On the Legitimacy of the European Court of Human Rights' Judgments

Jean-Paul Costa*

Criticism of the Court – Sources of legitimacy – Interpretation, too wide? – Sharing responsibility – Tensions between Court and other authorities: legislatures and courts

Introduction

The European Court of Human Rights has passed the fifty-year mark, celebrating its first half-century in 2009. The Interlaken conference (18-19 February 2010), followed by the Izmir conference (26-27 April 2011), unanimously hailed the 'extraordinary contribution' of the Court to the protection of human rights in Europe.[1] At an early stage in its history, the Court enjoyed the reflected prestige of its then-President, René Cassin, who was the 1968 Nobel Peace Laureate. In May 2010, the Court itself was honoured for its achievements. The Franklin and Eleanor Roosevelt Foundation bestowed its 'Four Freedoms Award' on the Court.

In his speech at the award ceremony at the Dutch city of Middelburg, in the presence of the Queen of The Netherlands, Prime Minister Jan Peter Balkenende, said:

> Over the last 50 years, the European Court of Human Rights has ruled on thousands of cases. It has ensured access to justice for every person in our vast and ancient continent. It has brought security and stability to our society. It has fully earned the respect and support of the member states of the Council of Europe. And even more important, the people of Europe have found the Court to be a fair and powerful instrument of justice on their behalf. Today, we gather to celebrate this great achievement. Because, as Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, said at the Court's 50th anniversary celebration: '*The story of the European Court of Human Rights is undoubtedly a success story*.'

* President of the European Court of Human Rights.

[1] *See also* the statement made at Izmir by Mr Harold Koh on behalf of the US Government <www.coe.int/t/dghl/standardsetting/conferenceizmir/Speeches/Speech%20USA%20_2_pdf>.

European Constitutional Law Review, 7: 173–182, 2011

doi:10.1017/S1574019611200026

> President Costa, you recently said that human rights require a permanent battle, because they can never be taken for granted. '*It is my belief,' you said, 'that the European human rights protection system, as it was first set up and has been enhanced by 50 years of case law, has all the necessary characteristics to guarantee it a promising future.*' We all share that belief. Therefore I am presenting this award to you, not only to express our deep appreciation for the Court's service to democracy and freedom in the past, but also on behalf of future generations.

Barely a year later, in certain states, including some of those who founded the system and who ratified the European Convention on Human Rights at the outset, very strong criticism of the Court was voiced in the press as well as by public representatives, calling its legitimacy or its putative 'activism' into question. Some of the Court's judgments have met with strongly negative reactions.[2]

Why such fuss? Is it a new fashion of some sort? A passing crisis? Or an 'anti-European' revolt, rooted in a certain euro scepticism? Or does it stem from hostility to human rights? To frame the situation in such terms would be to simply enter into polemics which are better avoided. One can instead take these recent statements as criticism of the Court, of the manner in which it functions and of the decisions it takes. Is this criticism justified? In my view it is not, as I shall endeavour to explain. I will consider (1) the legitimacy of the Court, (2) the way it interprets the Convention and, finally, (3) issues going to subsidiarity and the division of roles between the Court and national authorities.

The Court and legitimacy

The Court was set up by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which is itself a state creation (the first states to ratify it were all western European). It is the contemporary of the Court of Justice of the European Union in Luxembourg as well as of some constitutional courts in Europe (for example those of Germany and Italy), and older than most of the others.

The Court draws its legitimacy first of all from an international treaty (*pacta sunt servanda*) and from the will of democratic states. In fifty years, the number of states parties has risen from 10 to 47. Since 1998, all of these have been required

[2] This has been the case recently with the judgment in *Hirst (No. 2)* v. *the United Kingdom*, even though it was delivered five years ago (finding a violation on account of the blanket exclusion of prisoners from voting). Further examples are the judgment in *Varnava* v. *Turkey*, and, provoking reactions in the opposite sense, the decision in *Demopoulos* v. *Turkey*. *See also* the judgment in *Kononov* v. *Latvia* as well as the Chamber judgment in *Lautsi* v. *Italy* (subsequently overturned by the Grand Chamber). Going back some years, the example of *Von Hannover* v. *Germany* can also be given, as could several other judgments from that time. With the passage of time, though, criticism and opposition to the Court's judgments usually fades.

by the Convention to accept the compulsory jurisdiction of the Court and the right of individual application.

The Court's role is determined by the Convention (Articles 1 and 19, Article 32, Articles 33-35, Article 46, Articles 47 and 48). Its jurisdiction is adversarial for the most part, its consultative jurisdiction being somewhat incidental. It is a very broad jurisdiction, potentially covering a population of 800 million.

The task of the European Court of Human Rights is to ensure observance by the states parties – governments, parliaments, courts – of their engagements under the Convention and the Protocols. This is the source of its strength but also of its vulnerability. In ratifying the Convention and the various protocols, states undertake to guarantee the rights contained in these instruments to all persons within their jurisdiction (which is mainly a territorial concept, although it may in certain cases be extra-territorial as well[3]). When it accedes to the Convention, the European Union will become the 48th Contracting party.[4] I see this as the weightiest endorsement of all of the Convention system and the high standing of its Court. The desire to make the European Union a Contracting party in its own right is a matter of enhancing its own legitimacy in its dealings with European citizens and its credibility in the field of human rights. In such a context, any talk of one or other state denouncing the Convention is starkly at odds with the strong and widespread support for the protection of human rights at European level. Indeed, the clearly articulated consensus among European states is to ensure and sustain the effectiveness of the Convention system, hence the high-level gatherings at Interlaken and Izmir, and intensive follow-up within the Council of Europe.

The Court's legitimacy is enhanced by that of its judges. The Convention sets high legal and moral standards for the members of the Court. The system of appointment entails the proposal by each state of a list three candidates, which is submitted to a vote by secret ballot by the Parliamentary Assembly of the Council of Europe. The recently created panel of experts will further improve the quality of judges in future.[5] The non-renewable nine-year term of office introduced by Protocol No. 14 reinforced the independence of the Court's judges, as did the introduction of pension and social security cover for judges.[6] Previously, judges

[3] *See* the decision of the Grand Chamber in *Banković and Others* v. *Belgium and 16 Other Contracting States* (12 Dec. 2001). For another example, *see* the Grand Chamber judgment in *Medvedyev and Others* v. *France* (2010).

[4] EU accession is provided for in the Lisbon Treaty, which entered into force on 1 Dec. 2009, and is permitted by Protocol No. 14 to the Convention, which entered into force on 1 June 2010.

[5] Committee of Ministers Resolution (2010)26 on the establishment of an advisory panel of experts on candidates for election as judge to the European Court of Human Rights, which was adopted in response to an initiative that I took as President of the Court.

[6] Committee of Ministers Resolution (2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights.

served a renewable six-year term of office, and had no social security coverage. This raised the risk, regarding some states, of judge being in a position of vulnerability and dependence in relation to the government.

Some of the criticism aimed at the Court concerns its membership, but the logic of this is flawed. As all of the states parties are members of the Council of Europe it can be said that the older members have accepted the entry of the newer states – the 'new democracies' – into the organisation. The same applies for the Convention, which, as stated in its Preamble, is a mechanism for the 'collective enforcement' of human rights. Each state party has implicitly accepted the ratification of the Convention by other states. Moreover, it is the sovereign states themselves who are responsible for putting forward candidates for the Court and it is the Parliamentary Assembly, made up of delegations from national parliaments, that elects them (the Assembly has on occasion rejected a national list where it considers that the candidates do not reach the standard set by Article 21 of the Convention). Are we to conclude that the entire system is unsatisfactory?

It may further be noted that the Court sits in collegial formations, with the exception, of course, of the single-judge formation introduced by Protocol No. 14, but a single judge does not have the power to hold that there has been a violation of the Convention. The parties to a case decided by a Chamber may request its referral under Article 43 to the Grand Chamber, comprising seventeen judges compared to the seven judges who make up a Chamber. Admittedly, only a small number of such requests – approximately one out of every twenty – are accepted by the panel set up by the same provision. It is, however, an important guarantee, as the practice shows. In numerous cases, the Grand Chamber has varied the conclusion reached by the Chamber (not always in the way hoped for by the party – applicant or government – that sought referral, but such are the rules of the game). Furthermore, the procedure before the Grand Chamber nearly always includes a public hearing, and is longer and more thorough.

Interpretation of the Convention by the Court

Article 32 of the Convention gives the Court a very broad power in relation to all matters concerning the interpretation and application of the Convention, and also confers upon it *la compétence de sa compétence*.[7]

How has the Court interpreted the Convention – and its Protocols – over the past half-century? Operating under an international treaty, the Court is guided mainly by the rules in the Vienna Convention on the Law of Treaties, 1969, which

[7] Art. 32 § 2 provides: 'In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.'

it first invoked in 1975.[8] It therefore gives the words used in the text their ordinary meaning in their context, in light of the object and purpose of the Convention. On any reading of the text of the Convention it is plain that its underlying object and purpose is to protect human beings – their existence, their integrity, their dignity, their liberty and their autonomy. It is the highest expression of Europe's most cherished principles. The Preamble draws explicit inspiration from one of the seminal texts of our era, the Universal Declaration of Human Rights. The Convention was drafted as the concrete expression of European states' commitment to rendering some of the provisions of the Declaration effective. As with the Declaration, the Convention's aim is to secure 'effective recognition and observance' of its substantive provisions, these being formulated for the most part in broad and imperative terms. As the Court has reiterated time and again, the Convention was and is 'intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'[9] Effectiveness is the golden thread running through the fabric of the Strasbourg case-law. Excessive formalism or legalism is put aside.

There are other canons and methods of interpretation used by the Court as the need arises. It has long taken the view that the terms and concepts used in the Convention are to be given an autonomous interpretation, which may differ from the meaning of similar notions in domestic law.[10] In this way, the Convention retains a uniform meaning and so ensures a uniform *minimum* standard of human rights protection across all of the states parties. Another interpretative principle is that the various provisions must be interpreted so as to ensure the internal consistency of the Convention.[11] Without these principles, the Convention's meaning would risk becoming uncertain and unclear.

The most prominent canon of that of dynamic or evolutive interpretation. The European Court has long considered the Convention to be a 'living instrument, which must be interpreted in the light of present-day conditions.'[12] This doctrine has, inevitably, sparked a degree of controversy, since it relativises the significance of the *travaux préparatoires* (let it be recalled, though, that recourse to the *travaux* is but a *supplementary* means of interpretation under the Vienna Convention). Such controversy is not confined to the European Court; it will arise when any

[8] *Golder* v. *United Kingdom*.

[9] *Artico* v. *Italy* (1980).

[10] E.g., *König* v. *Germany* (1978).

[11] E.g., *Pretty* v. *United Kingdom* (2002) where the Court, in rejecting the applicant's attempt to read a positive obligation to permit assisted suicide, stressed the need to interpret Art. 3 consistently with Art. 2.

[12] *See* the judgments in *Tyrer* v. *United Kingdom* (25 April 1978) and *Marckx* v. *Belgium* (13 June 1979), followed consistently in many subsequent cases.

court, national or international, takes a similar approach.[13] The Court has applied the principle in different ways. It has used it to adapt the text of the Convention to new technologies or to social change. It has used it to justify a higher standard of protection,[14] and to reduce the width of the margin of appreciation allowed to states by certain provisions of the Convention.[15] It has also derived new rights from those expressly enshrined in the Convention or its Protocols. An example often given is the right to a healthy environment, derived from Article 8, which guarantees the right to respect for private and family life.[16] It has likewise adopted an extensive interpretation regarding the applicability of right to a fair trial in Article 6 § 1, or the concept of 'possessions' in Article 1 of the First Protocol, or the implications of the right to establish trade unions set down in Article 11 of the Convention.[17]

But the Court has not granted itself unfettered discretion to make new law and set new standards, guided only by the preferences of the seven or seventeen judges deciding the case. Evolutive interpretation, where it occurs, is rooted in and shaped by sufficient indicators of a developing consensus within European states, often accompanied by the development of new or higher international standards (Council of Europe, European Union, different bodies within the United Nations system). It is by this means that a text from the mid-twentieth century can retain all its relevance for today's societies, in all their dynamism and diversity.

Has the Court gone too far in its interpretation? Opinions will inevitably divide on this point, reflecting broader differences over what human rights are in the first place. What is deemed fundamental and non-negotiable from one perspective, for example that of civil society or legal scholars, may be regarded as far-fetched or excessive by another, such as government ministers, parliamentarians or the media.

The Court has extended within what I would consider reasonable limits the scope and content of the rights contained in the Convention. The Preamble of the Convention is significant here, which states that one of the means of pursuing the statutory aim of the Council of Europe is the maintenance and *further realisation*

[13] It is a matter of persistent argument in relation to the United States Supreme Court, and even within that court, between its 'originalist' and 'evolutionist' members.

[14] See in particular *Selmouni* v. *France* (1999).

[15] Prime examples being the rights of transsexuals and of homosexuals under Art. 8 of the Convention. Dynamism has its limits, though. The Court refused to read a right to divorce into the Convention (*Johnston* v. *Ireland*, 1986). In 2010 it declined to read a right for same-sex couples to marry into Art. 12 of the Convention, holding that the issue must be left to regulation at national level. The Court observed that in this area 'it must not rush to substitute its own judgment in place of that of the national authorities' (*Schalk and Kopf* v. *Austria*).

[16] *See López Ostra* v. *Spain* (1994) and many subsequent cases.

[17] *See* the landmark Grand Chamber judgment *Demir and Baykara* v. *Turkey* (2008).

of human rights and fundamental freedoms. Who phrased the Preamble in such solemn terms? Who drafted the Convention in such a purposeful and determined manner? Not the Court, but the states parties.

Subsidiarity and the sharing of responsibility between the Court and national authorities

Although the principle of subsidiarity does not expressly appear in the text of the Convention, it underpins the whole treaty. The states parties undertake to respect the rights guaranteed, and to abide by the final judgments of the Court (at least in the cases to which they are parties). The Convention, drafted and ratified by states, established the Court to ensure that the Contracting parties respected their commitments, and entrusted the task of supervising the execution of judgments to the Committee of Ministers. It is clear from this set-up that the primary role within the Convention system is that of the states parties. The Court's role, though major, is nonetheless a subsidiary one. In a perfect world where states never violated Convention rights, there would be no need for the Court, its judges and registry staff would be redundant.[18]

Subsidiarity provides the rationale for the requirement to exhaust domestic remedies, set down in Article 35 of the Convention, which is the primary criterion for the admissibility of applications. All too often, unfortunately, adequate remedies are lacking within national systems. This is not only unacceptable in principle, but is also a major cause of the severe overloading of the Court's docket. Suffice it to say that states should not lose sight of subsidiarity in this particular regard. That said, does the Court go beyond its role in relation to the national authorities?

Apart from a few borderline cases, which are practically inevitable given the tens of thousands of decisions and thousands of judgments delivered by the Court each year, I do not believe so.

It bears emphasising that the Court itself has, through its case-law, developed a number of devices that delimit its domain *vis-à-vis* national authorities:

- the margin of appreciation that must be allowed to states;
- the fact that the Court will not act in third-instance or fourth-instance mode;
- the corollary that it is the task of the national courts to establish and evaluate the facts in any case, as well as the relevant elements of proof;
- and the principle that, in the first place, it is the national courts that interpret the Convention, under the 'final European supervision' of the Court, whose

[18] The reality is quite the opposite. The Court had more than 150,000 pending cases in mid-2011.

role may be compared to that of an 'external auditor' for national systems (external audits being generally useful and valuable exercises).

It is sometimes forgotten that this stance of self-restraint is not imposed by the Convention, but by the Court itself, and that it may at times produce unsatisfactory outcomes from the perspective of fairness and justice.[19]

The margin of appreciation is a famously variable element in the Court's reasoning, its scope being determined by a series of factors: the importance of what is at stake for the individual, the degree of consensus among the states parties, the moral sensitivity of the issues raised, whether a balance must be struck between competing rights and interests, and so on. The Court recently described it as a 'tool to define relations between the domestic authorities and the Court.'[20] It accords a certain latitude to the domestic authorities to strike their own balance regarding Convention rights, guided by the relevant European case-law. Subsidiarity entails recognition of the state's 'space', but equally of the boundaries that delimit it. The Convention gives the final say to the European level, to the Court, which must perform its task in every case admitted for examination (but only in such cases, the Court has no free-standing power to inquire into the general state of human rights protection in a country).

The margin of appreciation is a clear expression of the fact that the Convention does not command or even aspire to strict uniformity throughout Europe in the protection of human rights. This is a key difference between the mission of the European Court at Strasbourg and that of the European Court at Luxembourg, which is the guarantor of the uniformity of the whole system of EU law. The states parties to the Convention *are* required to secure all Convention rights within their domestic systems, but this does *not* imply wholesale standardisation of national institutions, procedures and practices. The Convention accommodates and the Court accepts the great diversity of national traditions and practices in many areas (e.g., design of electoral systems,[21] structure of criminal justice systems,[22] the general interaction of the powers of state[23]). States have nonetheless been required on many occasions to make certain adjustments to their systems, modifying rules or practices that were long deemed unproblematic until they were subject to the external scrutiny of the European Court. With its international composition,

[19] For example in the context of criminal law it is very probable that some errors of justice are not dealt with by the Court once it is satisfied that the trial was 'fair' within the meaning of Art. 6. The inevitable logic of the Court's refusal to act as a fourth-instance body can be very difficult to accept for a person convicted as a consequence of judicial error.

[20] *A. and others* v. *United Kingdom* (2009).

[21] *Yumak and Sadak* v. *Turkey* [GC] (2008).

[22] *Taxquet* v. *Belgium* [GC] (2010).

[23] *Kleyn* v. *The Netherlands* (2003).

representing all of the legal cultures and systems of Europe, the Court at Strasbourg has often called longstanding arrangements into question, such as the sentencing powers of a government minister in Britain,[24] or the procedures followed by France's highest courts.[25] This is the 'external auditor' analogy at work.[26] The cases decided at Strasbourg show that no state party can award itself a completely clean bill of health.

It follows that tension is inevitable between the Court's judgments and the decisions or other acts of the national authorities, in particular (a) the legislature, and (b) the higher courts.

(a) The Court generally rules *in concreto* on individual complaints. It may decide that the law which formed the basis for a decision that violated the applicant's rights is itself incompatible with the Convention (a structural problem, which may or may not give rise to a pilot judgment[27]). There have been numerous cases of this sort since *Marckx* and *Dudgeon*. But the Court displays prudence towards national parliaments. Important societal issues – abortion, reproductive rights, same-sex marriage, assisted suicide – are essentially for the legislature to decide.[28] Where the legislature goes too far (or indeed not far enough) thereby acting contrary to civil liberties, it will incur the 'censure' of the Court. There have been many such cases concerning civil and political rights: freedom of expression, freedom of assembly and association, right to vote, etc.). Were a law to permit torture, it would obviously be incompatible with human rights, specifically Article 3 of the Convention. This in turn excludes deporting or extraditing individuals to certain countries with very poor human rights records (use of torture, application of the death penalty). The absolute nature of Article 3 has had significant practical implications for some states, not least the Netherlands, which has seen a surge in urgent, last-minute applications to Strasbourg from foreigners facing removal to potentially dangerous countries. The situation became so acute by the end of 2010 that I took the unprecedented step in early 2011 of issuing a statement on the matter, reminding governments of the domestic remedies that must be available to deal with claims of this type at the national level. It is not the Court's purpose or intention to take charge of immigration appeals from all over Europe. An international court cannot bear such weight.

[24] *Stafford* v. *the United Kingdom* (2002).

[25] *Reinhardt and Slimane-Kaïd* v. *France* (1998), *Kress* v. *France* (2001).

[26] Other examples include the *Kostovski* and *Van Mechelen* cases against the Netherlands.

[27] The pilot-judgment procedure was created by the Court in 2004 with the Grand Chamber judgment in *Broniowski* v. *Poland*. Using Art. 46 of the Convention as its legal basis, the aim of the procedure is to assist a state in dealing with an underlying systemic problem that may give rise, or has given rise to numerous repetitive applications to the Court. *See* the new Rule 61 of the Rules of Court, as well as the Information Note by the Registrar 2009, published on the Court's website.

[28] *See* in particular the recent *A, B and C* v. *Ireland* judgment (2010).

(b) As regards the national supreme courts and constitutional courts, the European Court has, through working meetings, fostered and developed a dialogue with the judges of these courts so as to improve our mutual understanding. The Court normally displays self-restraint in a case that has already been decided by a superior domestic court; it is quite rare for the two courts to have differing approaches, although it does happen. Why is this?

It is simply inevitable some of the time. If the European Court were always to act as a rubber stamp for the decisions of national courts, what purpose would it serve? If the last domestic decision in the case marks the final available domestic remedy, it would lead to the paradoxical situation in which the application would be admissible for having satisfied the rule of exhaustion but at the same time rejected *ipso jure* as unfounded! Furthermore, it is sometimes the case that the scope or content of rights protected at the national level is not the same as the rights set down in the Convention, as interpreted by the Court. Regarding the United Kingdom in the Seventies and Eighties, it was the Court's case-law that brought about a higher degree of protection of freedom of expression and of private life. Similarly, regarding France, the principles of the presumption of innocence and of respect for the rights of the defence were strengthened and enriched by Strasbourg judgments.

In conclusion, what I would like to convey to the readers of this article, from my experience as judge and President of the European Court of Human Rights, is that the Court continuously strives to accomplish the weighty task entrusted to it by an international treaty that has been freely accepted by Europe's sovereign states. It might not always succeed completely in its task, and its case-law might not always be as stable and consistent as one would wish.[29] But the independence, impartiality and integrity of its judges and of the officials of the Registry who provide it with sterling service, whatever the difficulties that may accompany certain cases, and irrespective of the pressures that they may engender, are not at issue. This is why I can accept a fair degree of criticism of the Court. Frank and even blunt commentary can serve as a stimulus to further improve. I remain convinced, however, that most Europeans would agree that their Human Rights Court has served them well.

[29] The Court has, however, created internal mechanisms to ensure the highest level of quality and consistency in its case-law. There is a systematic quality-check of every draft by senior Registry lawyers and all potential case-law developments are tracked by the Court's Jurisconsult and his staff. The Court's Research Division prepares comparative studies and reports on developments in other international systems. Where a conflict in the case-law appears imminent, the Court has a Conflicts Resolution Board that brings together Section Presidents, assisted by senior officials, to examine the matter and make recommendations to Chambers on how to proceed.