

INTERNATIONAL LAW AND PRACTICE

The ECtHR's Role as a Guardian of Discourse: Safeguarding a Decision-Making Process Based on Well-Established Standards, Practical Rationality, and Facts

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Abstract

This article argues that understanding the role of the European Court of Human Rights (ECtHR or the Court) to be that of a guardian of discourse would respect legitimate disagreement among pluralist democracies, while enabling the Court to safeguard human rights in a meaningful and effective way.

From the European Convention on Human Rights (ECHR or the Convention) and the Court's jurisprudence, three basic standards of review can be distilled: First, wherever the Convention's requirements are sufficiently concrete, the Court holds contracting states to well-established standards. Second, when applying broad, abstract and relative Convention rights, the Court safeguards the practical rationality of a democratic decision-making discourse under the rule of law – a substantive review standard that is influenced by procedural factors. Third, the Court also needs to check the facts underlying the case, in order to render its control effective.

By setting 'soft' precedent in the form of factors that guide future decision-making without entirely prejudging it, and by taking into account second-order reasons concerning its legitimacy to intervene, the Court is acting as a second player in states' decision-making discourse. Its task is not to replace the institutions originally responsible for taking the decision, but to ensure that they conform to their own role.

Keywords

counter-majoritarian difficulty; deliberative decision-making; democracy; margin of appreciation; proportionality review

I. INTRODUCTION

The ECtHR has turned into an oligarchical institution exercising foreign rule contrary to the idea of democratic self-government. Overstepping its mandate, it arrogated the competence to overrule basically any national decision. In recent years, this fundamental critique of the Court's role in Europe has increasingly gained

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traction, not only in tabloid articles criticizing the outcome of individual cases, but also among high-ranking judges and academics of various European countries. The exact scope and form of the critique varies, but the direction is always clear: Strasbourg is exceeding its role in applying the ECHR,¹ a European *gouvernement des juges* is nigh. It is voiced the loudest in the United Kingdom, but can be found in many other states, too.²

This article is based on the premise that common objectivist accounts of the Court's role, which propose that the Court should not take, in the strict sense, any decisions, but should merely state the law 'as it is', must be rejected. The Court exercises decision-making power legally delegated to it when taking decisions.³ It does not merely find and execute decisions already taken, e.g., by the Convention's framers. Consequently, the Court's judgments cannot only be understood as holding contracting states to standards thought to be pre-existing.

Safeguarding well-established human rights standards is an important part of the Court's role (Section 2.1), e.g., as regards the prohibition of torture in Article 3 ECHR or the right to defend oneself through legal assistance in Article 6(3)(c) ECHR. Broad relative rights, such as the right to respect for one's private life embodied in Article 8 ECHR, however, cannot be understood in the same manner. When applying such rights, the Court does not hold states to standards that can be understood to be pre-existing commitments to certain actions or omissions. Rather, the national decision-making process is bound to the way that it is supposed to function. This process is meant to take rational decisions that take into account all individual and community interests affected.

The rationality that is required from states' decision-making has a practical and a theoretical (or epistemic) side.⁴ Theoretical rationality requires deliberation about what *is*, or in legal terms, the facts of the case. Practical rationality requires deliberation about what one *ought to do*, i.e., the proper course of action. The Court requires states to use both aspects of rationality in a manner satisfying the requirements of a decision-making discourse under the rule of law. It reviews the practical reasons (Section 2.2) as well as the facts (Section 2.3) that are advanced in justification of a decision.

Structurally, the Court can be understood as a second and subsidiary player in the decision-making discourse of democratic states under the rule of law. In this discourse, two categories of practical reasons must be taken into consideration and

¹ 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005.

² For the UK see Lord Sumption, *The Limits of the Law*, 27th Sultan Azlan Shah Lecture, 20 November 2013, available at www.supremecourt.uk/docs/speech-131120.pdf; R. Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights', (2014) 25 EJIL 1019, at 1020–2; for Germany K.-H. Ladeur, 'European Law as Transnational Law: Europe Has to Be Conceived as an Heterarchical Network and Not as a Superstate!', (2009) 10(10) GLJ 1357, at 1364–5; for the Netherlands B. Oomen, 'A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands', (2016) 20(3) IJHR 407.

³ Cf. A. von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review', (2012) 10 ICON 1023, at 1049.

⁴ A. Mele and P. Rawling, 'Introduction: Aspects of Rationality', in A. Mele and P. Rawling (eds.), *The Oxford Handbook of Rationality* (2004), 3, at 3–4; R. Talisse, 'Deliberation', in D. Estlund, (ed.), *The Oxford Handbook of Political Philosophy* (2012), 204, at 204–6.

must be distinguished: first-order reasons relating to the substantive decision that needs to be taken, and second-order reasons that are not concerned with the question *what* decision to take, but *who* should take it.⁵ This takes account of the Court's and national institutions' legitimacy in taking a specific decision.

In practice, the most significant second-order reason is the legitimacy of the national decision under review. The reviewed decision's input legitimacy as well as its procedural legitimacy are relevant factors in determining the amount of respect owed to it. Procedural legitimacy is not only generated formally by observing procedures, but more importantly by the substantive process of giving (practical and theoretical) reasons to justify a decision. Unlike often assumed,⁶ output legitimacy usually plays only a limited role, since in many cases the outcome is precisely the contentious issue.

What has been termed 'procedural proportionality' or 'procedural rationality' review is, thus, neither an alternative to a substantive proportionality analysis by the Court in certain sensitive cases,⁷ nor the result of a wide margin of appreciation.⁸ Second-order reasons constitute the margin of appreciation. A margin of appreciation so understood neither excludes a substantive proportionality review by the Court altogether in the sense a political question doctrine would,⁹ nor does it allow the Court to abort a proportionality analysis to rule in favour of a state without further substantive argumentation.¹⁰ Instead, second-order reasons influence the Court's authority to determine the weight of the relevant first-order reasons for itself. Both, first- and second-order reasons, are applied in a single combined operation.

The legitimacy of the national decision, and therefore the respect owed to it, depends to a large extent on it taking into account all relevant first-order reasons, generating substantive procedural legitimacy.¹¹ But even then, the respect thus owed to national decisions may be overcome when strong first-order reasons speak in favour of a different decision. The Court's review cannot be *merely* procedural if it is to be effective. The mere will to take a certain decision – and be it the will of parliament

⁵ See A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012), 17 et seq., who first applied the distinction to the ECHR, albeit with a different set of second-order reasons. The idea of second-order reasons originates with J. Raz, *Practical Reason and Norms* (1975), 39, 193.

⁶ See, e.g., M.-B. Dembour, *Who believes in Human Rights? Reflections on the European Convention* (2006), 14.

⁷ Cf. T.-I. Harbo, 'Introducing Procedural Proportionality Review in European Law', (2017) 30 LJIL 25, at 32.

⁸ P. Popelier and C. van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?', (2017) 30 LJIL 5, at 12.

⁹ For such an understanding see M. Khosla, 'Proportionality: An assault on human rights?: A reply', (2010) 8 ICON 298, at 303; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007), 90; C. Feingold, 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights', (1977–78) 53 *Notre Dame Law Review* 90, at 105.

¹⁰ See, e.g., K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2015), 65 (para. 3-004); S. Besson, 'European human rights, supranational review and democracy: Thinking outside the judicial box', in P. Popelier et al. (eds.), *Human rights protection in the European legal order: The interaction between the European and national courts* (2011), 97, at 107; Lord Lester of Herne Hill, 'Universality versus subsidiarity: a reply', (1998) 1 EHRLR 73, at 80.

¹¹ Cf. M. Klatt, 'Balancing competences: How institutional cosmopolitanism can manage jurisdictional conflicts', (2015) 4 *Global Constitutionalism* 195, at 215–16.

after careful deliberation – cannot in and of itself be decisive.¹² Otherwise, even decisions blatantly in violation of the Convention could be taken.¹³ Manifest abuse and excess can pretend to be, or actually be, the result of a formally deliberative decision-making process. Early in its jurisprudence, the Court rejected such a merely procedural standard of review: '[T]he Court's supervision is [not] limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control.'¹⁴

The Court's role as a guardian of discourse is unfolded in this article based on a reconstruction of the Court's modern leading cases and draws on the parallel debate on the justification of national constitutional courts, in order to understand and justify the Court's role vis-à-vis its contracting states. It is submitted that the Court's modern jurisprudence can be understood, and that new cases can be adjudicated appropriately, by seeing the Court as guarding states' decision-making discourse with a view to these three standards of review.

Since the Court's methodology and role can only be understood adequately in relation to the proper mode of decision-making in a democratic state under the rule of law, this article will explore the structural properties of such decision-making. It will show that the principle of proportionality mirrors the democratic requirement to balance all interests affected by a decision. This principle is the result of an application of the Vienna Convention on the Law of Treaties (VCLT)¹⁵ and the failure of this interpretative methodology to justify a decision on its own when it comes to broad, abstract and relative Convention rights.

Finally, this article will analyze the reasons in favour of having an international court exercise such a role. What are possible deficiencies in the national decision-making process and what are the Court's structural advantages? It is submitted that if the Court is understood to act as a guardian of discourse, its role is a legitimate one benefitting Europe's states and citizens alike.

2. THE COURT'S STANDARDS OF REVIEW

From the Convention and the Court's jurisprudence, three basic standards of review, and therefore three aspects of the Court's role, can be distilled: First, wherever the Convention's requirements are sufficiently concrete, the Court holds states to well-established standards that may, to a certain extent, be thought of as pre-existing. Second, in applying broad, abstract and relative Convention rights, the proper functioning of a democratic decision-making discourse under the rule of law constitutes the standard of review. Third, the Court also needs to check the facts that underlie the normative justification of the decision under review.

¹² See, however, seemingly in a different direction: Popelier and van de Heyning, *supra* note 8, at 22–3; Harbo, *supra* note 7, at 44–5.

¹³ Cf. W. Powers, 'Hirst v. United Kingdom (No. 2): A First Look at Prisoner Disenfranchisement by the European Court of Human Rights', (2006) 21 *Connecticut Journal of International Law* 243, at 293.

¹⁴ Referring to the *Handyside* case: *Case of The Sunday Times v. The United Kingdom* [PL], Decision of 26 April 1979, No. 6538/74, at 59.

¹⁵ 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

2.1. Safeguarding well-established standards

First of all, the Court is guarding the well-established standards enshrined in concrete Convention rights.¹⁶ Among others, the prohibition of torture in Article 3 ECHR and the right to defend oneself through legal assistance in Article 6(3)(c) ECHR may be understood as such. For example, cases in which the Court held contracting states accountable for the employment of so-called no-touch torture techniques, like sensory deprivation, can be understood in that manner.¹⁷ So can holding that the treatment of a suspect, who was beaten for days, threatened with a syringe and a blowtorch, and urinated upon, was torture.¹⁸ Another example is the *Case of Sakhnovskiy*, in which the Court ruled that giving a defendant a mere 15 minutes to confer with his newly-appointed lawyer, via video link, immediately before the appellate hearing in a complex murder trial, violated his right to legal assistance.¹⁹

Interpretative results such as these are rather indisputable and the cases in that regard are easy cases. The idea that the Court's task is to effectively safeguard such well-established or even pre-existing human rights standards, consented to by the contracting parties, is and has always been a motive central to the justification of its jurisprudence. As noted by its former President Spielman: 'The first signatories to our Convention ... created a mechanism – the first of its kind – a court to ensure the observance of their own engagements'.²⁰ To a certain extent, the Court's jurisprudence may indeed be understood in that manner. However, this point of view more readily provides a basis for criticism when it comes to hard cases.

The most elaborate methodological attempt to conform meticulously to an ideal of consensual pre-commitment is originalism, which seeks to deduce a ready-made and democratically-taken decision from the Convention's text or the intent of its framers.²¹ This methodological approach, which is most prominent in US constitutional law, is also used to criticize the Court's jurisprudence:

[I]n recent years the Court seems to have forgotten that its job is to apply the principles of the Convention as originally intended by those who signed it – nothing more and nothing less. The Vienna Convention on the Law of Treaties requires that international treaties be interpreted as their drafters intended.²²

¹⁶ Cf. Harbo, *supra* note 7; D. Grimm, 'Types of Constitutions', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012), 98, at 103 et seq.

¹⁷ *El-Masri v. 'The Former Yugoslav Republic of Macedonia'* [GC], Judgment of 13 December 2012, [2012] ECHR (Appl. No. 39630/09), at 205 et seq.

¹⁸ *Selmouni v. France* [GC], Judgment of 28 July 1999, [1999] ECHR (Appl. No. 25803/94), at 101–6.

¹⁹ *Sakhnovskiy v. Russia* [GC], Judgment of 2 November 2010, [2010] ECHR (Appl. No. 21272/03), at 103, 107.

²⁰ Speech by President Dean Spielmann on the occasion of the visit by their Royal Highnesses the Grand Duke Henri and the Grand Duchess Maria Teresa of Luxembourg, 27 March 2014, available at www.echr.coe.int/Documents/Speech_20140327_Spielmann_ENG.pdf; cf. *Golder v. The United Kingdom* [PL], Judgment of 21 February 1975, [1975] ECHR (Appl. No. 4451/70), at 36.

²¹ For a concise overview of common arguments see S. Smith, 'What Does Constitutional Interpretation Interpret?', in G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (2008), 21, at 25–9.

²² D. Davis, 'Britain must defy the European Court of Human Rights on prisoner voting as Strasbourg is exceeding its authority', in S. Flogaitis et al. (eds.), *The European Convention of Human Rights and its Discontents: Turning Criticism into Strength* (2013), 65, at 67; see also J. Finnis, 'Judicial Power: Past, Present and Future', *Judicial Power Project*, 21 October 2015, at 23–5, available at judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf.

It may be argued, though, that the Court is in fact using the competence to interpret the Convention, delegated in Article 32 ECHR, in a manner consistent with the VCLT as applied in modern practice.²³ The contracting states, at least, have regularly and formally expressed their general approval of the Court's jurisprudence, and thus its methodology, at their High-level Conferences, most recently in 2015.²⁴ Leaving aside the fact that the VCLT declares many other interpretative aspects to be relevant, a technical prerequisite for such a model of pre-commitment is the possibility to clearly state and convey in a treaty what the contracting states should be bound to. Trust in the capacity of language to do this, however, has proven to be misplaced. The Convention's terms, of course, do convey a certain meaning. If our language was wholly inadequate we would be unable to communicate. What these words cannot do, however, is to provide, by themselves, ready-made decisions for all the complex and various individual cases pending before the Court.²⁵

Nonetheless, it is at times possible to arrive at convincing results employing an originalist methodology. It makes eminent sense to state that the ECHR's framers did not mean to prevent states from criminalizing homosexual behaviour or from using physical force as a method of education in schools and that the words of the Convention did not have that meaning when ratified. Accordingly, *Dudgeon*²⁶ and *Tyrer*,²⁷ ruling both to be in violation of the Convention, would clearly be a miscarriage of justice. And therein lies the problem.

Applied strictly and in good faith, originalism, as well as other 'restrictive' approaches to interpretation,²⁸ lead to the realization that the ECHR or other constitutional texts do not say much at all. In fact, early in the Convention's development, scholars were concerned that it would be ineffective because of this: 'The Treaty of Rome is so vague, and is so non-committal even in its vagueness, that we ought to be reduced to barbarism before anyone can successfully rely on it.'²⁹

²³ Cf. International Law Commission (ILC), First report on subsequent agreements and subsequent practice in relation to treaty interpretation (Special Rapporteur Georg Nolte), 19 March 2013, UN Doc. A/CN.4/660, at 17.

²⁴ High-level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility', *Brussels Declaration*, 27 March 2015, at 1: 'Acknowledges the extraordinary contribution of the Convention system to the protection and promotion of human rights in Europe since its establishment', available at www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf; similarly in the Interlaken, Izmir and Brighton Declarations – despite the critique leading to the adoption of Protocol 15 (see *infra* notes 166 and 167).

²⁵ This is common ground in linguistics: A. von Bogdandy and I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', (2011) 12(5) GLJ 979; D. Busse, 'Interpreting Law: Text Understanding – Text Application – Working with Texts', in U. Haß-Zumkehr (ed.), *Sprache und Recht* (2002), 239.

²⁶ *Dudgeon v. The United Kingdom* [PL], Judgment of 22 October 1981, [1981] ECHR (Appl. No. 7525/76), at 60–3.

²⁷ *Tyrer v. The United Kingdom*, Judgment of 25 April 1978, [1978] ECHR (Appl. No. 5856/72), at 31–5.

²⁸ See, e.g., S. Dothan, 'In Defence of Expansive Interpretation in the European Court of Human Rights', (2014) 3 CJICL 508, at 512–16.

²⁹ J. Leijtjen, 'Het fluorideringsarrest', in E. Zwolle (ed.), *t'Exempel dwinght* (1975), 289, at 314, cited and translated by M. Kuijer, 'The Impact of the Case Law of the European Court of Human Rights on the Political Debate in the Netherlands concerning the Court', in M. van Roosmalen et al. (eds.), *Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk* (2013), 99, at 102.

The Convention's framers were, indeed, aware of the need to continually apply the Convention's rights to new cases and to thereby develop its normative content. In the drafting process, they considered enumerating certain acts of torture in Article 3, but finally opted against that possibility in order not to imperil the provision's effectivity.³⁰ An interpretation according to the *travaux préparatoires*, thus, actually speaks *against* an originalist methodology. So does the VCLT, which provides for a wider array of interpretive factors. This is not to say that it is the Court's task to choose the 'expansive' interpretation in favour of the individual interest of the applicant in every case. Rather, its task is to take a decision that gives an appropriate weight to all relevant reasons.

Pursuant to modern linguistic insights, it is invariably necessary to take a decision not already taken by someone else when applying legal standards, even the well-established concrete rights of the Convention. What is torture, or inhuman or degrading treatment, and what is not, cannot simply be 'seen' but must be decided. Whether forcibly administering emetics to a drug dealer who swallowed his product is to be considered inhuman treatment remains a normative assessment.³¹ Nevertheless, this assessment is bound and specified to a much higher degree than are decisions concerning broad and relative rights: intersubjectively evident examples and leading precedent on the question, which together constitute the legal core meaning of a rule, usually provide guidance. In that sense, concrete Convention rights may be thought of as well-established or to a certain extent even as pre-existing, despite being further developed by the Court in every case. This also allows for criticism when the Court strays too far from that core meaning. In *Bouyid*, for example, the Court held a slap in the face to constitute degrading treatment, which was criticized by the dissenting minority for not reaching the minimum level of severity usually reached in other cases.³²

Finally, it should be stressed that the general rule requiring any interpretation to plausibly connect to the text of the treaty is of fundamental importance to the legality and legitimacy of the Court's jurisprudence. Only in rare cases, the principle of effective interpretation (*effet utile*) or the subsequent practice by all states under Article 31(3)(b) VCLT can, indeed, have the effect of relaxing this requirement to a certain extent. Despite being methodologically sound, this step should only be taken if very strong reasons to do so exist: in these cases, the gap of input legitimacy left by the Convention's text must be filled by that of subsequent

³⁰ Council of Europe (ed.), Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights, Vol. 2: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly 10 August – 18 November 1949 (1975), at 47.

³¹ Affirmative: *Jalloh v. Germany* [GC], Judgment of 11 July 2006, [2006] ECHR (Appl. No. 54810/00), at 75–83, in particular at 79: 'As to the manner in which the emetics were administered, the Court notes that, after refusing to take the emetics voluntarily, the applicant was pinned down by four police officers, which shows that force verging on brutality was used against him. A tube was then fed through his nose into his stomach to overcome his physical and mental resistance'; *contra* nonetheless, *ibid.*, Judges Wildhaber and Cafilisch dissenting, at 6.

³² See *Bouyid v. Belgium* [GC], Judgment of 28 September 2015, [2015] ECHR (Appl. No. 23380/09), at 100–13, and the Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney.

practice³³ or the legitimacy of effectively safeguarding rights otherwise firmly established.³⁴

2.2. Safeguarding the practical rationality of the decision-making discourse

The ECHR guarantees many rights, like Article 8, that are broad, abstract, and relative, as a whole, leaving basically no individual interest of importance outside the scope of its protection. This expansive interpretation of the Convention rights' ambit is easily covered, maybe even indicated, by these Articles' broad wording.³⁵ That severe pollution by a factory built next to one's home interferes with one's private and family life cannot be reasonably denied by reference to the wording.³⁶ The argument against including such constellations is not one of textual limits but of teleological considerations. The Convention, it is said, is not supposed to cover such trifles, but only real human rights.³⁷ And the list of interests that some have deemed unworthy of protection by an international court of human rights is long. Criminal prosecution of deviant sexual behaviour and sex reassignment have prominently been held not to be important enough.³⁸ Protection against noise pollution so extreme as to be a health hazard has been belittled as a 'right to sleep'.³⁹ The question of who enjoys the right to vote was considered merely a 'minor social policy issue'.⁴⁰ Considering such issues as trifles reveals a surprising degree of indifference to interests of eminent importance to the often vulnerable persons affected – an indifference that the Convention rights are precisely meant to counteract. Compared to issues classically understood as being covered by civil and political rights, these are not more indeterminate.⁴¹ Hard and easy cases exist in both.

This is not to say that the Court needs to deal with each and every issue that arises at the national level. The Court has long required a minimum level of severity to engage the Convention's protection⁴² and it also held situations not to be covered

³³ *Soering v. The United Kingdom* [PL], Judgment of 7 July 1989, [1989] ECHR (Appl. No. 14038/88), at 103; *Al-Sadoon and Mufdhi v. The United Kingdom* [GC], Judgment of 2 March 2010, [2010] ECHR (Appl. No. 61498/08), at 120; *Hassan v. The United Kingdom* [GC], Judgment of 16 September 2014, [2014] ECHR (Appl. No. 29750/09), at 101 – also showing that this may have the effect of expanding the possibility to restrict rights.

³⁴ *Golder*, *supra* note 20, at 28, 35–6; *Airey v. Ireland*, Judgment of 9 October 1979, [1979] ECHR (Appl. No. 6289/73), at 20–8; *Murray v. The United Kingdom* [GC], Judgment of 8 February 1996, [1996] ECHR (Appl. No. 18731/91), at 62–3; *Berlinski v. Poland*, Judgment of 20 June 2002, [2002] ECHR (Appl. nos. 27715/95 and 30209/96), at 75–7.

³⁵ Cf. G. Fitzmaurice, 'Some Reflections on the European Convention on Human Rights – and on Human Rights', in R. Bernhardt et al. (eds.), *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (1983), 203, at 214: 'What is there ... that cannot colourably be brought within these categories?'

³⁶ *López Ostra v. Spain*, Judgment of 9 December 1994, [1994] ECHR (Appl. No. 16798/90), at 51.

³⁷ Lord Sumption, *supra* note 2, at 7; see for a similar critique from the Netherlands Oomen, *supra* note 2, at 415.

³⁸ See for all of these Fitzmaurice, *supra* note 35, at 213–16.

³⁹ Lord Hoffmann, 'The Universality of Human Rights', (2009) 125 *Law Quarterly Review* 416, at 427, 430.

⁴⁰ Davis, *supra* note 22, at 70.

⁴¹ As Fitzmaurice is suggesting: *supra* note 35, at 215.

⁴² See, e.g., *Galev and others v. Bulgaria*, Decision of 29 September 2009, [2009] ECHR (Appl. No. 18324/04), where the emissions from a dental practice did not meet that threshold.

by Article 8 ECHR.⁴³ Considering the issues that have been claimed to be unworthy of being treated as human rights issues, it should be safe to say that it is advisable to err on the side of being somewhat over-inclusive in this regard. Moreover, it is *prima facie* for the individual to decide what is of importance to him or her.

As is well known, the broad ambit of the Convention rights thus established creates interpretive challenges. In substance, the review exercised with regard to such rights cannot be thought of as holding states to well-established or pre-existing standards, because not enough substance exists. A prototypical application of the right to freedom of expression as a political core right, for example, is expressing one's opinion during an election. But when advocating one's political opinion, for example, inside a polling station, doubts arise. Should this be allowed? Where are the limits? Generally speaking: Even when interests of the highest importance are concerned, experience shows that legitimate countervailing reasons may in certain situations be available to doubt which interest should prevail.

By endowing the Court with the authority to interpret this broad Convention text, the states accordingly delegated wide powers of judicial review. Being familiar with the example of the US Supreme Court, the experts who drafted the Convention were acutely aware of this fact.⁴⁴ Conferring on the Court the authority to review such broad rights can be understood as follows: States subjected the national decision-making process to review, in order to ensure that this process rationally strikes a balance between individual and community interests as well as between individual freedoms. The review exercised aims at ensuring the proper functioning of that decision-making process in a democratic state under the rule of law.

2.2.1. *Holding the democratic decision-making process to its own standard*

The purpose of the democratic process is sometimes taken to be the execution of the will of the majority. Such an understanding, however, is incomplete. It does not reflect our actual practice of democracy, in which it is not enough for decisions to be taken in a formally democratic manner subject to majority rule. This is true for all democracies. It may be the will of a democratic majority to kill every blue-eyed new-born.⁴⁵ Nevertheless, we tend to think that something went fundamentally wrong if such a decision were taken. Democratic decisions only in part gain their legitimacy from the people's or its representatives' vote and will. Equally important are the (practical and theoretical) reasons for which a decision is taken. The public use of reason to justify state action is an essential characteristic and legitimizing element of democracy.⁴⁶ The democratic process is meant to collectively agree on

⁴³ *Ivan Atanasov v. Bulgaria*, Judgment of 2 December 2010, [2010] ECHR (Appl. No. 12853/03), at 66: 'no right to nature-preservation'; *Friend and others v. The United Kingdom*, Decision of 24 November 2009, [2009] ECHR (Appl. nos. 16072/06 and 27809/08), at 43: 'hunting is, by its very nature, a public activity'.

⁴⁴ In particular the UK's representative Nally in Council of Europe (ed.), *Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, Vol. 1 (1975), 148, 150; see also E. Bates, *The Evolution of the European Convention on Human Rights* (2010), 82, 88 et seq.

⁴⁵ See, for the example, L. Stephen, *The Science of Ethics* (1882), 143.

⁴⁶ R. Alexy, 'Balancing, constitutional review, and representation', (2005) 3 *ICON* 572, at 579; J. Nida-Rümelin, *Demokratie und Wahrheit* (2006), 37–47; Cf. W. Sadurski, 'Supranational public reason: On legitimacy of supranational norm-producing authorities', (2015) 4 *Global Constitutionalism* 396, at 403–6.

what best to do in the common interest of all, not in that of only a few. Decisions that are not taken in that manner are deficient. Accordingly, the purpose of the democratic process is to decide by adequately taking into account the individual and community interests concerned. In that minimalist and pragmatic sense, all of Europe's democracies are profoundly deliberative.

The principle of proportionality applied by the Court when interpreting relative Convention rights mirrors this democratic balancing act. A (substantive) proportionality analysis is the result of employing the legal methodology of the VCLT to Convention rights that are broad, abstract, and relative – and the VCLT's failure to justify a decision all by itself. The binding effect of the Convention's text ('necessary in a democratic society') is almost non-existent and the oft-reliable guideline of the object and purpose malfunctions due to the fact that it is precisely the aim to be achieved which is controversial. The content of human rights is contentious in these cases, not the effectiveness of their protection.

The proportionality test follows from the necessity to safeguard these Convention rights in a meaningful way despite these difficulties. The Court and the contracting states apply the *same* substantive standard: a fair balance of reasons.⁴⁷ The review exercised by the Court holds the democratic decision-making process to its own standard.⁴⁸ No legal methodology in the strict sense is forced on the democratic process; rather, the legal technique mirrors the proper functioning of that process.⁴⁹

2.2.2. *Proportionality and guiding factors in the Court's jurisprudence*

Considering that the Court applies the same substantive standard, but that it is not for the Court to replace the national institutions as decision-makers, it is crucial to know when an intervention by the Court is warranted. In the Court's wording: if the reasons adduced fail to be relevant and sufficient.⁵⁰ A rule determining once and for all what is and what is not permissible under the Convention is impossible to devise. Often, a strong yearning for absolute determinacy can be seen in legal literature and politics. It is bound to be disappointed.

Unlike sometimes presumed, the reason for the Convention rights' indeterminacy does not so much lie in a failure of the Convention's framers to reach consensus.⁵¹ The complexity of the Convention rights is owed to their broad ambit, which prevented their framers from precisely defining them – and continues to prevent the Court from achieving absolute determinacy in its case law.

Historically, the most elaborate attempt at highly determinative legislation for an extremely wide field was the General State Laws for the Prussian States of 1794. With 19,000 articles, it not only proved to be extremely impractical, but also failed

⁴⁷ A. Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000), 107.

⁴⁸ Cf. M. Kumm, 'Democracy is not enough: Rights, proportionality and the point of judicial review', 11 March 2009, *New York University School of Law*, at 5, 21, 35, available at ssrn.com/abstract=1356793.

⁴⁹ Cf., seeking to decouple legitimacy and democracy, Sadurski, *supra* note 46, at 402.

⁵⁰ *Delfi AS v. Estonia* [GC], Judgment of 16 June 2016, [2016] ECHR (Appl. No. 64569/09), at 142.

⁵¹ Cf. A. Sweet, 'Constitutional Courts', in Rosenfeld and Sajó (eds.), *supra* note 16, 817, at 821; Dothan, *supra* note 28, at 517–18.

to eliminate the need for interpretation.⁵² Problems of a high complexity can only be solved appropriately by decisions that are not too pre-determined.⁵³

Nevertheless, the Court's decision-making need not be and is not completely *ad hoc* either.⁵⁴ In lieu of rigid rules, the Court develops in its jurisprudence factors that are meant to guide decision-making in interpreting the Convention's terms as well as in balancing exercises.⁵⁵ These factors are practical reasons understood to be relevant for decision-making in certain recurring constellations. The Court institutionally reaffirms them because of their weight as reasons and because they are generalizable. They direct the decision-making process in one direction, guide it to a certain extent but are not, by themselves, determinative of the outcome. In this way, guidance is given but future decision-making, by the Court as well as national institutions, is not overly restricted. Doing so would, considering the complexity of the problems that need to be solved, inevitably lead to decisions no one could accept, or make the amendment of those rigid rules necessary. An intervention by the Court in the national decision-making process is necessary in particular when these reasons, which are recognized in the Court's case law as relevant factors, are not taken into account or are applied in an unreasonable manner.

2.2.3. *The margin of appreciation as second-order reasons*

Two fundamental categories of practical reasons must be distinguished in this regard: first- and second-order reasons.⁵⁶ First-order reasons relate to the substantive decision that needs to be taken. Second-order reasons are not concerned with the question *what* decision to take, but *who* should take it. These are the reasons constituting the margin of appreciation. Such reasons are used in daily life, e.g., when grandparents respect parents' decisions concerning their children's upbringing, although they would have decided differently themselves. Second-order reasons are not restricted to particularly challenging ethical issues⁵⁷ or meant to strategically impose 'the costliest judgment that will still obtain compliance'.⁵⁸ They apply to all decisions, since they are good and general practical reasons, not political stratagems.

Second-order reasons differ from the way the margin of appreciation is sometimes understood. They neither exclude the Court from undertaking a substantive

⁵² M. Albrecht, *Die Methode der preußischen Richter in der Anwendung des Preußischen Allgemeinen Landrechts von 1794* (2005), 77, 221.

⁵³ Cf. N. Luhmann, *Legitimation durch Verfahren* (1983), 181; for an enlightening basketball analogy see S. Fish, *Doing What Comes Naturally* (1989), 123–5.

⁵⁴ Cf. for such an understanding N. Petersen, 'Balancing and judicial self-empowerment: A case study on the rise of balancing in the jurisprudence of the German Federal Constitutional Court', (2015) 4 *Global Constitutionalism* 49, at 52–3.

⁵⁵ See most recently *Bărbulescu v. Romania* [GC], Judgment of 5 September 2017, [2017] ECHR (Appl. No. 61496/08), at 121; cf. A. Bårdson, 'The Norwegian Supreme Court and Strasbourg', (2014) 15 *GLJ* 1293, at 1300 et seq.; Popelier and van de Heyning, *supra* note 8, 16–17.

⁵⁶ See Legg, *supra* note 5; cf. also C. Mendes, 'Is It All About the Last Word? Deliberative Separation of Powers', (2009) 3(1) *Legisprudence* 69, at 73.

⁵⁷ E. Dubout, 'Interprétation téléologique et politique jurisprudentielle de la Cour européenne des droits de l'homme', (2008) 74 *RTDH* 383, at 413–14.

⁵⁸ S. Dothan, 'Judicial Tactics in the European Court of Human Rights', (2011) 12 *Chicago Journal of International Law* 115, at 126; cf. also Petersen, *supra* note 54, at 53–6, 73.

proportionality review,⁵⁹ nor do they allow the Court to refrain from analyzing the merits in detail.⁶⁰ In contrast to the view held by some scholars on the different levels of scrutiny applied in domestic contexts, their existence or absence in a particular case also does not strictly correlate with the likelihood of finding a violation.⁶¹ Finally, first- and second-order reasons are not considered separately, but are part of a single combined balancing act.⁶²

Second-order reasons influence the Court's authority to weigh first-order reasons for itself. They reflect the insight that there is not only one legitimate player in the decision-making discourse: Conceptually, the decision-making process of democratic states under the rule of law must not be thought of as an antagonist to individual rights, although *de facto* it may on occasion prove to be just that. If that process worked as it is supposed to, then this is a strong second-order reason against an intervention by the Court. Very strong first-order reasons would be necessary to find a violation of the Convention and thus replace the national institutions' decision. For example, the second-order reason that makes grandparents respect parents' decisions in general may be overcome with sufficiently strong first-order reasons, e.g., violence against the child – even if that decision was taken by the parents after careful deliberation.⁶³ Inversely, even if the decision under review is found wanting in terms of second-order reasons, and therefore an intervention by the Court would be more legitimate, the first-order reasons might be clear enough to uphold the decision nonetheless. In consequence, by finding that a wide margin of appreciation is or is not warranted, the outcome of a proportionality analysis is not prejudged in any direction.

Important second-order reasons can be the issue's complexity⁶⁴ and the productivity of the interpretative methods of the VCLT, including subsequent state practice and thus a European consensus.⁶⁵ The latter is sometimes understood as allowing the Court to merely acknowledge the change that the Convention rights or the values underlying them already went through.⁶⁶ From this point of view, the Court in the above-mentioned *Dudgeon* and *Tyrer* cases⁶⁷ identified contemporary societal conditions and adjusted the Convention accordingly. However, this does not reflect the function of second-order reasons in the Court's jurisprudence.

⁵⁹ E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', (1999) 31 NYU JILP 843, at 854.

⁶⁰ See for such an understanding J. Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', (2011) 29 NQHR 324, at 356–7; see also *Egeland and Hanséid v. Norway*, Judgment of 16 April 2009, [2009] ECHR (Appl. No. 34438/04), concurring opinion Judge Rozakis.

⁶¹ For such an understanding cf. O. Arnardóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights', (2014) 14 HRLR 647, at 649, 656; von Staden, *supra* note 3, 1038; Kratochvíl, *supra* note 60, at 354.

⁶² Cf. D. Spielman, 'Wither the Margin of Appreciation?', (2014) 67 *Current Legal Problems* 49, at 56: 'Determining ... [the margin of appreciation's] span is not a prelude to the [Court's] exercise of judgment in a case, but intrinsic to it'.

⁶³ See, for that example, Legg, *supra* note 5, at 19, who in turn took it from J. Raz, *supra* note 5, at 37.

⁶⁴ *Sporrong and Lönnroth v. Sweden* [PL], Judgment of 23 September 1982, [1982] ECHR (Appl. nos. 7151/75 and 7152/75), at 69.

⁶⁵ Cf. ILC, *supra* note 23; Legg, *supra* note 5, at 103–6.

⁶⁶ G. Lebreton, *Libertés publiques et droits de l'homme* (2003), at 26–8: 'positivisme sociologique'.

⁶⁷ See *supra* notes 26 and 27.

The Court is not merely executing the current 'true will' of European states and citizens when looking for a European consensus.⁶⁸ But neither is the Court using the European consensus as mere 'subterfuge' for implementing some hidden agenda.⁶⁹

By referring to its contracting states' practice and other sources, the Court taps into the legitimacy these sources can provide.⁷⁰ The Court is drawing reasons from other norm-setting processes, and also the weight attached to these reasons in these processes.⁷¹ The subsequent practice of contracting states – but also that of their international organizations, such as the EU or the Council of Europe – provides input legitimacy to a decision taken in accordance with it.⁷² References to sources not related to the contracting states cannot provide input legitimacy, but they can serve as persuasive authority: It is indicative of a reason's weight when it is shared in other jurisdictions.⁷³

Contrary to popular belief, the use of all these materials does, in principle, *not* extend the range of decisions the Court can take⁷⁴ but actually restricts its interpretative freedom. The increased number of texts the Court is in this way referring to in interpreting the Convention is usually not used to overcome textual restrictions but to find reasons for making a decision that it could take anyway within the limits of the Convention text. When assessing the proportionality of a measure, e.g., the Court could, in principle, come to the conclusion that no fair balance was struck based entirely on its own substantive reasoning. In taking account of these additional materials, it is restricting its freedom by having to deal with them argumentatively. They may provide arguments against, but also in favour of a state's position, depending on the case.

Most often, the most important second-order reason will be the legitimacy of the decision under review: its input legitimacy, e.g., if taken by parliament or popular referendum,⁷⁵ as well as the substantive part of its procedural legitimacy. This latter form of legitimacy is generated procedurally by referring to substantive (first-order) reasons: if all relevant interests and reasons were seriously taken into account on the

⁶⁸ Dothan, *supra* note 28, at 524; P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in Institut suisse de droit comparé (ed.), *Le rôle du droit comparé dans l'avènement du droit européen: Lausanne, 14 - 15 avril 2000* (2002), 143 at 147.

⁶⁹ Benvenisti, *supra* note 59, at 852.

⁷⁰ F. Tulken et al., 'Le soft law et la Cour européenne des droits de l'homme: questions de légitimité et de méthode', (2012) 91 RTDH 434, at 473–81.

⁷¹ Cf. K. Dzehtsiarou and V. Lukashevich, 'Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court', (2012) 30 NQHR 272, at 277.

⁷² Cf. T. Kleinlein, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) 28 EJIL 871, at 883; D. Popović, 'Le droit comparé dans l'accomplissement des tâches de la Cour européenne des droits de l'homme', in L. Caflisch et al. (eds.), *Human Rights – Strasbourg Views: Liber Amicorum Luzius Wildhaber* (2007), 371 at 382, 386; Mahoney, *supra* note 68, at 144.

⁷³ See, e.g., *Timurtas v. Turkey*, Judgment of 13 June 2000, [2000] ECHR (Appl. No. 23531/94), at 79–80; *Demir and Baykara v. Turkey* [GC], Judgment of 12 November 2008, [2008] ECHR (Appl. No. 34503/97), at 78–86 with further references.

⁷⁴ Which is often taken for granted: W. Schabas, *The European Convention on Human Rights: A Commentary* (2015), 48.

⁷⁵ Cf. von Staden, *supra* note 3, at 1042.

national level, this constitutes a strong (second-order) reason to respect the decision thus taken.⁷⁶

2.2.4. *The interplay of first- and second-order reasons in the Court's jurisprudence*

Judgments such as *Evans* show that the Court is in fact reviewing the national decision-making process in said manner.⁷⁷ In this well-known case, the Court had to deal with the issue of in-vitro fertilization. Eleven eggs were extracted from the applicant, artificially inseminated with her partner's sperm and frozen. Since pre-cancerous tumours were discovered in the applicant's ovaries, these were surgically removed after the procedure had been completed. Before the eggs could be implanted, the applicant and her partner split up, the latter withdrawing his consent for the procedure. British law permitted him to do so until the implantation.

The Court held this regulation to be in conformity with the applicant's right to respect for her private life under Article 8 ECHR. Every possible decision would completely frustrate the interests of either the applicant or her former partner, i.e., her interest in having offspring genetically related to her or his interest in not having children with his former partner. Both had been adequately informed of the legal framework and the possibility to withdraw consent.

The Grand Chamber's majority, as had already a Chamber's, did not consider itself able to find a fairer balance than the British legislator had. As both chambers emphasized, a different rule could have been adopted, e.g., making consent final at the time of the artificial insemination. However, the issue's complexity, a lack of European consensus on it, the legislative history in which all interests affected had been carefully weighed, and in which the public had had the possibility to participate, led to a wide margin of appreciation. The serious endeavour of the British decision-making process to achieve a fair balance was respected.

Evans clearly shows the reviewed decision's input and substantive-procedural legitimacy to be factors in determining the width of the margin of appreciation. The Court did not 'hide' behind the margin of appreciation,⁷⁸ but recognized the limits of its own legitimacy. Since the national decision-making process had functioned in an exemplary fashion, and no decisive first-order reasons speaking against the decision taken were apparent, the Court could not but recognize the dilemma that the case was and respect the national decision. Another pertinent example is *Animal Defenders International v. The United Kingdom*, in which the Court upheld a prohibition of political TV and radio advertising, taking into account that the prohibition was the result of thorough deliberative decision-making by both Parliament and domestic courts.⁷⁹

⁷⁶ Cf. Kleinlein, *supra* note 72, at 889; Popelier and van de Heyning, *supra* note 8, at 23; L. Lazarus and N. Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference', in M. Hunt et al. (eds.), *Parliaments and Human Rights: Redressing the democratic deficit* (2014), 385 at 389.

⁷⁷ *Evans v. The United Kingdom* [GC], Judgment of 10 April 2007, [2007] ECHR (Appl. No. 6339/05), at 13 et seq.

⁷⁸ P. Ducoulombier, 'Conflicts Between Fundamental Rights and the European Court of Human Rights: An Overview', in E. Brems (ed.), *Conflicts Between Fundamental Rights* (2008), 217 at 242 (fn. 124).

⁷⁹ *Animal Defenders International v. The United Kingdom* [GC], Judgment of 22 April 2013, [2013] ECHR (Appl. No. 48876/08), at 114 et seq.; see for more details M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments', (2015) 15 HRLR 745, 754 et seq.

The contrary effect could be seen in the failure of the national decision-making process to perform similarly well in *Hirst (No. 2)*.⁸⁰ In this by-now infamous judgment, the Court held the deprivation of the right to vote of all prisoners serving a criminal sentence to be in violation of the Convention. The judgment remains key in the critique of the Court voiced in Britain by politicians, legal scholars, the media and the public.⁸¹

The great weight that must be attached to the right to vote in a democracy, and thus under the Convention, is an important first-order reason that speaks against depriving someone of that right. That the right to vote is still often understood in British discourses not to be a 'true' human right shows in itself the necessity of the control exercised by the Court. It seems rather contradictory to challenge the Court's authority by referencing the great importance of democratic self-government through Parliament while at the same time considering the right to vote to be only a minor issue not worthy of the name human right.⁸² Under the Convention, applying the methods of the VCLT, it is simply not possible to muster an argument for the proposition that the right to vote is of low importance.⁸³

The community interest in punishing offenders and strengthening people's confidence in the rule of law speaks in favour of depriving prisoners of this right. The Court in general accepted these reasons but found the measure to be disproportionate because it covered *all* prisoners serving a criminal sentence. At least for some prisoners, who serve only short sentences, the reasons of punishment and reinforcement of the rule of law did, according to the Court, not prevail over the importance of their right to vote.

It is precisely this point where it becomes evident why the question of what weight must be attached to reasons is and will always remain controversial. Weighing reasons constitutes the core of deliberative democracy. It could be and was argued that in a modern criminal justice system only the perpetrators of grave crimes face prison time, and that, accordingly, depriving them of the right to vote was a proportionate response to a violation of society's most fundamental rules.⁸⁴ The Court, in determining that this reasoning was insufficient, made a substantive decision to attach less weight to the reasons of punishment and strengthening the rule of law than the national decision-making process did.

The following second-order reasons bolstered the Court's legitimacy to make such an assessment: first, the absence of any substantive debate on the issue by the national institutions. Even discussions that took place post-*Hirst* centred mostly on

⁸⁰ *Hirst v. The United Kingdom (No. 2)* [GC], Judgment of 6 October 2005, [2005] ECHR (Appl. No. 74025/01), at 72 et seq.

⁸¹ For more details see E. Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg', (2014) 14 HRLR 503.

⁸² Lord Sumption, *supra* note 2, at 7, 10.

⁸³ Whether Art. 3 Protocol 1 enshrined a right at all, might have been subject to debate because of its wording, but this issue has long been settled, with convincing reasons, in *Mathieu-Mohin and Clerfayt v. Belgium* [PL], Judgment of 2 March 1987, [1987] ECHR (Appl. No. 9267/81), at 46–60.

⁸⁴ *R. (Chester) v. Secretary of State for Justice* [2013] UKSC 63 [135] Lord Sumption (with whom Lord Hughes agrees), concurring.

the Court's authority and not the substantive issue.⁸⁵ The legislature's will must be taken into account as input legitimacy, but the mere will to deprive a group of people of a right cannot generate substantive-procedural legitimacy.⁸⁶ Secondly, disenfranchised prisoners cannot participate in the democratic process to change the law, in order to be enfranchised, which reduces the input legitimacy of that law.⁸⁷ Finally, prisoners, who mostly do not attract people's sympathy, are a minority group that will always find it difficult to have its (legitimate) interests adequately taken into account in the democratic process. That they committed a crime warranting imprisonment does not change this assessment.⁸⁸

In light of these first- and second-order reasons speaking against depriving all prisoners serving a criminal sentence of the right to vote and in favour of the Court's authority to intervene in the national decision-making process, the judgment in *Hirst* seems quite reasonable after all. Contrary to the picture that is painted in the UK again and again, the Court was not, in presumptuous arrogance, 'waging a war' against the British legal order.⁸⁹ Moreover, the critique expressed in the UK was taken up in *Scoppola (No. 3)*, in which the Court overturned the more expansive judgment in *Frodl*,⁹⁰ which had called for a decision by a judge in the individual criminal case.⁹¹ That none of the relevant actors is completely satisfied with the outcome should be considered a strength of the Court's balancing influence, which avoids overly encroaching on any one interest.⁹²

Finally, the interplay between a proportionality analysis and the margin of appreciation is demonstrated well by the multi-polar rights constellations generated by media coverage affecting people's private lives. These cases also illustrate the necessity of the Court as a second player in the decision-making discourse.

Whenever the Court intervened in the balancing conducted by the national courts in the leading cases of *Von Hannover*,⁹³ *Von Hannover (No. 2)*,⁹⁴ and *Axel Springer AG v. Germany*,⁹⁵ it was criticized for overreaching.⁹⁶ However, the national courts in fact still enjoy a considerable margin of appreciation in balancing the interests affected. When the Court did intervene, it did so on the basis of sufficiently strong first- and second-order reasons. That the private life of the applicant in *Von Hannover* could, save when she actively and visibly retreated from the public, always be subject to

⁸⁵ See in particular HC Deb. 22 Nov 2012 Cols. 745–62.

⁸⁶ Cf. Kleinlein, *supra* note 72, at 879; see, however, apparently in a different direction Harbo, *supra* note 7, 44–5; Popelier and van de Heyning, *supra* note 8, at 22–3.

⁸⁷ Dothan, *supra* note 28, at 521.

⁸⁸ Not recognizing this: Lord Sumption, *supra* note 84, at 112: 'Prisoners belong to a minority only in the banal and legally irrelevant sense that most people do not do the things which warrant imprisonment by due process of law'.

⁸⁹ See on this C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (2017), in particular at 113 et seq.

⁹⁰ *Frodl v. Austria*, Judgment of 8 April 2010, [2010] ECHR (Appl. No. 20201/04); see Bates, *supra* note 81, at 533.

⁹¹ *Scoppola v. Italy (No. 3)* [GC], Judgment of 22 May 2012, [2012] ECHR (Appl. No. 126/05), at 97–102.

⁹² Critical towards the compromise in *Scoppola*: R. Bellamy, 'The democratic legitimacy of international human rights conventions: political constitutionalism and the Hirst case', in A. Føllesdal et al. (eds.), *The Legitimacy of International Human Rights Regimes* (2014), 243 at 268.

⁹³ *Von Hannover v. Germany*, Judgment of 24 June 2004, [2004] ECHR (Appl. No. 59320/00), at 61 et seq.

⁹⁴ *Von Hannover v. Germany (No. 2)* [GC], Judgment of 7 February 2012, [2012] ECHR (Appl. nos. 40660/08 and 60641/08).

⁹⁵ *Axel Springer AG v. Germany* [GC], Judgment of 7 February 2012, [2012] ECHR (Appl. No. 39954/08).

⁹⁶ See, e.g., K.-H. Ladeur, *supra* note 2 at 1364.

media reporting, can certainly be considered a strong restriction of her rights under Article 8 ECHR. The interest of the press in using this reporting for commercial entertainment purposes could not, although generally protected by Article 10 ECHR, have a similar weight. In *Von Hannover (No. 2)*, the Court condoned the national courts' balancing that had taken into account the guiding factors established in its jurisprudence and reached nuanced results.

In *Axel Springer AG*, the Court based its judgment on the same set of factors, *inter alia* the articles' contribution to a debate of general interest, how well-known the person reported on was, and his or her prior conduct vis-à-vis the media.⁹⁷ It held that the national courts' judgments against a publisher, who had reported on an actor's criminal conviction for a minor drug offence, could not be upheld. That the German courts had not considered the main protagonist of a television series with an audience of millions to be well-known was rather unconvincing – despite the fact that national courts generally are, indeed, better placed to make such an assessment. In this case, their assessment was simply not plausible: had the actor not been a public figure, the media would not have reported on his conviction for a very unspectacular offence. The conduct would not have been newsworthy. Reporting on the prosecution of crimes generally serves a legitimate public interest, and the applicant had already given interviews to the media concerning a prior conviction for drug offences. Thus, strong first-order reasons, all framed as general guiding factors for use in future cases, pointed towards a decision in favour of the applicant. An intervention by the Court seemed warranted, despite the margin of appreciation enjoyed by the national courts. At any rate, the Court's interventions were selective, not indiscriminate. Leaving national institutions considerable room for manoeuvring, these decisions do not reveal an excessive tendency towards harmonizing European legal orders.⁹⁸

Many more cases could be cited that enshrine first-order reasons as factors meant to guide decision-making in future cases. On the one hand, these factors can serve as reasons in balancing exercises. Concerning the conformity with Article 8 ECHR of expelling aliens for security reasons, *inter alia* the nature and seriousness of the offence perpetrated, the length of the applicant's stay, as well as his or her social, cultural and family ties to the host and the home country have been recognized as relevant factors.⁹⁹ Whether the eviction from one's home is justified depends, *inter alia*, on whether the home was established lawfully and the existence of suitable alternative accommodation.¹⁰⁰

On the other hand, the interpretation of Convention terms is also guided by such factors, e.g., the determination whether a measure constitutes deprivation of liberty

⁹⁷ *Axel Springer AG v. Germany*, *supra* note 95, at 89–111.

⁹⁸ See, most recently, *Sihler-Jauch and Jauch v. Germany*, Decision of 24 May 2016, [2016] ECHR (Appl. nos. 68273/10 and 34194/11), at 29–40, upholding the German courts' balancing; cf. Harbo, *supra* note 7, at 46–7.

⁹⁹ *Case of Üner v. The Netherlands* [GC], Judgment of 18 October 2006, [2006] ECHR (Appl. No. 46410/99), at 57–8; first established in *Boultif v. Switzerland*, Judgment of 2 August 2001, [2001] ECHR (Appl. No. 54273/00), at 48, and therefore also called *Boultif* criteria.

¹⁰⁰ *Chapman v. The United Kingdom* [GC], Judgment of 18 January 2001, [2001] ECHR (Appl. No. 27238/95), at 102–4; *Case of Winterstein and others v. France*, Judgment of 17 October 2013, [2013] ECHR (Appl. No. 27013/07), at 148.

under Article 5 (which depends on the type of the measure, its duration, effects, and the manner of its implementation),¹⁰¹ or whether a treatment constitutes torture under Article 3 (which depends on the duration of the treatment, its physical or mental effects, the sex, age and state of health of the victim, as well as the purpose of the treatment).¹⁰²

In a way, this technique sets a ‘soft’ kind of precedent. It dissolves the oft-perceived difference between an *ad hoc* style of decision-making that is only based on the facts of the individual case at hand and a style of decision-making that delineates rights more broadly, setting standards that transcend the individual case.¹⁰³ The Court’s and the parties’ argumentation is channelled through these factors,¹⁰⁴ generating the amount of legal certainty methodologically possible, while retaining sufficient openness for the Court and national institutions to arrive at appropriate decisions. The recognition of general first-order reasons in the Court’s jurisprudence allows to understand many of the human rights issues that arise daily as easy cases, thereby generating legal certainty. Hard cases cannot be avoided by a methodology that seeks to arrive at legitimate decisions.

The *Case of S.A.S. v. France*, in which the Court condoned a ban on wearing face coverings in public, was certainly one of these hard cases.¹⁰⁵ Although formulated in neutral terms, the ban was clearly intended to prohibit wearing *burqas*, *niqabs* and other religious apparel. Unlike in *Dahlab*,¹⁰⁶ the Court did not base its decision on a sweepingly negative interpretation of the applicant’s choice of garment. Neither did the Court simply point to the margin of appreciation in an offhand manner to justify the restriction. It examined in detail the merit of each justification that had been advanced.¹⁰⁷ It rejected public safety as a sufficient reason for the restriction because identification on request was considered a less restrictive but equally suitable measure and a general ban thus unnecessary. The ban was held not to further the aim of gender equality because this aim could not be reached by keeping individuals from voluntarily exercising their rights. Next, the protection of human dignity was rejected as a justification. The mere fact that someone’s behaviour is perceived as strange by others is not sufficient reason in a pluralist democracy for prohibiting it on account of it being undignified. There was also no indication that the action was meant to express contempt for others. Finally, and without further discussion, the Court accepted that the aim of ensuring respect for the minimum requirements of life in society, a ‘living together’, justified the ban for the protection of the rights of others.

¹⁰¹ *Austin and others v. The United Kingdom* [GC], Judgment of 15 March 2012, [2012] ECHR (Appl. No. 39692/09), at 64–5; first established in *Engel and others v. The Netherlands* [PL], Judgment of 8 June 1976, [1976] ECHR (Appl. No. 5100/71), at 58–66.

¹⁰² *Case of El-Masri*, *supra* note 17, at 196.

¹⁰³ The distinction is made, e.g., by G. Christie, *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values* (2011), 110.

¹⁰⁴ See, e.g., the parties’ argumentation in the *Case of Winterstein*, *supra* note 100, at 122 et seq., referring to *Chapman*, *supra* note 100.

¹⁰⁵ *Case of S.A.S. v. France* [GC], Judgment of 1 July 2014, [2014] ECHR (Appl. No. 43835/11).

¹⁰⁶ *Dahlab v. Switzerland*, Decision of 15 February 2001, [2001] ECHR (Appl. No. 42393/98).

¹⁰⁷ *Case of S.A.S.*, *supra* note 105, at 113–59.

The detailed analysis of all but the last ground of justification is exemplary and confirms the mode of decision-making described here. The treatment of the last argument, recently confirmed by a chamber,¹⁰⁸ remains questionable, both in terms of first- and second-order reasons.¹⁰⁹ How far a miniscule minority within a minority effectively threatens the fabric of society by wearing certain apparel in public, remains somewhat of a mystery. That society and the state have a strong legitimate interest in regulating public behaviour that does not affect any tangible individual interests may be doubted.¹¹⁰ As regards second-order reasons, the adoption of the law was, as the Court noted, marked by discriminatory statements against Muslim women – whom the law was clearly meant to address despite its neutral framing. This should have tempered the legitimacy generated by the substantive debate on the issue in the French parliament. Considering all this, the reasons seem to point rather towards finding a violation.

Maybe, this is indeed an instance where the Court used the margin of appreciation because the case was politically sensitive.¹¹¹ That this would not be legitimate according to the model explicated here does not devalue this article's approach. Neither a court's case law, nor its methodology, should be evaluated based solely on judgments perceived to be problematic. No court will always render judgments of which everyone approves.

In summary, the Court's interpretation of the Convention leaves ample room for legitimate disagreement when taking into account not only first- but also second-order reasons. Nevertheless, the Court must have the competence to determine not only procedurally *if* national decision-makers struck a balance considering all relevant interests, but also substantially whether the first-order reasons were given an appropriate weight. This is crucial if the review exercised by the Court is to be meaningful and effective.

2.3. Checking the facts

Finally, and although it should generally avoid acting as a fourth instance, the Court must necessarily be able to examine the facts underlying a case. Its control can only be effective if the facts advanced by the parties can be questioned. The normative justification of a decision and its factual basis, i.e., practical and theoretical rationality, are too intimately connected for it to be otherwise: Were protests really in danger of turning violent and had to be disbanded for reasons of security or were these reasons merely a pretext used to intimidate the opposition? Many human

¹⁰⁸ *Belcacemi and Oussar v. Belgium*, Judgment of 11 July 2017, [2017] ECHR (Appl. No. 37798/13), at 48 et seq., but see the Concurring Separate Opinion of Judges Spano and Karakaş, who followed S.A.S. only reluctantly because of its weight as a Grand Chamber precedent.

¹⁰⁹ Likewise critical E. Brems, 'S.A.S. v. France as a problematic precedent', *Strasbourg Observers*, 9 July 2014, available at strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/; C. Grabenwarter and K. Struth, 'Das französische Verbot der Vollverschleierung – Absolutes Verbot der Gesichtshüllung zur Wahrung der "Minimalanforderungen des Lebens in einer Gesellschaft"?' (2015) 42 *EuGRZ* 1; in favour of the result C. Tomuschat, 'Menschenrechte und kulturelle Traditionen', (2016) 43 *EuGRZ* 6, at 10.

¹¹⁰ See also the dissenting vote in the case by Judges Nussberger and Jäderblom; but see *Gough v. The United Kingdom*, Judgment of 28 October 2014, [2014] ECHR (Appl. No. 49327/11), at 174–6, holding the criminal conviction of someone going naked in public to be in conformity with the Convention.

¹¹¹ Popelier and van de Heyning, *supra* note 8, at 22.

rights questions are, at their core, not normative but factual. National courts will enjoy a wide margin of appreciation in this regard, since their superior capacity to take evidence and their greater proximity to the issue are strong second-order reasons for respecting their assessment. Yet, this does not mean that it cannot be questioned at all. If cogent reasons exist, the Court will reassess a national court's factual determinations.¹¹²

In *Rakevich*, for example, the Court evaluated the available evidence as to whether the applicant had been of 'unsound mind' in the sense of Article 5(1) ECHR when deprived of her liberty.¹¹³ It found no reasons to challenge the domestic institutions' assessment and recognized that it was in the first place, but not exclusively, for these to evaluate the evidence.¹¹⁴ Inversely, in *J.K. v. Sweden*, likewise noting that national authorities are generally best placed to assess the facts, the Court overruled the national institutions' assessment that the applicant would not face a real risk of treatment contrary to Article 3 ECHR when expelled.¹¹⁵

The relevance of the facts can also transcend the individual case. In *S.L. v. Austria*, the applicant claimed a violation of his right to equal treatment in connection with his right to respect for his private life (Arts. 8 and 14 ECHR), since Austrian law penalized sexual relations between male adults and male adolescents between the age of 14 and 18, but did not do so for heterosexual or lesbian relations.¹¹⁶ Having heard 11 experts, ten of whom clearly stated that the idea of being 'recruited' into male homosexuality had no factual basis, and one simply stating that he considered the law necessary nonetheless, the Austrian Parliament voted to keep the law as it stood.¹¹⁷ The normative justification of the unequal treatment – which had also been accepted by the national constitutional court – was based, according to contemporary scientific knowledge, on false factual assumptions. Since no other reasons capable of justifying the distinction existed, finding a violation was compulsory.

Finally, it should be noted that the facts of a case may also change with time and therefore the need to reevaluate a normative argument may arise. For example, in the 2008 *Dogru* case, the Court accepted the argument that the prohibition on wearing a headscarf in physical education class at school was 'not unreasonable' for reasons of safety and health.¹¹⁸ However, in 2014, after a two-year pilot, the world football association FIFA found there to be 'no indication as to why the wearing of head covers should be prohibited' as long as certain design restrictions were complied with.¹¹⁹ Since modern headscarves designed for sportive activities have proven not to

¹¹² *Austin and others v. The United Kingdom* [GC], Judgment of 15 March 2012, [2012] ECHR (Appl. nos. 39692/09 et al.), at 61; cf. also Popelier and van de Heyning, *supra* note 8, at 14.

¹¹³ *Rakevich v. Russia*, Judgment of 28 October 2003, [2003] ECHR (Appl. No. 58973/00), at 26–30.

¹¹⁴ A violation was found on different grounds, *ibid.*, at 43–7.

¹¹⁵ *J.K. v. Sweden* [GC], Judgment of 23 August 2016, [2016] ECHR (Appl. No. 59166/12), at 84, 112–23.

¹¹⁶ *S.L. v. Austria*, Judgment of 9 January 2003, [2003] ECHR (Appl. No. 45330/99), at 23.

¹¹⁷ *Ibid.*, at 22–6, 37–47.

¹¹⁸ *Dogru v. France*, Judgment of 4 December 2008, [2008] ECHR (Appl. No. 27058/05), at 73.

¹¹⁹ International Football Association Board, Annual Business Meeting, 1 March 2014, agenda, available at www.fifa.com/mm/document/affederation/ifab/02/27/44/18/31_01_2014_ifab_agm_agenda_final_neutral.pdf; International Football Association Board, Annual Business Meeting, 2 October 2012 – decisions and directives, Circular No. 1322, 25 October 2012. The impetus for the pilot came from protests after the Iranian women's team was not allowed to compete in the 2012 Olympics.

constitute a risk for health or safety, this assessment by the Court would have to be reconsidered in upcoming cases. In that way, developments in the factual sphere may also require a development of the Convention's normative content as a living instrument.

3. WHY AN INTERNATIONAL COURT?

The question remains why democratic states under the rule of law should submit to such, potentially invasive, scrutiny: 'Why would we submit to being governed by *that*?'¹²⁰ The answer can be sought in the fact that, like all human decision-making systems, the national decision-making discourse can be dysfunctional.

First, this process may, in certain situations, tend to disregard firmly established standards, as for example the prohibition of torture. Such political options, considered too essential to be left to the daily political process, are taken off the table by the Convention.¹²¹ The picture of Ulysses, who, aware of his future weakness, had himself bound to his ship's mast to withstand the Sirens' call, illustrates this function.¹²² Such control has, unfortunately, also proven to be necessary for well-established democracies.¹²³ That even these standards are not entirely pre-existing, but are developed in the Court's jurisprudence, cannot be avoided by a methodology that strives to be an effective safeguard.

Secondly, by reviewing national decisions' conformity with more abstract Convention rights, taking into account first- and second-order reasons, the Court safeguards the national decision-making process against dysfunctions that may arise even in well-established democracies under the rule of law.¹²⁴ Historically proven over and over, majoritarian rule can leave minorities who do not have realistic prospects of having their interests adequately taken into account vulnerable to disproportionate burdens and abuse in the democratic process.¹²⁵ The formal equality of majority rule can be problematic in giving those highly affected by a decision the same say as those not interested at all.¹²⁶ The party system, influence exerted by governments and interest groups as well as other political constraints can result in decision-making being more about bargaining than a fair balance.¹²⁷ Moreover, in Europe's parliamentary democracies, parliament is, at least in its day-to-day operations, not effective in exercising control against a government that consists of its own party members.¹²⁸ Taking into account the will of the voters and of interest

¹²⁰ Smith, *supra* note 21, at 30.

¹²¹ Cf. Grimm, *supra* note 16.

¹²² J. Elster, *Ulysses and the Sirens: Studies in rationality and irrationality* (1979), 94.

¹²³ See, e.g., *Selmouni v. France*, *supra* note 18, at 78–9, 101–6. Also, in the *Case of El-Masri*, *supra* note 17, the world's oldest democracy was involved.

¹²⁴ Cf. Kumm, *supra* note 48, at 25; Dothan, *supra* note 28, at 520.

¹²⁵ A. Føllesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory', (2013) 14 *TIL* 339, at 355; Benvenisti, *supra* note 59, at 848 et seq.

¹²⁶ C. Mendes, *supra* note 56, at 105.

¹²⁷ *Ibid.*; D. Grimm, 'Judicial Activism', in R. Badinter and S. Breyer (eds.), *Judges in Contemporary Democracy: An International Conversation* (2004), 17 at 25; Kumm, *supra* note 48, at 26.

¹²⁸ See empirically on the Australian experience: C. Evans and S. Evans, 'Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection', in T. Campbell et al. (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (2011), 329 at 341.

groups – which is of course democratically legitimate – can come into conflict with the search for a fair balance of interests. So can politicians' career plans. Consequently, and for structural reasons, parliaments will at times fail to act in a way satisfying the requirements of democracy's deliberative aspect. Decisions taken by popular referendum may, for different reasons, also fail to do so.

The dysfunctions described here are examples of what may go awry in democratic states under the rule of law. This must not, however, distract from the fact that generally and, – at least in well-established democracies – in most cases, the decisions taken on the national level will in good faith seek a fair balance.

Why, then, should we rather live with the mistakes of the Court, which is not democratically accountable, than with those by the national democratic legislator and its courts?¹²⁹ Proponents and critics of the Court, and of judicial review in general, tend to romanticize their positions.¹³⁰ Where one person sees a pillar of democratic legitimacy, the perfect expression of our association as free and equal citizens, others see party politics, intrigue, corruption, and oppression. Where one person sees the protection of everyone's right to equal freedom and dignity by an independent institution subject only to legitimate law, others see presumptuous oligarchy, and foreign rule. For example, to illustrate their positions, critics like to refer to cases such as *Roe v. Wade* decided by the US Supreme Court on abortion¹³¹ – which is commonly taken to be badly reasoned – and compare it to the exemplary parliamentary debate on the same topic in the British House of Commons.¹³²

Both approaches are to be dismissed. An evaluation of the position of parliaments, courts and other institutions in a modern democratic state under the rule of law and in its international framework must be made according to their structural tendencies, not based on worst- and best-case scenarios.¹³³ The respective advantages of these institutions and their modes of decision-making need to be used in order to minimize their disadvantages.¹³⁴

First, it must be noted that in most cases it is not plausible to distinguish between legislation and government of an entirely democratic nature, through and by which 'the people' decide, and judges who impose their 'external' will on the people.¹³⁵ Understanding parliaments as a miniature assembly of 'the people' overlooks the actual functioning of modern parliaments that organize themselves in committees and through party hierarchies.¹³⁶ Most of the time, representative democracy is able

¹²⁹ Cf. M. Kumm, 'The Problem of Judicial Review', in M. Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (2012), 201 at 212.

¹³⁰ See for such tendencies: C. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2007), 113–29; cf. C. Mendes, *supra* note 56, at 72–5.

¹³¹ *Roe v. Wade*, 410 U.S. 113 (Sup.Ct. 1973).

¹³² J. Waldron, 'The Core of the Case Against Judicial Review', (2006) 115 YLJ 1346, at 1384; Lord Sumption, *supra* note 2, at 13.

¹³³ A. Føllesdal, 'Why the European Court of Human Rights Might Be Democratically Legitimate – A Modest Defense', (2009) 27 NJHR 289, at 299.

¹³⁴ Mendes, *supra* note 56, at 109.

¹³⁵ Kumm, *supra* note 48, at 33.

¹³⁶ Mendes, *supra* note 56, at 104.

to realize the maxim '[w]hat touches all should be decided by all'¹³⁷ only to a very limited degree. This should not be understood as a critique, but as recognizing the unavoidable consequence of organizing political communities of a certain size and the necessary division of labour: Power is always exercised by a few and, in that sense, is always to a certain degree oligarchical¹³⁸ – even when exercised in good faith in the name of the people and in a way accountable to them.

Secondly, it should not be forgotten that the accountability of the people's representatives is, in practice, ensured by elections that take place only every few years. Between these, democratic power is exercised more or less independently, and the fashion in which politicians are held accountable is usually a rather global evaluation of their performance.¹³⁹ The accountability that elections provide is thus not as effective in imposing the will of the people on individual issues – supposing that such a will exists – as is often claimed. The establishment of the Court is consequently another, but qualitatively different, oligarchical element in the structure of modern European democracies.¹⁴⁰

The decisive difference between the Court and parliaments lies in the different aspects of democracy they represent. Politicians must not only take into account democracy's deliberative part, but also its aggregative and competitive side.¹⁴¹ It is also, and legitimately so, their purpose to represent citizens and their interests. Judges who safeguard human rights, however, are committed solely to the deliberative aspect.¹⁴² In contrast to politicians but also citizens, it is the judges' exclusive role to make a reasonable decision taking into account all relevant reasons and interests. The proceedings before a court like the European Court of Human Rights institutionalize the deliberation of public reasons.¹⁴³ For a politician, a conflict can arise between the interests or will of his voters and striking a fair balance between all interests affected¹⁴⁴ – but not for the Court.

Conducting a deliberation without undue pressure and prejudging the outcome, with empathy and a view to the common good, not looking to unilaterally assert preferences, is unquestionably a demanding ideal. But deliberative decision-making depends substantially on the institutional setting.¹⁴⁵ In an institution dedicated to that purpose, free from any direct non-argumentative pressure and composed of persons who are, according to all available data, impartially and independently fulfilling their tasks to the best of their knowledge and judgment, reaching this ideal seems to have good prospects of realization. The attitudinal model often used to

¹³⁷ Bellamy, *supra* note 2, at 1040.

¹³⁸ R. Michels, *Political Parties: A sociological study of the oligarchical tendencies of modern democracy* (1915), 32.

¹³⁹ A. Lever, 'Democracy and Judicial Review', (2009) 7 *Perspectives on Politics* 805, at 811.

¹⁴⁰ Cf. R. Dahl, *Democracy and its Critics* (1989), 177–8, 187–91.

¹⁴¹ A. Bächtiger and D. Wyss, 'Empirische Deliberationsforschung – eine systematische Übersicht', (2013) 7(2) *ZfVP* 155, at 166.

¹⁴² Cf. A. Bickel, *The Least Dangerous Branch* (1986), 63, 187.

¹⁴³ Cf. J. Rawls, *Political Liberalism* (1993), 231, 254: 'To check whether we are following public reason we might ask: how would our argument strike us presented in the form of a supreme court opinion? Reasonable? Outrageous?'

¹⁴⁴ Bächtiger and Wyss, *supra* note 141, at 166.

¹⁴⁵ *Ibid.*, at 168; J. Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (2012), 216.

understand and predict the voting behaviour of US Supreme Court Justices according to their political leanings fails when applied to the Court.¹⁴⁶ While the Court's judges are statistically more likely to vote in favour of 'their' state, they are far from certain to do so.¹⁴⁷ Moreover, a qualitative analysis of separate opinions reveals different motivations for doing so.¹⁴⁸ A judge voting for 'his or her state' on substantive legal grounds, as, e.g., Renate Jaeger in *Axel Springer*,¹⁴⁹ should not be taken to be biased. At any rate, judges recruited from 47 states and various backgrounds are unlikely to be biased or partial in the same way,¹⁵⁰ and will thus be able to provide a neutral, external view.¹⁵¹ In particular, vulnerable minorities may benefit from this.¹⁵²

This is not to say, though, that the Court has per se better access to correct answers and higher moral truth.¹⁵³ The objection that parliaments, political parties and governments are also capable of seriously and reasonably debating and taking decisions on issues relating to human rights is completely justified.¹⁵⁴ They are, however, subject to more forces that could distort this process or even prevent them from doing so altogether. National courts can, due to tradition or a long-standing jurisprudence, be susceptible to such dysfunctionalities as well. They may fail to provide redress for excesses, and in some countries courts may not be strong and independent enough to intervene when necessary.

Often it is thought that a difference ought to be made in dealing with cases from new and endangered, and well-established and stable democracies.¹⁵⁵ The Court's control is said to be really necessary only for such states in which democratic and rule-of-law structures have not yet taken a firm hold, i.e., where the decision-making process is structurally dysfunctional.¹⁵⁶ But also democracies whose decision-making processes generally work as they are supposed to can, from time to time or gradually, slip into such dysfunctionalities. Seeing the Court as a guardian of discourse, employing the three standards of review described above, allows for a common methodology to deal appropriately with all of these situations – irrespective of whether the state in question is a more robust or a more fragile democracy. For

¹⁴⁶ J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2009); E. Voeten, 'Politics, Judicial Behaviour, and Institutional Design', in J. Christoffersen and M. Madsen (eds.), *Law and Politics* (2011), 61 at 63–6.

¹⁴⁷ E. Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', (2008) 102 *American Political Science Review* 417, at 425–7. For a judge voting 'against his state' see, e.g., *Velkhiyev v. Russia*, Judgment of 5 July 2011, [2013] ECHR (Appl. No. 34085/06), or Nicolas Bratza in *Hirst (No. 2)*, *supra* note 80.

¹⁴⁸ Cf. J.-P. Marguénaud, 'L'opinion séparée du juge siégeant à la Cour européenne des droits de l'homme au titre de l'État défendeur', in P. Tituin (ed), *La conscience des droits: mélanges en l'honneur de Jean-Paul Costa* (2011), 421 at 424–30.

¹⁴⁹ *Supra* note 95.

¹⁵⁰ R. Maliks, 'Kantian Courts: On the Legitimacy of International Human Rights Courts', in A. Føllesdal and R. Maliks (eds.), *Kantian Theory and Human Rights* (2014), 153 at 168.

¹⁵¹ D. Spielman, *Wither judicial dialogue?*, Thomas More Lecture, 12 October 2015, at 4, available at www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf; Voeten *supra* note 147, at 428–30, finding no bias based on geopolitical affinities.

¹⁵² Gearty, *supra* note 89, at 131–60.

¹⁵³ See for such an understanding: Letsas, *supra* note 9, at 39.

¹⁵⁴ Waldron, *supra* note 132, at 1391.

¹⁵⁵ See, e.g., A. Williams, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy', (2013) 24 *EJIL* 1157, at 1182; Bellamy, *supra* note 92, at 246.

¹⁵⁶ Waldron, *supra* note 132, at 1401 et seq.

example, carefully avoiding the risk of seeming to apply 'double standards',¹⁵⁷ the Court applied exactly the same criteria in *Anchugov and Gladkov v. Russia* as it had in *Hirst v. The United Kingdom (No. 2)*, including the procedural ones.¹⁵⁸ The Russian debate was found to be similarly wanting because the adoption of the Constitution, which enshrines prisoners' disenfranchisement, may have been debated in general, but as far as apparent not the issue of prisoner voting itself. In *B. v. Romania (No. 2)*, the Court likewise recognized the relevance of procedural second-order reasons that it applied in the German and British cases cited above: 'The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism ...'.¹⁵⁹

Contrary to what many critics assume,¹⁶⁰ the Court is thereby not hampering human rights discourse in national decision-making. The legitimacy of the decision reviewed being a crucial factor, the margin of appreciation provides a strong incentive to extensively and intensively consider the human rights implications of any decision on the national level.¹⁶¹ Moreover, somewhat paradoxically, institutionalizing distrust against the national process can also have the effect to inspire trust in citizens that their institutions are working as they are supposed to.¹⁶²

After all, the human rights subject to the Court's review, which are not restricted to particularly important interests, derive their vast scope from the necessity to discursively justify the use of state power to the free and equal persons subject to it.¹⁶³ The Court's control institutionalizes this right to justification and makes it effective. It ensures that striking a fair balance is not merely lip service and cheap talk, but the serious deliberation of reasons.¹⁶⁴

4. CONCLUDING OBSERVATIONS

Short of condemning to death all blue-eyed new-borns,¹⁶⁵ the decision-making process of states, even democratic states under the rule of law, has shown time and again that it can malfunction. Decisions may disregard well-established standards, fail to rationally strike a fair balance between relevant interests or be based on incorrect facts. In fulfilling its task, the Court has, more often than not, demonstrated clearly that it is aware of the subsidiary role assigned to it and its limits. The incorporation

¹⁵⁷ See for this critique Popelier and van de Heyning, *supra* note 8, at 21.

¹⁵⁸ *Anchugov and Gladkov v. Russia*, Judgment of 4 July 2013, [2013] ECHR (Appl. nos. 11157/04 and 15162/05), at 101–12.

¹⁵⁹ *B. v. Romania (No. 2)*, Judgment of 19 February 2013, [2013] ECHR (Appl. No. 1285/03), at 89.

¹⁶⁰ See, e.g., Bellamy, *supra* note 2, at 1039; see also Mendes, *supra* note 56, at 94.

¹⁶¹ Cf. Spielman, *supra* note 62, at 12; Kleinlein, *supra* note 72, at 889.

¹⁶² See, e.g., *Bărbulescu*, *supra* note 55, at 139; cf. P. Sztompka, *Trust, Distrust and the Paradox of Democracy* (1997), at 16; A. von Bogdandy and I. Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority', (2013) 26 LJIL 49, at 57.

¹⁶³ R. Forst, 'The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach', in C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (2012), 81 at 87.

¹⁶⁴ C. Mendes, 'Neither Dialogue nor Last Word' (2011) 5(1) *Legisprudence* 1, at 39–40; see for further references on this common objection against deliberation Bächtiger and Wyss, *supra* note 141, at 158; cf. also Sweet, *supra* note 47, at 75.

¹⁶⁵ Stephen, *supra* note 45.

of the subsidiarity principle in the Convention's preamble by Protocol 15, following the Brighton Declaration of 2012,¹⁶⁶ reinforces this jurisprudence without being constitutive of it.¹⁶⁷

Of course, (international) human rights courts are not flawless.¹⁶⁸ The Court may fail to uphold otherwise well-established standards when it is necessary, or (mis-)apply them when it seems unnecessary. It may fail to give the appropriate weight to individual or community interests as first-order reasons in balancing, or it may fail to recognize the second-order reasons that speak in favour of respecting a state's decision. It may overrule the facts adduced by a state too easily or accept them too uncritically. Judges are human, too. There are even instances in which individual judges, in separate opinions, have not shown the restraint and modesty becoming of their office.¹⁶⁹ The Court as a whole has rarely, if ever, forgotten its role in such a way. Not every decision someone somewhere considers to be going 'too far' is a sign of the Court losing touch with reality. Whenever legitimate dissent is possible, the Court's judgments will remain controversial.¹⁷⁰ Legitimate disagreement being constitutive of pluralist democracy, this is unavoidable and not a sign of decay.¹⁷¹ In the discourse-ending effect of the Court's judgments – at least for the moment and the purposes of the individual case – therefore lies an exercise of power which calls for responsible use.¹⁷²

The Court's jurisprudence does not conform to the role explicated here in each and every case and in each and every way. For example, the importance of the interests and rights concerned is often regarded as a factor of the margin of appreciation,¹⁷³ whereas in the present understanding it is a first-order reason relating to the substantive decision. Likewise, the 'suspect' discrimination grounds said to tighten states' margin of appreciation¹⁷⁴ are not second-order reasons, but merely reflect that these differences between people (sex, sexual orientation, 'race' and

¹⁶⁶ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, available at wcd.coe.int/ViewDoc.jsp?id=1934031; see in detail Popelier and van de Heyning, *supra* note 8, at 7.

¹⁶⁷ See the Opinion of the Court on Draft Protocol No. 15 to the ECHR, 6 February 2013, at 4, available at www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf; Explanatory Report on Protocol 15, 9: 'It is intended . . . to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law', available at www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

¹⁶⁸ See, e.g., *X v. Germany*, Commission Decision of 30 December 1975, [1975] ECHR (Appl. No. 5935/72), where, reflecting the deplorable but common scientific opinion at the time, the Commission held that there were grounds to discriminate against male homosexuals; similarly, the German Federal Constitutional Court in BVerfGE 6, 389; see also the US Supreme Court judgments in *Dred Scott v. Sandford*, 60 U.S. 393 (Sup.Ct. 1857) or *Korematsu v. United States*, 323 U.S. 214 (Sup.Ct. 1944).

¹⁶⁹ See for a strong critique of this J. Allan, 'The Travails of Justice Waldron', in G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (2008), 161 at 167.

¹⁷⁰ See, e.g., the sizeable minority view by Judges López Guerra, Jungwirth, Jaeger, Villiger und Poalelungi in *Axel Springer AG*, *supra* note 95, contending that the threshold for the Court to intervene had not been reached.

¹⁷¹ Harbo, *supra* note 7, 45–6.

¹⁷² A. Wellmer, 'Menschenrechte und Demokratie', in S. Gosepath and G. Lohmann (eds.), *Philosophie der Menschenrechte* (1998), 265 at 272.

¹⁷³ See, e.g., *Case of Winterstein*, *supra* note 100, at 148; Klatt, *supra* note 11, at 215; A. Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "Democratic Society"', (2016) 5 *Global Constitutionalism* 16, at 30–1.

¹⁷⁴ See, e.g., *X and others v. Austria*, Judgment of 19 February 2013, [2013] ECHR (Appl. No. 19010/07), at 99; cf. Arnardóttir, *supra* note 61, at 649 et seq., in particular at 664: 'a priori suspect as not being legitimate reasons for differentiating between people'.

others) have generally proven not to constitute good practical first-order reasons for a difference in treatment – most often because, like in *S.L.*, the relevant assumptions associated with existing differences are simply false.

The model advocated for here may in this regard be understood as a proposal to segment and conceptualize the argumentation more clearly, in particular, by disentangling the reasons of proportionality and those of the margin of appreciation. When balancing first-order reasons in a proportionality analysis, the Court should take into account the national institutions' assessment regarding the relative weight of these first-order reasons. How much weight must be attached to their view depends on second-order reasons, which should be presented independently from but in relation to the first-order reasons in a judgment. That the Court currently does not clearly separate first- and second-order reasons in its reasoning does, however, not affect the model's capacity to explain the current jurisprudence. The Court takes into account all of the above-mentioned reasons in a single combined operation, as it should. While explaining and justifying much of the Court's jurisprudence, the model also allows for criticizing it.¹⁷⁵

Within the scope of the Convention, the Court watches over the balance struck between individual and community interests, between individual interests as well as over the democratic process itself. It watches over states' endeavour to find reasonable solutions to the conflicts that every democracy's premise of freedom and equality of all necessarily generates. In the past decades, the Court has shown that it can make a valuable contribution to this process. That its activities in this regard have not always elicited cheers from the national institutions that are overruled from time to time can hardly be surprising.

It is not the Court's task to completely substitute the political process for a legal one. Its mandate does not extend this far. The Court can, however, contribute to a national decision-making process seeking a fair balance in solving the problems facing modern societies. It can be an institutional framework in which well-established human rights standards, practical rationality and truth have better chances of prevailing than without it.¹⁷⁶ A reasonable amount of modesty is required in weighing first- and second-order reasons but so is sufficient assertiveness if these reasons so require. After all, the Court watches over the deliberative decision-making process of Europe's democratic states under the rule of law as a guardian of discourse.

¹⁷⁵ See for an enlightening baseball analogy in this regard R. Brandom, *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (1994), 184.

¹⁷⁶ Cf. on the institutional guarantee of deliberation Bächtiger and Wyss, *supra* note 141, at 159, 161.