THE ROLE OF THE ECHR IN SHAPING THE EUROPEAN MODEL OF THE CRIMINAL PROCESS

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I.

Developments in the European Union (EU) clearly indicate a trend of national substantive criminal laws becoming more and more uniform. As a result of conventions[1] concluded within the EU, as well as of decisions of the European Council[2], member states have adopted provisions similar in content making, for instance, corruption of EU or foreign officials, corruption in the private sector or money laundering a criminal offense, providing for liability of legal persons or for the confiscation of the proceeds of crime, etc. Also, the framework decision on the European arrest warrant, though addressing issues of international cooperation, is likely to contribute to bringing substantive criminal law provisions of member states closer to each other. For certain conduct defined as criminal offenses in the issuing state, the executing state may not refuse surrender of suspected offenders, claiming the lack of dual criminality. States will therefore certainly take steps, provided that they wish to maintain at least the appearance of their sovereignty, to make conduct enumerated in the framework decision a criminal offense under their national law as well.

The trend towards bringing national substantive criminal laws closer to each other is not limited to the EU. Numerous international treaties concluded in the past have had a harmonizing impact on the member states' criminal laws within the Council of Europe. While the primary aim of some of these treaties - such as the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches[3], European Convention on Offences relating to Cultural Property[4] and others[5] - is to make international cooperation smoother, a direct effect of this has certainly been a degree of harmonization of national laws. Also, the soft instruments of the Council of Europe on the suppression of particular types of antisocial behavior have contributed to bringing national criminal laws in Europe closer to each other.[6]

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[1] See Protocol [OJ 96/C 313/01 23.10.96] to the Convention on the Protection of the European Communities' Financial Interests [OJ 95/C 316/03 27.11.95] adopted on 27 September 1996 for criminalization of both active and passive corruption of national and Community officials; The Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union [OJ 97/C 195/01 25.6.97]; The second protocol [OJ 97/C 221/02 19.7.97] to the PIF Convention (OJ - C 316/1995/49), which has provisions for criminalisation of money laundering of proceeds generated by corruption.

[2] Framework decision criminalising corruption in the private sector [OJ L 192/54 31.7.2003]; Framework decision on money laundering, dealing with the identification, tracing, freezing and confiscation of criminal assets and the proceeds of crime 2001/500/JHA; Framework Decision on combating the sexual exploitation of children and child pornography 2004/68/JHA; Framework Decision on combating trafficking in human beings 2002/629/JHA; Some are still at the stage of proposal such as the Proposal for a Council Framework Decision to strengthen the criminal law framework to combat intellectual property offences {SEC(2005)848} or Proposal for Council Framework decision on combating racism and xenophobia (COM/2001/0664 final - CNS 2001/0270).

[3] European Treaty Series, No. 120, 1985.

[4] European Treaty Series No. 119, 1985.

[5] Convention for the protection of individuals with regard to automatic processing of personal data (ETS No.108, 1981); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No.141, 1990).

[6] Recommendation on the prevention of racism, xenophobia and racial intolerance in sport (2001/6) 2001; Recommendation on guidelines to the Parties for the implementation to Article 5 of the Convention: identification and treatment of offenders (90/1) 1990; Recommendation on comprehensive report on measures to counter hooliganism (89/2) 1989; Recommendation of the Committee of Ministers to Member States on the Reduction of

Furthermore, on the global level, harmonization of national criminal laws has become a priority target over the last two decades. Clearly, the conventions on drug crime[7], transnational organized crime[8] or corruption[9] are reflections of the trend.[10] Mention should also be made of the Statute of the International Criminal Court adopted in 1998 which, though in a limited area, has made a substantial contribution to harmonizing and even unifying national laws. Due to the complementary jurisdiction of the permanent international criminal court, State Parties to the treaty have been prompted to define war crimes and crimes against humanity in a uniform manner by following the wording of the Statute.[11]

Whereas the tendency of harmonizing substantive criminal laws is clearly evident, much less has been achieved so far in the area of criminal procedure.[12] Even within the EU differences in criminal procedural law are still considerable in areas of such significance as the legal preconditions for employing coercive measures, the rules of collecting and assessing evidence, the role of the preparatory stage of the process, the rights of suspects or whether prosecution is mandatory or can be made dependant on expediency considerations.[13] The envisaged measures in the direction of harmonization within the Union are rather modest.[14] The explanation may lie in that the rules of the criminal process are dependant to a considerable extent on the organizational structure of the criminal justice system, the extent to which the court system is based on the so called hierarchical or the coordinate model[15], the role of lay decision-makers, etc. This again is influenced by the cultural background, i.e. historical and political experience of a given people, the "*Zeitgeist*" in a particular society and socio-psychological factors.[16] The criminal process is not only a reflection of the cultural values; by giving them expression in the course of its operation it will further strengthen these values.[17]

Thus it appears that harmonization is a difficult undertaking in the area of criminal procedure. One can of course ask if there is a need at all for harmonization. Do potential benefits of making national criminal justice systems resemble each other outweigh the value of diversity? And assuming that harmonization is given priority over heterogeneity then which model will the harmonized European criminal process follow?

Spectator Violence at Sporting Events and in particular at Football Matches (84/8) 1984; Recommendation on the protection of the cultural heritage against unlawful acts (96/6) 1996.

[7] 1961 Single Convention on Narcotic drugs; 1971 Convention on Psychotropic Substances; 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[8] United Nations Convention against Transnational Organized Crime and its protocols (2000): Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Air and Sea, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

[9] United Nations Convention against Corruption (2003).

[10] It should be added that facilitating cooperation is also among the aims of these conventions.

[11] The definition of genocide in the Statute (see Article 6 and also Article 25 for incitement to commit genocide) in essence follows the wording of the definition of genocide (see Article 2) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

[12] This seems to be surprising in the light of the frequently voiced assumption that changes in substantive law will inevitably have their impact on the rules of the criminal process which, it is held, primarily serves the enforcement of substantive penal law.

[13] See: Robert Esser: *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, De Gruyter Recht, Berlin 2002. p.5.

[14] Proposal of the Commission for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union 2004/0113 (CNS)

15 Mirjan R. Damaska: *The faces of justice and state authority: a comparative approach to the legal process*, New Haven: Yale University Press, 1986.

[16] On the cultural factors explaining differences of systems of criminal procedure see Tatjana Hörnle: Unterschiede zwischen Verfahrensordnungen und ihre kulturellen Hintergründe, *ZStW*, Band 117. 2005/4, p.801-838.

[17] By this we assume that the goal of the criminal process is not limited to the enforcement of substantive law provisions. The autonomous function of the process is to express and demonstrate its link to the cultural background. See Hörnle *op. cit* p.834.

Let us put these dilemmas aside for the moment and simply acknowledge that in spite of the difficulties and the meager results, the international community does not consider harmonization or approximation a hopeless endeavor since steps have already been taken in the direction of harmonization on both the global and regional level. First, increased intensity in cooperation among states and international instruments on extradition and other forms of assistance, though not directly aimed at harmonization of national criminal procedures, have had an indirect harmonizing effect. Intensive cooperation, which leads to subsequent recognition of mutual dependence, will induce empathy for each other's problems and to making concessions to national sovereignty considerations. This is clearly reflected in that states are more and more prepared to provide assistance according to the procedural provisions of their partners (requesting states), not insisting that letters rogatory be executed exclusively in line with their own law.[18] It is hardly surprising that it is the EU Convention[19] that goes the furthest in this respect: the requested party, as per general rule, is under the obligation to comply with the formalities and procedures expressly indicated by the requesting State.[20]

Executing letters rogatory according to foreign laws may also give ideas to legislators in the requested state when it comes to reforming their own law on criminal procedure. Certain forms of cooperation, such as the mutual recognition of foreign judgments or transfer of proceedings presuppose that there exist no fundamental dissimilarities in the cooperating states' criminal procedures. Therefore states determined to cooperate will do their best to remove institutions unacceptable to their partners.[21] It can therefore be seen that institutions of international cooperation in criminal matters have the indirect effect of bringing criminal justice systems closer to each other.

International human rights treaties aim directly at harmonization. The International Covenant on Civil and Political Rights[22], for instance, enumerates the procedural guarantees that shall be observed in all states[23]. Also the "softer" instruments adopted within the framework of the

[18] According to the traditional doctrine which stressed respect for national sovereignty the collection of evidence and other procedural measures had to be performed in line with the law of the requested state. Thus the 1959 Council of Europe Convention on mutual assistance in criminal matters in article 3 proclaims that "the requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents". The Council of Europe Convention certainly set out from the then prevailing practice of Member States to permit the use of evidence collected abroad irrespective of whether the mode of collection was in line with their own law. As a general rule the only precondition of their use in domestic proceedings was the observance of the law of the requested state. It is primarily increased sensitiveness for equality concerns in the sense that also in cases with a "foreign component" defendants should enjoy the guarantees of the domestic criminal justice system that may explain the change in attitude.

[19] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union. *Official Journal 197,* 12/07/2000 p.0003 – 0023.

[20] According to article 4 "Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State".

[21] The fiasco of the Council of Europe Convention on the Transfer of Proceedings in criminal matters in comparison to the European Convention on Extradition or the Council of Europe Convention on Mutual Assistance in criminal matters is probably due to the fact that the required harmonization of criminal proceedings in European states has not yet taken place.

[22] Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

[23] However it is argued that the list contains only the minimum standards and since granting the right to individual application is still optional the case law of the UN Human Rights Committee gives little guidance to national decision-makers. *See* Esser *op.cit* p.31.

United Nations focusing primarily on vulnerable groups of defendants, such as juveniles[24] or pretrial detainees[25], set standards to be observed by national laws.

On the European level it is obviously the European Convention on Human Rights and Individual Freedoms (thereafter: Convention) which defines the basic standards all State Parties have to comply with. It is rightly claimed that whereas European community law has an impact rather on the substantive law of member states, the ECHR has made substantial contribution to shaping the criminal procedural law of members of the Council of Europe.[26] The impact exerted by the ECHR on national criminal justice systems proves that the objective of the criminal process is, besides enforcing substantive criminal law, to arrive at accurate factual findings in a manner by which basic human rights are observed.[27] In the remaining part of the paper I will explore the extent to which the Convention and the jurisprudence of the European Court of Human Rights (thereafter: ECtHR or Court) may contribute to further harmonizing criminal procedure in Europe.

III.

There is no doubt as to the legitimacy of the endeavor on the part of the Court to strive at harmonization of European legal systems. The Statute of the Council of Europe states that the aim of the Council is to achieve a greater unity between its members.[28] The preamble of the Convention adds that one of the methods through which this aim is to be pursued "is the maintenance and further realization of human rights." Thus it is clear that the Convention was drafted and the Court (together with the Commission)[29] were established with the aim of also contributing to harmonizing legislation affecting human rights in the State Parties.

No doubt the Court has already contributed to bringing European legislation, and within that criminal justice systems, closer to each other. However, in the first phase of its operation it took a rather cautious approach and demonstrated considerable self-constraint. The Convention was adopted with the consent of the then members of the Council of Europe and its operation presupposes the preservation of that consensus. Decisions of the Court that are perceived to go too far, in that they go beyond what the state parties agreed upon or are willing to accept at a given moment, may threaten the very existence of the Convention and the level of protection of human rights reached through the Court's earlier judgments. The United Kingdom, after the Tyrer judgment[30], for instance, decided not to renew its declaration by which the Convention was extended to the Isle of Man.[31] There have also been other judgments of the Court, which for a period of time shook the confidence of the states in the jurisprudence of the ECtHR.[32]

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[24] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Bejing Rules) (General Assembly Resolution 40/33 (1985)); Economic and Social Council resolution (1989/66); United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) (General Assembly resolution 45/112 (1990)); United Nations Rules for the Protection of Juvenile Deprived of their Liberty (General Assembly resolution 45/113 (1990)).

[25] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 (1988))

[26] Raimo Lahti: Towards an International and European Criminal Policy? In: *Liber Amicorum*, Bengt Broms, Helsinki 1999, p.238.

[27] Andrew Ashworth, Mike Redmayne: *The criminal process*, Oxford University Press 2005, p.45.

[28] Article 1

[29] Prior to Protocol 11 a two-tier system existed: the case were initially processed by the European Commission of Human Rights, through first an admissibility stage and secondly if it found it admissible a merits stage. Only then would cases referred to the European Court or to the Committee of Ministers for the final determination by the Commission or by the State concerned. Individual applicants could refer a case to the Court only where the respondent State ratified Protocol No.9.

[30] Tyrer v. The United Kingdom, 5856/72 (25/04/1978), A 026.

[31] In this case the question arose whether judicial corporal punishment of juvenile offenders on the Isle of Man amounted to degrading punishment within the meaning of Article 3. According to the British Government's submission in this regard corporal punishment on the Isle of Man was justified as a preventive measure, based on

A further argument against too much judicial activism that limits the Court's potential for harmonizing laws in Europe is that an international judicial body lacking adequate legitimacy can hardly be given the power to amend or annul legislation adopted by democratically elected parliaments. Nor should it touch upon consequences of decisions of domestic courts and other decision-making bodies. That is why the drafters of the Convention shaped the rules on its competence in such a manner as to avoid any resemblance with that of the highest national courts. The ECtHR was not to be seen either as a European constitutional court or as a supreme court. While the competence of constitutional courts extends to ruling on the compatibility of legislation with the national constitution, the Court took the view that the drafters of the Convention had confined its competence to the examination of the facts of the particular case brought before it without making an assessment on the quality of domestic legislation, i.e. on whether the law itself was in line with the Convention and therefore should be repelled or changed. In the Court's interpretation it is not its task to undertake an examination *in abstracto* of the legislative provisions of respondent states[33], nor is it empowered to order them to alter their legislation.[34]

Whereas supreme courts have the power to amend or quash decisions of lower courts, the ECtHR's competence has been restricted to declaring a breach of the Convention and eventually awarding compensation to the applicant without ruling on the validity of the decision in question or giving instruction on how the violation should be remedied. Upon first consideration the binding effect of the Court's judgment simply means that the State found in breach of the Convention has to accept the finding, i.e. it may not contest the occurrence of the violation.[35] We should add that also *ratione personae* is the binding effect of the judgment of the Court limited in that it has no legal effect on states other than the one party to the case.[36]

In brief, for the sake of state sovereignty and because of the Court's limited legitimacy, the drafters of the Convention envisaged a modest, self-restraining international judicial body. The Court accepted the role assigned to it and this is evidenced among other ways in its adopting the margin of appreciation doctrine.[37] The margin of appreciation, on the one hand, is a methodological tool by which the appropriate depth of the review to be exercised by the Court is defined, and which varies according to the right and the question involved. But in addition to serving as a technical device, the margin of appreciation is a substantive concept linked closely to the subsidiarity

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public opinion on the island, which amounts to a local requirement under Article 63(3). The Court did not accept this argument and held that the punishment concerned was degrading within the meaning of Article 3 of the Convention.

[32] See for instance *Öztürk v.* Federal Republic of Germany 8544/79 (21/02/1984), A 073, which invoked severe critics of the Court (S*ee* Esser *op.cit* p.63-64.) In this case an offence was involved which under German law was not qualified as a criminal offence but as a 'regulatory' offence. The issue arose whether Article 6(3) e, right to the free assistance of an interpreter in judicial proceedings, is applicable to a charge concerning such a petty offence. According to the Court any proceeding which involves the question of determination of a criminal charge should fall under the guarantees of Article 6 irrespective of its less serious nature.

[33] *Marckx* v. Belgium 6833/74 (13/06/1979) A31, par. 58: "The Court is not required to undertake an examination in *abstracto* of the legislative provisions complained of…"

[34] *Belilos* v. Switzerland 10328/83 (29/04/1988) A132, par. 78: "The Court notes that the Convention does not empower it to order Switzerland to alter its legislation; the Court's judgment leaves to the State the choice of the means to be used in its domestic legal system to give effect to its obligation under Article 53 (art. 53) (see, *mutatis mutandis*, the Marckx judgment of 13 June 1979, Series A no. 31, p. 25, § 58, and the F v. Switzerland judgment of 18 December 1987, Series A no. 128, p. 19, § 43)."

[35] Eckart Klein: Should the binding effect of the judgment of the European Court of Human Rights be extended? In: *Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective.* Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber, Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000, p.707.

[36] Klein *op. cit.* P.706.

[37] "…the margin of appreciation doctrine was invented and evolved by the Court itself: it was in no way forced on it by member States" Lord Mackay of Clashfern: The margin of appreciation and the need for balance. In: *Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective*. Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber, Carl Heymanns Verlag KG, Köln-Berlin-Bonn München, 2000 p.840.

principle and the doctrine according to which the Court is not a "fourth instance": it is primarily national authorities which are to establish the facts of the case and assess them under their national law. It is not for the Court to review the fact-finding activity of national agencies, nor is it authorized to rule on alleged errors of law. But what is even more important for our purposes is that the margin of appreciation has been interpreted to also say that "national authorities are generally in a better position than the supervisory bodies to strike the right balance between the sometimes conflicting interests of the community and the protection of the fundamental rights of the individual".[38] Accordingly, it is primarily the parties to the Convention who are competent to assess whether interference with human rights is justified in the light of the particular conditions of their societies. There is an area of discretion open to Contracting States[39] and unless the practice of a certain State is against a clearly established widely accepted European standard, the doctrine suggests that the Court should abstain from finding a breach of the Convention. Due to the extensive interpretation of the margin of appreciation the Court's role in raising the level of the protection of human rights is modest. It rather confines itself to extending the level of protection already achieved in the majority of states to those who are lagging far behind the average.

In this respect the doctrine of evolutive interpretation also used by the Court is of no relevance in that it does not make the Court's functioning more dynamic and activist. The Convention as a "living instrument" doctrine simply enables the Court to go above the level of protection envisaged by the drafters and what was foreseen by the Parties at the time they made the decision to accede to the treaty. The evolutive interpretation doctrine permits the Court to adjust the Convention to "present day conditions" but what constitutes present day conditions is determined again by what the majority of State Parties agree upon and find therefore acceptable at a given moment.

In summary, the doctrine of margin appreciation and of evolutive interpretation leave the task of taking the initiative to extend the scope of human rights and raising the level of their protection to the State Parties. The Court's role under these doctrines is rather to care for the preservation of the standard achieved by the autonomous decisions of Contracting Parties and the extension of these standards to the minority of States in which at a given moment the level of human rights protection is below the standard. This function of the Court should not be underestimated, since this may prevent States from lowering the standards claiming changes in conditions. The maintenance of what has already been achieved is guaranteed by the Court's general practice to follow its earlier case-law[40] and to depart normally from its precedents only if societal changes justify a higher level of protection of human rights. Thus by observing its precedents the Court may set limits to a downward evolution and the lowering of already achieved standards.[41]

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[38] Lord Mackay *op.cit.* p.840. It should be added that in matters of criminal procedure, due to the relatively detailed rules of the Convention there is little or no room for assessment, for a balancing of interests, and therefore "the margin of appreciation plays hardly any role" See P. van Dijk and G.J.H van Hoof: *Theory and Practice of the European Convention on Human Rights*. Third Edition, Kluwer Law International, The Hague/London/Boston 1998 p.86.

[39] J.G Merrils: *The development of international law by the European Court of Human Rights*, Manchester University Press, Manchester, 1990 p.151.

[40] "The European Court of Human Rights has stated that it would depart from earlier decisions for "cogent reasons" for instance "to ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions". With the citation of cases see Luzius Wildhaber: Precedent in the European Court of Human Rights. In: *Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective.* Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber. Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000, p.1530-1532.

[41] The evolutive interpretation doctrine would, in principle, allow an "evolution downward". Some commentators actually claim that in deciding on terrorist cases the Court has been prepared to accept lower standards as compared to what had been set by its earlier jurisprudence. Others, on the other hand, argue that the watering down of certain guarantees in fact raises the level of human rights protection since this is needed for oppressing activities that threaten democracy and the enjoyment of the Convention rights. This leads us to the problem of "militant democracy"(see Karl Loewenstein: Militant Democracy and Fundamental Rights, *American Political Science Review* 31 (1937) p. 417-432 and 638-658, which should not be discussed in this paper. See Søren C. Prebensen: Evolutive

IV.

There is a tension on the one hand between what a human rights treaty should aspire to and, on the other hand, the modest role assigned to and the imposed and self-imposed constraint on the Court. Of course there is no tension if the Convention is nothing more than a festive declaration without much practical significance.

This tension is reflected in the text of the Convention as well. The preamble makes a covert reference to the subsidiarity principle ("governments …. take the first steps for the *collective enforcement* of certain rights…..[emphasis added]) but at the same time a more ambitious objective of the Convention is envisaged, i.e. "the further realisation of human rights and fundamental freedoms" and article 32 makes it clear that in the end it is for the Court to interpret and apply the Convention ."[42]

In the first years following its adoption the signatory states actually viewed the Convention as a document without much practical significance, in that it simply proclaimed minimum standards that Western democracies have by far accomplished. The statement of the Council of State of the Netherlands is illustrative of this. In its advice on whether to ratify the Convention it was of the opinion that although there was not much need for the Convention, there was no objection to ratification either, since " Dutch legislation already tallied altogether with the treaty's spirit."[43]

The operation of the European Commission for Human Rights[44] in the first decades after its being established confirmed the assessment of the State Parties: it showed "wise self-constraint"[45] and little sympathy for applicants declaring the overwhelming majority of individual complaints ill-founded. The Commission's approach had the beneficial effect of dispelling fears of Governments and inducing those who had not done so before to accept the right of private petition. At the same time the Commission started to be more applicant friendly, declaring more and more complaints admissible (although improvement in the quality of petitions reflecting a better understanding of Strasbourg jurisprudence may have contributed to a significant extent to the increase in the number of complaints being accepted for further consideration as well).[46] The jurisprudence of the Commission and the Court has shown that even in old liberal democracies there might be problems with the observance of human rights and the Convention bodies have demonstrated that there is a genuine need for a regional human rights instrument with its monitoring mechanism which is not simply a decoration without any practical value.

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interpretation of the European Convention on Human Rights. In *Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective.* Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber. Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000 p.1136-1137

[42] "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto…"

[43] Cited by Egbert Myjer: The European dimension: More than a non-committal ornament. Notes on the consequences of the ECHR for the administration of Dutch criminal justice. In: *The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe.* Edited by Evert A. Alkema-Theo L. Bellekom-Andrew Z. Drzemczewski-Jeroen G.C. Schokkenbroek, Engel Publisher, Kehl-Strasbourg-Arlington 1993, p.197.

[44] The European Court of Human Rights was set up in 1959, however in the 1960s it produced only 10 judgements, 26 in the 1970s and 169 in the 1980s. There is a significant increase in this number starting from the early 1990s, the number of cases shows steady increase since then. See further: Philip Leach: *Taking a case to the European Court of Human Rights*, Oxford 2nd edition, 2005 p.6.

[45] Cited by Myjer (*op.cit.* p.198) from an internal document of the Dutch Ministry of Foreign Affairs.

[46] In the four decades after 1955 the Commission accepted eight per cent of the applications only, whereas the ratio has raised to twenty five per cent by 1994. For further figures showing the increase in the number of individual applications and the ratio of complaints held admissible see David P. Forsythe*: Human Rights in International Relations*, Second Edition, Cambridge University Press 2006 p.124-125.

As indicated earlier, both the drafters of the Convention and members of the Court were aware of the State Parties' sovereignty concerns and the Court's own "democracy deficit". That is why, as a general rule, the Court has avoided to make any straightforward assessment of the legislation adopted by democratically elected parliaments of respondent states and confined itself to ruling on individual decisions made or measures taken by national authorities in the particular case.

However, there have been exceptions to the general rule right from the time the Convention organs started to operate. In principle, individual applicants are not entitled to lodge a complaint alleging the mere existence of legal provisions they believe to be in conflict with the Convention, unless they can proof that they have been effected by it through a particular individual measure. But under certain conditions the mere existence of a law may constitute an unacceptable interference with the individual's right even if no implementing measure is applied.[47] In the case of inter-state applications there is no restriction at all; any State Party may lodge an application against another alleging the violation of the Convention through legislation even if the law in question has never been applied.[48]

Evidently, violations of the Convention may occur even if national law itself is in line with the ECHR. In such cases, the individual decision or measure taken violates both the Convention and national law. There is no reason for the Court to make a negative assessment of national law in cases when the state party's law is open to interpretation both in line with and contrary to the Convention. However there might be national laws which simply cannot be applied in conformity with the Convention, accordingly the cause for the breach is that national authorities follow domestic law. If the Court finds a violation it declares, even if not explicitly, not only the individual measure but also the legal provision to be contrary to the Convention.[49]

Under certain conditions, however, overt criticism of national legislation is simply unavoidable. In the case of the so-called qualified rights[50], as well as of the right to liberty (article 5), interference is permissible only if it is provided by national law. It is not sufficient, however, that the State Party qualifies a law to be as such; it also has to meet certain requirements in order to be considered as law under the Court's autonomous standard: it must be accessible and has to be formulated with

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[47] See *Dudgeon* v. The United Kingdom, 7525/76 (22/10/1981) A45, par.41: "…the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution. It cannot be said that the law in question is a dead letter in this sphere…there is no stated policy on the part of the authorities not to enforce the law in this respect.

[48] See P. Van Dijk *op. cit* p.40.

[49] In some cases judges may render decisions by disregarding (not applying) national laws they find to be contrary to the Convention. In these cases there is no need to openly admit the non-conformity of national law with the Convention. However, this applies only if the Convention provision is "self-executing" and may therefore be applied in lieu of the national norm and only in countries where the Convention has a higher status than "ordinary law". Following the *Marckx* judgment Belgian courts started to disregard the discriminatory provisions of the Civil Code and instead applied the provisions on "legitimate children" to children born out of wedlock. On the conflicting views of the Belgian high courts and the EctHR on the legitimacy of this practice see. Henry G. Schermers: A European Supreme Court In: *Protection des droits de l'homme: la perspective européenne/ Protecting Human Rights: The European Perspective.* Mélanges à la mémoire de/ Studies in memory of Rolv Ryssdal. Édité par/edited by Paul Mahoney-Franz Matscher-Herbert Petzold-Luzius Wildhaber, Carl Heymanns Verlag KG, Köln-Berlin-Bonn München 2000, p.1274-1275.

[50] Qualified rights or *primae facie* rights – the right is declared, but it is also declared that it may be interfered with on certain grounds, to the minimum extent possible. Examples of this are the right to respect for private life, the right of freedom of thought and religion, the right to freedom of expression, and the right of freedom of assembly and association. All these qualified rights are subject to interference, if it can be established that this is "necessary in a democratic society" on one of the stated grounds. See Andrew Ashworth Q.C.: *Human rights, Serious crime and Criminal procedure,* Sweet & Maxwell, London 2002, p.76.

sufficient clarity and precision.[51] Should the Court come to the conclusion that the domestic provision fails to qualify as law for its failure to be precise enough, for instance, the ruling also includes the statement that the national law is in violation of the Convention.

Furthermore, when it comes to the enforcement of the Court's judgment, the incompatibility of national law with the Convention becomes manifest. The Convention provides that the Contracting Parties "undertake to abide by the final judgment of the Court in any case to which they are parties."[52] From what has been outlined earlier about the respect of national sovereignty of State Parties, a rather narrow interpretation of the provision would follow: respondent States are not permitted to deny and contest the occurrence of a violation if so established by the Court. However, from the general obligation of State Parties " to secure to everyone within their jurisdiction the rights and freedoms defined […….] in the Convention one could rather conclude that "abiding by the Court's judgment" has a broader meaning, i.e. States are under the obligation to terminate the "offence". If the breach of the Convention is caused directly by the existence of legislation found in violation of the Convention (as in the case outlined above, if the mere existence of legislation, even without implementing measure, constitutes interference with the individual's right), terminating the "offense" evidently presupposes the amendment or the abolition of that law. But also, in cases where the legal norm that may not be applied in line with the Convention has served as the basis of the individual measure found in breach of the Convention, 'securing the enjoyment of rights" and terminating the offence implies the annulment or modification of the legislation in question. Thus we see that the effect of the Court's judgments may go beyond the particular case and will have an impact "on the legal situation" in the respondent State.[53]

Under article 46 of the Convention the execution of the judgments is supervised by the Committee of Ministers. The recently adopted Rules[54] make it clear that by now the restrictive interpretation of the judgment's binding effect, which extends solely to the payment of compensation and the prohibition of denying the finding of a breach of the Convention[55], is not valid. In addition to determining whether just satisfaction awarded by the Court has been paid, the Committee of Ministers will also examine whether the State Party has taken the appropriate individual and general measures, legislative changes among them, in order to remedy the applicant's individual situation and to prevent further violations. It should be added that the Court itself prior to the adoption of the Rules made it clear "that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects". [56]

The Committee of Ministers, in order to properly accomplish its function, may need the support of the Court. The Rules in their present form permit the Committee to request the Court for

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[51] See for examples: *Hashman and Harrup* v. the United Kingdom [GC], 25594/94 (25/11/1999) par.31;*Maestri* v. Italy, 39748/98 (17/02/2004) par.30.

[52] Article 46

[53] Peter Leuprecht: The Execution of Judgments and Decisions. In: Macdonald-F. Matscher-H.Petzold (Eds.) *The European System for the Protection of Human Rights.* Martinus Nijhoff Publishers, Dordrecht-Boston-London, 1993. p. 791.

[54] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Adopted by the Committee of ministers on 10 May 2006 at the 94th meeting of the Ministers' Deputies, thereafter: CM Rules)

[55] See Frowein, Jochen Abraham - Peukert, Wolfgang: *Europäische Menschenrechtskonventon-EMRK Kommentar,* Engel Verlag, Kehl-Straßburg-Arlington, 1996. P.725-726.

[56] *Scozzari and Giunta* v. Italy 39221/98 and 41963/98 (13/07/2000) par. 249. See also the *Papamichalopoulos and Others* v. Greece (Article 50) 14556/89 (31/10/1995) A -330-B par. 34: "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."

clarification if the execution of the "judgment is hindered by a problem of interpretation."[57] Not only for practical reasons, (why not encourage the Court to make its judgments clear right from the outset?), but also for transparency considerations is the Parliamentary Assembly's recommendation legitimate in that the Court should indicate in the judgment itself the manner in which national authorities should execute it.[58]

In fact, the Court, in some of its judgments, has already indicated the way the breach of the Convention should be remedied. By doing so it has gone beyond the wording of article 41, which seems to suggest that just satisfaction is the only consequence that may be attached to a finding of a violation.[59] The decisions indicating the manner in which the breach should be remedied also weaken the subsidiarity principle according to which the Court's "judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used" in order to comply with its obligation of abiding with the Court's judgment.[60] In some judgements, upon finding a violation of Article 1 of Protocol No. 1., the Court ordered the respondent State to return the applicants' property[61]; in another case it suggested that carrying out a thorough investigation could constitute adequate means of complying with its judgment.[62] In Assanidze[63] the Court ruled that the unlawfully detained applicant should immediately be released. It did not question the State's freedom to choose the means whereby it executes the Court's judgment but because of the nature of the violation found it considered that the particularities of the violation do "not leave any real choice as to the measures required to remedy it."[64]

[57] CM Rule 10.1. Prior to the adoption of the new version of the CM Rules the Committee was not entitled to ask the Court for interpretation, only the respondent State and, subject to considerable restrictions, the applicant had this right. See the explanatory memorandum prepared by rapporteur Mr. Erik Jurgens to the Parliamentary Assembly report on the execution of judgments of the European Court of Human Rights (Doc. 8808, 12 July 2000. par. 59.)

[58] "The Court should oblige itself to indicate in its judgment to the national authorities concerned how they should execute the judgment so that they can comply with the decisions and take the individual and general measures required."(Parliamentary Assembly Resolution 1226 (2000) 11.B ii.)

[59] Article 41 – Just satisfaction: If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

[60] See among others *Assanidze* v. Georgia 71503/01 (08/04/2004) par. 202. In *Papamichalopoulos and others* v. Greece 14556/89 (31/10/1995) A-330-B the Court indicated that the respondent States' discretion is not absolute: "Contracting States that are parties to a case are *in principle* [emphasis added]free to choose the means whereby they will comply with a judgment in which the Court has found a breach." (par. 34.)

[61] See *Papamichalopoulos and others* v. Greece 14556/89 (31/10/1995) A-330-B; *Brumarescu* v. Romania. (28342/ 95, 23/01/ 2001) For a detailed discussion of the relevant judgments see Philip Leach*: Taking a case to the European Court of Human Rights*, Second Edition Oxford University Press, Oxford 2005 p. 405 and 406.

[62] *Acar* v. Turkey (GC) 26307/95 (06/05/2003). On the issue see Leach *op.cit* p.99. and 100.

[63] *Assanidze* v. Georgia 71503/01 (08/04/2004)

[64] par. 202.

V.

For the purposes of this paper, (i.e. the ECtHR's potential to shape the rules on criminal procedure in member states), it is of course the "general measures" and, among them, instructions to amend legislation that are of relevance.[65] It should be added that individual measures formulated by the Court may also result in changes in legislation when their implementation so requires. In other words, formulated from the Court's perspective, instructions to take general and individual measures may appear in the same judgment. In Sejdovic[66], the Court stressed that in the case before it, where the violation of the right to a fair trial was caused by the applicant's conviction, "despite an infringement of his right to participate in his trial, the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings, in due course and in accordance with the requirements of Article 6 of the Convention."[67] But due to the lack of adequate provisions in Italian law, the Court identified the structural or systemic problem and also formulated "general measures", notably a recommendation for a change in legislation: "It is inherent in the Court's findings that the violation of the applicant's right as guaranteed by Article 6 § 1 originated in a problem which results from the Italian legislation on trial in absentia and which remains capable of affecting others in future. The unjustified hindrance of the applicant's right to a fresh determination by a court of the merits of the charge against him was not prompted by an isolated incident ….but was rather the consequence of the wording of provisions of the CCP …The facts of the case disclose the existence… of a shortcoming as a consequence of which anyone convicted in absentia who has not been effectively informed of the proceedings against him may be denied a retrial. It also finds that the deficiencies in national law and practice identified in the applicant's particular case may subsequently give rise to numerous well-founded applications..."[68] "The Court considers that the respondent State must remove every legal obstacle that might prevent anyone convicted in absentia who, having not been effectively informed of the proceedings against him, has not unequivocally waived the right to appear at his trial from obtaining either an extension of the time allowed for appealing or a new trial, so as to guarantee the right of those concerned to obtain a fresh determination of the merits of the charge against them….. The respondent State must therefore make provision, by means of appropriate regulations, for a new procedure capable of securing the effective realisation of the entitlement in question while ensuring respect for the rights guaranteed by Article 6 of the Convention [69]

The Sejdovic judgment was rendered subsequent to the adoption of the Committee of Ministers Resolution inviting the Court ""… to identify, in its judgment finding a violation of the Convention, what it considers to be an underlying systemic problem …[70] By this the Court was called upon by the Contracting States themselves represented in the Committee to abandon its earlier cautious approach and encouraged to give an explicit assessment on whether the law of the respondent state was in line with the Convention or not and by identifying "the source of the problem" to give guidance to national legislation. Obviously, the resolution is the reflection of member States' more limited understanding of the concept of sovereignty in that they are now prepared to accept the explicit critiques of the Court over the laws adopted by their democratically elected parliaments.

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[65] Also "individual measures" formulated by the Court may result in changes of legislation, when for instance their carrying out requires so.
[66] *Sejdovic v. Italy* 56581/00 (10/11/2004)
[67] *Sejdovic* judgment par. 55.
[68] *Sejdovic* judgment par. 44.
[69] *Sejdovic* judgment par. 47.
[70] Resolution Res(2004)3 of the Committee of Ministers on Judgments Revealing and Underlying Systemic Problem, par I.

It should be added that, even in the past when the Court strictly constrained itself to the analysis of the facts of the particular case, refraining from making any assessment of the relevant national laws, the reasoning of many of its judgments gave state parties sufficient insight into the deficiencies of their laws and the manner in which they could be remedied. The judgments in the majority of cases were clear enough to enable states to transform the findings of the Court in the individual case into generalized legal norms. Subsequent to Court decisions, several modifications of the provisions on pre-trial detention and those affecting the individuals' right to a fair trial were adopted in a number of jurisdictions.[71] Countries preparing for accession to the Convention used the Court's case-law to check if their legal system was in compliance with the Convention and made the necessary changes accordingly.[72] Also the Committee of Ministers was able to draw generalized conclusions from the Court's individual judgments in its recommendations addressed to member states on how to reform their criminal procedural laws in several areas. Thus the recommendation on the simplification of criminal justice[73] made reference at several points to the Court's jurisprudence; similarly the recommendation attempting to draw the right balance between the interests of witnesses and the defendant's rights to a fair trial relied heavily on the judgments of the ECtHR. [74]

In some judgments, the Court, prior to being encouraged by the Committee of Ministers, went beyond the boundaries of the particular case and commented on the quality of national legislation, giving also guidance on how to amend it narrowing by this the States' freedom of selecting the means of implementation. The Tyrer judgment,[75] though without explicitly proclaiming it left practically no choice for legislation: the only way by which compliance could be ensured was to abolish corporal punishment as a criminal sanction. The X and Y judgment left no doubt that States, in order to comply with their obligation to effectively protect private life, must adopt provisions criminalizing sexual abuse of vulnerable individuals.[76] In Poitrimol[77] the Court made it clear that restrictions on defendants' right of being represented by counsel in the appeal stage of the criminal process had to be removed in order to guarantee compliance with the right to a fair trial.

VI.

The Court's more straightforward position has, no doubt, weakened the subsidiarity principle that leaves States broad discretion to choose the means by which to implement its judgments. But what has prompted (made) the Committee of Ministers to encourage the Court to explicitly instruct State Parties on how to execute its judgments, to identify systemic deficiencies in their legislation and to give them guidance on how to remedy the shortcomings? The text of the Resolution seems to indicate that the reason for the adoption was rather pragmatic, notably the intention to reduce the number of applications and ease by this the Court's workload. However the Parliamentary Assembly resolution, which must have provoked the Committee of Ministers' action lists further reasons, such as the lack of clarity of some of the judgments and most importantly, the continuous reluctance of certain States to execute the Court's decisions. One may, of course

[71] For an overview of the impact on the substantive criminal law and the criminal procedure of Austria, Germany, Italy, Switzerland and the Swiss cantons respectively and the United Kingdom see the papers published in issues 2 and 3 of 1988 in the *Zeitschrift für die gesamte Strafrechtswissenschaft*.

[72] See compatibility reports at
http://www.coe.int/t/e/human%5Frights/awareness/4.%5Four%5Factivities/Compatibility%5FReports/

[73] Recommendation No. R (87) 18 adopted by the Committee of Ministers of the Council of Europe on 17 September 1987. See also the Explanatory Memorandum published by the Council of Europe in 1988.

[74] Recommendation No. R (97) 13 of the Committee of Ministers to member States Concerning Intimidation of Witnesses and the Rights of the Defence adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Ministers' Deputies. See, for example par. 11 of the recommendation and also examples for cases *Kostovski* v. the Netherlands 11454/85 (20/11/1989) A166; *Windisch* v. Austria 12489/86 (27/09/1990) A186.

[75] *Tyrer* v. the United Kingdom 5856/72 (25/04/1978) A26.

[76] *X and Y* v. the Netherlands 8978/80 (26/03/1985)

[77] *Poitrimol* v. Fance 14032/88 (23/11/1993)

argue that it is primarily for political reasons that judgments of the court are systematically ignored and that the Committee of Ministers, instead of taking firm measures against states which fail to comply with their obligation under the Convention[78], took the easier way. As the case may be the Committee of Ministers' resolution fits into the general trend of Member States' readiness to renounce part of their sovereignty claims evidenced by the development of the Convention control mechanism. By Protocol 9 individual petitioners were granted the right to invoke the Court subsequent to the decision of the Commission and later by adopting Protocol 11. contracting parties obliged themselves to accept the jurisdiction of the Court and to recognize the right of individual application of any person under their jurisdiction.

In spite of the development outlined the subsidiarity principle, though limited in validity, has been maintained. As noted in the Parliamentary Assembly resolution the principle still applies in that " the primary responsibility for ensuring the rights and freedoms laid down in the Convention rests with the national authorities."[79] However, in the resolution appears the complementary principle of solidarity, which suggests the extension of the *ratione personae* binding effect of the Court's judgments: ".the principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice."[80] The Parliamentary Assembly is not a decision-making body and its resolutions do not necessarily reflect what all member states are willing to accept in practice. Therefore one can rightly doubt if States are in fact sharing the above quoted conclusion drawn from articles 1[81] and 19 of the Convention[82] and from the undisputed principle that the interpretation of the ECHR ultimately rests with the European Court of Human Rights.[83] But no doubt, the resolution indicates that the earlier widely shared restrictive interpretation of the *ratione personae* binding effect of the Court's judgments based on article 46 of the Convention (States "undertake to abide by the final judgment of the Court in any case to which they are parties") has by now become problematic.

In summary, recent developments indicate that the ECtHR has acquired certain tasks that bring it closer to a kind of a European Constitutional Court and a European Supreme Court. Though it does not have the power to invalidate or amend decisions of national authorities it has been authorized by the State Parties to indicate the measures by which breaches of the Convention could be remedied. In addition it has acquired the competence to identify systemic deficiencies resulting in the violation of human rights and formulate general measures, among them legislative changes, to prevent future breaches of the Convention. One may wonder if the extended competence of the Court will, in fact, raise the level of the protection of human rights in Europe but there is no denying that it will permit the Court to contribute more actively to forming the European model of the criminal process in the future.

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[78] As stated in par. 4. of the Parliamentary Assembly Resolution 1226 (2000) there are no special sanctions envisaged in the Convention in cases where states do not execute the Court's judgments. The Committee of Ministers may only use the rather drastic measures listed in article 8 of the Statute of the Council of Europe notably to suspend the State, which fails to accept the rule of law and to respect human rights and fundamental freedoms and to request it to withdraw. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

[79] par. 2.

[80] par. 3.

[81] "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[82] Article 19 provides for the establishment of the ECtHR "to ensure the observance of the engagements undertaken by the Contracting Parties."

[83] For the reasoning see paragraphs 4 and 5 of the Explanatory Memorandum to the Draft resolution (Doc. 8808, 12 July 2000) prepared by Mr. Erik Jurgens