

The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights**

Introduction

The European Court of Human Rights (ECtHR) is a remarkable institution. Over the past 50 years, it has shown that the protection of human rights is no longer an exclusive matter for national constitutions and national courts. Human rights, as guaranteed under the European Convention on Human Rights (ECHR), have become an issue in European law and public international law.

This process has advanced considerably and has not yet come to an end. The practice under the ECHR of more than 60 years and the thousands of decisions of both the former European Commission on Human Rights and the ECtHR, clearly show that it is a success story without comparison in the history of public law. Established and ratified by the states of Western Europe against the background of the ruins of World War II and the horrors of Nazism, the ECHR, as a charter of human rights, became a necessary element of a democratic society. Twenty years ago, after having influenced the legal orders of two dozen of more or less 'old' democracies, and after their people had torn down the Iron Curtain, this remarkable instrument of European law started conquering the countries of the old communist regimes in Central and Eastern Europe. Within less than a decade, the ECHR became an undisputed legal instrument in these states too and started influencing constitutional law as well as legislation and the judiciary. At about the same time, in 1998, the new – permanent – Court began to work with higher capacity, leaving behind the former system of a Commission and a non-permanent Court.

As a direct consequence of its success, particularly in Eastern Europe but also in the 'old' member states, the ECtHR was flooded with applications. By the beginning of 2012, for instance,

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the ECtHR was faced with some 150,000 pending applications.¹ Individual applications have been increasing constantly in number ever since the right to individual application was introduced and led to the ECtHR's case overload. While the 'old' Court delivered fewer than 1,000 judgments in 38 years from 1959 to 1998, the number of judgments delivered by the 'new' Court since 1998 exceeds 14,000.²

At the same time the ECtHR's case law and its institutional background have changed enormously. What is its approach to interpreting fundamental rights today? What is its relationship with domestic courts and above all constitutional courts?

I The ECHR – a Constitutional Instrument on Human Rights

1 The ECHR as an Instrument of 'European public order'

The ECHR is the oldest international treaty in the field of regional human rights protection. Its development is closely linked to the end of World War II and was the answer to the systematic human rights violations in particular in the Third Reich. In the aftermath of the war, great effort was put into the development of international human rights documents with legally-binding effect. Following the Universal Declaration of Human Rights of the United Nations General Assembly of 10 December 1948 and in the face of the atrocities of Nazism, it was in Europe where the first international instrument of human rights protection was established. This was, on the one hand, a consequence of the realisation that a purely national mechanism to protect fundamental freedoms and human rights had proved woefully inadequate. On the other hand, it was an expression of the will of the democratic states of Europe to self-determination against the totalitarian communism of the Soviet regime.³

The ECHR as a multilateral treaty enjoys an exceptional position among international treaties in several respects. As regards their content, human rights treaties contrast with other international law in that their object is not the relationship between states but generally the relationship between individuals, who rely on human rights, and states that are obliged under international law to conform to the guarantees. Since the entry into force of Protocol No 11, the ECHR itself provides for a system of legal protection authorising the ECtHR to review judicially whether member states have complied with the guarantees, and obliges the member states to grant a right to individual application to the permanent ECtHR.⁴

¹ ECtHR, *Annual Report 2011 of the European Court of Human Rights*, Council of Europe, www.echr.coe.int/NR/rdonlyres/77FF4249-96E5-4D1F-BE71-42867A469225/0/2011_Rapport_Annuel_EN.pdf 152ff.

² *Ibid* 14.

³ R. Grote in R. Grote, T. Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006, Tübingen), ch 1, para 10; E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010, Oxford).

⁴ C. Tomuschat, *Human Rights Between Idealism and Realism* (OUP 2003, Oxford) 198.

In the course of time, the ECHR liberated itself from a purely international context. Through manifold influences on the legal orders and the process of implementation into the constitutions of European states, a close link between the ECHR, national constitutions and European Union (EU) law has been established. Nowadays, in Europe, fundamental guarantees form an essential, indispensable part of the constitutional structure and are spread across different legal systems. The ECHR, apart from the member states' constitutions, constitutes one of these legal systems. The member states, aligned with each other through the ECHR, have outsourced part of their substantive constitutional law to the 'complementary constitution' or 'ancillary constitution', the ECHR. It therefore seems appropriate to describe the ECHR, by reference to the ECtHR, as a 'constitutional instrument of European public order' and, by reference to literature, as part of the *ordre public européen*, as a 'European constitution of human rights', a 'substantive common European constitution', a 'constitution of human rights' or as a 'process of constitutionalisation'.⁵ Especially since the entry into force of Protocol No 11 to the ECHR and in the light of 50 years of decision-making of the ECtHR, the ECHR may be described as a European constitutional instrument of human rights and thus as a partial constitution in the field of human rights; the ECtHR may be referred to as a 'European constitutional court' for human rights.⁶

2 Protocols to the ECHR: from 'à la carte' to 'all inclusive'

One of the characteristics which distinguish the ECHR from national constitutions is that only certain core human rights are legally-binding upon all member states. New human rights guarantees contained in Additional Protocols to the ECHR are binding only upon those states who have ratified the respective Protocols. The number of ratifications in respect of the Protocols varies with the Protocol concerned. Protocol No 1, which comprises three very different human rights (protection of property, the right to education, the right to free elections), and Protocol No 6 concerning the abolition of the death penalty were ratified by almost all member states,⁷ including all EU member states. Protocols No 4 and No 7 have not been ratified by a large number of member states.⁸ There is even greater reluctance to ratify Protocol No 12

⁵ C. Grabenwarter, K. Pabel, *Europäische Menschenrechtskonvention* (CH Beck 2012, Basel) (C. Grabenwarter and K. Pabel, 'Europäische Menschenrechtskonvention') Art 2, para 3 with further references.

⁶ *Ibid.*

⁷ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Protocol No 1) CETS No: 009, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=&DF=&CL=ENG; *Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty* (Protocol No 6) CETS No: 114, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=&DF=&CL=ENG.

⁸ *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto* (Protocol No 4) CETS No: 046, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=046&CM=&DF=&CL=ENG; *Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Protocol No 7) CETS No: 117, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=&DF=&CL=ENG

concerning equality of treatment of all persons, which is still open to signature. So far, Protocol No 12 has been ratified by 18 states and entered into force on 1 April 2005.⁹ Among the signatory states are only seven EU member states (Finland, the Netherlands, Croatia, Cyprus, Luxembourg, Romania, Spain and Slovenia) have ratified it. Protocol No 13, which contains a general prohibition on the death penalty, entered into force on 1 July 2003. So far, 42 of the 45 states who have acceded have ratified the Protocol.¹⁰

When considering the dates of accession, it becomes obvious that almost all Central and Eastern European states that acceded to the ECHR in the 1990s have ratified all Additional Protocols which had then already existed.

3 Case Law Strengthening the Rule of Law and Democracy

For more than 30 years the ECtHR has delivered numerous judgments that have considerably strengthened the rule of law and democracy. Beginning with a right to access to court, the case law focussed on the rights of the accused. In the course of time, the ECtHR gave a legal basis to core guarantees under the rule of law, such as the right to remain silent,¹¹ clarity of the law,¹² legal effect or the principle of non bis in idem.¹³ Today it can be said without exaggeration that the judicial guarantees of the ECHR contain a European principle of the rule of law.¹⁴ What is more, the ECtHR has constantly expanded the scope of political rights, in particular the freedom of expression. Beginning with cases concerning the freedom of press and defamation,¹⁵ there is a differentiated case law on the rights of journalists,¹⁶ the electronic media including the

⁹ *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Protocol No 12) CETS No: 177, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG.

¹⁰ *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances* (Protocol No 13) CETS No: 187, www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=&DF=&CL=ENG.

¹¹ *John Murray v the United Kingdom* App no 18731/91 (ECtHR, 2 February 1996) 22 EHRR 29, para 45; *Saunders v the United Kingdom* App no 19187/91 (ECtHR, 17 December 1996) 23 EHRR 313, para 68; *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000) 33 EHRR 264, para 40.

¹² E.g. *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993), 17 EHRR 397, para 52.

¹³ E.g. *Franz Fischer v Austria* App no 37950/97 (ECtHR, 29 May 2001), para 25.

¹⁴ E.g. *Lavents v Latvia* App no 58442/00 (ECtHR, 28 November 2002), para 114.

¹⁵ *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) 41 EHRR 22

¹⁶ Exemplary: as to the right to confidentiality of journalistic sources, see e.g. *Goodwin v the United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) 22 EHRR 123 (Goodwin ECtHR), para 39; *Sanoma Uitgevers BV v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010), para 54; the right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism: *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) 31 EHRR 28, para 54.

internet,¹⁷ the access to information¹⁸ and the freedoms of civil servants¹⁹ and judges²⁰. This ‘essential foundation of a democratic society’ has become a backbone of all member states in Europe, notwithstanding their respective judicial traditions. Various member states were affected by the new case law on the role of investigative journalism and on the conflicts with the interests in the protection and confidentiality of journalistic sources and, above all, the protection of private life. A rough analysis shows that the ECtHR has strengthened the rights of the journalist as regards reports on topics in the public sphere or on public figures in public debates. On the other hand, it has become more sensitive as regards the protection of private life, in particular the protection of personal data.²¹

A second development has occurred through the case law on voting rights under Art 3 of Protocol No 1. Within this ambit, the required ‘European standards’ are clearly influenced by soft law. This may best be illustrated by giving three examples:

In the Turkish electoral case of *Yumak and Sadak*, the ECtHR quotes a 2007 Resolution of the Council of Europe according to which ‘in well established democracies, there should be no thresholds higher than 3 per cent during the parliamentary election.’ An even more political statement is drawn from two further Resolutions and a report on elections in Turkey in which the organs of the Council of Europe urge the country to lower the 10 per cent threshold.²²

In the *Tanase* case concerning the ban of candidates of dual nationality to stand for parliamentary elections in Moldova, the ECtHR quotes a report of the Council of Europe’s Commission against Racism and Intolerance of 2007 and two Resolutions of the Parliamentary Assembly of the Council of Europe, criticising not only the raising of the threshold from 4 per cent to 6 per cent but also the ban on dual nationality candidates. In addition, the ECtHR quotes an opinion of the Venice Commission and its Code of Good Conduct in Electoral Matters concerning particular amendments to the Moldovan Electoral Code. In this judgment – as in other recent judgments – there is a separate section called ‘Relevant instruments of the Council of Europe.’²³

In *Sejdic and Finci*, the ECtHR had to deal with the ineligibility of candidates of Roma and Jewish origin and not belonging to one of the constituent peoples. In this case, the ECtHR again

¹⁷ As to electronic media see e.g. *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) 19 EHRR 1, para 31; *Radio France and others v France* App no 53984/00 (ECtHR, 30 March 2004) 40 EHRR 29, para 39; as to internet media see e.g. *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011), paras 63ff.

¹⁸ *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) 14 EHRR 153, para 59; *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR 25 June 1992) 14 EHRR 843, para 63; *Guerra and others v Italy* App no 14967/89 (ECtHR, 19 February 1998) 26 EHRR 357, para 53.

¹⁹ E.g. *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995) 21 EHRR 205.

²⁰ E.g. *Kudeshkina v Russia* App no 29492/05 (ECtHR, 26 February 2009).

²¹ E.g. *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) 9 EHRR 433, para 48; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) 30 EHRR 843, paras 69, 80; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000), para 46; *Wasmuth v Germany* App no 12884/03 (ECtHR, 17 February 2011), para 74.

²² *Yumak and Sadak v Turkey* App no 10226/03 (ECtHR, 8 July 2008) (Yumak ECtHR), paras 52, 58.

²³ *Tanase v Moldova* App no 7/08 (ECtHR, 27 April 2010), paras 45f, 48f, 51ff.

quoted opinions of the Venice Commission and even admitted the Commission as a third party in the proceedings. Not surprisingly, the ECtHR followed the Opinion of the Venice Commission.²⁴

In conclusion: the ECtHR is establishing principles of the rule of law and democracy. In doing so, it uses the experience not only of the member states or the EU but also, and above all, of other Council of Europe organs.

II The ECtHR: An Emerging European Constitutional Court

1 From the 'old' Court to the Permanent Court

For more than 40 years, until the entry into force of Protocol No 11, the system of legal protection of the ECHR consisted of three organs, namely the European Commission on Human Rights (EComHR), the 'old' European Court of Human Rights (Court / 'old' Court) and the Committee of Ministers of the Council of Europe (Committee of Ministers).²⁵ In a first stage of procedure the EComHR had to examine the admissibility of an application. In case it determined an application to be admissible, it drew up a 'report' (*rapport*) on the question of whether a violation of the ECHR had occurred. Thereafter, the case could be brought before the Court. If the case was not referred to the 'old' Court within a period of three months, the Committee of Ministers decided on whether there had been a violation of the ECHR. In such way and contrary to the system, it was up to a political organ to make the legal assessment in a dispute on individual rights carried out before the Court.

Protocols Nos 11 and 14 have brought important changes to the organisational framework of the ECtHR. Today, the ECtHR functions on a permanent basis (Art 19). Its judges are independent; they are elected by the Parliamentary Assembly on the basis of a list of three candidates nominated by each member state for a period of nine years without the possibility of re-election. There are no rules securing the candidate's professional suitability comparable to Arts 253 and 255 TFEU. However, in 2010, a panel comprising seven experts was established, which gives its opinion on the candidates' suitability to the Parliamentary Assembly.

The cases brought to the ECtHR are considered in a single-judge formation, in Committees of three judges, in Chambers of seven judges or in the Grand Chamber of 17 judges (Art 26). The competence of single judges is enshrined in Art 27, the competence of the Committees and of the Chambers in Arts 27-31 ECHR. Other important organs that fulfil organisational tasks are the president and the plenary court (Art 25).²⁶

²⁴ *Sejdić and Finci v Bosnia and Herzegovina* App no 27996/06 et al (ECtHR, 22 December 2009), paras 22, 48ff.

²⁵ V. Schlette, 'Das neue Rechtsschutzsystem der Europäischen Menschenrechtskonvention: Zur Reform des Kontrollmechanismus durch das 11. Protokoll' (1996) 56 ZaöRV 905, 906ff.

²⁶ For further details see C. Grabenwarter and K. Pabel (n 5) Art 8, paras 1ff.

Recently, there have been discussions about the enactment of a statute of the ECtHR which would simplify the revision procedure, just like the Group of Wise Persons recommended to the Committee of Ministers in 2006.²⁷ Based on the existing legal protection regime, a draft statute consisting of 65 Articles was published on behalf of the Swiss Federal Department of Foreign Affairs for the Interlaken Conference in 2010.²⁸

2 The Right to Individual Application

The right to individual application is one of the cornerstones of the ECHR system as it is a procedural instrument guaranteeing the effective enforcement of the most essential human rights as part of European values. In other words, ECHR rights are given true practical relevance by virtue of individual application. Since the entry into force of Protocol No 11, the granting of the right to individual application is no longer optional for the states but compulsory (Art 34). The possibility of individuals being able to defend their rights against the state before a judge of an international court and to obtain a legally-binding judgment is a peculiarity of the ECHR system compared to other international treaties on human rights protection.²⁹

3 Legal Effects of Judgments

According to Art 46(1) ECHR, the member states ‘undertake to abide by the final judgment of the ECtHR in any case to which they are parties.’ Final judgments of the ECtHR may not be appealed against and have formal legal force; a judgment of formal legal force has, at the same time, substantive legal force. Thus, the parties to a case are bound by the elements of a judgment. The personal scope of a judgment is limited to the parties to a case (an effect *inter partes*). It is only the member state being a party to a case who is, under Art 46, obliged to abide by the judgment. However, the judgment has an ‘indicative effect’ for other member states.³⁰ The material scope of protection only encompasses the facts of the case and the content of the application.

The scope of the obligation under Art 46 differs as to how the situation contravening the ECHR may be remedied. Thus, the ECtHR’s competence is limited to finding a violation of ECHR rights; it may not quash laws or other acts of member states.³¹ If the ECtHR holds that a state has violated the ECHR, Art 46 imposes upon this state the obligation to put an end to the breach

²⁷ Council of Europe, ‘Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006’ CM(2006)203.

²⁸ H. Keller, D. Kühne, A. Fischer, ‘Statut-Entwurf für den Europäischen Gerichtshof für Menschenrechte/Ein Beitrag zur Reform des Konventionssystems’ [2011] EuGRZ 341.

²⁹ For further details see C. Grabenwarter and K. Pabel (n 5) Art 9, paras 1ff.

³⁰ C. Grabenwarter, ‘Grundrechtsvielfalt und Grundrechtskonflikte im europäischen Mehrebenensystem – Wirkungen von EGMR-Urteilen und der Beurteilungsspielraum der Mitgliedstaaten’ (2011) (C. Grabenwarter, ‘Grundrechtsvielfalt’) (2011) 38 EuGRZ Jg Heft 8-9 193, www.d-nb.info/1013588320/04.

³¹ J. Polakiewicz, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (Springer 1993, Heidelberg) (J Polakiewicz, ‘Die Verpflichtungen’) 223ff; W. Okresek in K. Korinek and M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht – Kommentar* (Springer 2007, Vienna), Art 46 EMRK, paras 1, 4, 8.

and to make reparation for its consequences in such a way as to restore, as far as possible, the situation existing before the breach.³²

In order to end human rights violations, a state has to take general and/or – if appropriate – individual measures which have to be adopted into domestic law.³³ In cases of continuing human rights violations, states are obliged to put an end to it.³⁴ However, the member states enjoy a freedom of choice as to the means of implementing the judgment. In the light of the declaratory nature of the judgments of the ECtHR, it is generally for the states to choose the measures to be taken under national law to fulfil the obligation pursuant to Art 46, provided that the measures are compatible with the judgment's conclusion.³⁵

Apart from the obligation to end human rights violations, member states have a duty under Art 46 to make reparation for the consequences of the violation. This requires that the state restores the situation existing before the breach (*restitutio in integrum*).³⁶ Therefore, in case of a violation of the right to property, states have to retransfer property unlawfully deprived of as *restitutio in integrum*.³⁷ In the context of Art 1 of Protocol No 1, the ECtHR concludes that, by ratifying, states do not only undertake to comply with the legal situation under the ECHR but also to remove all obstacles in their domestic legal system that might prevent an adequate redress of the applicant's situation.³⁸

It is a purely national matter to determine what national authority is competent to implement judgments of the ECtHR. Article (start of sentence, no abbreviations) 46 does not distinguish between state functions but equally binds the legislature, the executive and the judiciary. From the ECHR's point of view, it is decisive that an end is put to the breach of the ECHR.³⁹

According to Art 46(2), it is for the Committee of Ministers to supervise the execution of final judgments. Therefore, final judgments of the ECtHR have to be transmitted to the Committee of Ministers.

³² See also the case law in this respect, e.g. *Papamichalopoulos and others v Greece* App no 14556/89 (ECtHR, 31 October 1995) 16 EHRR 440, paras 34ff.

³³ *Scozzari and Giunta v Italy* App no 39221/98 et al (ECtHR, 13 July 1999) 25 EHRR 12 (Scozzari ECtHR), para 249.

³⁴ *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) 59 EHRR 52, para 198; J. Polakiewicz, 'Die Verpflichtungen' (n 31) 63ff, 355; J. Frowein, W. Peukert, *Europäische Menschenrechtskonvention* (Engel 2009, Kehl am Rhein) Art 46, para 6.

³⁵ *Scozzari* ECtHR (n 33), para 249; *Goodwin* ECtHR (n 16) para 120; *Gluhaković v Croatia* App no 21188/09 (ECtHR, 12 April 2011) para 85.

³⁶ G. Ress, 'Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane' [1996] EuGRZ 350, 351.

³⁷ *Hentrich v France* App no 13616/88 (ECtHR, 22 September 1994) 18 EHRR 440, para 71.

³⁸ *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) 3 EHRR 38, para 47.

³⁹ C. Grabenwarter and K. Pabel (n 5) Art 16, para 4.

4 The Pilot Judgment Procedure

In order to cope with the excessive workload pressure and to facilitate the way applicants obtain redress more speedily with a relevant national remedy, the ECtHR has gradually expanded its powers over the years. Since 2004, with the express approval of the Committee of Ministers,⁴⁰ the ECtHR applies, in repetitive cases rooted in the same structural or systematic problem or other similar dysfunction in a member state, the so-called ‘Pilot Judgment Procedure’ (PJP). This instrument does not allow for the delivery of more judgments each year. Instead the ECtHR is able to examine more applications while deciding fewer cases. From a general perspective, the PJP aims at reconciling the interests of every ‘party’ involved (individuals, national authorities, the ECtHR) and it displays features of a constitutional court.⁴¹

The PJP enables the ECtHR to single out certain applications for priority treatment while it formally adjourns all similar applications (until it finds that a member state has failed to comply with the operative provisions of the judgment or where the interests of the proper administration of justice require a resumption of the examination) if it concludes that all these cases are rooted in the same structural or systematic problem or other similar dysfunction in a member state.⁴² The PJP of the ‘original type’ (e.g. *Broniowski*⁴³, *Hutten-Czapska*⁴⁴) requires the Grand Chamber to decide on a possible violation of ECHR rights and a connected conclusion that the underlying problem is systemic and that it has caused or may cause a multitude of individual applications. The ECtHR provides the state with guidance on the type of remedial measure to end the human rights violations and to eliminate, as far as possible, its consequences. It demands that these measures are retroactive and implemented within a set period of time. It reinforces the state’s obligation to take legal and administrative measures by virtue of the operative provisions of the judgment.⁴⁵

Independent of the type of a pilot judgment, the execution stage remains under the authority of the Committee of Ministers. Article 4(1) of the Rules of the Committee of Ministers stipulates that priority treatment must be given to the supervision of pilot judgments. The ECtHR additionally assesses the implementation of the indicated general measures so as to be able to strike out the respective pending cases as soon as the measures have been complied with.⁴⁶

The PJP forms another element which brings the competences of the ECtHR closer to that of a constitutional court. However, its legal basis is still subject to debate⁴⁷ and execution by the Committee of Ministers is something unusual for an established ‘Constitutional Court’.

⁴⁰ Committee of Ministers, ‘Resolution of the Committee of Ministers of 12 May 2004 on judgments revealing an underlying systematic problem’ Res(2004)3.

⁴¹ C. Grabenwarter, ‘The European Convention on Human Rights and its Monitoring Mechanism’ in M Nowak et al (eds), *Vienna Manual on Human Rights* (NWV 2012, Vienna) (C. Grabenwarter, ‘The European Convention’) 128ff.

⁴² E. Fribergh, ‘Pilot judgments from the Court’s perspective’ (Stockholm Colloquy, Stockholm, 9-10 June 2008), www.coe.int/t/dghl/standardsetting/cddh/Publications/Stockholm_Proceedings.pdf 87.

⁴³ *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004) 40 EHRR 21.

⁴⁴ *Hutten-Czapska v Poland* App no 35014/97 (ECtHR, 19 June 2006) 42 EHRR 15.

⁴⁵ C. Grabenwarter (n 41) 128ff.

⁴⁶ *Ibid.*

⁴⁷ C. Paraskeva, ‘Returning the Protection of Human Rights to Where They Belong, At Home’ (2011) 12 *International Journal of Human Rights* 433.

It is a unanimous opinion among experts that the PJP does not constitute customary international law as it does not meet the requisite requirements.⁴⁸ Therefore, its legal basis has to be found in the ECHR itself. The demand of the ECtHR expressly to include the PJP in Protocol No 14 was rejected by the Steering Committee for Human Rights on the grounds that it considered such procedure covered by the ECHR in its Protocol No 11 configuration.⁴⁹ Therefore the ECtHR now grounds the procedure on Art 46, which is supplemented by Rule 61 of the Rules of Court. The new rule provides for a stronger legal basis of the PJP.

III The Margin of Appreciation: A Flexible Instrument of European Constitutional Justice

1 The Doctrine of the Margin of Appreciation

a) *The margin of appreciation and conflicting rights* – a corridor for national solutions

There will always be cases in which, from a national point of view, the scrutiny exercised by the ECtHR will appear to be either of a high or a low degree. Especially the Grand Chamber, which has existed since Protocol No 11, shows that the different composition of the ECtHR in a certain case can lead to a different degree of scrutiny being exercised.⁵⁰ If the ECtHR, as it does in various cases, corrects national authorities at the expense of subjects of fundamental rights, it is possible – indeed, necessary – to demand a comprehensive approach as to the degree of scrutiny exercised in respect of particular fundamental rights or comparable case groups.

The ECtHR does not review compliance of a particular legal situation on a general basis, but only the compatibility of its application in particular cases to the individual applicant.⁵¹ However, in its recent practice on the calculation of damages according to Art 41 ECHR, the Court increasingly makes general statements about national legal situations,⁵² a practice which also shows its tendency towards being a constitutional court.

⁴⁸ D. Milner, 'Codification of the Pilot Judgment Procedure' (ECtHR Seminar on Responding to Systematic Human Rights Violations, Strasbourg, 14 June 2010), www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/Events/Pilot%20Strasbourg/David%20Milner%20paper.pdf.

⁴⁹ Steering Committee for Human Rights, 'Interim Activity Report of 26 November 2003' CDDH(2003)026, para 21.

⁵⁰ E.g. *Sommerfeld v Germany* App no 31871/96 (ECtHR, 11 October 2001), paras 41ff and *Sommerfeld v Germany* App no 31871/96 (ECtHR, 8 July 2003) (*Sommerfeld* 2003 ECtHR), paras 68ff; ECtHR, 22/01/2004, *Jahn and others v Germany* App no 46720/99 et al (ECtHR, 22 January 2004) 42 EHRR 49, paras 89ff and *Jahn and others v Germany* App no 46720/99 et al (ECtHR, 30 June 2005) (*Jahn* 2005 ECtHR), paras 106, 112ff, 116.

⁵¹ *Sommerfeld* 2003 ECtHR (n 50) para 68.

⁵² See e.g. the pilot judgments *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004) 40 EHRR 21, paras 189ff and *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) 59 EHRR 52, para 202; critical in this respect M. Breuer, *Urteilsfolgen bei strukturellen Problemen – Das erste "Piloturteil" des EGMR [2004]* EuGRZ 445, 451; C. Grabenwarter and K. Pabel (n 5) Art 16, para 7.

b) *The margin of appreciation and judicial guarantees*

In this context, two cases may be distinguished: the first case concerns the weighing of interests which is required for the access to a court or which influences the extent to which a public hearing must be held. This case applies to the situations just described. The second case concerns the conceptual side. When deciding on the scope of civil rights, the effectiveness of a remedy or on cases of double jeopardy, specific concepts must be interpreted; the interpretation is, naturally, influenced by the concepts of national law. In this context it is to be determined whether a uniform practice exists all over Europe or whether the systems are quite different. If great differences exist among the member states, a wider margin of appreciation is appropriate.

2 The Scope of the Margin of Appreciation

In national discussions about separation of powers and the degree of scrutiny exercised by the ECtHR, the democratic legitimacy of the legislator is considered decisive for its margin of appreciation. This is particularly true in respect of cases where a constitutional court decides on a measure of the national legislator. As long as the legislator in a democratic society is legitimised through elections and stays within the boundaries of national fundamental rights, when enacting laws, the constitutional court must not become active.⁵³ In this context, an international court might argue with the international principle of subsidiarity. However, this does not mean that the separation of powers between the national courts and the legislator dissolves. The international judge will also respect comprehensible legislative opinions which stay within the boundaries of the ECHR as long as the legislator draws upon comprehensive judgments, assumptions and forecasts.⁵⁴

The following criteria are relevant for determining the scope of the margin of appreciation:⁵⁵

- Diversity of national solutions: if there is no common European standard on a matter, the margin of appreciation is wider than in cases of uniform legislation throughout Europe.
- The quality and character of guarantees: a margin of appreciation is granted in respect of core guarantees as well as in respect of most of the judicial guarantees.
- Conflicting ECHR rights: in cases of conflicting ECHR rights, the balance struck will affect the various groups of persons concerned.
- The quality of the national authorities that have decided: if decisions were made by independent tribunals or a court or constitutional court, the ECtHR will more likely accept the limits of the margin of appreciation applied.

⁵³ K. Korinek, 'Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen' (1981) 39 VVDStRL 7, 45ff.

⁵⁴ Jahn 2005 ECtHR (n 50) Art 116: 'In that connection the FRG parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice [...]':

⁵⁵ C. Grabenwarter, 'Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen aus der Sicht des österreichischen Verfassungsgerichtshofs' [2006] EuGRZ 487, 489ff.

– The quality of proceedings and, in particular, the reasoning: the more detailed a reasoning is and the better the right to be heard has been respected in the proceedings, the more the ECtHR is willing to accept particular national solutions.

From a constitutional perspective, the margin of appreciation is an instrument dealing with the separation of powers. The margin of the legislature under domestic law corresponds to the ‘international’ margin of appreciation. They both influence the control exercised by the constitutional court. While lowering the degree of scrutiny exercised, the ECHR affords a margin for different national solutions. Such plurality is not in itself incompatible with the idea of uniform human rights standards or, in other words, with constitutional standards.⁵⁶

IV The Role of Comparative Law

If we look at the case law of the ECtHR, we find a considerable number of cases where reference to the legal situation of various member states constitute one of the decisive, if not the decisive argument of the ECtHR for finding a violation or a non-violation of ECHR rights. Three examples will illustrate this point.

1 References to ‘European Standards’ in the ECtHR’s Case Law

A first example concerns voting rights. In its recent case law on Art 3 of Protocol No 1, the ECtHR established the unwritten principle of proportionality.⁵⁷ Against this background, the ECtHR, in *Yumak v Sadak*, decided that a 10 per cent threshold imposed for the Turkish Parliament elections complied with the ECHR.⁵⁸ The decisive argument put forward in the proportionality test was drawn from comparative law. The ECtHR pointed out that there were few states with high thresholds of 7 per cent or 8 per cent, that a third of the states had a threshold of 5 per cent and that another 13 states had even lower thresholds; the remainder of some ten states did not have a threshold at all. On that basis, the ECtHR found that no violation had occurred. It stressed that the great variety of national standards and the electoral and political background of each state, which had to be taken into account, warranted a wider margin of appreciation. While it found that a 10 per cent threshold appeared excessive, it concluded that the correctives and other safeguards in the Turkish system and especially the role of the constitutional court in enforcing these safeguards, led to its finding of a non-violation.⁵⁹

A second example concerns the freedom of the press and TV advertising, more specifically a general ban on political advertising on Norwegian TV.⁶⁰ The proportionality test under

⁵⁶ C. Grabenwarter (n 30) 231ff.

⁵⁷ *Ždanoka v Latvia* App no 58278/00 (ECtHR, 16 March 2006) 46 EHRR 17, para 115; *Paksas v Lithuania* App no 34932/04 (ECtHR, 6 January 2011) para 101.

⁵⁸ *Yumak* ECtHR (n 22) para 147.

⁵⁹ *Ibid*, paras 126ff.

⁶⁰ *TV Vest As & Rogaland Pensjonistparti v Norway* App no 21132/05 (ECtHR, 11 December 2008) 48 EHRR 51.

Art 10 (2) is too influenced by a comparative analysis of the law. It showed that a vast majority of Western European countries had a ban on political advertising; many Eastern European countries, on the other hand, allowed paid political advertising. The ECtHR stated the figures: 13 countries had a ban, 10 allowed advertising, 11 provided for free airtime for political parties and/or candidates, and several states had no system of free airtime. The ECtHR found that there was no European consensus and was therefore – although somewhat reluctantly – prepared to accept that the analysis peaked in favour of allowing a somewhat wider margin of appreciation than the one usually granted with respect to restrictions on political speech. However, the reasoning following this statement shows that this is not much more than paying lip service. The ECtHR starts a critical examination of all arguments in favour of a ban but rejects them all, in particular the position of the government that there was no viable alternative to a blanket ban.⁶¹

An example of European consensus concerns the freedom of religion and conscientious objectors.

On 7 July 2011, the ECtHR departed from the case law of the former EComHR, according to which there was no right to alternative service for conscientious objectors.⁶² In the case of *Bayatyan*, a young Jehovah's Witness, the Grand Chamber of the ECtHR found a violation of Art 9 of the ECHR as there was no alternative service under Armenian law. The ECtHR referred to the fact that almost all member states of the Council of Europe with compulsory military service had implemented the right to conscientious objection. In particular, it referred to an obvious trend in the late 1980s and the 1990s to recognise the right to conscientious objection. It counted 19 countries that had introduced such a right after the last decision of the EComHR on the matter.⁶³ Lastly, the ECtHR referred to the fact that Azerbaijan and Turkey were the only states not having introduced the right to conscientious objection, and that Armenia itself had recognised the very right.⁶⁴ In a German metaphor, this situation could be referred to as a '*Hornberger Schießen*' (i.e., coming to nothing); it was an argument which would not have been worthwhile mentioning if it were not for Art 4(3)(b). Article 4(3)(b) contains an exception to the ban on forced labour for, inter alia, service exacted instead of compulsory military service 'in case of conscientious objectors in countries where they are recognised'. The Chamber judgment of 2009 was based on that argument and thus concluded that no violation of the ECHR had occurred.⁶⁵

2 References to Soft Law in the Council of Europe

One main function of comparative law concerns the distribution of competences between national legislators and courts on the one side and the competence to review of the ECtHR on the other side. We can draw two lessons from the case law that are reflected by the examples

⁶¹ Ibid, paras 63ff.

⁶² *Grandrath v Germany* App no 2299/64 (EComHR Decision, 12 December 1966) 8 YB 324.

⁶³ *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) (*Bayatan ECtHR*), paras 46f, 103.

⁶⁴ Ibid, para 104.

⁶⁵ Ibid, para 56.

chosen: if there is a uniform practice in the member states, there is little room for a wide margin of appreciation. If, however, national solutions vary considerably, the margin of appreciation is generally wider. If the ECtHR holds (for other reasons) that the national discretion is narrower, it is ready to restrict the margin of appreciation even if there is no common European standard. One of these reasons is the soft law generated within the framework of the Council of Europe.⁶⁶ Other arguments are drawn from international law and EU law.⁶⁷ The latter, from the point of view of democratic legitimacy, are less problematic. Consequently, focus will be put on the role of the soft law of the Council of Europe. There are three main sources of soft law, i.e., non-binding instruments which have some influence on the practice of the organs of the Council of Europe, including the ECtHR and the organs of the member states:

1. Resolutions of the Parliamentary Assembly of the Council of Europe;
2. Recommendations of the Committee of Ministers of the Council of Europe;
3. Documents of the Venice Commission.

In an increasing number of judgments, the ECtHR refers to Resolutions of the Parliamentary Assembly; this either in combination with an argument of comparative law or – in the absence of such an argument – alone. A good example for the ‘combination approach’ is the *Üner* case, where the ECtHR quoted a Recommendation of 2001, in which the Parliamentary Assembly recommended that the Committee of Ministers invited member states to guarantee that long-term migrants who were born or raised in the host country could not be expelled under any circumstances.⁶⁸

3 Methods of Interpretation

Comparative law serves as a flexible tool for the ECtHR to regulate the extent of its scrutiny. It serves as a basis for the interpretation of specific words that are typical of constitutions and, above all, human rights,⁶⁹ or as an instrument to assess the weight of the interest of the respondent government in a particular national solution. This is part of the proportionality test. While constitutional courts draw their arguments from constitutional law, the ECtHR refers to the democratic legal systems of other member states.

From a methodological standpoint, it is, in both cases, an argument of systematic interpretation – with the difference being that its content is influenced by the practice of other states and their democratic decisions. At first glance, this practice seems to deserve to be favoured as in most cases it helps to improve the standard of protection of human rights.

⁶⁶ E.g. *Üner v The Netherlands* App no 46410/99 (ECtHR, 18 October 2006) (*Üner* ECtHR), para 37; Bayatan ECtHR (n 63) para 107.

⁶⁷ E.g. *Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009), paras 79ff; *Scoppola v Italy (No 2)* App no 10249/03 (ECtHR, 17 September 2009) 51 EHRR 323, paras 105ff; Bayatan ECtHR (n 62) 106

⁶⁸ *Üner* ECtHR (n 66) para 37.

⁶⁹ C. Grabenwarter (n 30) 231.

However, this approach may raise problems in cases of conflicting rights or if a widely criticised change in the fundamental rights protection (as in Hungary) is followed by the other states, which may ultimately even constitute a trend.

The last example shows that we talk not only about systematic interpretation but also about an *effet-utile* interpretation in the light of present-day conditions. The historical-systematic interpretation would lead to the opposite result as Art 4(3) contains a clear statement that it is for the member states to decide whether conscientious objection is allowed or not.

Conclusion

While the above analysis focuses only on some aspects of the constitutional character of the ECHR and the ECtHR, a more detailed analysis would not show different results. After 60 years of the ECHR and 50 years of decision-making of the ECtHR the conclusion would not change: the role of the ECHR for the development of national legal systems cannot be appreciated enough. The ECtHR is the last ‘conscience’ in human rights questions, a last legal instance or decision-making body similar to a constitutional court. It has, in many cases, given guidelines to the national courts – like a national constitutional court does. Sometimes it even uncovers structural problems that can only be solved by adaptation and amendment of the legal system. The amendment of the legal system is influenced by the European best practice or at least a better practice elsewhere.

The fact that the ECtHR, due to this role, is constantly faced with challenges and objections seems obvious. The tremendous workload but also the ECtHR’s jurisdiction that has lately become volatile in some areas should not be concealed; one feature of the ECtHR’s jurisdiction, its item-centred view, fuels this problem. Today, it is important for the member states and those inside the ECtHR to be aware of these dangers and constantly to face them. However, even critics and state reformers have to admit that the ECHR has become indispensable to all legal systems in Europe, not least to those of the Central European states.

The ECHR rights and the case law generated by the ECtHR stimulate the system of protection under constitutional law. Besides that, it increasingly supplements national guarantees. Both functions are of utmost importance and lead to better results for citizens but ultimately also for democratic states based on the rule of law. While these functions are in principle undisputed, the extent to which they are exercised has to be questioned constantly, especially in the light of recent case law. The margin of appreciation doctrine has for a long time proved to be a consistent and flexible concept. It must be shaped further in order to strike a balance between the needs of an effective control by the ECtHR, a consistency in the case law and internal practice in the field of human rights. ‘Consensus’ is drawn from more or less in-depth comparative analyses, whereas Council of Europe soft law cannot substitute for ‘democratic legitimacy’.

Lastly, the question of democratic legitimacy of constitutional functions of an international Court is also open for discussion especially with a view to the soft law in the Council of Europe. But this is a separate topic.