

PREVAILING OF JUDICIAL ACTIVISM OVER SELF-RESTRAINT IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

DRAGOLJUB POPOVIC†

Judges ought to remember that their office is *ius dicere* and not *ius dare*, to interpret law, and not to make law or give law.

Francis Bacon

The expression *judicial activism* was coined in the United States, but it crossed the Atlantic and became as much part of our day-to-day experience as blue jeans or Ford motor cars.

Thijmen Koopmans

Former Judge of the
European Court of Justice

I. INTRODUCTION

This Article is intended to address the same topic Justice Paul Mahoney addressed while holding tenure as chair of Human Rights at the University of Saskatchewan in Saskatoon, Canada. Published nineteen years ago, Justice Mahoney's article, entitled *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*,¹ was a result of Justice Mahoney's previous research and remains quite significant.

Currently, Justice Mahoney is the chief justice of the Administrative Tribunal of the European Union, holding a seat in Luxembourg.² Furthermore, Justice Mahoney is one of the most prominent authors in the field of European Human Rights Law, with his work composing a huge bibliography. While Justice Mahoney remains a leading expert in the field of European Human Rights Law, it is time to revisit his conclusions that were made in 1990.

† Judge at the European Court of Human Rights, Strasbourg, France. I am indebted to Professor Edward Morse from Creighton University School of Law in Omaha, Nebraska, Mrs. Aysegul Uzun-Marinkovic, lawyer of the Turkish division at the European Court of Human Rights in Strasbourg, and to Mr. Tanasije Marinkovic, assistant professor of the University of Belgrade School of Law, for their precious help and comments, which were most useful for accomplishing this text.

1. Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 *HUM. RTS. L.J.* 57, 57-89 (1990).

2. Paul Mahoney used to be the Registrar of the Court in Strasbourg for many years.

Specifically, Justice Mahoney presented a twofold thesis. In Justice Mahoney's opinion, the European Court of Human Rights³ (the "Court") view that a dilemma existed between theories of judicial activism and judicial self-restraint was more apparent than real. Justice Mahoney stated that judicial activism and judicial self-restraint were "sometimes presented as if they were conflicting theories as to how judges should go about decision-making."⁴ In contrast, Justice Mahoney stated that these two theories were not conflicting. Justice Mahoney added to his contention, stating that both judicial activism and judicial self-restraint were complementary components of the methodology of judicial review that was inherent in the nature of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").⁵

This Article seeks to revisit Justice Mahoney's thesis in light of the jurisprudence of the Court during the last nineteen years. At the outset, it is important to note that Justice Mahoney's thesis has never been universally accepted. Other authors' analyses led to opposite conclusions. Indeed, Justice Thijmen Koopmans, a former judge of the European Court of Justice in Luxembourg, favored judicial activism. Justice Koopmans opined that the Court was noted for its judicial inventiveness, an inventiveness that was comparable to that of the United States Supreme Court.⁶ In fact, the United States Supreme Court's ability to intervene in some of American society's most explosive social problems impressed Justice Koopmans. Justice Koopmans insisted on the idea that judicial activism was *firmly rooted in society*, providing a specific balance "between the powers of institutions and the challenges of social evolution."⁷

An individual should note that judicial inventiveness does not always suggest illegitimate judicial behavior. As in any judicial system, some level of court discretion is indispensable and the Court is no different in this regard. However, the Court differs significantly from the United States Supreme Court and the other similar courts because the Court operates in an international context.

3. For the purposes of brevity the *Convention for the Protection of Human Rights and Fundamental Freedoms* of November 4, 1950, will be hereinafter referred to as *Convention*, and the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

4. Mahoney, *supra* note 1, at 59-60.

5. See *supra* note 3.

6. THIJMEN KOOPMANS, THE ROOTS OF JUDICIAL ACTIVISM IN PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION, STUDIES IN HONOR OF GÉRARD J. WIARDA 318 (F. Matscher & H. Petzold eds., 1988). The American Court mentioned is the U.S. Supreme Court. *Id.*

7. KOOPMANS, *supra* note 6, at 317-18, 327.

A certain amount of creativity is also inherent in the Court's method of jurisprudence due to the nature of the Convention provisions that the Court interprets. Furthermore, the nature of the Court's position within the Council of Europe (the "Council") warrants creativity within the Court's jurisprudence. Therefore, the character of the Court's judicial activism and judicial self-restraint must be evaluated with the aforementioned considerations in mind.

This Article's main contention with Justice Mahoney's analysis is that in the two decades since Justice Mahoney published his article, the Court's case law shows that the Court is predisposed to engage in judicial activism. Therefore, the two methods of the Court's judicial approach should no longer be considered equal. Specifically, judicial activism and judicial self-restraint are not "two sides of the same coin" because judicial activism prevailed in the Court's jurisprudence for various reasons that are to be discussed below.

II. JUDICIAL ACTIVISM V. JUDICIAL SELF-RESTRAINT

Initially, this Article must attempt to define the basic concepts of judicial activism and judicial self-restraint, while also considering their implications for judging. Some general observations regarding judicial activism and judicial self-restraint will provide a framework for discussing the approach to the problem of interpretation within the jurisprudence of the European Court of Human Rights⁸ (the "Court").

A. DEFINITIONS

Justice Paul Mahoney offered a clear-cut definition of judicial activism, which he stated existed when "judges [modify] the law from what it previously was or was stated to be in the existing legal sources, often thereby substituting their decision for that of elected, representative bodies."⁹ While seemingly simple, Justice Mahoney's definition of judicial activism would condemn judicial actions that may be necessary to achieve justice in a particular case. For example, Justice Mahoney's definition of judicial activism would not permit a court to correct a mistake in previous jurisprudence. Furthermore, Justice Mahoney's definition of judicial activism would not allow a court to change its interpretation of legislation in light of changed social conditions.

8. For the purposes of brevity the *Convention for the Protection of Human Rights and Fundamental Freedoms* of November 4, 1950, will be hereinafter referred to as *Convention*, and the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

9. Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 *HUM. RTS. L.J.* 57, 58 (1990).

In contrast to Justice Mahoney's view, authors that view judicial activism as an American institution that has been transplanted to Europe insist that judicial activism is most valuable when "the legislative machinery practically comes to a halt."¹⁰ Therefore, when legislative machinery practically comes to a halt, judicial creativity must come into play.

Other approaches to judicial activism have similarly focused on measures that change existing laws. Professor Mark Tushnet recently analyzed the standpoints of various authors on the subject of judicial activism, finding three distinct approaches.¹¹ The first approach to judicial activism measures judicial activism in the United States by the number of statutes the United States Supreme Court has held to be unconstitutional. The second approach to judicial activism focuses on judges' willingness to overrule prior decisions and thereby depart from *stare decisis*. The third approach to judicial activism defines judicial activism as judicial departures from the constitutional text's original meaning.¹² Thus, the underlying constitution's past interpretations constrain judges reviewing the constitutionality of legislative enactments.

Under all three approaches, judicial activism involves what its critics might label as improper law-making by judges. The modern idea of separation of powers includes the concept that the legislative branch of government is entitled to promulgate legal rules, which judges are merely empowered to interpret. United States Supreme Court Justice William J. Brennan, while not hostile to judicial activism, defined the problem of the *democratic deficit* as "vesting in electorally unaccountable Justices the power to invalidate the expressed desire of representative bodies."¹³ Therefore, the idea of a democratic deficit provides a significant foundation for constraining judicial power.¹⁴ However, despite the democratic deficit issue, judicial law-making is considered to be a fact of life. Indeed, as early as medieval times in England, "judges were well aware that they 'interpreted' the law, and from time to time were aware that they were making law through 'interpretation.'"¹⁵

10. THIJMEN KOOPMANS, *THE ROOTS OF JUDICIAL ACTIVISM IN PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION*, STUDIES IN HONOR OF GÉRARD J. WIARDA 326 (F. Matscher & H. Petzold eds., 1988).

11. Mark Tushnet, *The United States of America*, in *JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS* 416-17 (Brice Dickson ed., 2007).

12. *Id.*

13. William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 55, 58 (Steven G. Calabresi ed. 2007).

14. KOOPMANS, *supra* note 10, at 326.

15. M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 98 (1998).

The concept of judicial self-restraint suggests that judges should avoid transgressing beyond their traditional roles as interpreters of the law. Justice Mahoney found two elements that can be formulated as legal precepts or, even commandments, to judges. First, judges “should exercise caution in the interpretation” of texts stemming from representative bodies “who have the main responsibility in democratic society for enacting important legislative changes.”¹⁶ Secondly, Justice Mahoney stated that judges “should . . . refrain from stating any legal entitlements not already contained in the existing corpus of law.”¹⁷ Some authors are inclined to call the second precept *strict and complete legalism*.¹⁸

However, the idea that judges should avoid law-making must face the reality of a judge’s day-to-day work. Legislation is often neither clear nor devoid of ambiguities. Therefore, legislation frequently requires judicial interpretation. As Justice Michael Kirby stated, “giving a meaning to uncertain words and phrases, rules and principles is the daily work that judges actually do.”¹⁹

Thus, a judge’s duty is to apply the law, but the process of applying the law to the facts of the underlying case includes making choices among various hypotheses and entails a fair amount of creativity.²⁰ Critics of judicial activism dispute the role of such creativity, with some critics going so far as to deny the possibility that a judge can assert some degree of creativity in his or her interpretation of the concerned law. Promulgating this viewpoint near the end of the nineteenth century, Lord Esher stated: “There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.”²¹ While the view that judges merely interpret the law and have no role in the law’s creation was formed in common law countries, that view also has support in civil law countries.²²

These exaggerated views, which purport an absence of judge-made law, are not in accord with the realities of modern legal systems. Instead, modern legal systems reflect a reliance on both judicial activism and judicial self-restraint. Thus, a judge’s task is to measure and

16. Mahoney, *supra* note 9, at 58.

17. *Id.*

18. MICHAEL D. KIRBY & HAMLIN TRUST, JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE, AND POLICY IN THE JUDICIAL METHOD 10 (2004).

19. *Id.*

20. Arthur Dyevre, *L’activisme Juridictionnel en Droit Constitutionnel Comparé: France, Etats-Unis, Allemagne* 64-173 (2007) (unpublished dissertation). A thorough analysis of the problem can be found here. *Id.*

21. KIRBY & TRUST, *supra* note 18, at 6.

22. PHILIPPE JESTAZ, *LES SOURCES DU DROIT* 68 (2005).

define the application of judicial activism and judicial self-restraint in the practical world of judicial interpretation. Specifically, a judge must define judicial activism and judicial self-restraint in a manner that is consistent with the judiciary's traditional role while also defining such concepts in a manner that gives content to the law and achieves the law's legislative purpose.

B. TEXTUALIST V. PURPOSIVE INTERPRETATION

Regarding matters of judicial interpretation, legal scholars commonly begin with the dogma that laws should be interpreted in accordance with their legislative formulation. Textually-oriented theorists and lawyers believe that judges should interpret laws based on the law's written words, or, as a consequence, the whole of the law will lose its grounding. In 1985, former United States Attorney General Edwin Meese articulated this principle, stating "judges were expected to resist any political effort to depart from the literal provisions" of the underlying law.²³

If the interpretation of laws cannot escape the apparently safe realm of words, then the task of judges becomes fairly simple and devoid of any possible creativity in interpretation. Indeed, Justice Michael Kirby referred to this idea as the *judge-as-mechanic principle*.²⁴ To illustrate the application of the judge-as-mechanic principle, a useful example can be found in Prussia near the end of the eighteenth century. At the end of the eighteenth century, Prussian lawmakers passed a huge code of laws known as the General Law of the Land ("*Allgemeines Landrecht*"). Under the *Allgemeines Landrecht*, nearly all branches of Prussian law were codified, with the exception of procedural law. *Allgemeines Landrecht* consisted of some 19,000 paragraphs that were formulated in a clear and comprehensive way. The intent of the *Allgemeines Landrecht* was that laymen and learned lawyers could both use it.

The goal of Prussia's *Allgemeines Landrecht* was to eliminate all gaps in the law. Judges were obligated to find a paragraph within the *Allgemeines Landrecht* that was applicable to the particular case before the judge. If the judge could not find an applicable paragraph within the *Allgemeines Landrecht*, the judge was to refer the case to the Justice Minister. The Justice Minister was then to teach the judge to find an applicable paragraph, out of the 19,000 paragraphs, of the

23. Edwin Meese, III, *Speech Before the American Bar Association*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 48 (Steven G. Calabresi ed., Regnery Publishing, Inc. 2007).

24. MICHAEL D. KIRBY & HAMLYN TRUST, JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE, AND POLICY IN THE JUDICIAL METHOD 11 (2004).

Allgemeines Landrecht.²⁵ Thus, under the *Allgemeines Landrecht*, the concept of strict legality was pushed to its extreme, and, of course, it was not entirely successful.

The idea that a judge should literally interpret the law as it is written predates the eighteenth century. Indeed, as early as the Tudor period in England, fidelity to the text of the law was praised to be of the highest possible value in legal interpretation. To quote Justice Kirby once again: "It was a very English, indeed Protestant, virtue to demand fidelity to the text so as to curb the inventions and pretensions to unwarranted power."²⁶

The *judge-as-mechanic principle* and the idea of literal interpretation of law face obstacles posed by the simple reality of everyday life. For instance, judges have to address the particular issues raised by parties in litigation. In addressing the issues raised by parties in litigation, judges exercise choices because the parties argue that the same laws apply in different ways in regard to the underlying case. Therefore, the task of a judge is not to satisfy logical precepts, but rather to be concerned with the objectives of law. This concern with the objectives of law may affect a judge's approach to judicial interpretation.

The objectives of law, which entail various theories of justice, involve deep philosophical questions that necessarily go beyond the scope of this Article. However, certainty and predictability are commonly stated goals associated with the objectives of law.²⁷

Ideally, the law's task could be considered fulfilled when the law produces both predictable outcomes and individual justice. A *purposive approach* to judicial interpretation involves teasing out the meanings behind the words of the law, based on the intended purpose behind the law. As Justice Brennan stated while discussing the United States Constitution, justices should "draw meaning from the text [of the law] in order to resolve public controversies."²⁸

The purposive approach to judicial interpretation allows judges to issue reasonably predictable judgments in that the judgements are rooted in the text of the law. Additionally, the purposive approach to judicial interpretation renders justice to the parties to a particular

25. DRAGOLJUB POPOVIC, UVOD U UPOREDNO PRAVO (AN INTRODUCTION TO COMPARATIVE LAW) 109-10 (2007).

26. KIRBY & TRUST, *supra* note 24, at 5.

27. Edward Morse, *Reflections on the Rule of Law and 'Clear Reflection of Income': What Constrains Discretion*, 8 CORNELL J.L. & PUB. POL'Y 448 (1998) ("Constraining discretion is essential to the Rule of Law, but some discretion is unavoidable.")

28. William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 56 (Steven G. Calabresi ed. 2007).

case as judges are often forced to choose between two or more possible meanings of a law. Indeed, the meanings that can be attached to legal terms are not always indisputable, and disagreement over the meaning of the law is often widespread and deep.²⁹

Therefore, literal interpretation is a logical starting point of the legal method, but often the letter of the law cannot provide the final answer if the full objectives of law are to be pursued. The task of judges, in interpreting the law, necessarily entails considerations beyond the literal interpretation of the laws. The judges' task of interpreting laws becomes even more complicated for the European Court of Human Rights,³⁰ the work and construction of which represented a breakthrough in international law half a century ago.

III. SPECIFIC CHARACTER OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights³¹ (the "Court") was founded by the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"),³² which was included within the framework of the Council of Europe (the "Council"). The Convention's provisions, which are very general in nature, present a challenge to the Court's jurisprudence because the Convention's general provisions need precise understanding. Judicial interpretation is necessary to make the notions contained in the Convention's provisions clear.

A. COUNCIL OF EUROPE, CONVENTION, AND COURT GENERALLY

The Council of Europe (the "Council") is currently the largest European regional organization. In May 1949, several European democracies founded the Council. After the end of the Cold War, the Council was enlarged and now consists of forty-seven member-states, practically enclosing the whole European continent.³³ The fundamental

29. George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 EUR. J. INT'L L. 280 (2004).

30. For the purposes of brevity, the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

31. For the purposes of brevity, the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

32. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

33. Only two European countries are not member-states. Those are the Vatican and Belarus, the former for its specific nature and the latter for the nature of its political regime. It is worth mentioning the so called micro-states, like Andorra, San Marino or Monaco, are member-states, along with huge countries, such as Russia, Turkey, or Germany.

values of the Council are democracy, rule of law, and the protection of human rights.

The Council should by no means be confused with the much more influential European Union, which currently consists of twenty-seven member-states. Similar to the Council, the European Union also has a judicial organ. The European Union's highest court is the European Court of Justice, which sits in Luxembourg. The European Court of Human Rights³⁴ (the "Court"), which sits in Strasbourg, has a jurisdiction that is quite different from the European Court of Justice's jurisdiction.

The European Union represents a sort of confederation amongst its member-states and has developed some features of a federal state. In comparison, the Council is no more than an international organization. The degree of coherence among the Council's member-states is much lower than the one existing among the members of the European Union, though it is constantly growing.

Nation-states that join the Council are obligated to ratify a certain number of vital international treaties that have been included within the Council's framework. Specifically, there are fifty international treaties that are included within the Council's framework. One of the most important treaties included within the Council's framework is the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").³⁵ Indeed, the Court originated from the Convention's provisions, with the Court characterizing itself as "a constitutional instrument of European public law."³⁶

B. PROVISIONS OF THE CONVENTION

The Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") was opened to signatures and ratifications on November 4, 1950. The Consultative Assembly, the most important organ of the Council of Europe (the "Council"), appointed a special committee to draft the Convention's text. In 1950, the Consultative Assembly changed its name to the Parliamentary As-

34. For the purposes of brevity the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

35. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

36. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995); see JEAN-FRANCOIS RENUCCI, *DRIT EUROPÉEN DES DROITS DE L'HOMME* 511-12 (2002) (recognizing European public order by the Court); see J. G. MERRILLS & A. H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 1-22 (Manchester University Press 2001) (reviewing the origins of the Convention); FRANCIS G. JACOBS & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1-10 (2002); FREDERIC SUDRE, *DRIT EUROPÉEN ET INTERNATIONAL DES DROITS DE L'HOMME* 132-43 (2005); CHRISTOPH GRABENWARTER, *EUROPÄISCHE MENSCHENRECHTSKONVENTION* 29-40 (2003).

sembly. The Parliamentary Assembly is composed of Members of Parliament. Members of Parliament are designated to their respective seats by their home country's national representative bodies. The number of seats attributed to a member-state, in the Parliamentary Assembly, corresponds with the member-state's population and the number of seats in that member-state's parliament. In the Parliamentary Assembly, the member-state is represented by both its national majority party and the majority party's opposition according to those parties' respective strengths within the member-state's government.

The Convention protects human rights at the continental level through a system comprised of three different organs. One organ was the Commission of Human Rights, a filtering body that was composed of representatives from the member-states. The Commission of Human Rights ceased to exist in 1998. The Convention charged two other organs with protecting human rights, namely the European Court of Human Rights (the "Court") and the Committee of Ministers.³⁷

The Committee of Ministers is composed of the member-states' respective ministers of foreign affairs. On certain occasions, the member-states' respective ministers of foreign affairs sit as the Committee of Ministers. Normally, however, the member-states' respective ministers of foreign affairs are represented by ambassadors or chiefs of missions whose respective member-states accredit them to the Council.

The Convention's text was drafted in two official languages, English and French. Furthermore, English and French are also the Court's official languages. The Convention contains three types of provisions. First, the Convention contains substantial provisions granting certain human rights to all individuals under the respective jurisdictions of a member-state. Second, the Convention contains procedural provisions. Third, the Convention contains other provisions that might be labeled as transitory or auxiliary.

Several additional protocols have been added to the original text of the Convention. Although all the Council's member-states ratified the Convention, not all member-states have ratified these additional protocols.³⁸ The 11th Additional Protocol, which came into force in

37. PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 8-12 (4th ed. 2006); DRAGOLJUB POPOVIC, *EVROPSKI SUD ZA LJUDSKA PRAVA (EUROPEAN COURT OF HUMAN RIGHTS)* 18-20 (2008).

38. For instance, Switzerland has never ratified the First Additional Protocol, opened to signatures and ratifications as early as 1952.

1998, established the present functioning of the Court and the whole system of human rights protection in Europe.³⁹

Though the United Kingdom has been a member-state of the Convention since the Convention's inception, some of the United Kingdom's lawyers may find the Convention's provisions, especially the provision granting certain human rights, awkward. To illustrate, Article 3 of the Convention reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." However, neither Article 3 of the Convention nor any other provision in the Convention provides meaning to the terms and phrases "torture," "inhuman or degrading treatment," or "punishment." Another example can be found in Article 8, paragraph 1, of the Convention which states: "Everyone has the right to respect for his private and family life, his home and his correspondence." Again, no definitions of the notions and concepts mentioned in Article 8, paragraph 1, of the Convention are found in the Convention's text.

The manner in which the Convention was drafted largely contributed to the Convention's destiny and developments in the Court's case law. Indeed, the Court was very intrigued by the lack of definitions of important concepts and large formulas in the text as this ambiguity offered many possibilities of judicial interpretation. In other words, when issuing judgments, the Court had to define and give meaning to the terms and phrases used by the Convention's drafters.

While the Convention may be amended with additional protocols, such amendments do not occur very often and the Convention's member-states have proved unwilling to define certain concepts through the amendment process. Instead, member-states tend to utilize the amendment process to introduce new and substantial provisions to the Convention, thus enlarging the scope of human rights protection in Europe.

C. COMPOSITION OF THE COURT

Article 20 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") reads: "The [European Court of Human Rights (the "Court")] shall consist of a number of judges equal to that of the High Contracting Parties." While the population and territorial size of the member-states varies considerably, the Convention's principle of equality among the member-states has been preserved to this day. The Convention further requires judges sitting on the Court to be of high moral character. Additionally, the

39. DRAGOLJUB POPOVIC, *UVOD U UPOREDNO PRAVO (AN INTRODUCTION TO COMPARATIVE LAW)* 15-17 (2007); PATRICK WACHSMANN, *LES DROITS DE L'HOMME* 154-60 (2002).

Convention requires judges on the Court to either possess the qualifications necessary for appointment to high judicial office or to be jurists of recognized competence. Judges sit on the Court in their individual capacity and are not allowed to engage in any activity incompatible with their judicial independence, impartiality, or with the demands of a full-time office.

The Parliamentary Assembly's Committee of Legal Affairs interviews three candidates nominated by a member-state's government to be a judge of the Court. The Parliamentary Assembly's Committee of Legal Affairs then proposes, to the Parliamentary Assembly, that a certain candidate become a judge on the Court. The Parliamentary Assembly normally follows the proposal, although the Parliamentary Assembly's Committee of Legal Affairs' opinion on the candidates is not binding.⁴⁰ From a list of three candidates nominated by a High Contracting Party to the Convention, the Parliamentary Assembly elects a judge to the Court by a majority of votes cast. Judges on the Court serve a six year term and can be re-elected.

D. COURT'S POWERS AND ADJUDICATIONS

The Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), specifically Article 19, establishes the European Court of Human Rights (the "Court"), "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto." The Court's mission is to implement the Convention, granting human rights protection to all individuals within the member-states' respective jurisdictions. However, the Court's jurisdiction extends to all matters concerning the interpretation and application of the Convention and its protocols. These matters are referred to the Court either as inter-state cases, on the basis of an individual application, or as a request for an advisory opinion. Inter-state cases are rare. Member-states refer inter-state cases to the Court by alleging that another member-state has breached the Convention or the Convention's protocols. Additionally, the Committee of Ministers of the Council of Europe (the "Council") may request advisory opinions to be issued on legal questions concerning the interpretation of the Convention or its protocols.

However, individual applications represent more than ninety-five percent of the Court's work. Article 34 of the Convention provides: "The Court may receive applications from any person, non-govern-

40. DRAGOLJUB POPOVIC, *UVOD U UPOREDNO PRAVO (AN INTRODUCTION TO COMPARATIVE LAW)* 35-38 (2007); PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 35-38 (4th ed. 2006).

mental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.” At the time the Convention was drafted, the possibility of individual petition to the Court was considered to be a great novelty in international law. However, prior to the Convention being amended by the 11th Additional Protocol in 1998, an individual’s ability to petition the Court was subject to the Commission of Human Rights’ scrutiny. The 11th Additional Protocol led to an almost exponential increase in the number of applications filed with the Court. Indeed, at present, nearly 100,000 cases are pending before the Court. Additionally, the Court must deal with each and every case; there is no writ of *certiorari* as in the American judicial system.

The Convention also established the Plenary Court which consists of all the judges serving on the Court. The Plenary Court is competent to adopt the Rules of Court, as well as to elect the Court’s president and two vice-presidents. Furthermore, the Plenary Court establishes sections of the Court. Specifically, each section of the Court is composed of at least nine judges. Within the Court’s sections, committees and chambers are instituted. A committee of three judges may declare an application inadmissible and strike it out of the list of cases to be heard by the Court when such a decision can be made without further examination. A decision that an application is inadmissible is final and must be unanimously voted upon by the committee. A chamber of seven judges decides on the admissibility and merits of an individual application. There is no jurisdiction on appeal, but Article 43 of the Convention provides that “any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.” The Grand Chamber is composed of seventeen judges whose names are drawn by lots.⁴¹

E. ENFORCEMENT OF JUDGMENTS

Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”) provides that contracting states “undertake to abide by the final judgment of the European Court of Human Rights (the “Court”) in any case to which they are parties.” The final judgment of the Court “shall be transmitted to

41. DRAGOLJUB POPOVIC, *UVOD U UPOREDNO PRAVO (AN INTRODUCTION TO COMPARATIVE LAW)* 41-51 (2007); PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 53-58 (4th ed. 2006); PATRICK WACHSMANN, *LES DROITS DE L’HOMME* 41-44 (2002).

the Committee of Ministers, which shall supervise its execution."⁴² The Committee of Ministers, being composed of the foreign ministers of member-states who are often represented by the ambassadors accredited to the Council of Europe (the "Council"), is thus in permanent session. The Committee of Ministers also deal with a wide range of subject matters in addition to the execution of the Court's judgments. The government of a respondent state must submit to the Committee of Ministers a report on the execution of a judgment and on all measures taken in that respect. Upon a finding that the Court's final judgment has been enforced, the Committee of Ministers will adopt a resolution that ends the enforcement procedure in a particular case.⁴³

IV. JUDICIAL DISCRETION

The European Court of Human Rights'⁴⁴ (the "Court") judgments are binding on the High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").⁴⁵ The Court's judges strongly favor stability in the Court's case law. An analysis of the Convention's legal developments under the Court's jurisprudence leads to the conclusion that the Court has the power to interpret, recommend, and prescribe the law of the Convention.

A. ROLE OF PRECEDENT AND JUDICIAL DISCRETION

Within European Court of Human Rights'⁴⁶ (the "Court") jurisprudence, a comprehensive doctrine of *stare decisis* does not exist. As the doctrine of *stare decisis* emerged in England through a spontaneous process centuries ago, it has similarly emerged as a sentiment among the Court's judges. The Court's sentiment seems to be rooted in the very idea of justice which demands the Court to treat identical cases identically.⁴⁷ A ruling of the Court, once given, should be fol-

42. Murray Hunt, *State Obligations Following From a Judgment of the European Court of Human Rights*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 37, 37-39 (Theodora Christou & Juan Pablo Raymond eds., 2005).

43. DRAGOLJUB POPOVIC, Uvod u UPOREDNO PRAVO (AN INTRODUCTION TO COMPARATIVE LAW) 90-91 (2007); PIETER VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 44-47 (4th ed. 2006); JEAN-FRANCOIS RENUCCI, DROIT EUROPÉEN DES DROITS DE L'HOMME 640-41 (2002); FRANCIS G. JACOBS & ROBIN C. A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 423-35 (2002).

44. For the purposes of brevity, the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

45. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

46. For the purposes of brevity, the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

47. KATIA LUCAS-ALBERNI, LE REVIREMENT DE JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME 107 (2008) (referencing Perelman).

lowed unless there is room for distinguishing the currently pending case from the previous one. The doctrine of *stare decisis* recognizes that the respect of precedents guides the Court in fulfilling its function.⁴⁸

The Court made its position on the doctrine of *stare decisis* clear in *Beard v. United Kingdom*.⁴⁹ In *Beard*, the Court expressed the view that “it was in the interest of legal certainty, foreseeability, and equality before the law that the Court should not depart from its own precedents without good reason.”⁵⁰ While the Court chooses to be bound by precedent, this choice has not been an obstacle to the Court’s creativity or an impediment to the development of the Court’s case law.⁵¹

B. THE COURT’S POWERS

The European Court of Human Rights (the “Court”) is entitled to interpret by the Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”),⁵² recommend measures of redress for violations of human rights, and prescribe measures of redress for violations of human rights. Judicial activism plays a role in all three domains.

1. Interpreting

The Convention’s text empowers the Court to interpret the Convention’s provisions and text. The Court’s power to interpret the Convention is mentioned *expressis verbis* in Article 30 of the Convention. However, the Court’s power to interpret the Convention can also be construed from Article 19 of the Convention, the Article that instituted the Court.

The Court has used many judicial concepts to interpret the Convention. First, the Court has utilized autonomous concepts while interpreting the Convention. Second, the Court has used concepts of evolutive interpretation and innovative interpretation to interpret the Convention as exhibited in the Court’s jurisprudence. Finally, the Court has interpreted the Convention in a manner that is contrary to

48. *Id.* at 64, 143.

49. No. 24882/94, § 81 (Eur. Ct. H.R. Jan. 18, 2001), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=beard&sessionId=21533542&skin=hudoc-en>.

50. *Beard*, No. 24882/94, § 81.

51. DRAGOLJUB POPOVIC, Uvod u Uporedno Pravo (AN INTRODUCTION TO COMPARATIVE LAW) 106-08 (2007); LUZIUS WILDHABER, THE EUROPEAN COURT OF HUMAN RIGHTS 153-95 (2006).

52. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

the intention of its drafters on some occasions. All of these techniques are tokens of the Court's creativity and judicial discretion.

a. Autonomous Concepts

Autonomous concepts are specific tools of legal interpretation often used by the Court. In describing autonomous concepts, Justice Paul Mahoney remarked that autonomous concepts had an "autonomous meaning, the same for all countries."⁵³ As autonomous concepts have the same meaning for all countries, such concepts provided universality in the international standard.⁵⁴ Justice Mahoney's remarks are well justified, but they do not offer a proper definition of autonomous concepts.

Autonomous concepts, to use a proper definition, are "technical terms that are employed in legal sources and are invested with special, non-ordinary meaning."⁵⁵ George Letsas, the author of the aforementioned definition of *autonomous concepts*, thoroughly analyzed the notion of autonomous concepts. Specifically, Letsas discussed the issue of relation of autonomous concepts to judicial discretion. Letsas concluded that judges must inevitably make choices when applying the Convention. For instance, even if judges adhere to what might be considered *ordinary* meanings of certain concepts, they are still exercising a choice. For that reason, Letsas rejects reproaching judges based on the assumption that by introducing autonomous concepts, those judges are making new law.⁵⁶ Essentially, judges must make choices while interpreting the Convention. Therefore, judges must necessarily make new law.

In order to clarify the nature of autonomous concepts to the reader, the following examples are illuminative. For instance, Article 6, paragraph 1, of the Convention guarantees individuals the right to a fair trial "in the determination of his civil rights and obligations." While the notion of *civil rights and obligations* may at first glance seem clear, it proved far more difficult for the Court to define. In

53. Paul Mahoney, *The Comparative Method in Judgments of the European Court of Human Rights: Reference back to National Law*, in *THE ROLE OF COMPARATIVE LAW IN THE EMERGENCE OF EUROPEAN LAW* 145, 145-46 (2000).

54. *Id.*

55. George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 *EUR. J. INT'L L.* 285 (2004). In his article Letsas defines *autonomous concepts*. *Id.* Letsas substantially reproduced the *autonomous concepts* definition in *GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 48 (2007). A slight difference between the two definitions consists of inserting the word "national" before the expression "legal sources" in the 2007 book, compared to the 2004 article's definition.

56. *GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 55 n.30 (2007).

Ringeisen v. Austria,⁵⁷ the Court first examined and took a position on the proper definition of civil rights and obligations under Article 6, paragraph 1.⁵⁸ In *Ringeisen*, a real estate speculator in Austria had to address administrative bodies, at the domestic level, as part of doing business. The question before the Court was whether Article 6, paragraph 1, of the Convention was applicable to the speculator's case, or in other words, whether the case concerned civil rights and obligations at all. The Court's answer was that civil rights and obligations under Article 6, paragraph 1, of the Convention were to be understood in the same way as those rights were understood in private law. If the nature of a legal issue fell into the category of private law, Article 6, paragraph 1, of the Convention could apply even if the legal issue had been an administrative dispute at the national level of jurisdiction.

In *Pellegrin v. France*,⁵⁹ the Court again faced the issue of defining the notion of civil rights and obligations. In *Pellegrin*, a French government service recruited an engineer to provide support to West African states. Ultimately, the engineer did not get the post because medical examiners found him unfit for the job due to the climate circumstances existing in Africa. The Court ruled that Article 6, paragraph 1, of the Convention could not apply to cases involving civil servants because civil servants had special bonds of loyalty to the sovereign power.

The ruling in *Pellegrin* heralded the principle of revisiting previous jurisprudence and introduced a new criterion in application of Article 6 of the Convention.⁶⁰ For years, *Pellegrin* remained the leading case in that field and its holding was followed by the Court's judges.

A Finnish case, *Vilho Eskelinen and Others v. Finland*,⁶¹ marked another turning point in the Court's interpretation of Article 6 of the Convention as the Grand Chamber of the Court departed from the rule in *Pellegrin*. In *Vilho Eskelinen*, a group of police officers initially complained at the domestic level about their salaries. The rule in *Pellegrin* spoke most clearly against the police officers' claim because the police officers were civil servants who, by virtue of their service, had

57. 13 Eur. Ct. H.R. (ser. A) (1971).

58. CHRISTOPH GRABENWARTER, *EUROPÄISCHE MENSCHENRECHTSKONVENTION* 327-31 (2003); FRANCIS G. JACOBS & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 144-46 (2002).

59. No. 28541/95 (Eur. Ct. H.R. Dec. 8, 1999), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=pellegrin&sessionid=21541595&skin=hudoc-en>.

60. KATIA LUCAS-ALBERNI, *LE REVIREMENT DE JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME* 184, 229-30 (2008).

61. No. 63235/00 (Eur. Ct. H.R. Apr. 19, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=vilho%20-%20Eskelinen&sessionid=21541697&skin=hudoc-en>.

rather *special bonds* to the exercise of national sovereignty. The Grand Chamber decided to depart from its holding in *Pellegrin*, finding that the rule excluding application of Article 6, paragraph 1, of the Convention to civil servants was overly broad. In *Vilho Eskelinen*, the Grand Chamber expressed the view that a member-state to the Convention was allowed to exclude Article 6, paragraph 1, of the Convention's protection in certain actions involving civil servants at the domestic level. When doing so, a contracting state must submit to two conditions. The first condition is that such an exclusion of protection under Article 6, paragraph 1, of the Convention must be grounded in the contracting state's national legislation. Secondly, such an exclusion must be justified. The latter condition that the exclusion must be justified is subject to the Court's scrutiny.⁶²

b. Evolutive Interpretation

Evolutive interpretation, also known as the Court's *living instrument approach*, is another example of judicial discretion. In *Tyrer v. United Kingdom*,⁶³ the evolutive approach appeared for the first time in the Court's jurisprudence. In *Tyrer*, the issue before the Court was whether the corporal punishment of juveniles amounted to a degrading punishment under Article 3 of the Convention. The case came to the Court from the Isle of Man, one of the Channel Islands belonging to the British Crown. Specifically, a court punished a schoolboy for taking some bottles of beer to his school by subjecting him to birching at a police station. In defense of the corporal punishment, the Attorney General of the Isle of Man noted that the schoolboy's punishment was prescribed by law. Therefore, the Attorney General of the Isle of Man submitted to the Court that corporal punishments of juveniles "did not outrage public opinion" of the little island.

In its holding, the Court stated that the Convention was a living instrument and that it had to be interpreted "in the light of present-day conditions." The Court further stated that its judgment was influenced "by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe." Under the facts of *Tyrer*, the Court found a violation of Article 3 of the Convention and stated that corporal punishment institutionalized assault on a person's dignity and physical integrity.⁶⁴ The Court's holding reflected the idea that a majority of the Convention's member-states had

62. DRAGOLJUB POPOVIC, Uvod u Uporedno Pravo (AN INTRODUCTION TO COMPARATIVE LAW) 108 n.23 (2007).

63. 26 Eur. Ct. H.R. (ser. A) (1978).

64. LETSAS, *see supra* note 56, at 298-99 n.19; Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 61 n.2 (1990).

rejected the corporal punishment of juvenile students as an outdated practice and, therefore, the Court could by no means uphold the Isle of Man's practice. Here, social developments throughout the member-states influenced the Court's ruling. Ultimately, the Court interpreted the Convention as a living instrument that goes hand in hand with legal and social developments in European countries.

Another case before the Court, *Dudgeon v. United Kingdom*,⁶⁵ illustrates that evolutive interpretation is a method of judicial interpretation for the Court. In *Dudgeon*, the issue before the Court was whether Northern Ireland's legislation that prohibited male homosexual practices between consenting adults was in accordance with Article 8 of the Convention.⁶⁶ The particular question was whether Northern Ireland's legislation violated Article 8's protection of an individual's private life. In the Court's disposition of *Dudgeon*, the evolutive interpretation and the living instrument approach were clearly visible. For instance, the Court recalled "the increased tolerance of homosexual behaviour" in the majority of the Council of Europe's (the "Council") member-states at the time the judgment was issued, as compared to "the era when that legislation was enacted." Therefore, the Court found that the notion of a private life had been considerably altered over time, and, as a matter of fact, the Court invalidated an outdated piece of legislation.

Evolutive interpretation is a method by which the Court considers the developments of European social and legal concepts to find grounds for attaching certain meanings to the Convention's terms.⁶⁷ Therefore, the Court's discretion is based on developments and evolution of ideas, which leads the Court to make turning points in its case law.⁶⁸ In his discussion of the evolutive method of interpretation, Justice Mahoney stated that evolutive interpretation could not "permit the judicial creation of new rights and freedoms, rights and freedoms not already protected by the text."⁶⁹ While Justice Mahoney's viewpoint might be considered true, the value of his remark seems to be primarily semantic. Indeed, the limited scope of Justice Mahoney's remark becomes obvious if an individual considers the substance of both examples of evolutive interpretation discussed above. If corporal

65. 45 Eur. Ct. H.R. (ser. A) (1981).

66. Mahoney, *supra* note 64, at 61-62 n.2; LETSAS, *supra* note 56, at 78-79; MICHAEL D. GOLDHABER, PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 37-38 (2007).

67. LETSAS, *supra* note 56, at 65. Some scholars use the expression *dynamic interpretation* as well. *Id.*

68. JEAN-OLIERRE MARGUÉNAUD, LE COUR EUROPEENNE DES DROITS DE L'HOMME 39-42 (2002).

69. Mahoney, *supra* note 64, at 66.

punishment of juveniles was not permitted anymore, there was no need to call it a new right under the Convention.

The same logic applies to the *Dudgeon* example. If previously forbidden homosexual practices are now allowed, then there is indeed a new right for a whole class of persons. It is irrelevant whether that right should be given the rank of a special right under the Convention. Therefore, Justice Mahoney's opinion, although apparently justified, remains more semantic than substantial.

c. Innovative Interpretation

A strict view of judicial interpretation purports that the Court may not recognize rights other than those rights granted by the Convention's text. However, the Court's holding in *Golder v. United Kingdom*⁷⁰ stands in stark contrast with that strict view of interpretation. Many legal scholars regard *Golder* as one of the most important cases in the Court's history.⁷¹

In *Golder*, a prisoner sought to bring a libel action against a prison officer, but the prison had refused to allow the prisoner to contact legal counsel. The Court faced the legal question of whether Article 6 of the Convention applied to the case. The legal problem in *Golder* concerned the wording of Article 6 of the Convention. Article 6 of the Convention's text provides rights for an individual who is already before a court of justice. Therefore, the Court had to determine if Article 6 of the Convention could be construed to provide access to justice under the facts as alleged by the prisoner. The Court concluded that access to justice was within the scope of protections afforded to individuals under Article 6 of the Convention. Specifically, the Court determined that Article 6 of the Convention should be read so as to provide the prisoner access to justice.

Since *Golder*, European Human Rights Law has included the right of access to justice even though such a right is not explicitly stated in the Convention's text. Indeed, the right of access to justice is listed within respective manuals on the subject of European Human Rights Law.⁷² The manuals refer to the right of access to justice as one of those recognized by the Convention.

The Court's judgment in *Golder* shows the Court's capacity to read into the Convention's text a certain meaning or substance, even

70. 18 Eur. Ct. H.R. (ser. A) (1975).

71. LETSAS, *supra* note 56, at 61.

72. PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 557-59 (4th ed. 2006); FRANCIS G. JACOBS & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 151-52 (2002); JEAN-FRANCOIS RENUCCI, *DROIT EUROPÉEN DES DROITS DE L'HOMME* 217-18 (2002); J. G. MERRILLS & A. H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 88-91 (Manchester Univ. Press 2001).

though that particular meaning or substance cannot be found explicitly within the text. Therefore, the Court's creativity is quite significant because the Court's holding in *Golder* created a new right that is recognized within the Court's jurisprudence and admitted as a Convention right amongst scholars.

While the Court's holding in *Golder* created a new right, an individual could argue that the holding failed to transgress the Convention's drafters' intentions. Indeed, the Court found that Article 6 of the Convention's text was neutral in regards to whether the concept of the right to a fair trial under that article should be read more broadly to include access to justice. At this point, this Article comes to the question of whether the Court could, by its interpretation of the provisions of the Convention, run counter to the intention of its drafters.

d. Interpretation Contrary to the Drafters' Intentions

The Court has recognized certain rights that the drafters of the Convention did not want to grant. To illustrate, in *Young, James and Webster v. United Kingdom*,⁷³ commonly known as the British Closed Shop case, the Court interpreted the meaning of Article 11 of the Convention, the article granting freedom of assembly and association. The issue before the Court in the British Closed Shop Case was whether an employer was entitled to demand that all its employees of a certain class should be members of the same trade union. In the British Closed Shop Case, British Rail employees brought an action before the Court on the basis that they did not want to join a trade union because they disagreed with the trade union's political attitudes and aims. Examining the drafting history of Article 11 of the Convention, the Court found that the Universal Declaration of Human Rights of the United Nations of 1948 ("Universal Declaration") served as a model for the Convention. According to Article 20, paragraph 2, of the Universal Declaration, an individual has a right to not be compelled to enter into the *close shop* system. However, while the Convention's drafters adopted many aspects of the Universal Declaration, the drafters, after much discussion, rejected inclusion of Article 20 of the Universal Declaration into the Convention's provisions.⁷⁴

Despite the fact that this drafting history was clearly recorded in the Preparatory Works, representing the Convention's legislative history, the Court was unwilling to view the drafters' intentions as decisive. Instead, the Court interpreted the substance of the right of freedom of assembly and association recognized by Article 11 of the Convention. The Court held that construing Article 11 of the Conven-

73. 26 Eur. Ct. H.R. (ser. A) (1981).

74. Mahoney, *supra* note 64, at 70; LETSAS, *supra* note 56, at 65-67.

tion so as to permit a “compulsion in the field of trade union membership would strike at the very substance of the freedom it [was] designed to guarantee.”

In the British Closed Shop Case, the Convention’s purpose prevailed over its words. The Court’s interpretation of the Convention’s text did not take into account the drafters’ intention, but rather favored the more profound need to accord protection of human rights. Thus, the Court’s power to interpret the Convention has most likely reached its highest point and the Court’s creativity and judicial discretion have reached their respective limits.

2. *Recommending*

Though not envisioned within the Convention’s text, the power to recommend measures of redress for violations of human rights has emerged in the Court’s jurisprudence despite not being envisioned by the text of the Convention. The Court is an international tribunal that cannot directly order or prescribe measures to sovereign member-states of the Convention. However, the Court’s power to recommend has proved to be sufficiently effective because of the Court’s undisputed authority. When considering the Court’s power to recommend measures of redress, as exercised by the Court, it is important to distinguish between recommending an *individual measure* of redress from recommending *general measures* of redress.

a. Recommending an Individual Measure of Redress

The Court’s jurisprudence involving the recommendation of an individual measure of redress began on January 19, 2000, with a Recommendation of the Committee of Ministers. The Committee of Ministers sought to address problems arising in cases in which there was a lack of appropriate national legislation. In order to remedy the problem in these cases, the Committee of Ministers suggested the re-examination or reopening of proceedings at the domestic level following judgments of the Court.⁷⁵

The Court’s decision in *Gençel v. Turkey*⁷⁶ is the Court’s leading case in respect to the Court’s power to recommend an individual measure.⁷⁷ In *Gençel*, a specialized tribunal known as the State Security Court sentenced the applicant for an offense against the State secur-

75. Murray Hunt, *State Obligations Following From a Judgment of the European Court of Human Rights*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 37, 39-42 (Theodora Christou & Juan Pablo Raymond eds., 2005).

76. No. 53431/99 (Eur. Ct. H.R. Oct. 23, 2003).

77. *Gençel v. Turkey*, No. 53431/99 (Eur. Ct. H.R. Oct. 23, 2003).

ity.⁷⁸ The bench of the State Security Court included military judges, who were submitted to the military discipline and chain of command structure as military officers.

The Court found that the bench's composition could not satisfy the requirements of Article 6 of the Convention. Specifically, the Court determined that the right to a fair trial could not be satisfied by a hearing in the State Security Court. Therefore, the Court recommended that the applicant be granted a new trial before a court that met the requirements of Article 6 of the Convention, specifically the requirement that the applicant be given a fair trial.⁷⁹

In another Turkish case, *Öcalan v. Turkey*,⁸⁰ the Grand Chamber reached a similar recommendation to the Court's recommendation in *Gençel*. The issue presented in *Öcalan* was identical to the issue presented in *Gençel*. In *Öcalan*, the issue again concerned the presence of military judges on the bench. The applicant was a prominent leader of the Kurdish opposition, however the Kurdish opposition was not legally recognized in Turkey. The applicant had been arrested abroad, extradited to Turkey, tried and sentenced for terrorism. In *Öcalan*, the Grand Chamber held that "the most appropriate form of redress would be for the applicant to be given a retrial without delay if he so requests."

In many similar cases arising out of Turkey, courts repeated the recommendations that the Court gave in *Gençel* and *Öcalan*. Subsequently, the Turkish government lost a number of disputes at the European level. These losses at the European level led the Turkish government to introduce a bill to the Parliament at the national level that would reform the State Security Courts system. As a result of this legislation, military judges no longer sit on the bench of such courts. While the so-called *Gençel-Öcalan* clause was inserted into judgments with the intended effect of producing results in particular cases, it has managed to achieve a broader effect, namely reform of a national legal system.⁸¹

78. State security courts in Turkey should not be confused with military courts. Military Courts are competent to try army and navy officers, whereas state security courts try civilians for the offences against state security.

79. DRAGOLJUB POPOVIC, *EVROPSKI SUD ZA LJUDSKA PRAVA (EUROPEAN COURT OF HUMAN RIGHTS)* 94 (Belgrade 2008).

80. No. 46221/99 (Eur. Ct. H.R. May 12, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=ocalan&sessionid=21543158&skin=hudoc-en>.

81. VAN DIJK ET AL., *supra* note 72, at 300-08.

b. Recommending General Measures of Redress

Occasionally, the Court has ventured to recommend general measures of redress to the respondent states. For instance, if a violation of the Convention resulted from particular domestic legislation or from the absence of legislation, the Court recommends that the respondent state has to either amend the legislation that violates the Convention or introduce new laws so as to comply with the Convention.⁸² The Court's practice in this respect dates back to the 1990s.

In *Bottazzi v. Italy*,⁸³ the Court noted that it had already rendered sixty-five judgments against Italy based on similar fact patterns. The issue in those Italian cases, and in *Bottazzi*, concerned the length of proceedings before the courts-of-law at the Italian domestic level. The Court's holding in *Bottazzi* was that the excessive length of proceedings before the Italian courts-of-law amounted to a continuous violation of human rights, a violation which remained unresolved because the parties to the proceedings did not have an effective domestic remedy at their disposal. The Court recommended that the respondent state, Italy, find a solution to the problem. The Italian government followed the Court's recommendation. Less than two years after the Court's judgment in *Bottazzi*, a bill was introduced to the Italian Parliament at the national level that provided a domestic remedy in cases of extensive proceeding length.⁸⁴ The Italian Parliament's bill was later enacted.⁸⁵

In *Scozzari and Giunta v. Italy*,⁸⁶ the Court used a more specific wording and a clearer formula to recommend a general measure. In *Scozzari and Giunta*, the Court reiterated that the Convention granted the Court the freedom to choose the appropriate general measures to be used to ensure that contracting states comply with the Court's holdings. At the same time, the Court stressed the obligation of the respondent state to introduce general measures to remedy the existing violation of human rights:

[T]he Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general

82. *Id.* at 308.

83. No. 34884/97 (Eur. Ct. H.R. July 28, 1999), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=bottazzi&sessionid=21543251&skin=hudoc-en>.

84. POPOVIC, *supra* note 62, at 96 (discussing the well-known *Pinto law*).

85. *Id.*

86. Nos. 39221/98 & 41963/98 (Eur. Ct. H.R. July 13, 2000), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=scozzari&sessionid=21543384&skin=hudoc-en>.

and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.⁸⁷

In *Scozzari and Giunta*, the issue before the Court involved child custody and the circumstances of conferring children to social care institutions, institutions who are charged with the duty to look after the children lacking parental care, that did not meet the requirements of Article 8 of the Convention. The Court stated that the respondent state could not be considered to have complied with the Court's judgment by simply paying a sum of money in just satisfaction.⁸⁸ Instead, the Court would consider a respondent state to have complied with the Court's judgment when the respondent state introduced remedial measures aimed at solving the problem generally.⁸⁹

Additionally, as the Court made clear in *Sejdovic v. Italy*,⁹⁰ recommendations of general measures remain under the Court's scrutiny. In *Sejdovic*, the applicant had been sentenced *in absentia* for murder in Italy. Several years later, the applicant was apprehended in Germany. German authorities refused to extradite the applicant to Italy on the grounds that the Italian law did not offer sufficient guarantees for a retrial of a person sentenced *in absentia*. In November 2004, a chamber of the Court held that Italy had violated Article 6 of the Convention, the article that grants the right to a fair trial.

At the request of the Italian government, the case was referred to the Grand Chamber. Before the Grand Chamber, Italy claimed to have fulfilled the general recommendation made by the Court's chamber. Meanwhile, a special piece of legislation amended the former Article 175 of the Criminal Procedure Code of Italy in April 2005. In March 2006, the Grand Chamber rendered its judgment, finding that it was too early to estimate the scope and efficiency of the April 2005 statutory amendment as Italy's Cassation Court had not yet developed any jurisprudence concerning the amendment. The Court stated that a mere adoption of a general measure, specifically the mere enactment of a statute, could not prove that a respondent state complied with the Court's recommendation. Therefore, the Grand Chamber affirmed the chamber judgment and found Italian law violated Article 6 of the Convention.⁹¹

87. *Scozzari and Giunta v. Italy*, Nos. 39221/98 & 41963/98 (Eur. Ct. H.R. July 13, 2000), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Scozzari&sessionid=21543384&skin=hudoc-en>; Hunt, *supra* note 75, at 33.

88. Popovic, *see supra* note 62, at 96-97.

89. *Id.*

90. No. 56581/00 (Eur. Ct. H.R. Mar. 1, 2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=sejdovic&sessionid=21543560&skin=hudoc-en>.

91. Popovic, *supra* note 62, at 97-98.

3. *Prescribing Measures of Redress*

Upon a finding that the Convention has been violated, the Court has the power to afford just satisfaction as a measure of redress. The Court imposes on the respondent state a legal obligation to put an end to the human rights violation and make reparations to the injured party. The respondent state must respond in a way that restores, as much as possible, the situation existing before its violation of the Convention.⁹² As the respondents are sovereign states, those respondent states are allowed to choose the mode of redress. However, on certain occasions, the Court has begun limiting the powers of the respondent states to choose a method of redressing a violation of the Convention.

a. Just Satisfaction

Under Article 41 of the Convention, the Court is entitled, when finding a human rights violation, to "afford just satisfaction to the injured party." While the language of Article 41 of the Convention is somewhat ambiguous, the language is clear enough to provide that the portion of a Court's judgment concerning just satisfaction is fairly prescriptive. However, it is subject to certain requirements: for instance, the Court has the power to award just satisfaction only to the extent that full reparation is not available under domestic law. Although the Court does not specify the remedy, i.e. a particular measure of redress for a violation of human rights, the court does award just satisfaction in the presence of a causal link between the violation of the Convention and the applicant's complained-of injury.⁹³

Upon finding a violation of the Convention, the Court usually affords a sum of money to the applicant in just satisfaction. In such instances, the respondent state government cannot escape meeting the obligation of just satisfaction in any way other than payment of the sum of money to the applicant.⁹⁴ The just satisfaction clause falls within the operative parts of the Court's judgments, sufficiently proving its prescriptive character.

b. Prescribing Individual Measure of Redress

While the Court's judgments are binding, in reality, the judgments of the Court are essentially declarative. The Court's judgments are prescriptive only insofar as they afford just satisfaction. However, the Court has gone beyond this limitation by introducing a certain amount of constraint towards member-states in respect to their obli-

92. VAN DIJK ET AL., *supra* note 72, at 257.

93. Hunt, *supra* note 75, at 30-32.

94. VAN DIJK ET AL., *supra* note 72, 261-78 (discussing just satisfaction).

gations to abide by the Court's judgments as the Court has limited the member-states' choice of measures of redress.

In *Assanidze v. Georgia*,⁹⁵ the peculiar political and social situation in Georgia forced the Court to utilize judicial activism in order to prescribe an individual measure to a respondent state.⁹⁶ In *Assanidze*, the applicant claimed authorities had unlawfully detained him in the Georgian province of Ajaria. At that time, Ajaria did not fully recognize the authority of Georgia's central government.⁹⁷ As a province, here Ajaria, has no standing under international law, the application to the Court was lodged against Georgia in its capacity as both a sovereign state and as a contracting state of the Convention.

The Court in *Assanidze* held that the applicant's detention was arbitrary and constituted a violation of Article 5 of the Convention. However, the Court determined that affording just satisfaction to the applicant, in monetary terms, would not provide effective relief because the applicant's arbitrary detention would have continued. Therefore, because the Court was limited in prescribing any relief other than just satisfaction under the Convention, the Court faced the dilemma of whether to issue a formal judgment devoid of effect or pursue the path of judicial discretion in order to put an end to a human rights violation.

The Court chose to order "the respondent state [to] secure the applicant's release at the earliest possible date." The Court's prescriptive measure was addressed to Georgia's central government, the respondent in the case. However, the Georgian central government did not have full control of the Ajaria province and, therefore, was not in a position to comply with the Court's prescribed measure of redress. Despite this political situation, the authority of the Court's judgment was effective as the Ajarian authorities complied with the Court's ruling.

In *Ilascu and Others v. Moldova and Russia*,⁹⁸ the Court followed the pattern that emerged in *Assanidze*. In *Ilascu*, several persons claimed to have been unlawfully arrested in Transdnistria, a part of Moldova that does not recognize the authority of the Moldovan central government. The Court ordered their release. In contrast to *As-*

95. No. 71503/01 (Eur. Ct. H.R. Apr. 8, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Assanidze&sessionid=21543560&skin=hudoc-en>.

96. VAN DIJK ET AL., *supra* note 72, 941.

97. Ajaria should not be confused with the Georgian breakaway province of Abkhazia, as Ajaria has compromised with the Georgian central government and remains a part of the state of Georgia.

98. No. 48787/99 (Eur. Ct. H.R. July 8, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ilascu&sessionid=21543560&skin=hudoc-en>.

sanidze, the respondent state in *Ilaşcu* did not fully comply with the Court's prescription.⁹⁹

It is noteworthy that *Assanidze* and *Ilaşcu*, both of which address political issues of destabilized new democracies and separatist tendencies existing therein, were not the only cases in which the Court prescribed an individual measure. The Court prescribes or orders individual measures more often in cases where it requires a respondent government to execute an unenforced judgment taken at the domestic level to put an end to human rights violations. The Court's judgments sometimes remain unenforced because of the ill-functioning of the domestic judiciary system.

The Court's judgments in *Terem Limited Chechetkin and Olius v. Ukraine*¹⁰⁰ and *Ilić v. Serbia*¹⁰¹ illustrate the Court's prescribing enforcement of a domestic judgment or decision.¹⁰² In *Terem*, the Court was presented with an irregular seizure of the applicants' property in tax proceedings. The Court ordered the respondent government, Ukraine, to pay the applicants the sum awarded by domestic courts-of-law. Comparatively in *Ilić*, the issue before the Court concerned the applicant's ability to evict a tenant from the applicant's apartment. The Court ordered the respondent government, Serbia, to comply with the decision rendered at the domestic level that had become final, but remained unexecuted.¹⁰³

c. Prescribing General Measure of Redress

In the respective judgments of *Broniowski v. Poland*¹⁰⁴ and *Hutten-Czapska v. Poland*,¹⁰⁵ the Court ventured to prescribe general measures of redress in the operative parts of its respective judg-

99. *Ilaşcu and Others v. Moldova and Russia*, No. 48787/99 (Eur. Ct. H.R. July 8, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ilaşcu&sessionId=21543560&skin=hudoc-en>.

100. No. 70297/01 (Eur. Ct. H.R. Sept. 27, 2005) (unpublished opinion).

101. No. 30132/04 (Eur. Ct. H.R. Sept. 10, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ilic&sessionId=21543560&skin=hudoc-en>.

102. *Terem Ltd. Chechetkin and Olius v. Ukraine*, No. 70297/01 (Eur. Ct. H.R. Sept. 27, 2005) (unpublished opinion); *Ilić v. Serbia*, No. 30132/04 (Eur. Ct. H.R. Sept. 10, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ilic&sessionId=21543560&skin=hudoc-en>.

103. Popovic, *supra* note 62, at 92-94.

104. No. 314443/96 (Eur. Ct. H.R. June 22, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Broniowski&sessionId=21543560&skin=hudoc-en>.

105. No. 35014/97 (Eur. Ct. H.R. June 19, 2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Hutten-Czapska&sessionId=21543560&skin=hudoc-en>.

ments.¹⁰⁶ These judgments fall within a category known as pilot judgments. In pilot judgments, the Court is entitled, on the grounds of two recommendations by the Committee of Ministers, to either recommend or prescribe a remedy to a systemic problem that leads to human rights violations at the domestic level.

In *Broniowski*, the Court addressed the issue of indemnification of repatriated individuals that settled in Poland immediately after World War II. Specifically, a huge number of individuals, being ethnic Poles, moved to Poland within its new frontiers as defined after the war. Those individuals left their properties in the regions they had previously resided and sought to be recompensed. They were entitled to recompensation under Polish law. However, the latter remained unexecuted for decades under the authoritarian government. In contrast, the Court in *Hutten-Czapska* sought to strike a balance between landlords and tenants in an apartment shortage situation.

In both *Broniowski* and *Hutten-Czapska*, the Court found systemic deficiencies in the domestic legal order's ability to function and prescribed that the respondent state must introduce remedies in the form of general measures. The respondent state was, however, free to choose the mode and form of these general measures.¹⁰⁷

Recently, the Court has further extended its power to recommend general measures by limiting member-states' sovereign powers. In *L. v. Lithuania*,¹⁰⁸ the Court went so far as to order the respondent state to pass a piece of legislation within a specified period! In *L.*, the issue before the Court concerned the right to have a State funded sex change operation, a right provided to Lithuanian citizens under Article 2.27, Section 1 of the Civil Code of Lithuania of 2001. While the Lithuanian Civil Code afforded Lithuanian citizens the right to have a sex change operation, the Lithuanian Civil Code envisioned that another piece of legislation would provide the conditions and the proce-

106. *Broniowski v. Poland*, No. 314443/96 (Eur. Ct. H.R. June 22, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=broniowski&sessionid=21543560&skin=hudoc-en>; *Hutten-Czapska v. Poland*, No. 35014/97 (Eur. Ct. H.R. June 19, 2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=hutten-Czapska&sessionid=21543560&skin=hudoc-en>.

107. Lech Garlicki, *Broniowski and After: on the Dual Nature of 'Pilot Judgments'*, in LUZIUS WILDHABER, *LIBER AMICORUM* 177-92 (2007); Vladimiro Zagrebelsky, *Questions autour de Broniowski*, in LUZIUS WILDHABER, *LIBER AMICORUM* 521-35 (2007); Renata Degener & Paul Mahoney, *The Prospects for a Test Case Procedure in the European Court of Human Rights*, in *TRENTE ANS DE DROIT EUROPÉEN DES DROITS DE L'HOMME: ETUDES À LA MÉMOIRE DE WOLFGANG STRASSER* 173-207 (Hanno Hartig ed., 2007); POPOVIC, *supra* note 62, at 99-101.

108. No. 27527/03 (Eur. Ct. H.R. Sept. 11, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=27527/03&sessionid=21543560&skin=hudoc-en>.

ture of gender reassignment. However, this secondary piece of legislation simply did not exist.

In *L.*, the applicant failed to address any Lithuanian authorities and simply filed an application with the Court that challenged the lack of secondary legislation prescribing the conditions and the procedure of gender reassignment. However, the Court found it would have been useless for the applicant to have addressed the Lithuanian authorities because of the absence of the secondary legislation on the subject envisioned by the Lithuanian Civil Code. As a result, the Court declared the applicant's application admissible. Furthermore, the Court found that the Lithuanian legislation constituted a violation of Article 8 of the Convention. The Court prescribed that the respondent state must "pass the required subsidiary legislation . . . on gender reassignment of transsexuals, within three months of the present judgment becoming final." However, it should be noted that the Court left some room for the respondent state to act because the operative portion of the judgment provided that the respondent state was to pay a certain sum of money in case it failed to pass the prescribed legislation.

The Court's prescription in *L.* is far reaching, at least in the respect that it requires a Parliament, with a complicated procedural system, to adopt legislation within a specific time period. Sitting on the bench in this case, my Swedish colleague, Justice Elisabet Fura-Sandstrom, and I dissented. In my opinion, the applicant's application should have been declared inadmissible for non-exhaustion of domestic remedies. During the oral hearing, the respondent state supplied a Constitutional Court of Lithuania ruling which proved that the Constitutional Court of Lithuania's judges favored construing statutes in a manner that satisfied social needs. For the most part, the judges at the domestic level did not venture to go beyond the literal interpretation of the Lithuanian Civil Code. However, those judges should have been given an opportunity to issue a ruling before the application went before the Court.

In a separate dissenting opinion in *L.*, Justice Fura-Sandstrom found that the Court had acted *ultra vires* in this case. While I am basically favorable to the Court's judicial discretion, I hereby declare that I agree with Fura-Sandstrom. In my mind, judicial self-restraint should have prevailed in this particular case.¹⁰⁹

109. POPOVIC, *supra* note 62, at 98-99.

V. JUDICIAL SELF-RESTRAINT

The European Court of Human Rights'¹¹⁰ (the "Court") most important tool of judicial self-restraint is the margins of appreciation afforded to member-states of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").¹¹¹ Margins of appreciation represent the "outer limits of schemes of protection, which are acceptable to the Convention."¹¹² Therefore, the Court does not interfere with actions that are within the margin of appreciation. The Court's role has always been considered subsidiary, leaving the authorities of the member-states of the Convention enough room to estimate the facts as those authorities are in a better position to do so.¹¹³ The Court only protects human rights within the limits posed by the Convention.

In one of the Court's earliest cases, *Handyside v. United Kingdom*,¹¹⁴ the Court ruled on the margin of appreciation.¹¹⁵ In *Handyside*, a court-of-law in the United Kingdom ordered the seizure and ban of a school book because of its obscene contents. The applicant invoked a right granted by Article 10 of the Convention, specifically the right of freedom of expression. The Court ruled that the freedom of expression granted under Article 10 of the Convention included distributing information that might offend, shock, or disturb. However, the Court ultimately found that no violation of the applicant's right of freedom of expression had occurred.

The Court founded its determination that the applicant's right of freedom of expression had not been violated in *Handyside* based upon the margin of appreciation principle that is afforded to the Convention's member-states. The Court stated that its role was subsidiary and that it was not to intervene with the deference afforded to member-states to define what is and what is not obscene. The Court's attitude in this case was considered to have its basis "in the very nature of the Convention."¹¹⁶

110. For the purposes of brevity, the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

111. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

112. FRANCIS G. JACOBS & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 40 (2002).

113. JEAN-PIERRE MARGUÉNAUD, *LE COUR EUROPEENNE DES DROITS DE L'HOMME* 43 (2002).

114. Eur. Ct. H.R. (ser. A) at 17-24 (1976).

115. JACOBS & WHITE, *supra* note 112, at 340-41, 780.

116. Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 83 (1990).

In *Ashingdane v. United Kingdom*,¹¹⁷ the Court was presented with multiple issues concerning Article 5 and Article 6 of the Convention. *Ashingdane* concerned an individual's access to justice, namely a mental patient's challenge to continued compulsory confinement in a special secure psychiatric hospital even though the patient was declared fit for transfer to an ordinary psychiatric hospital.¹¹⁸ The applicant sought relief from a domestic level court "only to be told that his actions were barred by operation of law."

The Court in *Ashingdane* held that the right to access to justice under Article 6 of the Convention was not absolute. The Court elaborated that the right to access to justice could be subject to certain requirements and the Convention's member-states should enjoy a margin of appreciation in posing those requirements in their respective legal systems. In both *Handyside* and *Ashingdane*, the Court was willing to grant a margin of appreciation to a member-state. Consequently, the Court opted for decisions inspired by self-restraint.

However in cases such as *Steel and Morris v. United Kingdom*,¹¹⁹ the Court was less favorable to the judicial method of self restraint. In *Steel and Morris*, London Greenpeace ecologists campaigned for individuals not to visit McDonald's restaurants. The Greenpeace ecologists alleged that McDonald's was responsible for causing hunger in the third world, depriving small land owners of their property, and depriving tribes of fertile land in those countries where tribal life and organization still existed.

In reaction to these allegations, McDonald's sued the London Greenpeace branch for libel. In the United Kingdom domestic proceedings, each party to the proceedings bears the costs of the attorney's fees. However, a defendant is generally entitled to demand legal aid from the court except in actions for libel where legal aid is not allowed in England and Wales. As such, the defendant at the national level, i.e. Greenpeace, could not be granted legal aid.

The defendant at the domestic level (Greenpeace) lodged an application with the Court, complaining of an alleged violation of their right to a fair trial under Article 6 of the Convention. The Court opined that each and every company doing business in the market should be able to prove the truth about its business and enjoy protection of its prestige. This should apply to McDonald's too. However, the Court held that benefits provided by a national legal system could

117. 93 Eur. Ct. H.R. (ser. A) (1985).

118. *Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (ser. A) (1985).

119. No. 68416/01 (Eur. Ct. H.R. Feb. 15, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Morris&sessionId=21544462&skin=hudoc-en>.

not be refused to a party confronted with a rich and influential company involved in worldwide trade.¹²⁰ Thus, the idea of fairness and striking a balance between parties in domestic proceedings prevailed over judicial self-restraint. The Court found a violation of Article 6 of the Convention on the grounds that a legal provision on bearing the attorney's fees by a party to litigation ran counter to the Convention's protection of human rights.

In other cases before the Court, the margin of appreciation had to be interpreted with respect to the whole social and political situation of a member-state. In *Yumak and Sadak v. Turkey*,¹²¹ the Court was presented with a constitutional issue involving the electoral system in Turkey. In *Yumak and Sadak*, the electoral threshold of ten percent of the votes in elections at the national level for an electoral list, to obtain parliamentary seats within the proportional system, was at stake. The applicants in *Yumak and Sadak* represented small political parties which complained that they could not achieve parliamentary representation because the electoral threshold was too great.

Once again, I sat on the chamber bench and opined that the applicants' application should have been declared inadmissible. However, *Yumak and Sadak* reached the Grand Chamber. The Grand Chamber, by a majority vote, held that the electoral system in Turkey did not violate the Convention. Therefore, in the end, the margin of appreciation left to a member-state to the Convention prevailed.

A comparative review of the member-states' electoral law showed that Turkey's electoral threshold was the highest in all of Europe. The second highest was Lichtenstein, with an electoral threshold of eight percent.

It seems that the margin of appreciation in *Yumak and Sadak* served its purpose well. Turkey is a country with a wide range of problems. Its political system remains unstable. The fact that the proportional system was introduced in Turkey speaks in favor of the nation's desire to have a wider representation in Parliament. An intervention of the Court in the Turkish constitutional and political system may have led to additional political instability within the country. Therefore, the Court's use of the margin of appreciation was rather helpful in *Yumak and Sadak* even though the Court did not reach a unanimous decision in the case.

120. DRAGOLJUB POPOVIC, UVOD U UPOREDNO PRAVO (AN INTRODUCTION TO COMPARATIVE LAW) 110-12 (2007).

121. No. 10226/03 (Eur. Ct. H.R. Jan. 30, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&actionhtml&highlight=Yumak&sessionid=21544462&skin=hudoc-en>.

In *Yumak and Sadak*, as in many other cases, the Court's holding was based on comparative law research prepared by a special service of the Court's registry. In this respect, the Court seeks inspiration both from the member-states of the Council and from other countries such as the United States, Canada, or South Africa.¹²² In *Goodwin v. United Kingdom*¹²³ and other certain cases before the Court, analysis of comparative law proved to be a reason for restricting the margin of appreciation. The applicant in *Goodwin* was an individual registered at birth as male, but who later underwent gender-reassignment surgery to become a woman. The applicant submitted an application to the Court in which the applicant complained about the lack of legal recognition of the applicant's sex change. Pursuant to the applicant's application, the Court found a violation of Article 8 of the Convention on the grounds that the "respondent government [could] no longer claim that the matter [fell] within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention." The Court thus narrowed the scope of the margin of appreciation after being inspired by the evolution of the attitudes towards sex change on a world level.¹²⁴

This aforementioned analysis proves that the margin of appreciation is an important tool of the Court's methodology. Legal scholars have observed that the margin of appreciation doctrine should be handled with care, for otherwise the Court would lose its "element of independent control of national action."¹²⁵ On the other hand, some scholars criticized the Court for allegedly trying to adhere to the margin of appreciation doctrine in order to avoid tackling sensitive social issues.¹²⁶ Ultimately, the margin of appreciation doctrine's characteristic features and limits still need to be made more precise by the Court, as well as by scholars.

VI. CONCLUSION

Legal scholars have observed that the text of the Universal Declaration on Human Rights of 1948, adopted by the United Nations, is a combination of the French tradition of abstract proclamations and the

122. Dragoljub Popovic, *Le Droit Compare dans l'Accomplissement des Tâches de la Cour Européenne des Droits de l'Homme*, in LUZIUS WILDHABER, HUMAN RIGHTS: STRASBOURG VIEWS, LIBER AMICORUM 383-86 (2007).

123. No. 28957/95 (Eur. Ct. H.R. July 11, 2002), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=goodwin&sessionid=21544462&skin=hudoc-en>.

124. Gregory Lewkowicz, *Droits de l'Homme, Droits du Citoyen : Les Présupposés de la Jurisprudence Américaine et Européenne*, in JUGER, LES DROITS DE L'HOMME : EUROPE ET ÉTATS-UNIS FACE À FACE 28-29 (Julie Allard et al. eds., 2008).

125. Mahoney, *supra* note 116, at 84; JACOBS & WHITE, *supra* note 112, at 40-1.

126. MARGUÉNAUD, *supra* note 113, at 46.

Anglo-Saxon concern for details.¹²⁷ The same observation applies to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").¹²⁸ The Convention's provisions represent what the Germans call provisions susceptible of development (*Entwicklungsfähige Normen*).¹²⁹ As such, the European Court of Human Rights'¹³⁰ (the "Court") jurisprudence has provided meaning and real substance to the Convention's provisions.

Throughout its fifty years of history, the Court has managed to achieve a considerable degree of creativity in its jurisprudence. By developing the European Law of Human Rights, the Court has been able to put aside short-sighted nationalisms and exercised an "independent control of national action."¹³¹

The Court's jurisprudential methods were two-fold: developing the provisions of the Convention and giving those provisions breaths of life. In doing so, the Court has used judicial activism along with self-restraint. In each case, the Court's choice depended on the various circumstances leading to its judgment. However, the two basic approaches are to some extent parallel. Dedicated defenders of judicial activism, for example Justice Michael Kirby, fairly admit the necessity of a certain convergence of the two opposed judicial methods.¹³² The French legal doctrine also has eminent representatives who favor the idea of a prudent approach to researching relations between legislation and jurisprudence. Among these legal scholars is the former first president of the Cassation Court of France, Guy Canivet.¹³³

However, the question presented at the outset of this Article should be answered at the end of this text. Based on the analysis of

127. DANIELE LOCHAK, *LES DROITS DE L'HOMME* 52 (2002).

128. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

129. This is how scholars describe the provisions of the French Code civil and the attitude of judges handling it. The judges have construed its rules "so as to develop, extend or limit them and have brought new legal ideas into play as well as developing old ones." KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 95 (Tony Weir trans., 3d ed. 1998).

130. For the purposes of brevity, the *European Court of Human Rights*, founded by the Convention, will be hereinafter referred to as *Court*.

131. Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 *HUM. RTS. L.J.* 57, 84 (1990).

132. Justice Kirby consecrated the fourth and last of his Hamlyn lectures on judicial activism to the search of common ground and concordance of the two methods. MICHAEL D. KIRBY & HAMLYN TRUST, *JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE, AND POLICY IN THE JUDICIAL METHOD* 61-91 (2004).

133. GUY CANIVET, *ACTIVISME JUDICIAIRE ET PRUDENCE INTERPRÉTATIVE: INTRODUCTION GÉNÉRALE*, *ARCHIVES DE PHILOSOPHIE DU DROIT* 7-32, 50 (2007); see also KATIA LUCAS-ALBERNI, *LE REVIREMENT DE JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME* 394-95, 502 (2008) (expressing the opinion that the changes of jurisprudence can be reconciled with the legal certainty).

the Court's jurisprudence above, this Article concludes that judicial activism as a method of interpretation has prevailed over self-restraint.

A range of various techniques used by the Court, such as evolutive interpretation, innovative interpretation, interpretation contrary to the drafters' intent, and autonomous concepts, prove that judicial activism has prevailed in the Court's jurisprudence. Furthermore, the Court's activist approach is justified to some extent because it functions within a limited legislative ability in the international context.

The context of the Court's work seems to be different, at least at first sight, if compared to the situation existing in the United States where "the federal judiciary has surrounded itself with an elaborate system of institutional devices of self-restraint."¹³⁴ Nevertheless, even in the United States, "the philosophy of [a] 'living Constitution' continues to predominate in the courts and in the law schools."¹³⁵

Judicial activism techniques followed by the Court are better adapted to the evolution of the Convention's provisions and are more susceptible to development than the self-restraint method. The Court's judicial activism techniques serve the purpose of allowing the Court's jurisprudence to evolve. At the same time, the Court's most important technique of judicial self-restraint, the doctrine of margin of appreciation, remains less developed from a doctrinal standpoint.

To close this Article, I feel bound to underline that the task of revisiting Justice Paul Mahoney's conclusions, which he reached nearly twenty years ago, has been undertaken with one single task – to display the current state of the Court's jurisprudence. It occurs to me that the two methods, judicial activism and judicial self-restraint, are no longer equal. Instead, judicial activism has prevailed.

Any estimation of the displayed fact of preponderance of judicial activism within the Court's jurisprudence goes beyond my task in writing this Article. Whether such preponderance is good or bad, valuable or devoid of value, whether it deserves praise or calls for criticism, are all questions that remain open. It is not for those who have participated in a process to judge its achievements.

134. John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in *NORMS AND THE LAW* 205 (John N. Drobak ed., 2006).

135. ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43 (Steven G. Calabresi ed., 2007). Justice Scalia, whose words are quoted, is unfavorable to such predominance. *Id.*