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Partnering with Strasbourg:
Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments

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Abstract

The accession of Central and East European States into the European Convention of Human Rights system was both a threat and a promise to the system. The *threat* resulted not only from the substantial increase of the number of Member States and that of the case-load, but also from the demise of a consensus which was, originally, presupposed by the system of protection of human rights in Western Europe: original members of the Council of Europe were "like-minded" and the Convention system did not represent a challenge to their internal apparatus of human rights protection. This paper, however, focuses on a *promise*: a possibility for the European Court of Human Rights to abandon once and for all the fiction of it being merely a sort of super-appellate court which scrutinizes individual decisions rather than laws in Member States. This shift towards a quasi-constitutional role, going beyond the simple identification of wrong individual decisions so as to point to *systemic* legal defects, was triggered by systemic problems within the new Member States, while also facilitated by collaboration between the European Court and national constitutional courts. The emergence of so-called "pilot judgments" is the best and most recent illustration of this trend. The way in which a national court may form a *de facto* alliance with the European Court effectively "pierces the veil of the State", and positions the European Court as a quasi-constitutional judicial body at a pan-European level.

Keywords

European Court of Human Rights – Council of Europe – democratization – fundamental/human rights – judicial review – constitutional courts – Central and Eastern Europe

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> "*…our pronouncements are decisions concerning minimum standards, irrespective of how the violations happened in Iceland or in Azerbaijan. We are not and cannot be the constitutional court for the 46 countries concerned. The fears that we shall usurp that role are not realistic*".[1]

Introduction

The European Court of Human Rights (ECtHR) and, more generally, the whole system of protection of human rights under the aegis of the Council of Europe (CoE), centered as it is around the European Convention of Human Rights (ECHR),[2] seem to be enjoying a renewed scholarly interest these days.[3] And it has become fashionable to

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* Professor in the Department of Law of the European University Institute in Florence and the University of Sydney, Faculty of Law. In the course of working on this paper I benefited from conversations with, and advice from, a number of people. In particular I wish to acknowledge invaluable inspiration coming from the current and former judges of the European Court of Human Rights and the Constitutional Tribunal of Poland, Professors Lech Garlicki, Marek Safjan, Andras Sajo, Mirosław Wyrzykowski and Luzius Wildhaber. It goes without saying that none of them should be necessarily associated with any of the opinions expressed here. This proviso applies also to a number of other scholars who helped me in various ways: Dia Anagnostou, Samantha Besson, Adam Bodnar, Dominika Bychawska, Sara Dezalay, Alun Gibbs, Magda Krzyżanowska-Mierzewska, Kasia Lach, Gerald Neuman, Renata Uitz, Michał Ziółkowski – I am grateful to them all.

[1] Partly concurring, partly dissenting opinion of Judge Zupancic, Hutten-Czapska v. Poland, Judgment of Grand Chamber of 19 June 2006, appl. 35014/97.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, entered into force 3 September 1953.

[3] See in particular a research project which culminated in a monumental book by Helen Keller & Alec Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press: Oxford 2008); see also the "Juristras" project funded by the European Commission entitled "The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, State Implementation and Domestic Reform", description available at http://www.eliamep.gr/eliamep/content/home/research/research_projects/juristras/en/.

press the claim that the Court has become (or is becoming) a sort of "constitutional court" for Europe[4] – at least for that overwhelming part of the continent which forms part of the CoE,[5] and insofar as human rights are concerned.

Whether it is indeed the case depends of course crucially on what one understands to be the typical properties of a "constitutional" court, and even more fundamentally, on what one takes to be the properties of a "constitution". But comparing the ECtHR to an ideal model of a constitutional court is, at first glance at least, not a very interesting exercise. There are clearly a number of points of analogy (such as issuing judgments on the basis of abstract and relatively vague human rights provisions formulated in a very similar way to typical, national constitutional bills of rights) as well as obvious points of *dis*analogy (such as relying for effectiveness ultimately on the good will of nation-states whose commitment to the ECHR system is based on traditional, international-law type of obligations). Attempting to determine which of these series of features – analogies or *dis*analogies – would prevail does not seem to me to be a particularly fruitful exercise.

Yet, examining the ECtHR through the prism of "constitutionalism" may prove useful, on the condition of bearing in mind that the stake is not whether or not this Court should be granted the majesty of a constitutional body – too much relies indeed on ultimately arbitrary definitions as to what renders a body constitutional – but rather that it may be used as a device to better account for the evolution and changes of the ECHR system, especially in the context of the changed composition of the CoE. The template of "constitutionalism" is as good a framework as any to help us elucidate and understand the inter-institutional relations both within Europe, vertically, and within Member States, horizontally, against the background of the ECtHR's active and dynamic case law, which often quite effectively "pierces the veil of Member States".[6] And this approach is particularly useful in the context of the accession of post-Communist States of Central and Eastern Europe (CEE) to the CoE, as they cast their own concerns, problems and agendas on this arena, prompting a response of the Court[7], which quite radically transformed it, as indeed the entire system of human rights protection in the CoE.

This will be the focus of this article: what does the *constitutionalization* of the ECtHR tell us about the relations between the legal order of new Member States and the European system of human rights protection? And, the other way around, what is the significance of the major enlargement of the CoE to the East in the 1990s as regards the

[4] E.g. Stone Sweet and Keller state that "the Convention and the Court perform functions that are comparable to those performed by national constitutions and national constitutional courts in Europe", Alec Stone Sweet & Helen Keller, "The Reception of the ECHR in National Legal Orders" in Keller & Stone Sweet, *A Europe of Rights* 3-28 at 7 [henceforth referred to as Stone Sweet & Keller, "Reception"]. See, similarly Heinz Schäffer, "Autriche" *in* Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant 2007): 95-124 at 123.

[5] At the time of writing, all European States with the exceptions of Belarus and Kosovo.

[6] Samantha Besson's formulation, though used not specifically in the context of the ECHR, "The Authority of International Law", The 2008 Annual Julius Stone Address, Sydney, 19 August 2008.

[7] Whenever I refer to the "Court" or the "European Court" in this article, I have in mind the European Court of Human Rights, unless the context suggests clearly a different court.

putative *constitutionalization* of the CoE system?[8] But let me emphasize once again the purely instrumental role of the issue of "constitutionalization" for the purposes of this research. I do not have an aspiration of giving a sustained answer to the question of whether or not the ECHR-based system is truly constitutional or not. Rather, I am going to use a "constitutionalization" template as a device to account for the effects of the CoE enlargement on the ECHR system itself, as well as on the new Member States.

At first glance, the accession of new members to the ECHR system seems to bear two main implications as regards *constitutionalization*, which point in two opposite directions. On the one hand, the enlargement of the CoE results in a significant increase of diversity and heterogeneity within the CoE's constituency. In contrast to a club of largely like-minded West European countries which share much of their legal and political culture and traditions, as it was with fourteen members at the point of the original signing of the Treaty, or even at 23 at the beginning of the 1990s, the CoE now comprises 47 members[9] and displays an unprecedented and formidable diversity. Indeed, the differences between, say, Sweden and Georgia or Ireland and Latvia seem to be significantly greater than between Sweden and Greece or Ireland and Portugal. This would seem to point at a "de-constitutionalization", if anything. Constitution and constitutionalism seem to presuppose a degree of homogeneity as regards the constituency of the constitutional polity, indeed a modicum of similarity of approaches to human rights within the space covered by a single constitution and regulated by a single constitutional court. Concerning the ECtHR, this "de-constitutionalization" may be illustrated with the example of the concept of "margin of appreciation". This established doctrine of the Court provides for a margin of appreciation – a device aimed at supporting a high degree of deference by the Court to the Member State summoned before it – when there is no consensus on a particular right recognized by the Convention.[10] When, on the contrary, such a consensus may be discerned, no margin of appreciation is allowed and the Court does not hesitate to override a delinquent State's

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[8] I should emphasize that I am using, for the purpose of this article, the category of "Central and Eastern Europe" as an aggregate but of course I am conscious of the fact that there is great diversity within this category, and from the point of view of the problems with democracy and human rights – an issue on which I focus in this paper – the differences are enormous. Indeed some of these countries can at best called semi-democracies, due to very strong illiberal tendencies and severely underdeveloped systems of rights protection. Those include: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Macedonia, Moldova, Montenegro, Russia, Serbia and Ukraine. (For an excellent analysis of the ECHR role towards those semi-democracies, which include also Turkey, see Paul Harvey, "The Future of the European Court of Human Rights", doctoral thesis defended at the European University Institute in Florence, December 2006, chapter 3 at 125-82). On the contrary, some of these countries have reasonably well-developed democratic and judicial (including constitutional), in particular Poland, Hungary, the Czech Republic, Slovenia and Slovakia. Romania and Bulgaria seem to be borderline cases, although much closer to the second than to the first category (largely thanks to the efforts undertaken in view of their accession to the EU). I will, however, keep referring to the CEE *en bloc*, because, as regards the main focus of this article, i.e. the *constitutionalization* of the ECHR system as evidenced, *inter alia*, by the emergence of "pilot judgments", the latter countries also raised a fundamental challenge to the ECHR system. After all, two main "pilot judgments" originated from Poland.

[9] For the record it may be recalled that Andorra (1994) and Monaco (2004) also feature among the post-1990 new arrivals at the CoE.

[10] For an examples of a finding of no consensus and the consequent application of wide margin of appreciation, see e.g. Otto-Preminger Inst. v. Austria, judgment of 20 September 1994, appl. 13470/1987.

practice. As a matter of pure logic, the enlargement of the CoE (and in the present case, at such a large scale) should therefore result in the *lowering* of the probability of finding an inter-CoE consensus and thus in an increase of the scope of the margin of appreciation. (Note that I am not inferring that this is actually occurring. Indeed, one of the intriguing aspects of the ECtHR, which will be considered below,[11] is that the increased diversity of the CoE has *not* been met with an intensified resort to the margin of appreciation by the Court. The point here is to express a speculative conjecture, not to describe the empirical trend). However, an increased resort to the margin of appreciation would seem to contradict the purpose of a constitutional court, i.e. to override any legislative or executive decision contradicting the Court's own interpretation of constitutional rights. This does not mean that only activist (or non-deferential) constitutional courts are genuine constitutional courts, but rather that courts that are leaning towards a more deferential approach seem to be favoring the political majoritarian choices, at the expense of the primacy of the constitution – at least, the judicially enforced constitution.

However, and this is the main constitutional implication of the enlargement which leans in the *opposite* direction, the increase of the number and diversity of the members of the CoE has also resulted in a surge of cases brought before the ECtHR raising issues concerning different urgent, basic, severe and egregious violations of human rights. This prompted an important change in the Court's position, and therefore a significant evolution. In the early years of the functioning of the ECHR system, the Court (and the Commission) had scarcely ever the opportunity to deal with grave breaches of human rights. There is indeed a certain benign paradox about the origins and the early years of the ECHR system: the very setting up of the ECHR system was prompted by the willingness to prevent the recurrence of extreme state violence and blatant disregard for the most basic individual human rights – hence the emphasis on the minimum standards for the protection of rights enshrined in the Convention. Yet, for the first forty years or so the Court (and the Commission) did not need to grapple with such matters. Instead, it operated very much at the margins of the human rights *problématique*, establishing the standards which were admittedly exciting for academic lawyers, but never going so far as to reverse really important policy and legal choices adopted within national systems. There was simply no reason for the Court to take up this role in the like-minded community of West European liberal democracies (with Turkey as the only distant relative), when the gates to the club were so firmly closed to the authoritarian and undemocratic regimes of the region. But the accession of the CEE States radically transformed this situation. The Court ceased being a "fine-tuner" of the national legal systems and was compelled instead to adopt a role of policing the national systems in which serious violations of rights occurred or suffering from important systemic deficiencies as far as the CoE standards of rights are concerned.

This evolution from a fine-tuning role to that of the scrutinizer of failing legal and political systems brought to the agenda of the Court many cases of greater importance, both in terms of the severity of the violations and the systemic nature of the challenged deficiencies. This greatly reinforced the "constitutional" role of the Court. One may of course claim legitimately that there are many unquestionably *constitutional* courts which essentially and fundamentally play only the role of fine-tuners. But the gravitas

[11] See the last two paragraphs of Part 2.4 of this article, and the accompanying footnotes.

of the constitutional courts which intrude more heavily into the realm of legislative and political choices is considerably higher. Both the former (fine-tuners) and the latter (central policy actors) may be called "constitutional", if one wishes so, but surely the ingredient of "constitutionalism" is more prevalent in the case of the US Supreme Court than that of the Japanese Supreme Court or, in the framework of continental European constitutionalism, in the case of the German BVG than that of the Italian *Corte costituzionale*. The whole distinction of fine-tuning v. fundamental policy intervention is of course a matter of degree, and may be subject to controversies. But if it is plausible (and I believe that it is) then there is no doubt that the Strasbourg Court, with the enlargement to the East (and the accession of Turkey) has considerably evolved from the former to the latter. And by doing so its "constitutional role" has been significantly enhanced.

This last point can be well illustrated with the apparition of so-called "pilot judgments", that is Court's judgments finding systemic and widespread violations, and ordering the State to undertake wide-reaching steps to redress the breach. This more "constitutional" role (compared with the traditional role taken up by the Court in individual cases, whereby no judgment is inferred as to the law underlying the claim) has been largely driven by a number of systemic deficiencies within CEE legal systems. It is indeed no coincidence that the two most significant "pilot judgments" so far have originated from Poland. These will be discussed in greater detail in Part 2. But before, I will provide an overview of the "ECHR system", and focus more specifically on the reasons and consequences of the fundamental transition it has undergone in the 1990s, with its enlargement to the East of Europe (Part 1). After exploring the significance of the "pilot judgments", as regards, in particular, the issue of a "constitutionalization" of the system, I will assess the reasons accounting for the contrasting approaches to the supremacy of the ECHR law over the national legal systems in the West and in the East (Part 3). I will suggest that the various factors which explain the relative resistance against the "constitutionalization" of the ECHR system in the West, do not prevail in the post-communist part of the continent. Furthermore, constitutional courts in CEE States play a particular role in the "constitutionalization" process of the European Court of Human Rights, by engaging with the Court. In Part 4, I will describe the main forms of this partnership, and provide some examples both of successes and failures of such interactions. Finally, I will deal specifically with the issue of "constitutionalization", and suggest standards to assess whether the European system is indeed undergoing such a process: whether the Convention has become a constitution, and the European Court of Human Rights – a constitutional court (Part 5). In the Conclusions, I will consider the challenges lying ahead – both threats and promises – triggered by the enlargement of the Strasbourg system.

1. The ECHR System in Transition

The ECHR system has been described, with justice, as "the most effective human rights regime in the world".[12] Indeed, compared to other regional and international

[12] Stone Sweet & Keller, "Reception" at 3.

frameworks of human rights protection, but also to the relatively modest aspirations which prompted the birth of this system, it is nothing short of impressive. It is based on an ambitious charter, likened by some to a European constitution,[13] which is growing both in its formal textual scope – through successive Protocols[14] – and also in the meaning and scope of the rights proclaimed through their interpretation by the Court. It is backed up by a political mechanism – *via* the Committee of Ministers and the Parliamentary Assembly which are tasked with various monitoring and supervisory functions related to the enforcements of rights. It is centered around the Court, which displays features of a genuinely independent and accountable supranational tribunal. Its judges are recruited in a way which provides only a partial control of Member States over the selection outcomes; while on the bench, the judges benefit from guaranties providing a real independence from pressure from their (or other) governments; generally speaking, it enjoys a high degree of prestige and support from national judicial institutions, the political branches of the CoE, as well as legal academia. Moreover, the Court has successfully staked its claim as the final and authoritative interpreter of the Convention,[15] thus equating the application of the Convention with that of its case law.[16] Its decisions are binding on Member States deemed to have violated the Convention, and are enjoying, through a growingly accepted custom, an authority of *erga omnes* nature, at least as far as the interpretive value of its judgments is concerned. The Court has an assured constituency, a sort of "captive audience": all European States have a strong incentive to join the CoE (both for the prestige value and also as an indispensable condition for an eventual membership to the EU) and the acceptance of the compulsory jurisdiction of the Court is now a condition of membership to the CoE. The effectiveness of the Court's judgments is guaranteed by a number of interconnected devices, such as the supervisory role of the Committee of Ministers, the general (though subject to national variations)[17] principle of the supremacy of the Convention over the national law of Member States or the rule according to which the judgments of the Court are binding on the States.[18] In fact, the Court's rulings have affected the shaping

[13] Ralph Beddard characterized the Convention "as a kind of constitutional document for a united Europe", *Human Rights and Europe* (Cambridge University Press: Cambridge 1993, 3rd ed.) at 5-6. In fact, it has been noted that the ECHR is even more entrenched than national constitutions insofar as unanimity of Member States is required for amendments and it is therefore more difficult to change than national constitutions are, Stone Sweet & Keller, "Reception" at 8 n. 20.

[14] Many of the protocol-generated "updates" were extremely important. The rights added through Protocols thus included: the right to property, the right to education (Protocol No. 1 of 1951), the abolition of the death penalty in times of peace (Protocol 6 of 1983), the rights of aliens to due process safeguards before they may be expelled (Protocol 7 of 1984), the abolition of the death penalty under all circumstances (Protocol 13 of 2002), etc.

[15] For instance, in Barfod v. Denmark, judgment of 22 February 1989, appl. No. 11508/85, the Court claimed that it is "empowered to give the final ruling" on whether a state's interference with a protected right is consistent with the European Convention, para. 28.

[16] As a judge of European Court has declared: "The process of application of the Convention has been, to a considerable extent, transformed into the process of application of the case law of the Strasbourg Court", Lech Garlicki, "Some Observations on Relations Between the European Court of Human Rights and the Domestic Jurisdictions", in Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant 2007): 305-325 at 30 [hereinafter referred to as Garlicki, "Some Observations"].

[17] See text below, accompanying footnotes 28-32.

[18] All of the Parties to the Convention must "undertake to abide by the decision of the Court in any case to which they are parties", Art. 59 of ECHR.

of domestic laws of Member States in more general terms, going beyond the determination of a specific remedy to a particular victim for a breach, by affecting legislative changes, governmental practices and judicial decisions throughout the CoE constituency.[19] As for the actual level of compliance of States with the Court's rulings, it has been overall very high, and to such an extent that the judgments have been described as being "as effective as those of any domestic court".[20]

This is not to say that the system is without its faults and weaknesses: each of the points listed in the paragraph above should be carefully qualified and counter-balanced with the facts and phenomena which detract from the unqualifiedly positive picture. The Convention itself – in its main bulk – reflects the human rights approach prevailing almost sixty years ago, and hence is in many ways anachronistic, and the incremental way of updating it, through Protocols, has not resulted in a comprehensive and modern document, as compared with, for instance, the EU Charter of Fundamental Rights.[21] The Court itself, in its procedures and modes of operations is closer to a more traditionally international instrument than a fully supranational judicial body, such as the European Court of Justice (ECJ).[22] The binding role of its judgments upon the national constitutional (and other) courts is subject to doubts and questioning, and occasionally, an outright rejection.[23] In Germany, for instance, the famous *Görgülü* decision of the Federal Constitutional Court[24] set forth clear limits as to domestic courts' duty of loyalty to the European Court, by basically stating that while domestic courts should take into account Strasbourg case law when interpreting domestic law, this must not violate the "competence order" and "substantive constitutional law" of Germany. As observed by a commentator, this judgment "keeps the door open for a respectful dissent".[25] Moreover, the status of the Convention in Member States is not uniform: in

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[19] For some telling examples of ECtHR-driven legislative changes in, inter alia, Austria, Belgium, Germany, the Netherlands, Ireland etc. see Dinah Shelton, "The Boundaries of Human Rights Jurisdiction in Europe", *Duke Journal of Comparative & International Law* 13 (2005): 95-153 at 147.

[20] Barry E. Carter & Phillip R. Trimble, *International Law* (Little, Brown: Boston 1995, 2nd ed.) at 309.

[21] For an in-depth comparison, see Paul Lemmens, "The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects", *Maastricht Journal of European and Comparative Law* 1 (2001): 49-67. Among many rights which are present in the Charter but not in the Convention are the right to engage in work, to asylum, to protection of data, to equality before the law, to conduct a business, the rights of the child, as well as many socio-economic rights, including those similar to the rights contained in the Economic Social Charter.

[22] For a similar comparison and conclusion, see Laurence R. Helfer & Anne-Marie Slaughter, "Towards a Theory of Effective Supranational Adjudication", *Yale Law Journal* 107 (1997): 273-391 at 297.

[23] A general report of the conference of European constitutional courts held in 2002 summarized the conclusions of national reports by noting that "a majority – and a large majority: 21 constitutional courts – declare themselves not bound by the rulings of the European Court of Human Rights". It also added that "an even larger majority mentions the preponderant influence of the case law that emanates from its rulings when it comes to determining the substance of the basic rights guaranteed by internal law and the extent of the restrictions that can be placed on them", General Report, "The Relations Between the Constitutional Courts and the Other National Courts, Including the Interference in the Area of Action of the European Courts; XIIth Conference of European Constitutional Courts, Brussels, 14-16 May 2002", *Human Rights Law Journal* 23 (2002): 304 at 327.

[24] Decision of 14 October 2004, 2BvR 1481/04.

[25] Frank Hoffmeister, "Germany: Status of European Convention on Human Rights in Domestic Law", *I-CON* 4 (2006): 722-31 at 729.

some States, it is considered to bear a constitutional weight,[26] while in others it is less than constitutional but more than statutory,[27] and in others still, it is of a merely statutory value.[28] The same can be said for the status of the Court's judgments in domestic legal systems: some national courts are happy to apply the law of the Convention, especially where it has been incorporated into national law, without at the same time necessarily committing themselves to following the interpretation of the Convention set by the European Court.[29] Similarly, as noted by Nico Krisch in his study of the position of Austrian, Spanish and French highest ranking courts towards Strasbourg case law, they "assert a power to decide on the limits of the authority of the ECtHR".[30] The judgments of the Court are occasionally ignored and some national bodies – including constitutional courts – simply refuse to follow them.[31] In fact, while States have a strong incentive to *join* the CoE and consequently the ECHR system (as mentioned, for its prestige value and as a prerequisite for membership to the EU), once they are *in* they have little incentive to comply with the norms of the ECHR (not to mention the rather nebulous sanctions that the CoE system may impose upon them). In contrast to the EU or the NATO systems, in which, if a member reneges on its duties, other members have strong reasons to punish the free rider, the benefits of collective action of the CoE are neither economic (as in the EU) or military (as in NATO), but rather purely moral, and therefore non-compliance by one member does not affect adversely in any direct ways other members.[32] So why should they care about non-compliance?

The Court itself has often been accused of displaying undue deference to Member States – by its use of the margin of appreciation doctrine – sometimes considered as no less than an abdication by the Court of its role as an authoritative standard-setter in

[26] E.g., in Austria.

[27] E.g. in Spain and France.

[28] E.g. in Germany and Italy.

[29] Helfer & Slaughter at 308.

[30] Nico Krisch, "The Open Architecture of European Human Rights Law", *Modern Law Review* 71 (2008): 183-216 at 196.

[31] The Romanian legal scholar Corneliu-Liviu Popescu thus provides the example of a traditional doctrinal position held by the Romanian Constitutional Court which for years refused to endorse a clearly stated position of the ECtHR according to which the capacity of a public prosecutor ("procurator") to place a criminal suspect in preventive detention for a period of up to 30 days was inconsistent with Article 6. 1 of the Convention. This legal regime was subsequently changed through legislative intervention, not by the Constitutional Court even though the latter had numerous occasions to do so. See Corneliu-Liviu Popescu, "La Cour constitutionnelle roumaine face à la Cour européenne des Droits de l'Homme – entre soumission et rebellion", *Perspectives Internationales et Européennes*, put online July 21, 2005, URL: http://revel.unice.fr/pie/document.html?id=34. For other examples of non-compliance by domestic Courts with the ECtHR see e.g. Garlicki "Some Observations" at 315-317 (UK Court-martial cases), id. at 314 (Belgian inheritance law cases); Schäffer at 117-8 (Austrian Constitutional Court decisions on civil procedure contradicting ECtHR case law under Art. 6.1 of the Convention). For a recent, long litany of unimplemented or insufficiently implemented ECtHR judgments, see the Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly "Implementation of judgments of the European Court of Human Rights", Doc. 11020 of 18 September 2006, available at http://assembly.coe.int/Documents/WorkingDocs/Doc06/EDOC11020.htm (last visited 10 September 2008).

[32] See, on this point, Harvey at 236.

Europe.[33] In addition, resort to this doctrine is often perceived as arbitrary and erratic. As pointed out, indeed, in legal academia: "it remains difficult to foretell whether in any given case the margin will be wide or narrow".[34] Structurally, the Court is in effect beset by numerous weaknesses, which impede both its effectiveness, and also its intellectual-legal gravitas. It is under-staffed and insufficiently funded, with judges complaining about the absence of essential secretarial and research facilities.[35] The rules of operation themselves – including that of linguistic diversity – often render the effective consideration of a case a nightmare, and most importantly of all, the lack of power of the Court to control its own docket (except for merely formal admissibility test) has resulted in a severe overload: the backlog now is such that the delay between application and judgment on the merits is of over five years.[36]

So the picture is far from ideal. And yet, there is no other supra- or international- human rights system in the world which comes close to the weight, scope and effectiveness of that built around the European Convention. And it is all the more impressive since the original intentions of the founders indicated something more modest, and more basic. The system originated both in the memories and lessons of the atrocities of World War II and as a response to the Stalinist rule imposed on the eastern part of the European continent, on the other side of the boundary separating the two German States. This twofold initial purpose influenced the aspirations underlying the European Convention and the institutional system built around it. Its past-oriented motivation (the lessons of the World War II) accounted for a focus on the most basic conditions of human life and liberty, best expressed in Articles 2-7 of the Convention. Its concern centered on the most fundamental violations of human rights, recognizing that they should command instant and unconditional outrage from all people, regardless of their cultural and political traditions. In turn, its present- and future-oriented purpose – related to the Cold War context of the newly divided Europe and the confrontation with the ruthless Stalinist authoritarianism over half of the Continent – prompted a concern with the fundamental political and civil rights and liberties, best articulated in the Articles 8-11 of the Convention. Thus, the Convention and the Convention system were not, initially, aimed at perfecting the finer points of articulation of rights at the peripheral spheres of their meanings, over which many people may reasonably disagree, but rather to establish and enforce a consensus at the most basic, elementary level.

Fortunately, in the first decades of its life the system scarcely ever had to deal with the issues for which it was precisely set up in the first place. Due to the composition of the CoE, and the legal and political conditions prevailing in Western Europe – apart from

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[33] The margin of appreciation "seems to undermine the notion of universality that is a foundation of human rights theory", Shelton at 134.

[34] Stefan Sottiaux & Gerhard van der Schyff, "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights", *Hastings International & Comparative Law Review* 31 (2008): 115-156 at 135, footnote omitted.

[35] Personal conversation with a judge of ECtHR, Strasbourg, 19 May 2008.

[36] Stone Sweet & Keller, "Reception" at 12. According to the Wise Persons Report at the end of September 2006, 89 000 cases were pending before the Court, Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, document CM (2006) 203, available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2006)203&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 para. 27.

the dictatorial regimes e.g. that of Spain and Portugal – the Court was under-utilized in these early years, and the truly basic violations of rights did not find their way to the Court, simply because they did not occur. In any event, in those early years, the institutional and procedural system effectively prevented any judicial hyper-activity. Indeed individual access to the Court was rendered mandatory for CoE Member States only in 1998. As a consequence, the Court's decisions were few and hardly of a fundamental character. Rather than a watchdog set up to prevent severe breaches of human rights, the Court settled on a role of a legal fine-tuner, acting at the boundaries of rights, setting up subtle tests of proportionality to examine restrictions aimed at legitimate ends, establishing the tests of, for example, access to personal information contained in medical files,[37] the scope of the duties of authorities to consult trade unions in order to give effect to the right of freedom of association,[38] or the status of "illegitimate children".[39] This was helped by a growing activism in the interpretative doctrine of the Court. By treating the Convention as a "living document", the Court moved away from the self-restraint that would have been dictated by an interpretation guided by an analysis of the original intentions. It thus declared that the Convention "must be interpreted in the light of present day conditions", rather than remain static,[40] and considered, moreover, that the limitations of the rights authorized in the Convention should be narrowly construed (thus, by implication, with a small degree of deference to democratically enacted national limitations).[41] In addition, the doctrinal vocabulary of the Court was enhanced by the "principle of effectiveness", which requires that the Convention should be interpreted so as to "make its safeguards practical and effective",[42] which in reality has led the Court to expand the protections of rights to a number of areas. As a result, the Court departed from the original purpose of the Convention, i.e., setting a basic level of protection to be guaranteed by all Member States, and smoothly embarked on the more ambitious task of determining aspirational standards of human rights protection, in particular by applying proportionality tests in its interpretation of Articles 8-11.

However, the pending (and later, the actual) accession of a large number of newly democratized States emerging from Communist authoritarianism, radically transformed this situation. (There had been earlier accessions of newly democratized States, of course, including that of Portugal in 1976 and Spain in 1977, but the overall impact was much less significant, and the ECHR system adjusted to these enlargements in an incremental fashion). Indeed, the institutional design underwent quite fundamental changes, in anticipation of an enlargement of such a scope. The most radical changes were brought about through Protocol no. 11 which entered into force in 1998. This Protocol abolished the Commission of Human Rights and centralized the administrative authority to process claims in a new permanent Court. The most important consequence of these changes was that the acceptance of individual applications and of the compulsory jurisdiction of the Court were rendered mandatory for all Member States of

[37] Gaskin v. UK, judgment of 7 July 1989, appl. 10454/83.

[38] National Union of Belgian Police v. Belgium, judgment of 27 October 1975, appl. 4464/70.

[39] Marckx v. Belgium, judgment of 13 June 1979, appl. 6833/74.

[40] See, e.g., Tyrer v. United Kingdom, judgment of 25 April 1978, appl. 5856/72, para. 31.

[41] See, e.g., Klass v. Germany, judgment of 6 September 1978, appl. 5029/71, para. 42..

[42] See, e.g., Loizidou v. Turkey, judgment of 23 March 1995, appl. 15318/89, para. 72.

the CoE. In addition, Protocol 11 set up a limited "appellate" procedure from any 7-member chamber to a Grand Chamber of 17 judges, at the request of one of the parties.[43] Overall, it is clear that the impending enlargement was a powerful agenda-setter to transform the Court. Moreover, and even more importantly, the very profile of the cases which started being brought to the Court changed considerably. The main concerns of the citizens who chose to "go to Strasbourg" to bring up issues for which they could not find a proper remedy in their home countries were no longer at the fringes of the rights enshrined in the Convention but right at its very core. Indeed the complaints no longer involved a controversial balancing of competing values according to a subtle proportionality test, but required an assessment of the minimum standards of protection of very fundamental rights.[44] As one scholar observed: "The Court ceases to be a secondary guarantor of human rights and instead finds itself in a more crucial – and exposed – front-line position".[45] The somewhat paradoxical consequence of the fundamental change in the composition of the CoE, as compared to its 1950 origins, was a return to the original intentions of the founders regarding the role of the institutional system of the Convention, i.e. to police the enforcement of basic rights, at a minimum fundamental level.

It is therefore not surprising that this arrival of new Member States, with significantly different traditions, cultures and approaches, and the accompanying influx of cases dealing with a more basic level of rights violation than before, raised concerns among the older members, and among the scholarly and political observers and friends of the Court, as to a probable lowering of the standards. Indeed, a number of lawyers and observers, especially in the UK, expressly linked this prospect with the planned arrival on the bench of judges who would lack sufficient democratic and rights-oriented credentials as they originated from new Member States. Lord Browne-Wilkinson, for example, thus warned in 1997 against a strict observance of the Court's case law: "I have found the jurisprudence of the European Court of Human Rights excellent, but a major change is taking place. We are now seeing a wider range of judges adjudicating such matters, a number of them drawn from jurisdictions 10 years ago not famous for their observance of human rights. It might be dangerous to tie ourselves to that…".[46] And another prominent British lawyer lamented, in a somewhat condescending manner: "The point, unfortunate but inescapable, is that the decisions of a court with this enlarged membership [from Central and Eastern Europe] are unlikely to win greater respect in this country for the principles embodied in the Convention".[47] At the same time, in some British circles, the concern was raised that the new judges recruited from CEE would be too "anti-establishment", a position deemed to increase "what was perceived as an unacceptable narrowing of the national margin of appreciation in the

[43] Whether such a request will be granted is decided by a panel of 5 judges of the Grand Chamber.

[44] As Stone Sweet and Keller observe, with the enlargement to the East and into the Balkans, the Court now confronts a problem of "massive State failures to provide even minimal protection of the most basic rights, including the prohibition of torture and inhuman and degrading treatment laid down by Article 3 ECHR", Stone Sweet & Keller "Reception" at 13.

[45] Robert Harmsen, "The European Convention of Human Rights after Enlargement", *International Journal of Human Rights* 5 (2001): 18-43 at 29.

[46] Quoted by Christopher McCrudden, "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights", *Oxford Journal of Legal Studies* 20 (2000): 499-532 at 504.

[47] S. Kentridge QC, quoted by McCrudden at 504 n. 11.

Court's decisions".[48] Some suggested that this would not necessarily result in an overall lowering of the standards, but rather in the creation of varied standards of protection. Stone Sweet and Keller thus wonder: "In the context of enlargement, can the Court maintain consistent standards of rights protection, or is the emergence of a two-track Europe inevitable?" [49].

Apart from the concern about the lowering of standards, the prospect of enlargement also raised legitimate fears about the effectiveness of the system. The latter, indeed, has always been tied – as is the case of any adjudication model based on traditional international-law mechanisms – to the political will of Member States. The main challenge was thus to develop normative standards whose effectiveness would not rely on the express consent of the concerned States and yet which, at the same time, could be supported by sufficient political will.[50] The relative homogeneity of the Member States was a crucial factor of success in this endeavor. As Judge Rudolf Bernhardt of the European Court observed: "The main reason for the effectiveness of the European Convention and the Court is the considerable measure of homogeneity among European states. … [T]here is a feeling among the member states that there exists a common European standard and that this standard should be further developed".[51]Without such homogeneity, the search for a "common European standard" seems doomed to failure, and the likelihood for effectiveness – very low.

The concerns about the lowering of the standards were partly triggered by a high degree of leniency in exercising "conditionality" in the admission process. To a certain extent (and here I am drawing a deliberately sharper distinction for the sake of comparison) the CoE conditionality was the reverse of that applied for accession to the EU. The latter operated on the basis of a full incorporation of the *acquis communautaire* as well as a comprehensive fulfillment of all the other conditions of membership (in particular, of the so-called political conditionality codified in the "Copenhagen conditions"[52]). This conditionality was driven by the awareness that once a State has acceded the EU, there are scant means of disciplining its members, especially in the areas of political democracy and respect for human rights. On the contrary, in the case of the CoE, the less-than-ready applicants were let in – on the basis of a principle that it is better to have a troublesome country *in* than *out*. Only then was the process of bringing a member fully up to standards (through political pressure exercised by the Committee of Ministers and through the judicial means operated by the Court) envisaged and hoped for. The admission therefore amounted less to the certification that a State is a full rights-respecting democracy and more to an incentive to carry out the necessary reforms, in the hope that the State would catch up with European standards when effectively subject to various supervisory, monitoring and judicial mechanisms within

[48] Harmsen at 23, footnote omitted.

[49] Stone Sweet & Keller "Reception" at 8.

[50] See, similarly, Shelton at 135.

[51] Rudolf Bernhardt, "Commentary: The European System", *Conn. Journal of International Law* 2 (1987): 299-302 at 299-300.

[52] The European Council, held in Copenhagen in 1993, established that in order to be successful in its pursuit of full membership the applicant State must enjoy, *inter alia*, "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities….", European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf.

the CoE. Some experts even refer to the "therapeutic" function of the accession,[53] or to the evolution of the CoE from a "club of democracies" into a "training centre".[54]

This process thus resulted in a number of clearly controversial admissions. The set of political conditions for admission were articulated as "presuppos[ing] that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights", including "[g]uaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law".[55] Few of the CEE applicants admitted in the early 1990s could claim such a record – if any. It certainly was hardly the case of Russia (it hardly *is* the case of Russia at the time of writing) when it applied for membership in 1992, and when it was eventually invited to join the CoE in 1996,[56] or with Romania in 1993, or with Croatia in 1996.[57] Whether the therapeutic theory has been validated and verified by an improvement in the State's behavior, is a matter for controversy. The dominant view is that, overall, it was a success, though there are also strong voices arguing the contrary, including, in particular, Peter Leuprecht, a long-standing high official of the Council of Europe. According to him, this policy of lowering the standards for admission of CEE States has been "incoherent and unprincipled".[58] He argues that on the whole, it has harmed the Council, as it has not brought about any visible improvements in the concerned Member States concerned, while devaluing the "certificate" of democracy which membership in the CoE traditionally conferred upon its Member States. Or, in the words of another observer, "given that perhaps the most attractive prize in the gift of the Council of Europe is membership itself, conceding it at an early stage in a process of democratic transition risks legitimating an inherently unsatisfactory state of affairs".[59] It has been noted, moreover, that the strongest leverage the organization has on its applicants/members is at the pre-admission stage and not exercising it thus amounts to a huge political waste of resources and opportunities.[60]

Whether Leuprecht and other critics of the policy are right or not is something that cannot be pursued here. What matters for our argument is that this perception of a lowering of the standards applied in the CoE has clear and multiple implications when

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[53] Jean-François Flauss, Les conditions d'admission des pays d'Europe centrale et occidentale au sein du Conseil d'Europe", *EJIL* 5 (1994): 401-422 at 421.

[54] See the views of Frédéric Sudre summarized by Harmsen at 20-21.

[55] Declaration of the Vienna Summit Meeting of the Heads of State and Government of Council of Europe member states of 9 October 1993, available at https://wcd.coe.int/ViewDoc.jsp?id=621771&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[56] For an account of the Russian admission saga see Peter Leuprecht, "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?", *Transnational Law & Contemporary Problems* 8 (1998): 313-336 at 329-30.

[57] See the excellent analysis of the diminished tests for membership applied to CEE applicants, between 1990 (Poland) and 2002 (Bosnia and Herzegovina) in Harvey at 52-55.

[58] Leuprecht at 331.

[59] Harmsen at 22.

[60] Karen E. Smith, "Western Actors and the Promotion of Democracy", in Jan Zielonka & Alex Pravda, eds., *Democratic Consolidation in Eastern Europe*, vol. 2 (Oxford, Oxford University Press, 2001) 31-57 at 43: "[t]he West may have wasted leverage by hastily offering membership in the Council of Europe".

assessing the role of the ECtHR as a central pillar in the CoE system. First, this perception is triggered by the dramatic expansion of the subject-matter of the caseload "downwards" – towards the most rudimentary and basic violations of rights. Secondly, it is triggered by bringing into the range of "European" standards a number of countries with as-yet backwards patterns of legal articulation and protection of rights – thus making the search for "consensus" much more difficult than before. And third, it is triggered by bringing on the bench individual judges whose credentials as exponents of the most refined and sophisticated human rights jurisprudence may be seriously questioned.

2. The "pilot judgments" and the *Hutten-Czapska* saga

2.1. Before the "pilot judgments"

A traditional perception of the status and reach of the ECtHR's judgments was that they carried a purely individualized, specific implication. The Court was perceived as a kind of tribunal of last resort, whose role was limited to specific cases of rights violations after the exhaustion of all domestic remedies. According to this view, it did not befall on the Court to assess the validity of domestic *laws* themselves. Its policing role was strictly restricted to the consideration of acts and decisions rather than to the laws allegedly underlying the latter.

However, this traditional perception was never completely accurate. Indeed, drawing a sharp distinction between bad decisions and bad laws ("bad" in light of the rights enshrined in the Convention as interpreted, at various points of time, by the Court) is not very credible. For instance, when deciding on an alleged breach of Articles 8-11, once the Court has ascertained that the challenged decision was taken on the basis of a "law" (which is the first tier of analysis, as required by the clauses providing for legitimate limitations of those rights), the two subsequent tiers scrutiny inevitably involved at times a critical analysis of the law itself. "At times" – because the scrutiny could have proceeded along the lines "good law – bad decision" (for instance, an incorrect proportionality analysis conducted by a domestic court on the basis of a law which provides for the possibility of a proportionality test). And this is indeed, how the Court's decisions have most often been structured.[61] And yet, at other times, an inevitable implication of the scrutiny of a decision was that the legal defect lay deeper than in the domestic court's reasoning, namely, that the sources of the defect resided in the domestic law itself.[62] And the Court has on occasions admitted this explicitly – long

[61] Cf. e.g. Papamichalopoulos v. Greece, judgment of 24 June 1993, appl. 14556/89, where the land, initially expropriated by military authorities without compensation, has not been returned to the rightful owners even though the Greek courts recognised their rights to the land. The European Court referred to the relevant Greek statutes, namely the law of 1983 on the compensation for land confiscated for the purposes of building a navy base, and the rural code, paras. 29 and 30, and, without questioning these laws in any way, found violation of Article 1 of Protoco1 in the conduct of Greek authorities, including the Athens Expropriation Board, para. 40.

[62] See e.g. the landmark case Marckx v. Belgium, judgment of 13 June 1979, where Belgian law related to "illegitimate" children was found discriminatory under Art. 14 in conjunction with Art. 8 of the Convention.

before the so-called "pilot judgments". When, for instance, the government of a country challenged with a law allegedly containing discriminatory provisions against children born out of wedlock objected that "it is not the Court's function to rule *in abstracto* on the compatibility with the Convention of certain legal rules", the Court responded tersely: "Article 25 … of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it".[63] The fact that, well before the concept of "pilot judgments" was coined, a number of Court's rulings related to the breach of rights led several States at various times to amend their own domestic legislation, in explicit or implicit response to the Strasbourg Court's judgments, is the best proof, if one needs one, that the scope of the Court's decisions went well beyond the simple condemnation of an individual domestic judicial decision. As recounted by one of the current judges of the European Court: "There have been numerous situations in which violations of the Convention resulted from the content of the State legislation and not 'only' from the incorrect application of that legislation by courts or administrative agencies. In such situations, the Court has never hesitated in identifying the real source of individual violations; sometimes undertaking quite abstract assessments…".[64]

But this was always carried out cautiously, without explicitly stating the "systemic" nature of the problem. Until the "pilot judgments", the Court resorted to a shrewd legal drafting technique by disguising the fact that it was *the law* which often was the target of its scrutiny. Indeed, the consideration of the more general, systemic directives was placed in the "reasoning" part of the judgments, while the operative part of the judgments focused strictly on the individualized violations. So, in the eyes of the States, the Court's legitimacy relied largely on a tacit (and sometimes, not-so-tacit) assumption that the Court would not interfere with the democratic processes of the Member States which resulted in a given legislative choice, but, rather, that it would provide enlightened leadership to the national courts which may occasionally fail to properly interpret their domestic legislation and national Constitutions fully in accordance with the Court's authoritative interpretation of the rights enshrined in the Convention. The inadequacy of this approach became finally evident with the new arrivals into the CoE

[63] Marckx, paras 26 and 27. This point, made almost *en passant* in the reasoning of the Court, was highlighted and analyzed with great lucidity in a lengthy dissent by Judge Fitzmaurice: "Basically, the Court's judgment constitutes a denunciation of a particular part of Belgian law as such, and in abstracto, because that law fails to provide a natural child with the civil status of being the child of its mother as from the moment and by the mere fact of birth, without the necessity of any concrete step on the part of the mother or guardian to bring that about. Although, speaking generally, it is not part of the Court's legitimate function to incriminate the laws of member States merely because they are difficult to reconcile with the Convention, or may lead to breaches of it - (so that in the normal case it will only be the specific step taken under, or by reason of, the law, leading to a breach, rather than the law itself, that can properly be impugned) - yet I accept that where it is the law itself, acting directly, that produces, ex opere operato, the breach (if there is one), it (the law) may be impugned even though there has been no specific act or neglect on the part of the authorities, or step taken under the law: it will be the law itself that, by its very existence, constitutes the act or neglect concerned", Marckx, dissenting opinion by Judge Sir Gerald Fitzmaurice, para. 28.

[64] Lech Garlicki, "Broniowski and After: On the Dual Nature of 'Pilot Judgments'", in Lucius Caflisch, Johan Callewaert, Roderick Liddell, Paul Mahoney & Mark Villiger (eds), *Human Rights – Strasbourg Views; Droits de l'homme – Regards de Strasbourg: Liber Amicorum Luzius Wildhaber* (N. Engel: Kehl 2007): 177-92, at 182-83, footnotes omitted [hereinafter referred to as Garlicki, "Broniowski"].

system where it clearly appeared that many problems were not so much due to occasionally erring courts but rather have to do with the substance of the laws themselves. The hypocrisy of the traditional "good law – bad decision" could no longer be maintained with a straight face.

In institutional terms, the direct trigger originated in the political branch of the CoE. In 2004 the Committee of Ministers adopted a resolution and a recommendation which provided the political ground for future pilot judgments.[65] The Resolution invited the Court "to identify in its judgments … what it consider[ed] to be an underlying systemic problem and the source of that problem, in particular when it [was] likely to give rise to numerous applications…".[66] In turn, the Recommendation adopted conjointly was addressed to Member States and pointed out that, in addition to individual remedies, States have a general obligation to solve the problems underlying the violations found.[67] The Court was more than happy to take up the invitation and act accordingly, as is evident from its own case law, and from the eagerness with which it communicated to the world its own self-enhanced role by the device of coining a new category of judgments, somewhat awkwardly dubbed "pilot judgments".[68]

2.2. The Hutten-Czapska *Saga*

In the following section, I will discuss, in some detail, one of the first "pilot judgments",[69] namely *Hutten-Czapska v. Poland*.[70] To render more vividly certain aspects of the case, namely, the complex interaction between the European Court, the domestic Constitutional Court (in this instance the Constitutional Tribunal of Poland)

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[65] Note that the concept "pilot judgments" is used in the Recommendation but not in the Resolution.

[66] Resolution Res. (2004)3 of the Committee of Ministers of 12 May 2004 on judgments revealing an underlying systemic problem, available at https://wcd.coe.int/ViewDoc.jsp?id=743257&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[67] Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies, 12 May 2004, available at https://wcd.coe.int/ViewDoc.jsp?id=743317&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 26 HRLJ 116 (2005).

[68] The awkwardness of the expression consists, in my view, in the fact that the noun "pilot" is generally used as an adjective in various contexts to refer to something tentative and preliminary, as in "pilot studies" or "pilot projects" which are meant to be a sort of test preceding the real thing, without a "pilot" qualification. But there is, as far as I can see, nothing of a "pilot" in *this* sense in the Court's "pilot judgments". On the other hand, one may argue that "piloting" is analogical to "guiding", and in this sense, the label is accurate.

[69] The first pilot judgment was *Broniowski v. Poland*, judgment of 22 June 2004 appl. 31443/96, where the Court found that broad measures needed to be undertaken so as to provide a general compensation for those claimants who had been repatriated in the course of a re-drawing of Poland's borders during the Second World War. In particular, it related to the claims of those who had been repatriated from the territories beyond the Bug River which constituted the Eastern border of Poland after the end of the War. In its judgment, the Grand Chamber found a violation of Art. 1 of Protocol 1 and noted that the violation was a result of "a malfunctioning of Polish legislation and administrative practice" affecting a large class of claimants, point 4 of the operative part of the judgment.

[70] Hutten-Czapska v. Poland, Judgment of 22 February 2005, appl. 35014/97 (referred to as Hutten-Czapska (1)); Judgment of Grand Chamber of 19 June 2006 (referred to as Hutten-Czapska (2)); Judgment (Friendly Settlement) of 28 April 2008 (referred to as Hutten-Czapska (3)).

and the domestic legislature, I will present a stylized description divided into a sequence of "acts", leading up to, and including, the Court's judgments.

But first, the background of the case should be briefly sketched. Polish legislation on rent control, for various historical reasons, placed restrictions on the amount of rent chargeable and limitations on the termination of leases, even as concerned tenants who did not comply with the terms of the contract. In effect, the restrictions placed on rent did not allow landlords to recover the full costs of maintaining their properties. After the fall of Communism, the government was faced with a situation whereby there was a very limited housing stock for rent, and much of that housing stock was in a poor state of repairs. In 1994, legislation was adopted in an attempt at providing better conditions for the creation of a market of private renting of property, and therefore a more favourable market-based economy for landlords. These measures did not, however, go far enough and there were challenges to the legislation that put an unfavourable cap on the amount that landlords could claim in compensation for repairs.

This case concerns the constitutionality of this governmental intervention on the rights of landlords. The details were the following. The applicant family used to own a family house. After the Second World War, the house was assigned to an individual A.Z by the communist regime. This happened as early as 1945, and there began a long and protracted effort by the applicant and her family to recover the property, which was rightfully hers. Eventually in 1990 the Gdynia District Court awarded the property to the applicant who then began the task of attempting to recover the various rooms in the house, which had been leased during the communist era. The applicant's attempt to evict the tenants was thwarted by a court's decision in 1992. Of course, part of her difficulty stemmed from the legislation of 1948 and 1974 (and then, of 1994), which grants considerable rights to tenants – and impedes any eviction attempts by the landlord. In fact all the attempts undertaken by the applicant to get the previous decisions under Communist rule failed. And her situation persisted whereby she had been awarded a house but with all the tenants from the communist times still living there.

Act I: The Constitutional Tribunal enters the stage

On the 10th of January 2000, the Constitutional Tribunal found that those provisions of the 1994 Act which sought to restrict and regulate the rent were unconstitutional as they amounted to an inadmissible limitation on property rights. It deemed amendments in the legislation necessary.

Act II: First law reform

In light of this decision, the new legislation was put in place in June 2001. The new Rent Act provides for some circumstances where the landlord can increase the rent – when the flat or property has in some way been reconstructed – but maintains significant restrictions on rent increases and limits on termination of leases.

Act III: The Constitutional Tribunal re-enters the stage

The Ombudsman made an application to the Tribunal arguing that this new legislation still failed to enable the landlords to adequately recover costs for maintenance and other work carried out on the property, and therefore, violated the constitutionally recognized right to property. In October 2002, the Tribunal agreed with the Ombudsman, and declared that the 2001 Act had not improved the situation for the landlords as it has introduced an inadequate system of control of rent increases, and had moreover, owing to the changing economic circumstances, significantly reduced any possibility of increasing the rent to cover expenses incurred by them in connection with maintenance.

Act IV: Second law reform

The government of Poland proposed some amendments to the Rent Acts in 2004 with the intention of implementing the above decision of the Tribunal. In December 2004 the parliament passed the amendments which attempted to develop a scheme of capping rents – and provide a package of measures for the landlord.

Act V: European Court of Human Rights enters the scene

On 22 February 2005 the case of Hutten-Czapska was heard by the Fourth Section of the ECtHR. The applicant argued that the system introduced by the Rent Act of 1994 had imposed a series of tenancy agreements on her and set an inadequate level of rent which amounted to a continuing violation of her right to the enjoyment of her possessions, and therefore breached Protocol 1 Article 1 of the Convention (right to property). The Court briefly dealt with the two first tiers of its usual scrutiny, conceding both that this legal interference of the Polish government had respected the principle of lawfulness, and also that given the prevailing socio-economic conditions as regards housing, it had aimed at securing an equitable arrangement between landlords and tenants, and had therefore been carried out in the pursuit of a legitimate aim. However, under the proportionality test, the Court – in the same vein as the assessment made earlier by the Constitutional Tribunal itself! – found that the government had failed to set an adequate balance between the interests of the landlords and that of the tenants so as to guarantee an equitable system of landlord rights. The Court then found Poland in breach of Article 1 of Protocol 1. A striking feature in the judgment – apart from a meticulous account of a complex legal and social situation – is that it contains extremely long and unreservedly approving quotations from all the relevant decisions pronounced by the Constitutional Tribunal until then.[71] In its "General conclusions", indeed, not only did the Court refer again to the Constitutional Tribunal's judgment pronounced five years before, but it explicitly reprimanded the government for not remedying the problem "in line with the Constitutional [Tribunal's] judgments".[72] It then likened the situation to that prevailing in the *Broniowski* case[73], hailed by the Court as a "pilot

[71] So long as to cause a dissenting judge to observe caustically: "I do not think that it was really necessary to reproduce all those very lengthy quotations from the Constitutional Court's judgments…", Judge Pavlovschi, partly concurring and partly dissenting in Hutten-Czapska (1).

[72] Hutten-Czapska (1) para 187.

[73] Hutten-Czapska (1) Para 187.

case", because in both cases "general measures at national level were called for".[74] And just as in the *Broniowski* case, where the number of individuals affected by the legislative scheme was extremely high (about 80 000), in this instance, about 100,000 landlords and between 600,000 and 900,000 tenants, were deemed to be affected, and thus "the principles established in Broniowski case app[lied] equally to the present case".[75]

Act VI: The Constitutional Tribunal enters for the third, fourth and fifth time

In the meantime, the 2004 legislative reform package was challenged in front of the Polish Constitutional Tribunal by the Polish Union of Property Owners in early 2005. And again the main argument put forth seemed to be that the control over private rent infringed the constitutional principles of protection of lawfully acquired rights over property. It was contested by the Polish tenants association, which claimed that the landlords had exaggerated the amounts needed to maintain and restore their property. In its 19 April 2005 judgment, the Constitutional Court decided to repeal two important provisions of the amended Act restricting rent increases, and – more importantly – it relied its decision on a comprehensive social, political and economic survey of the Polish housing situation. Interestingly, it already referred to the ECHR's judgment of 22 February of that year ("Act V" above), and it recognized that the Strasbourg Court's opinion provided additional arguments to conclude that the law violated both the constitutional principles of the rule of law (confidence in the State and the law) as well as ECHR standards on the protection of property.

In June 2005, the Constitutional Tribunal involved itself in the normative debate on this issue, by producing a set of recommendations or guidelines (in Polish: *sygnalizacja*) as to how a more equitable and less antagonistic relationship between landlords and tenants could be achieved.

Subsequently, in May 2006, in response to an application by the Ombudsman, the Constitutional Tribunal declared a number of provisions of 2001 Act unconstitutional – in particular, those on rent increases.

Act VII: European Court enters for the second time

On 19 June 2006, in response to an application by the government of Poland, the Grand Chamber of the ECtHR considered the *Hutten-Czapska* case, and concluded again to a violation of Article 1 of Protocol 1. It confirmed all the points and legal arguments of the Fourth Section, and again, quoted very extensively and approvingly the Constitutional Tribunal's judgments pronounced since the Fourth Section judgment. Interestingly, the Grand Chamber referred to, and quoted, the passages of the Tribunal's decision, which relied explicitly on the Fourth Chamber's judgment.[76] Hence a complex combination of mutually referential and self-reinforcing judgments, with the Fourth Section relying on earlier Tribunal's decisions to hand down a judgment, and the Constitutional Tribunal relying partly on this judgment, and the Grand Chamber

[74] Hutten-Czapska (1) para 190.

[75] Hutten-Czapska (1) para 191.

[76] Hutten-Czapska (2) para 39.

referring to the Tribunal's reference to the Strasbourg Court! A real symbiotic relationship, if ever there was one.

The status of this case as a "pilot judgment" is reinforced in the judgment itself, in a passage worth quoting at length because it will be important to the argument further developed in this article:

"This kind of adjudicative approach by the Court to systemic or structural problems in the national legal order has been described as a 'pilot-judgment procedure' … The object of the Court's designating a case for a 'pilot-judgment procedure' is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order. One of the relevant factors considered by the Court in devising and applying that procedure has been the growing threat to the Convention system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem…. Indeed, the pilot-judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned their Convention rights and freedoms ... offering to them more rapid redress".[77]

Two important dissents, by Judges Zagrebelsky and Zupancic, are attached to the judgment, and will be examined below.[78]

Act VIII: The Constitutional Tribunal enters for the sixth and the seventh time

Two more decisions of the Constitutional Tribunal followed: one (of 17 May 2006) triggered by the Ombudsman's application, and another (of 11 September 2006) in the process of a "concrete review", in response to a "legal question" by a district court. A number of specific provisions of the 2001Act were repealed. Especially in the first judgment, the Tribunal seized this opportunity to reiterate the critical assessment it had made of the existing legal framework in its 2005 Recommendations, related in particular to the lack of the statutory elements of the definition of rent, and the failure to cite some of the relevant factors (such as the costs of repairs and maintenance) that would justify rent increases.

Act IX: The parliament acts again

The legislator started then acting more decisively, by passing several statutes. First, on 8 December 2006, an act on financial assistance for "social accommodation" set out conditions for obtaining financial assistance from the State for the construction of houses for the homeless and those less well-off. This statute was deemed to resolve partly the problem, by providing a legal framework to help poor tenants. A week later, on the 15th of December, the Parliament adopted a general amendment to the 2001 Act on the protection of the rights of tenants, which, importantly, contained a new statutory definition of the expenses incurred for the maintenance of a rented dwelling, as well as new and much more liberal provisions on rent increases, and also a new rule providing

[77] Hutten-Czapska (2) paras 233 and 234

[78] In Part 2.3 of this article.

for the civil liability of municipalities for failure to supply a social accommodation to a protected tenant. This legal framework was deemed to have answered to much of the critical assessments emitted at the judicial level, both in Warsaw and in Strasbourg, up to that point.

Act X: The European Court enters the third, and the last time

On the 28th of April 2008, the Court decided to strike the case off the list – a normal procedure after a friendly settlement has been reached. Such settlement had been agreed upon by the parties in Warsaw in February of that year. The Court noted all the judicial and legislative developments after its Grand Chamber judgment, and included in the judgment the Friendly Settlement which noted that the restrictions of landlords' rights in Poland had constituted a breach of Article 1 of Protocol 1, and observed that the obligations incumbent on the Polish government were not limited to the specific situation of Mrs Hutten-Czapska, but that it had to undertake general measures for all landlords. In its own Declaration, the Government of Poland listed a number of comprehensive measures it had undertaken, in particular the law of December 2006, which contained "conditions enabling landlords to receive market-related rent".[79] In its own assessment, the Court noted all those measures with approval, and consequently decided to strike the case out of its list. A long section of the judgment was entitled "Implications of the pilot-judgment procedure applied in this case"[80] and the Court seized this occasion to reaffirm its new doctrine. "[I]in view of the systemic character of the shortcoming at the root of the finding of a violation in a pilot judgment, it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand".[81] Again, a very significant dissent by Judge Zagrebelsky (joined by Judge Jaeger) was attached.[82]

2.3. The Lessons of Hutten-Czapska

One obvious feature of the Hutten-Czapska case is the explicit and constant "collaboration" between two courts - the European and the national - in criticizing the domestic legal framework, and in bringing the legislative and executive branches of the State to a more-or-less complete compliance with the standards of rights protection shared by both courts. One can speculate that, should the national Court have not been so active in denouncing, over the years, the failures of the legal framework, the ECtHR may not have adopted such a grandiose rhetoric of "pilot judgment" in finding a systemic defect in the national law. A similar – even though less intricate – pattern of judicial alliance against the national legislature can be found in the first "pilot judgment": *Broniowski v. Poland*.[83] In both *Broniowski* and *Hutten-Czapska* – as in the other pilot-judgments so far – a form of division of labour seems to occur: the constitutional court deals with a general constitutional dimension, while the ECtHR

[79] Hutten-Czapska (3) para 27.

[80] Hutten-Czapska (3) paras 31-44.

[81] Hutten-Czapska (3) para 34.

[82] Discussed below in Part 2.3.

[83] See note 69 above.

focuses on a concrete case.[84] But it is thanks to the generalization provided by the constitutional court that the traditionally individualized assessment carried on by the Strasbourg Court could eventually be elevated to a more general level, enabling the ECtHR to identify "systemic" problems. And it is largely thanks to this constitutional framework of analysis provided earlier by the constitutional court that the "systemic" considerations of the pilot judgments did not appear (to most of the judges, at least)[85] as exceeding the European Court's realm of legitimacy. To a certain extent,[86] one could argue that the national constitutional court provided the grounds of legitimacy for the ECtHR in its pilot judgments rationale.

It is hard to find a more fitting example to illustrate the phenomenon of "piercing the veil of the State"[87] – an expression pointing to the disaggregation of States into their different constitutional branches, and to alliances that are formed with one of the branches to castigate another. This is what Helfer and Slaughter identified as a characteristic of supranational adjudication: a supranational tribunal's "ability to penetrate the surface of the state"[88], and the resulting "move away from the fiction of the unitary government".[89] As they observe, "stripping the State of its unitary façade creates the possibility of direct relationships between the [supranational] tribunals and different governmental institutions such as courts, administrative agencies, and legislative committees"[90] – and this is, of course, precisely what happened in *Broniowski*, *Hutten-Czapska*, and more generally, whenever the ECtHR collaborates with a national court against the national executive or legislature. This may be seen as anathema to a traditional idea of sovereignty whereby States present themselves to an international entity and to each other as uniform, homogenous units. But this traditional picture is particularly inappropriate when the protection of human rights is at stake: a citizen has only to gain from this "disaggregation" when some of the domestic bodies are more favourable to an expansive interpretation of his/her rights than others. In such cases, the intervention of an international body which "takes sides" with one of the national institutions against another may be a crucial element of a rights-supportive strategy.

As I have suggested earlier, the "revolution" triggered by the pilot judgments lies more in the rhetoric and structure of the judgment than it is anchored in reality. Indeed, the fiction according to which before its pilot judgments the Strasbourg rulings dealt with specific cases, and not with the law, was just that: a fiction. On several occasions, the Court reminded the Member States that "in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed"[91] –

[84] I am grateful to Mr Adam Bodnar for this observation.

[85] But see Judge Zagrebelsky's dissents, discussed below in Part 2.3.

[86] Because one should not forget about the resolution and the recommendation by the Committee of Ministers, referred to above.

[87] A formula used by Samantha Besson in her lecture on 9 August 2008 in Sydney.

[88] Helfer & Slaughter at 289.

[89] Helfer & Slaughter at 288.

[90] Helfer & Slaughter at 277.

[91] Maestri v. Italy, judgment of 17 February 2004, no. 39748/98, para 47.

though, as a matter of rhetoric and structure of the judgment, it avoided placing the general, systemic recommendations in the operative parts of its decisions. However, the rhetoric and drafting strategy have their own important effect: they are a good indicator of the decision-maker's intentions, and especially, of the self-perception of the decision-maker. If the Court can now announce that it is authorized (indeed, compelled) to identify systemic defects in a legal system and to prescribe major legislative changes, its self-perception as a "constitutional" court of sorts is quite clear.[92] And if this rhetoric meets no resistance and challenge – indeed, if it is presented as a faithful implementation of the will of the political branches of the CoE – this constitutional package can be said to be accepted by those who might be normally expected to be "threatened", i.e., Member States.

One should be careful not to give too much weight to this point. Indeed the legitimacy of the ECtHR, even when acting in a course already facilitated by a national court's intervention to issue "pilot judgments", is never stable and non-controversial. That the European Court should be entering a risky path is well evidenced in the biting dissents of Judge Zagrebelsky. In his (partly) dissenting opinion to the 2006 judgment ("Act VII" above), he emphasised a "horizontal" problem (my words, not his), and in his separate opinion (joined by Judge Jaeger) to the 2008 judgment on friendly settlement ("Act X" above), he pointed to a "vertical" problem. Taken together, these critical assessments constitute a powerful challenge to the legitimacy of the Court when issuing pilot judgments. In the first dissent, Judge Zagrebelsky thus focused on the balance between the Court and the political branches of the CoE system. According to him, when the Court indicates the need for the State to amend its own legislation in order to solve a general problem affecting other individuals than the applicant, it is usurping the role of the Committee of Ministers, and exceeding its tasks as set by Protocol 14 of the Convention.[93] In particular, the part of the judgments outlining the nature of the general measures to be undertaken by the Polish State[94] prompted him to consider that the Court "is entering territory belonging specifically to the realm of politics". He deems, as a result, the judgment to be "undermine[ing] the relationship between the two pillars of the Convention system – the Court and the Committee of Ministers – and entrust[ing] the Court with duties outside its own sphere of competence".[95] In turn, in his second dissent, he focused on the "vertical" problem – i.e. the relationship between the Court and the Member State: "The Court is not competent (and does not have the necessary knowledge) to express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development…".[96]

But even putting to the side the fundamental concerns of Judge Zagrebelsky, can we indeed draw a connection between the trend marked by "pilot judgments" and the hypothesis of a "constitutionalization" of the ECHR system? It is significant that the

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[92] Not to all judges, though; see dissent of Judge Zupancic in Hutten-Czapska (2), discussed below, in this Part of the article.

[93] Partly dissenting opinion of Judge Zagrebelsky, Hutten-Czapska (2).

[94] Hutten-Czapska (2) para 239.

[95] The "horizontal" concern is expressed also in the Concurring Opinion of Judge Ziemele to the 2008 judgment: the structural and systemic problems "raise legal and practical difficulties that the Committee of Ministers is much better equipped to monitor than the Court…", Hutten-Czapska (3).

[96] Separate opinion of Judge Zagrebelsky joined by Judge Jaeger, Hutten-Czapska (3).

main judgment of the Grand Chamber in the *Hutten-Czapska* case produced a separate opinion by a judge who explicitly raised this question, only to rebut any allegations as to such a connection.[97] Judge Zupancic defends the idea of pilot judgments against Judge Zagrebelsky's objections, and he claims that they do not represent a "qualitative jump" in terms of the binding *erga omnes* effect nor in terms of the generality of the judgment.[98] Referring to the first pilot judgment, *Broniowski*, Judge Zupancic indicates that, if the pilot judgment scheme had not been adopted, "there would have been 80,000 cases pending before the Court", and the Court would have to react by mechanically reiterating, in a "copy-paste" manner, the *Broniowski* ruling 80,000 times.[99] So this is, for Judge Zupancic, not a matter of principle but a "simple and pragmatic" question.[100] *Broniowski*, *Hutten-Czapska* etc. are merely "practical and pragmatic decisions – akin to class-action judgments – that avert an increase in the quantity of cases…"[101] And here comes the connection with the idea of constitutionalism: "The Court clearly does not have, *with the usual paraphernalia of constitutional law*, an interest in meddling in what national legislation should or should not do. … This is the role rightly reserved for national constitutional courts. … *We are not and cannot be constitutional court* for the 46 countries concerned".[102]

But one has an impression that Judge Zupancic protests too much. He is connecting the "binding effect *erga omnes*" issue with that of constitutionality by implying that such an effect (binding *erga omnes*, constitutional) *would* occur *if* the judgment were formulated *in abstracto* and if the Court were saying "that a particular piece of national legislation that had been the cause of the case before us was incompatible with the Convention, or in other words 'un-conventional'".[103] But this is, so it seems to me, precisely what the Court *is* saying, although not in so many words. By reproducing, in great lengths, and fully approvingly, the long passages of the Polish Constitutional Tribunal's judgments of unconstitutionality of the Rent's Act, including the developments referring to Protocol 1 of the Convention,[104] the European Court is effectively endorsing, echoing and amplifying the Tribunal's judgments of unconstitutionality and "un-conventionality". And, more significantly, the operative part of the judgment, in Parts 3 and 4, amounts for all practical purposes to the "meddling in what national legislation should or should not do", to use Judge Zupancic's words. Part 3 links the violation of the Convention with the "systemic problem connected with the malfunctioning of domestic legislation". Even if the use of the word "malfunctioning" may create an impression that it is not the law itself but rather its bad application which is the problem, the further specification of what this "malfunctioning" consists of removes any doubts as to what really is at stake: domestic legislation, the Court observes with disapproval, "imposed, and continues to impose, restrictions on landlords' rights, including defective

[97] See partly concurring, partly dissenting opinion of Judge Zupancic, Hutten-Czapska (2). The dissenting part of this opinion (Part III) deals with the interpretation of the terms "peaceful enjoyment of [one's] possessions" in Article 1 of Protocol 1, and has no relevance to our discussion here.

[98] Part I of his opinion.

[99] Part I.

[100] Part I.

[101] Part II.

[102] Part II, both emphases added.

[103] Part II.

[104] See e.g. Hutten-Czapska (2) paras 137-140, 142.

provisions on the determination of rent".[105] Now clearly *this* defect is not about the wrong application of a good law but is inherent to the law itself: restrictions on landlords' rights and the limits on rents which can be charged are intrinsic elements of the statute itself, and as the history of the legislative practice described in the judgment manifestly shows, no amount of good will and tinkering by law-enforcers could improve the situation as long as the law remains in force. Furthermore, as put forth by the ECtHR, the second troubling aspect of the domestic legislation was the following: "it did not and still does not provide for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance".[106] Again, this is obviously a fundamental omission in the law itself rather than a result of a bad administration of the law.

So much for the protest of Judge Zupancic that his Court has not taken on the role of a "negative legislator".[107] As for the positive part of the ruling the Court held, in Part 3 of the operative part, that "in order to put an end to the systemic violation identified in the present case, the respondent State must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interests of the community, in accordance with the standards of protection of property rights under the Convention (see paragraph 239 above)".[108] Now paragraph 239, to which the ruling refers, develops the concept of "the interests of the landlords" as including "their entitlement to derive profit from their property", and the general interests of the community as including "the availability of sufficient accommodation for the less well-off". The exact and peremptory character of these directives is manifest. The Court is not only saying what exactly is wrong with the law in question, but it is also stating how, through legislative changes, it should be remedied in order to bring it in line with "the standards of protection of property rights under the Convention".[109] Now if *this* does not amount to saying that "a particular piece of national legislation … [is] incompatible with the Convention",[110] then it is really hard to see what *would*.

Finally, Judge Zupancic undertook the heroic task of depicting the Court's ruling as amounting solely to a recommendation. In a nice piece of judicial rhetoric, Judge Zupancic likens the substance of *Broniowski* to the following message: "*'Look, you have a serious problem on your hands and we would prefer you to resolve it at home…! If it helps, these are what we think you should take into account as the minimum standards in resolving this problem'*".[111] It sounds great when thrown into a judicial opinion but it is emphatically *not* what the Court said in *Broniowski* (or later in *Hutten-Czapska* for that matter). The language of the rulings is stern, peremptory and imperative, none of the "hey, if you want our advice, here it is, but feel free to do what you want". It rather says what the Polish State "must" do ("in order to put an end to the

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105 Part 3, operative part of the judgment, Hutten-Czapska (2).

106 Operative part 3.

107 His opinion, Part I.

108 Operative part 4.

109 Operative part 4.

110 Zupancic Part II.

111 Zupancic Part II, italics in original.

systemic violation … the respondent State *must* … secure in its domestic order a mechanism…"),[112] no ifs or buts.

No wonder that another judge of the same Court, writing extra-curially, observed that one of the main characteristics of a pilot judgment is that it "constitutes not a mere recommendation but a command, at least in respect of those of its components included in the operative part of the judgment".[113] So it seems that under Judge Zupancic's own test about what would render the Court "constitutional" or operating "with the usual paraphernalia of constitutional law", the Court moved precisely in this quasi-constitutional direction in *Broniowski* and *Hutten-Czapska.*[114] And it did so explicitly by departing from a purely individualized justice limited to prescribing in a mandatory way a just remedy to a particular victim of a violation of the Convention towards a generalized justice in which a State is required to reform its law and practice in response to the finding of a violation by the Court. Thus, the Court "behaves more as a general and prospective lawmaker than as a judge whose reach is primarily particular and prospective".[115] As I had suggested earlier, there was an element of the "judging of the law" that has always occurred in practice, but never before was it so stark, visible and explicit as in the pilot judgments.

2.4. The Reasons for Pilots and Semi-Pilots

Of course, not all "pilot judgments" so far have been issued in cases originating from CEE. Some time after *Broniowski*, the Court found, in a case against Italy, that the violation of Article 6 "had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice",[116] using thus a key word ("systemic") indicating a pilot judgment.[117] There were other cases, around the same time, also originating from Italy, which identified "systemic violations".[118] But there was a subtle and yet significant difference with the "Polish" cases (*Broniowski* and *Hutten-Czapska*): in all the Italian cases, the Grand Chamber (in contrast to the chamber

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112 Hutten-Czapska (2) Operative part 4.

113 Garlicki, "Broniowski" at 185.

114 For other views suggesting the link between pilot judgments and "constitutionalzation", see e.g. Schäffer at 123; Garlicki in "Broniowski" at 182; Helen Keller & Alec Stone Sweet, "Assessing the Impact of the ECHR on National Legal Systems" in Keller & Stone Sweet, *A Europe of Rights* 677-710 at 703-704 [hereinafter referred to as Keller & Stone Sweet, "Assessing"].

115 Keller and Stone Sweet, "Assessing" at 703.

116 *Sejdovic v. Italy*, First Section judgment of 10 November 2004, operative part 2.

117 But note that in *Sejdovic* the Court did not use the notion of "pilot judgment" to characterize this case. In the First Section judgment of 10 November 2004 the notion of "pilot judgments" does not appear at all, while in the Grand Chamber judgment of 1 March 2006, the Court only used the concept when referring to *Broniowski*, *Sejdovic*-II, para 120, but only to establish a subtle distinction between that case and *Broniowski* noting that in the meantime the necessary legal reforms had been enacted in Italy, id. para 122, and thus "consider(ed) it unnecessary to indicate any general measures at national level that could be called for in the execution of this judgment", para 124.

118 Sejdovic v. Italy, judgment of 1 March 2006 appl. 56581/00; Cocchiarella v. Italy, judgment of 29 March 2006, appl. 64886/01; Scordino v. Italy, judgment of 29 March 2006, appl. 36813/97. Similar language was used also in Lukenda v. Slovenia, judgment of 6 October 2005, appl. 23032/02; Tekin Yildiz v. Turkey, judgment of 10 November 2005, appl. 22913/04; Xenides-Arestis v. Turkey, judgment of 22 December 2005, appl. 46347/99

judgments) has chosen carefully to place the "systemic violation" or "systemic problem" language in its *reasoning* on the merits, but decided not to include its findings in the *operative parts* of the judgements. This, at first glance subtle and perhaps pedantic difference, seems to be important enough, at least for one of the most thoughtful sitting judges of the Court to emphasize, in an article, that in the "Italian" cases "the Court seems to show a certain restraint in applying a Broniowski-like pilot-judgment procedure, i.e. a procedure in which both the identification of a systemic violation and the call for general measures are included in the operative part of the judgments".[119] No such "restraint" was shown in *Broniowski* and *Hutten-Czapska*: the systemic violations found, and the general recommendations aimed at comprehensive law reform, were placed fairly and squarely in the operative parts, using an exact and peremptory language, as we have just seen. In contrast, (what can be called) semi-pilot-judgments,[120] such as *Sejdovic*, *Cocchiarella* and *Scordino*[121] (all against Italy), show more continuity with the pre-pilot-judgments era when, as we had noted before, the Court also had identified defects in the legislation, albeit without using a new code-word "systemic" (or its synonyms).

Why would the Court decide to use, at times, the "full" pilot-judgment procedure, and at other times, show more "restraint", notwithstanding the existence of a "systemic" problem? The sample of full- and semi-pilot judgments is probably still too small to warrant any serious generalization, but the reasoning of Judge Garlicki, writing extra-curially, provides an interesting material. In his brief discussion of the post-*Broniowski* developments, he supplies two criteria which may legitimately cause the Court to opt for a full, unrestrained pilot-procedure. First, he says, such a procedure "can and, perhaps, should be applied in all situations in which the Court comes to the conclusion that other, less convincing, means of persuasion would not appear effective".[122] Second, such a procedure "may also be quite useful in situations where, in a Member State, a stalemate among the proponents and the opponents of a Convention-friendly solution of a problem arises. The judgment of the ECtHR may then serve as an additional argument and tip the balance in the right direction".[123]

To take the second point first, this is, as we have just seen, exactly what happened in *Hutten-Czapska*: the lengthy, drawn-out confrontation between the Constitutional Tribunal and the legislature about the landlords' rights, fits accurately the description of a "stalemate among the proponents and the opponents of a Convention-friendly solution". The decisive intervention of the ECtHR could thus be deemed to have tipped the balance in the direction of the Constitutional Tribunal. When no such confrontation between the domestic institutions can easily be ascertained, such a constitutional-style intervention of the European Court may be ineffective or, worse, counter-productive (i.e., by provoking a backlash against such interference from Strasbourg). But the first criterion provided by Judge Garlicki is even more intriguing: the full pilot-judgment procedure may be a sort of means of last resort, an act of desperation, when the Court has no confidence that other "means of persuasion" (that is, a traditional Strasbourg

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119 Garlicki, "Broniowski" at 190.

120 The concept used by Garlicki, "Broniowski" at 191.

121 See note 118 above.

122 Garlicki, "Broniowski" at 190.

123 Garlicki, "Broniowski" 190.

approach: individualized, particularist, etc) may be effective. This is very revealing, and convincing. When the Court has no reason to trust the State that it will get the message after a gentler, more habitual signal from the Court, it will abandon traditional subtleties and feel no restraint: it will no longer disguise its condemnation of the legislation in the language of individual violation. Significantly, such a lack of trust was expressed in that way towards one of the new CoE Member States – and no wonder.

Judge Zagrebelsky's warning about legitimacy is not forgotten – but at least for some judges the reasons for imperative intervention may be so strong that the fear of a loss of legitimacy of the Court seems misplaced *in those cases*. According, again, to Judge Garlicki: "Other States [than those towards which a full pilot-judgment is addressed] in other situations may show more hesitation as to the scope and manner of [Strasbourg Court judgment's] implementation. *This may put at risk the very authority of the Strasbourg system.* The legal basis of pilot judgments remains relatively fragile…".[124] So there must be something about the Member States towards which a full pilot judgment procedure is applied that convinces the Court that it can afford to abandon its traditional doctrines and behave in a more constitutional mode. What is it? For one thing, the special circumstances (pointed out in the first argument of Judge Garlicki) which suggest that such a strong intervention is necessary in order to effectively compel the State to do something. For another thing, the existence of an "ally" in the Member State in the form of, as in *Hutten-Czapska*, the domestic constitutional court (Judge Garlicki's second point): this greatly reduces the likelihood of the legitimacy-based objections that could be raised by the Member State. But, I would claim, there is also a third chief factor: those Member States have structural, ideological and political reasons to accept the European quasi-constitutional adjudication without much protest and questioning. I will return at a greater length to this point in Part 3.

For the time being it suffices to note that the two first decisions of this type, i.e. "full pilot judgments", and the ones which articulated the nature of pilot judgments most comprehensively, did originate from a Central European State. Surely, this is not merely a temporal coincidence. After all, the political stimulus for this move, exemplified by the Commission of Ministers' Resolution and Recommendation of 2004,[125] was clearly a response to the enlargement of the CoE. One can see a logic in this connection: the generality of the judgment, accompanied by a strongly peremptory tone, is a response to the entrance into the Council of new Member States, many of which have some fundamental, systemic problems in their legislation (at least in light of the standards of the Convention) compared to the established democracies. The gravity and scope of the problems – as exemplified by *Broniowski* and *Hutten-Czapska* – result in a practical erosion of the margin of appreciation (MA) doctrine, at least in those cases.[126] To be

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124 Garlicki, "Broniowski" at 191, emphasis added.

125 See the Resolution and Recommendation mentioned above.

126 In *Hutten-Czapska* the concept of margin of appreciation was barely mentioned: it was invoked in the reasoning once, in the context of assessing a "legitimate aim" of the legislation in question, but it was not relied upon as the decision did not focus on the legitimacy or otherwise of the legislative aims, Hutten-Czapska (2) para 166. This prompted a caustic observation of Judge Zagrebelsky: "the caution shown by the Court in recognising that the State has a wide margin of appreciation when laying down rules in such a difficult area might be merely ostensible", partly dissenting opinion by Judge Zagrebelsky to Hutten-Czapska (2). Earlier, in *Broniowski* [Grand Chamber judgment of 22 June 2004], while the notion of margin of appreciation was used several times (see paras 144, 146, 163 and 166) in the core part of the reasoning, that is when assessing "fair balance", the argument

sure, in abstract terms the Court reaffirmed the MA doctrine as applying to the transitional, post-communist States: "This logic [of MA] applies to such fundamental changes of a country's system as the transition from a totalitarian regime to a democratic form of government and the reform of the State's political, legal and economic structure, phenomena which inevitably involve the enactment of large-scale economic and social legislation".[127] However, no practical use was made of the MA in pilot judgments, and in core parts of its reasoning's, the Court sternly rebutted the Government's reliance on the MA.[128] As a result, there is not a great "margin" that a State (the Polish State, in this case) is left with in light of the operative rulings 3 and 4 of the judgment, as quoted above, which are addressed to it.

The link - between the enlargement and the reduction of the margin of appreciation – has certainly been best articulated by Judge Martens in his famous concurrence in the *Brannigan* case: "The 1978 view of the Court as to the margin of appreciation under Article 15 was, presumably, influenced by the view that the majority of the then members of the Council of Europe might be assumed to be societies which … had been democracies for a long time…. Since the accession of Eastern and Central European States that assumption has lost its pertinence".[129] Patronising though it may sound, this thinking has no doubt affected judges, other lawyers and legal commentators about the need to abandon a more lenient, deferential attitude to Member States with the accession of States whose democratic credentials could not be taken for granted.

3. Contrasting Approaches to "Strasbourg"

Pilot judgments are perhaps the most visible, but not the only, way in which the enlargement of the Council of Europe to the East prompted a "constitutionalization" of the Convention system and in particular of the Court. They are but one of the symptoms of the more general transformation of the Court which moved from the role of a "fine-tuner", oriented mainly at the dispensation of individual justice and operating largely at the fringes of rights, to a much more central role, i.e. that of an arbiter called upon to act when some quite fundamental breaches are asserted, and setting up some general and quite significant legal principles – including on such central aspects of a democratic state as restrictions on political parties,[130] eligibility to run in parliamentary elections,[131]

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from the "margin" was effectively and explicitly rebutted: the Court announced sternly that "margin, however considerable, is not unlimited, and that the exercise of the State's discretion, even in the context of the most complex reform of the State, cannot entail consequences at variance with Convention standards", para 182. On this basis, it decided that : "the Polish State has not been able to adduce satisfactory grounds justifying, in terms of Article 1 of Protocol No. 1, the extent to which it has continuously failed over many years to implement an entitlement conferred on the applicant, as on thousands of other Bug River claimants, by Polish legislation", para 183.

127 Broniowski para 149.

128 See footnote 126 above.

129 Brannigan v. UK, ECtHR judgment of 25 May 1993, appl. No. 14553/89, Judge Martens, concurring opinion, para. 3.

130 See e.g., Christian Democratic People's Party v. Moldova, Judgment of 14 February 2006, appl. No. 28793/02.

131 Melnychenko v. Ukraine, ECtHR judgment of 19 October 2004, appl. No 17707/02.

etc. This affects not only the CEE Member States, of course, but the entire CoE community of democratic States. It is not what many of the original founders hoped for, and not something that they must necessarily appreciate. As one commentator aptly put it, for example the French and British drafters of the Convention "comfortably assume[ed] that the ECHR was merely a Europeanization of their own national practices of respectively *libertés publiques* and civil rights".[132] The perceived activism of the Court, enhanced by the arrival of "anti-establishment" judges from CEE, was observed with concern in the UK where a possible narrowing of the margin of appreciation was feared.[133] So while the enlargement set the stage for an important evolution of the Court itself, the effects were not necessarily welcomed by everyone in the club.

In turn, the transformation of the nature of the decisions themselves, with cases dealing with more serious violations, and therefore requiring more "systemic" solutions, helped to dispel the traditional viewpoint according to which the role of the European Court is limited to repairing malfunctions in the administration of the law, and does not tackle with the law itself. This traditional view, never particularly convincing, was definitely put to rest, most spectacularly by the "pilot judgments", but also more generally by all those judgments which were meant to lead – and did lead – to legislative changes in the Member States concerned, and trough a more precedential and generalized value of the Court's judgments, in other States as well. This law-judging function of the Court makes it more obviously "constitutional" than when the fiction of its role as a sort of super-appellate European Court tasked with finding violations in individual judicial and administrative decisions in the Member States was maintained.

The constitutional turn of the ECtHR has not encountered a universal support in the Western part of the Continent. In his recent article, Nico Krisch puts together compelling evidence of a certain resistance towards the authority of the ECtHR by several West European countries: Spain, France, Germany, Austria, etc. As Krisch concludes, "domestic courts [in these countries] insist on the ultimate supremacy of their own legal order over European human rights law, and they have thus created a zone of discretion in deciding whether or not to respect a judgment of the ECtHR…".[134] The reasons for this "insistence", in my view, are not hard to understand.

First, the founding members[135] of the CoE may feel a sort of "ownership" over the ECHR framework. As mentioned earlier, originally, the system was far from the supranational and quasi-constitutional character it now displays: at the foundation stage the States considered, and rejected, more ambitious supranational schemes, and embarked upon a classical-international design, giving primacy to diplomatic measures over the directly applicable judicial ones. For example, in the case of France, it corresponded to its general mistrust against a supranational control in the arena of "public liberties" and its general preference for diplomatic rather than supranational measures in the field of international law.[136] The British approach was not dissimilar.[137]

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132 Madsen at 144.

133 Harmsen at 23.

134 Krisch at 215.

135 This characterization of course applies only to some of the case studies analyzed by Krisch, not to Austria (joined the CoE in 1956) and Spain (1977).

136 See Madsen at 145.

137 See Madsen at 146.

More generally, Mikael Rask Madsen observes that "the postwar universalization and Europeanization of human rights … was far from free from conventional strategies of safeguarding national sovereignty and interests".[138] So the recent constitutional tendencies may be seen as a departure from, or worse, a betrayal of, the design to which West European democracies agreed to in 1950. (Another symptom of departing from the original, international-law based design to a model of an autonomous supranational tribunal is a massive under-use, bordering on non-existence, of the interstate procedure under Article 24 of the Convention: the disproportion between the practice of interstate procedures as compared to individual petitions is striking).[139]

Second, there may be a legitimate feeling among many of the West European States, especially among their executive branches and bureaucracies, that they have not much to learn from the other European States (and certainly not from the recently democratized ones) in the domain of human rights - France with its proud tradition going back to the Declaration of Rights of Man and Citizen, the United Kingdom with its commitment to common law as the paramount guarantor of individual liberty, Germany with its strong dignity-based constitutional rights forged as a response to the horrors of the Third Reich and subsequently consolidated by the progressive case law of the Karlsruhe Court etc.. And they do not necessarily look to Strasbourg to learn how to protect their citizens' rights. Or at least, they do not feel that they need to. Hence a certain degree of complacency, on the part of lawyers from West European States about the consequences of joining the ECHR. As a leading UK constitutional lawyer commented in the early 1960s: "The rights and freedoms there proclaimed [in the ECHR] were, to a very large extent, already recognized in English law – not as formal constitutional or statutory guarantees but as residual rights, liberties and immunities of the individual".[140] This attitude is partly a matter of self-satisfaction (perhaps even arrogance) and partly of well-founded feeling that, at times, complying with supranational human-rights adjudication may result in a *lowering* rather than an improvement of the standards of protection of human rights. An Italian legal scholar Massimo Luciani provides an example in the case of freedom of commercial information: in the case law of the Italian law constitutional court it is interpreted as part of economic freedoms and is given only a limited protection, while the ECtHR articulates it as part of freedom of expression and thus awards it a much higher level of protection.[141] Professor Luciani thus concludes: "It is clear that the introduction of the Strasbourg court case law in Italy would have a consequence of enriching the protection

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138 Madsen at 147-48, footnote omitted.

139 Under Article 24 of the Convention, each Member State can complain about a violation of the Convention by another Member State. Until now (October 2008), only 22 applications by States were lodged in this form. But even this low number understates the usage of this procedure because there have been multiple applications triggered by one and the same alleged violation. In fact, only nine situations in different Member States have generated an interstate complaint under Article 24.

140 Professor S.A. de Smith, quoted by David Seymour, "The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks", *Connecticut Journal of International Law* 8 (1993): 243-261 at 251.

141 Casado Coca v. Spain, ECtHR 24 February 1994.

of rights only in an illusory way considering the severe implications it would have towards the protection of privacy".[142]

The unreserved incorporation of supranational case law as binding in a domestic system may often be perceived, justifiably, as not taking into account local traditions and understandings (this is the concern which lies behind the doctrine of margin of appreciation). Consider the Spanish case of *Moreno Gómez*,[143] which raised the issue of whether high noise level is a violation of a constitutional right of privacy. The Spanish Constitutional Tribunal was rebuked by the Strasbourg Court which concluded to a violation of Art. 8, notwithstanding the Spanish Tribunal's view to the contrary. But the national court's approach may be well understood "in a rather noisy country where tolerance levels are high".[144] (A similar earlier case, also originating from Spain, concerned the effect of environmental pollution: the ECtHR found a violation of Art. 8[145], while earlier the Tribunal had refused to consider it as a violation of constitutional rights). As a leading Spanish constitutional lawyer and President of Council of State noted, the right to environment proclaimed by the Spanish Constitution is not classified as a "fundamental right" and thus does not give rise to a "*recurso de amparo*".[146] This line of cases caused a degree of criticism in Spain. As Francisco Rubio Llorente complained, "the decisions of the ECtHR condemning Spain are generally interpreted [in Spain] as a disavowal of national judges, whose authority is therefore weakened"[147]. Yet another example of a different balancing of competing values involved in the proportionality test can be provided by the divergence between the Strasbourg Court and the German Federal Constitutional Court in the famous case regarding Caroline of Monaco:[148] the European Court found that in the balancing of the protection of the right to privacy (Article 8) versus the freedom of the press (Article 10), the German Court had improperly privileged the latter because the published photos did not "come within the sphere of any political or public debate",[149] and also criticised the characterisation of Caroline of Monaco as a public figure when "the interest of the general public and the press [in her] is based solely on her membership of a reigning family, whereas she herself does not exercise any official functions"[150]. One can understand that in cases such as these, reasonable people may disagree about the proper balancing of such competing values in specific contexts, and share the frustration of national judicial (and other) institutions about the supranational tribunal's eagerness to overturn the national

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142 Massimo Luciani, "Italie", in Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant 2007): at 217 (my translation).

143 Moreno Gómez v. Spain, judgment of 16 November 2004, appl. 4143/02.

144 Krisch at 190.

145 López Ostra v. Spain, ECtHR judgment of 9 December 1994, app. 16798/90.

146 Francisco Rubio Llorente, "Espagne", in Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant 2007): at 163-64 ("Les décisions de la CourEDH condamnant l'Espagne soint couramment interprétées [en Espagne] comme autant de désaveux aux juges nationaux, dont l'autorité se trouve ainsi affaiblie").

147 Rubio Llorente at 165.

148 Von Hannover v. Germany, ECtHR 24 June 2004, appl. 59320/00.

149 Para 64

150 Para 72.

judgments on such fine distinctions and weighing and balancing. That is why, in much of the commentary originating from Western Europe there is a strong degree of scepticism about the primacy of Strasbourg law over domestic constitutionalism, based on a by-and-large high confidence in the domestic level of protection of human rights. In addition, Western Europeans like to point out that domestic constitutional protection enjoys a higher degree of democratic legitimacy as it can be modified and amended more easily, through democratic means, than the European Convention.[151]

None of these considerations, which would warrant a degree of "resistance" towards the constitutional turn of the European Court from the original members of the CoE, apply to its new Member States, and especially those from CEE.

First, they are the late joiners; they have not had any input in the original design so in no way can they feel a sense of ownership over the original framework. They have acceded, on a "take it or leave it" basis, with no opportunities for exemptions, reservations or opt-outs, and with the full awareness that the Court had, at the point of their accession, long embarked on a "living instrument" approach of the Convention, interpreting it in light of its own understandings of the changing standards of human rights. So there is no room for disappointment, frustration, and protest that what you see is not what you get.

Second, CEE states have hardly a reason to believe that they are there to teach, not to learn. After many decades of authoritarian Communism, with its total neglect for individual rights and for democratic process, the Europeanization process of these transitional States involved a steep learning curve. The main purpose behind the accession to the CoE, and one of the main reasons for joining the EU, was to consolidate those democratic gains which have been achieved after the "round tables" in Poland and Hungary, "velvet Revolution" in (then) Czechoslovakia, or the dramatic riots in Romania etc. "Consolidation" was the *mot d'ordre*: democratic changes were at first unstable, endangered by the slide into nationalistic or populist authoritarianism, unprotected by deep constitutional and institutional reform, and most dangerously, they could not be entrenched more broadly in a democratic political culture. One way of making the changes more resilient was to back them up with international – and mainly European – supports: not so much with the idea that foreign influences would counter authoritarian temptations, but rather that they would provide the necessary support for domestic democratic and liberal evolutions and trends. And in Western Europe's point of view, the democratization of CEE was seen as the best guarantor of stability and peace in the Continent – a lesson well confirmed by the Balkan dramas.[152] Elsewhere, I have discussed at some length this democracy-consolidation aspect of the accession to

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[151] See Eivind Smith, "Pays scandinaves", in Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: conculrrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant 2007): at 273-4

[152] This link between stability and the observance of human rights was explicitly drawn at the first summit of the CoE held in Vienna: "The end of the division of Europe offers an historic opportunity to consolidate peace and stability on the continent. All our countries are committed to pluralist and parliamentary democracy, the indivisibility and universality of human rights, the rule of law and a common heritage enriched by its diversity", The Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe, 9 October 1993, available at https://wcd.coe.int/ViewDoc.jsp?id=621771&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

the European Union;[153] this can be evidenced even more strongly with the accession process to the ECHR system.

Thirdly, public opinion and legal and political elites in CEE countries were only very slightly – if at all – concerned about the effects of the supranational law of the ECHR upon their newly regained sovereignty. This contrasts greatly with the subsequent accession to the EU where the paradox of "surrendering sovereignty" only a few years after regaining it was much more evident, and triggered strong anti-accession protests, mainly from nationalistic parties and movements. This may have accounted partly for a relatively low support for accession to the EU in at least some of the CEE countries. But the situation with the Council of Europe and the ECHR system was very different: not only because of a more obviously inter-governmental nature of the Council and a less "intrusive" character of the ECtHR than that of the ECJ, but mainly because of the specificity of the CoE portfolio. If there is one obvious domain in which the concerns about national identity and the accompanying notions of sovereignty are particularly weak in CEE, it is in the area of protection of individual rights, be they civil and political, or socio-economic.[154] The legacy of the communist era, during which individual rights were crushed, is still fresh in many people's minds. In those days, "intervention" from outside – in diverse forms ranging from official State policy (e.g., under the Carter administration), through NGO actions (especially Amnesty International, the Helsinki Committee, and similar) to foreign media reports on human rights abuses in the USSR and its satellite States – was uniformly condemned by CEE Communist governments as "interference in internal affairs", while it was applauded by many citizens of these States. In this context, hardly anyone (other than those acting in an official capacity) took an offence at such intervention as jeopardizing national identity or sovereignty. Indeed, it was often perceived as the only source of hope in an otherwise grim situation, especially in light of still poor systems of individual rights enforcement. While the constitutional *texts* of charters of rights are by and large satisfactory,[155] the record in terms of administrative non-compliance is much less impressive, with inefficient and under-resourced systems of justice.

This explains why the Strasbourg Court ranks so high in the minds of the general public in CEE States,[156] even though – as we have seen – the European Convention's system has already affected the sovereignty of European States in multiple ways, e.g., by providing individuals with direct access to an independent European body to complain about their own governments, by requiring domestic (constitutional and "ordinary) courts to incorporate ECtHR case law, by prompting legislatures and executives to align their laws and policies with the case law of the EctHR etc. Indeed, no serious and perceptible objections to these "violations of sovereignty" committed by the Strasbourg

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153 Wojciech Sadurski, "Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe", *European Law Journal* 10 (2004): 371-401.

154 See more, Wojciech Sadurski, "The Role of the EU Charter of Rights in the Process of Enlargement", in George A. Bermann & Katharina Pistor, eds., *Law and Governance in an Enlarged European Union* (Hart: Oxford 2004): 61-95 at 71-86.

155 See Wojciech Sadurski, "Charter and Enlargement", *European Law Journal* 8 (2002): 340-62.

156 Robert Harmsen correctly assessed that "expectations of what may be accomplished through the Strasbourg system appear to run comparatively high in the [CEE countries]," see Harmsen at 27.

Court have been, to my knowledge, raised in CEE; not on a large scale, anyway.[157] On the contrary, at the level of civil society, "Strasbourg" is often perceived as the last resort for those who claim that rights has been violated, and its emotive and symbolic significance in public imagery is unequivocally positive.

All these considerations lead to the conclusion that CEE countries have had no reasons to fear that accepting unreservedly the supremacy of European standards for the protection of human rights would result in a lowering of domestic standards: "domestic standards" were viewed with mistrust and concern by local liberal-democratic elites, including the legal community, and in particular those favourable to, or recruited into, constitutional courts and their circles of advisors and friendly commentators. "Europeanization" (and centrally, the absorption into the ECHR system) was perceived, at least by those crucial segments of public opinion, as a doubtlessly good thing, and any resistance to it was viewed as triggered by anti-democratic forces, either longing for the *ancien regime*, or moved by populist, nationalistic and authoritarian motives. In fact, "Europeanization" through joining the CoE might have been seen as a good strategy of "self-binding" by a democratic-liberal elite of the State: such self-binding, as Andrew Moravcsik claimed, is of most use precisely to the States newly emerging from non-democratic rule, because they have "the greatest interest in further stabilizing the domestic political status quo against non-democratic threats".[158] In light of the weak sanctions for non-compliance, and very weak incentives on individual States to put pressure on other States for compliance (as evidenced, in the case of the ECHR system, by the weakness and under-use of the interstate claims mechanism), such a "self-binding" may be the best explanation for joining *and staying* in the CoE. This created the ground for an ideological basis conducible to full and enthusiastic embrace of "Euro-friendly" legal and political approaches. To put it sharply, an "intervention from Strasbourg" was seen as an important and highly appreciated additional guarantee of the correct path and irreversibility of the democratic transition.

But there is more to it than the three factors just listed: the lack of "ownership" over the ECHR system, the lack of conviction that a country may lose, not only gain, from accepting unreservedly Strasbourg intrusions, and the lack of concern as to the loss of sovereignty that would result from the alignment with ECHR system. One of the most important institutional factors was the incentive on the constitutional courts of the region to build a strong alliance with the ECtHR in order not only to pursue their ideological visions of progressive development of human rights, but also in order to build institutional capital to protect themselves in their confrontation with powerful executives and legislatures in their own countries. I have described above the way in which, in the case of the "pilot judgments", a close link was built between the constitutional courts and the ECtHR in order to enhance the legitimacy of the Strasbourg Court's "meddling in what national legislation should or should not do" (to

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[157] There have been some exceptions, though. During the term of Jarosław Kaczyński in Poland, his Deputy Prime Minister and leader of a far-right nationalist party LPR (League of Polish Families), Roman Giertych, suggested in public that Poland should consider withdrawing from the CoE after the ECtHR judgment in the case of Alicja Tysiąc v. Poland, judgment of 20 March 2007, appl. 5410/03. The appeal *was* unsuccessful, but Mr Giertych (for unrelated political reasons) lost his position in the government soon after.

[158] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in postwar Europe", *International Organization* 54 (2000): 217-52 at 220.

use Judge Zupancic's words).[159] But this alliance has also a powerful significance in the domestic realm, and not only in Strasbourg: it is a formidable asset gained by the Constitutional Court which is no longer lonely and helpless in its confrontation with the political branches of the State. And, as it happens, such an asset is badly needed. The last years, in particular, have witnessed some tough attacks launched by the Presidents, governments or the leaders of legislative majorities against constitutional courts in various States of the region.

For instance, the Polish Constitutional Tribunal was targeted as a major enemy by the governing elite which came to power after the double elections of 2005 (presidential and parliamentary), and as an obstacle to the allegedly pressing reforms that the new elite intended to pass.[160] Indeed, after the 2005 political handover, the Tribunal took several decisions which went clearly against the plans and preferences of the new President and government.[161] These decisions placed the Tribunal on a collision course with the new President, the parliamentary majority and the government. And the then Prime Minister Jarosław Kaczyński warned of changes in the system of appointment of judges (in particular, of the Tribunal's President), both as a threat and in order to discipline the Tribunal.

The Czech Constitutional Court has also undergoing through turbulent times over the recent years. And, for a much longer period than its Polish counterpart, it has had to face the openly hostile attitude of the executive and the parliamentarians alike. The conflict reached its apex after Vaclav Klaus became President in 2003 and basically blocked the Court's functioning by not appointing new judges. At one point (in 2004), due to this non-appointment, the Court lost its power to decide on the constitutionality of laws because the number of justices had fallen below twelve, which is the minimum number to declare laws unconstitutional.[162] When President Klaus eventually formally nominated his candidates, he did it by deliberately avoiding any prior consultation with the Senate, effectively ensuring that they would not get sufficient support (the judges of the Court are appointed by the President "with the consent of the Senate"): by the end of 2005, the Senate had rejected seven nominations. After the Court found unconstitutional a dismissal of a Supreme Court President, Klaus denounced the Court decision as "an example of judicial corporativism" [sic] and a "threat to democracy". The general public opinion often seemed to be supporting the President in this contest.

My third example is the Romanian Constitutional Court – admittedly not the most activist of the courts in the region – which has been regularly under the fire of the main political actors for taking decisions which are not to their liking. When in 2005 the Court struck down as unconstitutional several key aspects of the law reforming the

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159 See text accompanying note 102 above.

160 This governing majority lost the parliamentary election of late 2007, but President Lech Kaczynski – whose term of office lasts until 2010 – has been also part of this anti-Constitutional Tribunal tendency.

161 See more on these decisions, Wojciech Sadurski, "'*Solange*, Chapter 3': Constitutional Courts in Central Europe – Democracy – European Union", *European Law Journal* 14 (208): 1-35 at 32-33.

162 For a detailed description, see Zdenek Kühn and Jan Kysela, "Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic", *European Constitutional Law Review* 2 (2006): 183-208 at 196-205.

justice system,[163] Prime Minister Calin Popescu Tariceanu accused it of obstructing the reform process necessary for the accession to the EU, and threatened to resign and call for early elections. (He subsequently dropped this idea). Following this, some politicians implied that a number of judges were in a position of conflict of interests. Even harsher criticisms and accusation of conflicts of interests (including those made by Prime Minister Tariceanu) were launched when, in November 2005, the Court struck down a number of provisions of parliamentary standing orders.[164] In such an atmosphere it was not surprising that in February 2006, a leader of one of the main political parties should call for the abolition of Constitutional Court.[165]

So as one can see, many constitutional courts in the region are in a politically precarious position, and being aligned with a prestigious and powerful European tribunal, endowed with a high degree of legitimacy derived from States' international obligations, may be appear as a God-sent gift in domestic contexts of vulnerability and conflicts. In a recent study, I explored the attitude of some leading CEE constitutional courts towards the principle of supremacy of *EU* law. I suggested that the attitude of "resistance", in a *Solange*-like fashion, to the supremacy of EU law over the constitutional laws of nation-states can be at least partly explained by domestic inter-institutional relations in new Member States.[166] For constitutional courts, placing themselves in the position of guardians of the degree of transfer of sovereignty to the EU considerably strengthens their own position vis-à-vis the legislature and the executive. It is clear that, from the point of view of the strength and scope of constitutional courts' authority, the choice of a proper balance in the relationship between national and European law is not a neutral matter: a strong national sovereignty principle strengthens the role of constitutional courts while the acceptance of the absolute European supremacy rule weakens it. By accepting the supremacy of EU law, national courts would effectively cede their authority as the guardians of constitutionality to the ECJ where the principle of supremacy applies.[167]

What is perhaps less obvious is that this reliance on the national supremacy rule in the context of EU law strengthens the Courts' position on *two* fronts: *vis-à-vis* the European Court of Justice, *and also vis-à-vis* the other national institutions, including the legislature and the executive. By reaffirming their own role as guardians of European-national relations, national constitutional courts thus reinforce their own position *vis-à-vis* the parliament (for example, by directing it to adopt a constitutional amendment, with the decision of the Polish Tribunal on the European Arrest Warrant as a case in point)[168] or *vis-à-vis* the government (by instructing the administration how far it can go

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163 Decision no. 375/2005 of 6 July 2005.

164 Decision no. 610/2005 of 14 November 205.

165 Mr Teodor Melescanu, vice-president of PNL (National Liberal Party).

166 By "*Solange* story" I understand a tradition of resistance, by many European constitutional courts, to the supremacy of EU law over national constitutional systems on the basis that national constitutional courts are the ultimate guardians of democracy and the protection of constitutional rights. See Sadurski, "*Solange*, chapter 3", at 2-3.

167 See, similarly, Mathias Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", *ELJ* 11 (2005): 262-307at 281.

168 On the 27th of April 2006, the Polish Constitutional Tribunal (Decision P 1/05) found a provision of the code of criminal procedure implementing the European Arrest Warrant (EAW) inconsistent with the constitutional prohibition of extradition of Polish citizens; at the same time, the Tribunal

in the domains covered by European competence: the Czech decision on sugar quotas is an example here).[169] Both are very important prerogatives. The power to determine that a particular matter requires a constitutional amendment gives the courts a role, which was once described by Louis Favoreu as that of a "pointsman" (*l'aiguilleu*r).[170]According to this theory, a judgment of unconstitutionality "merely" amounts to finding a lack of competence of the ordinary legislator and a directive to follow a constitutional path: indeed, the prerogative is that of the *pouvoir constituant* rather than that of the *pouvoir constitué*. This is a formidable role - that of the guardianship of when the constitutional track needs to be taken to adopt a decision on a particular matter. The constitutional amendment procedure is of course costly and often risky, especially where the governing majority cannot muster a constitutional-change majority. In effect, this prerogative provides the court with an ability to shift political resources from the governing majority to the parliamentary opposition. The second prerogative (to rebuke the administration for overstepping its competences) consolidates the court's position as the main guardian of the separation of powers, and as a regulator of the actions undertaken by the executive. In terms of a purely domestic power game, deciding on the status of the European supremacy rule is therefore a valuable and effective asset for Constitutional Courts to enhance their position vis-à-vis other domestic political actors.

Therefore, the relations between national constitutional courts and EU law must be explored by taking into account their "vertical" dimension but also a "horizontal" one. *Mutatis mutandis* such an institutional analysis may apply to the subject-matter of this article, that is, to the relationship between national constitutional courts and the ECHR system – but in this case, "*mutandis*" describes something very vast. Indeed, national constitutional courts do not need to *resist* the leading role of ECHR law in order to build their institutional capital – as is the case with EU law. Indeed, for courts to simply accept the supremacy of EU law over national constitutional law, would amount to rendering themselves largely redundant. But the *manner* in which ECHR law operates *vis-à-vis* Member States is different, and even the primacy of ECHR law over national constitutional law (including over national constitutional adjudication) will not render constitutional courts unnecessary. To the contrary, the requirement of the exhaustion of national remedies (with constitutional complaint, wherever it is available, considered one of the remedies that need to be exhausted before bringing a case to Strasbourg)[171] indicates that the constitutional court will always retain its role, at least as a gatekeeper.

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suspended the effects of its decision for 18 months (the maximum it was allowed to) in order to give the legislature enough time to sort out the problem. The politicians got the message, and as a result of a surprisingly smooth cooperation between the President, the governing coalition and the parliamentary opposition, the Constitution was duly amended on the 8th of September 2006, and by adding the appropriate exception to the general ban on extradition, the clash between the EAW and the Constitution was removed.

169 The Czech Constitutional Court annulled, in its decision PL US 50/04 of 8 March 2006, governmental regulations on production quotas for sugar producers on the basis that the government has exercised a competence, which had been already transferred to the European Community; for discussion, see Solange at 6-9.

170 Louis Favoreu, *La politique saisie par le droit* (Paris: Economica, 1998) at 30.

171 Whether and what domestic constitutional remedies have to be exhausted for an application to be admissible in Strasbourg is a matter of a certain controversy, for two independent reasons. First, there is a great diversity in Europe as to the availability, for individuals, of constitutional complaints and the rule of standing etc. Constitutional complaints procedure (of the *amparo* type) may also be

Most importantly, national constitutional courts do not need to consider the ECtHR as a rival in adjudicating on the relationship between domestic and European law – in the way in which they may legitimately regard the ECJ. The principles of supremacy and direct effect of EU law trigger a competition about who is the ultimate umpire when EU law seems to collide with national constitutional law. But no such collision needs to occur between the domestic courts and the ECtHR. There is no way in which the ECtHR might ever declare a national constitutional law or practice to be inconsistent with the law of the Convention *with such an assessment having a direct effect*; there is no way the ECtHR may declare a statute "unconventional" (inconsistent with the Convention) with the direct effect of invalidating the statute. So the ECtHR has no – alleged or real – powers, which may ever intrude upon the constitutional courts' most cherished functions. Furthermore, domestic lower courts have no direct access to the ECtHR, compared to the direct access they may have to the ECJ, *via* the procedure of preliminary references. Constitutional courts do not need therefore to fear becoming marginalized, or isolated, on this account.

To conclude, in the "vertical" dimension there is no analogy between the courts/ECJ relationship and the courts/ECtHR relationship. In turn, in the "horizontal" dimension, the best way for constitutional courts in their inter-institutional rivalry with other branches of the State is to ally themselves with the ECtHR, and try to build a common front against the legislature or the administration. The support provided by the ECtHR is an important asset in the institutional capital of these courts – without the liabilities which would be engendered in the case of a partnership by placing themselves in an awkward situation as regards the principle of national sovereignty. As suggested above, when human rights are at stake (in contrast to the typical realms of application of EU law) such sovereignty objections would carry very little weight. Constitutional courts have thus no incentives to resist the Convention law and in particular the partnership with the ECtHR, and on the contrary many reasons to promote such a partnership.

4. Partnership with Strasbourg: CEE Approaches

There are many other ways in which constitutional courts engage in a partnership with the ECtHR – and for reasons just mentioned, CEE constitutional courts have particularly high incentives to do so. In turn, the ECtHR has incentives to be engaged in this partnership as well because it strengthens its legitimacy *vis-à-vis* the member States. Thanks to the "piercing of the veil of the State" process, the ECtHR cannot be accused of usurping a role well beyond the scope of the functions devolved to it by Member States. In the following remarks, I will briefly outline some of the models of such partnership.

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unduly restrictive, lengthy etc. Thus, in the opinion of many constitutional lawyers and constitutional courts, "appeals for constitutional protection need not be made before the case is referred to the European Court", even though, of course, it is the ECtHR which is the ultimate umpire on admissibility. See General Report, supra note*, at 329. Second, the ECtHR has often proven to be very flexible and liberal in its interpretation of the principle of exhaustion of domestic remedies, especially when the domestic judicial system is less than perfect, see e.g. Akdivar v. Turkey, judgment of 16 September 1996, appl. 99/1995/605/6, para 69.

First, and this is perhaps the least surprising, CEE constitutional courts very frequently refer to the judgments of the ECtHR in their decisions.[172] It is often a purely perfunctory, ritualistic rhetoric – but even the rhetoric has its consequences. It maintains the presence of the European Court in the official discourse, it enhances its own legitimacy in the eyes of the public opinion and political actors, and it sends a message of partnership to domestic and external audiences. As a Hungarian legal scholar notes, the references to the Strasbourg Court's case law "advanc[e] the Constitutional Court's legitimacy at home and further[] its reputation abroad".[173] It might also be a matter of a national judge's personal reputation: as observed by a judge of the Polish Constitutional Tribunal, the failure to comply with the ECtHR's case law in the Tribunal's judgment would no doubt risk being recounted and denounced in a dissenting opinion attached to the judgment. It would also be considered "unprofessional" by the legal community.[174] There is clearly a sense of "*noblesse oblige*" in aligning oneself with the Strasbourg Court.

Second, the references to the judgments of the ECtHR serve as an argument to support the domestic judgment. It is rarely, if ever, used as a sole and independent argument, but often as an auxiliary argument (to support the domestic court's ruling) or an interpretive aid in construing the national constitution. According to prevailing doctrine, the constitutional court will follow the ECtHR's case law when the Strasbourg doctrine is more rights protective than the established domestic constitutional level of protection. However, if the Court establishes that the domestic constitutional case law provides for a higher level of protection, it will usually not refer to the ECtHR. The more rights-protective level thus prevails. So there seems to be something of a "ratchet" mechanism at play: an appeal to the ECHR (and the Court case law) will automatically result in an improvement of the protection.

Third, constitutional courts occasionally change their own established case law in order to comply with the ECtHR's case law. In the case of CEE countries, which joined the ECHR system when it already had a reasonably solid *acquis*, this may be easier to do than in the case of the constitutional courts of countries, which built themselves along the ECHR system for several decades. As an example consider the Romanian Court's about-face: after it "discovered" the ECtHR case law on the scope of the right of the accused to be represented in court *in absentia*,[175] it moved away from its earlier stance and decided that the prohibition for the accused to be represented in his absence (provided for in the criminal code) was not a guarantee, but rather an unjustified restriction on the right of the defence.[176]

This is the theory – but reality may occasionally be less bright. There is a problem of relative ignorance of the ECtHR's case law, though such ignorance is admittedly more

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[172] As a random example, consider the case of the Romanian Constitutional Court. A research of the Court's case-law on its Internet portal shows that in the period 2004-2007, there have been, for each of these years, 108, 149, 202 and 224 cases containing references to the Convention. I am grateful for this research done by Dr Alina Stanciulescu.

[173] Renata Uitz, *Taking Courts to Court: The Story of Compliance with Strasbourg Jurisprudence in Germany* (unpublished draft 2008, on file with the author), at 2.

[174] Interview with a judge of the Constitutional Tribunal, Warsaw, 1 June 2008.

[175] Including Poitrimol v. France, judgment of 23 November 1993, appl. 14032/88.

[176] Decision 146/2000.

prevalent at the level of lower, "ordinary" courts than at the level of "elite" constitutional courts.[177] And there are occasional cases of dissonance between the ECtHR's case law and that of the constitutional courts. One example is provided by Romania: even though the ECtHR has at least twice specifically found that violations of the Convention in the Romanian rules giving the public prosecutor extensive quasi-judicial powers and powers regarding pre-trial detention,[178] the Constitutional Court subsequently upheld the constitutionality of the provisions.[179] Surprisingly (and non-typically) it was the legislature which eventually brought the Criminal Procedure Code in line with the Strasbourg decisions, greatly reducing the powers of the public prosecutor. This stand of the Romanian Court was dubbed by a Romania legal scholar, perhaps with some exaggeration, "The rebellion of the Constitutional Court of Romania against the European Court of Human Rights", and a violation of Romania's international obligations.[180]

In the end it should be stressed that the interaction of the kind at play in the *Hutten-Czapska* case may occur between the national court and the ECtHR *without* culminating in a pilot judgment and yet very significantly undermining an authoritarian policy or the law which does not properly protect individual rights. Consider the case of *Bączkowski* – a particularly significant case because it illustrates well a symbiosis and indeed, mutual reliance and reinforcement, between the decisions of a domestic court and the ECtHR in their partnership against an illiberal political action. The case originated from the ban issued by the Mayor of Warsaw, Lech Kaczyński (who subsequently became President of Poland) of a gay parade ("Equality Parade)" to be held on the 12 June 2005. The ban was officially based on the Road Traffic Act, which was eventually struck in January 2006 as unconstitutional by the Constitutional Tribunal, in so far as assemblies were concerned. In a long and very liberal decision,[181] the Tribunal developed a broad interpretation of the right to assembly as part of the constitutional freedom of expression, the implication being that the State has the obligation to refrain from hindering its exercise and to ensure that it is enjoyed by various groups despite the fact that their views may not be shared by the majority. Consequently, only the registration of an assembly rather than authorisations or licenses issued by the State should be required. Importantly, the Tribunal's judgment cites several decisions of the ECtHR in order to announce these "generally accepted rules"[182]: that the threat of a counter-demonstration must not be used as an argument to justify the restriction, that the burden of guaranteeing the security of demonstrators rests upon public authorities, that

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177 See Magda Krzyżanowska-Mierzewska, "The Reception Process In Poland and Slovakia" in Keller & Stone Sweet, *A Europe of Rights* 531-602 at 592.

178 Vasilescu v. Romania, 22 May 1998 appl. No. 53/1997/837/1043 (in this case, the ECtHR found a violation of Article 6 because it decided that giving certain judicial powers (regarding civil cases for restitution) to a public prosecutor amounted to a denial of "access to tribunal"), see Pantea v. Romania, 3 June 2003, appl. No. 33343/96 (here, the European Court found that the public prosecutor who orders pre-trial detention is not an "officer" for the purposes of Article 5.3 of the Convention).

179 E.g. Decision 108/1998 of 14 July 1998.

180 Popescu, Part 6.

181 D K 21/05 of 18 January 2006.

182 In Part 4 of the reasoning of the Tribunal.

the permission to hold a demonstration is separate from acceptance of the message of the assembly, etc.

In the meantime, the case also went to the European Court of Human Rights (the application was filed a month before the Tribunal's judgment, and was declared admissible in December 2006), which rendered its decision in May 2007.[183] The Court found a violation of three articles of the Convention: Articles 11, 13 (in conjunction with Article 11) and 14 (also in conjunction with Article 11). On the crucial violation, i.e. that of Article 11, the Court rested its judgment on the first prong of its standard three-tier scrutiny, namely that the restriction of the right was not "prescribed by law", because the ban on the parade was subsequently (but before the Constitutional Tribunal's decision) found unlawful by two local authorities in Warsaw.[184] Hence, there was no need to scrutinize the legitimacy of the aim and the necessity of the interference. Importantly, the Court referred positively to the Constitutional Tribunal's judgment, which was described very approvingly and in some detail.[185]

But there is at least one other interesting point where the European Court went beyond the Tribunal's argument. When discussing the violation of Article 14 (non-discrimination), the Court commented on the "strong personal opinions publicly expressed by the Mayor [of Warsaw] on issues directly relevant for the decisions regarding the exercise of the freedom of assembly".[186] These "strong personal opinions" are evidenced by some mildly shocking statements made by Mr Lech Kaczyński in an interview to a leading Polish daily in May 2005, and were quoted at some length in the ECtHR's judgment itself. Their flair is well summarized by this response of the Mayor to a question raised by the journalist: "Is this correct that the exercise of people's constitutional rights depended on the views of powers that be?" – "In my view, propaganda of homosexuality is not tantamount to exercising one's freedom of expression".[187] Having noted that the Mayor expressed these views while the request to hold a parade was had already been submitted to the municipal authorities, subordinate to the Mayor, the Court concluded that "his opinions could have affected the decision-making process … and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner".[188] This is quite an unusual rebuke (by ECtHR standards) of a politician feeding anti-gay prejudices and hostility. It certainly adds to the force of the reiteration, made earlier by the domestic Tribunal, of the scope of the freedom of assembly: by referring to public political statements, it emphasises the importance of political speech as a potential device of discrimination, as it had clearly triggered the political action in this case.

183 Bączkowski v. Poland, judgment of 3 May 2007, Applic. No. 1543/06.

184 Para. 70.

185 Paras, 39-42 and 71,

186 Para. 100.

187 Para. 27.

188 Para. 100.

5. So is the European Court of Human Rights *Constitutional*?

In the writings about ECtHR, various standards of what makes up a constitutional court are used, and depending largely on those different standards, different conclusions are reached. Most fundamentally, two different – indeed opposite – views on what counts as the "constitutional" character of the Court are noticeable in the literature. There are those, on the one hand, who take the view that a constitutional court is characterized by the fact that it operates, so to speak, in the penumbrae of the legal system, with the role of a fine-tuner of legal rules.[189] Typically, though not only, it is revealed in the fine balancing used in the proportionality test – arguably not relied on to dismiss fundamental political choices, but rather to correct specific choices made in the complex weighing and balancing of competing values in a particular context. And, on the other hand, there are those who believe that constitutional courts serve to intervene on the very basics of the legal system, and to strike down only the most egregious forms of legal and political wrongs.[190]

Both of these views carry some weight. The strength of the first approach – that of the constitutional court as a fine-tuner – rests on a concern with legitimacy, or, to use the American parlance, desire to avoid "counter-majoritarian difficulty". If the role of the Court is confined to corrections at the margins, for which lawyers may be well qualified, then no major clash with the principles of representative democracy need occur. Fine corrections of e.g. defamation standards or rules relating to the rights of a criminal defendant may well be entrusted upon a body composed of eminent lawyers, even if their democratic pedigree is only indirect, and they need not – indeed, must not – operate under the pressure of current societal preferences. In turn, the strength of the second approach also draws on the legitimacy question but in a different way: it relies on the view that judicial constitutional review is an emergency procedure, employed when routine democratic mechanisms fail, and when legal aberration is so egregious that extraordinary, non-majoritarian devices have to be employed.

The problem with the choice of one or the other conception of what accounts for the "constitutional" character of a court is that, in the end, such choice is made on intuitive, "inductive" grounds: we identify a court, or a number of courts, which we intuitively consider undoubtedly "constitutional", and then generalize their characteristics to establish criteria of constitutionality. And yet, in our specific context such method does not bring any determinate results. Indeed, paradigmatically "constitutional" courts engage both in fine-tuning and in intervention in (what they consider to be) egregious violation of basic rights. If one selects, for example, the Supreme Court of the US as a paradigmatically constitutional court of the system of concrete review, and the German

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189 See e.g. Seymour at 259-62. Seymour draws an alternative for the future of the ECtHR (as of 1993): either it will become "a supra-national *constitutional* court determining a limited range of civic and political rights; refining its already sophisticated jurisprudence in the application of the limited rights set out in the ECHR…", or it will "devote its undoubted reputation and limited resources to examining and policing the abuse of those human rights which are recognized by everybody as abuses whatever their cultural heritage" at 159-60 (emphasis added). Keller and Stone connect the function of judicial fine-tuning (through the proportionality test) with the constitutional nature of the Court, see Keller and Stone Sweet, "Assessing" at 698-701 (with the proviso that "[p]roportionality analysis … is an inherently constitutional mode of adjudication", id. at 699, reference omitted, and that "[p]roportionality is an instrument *par excellence* of judicial fine-tuning…", id. at 700).

190 See e.g. Harmsen at 32, 36.

Federal Constitutional Court as an iconic constitutional court of the abstract model, one can find confirmation for both criteria. No doubt, they have massively and most of the time engaged, over their institutional lives, in subtle fine-tuning. But they have also intervened on the basics. Thus, the United States Supreme Court struck down, as unconstitutional, racial segregation in schools,[191] criminal prohibitions of abortion (at certain stages of pregnancy),[192] death penalty (for some time, at least) or state aid to parochial schools,[193] while in turn the German Court outlawed the liberalization of abortion law,[194] or frustrated the attempts at university reform.[195] These have been quite fundamental policy choices, and it would not do them justice to describe them as an exercise in fine-tuning.

So we should look elsewhere for the criteria of a constitutional court, if this description is to have a useful function of helping us ascertain – or deny – the constitutional turn of the ECtHR. But perhaps first a preliminary question should be answered: is the European Convention a constitution?[196] After all, a commonsensical point can be made – and *has* been made[197] – that there can be no constitutional court unless there is a constitution. But what are the criteria for a document to have a *constitutional* nature? Joseph Raz's set of material criteria of a constitution is very useful. As argued by Raz, a constitution in a thick sense of the word is (1) constitutive of the legal and political structure, (2) stable, (3) written, (4) superior to other laws, (5) justiciable, (6) entrenched, and (7) expresses a common ideology.[198] A moment's reflection suffices to figure out that all these criteria lend themselves to judgments of degree, rather than yes-or-no characterization (including the "written-ness", as each constitution has also its unwritten, customary part). Hence, there may be *more* or *less* of a constitution in the thick sense of the word. The ECHR seems to fare very well under criteria (2), (3), (6) and (7): it proved very stable; it is written (and it is written in a formulaic fashion characteristic of constitutional texts and lending itself to direct application without any further need for "translation"),[199] it is well entrenched (in the sense of being extremely difficult to change), and it aspires to expound a common liberal-democratic ideology of human rights. Whether it is constitutive of a legal or political system (criterion 1) is more difficult to affirm: it is surely a cornerstone of the mechanism of protection of human rights within the CoE, but in itself it is preceded by the Treaty of London of

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191 Brown v. Board of Education, 347 U.S. 483 (1954),

192 Roe v. Wade, 410 U.S. 113 (1973).

193 Lemon v. Kurtzman, 403 U.S. 602 (1971).

194 The 1975 decision of GFCC, discussed by Alec Stone Sweet, *Governing with Judges* (Oxford: Oxford University Press 2000) at 109-10.

195 The 1973 decision of GFCC discussed by Stone Sweet, *Governing* at 86.

196 Such a claim has been made, famously, by the Court itself, see Loizidou v. Turkey, judgment of 23 March 1995, appl. 15318/89, para. 75, where the Court referred to "the Convention as a constitutional instrument of European public order (ordre public)".

197 See Franck Moderne, "Rapport de synthèse", in Julia Iliopoulos-Strangas, ed., *Cours suprêmes nationales et cours européennes: concurrence ou collaboration?* (Athens: Ant. N. Sakkoulas; Bruxelles: Bruylant 2007): 351-380 at 360.

198 Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries", in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press at 153-54.

199 "Most of the substantive provisions of the Convention are formulated in a way that presupposes their direct applicability on the domestic level", in Garlicki, "Some Observations" at 305.

1949 setting up the Council and its political bodies. It is also – compared to "normal" constitutions – very fragmentary, as it does not cover many of the items normally regulated by constitutions. Whether it is superior to other laws and justiciable (criteria 4 and 5) – depends on our assessment of the Court itself, and therefore has to be postponed for a moment. So far, under all the remaining criteria we can perhaps ascertain that the Convention is *largely* though not fully constitutional.[200]

What about the European Court then? In order to assess its constitutionality, under criteria (4) and (5) of the thick understanding of the term "constitution", I suggest a very simple, perhaps primitive, criterion of what renders a court constitutional: it is its power and authority to declare lower laws unconstitutional, and to strike them down in abstract terms, or set them aside. The advantage of the use of this criterion – in addition to its being, in my view, intuitively convincing – is that it allows us to avoid the dilemma of "fine-tuning versus fundamental intervention", discussed above. This power to declare laws unconstitutional gives effect to criteria (4) and (5) of Raz's set. A court which has that power makes the constitution effectively superior to other laws (criterion 4) and manages this superiority through the mechanisms of judicial review (criterion 5). (These, of course, are two independent criteria: we may have a constitution effectively superior but not justiciable, when the superiority is effectively and properly secured by political mechanisms).

If we rely on this standard, we will probably conclude that the European Court is not *fully* constitutional, in a way in which, say the US Supreme Court or the German Federal CC are constitutional. It, literally speaking, does not have the power and authority to strike down any national law on the basis of their inconsistency with the Convention. The judgments of the ECtHR do not have the immediate effect of eliminating the legal validity of the laws which the Court finds defective: it is for the political branches of Member States to draw their own conclusions on the basis of the Court's decision finding a violation in their country, or in another Member State. Their duty to implement the Court's decisions is ultimately of an international-law character: it is a treaty-based obligation, and there are no mechanisms of enforcement to guarantee such implementation other than moral and political pressure. And the main political inter-governmental bodies which are the ultimate authority behind the Court avoid using the concept of "supremacy" or "priority" of the Convention law over the national constitutional orders and use instead various euphemisms, such as that the Convention is "the essential reference point for the protection of human rights in Europe".[201]

But note that the question before us is not whether the ECtHR is constitutional one hundred percent. The question is, rather, whether it is *more* constitutional now than before (and in particular, before the admission of CEE Member States to the CoE)? Just

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200 I am putting to the side, of course, an obvious sense in which the Convention became "constitutional" by being "incorporated" (in a broad sense of the word) into domestic constitutions, in ways which render the rights enshrined in the Convention directly effective in the domestic systems, as is the case of the UK, but also Belgium, France, the Netherlands and Switzerland. In these countries, as argued by Keller and Stone Sweet, the Convention became a "shadow constitution", Keller & Stone Sweet, "Assessing", at 686. And there is also the special case of Bosnia Herzegovina where the Convention *is* part of the Constitution, in a literal sense of the word.

201 Recommendation Rec (2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies, 12 May 2004 available at https://wcd.coe.int/ViewDoc.jsp?id=743317&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

as the existence of a constitution (in the thick sense of the word) is a matter of degree, so is the "constitutionality" of a court. National courts which do not have the full power of declaring a statute invalid because all they can do is to *interpret* the statutes in accordance with the bill of rights (as in New Zealand),[202] or to take the decisions which may be overridden by the parliament (as in Canada),[203] or which can solely make a declaration of incompatibility of a statutory provision with a higher, rights-specifying instrument (as in the United Kingdom)[204] – are in a meaningful sense *less* constitutional than the courts whose decisions have such immediate and final effect, but still *more* constitutional than courts which cannot pronounce, even in such tentative ways, on the constitutional defects of laws at all, and are confined only to pronounce individualized decisions on the claims brought before them.

So in the case of the ECtHR the question is about a trend – not about reaching an extreme point on the spectrum of the constitutionality of courts. And the entire evidence produced by the material contained in this article so far seems to show that the ECtHR *has* become more constitutional – indeed, much more – than before. It has increasingly embarked on identifying the structural defects of the laws, on which the claims brought before it rely, rather than limiting itself to finding breaches of the Convention in individual decisions taken by the judiciary or administration of a particular State. And the States increasingly seem to perceive the meaning of the Court's judgments precisely in this way: as a directive to change their laws. "States are routinely required to reform their internal law and practices in response to findings of violation by the Court, not simply to provide compensation to individual victims"[205] – and States behave accordingly. The high level of compliance of this generalized law reform, rather than merely individual-remedies aspect, testifies to the fact that the Convention is now considered as more *superior* to the national laws (Raz's 4th criterion), and more *justiciable* (Raz's 5th criterion), than before. (The term "more superior" is not an error because, as suggested earlier, there are different degrees of "superiority" of law). And the emergence of pilot judgments is an important symbolic step on this path to a growing "constitutionalization" – through effective superiority and justiciability – of the Convention, and the growing "constitutionalization" of the Court.

Conclusions

The democratization and subsequent Europeanization of CEE States raised a significant challenge to the ECHR system, a challenge which contained both a threat and a promise. The *threat* was the possible collapse of the system resulting from the massive

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202 The New Zealand Bill of Rights Act of 1990 imposes a duty on all courts to interpret all the other statutes in accordance with the Bill (which, formally, is a statute); for discussion, see Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism", *American Journal of Comparative Law* 49 (2001): 707-760 at 727-32.

203 Section 33 of the Canadian Charter of Rights and Freedoms (so called "notwithstanding" clause).

204 On the basis of the Human Rights Act of 1998 certain specified higher courts may make a declaration of incompatibility of the legislation with the ECHR; in such a case, a fast-track procedure may be used to amend such legislation.

205 Keller and Stone Sweet, "Assessing" at 703.

growth in numbers and the correlative increase of the diversity of the system of human rights protection carefully designed in 1950 and crafted over the years to build on a consensus on rights among Member States and work at the margins in order to discipline occasional lapses. The jump from 23 to 47 States and the accession of States widely departing from the earlier consensus raised the issue of whether the ECtHR could adjust to its new role, and adopt a more heroic role of standard setter. Merely following the existing national standards – the role for which it had been originally designed – was no longer an option, not merely due to the accession of States with widely inadequate standards on human rights (as in post-Soviet societies) but also because of the prevalence of systemic defects and malfunctions in the legal systems of some States (as in Central European states).

But this threat was accompanied with a *promise*: a possibility to liberate oneself from the fiction that the European Court of Human Rights does not scrutinize the objectionable *laws* of CoE Member States, but merely corrects bad individual *decisions*. This fiction was pure hypocrisy in the best of times, but a fiction with which both the Court and its constituency – the Member States – could live because it sounded like a good reconciliation of the universality of human rights with the sovereignty of national States. But "the best of times" are gone, and the Court could find it salutary to announce – though not in so many words – that from now on it would review bad laws, not only bad decisions. This is a move away from an individualized justice performed by a sort of super-appellate judicial body to that of a systemic justice typically performed by a constitutional court, which, be it through concrete review or in abstract terms, evaluates the compatibility of laws with higher, constitutional, standards.

"Pilot judgments" are an emphatic expression of this constitutional turn. One should not exaggerate their significance at this point. There are still very few of them. Some are "pilot" only in a restricted and half-hearted way. Some ECtHR judges strongly dissent from the idea. And some of the judges who endorse the idea proclaim that there is nothing novel, and nothing constitutional about it. So the constitutional turn is far from being stable and emphatic. But it is unquestionably there, and it was clearly prompted by the enlargement of the CoE to the East.

Accession to the ECHR system was also a fundamental challenge to the new members themselves. In contrast to the old members, their entrance into the system coincided with (and was prompted by) the great transformation of their legal and political systems: democratization made Europeanization possible, and was further strengthened and stabilized by a "self-binding" undertaken by the newly democratized States which joined the European structures. The ECHR both *corresponded* to the democratic and liberal values which underwrote democratic transitions and also *questioned* much of the patterns of law, political culture and established habits. The situation of these countries thus differed greatly from that of the consolidated democracies of Western Europe. This contrast was well grasped by a British lawyer soon after the transition in CEE began: "Accession to the ECHR and incorporation of its values and standards into the domestic life of the countries of Eastern and Central Europe will not be perceived, as it was in Western Europe, as a mere reflection of pre-existing national values – but rather as a challenge which consciously has to be met with energy and vigour".[206] And even if the contrast sketched in this sentence is overdrawn – Western Europe is not free of illiberal

[206] Seymour at 254.

and authoritarian tendencies, and democratic values are not absent from national traditions in Central and Eastern Europe – the "challenge" for the new entrants is well described. In contrast to the founding members, who considered the Convention as a *reflection* of their bills of rights, written or otherwise, the newest Member States have to use the Convention as a blueprint to *changing* their domestic instruments and practices.

This challenge was handled differently by the different countries of the region, and the decisive difference lies between East European post-Soviet countries (including Russia, but by and large, excluding the Baltic States) and the Central European States, the former satellites of the Soviet Union. The countries belonging to the latter category presented formidable structural problems in their human rights protection frameworks, but no fundamental violations of the basic rights enshrined in Articles 2 to 6 of the Convention – not, at least, on the scale discernible in Russia, the Caucasus States, Ukraine or Moldova. It is this second category that is central for the argument of this article. Central European States – all, with their ambition to join the EU strongly in mind – responded to the challenge just outlined by accepting the supremacy of the Convention and the leading role of the ECtHR without much hesitation or second thoughts. They granted the Convention a status similar to that of the Constitution or just below it, they complied by and large with the Court's case law and used it as a blueprint for law reform, they introduced a number of legislative changes in response to Strasbourg's case law, etc. In doing so, they were not particularly troubled by "sovereignty concerns", which – in contrast to State-EU relationships – have not carried much weight in the public opinion and among the leading political-legal actors, with respect to the subject-matter of the Convention.

The relatively smooth and effective absorption of Central European States into the ECHR system of protection of human rights was greatly facilitated by the "disaggregation" of the State apparatus: the European Court penetrated behind the surface of a unitary State mechanism (it "pierced the veil" of the State) and found powerful allies, in particular, in the constitutional courts. Those courts – plagued by their own legitimacy problems,[207] and often enmeshed in struggles within the domestic political arena – seized this occasion for self-empowerment merrily, and engaged in a complex interaction and partnership with the European Court in order to compel the legislatures and the administrations of their States to adopt more rights-protective policies, taking their cues from Strasbourg's case law. (As observed by a judge of the Polish Constitutional Tribunal: "Poland has now two constitutional courts: the Tribunal in Warsaw and the Court in Strasbourg"[208], and there was no sense of irritation, but rather a satisfaction accompanying this statement). This complex and intricate interaction is nowhere better displayed than in the first "pilot judgments" where, as shown above, the European Court relied on the prior judgments of constitutional courts, and the latter in turn used the ECtHR's rulings to reinforce their pressure on domestic political actors. This created a truly constitutional dimension: a combined pressure from the domestic Constitution and the European Convention, articulated by the domestic court and by the European Court – which the political branches have found hard to resist.

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[207] More on legitimacy dilemmas and conundrums of constitutional courts in CEE, see Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer: Dordrecht 2005) at 27-63.

[208] Interview with a judge of Constitutional Tribunal of Poland, Warsaw, 1 June 2008.

This constitutional dimension is fragile and rests on unstable foundations: the European Court of Human Rights ultimately relies on the political will of Member States. But *national* constitutional case law is never much more robust, in the sense that it necessarily has to rely on the other branches of the domestic political arena for support and implementation, and always has to produce the grounds for its legitimacy. There is nothing new about the Strasbourg/national constitutional partnership in this way. What *is* new is that it is a *partnership*: an institutional link between national and European institutions, and it seems to be working, as proven by the responses of the legislatures so far. But these are still early days.