NOMIKO BHMA

EUROPEAN COURT OF HUMAN RIGHTS

50 Years

ATHENS BAR ASSOCIATION

ATHENS 2010

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❖ *We would like also to express our sincere thanks to all those who submitted their work for the editing of this special issue.*

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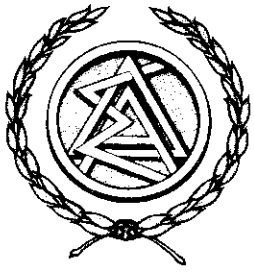

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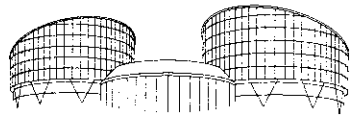

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

ATHENS BAR ASSOCIATION

ATHENS 2010

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A TRIBUTE TO FIFTY YEARS OF THE EUROPEAN COURT OF HUMAN RIGHTS

FIFTY YEARS SINCE THE ESTABLISHMENT OF THE ECtHR*

Dimitrios Paxinos
President of the Athens Bar Association
Editor of Nomiko Vima

This year heralds 50 years of operation for The European Court of Human Rights. In its course it has achieved what no other international jurisdictional organ has managed to achieve. It has become a court model which through its jurisprudence achieved the "revival" of a simple, non-superfluous abstract international human rights' treaty, namely the ECHR, converting this simple international text to the main medium of protection of fundamental individual rights in almost all countries of Europe.

This enabled European citizens to gain "power" and become administrators of their own rights, finding a true last refuge against the potential injustices of their own state organs and national justice systems.

The ECtHR is the last hope for each and every victim of state arbitrary and violation. This is corroborated from the incessant number of applications that are lodged with Strasbourg. On 31.10.2009 the number of applications pending before the European Court of Human Rights was 116.800. It should be noted that on 1.1.2009 this number stood at 97.300, which means that during the first ten months of this year this constitutes an increase of 20% in the total number of pending applications. This is a vote of confidence by the citizens of Europe in Strasbourg, which has been rendered the guardian of their hopes. On the other hand, this drastic increase is worrying and a solution must be found. Moreover, speculation exists and an extremely high percentage of applications are declared inadmissible, this percentage exceeded 93.5% for the year 2009.[1]

Undoubtedly, the European Court of Human Rights performs a huge task. It issues judgments that create uniformity with regard to the meaning and application of fundamental rights in the European sphere[2], and it has created a specific European legal culture which is based on the principle of respect for human rights. This is an achievement of the European citizens and it cannot be changed.

Finally, given the interpretational approach of Strasbourg, it is a fact that there are voices of scientific criticism and also objections as to the essence of judgments. This is logical and lawful. Judgments regarding human and individual rights cannot be liked by all, without this meaning that there are no erroneous judgments.

Justice is the art of the good and the equal.

It is held that nothing in the world is more difficult than the award of justice. Only the justice of God and the word of God are said to contain the whole truth.

One must not fail to appreciate the role of Strasbourg and its interpretation of the recognized rights that arise from the ECHR. The Court has obtained global prestige due to its interpretation, irrespective of if one considers it to be correct or not.

Its jurisprudence has conferred a wide acceptance on it and has also brought into effect the area of the *development of individual rights* which forms an order of European state throughout the preamble of the ECHR. The extension of the protection of the ECHR even to individuals who were

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* Introductionary speech-greeting at the festive event of the Athens Bar Association for celebration for 50 years of the ECtHR

1. For the period of 1.1.2009-31.10.09, 26.285 individual applications were declared inadmissible out of 28.097, while the applications on which judgment was issued were only 1812.

2. Except Belarus.

previously not allowed the right of individual petition, such as police officers, military and so on, the inclusion of the environmental protection under Article 8 of the ECHR, the exploration of the meaning of the right of free speech amongst others have established the ECHR as a living treaty and the European Court of Human Rights an "attractive" Court for the applicant.

This does not mean of course that the Court is perfect. Its huge workload causes problems as it leaves a great many things to be resolved and corrected.

Furthermore, the invisible side of the number of inadmissible applications must be taken into account and the total lack of explanation regarding their declaration as inadmissible and even regarding their consideration. It is not just bearing in mind the 6.5% of the cases that are tried on their merits, but also remembering the 93.5% that fail to have access to the court for significant matters even though they submitted their last hopes there. Perhaps a counter-check or simply providing an adequate explanation as to why an application was declared inadmissible could reduce discontent.

Another issue is the institutionalization of the national language until the end of proceedings at the European Court of Human Rights. Why, since the petition is sent in Greek, are the comments written in English or French and the judgment is also written in these two languages? Why are citizens deprived of having full access to the court in their own respective languages? Here, we should not forget that at the ECJ proceedings are conducted wholly in the national language. So why, therefore, is this not applicable at the ECtHR?

The Athens Bar Association, the Administrative Board and I, would personally like to thank our selected guests for accepting our invitation to celebrate 50 years of the European Court of Human Rights in our country and I reassure them that our struggle is common for the reinforcement of the human spirit, the European spirit, which is rooted in Ancient Greece, and the universal values that all of us at duty to serve with dedication. Socrates used to say "*man is the measure of all things*" and this maxim includes everything regarding our destination, our goal. Our super ego makes us believe that we are something unique, supreme and superior. Indeed we are, provided that we realize that we are something distinct with name and not with number. Provided that we do not get lost in the crowd that comes and goes, reciprocates and gets lost. However, we exist, we fight, we get disappointed, we hope, we feel happiness and we feel sadness. Furthermore, we feel our impermanence and our humbleness. We exist for our improvement, initially our individual one, the inner one and through it for our fellow human. We exist for the common good as we have been taught and we try to apply it in practice because this is our duty. The enhancement of human rights, in other words the elevation and encouragement by the Strasbourg Court for the fulfillment of the aims of the Council of Europe. That is (I remind) the fulfillment of a closer union between the members. The means of achieving this aim is through the protection and development of human rights and fundamental civil liberties, which constitute the platform of justice and peace in the world. The preservation of these ideals and global justice depend on each of us individually, and the greater we are in number then the better we shall reinforce our human mission, for a fairer world, without discrimination on grounds of nationality, sex, religion, language, colour. White, yellow, black and red, we all have the same rights and responsibilities and we ought to prove the benefits of a new ideology of humanitarianism that exceeds the establishments, the outdated, dogmatic shapes which boost the greed for profit and drive cannibalism. The European Court of Human Rights is here. All of us are here, with a distinct role and a specific purpose.

«Nomiko Vima» and its participation in the celebration of 50 years of Strasbourg

The European Court of Human Rights this year celebrates 50 years of its operation. Its contribution is recognized and has made a massive contribution to the establishment and development of human rights in the post-war Europe. It is an honour for all of us European citizens that we are geographically located under its jurisdiction.

In the recent years, Nomiko Vima systematically publishes, in almost every issue, the most important judgments of the ECtHR in a full form (even translated in Greek). The purpose of this is so that the readers of Nomiko Vima comprehend such judgments and become familiar with them. Simultaneously, with systematic frequency it includes in its material, journals for the ECHR, comments and observations on the case-law of the Court. From next year, Nomiko Vima will improve its material regarding Strasbourg case-law adding also *a summary presentation of all of the most important judgments* of the Court so that the reader is able to gain a full update and understanding of the determinative and up to date case-law of the ECtHR.

Nomiko Vima wants to honour the contribution of the ECtHR and for this reason it dedicates the whole current issue to this Court and also to the European Convention on Human Rights and fundamental freedoms, as a minimum tribute to a Court that has managed, through its interpretation and implementation of the ECHR, to become established as a model for international and regional courts all over the world.

The present issue has the honour of hosting journals of five top judges of Strasbourg, who dedicated part of their valuable time in order to write these journals exclusively for our legal journal. Included in these top judges are: the President of the Court, Mr Jean Paul Costa, the Vice-President of this Court Mr Christos Rozakis, the President of the Second Section of the ECtHR Ms Fran*çoise* Tulkens, and also the judges of the Court Mr Dean Spielmann and Mr Georgios Nikolaou. Also participating in this issue are the Vice-President of the Council of State Mr A. Rantos and other important highest and higher judges, professors and scientists from Greece and abroad, members of the Registry of the ECtHR and lawyers.

They all participate with extremely interesting journals, this reading will give the reader an opportunity to acquire a full picture of the Strasbourg Court, its problems, its future prospects and the Treaty applied by the ECtHR.

It must be noted that the Athens Bar Association organized a very important gala in Athens (Karatza's Mansion) in order to celebrate 50 years of the ECtHR. This successful gala which took place on 9th of November 2009 was prefaced by the President of the Athens Bar Association, Mr Dimitris Paxinos. The Minister of Justice Mr Charis Kastanides saluted and also the Presidents of the three supreme courts Mr P. Pikrammenos, Mr G. Kalamidas and Mr G. Kourtis. The speakers were the President of the ECtHR Mr Jean Paul Costa, the Vice-President of the Court Mr Christos Rozakis and the Head of the Greek Division of the Registry of the Court Ms Marialena Tsirli.

The anniversary issue constitutes a continuation and completion of the celebration by the Athens Bar Association for 50 years of Strasbourg.

Nomiko Vima extends heartfelt thanks especially to those who participated in writing for these journals and also to the completion of this special panegyric issue.

Finally, a special credit to Greek Judge, Mr Christos Rozakis for his important contribution which was determinative to the edition of the present issue. We thank him warmly.

THE EDITORIAL BOARD

La jurisprudence de la Cour européenne des droits de l'homme et son influence en France[1]

Jean – Paul Costa
Président de la Cour européenne des droits de l'homme
Conseiller d'État de France (h.)

En ce cinquantième anniversaire des débuts du fonctionnement de la Cour européenne des droits de l'homme, il est peut-être utile de se pencher sur l'influence de sa jurisprudence dans le pays que l'auteur connaît le mieux, la France. C'est un sujet vaste. Dans le cadre nécessairement limité de la présente contribution, il est toutefois possible d'en retracer les grands traits.

Les relations entre la Convention européenne des droits de l'homme et la France ont longtemps été complexes. Très peu de temps après la création du Conseil de l'Europe, en 1949, la question de la création d'une Cour européenne chargée de garantir un certain nombre de libertés et de droits fondamentaux fut envisagée et confiée à une Commission juridique émanant de l'Assemblée Parlementaire nouvellement créée au sein du Conseil de l'Europe. Un français, Pierre-Henri Teitgen, sera rapporteur au sein de cette Commission, présidée par un britannique, Sir David Maxwell-Fyfe. Les travaux aboutiront à la création de la Cour.

Pourtant, si la Convention européenne des droits de l'homme (ci-après la Convention) a été signée dès 1950 par la France, ce pays ne se distinguera pas par sa promptitude à se soumettre au mécanisme international créé par ce traité. Cette situation est paradoxale car la Cour, créée par la Convention européenne des droits de l'homme et chargée d'assurer le respect des engagements des Etats, a son siège en France, comme le Conseil de l'Europe, et le rôle joué par l'Etat hôte lors de l'élaboration de la Convention aura été moteur, notamment grâce à l'intervention déjà mentionnée de Pierre-Henri Teitgen. La Cour sera même présidée de 1965 à 1968 par un Français, René Cassin, l'illustre prédécesseur de l'auteur de ces lignes, alors même qu'il était à l'époque impossible d'introduire un recours contre la France à Strasbourg, ou même d'invoquer la Convention devant les tribunaux français.

En effet, s'agissant de la ratification du traité, indispensable pour permettre son entrée en vigueur, la France a adopté une attitude pour le moins timide. Elle ne figure même pas parmi les Etats membres du Conseil de l'Europe dont la ratification entraînera l'entrée en vigueur de la Convention (subordonnée au dépôt de dix instruments de ratification).

Les raisons de cette attente sont à la fois diverses et connues. Les personnalités alors au pouvoir en France se rangeaient davantage dans la catégorie des souverainistes que dans celles des pro-européens. Plus profondément, on peut imaginer que la réticence à voir un système supranational intervenir pour sanctionner les autorités françaises aura été la cause principale du retard apporté par la France à cette ratification, retard auquel la question longtemps épineuse de l'Algérie n'aura pas été étrangère. Il faudra attendre le 3 mai 1974 pour que la France ratifie enfin la Convention. Quant à la reconnaissance de la compétence obligatoire de la Cour, et du droit de recours individuel, **c**'est seulement avec l'alternance et l'arrivée de la gauche au pouvoir, sous l'impulsion notamment du Garde des Sceaux de François Mitterrand, M. Robert Badinter, que la France procédera, le 2 octobre 1981, à cette double reconnaissance.

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1. L'auteur remercie son collègue et ami Christos Rozakis, Vice-Président de la Cour européenne des droits de l'homme, de lui avoir fourni l'occasion de rédiger cette contribution. Il exprime sa gratitude à M. Patrick Titiun, son chef de Cabinet, de l'avoir aidé dans sa préparation.

C'est donc uniquement à compter de cette date que des requérants individuels ont été en mesure de porter des affaires devant la Cour. Pourtant, malgré ce retard par rapport aux autres Etats membres du Conseil de l'Europe, la situation s'avère là encore paradoxale : dès sa ratification par la France, en 1974, la Convention a eu une autorité supérieure à la loi, conformément à l'article 55 de la Constitution. Elle a pu dès lors être invoquée directement par les justiciables devant les tribunaux français même s'ils n'avaient toujours pas la possibilité de porter l'affaire devant la juridiction européenne. Toutefois, cette possibilité était rarement utilisée. En outre, si la Cour de cassation a dès 1975 fait prévaloir la Convention sur les lois même postérieures, (affaire des cafés Jacques Vabre) le Conseil d'Etat a attendu jusqu'en 1989, avec l'arrêt Nicolo, pour prendre le même virage. Toutefois, à peine un an plus tard, il a exercé, à propos de l'I.V.G., un contrôle strict de conventionnalité (arrêt Confédération nationale des associations familiales catholiques et autres). L'arrêt Nicolo a donc rapidement eu une riche postérité.

Il aura fallu attendre la fin de l'année 1986 pour qu'un premier arrêt soit rendu contre la France, l'arrêt Bozano. L'apport de la jurisprudence de la Cour, nul avant 1981 et très limité dans les premières années qui ont suivi l'acceptation du droit de recours individuel, connaîtra une montée en puissance à compter du début des années 1990, et l'influence générale de la Convention sur le droit français ne va dès lors cesser de s'amplifier.

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Traiter de l'apport de la jurisprudence de la Cour européenne des droits de l'homme suppose évidemment d'aborder la question sous l'angle des affaires rendues à l'encontre d'autres pays, puisqu'il n'y a pas eu d'affaires françaises avant 1986. C'est pourquoi on examinera d'abord l'influence de la jurisprudence de la Cour relative à d'autres pays que la France. On étudiera ensuite l'influence de cette jurisprudence au travers de plusieurs affaires françaises, ainsi que les modifications qu'elle a entraînées.

1. L'apport de la jurisprudence de la Cour dans les affaires concernant d'autres pays que la France

Des années 60 jusqu'au début des années 90, pendant une période d'approximativement trente ans, la Cour a rendu au total un peu plus de 300 arrêts. Pour les raisons déjà indiquées *supra*, il n'y a pratiquement pas eu d'affaires contre la France pendant cette période. Soit elle n'avait pas encore ratifié la Convention, soit elle n'avait pas accepté le droit de recours individuel.

Prévalait alors la conception selon laquelle les arrêts n'étant revêtus que de l'autorité relative de la chose jugée et n'ayant pas de valeur *erga omnes*, seuls les Etats condamnés étaient concernés par la décision rendue. On s'intéressait à l'époque assez peu encore, en France, à la Convention. Sans parler de réserve ou d'hostilité, régnait une relative indifférence. La France aurait pourtant gagné à suivre attentivement les évolutions jurisprudentielles de Strasbourg. Ainsi, elle continuait de discriminer, sur le plan successoral, les enfants dits adultérins par rapport aux enfants naturels ou litigieux. Elle aurait pu deviner qu'elle risquait d'être condamné, à la lumière d'arrêts concernant d'autres Etats, notamment Marckx c. Belgique (1979) et Inze c. Autriche (1987). La France aurait certainement gagné à prendre les devants, comme le firent les Pays-Bas, précisément dans ce domaine hérité du code Napoléon. Il faudra attendre plus d'une vingtaine d'années après l'affaire Marckx et une condamnation de la France par la Cour (dans l'affaire Mazurek de 2000) pour que la question soit enfin réglée par le législateur. De la même manière, pour les écoutes téléphoniques et depuis l'arrêt Malone c. Royaume-Uni (1984), il était clair que la France, à l'instar du Royaume-Uni, serait condamnée pour défaut d'un cadre juridique assez protecteur ; il est dommage qu'il ait fallu attendre les arrêts Huvig et Kruslin de 1990 pour que soit préparée et votée la loi du 10 juillet 1991. On y reviendra.

On trouve toutefois, dans les années qui

suivent l'acceptation du droit de recours individuel, quelques décisions de la Cour de cassation qui font application d'une jurisprudence de la Cour de Strasbourg rendue dans une affaire concernant un autre pays que la France, pour s'en inspirer. C'est le cas, notamment, de l'arrêt Renneman, rendu par la première chambre civile en 1984, qui fait application de la jurisprudence Le Compte, Van Leuven et De Meyere de 1981 qui consacre, en matière disciplinaire, « le droit de voir sa cause entendue publiquement ».

Du côté du Conseil d'Etat, il faudra attendre plus longtemps pour que la jurisprudence de la Cour de Strasbourg soit prise en compte : au nom de l'ancienneté de la jurisprudence administrative et de son libéralisme, on a pu parler de résistance et lorsque le Conseil d'Etat aboutissait aux mêmes solutions que celles fournies par la Convention, il préférait se fonder sur les principes de droit interne plutôt que sur le texte conventionnel. Il est vrai que celui-ci et ceux-là étaient souvent analogues, de même que le contrôle de proportionnalité « inventé » par le Conseil d'Etat dès 1933 avec le célèbre arrêt « Benjamin » a inspiré la Convention comme la jurisprudence de Strasbourg. Certes, le Conseil d'Etat, au cours de cette période, a parfois suivi la jurisprudence de la Cour, mais ce fut souvent sans citer sa source d'inspiration.

L'arrêt Maubleu, de 1996, a constitué un tournant : le Conseil d'Etat s'est enfin résolu à suivre la jurisprudence de la Cour de Strasbourg, après s'y être refusé dans ses arrêts Debout de 1978 et Subrini de 1984. Il opérait ainsi un revirement de jurisprudence très attendu en matière d'applicabilité de l'article 6, paragraphe 1, au contentieux disciplinaire ; il avait jusque-là privilégié l'autonomie de ce contentieux, qu'il ne jugeait ni « civil », ni « pénal ».

Or, la Cour avait déjà pris position sur cette question dans son arrêt Le Compte dès 1981, soit 15 ans plus tôt ; on mesure ainsi la réticence de la juridiction administrative française.

En ce qui concerne le législateur, c'est également dans le domaine des sanctions disciplinaires que l'on peut noter une influence de la Convention. Le décret n° 93-181 instituant la publicité des audiences disciplinaires devant les conseils de l'Ordre des médecins est certainement inspiré de la jurisprudence Le Compte.

En ce qui concerne, enfin, le Conseil constitutionnel, ce dernier faisait référence, dès 1988, dans une décision de contentieux électoral, à l'arrêt Mathieu-Mohin et Clerfayt rendu contre la Belgique en 1987. Toutefois, les affaires touchant au droit électoral, qui constituent un aspect non négligeable du domaine de compétence du Conseil constitutionnel, ont été pendant longtemps peu nombreuses devant la Cour de Strasbourg, ce qui a changé depuis lors.

Au cours des années 90, la situation allait considérablement évoluer et tout d'abord sur le plan quantitatif. Si la Cour a rendu 300 arrêts de 1960 à 1991, ce chiffre n'a cessé de croître pour atteindre 1543 arrêts rendus pour la seule année 2008. Pour ce qui concerne la France, depuis l'entrée en vigueur du Protocole 11 et de la nouvelle Cour, soit du 1er novembre 1998 jusqu'à la fin de l'année 2008, 623 arrêts ont été rendus contre ce pays et en 2008, 34 arrêts sur le fond ont été rendus dans des affaires françaises.

Mais les mentalités surtout ont évolué et, peu à peu, la Convention et la jurisprudence de la Cour sont devenues de plus en plus présentes dans la pratique quotidienne des avocats et des juges. Ces derniers notamment ont pris conscience que la Convention faisait partie, conformément à l'article 55 déjà cité de la Constitution, du droit interne et qu'ils en étaient les juges naturels, chargés au premier chef de son application, la Cour de Strasbourg ne devant jouer qu'un rôle subsidiaire.

Le rôle joué par des instances telles que la Commission nationale consultative des droits de l'homme ou bien sûr l'Ecole Nationale de la Magistrature a été, à cet égard, déterminant, sans oublier les Barreaux (ainsi de l'Institut de formation aux droits de l'homme du Barreau de Paris).

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2. L'apport de la jurisprudence de la Cour dans les affaires concernant la France

Inévitablement les nombreux arrêts rendus contre la France ont eu des incidences sur l'attitude du législateur et sur celles des juridictions internes.

La Cour, n'étant pas un quatrième degré de juridiction, n'a pas le pouvoir d'abroger des lois, de casser ou d'annuler des décisions nationales. C'est là une conséquence du caractère « déclaratoire » des arrêts qu'elle rend. Il appartient à l'Etat condamné d'adopter les mesures individuelles ou générales qui lui permettront de remédier aux violations constatées et d'éviter des condamnations à l'avenir.

En outre, à la différence de la Cour de Luxembourg qui, quand elle statue sur une question préjudicielle, intervient au cours d'un litige non encore tranché au plan national, la Cour de Strasbourg ne peut être saisie si les voies de recours internes n'ont pas été épuisées. Il s'ensuit que, lorsqu'elle statue, l'autorité de la chose jugée au plan interne (*res judicata)* s'oppose à ce qu'elle réforme ou abolisse le jugement national définitif.

Pour se conformer à un arrêt de la Cour européenne des droits de l'homme, dans certains cas, le législateur est intervenu, alors que dans d'autres, c'est le juge qui a pris en compte la jurisprudence de la Cour et a modifié sa propre jurisprudence. Parfois, les deux jouent un rôle pour éviter de nouveaux constats de violation.

Un bon exemple de l'activité conjointe du législateur et de l'autorité judiciaire est la suite réservée aux arrêts précités Kruslin et Huvig de 1990. Dans les jours qui suivirent ces jugements, qui comptent parmi les premiers grands arrêts rendus contre la France, une note fut adressée par le Garde des Sceaux à toutes les juridictions afin qu'il soit tenu compte dans toutes les procédures en cours des principes de cette jurisprudence. Un an plus tard, la loi du 10 juillet 1991 était adoptée pour mettre le droit français en conformité avec la Convention. C'est un évènement de grande importance puisque, pour la première fois, une loi était adoptée dans mon pays, à la suite d'un arrêt de Strasbourg et pour s'y conformer.

Dans le domaine du respect de la vie privée et familiale (l'article 8 de la Convention), on a vu également les juridictions et le législateur prendre en compte la jurisprudence de la Cour, notamment en matière de droit des étrangers : le Conseil d'Etat, peu après l'arrêt Nicolo, s'est inspiré de la jurisprudence de la Cour, protectrice des droits des étrangers en cas d'éloignement forcé du territoire (arrêt Moustaquim c/Belgique de 1988, arrêts Belgacem et Madame Babas du Conseil d'Etat de 1991).

Quant au législateur, il a lui-même introduit dans les textes sur le droit des étrangers (ordonnance puis code) des références - protectrices - aux articles 3 et 8 de la Convention, notamment en 1998.

La question de la discrimination dont faisaient l'objet en droit français les enfants « adultérins » illustre bien la prise en compte de la jurisprudence de la Cour par le juge et par l'auteur de la loi : comme indiqué précédemment, la France a été condamnée par la Cour de Strasbourg, le 1er février 2000, dans l'affaire Mazurek. En décembre 2001, le législateur français mettait le droit français en conformité avec cette jurisprudence. Toutefois, il est intéressant de souligner que, dès l'arrêt rendu et avant même que cette nouvelle loi intervienne, plusieurs tribunaux, dont celui de Montpellier, puis des cours d'appel, ont écarté l'application de l'article 760 du code civil sur le fondement de l'arrêt Mazurek, dans des cas analogues à celui du requérant, appliquant ainsi fort justement l'article 55 de la Constitution, qui fait prévaloir les traités (comme la Convention) sur les lois. A tous les niveaux, le juge interne a le droit et le devoir d'assurer la primauté sur la loi de la Convention, le cas échéant telle qu'interprétée par notre Cour. Ce « réflexe » a cependant mis longtemps à se manifester, tant la vieille notion (qu'on trouve déjà chez Jean-Jacques Rousseau) de la souveraineté de la loi -« expression de la volonté générale » - était ancrée

dans les esprits des juristes français.

Ceci témoigne de la réceptivité bien plus grande dès lors que l'arrêt rendu par la Cour concerne la France : les juges français auraient juridiquement pu, la Convention étant directement applicable en droit interne, écarter l'article 760 du code civil sitôt l'arrêt Marckx rendu. En revanche, après l'arrêt Mazurek, ils en tinrent compte sans même attendre la modification législative. Il est vrai que Mazurek étant rendu contre la France, cet arrêt a explicitement force obligatoire à l'égard de cet Etat (article 46 de la Convention).

Parmi les arrêts qui ont provoqué des modifications législatives ou règlementaires, on peut citer les réformes législatives intervenues en matière de visites domiciliaires et douanières, qui prennent en considération la jurisprudence de la Cour dans les affaires Funke, Miailhe et Crémieux de 1993, même si les réformes ne sont pas dans ce cas la conséquence directe des arrêts. Par contre, dans l'affaire Association Ekin (arrêt de 2001), le pouvoir règlementaire a abrogé un décret de 1939 sur l'interdiction administrative des publications étrangères, jugé par notre Cour incompatible avec l'article 10 de la Convention. Il l'a fait sur injonction au gouvernement du Conseil d'Etat, qui auparavant avait lui-même jugé (en 1997) le texte de 1939 compatible avec l'article 10, mais qui s'est rallié à la solution contraire dégagée à Strasbourg.

Suite à l'arrêt Gebremedhin de 2007, par lequel la France a été condamnée en raison de l'absence d'un recours suspensif contre les décisions de refus d'admission sur le territoire français et de réacheminement du requérant vers un pays où il encourait un risque de traitement contraire à l'article 3 de la Convention, une loi a été adoptée en novembre 2007 qui vise à appliquer la jurisprudence récente de la Cour en matière de recours contre les refus de demande d'asile à la frontière. Cette loi met en place un recours suspensif à exercer dans un délai de 48 heures à compter de la notification de la décision de refus.

Une loi Perben du 9 mars 2004 a supprimé l'article 36 de la loi du 29 juillet 1881 sur la liberté de la presse permettant de sanctionner l'offense à chef d'Etat étranger et l'article 2 de la loi du 2 juillet 1931 permettant de sanctionner la publication d'informations relatives à des constitutions de partie civile. Ces suppressions font suite aux arrêts rendus dans les affaires Colombani de 2002 et Du Roy et Malaurie de 2000, respectivement.

Par l'arrêt Ramirez Sanchez de 2006, la France a été condamnée pour absence de recours effectif permettant de contester les mesures prolongeant la mise à l'isolement d'un requérant. Deux décrets ont eu pour effet que les décisions de mise à l'isolement des détenus ne sont plus des « mesures d'ordre intérieur » insusceptibles de recours, mais des décisions administratives individuelles pouvant faire l'objet d'un recours pour excès de pouvoir devant le juge administratif.

Parfois, les modifications ont lieu avant la condamnation par la Cour, mais en prévision de celle-ci. Ainsi, l'arrêt Siliadin de 2005 a condamné la France en raison de l'absence de protection concrète effective de la requérante qui avait été soumise pendant plusieurs années à une situation de servitude prohibée par l'article 4 de la Convention. Avant même cette condamnation, la législation française a été amendée en vue de redéfinir dans le code pénal les infractions d'esclavage et de servitude, afin de permettre d'obtenir une condamnation pénale, suffisamment dissuasive, des personnes commettant des actes similaires à ceux commis dans l'affaire Siliadin (dite affaire de l' « esclavage moderne », ou de l' « esclavage domestique »).

Pour citer une affaire récente, l'article L. 16 B du livre des procédures fiscales prévoit que les ordonnances du juge autorisant les visites domiciliaires ne sont susceptibles que d'un pourvoi en cassation. Dans l'arrêt *Ravon c. France* de 2008 la Cour a considéré qu'à elle seule, la possibilité de se pourvoir en cassation ne répondait pas aux exigences de l'article 6 § 1 dès

lors qu'un tel recours devant la Cour de cassation, juge du droit, ne permettait pas un examen des éléments de fait fondant les autorisations litigieuses. Le 17 juin 2009, le Conseil des ministres a examiné un projet de loi ratifiant l'ordonnance qui a adapté les législations autorisant certaines administrations et autorités administratives à pénétrer au domicile d'une personne privée et, le cas échéant, à saisir certains documents dans le cadre de leurs pouvoirs de contrôle. Cette ordonnance prévoit la possibilité pour les personnes mises en cause de former un recours sur le fond contre l'ordonnance autorisant la visite domiciliaire, ainsi que contre l'exécution du droit de visite. Elle a parachevé la mise en conformité de la législation nationale avec les exigences formulées par la Cour dans l'arrêt *Ravon contre France*.

Beaucoup plus nombreux sont les cas où les modifications du droit national ont été exclusivement le fait des juridictions. Très souvent, une réforme législative n'est pas nécessaire dans la mesure où c'est une jurisprudence que la Cour de Strasbourg remet en question. Il est d'ailleurs plus facile et plus rapide, en général, pour le juge de modifier l'interprétation d'une loi que pour le législateur d'abroger ou de modifier celle-ci.

Un exemple frappant est celui qui a conduit la Cour de cassation, réunie en Assemblée plénière, le 11 décembre 1992, à renverser sa jurisprudence en matière de rectification de l'état-civil des transsexuels. Se fondant sur des principes considérés alors comme intangibles, à savoir l'indisponibilité et l'immutabilité de l'état-civil, les juridictions françaises s'opposaient fermement à une telle rectification pour les personnes ayant subi une opération de changement de sexe. L'arrêt de la Cour de Strasbourg du 25 mars 1992 dans l'affaire B contre France a suffi pour que cette jurisprudence interne soit écartée. La situation des transsexuels sous la double influence de la Cour européenne des droits de l'homme et de la Cour de cassation aura ainsi été modifiée dans un sens favorable.

Cet apport positif de la jurisprudence de Strasbourg doit être mis en parallèle avec les réticences de la Cour de cassation à modifier sa juris-

dence relative à la recevabilité du pourvoi formé par une personne en fuite. Dans plusieurs arrêts (Poitrimol en 1993, Omar et Guerin en 1998), notre Cour avait condamné la France au motif que ces pourvois étaient jugés irrecevables. Il faudra pourtant attendre plusieurs années, plusieurs arrêts de la Cour de Strasbourg et finalement la loi du 15 juin 2000 pour qu'un terme soit mis à cette jurisprudence nationale.

La pomme de discorde qu'a constituée la question du rôle de l'Avocat général près la Cour de cassation (arrêt Slimane Kaïd de 1998) et du Commissaire du gouvernement devant le Conseil d'Etat (arrêts Kress de 2001 et Martinie de 2006) est bien connue. L'incompréhension suscitée par ces décisions auprès des juridictions suprêmes concernées montre qu'elles se rangent beaucoup plus facilement derrière la Cour de Strasbourg lorsque celle-ci statue sur des droits matériels, et à cet égard l'exemple du transsexualisme cité *supra* est particulièrement éclairant, mais qu'elles se montrent plus réticentes lorsqu'il s'agit de modifier leur propre fonctionnement procédural. Elles ont pourtant été conduites à tenir compte de la jurisprudence de la Cour, et les règles et la pratique de la Cour de cassation comme du Conseil d'Etat ont été modifiées en conséquence.

Depuis le 1er janvier 2002, les avocats généraux près la Cour de cassation ne participent plus à la réunion au cours de laquelle les magistrats du siège examinent les rapports des conseillers rapporteurs et les projets d'arrêts. Ils n'assistent plus au délibéré de la Chambre.

En ce qui concerne le Conseil d'Etat, les principales modifications sont intervenues dans le cadre d'un décret du 6 mars 2008 sur l'organisation et le fonctionnement du Conseil d'Etat. En application de ce texte, les formations contentieuses ne comprennent plus de représentants des sections administratives. Il s'agit là d'un écho de la jurisprudence Procola contre le Luxembourg de 1995. Par ailleurs, la

règle a été adoptée selon laquelle un membre du Conseil d'Etat ayant délibéré d'un avis en formation consultative ne pourra pas siéger au contentieux dans la même affaire. C'est le rétablissement d'une règle ancienne, contenue dans l'article 20 de la loi du 24 mai 1872 et dont l'application avait été suspendue, même si elle était suivie dans les faits. Le texte de 1872 a donc été rétabli. Enfin, les parties peuvent demander que le commissaire du Gouvernement du Conseil d'Etat n'assiste pas au délibéré dans leur affaire.

Certaines procédures en vigueur à la Cour de cassation ont été contestées avec succès devant la Cour et ont conduit à des modifications dans la pratique. C'est notamment le cas de la jurisprudence relative à l'application de l'article 1009-1 du nouveau code de procédure civile. Les arrêts de principe ont été rendus le 14 novembre 2000, dans les affaires Annoni di Gussola. Les requérants se plaignaient d'avoir été privés d'accès à la Cour de cassation, dans la mesure où le Premier Président de la Cour de cassation, faisant application de l'article 1009-1, avait retiré du rôle de la Cour de cassation l'instance ouverte sur leur déclaration de pourvoi et ce, nonobstant leur situation financière. La Cour n'est pas revenue sur la compatibilité de principe de ce système avec les dispositions de la Convention, que la Commission européenne des droits de l'homme avait déjà admise. Toutefois, la Cour s'est livrée à un examen *in concreto* des mesures de radiation prononcées en application de l'article 1009-1, afin de voir si elles n'ont pas restreint l'accès ouvert aux requérants « *d'une manière ou à un point tels que le droit s'en trouve atteint dans sa substance même* », si elles poursuivent un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé. Ce faisant, la Cour a souhaité avant tout garantir l'effectivité du pourvoi en cassation et, dans un certain nombre d'affaires, elle a conclu à la violation de la Convention. Ces arrêts ont eu une influence directe sur la jurisprudence de la Cour de cassation. Les ordonnances du Premier Président de celle-ci, ou de son délégué, analysent la situation de l'auteur du pourvoi, à la lumière des principes dégagés à Strasbourg, avant de prononcer ou non la radiation de son pourvoi du rôle.

En introduisant par la loi du 15 juin 2000 sur la présomption d'innocence, à la suite de l'affaire Hakkar, un recours en droit interne qui permet, le cas échéant, le rejugement d'une affaire pénale en cas de condamnation de la France par la Cour de Strasbourg, le législateur a marqué un pas supplémentaire, vingt ans à peine après l'acceptation du droit de recours individuel. L'effet purement « déclaratoire » des arrêts est ainsi abandonné dans les cas les plus graves. C'est dire le chemin parcouru en si peu de temps.

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Un véritable dialogue entre le juge français et le juge européen a ainsi vu le jour. Ce dialogue est indispensable avec les juridictions de tous les Etats parties à la Convention. Les juges internationaux sont d'ailleurs souvent d'anciens juges internes ; et les juridictions nationales sont les responsables premières de l'interprétation et de l'application d'un traité tel que la Convention européenne des droits de l'homme : il ne faut pas oublier que la Cour de Strasbourg s'impose le respect du principe de subsidiarité, mais que celui-ci serait vidé de son sens si les juridictions nationales n'interprétaient pas et n'appliquaient pas la Convention. La Cour européenne des droits de l'homme se refuse à juste titre à être un juge « de quatrième instance ». Elle ne doit pas non plus se transformer en juridiction de première instance !

L'exemple français n'est évidemment pas isolé. L'évolution, depuis plusieurs décennies, montre que – grâce aux progrès du droit international et de l'idée d'une Europe des droits fondamentaux – les systèmes juridiques des Etats parties à la Convention subissent l'influence de la jurisprudence de la Cour européenne des droits de l'homme, ou plutôt qu'ils en bénéficient, et ce grâce à une interaction croissante. Ceci est vrai aussi bien pour des systèmes de type

« continental », comme la France ou la Grèce, pour les pays de common law, ou pour d'autres systèmes, tels que ceux des Etats de l'Est. Encore une fois, la France n'est pas la seule à s'inscrire dans ce mouvement. Il est cependant frappant de constater que celui-ci n'a été ni immédiat, ni spontané ; l'évolution n'en est que plus intéressante.

The Particular Role of the Strasbourg Case-Law in the Development of Human Rights in Europe

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1. Introduction

During its fifty years of operation (1959-2009), the European Court of Human Rights[1] has not been left lacking in praise for its contribution to the protection of human rights in Europe. Still, criticism has also not been in shortage, both with regard to a number of decisions taken by it, but, also, on a number of occasions, with regard to the manner in which the Court has interpreted and applied the European Convention on Human Rights.[2] More specifically with reference to the latter, the Court has been repeatedly criticised for the activism that it frequently demonstrates through the adoption of liberal interpretations of the text of the Convention. According to its critics, in some judicial instances such interpretations have generated new, *ex nihilo* rights, which can neither be justified by reference to the Convention's clauses, nor had they been anticipated by its drafters. The example of environmental protection, which has now been recognised by the case-law as an individual right (mainly by relying on Article 8 of the Convention, enshrining the right to respect for private and family life and home), has been recurrently targeted by critics of Strasbourg's judicial activism. Criticism has also been voiced *vis-à-vis* a series of judgments imposing, at the pan-European level, modes of conduct for domestic judicial or other authorities; in the view of the opponents, such conduct should be left exclusively in the hands of the national authorities, who best know the particularities of the State and society within which such conduct takes its course.

It must be acknowledged that the Court has interpreted – and continues to interpret – the Convention in a dynamic manner, considering it a "living instrument" in the hands of the judge.[3] Bearing in mind that the Convention is a laconic, analytically rudimentary text, which was drafted with the intention to serve for many years ahead the cause of protecting human rights in Europe, it follows that it must periodically adapt to the realities of the time of its actual application. Moreover, as with all long-lived legal instruments, the Convention cannot escape the fate of departing from the picture that its drafters had at the time of its conception with regard to the purview of the protected rights and the range of their application. Undoubtedly, and as we explain later on, the drafters had a specific impression of the extent of these rights at the time of the consolidation of the text, but, at the same time, they were perfectly aware that time and space would, sooner or later, impose interpretations which could not be anticipated, in all their details, at the time of drafting. Hence, carrying out such an adaptation exercise will aid in ensuring that the real original intentions of the drafters will be best served over time. As for the perception that Strasbourg imposes an overpowering body of case-law of general applicability, impinging upon the legal orders of 47 European States, it must be recognised that such a trend does exist. Indeed, this trend stems from the very nature of the Strasbourg system. Although the Court is confined to the examination of individual petitions and the delivery of judgments in individual cases, it also exercises a wider form of supervision over the

1. Hereinafter referred to as "the Court" or "Strasbourg".

2. Hereinafter referred to as "the Convention".

3. See, *inter alia*, Gomien, D., Harris, D., Zwaak, L., *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe, 1996), p. 11. Also, Costa, J.-P., "La Cour européenne des droits de l'homme au service de la construction européenne", in *En hommage à Francis Delperée : itinéraires d'un constitutionnaliste* (Paris and Brussels, Bruylant – L.G.D.J., 2007), pp. 300 *et seq.*).

institutional arrangements of the respondent State; but also, on many occasions, indirectly over non-litigant "third party" countries that are Contracting States to the Convention. The combination of the principle of *stare decisis*, which is consistently applied by the Court when deciding new cases, and the binding nature of its judgments are the two factors which, in the end, are the material elements leading to the gradual harmonisation of the domestic legal systems of the Convention's Contracting States with the Strasbourg jurisprudence.

Acknowledgment of these indisputable realities should not, however, lead us to the conclusion that the Court, by operating in the way we have described, exceeds the competence granted to it by the Convention. On the contrary, our conviction is that the Strasbourg judges apply the Rome text in a manner that faithfully follows the intentions of its drafters, as well as the spirit and (most of the time) the letter of the contractual text. Further, we consider that both with regard to dynamic interpretation and in relation to the issue of applying the Convention with "indiscriminate generalisation", the Strasbourg Court has sought, and has managed, to establish safety nets. These, in turn, preclude the onset of developments that could lead to the arbitrary overstepping of the power granted to the Court by the Convention.

It should also be underscored that a strong indication of the Contracting States' preparedness to accept the pronouncements of the Strasbourg Court is the fact that, apart from their compliance with them in relation to individual cases, most of the time they introduce changes of legislation or domestic practices in order to streamline them with the Court's findings. This acceptance is also demonstrated by the fact that, for fifty years now, the Convention has been interpreted by the Court (and also, until 1998, by the now defunct European Commission of Human Rights), without causing major instances of controversy. Had the Contracting States had constant problems with the Strasbourg jurisprudence, the easiest way out for them would have been to contemplate "legislative" intervention in order to achieve corrections to the way in which Strasbourg applies the Convention.

2. Intentions of the drafters

The Convention traces its pre-history, which can be identified with the political developments in the then Western Europe, back to the immediate aftermath of the Second World War. At the time Europe was witnessing the tragic repercussions, economic and otherwise, of that catastrophic war, and simultaneously the emergence of the two great powers, the U.S.A. and the U.S.S.R.. These two phenomena contributed to the birth of a conviction that in order for Europe to avoid the repetition of such events, and in order to survive, as an independent entity, the harsh competition from the emerging superpowers, the States belonging to the same ideological family (countries with a common past and historical roots, democratic regimes in a free market economy) had to co-ordinate, in an institutional manner, their policies. In order to achieve greater integration, allowing them to develop a common front to the challenges arising out of the omnipresence of the two superpowers on the international scene, and to combat the perceived threats that one of them, the U.S.S.R., presented to their socio-political choices. These concerns led, at the end of the forties and in the fifties, to the creation of a number of European Organisations, whose main task was to lay down conditions for gradual social and economic rapprochement between the participating States, and tighten up their cooperation in a multiplicity of fields of human activity. The fundamental concept which prevailed in the minds of those who inspired the organisation of Europe, through regional mechanisms of integration, was that the continent was in a need both of co-ordinating instruments to provide, in the short term, for a collective approach to matters requiring urgent solutions, and of long-term policies to further the unification of like-minded States within a supranational entity with political aspirations.[4]

4. See an article that the author of the present contribution published in *Zeus*, entitled "Multiple Institutional Protection in the New European Landscape", (*Zeus*, 1998, pp. 475 *et seq.*). There he presented a view of the European architecture, as conceived by its post-war founding fathers, by considering that each Euro-

For the realisation of this last ambitious goal the founding fathers of the European idea opted for a step-by-step approach which appeared, at the time, the most realistic and feasible means of achieving these difficult goals. Indeed, they considered that in the circumstances prevailing in post-war Europe, immediate political unification was impossible. Instead, a (lengthy) preparation for the gradual attainment of the conditions which would allow unification to fall as a ripe fruit at a more propitious moment was regarded as a viable alternative. A preparation that would touch upon all the crucial fields of human activity, whether social, economic, cultural or otherwise, allowing all States participating in this experiment to align their policies and practices in a manner which would make political integration the natural consequence of such a harmonisation of infrastructure.

With these ideas in mind, many prominent European leaders put forward a proposal for a political and economic union which was formally discussed at the Congress of Europe, organised by the International Committee of Movements for European Unity at The Hague in May 1948.[5] In a number of resolutions of the Congress there was a call for the establishment of a political and economic union. The Congress culminated with the preparation of a statute for the creation of the first (viable) European Organisation, the Council of Europe.[6] The Statute, adopted in London on 5 May 1949, provides that the Council of Europe's aim is to achieve unity amongst its members, through common actions in various fields (social, economic, cultural, scientific, legal, administrative), and through the maintenance and further realisation of fundamental freedoms. It is to be noted that throughout that standard-setting and value-creating period of preparation of the European integration mechanisms, human rights had been considered, together with democratic governance and the rule of law, as indispensable and inalienable founding concepts of European construction. In the declaration of principles for a European Union, adopted at The Hague Congress, the Movement for European Unity, which had proposed the drafting of a Charter of Human Rights, stated that:

"[no] other State may belong to the European Union unless it accepts fundamental principles of a charter of human rights and declares its readiness to guarantee their application" [7]

and it had equally proposed the establishment of a "Court of Justice" with the capacity to impose sanctions in the event of violations by States of its provisions. [8]

Similarly, in Article 3 of the Statute of the Council of Europe, the member States agreed that:

"Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms". [9]

With the initiative of the Council of Europe, and under its auspices, and as a step towards fulfilling its obligations to promote and further the protection of human rights, the Convention was drafted. It was adopted on 4 November 1950. The Convention, despite its being an independent instrument, governed by international law and more particularly by the Law of Treaties, is institutionally linked to the Council of Europe, and, as a consequence, to the causes that it serves. The institutional interdependence of the Convention – and particularly of its organs – with the Council is evident. In the original text of the Convention, before the amendments introduced by the 11th Protocol[10], the Committee of Ministers of the Council of Europe constituted one of the

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pean Organisation, created to serve an integration scheme, had its own (exclusive) share in the division of labour, intended to lead to the gradual unification of European States.

5. See, *inter alia*, Gomien, D., *op. cit.*

6. *Ibid.*

7. *Ibid.*

8. *Ibid.*

9. *Ibid.*

10. *Infra.*

judicial organs of the Convention, together with the now defunct European Commission of Human Rights, as well as the Court. Even today the Committee of Ministers virtually remains an organ of the Convention: it is authorised by the 11th Protocol to monitor the execution of the Court's judgments – and, according to existing practice, to propose proper individual or general measures of compliance by a State with the Court's findings –; while the administration of the Court, including the crucial element of the budget, is also linked to the administration of the Council of Europe.

One may reach, at this juncture, the conclusion that from the foregoing analysis a mathematical equation emerges showing the close inter-relation between the intentions of the western Europeans in the aftermath of the war to achieve further unity and integration with the creation of the Council of Europe, as one organisation serving these purposes, and the adoption of the Convention, which itself was to fulfil part of the overall visionary scheme of the founding fathers.

3. Drafters' Intentions Reflected in the Text of the Convention

We respectfully submit that the intentions of the drafters, as described in the previous lines, are moreover directly or indirectly reflected in the very text of the Convention; more particularly as follows:

First, the Preamble to the Convention, in which all the Contracting States express their expectations and describe their goals to be achieved through the implementation of the provisions, clearly states that the principles upon which the Convention as a whole rests are *inter alia* "the achievement of greater unity between the Members… to be pursued [through] the maintenance and further realisation of Human Rights and Fundamental Freedoms" and "effective political democracy and… a common understanding and observance… of Human Rights". [11]

A textual interpretation of this part of the Preamble reveals, without difficulty and without stretching the meaning of the words to eccentric results, that the drafters of the Convention did not envisage that the Convention would solely serve to protect individuals against possible violations of the rights contained therein, but that it had a more ambitious future. The "collective enforcement of human rights", to which the Convention's Preamble also refers, was to serve the cause of achieving greater unity between the European States participating in the scheme. It is also evident that the instrument was designed not only to safeguard respect for the rights contained therein, by maintaining them intact, but also to contribute to their further realisation. In other, more simple, words, the drafters invited those applying and interpreting the Convention – Contracting States, judicial organs of the Convention – to broaden the purview of the rights provided for by the text, presumably by streamlining its provisions to account for the ever-changing realities of life and the demands of progress which are typical of every modern society.

Finally, the reference in the Preamble to a "common understanding and observance of… Human Rights", taken together with the reference, in the same part of the Convention, to "greater unity", undoubtedly supports the assumption that the drafters intended to use the Convention, and its jurisdictional mechanisms, to operate as harmonising tools, gradually imposing a common reading of the rights protected by it on all participating States. The end result would, of course, be to achieve greater unity between them, thus serving the cause of European integration.

Second, connected to these initial observations is the fact that the choice of the drafters was to produce a rudimentary and general text which enumerates a number of rights without actually defining or determining the exact content or extent of their application. Characteristically – but not exclusively – Article 3 of the Convention speaks of "torture, inhuman or degrading treatment", without defining the terms; Article 8 speaks of "private and family life", without

11. Emphasis added.

delineating the exact scope of these notions.

Why is this so? It would seem logical to assert that the drafters of the Convention were led to approve such an elementary description of the protected rights, not because they were unable to agree on detailed definitions, but because they wanted to leave them open-ended, to be exposed to changes in their content with the passage of time and the concomitant differentiation which might occur as a result.

Third, the question which arises is whom the drafters had in mind, when leaving the definitions and scope of the Convention's provisions open-ended, for the task of determining their adaptation to contemporaneous conditions. It goes without saying that those primarily responsible for the interpretation and application of the Convention are the Contracting States; and no one could deny that it falls within their competence, when doing so, to determine the exact content and scope of the particular Convention provisions at a given time. Nevertheless, if one left the crucial issue of the adjustment of the Convention rights solely in the hands of the individual States, that is to say the 47 different States which today make up the Council of Europe, the most plausible end result would be a variety of interpretations based on the particularities of each country and their preferences and choices.

Was that the intention of the drafters when they spoke of "the achievement of greater unity", and of a "common understanding and observance" of the rights contained in the Convention? It does not seem so. The apparent intentions of the drafters are reflected more in their decision to create judicial organs which, through adjudication of specific cases, would create a homogeneous corpus of interpretation of the relevant substantive clauses of the Convention. Although, admittedly, the organs provided for by the Convention were vested with the competence to deal exclusively with concrete cases, whether submitted to them by States (inter-State applications) or by individuals (individual applications), and to decide on the concrete issues before them, each time without *erga omnes* effect, the potential repercussions of their decisions have extended in reality far beyond the specific situations of those involved in a particular dispute.

These potential repercussions were known to the drafters of the Convention when they decided not only to produce a conventional regime for the protection of human rights to be applied in the domestic order of the Contracting States, but also to endow it with jurisdictional organs to decide on alleged violations of the Convention. They could clearly anticipate that the conjunction in the Convention of two elements concerning the organs' jurisdiction, namely the element of *stare decisis* and the binding force of the decisions taken by the organs, would lead to the creation of authoritative jurisprudential precedents that would be binding indiscriminately upon all the Contracting States.

It is true that nowhere in the Convention can one find an express obligation for the judicial organs to follow their own precedents, when dealing afresh with a new case resembling factually and legally one already decided. It may be deduced from the text of Article 30, however, that the drafters not only considered such an eventuality but also wanted to ensure consistency in the case-law. Indeed Article 30 (relinquishment of jurisdiction to the Grand Chamber) provides that:

"… where a resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects".

Thus the drafters, by providing for the regime of relinquishment, both exhorted Strasbourg to adhere to its own case-law, and at the same time offered it a process through which the *stare decisis* could be better maintained. Article 30 makes the Grand Chamber the ultimate and highest authority of the Convention to determine what

the law is and how the instrument should be properly interpreted.

The Strasbourg organs have invariably followed the intentions of the drafters in this respect (as in many others). And now comes the second, concurring element which acts, together with the *stare decisis*, as the mainspring for the harmonisation of the protection of human rights in Europe: the binding force of the Strasbourg decisions. Article 46 of the Convention (binding force and execution of judgments), in its paragraph 1, provides:

"The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

In reality the fact that Strasbourg follows its own precedents and creates case-law to which it adheres, in a situation where the judgments have binding force, means that a State against which a violation has been found is obliged not only to compensate its victim for the established transgression, but also to proceed to make changes to the regime (legislation, practice) which is the "culprit" for the violation found. If it omits to do so victims of the same State conduct which had led to a finding of a violation in a previous case will submit their complaints knowing that Strasbourg applies its own case-law; and the Court, adhering to its own precedent, will again find a violation. So the only remedy for the avoidance of a series of similar violations is the removal of the source of a violation. Equally, other States which are parties to the Convention can also make changes to their own regimes if they are similar to those that the Court has found defective, in order to avoid, in turn, findings of violations against them through the interaction of *stare decisis* and the binding force of Strasbourg judgments. It should be underscored that the history of the Convention's implementation offers many examples not only of States which have rectified their impugned regime because of a finding of a violation against them, but also of other Contracting States not involved in a given case which, by acting pre-emptively, have also rectified their regimes to bring them into line with a Strasbourg ruling. It goes without saying then that the consequence of such indirect "competence" of Strasbourg leads to a gradual harmonisation of the protection of human rights among the countries participating in the Council of Europe's system, and to the creation of a "European public order".

4. The Court's position

We now turn to the Court's activity to see how Strasbourg has perceived its role, not only as a mechanism for settling individual disputes, but also as a tool for consolidating and furthering the protection of human rights in Europe. In this respect the following general jurisprudential principles can be identified as emanating from its case-law as a whole:

a) Despite the fact that the Court's role in protecting human rights is a subsidiary one, and the primary responsibility for maintaining and furthering human rights in Europe lies with the Contracting Parties to the Convention, Strasbourg has never denied that it has been entrusted with the weighty task of scrutinising and supervising the correct application of the Convention throughout the continent of 47 States. Even in situations where it accepts that a State enjoys a "margin of appreciation", in deciding a case – and we will come back to that discussion below[12] – it nevertheless warns States that their privilege of discretion is not unlimited and is subject to a "European" supervision.

b) Since its judgment in *Tyrer v. the United Kingdom*[13] the Court has reiterated many times that the Convention is a living instrument to be interpreted in the light of the conditions existing at the time of the examination of a particular case. This means that the Court is not obliged to interpret its constitutive instrument on the basis of the original conditions which were known to the drafters of the Convention, and which in the meantime may have drastically changed; and, even more so, that the Court is not obliged to

12. *Infra*.
13. *Tyrer v. the United Kingdom* (25 April 1978)

maintain its own case-law in situations where the social, cultural, economic substructure which supported a certain finding by the Court no longer exists.

The body of Strasbourg case-law contains a large number of judgments showing how the Court perceives the effect of changed circumstances on the determination of cases before it. This can be seen, to mention only two examples, in its judgments in the cases of *Christine Goodwin v. the United Kingdom*[14] and *Hénaf v. France*[15]. In that first case the Court overturned its previous case-law which had accepted that the lack of official recognition of the new gender of a post-operative transsexual by the United Kingdom authorities – through a change in the birth records – did not constitute a violation of Article 8 of the Convention (private life). In the new judgment, departing from its previous position and finding a violation of Article 8, the Court recognised that between the period of its former judgment and the period of consideration of the new case, societal and other changes had occurred that justified a different approach. In that second case, the Court considered that the notions of "torture, inhuman and degrading treatment" were not immutable, and that the passage of time might change their scope. An act of the authorities which had been identified as inhuman treatment in the past could be reclassified as torture at a later stage, in a new case.

c) The Court has, in a number of cases, adopted dynamic interpretations of the Convention, either through expansive interpretation of the existing text, or by inferring from that text the existence of new rights not specifically contemplated in it. A characteristic example in that first category is the interpretation given by the Court to the terms "civil rights" and "criminal charge" as contained in Article 6 (fair trial).[16] The drafters of the Convention, at the time of its preparation, intended to limit the applicability of the fair trial guarantees to purely civil or criminal cases. The Court has nevertheless taken the view that these guarantees should also be extended to other categories of judicial procedure, such as administrative or disciplinary procedures, in situations where such procedures present strong elements of resemblance with civil or criminal processes; and not to leave national authorities the unfettered right to exclude them from the protection of the Convention simply because their domestic characterisation is not covered by the literal terms of Article 6.[17] In so far as the second category is concerned, the most characteristic field of "law-making" activity by the Court is the protection of the environment. The *locus classicus* of the expansive interpretation of the Court on this matter is the case of *Lopez Ostra v. Spain*[18], where Strasbourg decided that Article 8, protecting private and family life and the home, had been violated because of serious environmental pollution caused by the operations of a waste-treatment plant situated near the applicant's house. That Spanish case heralded the beginning of an era of environmental protection cases where environmental damage was associated with a violation of the Convention. It should nevertheless be emphasised that in order for the Court to admit that an environmental hazard constitutes a violation of the Convention, applicants must show that the hazard affects them personally and rights already afforded to them by the Convention; it cannot be an abstract complaint amounting to an *actio popularis*.

d) The methods of interpreting the Convention that have just been described reflect the role that the Court assumes, with regard both to the harmonisation of the protection of human rights,

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14. *Christine Goodwin v. the United Kingdom* (11 July 2002).

15. *Hénaf v. France (*27 November 2003*)*

16. The approach followed by Strasbourg in this respect, which has incrementally extended the purview of protection under Article 6, has never been disputed by the Contracting States. On the contrary it seems that it has met with their approval. It is to be noted that the guarantees of the Charter of Fundamental Rights of the European Union (see *infra*) of a fair trial cover all possible categories of court proceedings, without any exception whatsoever (see Article 47 of the Charter).

17. *Oztürk v. Germany* (21 February 1984)

18. *Lopez Ostra v. Spain* (9 December 1994)

as part of the integrational activity of the European institutions, and to furthering the ambit of the protected rights by expanding them in accordance with contemporaneous needs at each moment of the Convention's application. Both these attributes of the Court's jurisdictional activity would seem to be perfectly consonant with the intentions of the drafters, as expressed in the Preamble to the Convention.

It should be pointed out, however, that Strasbourg uses this power, and the legacy of the drafters, with considerable caution. Prudence and self-restraint are the keywords for an understanding of the manner in which the Court builds its case-law or departs from its precedents. In principle, whenever the Court delineates new boundaries in its case-law, it reaches its decision after carefully examining the existing approaches of the European States to the matter before it. In a situation where the Court realises that there is either a strong national consensus accepting a certain legal regime, or a wide acceptance of it, or at least a clear trend which does not seem to meet with objections on the part of those States which have not expressed their views, then, and only then, will it proceed to the establishment of a new jurisprudential principle. By contrast, in a situation where it realises that a matter before it presents an issue which European States have not touched upon, or in respect of which they are strongly opposed to a particular solution, the Court refrains from ruling in a manner that would impose a departure from national preferences and would make the Court the first to "legislate" on a generally sensitive issue.[19]

It should also be noted that there is another dimension to the self-restraint principle in the Court's jurisprudential history, and that is the invocation and application by the Court of the margin of appreciation. In accordance with this concept – which is of jurisprudential inspiration and is not provided for by the Convention – Strasbourg accepts that in certain categories of cases national authorities, and more particularly domestic courts, are better positioned than the international judge to assess which measures should be taken to balance conflicting rights or interests (on the one hand the rights of an individual – as protected by the Convention -, and, on the other, the rights or interests of the wider democratic society within which the individual lives and acts). In a large number of cases Strasbourg has refrained from proceeding with the balancing of the rights and interests involved in a case, at the stage of the examination of proportionality, by accepting that the national authorities, which had already done so, are more competent to assess such interests on the basis of the domestic realities.

However, acceptance of the margin of acceptation does not mean a total surrender of the Court to the choices made by the national authorities. In the *Handyside v. the United Kingdom* judgment[20], the Court stressed that "[t]he domestic margin of appreciation… [went] hand in hand with a European supervision", while in *Klass v. Germany*[21] the Court said: "this does not mean that the Contracting Parties enjoy an unlimited discretion… the Contracting States may not… adopt whatever measures they deem appropriate". In the real world of the everyday application of the margin of appreciation, the Court first scrutinises the facts of the case and the response given by the national authorities to the issues relevant to the Convention, before giving the green light for the application of the margin and the exercise of its self-restraint. It can be said that the control made by the Court when it finally applies the margin of appreciation differs minimally from the control it exercises when it proceeds with its own tools to apply the proportionality test.

19. The case of *Pretty v. the United Kingdom* (17 July 2003) clearly illustrates the Court's reluctance to take the initiative of deciding on an issue which cannot find support in any legal order among the Contracting States, and which is still controversial in many European countries: that of legalising euthanasia. In this case the Court found that there had been no violation of the Convention, leaving the matter to mature before deciding otherwise.

20. *Handyside v. the United Kingdom* (7 December 1976)

21. *Klass and Others v. Germany* (6 September 1978)

Further, the margin of appreciation is not applicable to all those cases for which the Court has given its own answers concerning the balancing of the rights and interests involved, through an established case-law developed in previous similar cases. Equally the margin of appreciation cannot be justifiably applied in cases for which European standards have developed, showing that the parties to the Convention have adopted positions on the relevant matter that indicate a *consensus* towards a common solution. Applying the margin of appreciation in these conditions would be tantamount to allowing a State, through the Court's judgment, to depart from a harmonious application of standards of protection already existing in Europe on a specific matter.

In any event, although the margin of appreciation continues to be invoked in many cases, the frequency of its application is constantly losing ground. This is the result of the ever-growing enrichment of the Strasbourg case-law with new detailed answers to a great number of issues concerning the rights protected by the Convention; but it is also the result of the fact that European States are increasingly in agreement on common standards of protection of human rights in many areas. Because of these phenomena the margin of appreciation is shrinking, for the benefit of more harmonised protection around Europe.

5. The Approval of Case-Law by the Contracting States

The Strasbourg Court has now been working for fifty years. It is submitted that a good test to assess its success or failure and the approval or disapproval of its contribution to the protection of human rights in Europe and of its case-law, is to look at the reaction of those who are involved in its operation and who are affected by the consequences of its pronouncements, namely, the applicants and the Contracting States.

Admittedly, when a court of law decides in cases of opposing interests, there is always one party who is satisfied and one who is dissatisfied. Then in each individual case there is most often someone who complains and who usually considers that a court has decided unjustly. From this fate no court can escape - certainly not the Court in Strasbourg. Yet the question is not whether there may be disagreements between the parties with regard to specific cases, or allegations as to erroneous assessments of facts or laws, but whether, overall, the Court is considered to be a trustworthy institution which is correctly interpreting and applying its law and whether it meets the expectations of its visionary drafters and of those States which have entrusted it with the function of protecting human rights in Europe.

The continuous increase in the Court's caseload, with more than a hundred thousand cases pending, unquestionably shows that Strasbourg has gained, as a result of its work over the years, a good reputation throughout Europe; and this is despite the fact that it generally rejects more than ninety per cent of the applications lodged by individuals without detailed reasoning as to the grounds of rejection. Most applicants complain about this anomaly – unreasoned judicial decisions – which is unfortunately the price to pay for the flood of applications that the Court faces.

Then come the Contracting States. It is appropriate to look at the attitudes of States *vis-à-vis* the Court's pronouncements, first because the focus of this article is to show that Strasbourg acts within the limits of the mandate that was defined by the drafters and the Contracting States; and second because its survival largely depends upon the latter. The execution of its judgments is in their hands. The Court does not have any mechanism of enforcement, and the Committee of the Ministers of the Council of Europe – a political body composed of representatives of the Contracting States –, although entrusted with the power to monitor the proper compliance by States with the Court's pronouncements, is still a slow-moving organ and its reactions are rather lenient when it comes to the imposition of sanctions on a recalcitrant State. Hence if the States did not readily execute judgments, the whole Strasbourg system would find itself in serious trouble; not to

mention, moreover, the fact that the Court is financially dependent on States for its unimpeded operation.

The indications available concerning the disposition of States towards the Court is, in principle, positive. One may safely proceed with such an assumption on the basis of the strong inferences that support it. The crucial elements that convincingly point to this conclusion are as follows:

a) The degree of compliance by States with the judgments of the Court. With few insignificant exceptions, States have always complied with its pronouncements; and, most of the time, with the requests made by the Committee of Ministers to extend the scope of these pronouncements by taking individual or general measures intended to align the domestic legal order of States with the essence of a pronouncement, thus going beyond the simple monetary compensation provided for in the judgment's operative part.

b) The approval of the interpretation that the Court gives to the clauses of the Convention. Indeed the very compliance by States with the Court's judgments attests to such approval; but not only that. The fact that during the fifty years of its operation no State has asked for withdrawal from the Convention – with the exception of Greece, but for other political reasons[22] – or for amendment of its text is a good indication of States' satisfaction in this respect. It should not be forgotten that Contracting States have legislative power at their disposal. They could easily have used it to amend the Convention in a way that would preclude the Court from adopting interpretations that could be considered by them as incommensurate with the letter and spirit of the Convention. On the contrary, all the Protocols which have followed the coming into force of the Convention have either added new rights, extending the protection to new fields, or have increased the power of the Court to adjudicate on matters of human rights. Characteristically, both the 11th and 14th Protocol contain provisions which increase the obligations of the Contracting States – limiting their manoeuvring capacity when applying the Convention – and, at the same time, are intended to equip Strasbourg with effective tools so that the Court will be able to cope better with its ever-increasing case-load.[23]

c) The role that the Court's case-law plays in relation to European actors outside the close circuit of the Contracting States. Indeed, one of Strasbourg's major achievements is that it has gradually become, through its case-law, the beacon which, to varying degrees, directs third parties (in the strict legal sense of entities not participating in the Convention) towards a uniform application of human rights. It is clear that courts outside Europe frequently refer to the Strasbourg case-law in their decisions. But what is really more interesting – and pertinent from the point of view of our analysis – is that the European Community/Union has been strongly influenced by the Strasbourg case-law when dealing with human rights issues. The Court of Justice of the European Communities has relied on it in a large number of cases, considering that it is part, together with the constitutional principles of the Member States of the Community/Union, of the law applicable whenever issues of human rights arise in cases pending before it.[24]

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22. Greece, during the colonels' dictatorship (1967-74), and in order to avoid a humiliating "condemnation" by Strasbourg, voluntarily withdrew from the Council of Europe.

23. The 11th Protocol merged the jurisdictional organs of the Convention, replacing them with a single court. It has also imposed an obligation on all the Contracting States to observe a regime, whereby, without any other formality, all individuals under their jurisdiction have the right to submit an application to the Court, after exhausting domestic remedies, to allege a violation of the Convention and seek the Court's protection. The 14th Protocol has come as a "life-saver" for the Court, by providing for procedures to simplify and accelerate the Court's decision-making capacity.

24. See, *inter alia*, Hartley, T.C., *The Foundations of European Community Law* (5th ed., 2003), Chapter 5; Craig, P. and Burca, G., *EU Law: Text, Cases and Materials* (3rd ed., 2002), Chapter 7.

Equally important, if not more so, is the fact that the EU's Charter of Fundamental Rights, which is mainly intended to deal with the protection of human rights within the institutional framework of the Union, expressly provides that the interpretation to be given by the Union's organs to the rights in that Charter that are similar to those laid down by the Convention must follow the case-law of the Court.[25] There is also an obligation for the Union to accede to the Convention, allowing individuals, in due course, to have direct recourse to Strasbourg against any acts or omissions of the Union's organs that may be alleged to violate the Convention.

If one takes into account the fact that all the members of the European Union – 27 for the time being – are equally Contracting States of the Convention, one can readily conclude that their strong emphasis on the applicability of the Court's case-law to the Union's own protection, apart from attesting to their continuous desire to ensure harmonisation of protection, is a good indicator of their confidence in the work being accomplished by Strasbourg.

25. See Article 52 (3) of the EU Charter of Fundamental Rights.

7. Some Concluding Remarks

Let us finish with a disclaimer: our analysis in this brief study is not intended to demonstrate the infallibility and the omniscience of the Court. Like all human creations, the Court suffers from imperfections in both its structures and procedure, and, sometimes, in the decisions that it takes. This article's main aim has been to show that the Court's case-law complies both with the intentions of the drafters of the Convention and the will of the Contracting States to it; and that, according to their shared expectations, it contributes to the gradual harmonisation of the protection of human rights in Europe, as part and parcel of the process of the continent's integration.

The effect of the jurisprudence of the European Court of Human Rights on the jurisprudence of Greek Courts regarding the right to judicial protection

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Just a few decades ago, the national judge felt he could solve the disputes presented before him by using exclusively the domestic law and the solutions dictated by such law. This belief is already outdated. The country's membership in the European Union, whose Court is the European Court of Justice (CJEC), and in the judicial system of the Council of Europe, the European Court of Human Rights (ECHR), obliges the Greek judge, who realizes that he no longer has the last word on dispute resolution, to consider these Courts' jurisprudence and, what is more, to reshape his judicial judgment and comply with such jurisprudence. This drift should not be considered an inevitable harm. Jurisprudential solutions are being enriched and the quality of justice administration is being improved. The national self-sufficiency in the formation of jurisprudence is now considered outdated and no longer compatible with the needs of international communication. It is therefore required that there be constant renewal of the conceptual arsenal of the Greek judge, who should not confine himself to a mechanical repetition of the solutions given by the ECHR on specific issues. Instead, after studying in depth and realizing the (true and not the seeming) meaning of such Court's judgments, he should try to draw general conclusions from its jurisprudence by readjusting, if need be, the general manner in which he perceived until now the equivalent national rules.

I must confess that since I was a young judge I have been trying to understand in depth and apply with precision the procedural rules, – very numerous in administrative procedural law – restricting deceivability, because, in my opinion, without a strict observation of these rules, a trial upon the merits is not conceivable. Thus, I have contributed to the delivery of judgments that I have regretted. I must further confess that it was the jurisprudence of the ECHR, as regards the interpretation of Article 6 of Rome Convention on several areas of the right to legal protection, which later helped me understand something that seems simple to me today but, unfortunately, is not at all obvious in the everyday administration of justice: procedural rules constitute the system through which the provision of legal protection is organized and facilitated as regards each essential right constituting the trial's main object. This system cannot be interpreted and used in a way obstructing the examination of the essential issue. In other words, the procedural system should not claim (not of course as a scientific branch but during justice administration) independence and overriding application. It is subject to the trial's purpose, which is to determine the existence of the essential right claimed. Thus, the claim for an effective judicial protection imposes either the interpretative readjustment of explicit or jurisprudential procedural rules, which seem excessively restrictive, or the establishment or formulation of new rules in order for legal protection to be efficient, or even, in some cases and with cautiousness, the setting aside of such rules if these are considered contrary to the prevailing provisions of Article 20 par.1 of the Constitution and Article 6 of the Convention.

The purpose of this short anniversary article is not to examine exhaustively the effect of the ECHR jurisprudence as regards the enhancement of the claim for an efficient judicial protection. I will confine myself in mentioning three areas where, in my opinion, the jurisprudence of Strasbourg has brought a deep and significant change in the way in which Greek jurisprudence, as well as the legislator, understood until now the relevant issues. These areas are: a) the new interpreta-

tive approach or the setting aside of procedural provisions, which were either explicit of a jurisprudential origin (not an inspired one…) establishing excessively formalistic conditions or procedures, b) the compulsory and unobstructed enforcement of judicial decisions by the Administration, especially in the area of administrative law and c) the attempts of the legislator to interfere in pending trials.

The first area comprises the formalistic provisions and interpretations. Here is an example from the jurisprudence of the Conseil d'Etat which fortunately has not been brought before the ECHR, but is, in my opinion, typical of a certain approach. In the rules of procedure before the Condeil d'Etat there are no written rules on the joinder of parties. Its conditions have been established by jurisprudence. And also on the basis of jurisprudence it was admitted that when these conditions are not met, the appeal is examined as regards only the first appellant appearing in the lawsuit and is finally dismissed as regards the other ones. It was further admitted, on the basis of jurisprudence, that if one of the co-appellants in the lawsuit fails to establish an equitable interest to act, there is no joinder and the appeal is dismissed as inadmissible for all appellants except the first one. The issue raised in the light of this rigorous, either way, jurisprudence concerned the outcome of the appeal in case the appellant who failed to establish an equitable interest was the first-mentioned in the lawsuit. The following peculiar solution has been adopted: the Court examines first the joinder of the parties, its conditions are found not to be met due to the lack of equitable interest of the first appellant, the appeal is dismissed for the co-appellants and then dismisses the appeal as regards the first appellant as well, due to the lack of equitable interest! This way the Court, along with all other procedural rules, unconsciously produces one more, completely unjustified: the examination of the joinder of the parties precedes the establishment of the equitable interest to act. Wouldn't it be much simpler to first establish the equitable interest of the parties, to dismiss the appeal for this part, and then to examine the conditions of joinder for the rest of the litigant parties? This jurisprudence which has fortunately lost a great deal of its importance after the enactment of article 22 paragraph 9 of law 3226/2004 stipulating that the appeal shall not be finally dismissed in this case but the severance of the case shall be instructed, highlights an approach which, dominated by an ill-conceived "procedural dogma", leads to exceedingly formalistic, inclement solutions.

The second example, unfortunately, was brought before the ECHR and it is not honorable for the Conseil d' Etat. It is the matter of the formulation and filing of an appeal for annulment before another public authority, other than the Court itself. The decision of the ECHR on the case Koutras v. Greece (of 16.11.2000) resulted in the change of the jurisprudence formed by three consecutive persistent judgments of the Plenary Session of the Conseil d' Etat. It was only with the subsequent decision CdE (Pl.) 602/2002 that the Court judged that the appeal must not be definitively dismissed as inadmissible on the sole grounds that the civil servant who received and filed the appeal did not place the registration number upon the filing act but on another part of the page or that he placed the filing act on a distinct sheet of paper attached to the lawsuit instead of the header of the lawsuit… The, offensive but fair, designation of the ECHR for this jurisprudence was "excessively formalistic".

Furthermore, the same designation was reserved by the ECHR in 2006 in its successive decisions on the cases Liakopoulos v. Greece, Efstathiou v. Greece and Zoumboulidis v. Greece, on the well-known issue of the rejection of grounds of appeal by the Supreme Court for impertinence or vagueness.

A general observation should be stressed-out at this point: The Court of Strasbourg treats the jurisprudential procedural rules and structures than explicit written rules – and rightfully so. That is because jurisprudential rules offer by definition less safety to the litigant parties than a written rule.

A contrary fortunate example of "provisional" positive influence of the jurisprudence of the ECHR on the jurisprudence of the national courts is decision 4600/2005 of the Conseil d' Etat resolving the matter of the examination of a case whose administrative file contains classified documents. The Court adopted, with express ref-

erences to the jurisprudence of the ECHR, a system balancing between the reasonable requirement to preserve confidentiality and effective judicial control.

The second area is the question of enforcement of judicial decisions or rather the question of the Administration's obstruction in the enforcement of judicial decisions.

It was the Court of Strasbourg that, sadly, reminded the Greek authorities explicitly in a Greek case, which later on became an important jurisprudential precedent (Hornsby v. Greece, 19.03.1997), and still more sadly, in series of subsequent Greek cases, that the right of access first to a Court and then to a fair trial would be incomplete if the Law tolerates that a binding decision against a litigant party, and particularly the State, remain non-enforced. The enforcement of a decision must be considered an inseparable part of a trial, in the sense of the article 6 of the European Convention, and if the administrative authorities fail to enforce judicial decisions, the guarantees of the article 6 end up to be unnecessary. This jurisprudence was confirmed, among others, in the cases Antonakopoulos v. Greece (14.12.1999), Pialopoulos v. Greece (15.02.2001), Logothetis v. Greece (12.04.2001), Katsaros v. Greece (06.06.2002), Satka v. Greece (27.03.2003), Kyrtatos v. Greece (22.05.2003), Karachalios v. Greece (11.12.2003), Metaxas v. Greece (27.05.2004), Iera Moni Profitou Iliou Thiras v. Greece (22.12.2005), a series of decisions revealing of the situation.

Three of these cases present a particular interest: The Kyrtatos case, ruling that not only the legal but also the material non-enforcement of a judicial decision constitutes a violation of the Convention (namely the non-demolition of an illegal building). The Metaxas case, ruling that the delayed compliance with the decision (even if it was, ultimately, achieved) also violates the article 6 of the Convention. And the case of Iera Moni Profitou Iliou Thiras (Holy Monastery of Prophet Elias of Thera) that is of particular interest for trials before the Administrative Courts, ruling that the obligation of compliance with a judicial decision also includes dismissal rulings rendered by the Courts or, essentially, the obligation of the Administration to execute its own act against which an appeal was unsuccessfully filed (it concerned the demolition of illegal radar antennas).

The effect of such jurisprudence is of particular importance in Greece. It lead to the enactment of L. 3068/2002 upon the compliance of the Administration to judicial decisions, which, although far less ambitious than its original draft, elaborated by a committee presided by Prof. emeritus and member of the Academy Ep. Spiliotopoulos, still marks a substantial progress in the issue. The intensely operating Compliance Committee, instituted by provision of the above law, has embodied in its own jurisprudence most of the aforementioned principles and gladly observes the Administration complying at an accelerating pace with the judicial decisions rendered against it, following the emission of Ordonnances of the Commitee or even the imposition fines, when non-compliance persists. It is another substantial area where the jurisprudence of the ECHR has been indeed of crucial importance. Until then, the Greek Administrative Courts, including the Conseil d' Etat, would accept – using of course an impeccable procedural argumentation! – that failure to enforce a judicial decision does not constitute an "omission of a due legal action", subject to an appeal for annulment. The only existing feature on the matter was the insufficient procedure of L. 1470/1984.

The third area is the most "modern" in our country, as during the last fifteen years in particular the phenomenon of the legislator's interference in pending trials grew rapidly. Here also, as in the case of non-enforcement of judicial decisions, the jurisprudence of the ECHR is essentially "Greek", starting from the decision on the case Stran v. Greece (09.12.1994). The Stran jurisprudence was followed by the decisions Papageorgiou v. Greece (22.10.1997), Georgiadis v. Greece (28.03.2000), Anagnostopoulos v. Greece (07.11.2000) interrupted by the (comfortingly of French interest!) decision Zielinski v. France (28.10.1999). This jurisprudence admits that the legislator is not obstructed to regulate by a recent and even retroactive law any rights of civil nature, in the sense of the European Convention of Human Rights, provided that such legislation does not interfere in the administration of justice through a regulation aiming to alter the outcome

of a pending trial.

On this matter, the jurisprudence of the Greek administrative and civil Courts was disappointing. The interference in pending trials and even the subversion of the result of a judicial decision was considered, unfortunately in a uniform manner, constitutionally tolerable.

This jurisprudence has now changed by the Conseil d' Etat, by the decision 3633/2004 of the Plenary Session and other previous and subsequent decisions (CdE Pl. 173/2003 and 372/2005, CdE 1847/2008 – *vide* CdE 2979/2009 and Supreme Court 6/2007). With express reference to the ECHR, the jurisprudence the Conseil d' Etat currently admits that the legislator is not entitled in any way whatsoever to enact provisions whereby the outcome of a pending trial is objectively affected in favour of the State. Thus, a weapon unfortunately often used by the legislator is rendered inactive and this is exclusively due to the jurisprudence of the ECHR.

These two last issues should be particularly taken into consideration. Until now, the discussion was focused mostly around 'classical' procedural rules (various procedural conditions) but ignored the most important: What is the point of an impeccable procedure for the rest, when the State is able either to determine the outcome of the trial or to refuse with no cost the enforcement of the judgment? The Greek judge, unfortunately, had to be urged "from the outside" in order to consider things which should be self-evident.

A global review of the interaction between the jurisprudence of the Conseil d' Etat and the ECHR would lead to the observation that since 1953, the year of integration of the European Convention of Human Rights in the Greek legal order, until approximately the '90s the Greek Court always considered that the right guaranteed by the Convention was of lesser or equal amplitude compared to the respective right guaranteed by the Greek Constitution. This resulted to the sole application of the Constitution, even though the European Convention of Human Rights was also mentioned.[1] This approach is, in my opinion, correct in the majority of the of the cases, provided however that one crucial condition is met: The judge applying such rules should be well aware of the solutions adopted by the ECHR and apply them consistently, transposing these latter to the interpretation of the Greek Constitution and thus preventing the – hardly flattering – conclusion that the amplitude of protection provided by the Constitution is inferior to the one guaranteed by the Convention. In other words the Constitution should be interpreted in the light of the European Convention of Human Rights. There where, however, some cases where the ECHR interpreting the article 6 of the Convention judged as contrary to the latter some solutions that had been considered tolerable under article 20, par. 1, of the Constitution. Thus, the Conseil d' Etat was obliged to accept the distinct or in any case prevailing force of article 6, par. 1, of the Convention by referring expressly to the solutions adopted by the ECHR.

Some people, including myself in some occasions, may consider certain solutions given by the ECHR as excessive or even erroneous, during the interpretation and application of various rights guaranteed by the European Convention of Human Rights. I believe, however, that no one may doubt that the jurisprudence of the Court of Strasbourg has substantially contributed to the enhancement of the right to an efficient judicial protection in the country. The Greek legal order owes thanks to the Council of Europe for its jurisdictional activity in this field.[2]

1. *Vide* F. Arnaoutoglou, *Conseil d' Etat and European Courts*, Nomiko Vima 53 (2005), p. 1977.

2. *Vide* K. Kerameus, *Legal Studies*, in *Human Rights and Council of Europe*.

Migrants and their right to a family and private life under Article 8 of the European Convention on Human Rights*

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In my contribution to this special issue celebrating the 50th anniversary of the European Court of Human Rights ("the Court"), I have chosen to focus on the recent jurisprudence of the Court in a sensitive and changing field. The issue of migration is in my view one of the most crucial in Europe today – and probably will be even more so in the future. As far as "migrants" are concerned – and I put "migrants" in inverted commas on purpose –, the issues covered by Article 8 of the European Convention on Human Rights ("the Convention"), which, according to Article 1, guarantees to *everyone* within the jurisdiction of the Member States the right to respect for private and family life, are numerous, diversified and fundamental. Therefore, I will try to address what seem to me, today, the most important or sensitive ones. Under the general concept of "migrants", most of the cases the Court has to deal with, in relation to Article 8 of the Convention, are in fact related to immigration and expulsion, including refugees, asylum-seekers and people in need of protection. But of course it would be inappropriate to amalgamate between these situations.

I will start with some general considerations concerning Article 8 in this field (**I**) before examining different situations which the Court has faced recently (**II**). I will confine myself to giving *raw material* in order to enable those who are on the front line and who know the subject from the inside, to draw the lessons from this case-law, to appreciate its pertinence and limits, also to criticize it and to highlight its grey areas as well as its promises for the future.

I. General considerations

1. The court defines the scope of its intervention in a standard, ritual formula repeated in almost every decision. It reaffirms at the outset that a State is entitled, as a matter of well-established principle of international law and subject to its treaty obligations, to control the entry of aliens – non-nationals – into its territory and their residence there, including the right to deport and expel[1].

Some commentators have objections to the way the Court presents the reasoning and I have to confess that, to a large extent, I share their concern. This presentation implicitly influences subsequent analysis carried out by the Court. The provisions of the Convention are seen as restrictions to the States' sovereign power which remains the overriding principle and, moreover, in this case, a "well established" principle. Such an approach differs from the usual method according to which the rights protected by the Convention are the principle, a principle that can in some cases be undermined while respecting certain conditions. The rights protected by the Convention are also "well established" and no hierarchy allows them to be placed at a lower level[2]. "To say that the rule is the sovereignty of States and that

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* All judgments and decisions of the European Court of Human Rights mentioned in the text are available from the *Hudoc* database accessible via the Court's website: http://www.echr.coe.int/echr/en/hudoc/

** This reflects my personal view, and not that of the Court.

1. See, among many other authorities, ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment of 28 May 1985, § 67; ECtHR, *Boujlifa v. France* judgment of 21 October 1997, § 42.

2. S. SAROLIA, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*, Brussels, Bruylant, Collection du Centre des droits de l'homme de l'Université catholique de Louvain, 2006, p. 475.

the exception is the respect of the Convention rights is not equivalent to supporting the opposite. The opposite consists in laying down the respect of the Convention rights as the principle and the limitations and / or interferences as the exceptions. If need be, in the name of the sovereignty of States as regards migration"[3].

In fact, the formulation of the decision of the European Commission of Human Rights in the case of *X. v. Federal Republic of Germany* of 30 September 1974 seems preferable to me: "Even though the question of extradition, expulsion and the right to asylum do not figure, as such, amongst those rights which govern the Convention, the Contracting States have none the less agreed to restrict the free exercise of their rights under general international law, including their right to control the entry and exit of foreigners, to the extent and within the limits of the obligations they have accepted under the Convention"[4].

2. Article 8 guarantees the right to respect for private and family life. So we should say a few words about the **concept of private and family life**.

As far as *family life* is concerned, if the concept of family life is in general construed in a very extensive way[5], in the case-law of the Court concerning expulsion measures it has been interpreted in a more restricted way. In the *Slivenko v. Latvia* judgment of 9 October 2003, the Court recalls that – and I quote – "in the Convention case-law relating to expulsion and extradition measures, the main emphasis has consistently been placed on the 'family life' aspect, which has been interpreted as encompassing the effective 'family life' established in the territory of a Contracting State by aliens lawfully resident there, it being understood that 'family life' in this sense is normally limited to the *core family*"[6]. It follows, in this case, that the existence of family life could not be relied on by the applicants in relation to their elderly parents since they were adults who did not belong to the core family and who have not been shown to have been dependent members of the applicants' family[7].

However, it should be observed that in more recent cases, some judges expressed objections. In the *Shevanova v. Latvia* judgment of 15 June 2006, the Court held that the existence of "family life" cannot be relied on by the applicant in relation to her adult son: since the relations between adult children and their parents do not belong to the core family, they do not necessarily benefit from the protection of Article 8 when there are no links of dependence other than normal, emotional ones[8]. Judge Spielmann, in his partly concurring opinion, considers – rightly to my mind – that "to give greater importance to the link of dependence to the detriment of the normal, emotional links criteria, in order to determine the existence of a 'family life', seems (…) very artificial". It appears inconceivable to him "to attach so little weight to

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3. S. SAROLIA, « Quelles vies privé et familiale pour l'étranger ? Pour une protection non discriminatoire de ces vies par l'article 8 de la Convention européenne des droits de l'homme », *Revue québécoise de droit international*, Vol. 13, No. 1, 2000, p. 266: "Ce reproche peut paraître relever uniquement de la rhétorique et rien ne changer sur le fond. Et pourtant, l'analyse que l'on peut faire du respect d'un droit sera fort différente rente selon que l'on part du principe que le respect de ce droit est la règle et les tempéraments à celui-ci l'exception ou que l'on considère d'emblée que le respect du droit en question est déjà une exception à une autre règle qui serait le principe."

4. Eur. Comm. H.R., appl. no. 6315/73, *X. v. Federal Republic of Germany* decision of 30 September 1974, Decisions and Reports 1, p. 75.

5. ECtHR, *Lebbink v. the Netherlands* judgment of 1 June 2004, § 36; ECtHR, *X., Y. and Z. v. the Netherlands* judgment of 22 April 1997, §§ 36-37.

6. ECtHR (GC), *Slivenko v. Latvia* judgment of 9 October 2003, § 94.

7. *Ibid.*, § 97.

8. ECtHR, *Shevanova v. Latvia* judgment of 15 June 2006, § 67. The case has been referred to the Grand Chamber which, having found that the material facts complained of by the applicant had ceased to exist, decided by a judgment of 7 December 2007 to strike the application out of its list of cases. See also, among others, ECtHR, *Kwakye-Nti and Dufie v. the Netherlands* decision of 7 November 2000, p. 8.

the emotional links existing between a mother and her son by excluding such relations from the 'family life' orbit. Such a case-law, which certainly seems confined to the field of expulsion, singularly weakens the notion of 'family life'"[9]. In the *Kaftailova v. Latvia* judgment of 22 June 2006, Judge Spielmann joined by Judge Kovler repeated the same argument in a situation where the Court held that the expulsion measure could not have any effect on the family life of the applicant since her daughter was twenty-two years old and there were no specific dependence ties other than normal emotional bonds[10].

As far as *private life* is concerned, in most of the expulsion and / or exclusion cases, the Court used to deal with family and private life under the same heading, without a clear-cut distinction between these two aspects. However, in the *Slivenko v. Latvia* judgment of 9 October 2003, the Court observed that the applicants were removed from the country where they had developed, since birth, "the network of personal, social and economic relations that make up the private life of every human being. (…) In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their 'private life' (…) within the meaning of Article 8 § 1 of the Convention"[11].

Later, despite the fact that the Court found no violation in the case, the *Üner v. the Netherlands* judgment of 18 October 2006 encompasses an interesting development on private life, which can now claim to have an autonomous existence or reality. The Court observes "that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of Article 8. However, as Article 8 also protects *the right to establish and develop relationships with other human beings and the outside world* (see *Pretty v. the United Kingdom*, judgment of 29 April 2002, § 61) and can sometimes embrace aspects of an individual's social identity (see *Mikulić v. Croatia*, judgment of 7 February 2002, § 53), it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of '*private life*' within the meaning of Article 8. Regardless of the existence or otherwise of a 'family life', therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the 'family life'" and to find a violation in this respect "rather than the 'private life' aspect"[12].

One final question should be raised. When the family or private life is "in mutation". It seems to me that the methodology of the Court is now well established: the relevant facts in order to establish the existence or reality of family / private life are those which exist at the time when the expulsion measure is definitive[13]. It follows, on the one hand, that family / private life which would have been created after this moment cannot be taken into consideration and, on the other hand, that the fact that family life has ceased to exist afterwards (divorce, a.s.o.) cannot have any detrimental effect[14].

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9. Partly concurring opinion of Judge Spielmann, points 8 and 9.

10. ECtHR, *Kaftailova v. Latvia* judgment of 22 June 2006. The case has been referred to the Grand Chamber which, having found that the material facts complained of by the applicants had ceased to exist, decided by a judgment of 7 December 2007 to strike the application out of its list of cases.

11. ECtHR (GC), *Slivenko v. Latvia* judgment of 9 October 2003, § 96.

12. ECtHR (GC), *Üner v. the Netherlands* judgment of 18 October 2006, § 59.

13. ECtHR, *Yilmaz v. Germany* judgment of 17 April 2003, § 45.

14. ECtHR, *Yildiz v. Austria* judgment of 31 October 2002, § 44: "It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to

3. The right enshrined in Article 8 is not an absolute right: some **interferences** by the public authority are allowed under the strict conditions laid down in Article 8 § 2.

Among these conditions is the *legal basis*. In this respect, the *Al-Nashif v. Bulgaria* judgment of 20 June 2002 is worth quoting. In this case, it was undisputed that the applicant was a stateless person – of Palestinian origin – lawfully resident in Bulgaria. His residence permit was revoked and he was deported to Syria on the grounds of his religious activities, which were considered a threat to national security. As far as the concept of national security is concerned, was this interference in his family life "in accordance with the law"? The Court reiterates that the phrase 'in accordance with the law' implies that the legal basis must be 'accessible' and 'foreseeable'. Nevertheless, it "considers that the requirement of 'foreseeability' of the law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to deport an individual on national security grounds. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance. There must, however, be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse."[15] "Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information"[16]. Finally, "the individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention."[17]

In reality, one side-effect of this judgment and also of the *Kaya v. Romania* judgment of 12 October 2006 is to reintroduce, through Article 8, the guarantees of a fair trial of Article 6 of the Convention[18]. The same reasoning led to a violation of Article 1 of Protocol No. 7 to the Convention, which contains certain procedural safeguards relating to expulsion of aliens, in that the law in accordance of which the deportation order had been issued did not satisfy the requirements of the Convention[19].

The *Liu v. Russia* judgment of 8 December 2007 goes even further. This judgment is noteworthy insofar as, with regard to the "quality of law" requirements, the Court concluded that "the legal provisions on the basis of which the (…) applicant's deportation was ordered did not provide for the adequate degree of protection against arbitrary interference"[20]. Further, as far as judicial scrutiny is concerned, the Court noted that, without access to the information held by the police,

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make its assessment in the light of the position when the residence ban became final. Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. Nor can it be the Court's role to speculate as to whether there is – as claimed by the applicants – a causal link between the contested measure and the subsequent developments, in particular the first and second applicants' divorce".

15. ECtHR, *Al-Nashif v. Bulgaria* judgment of 20 June 2002, §§ 121-122. See also ECtHR, *Musa and Others v. Bulgaria* judgment of 11 January 2007, §§ 60 to 63.

16. ECtHR, *Al-Nashif v. Bulgaria* judgment of 20 June 2002, § 123.

17. *Ibid.*, § 124.

18. ECtHR, *Kaya v. Romania* judgment of 12 October 2006, §§ 41-43.

19. *Ibid.*, § 57.

20. ECtHR, *Liu v. Russia* judgment of 8 December 2007, § 68.

the courts were not in a position to assess whether a non-national constitutes a threat to national security. Hence, there were insufficient safeguards against arbitrary exercise of the wide discretion conferred by domestic law on the Ministry of Internal Affairs[21].

Finally, it should be observed that in the *Aristimuno Mendizabal v. France* judgment of 17 January 2006, the Court concludes that the period of over fourteen years taken by the French authorities to issue the applicant with a residence permit had not been in accordance with the law, whether the "law" in question was French or Community law[22].

As far as the *reasons* are concerned, the *C.G. and Others v. Bulgaria* judgment of 24 April 2008 concerned the deportation and ten-year exclusion order imposed on a Turkish immigrant, married to a Bulgarian national and having a Bulgarian child, on the ground that his participation in drug trafficking represented a serious threat to national security, even though no criminal proceedings had been brought against him. This judgment is of interest in that it limits the meaning of the expression "national security" in Article 8 § 2 of the Convention and Article 1 § 2 of Protocol No. 7. It excludes drugs-related offences as justification for interference with the right to respect for private and family life of an alien against whom deportation is ordered or as justification for depriving him of the procedural safeguards afforded to aliens prior to execution of such a measure[23].

Finally, as far as the *necessity test* is concerned, the Court must proceed to balance two sets of competing interests, the right of individuals to private and family life on the one hand and the interests of the community on the other. As H. Lambert pointed out, "it is a difficult exercise to carry out because it requires the Court (…) to assess the nature of the interference by the public authority and its effect on the individual"[24]. However, it is primarily for the States to assess the actual existence of private or family life and the necessary requirements that the interferences do affect these links, the task of the European Court being limited to a subsidiary organ of control[25].

4. While Article 8 of the Convention does not provide an absolute right for individuals – and more especially includes no right, as such, to establish one's family life in a particular country[26] –, it does impose certain **obligations** on States.

In the light of the Court's reaffirmation of the dynamic principle of interpretation of the Convention, the State's obligations are gradually growing. Increasingly, a requirement that States take action is now being added to the traditional requirement that they be passive. This requirement takes the form of **positive obligations** for the State to adopt administrative or judicial measures to protect human rights[27]. "Although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life. Thus, where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be developed and take measures that will enable the family to be reunited"[28]. So, for example, in the field of immigration, there is the question of the State's positive obligation to accept the members of the family on its territory, thus the question of

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21. *Ibid.*, § 63.

22. ECtHR, *Aristimuno Mendizabal v. France* judgment of 17 January 2006, § 79.

23. ECtHR, *C.G. and Others v. Bulgaria* judgment of 24 April 2008, §§ 43 and 78.

24. H. LAMBERT, "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", *International Journal of Refugee Law*, Vol. 11, No. 3, 1999, p. 428.

25. *Ibid.*, footnote 1.

26. ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment of 28 May 1985, § 68; ECtHR, *Gól v. Switzerland* judgment of 19 February 1996, § 38.

27. P. VAN DIJK, F. VAN HOOF, A. VAN RIJN et L. ZWAAK (eds.), *Theory and Practice of the European Convention on Human Rights*, Antwerp / Oxford, Intersentia, 4th edition, 2006, p. 706.

28. ECtHR, *Mehemi v. France (no. 2)* judgment of 10 April 2003, § 45.

family reunification[29].

In turn, positive obligations can be *substantive* but also *procedural.*

The *Ciliz v. the Netherlands* judgment of 11 July 2000 is interesting in so far as it constitutes a good example of a *procedural positive obligation*. "Whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8"[30]. In this case, the applicant had two sets of proceedings running at the same time, in order firstly to have a right of access to his son and secondly to obtain a prolongation of his residence permit. While the first proceedings were still pending, he was expelled. He complained that the refusal by the Dutch authorities to extend his residence permit infringed his right to family life. In determining whether the interference was necessary in a democratic society, in the view of the Court, "the authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, and more importantly, they denied the applicant all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance. (…). The authorities, through their failure to coordinate the various proceedings affecting the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed"[31]. "In sum, the Court considers that the decision-making process concerning both the question of the applicant's expulsion and the question of access did not afford the requisite protection of the applicant's interests as safeguarded by Article 8. The interference with the applicant's right under this provision was, therefore, not necessary in a democratic society. Accordingly, there has been a breach of that provision"[32].

5. Finally, as we all know, the control mechanism of the Court is a judicial one and the Court may receive applications from any person or group claiming to be the **victim** of a violation of the Convention (Article 34).

In this respect, the admissibility decision *Ariztimuno Mendizabal v. France* of 21 June 2005 is interesting. In this case, the applicant was issued with a series of temporary residence permits each valid for one year over a fourteen-year period. After such a long period, she eventually obtained a ten-year residence permit. Does this amount to reparation? The Court considers not, in so far as the alleged violation results from *the situation of precarity and uncertainty* experienced by the applicant over a long period. It follows that the authorities neither recognized nor repaired the violation alleged by the applicant and that the latter can still claim to be a victim[33].

II. Various situations

It seems to some authors that "the Court has introduced a distinction between, on the one hand, cases of entry of non-citizens into the territory of a contracting State (…) and, on the other

29. See S. SAROLIA, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*, *op. cit.*, p. 225, no. 199: "L'immigration et l'installation dans un pays tiers entraînent la création d'attaches sociales et, ou familiales. Des liens se tissent entre l' étranger et le pays dans lequel il est installé. L'intégration d'un étranger dans un pays tiers pose la question de l'effet créateur de droits qui pourrait être attaché à cette intégration. Les liens que l'étranger a noués dans le pays de sa résidence font-ils naître dans son chef le droit à ce qu'ils ne puissent être rompus ? Par ailleurs, les liens familiaux permettent-ils de se prévaloir d'un droit à entrer sur le territoire ou résident les membres de la famille où à s'y installer ? La première question a trait aux obligations négatives de l'Etat de résidence qui se verrait interdire l'éloignement des étrangers 'intégrés'. La seconde concerne les obligations positives qui pourraient être assignées à un Etat de permettre l'entrée ou le séjour sur son territoire à un étranger qui y a des liens".

30. ECtHR, *Ciliz v. the Netherlands* judgment of 11 July 2000, § 66.

31. *Ibid.*, § 71.

32. *Ibid.*, § 72.

33. The Court rendered its judgment on 17 January 2006 and held that there had been a violation of Article 8 ECHR. See *supra*.

hand, cases of removal resulting in the break up of family life[34]. More precisely, a constant case-law would reveal "that, in cases of entry, the Court will usually balance the individual's rights against the community's interest at the early stage of establishing an interference under article 8 § 1. In cases of removal, however, it will only balance the individual's rights against the community's interests at the later stage of considering whether or not the measure was necessary under article 8 § 2"[35]. I would add that, in both situations, the case-law of the Court is becoming rather rigorous[36]. As K. Reid says, the "Convention organs have not been immune to the general atmosphere of 'Fortress Europe' [and] given the current political sensitivity of the issues, [they] are unlikely to give vent to much creative interpretation"[37].

1. The entry into the territory

a) The residence permit

In the *Aristimuno Mendizabal v. France* judgment of 17 January 2006, the Court considers that the main point lies in the fact that the applicant, as a Community national, had been directly entitled under Community law to reside in France and be issued with a "residence permit for a national of an EEC Member State", valid for five years"[38]. Now, the Court of Justice of the European Communities considers, according to constant case-law, that the delivery of such a document is merely "stating the fact that" the right to reside to which Community nationals are entitled to in direct accordance with the Treaty of Rome and secondary legislation, and is not similar to a permit[39]. The Court therefore considers that Article 8 must, in this case, be interpreted in the light of Community law and in particular of Member States' obligations regarding the rights of entry and residence of Community nationals[40]. As observed by a commentator, "so, by holding by six votes to one that there has been a violation as a result of an interference by the French State [consisting, according to the Court, in the protracted failure to issue the applicant with a residence permit] with the right to respect for private and family life, this interference not being prescribed by law – whether the law in question be French or Community law (§ 79) – the Strasbourg Court is unfailingly and efficaciously, alongside the Court of Justice of the European Communities, the judge of breaches of Community law."[41]

The *Niedzwiecki* and *Okpisz v. Germany* judgments of 25 October 2005 concern, for one of the very first times, the question of the violation of Article 14 in conjunction with Article 8 of the Convention. The applicants complained that they were refused child benefit because foreigners were only entitled to child benefits if in possession of an unlimited residence permit or a provisional residence permit. They complained that this refusal amounted to discrimination contrary to Article 14 in conjunction with Article 8. Like the Federal Constitutional Court, the European Court of Human Rights does not discern sufficient reasons justifying the different treatment with regard to child benefit of foreigners who are in possession of a stable residence permit on one hand and those who are not, on the other. It therefore holds that there had been a violation of Article 14 in conjunction with Article 8.

b) The family reunification

It seems to me that until now the case-law of the Court was laid down as follows: Article 8 cannot be considered as imposing on a State a general

34. H. LAMBERT, "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", *op. cit.*, p. 429.

35. *Ibid.*

36. See N. ROGERS, "Immigration and the European Convention on Human Rights: Are new principles emerging", *E.H.R.L.R.*, 2003, pp. 53 et seq.

37. K. REID, *A practitioner's guide to the European Convention on Human Rights*, London, Sweet & Maxwell, 2nd edition, 2004, p. 367.

38. ECtHR, *Aristimuno Mendizabal v. France* judgment of 17 January 2006, § 67.

39. *Ibid.*, § 68.

40. *Ibid.*, § 69.

41. L. BURGORGUE-LARSEN, "Chronique de jurisprudence européenne comparée (2006)", *Revue du droit public*, n° 4-2007, p. 1109.

obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory[42]. However, having said that, in o der to establish the scope of the respondent State's obligations, the *facts* of the case must be considered. In other words, the extent of the State's obligations to admit on its territory relatives of aliens having been granted residence rights will vary according to the particular circumstances of the persons involved and the general interest. Nevertheless, a difference can be made between the situation of spouses and children. Some authors are critical. "Yet, confronted more and more often with the issue of family reunification because of the fact that many national legislations and administrative practices aimed at making the regulation of family-based immigration a priority, the jurisprudence of the European Court of Human Rights did not follow its reasoning through to its logical conclusion. The European Court is reluctant to push the logic as far as to fundamentally question the dogma of the sovereignty of States by obliging them to accept the entry of relatives of settled migrants. There are two reasons for that. The first one is textual: Article 8 § 2 of the European Convention on Human Rights authorises an interference with the exercise of the right to live a normal family life on a ground directly related to migration policies, that is 'the economic well-being of the country' which stands next to the standard grounds of public order. The other is technical and lies in the particular role devoted to the European judge and his dependence upon the circumstances of individual cases. So, at the risk of being more audacious when an integrated legal system such as the Community legal order offered it the possibility, the Court did not proclaim the existence of a subjective right to family reunification"[43].

For *spouses*, it is relevant in the Court's case-law, on the one hand, "whether there are *obstacles* to establishing the marital home elsewhere (in the country of the spouse or the applicant's own origin) or whether there are any *special reasons* why they should not be expected to do so" and, on the other hand, whether "the couples were *aware* of their problematic immigration status at the time of the marriage"[44]. So a large number of cases have been rejected using these criteria, with reference to the lack of obstacles to the spouses living elsewhere and their knowledge of the precarious situation beforehand. Furthermore, the Court rarely accepted the special circumstances test, even on health grounds.

For *children*, in many judgments, the Court deemed that consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with his or her children who, in the meantime, have been left behind in their country of origin or a third country, and that it may be unreasonable to force the parent to choose between giving up the position which he or she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company which constitutes a fundamental element of family life. The issue must therefore be examined not only from the point of view of immigration and residence, but also with regard to the mutual interests of the applicants. However, there must be shown to be substantial family ties, which may be difficult when the children have lived at a distance for some time: this was the situation in the *Ahmut v. the Netherlands* judgment of 28 November 1996, where the Court found no violation[45]. Where a child previously living apart from a parent outside a Contracting State is refused entry, violations may only conceivably arise where the child has no practical alternative. Moreover, the fact that the family is able to return to join the child

42. ECtHR, *Ahmut v. the Netherlands* judgment of 26 November 1996, § 67; ECtHR, *Gól v. Switzerland* judgment of 19 February 1996, § 96.

43. H. LABAYLE, "Le droit des étrangers au regroupement familial, regards croisıs du droit interne et du droit européen", *op. cit.*, p. 104.

44. K. REID, *A practitioner's guide to the European Convention on Human Rights*, *op. cit.*, p. 379.

45. ECtHR, *Ahmut v. the Netherlands* judgment of 28 November 1996; see also ECtHR, *P.R. v. the Netherlands* decision (inadmissible) of 7 November 2000; ECtHR, *J.M. v. the Netherlands* decision (inadmissible) of 9 January 2001.

may also be a decisive factor, as in the *Gül v. Switzerland* judgment of 19 February 1996[46].

Do we observe a certain evolution of the case-law of the Court? In the *Sen v. the Netherlands* judgment of 21 December 2001, the Court considers, contrary to what it has considered in the *Ahmut* case, that in the present case there is a *major obstacle* to the Sen family's return to Turkey. The first two applicants have settled as a couple in the Netherlands, where they have been legally resident for many years and where a second child was born in 1990, and a third one in 1994. These two children have always lived in the Netherlands, in the cultural environment of this country and they go to school there. They therefore have few or no links with their country of origin other than their nationality and there were thus, as far as they were concerned, obstacles preventing them from developing family life in Turkey. Under these conditions, having their eldest daughter joining them in the Netherlands would constitute the most adequate means to develop family life with her, all the more so since there existed, considering her young age, a particular need for her integration in her parents' family unit. Consequently, the Court concludes that in giving the applicants *no other option* than to choose between abandoning the situation they had acquired in the Netherlands or giving up the company of their eldest daughter, the State failed to strike a fair balance between the applicants' interest and their own interest in controlling immigration[47]. In other words, where a child previously living apart from a parent outside a Contracting State is refused entry, violations may conceivably arise where the child has no practical alternative.

However, the case of *Chandra and Others v. Netherlands* was declared inadmissible on 13 May 2003. The applicant settled in the Netherlands with a partner, leaving her four children, who were then 12, 11, 8 and 7 years old respectively, in Indonesia. Here the Court recalls that Article 8 does not guarantee a right to choose the most suitable place to develop family life. Moreover, the Court is not persuaded by the applicants' claim that they would be unable to develop this family life in Indonesia. However, the children had been living in the Netherlands without a permanent residence permit since 1997. The Court added that the fact that the children had been staying with their mother in the Netherlands did not impose a positive obligation on the State to allow them to reside there since they had entered the Netherlands only for visiting purposes. Having chosen not to apply for a provisional residence visa from Indonesia prior to travelling to the Netherlands, the applicants were not entitled to expect that, by confronting the Netherlands authorities with their presence in the country as a *fait accompli*, any right of residence would be conferred on them.

In the *Ramos Andrade v. the Netherlands* inadmissibility decision of 6 July 2004, the applicant complained under Article 8 of the Convention that residence in the Netherlands, for the purposes of family reunion, was refused to her daughters by the Netherlands authorities, due to which they could not enjoy family life together. Here the Court is not persuaded by the applicant's argument that her case should not be distinguished from the case of *Sen v. the Netherlands*. On the contrary, it is to be noted that, unlike the parents in the *Sen* case, the applicant does not have children who were born in the Netherlands, who are dependent on her and who have few or no ties with their mother's country of origin[48].

In the *Haydarie and Others v. the Netherlands* inadmissibility decision of 20 October 2005, the Court seems to have added a new excluding criterion when it "does not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that they have sufficient independent and lasting income, not being on welfare benefits, to provide for the basic costs of subsistence of his or her family members with

46. ECtHR, *Gül v. Switzerland* judgment of 19 February 1996.

47. ECtHR, *Sen v. the Netherlands* judgment of 21 December 2001, §§ 40 and 41.

48. ECtHR, *Ramos Andrade v. the Netherlands* decision of 6 July 2004, p. 8.

whom reunion is sought"[49].

The *Nolan and K. v. Russia* judgment of 12 February 2009 touches on a particular aspect of the right to family reunification. The Court, relying in particular on the best interest of the child, establishes definitely a refined but very explicit form of a right to family reunification. The Court did not modify its former jurisprudence insofar as, not more than before, does it consider Article 8 of the Convention to entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. However, very particular attention is paid in this case to the effective protection of the child and to the joint interest of children and parents to be reunited[50]. The applicant, the sole parent of a ten-months-old child, was the subject of an exclusion order from Russian territory. The order was enforced without notifying the applicant in advance and, depriving him of an opportunity to take administrative measures to prepare for the child departure, resulted in a physical separation of the applicant from his son which lasted approximately ten month. It is interesting to note that the Court establishes, not the right to family reunification on one territory in particular, but nevertheless a definite right as far as the right to family reunification is concerned. The criterion retained is less that of the strength of the bonds already existing between the father and his child than the vulnerable age of the latter. Regardless of the question of the determination of the place where they should be reunited, the Court attaches importance to the harmful consequences which too long a separation from his father would have for the child. The obligation on Russia is not a negative obligation not to expel in order to avoid separation but rather a positive obligation, while implementing an expulsion measure, to take into account the right of the family to be reunited. The details of implementation of an expulsion measure are thus conditioned in that case to the respect of the right to family reunification.

Against this background, an additional methodological question could be raised, that is *whether the national authorities and courts should determine the balance in these cases in a lesser or greater marginal way*?

The answer of the Court can be found in its recent judgments in the cases of *Tuquabo-Tekle and Others v. the Netherlands* and *Rodrigues da Silva and Hoogkamer v. the Netherlands* finding that the respondent State violated article 8 of the Convention having failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other[51]. I think that in these cases the problem lies maybe not so much in the manner of determining the balance between the two interests but rather that *the national authorities did not consider all the relevant facts in the case*. In fact, the excessive application of standard formulas in these cases leads the Dutch authorities to strike balances based on incomplete knowledge of the facts: I think that is the lesson which can be drawn from the recent case-law. By ignoring the pertinent facts, the Dutch Government is thus establishing a balance between interests which is based on incorrect premises.

So we can say that the problem is not to define whether the national authorities have to strike a fair balance in a lesser or greater marginal way, but rather to define more precisely the factual background taking into account all the relevant facts, judicial or not, which can thus allow a better overview of the case. By avoiding an "excessive formalism", the national authorities will be able to strike a fair balance built on a solid and global comprehension of the facts.

2. The removal from the territory

Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-

49. ECtHR, *Haydarie and Others v. the Netherlands* decision of 20 October 2005, p. 13.

50. ECtHR, *Nolan and K. v. the United Kingdom* judgment of 12 February 2009, § 88.

51. ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, judgment of 1 December 2005, § 52; ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, judgment of 31 January 2006, § 44.

law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision[52].

a) For **refugees or asylum-seekers**, expulsion could raise an Article 8 issue in two different directions: in the country where the alien lives when he is expelled (country of origin) and in the country to which he will be expelled (country of destination).

As far as the *country of origin* is concerned, the inadmissibility decision *Ghiban v. Germany* of 16 September 2004 is interesting. The applicant, previously a Romanian national who became stateless, complains about the illegal nature of his expulsion, which would have been ordered without a legal basis. He stresses that he no longer has any bond with Romania since he became stateless, that he legally immigrated to Germany, that he didn't commit any offence, that he has been living there for fourteen years and has all his ties there. The Court recalls that Article 8 cannot be interpreted as containing a general ban on expulsion of a non-national by the simple fact that the latter has been staying for a while in the territory of a Contracting State.

As far as the *country of destination* is concerned, the Court recalls that Article 8 does not go so far as to impose on States a general obligation to provide refugees with financial assistance to enable them to maintain a certain standard of living. That seems to me the gist of the *Müslim v. Turkey* judgment of 26 July 2005, in which the applicant submitted that since his entry into Turkey and regardless of his provisional refugee status, he is condemned to live in precarious conditions, as the Turkish authorities refuse to provide him with the economic, social and medical infrastructures designed for asylum seekers. For the reason stated above, the Court deems that the applicant's allegation does not withstand the test under Article 8[53]. Moreover, expulsions which threaten to have significant adverse effects on an applicant's physical or mental health may raise issues under Article 8 in its aspect of physical and moral integrity. But we should acknowledge that not many applicants succeed by raising this argument. As, for instance, the *Bensaod v. the United Kingdom* judgment of 6 February 2001 where the Court found that there was not sufficient risk.

b) Regarding the **expulsion of long-term residents**, as Cl. Ovey points out, "cases involving the countries of central and eastern Europe are throwing up new sets of circumstances for the Court to consider in this context"[54]. The *Slinveko v. Latvia* judgment of 9 October 2003 concerned members of the family of a Soviet military officer who had been stationed in Latvia[55]. The applicants had lived in Latvia for many years. Following the gaining of independence by Latvia in 1991, the applicants were entered in the register of Latvian residents as 'ex-USSR citizens'. But after the entry into force of the Treaty of 1994 on the withdrawal of Russian troops from Latvia, the applicants were required to leave the country. The Court (Grand Chamber), in a majority decision, concluded that there had been an interference with the applicants' private life and their enjoyment of their home. It decided that removal under the terms of a Treaty could constitute removal in accordance with the law. Furthermore, it could be said to serve the legitimate aim of protecting national security when viewed in the wider context of the constitutional and international arrangements following the gaining of independence by Latvia. In considering whether the interference was necessary in a democratic society, the Court drew a distinction between serving military personnel, for whom movement from one country to another was simply a matter of military posting, and retired military personnel. The Court's ultimate conclusion is that the Latvian authorities had applied the removal plan in a mechanical

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52. For the previous case-law, see A. SHERLOCK, "Deportation of Aliens and Article 8 ECHR", *E.L.Rev.*, 1998, pp. 62 et seq.

53. ECtHR, *Müslim v. Turkey* judgment of 26 July 2005, § 85.

54. C. OVEY and R. WHITE, *The European Convention on Human Rights*, Oxford, Oxford University Press, 4th edition, 2006, p. 267.

55. ECtHR (GC), *Slivenko v. Latvia* judgment of 9 October 2003.

way by failing to give appropriate weight to individual circumstances (as for instance the good integration of the applicants into Latvian society)[56].

The *Darren Omoregie and Others v. Norway* judgment of 31 July 2008 also illustrates the steadfastness of the Court's jurisprudence. Yet, it can be distinguished from the previous cases insofar as the first applicant's wife, though being an applicant, is not affected by the expulsion order. With the exception of the criterion relating to the applicant's immigration status, the criteria retained by the Court as far as Mrs Omoregie is concerned are, however, similar to those set out in the *Rodrigues da Silva and Hoogkamer v. the Netherlands* judgment of 31 January 2006[57].

c) Turning now to an **expulsion measure** or an **exclusion order following a criminal conviction** (on the grounds of criminal behaviour), the position of the Court is that the "Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued"[58]. More precisely, as P. van Dijk points out, in "the case of *deportation* of foreigners who have committed serious crimes, the ground of prevention of disorder or crime mentioned in the second paragraph of Article 8 in general will provide sufficient justification. However, the Court has indicated that this will not easily be the case if the foreigner concerned is a person of the so-called 'second generation'"[59].

Today, we can say that even if Article 8 of the Convention does not contain an absolute right for any category of alien not to be expelled, the Court's case law nevertheless demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision. In which cases and according to which criteria? That is the question.

In the *Boultif v. Switzerland* judgment of 2 August 2001, the Court elaborated the *relevant criteria* which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. Given the centrality of those criteria to subsequent cases, it is worth listing them in full: the nature and seriousness of the offence committed by the applicant[60] and, in this respect, the drug-related offences are very often considered as serious by the Court[61]; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family

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56. *Ibid*., §§ 123-124.

57. ECtHR, *Darren Omoregie and Others v. Norway* judgment of 31 July 2008, § 57.

58. ECtHR (GC), *Üner v. the Netherlands* judgment of 18 October 2006, § 54.

59. P. VAN DIJK, F. VAN HOOF, A. VAN RIJN et L. ZWAAK (eds.), *Theory and Practice of the European Convention on Human Rights*, *op. cit*., p. 709. On the second-generation migrants, see M.-B. DEMBOUR, "Human Rights Law and National Sovereignty in Collusion: the Plight of Quasi-Nationals at Strasbourg", *Netherlands Quarterly of Human Rights*, 2003, pp. 63 et seq.; R. CHOLEWINSKI, "Strasbourg's 'Hidden Agenda'?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights", *Netherlands Quarterly of Human Rights*, 1994, pp. 287 et seq.

60. In the *Ndangoya v. Sweden* decision of 22 June 2004, the applicant was convinced of related to engaging in sexual conduct without disclosing to his partners that he was HIV positive. Whilst the Court did not pronounce itself on the risk of recidivism, even assuming that the applicant would refrain from further hazardous behaviour, the serious nature of the crimes was enough to justify the applicant's expulsion.

61. ECtHR, *Benhebba v. France* judgment of 10 July 2003, § 35. See also ECtHR, *Rahmani v. France* decision of 24 June 2003; ECtHR, *Headley v. the United Kingdom* decision of 1 March 2005; ECtHR, *McCalla v. the United Kingdom* decision of 31 May 2005.

situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled[62].

The main purpose of this check-list is to "frame the debate" and to make sure that the applicants are treated on an equitable basis[63]. *A contrario*, it cannot be used in a mechanical way and, at the end of the day, the final decision will always depend on the particular circumstances of the cases.

In the *Yilmaz v. Germany* judgment of 17 April 2003, the Court has added a new criterion: the length of the expulsion measure or the exclusion order. In this case, the Court did not contest the proportionality of the measure in itself but it found a violation of Article 8 as to the length of the measure, which was indefinite, without limitation in time. *A contrario*, a temporary measure would have been sufficient for the implementation of the aims pursued[64].

Finally, in the case of *Üner v. the Netherlands*, the Court decided to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment: *the best interests and well-being of the children*, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the *solidity of social, cultural and family ties* with the host country and with the country of destination. As to the first point, the Court notes that this is already reflected in its existing case law: for instance, in the *Keles v. Germany* judgment of 2005 and in the *Sezen v. the Netherlands* judgement of 2006[65]. Moreover, it is in line with the Committee of Ministers' Recommendation Rec (2002)4 on the legal status of persons admitted for family reunification. As to the second point, it is to be noted that, although the applicant in the case of *Boultif* was already an adult when he entered Switzerland, the Court has held the "*Boultif* criteria" to apply all the more so (à *plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age[66]. Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger their ties with that country are and the weaker the ties with the country of their nationality will be. "Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens

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62. *A contrario*, in the *Amrollahi v. Denmark* judgment of 11 July 2002, the Court found that to expel the applicant to Iran would be in breach of Article 8 because this would cause the applicant's Danish wife and Danish children "obvious and serious difficulties" to live in Iran (§§ 40 et seq.). As K. Reid observes, this "appears to put an unfortunate emphasis on the ethnic or racial origins of the spouse but would still appear to be only one factor in the balancing exercise against legitimate immigration interests" (K. Reid, *A practitioner's guide to the European Convention on Human Rights*, *op. cit.*, p. 380).

63. S. Van Drooghenbroeck, *La Convention europ-ıenne des droits de l'homme. Trois annıes de jurisprudence de la Cour europıenne des droits de l'homme, 2002-2004*, Volume 2, Articles 7 ŭ 59 de la Convention, Protocoles additionnels, Brussels, Larcier, Les dossiers du Journal des tribunaux, n° 57, 2006, p. 49.

64. ECtHR, *Yilmaz v. Germany* judgment of 17 April 2003, § 48; see also ECtHR, *Benhebba v. France* judgment of 10 July 2003, § 37.

65. ECtHR, *Keles v. Germany* judgment of 27 October 2005, §§ 64 ("The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different *curriculum* in Turkish schools.") and 66; ECtHR, *Sezen v. the Netherlands* judgment of 31 January 2006, §§ 47 and 49.

66. See ECtHR, *Mokrani v. France* judgment of 15 July 2003, § 31.

who have spent most, if not all, their childhood in the host country, were brought up there and received their education there"[67].

We should now address the very sensitive issue of the *double penalty*, where the Court was faced with conflicting views. Indeed, the Parliamentary Assembly Recommendation 1504(2001) advocates that long-term immigrants, who have committed a criminal offence should be subjected to the same ordinary-law procedures and penalties as are applied to nationals and that the "sanction" of expulsion should be applied only to particularly serious offences affecting State security of which they have been found guilty. Moreover, whether the decision is taken by means of an administrative measure, or by a criminal court, a measure of this kind, which can shatter a life or lives, constitutes as severe a penalty as a term of imprisonment, if not more severe. That is why some States do not have penalties of this kind specific to foreign nationals, while others have largely abolished them in recent times.

Nevertheless, in the *Üner v. the Netherlands* judgment of 18 October 2006, the Court considers that, even if a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the above-mentioned power of the Contracting States to expel aliens[68] for one or more of the reasons set out in paragraph 2 of Article 8 of the Convention. It is, moreover, of the view that a decision to revoke a residence permit and/or to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal-law penalty does not constitute a double punishment, either for the purposes of Article 4 of Protocol No. 7 or more generally. Contracting States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society – provided of course that, to the extent that those measures interfere with the rights guaranteed by Article 8 paragraph 1 of the Convention, they are necessary in a democratic society and proportionate to the aim pursued. Such administrative measures are to be seen as *preventive rather than punitive in nature*[69]. Whether we like it or not – we are now faced with this judgment of the Grand Chamber of the Court which – provisionally – closes the door on this issue of the double penalty. We have, however, an interesting judgment, *Sayoud v. France* of 6 July 2007, which shows – to my mind – the relativity of the *rationale* of the double penalty grounded on nationality. After the applicant had been expelled to Algeria following a criminal conviction because of his non-national status, it was discovered that, in fact, he had French nationality and that the expulsion was simply a mistake. At once, the concern about protection of society has disappeared…

In casu, in the *Üner* judgment, as to the criminal conviction which led to the impugned measures, "the Court is of the view that the offences of manslaughter and assault committed by the applicant were of a very serious nature". Furthermore, "taking his previous convictions into account (…), the Court finds that the applicant may be said to have displayed criminal propensities"[70]. I have strong doubts about this new criteria used by the Court, "criminal propensities", which is the most intriguing criminology concept. In reality, this criterion gives to the State a very wide margin of appreciation. It is quite clear that the Court is no more in line with the judgment *Beldjoudi v. France* of 26 March 1992.

Finally, as far as *expulsion order against a minor* is concerned, in the *Jakupovic v. Austria* judgment of 6 February 2003, the Court stated that very weighty reasons had to be put forward to justify the expulsion of a young person (sixteen years old in that case), particularly given the history of conflict in the country of origin and no evidence of

67. ECtHR (GC), *Üner v. the Netherlands* judgment of 18 October 2006, § 58.

68. See ECtHR, *Moustaquim v. Belgium* judgment of 18 May 1991, § 49.

69. ECtHR (GC), *Üner v. the Netherlands* judgment of 18 October 2006, § 56. See also ECtHR (GC), *Maaouia v. France* judgment of 5 October 2000, § 39.

70. *Ibid.*, § 63.

close relatives remaining there. It gave close scrutiny to the boy's criminal record and, giving weight to the absence of any element of violence, found the expulsion would be a disproportionate interference with the applicant's right to respect for family and private life[71]. In the *Radovanovic v. Austria* judgment of 22 April 2004, the Court considered also "that, in the circumstances of the (…) case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure"[72].

Nevertheless, in the *Hizir Kilic v. Denmark* inadmissibility decision of 22 January 2007, the applicant – who was born in Denmark – was nineteen years old when he was convicted for attempted robbery, aggravated assault and manslaughter committed during a probation period imposed by a previous conviction, as well as aggravated assault, robbery and attempted extortion committed during the applicant's detention on remand. The order to expel the applicant for an indefinite time was imposed after he had been sentenced to a prison sentence of ten years. In these circumstances, the Court finds that the interference was supported by relevant and sufficient reasons and was proportionate: "(…) the offences committed by the applicant were of serious nature. In addition, taking his previous convictions into account, it does not appear unreasonable if the Danish courts concluded that the applicant displayed consistent and extreme violent propensities"[73]. In the *Ferhat Kilic v. Denmark* inadmissibility decision of 22 January 2007, the applicant was seventeen years old when he was convicted for attempted robbery, aggravated assault and manslaughter; in addition he was expelled for an indefinite time. Although the applicant had strong ties with Denmark, where he arrived when he was three years old, the Court finds that the interference "was proportionate in that a fair balance was struck between the applicant's right to respect for his private life, on the one hand, and the prevention of disorder or crime, on the other hand"[74].

The Grand Chamber judgment of 23 June 2008 in the case of *Maslov v. Austria* concerned an exclusion order issued against the applicant following convictions for mostly non-violent offences committed when a minor. The Court considered that the imposition and enforcement of the exclusion order against the applicant had constituted an interference with his right to respect for his private and family life, that the interference had been in accordance with the law and that it had pursued the legitimate aim of preventing disorder or crime. In the Court's view, the decisive feature of the present case was the young age at which the applicant had committed the offences and, with one exception, their non-violent nature[75]. The acts of which the applicant was found guilty were acts of juvenile delinquency. The Court considered that, where expulsion measures against a juvenile offender were concerned, the obligation to take the best interests of the child into account included an obligation to facilitate his or her reintegration. In its view this aim would not be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender[76]. After his release from prison, the applicant had stayed a further one and a half years in Austria without reoffending. Knowing little about the applicant's conduct in prison and not knowing to what extent his living circumstances had stabilised after his release, the Court considered that "the time elapsed since the commission of the offences and the applicant's conduct during this period carries less weight as compared to the other criteria, in particular the fact that the applicant committed mostly non-violent offences when a minor"[77]. The Court observed that the applicant had his main social, cultural, linguistic and family

71. ECtHR, *Jakupovic v. Austria* judgment of 6 February 2003, §§ 29-33.

72. ECtHR, *Radovanovic v. Austria* judgment of 22 April 2004, § 37.

73. ECtHR, *Hizir Kilic v. Denmark* decision of 22 January 2007, p. 7.

74. ECtHR, *Ferhat Kilic v. Denmark* decision of 22 January 2007, p. 7.

75. ECtHR (GC), *Maslov v. Austria* judgment of 23 June 2008, § 81.

76. *Ibid.*, § 83.

77. *Ibid.*, § 95.

ties in Austria, where all his relatives lived, and noted that there were no proven ties with his country of origin. Lastly, the limited duration of the exclusion order was not considered decisive in the present case. Having regard to the applicant's young age, a ten-year exclusion order banned him from living in Austria for almost as much time as he had spent there and for a decisive period of his life. The imposition of an exclusion order was therefore disproportionate to the legitimate aim pursued and not necessary in a democratic society[78].

The *Emre v. Switzerland* judgment of 22 May 2008 concerned the applicant's complaints surrounding his deportation from Swiss territory. He alleged, among other things, that he had health problems that could not be treated adequately in Turkey, where he did not have a family or social support network. He relied on Articles 8 and 3 of the Convention. The Court observed in particular that at least some of the offences committed by the applicant came under the heading of juvenile delinquency. It also noted that his health problems were liable to further complicate matters if he were to return to his country of origin, where he had few social ties[79]. Furthermore, given the degree of seriousness of the offences of which the applicant had been convicted, his weak ties with his country of origin and the final nature of the deportation order, the Court took the view that the Swiss authorities could not be said to have struck a fair balance between the interests of the applicant and his family on the one hand and their own interest in controlling immigration on the other[80]. It held unanimously that there had been a violation of Article 8.

* * *

I would like to end this short review with a personal view. Sometimes, I have this dream or maybe this nightmare. In the field of immigration and the expulsion of foreign nationals, we, as judges, bear an enormous responsibility. We should ask ourselves the question: in ten, twenty or thirty years, how will history judge the way we are dealing with these issues today?

78. *Ibid.*, § 100.

79. ECtHR, *Emre v. Switzerland* judgment of 22 May 2008, § 83.

80. *Ibid.*, § 86.

L'extériorisation du vote judiciaire à la Cour européenne des Droits de l'Homme *

Dean Spielmann
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Introduction

La Cour européenne des Droits de l'Homme partage avec d'autres juridictions internationales, telle la Cour internationale de Justice, la possibilité de joindre à ses arrêts ou avis consultatifs, des opinions séparées[1]. Les règles applicables offrent ainsi aux juges la possibilité d'extérioriser leur vote exprimé à l'occasion de l'examen des affaires dont ils ont à connaître. Au sein de la formation de la Cour qui décide l'affaire –chambre ou Grande chambre – le juge fait alors figure de soliste, « soloist in the Choir », pour reprendre une image musicale issue d'une étude récente sur le juge international[2].

L'origine de l'opinion séparée, que l'on retrouve dans la pratique des juridictions anglo-saxonnes, remonte, dans le contexte du droit des gens, à l'arbitrage international[3], qui, à son tour, a inspiré les règles de fonctionnement de la Cour permanente de Justice internationale[4], de la Cour internationale de Justice[5] et aussi celles de la Cour

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1. En principe, les décisions sur la recevabilité ne peuvent pas être accompagnées d'une opinion séparée. En principe, parce qu'il se peut, et le cas de figure est relativement fréquent, que les décisions sur la recevabilité et le fond peuvent être prises conjointement, c'est-à-dire dans un arrêt. En effet, l'article 29 § 3 de la Convention dispose : « 3. Sauf décision contraire de la Cour dans des cas exceptionnels, la décision sur la recevabilité est prise séparément. » Or dans des affaires simples, l'exception est devenue la règle et la décision sur la recevabilité est prise conjointement. La question de savoir si dans un tel cas un juge peut s'exprimer par une opinion séparée sur la décision de recevabilité est épineuse alors que généralement le grief déclaré irrecevable dans un tel arrêt pour défaut manifeste de fondement, souvent par une formule globale, n'a même pas été communiqué. Même si le juge est évidemment libre de voter contre la proposition d'irrecevabilité, il ne saurait, n'ayant pas recueilli la position gouvernementale, s'exprimer en faveur du caractère fondé du grief en attachant à l'arrêt une opinion dissidente.

2. D. Terris, C. P.R. Romano, L. Swigart, *The International Judge. An introduction to the men and women who decide the world's cases*, Oxford, Oxford University Press, 2007, p. 123.

3. Voy. p. ex. l'affaire de l'Alabama. Sur cette affaire, voy. T. Bingham, « The *Alabama* Claims Arbitration », *International and Comparative Law Quarterly*, 2004, pp. 1 et suiv. Concernant cette première sentence arbitrale du droit international moderne, l'auteur note ceci (p. 23, note infrapaginales omises) : « The award was formally read, in English, at the Hôtel de Ville [Geneva], on Saturday, 14 September 1872. Cockburn, who (with Tenterden) had arrived an hour late for the event, and appeared to be 'very angry', declined to sign the award, but instead produced a massive dissent, which he wished to be annexed to the protocol, as it was. This dissent, couched in immoderate and unjudicial language, caused understandable offence, and provoked Cushing into writing and publishing a lengthy and very insulting riposte…».

4. Voy. M. Hudson, *The Permanent Court of International Justice, 1920-1942,* New York, Macmillan, 1943, pp. 207 et suiv. L'auteur rappelle que le constat de dissentiment remonte à l'article 52 de la Convention de La Haye de 1899 pour le règlement pacifique des conflits internationaux et que l'article 79 de la Convention de la Haye de 1907 a abandonné la possibilité d'un tel constat. Pour les discussions en 1920 et 1929 lors de la rédaction du statut de la Cour permanente internationale de Justice, voy. M. Hudson, *ibidem.* Sur la Cour permanente de Justice internationale, voy. aussi O. Spiermann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary*, Cambridge, Cambridge University Press, 2005, spéc., p. 313.

5. Voy. M. Manouvel, *Les opinions séparées à la Cour*

européenne des droits de l'homme[6]. Au demeurant, au premier arrêt rendu par la Cour en date du 14 novembre 1960[7] sous la présidence de René Cassin, était joint l'exposé de l'une opinion dissidente du juge grec Georges Maridakis.

Durant les cinquante années de l'existence de la Cour, les opinions séparées ont permis aux nombreux juges d'apporter une valeur ajoutée doctrinale considérable aux arrêts rendus. Les opinions de certains juges ont d'ailleurs été rassemblées dans des recueils séparés[8]. Parfois, elles font même l'objet d'études doctrinales destinées à distiller la pensée du juge concerné[9]. Dans de rares cas, les opinions séparées servent à alimenter des critiques à l'égard de la Cour[10].

Inconnues des systèmes de droits continentaux[11], tels les systèmes français[12], belge ou luxembourgeois, les opinions séparées constituent incontestablement une atténuation à la rigueur du secret des délibérations, qui est consacré par l'article 22 du règlement de la Cour. En même temps, l'expression des opinions séparées est limitée par ce secret.

I. Les opinions séparées : une atténuation de la rigueur du secret des délibérations

Aux termes de l'article 45 § 2 de la Convention,

« [s]i l'arrêt n'exprime pas en tout ou en partie l'opinion unanime des juges, tout juge a le droit d'y joindre l'exposé de son opinion séparée ».

L'article 74 § 2 du règlement dispose que

« [t]out juge qui a pris part à l'examen de l'affaire a le droit de joindre à l'arrêt soit l'exposé

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internationale. Un instrument de contrôle du droit international prétorien par les Etats, Paris, L'Harmattan, 2005 ; G. Guillaume, « Les déclarations jointes aux décisions de la Cour internationale de Justice », in *Liber amicorum* – In memoriam *of Judge José Maria Ruda,* Kluwer Law International, 2000, pp. 421 à 434, publié également dans G. Guillaume, *La Cour internationale de Justice à l'aube du XXIème siècle. Le regard d'un juge*, Paris Pedone, 2003, pp. 161-172. Voy. aussi, H. Lauterpacht, *The development of International Law by the International Court*, London, Stevens & Sons, Réimpr. Cambridge, Grotius Publications Ltd, 1982, pp. 66-70. En général, concernant les tribunaux internationaux, voy. A.P. Sereni, « Les opinions individuelles et dissidentes des juges des tribunaux internationaux », *R.G.D.I.P.*, 1964, pp. 822-857.

6. Notons que les travaux préparatoires contiennent de nombreuses références à la Cour permanente de justice internationale et au statut de celle-ci. Voy. P.-H. Teitgen, *Aux sources de la Cour et de la Convention européennes des droits de l'homme*, (Préface de Vincent Berger), coll. « Voix de la cité », Paris, Editions Confluences, 2000.

7. *Lawless c. Irlande (exceptions préliminaires et questions de procédure)*, 14 novembre 1960, série A no 1.

8. Voy. p. ex. les collections d'opinions séparées du juge néerlandais Sibrand Karel Martens : *Martens Dissenting. The separate opinions of a European Human Rights Judge*, W.E.J. Tjeenk Willink, 2000, celles du Président Wildhaber: L. Wildhaber, *The European Court of Human Rights. 1998-2006. History, Achievements, Reform,* Kehl, N.P. Engel Verlag, 2006, pp. 249-304, celles du juge maltais Giovanni Bonello: Sir N. Bratza et M. O'Boyle, *A Free Trade of Ideas. The separate opinions of Judge Vanni Bonello*, Nijmegen, Wolf Legal Publishers, 2006 ou celles du juge chypriote Loukis Loucaides: F. Tulkens, A. Kovler, D. Spielmann et L. Cariolou (éd.), *Judge Loukis Loucaides. An Alternative View on the Jurisprudence of the European Court of Human Rights* (A Collection of Separate Opinions (1998-2007), Leiden, Boston, Martinus Nijhoff Publishers, 2008.

9. Par exemple les opinions de Louis Edmond Pettiti, par P. Lambert, « Les opinions séparées de M. le juge Pettiti », in *Mélanges en hommage à L.E. Pettiti*, 1998, pp. 25 et suiv., ou celles de Luzius Wildhaber, par M. E. Villiger, « The Separate Opinions of Judge Wildhaber in the Judgments of the European Court of Human Rights », in L. Caflisch, J. Callewaert, R. Liddell, P. Mahoney, M. Villiger (éd.), *Droits de l'homme – Regards de Strasbourg,* Kehl, N.P. Engel Verlag, 2006, 2007, pp. 507 et suiv.

10. Voy. la conférence donnée par Lord Hoffmann devant le *Judicial Studies Board* en date du 19 mars 2009.

11. Voy. M. Kirby, « Judicial dissent – Common law and civil law traditions », 123 (2007) *Law Quarterly Review*, 379-400.

12. Pour une discussion sur l'opportunité d'introduire des opinions séparées en droit français, voy. Y. Lécuyer, « Le secret du délibéré, les opinions séparées et la transparence », *Rev. trim. dr. h.*, 2004, pp. 197-223. Voy. aussi, W.M.E. Thomassen, « Het geheim van de Raadkamer en de dissenting opinion », *Nederlands Juristenblad*, vol. 81, 2006, pp. 686 et suiv.

de son opinion séparée, concordante ou dissidente, soit une simple déclaration de dissentiment ».

Concernant plus particulièrement les avis consultatifs, l'article 49 § 2 de la Convention prévoit que

« [s]i l'avis n'exprime pas en tout ou en partie l'opinion unanime des juges, tout juge a le droit d'y joindre l'exposé de son opinion séparée ».

Aux termes de l'article 88 § 2 du règlement,

« [t]out juge peut, s'il le désire, joindre à la décision motivée ou à l'avis consultatif de la Cour soit l'exposé de son opinion séparée, concordante ou dissidente, soit une simple déclaration de dissentiment ».

Alors que le texte de la Convention ne mentionne que les opinions « séparées », le règlement précise qu'une telle opinion peut être « séparée », « concordante » ou « dissidente », voire être une simple « déclaration de dissentiment »[13]. Les opinions individuelles sont très souvent d'une très grande richesse et font apparaître l'arrêt sous un autre éclairage. Elles constituent la manifestation de la « pensée indépendante »[14] du juge concerné.

Il va sans dire que l'expression, par le juge, d'une opinion séparée à la suite de l'arrêt, permet au lecteur de se faire une idée quant aux points de vue exprimés lors de la délibération. Mais cette atténuation de la rigueur du secret du délibéré n'est que partielle dans la mesure où la juxtaposition des différentes opinions exprimées face à l'arrêt émanant de la majorité ne donne qu'une idée parcellaire des débats couvert par la secret. En effet, la majorité peut elle-même être divisée quant à la motivation adoptée. L'opinion concordante, face à l'opinion dissidente, exprime une position plus ou moins opposée. Mais il peut arriver que l'opinion concordante soit plus proche de l'opinion dissidente que de celle exprimée par la majorité silencieuse. Ce cas de figure peut s'observer quand le juge concordant, en se distanciant de la motivation de la majorité, se retrouve plus proche de son collègue dissident nonobstant le fait qu'il a voté avec la majorité. A ceci s'ajoute, comme l'a relevé le Président Wildhaber, qu' « [e]n ce qui concerne la fonction des opinions concordantes ou séparées, il faut noter que celles-ci ne représentent en réalité qu'une dispute avec l'opinion majoritaire. Par contre, elles n'apportent normalement aucune ou seulement une réponse indirecte aux opinions dissidentes. (…) Si déjà on argumente que les opinions individuelles augmentent la transparence du processus de décision, il y manque un élément : alors que la minorité explique pourquoi elle n'est pas d'accord avec la majorité, les adhérents à la majorité, eux, sont privés de chance de justifier où, de leur côté, ils ne peuvent suivre la minorité »[15].

Rien n'empêche toutefois le juge concordant de commenter le point de vue dissident d'un ou de plusieurs de ses collègues. Par exemple, dans un arrêt, sur un point précis concernant la portée de la satisfaction équitable (article 41 de la Convention) adopté par quatre voix contre trois, une opinion concordante commune à deux juges de la majorité s'est opposée à une opinion en partie dissidente des trois juges de la minorité[16].

Quoi qu'il en soit, il a parfois été suggéré que

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13. Sur ces distinctions, voy. F. Rivière, *Les opinions séparées des juges à la Cour européenne des Droits de l'Homme*, Bruxelles, Bruylant, 2004, pp. 104 et suiv. L'auteur identifie « dans la majorité des cas », l'opinion séparée concordante, l'opinion séparée dissidente, l'opinion séparée partiellement concordante et/ou dissidente Voy. aussi, M. Eudes, *La pratique judiciaire interne de la Cour européenne des Droits de l'Homme*, Paris, Pedone, 2005, pp. 272 et suiv.

14. L'expression « independent thinking » est empruntée à Sir Nicolas Bratza et M. Michael O'Boyle. Voy. N. Bratza et M. O'Boyle, « Forword », *op. cit.*, p. 3.

15. L. Wildhaber, « Opinions dissidentes et concordantes de juges individuels à la Cour européenne des Droits de l'Homme », in R.-J. Dupuy (dir.) et L.A. Sicilianos (coord.), *Mélanges en l'honneur de Nicolas Valticos*, Paris, Pedone, 1999, p. 530.

16. *Arvanitaki-Roboti et autres c. Grèce*, n° 27278/03, 18 mai 2006. Notons que cette affaire a été renvoyée devant la Grande Chambre (article 43 de la Convention). *Arvanitaki-Roboti et autres c. Grèce* [GC], no 27278/03, CEDH 2008-…

la possibilité de l'opinion séparée porterait atteinte à l'indépendance des juges par l'atténuation de la rigueur du secret de la délibération[17].

Nous ne le croyons pas.

Déjà sous le système de l'ancienne Cour, Marc-André Eissen a réfuté le reproche en insistant qu'il « n'aur[ait] aucune peine à citer une foule de cas dans lesquels un membre de la Cour, et même un juge *ad hoc* (…), n'a pas souscrit à la thèse défendue à Strasbourg par son propre gouvernement »[18]. Le Président Wildhaber d'ajouter qu' « [e]n fait, on note dans la manière de voter – autrefois si souvent stigmatisée – des juges nationaux le développement d'un remarquable « esprit de corps » et l'effort certain de créer conjointement un système européen efficace et vivant dans lequel des préjugés et des sensibilités nationaux n'ont plus de place »[19]. Ceci est confirmé par des études doctrinales qui ont fait appel à des statistiques[20]. Déjà en 1997, M. Kuijer avait examiné la période de référence de 1970 à 1994 en relevant notamment que dans 39% des cas, l'arrêt a été rendu à l'unanimité, ce qui dénoterait une « culture strasbourgeoise » dans laquelle les juges venant d'horizons divers se retrouveraient[21]. *A fortiori*, ces considérations gardent toute leur valeur sous le système de la nouvelle Cour qui est en fonctions depuis novembre 1998. Ou, comme l'a dit le juge Christos Rozakis, « [t]he Court has proved to be very independent, without any liability to the States. This is partly due to the fact that the judges almost live in a vacuum and work in abstracto, far from their home countries in a detached environment. You forget the country you come from. Judges feel themselves assessed by their colleagues, they create their self-image in the eyes of their colleagues, and they run the risk of losing their respectability in their immediate environment if they pay too much attention to the interests of their home country »[22]. Rappelons dans ce contexte les exemples où des juges nationaux n'ont pas suivi la majorité qui s'est prononcée en faveur de la non-violation de la Convention[23].

Les opinions séparées augmentent la transparence du processus décisionnel et permettent de compléter la motivation de l'arrêt ou de l'avis consultatif. Les considérations exprimées par Sir Hersch Lauterpacht au sujet de la Cour internationale de Justice demeurent pertinentes : « The independence of the Judge is safeguarded by other means which may or may not call for expansion. It is arguable that, in some cases, the independence and impartiality of the Judges may be safeguarded by anonymity inas-

17. Des discussions similaires ont eu lieu en 1920 et 1929 lors la rédaction du statut de la Cour permanente internationale de Justice. Voy. M. Hudson, *op. cit.* et *loc. cit.*

18. M.-A. Eissen, « Discipline de vote à la Cour européenne des Droits de l'Homme ? », in J. O'Reilly (éd.), *Human Rights and Constitutional Law. Essays in honour of Brian Walsh*, Dublin, The Round Hall Press, 1992, p. 71. L'auteur se réfère à un inventaire dressé en 1986 qui, non exhaustif dès l'origine, n'a pas manqué de s'enrichir depuis lors : « La Cour européenne des Droits de l'Homme », *Revue du droit public et de la science politique en France et à l'étranger*, 1986, pp. 1543 et 1598.

19. *Op. cit.*, p. 535.

20. Pour des statistiques, voy. M. Kuijer, « Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice », *Leiden Journal of International Law*, 1997, pp. 49-61.

21. Pour des statistiques plus récentes, voy. l'étude de F. Bruinsma, « Judicial Identities in the European Court of Human Rights », in A. van Hoek *et alii* (éd.), *Multilevel Governance in Enforcement and Adjudication*, Anvers, Oxford, Intersentia, 2006, pp. 203 et suiv. Pour une réflexion d'ensemble, voy. E. Voeten, « The Impartiality of International Judges : Evidence from the European Court of Human Rights », 102 (2008), *American Political Science Review,* 417-433.

22. Cité par F. Bruinsma, « Judicial Identities in the European Court of Human Rights », *op. cit.*, p. 237.

23. La juge Tulkens dans Escoubet (*Escoubet c. Belgique* [GC], no 26780/95, CEDH 1999-VII), le juge Bonello dans Aquilina (*Aquilina c. Malte* [GC], no 25642/94, CEDH 1999-III), le juge Conforti dans Perna (*Perna c. Italie* [GC], no 48898/99, CEDH 2003-V), la juge Thomassen dans Kleyn (*Kleyn et autres c. Pays-Bas* [GC], nos 39343/98, 39651/98, 43147/98 et 46664/99, CEDH 2003-VI) , le juge Ress dans Sahin (*Sahin c. Allemagne* [GC], no 30943/96, CEDH 2003-VIII) et la juge Strážnická dans Kopecky (*Kopecký c. Slovaquie* [GC], no 44912/98, CEDH 2004-IX), cités par F. Bruinsma dans « Judicial Identities… », *op. cit.*, p. 238.

much as they may be free to vote without regard to the attitude of the States of which they are nationals. Any such argument, which is of controversial validity, is of limited significance when related to the considerations, …, connected with the necessity of ensuring completeness of the reasoning of the Judgments and Opinions of the Court. Dissenting and Separate Opinions – and the possibility of their being given-act as a stimulus in that direction »[24]. Pour Michel Dubisson, « [l]e système permettant aux juges de la minorité de se révéler et d'expliquer les raisons de leur désaccord avec la majorité est inconnu de la plupart des pays de droit écrit ; il est, par contre, pratiqué dans les pays appliquant la « common law ». Sur le plan de la justice internationale, ce système traduit l'indépendance absolue des juges dans l'exercice de leurs fonctions, en leur permettant d'exprimer librement leur opinion à propos de toute affaire tranchée par la Cour »[25].

Le secret atténué par l'opinion librement exprimée n'implique donc aucunement une remise en cause de l'indépendance qui reste entière. La liberté du juge de s'exprimer à titre individuel n'est que l'expression de son indépendance.

II. Le secret des délibérations : une limite à la liberté d'expression de l'opinion séparée

Mais l'expression de cette indépendance n'est pas sans limites. Ces limites sont tracées par le secret des délibérations[26].

« La Cour délibère en chambre du conseil. Ses délibérations restent secrètes », proclame l'article 22 du règlement.

L'article 3 du règlement dit :

« 1. Avant d'entrer en fonctions, tout juge doit, à la première séance de la Cour plénière à laquelle il assiste après son élection ou, en cas de besoin, devant le président de Cour, prêter le serment ou faire la déclaration solennelle que voici :

« Je jure » - ou « Je déclare solennellement » - que j'exercerai mes fonctions de juge avec honneur, indépendance et impartialité, et que j'observerai le secret des délibérations. »

2. Il en est dressé procès-verbal ».

Statuant en assemblée plénière, la Cour a adopté le 23 juin 2008 une résolution sur l'éthique judiciaire destinée à encadrer les conditions les conditions d'exercice des fonctions judiciaires des membres de la Cour[27]. Cette résolution complète le règlement en spécifiant que « les juges observent une discrétion absolue sur les informations confidentielles ou secrètes en rapport avec les procédures devant la Cour ».

René Chapus, cité par Yannick Lécuyer relève que « le secret du délibéré revêt une double signification » [28] : « il impose aux juges de délibérer hors la présence tant du public que des parties et de leurs avocats ; il interdit d'autre part, la divulgation, à quelque époque que ce soit, de ce qu'ont été les discussions et de la façon dont chacun des magistrats s'est prononcé»[29].

Le secret des délibérations à la Cour européenne des Droits de l'Homme, on l'a vu, n'existe pas sous cette forme rigide. Certes, les juges délibèrent hors la présence tant du public que des parties et de leurs avocats. Mais, et on l'a vu également, l'opinion séparée permet aux juges d'extérioriser leur point de vue.

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24. *Op. cit.*, p. 67, notes de bas de page omises.

25. M. Dubisson, *La Cour internationale de Justice*, Paris, L.G.D.J., 1964, p. 245.

26. Sur le secret des délibérations, voy. M. Eudes, *op. cit.*, pp. 238 et suiv. Sur la méthode de travail de la Cour, voy. L. Garlicki, « Judicial Deliberations : The Strasbourg Perspective », in N. Huls, M. Adams et J; Bomhoff (éd.), *The Legitimacy of Highest Courts' Rulings,* La Haye, T.M.C. Asser Press, 2009, pp. 389 et suiv.

27. Pour un commentaire de cette résolution, voy. J.-F. Flauss, in *Les droits de l'homme en évolution. Mélanges en l'honneur du professeur Petros J. Pararas*, « Les obligations déontologiques des juges de la Cour européenne des droits de l'homme », Athènes, Ant. N. Sakkoulas, Bruxelles, Bruylant, 2009, pp. 195 et suiv.

28. *Op.cit.*, p. 204.

29. R. Chapus, *Droit du contentieux administratif*, 9ème édition, Montchrestien, Paris, 2001, p. 932, indice 1170.

Mais le secret des délibérations constitue cependant une limite incontestable à la liberté d'expression du juge.

Une note interne de la Cour rappelle que

« [separate opinions] should contain no reference to any statements covered by the secrecy of the Court's deliberations ».

Le juge ne peut par exemple inclure dans son opinion un compte-rendu des discussions ayant précédé à l'adoption de l'arrêt. Il ne saurait non plus relater le contenu des notes du rapporteur. Pas question non plus de divulguer par le bais d'une opinion séparée les discussions qu'il y a eu au sein du comité de rédaction ou de faire connaître les noms de juges ayant fait partie de celui-ci. Par ailleurs, il n'est pas permis au juge de relater le point de vue d'un collègue qui ne s'est pas exprimé par la voie d'une opinion séparée.

A ceci s'ajoute que la note interne précitée impose généralement un certain devoir de réserve se dégageant des règles de bonne conduite concernant tout travail en équipe des juges.

Allant au-delà d'une simple règle de courtoisie, cette note dispose que

« [a]ny criticism of the views of the majority or of other judges should be couched in temperate language ».

Commentant la résolution sur l'éthique judiciaire du 23 juin 2008, Jean-François Flauss propose qu'« [u]ne conception élargie du devoir de réserve signifierait …que des opinions dissidentes devraient banner toute virulence dans le propos, se garder de dénoncer les erreurs de droit commises par la majorité et plus généralement de démontrer très systématiquement les faiblesses intellectuelles du raisonnement des collègues majoritaires »[30].

Enfin, la pratique de la Cour impose au juge de divulguer à ses collègues, *dans* le secret des délibérations, sa position personnelle qu'il sera appelé à présenter ultérieurement dans son opinion séparée. Sa liberté d'expression est limitée dans ce sens qu'au moment de la rédaction définitive de l'opinion, - généralement après le vote définitif -, une argumentation entièrement nouvelle, donc qui n'a pas été préalablement discutée du moins oralement avec les autres juges, ne saurait être présentée. La note interne de la Cour prévoit à ce sujet que

« [n]o separate opinion which has not been announced during the second deliberations will be accepted after the adoption of the judgment ».

Conclusion

Comme le souligne Florence Rivière dans sa remarquable thèse, le juge « dévoile le regard qu'il porte sur le travail de l'organe auquel il appartient » et « s'expose aussi et du même coup au regard d'autrui »[31] en arrivant à la conclusion pertinente que « l'opinion séparée perme[t] d'observer la manière dont [le juge] exerce son office. L'affirmer revient à dire que l'opinion séparée ébauche les lignes d'un « contrôle » dont la particularité est qu'il est déclenché par celui-là même qui en est l'objet »[32].

L'opinion séparée constitue à notre avis un outil procédural d'une très grande utilité. Elle permet d'exprimer un point de vue alternatif et parfois annonce le développement jurisprudentiel[33]. Après tout, on le dit souvent, à propos nous semble-t-il : « certaines opinions dissidentes d'aujourd'hui sont les opinions majoritaires de demain » ou, de manière moins tranchée : « il y a [les opinions dissidentes] dont

30. J.-F. Flauss, *op. cit.*, p. 204., notes de bas de page omises.

31. F. Rivière, *op. cit.*, quatrième de couverture.

32. *Ibidem*.

33. L. Wildhaber (*op. cit.*, p. 532) mentionne à titre d'exemple les cas de transsexualité, à savoir, les affaires suivantes : *Rees c. Royaume-Uni*, arrêt du 17 octobre 1986, série A no 106 ; *Cossey c. Royaume-Uni*, arrêt du 27 septembre 1990, série A no 184 ; *B. c. France*, arrêt du 25 mars 1992, série A no 232-C et *X, Y et Z c. Royaume-Uni*, arrêt du 22 avril 1997, *Recueil des arrêts et décisions* 1997-II.

on peut légitimement espérer qu'elles préfigurent des majorités dans l'avenir »[34].

L'opinion séparée en tant que « réplique à l'arrêt »[35], dans les limites du secret des délibérations, constitue un instrument « pédagogique et dialectique », « s'employant tant à commenter et à expliquer qu'à « discuter » les décisions de la Cour[36] ». La supprimer serait priver la Cour d'une de ses prérogatives qui contribue, par l'individualité exprimée de ses juges, à la richesse de sa jurisprudence.

Après tout, comme l'a souligné un juge de la Cour suprême des Etats-Unis, « quand les juges ne sont pas d'accord entre eux, c'est la preuve qu'ils traitent de problèmes au sujet desquels la société elle-même est divisée. L'expression de vues dissidentes fait partie intégrante de la démocratie[37] ».

34. J.-P. Costa, « Clôture du colloque », in P. Tavernier (dir.), *La France et la Cour européenne des Droits de l'Homme*, *Cahiers du CREDHO*, n° 6 – 2000, p. 205.

35. Selon l'expression de F. Rivière, *op. cit.*, pp. 135 et suiv.

36. F. Rivière, *op. cit.*, quatrième de couverture.

37. Le juge Douglas en 1948 : « [W]hen judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. It is the democratic way to express dissident views », cité par W.M.E. Thomassen, *op. cit.*, p. 689.

Pronouncing on Human Rights

George Nicolaou
Judge of the European Court of Human Rights

At the time when the European Convention on Human Rights was adopted in 1950,[1] there seemed to be nothing very remarkable about it. It has, however, turned out to be the greatest achievement of the Council of Europe and the most impressive of all developments in international human rights and humanitarian law. Unlike previous human rights documents which preceded it, including the more comprehensive United Nations Universal Declaration of Human Rights[2] adopted a couple of years earlier, it seriously did more than just declare rights in the abstract. The Convention was not meant as a mere guide that would indicate to Contracting States what they should, ideally, be aiming at. It singled out what were then considered to be the most important civil and political rights and freedoms, repeatedly proclaimed as universal, and gave them tangible, present significance. They were imperatively to be respected and enforcement was made the subject of ultimate collective responsibility.[3] This was achieved through a control mechanism which, though weak at first, has gradually grown to an extent that has made human rights protection accessible today to over 800 million people in 47 countries covering almost the whole of Europe. At the same time the Convention exerts an influence that is felt further afield.

The Convention was conceived as a system that would, in the aftermath of the Second World War, cover a broad area of European countries which shared the same ideals and were determined to foster democracy and the rule of law. It was hoped to attract other countries and support them in their efforts to join. The tremendous effect of this was shown after the break-up of the soviet bloc. The human rights situation in the Contracting Parties would be monitored in order to secure compliance with human rights obligations. It was thought, more particularly, that in case democratic rule was threatened it might be possible to pick up signals early so as to take corrective action in time. This last was prompted by fears that arose mainly from the pre-war political situation but, in the event, it did not prove significant. At another level, the Convention aspired to contribute to the resolution of disputes between Contracting States and, generally, in preserving peace. That, however, has not been very successful.

The control mechanism by which human rights protection was to be achieved required, of course, concessions by Contracting States. They would not, henceforth, insist on the absolute exercise of their sovereignty in the sphere of human rights. Although the full significance of this may not have been immediately apparent, it was vital. It was eloquently expressed by Anthony Lester QC in a speech he recently gave at the University of Copenhagen to celebrate the fiftieth anniversary of the Court:

"The master builders of the Convention were determined, in the aftermath of a second terrible war in half a century, never again to permit state sovereignty to shield from international liability the perpetrators of crimes against humanity; never again to allow governments to shelter behind the argument that what a state does to its own citizens or to the stateless is within its exclusive jurisdiction, and beyond the reach of the international community. So they resolved to create a binding international code of human rights, with safeguards against abuses of power and effective remedies for victims of violations by Contracting States".

Control was originally seen as essentially political. Not everyone agreed that a court should be

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1. It entered into force in 1953; further rights were added by Protocols No. 1, 4, 6, 7, 12 and 13.

2. It will be remembered that it also contained economic, social and cultural rights.

3. As the Court observed in *Ireland v. The UK (1978)*, Series A, no. 25, p.90: "Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement.'"

created. Many were content with only a partial judicial component, in the form of the Commission. But they did not prevail. It took some time for the Court to make its presence felt and then it was only slowly that it gained its present ascendancy. The law making scope of the Court was forcefully propounded in *Golder v. The UK (1976)*,[4] in which emphasis was laid on the object and purpose of the Convention. Soon afterwards the Court underlined, in *Tyrer v. The UK (1978)*,[5] that the Convention 'is a living instrument' to be interpreted in the light of present day conditions.[6] The Court continued with a quickening pace to issue important judgments that highlighted its role. With the considerable increase in Convention membership in the 1990's the system faced new challenges. Improvements were needed but they took time. At last, in 1998, the process of change received a marked impetus when the system was drastically overhauled by Protocol No.11. The European Commission was abolished, the permanent Court was established and the right of individual complaint no longer remained optional. This last was crucial. As the Court proudly proclaimed in *Mamatkulov and Askarov v. Turkey (2005):* [7]

"...individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention".

The Convention system has come a long way. Further, I think, than anyone could have imagined and at least a little more than those preferring an absolute national role would have wished. Until Protocol No.11 entered into force the Court did not move forward alone. The Commission had itself made an important judicial contribution, leaving indelibly its print on the functioning of the Court. It was the Commission which had, to a large extent, created the procedural framework for examining complaints. It set very high standards both through its judicial decisions on admissibility and through its reports on the merits. The reports were submitted to the Committee of Ministers for a decision and action in cases where a complaint had been held admissible but efforts to achieve a settlement had failed. It is probably not an exaggeration to say that the main distinguishing feature between a Commission Report and a Court judgment was, in both content and form, essentially the heading. Although structural changes have been made over time, some of them quite substantial, there has been no major innovation in the way that the system works.

Both the Court and the Commission had from the beginning interpreted the Convention creatively. The Court was guided by the accepted international rules of interpretation, later embodied in Articles 31 and 32 of the Vienna Convention of 1969 on the Interpretation of Treaties.[8] However, rules of interpretation do not necessarily lead to just one conclusion. The direction that a court takes is often not inevitable. There may be policy considerations involved and a choice will have to be made on whether to take a broader or narrower view.[9] International courts tend to move in their preferred direction more freely than do national courts and, of course, devise their own special means of explaining the result. The Court has drawn freely not only from the legal traditions and social and religious attitudes in Contracting States but also from general principles of law, applying them in a broad way, as well as from developments and trends in international law. It was obvious that in order to achieve a uniformly high level of protection in all Contracting Parties it was necessary that national standards of law, although taken into account, had to give way to Convention standards. The result was that Convention terms and concepts were given autonomous meanings that embraced related or necessary aspects, thus transcending forms in order to give effect to the realities of the situation.

It was at one time thought that a liberal inter-

4. Series A no. 18

5. Series A no.26

6. This covers not only substantive provisions but also those "which govern the operation of the Convention's enforcement machinery": *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, p.26; confirmed in *Mamatkulov and Askarov v. Turkey* (see note 5).

7. ECHR 2005-I, 225

8. *Golder v. The U K*; see, more generally, the *Commentary on the 1969 Convention on the Law of Treaties (2009)* by M. E. Villiger.

9. Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* 3rd ed., p.72

pretative approach was valid only for fundamental rights and freedoms while procedural and structural provisions of the Convention should be strictly interpreted.[10] It was argued that the scope of the latter was immutably fixed by what the Contracting Parties had agreed on how the system should work. There were indeed several examples which showed that when change was necessary it was brought about by means of additional Protocols. The original intention of the Parties is obviously important; but so too are subsequent developments for 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'[11]

The development of the Court's case-law has been a multifaceted process. As a matter of general policy the Court will not, in the interests of legal certainty and equality, depart from its previous case law unless there are cogent reasons for doing so. The global picture lucidly shows that in balancing the two the Court has taken the view that it should afford the highest possible human rights protection, consistent with what may be regarded as reasonably permissible.[12] Judgments reiterate that the Convention is a living instrument intended to promote the ideals and values of a democratic society and that the emphasis should, therefore, be on its object and purpose so that, in accordance with its general spirit, safeguards are rendered practical and effective not theoretical and illusory. Views may, however, legitimately differ on whether, in any particular case, the Court has gone far enough or, on the contrary has gone beyond Convention requirements. Each must answer the question for himself. This task is much facilitated by the Court which, as has been rightly said, 'tends to be discursive, fact-specific and concrete' in its judgments.[13]

The forward-looking attitude of the Court may be illustrated by two examples taken from relatively recent case law. The one concerns the now binding force of interim measures indicated under Rule 39; the other concerns the legal recognition of persons who have undergone gender reassignment. In *Cruz Varas and others v. Sweden (1991),*[14] the Commission examined whether interim measures under its own procedural rule were binding. The facts of the case were that the respondent State expelled the applicant in defiance of an interim measure that had been indicated by the Commission, thereby exposing him to a risk of torture in the receiving State. The question was whether non-compliance with the measure constituted a violation of Article 3. The Commission found that interim measures were binding on Contracting States, for otherwise the Convention would not afford sufficient protection. The Court held, though by only a slender majority, that in the absence of a specific empowering provision the Commission could not issue binding measures. It is worth noting that when the Convention was being drafted there was a proposal to include the power to indicate binding interim measures but this was not accepted; and, although the matter was again raised when Protocol No.11 was being prepared, again no such power was added. Ten years later, in *Čonka v. Belgium (2001),*[15] where the new Court had occasion to refer to *Cruz Varas,* it did so without expressing disapproval. Soon afterwards, in the *Mamatkulov and Askarov* case, the Court could no longer accept the absence of such power when other international courts did have it, especially in the light of a statement made by the International Court of Justice that interim measures must be binding as this is necessary to 'prevent the Court from being hampered in the exercise of its functions' and is in accord with 'the principle universally accepted by international tribunals' that parties to proceedings should desist from any action with prejudicial effect.[16] As a result it held by an overwhelming

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10. Heribert Golsong , *Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties*, Macdonald-Matscher-Petzold, (1993) p.147.

11. *Namibia (S.W. Africa) (Advisory Opinion)*, ICJ Reports 1971, 16, at p.31

12. Alastair Mowbray, *'The Creativity of the European Court of Human Rights'* HRLR 5:1, p.57

13. Cathryn Costello, *The Bosphorous Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*' HRLR (2006) 6:1, pp. 87-130.

14. Series A, no.201

15. Dec. no. 51564/99, 13 March 2001.

16. *LaGrand (Germany v. the United States of America)*, ICJ Reports, 2001, 466; confirmed in *Avena and Other Mexican Nationals (Mexico v. The United States of America)* ICJ Reports 2004.

majority that, unlike the Commission, it derived authority to do so by virtue of Article 34 (similar to former Article 25 which referred to the Commission) by which Contracting Parties undertook not to hinder in any way the exercise of the right of individual application. It stressed that this right, which was once optional, had become a key component of the Convention protection machinery. It therefore departed from its judgment in *Cruz Varas* and it did so by an overwhelming majority.

How ready the Court is to move in a new direction is also shown by the gender reassignment cases. It was held in a number of such cases, ending with *Sheffield and Horsham v. The UK (1998),*[17] that because there was little common ground between Contracting States on whether to recognize the post-operative identity of transsexuals it was not possible to accord to them such a right. Four years later, in *Christine Goodwin v. The UK (2002),*[18] although there was still no 'common European approach', the Court departed from its previous judgments on the ground solely that there was 'a continuing international trend' towards recognition. It thus took the initiative of setting new, higher human rights standards while remaining within the obviously wide scope of Article 8 and, consequently, of Article 12 of the Convention.

The prevailing view has always been that the Court is performing well in increasing human rights protection. This has given the Court considerable encouragement. Most Contracting States have been supportive. However, there has also been criticism of what some people see as an excessive judicial activism on the part of the Court. It has been said that that the Court has defined its jurisdiction too broadly and has been all too ready in creating new rights. Though criticism has sometimes been strongly expressed it has not been sustained and does not seem to have had an appreciable impact on the general outlook of the Court.

The problem lies, perhaps, in the margin of appreciation that should belong to national authorities; but it is not confined to it. This aspect of the principle of subsidiarity, or at least its application, has been controversial.[19] It was given high prominence by the Court in the case of *Handyside v. The UK (1976)*[20] but its significance has waned even though frequently referred to. Judgments show, I think, that in relation to certain rights the margin of appreciation is virtually non-existent. This may be inevitable. As rights become more and more closely defined and circumscribed by case-law or as consensus about rights increases, there is less room left for diversity. Margins of appreciation do not then relate to the content of rights but on how they may be protected. In other instances, what the Court describes as a permissible margin may not, ultimately, be reflected in the finding of a violation. One may then be forgiven for getting the impression that the Court accords an even higher human rights protection than its language admits; conversely, the finding of a non- violation may, in that context, give the probably unwarranted impression that it reflects, more than anything, the Court's agreement with the national authorities as to what the result should be. What is beyond doubt is that the margin of appreciation doctrine retains most of its significance in respect of rights involving considerations of social or economic policy, where the Court may be reluctant to impose on Contracting States some positive obligation.

Margin of appreciation issues are not always linked to broad aspects of policy. They may also be connected with the peculiarities of national justice systems. These are complex, each in its own way, with their own history and tradition, their own culture and ways of doing things. Understanding how a national system globally works is important, for then one may more readily accept, perhaps, that the overall human rights protection it affords may not be less than what the Convention requires. The view has also been expressed that in some cases the Court does not fully appreciate the wider national context in assessing com-

17. 1998 – V, 2011. The other cases are *Rees v. The U K,* Series A, no.106; *Cossey v. The UK* Series A no. 184, 15; *XYZ v. The UK* Reports of Judgments and Decisions 1997 - II

18. 2002 – VI, 1

19. See, indicatively, Herbert Petzold *'The Convention and the Principle of Subsidiarity'* Macdonald-Matcher-Petzold (1993).

20. Series A, no.24

pliance with human rights requirements. It is said to come to a decision without having the benefit of a complete picture that would enable it to place the matter in perspective, and without taking sufficiently into account the more precise tools used by the national judge. The Court is then seen as acting, on occasion, as an appeal court of last resort. Whether or not such criticism is justified in any particular case is again a matter of opinion. The Court is not infallible. No system is perfect. But if error does creep in, it is not often that it does. And it cannot detract from the very high esteem in which the Court is held, not only in Europe but in many parts of the world too.

The real question has always been the extent to which, on a proper judicial interpretation of the Convention, Contracting States have accepted to forgo the last word on the human rights of persons within their national jurisdiction for the sake of protecting the human rights of others outside it, in order to make Europe a better place for all. There are those who regard human rights as 'universal in abstraction' but national in application and so insist that human rights standards and protection should be within the sole province of national authorities.[21] That view is to be respected. But on that view, which denies the Court the right to decide on Convention compliance, the Convention would have been a superfluous repetition of what had already existed in previous human rights documents. Those, on the other hand, who readily accept that international supervision is essential and who are ready to accept a purposive and evolutive interpretation of the Convention may in fact differ on how far the Court should go. Some complain that the Court does not move fast enough whilst others protest that the Court, through an overly expansive interpretation, oversteps the limits. There is in the background a continuing, not much publicized debate, on whether it is necessary to reconsider the balance between, on the one hand, national responsibility for assessing and protecting human rights and, on the other, what some national authorities regard, often in the context of particular judgments, as the Court's assumption of more responsibility than that which belongs to it under the Convention.

There are challenges ahead. Solutions have to be found in order to reduce present delays and to enable the Court to cope with the ever increasing number of applications. Much has already been done in internal reorganization. This will help quite considerably in dealing more efficiently with cases. The pilot judgment procedure, introduced by the Court a few years ago and now picking up speed, is proving particularly useful.[22] The new Protocol No. 14 *bis* is also expected to help. At the same time more will have to be done for protecting and vindicating Convention rights at the domestic level so as to reduce the number of applications coming to Strasbourg.[23] However, in the long term all that will not be enough. In an open-ended system based on the right of individual application it is not possible to guarantee future effectiveness. It is not only a question of resources; the Court cannot grow indefinitely in size without losing, to a lesser or greater extent, cohesion and judicial control. The answer may be, though this is not the direction the Convention has taken, that individual applications should, in general, be examined in a wider context defined by the problems that they reveal rather than as each requiring a separate answer. Thus, decisions and judgments would be situation orientated and detached as much as possible from individual complainants to whom, of course, the attention of the respondent State should be drawn where a violation is found. As to the rest it should be a matter of an improved system of enforcement under judicial control.[24] It is hoped that the Interlaken Conference, to be held in February 2010, will give solutions that will enhance the effectiveness of the Convention and ensure the long-term survival of the Court. For nothing should be taken for granted.

21. Lord Hoffman, '*The Universality of Human Rights*' Judicial Studies Board Annual Lecture, 19 March 2009.

22. *Broniowski v. Poland* (GC) ECHR 2004 – V; *Burdov v. Russia* (no. 33509/04), 15 January 2009.

23. *Kudla v. Poland* (GC) ECHR 2000 – XI; *Scordino v. Italy* (No. 1) (GC) ECHR 2006 -V

24. Protocol No. 14, still not ratified by the Russian Federation, makes some provision for this but it is questionable whether it is enough.

DNA Bank, Safety and Human Rights

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I

The provision of article 200 A of the Greek Code of Penal Procedure has been amended with the recent legislative initiative. The voting of the new provision as an amendment was held during the session of the Department of Parliament's prorogation on July 15th 2009. The DNA analysis is provided for by a special procedural provision in the Third Chapter "Expertise and technical consultants". The positive characteristics of the above amendment are the following : 1) the genetic material (sample) is immediately destroyed after the analysis, 2) it is required to be provided that, there are existing serious indications that a person has committed a punishable action, 3) the purpose of the genetic analysis is restricted to the perpetrator's identicalness and 4) it is presupposed to be a comparison with the genetic material found in a place related to the punishable action under investigation.

The rewording provision of article 200 A of the Greek Penal Code contains points that, according to the Law 2472/1997 (protection of personal data), to the article 9 A of the Greek Constitution and to the article 9 of ECHR , are considered to be crucial and must be reviewed, in order the above provision to become in fact useful (in many cases necessary) in the penal procedure, completely compatible and in full harmonization with the article 9 A of the Constitution and the article 8 of ECHR and also with the demands arising from them (see S. *and Marper v. the United Kingdom,* nos. 30562/04 and 30566/04, *ECHR GRAND CHAMBER 2008, Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-...).

In *S and Marper*, judgment of the Grand Chamber, the European Court of Human Rights observes that: "(…) The DNA profiles contain substantial amounts of unique personal data.(…) In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals (…) is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. (…) The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (…). The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored (see Article 5 of the Data Protection Convention and the preamble thereto and Principle 7 of Recommendation R(87)15 of the Committee of Ministers regulating the use of personal data in the police sector). The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse (see notably Article 7 of the Data Protection Convention). The above considerations are especially valid as regards the protection of special categories of more sensitive data (see Article 6 of the Data Protection Convention) and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family (see Recommendation No. R(92)1 of the Committee of Ministers on the use of analysis of DNA within the framework of the criminal justice system). (…) The Court observes that the pro-

tection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests.(…)".

II

To be exact, it must be worded specifically in the law that "genetic analysis" is only then permitted when proof of the person's identity is not conclusive from other evidence. Thus, the provision must be supplemented with the phrase "as long as it is necessary" in front of the phrase "for the purpose of ascertaining the perpetrator's identity". So, in this way, the principle of analogy (proportionality) (article 25 of the Greek Constitution) is articulated in the more specific expression of necessity. Furthermore, the new provision contains a very excessive widening of the list of punishable actions, the investigation of which, permits the taking and analysis of the genetic material. Considering the legislator's expressed will for creating the relevant data base (DNA records and in the colloquial language: Bank) on the one hand, and on the other hand the principle of analogy, this crime list must be restricted to the felonies only, or at least there has to be some kind of gradation, as it is proposed in the Expertise Opinion 2/2009 of the Data Protection Authority (DPA). Furthermore, in paragraph 2 of the article 200 A, there must be added to the phrase "other crimes", the phrase "provided in paragraph 1", so that the sidelong widening of the catalogue is not possible. Moreover, the fact that the new provision foresees that the genetic prints are being kept indiscriminately and for an unlimited time for the person concerned (death of the suspect), causes problems with the principle of analogy, the special principle of the definite and necessary period of keeping the personal data, and the obligation of increased state protection towards the minors as well as the rehabilitation of the convicted ones after serving their penalty.

In addition, the terms and the conditions of the maintenance of the so-called "not identified" genetic prints (see article 4, 26 par. 2 of the decision 2008/615/DEY of the Council of Europe, where the relevant regulations are mentioned) must be definitely regulated, so that they will not be used for the investigation of crimes other than those provided in this specific amendment. There should also be a particular law or a presidential decree concerning the competence and the organization of the Hellenic Police, which will contain specific provisions regarding the archives of the genetic prints (see specific references and recommendations in the Expertise Opinion 2/2009 of Data Protection Authority). The voted amendment of the article 200 A of the Code of Penal Procedure nullifies the Judicial Court, a fact that should be reconsidered, too. The taking and analysis of the genetic material is an especially serious intervention for the individual. The relevant decision is associated with the existence of serious indications and – in accordance with the Expertise Opinion 2/2009 – in combination with a negative prognostication for a specific person. In particular, the referring act should be decided by the Judicial Court (as foreseen by the former regulation) or at least by the Public Prosecutor with a special provision. There are, furthermore, two terms which should be deleted from the new formulation of the article 200A of the Code of Penal Procedure: a) the "prosecuting authorities" and b) "obligatory", as they may lead to misinterpretations. The first term is not provided by the Code of Penal Procedure and the second one is dispensable, since the specific act is obligatory only in case that the provided terms and conditions apply.

Finally, the altered provision of the article 200 A foresees the supervision of the archives containing the genetic prints by a vice Public Prosecutor or a Public Prosecutor at the Court of Appeal; this seems to us problematic as well. More specifically, the Public Prosecutor as an additional statutory guarantee cannot be considered as an alternative guarantee regarding the supervision being exercised by the Data Protection Authority (DPA). This would be contradictory to the core provision of the article 9 A of the Constitution, which provides that the function of the Data Protection Authority is to be a statutory guarantee of the personal right of informative self-

determination. Furthermore, it would not be according to the article 8 par. 2 of ECHR and the terms and conditions set by the Recommendations 87(15) and 92(1) of the Council of Europe in regard to the existence of the independent control authority (see the interpretation of the European Court of Human Rights law case and the Expertise Opinion 1/2009 of the Data Protection Authority). Moreover, any deprivation of the supervision of the relevant records from the authority will lead to the lack of the country's compliance undertaken in the sector of police and judicial cooperation in penal cases (third pylon) and especially with the decision 2008/615/DEY, which the explanatory report of amendment invokes. In order for the exchange of genetic material to be possible, the mentioned decision assigns the record's supervision to the Data Protection Authority. In other words, it would be especially difficult to provide the implied integrated protection only for the genetic prints of the national records, transmitted to other state – members (or collected by them), regarding the availability principle provided by the Hague program pursuant to which all data of national records are in fact also available to the competent authorities of the other state – members (see the Expertise Opinion 2/2009 of the Data Protection Authority).

III

We are living in a period of relative insecurity and uncertainty. And this climate, the very atmosphere which is surrounding us, is sometimes being cultivated by publications or being fed by certain events that cause, without any doubt, anger and abhorrence as well as fear. Freud remarks (see "Das Unbehagen in der Kultur", p. 445) that in human societies a primitive aggressiveness that could be expressed with the principle "homo homini lupus" is prevalent. However, this aggressiveness is handled and outflanked with the help of cultural rules as well as, by consequence, law. But, while the rules are setting barriers to the aggressiveness on the one hand, they are continuously menaced by it, on the other hand. This general functionality of the rules of the law and the rival human powers that fight them, are commented (a little bit biting) by Freud (see "Die Zukunft einer Illusion", p. 364) : "the danger of uncertainty in life is the same for all human beings. It is this insecurity which is unifying the human beings in such a society that forbids an individual to kill and reserves for itself the right to kill the very person that is violating this prohibition! This is what we are calling justice and penalty".

The protection of a civilian in society against real danger must be guaranteed with observance and respect to human rights. The security of the individual cannot be considered as an absolute good, for which all the rules of the law and the total law and order have to provide. The Constitutional State functions and consolidates then, when the crucial incidents do not lead to a surrender or excessive reaction (see L.Kotsalis, "Constitutional State and Penal Law", NoB 2008 [issue 56], p. 285 et seq.). Judgment, sobriety, moderation, and stability are the qualitative characteristics of a society, which follows the principles of the Constitutional State. Our guiding thoughts, our compass for finding solutions towards the new and indeed sometimes extremely dangerous challenges should be the double mission of the penal law, which is on the one hand the protection of the legal good and on the other hand, the ensuring of the rights of the individual. Our valuable assistant in this arduous task can and must be the adoption of moderation. To cultivate an atmosphere of fear or intolerance will not help us. This will lead us into disorientation and to extreme solutions, which will cause both explosiveness within the society (a state of "anomie" in the sense of E. Durkheim), and a weakening and finally leveling down of the Constitutional State.

** The responsibility for the translation of the present article has been assumed by Heike Kotsali and Marilena I. Katsogiannou, Attorney at Law, LL.M. in Criminal Law, Assistant at University of Athens, Faculty of Law.*

The Prohibition of Discrimination in the Granting of Social Benefits: Some Thoughts Arising from the Recent Jurisprudence of the European Court of Human Rights.

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A. The right to non-discriminatory treatment of the holders of social rights according to the European Convention on Human Rights.

The principle of non-discrimination constitutes one of the fundamental rules that have been consolidated in various international legal texts[1], deriving from the need to secure the respect for human dignity.

This rule has also been recognised by the European Convention on Human Rights (ECHR), whilst it has been granted the status of a right through the case-law of the European Court of Human Rights (ECtHR)[*], which has progressively expanded its action to the domain of social rights.

Indeed, for a considerable length of time, social rights lay outwith the field of protection afforded by the ECHR, as the Convention was steadfastly considered to cover civil and political rights only. Notwithstanding contrary theoretical views[2] advocating the furthering of the field of application of the ECHR to social rights, the initial trend in the Court's jurisprudence was to incorporate any such social claims within existing substantive rights that had been expressly codified in the ECHR[3]. The Court, however, has progressively contributed to the recognition of the substantive protection of social rights by adopting the notion of 'autonomous concepts' in its interpretation of the ECHR[4]. In turn, the 'autonomous concepts' method of interpretation has led the European judiciary to a re-delimitation of the notions found in domestic legal orders, and to their practical application in a manner that is colored by the essence of the ECHR.

The following analysis concerns the examination of the right to non-discrimination under the light of the ECHR. On an additional level, it also engages in a study of the jurisprudential handling of that right, as witnessed in the realm of social benefits allocation.

1. *The prohibition of discrimination according to Article 14 ECHR*

1. See the Universal Declaration of Human Rights (Articles 1and 2), the UN Charter (Article 1, para. 3), the International Covenant on Civil and Political Rights (Articles 2 and 3), and many other international covenants prohibiting various forms of discrimination.

∗ Hereinafter also referred to as: the Court; and the Strasbourg Court.

2. See, among others, IMBERT (P.H.): Droits des pauvres, pauvre(s) droit(s)? Réflexions sur les droits économiques, sociaux et culturels, R.D.P., 1989, p. 789 et seq., and PETITI (Ch.): La protection des droits sociaux fondamentaux à l'aube du troisième millénaire, Revue trimestrielle des droits de l'homme (R.T.D.H.), 1999, pp. 613-625.

3. In the case of *Airey* (9.10.1979), the ECtHR proclaimed that "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature." (para. 26)

4. For this method of interpretation of the ECHR, see SUDRE (F.): Le recours aux « notions autonomes», in F. Sudre (dir.), "L'interprétation de la Convention Européenne des Droits de l'Homme", Bruylant, Bruxelles, 1998, pp. 93-131, and particularly p. 102 et seq.

Article 14 ECHR prohibits discrimination in every plain, reciting a series of grounds such as sex, race, colour, language, religion, political or other opinion. As it has been firmly established, Article 14 ECHR does not have independent standing: it may only be relied upon as an accessory complementing the "enjoyment of rights and freedoms" already safeguarded by existing provisions of the ECHR.

Thus, the prohibition of discrimination is not perceived by the Convention as one covering every type of differentiation. The definition of discrimination that falls within the meaning of the ECHR presupposes the existence of differential treatment in the enjoyment of a right that is already recognized by the Convention. Additionally, there must be a lack of objective and reasonable justification for that difference in treatment.

The monitoring mechanism for assessing the compliance of national arrangements protecting human rights with the prohibition against discrimination provided by Article 14 ECHR is distinctive in the following manner: the Strasbourg Court will, first of all, assess whether the particular social claims of a case fall within the applicable scope of a right protected by the ECHR or by its Additional Protocols. Only if the answer is in the affirmative will it examine, on a second level, to which extent the contested claims institute a prohibited form of discrimination in violation of Article 14 ECHR[5].

According to well-established case-law of the ECtHR, rulings condemning discriminatory treatment against individuals - which is an act seen as being contrary to Article 14 ECHR - are issued only when the Court is satisfied that the discriminatory conduct in question constitutes an unreasonable differentiation in the treatment of similar situations. On the contrary, the difference in treatment of dissimilar situations, or any differentiation in conduct that can be objectively and reasonably justified in view of the wide margin of appreciation afforded to state signatories, is deemed to be compatible with the ECHR[6]. This broad discretion forms part of the interpretative method followed by the ECtHR, which ensures a certain margin of appreciation in favour of national authorities, finding its roots in the principle of primacy of state sovereignty[7].

When the national legislature acts within the boundaries of the margin of appreciation granted to it by the Convention in matters of social and economic policy, such as in relation to issues concerning social benefits policy, regulations introducing differentiating treatment of similar situations will only be acceptable under the ECHR if they do not lack a 'manifestly reasonable' basis. Furthermore, in addition to considering whether there exists a reasonable and objective justification for the difference in treatment of beneficiaries, the Court will also deliberate on whether the principle of proportionality has been adhered to[8].

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5. For an analysis of the relevant interpretative approach to Article 14 ECHR, see ECtHR, judgment of 24.10.2006, *Vincent v France*, paras. 143-144.

6. For an analysis of the ECtHR case-law in the field of social security benefits, see *inter alia*, our study: Social benefits under the light of the ECHR, Journal of Theory and Practice of Administrative Law (Θεωρία και Πράξη Διοικητικού Δικαίου, ΘΠΔΔ), June 2009, pp. 657-669.

7. The ECtHR respects national authorities' choice of social policy, given their more direct knowledge of the social demands faced by them, as well as due to their vested authority to adopt measures that best serve the public interest.

8. The ECtHR considered the application of the principle of proportionality in relation to a legislative measure intended to reduce a social fund's financial difficulties. The measure had introduced an amendment to the standard for assessing the notion of disability to perform work, thus adversely affecting the applicant. The Court found that this was in violation of Article 1 of Protocol No.1 ECHR (FAP). This was due to the fact that the measure in question had introduced new assessment criteria for the granting of a disability pension allowance, which led to a complete deprivation of the established right to a disability pension. In the end, it was held that this legislative amendment imposed an excessive and disproportionate burden on a small group of beneficiaries, and was thus found to be contrary to Article 14 ECHR: ECtHR, *Kiartan Asmundson v Iceland*, Social Security Law Review (Επιθεώρηση

Similarly, even in cases where very weighty reasons have been advanced for excluding an individual from a social security scheme, the Court has categorically maintained its view that "such exclusion must not leave him in a situation in which he is denied any social insurance cover, whether under a general or a specific scheme, thus posing a threat to his livelihood". Thus, the Strasbourg judge concludes that "Indeed, to leave an employed or self-employed person bereft of any social security cover would be incompatible with current trends in social security legislation in Europe"[9].

Nonetheless, Article 14 does not preclude differential treatment of dissimilar situations when the aim is to 'remedy actual inequalities'. In line with this spirit, the ECtHR has held that different retirement ages set by UK law for men and women are not incompatible with Article 14 ECHR taken in conjunction with Article 1 of Protocol No. 1 ECHR (FAP). The above measure which allowed differential treatment was, at the time of its enactment (1940), introduced in order to correct factual inequalities that placed women in a disadvantageous position in their social and economic life.

When the ECtHR assesses the compatibility with the ECHR of national measures allowing discriminatory practices in the granting of social benefits, it seeks to adjust its jurisprudence in view of newly emerging socioeconomic conditions. Hence, the Court followed this approach when considering whether, given the latest developments, the contested British legislation in question was sufficiently and reasonably justified in the case of *Stec v United Kingdom*. The Court concluded that the difference in state pensionable age for men and women continued to be acceptable, notwithstanding the noted change in the circumstances of women. Moreover, the ECtHR held that the UK legislature had not exceeded the margin of appreciation granted to it by the Convention: the domestic legislative measures that had been adopted were not manifestly unreasonable, and there was already a decision in place for the progressive equalization of pensionable age limits by 2020[10].

The important 'novelty' introduced by this decision was the widening of the scope of protection provided by Article 14 ECHR. The Strasbourg Court recalled that the Convention must be read as a whole and be interpreted in such a way as to promote internal consistency and harmony between its various provisions, so as to ensure that protected rights are 'tangible' and effective rather than theoretical and hypothetical. In this sense, the ECtHR observed that its preceding case-law was confined to only allowing social benefit claims of a contributory character – i.e. ones requiring the prior deposit of social security payments – under the protective scope of the Convention. This narrow definition of the social rights that were to be protected under the ECHR was due to the proportion of social benefits in relation to claims against private insurance funds. This was especially so in view of the characterisation of such benefits as property assets, which constituted the necessary condition for this type of claim to be actionable under civil lawsuits within the protective realm of Article 6 ECHR. This basis for justification was set aside, as seen in the decision of *Stec* itself, following the shift in the jurisprudence of the ECtHR, but also in view of the application of the fair trial guarantees and the differences arising in claims of a non-contributory character[11]. Prompted by the claim for a non-contributory social benefit related to the loss of

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Δικαίου Κοινωνικής Ασφαλίσεως, ΕΔΚΑ), 2005, pp. 97-108, PETROGLOU (P.).

9. See ECtHR, judgment of 27.11.2007, *Luczak v Poland*, para. 52.

10. See ECtHR, judgment of 12.4.2006, Grand Chamber, *Stec and Others v United Kingdom*. For a commentary on the case in relation to the setting of a price ceiling on the one-off benefit payment of employees in the banking sector, see the study of PAPASTAGOS (P.): The application of European Human Rights Law in social benefits tortious liability claims, Social Security Law Review (Επιθεώρηση Δικαίου Κοινωνικής Ασφαλίσεως, ΕΔΚΑ), 2008, pp. 617-630.

11. For an analysis of that shift in the relevant case-law, see our study: Civil Service Law and the ECHR, P. Sakkoulas Press, Athens-Thessaloniki, 2004, p. 59 et seq.

earning capacity caused by an industrial accident, and bearing in mind that this benefit was state-financed, the ECtHR adopted an autonomous concepts interpretative approach in ascertaining the meaning of a "property asset" according to Article 1 FAP, in a manner that would be consistent with the definition of a "civil law right". The aim of this approach was to avert any discriminatory practices that had, by that time, been found to be "unreasonable and unjustified"[12]. In this way, any doubts as to the possibility of relying on Article 14 in conjunction with Article 1 FAP, in cases of discriminatory treatment in the granting of non-contributory benefits were waived.

This formative interpretation of the ECHR has contributed to the creation of a free-standing right to non-discrimination. As a result, it has led to the widening of the prohibition against discrimination in the field of granting of social benefits. Moreover, this prohibition is applicable irrespective of their contributory character, thus ultimately promoting the indiscriminate enjoyment of such social rights[13].

2. *The establishment of the right to non-discrimination by Article 1 of Protocol No. 12 ECHR.*

Protocol No. 12, which came into force on the 1st of April 2005, expressly stipulates that:

"1. The enjoyment of any right set forth by law shall be secured without any discrimination", while in paragraph 2 of the same Article it is proclaimed that "No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1", regardless of what authority that may be.

This Additional Protocol is not confined, in a regulatory content sense, to a general proclamation such as the one provided by Article 14 of the ECHR, recognizing the right to rely on established Convention rights in a non-discriminatory manner. As such, Protocol No. 12 establishes a general prohibition of any form of discrimination and, consequently, it places within its field of application every recognized right civil right provided by the national laws of member states. At the same time, this means that any conflict arising from unfavorable treatment in regard to the enjoyment of such rights would fall within the scope of the Court's jurisdiction[14].

The scope of application of Protocol No. 12 reintroduces the theoretical question of whether non-discriminatory treatment is an actual "right", or whether it constitutes a general principle. What is more, in the event that it ends up being considered a right in itself, the question of its social nature will also need to be addressed.

The notion of non-discrimination clearly adheres to a special mode of reasoning[15] that is pro-

12. Op. cit. Note 10, para. 49.

13. For a consideration of the recent case-law of the ECtHR, see the study of SUDRE (F.): Droit européen et international des droits de l'homme, 8e éd. PUF, Paris, 2006, p. 265 et seq.

14. Protocol No. 12 ECHR has been ratified by a small number of member states of the Council of Europe, not including Greece. It is worth noting that, in its latest report, the European Commission Against Racism and Intolerance (ECRI) has recommended that Greece should ratify the said Protocol, which is considered a vital instrument for the prevention of any form of racial discrimination on a national level. See the relevant report of the ECRI on Greece, published on 15.9. 2009, available at http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-IV-2009-031-ENG.pdf For a detailed theoretical approach to Protocol No. 12, see GONZALEZ (G.): Le Protocole no 12 de la CEDH portant interdiction générale de discriminer, Revue Française de Droit Administratif (R.F.D.A.), 2002, p. 113 et seq. For the application of the principle of non-discrimination by the ECtHR, see also SUDRE (F.): Le droit à la non discrimination dans la jurisprudence du C.E.D.H. des Nations Unies», in F. Sudre (dir.), La protection des droits de l'homme par le Comité des droits de l'homme des Nations Unies. Les communications individuelles, I.D.E.D.H., 1995, p. 32 et seq.

15. With regard to this, see AKANDJI-KOMBE (J. F.): Le droit à la non-discrimination vecteur de la garantie des droits sociaux, in F. Sudre, H. Surrel (dir.), «Le droit à la non-discrimination au sens de la Convention européenne des droits de l'homme», Bruylant, 2008, pp. 183-196, particularly p. 185 et seq.; and BOUCAUD (P.): La première application concrète de la Déclaration

tective of social rights, bearing in mind that it is an interpretative tool aiding the protection of disadvantaged individuals, such as foreigners, members of national minorities or immigrants, or even people with special needs. The regulatory framework of the Protocol reaches further than the area covered by Article 14 ECHR, as it applies to the member states upon which it imposes the obligation to avoid the enactment of rules that would contradict the prohibition of discrimination. Additionally, Protocol No. 12 ECHR establishes an independent right with a protective scope that is not confined to rights already protected by the Convention, but it is instead extended to every right recognised by law. As such, this rule is regarded as *lex specialis*, laying down a wider prohibition against discrimination. For this reason, during the process of its judicial scrutiny, the ECtHR tends to apply the Protocol independently, instead of resorting to a combined application of Article 14 ECHR with another, right-guaranteeing provision of a substantive ECHR right.

Any discriminatory treatment as to the enjoyment of social rights falls within the general prohibitions prescribed by Protocol No. 12 ECHR. This provision must be interpreted within the spirit of the Strasbourg Court's jurisprudence, according to which the differential treatment in the enjoyment of any ECHR recognized right, where such conduct is not objectively and reasonably justified, is considered unacceptable[16]. The prohibition against discrimination in the granting of social benefits is binding upon member states that have ratified Protocol No. 12 ECHR, although this does not mean that national legislatures have to give effect to this duty of allocation of social rights for their citizens in a specific manner, such as through a social security system for example. If, however, a state has established a social-insurance system, the contracting state is precluded from introducing regulations that will allow for the disadvantageous treatment of specific categories of people[17].

In summary, we note that the Convention and its additional Protocols do not, *prima facie*, include social rights. Nonetheless, the Strasbourg Court in its role as the institutional guarantor of the ECHR, has often incorporated a considerable social dimension in its case-law. The main expression of that propensity in the Court's jurisprudence can be seen in the establishment of the prohibition against discrimination in the granting of social benefits.

B. The prohibition of discrimination in the granting of social benefits as seen in the relevant case-law of the ECtHR.

1. *The unacceptability of unfavorable treatment in the establishment of pension rights on the grounds of nationality*.

The main contribution of the ECtHR to the protection of social insurance benefits can be seen in their characterization as property assets by the Court, thus leading to their inclusion within the meaning of property, which is protected under Article 1 FAP[18].

The scope of the margin of appreciation that is initially afforded to member states by the European Court in their decisions regarding measures

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Universelle: La Convention Européenne des Droits de l'Homme et des Libertés, Revue Aspects, hors-série, 2008, pp. 47-59.

16. See, ECtHR, Affaire linguistique belge, 23 juillet 1968, Les grands arrêts de la CEDH, no 8, § 10. That judgment expressly establishes the application of the principle of proportionality in the examination of the compatibility with the ECHR of measures introducing differential treatment.

17. See the relevant study of SUDRE (F.): La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux, in «Pouvoirs et libertés», études offertes à Jacques Mourgeon, Bruylant, 1998, p. 467 et seq.

18. See PETROGLOU (A.): The meaning of property according to Article 1 of Protocol No. 1 ECHR, Social Security Law Review (Επιθεώρηση Δικαίου Κοινωνικής Ασφαλίσεως, ΕΔΚΑ), 1995, pp. 513-519.

of social policy, including regulations concerning social welfare in general, is more narrowly defined when the measures in question introduce differential treatment based solely on nationality. According to the general principle characterising the case-law of the ECtHR, national governments can only present and rely on manifestly serious grounds; it is upon these that the European judge may accept that differential treatment based on nationality can still remain compatible with the ECHR.

In line with this general principle, it was held that there was no reasonable justification for the differential treatment of a Turkish national, who was permanently resident in Austria but who – according to Austrian law – was not entitled to a social benefit because he was not actually an Austrian national. Moreover, the idea that the state has a special responsibility towards its own nationals and a duty to assist their needs as a matter of priority was also not accepted. Following these observations, the Court decided that, in this instance, the Austrian authorities' refusal to grant the contested social benefit to the applicant, on the basis of his nationality, was in violation of Article 14 in conjunction with Article 1 FAP[19].

In a more recent case, the ECtHR was called to examine the compatibility with the ECHR of a decision of the Polish state to exclude a French citizen resident in Poland from its social security system for farmers, following relevant Polish legislation. The Court made a special note of the fact that the applicant was a permanent resident in Poland, who had already been enrolled in the country's general system of social security, thus having contributed to the financing of the social security system for Polish farmers. According to the Court, the petitioner's circumstances were comparable to those of Polish nationals who had previously been insured under the general system of social security, and who were subsequently seeking to accede to the social security system for farmers.

It must be highlighted that the contested differential treatment in question formed part of the general social and economic policy of Poland that was adopted prior to 2004, after which date the country was under obligation to enforce the relevant legislation because of it membership in the European Union. As emphasized by the Strasbourg Court, the Polish government had not put forward any reasonable and objective justification for the different treatment, based on nationality, resulting in the petitioner's exclusion from the social security system for farmers. The Court maintained this position notwithstanding the fact that the state enjoyed a wide margin of appreciation in the field of social security and, following these observations, it held that in this case, too, there was a violation of Article 14 in conjunction with Article 1 FAP[20].

In its interpretation of the ECHR, the Strasbourg Court has consistently held that member states are afforded a wide margin of appreciation in matters relating to decisions about the establishment of a particular social security system, and in choosing the type of benefits that may be granted within that social security system's framework. In cases where a state enacts legislation allowing for the granting of an automatic social benefit, however, it is possible to generate protected property rights under the meaning of Article 1 FAP[21].

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19. See ECtHR, judgment of 16.9.1996, *Gaygusuz v Austria*, Social Security Law Review (Επιθεώρηση Δικαίου Κοινωνικής Ασφαλίσεως, ΕΔΚΑ), 1997, p. 11 et seq.

20. See ECtHR, judgment of 27.11.2007, *Luczak v Poland*, and the study of PETROGLOU (P.): Thoughts on the occasion of the ECtHR judgment of 27.11.2007 *Luczak v Poland*, as well as the decision of the Council of State 771/2007, Social Security Law Review (Επιθεώρηση Δικαίου Κοινωνικής Ασφαλίσεως, ΕΔΚΑ), 2008, pp. 1-13.

21. See ECtHR, decision on admissibility of 6.7.2005, *Stec and Others v United Kingdom*, para. 54. For an analysis of this judgment see also STANGOU (P.): The application of European Human Rights law in tortious claims for social benefits. Observations on the occasion of judgments 3, 4 and 5/2007 of the (Hellenic) Supreme Special Court in relation to the setting of a price ceiling on the one-off benefit payment of employees in the banking sector, op. cit. Note 10, p. 619.

In all the instances discussed above, Article 14 was applied only after the nature of a pension right as a property asset had been ascertained, and following the finding that the actual circumstances of the dispute fell within the protective scope of Article 1 FAP.

On a further level, in its interpretation of Article 14 in conjunction with Article 1 FAP, the Court has held that signatory states must ensure the protection of established Convention rights for all citizens under their authority, irrespective of their nationality. Similarly, the ECtHR has postulated that no form of discrimination based solely on the element of nationality will be acceptable. Hence, the protection of all property rights, such as pension rights, must be secured for all beneficiaries under the same conditions applying to each member state's own nationals.

2. *Incompatible rules with the ECHR on the granting of benefits in the field of social security, based on the criterion of nationality.*

The decision in *Gaygusutz v Austria* mentioned earlier[22], undoubtedly offered a fresh solution as to the classification of social benefits under the protective scope of Article 1 FAP. The case-law, however, continued to raise doubts about whether all types of social security benefits would fall within the meaning of the protected assets prescribed by Article 1 FAP.

In the case of *Stec v United Kingdom*, the Court set aside the existing distinction between benefits of a contributive character and benefits of an exclusively social welfare character, in order to determine the scope of application of Article 1 FAP. Additionally, the ECtHR held that once a member state puts into place a system of social benefits, all rights deriving from that system will fall under the scope of Article 1 FAP, irrespective of whether a claim for the granting of such benefits is based on the prior deposit of social insurance payments or whether the matter relates to a benefit of a non-contributory character[23]. The most crucial point of reasoning in the relevant case-law, however, concerns the formal establishment of the principle of non-discrimination against the recipients of social benefits by the signatory state that has established the social-insurance system in question[24].

Elements of this line of reasoning can also be traced in an earlier ECtHR decision, where the notion of protected property rights under Article 1 FAP had been gradually expanded to include welfare-type benefits. Following this approach, in the case of differential treatment of an Ivory Coast national permanently resident in France, the Court found that there were no compellingly serious reasons relating to safeguarding the balance of the state's fiscal policy in the area of welfare. The relevant French authorities had refused to award the applicant a disabled adult's allowance on the ground that he was not a French national. The

22. Judgment in *Gaygusuz v Austria*, op. cit. Note 19.

23. Judgment in *Stec and Others v United Kingdom*, op. cit. Note 21, para. 47-53. This new approach in case-law was also adopted in *Runkee and White v United Kingdom*, judgment of 10.5.2007, where the ECtHR held that the claim for the granting of a benefit to a pensioner, irrespective of the existence of a contributory payment to an insurance fund, was a right protected under Article 1 FAP. Furthermore, the Court ruled that the differential treatment between men and women in the granting of a benefit to a widow pensioner was objectively justified, to the extent that that widow's pension had been awarded "in order to correct the inequalities between older widows, as a special group, and the rest of the population". See also SUDRE (F): Rapport introductif, in F. Sudre, H. Surrel (dir.), « Le droit à la non-discrimination au sens de la Convention européenne des droits de l'homme», Bruylant, 2008, pp. 17-48, particularly p. 38 et seq., and PRISO ESSAWE (S.-J.): Les droits sociaux et l'égalité de traitement dans la jurisprudence de la Cour européenne des droits de l'homme. A propos des arrêts Van Raalte c. les Pays-Bas et Petrovic c. l'Autriche, R.T.D.E., 1998, pp. 721-736.

24. See the relevant study of SIMON (A.): Les prestations sociales non contributives dans la jurisprudence de Cour européenne des droits de l'homme; A propos de l'arrêt Stec et autres c. le Royaume-Uni, R.T.D.E., 2006, pp. 647-653, particularly p. 650.

Court concluded that the refusal to grant a non-contributory disability benefit to a foreign national, based on the fact that he did not have the nationality of the signatory state, was in breach of Article 14 ECHR in conjunction with Article 1 FAP[25].

Two other recent judgments, extending the web of ECHR guarantees to other social benefits of a welfare nature, may also be of particular interest to any ECtHR case-law researcher:

In the first decision, the ECtHR was called to deliver a ruling in a petition lodged by an ex-Soviet Union national against Latvia[26]. The applicant had been permanently resident and working in Latvia for a number of years before the country had been declared an independent Republic. Once she had fulfilled the conditions set by national law, the applicant had requested the granting of a pension from the relevant Latvian authority. Latvian legislation, however, provided for a noticeably lower social benefit payable to non-Latvian nationals resident in the country than the equivalent benefit granted to the state's own national in similar circumstances.

It is worth noting that the Latvian Supreme Court sought to justify this differential treatment on the basis of the specificity of the country's insurance system on the one hand, and on the particular situation prevailing in Latvia, following its independence from the ex-Soviet Union, on the other. According to this ruling, the social insurance scheme was based on the principle of social solidarity, which did not allow for the establishment of a direct relationship between the ratio of insurance contributions and social benefits. In this context, insurance benefits were based on the principle of collective security of the greater public and, as such, they could not be granted depending on the specific contributions of each individual.

At the same time, according to the national court's reasoning, the organization of insurance schemes was a matter that should be left at the discretion of states, as it has to operate and be adjusted in view of each country's current economic circumstances and available resources.

Repeating findings that had been pronounced in its previous judgments[27], the Court made it clear that the discretion vested with signatory states as to the exercise of social policy would have to be delineated by their own decision to grant social benefits. In fact, once again, the ECtHR expressly stated that this would apply irrespective of payments of defined insurance contributions. In such instances, national rules should not allow differential treatment in the granting of such benefits on the sole criterion of the claimant's acquisition of the signatory state's nationality.

In addition, the European judge considered whether the contested discriminatory treatment had initially been introduced by the Latvian legislature in order to achieve a legitimate aim; and, furthermore, to what extent that regulation was disproportionate to the end sought.

The wide margin of appreciation that has been granted to states in their adoption of measures related to their social policy can be explained by the fact that national authorities are in a better position than the European judge when it comes to ascertaining what constitutes a public benefit of a social character in any particular member state. In that sense, the ECHR does not preclude national legislatures from enacting social measures that are based on criteria that may differentiate between certain groups of people, but only on the condition that such criteria will be compatible with the spirit of the Convention[28].

Specifically in this case, the ECtHR accepted

25. See ECtHR, judgment of 30.9.2003, *Koua Poirrez v France*.

26. See ECtHR, Grand Chamber, judgment of 18.2.2009, *Andrejeva v Latvia*.

27. Judgment in *Stec and Others v United Kingdom*, op. cit. Note 21, para. 55.

28. Judgment in *Andrejeva v Latvia*, op. cit. Note 26, paras. 83-85.

the argument that the contested differential treatment was, indeed, based on a legitimate aim – namely, the country's economic system. The special circumstances of Latvia following the declaration of its independence were taken into account and, in particular, the need – in view of these prevailing conditions – to establish a sustainable system of social security.

Moving on to the next level of its examination, the Strasbourg Court considered whether the contested regulation was, within the social sector, a necessary and proportionate measure towards the achievement of the goal of protecting the economic system of Latvia. This proportionality-check carried out by the ECtHR is applied in every instance where there is a need to ascertain the compatibility with the ECHR of restrictive measures affecting established Convention rights[29]. In this case, the ECtHR found that a Latvian national, who would fulfill the same conditions that applied to the petitioner at the time of the lodging of her application, would have been undoubtedly entitled to receive a different rate of pension than the minimum payment of a welfare character that the petitioner was awarded, based on the sole justification that she wasn't a Latvian national. In other words, in this case the ECtHR accepted that nationality was the only basis for the discriminatory treatment of the petitioner, to the extent that the latter had met all the other legal requirements that were necessary in order for her to receive a full pension, based on the entire duration of her service.

After all, the Court also took into account the fact that the petitioner was under the special status of a "permanent resident who did not have the nationality of the state in question". Moreover, the ECtHR noted that, due to the applicant's long-term residency, Latvia was the only state with which she had a stable legal link; as such, it was also the only state that could objectively be in the position to grant her some form of social insurance. Hence, the Court held that the denial of the social benefit that the petitioner would have been entitled to under the same circumstances had she been a Latvian national, was disproportionate to the aim sought by the independent Republic of Latvia, which was the protection of the country's social policy scheme. Additionally, the Court recalled that Latvia had ratified the ECHR and, as a contracting state, it had assumed the responsibility to safeguard the rights guaranteed by the Convention in relation to every citizen under its jurisdiction. Consequently, the Latvian government could not escape the responsibility to respect the principle of non-discrimination in view of the fact that it was not bound by other, inter-state agreements with Russia and Ukraine in the field of social security.

In summary, this recent judgment provides an express pronouncement by the ECtHR, dictating that any discriminatory treatment between recipients of social benefits that is triggered exclusively by their foreign nationality, is in violation of Article 14 in conjunction with Article 1 FAP. Any opinion to the contrary would deprive the effect of the substantive content of Article 14 ECHR[30].

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29. In the case of *Handyside* (7.12.1976, Série A, no 24, para. 49), the Strasbourg Court held, for the first time, that the democratic need for a measure is dependent upon three individual elements: the necessity to take this measure, the proportionality between the proposed measure and the aim it seeks to achieve, and the compatibility of this measure with the spirit of democracy. This judgment established the examination of proportionality, in the sense that any restriction placed upon ECHR protected rights must be proportionate to the aim pursued. See, also, EISSEN (A.): Le principe de proportionnalité dans la jurisprudence de la Cour Européenne des Droits de l'Homme, Etudes et Documents du Conseil d'Etat (E.D.C.E.), 1989, p. 275 et seq.

30. Judgment in *Andrejeva v Latvia*, op. cit. Note 26, paras. 90-91. See also, however, the partially dissenting opinion of ECtHR judge Mrs ZIEMELE, which is based on the specificity of the conditions that were prevailing in the Republic of Latvia after the declaration of its independence. According to this opinion, the said circumstances could have justified the differential treatment of the applicant, in view of the need for social protection of Latvian citizens in relation to the remaining, permanently resident individuals who were working in the country.

In yet a more recent ruling, the Strasbourg Court delimitated the notion of the margin of appreciation granted to signatory states in their exercise of social policy even more strictly, holding that demographic grounds cannot constitute sufficient justification for the discriminatory treatment of recipients of social benefits, particularly in relation to welfare-type benefits. The occasion leading to this judgment was a case of Greek interest, which tested the compatibility with the ECHR of a rule establishing a criterion for the granting of a large-family benefit, involving both the nationality of the mother and of her children.

The jurisprudence of the Hellenic Supreme Administrative Court in similar cases takes very seriously into account the public interest which is served by the recognition of such benefits. Furthermore, its decisions are based on the condition that the children – and not the mother herself – must be Greek nationals. This approach is further reinforced by the Council of State in its firm application of paragraph 4 of Article 3 of law no. 2163/1993, according to which the granting of benefits stipulated under paragraphs 3 and 4 of Article 63 of law no. 1892/1990 – dealing with benefits and a pension payable for life entitled by mothers of many children – is based on the Greek citizenship of her children[31], contrary to what was applicable before the adoption of the said provisions[32].

The Council of State has considered the setting of Greek citizenship of the children of large families as a criterion for the granting of the relevant welfare benefit, as seen in the legislation mentioned above; and it has done so both in relation to the Hellenic Constitution and in view of Articles 12 and 14 ECHR[33]. More specifically, the appeal judge was called to rule on the compatibility of the differential treatment, based on nationality, which was introduced by the contested rules on the granting of a pension payable for life to mothers of many children, with the relevant provisions of the Constitution and the ECHR.

This instance of judicial review arose from the denial of a claim for a pension granted to mothers of many children requested by Bedrie Zeïbek, a Greek national of the Muslim minority in Thrace. The reason for the rejection of her request was that one of her four children did not have Greek nationality at the time of her application for the said benefit. In this case, the Council of State held that the rule under Article 3 paragraph 4 of law no. 2163/1993 on the granting of welfare-type benefits to mothers of many children, based on the criterion of their children's citizenship, did not violate the principle of equality between women who had children with Greek citizenship and women whose children had foreign nationality. The reasoning of this decision was based on the intention lying behind the relevant law, as well as in view of the special nature of the constitutional mandate inherent in Article 21 regarding the necessity to support Greek families with many children[34].

Following the rulings of the Greek courts, the applicant petitioned the ECtHR. Her primary claim was that the contested regulation in law no. 2163/1993 had introduced differential treatment of foreigners whose children were not in possession of Greek citizenship, in relation to the receipt of welfare-type benefits. For this reason, the peti-

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31. Council of State 298, 1489/2006, 3705/2005.

32. Council of State 2654/2000.

33. It is worth noting that, later on, the Council of State acting in majority session (7 members), held that the contested statutory regulation was not contrary to Article 1 FAP. The reasoning behind this decision was that benefits granted to large families with many children – particularly due to their welfare character – did not fall under the meaning of "property" established by Article 1 FAP. In judgment 771/2007 (7 members) of the Council of State, the Court held that the benefits in question were put into place in order to create an incentive for having large families with many children, as a means of addressing the demographic problem faced by Greece. As such, these reasons did not serve to render nationality requirements "sufficient and objective" grounds for discriminating between recipients of benefits awarded to large families with many children.

34. Council of State 1489/2006.

tioner alleged that the statutory regulation in question was in direct violation of the fundamental principle stemming from Article 14 ECHR in conjunction with Article 12 ECHR, and with Article 1 FAP.

The Strasbourg Court held that, to begin with, the contested regulation was not intended to disrupt the family relations of the applicant's under-age daughter, who did not have Greek citizenship, as she had married a Turkish national and had, thus, acquired Turkish nationality.

In fact, the ECtHR took into consideration that the applicant's daughter had started her own family and was no longer a member of the petitioner's family, upon which the latter was seeking to derive protection from. Within this light, the rule requiring that all of the applicant's children had to be Greek citizens in order for her to be eligible for a pension granted to mothers of large families was not against Article 12 ECHR, whether this was considered independently or in conjunction with Article 14 ECHR[35].

During its consideration of the compatibility of the contested regulation with the guarantees provided by Article 1 FAP, however, the ECtHR initially found that the refusal to grant the specific pension payable for life – which was not dependent on any particular contribution – did fall within the scope of Article 1 FAP on the protection of "property". Furthermore, in considering to what extent there existed a "sufficient and reasonable" basis for the refusal to grant the benefit in question to the petitioner, the Strasbourg Court found that the differential treatment that was extended to the applicant both by the Greek legislation, but also by the Greek courts, constituted a disproportionate burden for her. Indeed, this burden had upset the balance that had to be kept between the demands of the general interest of Greek citizens on one hand, and the respect towards the fundamental rights of the petitioner on the other. With these thoughts in mind, and also in line with the spirit of its existing case-law, the ECtHR ruled that, in the current instance, there was a violation of Article 1 FAP in conjunction with Article 14 ECHR. Therefore, Greece was condemned and called to restore the damage caused to the petitioner[36].

In conclusion, the apparent deviation in the case-law of the Council of State from the interpretation that the Strasbourg Court had given to ECHR provisions in its attempt to extend its guarantees to social rights, has now been well-fermented following the recent developments in the jurisprudence of the ECtHR. The Court currently adopts an expansive application of the prohibition on discrimination in the area of benefits granting, irrespective of whether these are of a contributory nature. It has progressively come to accept the responsibility of signatory states to adopt the necessary social policy measures that will guarantee the equal treatment of social security recipients. The proportionality test allows the European judge to exclude any social measure that is clearly disproportionate to its purpose, when this measure introduces discrimination

35. See ECtHR, judgment of 9.7.2009, *Zeibek v Greece*, paras. 32-33. The European judge specifically notes that the Court finds it surprising that the Council of State had found that "the contested benefits in question were not, primarily, aimed at protecting motherhood, but were adopted in order to protect larger families, thus acting as an incentive for Greek citizens to have more children".

36. For the responsibility of signatory states deriving from the non-compliance with ECtHR judgments, see our study : Civil liability of the State within the European Convention on Human Rights framework, Nomiko Vima Law Journal 2005, pp. 2003-2022.

based solely on the ground of nationality. In the end, this check restricts the scope of power vested in states in the exercise of their social policy.

Some of the recent developments in the case-law of the ECtHR may, without doubt, give rise to criticism. This is especially so given the restrictive approach that the Court has taken in its primary method of interpretation, namely the freedom it grants to the member states of the Council of Europe in their adoption of measures that implement their socioeconomic policy. This trend in jurisprudence reflects the expression of the coexistence of pretorial activism, but also self-restraint, that characterise the control exercised by the European judge of human rights.

The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges

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1. Introduction

The fiftieth anniversary of the European Court of Human Rights this year is an occasion for both celebration and apprehension. The Court started functioning in 1959 at the heart of the Council of Europe, an organisation set up after World War II to protect democracy against dictatorship and thereby to avoid the recurrence of the massive human rights violations of the war. From a timid beginning the Court has grown into a full-time institution successfully dealing with thousands of cases each year. Its case law is generally perceived to be among the most developed and extensive of all international human rights institutions and most of its judgments are routinely implemented by the state parties to the European Convention on Human Rights (ECHR).

However, for over a decade dark clouds have been gathering over Strasbourg. The number of applications has been rising so sharply – partly due to the accession of a large number of new state parties to the ECHR – that the very work and survival of the Court seems to be at risk. Or, as one scholar has put it, the Court is fighting with its back to the wall.[2] It is precisely because of these high numbers that the Court has started to deal creatively with large-scale violations of human rights by way of so-called pilot judgments. This article will assess this new phenomenon which holds the promise of being the most creative tool the Court has developed in its first fifty years of its existence. First, it will look at what pilot judgments are and in which cases the Court has applied the pilot methodology. Secondly, the main reasons for setting up the pilot judgment procedure will be considered. Finally, this article will analyse the challenges the pilot judgment procedure faces, such as its legal basis and the position of applicants in comparable cases.

2. Pilot Judgments: Combining Individual and General Redress

A pilot judgment could be said to address a general problem by adjudicating a specific case. This is done by going beyond the mere determination that the ECHR has been violated: in a pilot judgment the Court also gives general indications on how a state should remedy the underlying problem. Often this will involve legislative changes, for example when a national remedy is non-existent or insufficient. In doing so, the state concerned is called upon to resolve comparable cases. The Court's former President, Luzis Wildhaber, has identified up to eight different features of a pilot judgment.[3] I will enumerate them here, since they provide an overview of what a pilot judgment includes in its full-fledged form: (1) the finding of a violation by the Grand Chamber which reveals that within the state concerned there is a problem which affects an entire group of individuals; (2) a connected conclusion that that problem has caused or may cause many other applications to be lodged in Strasbourg with the European Court; (3) giving

1. Dr. Antoine Buyse hosts a blog on the European Convention on Human Rights: echrblog.blogspot.com.

2. Stéphanie Lagoutte, 'The Future of the European Human Rights Control System: Fighting with Its Back to the Wall', in: Lagoutte a.o. (eds.), *Human Rights in Turmoil. Facing Threats, Consolidating Achievements* (Leiden: Martinus Nijhoff Publishers 2007).

3. Luzius Wildhaber, 'Pilot Judgments in Cases of Structural or Systemic Problems on the National Level', in: Rüdiger Wolfrum & Ulrike Deutsch (eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Berlin: Springer Verlag 2009) pp. 69-75, at p. 71.

guidance to the state on the general measures that need to be taken to solve the problem; (4) indicating that such domestic measures work retroactively in order to deal with existing comparable cases; (5) adjourning by the Court of all pending cases on the same issue; (6) using the operative part of the pilot judgment to "reinforce the obligation to take legal and administrative measures", as Wildhaber phrased it; (7) deferring any decision on the issue of just satisfaction until the state undertakes action; (8) informing the main Council of Europe organs concerned of progress in the pilot case. The latter would include the Committee of Ministers, as the responsible organ for the Supervision on the execution of the Court's judgments, the Parliamentary Assembly, and the Human Rights Commissioner.

The first time the Court tested the pilot judgment procedure was the Polish case of Broniowski – which is the judgment on which Wildhaber based his enumeration of characteristics.[4] The case had its origins in one of the legacies of World War II, when the Polish state was moved westwards. Large parts of the east of Poland were incorporated into the Soviet Union, in what today are the states of Ukraine, Belarus, and Lithuania. The Polish inhabitants of those areas were forced to move westwards and under so-called "Republican Agreements" between the Polish authorities and the Soviet republics, Poland undertook to compensate the more than one million displaced persons. This was mostly done by giving them land in the newly acquired western parts of Poland. However, a group of around 100,000 people did not receive any compensation. Since they came from the territories beyond Poland's new eastern border, the Bug River, their claims for compensation were called the Bug River claims. Broniowski was the heir of one of those people. Although, as a lawful heir, he had a right to compensation, he did not receive it. Polish Court's, including the Supreme Court and the Constitutional Court found the state's actions and regulatory framework, which heavily reduced the possibility to receive any compensation, contrary to the constitution. These judicial findings did not improve Broniowski's situation. Therefore, he brought his case to Strasbourg, where the European Court of Human Rights found a violation of the right to peaceful enjoyment of one's possessions.

Broniowski's case could simply have ended up on the long list of property restitution cases which the Court has been dealing with over the past decade. The Grand Chamber decided, however, to specifically acknowledge that the applicant's case was part of a wider problem. The Chamber held that the violation "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons"[5], namely the identifiable group of the Bug River claimants. This could lead to many new and well-founded applications by applicants placed in a similar situation as Broniowski. The Court even specifically referred to the 167 cases of Bug River claimants pending at that moment and the over 80,000 people affected by the lack of compensation. It assessed that this did not only imperil the effectiveness of the supervisory mechanism of the ECHR, but also that it was "an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs."[6] It is at that point that the Court went beyond its established case law. Until then it had always held that when it found a violation of the Convention, it was in principle upon the state party to choose the manner of remedying a situation.[7] But in *Broniowski* the Grand Chamber concluded that the state had to take general measures which would

4. ECtHR, *Broniowski v. Poland*, 19 December 2002 (admissibility), Appl.no. 31443/96. The decisions on the merits and on the friendly settlement reached were decided on 22 June 2004 and 28 September 2005 respectively. The facts described here are taken from the Court's decisions and judgments in this case.

5. *Broniowski* (merits) para. 189.

6. Ibid., para. 193.

7. See for a fuller overview of the Court's case-law on this issue, my 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* vol. 1 (2008) pp. 129-153.

deal with the whole group of affected Bug River claimants. Thus, not only the individual case, but also the broader problem had to be tackled. The Court even specified the following about such measures:

«[T]he Court considers that the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu. As to the former option, the respondent State should, therefore, through appropriate legal and administrative measures, secure the effective and expeditious realisation of the entitlement in question in respect of the remaining Bug River claimants, in accordance with the principles for the protection of property rights laid down in Article 1 of Protocol No. 1, having particular regard to the principles relating to compensation».[8]

The duty to take general measures then innovatively reappeared in the operative part of the judgment which summarizes the holdings and decisions the Court takes in a particular judgment. This reappearance truly shows that the Court broke new ground in *Broniowski*. Of course, in earlier cases the Court also regularly had to acknowledge that a violation did not follow just from an act or omission by a state party, but was a result of national legislation. The early *Marckx* judgment (1979)[9] on inheritance discrimination is a case in point in which the Court indicated such an underlying problem. Sometimes, the Court even made suggestions for actions to be undertaken by the state[10] – but never in the operative part of the judgment until *Broniowski*.

In *Broniowski,* the Court relegated the matter back to the Polish authorities in order to take such general measures and to reach a friendly settlement with the applicant on just satisfaction. In addition, the Court decided to adjourn consideration of other Bug River cases. A friendly settlement between Broniowski and Poland was indeed reached on his particular case in September 2005. More importantly changes happened on the domestic level. Just a few months after the Grand Chamber's judgment, the Polish Constitutional Court declared the newest version of the Bug River compensation law unconstitutional. Early in 2005 the government then drafted a new bill, which *inter alia* made pecuniary compensation possible for all remaining claimants, up to a maximum of 15% of the original value of their property. Following debate in parliament, the ceiling was raised to 20% and the law was approved in the summer of the same year. In September, the Court then decided to strike Broniowski's case out of the list.

In this friendly settlement judgment the Court itself first used the wording "pilot judgment" to refer to the judgment on the merits. The Court stressed that it was important "to have regard not only to the applicant's individual situation but also to measures aimed at resolving the underlying general defect in the Polish legal order identified in the principal judgment as the source of the violation found."[11] The Court accepted that the new 2005 law was designed to take away practical and legal obstacles for the Bug River claimants and that it addressed both the situations of existing claimants and of the future functioning of compensation for this group. The Government had indicated that the Polish system also offered possibilities for people whose cases were pending before the European Court to seek compensation as a result of the damage flowing from the systemic violation as established by the Court in its judgment on the merits. The Court thus concluded that there was an "active commitment"[12] by Poland to remedy the systemic problem. Interestingly, it commented that it was eventually for the Committee of Ministers to

8. *Broniowski* (merits) para. 194.

9. ECtHR, *Marckx v. Belgium*, 13 June 1979 (Appl.no. 6833/74).

10. E.g. ECtHR, *Scozzari and Giunta*, 13 July 2000 (Appl.nos. 39221/98 & 41963/98). For these and other cases, see: Lech Garlicki, 'Broniowski and After: On the Dual Nature of "Pilot Judgments"', in: Lucius Caflisch a.o. (eds.), *Human Rights – Strasbourg Views. Liber Amicorum Luzius Wildhaber* (Kehl am Rhein: Engel Verlag 2007) pp. 177-192, at pp. 182-183.

11. *Broniowski* (friendly settlement), para. 37.

12. Ibid., para. 42.

evaluate the Polish measures and their actual implementation, but for its own decision-making evaluated the measures as a "positive factor".[13] One may note at this point that the division of tasks between the Court (adjudication) and the Committee of Ministers (supervision of implementation) thus slightly shifted towards the Court. The Court seems to make a *prima facie* assessment based on national reforms undertaken and a positive commitment by the state concerned, without testing in detail how this works out in practice. That latter and essential task still remains for the Committee of Ministers.

The *Broniowski* saga does not end here, however. On 4 December 2007 the Court decided in the *Wolkenberg and others*[14] decision to strike out of its list a number of the cases of Bug River claimants whose applications it had adjourned during the pilot procedure. A large group of these applicants had been offered compensation by Poland under an accelerated procedure in 2006. But many of them were not satisfied with the amount (20% of the original value) they received[15] and indicated that they wished to pursue their application in Strasbourg. In *Wolkenberg* the Court evaluated the 20% compensation ceiling and found it not to be unreasonable. The Court also assessed, once again, the broader issue: it evaluated how the compensation scheme had functioned since its introduction in 2005 and held that the system seemed to function satisfactorily, although improvements in its efficiency were still necessary. It concluded by further clarifying its own function in a pilot procedure: "the Court's role after the delivery of the pilot judgment and after the State has implemented the general measures in conformity with the Convention cannot be converted into providing individualised financial relief in repetitive cases arising from the same systemic situation."[16] The pilot procedure cycle finally ended in October 2008 when the Court struck out the last 176 Bug river claimant cases.[17]

The trickle of fresh water caused by the first pilot procedure quickly turned into a small stream when from the autumn of 2005 onwards various sections of the Court started to issue pilot judgments. In addition, the Grand Chamber also issued new pilot judgments. All of these can be characterised as variations on a theme: although they display some features of a full-fledged pilot procedure, they mostly do not reflect all eight features as identified by Wildhaber.

In *Lukenda*, a judgment concerning the length of proceedings in Slovenia, the Third Section of the Court noted that "that the violation of the applicant's right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice. The problem continues to present a danger affecting every person seeking judicial protection of their rights."[18] The Court "encourage[d]" Slovenia to put in place effective remedies at the domestic level.[19] The other 500 pending Slovenian cases on the same issue were not adjourned, but the Court held in the operative part of the judgment that Slovenia "must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time." In the ensuing months the Court dealt with around 200 comparable Slovenian cases[20], perhaps as a way to keep up the pressure on Slovenia. The state party meanwhile introduced legislation to deal with the problem. Since this new national scheme for acceleration of procedures and for compensation also covered those applicants whose cases were already

13. Ibid.

14. ECtHR, *Wolkenberg and others*, 4 December 2007 (Appl.no. 50003/99).

15. Wildhaber (2009) p. 72.

16. *Wolkenberg*, para. 76.

17. ECtHR, *Press Release First "pilot judgment" procedure brought to a successful conclusion Bug River cases closed*, 6 October 2008.

18. ECtHR, *Lukenda v. Slovenia* , 6 October 2005 (Appl.no. 23032/02) para. 93.

19. Ibid., para. 98.

20. Erik Fribergh, 'Pilot Judgments from the Court's Perspective', in: Council of Europe, *Towards Stronger Implementation of the European Convention on Human Rights. Proceedings of the Colloquy organised under the Swedish Chairmanship of the Committee of Ministers of the Council of Europe* (Strasbourg: Council of Europe 2008) pp. 86-93, at p. 91.

pending in Strasbourg, the Court declared such cases inadmissible once the domestic scheme was in place and operational.[21]

In a dissenting opinion in *Lukenda*, judge Zagrebelsky qualified the Court's call for appropriate legal measures and administrative practices" as both too far-reaching and too general. He convincingly argued that such a Court order without further specification of the context in Slovenia did not help the country itself nor the Committee of Ministers in its supervisory task. He also indicated that in his view pilot judgments should only be issued by the Grand Chamber – and there he is in line with former Court president Wildhaber. Zagrebelsky underlined that this was important for reasons of coherence of case-law and also because it would be the best way to discus the systemic problems. One could add that it would be wise for an additional reason: by dealing with a case through the Grand Chamber, the European Court of Human Rights gives a clear signal that it takes a systemic problem seriously, which might help the respondent state to do the same.

In spite of these doubts as to the appropriateness of having sections of the Court issue pilot judgments, it happened several times. In *Xenides-Arestis*[22], the Third Section of the Court dealt with a case of denial of access to property in northern Cyprus, occupied by Turkey, and the lack of remedies on the national level. The judgment reflected that this was a problem affecting a large number of people. The Court held in the operative part of its judgment that Turkey, as the respondent state, had to "introduce a remedy which secures the effective protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 in relation to the present applicant as well as in respect of all similar applications pending before the Court. Such a remedy should be available within three months from the date on which the present judgment is delivered and redress should be afforded three months thereafter." As in *Broniowski*, consideration of all other cases (around 1,400) was adjourned. A year later the Court decided to award the applicant a large sum in terms of just satisfaction, since the applicant and the state had failed to reach a friendly settlement. Nevertheless, on the broader problem the Court did give the state the benefit of the doubt. It took note of the fact that the new compensation and restitution mechanism set up in Northern Cyprus in the intermediate time had "in principle" lived up to the standards indicated in the Court's earlier judgments and decisions.[23] One should note, however, that in subsequent years the Court continued to find violations of the Convention in similar cases of applicants whose cases had been already lodged in Strasbourg before the judgment in *Xenides-Arestis*.[24]

The Court even started to label judgments retroactively as pilot judgments. In the January 2006 decision in the case of *İçyer*[25] it declared a petition in one of the many cases of internally displaced persons in Eastern Turkey inadmissible, because of failure to exhaust a new domestic remedy: a compensation mechanism. In that decision the Court referred back to its judgment in the comparable case of *Doğan and others*[26] of 29 June 2004 – that is exactly a week after the *Broniowski* judgment on the merits. That judgment had been the incentive for Turkey to set up the new mechanism. Consequently, approximately 1,500 cases were dismissed in Strasbourg for failure to exhaust this domestic remedy.[27]

Then there are cases which started at the

21. ECtHR, *Korenjak v. Slovenia*, 15 May 2007 (Appl.no. 463/03).

22. ECtHR, *Xenides-Arestis v. Turkey* (merits), 22 December 2005 (Appl.no. 46347/99).

23. ECtHR, *Xenides-Arestis v. Turkey* (just satisfaction), 7 December 2006 (Appl.no. 46347/99) para. 37.

24. See e.g. *Kyriakou v. Turkey* (merits), 27 January 2009 (Appl.no. 18407/91). Note specifically the dissenting opinions of the Turkish judge Karakaş in this and similar judgments on the particular issue of the newly created domestic remedy.

25. ECtHR, *İçyer v. Turkey*, 12 January 2006 (Appl.no. 18888/02).

26. ECtHR, *Doğan and others v. Turkey*, 29 June 2004 (Appl.nos. 8803-8811/02 a.o.)

27. Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights', *Human Rights Law Commentary* vol. 3 (2007).

Chamber level, but at the request of one of the parties were referred to the Grand Chamber. In the Polish case of *Hutten-Czapska*[28] the Grand Chamber did follow the Chamber's lead in holding that a full pilot procedure was the appropriate way to deal with the issue – contrary to what the Polish government had contended. The case concerned the system of rent restrictions which were meant to protect tenants against extreme rent increases. These restrictions were so tight that landlords could not increase the rent on their property sufficiently and were in effect making losses. The issue affected around 100,000 landlords and even more tenants. Although only eighteen comparable cases were pending when the Grand Chamber dealt with the case, it held that

«[T]he identification of a "systemic situation" justifying the application of the pilot-judgment procedure does not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court's docket, which hinders the effective processing of other cases giving rise to violations, sometimes serious, of the rights it is responsible for safeguarding».[29]

In the operative part of the judgment, the Grand Chamber ordered to put and end to the systemic violation and to establish and guarantee a fair balance between "the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention". Two years later, in 2008, the Grand Chamber struck the case of the list, after the applicant and the government had reached a friendly settlement and after Poland had shown an "active commitment" by taking various steps to reform the rent control system.[30] Again, specific supervision was left to the Committee of Ministers.

In the Italian case of *Sejdovic*[31] the Court found a violation of the right to a fair trial in the context of *in absentia* convictions. In the operative part of the judgment, the Court found that this violation originated in systemic problems in domestic law and practice and that the state party thus had to take general measures, going beyond the facts of the particular case. After the Chamber's judgment, Italy did initiate legal reforms in order to bring its practice in line with the European Convention. The new laws did not have retroactive effect on the case of Mr Sejdovic, however. This Italian willingness to undertake action led to an interesting reaction by the Grand Chamber. Although it acknowledged the systemic nature of the problem, it did not call for general measures, but only noted the reforms. In the operative part of the judgment it limited itself to the finding of a violation in the specific case.[32]

In a similar vein, the Grand Chamber in *Scordino v Italy*[33] found a double systemic problem. This concerned on the one hand systemic failures in the system of compensation after expropriation and on the other hand in the operation of the so-called *Pinto Act* which offered a remedy for excessively long judicial proceedings. Although Italy was requested to address the broader problem within a fixed time limit of six months, the Court did not mention this in the operative part of the judgment nor did

28. ECtHR, *Hutten-Czapska v. Poland* (Grand Chamber), 19 June 2006 (Appl.no. 35014/97). The Chamber judgment of the Fourth Section was delivered on 22 February 2005. For a detailed analysis of the inteprlay between the European Court and the domestic courts in this case, see: Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments', *Sydney Law School Legal Studies Research Paper* No. 08/135 (2008). At: ssrn.com/abstract=1295652.

29. Ibid., para. 236.

30. ECtHR, *Hutten-Czapska v. Poland* (friendly settlement), 28 April 2008 (Aappl.no. 35014/97) para. 43.

31. ECtHR, *Sejdovic v. Italy* (Chamber judgment), 10 November 2004 (Appl.no. 56581/00).

32. The Grand Chamber judgment was rendered on 1 March 2006.

33. ECtHR, *Scordino v. Italy* (Grand Chamber), 29 March 2006 (Appl.no. 36813/97).

it adjourn similar cases. This seemed to be part of a wider pattern of caution by the Grand Chamber. In all its cases concerning Italy in the spring of 2006, the Grand Chamber discussed systematic problems in the merits and not in the operative part of its judgments.[34]

All of the above shows that a variety of pilot or quasi-pilot judgments has evolved over the years. How does this variety reflect the eight features of the pilot procedure identified by Wildhaber? The clearest way to establish a typology is to think of the range of pilot-like judgments as a continuum. At the most traditional end of the continuum are those judgments which like *Marcxk* point to a broader issue underlying a particular violation, for example domestic laws. At the other extreme is *Broniowski* which reflects all eight features. In some judgments the Court has only pointed at broader or systemic problems, in others it has taken a further step by indicating – in varying degrees of precision – what kind of action a state party to the European Convention needs to take. These two elements are indeed the core of a pilot judgment: (1) the identification of a systemic problem[35] and (2) explicit guidance given by the Court to the state concerned.[36] This implies that a situation could lead to many applications in Strasbourg. Whether such a judgment is pronounced by a Grand Chamber or not does not alter, in my view, the qualification as a pilot judgment. Of course, as indicated above, it would be very commendable if only the Grand Chamber would deliver pilot judgments. It adds to the authority of the procedure. The same goes for the choice between including the indications for state action only in the merits of the judgment or also in its operative provisions. This choice does not influence the character of the judgment as a pilot judgment, but of course inclusion in the operative provisions does increase its legal authority and persuasive effect.[37] A final way to put pressure on the respondent state is to include a time limit within which the state has to effect domestic changes.[38] This is to a certain extent a risky step that could backfire, since the authority of the Court is explicitly challenged if the state does not comply with such a time limit.

Interestingly, the pilot judgment procedure is both looking forward and backward. On the one hand it requests state parties to remedy past injustice to the person affected in the particular case and to those in a similar situation. On the other hand it is also future-oriented by indicating, albeit often in broad strokes of the legal brush, the actions a state should pursue in order to take away the underlying cause of the violation.[39] This Janus-faced feature of a pilot procedure fits in well with general public international law. When an international obligation has been violated by a state, there is not only a duty to repair, but also a duty of non-repetition. The future-oriented aspect of the general measures ordered in pilot judgments relate to this latter duty.[40]

3. Underlying reasons for the creation of the pilot judgment procedure

The pilot procedure originated in the discussions on the drafting of Protocol 14 of the ECHR which was meant to reform the supervisory mechanisms of the Convention.[41] The procedure was the result of discussions and cooperation between the Court, the state parties to the Convention, and the Steering Committee on Human Rights of the Committee of Ministers. In spite of the Court's urging, the Steering Committee decided not to include the pilot judgment procedure in the Protocol. It was of the opinion that pilot judgments could be issued even

34. Garlicki (2007) p. 187.

35. The existence of which can often be assumed if a large group of people is affected, which can – but not necessarily so – be reflected in the number of applications pending in Strasbourg.

36. Fribergh (2008) p. 91.

37. Garlicki (2007) p. 190.

38. See e.g. ECtHR, *Burdov v. Russia* (No. 2), 15 January 2009 (Appl.no. 33509/04).

39. Paul Mahoney in the discussion following the Presentation by Luzius Wildhaber, in: Wolfrum & Deutsch (2009) pp. 77-92, at p. 84.

40. Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures', *Human Rights Law Review* vol. 7 (2007) pp. 396-411, at pp. 408-410.

41. At the moment of writing this Protocol has still not entered into force

within the existing legal framework.[42] The Committee of Ministers, at the moment of adopting Protocol 14 in May 2004[43], urged the Court to start using the pilot procedure – without using the word "pilot" as such. It invited the Court to:

«I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;

II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court».[44]

In the resolution, two underlying reasons for this are mentioned. The first is to safeguard the effectiveness in the long run of the Convention's supervisory mechanism – a clear reference to the Court's overwhelming workload. The Court has not been able to keep pace with the influx of new cases. This has led to an increasing backlog and eventually will indeed threaten its entire supervisory function. The number of pending cases was almost a 100,000 at the end of 2008.[45] Since many of the cases which are declared admissible – in themselves a small minority of the total amount of applications – are cases concerning comparable situations, there seemed to room for improvements in efficiency. Undoubtedly the pilot judgment procedure can serve as part of the solution to deal with states which are "repeat offenders".[46] It is obvious, that if the Court could help to solve a large-scale or systemic problem, this may prevent numerous new applications and even make it possible for the Court to strike a large number of comparable cases out of its list.

The second underlying problem mentioned in the Committee of Minister's resolution is the states' need to receive guidance in identifying systemic problems and in tackling them. The more clearly the Court can indicate which parts of a country's laws or practice are contrary to the Convention, the easier it becomes for a state to bring the national situation in line with ECHR standards.[47] If the Court would only find a violation, there is a risk that a reformed situation in a particular country leads to new violations of the Convention. Potentially, this would be the start of an endless and time-consuming process of trial and error, which serves neither the Strasbourg institutions nor the state concerned. In this sense, the pilot procedure includes a pedagogical element: not only indicating what is wrong, but also shedding some light on the correct path to be taken.

The Court responded very quickly to the Committee of Minister's call: the *Broniowski* judgment was issued within a few week's after the resolution. One could add that the friendly settlement decision of the Court in that case

42. Costas Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At home', *The International Journal of Human Rights* vol. 12 (2008) pp. 415-448, at p. 434, including references to the relevant Council of Europe documents.

43. Of course Protocol 14 itself and the later Protocol 14-bis were both meant to increase the Court's efficiency as well. Among other matters, they enable three-judge panels – instead of seven judges – to deal with repetitive cases.

44. Committee of Ministers, resolution Res(2004)3 on judgments revealing an underlying systemic problem, 12 May 2004.

45. ECtHR, *Annual Report 2008*, to be found on www.echr.coe.int.

46. The term is used by Philip Leach in his 'Beyond the Bug River – A New Dawn For Redress Before the European Court of Human Rights, *European Human Rights Law Review* (2005) pp. 148-164, at p. 159.

47. The British government raised this problem in: ECtHR, *Hirst v. the United Kingdom (no.2)* (Grand Chamber), 6 October 2005 (Appl.no. 74025/01) paras. 83-84.

explicitly reflects the two underlying reasons for the pilot procedure.[48] The two reasons are closely connected to the third and most important underlying reason to create the pilot procedure: the presence and accession of a number of states with large-scale problems of human rights. The end of the Cold War at the start of the 1990s marked the starting point for a massive eastward expansion of the reach of the ECHR, with the number of state parties doubling in a bit more than a decade. Obviously, this in itself eventually led to a large increase in applications in Strasbourg. Most of the newly acceding countries were grappling with large-scale reforms in the transition from authoritarian communist states to free-market democracies based on the rule of law. Issues ranging from the implementation of judgments to large-scale restitution and compensation schemes for properties nationalised in the communist era all surfaced. This partially changed the role of the Strasbourg Court from fine-tuning the situation in relatively stable and functioning societies to having to deal with large-scale and systemic human rights problems.[49]

However, it would be a misunderstanding to solely ascribe the rise of the pilot procedure to the accession of these Middle and Eastern European states. The earliest example of a truly large-scale problem reaching Strasbourg was the range of Italian complaints about excessively long domestic judicial proceedings.[50] Another long-time state party to the Convention, Turkey, was equally a source of numerous repetitive applications. One the one hand this was due to problems arising from the Turkish occupation of Northern Cyprus, on the other hand from the internal armed conflict in Eastern Turkey between Turkish security forces and Kurdish opponents. Both situations led to larger-scale displacement and loss of housing and property. Since Turkey accepted the Court's jurisdiction only from 1990 onwards, cases related to these issues started reaching the Court in the same decade as the Eastern European ones. In addition, violent conflicts broke out or endured not only in Eastern Turkey, but also in the Balkans and the Caucasus. The legacy of those wars, among many other sad effects, has compounded Strasbourg's caseload problem.

The pilot procedure has thus arisen out of necessity. From the side of the Court this necessity was the incoming flow of applications that became too large to handle efficiently. For the states parties, united in the Committee of Ministers, this was a call for more clarity on how to bring their laws and policies in line with the European Convention of Human Rights. Both problems arose from three kinds of large-scale human rights violations: systemic problems with the rule of law and/or the functioning of the judiciary (Italy), problems of transition (most of Middle and Eastern Europe), and legacies of recent armed conflict (Turkey, Russia, states of the former Yugoslavia) and combinations of these.

4. Challenges for the Pilot Procedure

The pilot procedure has now been tested in a number of different situations. This has occurred under rather widespread enthusiasm. Both Lord Woolfe (2005) and the Committee of Wise Persons (2006) have in their respective reports on reforming the Court, recommended that the Court continue to use the procedure.[51] Nevertheless, this testing period has led to a number of doubts and concerns about the procedure. The first is of a legal character: the legal basis of the pilot judgments is contested and has been called "fragile" by one of the current judges.[52] As we have seen above, the Committee of Ministers – and one may thus assume most member states – did not in principle consider that any treaty change was needed to start using the pilot

48. See specifically para. 35 of *Broniowski* (friendly settlement).

49. For more on this shift, see Sadurski (2008).

50. See e.g. the Italian case in which the Court for the first time concluded that the extent of the issue was not a series of isolated incidents, but could be labelled as a "practice": ECtHR, *Botazzi v. Italy*, 28 July 1999 (Appl.no. 34884/97) para. 22.

51. Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, p. 6 and p. 40; *Report of the Group of Wise Persons to the Committee of Ministers*, 15 November 2006, CM(2006)203, para. 105.

52. Garlicki (2007) p. 191.

judgment procedure. Indeed, from the beginning the Court has based its pilot judgments on an existing ECHR provision: Article 46. This Article provides that state parties are legally bound "to abide by the final judgment of the Court in any case to which they are parties." Traditionally, the Court had restricted itself to finding violations and sometimes ordering just satisfaction under Article 41 ECHR in the form of monetary compensation to be paid by the state to the victim. This was in line with the intention of the drafters of the ECHR who purposefully left out of the Convention's text any powers for the Court to order broader measures such as the annulment or amendment of national legislation.[53] In *Broniowski* the Court summarised its interpretation of Article 46 by holding that it included the obligation:

«[N]ot just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment».[54]

Arguably, the latter enables the Court to give indications to the state concerned. As judge Zupančič argued in a concurring opinion to *Broniowski* this should be justified not so much by pragmatism and efficiency, but rather by logic and justice.[55] He contended that it logically follows from the system of the Convention that in some situations it does not make sense to afford only monetary compensation. If for example a violation is ongoing, any compensation can only remedy the violation up to that point, but does not change the future. Likewise, he argued, in cases of structural violations, individual compensation does not solve the problems of people in comparable situations. Whereas the first example indeed represents strong legal logic to make the Convention effective, the second example (which reflects the situation in *Broniowski*) is more of a moral justification. The strongest *legal* justification is indeed that of making the Convention practical and effective in the state parties on the domestic level. This can only be done if the state party indeed accepts guidance from the Court on how to make its laws and policies more "ECHR-proof". Judge Zagrebelsky, in a partly dissenting opinion in *Hutten-Czapska*, argued against the use of ordering general measures in the operative part of the Court's judgments. He took the position that the Court went "outside its own sphere of competence" and entered "the realm of politics". He pointed to the fact that the pilot procedure was not included in Protocol 14. As a counter-argument one may argue that the state parties themselves, through the Committee of Ministers, have asked the Court for clearer directions. Thus the consent of states with the Court's functioning seems to be there. This does not rule out that practical problems may arise if a state, more specifically the executive, in a *particular* case – such as *Hutten-Czapska* – is not keen to cooperate. I will return to that issue below.

The Court as a whole has now taken a pragmatic approach in the controversy about the legal basis. In reaction to the *Report of the Group of Wise Persons*, the Court has stated that more experience is needed in practice before undertaking any new treaty changes.[56] This would also entail, in the Court's view, evaluating

53. Buyse (2008) p. 144.

54. *Broniowski* (merits), para. 192. This in itself was a quotation from an earlier case: ECtHR, *Scozzari and Giunta v. Italy*, 13 July 2000 (Appl.nos. 39221/98 and 41963/98) para. 249.

55 It should be noted that later on, in a partly dissenting opinion in the case of Hutten-Czapska (merits), he argued almost the exact opposite, by holding that *Broniowksi, Hutten-Czapska* and *Lukenda* are "pragmatic decisions that avert an increase in the quantity of cases."

56. One may note that this is a completely opposite position from the stance taken years earlier by the Court when Protocol 14 was discussed. See section 3 above.

how efficient the pilot procedure is in helping state parties to deal with systemic problems.[57] Put differently, the Court wants to test whether the key fits the lock before asking for a brand new door. It is also in this sense that the wording 'pilot' in 'pilot procedure' is probably best understood.[58] As the difficulties with the ratification of reform Protocol 14 have shown, this seems wise.

A second concern about the pilot judgment procedure is the situation of applicants in comparable situations whose cases are already pending in Strasbourg. If, as in some pilot judgments, a large number of parallel applications is frozen, this obviously affects the interests of those applicants. Especially when it concerns complaints about trials that have taken too long, freezing an application at the international level would be ironic, to say the least. Such a measure seems only to benefit the Court itself, as the defendant state will in all probability not feel the "freeze" as pressure. Thus, caution is called for: such decision requires a careful balancing between the interests of such parallel applicants and the efficiency of the Court. This is indeed the path that the Court generally seems to take: only in some pilot judgments has it frozen pending cases. As to the referral of cases back to the domestic level in case of the creation of a new remedial mechanism, the Court has declined to do that for those applications where it has already decided on the merits, but not yet on just satisfaction.[59] One could add, that – in the best interest of the parallel applicants and to put sufficient pressure on the state – freezing of cases should only be done if the request to take general measures is accompanied by a specific time-limit.[60]

Another concern is whether the consideration of a particular case enables the Court to address the underlying general or systemic problem to a sufficient extent. Each application has its particularities and some applications will only address one or a few aspects of a larger issue. For example, one application may be a complaint about the excessive time a national restitution mechanism takes to handle cases, whereas a second one may only concern the height of the compensation. Ideally, the Court would in such a case choose an application as a pilot case which concerns both issues. This requires particular care by the Court's registry in the selection process of a "suitable" application.

Crucially, the whole pilot judgment procedure depends to a large extent on the defendant state's willingness to cooperate. Since a pilot judgment by its very character addresses a broader situation than only the predicament of an individual applicant, state cooperation could be called its Achilles' heel. The first two full pilot procedures, *Broniowksi* and *Hutten-Czapska*, show how different a state's attitude can be. Whereas in *Broniowski* the Polish government was fully willing to cooperate, in *Hutten-Czapska* the same state contested that a pilot procedure should be used at all. This can be explained by the fact that in *Hutten-Czapska* the underlying issue led to a wide divergence of views between the highest Polish courts on the one hand and the executive and the legislative on the other hand. The European Court in this case operated in alignment with the Polish judiciary, both of which defended the rule of law.[61] Eventually, the pilot procedure in the case did lead to reforms. One may question, however, how willing a state is to cooperate when it concerns issues with even higher state interests at stake, such as large scale violations of the right to life in the context of an armed conflict.

State cooperation is linked to a final concern about pilot judgments: enforcement and implementation. The execution of a pilot

57. *Opinion of the Court on the Wise Persons' Report*, 2 April 2007, p. 5.

58. Another explanation is that the single case serves as a test case or 'pilot' to try and solve the broader issue. However, such an interpretation does not set pilot cases apart from other many other cases involving larger problems. See also Sadurski (2008) p. 16, on a short discussion on the opaqueness of the word 'pilot' in this context.

59. E.g. ECtHR, *Demades v. Turkey* (just satisfaction), 22 April 2008 (Appl.no. 16219/90) para. 23; *Xenides-Arestis* (just satisfaction) para. 37.

60. For the most refined time-limit indications to date, see *Burdov (No.2)*.

61. For a full account, see Sadurski (2008).

judgment requires much more from a state than simply paying compensation in an individual case: very often domestic legal changes are necessary and in all cases changes in policy and practice. This means that it becomes more complex to assess state progress.[62] Traditionally, the Committee of Ministers of the Council of Europe performs this task. Nevertheless, as described above, the Court in its judgments on just satisfaction sometimes assesses whether the state has *prima* facie shown willingness to undertake reforms. In their dissenting opinion in *Hutten-Czapska* (friendly settlement), judges Jaeger and – once again – Zagrebelsky – argue that the Court is hardly equipped to "express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants." In addition, they point to the need to exercise caution in order not to prejudice future proceedings concerning applications by people who are not satisfied with any newly created domestic remedy. Finally, they refer to the danger of disturbing the balance between the roles of the Court and of the Committee of Ministers. They have a point: domestic reforms could stagnate and then parallel applications which have been sent back to the national level are to a certain extent left out in the cold. On the other hand, large-scale reforms necessarily always require time. In any event, it is clear that strong and efficient supervision by the Committee of Ministers becomes crucial in the case of a pilot judgment procedure.[63]

5. Conclusion

The pilot judgment procedure is a legal novelty which builds on an older trend to look beyond the facts of a particular case and into the underlying systemic problems. What used to be a question of mere rigorous analysis, has now become a necessity for the Court. The rising number of applications concerning systemic or large-scale violations of human rights and the states' call for guidance by the Court have led to experiments with pilot judgments. The pilot judgment can be perceived as part of three larger processes. First, efforts at increasing the efficiency of dealing with applications within the Court itself – the most important part of which are the reforms of Protocol 14 and 14-bis.[64] Secondly, pilot judgments reflect a wider trend of constitutionalization of the Court's work. Through a pilot judgment the Court to a certain extent reviews whether laws and policies conform with the ECHR instead of just assessing whether national authorities have or have not violated human rights in an individual case.[65] Finally, it fits in the broader development of increasing the Convention's effectiveness on the national level. As seen in the Polish cases, the Court can help to get situations to a tipping point of conformity with the ECHR. The pilot procedure is a promising way to channel the cooperation between national and Strasbourg institutions to improve compliance with the ECHR. Obviously, this depends on a more active role by the primary organ supervising the implementation of the Court's judgments. It is a welcome step that the Committee of Ministers decided in May 2006 to "give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem".[66] In addition, the Parliamentary Assembly has started to prioritize the examination of major structural problems concerning cases in which unacceptable delays of implementation have arisen. This is

62. Michael O'Boyle, 'On Reforming the operation of the European Court of Human Rights', *European Human Rights Law Review* (2008) pp. 1-1, at p. 7.

63. See also: Amnesty International and others, 'Council of Europe: Comments on Reflection Group Discussions on Enhancing the Long-term Effectiveness of the Convention System', IOR 61/002/2009 (2009) paras. 27-37.

64. For further suggestions on efficiency reforms, see also: ECtHR, *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference*, 3 July 2009.

65. For a more extensive analysis of this issue, see Sadurski (2008).

66. Committee of Ministers, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted 10 May 2006, CM(2006)90.

done *inter alia* by way of visits by Assembly rapporteurs to the countries concerned. All of this shows a commitment by the Council of Europe's institutions to take the issue of structural problems seriously. This support will be crucial for the Court in the years to come.

The pilot judgment procedure is still in its early years and more experience is necessary. Nevertheless – and bearing in mind the concerns about legal basis, the interests of applicants in parallel cases, the choice of the right case as a pilot and other matters – it would be commendable if the Court would devise clear guidelines for itself on how it will deal with the whole process of a pilot judgment from beginning to end, including the selection of pilot cases and the possible freezing of comparable applications. This would serve both the interests of potential applicants and of the state parties to the Convention. If this "pilot" keeps flying, the Court at the very respectable age of fifty will be able to continue to function as the ultimate guardian of human rights throughout Europe.

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The influence of the jurisprudence of the European Court of Human Rights case law in Greece

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Introduction

Many times in recent years, the parties to a case complain about a judicial judgment which affects their interests. They may feel resentful and powerless to understand the rationale of the court and the purpose behind the law which was applied, they "threat" that they will resort to the European Court of Human Rights. This constitutes an alarming phenomenon. This concern becomes more pronounced when the dispute refers to and concerns decisions of higher but also of supreme courts. It is worrying because it constitutes the barometer of acceptance of judicial decisions by the society and the ordinary everyday citizen, to cure its needs and interests for which the laws were enacted and judicial decisions are issued.

The administration of justice is organized in such a manner that, (apart from the sometimes fluctuations of judicial decisions from court to court), the legal battle until its final outcome, is considered to be long, difficult and, above all, unpredictable and uncertain. As when, after such a lengthy and costly process the feeling of justice is not satisfied, resentment is caused and a feeling of aversion to the legal system, either in a form of law, or in a form of a judicial decision that brought the law into effect in the instant case. This resentment is outside the limits of subjectivity, which is natural that the party has, when it reaches the indifferent third parties and provokes the society and the popular sentiment. But even more worrying is the fact that what was decided, without satisfying the peoples' sense of justice and without promoting the interests of the parties and the interests of the social unit, it constitutes a cheque to the order of the law, which necessarily must be observed. Consequently, the way the law is interpreted and applied, the phenomenon of citizens resorting to the European Court of Human Rights rises, which has gone beyond the limits of modernism and mimicry and it forms a contemporary social reality.

The most tragic part of the case is that Greece is often condemned by the Court for the judgments that are issued. The legitimacy of judicial assessment(judicial judgment), having gone through all stages of the administration of justice and presumably, it is for this reason which is armed with the presumption of undeniable truth, is overturned by the European Court of Human Rights given the fact of the frequent condemnations of Greece by the European Court of Human Rights indoctrinates with its decisions some simple truths that are or should be known and, more importantly, they must be implemented and manifested in order for the law to constitute the project for which it was enacted, namely the treatment of the needs of the societal unit and the reassurance of an equable and quiet social partnership. Some of the simple and daily truths that the European Court of Human Rights teaches us through its case law, are inspired by life itself and by people, I believe the following:

A. Anthropocentric approach of the law

From the study of the judgments of the ECtHR which are published at the legal press, an impression is created that this Court is dominated by and is driven by a sense of humanism. Its deliberation, assessment and logic are moving around the individual. By the individual all do they start, and to the individual all they result. The Court has espoused this self-evident fact, that all exist to serve the individual, to improve and enhance its live. With its decisions and through them, the person has acclaimed and occupied the position that it was determined since its creation; the individual is placed on the top of the values and is the crown of creation. In the judgments of this Court, 'life' and 'man' are identical concepts. The two sides of the same coin.

With the decisions of this Court, the law irrespectively if it is distinguished by a generality of

its wording or by its technicality, it is interpreted and then it is applied, with the criterion of the treatment and service of the individual. Its status as an individual makes it by itself a supreme value. This value is the safe valve to avoid any arbitrariness. Therefore, humanism, the recognition namely that an individual is the supreme value of life, which was born in Greece two and a half thousand years ago and was proclaimed by Greek philosophers and thinkers, it finds expression through the decisions of the ECtHR which come into effect in a daily practice and in life[1].

The attributes of each person are recognized and respected as being part of his/her personality and not as an element of rejection or exclusion.

Through the decisions of the ECtHR, different categories of people apparently recovered from the quagmire of the social isolation and alienation, in which they had been condemned due to their diversity, which, in many cases, it is independent of their will and of their ability and they were recognized as entities and personalities, as people themselves, but also as equal to others with the same opportunities and prospects[2].

In the Greek case- law there are parties to a case. is Decisions refer to parties to a case. The society which it serves and which the judicial system is integrated is a human society. The physical distance of a curule unites it with those who resort to or they are in need to resort to court. This distance has a meaning and a purpose only when it is referred to the conflicting interests of the parties who are contesting. People resort to court in order to treat a need and in order to solve a problem.

At the Greek judicial practice each defendant invokes a testimony of another person, in order to prove that he/she (the defendant) is virtuous and honest, so as to seek in case conviction a mitigating factor, whereas honesty and goodness is an innate element to the capacity of the accused as a person and a confirmation by another person is not needed. It would not have been paradox and unexpected, if it is found that the allegation of the convicted defendant about his/her former honest live was not proved, namely that he/she lived his/her personal, family, professional and social life in general as a man or a woman of honour, for the reason that he/she did not presented witnesses and he/she did not establish it, (without certainly proving the opposite), for the accused to resort to the European Court against a refusal of a claim for the recognition of this mitigating factor i.e. the former honorable life.

The anthropocentric approach of the law is a fundamental element and an attribute of the jurisprudence of the Court[3] that affects and pushes towards this the case- law of the Greek courts. The bench men of the law are inspired by the abovementioned spirit and they try via their decisions for the humanization of the law, a point which is comforting, and hopeful.

B. Bending the formalism

Formalism constitutes sometimes a part of the jurisprudence of the Greek Courts of all levels.

Despite the dynamics of the law, its purpose, meaning, content and the need to be brought into effect, due to its wording and due to legal practices[4], sometimes the essence of the problem is not confronted which social reality and, often, human suffering brought about resolution, through complex and multifarious analysis grid of scarce and, of not rare, obsolete legal provisions or even of simple and clear provisions, which need only application and not interpretation.

To present the essence of the matter, sometimes it is claimed and required the obvious and the given. Evidence is requested which accrue from evidence that has been deposited in a man-

1. As, among others, was the decision of the ECHR in the case *Vassilakis v. Greece* 17.1.2008, Nomiko Vima 2008, 1065 et seq for AP[Arios Pagos] 255/05 and above decision of the ECHR case-*Reklos Davourlis v. Greece* for the AP[Arios Pagos] 990 / 04.

2. Decision ECHR, *Nachova etc v. Bulgaria*, 6.7.2005, Nomiko Vima 2006-302 et seq.

3. See G. Nikolopoulos, The vagueness of Article 559 in the Code of Civil Procedure No. 1 appellate plea in light of the jurisprudence of the ECtHR, Nomiko Vima 2009-469 et seq and, p. 485.

4. As, among others, was the judgment of the ECtHR in the case *Vassilakis v. Greece* 17.1.2008, Nomiko Vima 2008, 1065 et seq for AP[Arios Pagos] 255/05 and above decision of the ECHR case-*Reklos Davourlis v. Greece* for the AP [Arios Pagos] 990 / 04.

ner different from the one provided[5] or evidence is requested which is known from previous operations.

Law was enacted to cure a specific social need and reality, without this to mean indifference to this social need and its treatment, the attention and the interest are focused not only on the simple, the useful, the real and the practical, but sometimes on the repetition of similar arrangements, which, perhaps, once they were necessary and required for some reason and a purpose, today they seem bizarre, remote and detached from life. A citizen, however, is not interested neither in the law itself, nor in the legislative structure of a judicial decision which is often incomprehensible to the average person, but it is interested in the resolution through the law and through a judicial decision which brings the law into effect in this instance, of the problem which concerns the citizen and the outcome of which the citizen has resorted to courts.

The formalism and this relevant mental outlook , not only do they lead to a denial of justice but many times, especially in the area of criminal justice with the extremity and excess , the formalism and the relevant mental outlook are rendered dangerous, because they endanger basic human rights such as personal liberty.

Accordingly, the arrest is ordered and the detention of an absent defendant charged with felony, as a consequence to be effectively penalized for his/her absence, despite the belief formed by reading the evidence, that the act for which he/she is charged and for which his/her arrest and his/her temporary detention were ordered, he/she be acquitted[6]. A person namely is imprisoned when he/she is deprived of one the most basic human rights, his/her liberty, although the aspirator of these specific legal provisions, even if they are not repealed, or should not be considered to be repealed, primarily because, under these circumstances, it will be done contrary to logic, while law and absurdity are inconsistent and contradictory concepts, the aspirator would not require their application in this case even if he/she had not made a provision for the exclusion of the case, therefore a vacuum is created. Therein this vacuum lies the value, importance and significance of a judicial decision, it must be filled with the common sense of an average person, which will protect from dangerous situations and simultaneously it will rationalize the law and will attach to it the role for which it was established, namely the treatment of the needs of the society and to ensure the protection of fundamental rights and freedoms of the citizens against any form of violence and arbitrariness.

It has been observed, that the contumacy appeal to be rejected as being unacceptable, because the fee in absentia, according to a contumacy decision, should be advanced and received by the state, but not through the Deposits and Loans Fund, but in the form of a deposit form[7]. Addressed, namely by the court to the citizen, who fled before seeking the protection of the state and deprives him/her of the protection and investigation of his/her case, saying that while filling the debt in your state, but, in a manner different from the one provided by law. Thus, access to justice as well drawn as it is, and whether is done by experts, no matter how carefully it is methodized, it always involves an element of unpredictability and surprise, instead an element of certainty, stability and security.

Thence, sometimes the intervention is refused, holding for the first time in the second degree court of criminal jurisdiction, the owner of the vehicle used by the purchaser with retention of ownership for transporting illegal immigrants on the grounds that the seller had not intervened to highlight his relevant requirements and the claims in the first degree of jurisdiction, through the composition, interpretation and analysis of various legal provisions[8]. But if this is the case and if, indeed, this is the real meaning of the rules, what

5. See the above judgments of ECtHR *Lionarakis v.Greece* 5.7.2007, *Zouboulidis v. Greece*, 14.12.2006, *Efstathiou and others v. Greece*, 27.7.2006.

6. Judgements of the majority of the three-member Court of Appeal felonies in Ioannina 19/09, 42/09, 85/09, 86/09 unpublished.

7. Court of Appeal of Crete 532/90 Nomiko Vima 1991-934, one member District Court of Ioannina. 456/07 unpublished

8. Majority of decision of three-member Court of Appeal Misdemeanours of Ioannina 183/09 unpublished.

is the value and usefulness, since they lead to a result different from that which they would have to which is the return of the vehicle to the owner who intervened because, since there are other legal requirements concur, he is entitled to it. Furthermore, even if he did not even exercise intervention, this should have happened with the self-evident condition of concurrence of the other preconditions.

This formalism the European Court of Human Rights comes to mitigate through its decisions, condemning often Greece also for positions similar to the above. Simple decisions, with clear solutions, positions and opinions instruct the mission of the law, the judge and the court is to deal with the merits[9] . Having as a criterion this position and as an organ, mainly, the Article 6 of the ECHR[10] it teaches the measure and reminds the obligation not to seek, in order to issue a decision and also the parties not be forced to what already exists and is available to the court or can be aware of. Accordingly, what only matters is not the way, or the procedure or the mean of submitting the arguments or materials or the meeting of conditions that are necessary for the issuance of decision, but their submission and fulfillment as such[11]. That this right belongs exclusively to the sphere of influence of the body and therefore the latter, since it has the right and is not required to exercise it, it should not be forced to exercise it, or even more, to be punished for a failure to exercise it. That the punishment befitting and it is appropriate to the delinquency rather than to the non exercise at the frame of assessment not of a right from one who appears to be a delinquent. Means that the interpretation of the law should be done only when it is necessary and never such an interpretation to result in different settings or to be contrary to law[12]. These are simple truths and simultaneously they are guidelines which, because the majority of people is unable to resort to the ECtHR, they should influence and guide national case- law[13].

C. The legitimate time for the completion of a judicial battle

The slowness in the administration of justice and in particular on the issuance of judicial decisions constitutes a key deterrent for the fulfillment of courts' mission to ensure, or in any event, to facilitate the evenness of a social partnership. Sometimes whole decades are needed for the completion of the legal battle including the passage of a case through all legal stages until the issuance of a judicial decision which ceases the dispute. The time lapsed is so much, that, sometimes, apart from the death of the interested parties, it undermines the importance and the meaning of the issued decision with all the consequences which this may have**.** Uncertainty, insecurity, inactivity, financial burdens and disappointment are the inevitable consequences of the afore-mentioned situation. The acrimony of this problem is demonstrated by the efforts of all the Ministers of Justice without exception to take steps for the diminution of this phenomenon. Nevertheless, the problem is not driven to its final solution in

9. See G. Nikolopoulos, The vagueness of Article 559 in the Code of Civil Procedure No. 1 appellate plea in light of the jurisprudence of the ECtHR, Nomiko Vima 2009-469 et seq and, p. 485.

10. The ECHR has become domestic law in almost all states of the Council of Europe. In Greece, incorporated into national law first with the law 2329/1953 and after the regime change, law order 53/1974, Official Gazette A 256/20.9.1974 and prevail, in accordance with Article 28 paragraph 1 of the Greek Constitution, national law.

11. See V. Chirdaris, Remarks at Nomiko Vima 2007-209 et seq, M. Margaritis, Note to Nomiko Vima 2007-2223 ff especially p. 2226. By itself, the vagueness of the grounds for appeal against the Code of Civil Procedure, 2007-28 et seq Nomiko Vima especially p. 30, 31, 40 and 41. Also, G. Nikolopoulos, this analysis at Nomiko Vima, 2009, p. 481-483.

12. See the above judgments of ECHR *Lionarakis v.Greece* 5.7.2007, *Zouboulidis v. Greece*, 14.12.2006, *Efstathiou and others v. Greece*, 27.7.2006.

13. For the effect of the ECtHR and the Convention in general in the case-law of Greek courts see and D. Spinelli, 'Findings from the case of the European Court of Human Rights', Poinika Chronika 1998-5 et seq, Kroustalakis E., 'The European Convention on Human Rights renew driver rulings by courts', Nomiko Vima 2000-1723 ff, N. Frangakis, 'The European Convention on Human Rights ages 50 years', Nomiko Vima 2000-1720, 1721.

order ensure a stable system of justice.

This problem becomes more acute at the sphere of criminal justice , since the consequences mentioned above are directly apprehended by all, while, at the same time, it concerns cases of social interest.

The consecutive postponements for a variety of reasons cause the protests of 'poor' witnesses and the protests of the parties that do not agree to the postponement[14]. The frequent condemnations of Greece because of the afore-mentioned situation caused the European Court of Human Rights to demonstrate the magnitude of the problem and to emphasize the importance for the administration of justice that is to complete the relevant procedures within a reasonable time[15].

These jurisprudential lessons given by the European Court of Human Rights combined with a soul-searching, a sense of mission, a sense of debt and a sense of responsibility, many times they lead and they have as a result the powerful resistance of the officials of justice to the phenomena of procrastination and slowness generally in the administration of justice. It is an optimistic and hopeful message that, perhaps, apart from the improvement of this situation, it may lead to a change in attitude, way of thinking and dealing with these phenomena.

D. Disallowance of discriminations

There are not few the times when Greece was condemned by the European Court of Human Rights because of manifestations of state violence and arbitrariness[16]. Of course this does not exclude or it is impossible to include judicial violence. Sometimes, these manifestations, sometimes directly and sometimes suppresly, are conducted against persons belonging to particular groups, with racial, ethnic, economic or other criteria, rendering them weak and vulnerable. These, however, are groups and populations, which are enrolled or in any event, live in the Greek society and, therefore, their treatment must be the same with that of the other citizens.

The condemning judgments of the European Court of Human Rights, by reciting a sentence, except from the fact of violence itself, on the one hand they sear and stigmatize first its state of origin and on the other hand the cause of it, which it is identified at the diversity of this people, but also in their inability due to their diversity and because of their unfavorable position than the rest of the society.

Hence, the ECtHR through its decisions declares that violence has no place in a modern society and becomes the promoter of equality for all regarding the exercise of state power but also the state's power in its exercise. More importantly, the person becomes the center of the social life in all of its forms and its manifestations and it stresses the need and the obligation that this power to be exercised only in order to treat a person's needs , since this is the reason for its enactment. These legal principles have a timeless and panathropic values, and they are the guidelines on the treatment of various social groups, ignoring the element of diversity, so as to feel that they are treated like the rest of the citizens and not as blamable and responsible for all, for which responsibility is given in advance or the lack of it or its limitation to be a product of compassion and

14. See, for example, the decision of the three-member appeal court of felonies in Ioannina 74/09 unpublished, in which one of the many defendants who violated the law on drugs, while he was temporarily in custody, he requested to postpone the trial in order to undergo a psychiatric expert, to determine whether or not he is a drug addict within the meaning of that Act. The Court reserved to decide. The lawyer then asked to "keep" the case, in order to prepare his defence, a request which was accepted. The next day, which resumed the suspended, due time, meeting and began the hearing of the case, the same defendant asked to withdraw this decision on the subject and the immediate decision to call for a postponement. The Court rejected the latter's request for withdrawal. Thereafter, the accused, while the request for psychiatric expert was pending, presented a request to postpone the trial because of weakness, due to the illness of his lawyer, to defend him, who attended and the two days meeting and presented the above requests. The latter request was accepted by majority

15. ECHR decisions Soya Hellas SA v. Greece, 27.9.2007, et seq Nomiko Vima 2007-2491, *Padaleon v. Greece*, 10.5.2007, Nomiko Vima 2007-1226 et seq, *Gorou v. Greece* of 20.3.2009, Nomiko Vima 2009-747 et seq.

16. See ECHR decision in the case *Bekos and Koutropoulos v. Greece,* 13.12.2005.

goodwill, due to feeling sorry because of their diversity.

E. The freedom of expression and its boundaries

The complexity of human relations, which continuously increase; is one of the characteristics of a modern social reality, with strong elements such the elements of publicity and recognition.

Publicity has become if not the only, at least the main medium of emergence, dominance and finally assertiveness in most areas of activity. Thus, the meaning and circle of public figures have arisen and it is expanded continuously. The influence of such persons and the interest which their acts or omissions first of all reason to gain publicity and all the benefits emanating from it they cause the interest of the social unit. This is granted. For granted for this reason should be considered the criticism in all aspects of their lives.

Therefore, arises the issue of delimitation of criticism and ultimately the limits between freedom to express a view or an opinion on the one hand and on the other hand the matter of private (or not) life of the public figures.

The Greek case-law really focuses these limits on the "reason of insult" of the public figure, which searches out at the way the event was demonstrated was really necessary for the content of thought to be attributed objectively, and if this is not the case , if this was known, this method was used to offend of the public figure[17].

This view it seems not to be adopted, at least always, by the ECtHR, with the known consequences[18]. With its decisions the Court appears to endorse the view that if a person chooses the status of a public figure it exposes itself and all aspects of its life to public criticism. This general position seems to be based on the view that the element of publicity and its adverse effects to the community was the one which constituted the reason that it gave rise to criticism. If this person was not a public figure, it would not have caused criticism, since its acts and omissions would have been indifferent to the social unit.

Hence, it considers it to be an exaggeration and it condemns the exposure of criticism in both criminal and civil consequences, without its limitation to the one or the other[19], while it does not consider the criticism to be excessive even when, as its extreme form, it shocks, since the reason of its manifestation was the element of publicity[20]. With these judgments the Court seems not only to protect the freedom of expression and to prefer it from the respect for private life even of public figures, considering it as a more precious value[21], but it gives the impression that perhaps it protects or tries to protect the social unit from the public figures.

This case-law position , either in the one or the other version, in view of the Greek data, and the structures of the Greek society, strange at first sight, should ,if not be adopted, at least cause a concern and reconsideration of the whole issue from the beginning, with its above position mandatory in any case basis.

Furthermore, through its above case law positions, the Strasbourg Court, by recognizing the importance and significance of the right of freedom of expression as the essence of democracy, it excludes in practice any state arbitrariness , giving to the interpretation of Article 10 of the ECHR a wide scope and it expands its limits. Strasbourg's case law has led to a substantial expansion of the limits of freedom of expression, so that the press and the media appear privileged and are protected significantly. The press is considered to be the «guardian» of democracy and the ECHR gives it the power of expanded criticism and control, even at the levels of hyperbole.

Certainly the right of the press is not unlimited

17. AP [Arios Pagos] 1231/07 Nomiko Vima 2007-2450. 146/01 Nomiko Vima 2001-1350. 239/2000 Nomiko Vima 2000-845.

18. See P. Vogiatzis, 'Press freedom and the protection of honor and reputation: the Greek legal system confronted with the European Court of Human Rights', Nomiko Vima 2009-293 et seq especially p. 307.

19. Decision ECHR *Katrami v. Greece* of 6.12.2007, Nomiko Vima 2008-783 et seq.

20. See the judgments above of ECHR *Lionarakis v. Greece* of 5.7.2007, *Vassilakis v. Greece* 17.1.2008 and Kanellopoulou v. Grecee 11.10.2007, 2007-2227 ff Nomiko Vima, *Klein v. Slovakia* of 31.10.2006, *Vereinigung Bildender Kunstler Wiener v. Austria*, 25.1.2007.

21. See P. Vogiatzis, the above study in Nomiko Vima 2009-313

and it must not exceed certain limits[22], but in any case, the criminal prosecution of journalists, if the entries have a real basis, it is incompatible with the ECHR. Indeed, the case-law of the ECtHR under some conditions it abolishes the defamation by the press (libel) and it does not consider it necessary in a democratic society[23].

Furthermore, the law requires the public figures to accept public criticism up to the limits of harseness and excess, even if this criticism is defamatory a person.

It broadens also significantly the circle of public figures, it incorporates therein, except politicians, judges, prosecutors, people involved in political life, those who are involved in the public policy of the country either directly or indirectly, etc. Finally, it extends the protection of the freedom of expression to ordinary citizens who criticize and express views against public figures[24].

It is about legal principles, which should be adopted and be accepted by the domestic courts, in order to allow an immediate and effective protection of the right of freedom of expression.

F. **The human face of authority**

The crisis is not only domestic but also global, which in recent years with an ever increasing rate is observed in the most events of social life, is natural not to leave unaffected the legal system.

Amplifying the gap between the formal, with the existence of legal provisions and the effective protection of rights, with the respect of the legitimate diversity in all its forms, the state arbitrariness, the induration**,** as they claim some, of case-law and the decline in sentiment of the protection of citizens, phenomena of the times, cast the law away from the society and from the individual and they undermine the foundations of democracy[25].

The case-law of the ECtHR, by setting in order of precedence values and institutions, it places constraints to the exercise of state authority and it implements in practice the principles of democracy, and it stresses that the measure of democracy is the proclamation and also the recognition by all, the person and the citizen as the center of life and core value. It spells out and introduces a measure to the administration of justice, it emphasizes that the terms 'public interest' and 'citizen' are identical, namely the two sides of same coin and that the interest is public when it serves the citizen. It entrenches the rights they form the quintessence of democracy[26] and it highlights that the state can only be built on the foundations of a genuine, honest and impartial justice, which it will maintain and it will apply with a religious devotion, not only the letter but also the spirit of the law[27] and which it will neither push, nor intimidates, but it will protect and it will respect rights and it will facilitate the contest of ideas and the freedom of thought[28]. It concerns legal principles that they must form an example for all the national courts.

G. The presumption of innocence

A fundamental element and a principle of the rule of law, which it follows, is the presumption of innocence of the accused. The European Court of Human Rights through its judgments has repeatedly stressed the paramount importance and value of this presumption, as determinative to the

22. See S. Ktistakis, 'Liability of the State under the European Convention on Human Rights', 2005-2003 ff Nomiko Vima especially p. 2006, 2007.

23. See P. Vogiatzis, the above study in Nomiko Vima 2009-313

24. See V. Chirdaris, 'The right to freedom of expression', Dikaiorama 2008, issue of the 17th, p. 24 et seq. Also B. Sotiropoulos, Comment in Nomiko Vima 2007-1458 ff.

25. See K. Botopoulos, 'Rights in heavy', Dikaiorama 2008, issue of the 17th, p. 5.

26. By requiring for their fair limit the data first the necessity of the restrictive measures in relation to the requirements of a democratic society, and of the proportionality of such measures in relation to the objective with these purposes, see S. Ktistakis, this analysis in the 2005-2003 Nomiko Vima ff especially, p. 2006. S. Matthias, 'The scope of operation of the principle of proportionality', ElDik 2006-1 et seq especially p. 8 and 9.

27. J. Tzevelekaki, Institutional ensurance of impartiality of the judge, Nomiko Vima 1998 - 745 ff and in particular, p. 745 and 751.

28. See Decision ECtHR *Giannousis v. Greece*, 14.12.2006, Nomiko Vima 2007-516 et seq.

protection of individual rights and strictly necessary for the creation and development of a modern European legal culture, since this culture can only be based on the respect and on the attainment of human dignity. Therefore, the ECtHR addressed through its decisions to the national legal systems and reminds the obligation of observance the presumption of innocence of the accused by all public authorities, judicial and non-judicial and its application to all the proceedings until the final discharge of the accused and even more, after his discharge which implies also the termination of the criminal prosecution due expiration of the limitation period[29]. This is one of the fundamental concepts of Article 6 of ECHR, which is formulated in Article 6 paragraph 2 of this Convention, and also in Article 14 paragraph 2 of the International Covenant on Civil and Political Rights[30] and Article 11 paragraph 1 of the Universal Declaration of Human Rights, adopted by the General Assembly of U.N. on 10.12.1948[31], recognized in all jurisdictions of the Member States of the European Union as a corollary of the principle of rule of law and it requires that each individual is presumed innocent until a final decision issued on guilt. This presumption is designed to protect the accused and only exists for the protection of the accused[32] , and it governs all criminal proceedings from the preliminary investigation until the finality of the decision and it is not confined only to an examination of the merits of the case[33].

According to the ECHR, the burden of proof lies on the prosecution and any doubt should be in favour of the accused[34]. In case of acquittal of the accused for any reason, the presumption runs in perpetuity, with no expiration time and it bounds all the future courts of any jurisdiction and competence. During pre-trial and criminal proceedings, the presumption of innocence requires from the coroners and investigating officials and judges not to begin from the biased view that the suspect or the accused committed the offense for which he/she is charged. There is also a violation of this presumption even in the case that bias is not expressly formulated by the above judicial or investigative officers but it is reflected on their behavior even indirectly[35].

Consequently, the ECtHR' s case-law has expanded the scope of this presumption and outside criminal courts, making it broader. This requires all public authorities to refrain from judgments and gnomes that the accused committed the crime for which he/she is arrested or charged[36]. Essentially it requires the state to treat the accused at all levels as the accused has not committed any crime at all until this is proved by an irrevocable (final) court decision.

This of course does not mean that the aforementioned authorities are prevented from informing the public about the progress of criminal investigations, but to do so in such a manner in order to meet their obligation to respect the presumption of innocence of the individual which is arrested or accused and not to substitute courts at the level of irrevocable (final) decisions. The ECtHR notes through its decisions the importance of formulating the conditions used by state authorities and their representatives at their statements before the person is tried and be convicted for committing an offense.

Even in the case that the presumption of innocence is violated by the media, the Court of Strasbourg recognized that a state party has a duty of care, from which the obligation to protect the citizen arises. Under this obligation, the state has an active role to take positive steps (positive obliga-

29. Decision of ECtHR *Paraponiaris v. Greece* 25.9.2008, 2009-173 Nomiko Vima ff.

30. In Greece, the Covenant was ratified and became national law under Article 28 paragraph 1 of the Greek Constitution, Law 2462/1997, Government Gazette A 25/26.2.1997.

31. See the text of the declaration that in 1998-1539 on Nomiko Vima.

32. Decision of the ECtHR in 4483/70 action against the Federal Republic of Germany.

33. ECtHR Decision of 25.3.1983 in case *Minelli v. Switzerland*, para 30. Considerations on this decision from E. Kroustalakis see Elliniki Dikaiosini 1986-601 et seq especially p. 606.

34. ECtHR Decision of 6.12.1988 in Case *Barbera Messegue & Jabardo*, paragraph 77.

35. ECtHR in paragraph 37 above case *Minelli*

36. Decision ECtHR in case *Allenet de Ribemont v France* A 308 (1995), paragraph 36

tions) in order to ensure that the media will remain within the boundaries of objectivity for the criminal cases pending[37].

The case-law of Strasbourg , when it interprets and apply this presumption, it is based on the principle that only through the criminal judicial process can a formal finding of criminal liability be achieved and therefore, no other state organ may characterize someone as guilty, substituting the institutional assessor. It is a principle which seeks to protect the suspect from a prior conviction.

At the same time, the ECtHR via its judgments, by consolidating the relevant case-law, it extended the application of the presumption of innocence and in the occasion of cessation of prosecution (*nolle prosequi*) because the limitation period of the offence has expired, which identifies it and treats it the same as the acquittal of the accused, while it has extended the time of its application and for the time after his acquittal for any reason. Accordingly, it makes it clear that the discharge of the accused or the cessation of criminal prosecution in any way is equivalent to an acquittal, which it does not even excuses any suggestion that he/she is not innocent[38].

By interference, the ECtHR via its case law it has extended and widened significantly the presumption of innocence, justifying fully its traditionally creative character, which contributes to the release from the isolation of individual rights from the typical minimalism to the substantial upgrade. An upgrade which adds up to the creation and development of a modern European legal culture that it will respect primarily the human dignity and it will bring it into effect in practice and the creation of which, even the dire need is more compelling today and social imperative, are not possible if the above case-law principles of the Strasbourg Court are not adopted by the national courts[39].

H. The right of access to court

In applying the right of a fair trial embodied in Article 6(1) of the ECHR[40], the Court of Strasbourg stresses the value and the importance of the right of access to a court which derives from this principle[41] and which its special aspect is the right of access to court, it stresses through its decisions, that indirect restrictions imposed by national law in the exercise of this right should not and can not hinder the freedom of access to court in a way or to such an extent that it substantially impairs that right. Therefore, according to the Strasbourg Court, these restrictions are compatible with Article 6 § 1 of the ECHR only if they are proved that they serve a legitimate aim and also that there is a reasonable relationship of proportionality between the means employed and the aim pursued. This happens when the restrictions of the national legislation serve the purpose of legal certainty and the sound administration of justice and do not constitute a barrier to the citizen as to be judged on the essence of the dispute by the court[42]. Thus, it is clear that a basic principle underlying the philosophy of the afore-mentioned Court's judgments is that access to a judicial body should be a substantial rather than a purely formal right.

In this way, the ECtHR expresses its opposition to the attachment of the national courts to formalist principles and sometimes their obsession with the unrestrained formalism. This formalism, where it has the effect of undermining the core of the right, is not accepted by the Strasbourg Court, which it considers it a violation of

37. General Attorney V. Trstenjak. Opinion of 3.5.2007 in Case C-62 of the ECJ, paragraph 63 and footnote 56 in conn. with footnote. 45.

38. ECtHR decisions *Rushiti v. Austria*, 21.3.2000, paragraph 31 and *Sekanika v. Austria*, 25.8.1993, paragraph 30.

39. See V.Chirdaris., Remarks in the Nomiko Vima 2009-178.

40. For the historical origin of a fair trial, see J. Tzevelekaki, his above analysis of the 1998-745 et seq Nomiko Vima in footnotes 4 through 13. Also, for the individual rights of the accused arising from the wider and more general right of due process, see I. Mylonas, 'Criminal "fair trial" in-law of the European Court of Human Rights in the three years 2002-2004', edition. 2007.

41. For the analysis of this principle see E. Kroustalakis, The right to justice (right to fair trial) Article 6 of the European Convention of Human Rights in Elliniki Dikaiosini 1986, p. 601 ff I. Mylonas, his above work.

42. Decision ECtHR *Efstathiou and others v. Greece*, 27.7.2006, Nomiko Vima 2006-1170

the right to a fair trial, which it includes also the basic right of access to court. Therefore, it underlines that it is not possible a potential problematic exercise of a right even due to a fault of its organ, to have as a consequence the dissolution and the annulment of this right. The State and the courts must give the citizen the opportunity to be heard effectively by competent jurisdictional organs, guaranteeing the citizen access not just of a typical presence, but also to present before the courts its substantive arguments in both civil cases but also in criminal and disciplinary proceedings.

Under the protective scope of Article 6 § 1 of the Convention it is the obligation of the courts to respond justified to all claims of the parties. This completes the effective access to court which tries rights and obligations of civil nature or the validity of criminal charges.

With its above decisions, the ECtHR signals the need to shift the national case-law towards a fuller assurance of the substantive rights of citizens, by minimizing the traditional formalistic encounter.

It also underlines the need to be aware that all the rights guaranteed by the ECHR, the ICCPR and the other international Treaties guarantee the minimum protection of these rights, that is why and due to this, it is not possible for the courts to make a further reduction of the minimum protective level of human rights[43].

43. See V. Chirdaris, Comment in Nomiko Vima S. 2006-1179 ff, Ktistakis, his above analysis of the 2005-2003 Nomiko Vima ff and in particular, p. 2006, 2007.

Addendum

Through its above case law positions and the timeless and panathropic values and principles which through its case-law positions the ECHR expresses and proclaims , it forges the unity of the law and it builds a cohesive European legal culture, which, in turn, it constitutes one of the pillars of European integration. Maybe this is the main contribution of the ECtHR to the effort of the people of Europe to achieve their integration and to walk the path of their common destiny. In particular, as far Greece is concerned, apart from the above general contribution of the ECtHR, the value and importance of its case-law it rests the finding and perhaps the encouragement of the competent bodies, which was established by the decision *Meïdanis v. Greece*, 22.5. 2008, that "... a decision recognizing a breach of a human right means for the state's legal obligation to end this insult and to annul its effects in order to restore the situation prior to the breach"[44].

44. For the obligation of the state ordered by the ECHR to adopt the necessary arrangements in order to protect the rights of the ECHR against an attack by agencies, but also to implement in practice any existing arrangements for ensuring the effective enforcement of these rights, as for legislative changes that took place in view of the obligation, to Greek law, see S. Ktistakis, his above analysis of the Nomiko Vima 2005, p. 2019 ff.

Anachronistic Interpretations by Greek Courts and the European Court of Human Rights' Corrective Role

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Doctor of Laws
Référendaire at the European Court of Human Rights*

During the last decade, the European Court of Human Rights[1] has dealt with a series of cases against Greece in which the subject-matter has been the compliance with the guarantees of fair trial by the national courts. With the exception of cases concerning delays in the administration of justice, which now consistently place Greece among the countries with the most violations (a problem of the Greek domestic system that could merit being the subject of a separate study), the majority of these cases deal with the right of access to court and are revealing as to the formalistic perceptions of the highest courts of the country in the administration of justice. The present study examines the relevant case-law and the role that can be played by the Court towards the improvement of domestic legal procedures. For this purpose we will present a selection of some distinctive Court judgments against Greece and we will classify the cases concerning access to court. Following that, we will compare the position adopted by the highest domestic courts in their examination of national procedural rules with the way the Court examines the conditions of admissibility of individual applications and the way it conducts, in general, the proceedings before it.

A. The Excessive Attachment of the National Judiciary to Procedural Rules

First of all, we need to recall that according to the Court's well-established jurisprudence, the right of access to a court secured by Article 6 of the European Convention on Human Rights[2] is one of the aspects of the right to a fair trial. This right, nevertheless, is not absolute and is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Hence, the right of access to court is violated when the regulation of that right by the State ceases to serve the purposes of legal certainty and proper administration of justice, and becomes an obstacle to the examination of the merits of the case[3]. The Court has repeatedly reached the above conclusion in cases against Greece, holding that the restrictions faced by the applicants in the exercise of their right of access to a court were disproportionately applied in view of the aims pursued. If we try to classify the cases in which the Court has found against the country we can distinguish the following three categories:

a) Cases where the appeal is declared inadmissible owing to a formal omission in its drafting or registration;

b) Cases where the grounds of appeal on points of law are declared inadmissible because the allegedly erroneous findings of the appellate court are not stated in their entirety in the appeal on points of law; and

c) Cases where the grounds of appeal on points of law are declared inadmissible because they rely directly on Article 6 of the Convention.

Selecting the most characteristic judgments

* All opinions expressed in this article are the author's own, and do not necessarily represent those of the European Court of Human Rights.

1. Hereinafter referred to as "the Court".

2. Hereinafter referred to as "the Convention".

3. See, *inter alia*, *Platakou v. Greece*, no. 38460/97, § 35, ECHR 2001-I.

from each of the above thematic categories, we note the following:

(a) When the appeal is declared inadmissible owing to a formal omission in its drafting or registration

The first judgment against Greece finding a violation of the right of access to a court was delivered in 2000 in the case of *Sotiris and Nikos Koutras ATTEE S.A.*[4]. In that case, the applicant company had lodged with the Supreme Administrative Court an application for judicial review, complaining against the rejection by the Ministry of the National Economy of its request for a subsidy to build a hotel. The company's counsel delivered the application by hand to two police officers at the Athens police station no. 4. The police officers affixed the police station's seal to the first page of the application and wrote the registration number and date on it. They did not, however, note the registration number on the record of deposit stamped onto the application itself. The record of deposit was signed by the lawyer depositing the application, the two police officers receiving it and the senior officer at the station. In view of this omission, the Supreme Administrative Court declared the application inadmissible on the basis of Article 19 §§ 1 and 2 of Presidential Decree no. 18/1989, which provides that in order for an application for judicial review to be validly lodged with a public authority, it must be stamped with a record of deposit which must mention the registration number and the date.

In the case of *Louli*[5], the applicant had lodged a complaint against three individuals alleging theft, on her own behalf and as the legal representative of her husband, who was then senile. When the Indictment Division of the Athens Criminal Court decided not to commit the accused for trial, the applicant lodged an appeal in her capacity as a civil party, registering her statement with the Registrar of the Criminal Court. She also lodged a memorial in which she mentioned that she was acting on her own behalf and also as the sole heir of her (by then deceased) husband. The registration documents were prepared and signed by the Registrar, who noted that the appeal had been lodged by *Dionysia, widow of Themistocles Loulis*. The Indictment Division of the Athens Court of Appeal partially allowed the appeal and committed one of the accused for trial, who then also appealed against that decision. The Indictment Division of the Court of Cassation held that the appeal was inadmissible because the applicant had not clarified whether she was acting on her own behalf or as the legal representative of her husband. According to the Court of Cassation, the applicant did not have the right to lodge an appeal on her own behalf, since she herself was not the victim of the alleged theft, nor did she have the right to appeal as the victim's heir, since that capacity did not arise from the registration of the appeal. At that point, the Court of Cassation pointed out that the reference to the applicant as *widow of Themistocles Loulis* did not suffice.

In the case of *Kallergis*[6], the applicant appealed against his conviction by the Rethymnon Criminal Court, which had given him a suspended sentence of three years' imprisonment for destroying antiquities. The Registrar of the court, who received the appeal, noted on the first page of the application the phrase "Rethymnon District Court, Three-Member Criminal Court", wrote the registration number and affixed the court's seal on the stamp. She also signed the last page of the appeal as "the Registrar" and registered it in the court's register of appeals. On the basis of Article 474 of the Code of Criminal Procedure (which provides that an appeal is lodged by declaration to the Registrar of the court which delivered the contested decision and that, for this purpose, a record of deposit is drafted and signed by the person making the declaration and by the person receiving it), the Court of Cassation declared the appeal inadmissible owing to the failure of the Rethymnon Criminal Court's Registrar to draft a record of deposit. According to the Court of

4. *Sotiris and Nikos Koutras ATTEE S.A. v. Greece*, no. 39442/98, ECHR 2000-XII.

5. *Louli v. Greece*, no. 43374/06, 31.7.2008.

6. *Kallergis v. Greece*, no. 37349/07, 2.4.2009.

Cassation, neither the fact that the Registrar gave the appeal a registration number and sealed it, nor the fact that she signed the appeal were sufficient to grant this document the status of a record of deposit.

In all three cases, the Court found a violation of Article 6, castigating the excessive formalism displayed by the highest courts of the land and condemning the fact that a simple clerical error had deprived the applicants of the opportunity to have their case examined on its merits. Specifically in *Koutras*, the Court held that the identification of the application had not been jeopardised, as the missing registration number appeared both on the seal affixed next to the record of deposit and on the first page of the application. The same reasoning was adopted in *Kallergis*, in view of the fact that the Registrar of the Rethymnon Criminal Court had abided by numerous other formalities, which eliminated any danger of that document being forged. In *Louli*, the Court observed that the Court of Cassation seemed to ignore the principal facts of the case, given that the dual capacity in which the applicant had acted followed logically from the supporting documents. The Court stressed that consulting the memorial attached to the appeal would have sufficed to ensure beyond any doubt that the applicant was also acting as the legal heir of her deceased husband. Moreover, in both *Koutras* and *Kallergis*, the Court stressed that the responsibility for the omissions leading to the inadmissibility of the domestic remedies rested principally with the public officers empowered to receive such remedies. In that context, the Court also formulated the principle that although the parties have an indisputable duty of diligence during the use of the domestic remedies available to them, they are nonetheless not obliged to supervise the diligent fulfilment of all the formalities that need to be accomplished by the public officers who are empowered to receive their applications.[7]

(b) When the grounds of appeal on points of law are declared inadmissible because the allegedly erroneous findings of the appellate court are not stated in their entirety in the appeal on points of law

The central issue of the cases in this category has been the inadmissibility of appeals on points of law on account of their imprecise nature. According to the Court of Cassation, such lack of precision was caused by the applicants' failure to indicate with "clarity and completeness" the factual circumstances on which the Court of Appeal had based its decisions dismissing their appeals. Specifically in the case of *Liakopoulou*, relating to an expropriation, the applicant had claimed before the Court of Cassation that the Thessaloniki Court of Appeal had omitted to establish a unit amount for the compensation of the entirety of her expropriated land and movables. Moreover, she alleged that the amount of compensation awarded fell well below the real value of her land. In the introduction of her appeal on points of law, she provided a brief overview of the events and of the history of the case, while she also attached the contested decision of the Court of Appeal. In *Efstathiou*, the applicants, who were former employees of EYDAP (the Athens Water Supply and Sewerage Company), argued before the Court of Cassation that the Athens Court of Appeal had erroneously interpreted the applicable legislation and that they should have been called to retire at the age of 65, instead of at 58. They, also, attached the contested decision to their appeal on points of law. In *Zouboulidis*, the applicant was a civil servant at the Greek embassy in Berlin, who requested that an incremental payment be made to his expatriation allowance in respect of his children. In his appeal on points of law, he mentioned the conditions of his employment contract, along with a file containing all the documents verifying the age and number of his children.

The Court observed that the Greek Court of Cassation had judicially laid down a condition of admissibility based on the degree of precision of the grounds of appeal on points of law and accepted that that rule complied, in general terms, with the requirements of legal certainty and the

7. *Kallergis,* op. cit., § 20. See, also, *Boulougouras v. Greece*, no. 66294/01, § 26, 27.5.2004.

proper administration of justice. When the appellant before the Court of Cassation alleged that the Court of Appeal had made a mistake in its assessment of the facts of the case in relation to the legal rule applied, it would have seemed reasonable to require the appellant to set out in his appeal the relevant facts that constituted the subject-matter of his submissions. Otherwise the Court of Cassation would not have been in a position to exercise its right of review in respect of the judgment appealed against, but would be required to re-establish the relevant facts of the case and to interpret them itself in relation to the legal rule applied by the Court of Appeal. Nonetheless, the Court did not accept that, in these particular cases, the applicants' appeals on points of law had imposed on the Court of Cassation the burden of re-establishing the facts of their cases. In fact, the crucial facts of all the cases, such as the number and age of Mr Zouboulidis's children or the age at which the former EYDAP employees retired, could be easily and clearly determined by reference to the relevant supporting documents. In all three instances, the ECHR reached the conclusion that the Greek Court of Cassation had adopted a particularly formalistic approach in relation to the conditions of admissibility of the appeal on points of law, and had thus prevented the applicants from having the merits of their allegations examined by it. [8]

(c) Cases where the grounds of appeal on points of law are declared inadmissible because they rely directly on Article 6 of the Convention

The first, and most representative, judgment in this category was the case of *Perlala*[9]. The applicant, who was an Albanian national residing in Greece, was arrested during a demonstration in Athens on suspicion of throwing Molotov cocktails. He was subsequently convicted and given a suspended sentence of imprisonment, both at first instance and on appeal. The applicant lodged an appeal on points of law, alleging – *inter alia* – that there had been a violation of his right to a fair trial under Article 6 § 1 of the Convention. The Court of Cassation declared that ground of appeal inadmissible, noting that Article 6 of the Convention was not directly applicable and therefore could not be invoked as an independent ground of appeal, but had to be raised in conjunction with one of the grounds which were exhaustively enumerated in Article 510 § 1 of the Code of Criminal Procedure. The Court of Cassation delivered a similar judgment in the case of *Karavelatzis*,[10] dismissing the ground of appeal on points of law submitted by the applicant on the basis of the principle of presumption of innocence (Article 6 § 2 of the Convention). The high court claimed that the violation of the right to a fair trial could not be relied upon as an autonomous ground of appeal. In its relevant judgments, the Court first observed that in accordance with Article 28 § 1 of the Greek Constitution, the Convention constituted an integral component of domestic law and prevailed over any conflicting national legislation. Using particularly stern language, the Court held that, in these specific cases, the interpretation of the admissibility rules "were more akin to sophistry, and thus weakened, to a significant degree, the protection of citizens' rights by the supreme court of the land".[11]

B. The Effective Safeguarding of the Right of Individual Petition by the European Judiciary

In all of the above-mentioned cases, we note that the applicants had not been formally denied their right of access to a court, but they had been deprived of the opportunity to have their cases considered on their merits, owing to the national judges' uncompromising attachment to the formalities which govern the exercise of domestic remedies. Indeed, they exist many other similar cases against Greece.[12] The Court now regularly

8. *Liakopoulou v. Greece*, no. 20627/04, 24.5.2006; *Efstathiou and Others v. Greece*, no. 36998/02, 27.7.2006; and *Zouboulidis v. Greece*, no. 77574/01, 14.12.2006.

9. *Perlala v. Greece*, no. 17721/04, 22.2.2007.

10. *Karavelatzis v. Greece,* no. 30340/07, 16.4.2009

11. *Perlala* op. cit., § 27; and *Karavelatzis,* op. cit., § 22.

12. See, for example, *Vasilakis v. Greece*, no. 25145/05, 17.1.2008; *Koskina and Others v. Greece*, no. 2602/06, 21.2.2008; *Alvanos and Others v. Greece*, no. 38731/05, 20.3.2008; *Reklos and Davourlis v. Greece*, no. 1234/05, 15.1.2009; and *Pistolis and Others v. Greece*, no. 54594/07, 4.6.2009.

condemns the disproportionate rigidness of the highest courts of the country, and in particular that of the Court of Cassation, pointing out the incompatible nature of such practices – which amount to a denial of justice – with the need to effectively ensure the right of access to justice. The Court does not hesitate, in fact, to adopt increasingly sterner language and to emphasise that "Article 6 § 1 does not allow the use of subterfuges which aim to avoid the examination of the merits of a case."[13] The message in each of these judgments is the same: priority must be given to ensure the protection of substantive rights and not to the protection of procedural rules. It must also be understood that, even if the decisions of the highest courts of the country are, save for some exceptions,[14] in line with the domestic law, they do not stand up to the Court's scrutiny, since they are obviously contrary to its case-law, which is steadily moving towards more sophisticated issues of protection of the procedural guarantees of Article 6.

This should not, however, lead to the conclusion that the ECHR is questioning the admissibility requirements in their entirety, or that it aims to eliminate all procedural rules in favour of promoting the right of access to a court. Such a thought would have been undoubtedly naïve and absurd, not only because legal certainty clearly requires the adoption and application of admissibility rules – a requirement that is invariably aligned with the Court's established case-law[15] – but also because the conditions of admissibility of individual petitions set out in Article 35 of the Convention form a central aspect of the human rights protection mechanism, as well as a matter on which a large proportion of the Court's attention is focused[16]. In fact, the Court carries out a meticulous examination of the fulfilment of the admissibility conditions, imposes deadlines, requests information and observations and, in general, requires applicants to remain diligent in all judicial steps, and to maintain a constant interest in the continuation of the proceedings and the examination of their case. In the event of non-compliance, the anticipated consequences are particularly severe, including the destruction of the case file, the rejection of the application as unsubstantiated, the striking out of the application from the Court's lists, the rejection of requests for just satisfaction, etc. That said, it is, however, obvious that the Court is organised and operates in a manner that leaves no margin for formalistic practices. Hence, it would be interesting at this point to compare the Court's position in relation to questions of admissibility and, generally, in relation to the right of European citizens to have access to it with the above-mentioned judicial practices of the highest courts of Greece.

(a) The examination of conditions of admissibility of individual applications

The conditions of admissibility of individual applications do not form part of this study.[17] It is, however, worth mentioning the manner in which the supranational judge interprets and applies the basic rules of exhaustion of domestic remedies and compliance with the six-month time-limit, as this would conclusively reveal that, in every event, the Court gives priority to the protection of rights rather than that of rules.

It is noteworthy that the principle of *excessive formalism* was introduced as far back as in 1968, in the case of *Neumeister*,[18]where the Court rejected the Austrian government's argument that it could not consider the applicant's detention on remand

13. *Giannousis and Kliafas v. Greece*, no. 2898/03, §§ 26-27, 14.12.2006.

14. We believe that in the cases of *Perlala* and *Karavelatzis*, the Court of Cassation directly breached domestic law, since it refused to examine a ground of appeal deriving from an international legal text which is incorporated in Greek law and has priority over conflicting national rules.

15. See, *inter alia*, *Zouboulidis*, op. cit., § 24.

16. We note that approximately 85% of new applications are declared inadmissible by the Court each year.

17. On this matter, see M. Tsirli, "Conditions of admissibility of individual petitions", *To Syntagma* ('*The Constitution*', legal journal) 2/2002.

18. *Neumeister v. Austria*, no. 1936/63, § 7, Series A no. 8.

subsequent to the day on which he filed his application. The Court considered that it would amount to demand that an applicant complaining about such a situation should file a new application after each final decision rejecting a request for release; it thus expressed, for the first time, its opposition to excessive attachment to the formalities which govern the proceedings before it. A year later, in the case of *Stögmüller*,[19] the Court condemned the "inflexible character" which the Austrian government seemed to attribute to the rule of exhaustion of domestic remedies, which – at that time – was set out in Article 26 of the Convention. In 1971, in the case of *Ringeisen*,[20] the Court referred to the need "for a certain flexibility" in the application of the rule and to the "unfair consequences" to which a formalistic interpretation of Article 26 would lead. In 1980, in the case of *Deweer*,[21] the Court once again disapproved of the "inflexible character" which the Belgian government seemed to attribute to Article 26. A year later, in the *Guzzardi* case,[22] the Court stated expressly that "[former] Article 26 of the Convention should be applied with a certain degree of flexibility, and without excessive regard for matters of form". Since then, this case-law has been consistently applied.[23] As regards in particular exhaustion of domestic remedies, the Court has emphasised, in the meantime, that this rule is neither absolute nor capable of being applied automatically and that in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of each individual case[24]. The Court has further recognised that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which it operates as well as the personal circumstances of the applicants.[25]

A similar logic may also be observed in the application of the six-month rule. Although, on account of its nature, this rule is less open to exceptions, it is in fact applied by the Court in a realistic manner. As regards Greece, for example, we note that this time-limit is now calculated from the date on which the final domestic decision is finalised, certified and signed, this being so because the public pronouncement of the judgments is often confined to the announcement of their registration number or the simple reading of their conclusions and because the judgments of the Greek Supreme Courts (Court of Cassation, Supreme Administrative Court) are not served on the parties. Therefore, the Court has run through the stages of delivery and notification of judgments and has placed the starting point of the six-month period at the date on which the applicants are definitely able to find out the content of the judgments resulting from the exhaustion of domestic remedies.[26] However it would be counter to the philosophy which governs the functioning of the European protection mechanism to regard this practice as a simple demonstration of judicial lenience. In our opinion, the Court operates on the basis of a very simple logic, which is primarily inspired by its major juridical role and which aims at ensuring effective, rather than theoretical, protection of human rights in Europe. With the same kind of common sense, the Court also deals with the other issues of a practical nature which concern access to it and procedures before it.

(b) Access to the Court and observance of its procedural requirements

Looking outside the narrow confines of the conditions of admissibility of individual applications, we observe in fact that all the rules

19. *Stögmüller v. Austria*, no. 1602/62, § 11, Series A no. 9.

20. *Ringeisen v. Austria*, no. 2614/65, §§ 89-92, Series A no. 13.

21. *Deweer v. Belgium*, no. 6903/75, § 29 *in fine*, Series A no. 35.

22. *Guzzardi v. Italy*, no. 7367/76, § 72, Series A no. 39.

23. See, *inter alia*, *Cardot v. France*, no. 11069/84, § 34, Series A no. 200.

24. *Van Oosterwijck v. Belgium*, no. 7654/76, § 35, Series A no. 40.

25. *Akdivar and Others v. Turkey*, no. 21893/93, § 69, *Reports* 1996-IV.

26. See the first relevant judgment in this field, *Papachelas v. Greece*, no. 31423/96, § 30, ECHR 1999-II.

which regulate the Court's proceedings are characterised by a spirit of flexibility. A few indicative observations are the following.

Initial contact with the Court need not be made in any particular form (complaints can now be lodged by fax or e-mail, as long as a complete application form is subsequently also dispatched by post, within a prescribed time period),[27] nor is there a requirement for a full and substantiated report of the case for the running of the six-month period to be interrupted. The six-month time-limit set out in Article 35 of the Convention is interrupted upon receipt of the first communication by the applicant setting out, even summarily, the object of the application. The application form, constituting the basis for the examination of each case by the Court, is accompanied by an explanatory note with detailed instructions for its completion, so as to avoid any potential errors or omissions. But even when mistakes do occur in the completion of the application form or when crucial documents for the consideration of the case are found to be missing, the Court takes the initiative in requesting such clarifications from the applicants, or calls for the dispatch of the necessary documents. Additionally, the procedure before the Court is free of charge, and there is no stamped tax or other fee requirement. Similarly, it is not required that copies of the documents accompanying the application should be certified. Finally, we also note that in the initial stages of proceedings, the applicants may address the Court in the language of any of the Contracting Parties, while representation by a lawyer is not obligatory. If the Court subsequently finds that the legal representation of the applicant is necessary for the proper conduct of the case, it may, under certain conditions, grant legal aid to the applicant. It is also worth noting that the web of regulations on procedural matters is complemented by more substantial intervention by the Court when this is required for better comprehension of the case. For example, when the applicant does not invoke any Article of the Convention in the statement of his complaints or when he relies on a provision of the Convention which is not pertinent, the Court does not dismiss the application as unfounded or vague. In such circumstances, the Court refers to the provision upon which the applicant is relying in substance, or it selects itself the applicable provision of the Convention. The wording adopted by the Court in such cases is indicative of its approach, as it states that it is "the master of the characterisation to be given in law to the facts of the case",[28] thus asserting the substantive and active role that it plays in the process of the examination of each case.

The desire of the European judges to guarantee the right of individual petition is thus palpably demonstrated. All of the above-mentioned regulations aim to facilitate this right as effectively as possible and to simplify the procedure before the Court. They also manifest the flexibility with which the Court deals with situations which, in any other event, that is to say if the Court suffered from formalism, would constitute insurmountable obstacles to access for a large number of citizens or would give rise to new grounds for inadmissibility, and which would thus significantly weaken the right to European judicial protection. In an era where the system is inundated with applications, the European Court is resisting: it chooses not to yield to the temptation of drastically reducing the number of cases pending before it under the pretext of formal omissions, or by enforcing strict procedural rules.

C. A Few Thoughts by way of Conclusion

In this study, we have aspired to show that the corrective role of the Court operates on a dual level. By finding in civil and administrative, but also in criminal cases that there has been a violation of Article 6 of the Convention, the Court seeks to reinforce judicial protection guarantees,

27. It is interesting to note that there is an experimental programme in place enabling applicants to submit petitions online via the web-page of the Court in Swedish or Dutch, the aim being to extend this option to all other languages of the Contracting Parties.

28. See, *inter alia*, *Kutzner v. Germany*, no. 46544/99, § 56, ECHR 2002-I.

and to identify and eradicate anachronisms in the interpretation and application of procedural rules by the domestic courts. At the same time, the manner in which the Court interprets and applies the rules of admissibility of individual applications, and the care it displays in order to effectively secure the right of individual petition may become – as a model of judicial practice – a source of inspiration for the highest courts of the country, as well as a focal point for the revision of their jurisprudence and practices. Of course, it is without doubt that the mission and operating conditions of judicial institutions are not the same for national and supranational legal orders. Nonetheless, to the extent that the subsidiary function of the Court[29] presupposes that national judiciaries are primarily responsible for ensuring the protection of human rights, we consider that it is necessary to comprehend that it is not acceptable to dismiss requests for judicial protection on the basis of arguments which do not genuinely serve legal certainty. The Court proposes a different point of view from which the right of access to a court should be approached: it is just and in accordance with the spirit of the Convention to draw a distinction between the truly necessary and the less necessary elements of formal requirements, the omission of which can be remedied by the employment of common sense, so as not to blindly enforce procedural rules. If national courts merely examine the final outcome (for example, the absence of a stamp) without considering the circumstances that have led to the breach of formalities or without taking into account the extent to which such an irregularity may endanger legal certainty, then the administration of justice will not be proper but will fall prey to trifling errors and omissions. The serious criticism that the Court has already made in its judgments, putting aside its traditionally diplomatic language, highlights the gravity of the problem and carries the clear message that the practices of Greece's highest courts in fettering the right of access to a court must cease. We cannot but concur with that message, and express our wish that the fertile dialogue which started a number of years ago between the national and the European judiciaries will produce beneficial effects also in this field.

29. For the concept of subsidiarity, see Petzold, H., "The Convention and the Principle of Subsidiarity", in Petzold, H., (ed.), *The European System for the Protection of Human Rights* (The Hague: Nijhoff, 1993), pp. 465-81.

La privation de la propriété foncière, la Cour de Strasbourg et la réalité grecque: Variations de violations sur un même thème

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Introduction

Le présent texte se réfère à la jurisprudence de la Cour européenne des droits de l'homme (ci-après CourEDH) sur les affaires grecques de privation de propriété immobilière[1]. Par le terme « privation », on entend aussi bien l'expropriation de terrains, telle qu'elle est prescrite par le droit grec[2], que l'imposition de mesures conséquentes de restriction à l'usage de la propriété immobilière. Cette étude aspire à mettre en valeur les questions spécifiques soulevées par les arrêts de la CourEDH quant à l'étendue de la protection du droit de propriété, garanti par l'article 1 du Premier Protocole (ci-après P1-1) de la Convention européenne de sauvegarde des droits de l'homme (ci-après CEDH). Sur ce point, il convient de définir un élément méthodologique : l'objectif du présent texte n'est pas d'examiner de façon isolée les arrêts qui composent la jurisprudence en la matière, pour faire ressortir la particularité factuelle ou juridique de chacune de ces affaires. En d'autres termes, le présent article n'a pas pour ambition d'établir la typologie des arrêts « grecs » relatifs aux restrictions imposées à la propriété foncière sous l'angle du P1-1 mais plutôt de rechercher des modèles de comportement des pouvoirs publics en matière de privation de la propriété immobilière, qui constitueraient les causes les plus profondes des violations de la CEDH.

En effet, la considération de la jurisprudence comme un ensemble de cas particuliers qui interagissent l'un avec l'autre et la recherche du tissu conjonctif qui parcourt cet ensemble permettraient d'aboutir à des conclusions plus générales quant à la manière dont les pouvoirs législatif, exécutif et judiciaire envisagent leur rôle respectif dans le cas de privations de la propriété foncière. Faire ressortir cet élément, à savoir le comportement général des trois pouvoirs publics face à des questions d'expropriation, est crucial si l'on souhaite détecter les défaillances structurelles de l'ordre juridique hellénique, telles qu'elles sont révélées par les violations du P1-1. En d'autres termes, le comportement parfois problématique sous l'angle duquel les autorités nationales conçoivent leur rôle institutionnel lors de l'expropriation de la propriété immobilière nous permet de détecter la manière dont chaque pouvoir public envisage plus ou moins sa relation avec le citoyen dans le contexte de la mise en œuvre de politiques relatives à l'aménagement du territoire et à la protection de l'environnement naturel et culturel.

La thèse plus spécifique défendue par la présente étude est la suivante : les problèmes principaux de l'ordre juridique grec sont déjà repérés dans les premiers arrêts « grecs » de la Cour de Strasbourg relatifs à des restrictions apportées à la propriété foncière (A). Ces problèmes constituent une sorte de canevas, sur lequel se dessinent les « variations », voire les violations subséquentes du P1-1. Cependant, ces dernières obéissent toujours au thème initial, à savoir les archétypes de comportement problématique du pouvoir législatif, exécutif et judiciaire (B). On se permettra, enfin, de rechercher comment les pouvoirs publics internes pourraient s'émanciper d'une conception de leur rôle plutôt au service des intérêts financiers de l'Etat et s'aligner sur les standards européens de protection de la propriété individuelle (C).

1. Le texte se fonde sur un rapport présenté par son auteur dans le cadre d'une conférence organisée, le 6 février 2009, par le Barreau de Thessalonique à l'occasion du 8ème anniversaire de l'entrée en vigueur du nouveau Code d'Expropriations Forcées. En outre, les opinions qui sont exprimées ici sont personnelles et n'engagent pas la Cour européenne des droits de l'homme.

2. Loi n° 2882/2001.

A. La « matrice » des affaires grecques de propriété

Au cours des années 1993-1996, la CourEDH a rendu les arrêts Papamichalopoulos c. Grèce[3], Les saints monastères c. Grèce[4], Raffineries grecques Stran et Stratis Andreadis c. Grèce[5] et Katikaridis et Tsomtsos c. Grèce[6]. Comme il a déjà été relevé, ces premiers arrêts « grecs » ayant examiné la compatibilité de restrictions à la propriété individuelle avec le P1-1, contiennent des indices de violations que l'on retrouvera dans la jurisprudence postérieure.

1. Papamichalopoulos ou l' arbitraire de l'administration

En 1993, la CourEDH a rendu l'arrêt Papamichalopoulos qui portait sur la première affaire grecque relative au droit à la protection des biens. Cet arrêt constitue un exemple significatif de privation arbitraire de la propriété immobilière sans dédommagement des propriétaires lésés. La Cour EDH a affirmé que l'occupation du terrain litigieux par le Fonds de la marine nationale aux fins d'y construire un lieu de villégiature pour les officiers de l'armée grecque, ainsi que la perte de toute disponibilité du bien litigieux par ses propriétaires, avait comme conséquence son expropriation de fait. Ce premier arrêt constitue un signe précurseur de la position du juge européen quant à la manière dont il examinerait à l'avenir des affaires de contenu similaire : le juge de Strasbourg condamnerait le comportement abusif de l'administration dans une affaire de violation flagrante du droit à la protection des biens.

Il est à noter que l'Etat grec a allégué devant la Cour que certains des requérants ne sauraient être considérés comme propriétaires du bien litigieux, car le droit de propriété invoqué n'aurait pas été reconnu par les tribunaux grecs[7]. La CourEDH a rejeté cet argument après avoir constaté qu'il ressortait du comportement de l'administration que celle-ci considérait de fait les requérants comme propriétaires du terrain en cause. Par conséquent, comme la CourEDH l'a de manière caractéristique admis, « pour les besoins du présent litige, il y a donc lieu de considérer ces derniers comme propriétaires des terrains en cause »[8]. Cet élément est en soi important : la CourEDH a souligné que, lors de l'examen de chaque affaire, elle n'était pas nécessairement liée à la manière dont les autorités nationales qualifiaient à chaque fois le bien litigieux. En ayant recours à la technique des « notions autonomes »[9], le juge de Strasbourg peut définir de sa propre manière la notion de « bien ». Il s'agit là d'un élément crucial qui sera repris dans la jurisprudence postérieure, afin que la CourEDH constate l'existence de « bien », condition nécessaire pour l'application de l'article 1 du Protocole n° 1 et l'examen de la proportionnalité de la mesure restrictive.

2. Les saints monastères et Raffineries grecques ou l'ombre du législateur

Les deux arrêts suivants, Les saints monastères c. Grèce et Raffineries grecques Stran et Stratis Andreadis c. Grèce, concernent la responsabilité du législateur lorsqu'il se trouve à la source de mesures restrictives de la propriété individuelle. L'affaire Saints monastères était afférente à la création d'une présomption de propriété en fa-

3. CourEDH, *Papamichalopoulos et autres c. Grèce*, arrêt du 24 juin 1993, série A no 260-B.

4. CourEDH, *Les saints monastères c. Grèce*, arrêt du 9 décembre 1994, série A no 301-A.

5. CourEDH, *Raffineries grecques Stran et Stratis Andreadis c. Grèce,* arrêt du 9 décembre 1994, série A n° 301-B.

6. CourEDH, *Katikaridis et autres c. Grèce*, arrêt du 15 novembre 1996, *Recueil des arrêts et décisions* 1996-V, *Tsomtsos et autres c. Grèce*, arrêt du 15 novembre 1996, *Recueil des arrêts et décisions* 1996-V.

7. *Papamichalopoulos*, voir *supra*, § 38.

8. *Papamichalopoulos*, voir *supra*, § 39.

9. Voir, entre autres, F. Sudre, Le recours aux notions autonomes, *in* F. Sudre, L'INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME, (Bruylant, 1998), p. 93 ; F. Sudre, Les concepts autonomes dans la Convention européenne des droits de l'homme, *CAHIERS DE L'IDEDH*, (Montpellier I, 1997), p. 123 ; E. KASTANAS, UNITÉ ET DIVERSITÉ : NOTIONS AUTONOMES ET MARDE D'APPRÉCIATION DES ÉTATS DANS LA JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME, (Bruylant, 1996).

veur de l'Etat, en vertu de la loi n° 1700/1987, sans prévoir de compensation pour les terrains agricoles et forestiers des Monastères requérants pour lesquels ceux-ci ne possédaient pas de titres de propriété non contestés et dûment transcris au bureau des hypothèques. La CourEDH a jugé contraire au P1-1 la création de cette présomption législative en faveur de l'Etat. En interprétant de manière autonome la notion de « privation », la Cour de Strasbourg a rejeté l'argument du gouvernement grec, à savoir que la présomption spécifique n'était qu'une simple règle procédurale ayant transféré la charge de la preuve aux Monastères requérants. La CourEDH a souligné qu'à travers cette règle, l'Etat défendeur avait de fait imposé la privation des biens en cause, lesquels, selon les Monastères, étaient déjà devenus partie de leur propre propriété, principalement par voie d'usucapion. Selon la CourEDH, par le biais de la disposition législative en cause, les requérants avaient été privés de fait de leur propriété sans que ne leur soit versée une indemnité[10].

L'affaire Raffineries grecques Stran et Stratis Andreadis c. Grèce ne concerne pas la privation de propriété foncière. Toutefois, elle est directement liée au sujet de cette étude puisqu'elle illustre bien le comportement du législateur dans le contexte d'un litige judiciaire entre un particulier et l'Etat afférent à des questions de propriété. L'affaire concernait l'abrogation par voie législative d'une créance née suite à une sentence arbitrale définitive et obligatoire qui avait reconnu l'existence de l'obligation de l'Etat à verser une indemnité conséquente à l'entreprise requérante en raison de l'inobservation par le premier de ses obligations contractuelles. En particulier, alors que l'affaire se trouvait au dernier stade de la litispendance devant la Cour de cassation, le législateur est intervenu en adoptant une disposition législative de caractère « photographique » (loi n° 1701/1987) qui a résolu le litige en faveur de l'Etat grec. La CourEDH, invoquant les principes de procès équitable et de la prééminence du droit, a souligné que l'intervention législative, bien que l'affaire fût toujours pendante, n'était pas tolérable sous l'angle du P1-1 puisqu'elle avait influé de manière déterminante sur l'issue du litige[11].

Cet arrêt est important du fait qu'il reflète l'image du législateur comme un facteur institutionnel qui ne respecte pas des règles fondamentales de l'Etat de droit, à savoir celles qui ont trait à la séparation des pouvoirs. En effet, l'Etat tire ici profit de sa position privilégiée au détriment du particulier en tant que partie adverse dans le cadre d'une procédure judiciaire. On observera, par la suite, que l'évolution de la jurisprudence « grecque » concernant la protection de la propriété offre plusieurs variations de la même attitude dont le pouvoir exécutif fait preuve en matière d'expropriations. On verra que dans ce cas, l'administration, comme le législateur, profite de sa position dominante face à un particulier dans le cadre d'une procédure d'expropriation, notamment en tardant à résoudre judiciairement le litige afin de se soustraire de fait à son obligation d'indemnisation.

3. Katikaridis et Tsomtsos ou l'inflexibilité du juge

En 1996, par ses arrêts Tsomtsos et Katikaridis, la CourEDH a condamné l'application par les tribunaux grecs comme irréfragable de la présomption dite d' « auto-indemnisation » des propriétaires riverains d'une route nationale. Selon cette présomption, en cas de percée en dehors du plan d'urbanisme de routes nationales d'une largeur allant jusqu'à trente mètres, les propriétaires riverains, considérés comme tirant profit de la construction de l'ouvrage public, étaient astreints à payer pour une zone d'une largeur de quinze mètres, participant ainsi aux frais d'expropriation

10. En d'autres termes, le juge de Strasbourg n'est pas lié par la considération des autorités nationales quant à la nature de la privation et il peut procéder lui-même à la qualification autonome de la mesure restrictive, élément important pour l'application de P1-1. Voir sur ce point, H. Vandenberghe, La privation de propriété. La deuxième norme de l'article 1 du Premier protocole de la Convention européenne des Droits de l'Homme, *in* PROPRIÉTÉ ET DROITS DE L'HOMME, (Die Keure-La Charte/Bruylant, 2006), pp. 34-38.

11. *Raffineries grecques*, voir *supra*, § 49. Voir aussi CourEDH, *Antonakopoulos, Vortsela et Antonakopoulou c. Grèce*, no 37098/97, arrêt du 14 décembre 1999.

des terrains sis sur ces routes. La CourEDH a critiqué la rigidité de ladite présomption, dont l'application rompait le juste équilibre devant régner entre la sauvegarde du droit à la propriété et les exigences de l'intérêt général[12].

Ces deux arrêts marquent une évolution qualitative de la jurisprudence « grecque » de la CourEDH relative au droit de propriété. En premier lieu, ils sont les premiers à ne pas concerner des violations manifestes du P1-1, comme dans les affaires Papamichalopoulos, Saints monastères et Raffineries grecques. Dans ces dernières, l'Etat grec apparaissait, plus ou moins, comme un paramètre institutionnel qui ignorait ostensiblement les règles de base de l'Etat de droit. Avec les arrêts Tsomtsos et Katikaridis, une nouvelle ère s'esquisse pour la jurisprudence de la Cour de Strasbourg relative à des affaires « grecques » où les violations du P1-1 peuvent être perçues comme des déclinaisons des situations décrites dans les premières affaires précitées concernant des questions d'expropriation.

Un autre élément qui différencie les arrêts Tsomtsos et Katikaridis de la jurisprudence précédente réside dans le fait que le constat de violation cible pour la première fois le raisonnement du juge national. Toutefois, le contrôle de la Cour conserve également comme point de référence la disposition législative qui prévoyait la présomption en cause. On observe, ainsi, que la violation du droit de propriété peut découler de la combinaison du rôle de plusieurs pouvoirs institutionnels qui agissent ensemble ou consécutivement. Il s'agit là d'un élément que nous rencontrerons dans la jurisprudence à venir. En d'autres termes, il se peut que la violation du droit à la propriété soit la conséquence d'une situation où tant l'administration que les pouvoirs législatif et judiciaire sont impliqués.

En somme, ces cinq premiers arrêts contiennent déjà au milieu des années 90 les éléments essentiels qui transparaissent dans la jurisprudence y relative en son état actuel. Ils soulignent que pour la CourEDH tout pouvoir public est susceptible d'enfreindre le P1-1 tant à titre individuel que collectif. En ce qui concerne le contrôle exercé par la CourEDH, celle-ci a fait savoir qu'elle interprète les questions d'applicabilité du P1-1 et de contrôle de proportionnalité de la mesure restrictive de sa propre manière, indépendamment de l'approche y relative adoptée par les instances nationales. Ces éléments, disparates dans les arrêts initiaux de la CEDH, se développent de manière plus systématique dans la jurisprudence subséquente.

B. Les variations de violations du droit à la protection des biens

1. Les dysfonctionnements du cadre législatif portant sur l'expropriation de biens immobiliers

Dans la jurisprudence postérieure à la période 1993-1996, l'activité législative n'apparaît pas comme un facteur qui provoque en soi la violation du droit à la protection de la propriété immobilière, comme c'était le cas de l'affaire Saints monastères. Ceci n'est pas surprenant puisque l'intervention législative directe pour restreindre la propriété individuelle ne peut normalement survenir que dans des circonstances exceptionnelles, voire lorsque des raisons particulières de nature économique ou politique l'exigent. Il est ainsi significatif que l'affaire portant sur le « patrimoine royal » est la seule qui s'inscrit dans ce contexte, évidemment en raison de sa particularité historico-politique qui a fait appel à une intervention législative pour régler directement des questions afférentes à une certaine propriété individuelle. L'affaire portait sur la compatibilité avec le P1-1 de la loi n° 2215/1994 qui avait transféré le patrimoine des requérants à l'Etat grec, sans le versement d'une quelconque indemnité. Le constat de violation du P1-1 a souligné l'importance conférée au droit à la propriété individuelle par la Convention. Pour la Cour, le fait de priver les requérants de leurs biens sans le versement d'une quelconque indemnité ne pouvait pas être justifié par le statut particulier de la famille royale, puisque, tout au moins une partie de la propriété, avait été achetée par les ascendants des requér-

12. *Katikaridis*, voir *supra*, §§ 49 et 51, *Tsomtsos*, voir *supra*, §§ 40 et 42.

ants et, donc, ceux-ci avaient une « espérance légitime » d'indemnisation pour la perte de la propriété immobilière en cause[13].

Au demeurant, dans le cadre de la présente étude, la question de la mise en place par la législation pertinente d'une procédure unique pour la détermination par le juge du montant unitaire de l'indemnité due présente un intérêt particulier[14]. A l'occasion de son arrêt Azas et autres c. Grèce, la CourEDH a souligné la nécessité de l'institution par le législateur d'une seule procédure judiciaire à travers laquelle le tribunal compétent pourrait globalement examiner toutes les questions relatives à l'indemnisation et surgissant au cours d'une expropriation. La CourEDH a constaté que la fragmentation de la procédure de fixation de l'indemnité due était susceptible de provoquer des retards inutiles et, par conséquent, de compliquer le calcul du montant à verser à son titulaire. Le juge de Strasbourg a, en l'espèce, jugé problématique l'obligation pesant sur les épaules des intéressés à faire avancer leurs arguments quant à la non-application de la présomption de l'auto-indemnisation en raison de l'absence de profit suite à l'expropriation litigieuse, au cours d'une procédure judiciaire distincte de celle relative à la fixation du montant unitaire d'indemnisation. En soulignant que la Convention a comme but de sauvegarder des droits non pas théoriques mais concrets et effectifs, le juge de Strasbourg a considéré que le phénomène de multiplication des instances pour le versement de l'indemnité d'expropriation avait restreint le droit à la protection des biens contrairement à l'esprit du P1-1[15].

Il est à noter que, avant de conclure à la violation de la CEDH, la Cour a signalé que le juge grec s'était entre-temps conformé au contenu des arrêts Katikaridis et Tsomtsos. En effet, dès 1999, les juridictions grecques interprétaient le critère de l'auto-indemnisation comme une présomption réfragable[16]. En concluant, par contre, à la violation du P1-1 au niveau de la loi, le juge de Strasbourg a souligné l'importance primordiale de l'existence au sein de tout ordre juridique d'un système efficace de fixation de l'indemnité d'expropriation. En d'autres termes, aussi focalisées sur le but de versement d'une indemnisation juste que les décisions des juridictions nationales puissent être, un cadre législatif dysfonctionnel sapera leur efficacité et, le plus probablement, compliquera l'achèvement de cette procédure en temps utile. C'est pour cette raison que l'arrêt Azas est particulièrement important dans le contexte de l'ensemble de la jurisprudence qu'on se met à esquisser. Il souligne que le facteur temps est une composante essentielle de la procédure d'expropriation. Il s'agit là d'un élément qui dès le début du processus d'expropriation va à l'encontre des intérêts du bénéficiaire de l'indemnisation. De plus, ce phénomène empire lorsque l'administration, tirant profit de sa position dominante par rapport au particulier, essaie

13. CourEDH, *Ex-roi de Grèce et autres c. Grèce* [GC], no 25701/94, § 98, arrêt du 23 novembre 2000, CEDH 2000-XII. Vue sous cet angle, l'affaire manifeste une claire réticence du législateur grec à suivre la logique dont la Cour de Strasbourg avait déjà fait preuve dans le cadre des premières affaires de privation du droit à la propriété. Tant l'arrêt au principal que l'arrêt subséquent portant sur la demande de satisfaction équitable font entendre que la CourEDH était pleinement consciente de la particularité politique de cette affaire qui ne constituait en aucun cas une situation ordinaire de privation de bien. La CourEDH s'est ainsi référée à plusieurs reprises aux privilèges de la famille royale et aux exonérations fiscales dont elle bénéficiait, comme des éléments à prendre en compte pour la fixation de l'indemnité due. Ces données particulières ont joué un rôle crucial pour l'allocation par la Cour d'une somme à titre de satisfaction équitable beaucoup plus basse par rapport à la valeur réelle des propriétés litigieuses (*Ex-Roi de Grèce et autres*, voir *supra*, §§ 95-100). On pourrait donc soutenir que l'omission du législateur de prévoir une quelconque indemnisation pour la privation des biens litigieux a joué, en l'espèce, un rôle déterminant pour le constat de violation du P1-1.

14. Voir, I. Choromidis, Questions d'actualité quant à la procédure judiciaire unique dans le cadre de l'expropriation forcée *(en grec)*, ELLINIKI DIKAIOSYNI, n° 2 (2009), pp. 408-417, *passim*.

15. CourEDH, *Azas c. Grèce*, no 50824/99, §§ 52 et 56, arrêt du 19 septembre 2002.

16. Ce qui s'est produit avec l'arrêt n° 8/1999 de la Cour de cassation (formation plénière). Voir aussi sur le même sujet, CourEDH, *Papachelas c. Grèce* [GC], no 31423/96, arrêt du 25 mars 1999, CEDH 1999-II, et *Savvidou c. Grèce*, no 38704/97, arrêt du 1er août 2000.

de retarder l'indemnisation. Le juge de Strasbourg relève ainsi dans Azas la nécessité de simplification et d'accélération de la procédure de calcul de l'indemnité, afin que le juste équilibre qui doit exister entre le droit individuel et l'intérêt public ne soit pas rompu.

Il faudra souligner, sur ce point, que malgré le constat de dysfonctionnement du système de fixation de l'indemnité d'expropriation avec l'arrêt Azas, constat entériné dans une série d'arrêts postérieurs[17], le législateur n'a pas à ce jour modifié l'article 33 de la loi n° 2971/2001 qui prévoit une procédure administrative et judiciaire distincte pour contester l'existence de profit par le propriétaire d'un terrain riverain à une route nationale. On présentera de manière plus détaillée, par la suite, la façon dont l'allongement de la procédure, qui a comme point de départ un cadre législatif inopérant, peut produire des effets négatifs supplémentaires, notamment en ce qui concerne tant le calcul par le juge des intérêts légaux à verser au titulaire de l'indemnité que l'attitude en général de l'administration dans le cadre de l'expropriation.

2. Un contrôle judicaire inefficace : le refus du cadre historique du litige et le contrôle déficient de proportionnalité

En ce qui concerne la démarche du juge national dans des affaires d'expropriation, la jurisprudence de la CourEDH subséquente aux arrêts Tsomtsos et Katikaridis manifeste, *grosso modo*, deux comportements problématiques des juridictions helléniques. En premier lieu, le juge évite souvent de placer l'affaire dans son cadre historique et d'admettre que le temps écoulé est un élément décisif pour l'issue du litige. En particulier, dans des affaires relatives à des procédures judiciaires longues, afférentes au calcul de l'indemnité, le juge de Strasbourg condamne parfois le refus du juge national de prendre en considération le laps de temps important écoulé entre les différents stades judiciaires nécessaires pour la fixation de l'indemnité afin de réajuster les intérêts légaux à verser à l'intéressé. Deux exemples pertinents se trouvent dans les arrêts Malama[18] et Zacharakis[19]. Dans la première affaire, le terrain des ascendants de la requérante a été exproprié en 1923 et, en raison de la procédure judiciaire de durée excessive pour la fixation de l'indemnité, le prix unitaire définitif a été fixé soixante-dix ans plus tard, selon la valeur du terrain au moment de son expropriation. La CourEDH a condamné la réticence des tribunaux grecs à prendre en considération la durée excessive de la procédure judiciaire, ce qui a eu comme conséquence l'absence de compensation pour le préjudice matériel ou moral subi par la requérante et sa famille en raison de la privation du bien litigieux pour une période de plus de soixante-dix ans[20]. Dans l'affaire Zacharakis, le tribunal d'instance compétent a fixé le prix unitaire définitif d' indemnisation sur la base du prix provisoire qui avait été fixé trente ans environ plus tôt, sans, toutefois, réajuster le prix en tenant compte de l'écoulement de trois décennies. La CourEDH a constaté la violation du P1-1. Elle a souligné « le retard anormalement long dans le paiement de l'indemnité d'expropriation qui a [eu] pour conséquence d'aggraver la perte financière de la personne expropriée et de la placer dans une situation d'incertitude, surtout si l'on tient compte de la dépréciation monétaire résultant d'une si longue période de temps »[21].

On observe que dans les affaires précitées, à l'instar d'Azas, la situation problématique est le résultat de déficiences tant au niveau de la loi qu'au stade du contrôle judiciaire. En particulier, le cadre législatif inopérant multiplie les procédures judiciaires pour la fixation de l'indemnité d'expropriation. Cet élément est combiné avec un

17. CourEDH, *Biozokat A.E. c. Grèce*, no 61582/00, arrêt du 9 octobre 2003 ; *Interoliva ABEE c. Grèce*, no 58642/00, arrêt du 10 juillet 2003 ; *Organochimika Lipasmata Makedonias A.E. c. Grèce*, no 73836/01, arrêt du 18 janvier 2005.

18. CourEDH, *Malama c. Grèce*, no 43622/98, arrêt du 1er mars 2001, CEDH 2001-II.

19. CourEDH, *Zacharakis c. Grèce*, no 17305/02, arrêt du 13 juillet 2006.

20. *Malama*, voir *supra*, § 51. Voir aussi, CourEDH, *Karagiannis et autres c. Grèce*, no 51354/99, §§ 42-43, arrêt du 16 janvier 2003.

21. *Zacharakis*, voir *supra*, § 33.

autre défaut de l'ordre juridique interne, à savoir la lenteur dans l'attribution de la justice[22] qui provoque souvent des écarts excessifs entre les différents stades de la procédure judiciaire pour la fixation de l'indemnité due. Or, sur ce point, le juge national ne fonctionne pas comme un élément correcteur, reconnaissant le déploiement temporel de l'affaire et réajustant ainsi la somme de l'indemnité due. La fonction judiciaire semble alors fonctionner dans un vide temporel où les procédures judiciaires nécessaires pour le versement de l'indemnité se succèdent de façon ininterrompue.

Le refus des tribunaux helléniques de traiter les affaires précitées en les intégrant dans leur contexte historique, souvent composé d'un imbroglio d'actes administratifs et de procédures judiciaires superposées qui prolongent à perpétuité la privation de fait de la propriété immobilière de l'intéressé, surgit également dans le contexte d'autres affaires qui ne concernent pas exclusivement la fixation de l'indemnité due. Un exemple qui illustre la manière divergente dont le juge grec et la Cour de Strasbourg traitent la même affaire d'expropriation, se trouve dans l'arrêt Yagtzilar et autres c. Grèce[23]. En 1995, au cours de la procédure de fixation du prix unitaire définitif, le tribunal compétent a constaté la prescription extinctive du droit des requérants à l'indemnisation pour l'expropriation de leurs terrains depuis 1925. La CourEDH a conclu à la violation du P1-1, en relevant que, en raison de la prescription, les requérants avaient été privés de toute sorte d'indemnisation pour l'expropriation de leur propriété immobilière qui avait eu lieu soixante-dix ans plus tôt. A la différence du juge grec, la Cour de Strasbourg a placé l'affaire dans son cadre historique et s'est interrogée sur les raisons pour lesquelles l'Etat grec n'avait pas versé l'indemnité due aux requérants au cours d'une période anormalement longue[24]. Cet arrêt ne saurait être considéré comme l'immixtion du juge international dans la manière dont les tribunaux nationaux avaient appliqué la prescription extinctive en cause. Au contraire, la décision de la Cour rappelle que le juge ne saurait faire abstraction du sens de la justice lors de la pondération de l'intérêt public avec le droit à la protection des biens. Le juge de Strasbourg a considéré, de manière implicite mais claire, que l'invocation par l'Etat grec de l'exception de prescription à un stade aussi avancé d'une procédure judiciaire était abusive, puisque celle-ci s'était déjà étalée sur sept décennies environ et que, de plus, l'Etat grec n'avait pris aucune initiative pour dédommager les intéressés.

Cette ligne de raisonnement de la CourEDH est le fil conducteur qui lie l'arrêt Yagtzilar à deux arrêts subséquents qui concernent, cette fois, la façon dont le Conseil d'Etat a abordé des questions de privation de la propriété foncière. Le premier est l'arrêt Papastavrou et autres c. Grèce, où le terrain des requérants a été qualifié, en 1994, par l'administration de terrain destiné au reboisement, ce qui a évidemment eu des conséquences négatives sur l'étendue de son exploitation[25]. Lorsque le Conseil d'Etat fut saisi pour examiner la légalité de l'acte administratif précité, celui-ci rejeta le recours en annulation comme irrecevable, considérant que l'acte attaqué n'était pas exécutoire mais qu'il se bornait à confirmer un acte administratif délivré en 1934. En s'abstenant, à juste titre, de se prononcer sur le caractère forestier ou non du terrain en cause, la CourEDH a simplement relevé que les parties avaient soumis des éléments contradictoires sur ce sujet. La Cour de Strasbourg préféra orienter son contrôle vers la façon dont le Conseil d'Etat avait examiné l'affaire. Elle conclut qu'en qualifiant l'acte attaqué comme non exécutoire, le juge administratif avait refusé de reconnaître la complexité de la situation juridique en cause. De plus, le Conseil d'Etat avait omis de prendre en considération que les autorités compétentes avaient qualifié le ter-

22. En 2008 la Grèce a été condamnée à 74 reprises par la CourEDH, dont les 53 concernaient la question de la durée excessive de procédures judiciaires (voir Cour européenne des droits de l'homme, RAPPORT ANNUEL 2008, p. 134).

23. CourEDH, *Yagtzilar et autres c. Grèce*, no 41727/98, arrêt du 6 décembre 2001, CEDH 2001-XII.

24. *Yagtzilar*, voir *supra*, § 41.

25. CourEDH, *Papastavrou et autres c. Grèce*, no 46372/99, arrêt du 10 avril 2003, CEDH 2003-IV.

rain litigieux comme destiné au reboisement soixante ans après la qualification de la zone dont ledit terrain faisait partie comme espace destiné au reboisement et sans rechercher si et comment l'état du terrain avait entre-temps évolué[26]. En d'autres termes, à l'instar de l'arrêt Yagtzilar, dans Papastavrou, le juge de Strasbourg a reproché à la Cour administrative suprême d'avoir omis d'intégrer l'affaire dans son contexte historique, tout en reconnaissant le caractère radical de la mesure restrictive sur la propriété individuelle des requérants.

Le raisonnement de la CourEDH suit un chemin similaire dans l'arrêt plus récent Fakiridou et Schina c. Grèce, affaire relative à la levée de l'expropriation dont faisait l'objet le terrain des requérants depuis 1933[27]. Pour le juge de Strasbourg, seul l'élément de la période pendant laquelle le terrain en cause demeurait bloqué[28], était, plus ou moins, suffisant pour conclure au caractère disproportionné de la mesure restrictive. Selon la Cour, le fait que les propriétaires d'un terrain voisin avaient initié la procédure judiciaire pertinente pour l'indemnisation des requérants ne suffisait pas pour justifier la mesure restrictive en cause[29]. En outre, la Cour n'a pas retenu l'argument du gouvernement grec, à savoir que le Conseil d'Etat avait raisonnablement rejeté en 2005 (plus de soixante-dix ans après l'imposition de l'expropriation) la demande en annulation des requérants en raison de la litispendance d'autres procédures relatives à cette expropriation[30].

En deuxième lieu, on pourrait considérer comme « descendant » des arrêts Katikaridis et Tsomtsos un groupe d'arrêts récents, où le constat de violation de l'article 1 du Protocole 1 est la conséquence de la rigidité de règles afférentes au calcul de la compensation pour cause d'expropriation ou en raison de restrictions conséquentes à l'exploitation d'un terrain. L' application de règles par le juge interne qui jouent de fait le rôle de présomptions irréfragables, sans prêter égard à la mise en équilibre *in concreto* entre l'intérêt public et le droit à la protection des biens, entraîne la méconnaissance de la particularité de chaque affaire. En effet, dans les arrêts Ouzounoglou[31], Athanasiou et autres[32], Sampsonidis et autres[33] et Antonopoulou et autres[34], la CourEDH a réexaminé une question que l'arrêt Azas avait initialement suggéré qu'elle relevait du pouvoir discrétionnaire[35] de l'Etat grec : le versement d'une « indemnité spéciale », comme prévu par l'article 13 du décret-loi n° 797/1971, en cas de dépréciation de la partie non expropriée du terrain en raison de la nature de l'ouvrage visé par l'expropriation. Dans les quatre affaires précitées, la Cour de cassation avait rejeté les demandes des requérants à bénéficier de l'indemnité spéciale, admettant que celle-ci ne pouvait pas dépendre de la nature de l'ouvrage réalisé mais uniquement du fait de l'expropriation. Le constat de violation de l'article 1 du Protocole 1 par la CourEDH s'est principalement fondé sur le fait que le juge national avait méconnu que la nature de l'ouvrage avait directement contribué à la dépréciation substantielle de la valeur des parties restantes des terrains expropriés. A titre d'exemple, dans l'arrêt Ouzounoglou, la CourEDH a affirmé qu'en raison de la construction d'une nouvelle route, la maison de la requérante, qui se trouvait dans la partie du terrain non expropriée, se situait désormais à un

26. *Papastavrou*, voir *supra*, § 37.

27. CourEDH, *Fakiridou et Schina c. Grèce*, no 6789/06, arrêt du 14 novembre 2008.

28. De même, dès 1979 avait été délivré l'acte de désignation des terrains expropriés et de répartition proportionnelle des indemnisations dues aux propriétaires (*Fakiridou*, voir *supra*, § 53).

29. *Fakiridou,* voir *supra*, § 53. Ceux-ci avaient un intérêt légitime pour la réalisation de l'expropriation puisque la valeur de leur terrain augmenterait.

30. Il est à noter que la Cour, après avoir constaté que la nature de la violation permettait une *restitutio in integrum,* a considéré que la révocation de l'expropriation serait la mesure appropriée à prendre en l'espèce (*Fakiridou*, voir *supra*, § 61).

31. CourEDH, *Ouzounoglou c. Grèce*, no 32730/03, arrêt du 24 novembre 2005.

32. CourEDH, *Athanasiou et autres c. Grèce*, no 2531/02, arrêt du 9 février 2006.

33. CourEDH, *Sampsonidis et autres c. Grèce*, no 2834/05, arrêt du 6 décembre 2007.

34. CourEDH, *Antonopoulou et autres c. Grèce*, no 49000/06, arrêt du 16 avril 2009.

35. La « marge d'appréciation » selon la terminologie de la CourEDH (*Azas*, voir *supra*, § 51).

carrefour, avec vue sur l'autoroute, et que, par conséquent, la requérante subirait la pollution sonore et les vibrations constantes dues à l'augmentation de la circulation de véhicules[36]. Dans l'arrêt Athanasiou et autres, suite à la construction d'un ouvrage public, les maisons de certains des requérants se retrouvèrent sous un pont construit pour le passage d'une ligne ferroviaire, avec toutes les conséquences défavorables sur la valeur des parties non expropriées de leurs terrains[37]. Le juge de Strasbourg a ainsi constaté que l'application in abstracto de la règle, selon laquelle la nature de l'ouvrage visé par l'expropriation ne pouvait pas être prise en compte pour la détermination de la dépréciation éventuelle de la partie non expropriée du terrain litigieux, violerait le P1-1[38].

La même ligne de raisonnement transparaît dans les arrêts récents de la CourEDH relatifs à des restrictions à l'usage des propriétés foncières situées hors de la zone urbaine. Selon la jurisprudence constante du Conseil d'Etat, l'usage de ces terrains est destiné de par leur nature à l'exploitation agricole, avicole, sylvicole ou de divertissement du public. La juridiction administrative suprême considère ainsi que l'Etat n'est pas tenu d'indemniser le propriétaire d'un terrain situé hors de la zone urbaine dont l'exploitation a subi des restrictions en vue de protéger l'environnement naturel ou culturel[39]. Par ses arrêts Z.A.N.T.E. – Marathonisi A.E[40] et Anonymos Touristiki Etairia Xenodocheia Kritis[41], la CourEDH a considéré que ce critère général était contraire au P1-1. En faisant clairement écho aux arrêts Katikaridis et Tsomtsos, elle a souligné que ce critère se distinguait par sa rigueur particulière. Pour le juge de Strasbourg, le terme « destination » était vague et indéfini puisqu'il ne permettrait pas au juge de prendre en considération la législation qui régissait la constructibilité du terrain litigieux au moment de l'imposition des restrictions. Contrairement au juge national qui avait appliqué sans distinction dans les affaires précitées le critère général de « destination » du terrain, et avait donc conclu à l'absence d'obligation d'indemnisation, la CourEDH s'est penchée sur la proportionnalité des restrictions en tenant compte d'un faisceau d'indices ressortant du dossier de chaque affaire. Elle a ainsi recherché si au moment de l'acquisition des terrains ces derniers étaient constructibles, en vertu de la législation relative aux terrains situés hors de la zone urbaine, si les requérants avaient exprimé leur volonté d'y faire construire des immeubles et s'ils avaient procédé à des actes spécifiques en ce sens. De plus, la Cour a examiné la manière dont l'administration avait réagi dans chaque cas particulier[42].

En d'autres termes, d'après la CourEDH, la question de la compensation des intéressés pour cause d'interdiction totale de construire sur leurs propriétés ne pouvait pas dériver d'une règle générale et abstraite, produit d'une construction jurisprudentielle, qui méconnaissait les particularités de chaque affaire. En revanche, ladite question était dépendante d'une série d'éléments, qui devraient coordonner la mise en balance de la nécessité de protection de l'environnement naturel ou culturel avec la garantie efficace du droit à la propriété. Les arrêts précités transposent donc dans le cas de la jurisprudence du Conseil d'Etat l'esprit des arrêts Katikaridis et Tsomtsos, rappelant au juge national que l'emploi de présomptions irréfragables ou de règles inflexibles, aboutissant

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36. *Ouzounoglou*, voir *supra*, § 30.

37. *Athanasiou et autres*, voir *supra*, § 25. De plus, dans les arrêts *Sampsonidis* et *Antonopoulou*, la question de l'indemnisation spéciale concernait la dépréciation de la valeur des parties non expropriées de terrains qui avaient été expropriés pour cause d'élargissement de la route nationale.

38. Par son arrêt n° 31/2005, la Cour de cassation, en formation plénière, a admis que l'indemnisation spéciale peut comprendre également le dommage subi en raison de la dépréciation de la valeur de la partie non expropriée due à la réalisation de l'ouvrage public.

39. Voir parmi d'autres, Conseil d'Etat, arrêts nos 3135/2002 et 982/2005.

40. CourEDH, *Z.A.N.T.E. – Marathonisi A.E. c. Grèce*, no 14216/03, arrêt du 6 décembre 2007.

41. CourEDH, *Anonymos Touristiki Etairia Xenodocheia Kritis c. Grèce*, no 35332/05, arrêt du 21 février 2008.

42. *Z.A.N.T.E. – Marathonisi A.E, voir supra,* § 53, et *Anonymos Touristiki Etairia Xenodocheia Kritis,* voir *supra,* § 48.

à un jugement dépourvu de proposition mineure[43], se heurtera, le plus probablement, à la jurisprudence de la Cour de Strasbourg. Cet élément est en soi important car il est révélateur de la perspective manifestement divergente sous l'angle de laquelle les juges national et international abordent, à tour de rôle, la même question relative aux limitations à l'usage de la propriété foncière pour cause de protection de l'environnement. Il nous semble que cette divergence ne saurait être expliquée en des termes exclusivement juridiques.

On pourrait expliquer cette divergence en observant le rôle que s'attribuent de manière différente le juge grec et la Cour de Strasbourg lors de l'examen des restrictions à l'usage de la propriété foncière, dans le contexte de la mise en œuvre de politiques en matière d'aménagement du territoire. Prenons par exemple le cas du Conseil d'Etat grec : la haute juridiction nationale se confronte à la nécessité d'intervenir pour définir l'organisation spatiale des activités économiques en ce qui concerne les propriétés se trouvant hors de la zone urbaine. Ce volontarisme du Conseil d'Etat est le produit de la lenteur dont fait preuve le législateur pour mettre en œuvre une loi d'orientation pour l'aménagement et le développement durable du territoire à l'échelle nationale[44]. Bref, l'inertie du pouvoir législatif à planifier une politique d'aménagement du territoire à long terme oblige le juge administratif suprême à prendre l'initiative de réglementer lui-même l'usage des propriétés se trouvant hors de la zone urbaine ; il applique ainsi la présomption jurisprudentielle précitée qui sous-entend l'inconstructibilité, *de plano*, des terrains se situant hors de la zone urbaine. Le juge se substitue ainsi au législateur qui hésite à réglementer de manière cohérente et systématique le développement spatial des terrains ruraux et perpétue ainsi la conception sociale dominante en Grèce, à savoir que la destination primordiale de la propriété foncière est la satisfaction de besoins d'habitation[45]. Par conséquent, la politique équivoque du législateur sur la question de la planification spatiale du pays oblige le juge administratif à endosser le rôle de l'arbitre suprême de questions dont le contenu est de nature politico-économique : le juge est conscient que la compensation systématique des propriétaires de terrains ruraux frappés d' inconstructibilité pour des raisons de protection de l'environnement aurait des répercussions négatives sur les finances publiques. En d'autres termes, le raisonnement juridique du juge national ne peut pas ignorer la composante politique et économique du problème, ce qui entraîne une méconnaissance *ab initio* de la valeur du droit à la protection des biens lorsqu'il examine des affaires de contenu similaire[46].

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43. L. Κιουssopoulou, La « destination » de la propriété foncière située hors de la zone urbaine : une présomption irréfragable de plus sous épreuve ? *(en grec)*, www.nomosphysis.org.gr/articles, mai 2009.

44. En été de l'année 2008, le Parlement a adopté le Cadre général de la planification spatiale et du développement durable qui prévoit comme orientation principale la restriction de la construction dispersée sur les espaces hors de la zone urbaine (décision du Parlement n° 6876/487/2008). Voir A. Vlantou, Construction hors de la zone urbaine : la particularité grecque de la planification de la campagne. Causes de la pathogénie et remèdes *(en grec)*, www.nomosphysis.org.gr/articles, novembre 2008.

45. A. Sinis, La construction sur les espaces hors de la zone urbaine et la protection de l'environnement dans l'ordre juridique grec *(en grec)*, www.nomosphysis.org.gr/articles, mars 2009.

46 Pour une telle approche, voir N. Rozos, Observations sur les arrêts de la CourEDH, *ZANTE-Marathonisi A.E.* et *Anonymos Touristiki Etairia Xenodocheia Kritis c. Grèce (en grec)*, ΘΠΔΔ, 4/2008, pp. 476-483. L'auteur traite la question de l'impossibilité de construction hors de la zone urbaine exclusivement selon la perspective du juge national, sans incorporer à son analyse la logique de la CourEDH. En effet, selon lui, dans la seconde affaire commentée l'élément crucial était que, lors de l'acquisition du terrain litigieux, l'aire où celui-ci se situait avait déjà été qualifiée de « paysage de beauté naturelle » et, par conséquent, sa construction exigeait l'autorisation du ministre compétent (*ibid*., p. 482). Par contre, selon la CourEDH, l'élément central de l'affaire était la rigidité de la présomption jurisprudentielle quant à la « destination » des terrains hors de la zone urbaine. Pour le juge de Strasbourg, la reconnaissance par la loi, depuis 1923, de la possibilité de construction, sous certaines conditions, sur les espaces hors de la zone urbaine était un élément crucial afin de contrôler la rigidité du critère jurisprudentiel en cause. La question de l'étendue de la constructibilité du terrain litigieux constitue un élément important qui est, pour au-

De son côté, la CourEDH, de par sa nature de juridiction internationale, n'est pas liée aux contraintes précitées, difficilement méconnaissables par le juge interne. Certes, elle reconnaît un large pouvoir discrétionnaire aux Etats-membres de la Convention pour définir les politiques d'aménagement du territoire et de protection de l'environnement[47]. Pourtant, l'exercice du contrôle de proportionnalité n'a pas, pour le juge de Strasbourg, comme point de départ des considérations de nature politique, au sens large du terme, à savoir l'orientation du développement spatial du pays, mais plutôt le souci d'évaluer la rigidité des restrictions sur la propriété individuelle, telle qu'elle ressort des éléments du dossier. Ceci semble être la raison pour laquelle la jurisprudence de la CourEDH se distancie systématiquement de la recherche, *in abstracto* et à travers l'application de présomptions irréfragables, du juste équilibre qui doit régner entre l'intérêt public à préserver et le droit à la protection de la propriété.

De surcroît, la volonté du juge de Strasbourg à exercer, contrairement au juge national, un contrôle intense de proportionnalité se confirme par par la prise en compte du contexte factuel général de chaque affaire afférente à la réglementation de l'usage d'un bien foncier en vue de protéger l'environnement. Plus précisément, selon la Cour EDH, le respect des principes de confiance légitime et de la bonne administration de la justice joue un rôle important lors de la mise en balance des intérêts légitimes qui entrent en conflit. En effet, dans l'arrêt Z.A.N.T.E. – Marathonisi A.E. c. Grèce, la CourEDH, conformément à la logique dont les arrêts Papastavrou et Yagtzilar étaient imprégnés, a imputé aux autorités nationales la tolérance de leur part d'activités touristiques sur l'îlot qui sapaient le but pour lequel des restrictions radicales avaient été imposées sur sa constructibilité, à savoir la protection de la tortue «caretta-caretta». La Cour a souligné de manière caractéristique que

« le but de la restriction peut devenir caduc et la charge initialement imposée à l'intéressé s'avère ainsi plus difficilement tolérable par lui-même, élément qui doit être pris en compte lors de l'appréciation de sa proportionnalité par rapport au but poursuivi. En l'occurrence, il serait déraisonnable que l'Etat exige de la requérante de se conformer aux restrictions sévères à la jouissance de sa propriété dans le but de préserver la tortue « caretta-caretta », quand l'autorité compétente omet en même temps de prendre les mesures nécessaires face à des activités qui mettent en danger la matérialisation du but précité »[48].

Enfin, la Cour est arrivée à la même conclusion dans l'arrêt Theodoraki et autres, à propos de la décision de l'administration de qualifier les terrains litigieux comme faisant partie de « l'ancien rivage ». Sans citer explicitement le principe de

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tant, pris en considération par la Cour lors du calcul de la satisfaction équitable à allouer en vertu de l'article 41 de la Convention (voir CourEDH, *Z.A.N.T.E. – Marathonisi A.E. c. Grèce, arrêt sur la satisfaction équitable,* no 14216/03, 28 mai 2009, § 27). En d'autres termes, le juge de Strasbourg se focalise, dans les affaires précitées, sur le critère de la « destination » en tant que tel et se demande si son application comme présomption irréfragable méconnaît l'exigence du P1-1 pour une protection substantielle du droit à la propriété. Pour cette raison, il nous semble que l'incompatibilité de ladite présomption avec la jurisprudence de la CEDH est générale et ne se limite pas uniquement aux affaires comportant des faits semblables à ceux examinés jusqu'ici par la CourEDH (*contra* Rozos, *supra*., page 483). Néanmoins, la convergence de la position du juge national avec les conclusions du juge international ne semblerait pas difficile, pourvu que le premier abandonne l'application sans distinction de la présomption en cause comme irréfragable (voir L. Κιουssopoulou, Commentaire sur l'arrêt de la CourEDH, requête 35332/2005, arrêt 21.2.2008, *Anonymos Touristiki Etairia Xenodocheia Kritis c. Grèce (en grec)*, ΘΠΔΔ, 2/2008, pp. 219-221).

47. *Z.A.N.T.E. – Marathonisi A.E. c. Grèce*, voir *supra*, § 50.

48. *Z.A.N.T.E.–Marathonisi A.E. c. Grèce,* voir *supra*, § 54. Dans cette affaire, la CourEDH a noté que selon le rapport établi par le Comité des pétitions du Parlement européen, la plage de l'îlot litigieux était envahie au quotidien par des touristes qui la polluaient. Elle a aussi relevé que l'autorité responsable de gérer le Parc National de Zakynthos devrait au moins ne pas tolérer des situations susceptibles de saper le but pour lequel l'îlot litigieux avait été frappé de restrictions radicales quant à son exploitation.

confiance légitime, le juge de Strasbourg a souligné qu'au cours de leur litige de longue date avec l'Etat grec quant à la légalité des restrictions radicales imposées à l'usage de leurs propriétés, celuici n'avait jamais soulevé des arguments présupposant que les propriétés en cause lui appartenaient depuis toujours[49].

3.La politique dilatoire de l'administration grecque

Le rôle de l'administration dans les affaires d'expropriation de propriété foncière est décisif puisque celle-ci constitue avec l'individu concerné le bipole se trouvant au centre de la procédure judiciaire y relative. En d'autres termes, l'administration est la partie adverse de l'individu et ce dernier revendique directement des autorités compétentes son indemnisation pour la privation de sa propriété. Comme vu précédemment, les dysfonctionnements au niveau du cadre législatif et du contrôle judiciaire représentent des facteurs importants qui exercent une influence indirecte sur la célérité et l'équité de la procédure d'indemnisation. L'administration est l'élément institutionnel qui se trouve au cœur de la procédure de compensation. Ainsi, le bon déroulement de cette procédure dépend largement de l'aptitude de l'administration à se conformer aux règles de l'Etat de droit.

La jurisprudence de la CourEDH révèle une administration dont le comportement, à l'instar de l'exemple décrit dans l'affaire Papamichalopoulos, ne pourrait pas être caractérisée d'exemplaire. En particulier, deux conclusions principales ressortent de la jurisprudence européenne. En premier lieu, l'administration grecque se montre dilatoire quant au paiement de l'indemnisation due. En second lieu, les dysfonctionnements déjà constatés des branches législative et judiciaire aggravent les problèmes de « mauvaise administration ». En effet, l'administration publique se montre assez souvent tolérante ou même tirant profit des problèmes structurels de l'ordre juridique interne en vue de compliquer le versement de la compensation dont elle est redevable.

En particulier, la pratique dilatoire de l'administration consiste essentiellement en l'adoption d'actes consécutifs qui imposent soit une nouvelle expropriation du terrain litigieux soit l'interdiction à l'infini de son libre usage, dans le but de son appropriation à la longue par l'Etat ou de la prolongation de son blocage sans pour autant que soit accordée une quelconque compensation[50]. L'affaire Satka et autres est un exemple révélateur d'un tel comportement[51]. Bien que le tribunal compétent eût déjà définitivement fixé l'indemnité pour l'expropriation du terrain en cause, la municipalité de Kalamaria non seulement refusa de la verser aux bénéficiaires mais elle modifia aussi le plan de l'aménagement du territoire, qualifiant la propriété litigieuse d'espace public culturel, de loisirs et de sports[52]. Le constat de violation du P1-1 a été accompagné d'une référence au rôle que l'administration doit jouer dans un Etat de droit : « la Cour considère que les interventions successives et répétées de l'Etat [sur la propriété des requérants] privèrent de tout effet utile les décisions judiciaires rendues en faveur des requérants et les empêchèrent en réalité de voir que la contestation les opposant à l'Etat soit décidée par un tribunal, conformément au principe de la prééminence du droit »[53].

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49. CourEDH, *Theodoraki et autres c. Grèce*, no 9368/06, §§ 64-65, arrêt du 11 décembre 2008.

50. Il se peut aussi que cette conséquence ne résulte pas de la volonté délibérée de l'administration à retarder le déroulement des procédures judiciaires mais de la complexité de ces dernières qui impliquent plusieurs organes administratifs avec des compétences qui se chevauchent et ne sont pas clairement définies (voir l'exemple caractéristique de l'arrêt CourEDH, *Assymomitis c. Grèce*, no 67629/01, §§ 52-55, arrêt du 14 octobre 2004).

51. Voir, en ce qui concerne le cas de la levée de l'expropriation pour cause de modification du plan d'alignement d'une ville, les arrêts CourEDH, *Katsaros c. Grèce*, no 51473/99, § 44, arrêt du 6 juin 2002, et *Fakiridou et Schina c. Grèce*, voir *supra*.

52. Une attitude similaire de l'administration peut être constatée dans les arrêts CourEDH, *Zazanis et autres c. Grèce*, no 68138/01, § 39, arrêt du 18 novembre 2004, et *Pialopoulos et autres c. Grèce*, no 37095/97, § 60, arrêt du 15 février 2001.

53. *Satka*, voir *supra*, § 57.

L'arrêt Satka rappelle aussi la fonction des articles 1 du Premier Protocole et 6 § 1 de la Convention, tels des vases communicants, lors de l'examen du comportement de l'administration en cas d'expropriation d'une propriété foncière. Bref, la pratique souvent dilatoire de l'Etat peut provoquer des violations tant du droit à la protection des biens que du droit à un tribunal, sous son aspect particulier de l'obligation de se conformer aux décisions de la justice. En effet, le juge de Strasbourg a condamné à plusieurs reprises le refus ou le retard excessif de l'administration de se soumettre aux décisions des tribunaux administratifs ayant constaté la levée de la charge qui pesait sur un terrain pour cause d'application d'un plan d'alignement urbain[54]. Un exemple caractéristique est celui de l'affaire Rompoti et Rompotis où l'administration n'a pas directement refusé de se soumettre à la décision judiciaire qui constatait la levée de la charge pesant sur le terrain des requérants mais elle a invité ces derniers à produire plusieurs documents afin de procéder à la révocation de l'expropriation. La CourEDH a considéré que ces documents soit se trouvaient déjà à la disposition de l'administration soit n'étaient pas nécessaires, selon le dispositif de la décision judiciaire, pour que la charge litigieuse soit levée[55]. En d'autres termes, la Cour a sous-entendu que le comportement de l'administration était abusif et visait simplement à retarder la levée de la charge[56].

Dans d'autres cas, la politique dilatoire de l'administration va de pair avec le retard excessif de la procédure judiciaire, et la violation du P1-1 est le résultat de la combinaison des dysfonctionnements dont souffrent les pouvoirs exécutif et judiciaire. L'affaire Tsirikakis illustre bien ce problème : dans le cadre d'une procédure d'expropriation, l'administration a qualifié l'îlot litigieux comme faisant partie du domaine public et a également retardé la production des preuves nécessaires devant le tribunal compétent afin que la qualité du requérant comme ayant droit de l'indemnité d'expropriation soit établie. De plus, les juridictions internes, malgré la durée excessive de la procédure, n'ont pas réajusté au stade ultime de celle-ci le montant de l'indemnité, qui avait déjà été déterminé environ quinze ans plus tôt par le tribunal de fixation du prix unitaire[57]. D'ailleurs, la CourEDH n'hésite pas à relever dans le contexte de la même affaire tant les lacunes législatives que les dysfonctionnements des pouvoirs exécutif et judiciaire comme des facteurs qui, conjointement, entraînent la violation du P1-1. Ainsi, dans l'arrêt Hatzitakis c. Grèce il a été constaté qu'en raison de l'absence de cadastre, les intéressés furent obligés de recourir à la procédure complexe de reconnaissance d'ayant droit de l'indemnité d'expropriation, dans le cadre de laquelle l'administration ne s'est pas montrée diligente afin de l'achever en temps utile[58].

La pratique dilatoire de l'administration en ce qui concerne le versement prompt de l'indemnisation allouée par les tribunaux pose des questions intéressantes d'application de l'article 1 du Protocole 1. En particulier, l'applicabilité de ladite disposition est mise en cause lorsque les juridictions saisies, au stade ultime de la procédure d'allocation de l'indemnité d'expropriation, tardent à se prononcer sur son ayant droit. Dans certains cas, d'anciens propriétaires de terrains expropriés qui étaient concernés par des retards excessifs quant au paiement de l'indemnité due, ont saisi la Cour de Strasbourg, avant la conclusion de la procédure interne relative à la recon-

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54. Voir, entre autres, CourEDH, *Georgoulis et autres c. Grèce*, no 38752/04, §§ 24-25, arrêt du 21 juin 2007 ; *Beka-Koulocheri c. Grèce*, no 38878/03, §§ 22-24, arrêt du 6 juillet 2006 ; *Manolis c. Grèce*, no 2216/03, § 24, arrêt du 19 mai 2005 ; *Basoukou c. Grèce*, no 3028/03, § 14, arrêt du 21 avril 2005.

55. CourEDH, *Rompoti et Rompotis c. Grèce*, no 14263/04, §§ 27-29, arrêt du 25 janvier 2007.

56. Voir, pourtant, CourEDH, *Kosmidis et Kosmidou c. Grèce*, no 32141/04, §§ 25-27, arrêt du 8 novembre 2007, où la CourEDH conclut à la non-violation de l'article 6 § 1 de la CEDH avec un raisonnement qui se concilie mal avec ses considérations dans l'arrêt *Rompoti et Rompotis,* voir *supra*.

57. CourEDH, *Tsirikakis c. Grèce*, no 46355/99, §§ 57-60, arrêt du 17 janvier 2002. La CourEDH relève aussi l'incertitude causée au requérant en raison de la pratique de l'administration et des tribunaux quant au sort du bien litigieux et au versement de l'indemnité.

58. CourEDH, *Hatzitakis c. Grèce*, no 48392/99, §§ 49-51, arrêt du 11 avril 2002.

naissance de l'ayant droit de l'indemnisation[59]. Le gouvernement grec a soulevé l'exception de non-épuisement des voies de recours internes, du fait que les juridictions internes ne s'étaient pas encore prononcées sur la question du bénéficiaire de l'indemnité d'expropriation. Le juge de Strasbourg, se fondant sur l'acquis jurisprudentiel de l'arrêt Papamichalopoulos quant à la notion autonome de « bien », a rejeté ladite exception du Gouvernement défendeur en soulignant que les requérants avaient produit un certain nombre de preuves dont il ressortait qu'ils avaient des droits de propriété sur les terrains expropriés[60]. Cet élément fut crucial pour le dénouement des litiges en cause. Il a permis à la CourEDH de procéder à l'examen du fond de chaque affaire et, partant, de conclure à la violation de l'article 1 du Protocole 1, en soulignant que l'Etat défendeur n'avait pas fourni d'explications convaincantes pour le non-paiement de l'indemnisation due malgré un laps de temps de deux[61] et trois[62] décennies depuis l'imposition de la mesure d'expropriation. Le fait donc que la procédure pour le paiement de l'indemnisation n'était pas encore achevée n'a pas constitué pour la CourEDH une raison d'exonération de l'Etat de sa responsabilité de protection effective du droit à la protection des biens. Selon la Cour, à partir du moment où l'examen des pièces du dossier permet d'établir des droits patrimoniaux des requérants, celle-ci examinera le fond de l'affaire et, le cas échéant, elle conclura à la violation de l'article 1 du Protocole n° 1.

Il ressort, donc, que la durée excessive de la procédure d'expropriation, le paiement de l'indemnisation y inclus, peut servir de base exclusive pour que la CourEDH reconnaisse la violation du droit de propriété. En effet, l'élément temporel fonctionne telle une sorte de présomption pour établir la responsabilité des organes de l'Etat défendeur : plus la procédure d'expropriation traîne en longueur, plus son imputation *de plano* aux organes administratifs ou judiciaires impliqués sera probable. Cette thèse ressort de la logique générale qui traverse la jurisprudence examinée de la CourEDH selon laquelle la procédure d'expropriation ne peut pas rester dans un Etat de droit pendante à l'infini, étant données les conséquences négatives sur l'état patrimonial de l'intéressé. Le dépassement alors du délai considéré comme raisonnable pour le versement de l'indemnité d'expropriation transfère d'une certaine manière la charge de la preuve sur les épaules du Gouvernement grec qui, afin de justifier la restriction au droit de propriété, doit, comme il fut mentionné dans les arrêts Nastou[63], offrir « des explications convaincantes »[64].

C. Le juge de Strasbourg tel un « visiteur impromptu »

L'analyse de la jurisprudence précitée s'est efforcée de montrer que les violations du droit à la protection de la propriété foncière dont l'état grec est responsable obéissent à une certaine logique, indépendamment des questions particulières que peut soulever chaque affaire. Si les arrêts précités de la CourEDH étaient traités comme des pièces d'un puzzle, emboîtées les unes dans les autres, l'image reconstituée représenterait les différentes sortes de comportements problématiques provenant des trois pouvoirs. Comme nous l'avons souligné dans l'introduction du présent texte, la manière dont chaque pouvoir conçoit son rôle dans le contexte de l'expropriation se répercute dans les exemples concrets de violation de l'article

59. Voir, entre autres, CourEDH, *Nastou c. Grèce (no 2)*, no 16163/02, arrêt du 15 juillet 2005 et *Nastou c. Grèce,* n° 51356/99, arrêt du 16 janvier 2003.

60. *Nastou*, § 28, *Nastou (n° 2),* § 30. Voir aussi *Papastavrou, supra*, §§ 34-35. Le gouvernement grec a affirmé que les requérants avaient omis de demander auprès des tribunaux civils leur reconnaissance comme propriétaires de l'espace litigieux (comme il a déjà été mentionné, l'affaire concernait l'appréciation par le Conseil d'Etat de la légalité de l'acte administratif en vertu duquel le terrain des requérants avait été qualifié comme destiné au reboisement). La CourEDH a rejeté cette exception, en retenant que les requérants avaient produit une série d'éléments établissant que, dans le cadre de la procédure en cause, ils possédaient un « bien » en vertu de l'article 1 du Protocole n° 1.

61. *Nastou (n°2),* voir *supra*, § 34.

62. *Nastou,* voir *supra*, § 34.

63. *Nastou*, voir *supra.*

64. Voir, l'application de la même ligne de raisonnement dans *Yagtzilar*, *supra.*

1 du Protocole n° 1, tels qu'ils ressortent de chaque affaire « grecque » relative à la privation de la propriété foncière.

Cette observation fait naître deux questions supplémentaires, auxquelles on essaiera de répondre en guise de conclusion à la présente étude. En premier lieu, la CourEDH, en tant que juridiction internationale, dispose-t-elle de la connaissance nécessaire des particularités du droit grec afin d'examiner les questions spéciales et techniques soulevées par l'application du droit des expropriations ? En particulier, le juge de Strasbourg peut-il procéder à une juste mise en balance de l'intérêt public avec le droit de propriété, alors qu'il ne jouit pas d'un contact direct avec le contexte politique et socio-économique grec, éléments qui composent l'arrière-plan de l'application du droit des expropriations en Grèce ? Le juge européen est-il capable de concevoir les particularités de la « construction hors de la zone urbaine », prendre en compte le déficit normatif quant à la planification du développement spatial en Grèce, constater de près la protection problématique des ressources naturelles du pays ? Et finalement, à quel point est-il légitime pour la CourEDH de substituer son appréciation à celle des juridictions suprêmes de l'Etat grec en ce qui concerne les limites de la protection du droit de propriété ? En s'attribuant une telle compétence, le juge européen outrepasse-t-il ses limites en tant que juge international, agissant ainsi comme « juge de quatrième instance » ? La seconde question a trait à la valeur pratique des constats précités quant au comportement problématique des trois pouvoirs dans le cas de limitations imposées sur la propriété foncière ; si la thèse défendue dans le présent texte est correcte, quelles obligations spécifiques comporte la jurisprudence de la CourEDH vis-à-vis du législateur, de l'administration et du juge ?

Il semblerait que la réponse à la première question ne soit pas utile uniquement dans le cadre de la présente étude mais qu'elle ait une valeur plus générale, étant donné qu'en 2009 la Cour de Strasbourg a fêté son cinquantième anniversaire. Cette question est également abordée dans le cadre de discussions ayant lieu dernièrement tant dans des cercles académiques[65] qu'au sein de la Cour elle-même[66] quant au profil juridictionnel que la Cour devrait adopter dans l'avenir. En particulier, la question se pose de savoir si la CourEDH devrait se transformer en une juridiction d'attribution de justice constitutionnelle. Il est aussi vrai que, selon un reproche adressé parfois à la Cour, sa fonction juridictionnelle souffre du défaut intrinsèque d'absence de contact direct avec l'ordre juridique national qui fait à chaque fois l'objet de son contrôle[67]. Cette remarque n'est pas inexacte. En effet, la CourEDH, en raison de la distance qui la sépare de la réalité des ordres juridiques nationaux, ne peut pas être aussi familiarisée que le juge interne avec les particularités du droit national, l'évolution de son interprétation et la dynamique et l'efficacité des voies judiciaires internes. Cette constatation peut tout particulièrement être confirmée dans le contexte du droit, particulièrement technique, des expropriations. En principe, la CourEDH ne peut pas avoir l'expérience du juge national en ce qui concerne l'application des procédures de fixation du prix unitaire d'indemnité et la succession des procédures judiciaires qui aboutissent à son versement au bénéficiaire. Toutes ces questions font l'objet de la procédure des preuves devant le juge de Strasbourg. Celui-ci dépend donc essentiellement de l'initiative des parties à fournir les éléments qui lui permettront d'avoir la connaissance la plus complète possible du droit national à chaque fois applicable.

Néanmoins, ledit désavantage de la nature du

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65. Voir, entre autres, S. Greer, What's wrong with the European Convention on Human Rights ?, HUMAN RIGHTS QUARTERLY, Vol. 30 (2008), p. 686. De plus, A. Mowbray, Faltering Steps on the Path to Reform of the Strasbourg Enforcement System, HUMAN RIGHTS LAW REVIEW, n° 7 (2007), pp. 609-617, *passim*.

66. M. O' Boyle, On Reforming the Operation of the European Court of Human Rights, EUROPEAN HUMAN RIGHTS LAW REVIEW, n° 1 (2008), pp. 1-11, *passim*.

67. Voir entre autres, V. Rigas, Les arrêts récents de la CourEDH quant au caractère vague des moyens de cassation selon le Code de procédure civile *(en grec)*, NOMIKO VIMA, n° 3 (2008), pp. 538-543.

contrôle juridictionnel opéré par la CourEDH lui offre également un avantage indisputable : la distance avec laquelle elle examine chaque affaire de privation de propriété immobilière lui permet de reconstituer un « plan panoramique » du droit national. En d'autres termes, l'optique du juge de Strasbourg n'est pas limitée aux questions juridiques spécifiques soulevées par chaque affaire relative au P1-1. Par conséquent, la Cour a la possibilité de placer la question particulière de chaque affaire dans un contexte juridique plus large. Elle peut donc identifier, le cas échéant, des défauts plus généraux de l'ordre juridique interne qui entourent les actes ou les omissions des autorités nationales dans chaque affaire portée devant elle.

D'une certaine manière, le juge de Strasbourg fonctionne comme un voyageur qui, de passage dans une ville, décide de rendre visite à un couple d'amis dont il n'avait pas de nouvelles depuis longtemps. En prenant avec eux un café l'après-midi, notre visiteur n'aura pas, probablement, l'occasion de connaître les petites habitudes qui constituent la vie quotidienne de ses amis. Il ne pourra pas savoir l'heure exacte à laquelle ses amis se réveillent et quand leurs enfants rentrent de l'école. Il ne saura pas ce que la famille préfère manger le soir. Toutefois, le visiteur attentif aura à sa disposition le temps nécessaire pour remarquer certains éléments qui constituent les composantes de la vie familiale : si la maison est propre, si la relation du couple est tendue ou harmonieuse, si les enfants sont bien élevés ou s'ils sont gâtés. De la même façon, le juge de Strasbourg, à l'image d'un « visiteur impromptu », peut se placer au dessus des détails d'application du droit national et de la mise en balance opérée à chaque fois par le juge grec entre l'intérêt public et la protection du droit de propriété. Il se trouve alors dans une position avantageuse pour constater les problèmes systémiques de l'ordre juridique grec afférents à la protection de la propriété foncière, pour détecter un comportement éventuellement dilatoire de l'administration et, enfin, pour constater une certaine hésitation du juge grec à juger sur un pied d'égalité les intérêts public et individuel qui entrent en conflit.

Cette dernière observation nous permet de répondre à la seconde question posée ci-dessus, relative à la manière dont les autorités nationales peuvent incorporer l'acquis jurisprudentiel de la CourEDH dans l'ordre juridique interne. On estime que la jurisprudence européenne exige la modification radicale de la manière dont les pouvoirs législatif, exécutif et judiciaire envisagent leur rôle institutionnel dans le cadre d'affaires de privation de la propriété foncière. Le législateur devrait pouvoir prendre de nouvelles initiatives après la mise en œuvre, en 2001, du nouveau Code des Expropriations Forcées afin de garantir de manière substantielle la fixation de l'indemnité dans une procédure unique[68]. Des mesures allant dans ce sens seraient, entre autres, l'abrogation de l'article 33 de la loi n° 2971/2001, en vertu de laquelle l'intéressé doit contester la présomption de profit en raison de l'expropriation à travers une procédure distincte de celle pour la fixation de l'indemnité.

En ce qui concerne l'administration, celle-ci devrait abandonner des comportements qui ne s'accordent pas avec les principes fondamentaux de l'Etat de droit. La procédure judiciaire complexe pour la fixation de l'indemnisation ne saurait être utilisée comme un prétexte pour retarder son versement à l'intéressé, souvent jusqu'à son épuisement physique. Le fait qu'il s'écoule des décennies entre l'imposition de l'expropriation et le versement de l'indemnité d'expropriation est un phénomène qui devrait appartenir tout simplement à la sphère de la science-fiction en ce qui concerne des Etats dotés d'ordres juridiques modernes. Enfin, le juge grec ne saurait traiter l'expropriation immobilière comme une procédure qui évolue dans un vide temporel, en méconnaissance de plus de la politique souvent dilatoire de l'administration. Par ailleurs, l'utilisation *in abstracto*, par le juge civil et administratif, de présomptions irréfragables tire, certes, son origine de la volonté de remédier à l'inertie des autres pouvoirs en matière de modernisation du développement spatial du pays

68. Il est pour autant vrai que le nouveau Code d' Expropriations Forcées a déjà entrepris des mesures allant dans ce sens (voir Choromidis, *supra* note 14, p. 415).

mais, en fin du compte, elle crée plus de problèmes qu'elle n'en résout[69]. En somme, le juge grec devrait recourir plus souvent dans son raisonnement aux principes de « bonne administration » et de « confiance légitime » au stade du contrôle de proportionnalité et de la mise en balance entre l'intérêt public et le droit à la propriété individuelle.

Le caractère « éducatif » de la jurisprudence de la Cour de Strasbourg, institution qui joue le rôle de « visiteur impromptu » de l'ordre juridique grec, peut être très bénéfique dans ce sens. Les autorités nationales ont la possibilité de repérer dans le corps constamment enrichi de la jurisprudence de la CourEDH les dysfonctionnements précités de l'ordre juridique national et de rechercher des solutions à long terme. De toute façon, les autorités nationales devraient avant tout s'apercevoir de la valeur et de l'utilité générales de la jurisprudence de la Cour de Strasbourg pour en tirer profit. Comme on l'a déjà souligné, ses arrêts ne reconnaissent pas uniquement l'obligation de l'Etat grec de redresser le préjudice éventuellement causé à l'intéressé dans le contexte de chaque affaire prise séparément. En substance, ils invitent en même temps le législateur, l'administration et le juge à mettre en cause leur comportement en tant qu'acteurs institutionnels dans un Etat de droit.

69. Comme il est relevé à juste titre, les positions inflexibles du juge interne « aboutissent à perpétrer les inerties du pouvoir exécutif et législatif qu'ils aspirent à remédier » (Kioussopoulou, La 'destination' de la construction de propriété hors de la zone urbaine : une présomption irréfragable de plus sous épreuve, *supra* note 43).

European Convention on Human Rights:
History and Adaptation
The role of European Court of Human Rights

Christophoros D. Argyropoulos

I. An important example of the law's interpretation is the opposite application of the European Convention on Human Rights, which was the result of the first postwar decade and its problems in the radically transformed conditions of the globalized modernism.

In the divided Europe of that period, the European Convention on Human Rights had been characterized as the "democratic manifesto of the Western World" and constituted the proper "weapon" to conduct the cold war by ideological means. This historic destination of the European Convention on Human Rights is revealed by the fine balance between its inspired declarations with regard to the Human rights and the reasoned limitations that the Convention itself *expressly* imposes to these rights. The provisions of the European Convention on Human Rights makes a composition between the need "*to safeguard and promote the common ideals and principles*" of the political and financial liberalism and the control of the democratic participation. This goal is achieved through a system of "*formalities, conditions restrictions or penalties"* which refers to the fundamental "freedom of thought" and "expression of beliefs" (articles 9 and 10) and the permitted interferences of the public authority to the private area, as well as the region of the collective action for the benefit, between others, of "*the public safety, the public order, the national security"* (articles 8 and 11). It is also provided that any contracting party would have the possibility to take measures derogating from its obligations "*in time of public emergency threatening the life of the nation*" (article 15).

The "exceptional circumstances" existing at the period when the European Convention on Human Rights has been born are embossed in the declaration of Human Rights and Fundamental Freedoms. The comparison of the provisions of the European Convention on Human Rights to those of the Universal Declaration of Human Rights of 10.12.1948 leads to obvious conclusions: the United Nations expressed the universal hope for a World of peace and freedom, with the innocence that lies in limitless expressions, without the need to use the method of "rule" and "exceptions" at the declaration of the fundamental rights. On the contrary, the European Convention on Human Rights followed this systematic method, due to the conditions that lead to its creation and in an environment of a contest, which took even the character of a "balance of terror" and imposed "less ideal and more feasible targets"[1].

Legal texts have their own history. As much as the legal positivism is being criticized for its moral relativism and a need is indicated, every normative provision to correspond to a definite preferential value, the law is always limited to play the role of the moral "*minimum*" of every period. The law constitutes the *appropriate* solution of the problems that it is called to solve. And the appropriate character is defined on the basis of the needs of the specific historical circumstances.

II. The European Convention on Human Rights has been formulated in view of some special historical conditions. This fact, however, did not forestall the adaptation of the meaning of its provisions to the facts that existed at the time of its application, as these facts had been shaped by the transformed political and social circumstances.

The Convention offered, to that direction, two favorable elements. The first element is *structural*: it refers to the establishment of the European Court of Human Rights. The second element is

1. see characteristically the relation between par. 1 and 2 of article 10.

functional: it refers to the extensive use of indefinite legal terms, among which are terms having a particular axiological charge, as the "*democratic society*", the (each time) "*necessary degree*", the "*public safety*", the "*protection of public order*" and the "*protection of the morals*".

The examination, by the courts, of the violations of human rights, as applied, in particular, after the "one-sided" function of the Court, in the place of the initial tripartite organization of intermediation[2] transforms their protection, from the general and formalist declaration to the effective in concrete restoration of their force. The repressive activity of the European Court of Human Rights constitutes a "actual" and "objective" guarantee for the fundamental rights[3], which no longer give voice to an absent-minded and high-flying humanism, but offer a real and useful protection, which corresponds to the primal obligation of a fairly organized society to substantially and actually respect human decency.

On the other hand, the indefinite legal terms give space to the use of different meanings in any particular case, on the basis of the factual circumstances that actually exist at that time. This necessitates the adaptation of the provisions of the European Convention on Human Rights, as a text, which was formed in order to last, like the Constitution, to the challenges of every era, the bridging of the gap between the absent rule and the constantly evolving social and political reality. *'Because the normative 'necessary' is existing and functioning within the primal historical being"*[4]. The case-law is called "*to stand by the legislator –not exceeding, naturally, the general frame defined by him- and play the role of a serious and self-existent factor in favor of the better satisfaction of the emerged, at the time, needs of the society"*[5]. The particularization, by a court decision, of a general law provision constitutes the most representative manifestation of the judge's creative mission.[6]

The case-law of the European Court of Human Rights has exploited this possibility in such a way, as to make the guarantees of the Convention harmonize the legitimate aspirations of the state authority with the fundamental rights, as a condition and a limit to the protection of the personal and collective autonomy. This especially applies to a lawful society, which guarantees the harmonic coexistence of counterbalancing lawful benefits and rights, based on the principle of proportionality. Under this reasoning, the case-law of the European Court of Human Rights "updated" creatively the provisions of the European Convention on Human Rights, in a such way that, a text which initially expressed a notion of a particular ideological confrontation, started to be rationally applied in a radically different social and political environment, to the contemporary open "democratic society", in which the Human Rights constitute a "new horizon of unity". The case-law of the European Court of Human Rights "*must be invariably adapted to the new demands of the times that are constantly renewed, like life itself"*[7].

III. The above-mentioned ascertainments correspond to fixed interpretative views. The application of the law constitutes, in practice, an important aspect of its overall operation, in an actual, but also a symbolical field. In a state of law, the legal interpretation is pledged by the organizational foundations of the regime and the individual and political freedoms and ought to comply with the obligations raised in a democratic nation, being a member of the international community.

The European Court of Human Rights, as the product of the common will of the members of the European Council, aims to protect the Human Rights, established by the European Convention on Human Rights. Its authority is extended to all the cases referred to the interpretation and application of the Convention (article 45). The interpret-

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2. *Ch. Rozakis,* Some thoughts for the new European Court of Human Rights, "The Constitution", KZ (2002), page 13 and next, in particular page 14.

3. at the lesson of *A. Manessis* to the Guarantees in the enforcement of the Constitution, II, 1965, page 30-32.

4. *S. Matthias, the recognition of University diplomas from the countries of the European Union, The Constitution, ΚΘ'(2003), page 1 and next, in particular page 9.*

5. *A. Litzeropoulos*, The case-law as a factor of formation of the private law, 2000, page 8.

6. *N. Papantoniou*, General principles of civil law, 1983, page 48-49.

7. *Ch. Rozakis*, as above, page 21.

tation of the provisions of the European Convention on Human Rights by the supranational European Court of Human Rights is made on the basis of the "deep dedication" of the contracting countries to the fundamental freedoms, which rely to a "*true political democracy*" and to "*the common understanding and observance of the human rights*", according to what is mentioned at the preamble of the Convention.

Accordingly, the interpretation of the European Convention on Human Rights must aim at finding *lawful* solutions and, if possible, *correct* solutions, through the rational and apposite resolution of the unavoidable conflicts of legal interests. The frame under which the application of the provisions of the European Convention on Human Rights, like of every law provision, is made "*cannot have reference to the historical framework of the provisions' genesis*". The normative content of the provision, its regulatory meaning is being searched out through the will of the historical legislator but, also, through the singularity of the biotical relationships which are under judgment[8].

On the basis of these fundamental principles, which govern the interpretation of the provisions of national law, the supranational judge aims, in every case, at the more successful application of any provision. This presupposes the definition of terms that are subject to significant changes over the years, such as the ´public safety', using as a constant criterion the ´necessary degree' in every particular case, which is also specified as to the time element[9]. The European Court of Human Rights is a historical novelty. It operates, therefore, in such a way, as to justify its function in a world of continuous changes, which, however, has the need, in order to maintain its coherence, of consistent principles, like the one referring to the '*democratic society*'. As it is applied to the interpretation of the constitution, in reference to the European Convention on Human Rights as well, as a idiomorphic 'Constitution of the Rights', the case-law of the European Court of Human Rights aims at '*the evolution of the "classical" solutions and the resolution, in a "new" way, of possible new problems. All these, having as a target the improved and differentiated typical form of the texts. In this way, the demand for the written formulation of the Constitutions (*and of the European Convention on Human Rights) *is satisfied and the principle of the human value is served, as the meaning and target of the (constitutional) history'* (and the history of the Human Rights)[10].

8. *K. Stamatis,* The foundation of the legal judgment, 2006, page 321 next.

9. For the harmonic relation between the rule and the actual fact, as demanding request of the Constitution's interpretation, see A. Manitakis, Interpretation of the Constitution and function of the regime, 1996, page 83 next.

10. *P. Haberle*, The theory of evolutional levels of the texts, Introduction by D. Tsatsos/G. Papadimitriou, 1992, page 65-66.

Systemic Human Rights Violations in the Jurisprudence of the European Court of Human Rights

by Nikos Frangakis*

Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms [the Convention; ECHR] with its additional Protocols and its mechanism of judicial control (since 1998 the permanent European Court of Human Rights [the Court; ECtHR]) constitute the major achievement not only of the Council of Europe [CoE] but of the whole project of European integration. With a geographic expansion of 47 States stretching across the continent and beyond, inhabited by 800 million people, and building on an institutional framework that shows a remarkable cohesive strength between the older "western" democracies and the post-communist countries, the Court, in interpreting and applying the Convention in particular as regards individual petitions, has managed to raise the latter to the rank of a "constitutional instrument of European public order (*ordre public*)"[1]. This definition was the result of a long maturing process, undertaken by the Convention's organs - the Commission that ceased to exist in November 1998 and the Court - to transcend the State boundaries as the exclusive space wherein the notion of constitution can be conceived and deployed. The Court enforces a concrete and effective protection of human rights, in an attempt to approach the European public order to a homogeneous constitutional order of the States parties to the ECHR[2]. The Court maintains that order by balancing an independent judicial review with due deference to the national legal and judicial systems. It stresses the subsidiary nature of the Treaty's supervision machinery in relation to national human rights protection systems[3]. It should be pointed out that the Commission of Human Rights was the first to use the wording "*ordre public communautaire des libres démocraties d' Europe afin de sauvegarder leur patrimoine commun de traditions politiques d' idéaux, de liberté et de prééminence du droit*"[4]. This spirit was later on transplanted to the newcomers from the East, resulting in today's rule, all over this continent, of the synthesis of values based on democracy and protection of human rights, under the rule of law. This is what constitutes the nucleus of European public order[5]. This also explains why the Court ranks so high in the minds of the citizens of European States (particularly of the CEE ones), even though the ECHR system has already affected the sovereignty of States-parties in many ways. Especially at the level of civil society, "Strasbourg" is often perceived as the last resort for those to claim that their rights have been violated, and its emotive and symbolic significance is

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1. *Loizidou v. Turkey*, First judgment (preliminary objections), 23 March 1995, § 75. Similar but not identical expressions are used in other parts of the judgment, see §§ 72 and 93. This was subsequently reaffirmed –by its judgement of 10 May 2001 in the *Cyprus v. Turkey* Case, § 78: ECHR has par excellence the special character of a tool "for the protection of individual human beings". The debate on the "constitutional" character of the ECtHR is continuing, but it falls outside the scope of this paper.

2. See J. ANDRIANTSIMBAZOVINA, "Chronique droits de l'Homme", CahDrEur 1997 p. 667.

3. See L.R. HELFER « Redesigning the ECtHR : Embeddedness as a Deep Structural Principle of the European Human Rights Regime", EJIL (2008) pp 125-159, at 138 with reference to Sadik v. Greece.

4. CommissionEDH, 11 juillet 1961, *Autriche c. Italie*, req. 788/60, Annuaire de la CEDH, 1961, vol. 4, pp 117 et seq., at 139.

5. For the notion of European public order, with references to authors (F. Sudre, F. Ermacora, G. van der Meersch, F. Ost, G. Cohen-Jonathan, G. Tenekides), see S. PERRAKIS "Human Rights and European Public Order …" in RHellDE Special Issue 2001 pp 383-415 [in Greek]. See also N. FRANGAKIS "Human Rights and European Integration" in Mélanges en hommage à Jean-Victor Louis, éd. ULB, vol. 1, pp 189-201.

very positive indeed[6]. Thus the Council of Europe, with the ECHR and, to a lesser extent, the European Social Charter, has gradually imposed the principle laid down in the Convention that fundamental freedoms are the foundation of justice and peace in the world. It successfully undertook to transform Europe into an area of human rights, in a manner more comprehensive and binding than in any other part of the world. As a result, the ECHR has become the regional, *sui generis* conventional norm, which stands on the borderline between international and domestic legal order, with which the High Contracting Parties (by now all the 47 Member States of the Council of Europe) have accepted to comply[7].

Meanwhile the problem of the huge and ever-increasing number of individual applications has become pressing and extremely difficult to handle: the pending cases at the end of 2008 were approaching 100.000 with over 27.000 of them originating from a single State (Russia). To the extend that Additional Protocol No 14 is aiming at somehow managing the burden of the docket, it is deplorable that this Protocol cannot come into force as yet, because of the same single State's refusal to ratify it.

Initially the Court confined its remedial powers in simply declaring whether a violation of the Convention had occurred and, occasionally, in awarding 'just satisfaction'[8] to the applicant in the form of pecuniary compensation usually inferior to the real damage sustained by the victim. Damages awarded to successful complainants are of an order which allows the 'buying off' of violations. The Court for a long time failed to act as the driving force for more radical steps to be taken[9]. At a later stage the Court enhanced its role as a quasi-constitutional court by attempting to verify the compatibility of domestic law with the ECHR, irrespective of individual injury on which the system of the Convention was traditionally based on[10], a jurisprudential policy that led to the identification of systemic violations of the Convention by certain States parties and the issuance of the so-called 'pilot judgments'. This gradual evolution of the Court's jurisprudence will be briefly examined in this paper.

The concept of pilot judgments is the core issue of the debate relating to a more efficient implementation of the ECHR at the domestic level. The pilot judgment procedure is aimed at implementing the Convention in a national legal order in the context of systemic problems being identified as lying behind a series of repetitive violations of the ECHR. Having regard to such systemic cause of a violation the ECtHR held that its consequences concerned not only the particular applicant in a specific case, but also applicants with pending similar cases and even potential, future, applicants. Be it noted, though, that the Court was driven gradually to the specification of certain non-monetary individual measures of reparation to be adopted by respondent States even before the emergence of the concept of pilot judgments as such.

Moving towards a Pilot Judgment approach

The Court has often stated that the effect of a judgment finding a violation is to impose on the respondent State the obligation to stop the violation and to make reparation for its consequences in a way to be as close as possible to a *restitutio in integrum*, provided that such reparation is possible indeed. In such a case is for the State to carry it

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6. See W. SADURSKI, Partnering with Strasbourg: Constitutionalization of the ECtHR, the Accession of CEE States to the CoE, and the Idea of Pilot Judgments, EUI Working Paper LAW No. 2008/33, p. 35.

7. See C.L. ROZAKIS "The European Convention of Human Rights as an International Treaty" in Mélanges en l'honneur de Nicolas Valticos, Paris, éd. A. Pedone, 1999, p. 497.

8. Art. 41 ECHR.

9. See, on the occasion of the non-acceleration of criminal proceedings S. STAVROS, The Guarantees for Accused Persons under Article 6 of the ECHR, Martinus Nijhoff Publ., p. 115.

10. Art. 34 ECHR. See A. NOLLKAEMPER "Constitutionalization and the Unity of the Law of International Responsibility" Amsterdam Center for International Law, University of Amsterdam, 2009; forthcoming in Indiana Journal of Global Legal Studies (2009).

out, as the Court itself has neither the power nor the practical possibility of doing so itself[11]. Should this be impossible the State is free to choose the means for complying with the judgment, on condition that those means are compatible with the Court's dictum. It has been further clarified that "a judgment in which the court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects."[12] Yet, in practice the judgments themselves continued to be "essentially declaratory in nature"[13]. The Court has rejected applicants' requests for a government to take particular measures within its national legal system, reflecting the fact that the Court is adjudicating on breaches of international law[14], traditionally maintaining on the other hand the position that it was beyond its authority to assess the validity of domestic laws; it confined itself to the control of administrative and judicial acts and decisions, avoiding systematically to attack the underlying national legislation. The attempt to draw a sharp distinction between 'bad' decisions and 'bad' laws is not very credible, as it has been pointed out[15], while the hypocrisy of the traditional 'good law - bad decision' approach could no longer be maintained with a straight face[16]. The Court had, sooner or later, to stop disguising the fact that it was the national law which was often in the roots of the violation and therefore it should be the target of the Court's judicial control. Consequently, the more general, systemic findings had to cease being confined in the reasoning on the merits part of the judgments and move forward to their operative part. Admittedly, in view of the adoption of Protocol No. 14, the Court made concrete proposals[17] for the inclusion of a pilot judgment procedure into the Convention's institutional framework but without success.

The Scozzari and Giunta Doctrine

In *Scozzari and Giunta*[18], a family-law case, the Court, for the first time, applied the language of Article 41 of the Convention in conjunction with Article 46, to the effect that, taken together, they require the State to remedy the situation which had caused the violation ('*restitutio in integrum*') in the first place and which in fact was the violation found in the case[19]. Article 46 requires the High

11. See e.g. *Iatridis v. Greece*, no. 31107/96 (Just satisfaction), 19 October 2000, § 33; *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34.

12. *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, 13 July 2000, § 249.

13. Among other authorities, *Assanidze v. Georgia* [GC], 8 April 2004, § 202.

14. See P. LEACH "Beyond the Bug River – A New Dawn for Redress Before the ECtHR?", in E.H.R.L.R. 2005, 2, p. 150, with further references.

15. See W. SADURSKI, op.cit., p. 14.

16. Ibid., p. 16.

17. See, for example, the Court's position paper on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003 (CDDH(2003)006 Final, unanimously adopted by the Court at its 43rd plenary administrative session on 12 September 2003, paragraphs 43 to 46; and the response by the Court to the CDDH Interim Activity Report, prepared following the 46th Plenary Administrative Session on 2 February 2004, § 37.

18. *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, 13 July 2000.

19. The exact wording of the Court is as follows: " The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see, mutatis mutandis, the *Papamichalopoulos and Others v. Greece* (Article 50) judgment of 31 October 1995, § 34). Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set

Contracting Parties to undertake to abide by the final judgment of the Court; Article 41 refers to situations where the internal law of the state concerned allows only partial reparation to be made. The way Article 41 is phrased, which was the basis of the Court's position taken in *Scozzari and Giunta*, implies that the just satisfaction afforded to the party injured by the respondent State is granted derivatively and secondarily, that is, in situations where the internal law does not itself provide for and deliver full reparation (i.e. *restitutio in integrum*)[20].

However, *in Scozzari and Giunta* the Court finally decided to interpret the above language consistently with its logical import, namely, to the effect that pecuniary just satisfaction cannot be the sole remedy. As Judge Zupančič observed[21], "there are situations where mere just satisfaction has rather absurd results. This follows the crucial legal logic according to which the right and the remedy must be interdependent. The consubstantiality of the language of Articles 41 and 46 logically implies that the internal law of the respondent State must offer a remedy to the applicant in whose case the violation was found and, moreover, that that remedy should be decided upon by the Court in its final judgment, by which the State undertakes to abide. In other words, in *Scozzari and Giunta* the Court came to the logically inescapable conclusion that *restitutio in integrum* should be required in situations in which the non-compliance with the Convention is a continuing situation extending into the future. Partial or complete compensation for the injury incurred prior to the Court's final judgment, even assuming that money can make good such injuries, would only cover the period up to the point of the Court's own final finding of a violation".

The Assanidze Doctrine

In the case of *Assanidze v. Georgia*[22], an Article 5 § 1 and Article 6 § 1 ECHR case, where the applicant continued to be illegally detained, the Court required, for the first time in the operative part of the judgment, the applicant's immediate release at the earliest possible date. Indeed, it would have been illogical and even immoral to leave Georgia with a choice of (legal) means, when the sole method of bringing arbitrary detention to an end is to release the prisoner, as Judge Costa pointed out in his partly concurring opinion.

There had already been cases in which the Court has limited the State's choice of means. In cases involving deprivation of property, it has stated in the operative provisions that the State must return the property to the applicant[23]. It is true that it had not viewed that obligation as being totally mandatory, as it stipulated in the judgments that "failing such restitution ..." the State must pay certain sums to the applicant. In other words, *restitutio in integrum* is only compulsory in cases of this type to the extent that it is feasible (such a proviso being necessary, *inter alia*, to protect the rights of third parties acting in good faith)[24]. If it is feasible, though, it is compulsory.

The challenge of repeat violations and the reaction of the Committee of Ministers

The Committee of Ministers, being the organ entrusted with the supervision of the execution of the Court's judgments[25], had to take initiatives aiming at fulfilling the task entrusted to them by the Convention. At the same time, the Ministers and their deputies decided to contribute to the tackling of the enormous problem of the excessive number of pending cases before the Court, especially for as long as Protocol No 14 has not entered into force[26], and on how more cases of this

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out in the Court's judgment."

20. See the concurring opinion of Judge Zupančič in Broniowsky II.

21. Ibid.

22. *Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004.

23. See *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995 and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95.

24. See the partly concurring opinion of Judge Costa in *Assanidze v. Georgia*.

25. Art. 46 § 1 ECHR.

26. The changes to be implemented under Protocol No 14 are expected to lead to a more expeditious handling of repetitive cases. See Art. 8, Protocol No 14,

kind could be prevented reaching the docket in the first place. To this end, in a Resolution of May 2004 the Committee of Ministers urged the Court: "as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments […]"[27]. The Committee of Ministers has also issued the same day a Recommendation urging the states to reassess the effectiveness of domestic remedies in view of Court judgments "which point to structural or general deficiencies in national law or practice […] in order to avoid repetitive cases being brought before the Court"[28]. Finally, the Committee, the same day addressed a Declaration to its own deputies (the Permanent Representatives of member States to the CoE) requiring the improvement and acceleration of the execution of the Court's judgments, "notably those revealing an underlying systemic problem"[29].

The *Broniowsky* Case Law

The *Broniowsky v. Poland* landmark judgment is the first in which the Court responded, in few weeks time, to the aforementioned resolutions and recommendations of the Committee of Ministers. The case, in all its three consecutive stages[30], is the first to result at a pilot judgment and certainly marked a very important step forward of the Court's case law in recent years. Mr. Broniowsky's was the first to be declared admissible out of a substantial number of similar applications; it concerned the persisting consequences of the re-drawing of the eastern border of Poland with the Soviet Union after the Second World War which had as a consequence the relocation of thousands of people. It dealt with the so-called "Bug River claims" affecting a group of about 100.000 persons who remained uncompensated for the loss of their property in spite of the Polish Government's obligation to offer them adequate restitution. The Grand Chamber found a violation of Art. 1, Protocol No. 1 as a result of the defendant State's failure to compensate the applicant.

Regarding the notion of the public interest the

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amending Art. 28 ECHR. Pending the final ratification that would allow the instrument to come into force and in order to provide a temporary but quick solution to the Court's excessive caseload, a new Protocol 14bis was adopted in May 2009. This protocol contains two procedural measures taken from the earlier Protocol 14 to increase the Court's case-processing capacity as rapidly as possible:

- a single judge will be able to reject manifestly inadmissible applications, a decision which hitherto could be handed down only by a committee of three judges;
- the powers of the committees of three judges will be extended to allow them to declare applications admissible and deliver judgments on the merits if there is already well-established case-law of the Court. Such cases were formerly dealt with by chambers of seven judges.

In addition to the normal process of entry into force, and so as to enable the Court to implement these measures as soon as possible, states may declare that cases brought against them will be subject to the new procedures, via two further avenues:

- either acceptance of the provisional application of Protocol 14bis;
- or the provisional application of the corresponding elements of Protocol 14.

Several states have already pursued one or other of these avenues. Indeed, the Court already began to apply the new procedures as from 1 June 2009, for certain states. See REGISTRY OF THE COURT, Addendum to the Rules of Court relating to the Provisional Application of certain provisions of Protocol No. 14 to the ECHR (1 July 2009).

27. Res (2004) 3, of 12 May 2004, on judgments revealing an underlying systemic problem.

28. Rec (2004) 6, of 12 May 2004, on the improvement of domestic remedies.

29. Declaration of the Committee of Ministers, of 12 May 2004.

30. *Broniowsky v. Poland* [GC], No 31443/96: decision on admissibility of 19 December 2002 [*Broniowsky* I]; judgment of 22 June 2004 (merits) [*Broniowsky* II]; judgment of 28 September 2005 (friendly settlement and just satisfaction) [*Broniowsky* III]. See L. GARLICKI "Broniowsky and After: On the Dual Nature of 'Pilot judgments'" in (Caflisch, Callewaert, Liddell, Mahoney, Villiger eds.) Liber Amicorum Luzius WildhaberHuman Rights – Strasbourg Views, N.P. Engel Publ., pp 177-192; V. ZAGREBELSKI " Questions autour de Broniowsky" ibid., pp 521-535.

Court reiterated that the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest", especially in a State in transition from a totalitarian regime to a democratic form of government. "Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of "public interest" is necessarily extensive. […]. The Court has declared that, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one it will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation. This logic applies to such fundamental changes of a country's system as the transition from a totalitarian regime to a democratic form of government and the reform of the State's political, legal and economic structure, phenomena which inevitably involve the enactment of large-scale economic and social legislation"[31]. "In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". […]. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner"[32].

Coming to the core of its reasoning, the Court, without providing a definition of "systemic or structural problems", found that "the violation of the applicant's right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons. The unjustified hindrance on the applicant's "peaceful enjoyment of his possessions" was neither prompted by an isolated incident nor attributable to the particular turn of events in his case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens, namely the Bug River claimants."[33] It is added in the judgment that the existence and the systemic nature of that problem have already been recognised by the Polish judicial authorities: In its judgment of 19 December 2002 the Constitutional Court described the Bug River legislative scheme as "caus[ing] an inadmissible systemic dysfunction". Endorsing that assessment, the ECtHR concludes that the facts of the case disclose the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions. It also found that the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications[34].

Making explicit reference to the Resolution of 12 May 2004 of the Committee of Ministers on judgments revealing an underlying systemic problem[35], the Court concluded that "this resolution has to be seen in the context of the growth in the Court's caseload, particularly as a result of series of cases deriving from the same structural or systemic cause".[36] The Court also drew attention to the Committee of Ministers' Recommendation of 12 May 2004 on the improvement of domestic remedies, in which it is emphasised that, in addition to the obligation under Article 13 of the Convention to provide an individual who has an arguable claim with an effective remedy before a national authority, States have a general obligation to solve the problems underlying the violations found and, "where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court"[37].

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31. *Broniowsky* II, § 149 (with references to James and Others § 46, and The former King of Greece and Others § 87).

32. *Broniowsky* II, § 151 (with references to *Vasilescu v. Romania*, judgment of 22 May 1998, § 51; *Beyeler*, §§ 110 in fine, 114 and 120 in fine; and *Sovtransavto Holding*, §§ 97-98).

33. *Broniowsky* II, § 189.

34. Ibid.

35. See footnote 23, above.

36. *Broniowsky* II, § 190.

37. *Broniowsky* II, § 191.

Having regard also to the evolution of its caseload, the Court considered what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterated that "by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment"[38].

Finally, the Court, after estimating that the violation which it has found in the present case has as its cause a situation concerning nearly 80,000 people while there are already 167 pending applications by Bug River claimants and repeating that this situation also represents a threat to the future effectiveness of the Convention machinery, reaches the following conclusion: "Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant. In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases."[39] The Court deemed it necessary at this point to specify that with a view to assisting the respondent State in fulfilling its obligations under Article 46, to indicate the type of measure that might be taken in order to put an end to the systemic situation identified, with the additional assessment that for this group of Bug River claimants the existing legislation cannot be regarded as a measure capable of putting an end to the identified systemic situation[40].

In the operative part of its judgment, the Court held that the violation of Article 1 of Protocol No. 1 has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the "right to credit" of Bug River claimants; and that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in

38. *Broniowsky* II, § 192 (with reference to *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249).

39. *Broniowsky* II, § 193 (with references to *Bottazzi v. Italy* [GC], no. 34884/97, § 22, *Di Mauro v. Italy* [GC], no. 34256/96, § 23, and the Committee of Ministers' Interim Resolution ResDH(2000)135 of 25 October 2000 (Excessive length of judicial proceedings in Italy: general measures); see also *Brusco v. Italy* (dec.), no. 69789/01, and *Giacometti and Others v. Italy* (dec.), no. 34939/97).

40. *Broniowsky* II, § 194.

accordance with the principles of protection of property rights under Article 1 of Protocol No. 1.

Among human rights scholars the *Broniowsky* judgment raised satisfaction as well as certain concerns, starting with the ones expressed in the concurring opinion of Judge Zupančič[41]: He first agreed that to offer just satisfaction to Mr Broniowski will do absolutely nothing to resolve the predicament in which thousands of other citizens of Poland have found themselves in the whole post-war period. At issue, therefore, is not the continuing violation of the human rights of a single applicant, but of thousands of other subjects. *A fortiori*, therefore, the Court does have reason to require the State to remedy this "systemic situation". But he does not think the Court needs, apart from the Convention itself, any additional legal rationalisation to legitimise its principled logic, and especially if it is to seek that legal basis in a resolution of the Committee of Ministers which, in fact, has quite a different pragmatic goal in mind in referring to the underlying "systemic problem" which, typically, is the situation in which Italy found itself with its massive unreasonable delay problem. Therefore the reference in the first sub-paragraph of paragraph 193 of the judgment to the "threat to the future effectiveness of the Convention machinery" has absolutely nothing to do with the principled position taken by the Court. The same applies to the mention in the middle of the second sub-paragraph of the same paragraph where it is said that "the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as to not overburden the Convention system with large numbers of applications deriving from the same cause". In Zupančič's view the true reason for the logic started in *Scozzari and Giunt*a and continued in *Assanidze* has nothing to do with the Court's caseload. Indeed it does not seem appropriate for the Court to make reference to a recommendation and/or a resolution of the Committee of Ministers in order to add reasoning to its own judgments; but it is even more inappropriate to mention in a judgment the Court's excessive caseload – a factor that has nothing to do with the substance of the protection guaranteed by the Convention.

The completion of the *Broniowski* case was effected with the friendly settlement reached 15 months after the Court delivered its judgment on the merits[42]. This was rendered possible after the enactment of the Law of 8 July 2005 on the realisation of the right to compensation for property left beyond the present borders of the Polish State, in combination with the relevant judgment of 15 December 2004 by the Constitutional Court of Poland.

In the context of a friendly settlement reached after delivery of a pilot judgment on the merits of the case, the notion of "respect for human rights as defined in the Convention and the Protocols thereto" necessarily extends beyond the sole interests of the individual applicant and requires the Court to examine the case also from the aspect of "relevant general measures". In view of the systemic or structural character of the shortcoming at the root of the finding of a violation in a pilot judgment, it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand. The respondent State has within its power to take the necessary general and individual measures at the same time and to proceed to a friendly settlement with the applicant on the basis of an agreement incorporating both categories of measures, thereby strengthening the subsidiary character of the Convention system of human rights protection and facilitating the performance of the respective tasks of the Court and the Committee of Ministers under Articles 41 and 46 of the Convention. Conversely, any failure by a respondent State to act in such a manner necessarily places the Convention system under greater strain and undermines its subsidiary character[43]. Taking note of the above, the Court decided to strike the case out of the list.

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41. See in *Broniowsky* II, concurring opinion of Judge Zupančič.

42. See *Broniowsky* III at the Law section, incorporating the friendly settlement agreement between the parties.

43. *Broniowsky* III § 36.

The *Broniowsky* legacy was followed by a series of (some 110 further) individual summary decisions specifically applying the pilot-judgment procedure leading to the striking of "Bug River" applications out of the Court's list of cases[44]. In its last "global" decision of the kind, including 176 cases,[45] the Court decided to close this procedure applied in respect of this category of applications. The Strasbourg judges showed emphatically their annoyance and frustration in the following words: "It is also to be recalled that the Court's principal task under the Convention is, as defined by Article 19 of the Convention, "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". A requirement to deliver, continually, individual decisions in cases where there is no longer any live Convention issue cannot be said to be compatible with this task. Nor does this judicial exercise contribute usefully or in any meaningful way to the strengthening of human rights protection under the Convention; indeed, it cannot be excluded that in the future the Court may wish to redefine its role in this respect and decline to examine such cases."[46]

Another early pilot judgment case is the *Hutten-Czapska v. Poland*[47] that concerned the Polish legislation on rent control and limitation on the termination of leases. As in *Broniowsky*, the general recommendations for national law reform, are placed in the operative part of the judgment and not only in its reasoning on the merits, using an exact and peremptory wording: The Court held that "the violation has originated in a systemic problem connected with the malfunctioning of domestic legislation […]" and that, "in order to put an end to the systemic violation identified in the present case, the respondent State must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention."[48]

One more case worth mentioning, as it emanates from the *Broniowsky* doctrine, is *Xenides-Arestis v. Turkey*[49], an Article 8 ECHR and Article 1 of Protocol No. 1 judgment regarding the fact that the Turkish military forces were preventing the applicant from having access to, using and enjoying her home and property in the area of Famagusta, in northern Cyprus. Before examining the applicant's individual claims for just satisfaction under Article 41 of the Convention, the Court considered what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterated that a judgment in which the Court finds a breach imposes on that State a legal obligation not just to pay those concerned the sums awarded, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the Court's judgment[50]. To be more precise, the Court considered that the respondent State must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the judgment in relation to the present applicant as well as in respect of all similar applications pending before it. Such a remedy should be available within three months from the date on which

44. See *Wolkenberg and Others v. Poland* (dec.) no. 50003/99, 4 December 2007, *Witkowska-Toboła v. Poland* (dec.) no. 11208/02, 4 December 2007, *Sagatowski v. Poland* (dec.) no. 44425/02, 11 December 2007.

45. E.G. v. Poland and 175 other Bug River applications (dec.) no. 50425/99, 23 September 2008.

46. *E.G. v. Poland and 175 other Bug River applications* (dec.) § 27.

47. *Hutten-Czapska v. Poland*, no. 35014/97: IV Chamber judgment of 22 February 2005 [*Hutten-Czapska* I]; GC judgment of 19 June 2006 (merits) [*Hutten-Czapska* II]; judgment of 28 April 2008 (friendly settlement) [*Hutten-Czapska* III].

48. *Hutten-Czapska* II, operative part, nos. 3 and 4.

49. *Xenides-Arestis v. Turkey*, no. 46347/99, 22 December 2005 (merits) and 7 December 2006 (just satisfaction).

50. *Xenides-Arestis*, § 39.

the judgment is delivered and redress should be afforded three months thereafter[51].

The *Broniowsky* doctrine continues to be applied in other groups of repetitive cases. Once more a systemic problem from Poland, regarding the unreasonable length of pre-trial detention, in the case of *Kauczor*[52] drove recently the Court to observe that it has delivered a considerable number of judgments against Poland in which a violation of Article 5 § 3 on account of the excessive length of detention was found. In 2007 a violation of that provision was found in 32 cases and in 2008, the number was 33. In addition, approximately 145 applications raising an issue under Article 5 § 3 are currently pending before the Court[53]. The Court thus concluded that for many years numerous cases have demonstrated that the excessive length of pre-trial detention in Poland reveals a structural problem consisting of "a practice that is incompatible with the Convention"[54].

The same jurisprudential principles are applied in several cases concerning, in one way or another, the right to peaceful enjoyment of property at large. It is worth noticing – for their Greek interest – three judgments against Turkey[55]. In the operative part of all of them the respondent State is instructed to proceed, within three months from the date on which the judgment becomes final, to *restitutio in integrum* of the property rights of the applicants, two of whom regard legal entities of Greek and Orthodox communities and one a group of natural persons.

In a "Greek" case of violation of Article 1 of Protocol No. 1[56], the Court reiterated that if the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it. In view of the circumstances of the case, the Court considered that the restoration of the applicants' ownership rights would put them as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach. It held in the operative part of the judgment that the respondent State is to restore, within three months from the date on which the judgment becomes final, the applicants' ownership rights over the disputed land[57].

The Systemic Problem of Excessively Lengthy Proceedings and the reactivation of Article 13 ECHR

In addition to its substantive provisions of the Convention (Articles 2-12) and its Protocols, Article 13 requires the existence of an effective remedy before a national authority to everyone whose rights and freedoms are violated. For quite a long time the Court had adopted a rather restrictive approach to Article 13. In recent years, however,

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51. *Xenides-Arestis*, § 40 and no. 5 of the operative part.

52. *Kauczor v. Poland*, no. 45219/06, 3 February 2009.

53. *Kauczor v. Poland*, § 56. This issue has been recently considered by the Committee of Ministers in connection with the execution of judgments in cases against Poland where a violation of Article 5 § 3 ECHR was found. In its 2007 Resolution the Committee of Ministers concluded that the great number of the Court's judgments finding Poland in violation of Article 5 § 3 on account of the unreasonable length of pre-trial detention revealed a structural problem.

54. *Kauczor v. Poland*, § 60 with references to *mutatis mutandis Broniowski v. Poland* [GC], no. 31443/96, §§ 190-191; *Scordino v. Italy* (no. 1) [GC], no. 36813/97, §§ 229-231; *Bottazzi v. Italy* [GC], no. 34884/97, § 22 with respect to the Italian length of proceedings cases.

55. *Fener Rum Erkek Lisesi Vakfı c. Turquie*, no. 34478/97, 9 janvier 2007; Apostolidi et autres c. Turquie (satisfaction équitable) no. 45628/99, 24 juin 2008; *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfı c. Turquie* (n° 2) nos. 37639/03, 37655/03, 26736/04 et 42670/04, 3 mars 2009.

56. *Vontas & Others v. Greece*, no. 43588/06, 5 February 2009.

57. See the partly dissenting opinion of Judge Malinverni who sustains that, since in the opinion of the Greek courts, "the applicants had never acquired ownership" (§ 38), the applicants never owned the disputed land; therefore it is difficult to see how the Court could order the authorities to return it to them. The authorities could rely on the judgments of the domestic courts recognising their ownership rights, which have since become *res judicata*. Without a reopening of the domestic proceedings, which does not appear to be possible in Greek law, the solution proposed by the majority (*restitutio in integrum*) is not the most appropriate *in casu*.

the Court, reacting mainly to the avalanche of complaints for unreasonable length of proceedings in all kinds of national courts (civil, criminal and administrative) constituting a category of repetitive cases, developed considerably its Article 13 jurisprudence; it reached the point to interpret this provision as imposing on the States the duty to organise their respective judicial systems in a way that would limit the excessively lengthy legal proceedings. *Kudla v. Poland* [58](2000) was the case to mark this jurisprudential change. In the Court's view, "the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1."[59] The Court made reference to the growing frequency with which violations in this regard that draw attention to "the important danger" for the rule of law within national legal orders when "excessive delays in the administration of justice" occur "in respect of which litigants have no domestic remedy". Against this background, the Court perceived the need to admit the applicant's complaint under Article 13 taken separately, notwithstanding its earlier finding of a violation of Article 6 § 1.

The *Kudla* doctrine is followed since, in many cases of excessively long proceedings, where the respondent States are found to have violated both Article 6 § 1 and Article 13 of the Convention, with Italy being the champion, despite the efforts made with the enactment of Pinto Law[60]. In *Lukenda v. Slovenia*[61] in addition to finding of a violation of Article 6 § 1 and Article 13, the Court added in the operative part the *Broniowsky*-type command that the respondent State must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time, after finding that the violations have originated in the malfunctioning of domestic legislation and practice. Yet, the problem of excessive length of judicial proceedings remains unresolved. It is a complex phenomenon, not of only a legal nature but also of a socio-political one[62].

Excessively Lengthy Proceedings are endemic in Greek Courts. The Greek Ombudsman refers to an existing national 'political culture' in which a non-accountable State (central administration) seems to thrive[63]. Small wonder that the Committee of Ministers resorted in adopting on June 2007 an Interim Resolution on excessively lengthy proceedings in Greek administrative and civil courts and the lack of an effective domestic remedy. The large number of judgments of the Court finding Greece in violation of Article 6 § 1 and, in many cases, of Article 13[64] will sooner or later lead the Court to treat Greek cases under a pilot judgment procedure.

Conclusions

The CoE system for the protection of human rights has proven its ability to evolve institutionally, juridically and politically, imposing itself upon all the states parties while giving to individuals across the continent a unique means to defend their own rights, namely the individual petition. "The process of the application of the Convention has been, to a considerable extent,

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58. *Kudla v. Poland* [GC] no. 30210/96, 26 October 2000. The Court held (§ 160) that in the present case there has been a violation of Article 13 in that the applicant had no domestic remedy whereby he could enforce his right to a "hearing within a reasonable time" as guaranteed by Article 6 § 1.

59. *Kudla v. Poland* § 148, with reference to *Bottazzi v. Italy* [GC], no. 34884/97, § 22; *Di Mauro v. Italy* [GC], no. 34256/96, § 23; *A.P. v. Italy* [GC], no. 35265/97, § 18, 28 July 1999 and *Ferrari v. Italy* [GC], no. 33440/96, § 21, 28 July 1999.

60. See among many authorities *Scordino v. Italy* (no. 1) [GC], no. 36813/97; *Bottazzi v. Italy* [GC], no. 34884/97; *Di Mauro v. Italy* [GC], no. 34256/96; *A.P. v. Italy* [GC], no. 35265/97, 28 July 1999 and *Ferrari v. Italy* [GC], no. 33440/96, 28 July 1999.

61. *Lukenda v. Slovenia*, no. 23032/02, 6 October 2005.

62. See N. SITAROPOULOS "Comment on Interim Resolution CM/ResDH(2007)74 on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy", ΔΤΑ No. 38/2008, pp 491-510.

63. Quoted by N. SITAROPOULOS, op. cit., p. 504.

64. In respect of Greek civil courts judgments, the *Konti-Arvaniti v. Greece*, no. 53401/99, 10 April 2003, is followed by a long series of similar cases. See the list of cases in Appendix to Interim Resolution CM/ResDH(2007)74, op. cit., p. 507-510.

transformed into the process of application of the case law of the Strasbourg Court"[65]. The system is definitely overloaded, thus risking to become ineffective and – victim of its own success – to see its moral high ground to be questioned, to the detriment of many people and, eventually, of the project of European integration as a whole[66]. New procedural practices should be invented and put to work. Addressing systemic violations is a positive step in this quest.

In the ambit of the new pilot judgment procedure the Court has by now issued several judgments addressing systemic problems, without al- ways mentioning the use of the specific procedure, and without distinguishing between full and semi - or half - pilot judgment character.Besides, the crucial institutional role of the Committee of Ministers has been typically reiterated. In such cases it consistently indicates, though, to the respondent government the need for adoption of general measures in order to implement its ruling, without paying particular attention to the fairness of the procedure itself as far as the particular applicant is concerned[67]. However the legal basis of pilot judgments remains relatively fragile and therefore resorting to it should be decided with prudence, in consideration also to the fact that the examination of similar cases is adjourned pending the adoption of general measures by the respondent state, letting down in the meantime a whole class of applicants. The systemic character of a problem should be carefully examined by the Court, as well as the willingness of the respondent state to adopt the indicated measures without further delay. The problem risks not to be resolved where a State is unwilling to comply with the pilot judgment procedure, or to provide adequate redress.

In handling systemic problems the Court should seek to establish the necessary fine balance reconciling the interests of the three actors: the applicant's, the responding State's and, last but not least, the Court's.

65. L. GARLICKI, "Some Observations on Relations between the ECtHR and the Domestic Jurisdictions", in (J. Iliopoulos-Strangas, ed. by) Cours suprêmes nationales et cours européennes: concurrence ou collaboration? Ant.N. Sakkoulas/Bruylant, 2007, pp 305-325.

66. See N. FRANGAKIS, "A Glance at the Future of Individual Petition after Half a Century of Application of the ECHR" [in Greek], NoB 53 (2005) 209-218.

67. See L.R. HELFER, op. cit., p. 154.

Criticizing Strasbourg, Lord Hoffmann, the Limits of Interpretation, the "Margin of Appreciation", and the Problems Faced by the European Court of Human Rights.

(London, Athens v. Strasbourg, and the relationship between the ECtHR and English grandmothers, Qadi court, logic and Einstein)

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1. The criticism of the European Court of Human Rights

It is an undeniable fact that, in its 50 years of operation, the European Court of Human Rights[1] has enjoyed the privilege of favourable treatment by legal scientists, writers, academics, lawyers and journalists, but also by the citizens of Europe. This reality is also undoubtedly not without good cause: this International regional Court, entrusted with the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms[2], has managed to become an exemplary human rights Court due to its interpretational approach and the quality of its judgments. What is more, it has also gradually enforced a common 'umbrella' of human rights protection for all European citizens.

No other International or regional Court in the world has been met with this kind of universal recognition, and with the respect and authority commanded by the Court in Strasbourg. At the same time, ECtHR case-law is also the most widely-quoted and referenced body of jurisprudence by all other national, regional and international courts of the world.

Strasbourg is by now regarded as the 'navel of the earth' when it comes to human rights, as the Court has become the most genuine and authoritative effecter of fundamental individual rights. In essence, the ECtHR rendered abstract rights into effective, practical rights in action. In other words, the Court transformed rights that were restrictively interpreted or irregularly applied by domestic courts or national organs. Through its work, these rights assumed a new dimension, acquired a 'live existence' and became mandatory and applicable throughout Europe (with the sole exception of Belarus[3]). As a result, a European citizen – whether he lives in Norway or in Turkey – is covered by a shield of protection, may rely on human rights legislation (the ECHR) and can petition a court that applies this legislation in a uniform manner by its own judges. Consequently, no European citizen needs to feel alone or unprotected in cases of violation of his rights by state authorities or by domestic courts. On the contrary, citizens are now fully aware that there are judges in Strasbourg that will grant them this type of protection, as they will do for all other people living or residing in Europe. The ECtHR is the last resort and the ultimate hope of every natural or legal person whose rights are infringed by the member states of the Council of Europe.

At the same time, through the progressive development of its jurisprudence, the ECtHR has managed to establish itself on an international plane as the prime model for all human rights courts and forums. Moreover, the Strasbourg Court is the main source of jurisprudence for regional courts (*European Union* courts, the *Inter-American Court of Human Rights*, the *Inter-American Commission on Human Rights*, the *African Commission on Human and People's Rights*, etc.), international courts and institutions (various *Human Rights Committees* associated with relevant Conventions and operating under the auspices of the United Nations, *Special UN Rapporteurs*, the *International Criminal Court of Justice*, et al.), and domestic courts all around the world. Indeed, the

1. Hereinafter referred to as: the ECtHR; or the Court.

2. Hereinafter referred to as: the ECHR; or the Convention.

3. Belarus is not a signatory to the ECHR, nor is it yet a member of the Council of Europe.

ECtHR has achieved all these through its application of a text such as the ECHR, which is a general[4] human rights Convention, abstract and 'poor' in comparison to the more recent American Convention on Human Rights (ACHR)[5] and the International Covenant on Civil and Political Rights (ICCPR)[6].

Hence, the jurisprudential approach to fundamental rights adopted by the ECtHR is met with universal approval by lawyers and judicial bodies of all kinds, but also by citizens who have literally flooded the Strasbourg Court with thousands of petitions. This occurrence constitutes, in itself, a vote of confidence to this Court that no-one could doubt.

The Strasbourg Court is, simultaneously, a highly successful Court but also a great 'victim' of its own success. Its thousands of pending petitions, its regional jurisdiction that extends to 47 European countries and to over 800 million citizens, and its delivery of an overwhelming number of condemning judgments against most of the respondent states have impeded its operation and have given rise to various expressions of discontent.

Even so, up until recently, the Court appeared to be virtually immune against attack, as its purpose and prestige weighted disproportionately against any attempt of negative criticism. Any critique that did take place was usually confined to praising comments for the rulings delivered, or to a mild form of displeasure for the pending cases and for some of its decisions. It should be noted at this point that countries with a very high ratio of condemning decisions against them, such as Turkey, Russia, Romania and Ukraine, have not publicly criticized the Court's rulings neither on a government, legal or political level, nor on a scientific or judicial level.

But things have recently changed, although this did not come about through stern criticism by government officials, academics or human rights lawyers. Quite unpredictably, this surprise emerged through people who usually remain silent, and who are genial and reticent by virtue of their profession. Two of the most senior, leading judges in their countries, effectively 'took out their guns and began to shoot'! The conditions of the attacks were almost identical: the use of remarkably harsh and unusual language against the Strasbourg Court and ardent disapproval of its interpretative approach, coupled with a stance supportive of their own nationality and the invocation of maxims of famous and prominent men, who have played a historical role in the field of science.

Let us now turn to these reactions in more detail:

(a) Lord Hoffmann and his speech against the European Court of Human Rights[7]

Lord Hoffman was born in 1934 in Cape Town, South Africa. He served as a Lord of Appeal in Ordinary at the House of Lords, the highest court in the United Kingdom, from 1995 to April 2009. He retired at the age of 75. He was one of Britain's most prominent judges of the past twenty years, characterised by British legal circles as "the most dominant personality in the Lords by a mile" and as "an intellectual heavyweight"[8]. Hoffman is a great legal personality with strong opinions, daring, who is known for his deductive legal reasoning, but who was also considered to follow a somewhat controversial judicial approach[9]. He

4. The only other more generally drafted, regional Convention on human rights is the African Charter on Human Rights and People's Rights, which is also more recent (adopted in 1981).

5. Adopted in 1969.

6. Adopted in New York on 16.12.1966.

7. For the complete text of Lord Hoffmann's speech, see http://www.jsboard.co.uk/aboutus/annuallectures.htm [page last visited on 3.12.2009]

8. See, Afua Hirsch "Judges: can't live with 'em...", article in The Guardian online edition (6.4.2009), available at http://www.guardian.co.uk/commentisfree/libertycentral/2009/apr/06/law-eu [page last visited on 26.10.2009]

9. See *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.1), [2000] 1 A.C. 61, where he was one of the judges hearing the appeal on the extradition of former Head of State of Chile, Augusto Pinochet, to Spain. In that case, Amnesty International had been allowed to intervene in the appeal. Lord Hoffmann had been an unpaid director and chairman of Amnesty International Charity Ltd. since 1990, while his wife, Gillian, had been an administra-

was a judge who adopted his own approach in his role of applying the law, whilst also having a unique personality. He is an exceptionally charismatic individual, keen to surprise, raise concerns and create impressions and conflicts[10]. A judge who participated in many landmark judicial rulings, at times supporting activist views on human rights that attracted the admiration and respect of the international community, but at other times causing concern and negative outcomes. He is considered to hold the second place in the United Kingdom's judicial hierarchy, along with Lord Bingham Cornhill, who is thought to have exercised the greatest influence in the decisions of the highest court of the land during the last decade[11].

Lord Hoffman became internationally well-known for the opinion he expressed in the infamous *Belmarsh detainees* case, *A v SSHD* of 2004[12], by reference to the legislation in force allowing for the indefinite detention of suspects without trial: "*The real threat to the life of the nation […] comes not from terrorism but from laws such as these*"[13]. This approach was widely celebrated in the United Kingdom as a triumph of British freedoms, whilst also giving hope to the world as to the persisting existence of pockets of respect towards human rights. This was particularly important given the context of the difficult times prevailing during the delivery of this judgment, where security appeared to overshadow all other rights – a fact that could be seen especially in the culmination of the implementation of such views in the USA and the United Kingdom. After all, when a judge of such great authority delivers such an opinion, this in itself constitutes a form of guarantee as to the unhindered exercise of individual rights and fundamental freedoms.

Moreover, a year later in the case of *A v. Secretary of State for the Home Department* [14], which involved issues of terrorism, Lord Hoffmann found the courage to state that: "*The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it*"[15]. Once again, he showed his firm commitment of respecting human rights, leaving behind the hysteria that had resulted from the relatively recent wounds that had come about from the well-known events[16].

Adding to his positive profile as a human rights defender was the position he took in relation to an ultra-conservative English judge, who had delivered judgments restricting the freedom of expression and the freedom of the press. Judge Eady's reputation for his conservative rulings had spread widely in the United States, leading four different States to consider them as a model for adopting legislation that was later referred to as "*Eady laws*", causing serious concern for individual human rights and fundamental freedoms. In the case of *Mohammed Abdul Latif Jameel v. Wall Street Journal*[17], the judge ruled that the article run by a newspaper, mentioning that the Saudi Central Bank was monitoring the accounts of businesses suspected of funnelling funds to terrorists, was not a responsible journalism, basing his rea-

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tive assistant for Amnesty's London office for 21 years. Following the revelation of his affiliation with the organization, his participation at the bench was subsequently challenged on the grounds of bias, resulting in the setting aside of the judgment previously delivered and the ordering for a rehearing of the case by a differently constituted committee. [See *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.2), [2000] 1 A.C. 119.

10. See, "A look at Lord Hoffmann", article in the online edition of BBC NEWS (17.12.1998), available at http://news.bbc.co.uk/2/hi/uk_news/235456.stm [page last visited on 26.10.2009], where Lord Hoffmann is portrayed as a "arming and urbane" man, who tried to simplify his daily routine as a judge by arriving at the judges entrance of the Court of Appeal "on his bicycle wearing a T-shirt", but also of a man of quality who was an opera lover, etc.

11. See the article on Lord Hoffmann in The Times online edition (21.4.2008), available at http://business.timesonline.co.uk/tol/business/law/article3758397.ece [page last visited on 26.10.2009]

12. *Belmarsh detainees* case, *A v SSHD* [2004] U.K.H.L. 56.

13. *Ibid*., para. 97.

14. A v Secretary of State for the Home Department [2005] U.K.H.L. 71.

15. *Ibid*., para. 82.

16. The New York Twin Towers, etc.

17. Jameel (Mohammed) and another v Wall Street Journal Europe Sprl [2006] U.K.H.L. 44.

soning on that the American government had not published these information! Thus, in this respect, he tried to equate the interests and statements of another state with the right to information of the citizens of his own state. The House of Lords decided that Eady was "*hostile to the spirit*" of the defence of the public interest, and also that he was "*quite unrealistic … and positively misleading*"[18]. In a certain passage, Lord Hoffmann even went as far as to compare the approach taken by Eady to that of the Communist Party censors in the Soviet Union[19]. Although this was a harsh pronouncement, it nonetheless reflected public outrage and democratic sensitivity.

Indeed, it would be an incomplete portrayal of Lord Hoffmann's positive profile if we fail to mention that his legal pronouncements in matters of commercial, bankruptcy and tax law have been followed by the most important courts of his country but also world-widely[20]. Moreover, he is a non-permanent judge of the Hong Kong SAR Court of Final Appeal, clearly illustrating his international recognition and his undoubted, high judicial authority.

This exemplary British high court judge, however, also retains another side to his judicial career: this can be witnessed in his judgments that promote a different approach to the interpretation of human rights. For example, he had held that Trevor Fisher, a convicted murderer in the Caribbean, *could be legally executed* – a sentence that was ultimately carried out[21]. In 1989, one of his own rulings was set aside, following his controversial order to the independent journalist, Bill Goodwin, to reveal the sources of an unpublished article for "*The Engineer*" magazine. Furthermore, in 2008, he criticized UK lawyers for trying to convert the whole system of justice into questions of human rights[22].

In fact, Lord Hoffmann had a rather guarded approach towards the jurisprudence of the Strasbourg Court up until the beginning of 2009, but also generally in regard to its mode of operation.

In the House of Lords decision in *A and others v Secretary of State for the Home Department*[23] of 16.12.2004, Lord Hoffmann indicates his dislike for the ECtHR and moves on to make a disdaining reference to its judgments, noting that he "*does not find the European cases particularly helpful*"[24]. In the paragraph immediately following this statement, he offers his advice to the ECtHR regarding cases involving terrorism, suggesting that "*it is wise for the Strasbourg court to distance itself from these matters*"[25].

This reservedly critical stance of Lord Hoffmann towards the ECtHR is then suddenly changed, turning into a polemic position against Strasbourg just before the twilight of his career as a judge: in a speech titled "The Universality of Human Rights", delivered at the Judicial Studies Board on March 19th 2009, Lord Hoffmann launches a direct and unprecedented attack against the Court. In fact, it is the most severe attack ever delivered by a lawyer against the ECtHR. This approach taken by Lord Hoffmann literally startled Europe, raised questions and concerns and gave rise to a number of reprimands against him[26], even though a considerable number of people (particularly from the United Kingdom), welcomed his views.

Lord Hoffmann mentions the following in his speech:

"…**24**. *The fact that the 10 original Member States of the Council of Europe subscribed to a statement of human rights in the same terms did not mean that they*

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18. *Ibid*., para. 57.

19. *Ibid*., para. 55.

20. *Twinsectra v Yardley* (trust law) [2002] 2 A.C. 164; and *MacNiven v Westmoreland* (tax law) [2003] 1 A.C. 311 are two of the most representative examples of Lord Hoffmann's approach in relevant case-law.

21. See *supra* note 7.

22. See article in the Solicitors Journal of 7.4.09, at www.solicitorsjournal.com/story.asp?sectioncode=2&storycode=14002&c=1&eclipse_action=getsession [page last visited on 3.12.09]

23. *Belmarsh detainees* case, *supra* note 12.

24. *Ibid*., para. 92.

25. *Ibid*., para. 93.

26. A notable response to Lord Hoffmann is that of Mr Christos Rozakis, the Vice-President of the ECtHR, who refutes the accusations of the former higher court judge in an article entitled "*Is the Case-Law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffmann's Criticisms*", published in a recent issue of the UCL Human Rights Review (2009).

had agreed to uniformity of the application of those abstract rights in each of their countries, still less in the 47 states which now belong. […] The Strasbourg court, on the other hand, has ***no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights****. Because, for example,* ***there is a human right to a fair trial, it does not follow that all the countries of the Council of Europe must have the same trial procedure.*** *Criminal procedures in different countries may differ widely without any of them being unfair.* […]

27. *The Strasbourg court has to a limited extent recognised the fact that while human rights are universal at the level of abstraction, they are national at the level of application. It has done so by the doctrine of the '****margin of appreciation****', an unfortunate Gallicism by which* ***Member States are allowed a certain lattitude to differ in their application of the same abstract right****. Clearly,* ***that is a step in the right direction****. But there is no consistency in the application of this doctrine and for reasons to which I shall return in a moment, I do not think that there is a proper understanding of the principle upon which it should be based. In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been* ***unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States****, laying down a federal law of Europe.*

28. *I could give many* ***examples****, but I shall confine myself to* ***three*** *and keep off the Strasbourg court's jurisprudence […] First, the court's enthusiasm for* ***the right to silence****. […] Lord* ***Templeman*** *said of one of them,* ***the right to refuse to answer questions if the answer might tend to incriminate, that it affords protection for the guilty and is unnecessary to safeguard the innocent****. […] Indeed, the main value of such statements in subsequent criminal proceedings is that they sometimes contain the witness's first thoughts at variance with his later story.*

29. *That was the background to the case of* ***Mr Saunders****, the chief executive of Guinness plc, who was convicted of conspiracy, false accounting and theft in connection with a take-over bid for Distillers plc […] In 1996 the Strasbourg Court held that he had been denied the human right to a fair trial guaranteed by article 6. It was acknowledged that article 6 did not mention the right to silence, but the Court said in sweeping fashion that "****the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6****." […] The court said that* ***the privilege applied to "all types of criminal offences without distinction from the most simple to the most complex****." […] One would imagine from the language of the Court that the inspectors had used thumb screws to obtain the information.*

30. […] *Most recently, in* ***O'Halloran and Francis v United Kingdom the owner of a car complained that his privilege had been violated because he had been required, on pain of a fine, to say who had been driving his car when it was photographed speeding****. […] And although the application was rejected, there were two dissenting opinions. In order that you may appreciate the type of reasoning employed in Strasbourg, I cannot resist reading a passage from one of the dissents*:

" […] *in the case of* ***speed violations*** *[…]such offences represent hundreds of thousands if not millions of cases […] In my opinion,* ***if there are so many breaches of a prohibition, it clearly means that something is wrong with the prohibition. It means that the prohibition does not reflect a pressing social need, given that so many people choose to breach it even under threat of a criminal prosecution. And if this is the case, maybe the time has come to review speed limits and set limits that would more correctly reflect peoples' needs… It is difficult for me to accept that hundreds of thousands of speeding motorists are wrong and only the government is right****."*[27]

He then moves on to consider the **rights of those charged with a criminal offence during the examination of witnesses for the prosecution**, prescribed by Article 6(3)(d) ECHR. Lord Hoffman notes in paragraph *31* of his speech:

"**31**. […] *In the recent case of* ***Al-Khawaja and Tahery v UK*** *(20 January 2009) […]* ***Dr Al-Khawaja was a doctor charged with indecent assault on two of his patients. One of them, after***

27. Dissenting opinion of judge Pavlovschi in the case of *O' Halloran and Francis v United Kingdom*, case number 15809/02 and 25624/02, of 29.06.2007.

making a statement to the police, committed suicide. The judge admitted her statement *[…] but warned the jury that they had not seen the complainant or heard her cross-examined. […] The Strasbourg court said that there had been a violation of the fair trial provision of article 6. In their opinion, in any case in which a conviction is based "solely or to a decisive degree" on a statement by a person whom the accused has had no opportunity to examine,* ***he has not had a fair trial****. […] It is quite extraordinary that on a question which had received so much consideration in the Law Commission and Parliament, the Strasbourg court should have taken it upon themselves to say that they were wrong*."

Following this, Lord Hoffmann raises serious disagreement with the establishment of a right **to environmental protection** by Strasbourg:

"**32**. *The last example is about* ***night flights at Heathrow*** *[…] In 1993 the government […] introduced a change in the regulations about landings after 4:30 am. There were objections from residents in the area […]* ***The Secretary of State, in deciding to authorise the new scheme, had to decide whether the general economic interest of the country outweighed the obvious inconvenience to the residents****. That was an essentially political decision which his government had been elected to make. In 2001, in* ***Hatton v United Kingdom****, the Strasbourg court decided by a majority of 5 to 2 that* ***there had been a violation of the rights of the local residents to privacy and family life*** *[…]"*

The rest of his speech was extremely interesting, and included **sarcastic remarks** about the **ECtHR and its judges**, '**concoctions**', **offers of advice** and further general commentary regarding Strasbourg:

"**34**. *I regard all three of these cases, and many others which I could mention […] as examples of what Bentham called* ***teaching grandmothers to suck eggs****. In Brown v Stott*[28]*, Lord Bingham made some wise remarks about the interpretation of an international treaty like the European Convention*:

" […] ***The language of the Convention is for the most part so general that some implication of terms is necessary [...] But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept***."

36. ***The proposition that the Convention is a "living instrument" is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by "European public order"****. I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. […]* ***But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times.***[29] ***It cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge***[30] *[…]*

37. *What grandeur, Bentham would have said.* ***What legislative power the judicial representative of Slovenia can wield from his chambers in Strasbourg****. […] It is we in Strasbourg who decree the European public order […]* ***and all the courts of Europe must jump to attention****.*

38. […] ***an international court such as Strasbourg should be particularly cautious in extending its reach in this way****. That is because* ***[...] it lacks constitutional legitimacy****. […] The judges are elected by a sub-Committee of the Council of Europe's Parliamentary Assembly, which consists of 18 members* ***chaired by a Latvian politician****, on which the UK representatives are, a* ***Labour politician with a trade union background and no legal qualifications and a Conservative politician who was called to the Bar in 1972 but so far as I know has never practised****. They choose from lists of 3 drawn by the governments of the 47 members in a* ***manner which is totally opaque****.*

39. […] ***But we have not surrendered our sovereignty over all these matters. We remain an independent nation with its own legal system, evolved over centuries of constitutional struggle***

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28. *Ibid*.

29. See *Birmingham City Council v Oakley* [2001] 1 A.C. 617, at 631-632.

30. He is referring to Mr Zupančič and his opinion in the ECtHR judgment *Von Hannover v. Germany*, of 24.6.2004.

***and pragmatic change**. I do not suggest belief that the United Kingdom's legal system is perfect but I do argue that **detailed decisions** about how it could be improved **should be made in London**, either by our democratic institutions or by judicial bodies which, like the Supreme Court of the United States, are integral with our own society and respected as such.*"

And, finally, the conclusion of Lord Hoffmann's speech:

"**44**. *What is to be done? […] **I have no difficulty about the text of the European Convention [...] The problem is the Court; and the right of individual petition, which enables the Court to intervene in the details and nuances of the domestic laws of Member States** […]"*

Through his speech, the highly distinguished former judge of Great Britain has effectively taken out his sword in an effort to wound the Strasbourg Court. Adopting firm language, he refuses to tolerate the role played by the ECtHR in contemporary European culture, while he is also clearly discommoded by the Court's jurisprudence. Indeed, he is particularly vexed by the mode of legal reasoning and interpretation followed by the ECtHR in its case-law. He would rather see Strasbourg to act more as a forum of theoretical discussions on human rights, with capabilities that would be limited to making general suggestions to the member states of the Council of Europe, and not as an effective organ of uniform application and enforcement of human rights.

He does not tolerate the granting of competence and authority from his own national court to a supranational judicial body, not even where human rights are concerned. Three fundamental rights, such as the right to silence, the right against self-incrimination and the right of the accused to cross-examine witnesses for the prosecution are otiose, according to Lord Hoffmann's speech. Hence, he is asking that these be restricted, if not abolished; and he stands against the establishment of new, necessary fundamental rights, such as that of environmental protection. Ultimately, he does not wish to move into the future but, instead, seeks to retain the status quo of the past.

What is worse is that, for all the issues he mentions, he does not confine himself to a 'scientific' presentation of his viewpoints – something that he clearly possesses: on the contrary, he adds a touch of undue irony towards the Strasbourg Court and its judges. In this respect, he exhibits a 'loud' and provocative sense of self-involved superiority, which is not consistent with either a judge or a mentor of human rights implementation.

To begin with, he is offering advice that has as its highlight the suggestion that the ECtHR should refrain from trying to teach grandmothers how to suck eggs.

But he does not stop at that. He shows **a racist tendency by being sarcastic towards two judicial personalities**, the **Slovenian** judge Mr. Zupančič and the Moldavian former judge Mr Pavlovschi. In relation to the latter, he refers to his dissenting opinion, implying that is – at the very least – irrelevant. The argumentation of dissenting judges, however, which expresses minority opinions, is important and unique, as it may well open a new road in the future case-law of the Court. In all honesty, I could not gauge whether such a rigid mode of thinking as to the amendment of a law, which stands so contrary to the overwhelming majority of citizens, could ever form part of the high reasoning of Lord Hoffmann. Indeed, I cannot help but wonder: does the debate on the legislation imposing speed limits, where there are no drivers violating these, appear to be so unreasonable to him?

b) The Greek high court judge Mr V. Rigas, his article in "Nomiko Vima" and the role of the Greek Court of Cassation (Areios Pagos) in the international legal sphere

Mr Vassileios Rigas is one of the most distinguished, Greek leading Supreme Court judges of recent years, and the most senior Greek judge of the Court of Appeal. His knowledge of the law is remarkably thorough and advanced, a fact which is reflected in the court judgments he has participated in, but also in the many legal articles that he has authored and published in virtually every distinguished legal journal in Greece.

He was born in 1943 and studied law at the University of Athens. He has been a judge since 1969, where he was ranked first in his judicial academy entrance exam. He was called to the

Greek Court of Cassation in 2004, where he is still an active member of the bench, while his term will come to an end in 2010, when he is due to retire. He is the President of the Hellenic Union of Procedural Lawyers, a member of the Hellenic Union of Civil Lawyers and of the Hellenic Pro-Educational Fund, among others. He has taught civil procedure in the National Academy of Judges and has published more than 30 articles in legal journals, such as '*Nomiko Vima*' ('Legal Forum' legal journal), the '*Elliniki Dikaiosyni*' ('Greek Justice' legal journal), the '*Diki*' ('The trial' legal journal),, as well as critiques and commentaries with substantiated deviations from the prevailing theory and jurisprudence. Some of his texts concern the ECHR but also the case-law of the Strasbourg Court and its relation to national Greek jurisprudence.

Judge Rigas published an article with title "***Issues relating to grounds of review – the recent ECtHR judgments on the vagueness of appeal grounds provided by the Code of Civil Procedure***" in a 2008 issue of the 'Nomiko Vima' journal[31].

Mr Rigas reacts against the multitude of repeatedly condemning ECtHR rulings against Greece that share the same grounds for 'conviction', namely that the Greek Court of Cassation interferes with the right to access to court as a result of its adherence to excessive formalism.

To begin with, let us turn to consider how the Greek Court of Cassation (of which Mr Rigas is a distinguished member) is represented on an international and European legal environment. In doing so, we must also bear in mind the now indisputable interaction between jurisprudence, globalization and the existence of binding decisions stemming from the judicial bodies of two multi-national European institutions, i.e. of the European Union (the ECJ and the Court of First Instance) and of the Council of Europe (the ECtHR)

In this context, *Areios Pagos* presents two sides.

The first, ***positive*** one, relates to the ***reasoning*** leading to its judgments. Objectively speaking, in this respect the Greek Court of Cassation has generated a series of judgments that have – in their majority – followed a mode of reasoning that is ***expert and substantiated***. Consequently, the court regularly delivers rulings of a high quality, incorporating detailed reasoning that surpasses that of many European and lower (non-cassation) courts, providing parties with a thorough response to their grievances and claims. The very high quality of the enunciation of the reasons for its judgments is to be applauded, as it exceeds the requirements set by the case-law of the ECtHR (which, in fact, limits itself to the basic level of granting **sufficient** reasons[32]).

There is also, however, another side of the Greek Court of Cassation which is ***negative***.

Areios Pagos seems to have determinedly "shut" the doors and windows at "Alexandras Avenue"*. The Court seems to be actuated by a **considerable degree of introversion**, leading to its refusal to accept the newly emerging international, European and national trends in case-law and current challenges. Characteristic of this claim is the **absolute exclusivity of its authority**: **there is no other supreme court in Europe where the sole source of jurisprudential precedent consists exclusively of its own case-law**. The entire body of **its new jurisprudence stems only from its own previous case-law**, which is thus **the only source of *any* binding case-law**! Hence, it is caught in a circle of **self-reproduction of its own jurisprudence, without sufficient renewal as it does not incorporate the case-law of other countries' supreme courts, international courts and human rights committees, or even of the ECtHR or the ECJ**. An indicative aspect of the introversion of *Areios Pagos* is also its lack of reference and consideration of expert legal articles or of the opinions of Greek and European esteemed academics in the making of its judgments. The exceptional, sporadic mentioning of other judgments or academic views in a very small number of cases only stands to confirm the rule. It is worth noting, however, that this is not an attitude that is also espoused by the Public Prosecutors of the Greek

31. 'Nomiko Vima' 56 (2008), pp. 538-543 (issue 3).

32. See, *inter alia*, *Ruiz Torija v Spain*, judgment of 9.12.1994, para. 29, series A, number A-303; and *Van de Hurk v the Netherlands*, judgment of 19.04.1994, para. 61, series A, number 288.

* Note: The Hellenic Supreme Court is located at Alexandras Avenue in central Athens.

Court of Cassation.

Equally, characteristic of this sense of introversion is the **method of interpretation** adopted by *Areios Pagos*. The Court insists on following the same, traditional and unchanging manner of interpretation that was used at the time of the enactment of the basic Codes. It fails to accept and apply the new mode of interpretation, which is not based on the retrieval of the ancient will of the legislature, but seeks to apply the law in view of current requirements. This **contemporary method of interpretation** asks that legislation is applied ***with consideration to current conditions and to the newly emerging manners and customs, whilst also taking into account newly merging viewpoints and living conditions***. In other words**, the Court should embrace the initiation of the widespread use of evolutionary interpretation, which places emphasis on modern conditions as a determining factor in interpretation. Moreover, it should also pay attention to the generally accepted measures that are being established particularly in the legislation of the member states of the EU and of the Council of Europe**[33].

Another observation that can be made about the *Areios Pagos* is about its **formalistic approach with regard to rights**. Nobody can abolish the core of a fundamental right: this core does not belong to courts or to states. It belongs to its beneficiary, who is the citizen and, thus, it cannot be abolished. If there has been an erroneous application, exercise or use of the right in question, courts are under a duty not to abrogate the core essence of that right purely due to formalistic grounds. Following this reasoning, we see that the manner in which a right is applied cannot negate the right itself. The national judge, instead of seeking the breaches of the core of the right, insists on adhering to procedural rules that are then themselves turned into a right! Hence, we end up missing the forest for the tree.

Two apt examples are the following:

In the recent ECtHR judgment in *Kallergis v. Greece* of 2.4.2009, *Areios Pagos* held that a claim was inadmissible because the registrar of the Criminal Court had failed to draft a deposition report for the appeal of cassation, even though a case registration number had been issued, court stamps had been affixed and both the applicant and the registrar had duly signed the documents of appeal of cassation! In another ruling that was issued just a few months ago in *Roumeliotis v. Greece* of 14.10.2009, the Greek Court of Cassation had, once again, dismissed the appeal of cassation against a civil judgment as inadmissible. This was because the applicant had not indicated in his deposition (that concerned the lack of specific and corroborated grounds) the approach that had to be taken by the court of second instance in its reasoning, so as to grant a specific and corroborated conclusion to the judgment being appealed against. In essence, then, what was required of the applicant was that he should effectively assume the role of a judge in a court of second instance! If that does not amount to excessive formalism, then it is unclear what would…

Finally, what should also be noted with regard to the Greek Court of Cassation is its inappropriate (non) interpretative approach, specifically in its reading of the ECHR and of EU law[34]. The above mentioned introversion leads *Areios Pagos* to a predominantly negative reasoning as to the (non)-violation of Convention provisions. We should also note that the recently, substantially revamped website of the Court[35] mentions 29 criminal law judgments that were decided between 2007 and February 2009. These include references to the ECHR and, in their overwhelming majority, do so through a negative causative dismissal: there is a statement, which appears to be phrased in the same manner in all of these decisions, positing that the judgments being appealed against were not in breach of ECHR provisions. This is done, however, without providing any

33. George Letsas, A Theory of Interpretation of the European Convention on Human Rights (OUP, 2007), chapter entitled "Evolutive Interpretation: Truth Not Current Consesu"s, pp. 75-76.

34. See the criminal law judgment of the *Areios Pagos* ΑΠ 547/2008, 'Nomiko Vima' issue 56, p. 1910 et seq., with commentary by V. Chirdaris. In this case, the *Areios Pagos* engaged in a jurisprudential construction though its interpretation of EU legislation, in manner that was contrary to ECJ case-law, even though it was binding for the Greek Court.

35. See http://www.areiospagos.gr [page last visited on 4.12.09]

particular qualification, reasoning or elaboration on the decision, thus ignoring – and potentially also appearing to be indifferent – towards the extensive jurisprudence of the ECtHR, which offers the only authoritative interpretation of the Convention that the *Areios Pagos* is under obligation to resort to.

In view of his service in a traditional supreme court, Mr Rigas – a highly prominent judge – sought to support the positions and practices of his court in a defensive, but also dismissive, manner. A substantial response to the views of justice Rigas has been issued in the same legal journal by the lawyer Mr Manolis D. Giannousakis, in his article "*Areios Pagos, the vagueness of grounds of appeal of cassation and the European Court of Human Rights*"[36]. I will not go into a detailed consideration of Mr Rigas's objections, with which I am obviously in disagreement. I will, however, focus on the way that the Strasbourg Court is being perceived by a national judge of a small country, who also happened to be chronologically the first one to engage in such an extensive critique, as his article was published in March 2008 – i.e. one year before Lord Hoffmann's speech.

Mr Rigas writes in his article: "[…] *The application of law must take place in a* ***reasoned*** *manner. The principle of reasoned application of the law appears to be followed by the ECtHR, as its decisions are rife with legal reasoning, interpretational analyses, argumentations, etc. Nonetheless,* ***its abovementioned considerations appear to lean towards an illogical application of the law, which is reminiscent of "the justice of the Qadi", lacking consistency and allowing for the differential treatment of similar issues or for the same approach to dissimilar issues***".

In essence, he suggests that **the judgments of the ECtHR are devoid of reason**. He reaches that conclusion as Strasbourg has ruled against Greece due to the fact that *Areios Pagos* had dismissed the appeal of cassation as inadmissible, because the facts of the case were not mentioned in the above mentioned document, notwithstanding that they had already been confirmed by the Court of Appeal. At the same time, most necessary details – such as the main factual circumstances, the procedures that had been followed and the grounds for the appeal of cassation against the prior judgment – had been summarily provided in this document. Hence, the ECtHR made this very simple observation: since there was a summary of the main facts and the admissions of the judgment of the court of second instance outlining the reasons for rejecting the appeal as inadmissible; and provided that *Areios Pagos* had in its possession the most important document of the case being appealed against (which was the text of the judgment of the court of first instance itself); and given that *Areios Pagos* is under the obligation to read the text of that judgment, which includes all these admissions and statements as to the relevant facts, is this not unreasonable? Or have we reached a point where it is deemed to be unreasonable to believe that something entirely reasonable is, indeed, reasonable?

After all, how can one liken the ECtHR with a ***Qadi court*** when the former acts in a clearly opposite manner than that presented in the article? In the cases relating to scrutiny of appeals of cassation that Mr Rigas's article refers to, Strasbourg has maintained a uniform jurisprudential approach, issuing coherently matching judgments when it deals with similar themes. As a result, there is an **overwhelmingly large number of same and identical judgments against the Greek Court of Cassation on issues relating to the vagueness of reasons for dismissal of appeals of cassation and the formalism favoured by the Court** (*Liakopoulos v. Greece*, judgment of 24.5.2006, *Efstathiou and Others v. Greece,* judgment of 14.12.2006[37], *Zouboulidis v. Greece,* judgment of 14.12.2006[38], *Lionarakis v. Greece,* judgment of 5.7.2007[39], *Vasilakis v. Greece,* judgment of 17.1.2008[40], *Koskinas v. Greece,* judgment of 21.2.2008, *Alvanos and Others v. Greece,* judgment of 20.3.2008, *Reklos and Davourlis v. Greece,* judg-

36. 'Nomiko Vima' (2008), volume 56, pp. 2727-2733

37 'Nomiko Vima' (2006), volume 54, p. 1170 et seq., with commentary by V. Chirdaris.

38 'Nomiko Vima' (2007), volume 55, p. 206 et seq., with commentary by V. Chirdaris.

39 'Nomiko Vima' (2007), volume 55, p. 2212 et seq., with commentary by M. Margaritis.

40 'Nomiko Vima' (2007), volume 55, p. 206 et seq., with commentary by V. Chirdaris.

ment of 15.1.2009[41], *Pistolis and Others v. Greece,* judgment of 4.6.2009, *Roumeliotis v. Greece,* judgment of 14.10.2009[42], and others), exhibiting a timeless and uniquely consistent approach in its case-law. This occurrence in itself should provide enough proof that the ECtHR is *nothing like a Qadi* court, even if the author of this article would not, in any way, wish to suggest that Strasbourg is a *perfect* court – a viewpoint that is also supported later on in this work.

At the end of his article, Mr Rigas reaches the following conclusion: "***The judgments of the ECtHR are flawed. Perhaps it would be useful for the enforcers of legal rules to recall Albert Einstein's suggestion, recommending that 'Things should be as simple as possible, but not simpler'*** ".

Undoubtedly, this is a benchmark position taken by an important national judge as to the incorrectness of Strasbourg judgments. As such, his opinion is certainly to be respected. The allusion to Einstein, however, who was a man with a complex mind, and his involvement in such simplifying stories appears to me to be rather misplaced. In any event, obstinate persistence to formalism and ritualism seems to be far more of a simplification than the protection of fundamental rights – which is, after all, a very serious matter.

2. The limits of interpretation of the Strasbourg Court, the development of rights, judicial activism and the "margin of appreciation

a) The limits of interpretation of the ECtHR: the restrictive or expansive interpretation of the ECHR

The interpretations applied by Strasbourg constitute the pinnacle of its function, its greatest success and the guiding force behind its global recognition. Indeed, the fact that the ECtHR is universally recognised as the world's premier judicial tribunal is certainly not coincidental. The creative, dynamic and evolutionary interpretation of a 'terse' Convention, which has turned this soulless international text of general principles into a living instrument of homogenous application of fundamental individual rights and freedoms, has rendered the Court a collective organ of hope, collectively shared by all European citizens. In practice, it has granted a voice to those who have been victims, whilst enabling them to stand tall in a direct confrontation with the state-offender, thus placing the latter in a position of being an equal party to a legal dispute with its citizens.

This approach favoured by the Court, coupled with the breadth of its interpretation, has given rise to discomfort and concern. Lord Hoffmann directly referred to this issue in his abovementioned speech. Can Strasbourg really determine the schedule of flights at Heathrow, which is – after all – an English airport?

These questions need to be answered and, above all, the cardinal issue that commands a response is the following: where *should* the limits of Strasbourg interpretation be set? Does this Court have unlimited rights and competencies? And, if the answer is in the negative, what *are* its limits?

I believe that matters are far simpler than they appear to be and, potentially, it may not be necessary to trouble Lord Hoffmann's grandmothers or Einstein's complex mind in order to comprehend where things stand.

The ECHR has been signed and ratified by 47 member states of the Council of Europe and applies to all European states other than Belarus. In its Preamble, there is an express and unequivocal reference to the aim of the Council of Europe, which is "*the the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the* ***maintenance*** *and* ***further realisation*** *of human rights and fundamental freedoms*".

The **key medium** through which **this aim is to be fulfilled**, accepted by all contracting states of the Council of Europe, **is the ECtHR**. Indeed, this is a mandate that has been clearly stipulated by Article 19 of ECHR: "*To* ***ensure the observance of the engagements undertaken*** *by the High Contracting Parties in the Convention and the Protocols thereto,* ***there shall be set up a European Court of Human Rights*** *[…]* ".

Therefore, in its interpretation of rights deriv-

41 'Nomiko Vima' (2009), volume 57, (March-April issue), p. 738 et seq.

42 'Nomiko Vima' (2009), (November issue), with commentary by S. Glentzi.

ing from the ECHR and its Protocols, the **ECtHR is obliged** to follow the commitment that it has undertaken under the Convention in itself. It must **interpret** its provisions in two expanding and not restricting ways.

Firstly, the Court is under an obligation to safeguard and uphold all the rights that are protected by the Convention and its Protocols, meaning that it has no interpretative allowance to restrict or curtail established rights. Its minimum limit is the grammatical phrasing that it may chose to adopt. Therefore, there is no scope for any possibility of a restrictive interpretation of the Convention rights or of any other interpretation that would narrow the application of rights[43]. The first type of interpretation mentioned above shows a ***defensive*** disposition towards rights.

Secondly, the Court is simultaneously entitled to engage in the development of rights and, provided that ***such advancement is also directly related to the achievement of closer integration between the member states*** of the Council of Europe, then the **Strasbourg Court is obliged to adopt a broadening definition**. This second mode of interpretation has ***a dynamic character*** and stands as a motivating component in the Court's case-law. The reputation, authority and success of the ECtHR is largely due to this aspect.

It is within this aspect that ***judicial activism*** and the ***hybrid nature*** of the Court fall under. The first concept is a privilege and a right that Strasbourg is entitled to, whereas the second is an inescapable reality of its character: when a right has already been placed within a propelled 'evolutionary' route through the Court's jurisprudence or by the ECHR member states' legislation, then the ECtHR cannot but apply this progressive form of the said right, having no choice but to follow the express wording of the Convention's Preamble.

The development of rights cannot have a static character but must be ***dynamic***[44], ***evolutionary***[45] and ***in line with society's prevailing contemporary conditions***[46]. This mode of interpretation is not connected to the past but based on current reality, ***taking into account the historical changes in ethics, conditions and everyday life, whilst also considering changes in society***. The interpretation of judicial judgments must be adjusted according to the contemporary way of life, thus ***safeguarding the harmonious and appropriate evolution of rights***. In fact, it is this very interpretative method that has allowed the Court to adopt, from the very beginning, **the development of ethics and technologies of the third millennium**. The social context within which the inspiration for and the materialization of this international agreement took place, has persisted and has also directly affected its contractual regulatory framework. In effect, the realization of the aims of the Convention is dictated by the model of societal advancement. [47]

The method of **evolutive interpretation** and the **consideration of the changes in current conditions** made their first appearance in Strasbourg case-law in the well-known ***Tyrer v. United Kingdom*** judgment of 25.4.1978[48]. In this case, the Court was confronted with national (British) legislation[49], but also with the local way of thinking of the residents of the Isle of Man, where it was legal to chastise minors by employing the use of

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43. Michele de Salvia, Compendium de la CEDH, Vol.1. Jurisprudence 1960 à 2002 , N.P. Engel, Kehl, Strasbourg, Arlington, Va, p. 9.

44. *Marckx v Belgium*, ECtHR judgment of 13.6.1979.

45. *Guzzardi v Italy*, ECtHR judgment of 6.11.1980, para. 95; and *Johnston and Others v Ireland*, ECtHR judgment of 18.12.1986, para. 53.

46. *Airey v Ireland*, ECtHR judgment of 9.10.1979, pp. 14-15, para. 26; and *Annoni di Gussola and Others v France*, ECtHR judgment of 14.11.2000, para. 56.

47. Jean-Loup Charrier Code de la Convention européenne des droits de l'homme, p. 2, G. Van Des Mersch, Le caractère « autonome » des termes et la « marge d'appréciation » des gouvernements dans l'interprétation de la Convention européenne des droits de l'homme in Mélanges Wiarda, Cologne 1988, p. 202. - V. également C. Russo, Commentaire sous article 8 in Pettiti, Decaux et Imbert, La Convention européenne des droits de l'homme, Économica 1995, p. 308.

48. See Application no. 5856/72, *Tyrer v United Kingdom* (1979-80) 2 E.H.R.R. 1, also available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tyrer&sessionid=39012524&skin=hudoc-en [page last visited on 8.12.2009]

49. Section 56 (1) of the Petty Sessions and Summary Jurisdiction Act 1927 (as amended by section 8 of the Summary Jurisdiction Act 1960).

corporal punishment (caning). More to the point, apart from it being allowed by law, this was a practice that was also largely deemed to be acceptable by the local community. The ECtHR held that, given that the Convention is a living instrument, it **must be interpreted in the light of currently prevailing circumstances**, whilst it **cannot** remain unaffected by the commonly acceptable measures of penal policy espoused by the contracting parties of the Council of Europe in that particular field. Thus, it was **decided that the British rules allowing the use of corporal punishment**, which was a practice protected under the veil of judgment and exercised to the detriment of the minor, were **in violation of Article 3 ECHR**. The Court then moved on to clarify that "*The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being […] [and] constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity*"[50].

The Strasbourg court **applies time** as a **tool of interpretation**. In the case of Goodwin, it observes that "T*he Court is not persuaded that* ***at the date of this case*** *it can still be assumed that these terms must refer to a determination of gender by purely biological criteria. […]There have been* ***major social changes*** *in the institution of marriage* ***since the adoption of the Convention as well as dramatic changes*** *brought about by developments* […]"[51].

It must be noted that the above remarks on the subject and purpose of the ECtHR clearly illustrate why the ECHR must be interpreted in view of currently prevailing circumstances, rather than in terms of the applicable conditions that were specific to the time of the drafting of the Convention[52]. Strasbourg case-law interpretation is also amenable to this notion, as the Court is regarded as *a living instrument, having as its aim the optimal comprehension of the principles that lay the foundations of the rights established by the ECHR, irrespective of how the signatory states themselves enforce those principles*[53].

Lord Hoffmann may be protesting against the mode of interpretation adopted by Strasbourg, but it would be preferable if he had paused to consider a ruling delivered by his own court. A truly indicative example can be seen in the criticism directed against an infamous decision of the House of Lords itself: "*A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z. Public and professional opinion are a continuum*"[54]. Dare I say that one could not find a more striking exaltation of the recognition of the evolutive process, coming straight from Lord Hoffmann's Court!

A certainly noteworthy application of this **evolutive** and **dynamic** method of interpretation is also followed by the Courts of the European Union, which 'enjoy' Lord Hoffmann's acceptance, as he concedes that they have been granted the necessary legal competence through the various Community treaties. Two relevant examples are the judgments in *Maruko*[55] and *Roodhuijzen*[56]. In the first case, the **European Court of Justice** reversed the approach it had previously taken in its existing case-law, holding that the same sex partner of a registered life relationship was entitled to a widower's pension equivalent to that granted to

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50. See para. 33 of the *Tyrer v. United Kingdom* judgment mentioned above, where the reasoning leading to the Court's findings incorporates considerations of the detrimental psychological effects to the convicted party from this type of punishment. These include the stress related to the anticipation of violence that was about to be administered against him, as the sentence had not been carried out immediately but, instead, he was waiting for its execution.

51. *Christine Goodwin v. United Kingdom*, ECtHR judgment of 11.7.2002, para. 100.

52. George Letsas, *A Theory of Interpretation of the European Convention on Human Rights, supra* note 33, p. 74.

53. Ibid.

54. Sir Thomas Bingham MR, in *R v Ministry of Defence, ex parte Smith* (1996) Q.B. 517, pp. 553.

55. Judgment of 1.4.2008 (Grand Chamber), Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757. See report and commentary by V. Chirdaris in *Nomiko Vima* (2008), p. 767 et seq.

56. Judgment of 27.11.2007 of the European Union Civil Service Tribunal (First Chamber), Case F-122/06 *Anton Pieter Roodhuijzen v Commission* (not yet reported in the ECR). See report and commentary by V. Chirdaris in *Nomiko Vima* (2008), pp. 781-882.

a surviving spouse of the opposite sex. Similarly, in *Roodhuijzen v Commission*, the **European Union's Civil Service Tribunal** employed a particularly dynamic and evolutive interpretation of the applicable rules, moving to recognize Mr Anton Pieter Roodhuijzen's unregistered partnership as a relationship that would yield equal rights to those granted to a recognized partner or spouse, hence equating *actual* relationships with their *legally recognized* counterparts.

In conclusion, I would submit that the interpretation favoured by Strasbourg is consistent with contemporary trends, adjusting an international Convention that was drafted in the middle of the previous century to today's reality: in doing so, the Court takes into consideration the currently prevailing conditions and way of life, as well as contemporary manners and customs. As a result, by adopting this mode of interpretation, Strasbourg has succeeded in transforming the ECHR into a modern Convention that is enabled to provide solutions to current problems, whilst effectively realizing its formative aim. Hence, the limits of interpretation are not restricted as long as they serve the original purposes of the Convention, which are set out by the Convention text itself, including its Preamble.

b) Judicial activism, establishing new rights and the right to environmental protection

Lord Hoffmann expressed serious disagreement with the manner of interpretation of the Strasbourg Court since, according to his view, this interpretation leads to the creation of new rights, such as the right to environmental protection. Consequently, following Lord Hoffmanns' reasoning, the ECtHR is effectively turned into a legislative body, thus exceeding its competence by establishing new rights that do not exist in the Convention.

As mentioned earlier, however, this method of interpretation adopted by Strasbourg does posses the required legitimacy that is needed in order to further existing rights. This is particularly pertinent when a more recent interpretation also includes, within the content of an established right, an additional aspect to it – an occurrence which does not lead to the founding of an autonomous and independent new right. In fact, this process represents the widening scope of a pre-existing and legally established individual right.

Furthermore, the right to environmental protection is not a novel concept, as the ancient Romans were, in actual fact, the first to consider environmental nuisances[57]. The Court itself has referred to the term "environmental protection" in 58 of its judgments[58] preceding Lord Hoffmann's speech. Thus, his concern about the environment ending up being protected by 'humble – Strasbourg' in a manner that would be inordinate has, arguably, come too late. After all, should the focus of our concerns be aimed at wondering *whether the person or body protecting the environment* is *legally authorized and institutionally mandated to do so*? Is this, really, what we should be fretting about?

The President of the ECtHR, Mr Jean Paul Costa, mentions the following in his separate opinion in the case of Hatton[59]: "*[…] the right to a healthy environment is included in the concept of the right to respect for private and family life […] Since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people's lives. Our Court's case-law has, moreover, not been alone in developing along those lines. For example, Article 37 of the Charter of Fundamental Rights of the European Union of 18 December 2000 is devoted to the protection of the environment.* […]". In the Grand Chamber judgment of the same case, judge Costa - along with some of his colleagues – provide the following in their dissenting opinion: "*As the Court has often underlined: '**The Convention is a living instrument, to be in-***

57. Roman law codifies environmental nuisances as *immissiones* in *alienum*. Dig.8.5.8.5 Ulpianus 17 ad..ed. See http://www.thelatinlibrary.com/justinian/digest8.shtml [page last visited on 8.12.2009]

58. See, *inter alia, Powell and Rayner v UK,* February 21, 1990, Series A, No.172; 12 E.H.R.R. 355; *Lopez Ostra v Spain,* December 9, 1994, Series A, No.303-C; 20 E.H.R.R. 277; *Balmer-Schafroth v Switzerland,* August 26, 1997, RJ.D. 1997-IV; *Guerra v Italy,* February 19, 1998, RJ.D 1998-1; *Athanassoglou v Switzerland,* April 6, 2000, ECHR 2000-IV; *Hatton v UK,* July 8, 2003, ECHR 2003-VIII; *Taskin v Turkey,* November 10, 2004, ECHR 2004-X; and *Fadeytva v Russia,* June 9, 2005, ECHR 2005.

59. Application no. 36022/97, *Hatton and Others v United Kingdom*, judgment of 2.10.2001.

***terpreted in the light of present-day conditions**' […] This **"evolutive" interpretation** by the Commission and the Court of various Convention requirements **has generally been "progressive",** in the sense that they have **gradually extended** and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the "European public order". In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view* that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on"[60].

In cases concerning matters of environmental protection, the Court has truly exhibited a jurisprudential practice that asserts its role in applying the ECHR, thus granting the Convention an essential and practical substance in cases concerning the protection of private and family life. Most importantly, the Court has achieved this by generating a dynamically evolutive and progressive body of human rights jurisprudence.

A few representative rulings that the ECtHR has generated include the following:

a) *The operation of a **plant for the treatment of waste from tanneries**, that did not have the required municipal license* and which operated at a distance of twelve meters from the applicant's home, was in violation of Article 8 ECHR. This was due to the fact that it could affect the individual applicant's well-being and prevent her from enjoying her home in such a way as to affect her private and family life adversely, without, however, seriously endangering her health[61].

b) The *operation of a **steel-plant** in close proximity to a densely populated area, which **produced certain hazardous substances in the atmosphere that largely exceeded the maximum permitted limit***, was a matter falling under Article 8 ECHR. Even assuming that the pollution did not cause any quantifiable harm to the applicant's health, the Court held that it inevitably made her more vulnerable to various diseases, whilst adversely affecting the quality of life at her home[62].

c) *The failure of the State to provide local population with **information about the risk factor*** involved in the operation of a nearby chemical factory, from which explosions had taken place in the past, affected the applicants' right to respect for their private and family life[63].

d) The applicant had suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the ***night-time noise disturbances*** that were caused by (the more than 100) nightclubs near her home[64].

In cases concerning the environment, the ECtHR has shown a commonly shared sense of sensitivity, which is clearly illustrated in its relevant jurisprudence, leading it to operate as an activist court.

The term ***judicial activism***[65] is used in order to describe court jdugments that appear to be based more on the personal views and prejudices of judges, rather than on the applicable law itself. The term seems to carry negative connotations, as it has been mainly construed by the supporters of a more conservative stance, namely that of "*judicial restraint*".

Nonetheless, the ***meaning*** of ***judicial activism*** is more of a technical matter, rather than an issue of substance, when it comes to Strasbourg.

In the jurisprudential approach of the ECtHR, judicial activism cannot be considered as an autonomous and separate method of interpretation. In fact, it is more akin to a characterization of the Court's predominantly evolutive and dynamic interpretation, which is impliedly incorporated within the definition of 'furthering of rights', expressly provided in the Convention's Preamble. Thus, the notion of "**activism**" is **inherently encapsulated within the evolutionary na-**

60. Joint dissenting opinion of judges COSTA, RESS, TÜRMEN, ZUPANČIČ and STEINER in the Grand Chamber judgmetn in *Hatton and Others v United Kingdom*, judgment of 8.7.2003.

61. *López Ostra v Spain*, judgment of 9.12.1994.

62. *Fadeyeva v Russia*, judgment of 9.6.2005.

63. *Guerra and Others v Italy*, judgment of 19.2.1998.

64. *Moreno Gómez v Spain*, judgment of 16.11.2004.

65. See the relevant article by Keenan D. Kmiec, "The Origin and Current Meanings of 'Judicial Activism'", (2004) *California Law Review*, providing an extensive overview of judicial activism, both in a theoretical, as well as in a historical sense.

ture of the rights protected by the ECHR and, as such, it has acquired legislative force. In essence, when the term is used in the context of ECtHR case-law, it can be simulated with that part of the Court's jurisprudence that falls under the concept of creative interpretation. This practice can mostly be seen in cases involving Articles 8, 9 10 and 12 ECHR, which have, in turn, granted the Court consentient global recognition[66].

But what does **Lord Hoffmann** have to say about judicial activism in his direct attack against this very interpretational method of Strasbourg? His views are firm and recent. On10 July 2008, about eight months before his abovementioned speech, Lord Hoffmann participated in a web-hosted discussion amongst many distinguished law professors and judges.

As expressed in his own words, " […] *much of the discussion has been about how trial judges behave. Perhaps one should concentrate on the guidance they should receive from Supreme Courts […] They are responsible for the proper functioning of their judicial system and although it might be* ***"judicial activism" to make changes in the law for purposes of social engineering, it must be part of their proper function to try to prevent existing law or procedure from having obviously unintended consequences, such as discouraging people from undertaking socially desirable activities***"[67]. One could hardly find a more sustained and supportive statement for Strasbourg Judges with regard to "judicial activism" than this proclamation of their subsequent accuser!

c) The "margin of appreciation": A jurisprudential construction of the Strasbourg Court

The Strasbourg Court has made a balancing, diplomatic gesture towards national state signatories to the ECHR. It has created a **jurisprudential construction**, termed as "**margin of appreciation**"[68], that was **not foreseen in the Convention** itself[69]. In essence, this **captures the Court's judicial constraint** and its **abstention from judicial scrutiny**. The Court accepts that in certain cases where there is a clash between ECHR protected rights and the wider public interests of a member state, it is more appropriate that the matter should be decided by national courts or national authorities, rather than by Strasbourg[70].

The manner in which the delimitation of the margin of appreciation has been set refers to the authority of the contracting states in assessing factual circumstances, as well as to the application of the provisions that apply through the various regional and international human rights conventions[71]. Its defining core is that, within its territory, each society retains the right to balance individual rights with national interests, and to rule on any disputes that may result from the varying moral, social, cultural, political and legal traditions[72] of contracting states[73].

Thence, Strasbourg engages in a form of self-restraint that lies outwith the Convention, effectively granting authority to the offender (state),

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66. In contrast, ECtHR case-law on Article 6 ECHR is not particularly dynamic or evolutive.

67. See Lord Hoffmann's contribution in the NewTalk web discussion on the role of the courts in making social policy, available at http://newtalk.org/2008/07/what-is-the-role-of-the-courts.php [page last visited on 8.12.2009].

68. Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff, 1996); Eva Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" 56 *Heidelberg Journal of International Law* (1996) 240.

69. See C. Rozakis, "The Jurisprudence of the European Court of Human Rights: Bed of Procrustes or a Contribution to European Integration?" *Nomiko Vima* (2009), p. 1833 et seq.

70. *Casado Coca v Spain*, judgment of 24.02.1994, para. 50; *Jacubowski v Germany*, judgment of 23.06.1994, para. 26.

71. *Chorherr v Austria*, judgment of 25.08.1993, para. 31.

72. Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia Publishers, 2002); and Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" 31 *International Law and Politics* (1999) 843.

73. Onder Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases" 8 *German Law Journal* (2007) 711.

rendering it the sole entity entrusted with the making of a decision as to the existence of a violation against the victim (applicant)! This constitutes a **judicial "*invention*"** that weakens the force of the ECHR, whilst it also stands against the aims of the Convention itself.

In practice, whenever the ECtHR does not wish to involve itself in a case, **it abstains from its ECHR obligation to protect the victim**, opting for the indirect transferal of that obligation to act to the respondent state (or, effectively, accepting that the state *will not act*). **The "margin of appreciation" is, in reality, a medium for the self-protection of the Court itself, and a form of judicial tolerance vis-à-vis state arbitrariness**. Strasbourg is not entitled to abstain from the application of any right: on the contrary, it is the only body that is positively obligated to enforce the Convention, since its interpretation is both conclusive *and* authoritative.

The rights of every European citizen cannot be separated by 'dividing lines', defined by varying moral and cultural traditions: they must be interpreted in the same manner throughout Europe, as people should be entitled to the same 'umbrella' of protection. The Convention's Preamble is explicit in mandating this very requirement, which culminates in the realization of true integration between member states. This goal could never be fulfilled if national particularities, and especially those imbreaching individual rights, were to be maintained.

The tenet of the margin of appreciation is a creation of Strasbourg institutions. The first time it was utilized by the ECtHR was in the case of *Handyside v. United Kingdom* of 7.12.1976[74]. It was then subsequently used indirectly by the Committee that enforces the ICCPR[75], and directly by the Inter-American Court of Human Rights[76], a judicial body that regularly references ECtHR case-law.

Following that, the ECtHR has issued a number of judgments where the principle of the "margin of appreciation" has been consistently used. Nonetheless, it is submitted that, in practice, it undermines the protection of rights and freedoms of European citizens, as it affects the unfettered enjoyment of their protected rights. Moreover, the notion of the "margin of appreciation" does not have a clearly defined nature. As such, it becomes counter-productive in view of the aim of effective application of the Convention, especially since rights are meant to be interpreted in a clear and precise manner[77]. Recently, however, there has been a discernible effort to limit its use, although Strasbourg's resolve will be seriously tested in the adjudication of *Lautsi v Italy* in its Grand Chamber. In this case, the Court's own strength will be tried, as it will be called to pass judgment in view of the virtually unanimous reaction by a member state towards its prior ruling. Will it resort to its diplomatic 'weapon', the all-too-well-known "margin of appreciation"? Only time will tell…

Undoubtedly, the principle of the "margin of appreciation" is a construction of the Court. It would be a gesture of consistency with the purposes of the Convention, but also towards the realization of effective and homogenous human rights protection, if the 'maker' were to destroy his own creation. It would be an act born of bravery but also a move of substance… Perhaps it would not be much to Lord Hoffmann's liking, but it would certainly find many others in agreement.

3. The Court gazing at its next 50 years – Problems and Prospects

Is Strasbourg a perfect court? The answer is, of course, negative: without a doubt, it is not perfect. Nonetheless, it is the best our planet has to offer

74. See C. Rozakis, supra note 69.

75. Case of Shirin *Aumeeruddy-Cziffra and Others v Mauritius*, Communication No. R.9/35 (2 May 1978), U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), para. 9.2(b)2(ii), available at http://www.unhcr.org/refworld/category,LEGAL,,,MUS,3f520c562,0.html [page last visited on 8.12.09].

76. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (Jan. 19 1984), Inter-American Court of Human Rights (Ser. A) No. 4, paras. 56-5.

77. Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law" 16 *European Journal of International Law* (2005) 907.

for human rights on a regional and international level. After all, the only court that could be "perfect" would be one that does not adjudicate or issue judgments. The ECtHR, however, is a judicial body that has given a lot to European natural and legal persons, whilst acting as a role model for many other courts around the world. Even so, a very good court can always become better – or, indeed, excellent, which is precisely what the beginning of the next 50 years calls for. The gradual upgrading of the Court, the furthering of rights and the European integration of human rights through homogenous protection, without exceptions and "margins of appreciation", must be the next goal.

With all due respect to Strasbourg institutions, I will attempt to make a few remarks on the weaknesses of the Court, with the aim of contributing to its improvement.

I will not deal with the well-known problems (increase in lodging applications[78], thousands of pending cases[79], etc.): Protocol No. 14 of ECHR, which was ratified by Russia on 22.01.2010 and will come into force on 1.05.2010, is step in the right direction. Hence, I will refer to two pressing problems that have not received adequate coverage, having thus escaped the spotlight of attention.

I) Decisions on the inadmissibility of cases and the lack of transparency in the Court

The Court demonstrates **two sides**. *One side* is that which is visible and well-known. It is its projected "image", which is mainly shaped by its "dynamic" and "evolutive" jurisprudence, the way ECHR rights are protected and the personalities of many of its judges. It is the side that granted great fame and prestige to the Court. This is the part where, as a rule, praise can be found and almost no adverse criticism exists[80]. Included in this section are publicity, decisions, press releases, speeches, lectures, the excellent site, reports and commentaries in legal journals, books, authors, judges, lawyers etc., coming from national and international courts. Within the framework of the sum of Strasbourg judgments, however, this part only amounts to **6,5%** of these[81], which is the percentage of petitions that actually end up being examined on their merits by the 7-member Chambers of the Court!

The *second side* is the *invisible* face of the Court. It represents **85%** of the total applications of European citizens, a part that amounts to more than 8/10 of the cases. It is the side that books, blogs, academics, the press and television do not get involved with. It is the part where no drumrolls are to be heard; only silence. It is a vast cemetery hosting the last hopes of European citizens[82].

Undoubtedly, the overwhelming majority of applications reaching Strasbourg are clearly inadmissible. Many applicants resort to Strasbourg either because they misunderstand the meaning of a fair trial, because they misinterpret the ECHR or because they are completely unaware of the Court's jurisprudence. Indeed, a great number of them may be driven by despair, due to their judi-

78. There were 52.200 applications lodged during the first 11 months of 2009, while during the same period in 2008, the number of applications was 46.250 (13% increase).

79. Up to 31.10.2009, the number of outstanding petitions was 117.850, this being an increase of 21% from 1.1.2009 (97.300).

80. The two national judges mentioned above – and nobody else – are the only people who attempted to create the first crack in the excellent image of the Strasbourg Court. Until recently, member states had not adopted a critical stance towards Strasbourg jurisprudence. An indirect indication of dissatisfaction that arose following the rulings regarding Chechnya was seen in Russia's diplomatic reaction of not ratifying, for four years, the Protocol No. 14, thus creating relevant operational problems for the Court. Following the well-known ruling of 03.11.2009 in *Lautsi v Italy* (a case on the *banning of crosses in Italian schools*), the whole of Italy (the government, most of the opposition, but also the majority of the Italian citizens) attacked Strasbourg by characterizing the judgment as "shameful", "short-sighted" and "insulting to the national identity of Italy".

81. From data provided by the Court, updated up to 30.10.2009.

82. See also the reflections of Mr. Jean Paul Costa, President of the ECtHR on the inadmissible applications, in «*Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference*» (July 3, 2009), p.2.

cial failures in their own, national courts. Certainly, not all claims can be justiciable, however it is difficult for me to believe that **85%** of individual applications are truly and objectively inadmissible[83]. The bitterness borne by the applicants is much greater than that which is considered reasonable by Strasbourg. The ignorance and impulsiveness of the applicants are not the only factors that should be blamed for this: the Court is also liable for the manner in which it operates.

The process followed in relation to obviously inadmissible applications is absolutely "***non-transparent***". The procedure governing admissibility is an "**obscured**" process, in which **applicants have absolutely no involvement and no entitlement to any explanation or observation, nor are they ever updated on the progress of their application**. Apart from this, the decision which is issued and announced to them is in the form of a simple letter, which is drafted in an *unacceptable style* for a court of human rights, as it bears no mention whatsoever of the reasoning behind the decision. The only thing that it does mention is that "*the Court has found no violation of the rights and freedoms guaranteed by the Convention and its Protocols*", adding that no documents from the case file will be returned to the applicant. Moreover, it provides that no additional details will be issued and that the Court will not respond to any further correspondence.

According to the Court[84], even where manifestly inadmissible petitions are concerned, there is a written ***summary statement*** on the reason(s) why each application is rejected as inadmissible. Therefore, if a reason does exist, why is it not communicated to the applicant? Why should there be such 'opaqueness' in a court which should, above all, remain transparent? Moreover, if the reasoning for the inadmissibility of a petition were to be communicated and made public, this would benefit *both* the applicants (*who will know the reasons for the rejection of their petition and will, therefore, not repeat the same mistakes*) *and* the Court, as it might then receive fewer applications and thus have its workload reduced.

By espousing the abovementioned non-transparent way, there is a strong reaction from the 85% of unsuccessful applicants, which could be reduced or even eliminated if Strasbourg hadn't chosen to raise this impenetrable "wall". This entire issue could be resolved in a simple way. Prior to the issuing of decisions by the three-member Committees, a relevant recommendation is made by the national Secretariat, which is a body familiar with the national language of the applicant, as well as with the relevant national legislation. *This recommendation could be communicated to the applicant so that he, in turn, would be able to reply with a relevant memorandum providing clarifications, within a 10-day time limit*. Thus, the three-member Committee, or a Single Judge from 1.05.2010 (after the application of Protocol No. 14 of ECHR), would be able to reach a judgment by drafting a brief statement that will also take into consideration the views and answers of the applicants. This statement would then be made public and it will be communicated to the applicant, thus abolishing this well-known, thoroughly inappropriate letter of response. In essence, the sum of the 'extra burden' that will be placed upon the Court will be the drafting of just one more document, while the benefits will be multiple.

In any case, and during all stages of procedures, article 45(1) ECHR is applicable, explicitly stating that "***Reasons shall be given for judgments, as well as for decisions declaring applications admissible or inadmissible***". Therefore, is there any reason why decisions declaring applications inadmissible should not be justified? And, more to the point, why should the reasoning for reaching such a decision be "hidden" and obscured, rather than being public? Can't the Strasbourg Court apply the Convention to 9/10 of its cases? Is this, truly, its prerogative?

II) National languages and Strasbourg.

The Convention, in two of its articles (5(2) and 6(3)(a) and (e)), refers to the **necessity of using national languages**. In addition, each applicant

83. As far as Greek cases are concerned, the percentage is significantly lower. Approximately 55% of the manifestly inadmissible applications can be considered as a reasonable percentage.

84. See Marialena Tsirli, "The European Court of Human Rights and manifestly inadmissible cases: The invisible side of the iceberg", 55 *Nomiko Vima* (2007), p. 618 et seq.

may file his application in his own native language. The procedure in his own language is followed by Strasbourg in the first phase of the procedures, until the declaration of the application as admissible, or until the notification of the application file to the respondent state's government. Following that, the applicant is obliged to participate in the procedure in one of the two official languages of the Court (English and French). Furthermore, the rulings of the Court's Divisions are issued in one of the aforementioned two languages, while the rulings of the Grand Chamber are issued in both languages.

Strasbourg is a human rights court that victims of violations carried out by state institutions turn to. Many of those applicants are poorly educated, while probably most of them do not know any language other than their own. Thus, the requirement that applicants must have an excellent command of the two official languages, especially when set by a court whose very mandate is to protect human rights, appears to be contrary to the purposes of this type of judicial body.

What is even more unfortunate for those who deal with human rights (experts, professors, specialists, scientists, etc.) and participate in various committees for the drafting of international agreements, is that they have never been victims of human rights violations themselves, whilst they do have knowledge (possibly of many) foreign languages. As a result, the institutional service for the realization of human rights is implemented on a framework that serves the specialist and the knowledgeable, rather than those who the Convention seeks to protect. Thus, in reality, the mechanisms are "assembled" in such a way as to suit the multilingual and educated connoisseurs, instead of serving the uneducated and monolingual victims.

As a result of the above, the former demand from the latter (who, for example, may be farmers in Romania) to have a perfect knowledge of French in order to understand the comments of the Romanian government. At the same time, the said government, instead of sending these comments in Romanian does so in French. In turn, the petitioners have to answer in a language that they don't know and, ultimately, the decision that concerns them directly ends up being in French, which is a language that they do not understand. In fact, what takes place is a procedure examining the violation of a Romanian's human right – which he is unable to understand – resulting in a ruling[85] that is only understood by the Court that has issued it, rather than by the person it concerns!

And yet, Strasbourg is not so far away from the city of Luxembourg, where another international court – the ECJ and its Court of First Instance – is located. In this court, where human rights do not form part of its direct area of competence, and where the litigant parties are states or mainly large corporations with capable, experienced and multilingual staff and lawyers, a process understandable to everyone has nonetheless been established. Petitions are lodged in the national language of the applicant and the judgment is also issued in this language as well. Consequently, the entire process is fully accessible to all, from its beginning and up to the issuing of the court's ruling, while everyone concerned is thereafter kept informed.

I cannot help but wonder: why does something that is so obvious and reasonable for Luxembourg, appear to be so exotic, difficult and unusual for Strasbourg?

III) Just Satisfaction and legal expenses in the case-law of Strasbourg

A serious issue is that regarding the amount of satisfaction that the European Court of Human Rights awards for non-pecuniary damage**.**

The European Court of Human Rights has so far shown timidity in "just satisfaction". This timidity leads *inter alia* to the selective and unequal protection of human rights.[86] In cases which refer

85. It should be noted that in an English blog (see htpp://ipkitten.blogspot.com/2005/10/translation-watch-latest-eipr.html) complaints are raised about the Strasbourg judgment in Anheuser-Busch Inc v Portugal, questioning why the decision is written in French and not in English, so as to be understood by English citizens and lawyers as well. What can the rest of European citizens say, who are neither English, nor French-speakers…

86. C. Chysogonos, "The ECHR a half century later", *The Constitution:* A bimonthly review of constitutional

to the violation of property rights, "just satisfaction" is generally interpreted to mean the monetary compensation which (correctly) covers the total damage that the applicant suffered and therefore, it annuls the consequences of the violation of his/her rights. However, if the damage is moral, usually the European Court of Human Rights proves to be "extremely prudent"[87] and either it is satisfied that simply finding a violation to be "just satisfaction" suffices, or it awards a rather exiguous or inadequate compensation. A good example of the former is the leading case of *McCann v. United Kingdom*[88] where three unarmed Irish men, who were members of a terrorist organization, were killed in cold-blood by the British Special Forces. The European Court of Human Rights ascertained that it constituted a violation of Article 2 of the ECHR (right to life), nevertheless, the 'Court' held that it was not necessary to award a further "just satisfaction" to the parents of the victims beyond the finding of the violation.

The ECtHR on the award of satisfaction has not yet established in its case-law any legal principles that govern the amount of damages it should award. The only exception appears to be the cases that concern violations of trial within a reasonable time[89], in which there seems to be at least some regularity regarding the size of the financial damages and these are the only cases which reflect reality and somehow satisfy the applicants.

Therefore, on the issue of non-pecuniary damages in the case-law of Strasbourg there is obviously a lack of clear principles on how damages are awarded and the amount of damages.[90] Generally the judges of Strasbourg appear to be reluctant on the issue of the detailed calculation of just satisfaction[91].

Dinah Shelton[92] observes that: It is rare to find a reasoned judgment articulating the principles on which remedy is afforded[93]. Moreover, the reasoning of judgments of the ECtHR, as far as the award of "just satisfaction" is concerned, is often perfunctory or non- existent. In the most cases one can only speculates how the ECtHR arrived at a judgment[94].

Generally in this matter the case law of the ECtHR lacks coherence. The lawyers, applicants and judges are in danger of wasting time attempting to identify principles that do not exist[95].

Grosz, Beatson and Duffy comment that:

"The Court has used the 'equitable basis' formulation to cloak the fact that, to all appearances, the figures which it arrives at are based neither on any detailed calculation nor any discernible principle. The student of the Court's practice is left wondering whether the process by which the Court arrives as its judgment is anything more sophisticated than sticking a finger in the air or tossing a coin"[96].

Furthermore, it is a fact that the ECtHR awards damages for moral injury of an extremely low monetary sum for violations of fundamental rights, for violations of rights that are protected by the provisions of Articles 2, 3, 5, 8, 10 and also the same applies to the most frequent kind of violations in Article 6 (except for cases regarding trial within a reasonable time). Extremely low sums are awarded for violations concerning the right of having access to court.

The same applies to the costs and expenses that fall short of the real expenses and they undermine the ECtHR, given that the ECtHR itself admits that the remuneration of the applicants'

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theory and practice, Issue 5/2001

87. *Ibid.*

88. Series A, No 324, Application No 18984/91(1995)

89. See in detail E. Salamoura, "The right to be tried within a reasonable time and the restoration of the party's "presumptive" prejudice", 57 Nomiko Vima (2009), p. 2009 et. seq

90. Damages under the Human Rights Act 1998, Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965,

91. K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* , Sweet & Maxwell, London (1999) p. 398

92. Professor of International Law at George Washington University

93. Remedies in International Human Rights Law, 2nd ed, Oxford,(1999) p.204.

94. *Ibid. 88*

95. Lord Lester of Herne Hill and D. Pannick, eds. *Human Rights Law and Practice* (Butterworths,1999), para 2.8.4.

96. S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, London, 2000),para 6-21.

lawyers ought to be low. The adjudicated sums do not correspond to the prestige of the ECtHR nor to the extent and quality of legal work which is necessary. This issue could have been resolved through the enactment of particular rules and figures for the costs and expenses of the applicants.

In these areas, the ECtHR has noticeably distanced itself the prevailing economic circumstances and from the present reality, perhaps forgetting that the perpetrator of such violations is the state which has an economic strength in relation to the victims. The award of small sums of money as damages humiliates and weakens the protective scope of a fundamental right and gives the perpetrator the right to repeat the violation as the sanction does not have a real consequence.

IV) Reasoning of Strasbourg judgments

An equally important issue in many of the judgments of the ECtHR is that they are not duly motivated and that they are inconsistent[97]. Apart from decisions on admissibility, in which reasoning is almost non-existence (and even in these cases the right to appeal is not provided), judgments on merit do not always comply with the principle of adequate motivation.[98]

Regarding judgments on merit sometimes serious doubt is created regarding their quality and generally the proper way of reasoning[99]. In many instances, especially in cases that were declared inadmissible, the reasoning is not only elementary but also defective since it does not address the complaints of the applicants at all.

A more careful approach of the Strasbourg Court would have been to welcome European citizens since the "Court' which issues judgments against European countries, on the ground that they are not duly motivated, is not really able to not apply this principle in its reasoning. The requisite of third party reasoning must be the rule for all of its judgments, without exception.

V) Significant support of the role of the ECtHR Registry, after Protocol No.14 came into force declaring individual application inadmissible

As it is already known, Russian Duma ratified Protocol No.14 of the ECHR, which will come into force on 1st May 2010. After its implementation the role of the Registry will be upgraded to play a more dominant role, given that for the first time the institution of Rapporteurs is to be introduced who, according to the amended Article 24 par. 2 of the ECHR[100], will assist the judge of the Single Judge Chamber. Since this judge will be solely responsible for decisions regarding the admissibility of an individual case (this judge will not be the national judge), one is able to apprehend the power that the national Registry gains on the issue of admissibility of applications, given the fact that in practice only the Rapporteur will be able to deal with the subject-matter of a national application which will be in the national language and all the accompanying papers (judgments, legal documents etc) will be in the same language. Practically, the recommendation of the Registry will form the judgment of the judge on the issue of admissibility[101].

4. Conclusion

In the end, what is the European Court of Strasbourg? Is it a court with paternalistic aspirations and constitutional visions that should arouse fear to national judges? Is it a court that arbitrarily intervenes within the legal space of member states or a court that, rather than generating jurisprudence, legislates in an indirect way? Or is it, ultimately, a court that will protect European citizens and substantiate the materialization of human rights?

The European Court of Human Rights, irrespective of its potential weaknesses, is a court that deals with humans, human values and human dignity. It seeks, through routes resembling the

97. J.H. Gerards, "Judicial deliberations in the European Court of Human Rights".

98. T. Barkhuysen and M. Van Emmerik "Legitimacy of the ECtHR judgments: procedural aspects", cited in in the legitimacy of highest courts' rulings: judicial deliberations and beyond", the Hague,the Netherlands, T.M.C, Asser Press.

99. *Ibid*.

100. See article 14 of Protocol No. 14

101. A .Lester "The European Court of Human Rights 50 years later" E.H.R.L.R (2009), p.470

mythical steep passages of the *Symplegades*, to consolidate and promote human rights and to integrate human values. It is the Court that brought human rights "to life", gave them real substance and imposed their effective implementation. It is the last gateway of human hope in the whole of Europe. Let us be proud for having it and let us feel fortunate that there are Judges in Strasbourg. Its existence and operation is one of the best things that have happened in Europe over the past 50 years. …

The European Court as a founding instrument for the implementation of human rights

by Makis Tzifras

member of the Greek Association of Criminalists

The European Court as an institution was necessary for the accomplishment politically and strategically of the goal of unification of the member states into a united polity. However the main issue remained what more, in regard to his judicial protection could the new institution provide the European citizen that the national Courts had not already provided? The aim was found, and it was no other but for the European Court to control the sovereign national legislator and his national Courts, and therefore assure that his laws, to the context in which they have been passed, and mainly to the context in which they are interpreted-implemented in practice, really offer protection of substance and not just to the letter of the law. Especially for the citizen, who lives in the united field of the new European polity, the Court wished to safeguard his fundamental rights and freedoms versus any attempt on behalf of anyone, even on behalf of the national governments and their administrative mechanisms to obstruct their exercise. As a result these fundamental freedoms are held in reverence and become in general conscious and apprehensive to everyone.

These rights and freedoms were "moulded" into shape gradually till the end of the 19th century, but then in the first half of the 20th century respect for them piecemeal subsided. It was when the second world war ended, after the deflection of litigations, which were voted and systematically "undermined" the protection of human rights during the mid-war, that it became obvious to most citizens that the administration of a state is capable even by using the law as a "mean" to forbid the exercise of fundamental freedoms and therefore repress the citizens and "wrong" them. Therefore the safeguarding of human rights as a synopsis of the international treaty, that could be described as the treaty, that reflects political and legal civilization (which was signed in 1950 and is commonly known as the European Convention of Human Rights) and as the treaty, that restrained the exercise of state administrative power only with law and within the law, regarding the exercise of human freedom, would result to be only a plain international commitment without a binding meaning ,if the European Court was not established as an instrument of control of the rightful implementation of the Convention of Human Rights within the member states.

Since then, states and administrations maintain their sovereignty, but they are now subject of control from the other member states of the Council of Europe. The goal of this exercise of control is to assure, that the states will keep their commitment to respect the context of the European Convention of Human Rights. Furthermore after the institutionalization of the right to an individual recourse before the Court, the member states are now liable to the European citizens in case of any violations of the treaty.

Thus the Court as a controlling instrument of legislators and courts was not welcomed within the national states. This was due to the fact that those in charge felt threatened because their actions would from then on undergo in additional assessment. Therefore in each country individually, political pressure was needed and struggle on behalf of legists in order for any skepticism towards the new institution to be revered and finally it was not until it was stated that the court would consist of judges from every member state, that the Court was "legalized".

This is a reality which only a few, years after its complete establishment, publically acknowledge. This struggle was worth giving since it was a struggle for the preservation of all of us from the arbitrary acts of the states and any struggle for human rights is always worth giving.

The Court throughout all these years has offered through its jurisprudence a decisive contri-

bution in the change of our perspective in relation to the legal freedom and human rights. This is actually the greatest achievement in our country and we owe it mainly to this Court. Especially for Greece stating that the court succeeded to change root and branch our legal perception for human rights issues would not be considered as an exaggeration, contrarily today this is something no longer doubtful. The benefit is that we became aware of the meaning of human rights and this is a great achievement of political culture even at the cost of challenging the complacency of our domestic legal authority.

We will also in the future support the European Court, provided that it will continue its efforts to safeguard human rights in the years to come, even when limitations on the exercise of fundamental freedoms are imposed by the central European administration. This is unfortunately the case in the latest years, when legislation deriving directly from the central European administration placed in doubt these achievements of political civilization and therefore limited freedom. In the future though everybody and everything will be judged and this future came earlier than expected and is actually today. The judgment will be placed upon everyone and everything responsible for the violation of human rights. For the act of abuse of power does not have a homeland.

The right to be tried within a reasonable time and the restoration of the party's «presumptive» prejudice

by Evita Salamoura
member of the Athens Bar Association

Within the framework of the 50th Anniversary celebrations of the European Court of Human Rights (hereinafter "ECtHR"), reference should be made to the delays in the administration of justice. This is an issue of fundamental importance that has caused deep concern at an international level and the treatment of this issue is the subject of ongoing discussion and research. A large number of applications inundate the ECtHR on a daily basis; the overwhelming majority of these concern the violation of the right to be tried within a reasonable time. It should be noted that our country, Greece, along with Italy, Poland, France and Turkey, are all in the "*red zone*" of violations due to the excessive amount of time required to pursue an examination of a case on its merits and to get a judgment issued by the domestic courts. Illustratively it is reported that the percentage of issued judgments for all State Parties which concern violations of the right to be tried within a reasonable time stands at 35%, of which Greece accounts for 8%. This is a remarkably high percentage if we consider that the corresponding percentage of the neighbouring country of Turkey, a country with a fivefold population, stands at 7.6% and Russia a country with a far greater population stands at just 2%.! At a national level the breach of reasonable time stands at 62%, i.e. more than half of the convictions against Greece concern such a breach.[1]

The right to be tried within a reasonable time is entrenched at an international level:

a) Under Article 6 § 1 of the European Convention of Human Rights (hereinafter "ECHR" or "Convention"), which provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair (…) hearing within a reasonable time",

b) Under Article 14 § 3 (c) of the International Covenant on Civil and Political Rights (ICCPR), which provides "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (…) To be tried without undue delay, (…)",

It should be noted that the ICCPR only grants the accused person the right to be tried within a reasonable time and not any other parties.

c) Under Article 8 § 1 of the American Convention on Human Rights which provides: "Every person has the right to a hearing, with due guarantees and within a reasonable time, (…)",

d) Under Article 7 § 1 of the African [Banjul] Charter on Human and Peoples' Rights, which provides: "1.Every individual shall have the right to have his cause heard. This comprises: (…) (d) the right to be tried within a reasonable time".

The present study focuses on the right to be tried within a reasonable time and an attempt will be made to: a) present the guiding principles of this right, developed by the rich jurisprudence of the ECtHR, b) demonstrate the effect that the length of proceedings has on the fairness of the trial, c) determine what constitutes "just satisfaction" under Article 41 of the ECHR in relation to the violation of this right, and finally, d) set out the opportunities available, concerning appropriate measures that could eliminate or mitigate the adverse effects suffered by parties due to the excessive length of proceedings.

I. "Reasonable time" under the case-law of the ECtHR

Article 6 § 1 of the Convention provides that a court, "in the determination of civil rights and obligations or of any criminal charge" must decide *within a reasonable time*. The concept of reasonable time actually indicates the period within which the decisions of a court (civil, criminal, administrative) must be delivered in order for the

1. The statistics cited above are available on the European Court of Human Rights, *www.echr.coe.int*, referring the decade 1.11.1998-31.12.2008.

administration of justice to be effective and efficient.

As far as civil cases are concerned, an expeditious holding of trial is required, in order to avoid the prolonged state of uncertainty in which the involved parties find themselves. In criminal cases, this requirement is of prime importance given the consequences experienced of a "charge" pending against the accused person.[2]

As for criminal cases, the "reasonable period" under Article 6 § 1 commences *(dies a quo*) from the moment that a formal charge is brought against the person. The term "charge" under the framework of Article 6 § 1 of the ECHR is an autonomous concept and can be defined "as the official notification given to an individual by a competent authority of an allegation that he has committed a criminal offence or some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect".[3] In practice, the starting point when calculating the "reasonable time" may precede the date of the trial and could be the date of the arrest[4], the date that a person's home is searched[5], the date of prosecution[6], the date an applicant was officially notified that he was to be prosecuted, the date on which the preliminary investigation/ pre-investigation/main interrogation is opened (i.e. from the moment a summons is served to the accused person to defend himself)[7]. For the civil party, the time is calculated from the time that the person declares his participation as a civil party during the trial[8]. However, it can be maintained that in some cases the "charge" does not signal the beginning of the period: Thus, if the accused person has not received any formal notification and was tried in absentia, one could conclude that although a "charge" does indeed exist, the requirement of reasonable time is not violated, since the accused does not face the pressure of criminal proceedings against him[9].

In civil and administrative cases, the starting point is calculated as the date on which the concerned proceedings are addressed, i.e. the date on which the relevant action is filed with the court's secretary. However, when a preliminary administrative objection constitutes a prerequisite for presenting the case before the court, the ECtHR considers the starting point of the legitimate procedure to be the date of that objection[10].

The civil and administrative proceedings terminate (*dies ad quem*) on the date that the final decision, which resolves the dispute, is published. The criminal proceedings terminate on the date that the final decision is published, whether it be a conviction or an acquittal or a discontinuation of the prosecution.

Not taken into account is the lapse of time caused by the examination of extraordinary remedies, even if the latter is provided by domestic legislation or by the preliminary proceedings under Article 234 of the EC Treaty, before the Court of Justice of the European Communities[11].

It should be noted, that an acquittal of the accused person or an outcome in favour of the party before the national courts does not amount to deprivation of *victim status*[12]. This status, however, is eliminated when the party's prejudice is

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2. Michele de Salvia, Compendium de la CEDH, Vol.1. Jurisprudence 1960 à 2002 , N.P. Engel, Kehl, Strasbourg, Arlington, Va, p. 346

3. ECtHR, *Eckle v. Germany,* judgment of 15 July 1982, § 73, *Proios v. Greece*, judgment of 24 November 2005, §15

4. ECtHR, *Vlachos v. Greece* judgment of 18 September 2008, § 16

5. ECtHR, *Diamantides v. Greece* judgment of 23 October 2003, § 20

6. ECtHR, *Angelov v. Greece* judgment of 6 November 2008, § 15

7. ECtHR, *Aggelopoulou v. Greece* judgment of 4 December 2008, §§ 14, 15

8. ECtHR, *Gorou v. Greece (no.1)* judgment of 31 July 2008, §14, See. Ipp. Milonas, The Criminal "Fair Trial" at the case-law of the European Court of Human Rights, Publisher: Ant.N. Sakkoulas, pp. 272-274

9. Peter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds.) (2006), Theory and Practice of the European Convention on Human Rights, 4th edition, Antwerpen-Oxford: Intersentia, pp. 604-605

10. ECtHR, Ichtigiaroglou v. Greece judgment of 19.06.2008, The Court considered that the relevant time began on the date that the applicant brought proceedings before the Local Administrative Committee of Social Security Services, since this was a prerequisite for bringing proceedings before the Administrative Courts, ECtHR, Vilho Eskelinen and Others v. Finland, judgment 19.04.2007, §66

11. ECtHR, *Pafitis and others v. Greece* judgment of 26.02.1998, § 95

12. ECtHR, *Kouroupis v. Greece* judgment of 27.03.2008,

recognized and restored by the domestic courts (e.g. by reduction of the sentence or by discontinuation of the criminal proceedings or by compensation of the party, or by exemption of the party from legal costs or by means of any other possible way). However, in order for the status of victim to be eliminated, in the case of award of compensation by the domestic courts, the amount of this compensation should be manifestly reasonable when compared with the financial reward that would be awarded to the applicant by the ECtHR for non-pecuniary damage. A lesser amount is acceptable only in cases where restoration would have lead to a further acceleration of the process[13].

The whole duration of the proceedings is monitored by the ECtHR, each stage of the process is included within this time period, namely the time spent before the First Instance Court, the Second Instance Court and before the Court of Cassation[14] or the Council of State[15] or the Audit Court[16], respectively. Furthermore, in criminal cases the pre-trial period is also included[17]. It can be observed that in numerous ECtHR judgments that the violation of the right to be tried within a reasonable time is recognized due to the excessive duration of one individual stage of the proceedings (e.g. excessive length of proceedings at the pre-trial stage[18] or before the First Instance Court or before the Court of Appeal[19] or before the Court of Cassation etc), even though the total time of the proceedings before the domestic courts is assessed as being reasonable. A total duration of up to two years, in normal (non-complex) cases, for each instance of jurisdiction is generally regarded as reasonable[20]. However, when proceedings last longer than two years per instance, or more than six years for the whole process (i.e. from the institution of the case until the publication of the final decision of the Court of Cassation or the Council of State), the ECtHR examines the case closely and considers whether the national authorities and the parties have shown due diligence.

Finally, under Article 35 § 1 of the ECHR, the exhaustion of domestic remedies is a condition which is necessary for the admissibility of the application. This is based on the belief that the individual members should have the opportunity to prevent or remedy the violations alleged against them before the complaints are submitted to the ECtHR[21]. However, with respect to violation of the right to be tried within a reasonable time, this obligation is flexible and the case can be examined by the ECtHR even when proceedings are pending before the national courts[22], as long as it can be argued that the trial up until that time has been unreasonably delayed. In such a case, the period taken into account, as far as reasonable time is concerned, terminates on the date on which the ECtHR issue a jdugment on the case. When a violation of reasonable time in a pending case has already been recognized by the ECtHR, the time already elapsed is also taken into account when assessing the reasonableness of the time taken in the later part of the proceedings[23].

It is also worth noting that the examination of Greek cases by the ECtHR, despite the large number of cases pending before this court, is carried out within a very reasonable time which does not normally exceed one year for cases that are declared inadmissible (i.e. without seeking in advance observations from the Government) and three years for cases that are examined on the merits.[24]

As becomes clear, from the body of ECtHR

13. Karen Reid (2008), A Practitioner 's guide to the European Convention of Human Rights, Sweet & Maxwell, pp. 162-163, *Metzger v. Germany* judgment of 31.05.2001

14. ECtHR, *Karanikas v. Greece* judgment of 29.04.2008

15. ECtHR, *Ladas v. Greece* judgment of 21.02.2008

16. ECtHR, *Examiliotis v. Greece*, (no. 3) judgment of 4.12.2008

17. ECtR, *Korfiatis v. Greece* judgment of 20.03.2008

18. ECtHR, *Ottomani v. France* judgment of 15.10.2002

19 ECtHR, *Terzoglou v. Greece* judgment of 27.03.2008, §17

20. F. Calvez, Judge (France), Report, «*Length of Court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights*», CEPEJ, Council of Europe (2007), p.83

21. ECtHR, *Selmouni v. France* [GC], no. 30210/96, §152, ECHR 2000-XI), *Dim. και Aik. Tzivani O.E v. Greece* judgment of 27.03.2008, § 12

22. ECtHR, Petroulia v. Greece judgment of 6.11.2008

23. K. Reid, op. cit., p. 162

24. Marialena Tsirli, Dikaiorama (legal journal) 14 (March 2008), p.26.

judgments, the method employed when examining relevant violations is as follows: firstly, a calculation of the period of time under consideration, then, an assessment of whether this period of time was reasonable or excessive. The Court, in several judgments indicates that it makes an overall assessment based on the specific circumstances of the case (*in concreto*) after taking into account measures developed through its case-law[25] and in particular a) the complexity of the case, b) the conduct of the applicant, c) the conduct of the competent authorities, and finally d) what is at stake for the applicants.

a. *The complexity of the case* is assessed on a legal, juridical and substantial basis and naturally determines the extension of the proceedings. However, the mere fact that a case is complex is not always sufficient to justify the excessive length of proceedings. The vast body of ECtHR case law determines that the factors determining the complexity of the case are,: the nature of the facts to be established (e.g. financial affairs), the volume of legal documents involved, the number of parties/defendants involved, the number of charges, the intervention of third parties in the procedure, the volume of the body of evidence, the number of witnesses to be examined, the examination of witnesses living abroad or at a distance from the court, a numerous amount of investigative acts, the need to obtain expert evidence, the need to produce evidence from abroad, the need for an interpreter, the need for the translation of legal documents, the relevance of the case to other cases, the complexity of legal issues, the ambiguity of the applicable rule of law, changes in legislation and the dependence of civil proceedings on the outcome of criminal proceedings[26].

b. *The conduct of the applicant.* This factor is the only one that can lead the Court to assume that there is no breach; even in cases where the period of time lapsed was excessive.

For example, in *Karvountzis v. Greece*, in the judgement of 6.11.2008, the ECtHR held that, although the total length of proceedings was more than six (6) years for three instances of jurisdiction, it did not constitute a violation because the applicant delayed lodging his cassation appeal by a period of two (2) years and even more time was needed to determine its hearing. Specifically, in para. 23, the ECtHR holds: "*Pour ce qui est ensuite du comportement des parties, la Cour relève que le requérant a mis un an pour se pourvoir en cassation, délai qu'il a encore rallongé de plus de cinq mois avant de déposer copie de ce pourvoi devant la Cour de cassation et de demander la fixation d'une date d'audience, et qu'il a attendu six mois pour reprendre l'instance devant la cour d'appel de Nauplie après le renvoi de l'affaire par la Cour de cassation. Ce comportement, pour lequel le requérant ne fournit aucune explication étayée, est à l'origine d'un retard global de deux ans environ, dont l'Etat ne saurait être tenu pour responsable. La Cour note en effet que, selon les principes de la disposition de l'instance et de l'initiative des parties consacrés par les articles 106 et 108 du code de procédure civile (voir paragraphe 16 ci-dessus), le progrès de la procédure dépend entièrement de la diligence des parties ; si celles-ci abandonnent provisoirement ou définitivement l'instance, les tribunaux ne peuvent pas de leur propre initiative leur imposer sa reprise (voir, parmi beaucoup d'autres, Makropoulou et autres c. Grèce, nº 646/05, 26 avril 2007). La Cour relève par ailleurs que les parties demandèrent à deux reprises le rapport de l'audience devant la cour d'appel après le renvoi de l'affaire par la Cour de cassation, ce qui retarda davantage l'examen de l'affaire.*".

Furthermore, in *Mariettos and Mariettou v.*

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25. *Frydlender v. France* [GC], no. 30979/96, par. 43, ECHR 2000-VII, *Pélissier et Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II.

26. ECtHR, *Wejrup v. Denmark,* judgement of 7.03.2002 concerning a case of fraud; Karvoutzis v. Greece judgment of 6.11.2008, where the ECtHR held that given the nature of the dispute and in particular the number of owners of expropriated property, the case was undoubtedly complex; *Papathanasiou v. Greece* judgment of 5.02.2004, in which there were suspicions that the applicant belonged to a group charged with smuggling, forgery and use of counterfeit, and the contested proceedings were conducted along with seventeen other procedures which dealt with similar activities; *Sari v. Turkey and Denmark* judgment of 8.11.2001, a case concerning murder by a Turk in Denmark and there was need for translation in two languages; *Geromanolis and Others v. Greece* 16.10.2008, where the ECtHR held that the Supreme Administrative Court had to rule on other cases before considering the issues raised by these cases, which therefore caused delays in the proceedings; *Chatzimanikas v. Greece* judgment of 31.07.2008, in which five decisions were issued by the courts, two of which were issued by the Court of Cassation, *Dganzov v. Bulgaria* judgment of 8 July 2004, etc.

Greece, in the judgement of 21.02.2008, the proceedings lasted a total of eighteen (18) years and (8) months. The ECtHR, taking into account the conduct of the applicants, stated that (§28): *"Par ailleurs, la Cour admet que les requérants sont en partie responsables de plusieurs retards que connut l'affaire, notamment parce qu'ils n'ont pas fait un usage correct de la procédure : ils ont introduit une première action devant un tribunal incompétent ratione loci et ont persisté à ce qu'il examine leur affaire, puis ils ont introduit une seconde action avec le même objet devant le tribunal compétent – alors qu'ils auraient très bien pu reprendre l'instance qu'ils avaient initialement engagée, ce qui a compliqué davantage l'examen de leur affaire. De plus, il ressort de la chronologie de la procédure qu'ils n'ont pas toujours fait preuve de diligence dans la conduite de leur affaire. Cela étant, il n'en demeure pas moins que même si l'on déduit de la durée globale de la procédure les retards attribués aux requérants, soit neuf ans environ, celle-ci demeure excessive."*

With regard to the conduct of the accused person in criminal cases, the Court recalls that Article 6 does not require active co-operation with judicial authorities in expediting the proceedings. However, the conduct of the applicant is an objective fact which cannot be imputed to the respondent State and it is taken into account when deciding whether the time was reasonable or not[27].

As concerns this factor, a distinction should be drawn between the dilatory conduct of the applicant, which is that which contributes to weakening of the complaint regarding the excessive length of proceedings, and that which results from the exercise of a legal right, provided by domestic legislation, for which the accused person cannot be blamed unless he makes an extensive use of it (e.g. numerous requests for adjournments[28]). For instance, the ECtHR justifies delays due to: the exhaustion of all domestic remedies, the request for examination of witnesses or experts, the request for exemption and exclusion of judicial agents, or the absence or abscondment of the applicant[29].

c. *The conduct of the competent national authorities*. The ECtHR often recalls that the Signatory States are responsible for the organization of their judicial systems in such a way that their courts can guarantee anyone the right to obtain a final decision on disputes relating to rights and obligations of a civil or criminal nature within a reasonable time[30]. The way in which the State acts – either by imposing deadlines, instructions, or employing other methods – is subject to its own discretion. Where a State permits proceedings to exceed the "reasonable time" under Article 6, without intervening to reduce them, it is then considered to be responsible for the delays that occur[31]. Moreover, only delays attributable to the competent judicial authorities may lead to findings contrary to the Convention.

Even in legal systems in which the principle of initiative of the involved parties is established, such as in proceedings before the civil courts, the conduct of the judges is not exempt from meeting the requirement of reasonable time prescribed by Article 6 § 1[32]. Thus, in this context the ECtHR requires that the courts more carefully examine requests for trial adjournment and the period in which intervention is permitted between the two hearings.

However, the ECtHR has held that, unlike civil proceedings which leave the initiative to the involved parties, the proper conduct of administrative proceedings does not depend on the behaviour of the applicant to advance the process but it is imputed to the respondent State[33].

Overburdening of a judiciary system, which is the most frequent justification of inactivity by the Member States, is not accepted by the ECtHR. Furthermore, since governments refer in particular to strikes and abstentions of lawyers, the Court notes that, although it is not unaware of the complications and the backlog of cases which may result from a strike, the requirement, under Article

27. ECtHR, *Lechner et Hess v. Austria* judgment of 23.04.1987, série A no. 118, p. 19, § 49

28. ECtHR, *Dim. and Aik. Tzivani O.E v. Greece* judgment of 27.03.2008

29. The Greek cases before Strasbourg, vol. A', 1991-2001, Publisher: Ant. N. Sakkoula, p. 219

30. *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 24, ECHR 2000-IV, *Dali v. Greece* judgment of 6.11.2008, §31

31. ECtHR, *Blake v. the United Kingdom* judgment of 26.09.2006, § 45

32. ECtHR, *Litoselitis v. Greece* judgment of 5 February 2004, § 30,

33. ECtHR, *Agathos and Others v. Greece* judgment of 23.09.2004, § 23, *Dali v. Greece*, op. cit, §30

6, for an expeditious trial is still valid[34]. Finally, factors such as: an insufficient number of judges and judicial staff, poor building infrastructure, incorrect notification of summons resulting in the absence of witnesses, and other parties, late transfer of the case file to the Court of Appeal, delays in the write-up and validation of judgments, as well as the uneven distribution of courts within countries which leads to non–satisfaction of geographic[35] and demographic changes, all constitute organizational failures. It is these failures which lead to long time delays and States need to take positive measures in order to eliminate them[36].

d. *The issue of dilatory conduct for the applicant*: The ECtHR, in taking this factor into account, establishes the priority cases and furthermore draws a distinction between those demanding "special or particular diligence" and those necessitating "exceptional diligence". In this latter category, the requirement of reasonable time is more demanding. Cases in the former category include: a) cases related to family affairs and relations between parents and children, b) cases in which parties are victims of road accidents, c) cases of police violence, d) labour disputes involving dismissals or recovery of wages, e) cases in which the applicant is serving a prison sentence, and finally, f) cases relating to applicants of a limited physical state and capacity. Cases in this category are: i) cases where the health of an applicant is critical and ii) cases of applicants of advanced age[37].

For example, in the case *Svetlana Orlova v. Russia,* judgment of 30.07.2009, the ECtHR held that there was a breach of the reasonable time requirement as consecutive referrals had occurred due to lack of jurisdiction. This highlighted the fact that the national courts had completely ignored the issue that the case concerned a labour dispute and also that at the time of dismissal, the applicant was pregnant[38].

II. The requirement of reasonable-time as a specific aspect of the right to a fair trial

It is said that: "*Justice delayed is justice denied*".

In many cases, the ECtHR has reiterated the importance of administering justice without delays which might jeopardize its effectiveness and credibility.[39] Courts have an obligation to end situations of prolonged insecurity in which a person is found, situations which are indeed inconsistent with the rule of law, and which could in fact be considered to be a denial of justice.

Article 6 § 1 of the ECHR guarantees the party – or in criminal proceedings the accused – the right to a fair trial, that is, the right to be tried fairly. Although the concept of a fair trial is set out in general terms, the spirit of the Convention implies that the term "fair" refers to a timely, effective and unimpeachable trial, under such procedural safeguards that enable the objective search for truth and the issuance of a sound decision.[40]

From the wording of this provision, a series of rights for the litigant can be derived, including the right to be tried by an independent and impartial tribunal, which has been established by law, in public and within a reasonable time. Particular aspects of the right to a fair trial are the right to have access to a court and the right to be heard – which means the right of the party to present his arguments before the court and in criminal proceedings the right to object to the charge against him – rights which are directly related to the right to be tried within a reasonable time. The right of access to a court and the right to be heard, both become ineffective when domestic courts fail to issue a judgment within a reasonable time. This is because their sole objective is the restoration of social peace, namely the settlement of the dispute

34. ECtHR, Papageorgiou *v. Greece* judgment of 22.10.1997, *Tsilira v. Greece*, judgment of 22.05. 2008, § 15

35. *Union Alimntaria Sanders SA v. Spain* judgment of 7 July 1989, S F. Calvez, Judge (France), op. cit. p. 53, Relevant application, *Loulakis v. Greece*, appl. no. 58821/09, was lodged before ECHR, on 22.10.2009, due to the considerable distance between applicant's residence and the competent Court of Appeal.

36. F. Calvez, Judge (France), op.cit. p. 49-76

37. Frédéric Edel, «The length of civil and criminal proceedings in the case-law of the European Court of Human Rights», Human Rights file, No. 16, Strasbourg (1996-2007), Council of Europe, p.43 et seq.

38. Panayotis Voyatzis, ECtHR Judgments, Synigoros ("Counsel", legal journal) , issue 74, p. 63

39. ECtHR, *Katte Klitsche de la Grange v. Italy* judgment of 27 October 1994, § 61

40. The protection of Human Rights in Europe (2006), Athens Bar Association, p. 65

in civil and administrative cases, and the attribution or not of guilt to the offender in criminal cases, and such an objective can only be achieved by means of a court decision.

It should be further noted that under paragraph 3 of this Article, the special rights of the accused person are explicitly detailed, including the right to defend oneself and the right to examine witnesses, rights which are provided to ensure a fair trial as a whole.

Undoubtedly, the lapse of an excessive period of time from the execution of a crime or from a dispute on civil rights, leads to a weakening of the defensive position of the party/defendant, since the quality of evidence deteriorates as proceedings progress. This is due to: a) loss of memory of the witnesses and the involved parties, b) loss of witnesses due to death, disappearance, change of address, and so forth, c) loss of relevant evidence (e.g. documents) and hence d) difficulty in locating relevant evidence, which all therefore affect the issuance of a decision as there is incorrect perception over the truth of the facts. Such weaknesses which could, however, be avoided if the case was heard at a time closer to the actual events.[41] Thus, in practice, parties are deprived of the possibility of finding evidence and supporting their claims, and therefore an irreparable "presumptive prejudice" is sustained.

For example, in *Kyriazis v. Greece* judgment of 4.06.2009, the applicant filed a complaint against the proprietor of a car rental establishment, claiming that the poor condition of the windscreen wipers on the leased car had led to an accident. During proceedings before the Orestiada First Instance Court, which took place four (4) years after the date of the accident, the plaintiff's counsel requested the case be postponed so that experts could be called on to examine the car wipers and present their findings before the Court. However, the Court rejected the applicant's request, taking into consideration the time which had elapsed from the date of the accident and the normal wear of legitimate wipers[42].

On the other hand, it is also reasonable not to ignore such requests, as it also said that: "*Justice hurried is justice buried.*"

Accelerating proceedings is not always in the interests of the party. The speedy administration of justice should not be pursued, under any circumstances, at the expense of the proper administration of justice. Moreover, this is the purpose of the use of the term "within a reasonable time" under Article 6 ECHR. Undoubtedly, the right to a speedy trial should not be equivalent to the right of the party to be protected against any delay, but against delay which could reasonably be avoided. Under criminal law, special attention should be given primarily to the right guaranteed by Article 6 § 3 (b) of ECHR, which provides that "*Everyone charged with a criminal offence has the following minimum rights: (…) (b) to have adequate time and facilities for the preparation of his defence.*" Under no circumstances should this right be compromised or sacrificed for the quick conduct of judicial acts, since, as mentioned above, the requirement of reasonable time primarily serves the interests of the accused.[43]

Thus, the main purpose of judicial authorities should be the achievement of a fair balance between a speedy trial and a fair trial.[44]

Taking into consideration the above, a fair trial can only be that in which all the rights of the individual are respected and the obligations of judicial bodies are met, so that the defence of the parties is efficient and effective. Moreover, the duration of the trial, so as to be fair, should be adjusted *in concreto* depending on the needs of the defence, which by no means should be overlooked.[45]

The most fundamental constitutional requirement for the protection and respect of human dignity is satisfied through such an approach, which is apparently violated when the party goes from being the subject of the proceedings to becoming an object of the proceedings and thus irreparable damage to his interests is sus-

41. Nomiko Vima 54 (legal Journal) (2006), p. 1842, with commentary by V. Chirdaris

42. Nomiko Vima 57 (legal Journal) (2009), p. 1236, with commentary by E. Salamoura

43. Arg. Karras, Penal Procedural Law, Publisher: Ant. N. Sakkoulas, Ph. Papadopoulos (1995), Delay of penal procedure and the ECHR, Iperaspisi, ('Defence', legal journal) p. 189

44. ECtHR, *Nideröst-Huber v. Switzerland* judgment of 18 February 1997,§ 30; mutatis mutandis, *Acquaviva v. France* judgment of 21 November 1995, Series A no. 333-A, p. 17, § 66.

45. The Greek cases before Strasbourg, op.cit., p. 211

tained[46].

In conclusion, the requirement of reasonable time is a safety valve for the guarantees and rights arising from the general right to a fair trial. Failure to comply with the requirement to be tried within a reasonable time indirectly encroaches on the body of rights granted to the parties, and thus it renders all guaranteed rights both illusory and ineffective, and is in breach of the guarantee of Article 6 §§1, 3 of the ECHR.

III. Just Satisfaction of the applicant under Article 41 of the ECHR

Article 41 of the Convention reads as follows: "*If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*" Since the nature of the infringement of the right to a trial within a reasonable time does not allow time to be regained, the infringement cannot be redressed by *restitution in integrum* for the violation. Thus, fair satisfaction at a European level can only take the form of financial compensation. Thus, the applicant is awarded: a) a sum for the pecuniary damage suffered, b) a sum for non-pecuniary damage suffered and c) a sum for expenses and legal costs incurred before both the national courts[47] and the Strasbourg Court.

However, in practice, in cases of "reasonable time", the ECtHR rarely awards a compensatory amount for the pecuniary damage suffered and rejects the applicant's claims based on the following formalised justification: "*The Court points out that its finding of a violation of the Convention was based exclusively on the breach of the applicant's right to have their case determined within a "reasonable time". In those circumstances, it discerns no causal link between the breach established and any alleged pecuniary damage sustained by the applicants; this aspect of their claims must therefore be dismissed*"[48].

On the other hand, as far as non-pecuniary damage is concerned, ECtHR case-law states that non-pecuniary damage, is always acknowledged, which redresses the applicant for the anxiety, inconvenience and uncertainty caused by the violation. The ECtHR enjoys a certain amount of discretion in the exercise of power conferred by Article 41, as is borne out by the use of the terms "just" and "if necessary", but any satisfaction awarded should be calculated on an equitable basis[49].

In *Apicella v. Italy*, judgment of 10.11.2004, the ECHR lays down the general principles to be followed in the calculation of the amount, and specifically states that[50]: "*As regards an equitable assessment of the non-pecuniary damage sustained as a result of the length of proceedings, the Court considers that a sum varying between EUR 1,000 and 1,500 per year's duration of the proceedings (and not per year's delay) is a base figure for the relevant calculation. The outcome of the domestic proceedings (whether the applicant loses, wins or ultimately reaches a friendly settlement) is immaterial to the non-pecuniary damage sustained on account of the length of the proceedings. The aggregate amount will be increased by EUR 2,000 if the stakes involved in the dispute are considerable, such as in cases concerning labour law, civil status and capacity, pensions, or particularly serious proceedings relating to a person's health or life. The basic award will be reduced in accordance with the number of courts dealing with the case throughout the duration of the proceedings, the conduct of the applicant - particularly the number of months or years due to unjustified adjournments for which the applicant is responsible - what is at stake in the dispute - for example where the financial consequences are of little importance for the applicant - and on the basis of the standard of living in the country concerned. A reduction may also be envisaged where the applicant has been only briefly involved in the proceedings, having continued them in his or her capacity as heir.*"

Furthermore, a new factor was introduced in two Greek cases, namely *Arvanitaki-Roboti and Others v. Greece* (91 applicants) and *Kakamoukas and Others v. Greece* (58 applicants) [GC], judgments of 15.02.2008, which is that the number of

46. Ph. Papadopoulos, op.cit., p.187

47. ECtHR, *Capuano v. Italy* judgment of 25 May 1987, § 37

48. ECtHR, *Papastefanou v. Greece*, judgment of 20 March 2008, § 24

49. ECtHR, *Guzzardi v. Italy,* judgment of 6 November 1980, série A no 39, p. 42, § 114

50. Frédéric Edel, «The length of civil and criminal proceedings in the case-law of the European Court of Human Rights», Human Rights file, No. 16, Strasbourg (1996-2007), Council of Europe, pp.93-100, on p.97.

participants in a proceeding reduces the sum awarded for non-pecuniary damage. In particular, the ECtHR held that *"Where common proceedings have been found to be excessively long, the Court must take account of the manner in which the number of participants in such proceedings may influence the level of distress, inconvenience and uncertainty affecting each of them. Thus, a high number of participants will very probably have an impact on the amount of just satisfaction to be awarded in respect of non-pecuniary damage. Such an approach is based on the fact that the number of individuals participating in common proceedings before the domestic courts is not neutral from the perspective of the non-pecuniary damage that may be sustained by each of them as a result of the length of those proceedings when compared with the non-pecuniary damage that would be sustained by an individual who had brought identical proceedings on an individual basis."*

Moreover, the importance of this factor was underlined by Vice-President Mr. Bratza, an opinion shared by Vice-President Mr. Rozakis, who noted that: *"(…) However, where, as in the present case, the complaint of undue length of proceedings is made by a large number of parties to the same set of civil proceedings, a further consideration comes into play, namely the proportionality of the overall award. Although it is the Convention right of each individual which is found to have been violated, the total amount of the award under Article 41 should not be out of all proportion to the nature and seriousness of the violation found in the case, including the fact that the violation found relates to the excessive length of a single set of proceedings. The importance of upholding this principle justifies the making of a substantial reduction in the amount which would have been awarded to each applicant, had he or she been the only party, or one of a small number of parties, to the proceedings."*

However, great concern is voiced by Judge Zupančič and Judge Zagrebelsky on the way that the sum for non-pecuniary damage is generally calculated, this voice of dissent points out that: *"(…) That being said, we would add that it is understandable that the Court was concerned by the sheer scale of the amounts in question if they were not to be reduced. In our opinion, however, this is the inevitable consequence of several questionable aspects of the Court's practice with regard to the application of Article 41 in the event of a violation of the right to a reasonable length of proceedings. These range from an almost automatic assumption that non-pecuniary damage has been sustained, without the requirement of any evidence or argument, and the use of mathematical calculation criteria which take into account the entire length of the proceedings, even the period recognised as justified, to the use in this area of scales which are unrelated to the Court's practice concerning violations which cause considerably greater suffering to the victims (Articles 2, 3, 8, 10, etc.)".*

For example, in *Kontogeorgas v. Greece* judgment of 21.02.2008, a case concerning an action for damages instituted before the civil courts and which lasted thirteen (13) years and eight (8) months for three instances of jurisdiction, the ECtHR awarded the applicant, for non-pecuniary damages suffered, the amount of 14,000 Euros. Furthermore, in the case *Loukas v. Greece* judgment of 29.05.2008, a case concerning proceedings brought before the Administrative Courts which lasted eleven (11) years and three (3) months for three instances of jurisdiction, for which the amount of 10,000 Euros was awarded. Finally in *Aggelopoulou v. Greece* judgment of 04.12.2008, which was a case concerning the offence of libel before criminal courts, which lasted five (5) years and seven (7) months for one instance of jurisdiction, the amount of 7, 000 Euros was awarded.

Finally, regarding costs and expenses in Greek cases, the awarded amount ranges from 500 Euros to 2,000 Euros, while usually the amount of 1,500 euros is awarded. The Court reiterates in many cases that costs and expenses will not be awarded under Article 41, unless it is established that they were actually and necessarily incurred and were also of a reasonable amount[51].

IV. Remedies to redress the violation of the right to be tried within a reasonable time

Ubi Jus ibi remendium: When there is a right, there should be a remedy.

At European level[52], as far as the right of reasonable time and the pursuit of appropriate measures provided to redress the violation are

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51. *Iatrides v. Greece* (just satisfaction), [GC], no. 31107/96, § 54, CEDH 2000-XI

52. European Commission for Democracy through law (Venice Commission), «Report on the Effectiveness of national remedies in respect of excessive length of proceedings», adopted by the Venice Commission at its 69th Plenary Session, Venice 15-16 December 2006, Council of Europe

concerned, various views have been expressed and various measures have been taken into account *ex officio* by the court or at the request of an applicant. In some countries these measures have been incorporated into legislation[53], whereas in others it appears to have been set out or developed through their case-law[54].

Measures, aiming at the *restitutio in integrum* of the prejudice suffered, are preferred. In criminal proceedings, such measures are the reduction or mitigation of sentence, the discontinuation of proceedings, and acquittal of the accused person or discharge from punishment (e.g. deprivation of political rights). With respect to civil and administrative proceedings, such measures are applicable only to pending proceedings and consist of an acceleration of the remainder of the proceedings.

The mere award of an amount for pecuniary or non-pecuniary damage sustained, which is the most common measure applicable to civil and administrative proceedings, is a measure offered *a posteriori*, and therefore cannot be considered to fully restore the damage that the party sustained. However, as mentioned above, the amount of pecuniary compensation awarded should be adequate and sufficient and conform to the jurisprudence of the ECtHR. Otherwise, the damages would not amount to true reparation of the violation.

Possibilities and challenges within Greek legal system:

a. Reasonable time as a reason for reducing sentences

This is widely accepted by the legal systems of many European countries such as Germany, Belgium, Estonia, Finland, Iceland, the Netherlands and the United Kingdom. It is also accepted by the ECtHR[55] as well as the body of Greek theory[56].

In the Greek legal order, exceeding reasonable time could – with the sole purpose of achieving a fair trial – actually be a mitigating factor, indirectly provided by Article 84 § 2 of the Penal Code (hereinafter "PC"), to be taken into account at the stage of assessment of the sentence and thus reducing it to the lower limit provided by law[57].

Article 84 § 1 of the PC provides the following: "*The penalty is also reduced to the extent provided in the previous article and where the court finds that there are mitigating circumstances''.*

Furthermore, Article 84 § 2 of the PC reads as follow: "Mitigating circumstances are particularly....". From the proper (legal) form of this provision and more specifically from the use of the term "particularly", it follows that the list of mitigating circumstances by law is illustrative. Therefore, there is a distinction between known mitigating circumstances listed by name under the law – namely, a) the prior honest, individual, family, professional and social life of the offender in general terms, b) committing an act due to non humble causes or destitution, c) the offender being forced to act due to the misconduct of the victim, d) demonstration of sincere remorse by the offender and the pursuit of eliminating or reducing the consequences and finally e) the proper conduct of the offender for a relatively long pe-

53. Andorra, Austria, Bosnia and Herzegovina, Bulgaria, Czech Republic, Estonia, Finland, France, Georgia, Hungary, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Ukraine.

54. For example: by the Courts of Estonia, Germany, Netherlands, Switzerland etc.

55. *Eckle v. Germany judgment of* 15 July 1982

56. I. Anagnostopoulos, «Violation of the right of the fair trial», Poinika Chronika ("Penal Chronicals "legal journal), p. 5 et seq., D. Spinellis, "The reasonable time of the criminal proceedings", Nomiko Vima (legal Journal) 1998, p. 1583, L. Kotsalis - G. Triantafyllou (eds.), Human Rights and Criminal Law, Publisher: Ant. N. Sakkoulas, Athens-Komotini (2007), p. 148, K. Chrysogonos, «The reopening of criminal proceedings following a judgment of the ECtR", Nomiko Vima (legal journal) 2001, p. 1112 et seq., Ip. Milonas, «The importance of the case-law on the right of the fair trial, for the Greek criminal procedure", Poinika Chronika ("Penal Chronicals "legal Journal") p. 805 et seq., V. Chirdaris op.cit p. 1843, Ph. Papadopoulos, op. cit., p. 183 et seq. The same issue is dealt with in judgment no. 1454/1997 of the Court of Cassation (Nomiko Vima 1998, with commentary by Chr. Argyropoulos), which rejected the grounds of appeal of the cassation for not taking into account the mitigating element of the excessive length of proceedings for the reason that it was obvious from the minutes of the proceedings that the submission of such an independent claim indirectly accepted the possibility of submission.

57. Nomiko Vima 54 (2006), with commentary by V. Chirdaris, op.cit., p.1842

riod of after committing the act – and anonymous mitigating circumstances which should be determined according to the specific circumstances of each case.

So, according to the above, in the case that a degradation of the defensive rights of the accused means unfair criminal proceedings, the accused is then provided the right to request a reduced sentence, citing a violation of Article 6 § 1 of the ECtHR, in that the case was no examined within a reasonable time in conjunction with Articles 83, 84 § 2 of the PC[58]. Then, the national courts on the one hand have a duty to go through the acknowledgement of non-reasonable time for the procedure and on the other hand to reduce the sentence which should be sufficient and implicit – with duly motivated judgment – so that the purpose of reducing the sentence is compensation of the applicant who suffered damage due to the excessive length of the proceedings. It would also be appropriate for the judgment to state what penalty would be imposed in the absence of compensation for the excessive length of proceedings. In the event that these two conditions are met, the defendant then ceases to have the capacity of a victim (victim status)[59].

b. A reasonable time as a reason for discontinuation of criminal proceedings

Acknowledgement of the excessive length of a case adjudicate (absolute) as a procedural bar to proceedings[60] under the Greek legal system is based essentially on the obvious sociological factor regarding the deterioration of the criminal phenomenon over time. A long duration, from the actual date of the crime until the time when punishment is enforced, weakens the purpose of such a punishment and makes it unworthy of being imposed.

This option is used only in "exceptional cases", in particular by the courts of the Netherlands, Switzerland and Germany. The English courts apply the measure only in certain circumstances; however, it is necessary to establish that the delay is solely due to the conduct of the judiciary. Furthermore, even in such a case, the defendant must prove that the delay affected the fairness of the trial and therefore damage was incurred. However, the trial is not annulled if the results of its unfairness can be rectified during its duration. Similarly, the Belgian courts accept that for the trial to be abolished the presentation of evidence or the defensive rights of the accused must have been affected[61].

The way that the Supreme Court of New Zealand treats the excess of reasonable time is remarkable. Among other matters it held in *Russel v. Steward* (1988) BCL 1981 and *Watson v. Clarke* (1988) BCL 1980 that: The excessive delay in the administration of justice could constitute an abuse of process, depending on the circumstances of the case. If the delay is such that it can be viewed a failure or be presumed as having a negative effect on the fairness of the proceedings (the existence of such depends on the nature of the case) then this is deemed to be abuse and the court must acquit the accused person. The implicit damage is caused in cases where clear evidence of deterioration is apparent.

c. Reopening of the procedure under Article 525 para. 1 subsection 5 of the CPP (Code of Penal Procedure)

Finally, in recent years many State Parties have gone to retrial before national – particularly criminal – courts following a judgment of the ECtHR, which holds violation of the Convention[62]. The repetition of this process plays a prominent role in the enforcement of judgments of the ECHR. In many cases it is the only effective restorative measure (restitutio in integrum) against the adverse breaches of the Convention.

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58. L. Kotsalis - G.Triantafyllou (eds.), op. cit. p.148

59. Stefan Trechsel (2006), Human Rights in Criminal Proceedings, Oxford, p. 148

60. I. Anagnostopoulos, op. cit. p. 3, L. Kotsalis - G.Triantafyllou (eds.), op. cit. p. 151, Ph. Papadopoulos, op. cit., p. 196

61. European Commission for Democracy through law (Venice Commission), op.cit, p. 21

62. Such an explicit provision is provided in at least fourteen other Contracting States (Austria, Denmark, Switzerland, France, Germany, Bulgaria, Croatia, Lithuania, Poland, Slovenia, Luxembourg, Malta, Chech Republic, Norway), For a detailed analysis, see K. Chrysogonos, «The reopening of criminal proceedings following a judgment of the ECtHR», Nomiko Vima 2001, p. 1110 et. seq.

Article 525 par. 1 subsection 5 of the CCP[63] states the following: "A criminal process which was completed by a final decision is repeated in the interest of the sentenced for a misdemeanor or felony only (in the following situations): (...) 5) If a decision of the European Court of Human Rights found violation of the right to fairness of the procedure or substantive provision applied".

So, from the proper wording of this provision it follows that the accused person, in the event of the violation of any right which is a component of a fair trial including the right to trial within a reasonable time – as mentioned above this right is a safety net for the fairness of the proceedings, has the ability to request the reopening of the proceedings and to request that the court resumes the procedure, taking appropriate measures to remedy the damage suffered by the defendant through the infringement

However, the Court of Cassation in judgment no. 1638/2002[64] rejected a retrial request following a Strasbourg judgment against Greece on the grounds of excessive length of proceedings and stated the following: "The repetition of the procedure is under the provision that the observed violation of the applicant's right affected the judgment of the criminal court, particularly in a negative way, whereas the compensation for damage to the applicant can be achieved by repeating the process. The application which referred to the excessive length of criminal proceedings is inadmissible because it does not follow that exceeding the reasonable time of proceedings ... had a negative impact on the judgment of the criminal courts that sentenced him for murder with intent ... in addition exceeding the reasonable time is already an accomplished fact which cannot be retrospectively refuted. Furthermore, the Court of Cassation with its judgment (no. 717/2004)[65], on a similar case, extends the above line of thought as follows: "The desire of the applicant to have mitigating circumstances recognized in order to be awarded a reduced punishment, through repetition of procedure, is not related to the duration of the criminal proceedings and to the cause of the applicant's failure."

It is obvious that in cases where there has been a violation of the right to trial within a reasonable time, it is impossible through repetition of the procedure to achieve restoration of the violation itself i.e. the adjudication within a reasonable time.

However, the Court of Cassation, acknowledges the above with jurisprudential construction, which limits the scope of Article 525 § 1 subsection 5 CPC quite arbitrarily and without any legal basis, excluding in this way the concept of reasonable time from the fair nature of the proceedings, although as mentioned above, the right to a fair trial within a reasonable time is a safety net for the fairness of a trial as a whole and surpasses the purpose of the legislature, excluding the defendant from the restoration of any damage he has sustained by any means (for example, the reduction of sentence or acquittal).

Finally, under Article 58 of the Draft Law of the Code of Civil Procedure, such a measure is also provided in civil procedures, and establishes that the finding of a breach of fair trial by the ECtHR, constitutes a new foundation for the reopening of a case.

V. Conclusion

The right presented in this article appears as an aspect of the broader fundamental right to a fair trial. Therefore, it is accepted by the Court of Cassation, which is the highest appellate court in our country. However, the real consequences of the violation of the right of trial within a reasonable time are not only harmful but often disastrous to the party. Consequently, the damage that the party suffered cannot be restored by the pecuniary satisfaction awarded by the ECtHR nor by the exclusion from the Greek Court of Cassation that the violation of this right does not affect the fairness of the proceedings. The State needs to seek full remedial measures for the victims of the breach. This is the only way that the obligation of real and effective consideration of the violated right will be achieved. It is never too late...

63. Subsection 5 of par. 1 was added by article 11 of the Law No. 2865/2000 (Gazette A271) and come into force on 19.12.2000, see for the reopening of the proceedings (CPP par.1 subsection 5), I. Anagnostopoulos, op.cit., p. 6

64. Poinika Chronika ("Penal Chronicals "legal journal) (2003), p. 607 et seq.

65. Poinika Chronika ("Penal Chronicals" legal journal) (2005), p.252, with information note by D. Christopoulos, p. 252.

The Greek part of the Strasbourg Court

by Vassilis Chirdaris,
member of the Athens Bar Association,
Supreme Court Attorney

The European Court of Human Rights (ECtHR) is familiar to all of us. This "Court", however, is not just buildings and judgments but it has also a soul that fulfills its central aim and purpose, which is the interpretation and application of the European Convention on Human Rights for the protection of Human Rights and the protection of fundamental freedoms (known as the "ECHR"). The "soul" of the Court is its people, the judges, the *référendaires*, the employees and all who work inside this huge construct in Strasbourg which covers an area of 28.000 m².

Given the occasion of the celebration for the completion of 50 years of life of the ECtHR (1959-2009) held by the Athens Bar Association, it is an opportune moment to get to know all the Greek judges who have served and who continue to serve the Strasbourg Court and the members of the Greek Section of this Court. Moreover, it will be useful to have a glance at the data of the Greek cases.

1. The Greek judges

As a country, we have the honour to be represented by distinguished figures who have served as judges.

a) Georgios Maridakis

Was born in Sifnos in 1890. He was declared a Doctor of the Law School of Athens in 1911. He served as a lawyer in Athens, being registered at the Athens Bar Association since 1913. He was elected as Professor of Private International Law at the Law School of Athens in 1925. He was elected as a member of the Athens' Academy in 1940 and as its president in 1951. He was appointed Minister of Justice in 1952 and was elected Chancellor of the University of Athens in 1957. In 1954 and in 1961 he taught at The Hague Academy of International Law. During the period 1929-1945, he was a member of the committee that redacted the Greek Civil Code and over the period 1952-1958 he was the President of the committee which redacted the Greek Code of Private Shipping Law.

He served as *the first Greek Judge of the European Court of Human Rights for 11 years from 1959 since 1970. He died in Athens in 1979.*

b) Dimitrios Evrigenis

Was born in Thessaloniki in 1925. He was declared a Doctor of the Law School of Thessaloniki in 1951. He was elected Professor of Private International Law at the Law School of Thessaloniki in 1965. He was a legal consultant at the Ministry of Foreign Affairs in 1965. Amongst other things, he taught at the University of Berlin (1964), at the International School of Comparative Law in Luxembourg (1962), at the International Centre of Luxembourg for the study and research of European Law (1964, 1965). In 1975, he served as a Visiting-Professor at the Law School of the University of Ohio in the U.S.A.

He served as a *Judge of the European Court of Human Rights for 11 years, from 1975 since 1986. He died in 1986.*

c) Nicolaos Valticos

Was born in 1918. He was a registered lawyer at the Athens Bar Association from 1941. From 1976 until 1981 he was the deputy director of the International Labour Office. From 1972 until 1981 he served as Assistant Professor at the Law School of Geneva. He was a member of the Institute of International Law and a member of the Permanent Court of Arbitration in The Hague. He was a corresponding member of the Academy of Athens. He was a member of the American Society of International Law, a member of the French Society of International Law and also a member of the Greek Society of International Law.

He served as a *Judge of the European Court of*

Human Rights for a period of 12 years, from 1986 since 1998. He died in 2003.

d) Christos Rozakis

Was born in Athens in 1941. He graduated from the Law School of Athens in 1965. He was Doctor of the University of Illinois in 1973. Lecturer (1975 to 1977), Assistant Professor (from 1977 since 1980), Professor holding chair in Public International Law at Pantios University of Social and Political Sciences (1980-1986), Professor in the area of Public International Law at the School of Law, Economics and Political Sciences (1986 to the present today). Dean of the School of Law, Economics and Political Sciences (1991-1994).

Member of the European Commission of Human Rights for 11 years, from 1987 to 1998.

Judge of the European Court of Human Rights and Section President of the European Court of Human Rights since 1998. Vice-President of the European Court of Human Rights from 1998 to the present today.

His tenure at the ECtHR will be complete on May 2011[1]. Already he has served tenure as a judge for 11 years and totally 22 years at the Strasbourg organs (Commission and Court).

2. The Greek Registry of Strasbourg

The Greek Division of the ECtHR is comprised of the following lawyers:

a) Nicolaos Sansonetis

Was born in Athens in 1958. Graduate of the Law School at the University of Strasbourg. DEA Public Law at the University of Paris I (Pantheon-Sorbonne). Since 1987 he has been working as a *référendaire* of the European Court of Human Rights, this is a period of 12 years, and he continues working there to this day.

b) Marialena Tsirli

Was born in Thessaloniki in 1967. Graduate of the Greek-French School of Ursulines. Graduate of the Law School at the University of Athens (1989). D.E.A. Droit Public at the Law School of Robert Schuman at the University of Strasbourg (1991). Since 1992 she is registered at the Athens Bar Association. She was elected as a Doctor of Law at the Law School of Robert Schuman at the University of Strasbourg (1994). Since 1994 she has been an employee of the Council of Europe. She works at the Registry of the European Commission of Human Rights. Since 2004 she has been the Head of the Division dealing with Greek cases. She has worked for a total of 15 years in the Strasbourg organs and for a period of 11 years at the ECtHR.

c) Panayotis Voyatzis

Was born in Athens in 1970. Graduate of the Law School of Athens in 1992. DEA Public Law at the University of Paris I (Pantheon-Sorbonne). Doctor of the University of Paris I (Pantheon-Sorbonne) in 1999, the topic of his doctorate was "La Cour *européenne des droits de l'homme et la liberté d' expression*". Since 1994 he has been registered as a lawyer at the Athens Bar Association. Since 2003 he has been working as a *référendaire* at the European Court of Human Rights. He has worked at the ECtHR for a total of 6 years.

3. Some statistical data of Greek cases at the ECtHR

A few words will be said on the Greek cases at Strasbourg. It is a fact that the number of Greek cases is huge. Over the last few years around 500 applications against Greece are lodged annually that are dealt by the Greek Division of the Court. This means that there are many cases to be administered by personnel of just three. Despite this, the time from the lodging of an individual application with a completed file until the issuance of a judgment in many cases is only two (2) years.

For the period 1959-2008 the ECtHR dealt with 2,825 Greek cases. From these 2.344 were declared inadmissible (around 83%) and 481 judgments were issued[2] (approximately 17%). From the

1. After the ratification of Protocol No. 14 by Russia, which comes into force on 1.06.2010

2. From these 428 judgments were issued by Strasbourg in the decade 1998-2008 (operation of the ECtHR

judgments issued 419 held that there was a violation, while those declaring that there was no violation were only 11 (around 2.3%), and also 51 other judgments were issued (striking out of the list and so on).

Over this period *we were the 8th country out of a total of 47 countries in the Council of Europe regarding the number of judgments in which it was held that there was a violation*. First, is Turkey with 1,676 and second is Italy with 1,495 judgments[3].Having the least of these judgments are Andorra (2) and Lichtenstein (4). From the larger countries Spain has a small number (39) and Germany (81), with remarkably small percentages are Iceland (8), Ireland (13), Norway (19), Sweden (42), Cyprus (44), Switzerland (58).

Regarding these kind of violations, as far as our country is concerned, remarkably the facts are that:

i) We are the 1st country regarding violation of Article 9 of the ECHR (freedom of thought, conscience and religion) with 8 judgments. Second are Bulgaria and Ukraine with 3 judgments each. From a sum of 25 judgments regarding this kind of violation, Greece holds a percentage of 32%.

ii) We are the 3rd country from the 47 countries of the Council of Europe regarding violation of the right to be tried within a reasonable time (Article 6 (1) of the ECHR). From the 3559 judgments of the ECtHR regarding the violation of reasonable time, 279 cases concern Greece (7.84%!). The greatest number of judgments are issued against Greece (1083) and Poland (310).

iii) We are the 5th country in Europe for violation of Article 13 of the ECHR. From the 997 judgments of the ECtHR, 75 cases have been issued against Greece (percentage of 7.5%!).The greatest number of judgments are issued against Slovenia (195) and secondly against Turkey (189).

iv) We are the 7th country in Europe regarding violation of the right of protection of property (Article 1 of the Protocol No.1 of the ECHR). From 1931 judgments of the ECHR, 55 cases were issued against Greece. The greatest number of judgments was issued against Turkey (458), secondly, Russia (337) and thirdly, Romania (281).

v) We are the 7th country in Europe regarding violation of the right to a fair trial (Article 6 (1) of the ECHR), having 90 cases. The greatest number were issued against Turkey (531), secondly against Russia (401) and thirdly, against Ukraine (327).

vi) Finally we are the 9th country of Europe concerning violation of the right of freedom of expression (Article 10 of the ECHR), with 7 cases. The greatest number of judgments were issued against Turkey (170) and secondly against Austria (32).

Let's hope that over the next half century of operation of the Court, our country will limit these sad percentages and that it will cease to be located in these top positions regarding breach of human rights. It is one sector in which we do not need to be champions.

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under the new form according the additional Protocol 11)

3. Russia follows with 605 holding third place, fourth is France with 556, fifth is Poland with 551, sixth is Ukraine with 476 and seventh country (before Greece) is Romania with 431 judgments.

Dix arrêts importants dans la jurisprudence de la Cour européenne des droits de l'homme

P. Voyatzis,

Juriste à la Cour européenne des droits de l'homme

1. *Engel et autres c. Pays-Bas*, arrêt du 8 juin 1976, série A n° 22

La Cour inaugure ici l'application de la technique des « notions autonomes ». Elle fait entendre ainsi que son interprétation des termes inclus dans la Convention ne dépend pas forcément de leur qualification juridique au sein des ordres nationaux. Afin de garantir l'homogénéité dans l'interprétation de la Convention, le juge européen peut ainsi recourir aux « notions autonomes », ce qui lui permettra dans la jurisprudence subséquente d'étendre considérablement le champ d'application des droits garantis par la Convention.

2. *Airey c. Irlande*, arrêt du 9 octobre 1979, série A n° 32

La Cour reconnaît la dimension socio-économique des droits consacrés par la Convention. Elle admet que si la Convention « énonce pour l'essentiel des droits civils et politiques, nombre d'entre eux ont des prolongements d'ordre économique et social ». Elle entérine aussi l'application du principe des « obligations positives », déjà énoncé dans l'arrêt *Marckx c. Belgique* (13 juin 1979, § 31, série A n° 31). Dans *Airey*, la Cour souligne que l'État « ne saurait se borner à demeurer passif » et que l'effectivité des droits énoncés dans la Convention peut requérir des « mesures positives » de sa part.

3. *Sporrong et Lönnroth c. Suède*, arrêt du 23 septembre 1982, série A n° 52

La Cour définit les trois normes contenues dans l'article 1 du Protocole n° 1. Une règle générale, celle qui énonce le principe du respect de la propriété et deux spéciales : celle qui vise la privation de propriété et celle qui concerne le pouvoir de l'Etat de réglementer l'usage des biens.

4. *Soering c. Royaume-Uni*, arrêt du 7 juillet 1989, série A n° 161

La Cour considère que l'extradition d'un individu par un Etat partie à la Convention vers un Etat tiers peut constituer une violation de l'article 3 de la Convention pour les mauvais traitements que la personne extradée est susceptible de subir dans le pays de destination. Le juge européen consacre en effet le mécanisme de la « protection par ricochet » en admettant qu'il s'avérerait incompatible avec les valeurs sous-jacentes à la Convention si un Etat contractant remettait sciemment un fugitif à un autre Etat où il existe des motifs sérieux de croire qu'un risque de torture menace l'intéressé. La Cour reconnaît ainsi la responsabilité d'un Etat membre de la Convention pour des actes accomplis par ses organes (ici, la mesure d'éloignement) mais qui entraînent des effets produits en dehors de son territoire.

5. *López Ostra c. Espagne*, arrêt du 9 décembre 1994, série A n° 303-C

Cet arrêt énonce le « droit à un environnement sain » dans le cadre de l'article 8 de la Convention en considérant que « des atteintes graves à l'environnement peuvent affecter le bien-être d'une personne et la priver de la jouissance de son domicile de manière à nuire à sa vie privée et familiale ». Il confirme aussi l'application de la Convention aux rapports interindividuels, bref son « effet horizontal ».

6. Parti communiste unifié de Turquie et autres c. Turquie, arrêt du 30 janvier 1998, *Recueil des arrêts et décisions* 1998-I

Après avoir réaffirmé que la démocratie représente un élément fondamental de « l'ordre public européen » (principe énoncé pour la première fois dans *Loizidou c. Turquie* (exception préliminaires), 23 mars 1995, § 75, série A n° 310), la Cour esquisse les idéaux qui incarnent la conception européenne de la démocratie. En outre, il s'agit du premier arrêt qui inclut les partis politiques dans le champ d'application de l'article 11.

7. *Kudła c. Pologne* [GC], nº 30210/96, arrêt du 26 octobre 2000, CEDH 2000-XI

La Cour affirme pour la première fois que « l'article 3 impose à l'Etat de s'assurer que tout prisonnier est détenu dans des conditions qui sont compatibles avec le respect de la dignité humaine, que les modalités d'exécution de la mesure ne soumettent pas l'intéressé à une détresse ou à une épreuve d'une intensité qui excède le niveau inévitable de souffrance inhérent à la détention et que, eu égard aux exigences pratiques de l'emprisonnement, la santé et le bien-être du prisonnier sont assurés de manière adéquate, notamment par l'administration des soins médicaux requis ». Cette jurisprudence est l'aboutissement d'une construction prétorienne, puisque la Convention ne consacrait pas en soi un droit à des conditions de détention déterminées. La Cour fait ainsi référence à deux obligations qui pèsent sur l'Etat en ce qui concerne les conditions de détention d'une personne. La première, plus générale, est de contenu négatif : l'Etat doit s'abstenir de soumettre le détenu à des conditions de détention qui ne sont pas compatibles avec la dignité humaine. La seconde, plus spécifique, est de connotation positive : l'Etat doit administrer des soins médicaux requis pour assurer « la santé et le bien-être » de la personne détenue.

8. *Pretty c. Royaume-Uni*, nº 2346/02, arrêt du 29 avril 2002, CEDH 2002-III

Le juge de Strasbourg consacre de manière solennelle la notion d'autonomie personnelle comme « un principe important qui sous-tend l'interprétation des garanties de l'article 8 ». Elle ouvre ainsi la voie à l'approfondissement de la jurisprudence sur le droit de disposer de son corps, en tant que composante du droit à la vie privée.

9. *Broniowski c. Pologne* [GC], nº 31443/96, arrêt du 22 juin 2004, CEDH 2004-V

Il s'agit du premier « arrêt pilote » de la Cour ayant trait au droit de propriété et aux affaires « relatives à la rivière Bourg ». A travers ce nouvel outil, la Cour aspire à renforcer l'effectivité de ses arrêts : elle traite dans le cadre d'une seule procédure de groupes d'affaires identiques tirant leur origine du même problème systémique au sein de l'ordre juridique interne. La Cour peut ainsi identifier dans un « arrêt pilote » les déficiences générales de l'ordre juridique interne et indiquer au Gouvernement défendeur la manière dont il pourrait parvenir à les éliminer.

10. *D.H. et autres c. République tchèque* [GC], nº 57325/00, arrêt du 13 novembre 2007

La Cour définit le principe de la « discrimination indirecte » dans une affaire où des enfants d'origine rom avaient été placés dans des écoles spéciales destinées aux enfants atteints de déficiences intellectuelles. Le juge européen relève qu'il s'agit d'« une différence de traitement [consistant] en l'effet préjudiciable disproportionné d'une politique ou d'une mesure qui, bien que formulée de manière neutre, a un effet discriminatoire sur un groupe », et n'exige pas nécessairement qu'il y ait une intention discriminatoire. La Cour met en valeur le rôle des statistiques qui peuvent constituer le commencement de preuve à apporter par l'intéressé. Enfin, elle opère un renversement de la charge de la preuve, qui se transfère à l'Etat, lorsque les requérants établissent une présomption réfragable de discrimination indirecte par le biais des statistiques.

La liberté de l'Europe

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Lysias, métèque Athénien, à un de ses discours intitulé *« Éloge funèbre des guerriers d'Athènes, morts en secourant les Corinthiens »*, à l'occasion d'une de guerres dites de Corinthe, se réfère à la bravoure et au patriotisme de ceux qui s'étaient précédemment défendus contre les invasives Perses et relève que les combats pour écarter la conquête de la Grèce par ces barbares, parmi d'autres, « se consolidèrent la liberté en Europe ».

Ce n'est pas le moment pour se référer en plus de détailles à l'orateur d'Athènes du 5ième siècle avant J-C. et à ses discours, mais l'actuel obscurité internationale nous fait penser spontanément à la question : où est aujourd'hui cette Europe, pour laquelle l'orateur parla avec tant de souci et de tendresse ?

Une Europe, qui, comme notre monde entier, est assiégée par la nature, qui se trouve dehors devant notre porte, moissonneur sauvage et vengent, tenant à la main la même faucille de la mort, qu'on lui avait donnée, quand on moissonnait son innocence, ayant le bleu du ciel et étant justement réglée.

Une Europe, qui, comme notre monde entier, est plongée dans ce silence étourdissant, dans lequel chaque fois que nous sentons une fleur, un enfant affamé commence silencieusement son dernier voyage pour un monde, où le pain fleurit aux branches et l'amour murmure dans l'air.

Une Europe, qui, dans sa prospérité épaisse, ne connaît pas et ne connaîtra jamais, que chaque fois que nous tournons une page de notre séduisante étude judiciaire, un de ces déshérités de notre temps, abandonne pour toujours l'espoir de se réfugier auprès la scène de la justice.

Alors nous, qui nous n'avons pas encore cessé de se mettre en colère mais aussi en même temps d'espérer, on peut dire sincèrement que cette Europe, avec sa plus haute expression de sa liberté, sa Justice, c'est-à-dire la meilleure des qualités humaines, se trouve aujourd'hui, ici, à son berceau.

Pour nous rappeler que :

Selon sa jurisprudence constante, la Cour européenne des droits de l'homme, tout en n'ayant pas pour tâche de se substituer aux juridictions internes, et bien que « *le « droit à un tribunal », dont le droit d'accès constitue un aspect particulier, n'est pas absolu et se prête à des limitations implicitement admises … toutefois, ces limitations ne sauraient restreindre l'accès ouvert à un justiciable de manière ou à un point tels que son droit à un tribunal s'en trouve atteint dans sa substance même ; …. elles (: les limitations) ne se concilient avec l'article 6 § 1 que si elles tendent à un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé…* » (*Zouboulidis c. Grèce,* arrêt du 14.12.2006).

Ce qui précède correspond exactement à ce qu'Aristote nous a enseigné, c'est-à-dire que «*… ce juste est le milieu, quand l'injuste est le contraire de l'analogue, par ce que l'analogie est le milieu, et le juste est analogie » (*Aristote, *« Éthique à Nicomaque »).*

« La Cour rappelle que la présomption d'innocence se trouve méconnue si une décision judiciaire concernant un prévenu reflète le sentiment qu'il est coupable, alors que sa culpabilité n'a pas été légalement établie au préalable. Il suffit, même en l'absence de constat formel, d'une motivation donnant à penser que le juge considère l'intéressé comme coupable … A cet égard, la Cour souligne l'importance du choix des termes par les agents de l'Etat dans les déclarations qu'ils formulent avant qu'une personne n'ait été jugée et reconnue coupable d'une infraction » (Paraponiaris c. Grèce, arrêt du 25.9.2008*).*

C'est ça exactement que Démosthène criaillait à voix sonore à ses discours en disant que : « on ne peut nommer personne comme assassin, sacrilège, traître et c'est ainsi pour les accusations pareilles, que si sa culpabilité soit prouvée et que sa condamnation prononcée» (Démosthène, *« Contre Aristocrate »).*

«Il faut d'abord que le tribunal ne manifeste subjectivement aucun parti pris ni préjugé personnel » (Kleyn et autres c. Pays-Bas, arrêt du 06.05.2003).

« …Même les apparences peuvent revêtir de l'importance. Il y va de la confiance que les tribunaux d'une société démocratique se doivent d'inspirer aux justiciables. En conséquence, tout juge à l'égard duquel il existe une raison légitime de redouter un défaut d'impartialité doit se déporter… » (*Pétur Thór Sigurðsson c. Islande*, arrêt du 10.04.2003).

Il s'agit là de ce que Solon, le grand législateur qui a conduit l'humanité à passer de la conception de la punition du coupable comme résultant de la revanche de la part des dieux à la conception de la punition comme un acte de la part de l'État, résultant des choix personnels de chacun et de ses actions illicites, a inclu à la suite du serment que les juges Athéniens étaient obligés de prêter avant d'entreprendre leurs fonctions. Ce serment stipulait parmi d'autres les suivants : *« Je ne serai pas rancunier contre personne et je ne laisserai pas personne me convaincre là-dessus ; en outre je déciderai conformément aux lois. De plus j'entendrai tous les deux l'accusateur et le défendeur»* (Solon, *«Lois»).*

Nous pourrions ainsi parler pendant des jours pour les arrêts de la CEDH, qui ont ouvert des voies lumineuses vers l'humanisation de notre droit ; pour les arrêts qui, pour la première fois, d'une sensibilité pénétrante, ont touché et ont jugé sur des sujets qui constituaient jadis pour les ordres juridiques nationaux des profondeurs inaccessibles.

C'est alors cette *Justice de l'Europe,* qui est maintenant notre Justice, qu'il faut –malgré ses exagérations dans certains cas- aimer, parce que la Justice est en soi-même d'une beauté merveilleuse, puisque elle est considérée comme *« la meilleure des qualités et ni l'étoile du crépuscule ni l'étoile de l'aube sont tellement admirables qu'elle »* (Aristote, *« Éthique Nicomaque »).*

Traduction: Spyridoula Glentzi