition) is not very attractive either.

[80] Cf. J. Donnelly, *The Concept of Human Rights* (New York: St. Martin's Press 1985) p. 27; Nickel, *supra* n. 22, p. 62; Beck, *supra* n. 23, p. 619-620.

[81] *See*, e.g., Beck, *supra* n. 23, p. 646; C. Gearty, *Principles of Human Rights Adjudication* (Oxford: OUP 2004) p. 60.

[82] Cf. 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* (Antwerp: Intersentia 2008) p. 169. Nickel has developed an elaborate system to employ this factor in a very useful manner: Nickel, *supra* n. 22, p. 70.

[83] The ECtHR already sometimes uses this approach when determining the scope of the margin of appreciation; *see* Gerards 2011, *supra* n. 28, section 3.3.4.

nity of law where the judge lives and works in.[84] The 'community of law' where the judges of the ECtHR live and work in is constituted by the entire Council of Europe, which means that it is a community consisting of 47 states and about 800 million inhabitants. The best way to respond to the objective norms, principles and legal opinions existing in such a large community is to use consensus interpretation, which is a method that the Court already relies on and that is also visible in the case-law of the Court's counterpart, the Court of Justice of the EU.[85] The Court of Justice has accepted a fundamental right as a general principle of EU law if it has been recognised as a fundamental right in the constitutional traditions of the member states. On this basis it has recognised and protected, for example, property rights as general principles of EU law, whilst leaving the protection of the right to legal aid for companies to the member states.[86]

The Court should be well aware of the complexities and difficulties surrounding the application of the consensus method.[87] Nevertheless, it can be a very useful tool in determining the scope of rights as is proposed in this article. It may be assumed, after all, that in and among the European states there will be less debate and more consensus on what constitutes the very core of a fundamental right; opinions start to diverge mainly where the periphery of that right is concerned.[88] Thus, where there is consensus on the recognition of a right *as a fundamental right*, there apparently is a 'common core' of generally accepted and shared values, which the Court may rely on.[89] This means that the number of states that recognise a fundamental right as such, the level of abstraction of such recognition, as well as the degree to which there is still debate on the recognition of the right, may offer valuable information on the (perception of) the importance of an individual interest.[90]

[84] Wiarda, *supra* n. 40, p. 84. Specifically for the recognition of fundamental rights, *see* Nickel, *supra* n. 22, p. 79.

[85] Cf. L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 26 *Cornell International Law Journal* (1993) p. 133 at p. 146; Mowbray, *supra* n. 19, p. 69; Gerards 2011, *supra* n. 28, section 1.4.5; Senden 2011, *supra* n. 45, section 10.2.1.2.

[86] ECJ 13 Dec. 1979, case 44/79, *Hauer* [1979] 3727, paras. 17 en 20 and CJEU 22 Dec. 2010, case C-179/09, *DEB*.

[87] For an overview (with references), *see* Senden 2011, *supra* n. 45; Gerards 2011, *supra* n. 28, section 1.4.5.2.

[88] E.g., Ch. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law* (2008) p. 655-724, at p. 373.

[89] *See*, e.g., the dissenting opinion of Judge Matscher to the case of *König* v. *Germany* (ECtHR 28 June 1978, No. 6232/73); cf. also P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in G. Canivet et al. (eds), *Comparative Law before the Courts* (British Institute of International and Comparative Law 2004) p. 135 at p. 138.

[90] Cf. Mahoney, *supra* n. 89, p. 147. The Court should be aware, however, of the criticism that has been raised; *See*, e.g., Letsas, *A Theory of Interpretation of the European Convention on Human*

In addition, it may be useful for the Court to employ methods of judicial borrowing, which is a different variant of comparative interpretation.[91] Many of the cases that are brought before the Court do not concern entirely new issues, and it may well be that useful criteria for definition have already been found in national or foreign legal systems.[92] Of course the Court should make sure that national or foreign definitions and criteria are suitable for the special fundamental rights context of the Convention system. If used with good care, however, judicial borrowing can lead to important and useful forms of interpretative cross-fertilisation.[93]

Use of own criteria

Thirdly, there is a special role for the Court's own case-law as a source of inspiration for the definition of fundamental rights. It was mentioned above that the Court's case-law is strongly case-based and that the Court usually does not develop general criteria to determine the meaning and scope of a certain right. Nevertheless, series of judgments on specific topics may provide interesting information about the perceived importance and meaning of certain Convention rights.[94] Analogical argumentation, as it is consciously or unconsciously applied by the Court, has the essential characteristic that there must be a common element or principle that is relevant for both the old case and the new one.[95] Using inductive methods, it is possible to distil the substantive or logical similarities the Court has seen in different cases and which it has used as a basis to extend a certain precedent to a new set of facts. These common principles or elements can be used to help to determine how fundamental rights should be defined. Again, however, it is important that the Court should not only look for common elements or

Rights (OUP: Oxford 2007) p. 123 and J.A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', 54 *International and Comparative Law Quarterly* (2005) p. 459-474 at p. 459.

[91] On the value of borrowing, *see* in particular M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, trans. from French by N. Norberg (Oxford/Portland: Hart 2009) p. 19 and S. Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', 74 *Indiana Law Journal* (1999) p. 819 at p. 833-839.

[92] About the value of this type of references, *See*, e.g., J. Tsen-Ta Lee, 'Interpreting Bills of Rights: The Value of a Comparative Approach', 5 *International Journal of Constitutional Law* (2007) p. 122-152, at p. 123 and Delmas-Marty, *supra* n. 91, p. 37. Examples of this approach are already frequently visible in the Court's case-law. *See*, e.g., ECtHR 29 April 2002, No. 2346/02, *Pretty* v. *UK*; ECtHR (GC) 11 July 2002, No. 28957/95, *Christine Goodwin* v. *UK*, para. 84; ECtHR 6 May 2003, No. 44306/98, *Appleby* v. *UK*, para. 46; ECtHR 7 March 2006, No. 6339/05, *Evans* v. *UK*, para. 67.

[93] The Court could make good use of 'bricolage'; cf. M. Tushnet, 'The Possibilities of Comparative Constitutional Law', 108 *Yale Law Journal* (1998) p. 1225-1309 at p. 1286.

[94] Cf. Matscher, *supra* n. 40, p. 64.

[95] *See* Brewer, *supra* n. 36, p. 965 and cf. Schauer, *supra* n. 36, p. 15.

principles, but it also always make sure that such an element or principle really can be applied in a more general manner to delineate the scope of a Convention right.

Common elements and principles can be found on different points in the Court's case-law. Most evidently they can be looked for in the case-law on interpretation and definition of the Convention rights, but relevant guidelines for future interpretation may also be found in the scope of the margin of appreciation that the Court leaves or in the balance that it has struck between a fundamental right and other interests. If the common elements that follow from these different stages of review are brought together, they can be very useful to formulating criteria for the definition of rights. This may be illustrated by the example of social security. Since all possible social security schemes (including those completely paid out of general taxation) have been brought within the scope of the right to property, it seems that hardly any delimiting criteria can be found in this case-law. Notably, however, the Court consistently leaves a very wide margin of appreciation to the states in social security cases.[96] It sets relatively low standards for the proportionality of limitations of allowances or pensions, and complaints in this area are rarely successful.[97] Given the Court's overall assessment of such cases, it may be concluded that, even though social security rights and claims to social benefits are covered by the Convention, they are an almost imperceptible hue in the colour spectrum of the Convention. Based on this experience and knowledge, it can be decided to exclude certain social rights from the Convention in the future, or to extend the scope not any further than has been done thus far.

Towards a sharper delineation of Convention rights – how?

Constitutional role for the Grand Chamber

The next question to be asked is how general guidelines such as those sketched above can be used to delineate the scope of Convention rights. Following the argumentative approach suggested here, I think that the main work in defining the various rights should be done by the Grand Chamber of the Court, which should play a far more important constitutional role than it currently does. The Court's chambers, committees and single judges could restrict themselves to ap-

[96] The ECtHR has granted the states a wide margin of appreciation in cases concerning socio-economic policies; *See*, e.g., ECtHR 21 Feb. 1986, No. 8793/79, *James and Others* v. *UK*. This is different if the social security complaint concerns discrimination based on a 'suspect' ground (e.g., nationality or ethnicity); *See*, e.g., ECtHR 30 Sept. 2003, No. 40892/98, *Koua Poirrez* v. *France* and ECtHR 18 Feb. 2009, No. 55707/00, *Andrejeva* v. *Latvia*.

[97] Cf. Cousins, *supra* n. 35, p. 45. I would like to thank Ingrid Leijten for pointing out to me that the extension of the scope of Art. 1 P1 did not offer very much in terms of individual protection because of the very wide margin of appreciation and the very lenient test of proportionality that the Court usually applies in these cases.

plying the Grand Chamber's criteria, but in case of doubt they can relinquish jurisdiction to the Grand Chamber. This would allow the Grand Chamber to hand down an authoritative judgment on how the criteria should be applied, or, alternatively, it might decide to modify the criteria because of the new insights provided by the specific facts of the case.[98] In Grand Chamber procedures concerning the definition of the Convention, it also would be desirable to engage the national governments in the procedure, for example by asking them to intervene. By doing so, the states are given an express opportunity to participate actively in the debate about the further development of the Convention.

Symmetrical approach towards positive and negative obligations

The choice for a clear definition of the scope of the Convention rights also means that the current differences between review of positive and negative obligations should disappear.[99] The general starting point should be, after all, that the Court establishes if a Convention right is at stake and if it has been interfered with. Only if this is clear should it continue to assess the arguments advanced in justification of the interference. Presently this twofold approach is only commonly followed in relation to negative obligations, i.e., in those cases where a public authority has actively infringed a fundamental right or impeded its exercise.[100] In cases concerning positive obligations, where the (alleged) harm is chiefly caused by an omission or by non-action of a public authority, the Court tends to follow a different approach. In these cases, the question is raised if the state should have done more, or should have acted differently, to guarantee fundamental rights in an effective manner. In determining if any such positive obligations exist and if the state has acted in conformity with them, the Court applies a 'fair balance' test, balancing the individual interest of the applicant against the government's interest in not having to act in a certain manner.[101] In applying the fair balance test, the Court usually (but not always) omits providing a definition of the Convention right that is at stake.[102] This is unfortunate, especially as it is mainly by means of recognising

[98] *See also* De Schutter and Tulkens, *supra* n. 82, p. 213.

[99] I have argued in favour of a more 'symmetrical approach' towards positive and negative obligations before; *see* Gerards and Senden, *supra* n. 19; Gerards 2011, *supra* n. 28, section 1.4.4.3.

[100] *See* more elaborately on this Gerards and Senden, *supra* n. 19; Gerards 2011, *supra* n. 28, section 1.4.4.3.

[101] *See*, e.g., ECtHR 17 Oct. 1986, No. 9532/81, *Rees* v. *UK*, para. 37 and ECtHR (GC) 8 July 2003, No. 36022/97, *Hatton and Others* v. *UK*, paras. 118-130. *See* further Gerards 2011, *supra* n. 28, section 2.1.1.

[102] *See also* Palmer, *supra* n. 25, p. 407. There are several examples of cases in which the Court does use a two-step test in determining positive obligations and that may serve to illustrate that this is not at all impossible; *See*, e.g., ECtHR 10 Feb. 2011, No. 30499/03, *Dubetska and Others* v. *Ukraine*.

positive obligations that the scope of the Convention has been extended.[103] Currently the Court commonly restricts itself to giving case-based arguments for such extensions, leaving the question unanswered of whether the case really concerns a Convention right. For that reason it is desirable for the Court to apply a similar test to positive obligations as to negative obligations, meaning that it should first determine if the complaint actually relates to a Convention right, and only then evaluate if the state has made sufficient effort to protect this right.[104] Only then can the advantages of sharply delineating the Convention rights be exploited to their fullest effect.

Three categories of rights; inadmissibility of the third category

As for the actual definition of the rights contained in the Convention, it is useful to distinguish roughly three different categories. The first category is that of cases where it is patently obvious that a Convention right has been affected and where it is clear that the very core of the right is at stake. Examples are censure of press publications on topics of general interest, criminalisation of homosexual contacts, and mistreatment or torture of suspects. All of these examples concern situations that are closely related to the basic values of the Convention (democracy, human dignity, physical integrity) and they concern rights that are widely recognised as fundamental. Moreover, the Court's own case-law clearly supports the recognition of these situations as being covered by the Convention.[105]

The second category is that in which it is still clear that the case concerns the exercise of a fundamental right, yet the core of the right has not been affected. In the example of freedom of expression, such a case may concern expressions on weblogs or internet forums that do not relate to particularly important topics of general interest.[106] As regards privacy, one might think of using saliva or fingerprints for forensic examination,[107] and as for prisoners' rights, such cases may concern the right to freely correspond with one's family.[108]

[103] *See*, e.g., Palmer, *supra* n. 25, p. 399; Gerards 2011, *supra* n. 28, section 4.3.2.

[104] Gerards and Senden, *supra* n. 19; Gerards 2011, *supra* n. 28, section 4.4.3. *See also* the proposal made by Judge Wildhaber in his dissenting opinion in *Stjerna* v. *Finland*, ECtHR 25 Nov. 1994, No. 18131/91. It is easily possible to do so as the Court has already indicated that the applicable principles generally will be the same; *see*, e.g., ECtHR (GC) 12 Nov. 2008, No. 34503/97, *Demir and Baykara* v. *Turkey*, para. 116.

[105] *See* ECtHR 26 Nov. 1991, No. 13585/88, *Observer and Guardian* v. *UK*; ECtHR 22 Oct. 1981, No. 7525/76, *Dudgeon* v. *Ireland*, para. 52; ECtHR (GC) 1 June 2010, No. 22978/05, *Gäfgen* v. *Germany*, para. 107.

[106] The Court has held, for example, that publications in the gossip press are less important; *See*, e.g., ECtHR 18 Jan. 2011, No. 39401/04, *MGN Ltd.* v. *UK*.

[107] The Court is rather nuanced in this respect. *See* the difference between taking finger prints and taking saliva for DNA-tests in *S. and Marper* v. *UK* (ECtHR (GC) 4 Dec. 2008, Nos. 30562/04 and 30566/04).

[108] Cf. more implicitly ECtHR 25 March 1983, No. 5947/72, *Silver* v. *UK*.

The third category includes rights and interests that are important, yet cannot be regarded as so fundamental as to warrant protection on the European level. To speak in Convention terms: these rights may still come 'within the ambit' of the Convention, but they do not come within its scope.[109] One might think of commercial advertisements in the example of freedom of expression[110] and, in the example of the right to privacy, of CCTV cameras in the streets[111] or the right to give birth to one's child at home.[112] For suspects and prisoners, one might think of being forced to wear handcuffs or prison clothing.[113]

The third category of rights should be sharply delineated in a new argumentative approach by the Court, using the guidelines defined above. If the connection of an individual interest to the Convention is not sufficiently strong to justify an intervention by the Strasbourg Court, the case should be declared inadmissible. If the Court would follow this approach, a number of complaints would not reach the stage of a decision on the merits. If definitional criteria are sharply drawn and visibly applied, applicants will be discouraged from bringing clearly non-fundamental rights-related complaints before the Court, looking for protection of their interests on the national level instead. This may not lead to a substantial reduction of the number of complaints before the Court, but the approach proposed in this article does not primarily aim to provide a solution to the caseload problem – if such a reduction results from this approach, this is mainly a fortuitous side effect. More importantly, the suggested approach would lead to a sharper division of tasks and competences between the Court and the state, which is suitable given the Court's special function and which is appropriate given the need to provide primary protection of fundamental rights on the national level.

[109] The Court has developed this terminology in relation to the prohibition of discrimination of Art. 14 ECHR; *See*, e.g., ECtHR (GC) 22 Jan. 2008, No. 43546/02, *E.B.* v. *France*, para. 47. Although a right from the third category generally falls outside the scope of the Convention and an application concerning such a right should be declared inadmissible, this may be different if the case concerns discrimination in the exercise of such a right. As the right to non-discrimination constitutes a fundamental right, it is desirable that the ECtHR examines the reasons advanced in justification of a difference in treatment in the exercise of a fundamental right, even if that right does not appear to be particularly important. The decision to accept such a case may depend, however, on the ground of discrimination. If the distinction is directly or indirectly based on a suspect ground (e.g., race or gender) it is more important to decide on the merits of the case than if the distinction is based on neutral grounds.

[110] Cf. ECtHR 25 Oct. 1989, No. 10572/83, *markt Intern Verlag GmbH* v. *Germany*.

[111] Cf. ECtHR 28 Jan. 2003, No. 44647/98, *Peck* v. *UK*.

[112] Cf. ECtHR 14 Dec. 2010, No. 67545/09, *Ternovszky* v. *Hungary*.

[113] Cf. ECtHR 16 Dec. 1997, No. 20972/92, *Raninen* v. *Finland*.

Procedural review

If the Court would pay more attention to the definition of rights in the way proposed above, this would mean that the Court's subsequent assessment of the justification of limitations could be changed. Whilst the Court presently evaluates whether an interference with a right can be justified on substantive grounds, applying a test of reasonableness and proportionality, it is proposed here that it should always apply a procedural test first.[114] It should examine whether the contested measure or decision has been prepared in a careful manner and if there have been sufficient remedies available to correct eventual mistakes or flaws in the decision-making process. In a number of cases the Court has already used such an approach, which is a desirable development.[115] Procedural review does justice to the classic doctrine of the separation of powers between the judiciary, the legislature and the executive.[116] Ideally, political decision-making procedures should be organised in such a way that they lead to legitimate and acceptable rules, measures and decisions, respecting important principles such as those of transparency and accountability.[117] Procedural justice and good governance are also of eminent importance for the protection of fundamental rights.[118] If it is clear that such basic principles have been respected, the outcomes of democratic decision-making processes usually should be respected, even if not everyone agrees with them.[119] This also implies that the judiciary, including the ECtHR, would not be free to intervene for *substantive* reasons.[120] Instead, the courts should focus on the ques-

[114] *See also* L. Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Journal* (2002) p. 161 and De Schutter and Tulkens, *supra* n. 82, p. 208.

[115] For some examples, *see* ECtHR 6 Oct. 2005, No. 11810/03, *Maurice* v. *France* and ECtHR (GC) 10 April 2007, No. 6339/05, *Evans* v. *UK*, paras. 86 and 91. In several cases the Court accepted a careful consideration of the decision-making process by the national court; *See*, e.g., ECtHR 22 March 2012, No. 45071/09, *Ahrens* v. *Germany*, paras. 76-78). There are various examples of cases in which the Court did not accept a national decision because the underlying decision-making process was flawed; *See*, e.g., ECtHR 6 Oct. 2005, No. 74025/01, *Hirst* v. *UK*. For a similar example, *see* ECtHR (GC) 4 Dec. 2007, No. 44362/04, *Dickson* v. *UK*, para. 83. *See* further on this Gerards 2011, *supra* n. 28, sections 2.8 and 4.3.3; *see also* Wildhaber, *supra* n. 114, p. 161.

[116] Cf. C.R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press 1993), p. 133.

[117] Cf. Sunstein 1993, *supra* n. 116, p. 143.

[118] Cf., e.g., Gearty, *supra* n. 81, p. 20.

[119] Cf. M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press 1999), p. 31; *see also* J.H. Ely, *Democracy and Distrust* (Cambridge, MA Harvard University Press 1980) p. 81 and 135; L.F. Powell, '*Carolene Products* Revisited', 82 *Columbia Law Review* (1982) p. 1087 at p. 1091; B. Ackerman, 'Beyond *Carolene Products*', 98 *Harvard Law Review* (1985), p. 713 et seq., at p. 719.

[120] Cf. Tushnet, *supra* n. 119, ch. 7 and 8; Sunstein, *supra* n. 116, p. 146; A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 2nd edn. (New Haven/London: Yale University Press 1962) p. 16-17; Ely, *supra* n. 119, p. 5 and 45. These objections can be rebutted

tion if the decision-making process was such as to respect the various requirements of procedural justice, transparency, accountability and good governance. If there is a suspicion of procedural incorrectness, the court should act, since it is then not possible to trust the reasonableness of the outcomes of the procedures.[121] Suspicions of procedural defects may arise, for example, if it is clear that relevant interests have not been considered, if the impact of a decision on fundamental rights has been insufficiently examined, or if the decision was influenced by prejudice or stereotyping.[122] In such cases, the substantive content of the decision should be further examined.[123]

From this perspective it is the Court's primary task to supervise and control the quality of national procedures.[124] If the national process of decision-making has been qualitatively good and well-balanced, if there are no indications that improper considerations have influenced the outcomes of the process or that certain groups have had insufficient opportunity to participate, and if there has been sufficient access to judicial remedies that meet the requirements of a fair trial and of procedural justice, the Court generally has to accept the outcome of such a procedure, even if it reflects a different balance or a different choice than the Court's judges would have preferred.

by using a different conception of democracy (e.g., R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Cambridge: Harvard University Press 1996) p. 16), or by stressing the need to protect fundamental values (M. Cohn, 'Judicial Activism in the House of Lords: A Composite Constitutionalist Approach', *Public Law* (2007) p. 95-115, at p. 97 and 109). The real challenge seems to be to devise a system in which justice is done to the special roles of both the legislature and the judiciary and in which there is a constant dialogue; s*ee*, e.g., P. Hogg and A. Bushell, 'The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't a Bad Thing after All', 35 *Osgoode Hall Law Journal* (1997) p. 75.

[121] *See* in particular Ely, *supra* n. 119, p. 103 and ch. 5 and 6.

[122] Cf. Sunstein, *supra* n. 116, p. 27 and p. 143; *see* also Ely, *supra* n. 119, p. 81 and 153 and M. Cohn and M. Kremnitzer, 'Judicial Activism: A Multidimensional Model', 18 *Canadian Journal of Law and Jurisprudence* (2005) p. 333 at p. 351. *See also* K. Roosevelt III, *The Myth of Judicial Activism. Making Sense of Supreme Court Decisions* (New Haven/London: Yale University Press 2006) p. 24.

[123] Not every decision that finds its origin in a flawed process of decision-making will be entirely unreasonable or contrary to a fundamental right. As O'Fallon has said: 'Sometimes, despite a high antecedent likelihood of corruption, the result of the legislative process clearly negates the presupposition of corruption' (J.M. O'Fallon, 'Adjudication and Contested Concepts: The Case of Equal Protection', 54 *New York University Law Review* (1979) p. 19 at p. 48).

[124] Cf. Wildhaber, *supra* n. 114, p. 162.

Substantive review

The outcome of the procedural test may be that the national procedure was defective. It may become clear that relevant interests have not been identified, that stereotypes or stigmata have tainted the decision, or that the judicial procedure was flawed. Sometimes these defects may be so serious as to warrant a direct finding of a violation of the Convention.[125] In those cases the Court needs to provide for sound reasoning of its findings, pointing out the defects that it has found and perhaps even suggesting possible solutions. Such elaborate argumentation might facilitate some kind of dialogue between the Court and the states and it might improve the impact of the Court's judgments on structural issues such as the quality of national judicial procedure.

If the Court would apply such a procedural test, it often would not need to resort to a substantive assessment of a justification for a limitation of a right, nor does it have to answer questions of necessity or proportionality. This has obvious advantages, as it is often very difficult for a supranational, subsidiary organ to assess the reasonableness of a national measure or decision. Moreover, it seems to be mainly the substantive assessment of reasonableness that causes national criticism at the Court's judgments.[126] Procedural review can be conducted on more objective and neutral grounds and may therefore be less debatable from the perspective of the role of a European court.[127]

In many cases, however, the procedural defect may appear to be rather small or there may be other reasons (such as a need for standard-setting) why it is still important to provide for substantive review.[128] If the Court would conclude that substantive review should be carried out, its assessment of the justification neces-

[125] Cf. Wildhaber, *supra* n. 114, p. 162.

[126] It is probably for this very reason that the Court has applied a procedural test in some sensitive cases (*see* n. 115 *supra*), such as withdrawal of consent for IVF-treatment (*Evans*), wrongful birth (*Maurice*) and voting rights for prisoners (*Hirst*).The application of a procedural test does not protect the Court against all criticism, as the reactions to the judgment in *Hirst* illustrate. However, the negative response may be explained partly by the fact that the Court did not only apply a procedural test in this case, but it also set very high standards for decision-making in the future (*see* the Court's later decisions in the cases of *Frodl* v. *Austria* (ECtHR 8 April 2010, No. 20201/04) and *Scoppola (no. 3)* v. *Italy* (ECtHR 18 Jan. 2011, No. 126/05, pending before the Grand Chamber at the time of writing). As a result of this requirement, the Court intervenes in national constitutional law, which may be hard to accept for a state. About this, *see* further J.H. Gerards, 'Concrete redelijkheidstoetsing en de rechtspraak van het EHRM. Over "mandatory rules", individuele gerechtigheid en de eisen die het Hof stelt aan de nationale rechtstoepassing' [Concrete review of reasonableness in the case-law of the ECtHR. About mandatory rules, individual justice and the Court's requirements for national decision-making', in T. Barkhuysen et al. (eds.), *Geschakeld recht* (Deventer: Kluwer 2009) p. 169-188.

[127] Cf. Wildhaber, *supra* n. 114, p. 162.

[128] *See* O'Fallon, *supra* n. 123.

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sarily is a strict one.[129] After all, in all of the cases in which the Court would apply substantive review, an interference with a 'real' fundamental right would be at stake – otherwise the application would have been declared inadmissible, as proposed in the section entitled 'Towards an alternative approach – delineating fundamental rights' above.

This also means that the alternative approach would reduce the need to apply the margin of appreciation doctrine. This doctrine now has the main function of offering some leeway to states in cases where there are no important fundamental rights at stake and where the complaint relates to sensitive or complex policy areas. If the alternative approach is followed, most of these cases would not be decided on the merits, either because they do not concern real fundamental rights (and therefore would be declared inadmissible), or because they result of a good (or really bad) national procedure. If a substantive test is applied in the alternative approach, the case would inherently relate to important fundamental rights where there are at least some flaws in the national decision-making procedure. Clearly there is much less reason to leave a wide margin of appreciation in such cases. Perhaps the Court's assessment might be even more critical in relation to the first category of rights (the real core rights) than in the second category, but even then the complexity of the current margin of appreciation doctrine would be reduced, as there would be less intensity-determining factors.

If the Court would carry out strict and substantive review of the justification, it is clear that its argumentation should be as transparent and consistent as possible. It is desirable in this regard that the ECtHR would abandon some of the standards it currently uses and that are little accepted and unclear, such as the requirement that the limitation of a right is supported by 'relevant and sufficient reason.'[130] Instead, the Court could make use of the classic threefold test of proportionality as it is used by constitutional courts in various states and by the Court of Justice of the EU: a limitation is only acceptable if it constitutes a means that is both suitable and necessary to achieve a legitimate aim and if a reasonable balance is struck between the interests served and the interests that have been affected.[131]

[129] O'Fallon, *supra* n. 123, p. 44.

[130] *See* critically Gerards 2011, *supra* n. 28, section 2.6.6 and Gerards 2012, *supra* n. 19, forthcoming. *See also* A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', 92 *Modern Law Review* (1999) p. 671 at p. 672-673.

[131] Much has been written on this test; *see* generally, e.g., J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers 2009) p. 69-72; D. Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality', University of Oxford Legal Research Paper Series, Paper No. 26/2009, <http://ssrn.com/abstract=1463853>; J.H. Gerards, *Belangenafweging bij rechterlijke*

Moreover, it would always be necessary for the Court to have regard of the individual effects of a certain measure or decision, rather than just applying an abstract review. This practice is already well established in the Court's case-law approach and it is an essential form of review, especially considering that the definition of a fundamental right and procedural review are not very strongly concerned with the individual complaint. Since it is one of the most important functions of the Court to protect individuals against unwarranted interference with their rights, it should focus its substantive review on the reasonableness of the application of such a measure in the case at hand.[132]

Conclusion

In this article, I have proposed an alternative argumentative approach for the Court. This approach departs from the main functions of the Court: protection of individual rights, standard-setting, and agenda-setting. It also takes into account that the Court is a judicial institution acting on a supranational level. The specific functions and position of the Court imply that it should take great care in deciding which issues really deserve European supervision, and which issues reasonably could be left to the states.

The alternative approach suggests that, given the Court's specific function and role, it is desirable that it carefully and sharply delineates the scope of the various Convention rights. The Court should declare cases inadmissible that concern individual interests that can only with some difficulty be termed 'fundamental rights', or that come within the 'ambit' of the Convention rather than fall within its 'scope'. By doing so, the Court's review of limitations of fundamental rights would be restricted to those cases where such review has real added value over what the states themselves are able to achieve.

Moreover, the alternative approach proposes that the Court should always apply procedural review to examine if a limitation of a right follows from a careful national decision-making process that is not tainted by impermissible considerations, and to examine if there has been sufficient opportunity for correction by using judicial remedies that meet the requirements of a fair trial and of procedural justice. If such procedural requirements have been met, the Court in principle has to accept the substantive outcome. If not, the Court should carry out a strict substantive review, based on the classic proportionality requirements of suitability, necessity and fair balance. By using such a procedural test the Court can

toetsing aan fundamentele rechten [Balancing review in fundamental rights cases] (Alphen a/d Rijn: Kluwer 2006).

[132] Cf. Gerards 2009, *supra* n. 126, with many references.

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position itself *vis-à-vis* the national legislature and executive, in a manner that is appropriate for a judicial institution.

It is of great importance that fundamental rights are protected on a high level throughout Europe, but the alternative approach will certainly be able to guarantee such a high level of protection. Interferences and limitations will not be accepted if there are flaws or defects in the procedure of decision-making or judicial review, or at the least the Court will examine them in a very critical and precise manner. Moreover, the proposed methods may lead to increased transparency and consistency of the Court's case-law, since it allows for clarification of the scope of the Convention as well as for less complex applications of doctrines such as those of positive obligations and the margin of appreciation.

This all seems to be very valuable indeed. However, it has been pointed out in the introduction that the alternative approach certainly cannot provide a solution to all the problems that the Court currently faces. There is dear need of solutions to improve the level of protection on the national level and of innovative ideas to enhance the effectiveness of the Court's own procedures. Thus, even if the alternative approach suggested in this article is not accepted, it could be regarded as an invitation – an invitation to think in terms of alternatives and constructive solutions, rather than in terms of problems. It is this kind of thinking about the Court's future that is necessary to safeguard the system of European fundamental rights supervision and it is this constructive debate that I hope to have contributed to.