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The structure of fundamental rights and the European Court of Human Rights

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An important aspect of the structure of fundamental rights is the bifurcation between the definition of scope and the review of justification. Although this bifurcation is of great importance both to the division of the burden of proof and to the use of such tools as the doctrine of the margin of appreciation, it appears that the European Court of Human Rights does not always take it seriously. The Court often fails to address issues of definition or merges the two elements into a single test. This paper highlights some of the problematic consequences of the Court's current approach; in the end, this approach may hamper the effectiveness of the European Convention on Human Rights and limit the protection offered to individual citizens. A more structured approach toward the scope and definition of Convention rights may help to solve or avoid these problems.

1. Introduction

As a newly established, supranational court deciding on human rights in a highly diverse and ever-widening Council of Europe, the European Court of Human Rights (ECtHR) finds itself in a difficult position. Over the last sixty years, the Court has had to create a set of argumentation techniques and a judicial discourse that would be acceptable to all the Council's states parties and would be compatible with a variety of legal systems and legal traditions. It has had to navigate carefully between the aim of the European Convention on Human Rights (ECHR)—the effective protection of fundamental rights—and the need to respect national traditions and sensitivities. It has had to thread its way, as well, between the need to protect individuals against fundamental rights violations and the need to provide sufficient clarity as to the general scope and meaning of the Convention.

In general, the ECtHR has performed admirably in steering a middle course among these conflicting needs and obligations.[1] Nonetheless, the Court's

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[1] *See generally* Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, *in* The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond 407 (Nick Huls, Maurice Adams & Jacco Bomhoff eds., 2009).

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approach to argumentation reveals shortcomings that might be considered harmful both to the protection of fundamental rights in national legal systems and the Convention system itself. In particular, the Court's approach to the structure of fundamental rights is ambiguous and confusing. In many classic understandings of fundamental rights, a distinction is made between two different elements: the element of the definition of the scope of fundamental rights, on the one hand, and the element of justification or limitation, on the other. This seemingly theoretical distinction, which we further explain and elaborate on in section 2 of this paper, has several significant consequences. For example, if hate speech is defined as a form of "expression" that is protected by the freedom of expression, it clearly comes within the scope of article 10 of the European Convention. This means that restrictions of hate speech, such as imposing a penalty on someone for distributing racist flyers, must be justified by the government in accordance with the limitation clause of the second paragraph of article 10. As a consequence, the ECtHR is competent to examine the reasonableness of the national justification and to give a binding judgment on the matter. By contrast, if freedom of expression were defined more narrowly, cases of hate speech might fall outside the scope of article 10. That would mean that there would be no need, under article 10 § 2, to justify a penalty imposed because of hate speech and that an individual found guilty of hate speech would have no standing in Strasbourg.

The conceptual distinction between scope and justification is thus of great importance to the application of the European Convention on Human Rights. The definition of the scope of fundamental rights determines whether a justification must be advanced and whether the Court is competent to examine the reasonableness of the justification. Unsurprisingly, therefore, the bifurcation between definition and justification is clearly reflected in many Convention provisions. Many, if not most, Convention articles contain two or more different paragraphs, the first paragraph stating the right at issue and the second containing the possibilities for limitation or justification. Particularly well-known in this regard are articles 8 through 11 of the Convention; however, examples may also be found in article 2 (right to life) and article 4 of Protocol No. 2 (freedom of movement).

It might be expected from this that the European Court would pay close attention to the distinction. Indeed, the Court usually seems to apply a bifurcated approach, often even using different headings to indicate the various stages of its review.[2] Nonetheless, it appears that the Court does not take the

[2] Since its very early decisions, the Court has recognized the importance of the division between definition of the scope of a right under the first paragraph of articles 8 through 11 and the examination of the justification under the second paragraph; *see, e.g.,* National Union of Belgian Police v. Belgium, 19 Eur. Ct. H.R. (ser. A) §§ 37–42 (1975), in which it found that it did not have to examine a justification under the second paragraph as it did not find an interference with the right to trade union freedom in the case at hand; *see also,* expressly, the well-known *Handyside* case (Handyside v. United Kingdom 24 Eur. Ct. H.R. (ser. A) § 43 (1976): "The various measures challenged—the applicant's

bifurcation as seriously as it should. In many cases it either ignores the first, definitional stage (or confines itself merely to noting the applicability of the Convention)[3] or merges the two stages of fundamental rights review into a single test.[4]

In this paper, we will highlight some of the problematic consequences of the ECtHR's approach to the structure of fundamental rights. It is important to do so, since the way the Court deals with the structure of fundamental rights strongly influences the interpretation and application of the Convention by national courts. Structural faults and deficits thus may be multiplied in national cases that never reach Strasbourg. In the end, this may hamper the effectiveness of the Convention system and limit the protection offered to individual citizens.

To support this argument, we will first discuss a number of theoretical aspects of the distinction between definition and application (section 2). In section 3, we will provide an overview of the case law of the Court in which it either pays little or no attention to the scope of the right at stake or else merges the stages of definition and justification into a single test. In section 4, we will argue that this case law has a number of problematic consequences as regards the clarity of the Court's case law (4.2), the division of the burden of proof (4.3), and the use of the margin of appreciation doctrine (4.4). Finally, we will submit that a more structured approach toward the scope and definition of Convention rights may help to avoid or solve these problems (section 5).

As a preliminary to this paper it is important to note that we will focus on Convention rights that are not absolute in character. Some of the rights contained in the Convention, such as article 3 (the prohibition of torture) or article 7 (*nulla poene sine lege priori*), are nonderogable or can be limited only in the rarest of circumstances. The need for the definition of the scope of protection of such provisions is of great importance, since no justification or balancing operation is possible once an interference with these rights has been established.

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criminal conviction, the seizure and subsequent forfeiture and destruction of the matrix and of hundreds of copies of the Schoolbook—were without any doubt, and the Government did not deny it, 'interferences by public authority' in the exercise of his freedom of expression which is guaranteed by paragraph 1 of the text cited above. Such interferences entail a 'violation' of article 10 if they do not fall within one of the exceptions provided for in paragraph 2, which is accordingly of decisive importance in this case." In later cases, it has stressed the importance of the bifurcation by using headings; it did this for the first time in the case of *Young, James, and Webster:* "1. The existence of an interference with an article 11 right" and "2. The existence of a justification for the interference found by the Court" (Young, James and Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) (1981)).

[3] This is already visible in the Handyside case, in which the Court restricted its argumentation at the first stage of the review to noting that the "various measures challenged . . . were, without any doubt, . . . 'interferences by public authority' in the exercise of his [the applicant's] freedom of expression" (*see supra* note 2).

[4] *See infra* section 3.

The debate surrounding nonderogable rights and the hidden possibilities for limitation of these rights is very different from the debate regarding the structure of judicial review of interferences with nonabsolute rights. This renders the case law about nonderogable rights less material from the perspective chosen in this paper. For that reason, this case law will not be discussed.

2. The structure of fundamental rights—Theoretical issues

2.1. The need to distinguish different stages of review

According to many legal scholars and judges, it is important, almost self-evident to distinguish between at least two elements or stages of review in cases focused on derogable fundamental rights.[5] First, the body of facts presented by an individual applicant must establish that an interference with an expressly protected right has occurred.[6] A prima facie case of infringement of a fundamental right is established thereby. Such a prima facie case of infringement usually does not suffice, by itself, to support the decision that the interference constitutes a breach or a violation of a fundamental right. This would be true only if fundamental rights were considered to be absolute in character, which means that they would provide full and unlimited protection against all government interference as soon as they apply. It is generally accepted, however, that limitations of fundamental rights can be justified by convincing and important general interests or by the need to protect a conflicting individual

[5] *See, e.g.*, David L. Faigman, *Reconciling Individual Rights and Governmental Interests: Madisonian Principles versus Supreme Court Practice*, 78 Va. L. Rev. 1521, 1522–1523; Gerard Van der Schyff, Limitation of Rights: A Study of the European Convention and the South African Bill of Rights 11 (2005); Stefan Sottiaux, Terrorism and the Limitation of Rights: The ECHR and the US Constitution 35 (2008). See also the dissenting opinion of Judge Fitzmaurice in Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) §§ 3–5 (1979) (stating that the two separate stages of review "are elementary, standard propositions which should not need stating because they are such as everyone would assent to in principle").

[6] In this respect, it may be maintained that the first stage of fundamental review actually consists of two separate elements, *i.e.*, the definition of the scope of the right and the establishment of a concrete interference with that right in the case under scrutiny (*see also* Van der Schyff, *supra* note 5, at 41). The European Court also tends to make this distinction in its case law, examining the issue of whether there has been an interference with the Convention on its own. There are some problems of conceptual confusion in this case law too, as is visible in the case of *Cha'are Shalom Ve Tsedek*, in which the Court used elements of the application test (namely the question whether there was a *sufficiently serious* interference, which was decided on basis of the availability of alternatives to the applicants) in deciding whether the claim attracted the protection of article 9 of the Convention (Cha'are Shalom Ve Tsedek v. France, 2000-VII Eur. Ct. H.R. §§ 78–84). The question of interference with the Convention certainly requires attention but lies outside the scope of this paper, which has as its main focus the issue of the definition of the Convention's scope in relation to the application of Convention rights.

right.[7] A definitive conclusion about the alleged violation can be reached only when the soundness of the justification adduced by the government has been scrutinized.

Although this two-part structure of fundamental rights is widely recognized, its importance for judicial review is sometimes questioned. This is especially true with respect to the European Convention on Human Rights.[8] In his important book about the Convention, Steven Greer has stated that "the Court has the ultimate constitutional responsibility for determining what each right means. . . . [W]hether this process is described as 'defining' vague rights more precisely, 'determining their scope', or 'balancing' one right against the other, matters less than the recognition that there is no scope for genuine domestic discretion concerning how the rights themselves should be understood."[9] In a similar fashion, Franz Matscher and George Letsas generally have classified such diverse argumentative methods as teleological interpretation, margin of appreciation, and proportionality review as "methods of interpretation" of the Convention.[10] If this perspective is taken, the distinction between definition and application does not really matter, nor is there any need to distinguish between classic argumentation techniques concerning the definition of rights (such as textual and teleological interpretation) and techniques that are mainly used to examine the justification for an interference (such as proportionality review and the margin of appreciation doctrine). Interpretation of the Convention is thus regarded as a conglomerate of judicial decision making where only the final result counts.[11]

[7] Some rights, such as the prohibition of torture and inhuman and degrading treatment (article 3 of the Convention) and the principle of *nulla crimen sine lege priori* (article 7 of the Convention), are considered to be absolute. In those cases, no limitations are possible; as explained in section 1, however, these nonderogable rights will not be discussed in this paper.

[8] Although, as has been mentioned above, the Court itself usually starts from the assumption that the bifurcation does matter.

[9] Steven Greer, The European Convention on Human Rights: Achievements, Problems and Prospects 212 (2006).

[10] *See* Franz Matscher, *Les contraintes de l'interpretation juridictionnelle—les méthodes d'interprétation de la Convention Européenne [Constraints on Judicial Interpretation—Methods of Judicial Interpretation], in* L'interpretation de la convention européenne des droits de l'homme [The Interpretation of the European Convention on Human Rights] 15, 18 and 37 (Frédéric Sudre ed., 1998) and George Letsas, A Theory of Interpretation of the European Convention on Human Rights (2007); *see* also Aaron A. Ostrovsky, *What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals*, 1 Hanse L. Rev. 47, 57 (2005) (regarding the margin of appreciation doctrine as an interpretative tool that "allows the Court to draw a line around core rights," thus not clearly distinguishing between defining and limiting fundamental rights). By contrast, Greer criticizes the Court for its unstructured approach and the indistinct way in which it uses "a dozen or so" interpretative principles (*supra* note 9, at 696). Although Greer does not (like Letsas and Matscher) make any clear distinction between principles and methods concerning the definition of scope and principles and methods relating to the test of justification, he does seem to accept that a distinction between the two stages must be made.

[11] Matscher, *supra* note 11; Letsas, *supra* note 11.

The doctrinal approach toward the European Convention taken by authors such as Steven Greer, George Letsas, and Franz Matscher may be contrasted with the classical constitutional rights doctrine that has developed in countries such as the Netherlands, Germany, and the United States. In the United States, for example, David Faigman has demonstrated that the distinction between the definition of the scope of rights and the possibilities for justification is deeply embedded in the constitutional system, even though it is not always respected by the Supreme Court.[12] Similarly, the bifurcation is clearly visible in German constitutional doctrine, where German legal theorists such as Robert Alexy have argued that it is, structurally, an essential part of all fundamental constitutional rights.[13]

A number of reasons have been advanced for distinguishing between definition of scope and examination of justification. Faigman has put particular weight on the respective values guiding the courts in the stages of definition of scope and of justification. In his view, when *defining* fundamental rights, the guiding values should come from the constitution per se.[14] The value of constitutional protection of fundamental rights is that these rights and liberties are placed beyond the reach of majority forces, such as the legislature. The constitution operates as a bulwark against majority tyranny.[15] When defining the scope of a fundamental right the courts, therefore, should be guided only by the text and aims of the constitution, not by general interests as defined by the legislature.[16] By contrast, when applying fundamental rights to individual cases and scrutinizing the *justification* advanced in defense of an interference, Faigman argues that the courts must be guided by values coming from the majoritarian forces.[17] The reason for this is that the "counter-majoritarian difficulty" (that is, the constitutional problem created by a nonelected court being authorized to strike down or correct democratically legitimized measures) imparts a presumptive validity to state action.[18] Whereas the courts must place the constitution in the forefront when defining individual rights, they have to step back when scrutinizing the limitation of these rights so as to respect the primacy of the legislature.

Alexy has grounded his argument for distinguishing between definition and application in more structural considerations. In Alexy's view, fundamental

[12] Faigman, *supra* note 5, at 1522ff.

[13] Robert Alexy, A Theory of Constitutional Rights (Julian Rivers, trans., Oxford Univ. Press 2002), at 84–86, 180, and 199.

[14] Faigman, *supra* note 5, at 1529.

[15] *Id.* at 1528.

[16] *Id.* at 1529.

[17] *Id.*

[18] *Id.* at 1528.

rights provisions typically have a "double aspect," since they couple rules and principles.[19] The "rule" is the actual right as protected by the fundamental rights provisions, such as "everyone has the right to freedom of expression." This formulation of the right would be a "complete rule" if it were limitless or nonderogable, because it would then be applicable without any need for the right to be balanced against any other norm or interest.[20] Moreover, the right would then have a rule-like character since it would enable each case to be solved by a simple form of subsumption.[21] However, Alexy proceeds to show that almost no limitless fundamental rights exist in practice, and that express or implicit limitation clauses call, usually, for a balance to be struck between the fundamental right at stake and one or more competing general interests. To that extent fundamental rights typically have the character of principles.

In this argument, it is inadequate to conceive of constitutional rights norms purely as rules or purely as principles.[22] Because of the difference in character of both aspects of fundamental rights, Alexy submits that it is necessary to distinguish carefully between the rule-like element and the principle-like element. We may add to this that the two distinct stages of review call for different judicial methods to be applied, precisely because of their difference in character. When examining whether a given set of facts comes within the scope of the freedom of expression, a court may apply the classic methods of interpretation of rules (such as textual and structural interpretation), while it must apply the typical methods of balancing in the context of scrutinizing the justification.[23] For this reason, the distinction between scope and justification is of great importance.

2.2. The importance of the definitional stage—Wide or narrow definition of fundamental rights?

Although the theoretical arguments discussed in section 2.1 seem to demonstrate that there is good reason to take the distinction between scope and justification seriously, something more may be said about the need for the definition of rights. Even if it is agreed that it is necessary to distinguish carefully between defining the terms of a fundamental right and examining the reasons advanced in justification of an interference with the right, an important question arises concerning how courts should proceed when defining the scope of certain

[19] Alexy, *supra* note 13, at 84–85.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 85–86.

[23] Alexy himself argues that a wide conception of constitutional norms should be chosen, "in which everything which the relevant constitutional principle suggests should be protected falls within the scope of protection" (Alexy, *supra* note 13, at 210). He leaves little room for "definitional balancing" or other ways to establish the scope and meaning of fundamental rights.

notions central to fundamental rights, such as "expression," "religion," or "private life." After all, such concepts can be defined either rather broadly (encompassing a range of individual interests that might vary from the right not to be subject to unannounced nighttime searches to the right to walk one's dog on a nearby field) or rather narrowly (limiting the scope of the right to what is considered its "core").[24]

A variety of reasons have been adduced in support of a narrow definition of fundamental rights. It has been argued, for example, that a broad interpretation of fundamental rights would disable the legislature in favor of the courts, which would be empowered, in many cases, to strike down unfavorable legislation that might interfere with individual rights.[25] In addition, the warning has been issued that a wide-ranging interpretation of fundamental rights could result in a flood of cases about fundamental rights and, thus, in an undesirable "fundamental rights-alisation" and constitutionalization of society.[26] Such constitutionalization would not only be problematic from the perspective of judicial caseload but it could also have the effect of giving more importance and influence to the courts. Especially when a wide scope given to rights could be combined with a broad interpretation of the limits of the right, it would be up to the courts to decide on the reasonableness of practically any action taken by the state.[27] The ensuing judicialization of the legal system might be considered a threat to classic balances of power.

The call for a narrow definition of fundamental rights has taken on particular relevance in the context in which the ECtHR hands down its judgments. If the widest possible interpretation of fundamental rights were chosen by this Court, it would have to examine national justifications and limitations in nearly any case brought before it.[28] This would not only be highly problematic because of the Court's enormous caseload but it would also put great pressure on the Court's already complex relationship with the national authorities. According to article 1 of the Convention, the latter have the primary responsibility to protect and respect fundamental rights.[29] The Court is called on to

[24] *Cf.* Mattias Kumm, *Who's Afraid of the Total Constitution?, in* Arguing Fundamental Rights 113, 117 (Agustín José Menéndez & Erik Oddvar Eriksen eds., 2005); *cf. also* Alexy, *supra* note 13, at 201.

[25] *Cf.* Van der Schyff, *supra* note 5, at 35 (with references); *cf. also* Alexy, *supra* note 13, at 211.

[26] *Cf.* Alexy, *supra* note 13, at 213.

[27] *See* Kumm, *supra* note 24, at 118.

[28] It has been argued by Alexy that it does not make a difference to the caseload of a court to use a narrow or broad definition of fundamental rights since, in his view, a narrow definition also necessitates an examination of the justification (Alexy, *supra* note 13, at 213ff.). The only difference would be that the justification test is then applied at a different stage and would be somewhat obscured. This is not entirely true, however, if a different approach is taken toward the ways in which a narrow definition of fundamental rights can be given, as we propose to do. We will further explain this point below.

[29] *See*, more specifically, *infra* sections 4.1 and 4.4 (with references).

intervene only when it is clear that the national authorities have failed to live up to their responsibilities and have shown an obvious lack of respect for fundamental rights. As a result of the specific supranational situation, the Court has a doubly complicated constitutional position.[30] Just as national (constitutional) courts do, it must deal with the countermajoritarian difficulty, which means that it must respect the democratic legitimacy of national legislative measures. In addition, it owes respect to the sovereignty of nation-states[31]—a respect more easily accorded if a narrow definition of fundamental rights is chosen. A narrow definition also means that national governments will not be asked to defend decisions and legislative acts that have only a tangential impact on the rights protected by the Convention. In this way, the Court need consider itself competent only to decide issues that truly concern fundamental rights and over which the exercise of supranational power would be appropriate.

Although a narrow definition of fundamental rights seems desirable for these reasons, often it has been stressed, as well, that a broad definition would be preferable. Aside from the general argument that the desire for effective protection of fundamental rights warrants a generous definition of such rights,[32] the argument has been made that a narrow definition could cause major problems with regard to the structural and conceptual distinction between scope and justification. A narrow definition of the scope of fundamental rights might too easily invite a balancing of interests and of the elements of application, all of which could be introduced in the first, definitional stage of review.[33]

This risk has been stressed, in particular, by Alexy, who has supported the argument by the example of an artist who wants to paint on a busy intersection.[34] A broad reading of the right to freedom of artistic expression clearly suggests that the artist's right is protected by the relevant provision. It is hardly to be denied, after all, that painting (even if it is done on a busy intersection) is an artistic activity. By contrast, a narrow interpretation of the freedom of expression could mean that only those forms of artistic expression are covered that do not cause a threat to traffic. The definition of the right is then made conditional on the governmental interest that is served by limiting the right to freedom of expression (that is, in the interest of guaranteeing traffic safety), which means

[30] *Cf.* James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 Int'l & Comp. L.Q. 459, 472 (2005).

[31] See, for a strong normative underpinning of this argument, J. H. H. Weiler, The Constitution of Europe (1999), at 104–107.

[32] Van der Schyff *supra* note 5, at 32.

[33] Van der Schyff, *supra* note 5, at 33. See, in particular, with respect to the doctrine of positive obligations as recognized by the European Court of Human Rights, also Pieter Van Dijk, '*Positive Obligations*' *Implied in the European Convention on Human Rights: Are the States Still the* '*Masters*' *of the Convention? in* The Role of the Nation-State in the 21st Century 17, 25 (Monique Castermans-Holleman, Fried van Hoof & Jacqueline Smith eds., 1998).

[34] Alexy *supra* note 13, at 204.

that the question of limitation or justification is made part of the determination of the scope of the right.[35] Evidently, such an approach does not do justice to the important differences between definition and application or limitation that have been explained above.[36] For that reason, Alexy has rejected the narrow approach in favor of giving the widest possible scope to fundamental rights.[37]

It must be stressed, however, that the need to distinguish between scope and justification does not demand the widest possible definitions of fundamental rights, nor does a narrow definition of fundamental rights necessitate the introduction of elements of justification at the stage of definition. It is possible to use the classic methods of constitutional interpretation (textual, historical, teleological or purposive, structural or systematic) to exclude certain claims from the scope of protection of fundamental rights without resorting to balancing or without referring to specific governmental interests.[38] It can be reasoned, for example, on the basis of teleological arguments, that pure hate speech has nothing to do with the kind of rights protected by the ECHR and does not fit in with the general aims of the Convention. No actual balancing exercise is required if notions such as "expression" or "private life" are defined with reference to the text of the Convention or with reference to its underlying principles and guiding values. After all, no concrete juxtaposition of individual interests against public or general interests is apparent if it is stated that, in light of the underlying goals of the Convention, hate speech cannot be regarded as protected speech under the Convention.[39] This is different from the example of the

[35] *Id.* at 205.

[36] *Id.* at 213.

[37] Meaning that "everything which the relevant constitutional principle suggests that should be protected falls within the scope of protection" (Alexy, *supra* note 13, at 210).

[38] *Cf.* Sottiaux, *supra* note 5, at 36; *see* also Aharon Barak, *Constitutional Interpretation*, *in* L'interpretation constitutionelle 91, 93ff. (Ferdinand Mélin-Soucramanien ed., 2005); *cf. also*, specifically in relation to the ECtHR, François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, *in* The European Convention for the Protection of Human Rights 283, 288ff. (Mireille Delmas-Marty ed. (1992). Ost also makes clear that the ECtHR, in practice, indeed makes use of such methods in determining the meaning of the terms contained in the Convention (*id.* at 293ff.).

[39] Of course, it may be argued that even in this case some kind of balancing is visible, since each determination of scope requires a choice to be made, and each choice presupposes a balance to be struck between a variety of interests. In this argument, definition of fundamental rights is never possible without balancing—even an entirely text-based limitation of the scope of rights is then the result of a choice between different possible interpretations. Taken to its extreme, the argument that elements of balancing should not be introduced in the stage of defining the scope of a right is then untenable, since it would imply that fundamental rights cover an unlimited number of individual interests—after all, any restriction of scope would imply a certain choice or limitation. The result would be that the stage of definition would become factually meaningless and the competence of the ECtHR to decide about fundamental rights would become virtually infinite (*cf.* the dissenting opinion of former Judge Fitzmaurice in the *Marckx* case, who stated that "within certain limits almost anything can colourably be presented as connected with or related to some other given thing, or as belonging to the same sphere of ideas" (Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) § 5 (1979)).

artist painting on a busy road junction, where such a juxtaposition is visible indeed, albeit rather covertly. The painter's activity is considered not to constitute a form of artistic expression *because of the need to protect traffic safety*, not because of limitations inherent in the text of the Convention, its drafting history, or its underlying aims. This means that a clear and concrete public interest is covertly balanced against the freedom of expression; such balancing is a judicial activity that is only in its proper place in the second stage of the review. Judicial determination of scope as a matter of interpretation by means of classic canons of interpretation can thus be distinguished from application or examination of justification. This means that it is not necessary to resort to the widest possible interpretation of fundamental rights in order to safeguard structurally correct judicial review.

2.3. Conclusion

We have explained, in this section, that it is desirable for theoretical reasons that the ECtHR make an effort to distinguish carefully between the definition of the scope of rights and the examination of the justification for an interference with those rights. However, this does not automatically mean that the widest definition of rights should be given. The stage of the definition of scope would become rather empty if all individual interests, however far removed from the core of the right in question, were covered by the Convention. Instead, the determination of the scope of fundamental rights must be taken seriously so as to avoid having the Court become overburdened with cases that have little to do with fundamental rights. The challenge for the Court is to pay sufficient attention to the definition of the rights contained in the Convention, without confusing elements of "pure" definition and elements of application (such as balancing of interests). In our view, the Court, thus far, has not truly met this challenge, as we will endeavor to show in the next section.

3. The structure of fundamental rights and the Strasbourg Court's case law

3.1. Introduction

Now that the theoretical perspective has been outlined, it is important to see where the Court's approach presently falls short. There are different types of cases in which it can be seen that the Court does not take the bifurcation (between scope and justification) particularly seriously. The purpose of this section is to discuss some examples that represent the Court's various approaches. Three types of cases will be discussed. First, there is a range of cases in which the Court does not address or ignores the first, definitional stage. In the second sort of cases the Court does pay some attention to the stage of definition, though it does so in such a summary way that it can hardly be considered a proper discussion of the definition of the right in question. The final type of case is one where the Court confuses or merges the first and second stage, taking both stages together in a single test.

3.2. Cases in which the ECtHR does not address the issue of definition of rights

In the first set of cases, the Court acknowledges that there is an issue in the definitional stage that should be addressed; however, the Court, in the end, fails or refuses to go into the matter. The case of *Molka v. Poland*[40] provides an illustration of this approach. In this case, the Court paved the way for an answer to the question whether a positive obligation existed, though it explicitly refused to answer that question. The litigation concerned a man in a wheelchair who had been unable to vote, since the polling station was not accessible to the disabled. The question was whether the failure to provide appropriate access to the polling station constituted a breach of article 8 of the Convention. After reiterating some precedents the Court continued as follows:

> Having regard to the above considerations, the Court does not rule out the possibility that, in circumstances such as those in the present case, a sufficient link would exist to attract the protection of Article 8. However, the Court does not find it necessary finally to determine the applicability of the Article in the present case since, for the reasons which follow, the application is in any event inadmissible on other grounds.[41]

The Court thus recalled existing principles developed in previous cases, though it failed to apply them to the new situation presented by the applicant. The vague indication that the Court would not rule out the possibility that the applicant's situation falls within the scope of article 8 is not helpful in providing clarity. The individual case might be solved; nonetheless, the Court's decision leaves the reader, at least, with the rather unsatisfactory feeling that no clear answer has been given to the question whether the applicant had a right protected under article 8.

A somewhat similar approach has been adopted by the Court in *Maurice v. France*.[42] This case concerned a matter of wrongful birth. The applicants claimed that the state did not protect, sufficiently, the interests of the family; it failed, they asserted, to provide them with a remedy and compensation enabling them to cope with the special burden of a child's disability. After reiterating some very general considerations on the concept of positive obligations, the margin of appreciation, and the subsidiary position of the Court, the Court acknowledged that it had to address the applicability of article 8. Subsequently, however, the Court refused to answer that question and concluded: "[T]he Court does not consider it necessary in the present case to determine that issue since, even supposing that Article 8 may be considered applicable, it considers

[40] Mólka v. Poland (*dec.*), 11 April 2006, appl. no. 56550/00, http://www.echr.coe.int/eng.

[41] *Id.*

[42] Maurice v. France (*Grand Chamber*), 2005-IX Eur. Ct. H.R.

that the situation complained of by the applicants did not constitute a breach of that provision."[43]

Without answering the question of applicability of article 8, the Court thus proceeded on an assumption of applicability. It is unclear how the Grand Chamber can decide, convincingly, whether the limitation of a certain Convention right was legitimate when the scope of the Convention right has not been determined at all. Merely supposing or assuming that an article is applicable cannot take the place of paying proper attention to the definition stage; to proceed so is far too indefinite. The scope of a right provides an indication of the type of limitations that might be allowed. Moreover, it is necessary to determine the obligations for the respondent state before one can actually decide whether they have been violated. Thus, it would have been necessary to discuss the scope of a provision in order to provide, in this particular situation, a convincing and coherent answer to the problem posed by the case at hand.

Within this first set of cases, in which the Court either does not address or ignores the first stage, a closely related range of cases can be distinguished, where a similar approach has been taken by the Court. In these cases, the Court tends to indicate that the applicability of a Convention right is not clear-cut; in other words, it is unclear whether the situation comes within the scope of the provision invoked. In these cases, the Court concludes, however, that the applicability has not been disputed, and, therefore, it is not necessary to discuss the scope of the right in question. An example of this type of case is presented by *Elli Poluhas Dödsbo v. Sweden.*[44] The applicant in this case claimed that the refusal of the Swedish authorities to permit her to move the remains of her deceased husband to a family grave resulted in a breach of article 8. The Court stated that not every involvement with burials constituted an interference with article 8, yet it continued, surprisingly, with the following considerations:

> In the present case, the Government have not disputed that the refusal to allow the removal of the urn involved an interference with the applicant's private life. The Court does not consider it necessary to determine whether such a removal involves the notions "family life" or "private life" cited in Article 8 of the Convention, but will proceed on the assumption that there has been an interference, within the meaning of Article 8 § 1 of the Convention.[45]

It seems startling that the Court openly acknowledges that a case may raise questions on the scope of article 8, but, given the positions of the parties, refuses

[43] *Id.* § 120. A similar approach has been adopted by the Court in Sentges v. Netherlands (dec.), 8 July 2003, app. no. 27677/02, http://www.echr.coe.int/eng; Draon v. France (*Grand Chamber*), 6 October 2005, app. no. 1513/03, http://www.echr.coe.int/eng; Wendenburg v. Germany (*dec.*), 2003-II Eur. Ct. H.R.; Iliya Stefanov v. Bulgaria, 22 May 2008, app. no. 65755/01, http://www.echr.coe.int/eng.

[44] Elli Poluhas Dödsbo v. Sweden, 2006-I Eur. Ct. H.R.

[45] *Id.* § 24.

to answer that question. In this type of case, just as in the cases discussed above, the Court finally decides the case purely on the assumption that article 8 is applicable.

In the case of *Laskey, Jaggard and Brown v. United Kingdom*,[46] concerning the conviction of three men for consensual homosexual sadomasochistic activities, the Court even more explicitly expressed its doubts as to whether the situation was covered by the scope of article 8:

> The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. . . . [I]t may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.
>
> However, since this point has not been disputed by those appearing before it, the Court sees no reason to examine it of its own motion in the present case. Assuming, therefore, that the prosecution and conviction of the applicants amounted to an interference with their private life, the question arises whether such an interference was "necessary in a democratic society" within the meaning of the second paragraph of Article 8.[47]

The Court thus openly doubted whether the activity complained of fell within the scope of article 8, yet it did not address this issue in any more detail because the government did not raise the matter. A particularly problematic aspect of this approach is related to the fact that the definition of a Convention article determines whether the Court has jurisdiction to decide the case.[48] For that reason, this type of question should not be left solely to the position and arguments of the parties. Important procedural aspects should be addressed by the Court *ex officio*, which means that it should always address the question of whether article 8 is applicable to this type of situation in order to determine its own competence to deal with the case. This is even more relevant when the Court expressly doubts whether a certain case falls within the scope of one of the Convention rights.

3.3. Cases in which the ECtHR does not explain why the Convention is applicable

The second set of cases is related to the type just described. In these cases, the Court does accept that the case falls within the scope of the Convention article, but it fails to explain why. The examples that will be discussed hereinafter all

[46] Laskey Jaggard and Brown v. United Kingdom, 1997-I Eur. Ct. H.R.

[47] *Id.* § 36.

[48] *See* section 1.

involve article 10, the freedom of expression. This is the main area where the Court has adopted this approach, probably due to the very broad scope of the term "freedom of expression." Even if a term has a broad scope, the Court should still explain why a case falls within it. If the Court consistently fails to answer that question, a notion such as freedom of expression becomes void of any substance, and it makes it more difficult in cases of doubt to determine whether a certain situation is covered by this notion. The following examples illustrate the Court's approach and demonstrate that some substantial explanation and interpretation by the Court can be helpful in understanding the scope of article 10 of the Convention.

In the case of *Vajnai v. Hungary*,[49] the applicant had worn a red star on his jacket during a demonstration. He was convicted for wearing this button, and a relatively light criminal sanction was imposed. In its judgment, the Court immediately jumped to examine the necessity for the interference by the government, thereby implying that wearing a certain button automatically engages protection under the freedom of expression. Precisely why wearing a button, or other forms of "symbolic speech," constitute a protected form of expression, therefore, remains unclear—the Court did not address that question at all.

A similar approach is seen in the case of *Vereinigung Bildender Künstler v. Austria.*[50] At issue was the exhibition of an obscene painting in which, among others, a politician was visibly depicted. Without addressing the question whether all forms of artistic expression or satire come within the scope of article 10, the Court considered whether the interference was legitimate. According to the dissenting opinion of Judge Loukis Loucaides, it would have been at least appropriate for the Court to discuss this aspect of the case. While Judge Loucaides somewhat confused the first and second stage as well (he did not really make a distinction between defining the scope of article 10 and its application to the facts of the case), he clearly disputed the assumption by the Court that every painting constitutes a protected form of artistic expression. He revealed, thereby, the need for the Court to have dealt with this aspect of the case. It would have been enlightening if the ECtHR had used the opportunity to justify the implicit conclusion in both cases that the situations were covered by article 10.

The case of *Perrin v. United Kingdom*[51] dealt with the conviction of the applicant for obscene publications on a Web site. By referring to a single precedent, that is, the case of *Müller v. Switzerland,*[52] the Court determined that the conviction constituted an interference with article 10. This case presents a proper

[49] Vajnai v. Hungary, 8 July 2008, app. no. 33629/06, http://www.echr.coe.int/eng.

[50] Vereinigung Bildender Künstler v. Austria, 25 January 2007, app. no. 68354/01, http://www.echr.coe.int/eng.

[51] Perrin v. United Kingdom (*dec.*), 2005-XI Eur. Ct. H.R.

[52] Müller v. Switzerland, 5 November 2002, app. no. 41202/98, http://www.echr.coe.int/eng.

example of the dangers of brief references to precedents without any further explanation. First of all, the reference was incorrect, since the case mentioned concerned a complaint under article 6 of the Convention. The Court clearly intended to refer to a different case with a similar name, namely, *Müller et al. v. Switzerland*.[53] Furthermore, the situations differ in important aspects, most significantly, with regard to the type of expression. *Müller et al.* dealt with obscene paintings, that is, a form of artistic expression, while in *Perrin* the expression at issue consisted of obscene publications on a Web site without any claim to artistic elements.[54] For the development of the interpretation of the right to freedom of expression, it would be informative if the Court indicated on the basis of which element it considered the precedent applicable. That way, the meaning of freedom of expression would become clearer by explaining what the decisive elements are for the Court in considering article 10 applicable in a certain case. The Court, however, hardly paid attention to the applicability phase and simply invoked *Müller et al.* to justify the applicability of article 10.

It should be clear, by now, in this second type of case, that the Court fails to provide a sufficient explanation as to why the situation at hand falls within the scope of the right in question. In some cases, this determination occurs by simply omitting the definition stage; in others, it is effected by such cursory reasoning that, in effect, the stage of definition seems to have been ignored to nearly the same extent as in the first type of case.

3.4. Cases in which the ECtHR merges the first and second stages of fundamental rights review

The third and final type of case is one in which the Court confuses or merges the first and second stages. These are mainly cases on positive obligations, such as *Christine Goodwin v. United Kingdom*[55] and *Hatton v. United Kingdom.*[56] The case of *Christine Goodwin* marked the end of a line of cases in which, for over a decade, transsexuals had tried to obtain the right to legal recognition of their change of gender.[57] In all of these cases, the applicants claimed that the authorities failed to respect their private life by not allowing their gender change to be implemented in the register of births, which meant that, for legal purposes, they retained the gender they had had before the operation.

[53] Müller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) (1988).

[54] The Court intended to refer to a paragraph that does not deal with the type of expression, but only to a paragraph stating that the imposition of a fine can constitute interference with article 10 and that such has to be justified in accordance with article 10 § 2. *Id.* § 28.

[55] Christine Goodwin v. United Kingdom (*Grand Chamber*), 2002-VI Eur. Ct. H.R.

[56] Hatton v. United Kingdom (*Grand Chamber*), 2003-VIII Eur. Ct. H.R.

[57] *See* Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) (1986); Cossey v. United Kingdom, 186 Eur. Ct. H.R. (ser. A) (1990); B v. France, 232-C Eur. Ct. H.R. (ser. A) (1992); Sheffield & Horsham v. United Kingdom, 1998-V Eur. Ct. H.R.

The question in these cases, basically, was whether the time was ripe to impose a positive obligation on states to ensure legal recognition of gender change. In trying to answer that question, the Court in *Christine Goodwin* mixed the discussion of the meaning and essence of article 8—elements typical of the first, definitional stage—with references to typical elements of the second stage, namely, the margin of appreciation and the fair balance test. The Grand Chamber concluded that there was no longer a fair balance between the individual interest in having the gender change legally recognized and the public interest in maintaining the current system. Therefore, the matter no longer fell within the margin of appreciation of the states. What the Court seems to have done in this case is to incorporate a balancing exercise into the definition of the scope of article 8 in relation to transsexuals. The Court defined the positive obligation under article 8 so as to ensure legal recognition of gender change by "weighing" the public hardship against the individual hardship. This weighing of interests is an exercise that is characteristic of the second phase, in which the Court tries to establish whether a certain interference is necessary in a democratic society.[58] From a theoretical perspective, however, it is strange to conclude that the *existence* of a fundamental right depends on public interests—such interests are only relevant within the context of the justification of a limitation of fundamental rights.[59]

This confusing approach was also adopted in *Hatton v. United Kingdom*.[60] In this case, the applicants complained about sleep disturbance as a result of night flights at Heathrow Airport. In the applicants' view the national authorities were under a positive obligation to ensure that their rights under article 8 would not be violated. The Grand Chamber acknowledged that there is no explicit right to a clean and quiet environment in article 8 but held that, in case of aircraft noise, an issue may arise under article 8.[61] Without answering the question whether article 8 was applicable to the case at hand, the Court recalled its subsidiary position and claimed that the state enjoyed a wide margin of appreciation in these cases.[62] It also emphasized that it had to assess the policy decisions by the government:

> The Court considers that in a case such as the present one, involving state decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may

[58] *See*, *e.g.*, Dickson v. United Kingdom, 4 December 2007, appl. no. 44362/04, http://www.echr.coe.int/eng.

[59] *See* Faigman, *supra* note 5, at 1523.

[60] Hatton v. United Kingdom (*Grand Chamber*), 2003-VIII Eur. Ct. H.R. *Cf. also* Giacomelli v. Italy, 2 November 2006, app. no. 59909/00, http://www.echr.coe.int/eng; Fadeyeva v. Russia, 2005-IV Eur. CT. H.R.; Moreno Gomez v. Spain, 2004-X Eur. Ct. H.R.

[61] Hatton v. United Kingdom (*Grand Chamber*), 2003-VIII Eur. Ct. H.R. § 96.

[62] *Id.* §§ 97–100.

> assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.
>
> In relation to the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation.[63]

As these considerations show, the Court in this case did not emphasize that it needed, first, to consider the applicability of article 8. Leaving that question unanswered, it only discussed whether article 8 had been violated and focused on achieving a fair balance between the governmental policy decisions and the individual interest. The conclusions are limited to this specific case, since the Court confined itself to the particular circumstances of the case and did not address the more abstract question of whether a right to a clean and quiet environment could be read into article 8. Thus the judgment does little to clarify the proper interpretation of article 8.[64]

3.5. Conclusion

It has become clear, by now, that the Court in its adjudicative approach to fundamental rights cases does not always pay attention to the bifurcation between the definition of scope and the examination of justification. In the first and second type of cases, the problem is that the Court does not address the definition stage properly. In these cases it tries to answer the question whether a limitation to a Convention right is justified without adequately defining the right. In the third type of cases, the Court determines the scope of the Convention right by including public interests and other elements typical of the application stage. This case-based approach thus puts a strong emphasis on the so-called second stage and, thereby, on the specifics of individual cases.

As examples from its case law have shown, the Court's approach differs from the theoretical approach discussed in section 2. Does this give rise to negative consequences or specific problems? The following section will address this question.

4. Problematic consequences of the Strasbourg Court's approach

4.1. Introduction

The Strasbourg Court is a special court in many respects. In principle, and from a purely legal perspective, the Court must be regarded as a supranational court. The legal status of the Convention in each of the states parties depends on their

[63] *Id.* §§ 99–100.

[64] Case comment by Heleen Janssen published in European Human Rights Cases 2003, no. 71.

respective constitutional systems and legislative choices.[65] In addition, even though states parties have recognized the Court's power to give binding judgments on individual complaints or interstate applications, each judgment is legally binding only for the state named in the case.[66] Although there is some legal debate regarding the *erga omnes* effect, the actual legal effect of Strasbourg case law is limited to the concrete circumstances of each case.[67]

In practice, however, the status of the Court's case law reaches far beyond the individual case decided. The Court has, by now, created an impressive body of case law, in which the rights contained in the Convention are interpreted and applied in an authoritative manner and which are regarded, generally, as authoritative.[68] Several scholars have even argued that the Court may now be characterized as a constitutional or, at least, a semiconstitutional court.[69] This classification is of great importance. The characterization of a supranational court as a constitutional court has an immediate, complicating effect on the dialogue with national constitutional courts.[70] The "new" constitutional court may be regarded as a rival court, and the natural reaction of the national constitutional court may be to resist any disputable judgments the newcomer hands down.[71] In addition, the Court is not organically embedded in national constitutional systems. Rather, it has been imposed upon states parties as an alien body that may be difficult to incorporate into existing legal structures and traditions. It is, therefore, not surprising when national legal systems have difficulties coping with judgments handed down by the Court.

In this context, the Court may be able to maintain its important supervisory position only if the national courts continue to accept its judgments as authoritative explanations of the Convention.[72] For that reason, the Court will have to

[65] *Cf.* Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order* 40 Tex. Int'l L.J. 359, 374 (2004–2005).

[66] *See* article 46 ECHR.

[67] If a state refuses to accept a judgment or interpretation given in a case to which it was not a party, there are no means to force the state to accept it. The only way is for an individual citizen to lodge an application regarding the same matter, thus triggering the Court to hand down a judgment that is binding for the state in question. On the incorporation of interpretations of the ECtHR and the *erga omnes* effect of the Court's interpretations, see Saša Beljin, Bundesverfassungsgericht *on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order; Decision of 14 October 2004*, 1 Eur. Const. L. Rev. 553, 558–559 (2005); *see* also Ress, *supra* note 65, p. 374.

[68] *Cf.* Ost, *supra* note 38, at 284.

[69] *Cf.* Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 Hum. Rts. L. J. 161 (2002); Greer, *supra* note 9, at 172–173; Steven Greer, *What's Wrong with the European Convention on Human Rights?*, 30 *Hum. Rts. Q.* 680, 684–685 (2008).

[70] Monica Claes, The National Courts' Mandate in the European Constitution (2006), 401.

[71] *Id.*

[72] *Cf.* Lawrence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell Int. L.J. 133, 137 (1993).

hand down clear judgments that are understandable for the national authorities and provide convincing interpretations of the text of the Convention.[73] This is true not only with regard to the application of fundamental rights in individual cases but also in connection with the development and use of argumentation strategies and procedural methods. If insufficient guidance is given in this respect, the states may be inclined to follow their own paths.[74] In the end this may harm the supervisory and constitutional position of the Court, and it may hamper the effective and uniform protection of the rights contained in the Convention.

[73] *Cf.* Greer, *supra* note 69, at 686.

[74] This risk is not entirely theoretical, as is clear from a judgment rendered by the German Constitutional Court in 2004, in which it stressed that it considers the German Basic Law to be of higher order than the ECHR, which means that in situations of real conflict between a Strasbourg interpretation of the Convention and one of the rights guaranteed by the Basic Law, the Basic Law will prevail (Bundesverfassungsgericht [BVerfG] [German Constitutional Court], Oct 14, 2004, docket number 2 BvR 1481/04, *available at* http://www.bundesverfassungsgericht.de, in particular at para. 35). German scholars have commented that this judgment may not be as revolutionary as it seems. Schaffarzik has stressed, for example, that conflicts between the interpretation by the ECtHR and the national law will be rare, and that, moreover, article 53 of the Convention leaves sufficient scope for "a higher level of protection" of fundamental rights on the national level (B. Schaffarzik, *Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts*, Die Öffentliche Verwaltung 860, 863 (2005)). Since the Constitutional Court decided that deviations from the ECtHR's case law would only be permissible if such would be necessary to protect constitutional rights in Germany, there would be no real conflict between the Convention and the national law (*id.*, at 863). Dörr has argued that the issue of a different national interpretation or application will, in fact, only occur if the facts of the case have changed (O. Dörr, *Rechtsprechungskonkurrenz zwischen nationalen und europäischen Verfassungsgerichten*, Deutsches Verwaltungsblatt 1088, 1097 (2006)). Furthermore, the president of the German Constitutional Court, Hans-Jürgen Papier, has stated that the judgment has resulted in "a considerable increased effect of the Convention as compared with previous practice," rather than the opposite (Hans-Jürgen Papier, *Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts*, 27 Human Rts. L.J. 1, 2 (2006); *cf. also* Dörr, *supra*, at 1092). Such arguments notwithstanding, it may be remarked that the result of the judgment, still, is that real interpretive clashes between the German Constitutional Court and the ECtHR will not be solved in favor of the supranational court, but in favor of the (lower) national court. As Papier puts it: ". . . the Basic Law . . . has theoretically the final say" (Papier, *supra* at 2; *see also* Matthias Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights*, 6 German L.J. 869, 875 (2005)). For this reason and to this extent, the judgment discloses potential rivalry between the two highest courts. This is important, since the German decision appears to have raised the question in other states whether the decisions of the Court should always be implemented. *See* '*Das tut mir weh', interview with the president of the ECtHR, Luzius Wildhaber*, *in* Der Spiegel, 15 November 2004, at 52 (disclosing that Turkey and Poland have actually approached the ECtHR with this question). It is also important to note that the ECHR, different from EC law, does not have direct effect in the states parties. *See also* Ress, *supra* note 65, at 376 (mentioning that the Austrian Constitutional Court has stated that "there is still a difference between the Convention as a part of the constitution and the Convention as an international treaty interpreted by the ECtHR. Within the domestic legal order, the Convention is only one element in the mosaic of different constitutional provisions and its interpretation in that context may differ considerably from an interpretation based on the Convention alone"). The superior status of the judgments of the ECtHR is far from firmly established.

In our view, the approach taken by the Court with respect to the bifurcation between the definition of scope and the examination of the justification for an interference falls short of the dual need to provide guidance and to interpret the Convention in an authoritative manner. In this section, we will elaborate on this statement by discussing three problematic consequences of the Court's approach. First, we will argue that, on a substantive level, the case-based approach of the Court and the lack of attention it pays to the definition of fundamental rights is undesirable, because it allows the Court to hide behind the specific circumstances of the case and to avoid having to make structural decisions on the scope of a Convention right (section 4.2). Second, we submit that the confusion of the two stages of review creates uncertainty regarding the allocation of the burden of proof, both at the level of the Strasbourg Court and at the national level (section 4.3). Third, and finally, we find that the lack of attention to the bifurcation between scope and justification causes problems in connection with the margin of appreciation doctrine (section 4.4).

4.2. Consequences for the scope of fundamental rights

As seen in section 3, the ECtHR places much emphasis on the second application-and-justification stage, much less on the definition stage. The heavy reliance on justification results in a case-based approach in which the bifurcation is not always properly respected.[75] This can affect the soundness of the Court's reasoning, which has been shown by the examples discussed in section 3. This section will focus on the problematic consequences of this approach, not only for national courts and authorities but for Strasbourg itself.

The Court's approach as it has been outlined in section 3 is strongly influenced by the special position of the ECtHR. In sections 1 and 4.1, we have already made reference to the Court's supranational character and to the need for it to earn and continue to hold its specific position in the European legal landscape. The Court must search, constantly, for a balance between, on the one hand, its subsidiary position vis-à-vis the member states and, on the other, its aim to interpret the Convention and provide effective protection to individuals. This is a difficult position, especially since the confidence of the member states in the Court matters a great deal to the effectiveness of the judgments of the Court.[76] In this context, the Court's case-based approach is understandable indeed. The focus on the facts of the case placed before it allows the Court to take "incremental steps in specific contexts rather than . . . dramatic leaps in

[75] See, on the case-based approach of the Court: Gerards, *supra* note 1, at 9; Matscher, *supra* note 10; Paul Mahoney, *Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 Human Rts. L.J. 57, 77 (1990); Evert A. Alkema, *The European Convention as a Constitution and its Court as a Constitutional Court, in* Protecting Human Rights: The European Perspective 41, 59 (Paul Mahoney ed., 2000).

[76] Mahoney, *supra* note 75, at 77 and section 4.1.

the dark."[77] This does not mean that the Court has no interest at all in adopting general conclusions or interpretations in individual cases; however, it appears reluctant to reach conclusions that expressly go beyond the case at hand.[78]

The special position of the Court might also explain why the Court does not always respect the bifurcation between definition and justification. Its current approach allows the Court to focus on the specifics of each individual case and, as it were, to hide behind them.[79] Paying proper attention to the definition stage might, in some cases, require the Court to make structural decisions, while these can be avoided or, at least, be left implicit by focusing on the individual case.[80] The possibility of avoiding these choices allows the Court to take a modest position in the constitutional landscape and to maintain, carefully, the balance that has been described above. It enables the Court to take gradual steps and not to force itself upon all member states.

The downside to this approach is that it affects the semiconstitutional or guiding function of the Court. National courts and authorities are frequently left in doubt about the precise scope and meaning of the Convention and often must give their own interpretation to the Convention provisions. After all, in current Court practice, frequently, the scope of rights is determined by taking into account elements that are highly case-specific, which makes it more difficult to deduce general or abstract conclusions from the precise elements of the case.

The effect of this approach is not only that national authorities do not receive enough guidance; the approach of the Court also sets a bad example for judicial decision making on the level of the states. Unfortunately, inspiring the national authorities with its approach can also work against Strasbourg. Member states can use the same case-based approach to evade their Convention obligations. If the Court strongly focuses on the characteristics of the individual case, then national authorities can also focus on these characteristics to escape Convention obligations they do not want to abide by. This provides states with an excuse to say that the particular situations they are dealing with are to be distinguished from the case law of the Court and, in their view, do not fall within the scope of the Convention. Such a development might frustrate the implementation and effectiveness of the ECHR. In the end, and as a result, even more cases might find their way to Strasbourg, which would put still more pressure on the already overburdened Court.

The national authorities can be provided with more guidance if the Court pays more attention to the bifurcation. The definition stage will then be separated from the justification stage, which ensures that application to the facts of

[77] *Id.*

[78] On the willingness to draw general conclusions, see Gerards, *supra* note 1, at 424–425.

[79] *Id.* at 420.

[80] Mahoney, *supra* note 75, at 77 (explicitly confirming that the Court will avoid deciding some general issues if there is no need to decide them in the particular case).

the case will be concentrated in the second phase. Defining the scope of the right on its own merits will provide national authorities with more indications as to how to interpret the Convention. More transparency in the choices made by Strasbourg could surely enhance the implementation of the Convention at national level. That would be beneficial both on an abstract level and—in the end—on the level of the individual applicant. If the understanding of the Convention is improved at national level this might have the result of fewer individuals finding their way to Strasbourg. Indeed, the current number of applications and, particularly, the fact that about 60 percent of these applications are repetitive may be considered an indication that the national states are in need of more guidance from Strasbourg.[81]

Would this change of approach upset the balance the Court is trying to maintain? Probably not, since the bifurcated approach would just divide the different roles of the Court between the different stages. In the definition stage, the Court can guide member states on the proper interpretation of the Convention, while national differences and the subsidiary position could play a more prominent role at the justification stage. The emphasis on the bifurcation would thus still enable the Court to maintain the balance.

4.3. Consequences for the burden of proof

One of the most important arguments in favor of the bifurcation in fundamental rights cases is that it ensures a fair division of the burden of proof.[82] In the first or definition stage, the applicant must demonstrate that the complaint concerns a fundamental right and that it actually comes within the scope of that right.[83] The applicant must take this first step in order to overcome the presumption of the validity of state action.[84] If the applicant succeeds, a prima facie case of an infringement of the Convention is established.[85] As a consequence of this, the burden shifts to the government in the second or application stage; the state must then refute the assumption of a Convention violation by proving that the interference was justified.[86]

Before going into the question of whether the organization of the burden of proof before the Strasbourg Court corresponds to this view, it is necessary to

[81] Explanatory report to Protocol 14, CETS no. 194, 12 May 2004, § 7. *See also* Alkema, *supra* note 75, at 60 (confirming that states are often in need of guidance from the Court).

[82] *See, e.g.*, Faigman, *supra* note 55, at 1523–1524.

[83] *Id.* at 1528.

[84] *Id. See also* Tobias Thienel, *The Burden and Standard of Proof in the European Court of Human Rights*, 50 German Yearbook of International Law 543, 553–54 (2008) and *see* section 2 of this paper.

[85] Ugur Erdal, *The Burden and Standard of Proof in Proceedings under the European Convention*, 3 Eur. L. Rev. 68, 81 (2001).

[86] Faigman, *supra* note 5, at 1523–1524; Erdal, *supra* note 85, at 82; Thienel, *supra* note 84, at 553–554.

explain some theoretical notions that may help to understand the case law approach of the European Court. In the literature, a distinction is made between two concepts of the burden of proof.[87] The burden of proof is a term that is employed, generally, to refer to the burden of producing evidence.[88] It means that the party bearing this burden first must produce evidence supporting its claim. The second element of the burden of proof is regularly referred to as the burden of persuasion.[89] According to Tobias Thienel, this means that "if the factual contentions of the party bearing the burden of proof are not in the end proved to the appropriate standard, that party will lose on the relevant point."[90] In the view of Faigman this meaning of the burden of proof is used to "describe the allocation of the responsibility of demonstrating issues of constitutional concern between the parties."[91] Rüdiger Wolfrum approaches both concepts differently and refers to two different stages in the burden of proof.[92] First, he states that the production phase is concerned with who should produce evidence.[93] The second phase is the assessment phase, in which the party bearing the burden of proof will lose if the court is not convinced that the assertions have been proven.[94] Although the descriptions differ, the bottom line of all of these distinctions is the same; there is one element that deals with the burden of producing evidence, and another that deals with the consequences of failure to prove a certain claim.

In proceedings before the ECtHR, the burden of proof or the burden of producing evidence does not play a significant role in the sense that it is not placed strictly on either party.[95] An explanation for this may be found in the nature of the proceedings before the Court. The complaints in Strasbourg always concern state action or the lack thereof. As a result, certain kinds of evidence might be impossible for an individual to obtain, because they are exclusively in the hands of the government.[96] If the Court were to rely strongly on the burden of producing evidence this would weaken the position of the individual applicant. The Court, therefore, examines all

[87] Thienel, *supra* note 84, at 545; Juliane Kokott, The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems 150 (1998).

[88] Thienel, *supra* note 84, at 545; Kokott, *supra* note 87, at 150.

[89] Faigman, *supra* note 5, at 1523; Kokott, *supra* note 87, at 150; Thienel, *supra* note 84, at 548.

[90] Thienel, *supra* note 84, at 548.

[91] Faigman, *supra* note 5, at 1523.

[92] Rüdiger Wolfrum, *The Taking and Assessment of Evidence by the European Court of Human Rights, in* Human Rights, Democracy and the Rule of Law 915, 918 (Stephan Breitenmoser ed., 2007).

[93] *Id.*

[94] *Id.*

[95] *Id.*; *see also* Thienel, *supra* note 84, at 546.

[96] *See, e.g.,* D.H. v. Czech Republic (*Grand Chamber*), 13 November 2007 § 179, appl. no. 57325/00, http://www.echr.coe.int/eng.

material, "whether it originates from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*."[97]

The burden of persuasion, by contrast, does play an important role in Strasbourg proceedings.[98] It is not an issue on which the Court has expressed itself explicitly,[99] although it may be inferred from its case law that the responsibility for failing to show the applicability of the Convention or a failure to show that an interference has occurred clearly lies with the applicant.[100] On the other hand, a failure to show that an interference is warranted by a "pressing social need" is the responsibility of the respondent government.[101] It seems beyond doubt that the burden of persuasion lies with the applicant to show the applicability of the Convention. The burden of persuasion on the state seems to depend on the type of right concerned, or, in the words of Thienel, it "depends on the logical relationship of the human right at issue and the limitations provided for it in the Convention."[102] Within the range of cases pertaining to articles 8 through 11, the burden of persuasion is usually placed on the respondent state.[103] It is in the context of the division of the burden of persuasion—between applicant and respondent state—that the lack of respect for the bifurcation can have negative consequences.

The burden of persuasion is closely connected to the division between the first and second stages discussed in this paper. The presumption of the legality of state action results in the burden of persuasion being placed on the applicant in the first stage, which means that the applicant must prove that the provision is applicable and that there has been an interference.[104] In the second stage, in line with the text of provisions 8 through 11 in the Convention, the state is obliged to prove the justification for the interference.

[97] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A.) § 160 (1978) (referred to by Thienel, *supra* note 84, at 546–547 and Erdal, *supra* note 85, at 81).

[98] Wolfrum, *supra* note 92, at 918; Thienel, *supra* note 84, at 548; *see also* Makhmudov v. Russia, 26 July 2007 § 68, appl. no. 35082/04, http://www.echr.coe.int/eng.

[99] The Court seems to pay more attention in its case law to the standard of proof in different types of cases, which is a related matter, but beyond the scope of this paper. The Court does, however, in certain types of cases address the issue of the burden of proof. For example in cases concerning articles 2, 3, and the exhaustion of local remedies. *See, e.g.,* Pieter van Dijk et al., Theory and Practice of the European Convention on Human Rights 132, 355 (4th Ed. 2006).

[100] *See, e.g.,* Botta v. Italy, 1998-I Eur. Ct. H.R.; Kyrtatos v. Greece (*dec.*), 2003-VI Eur. Ct. H.R. *Cf.* Makhmudov v. Russia, 26 July 2007 § 68, appl. no. 35082/04, http://www.echr.coe.int/eng.

[101] *See, e.g.,* the recent case of Demir and Baykara v. Turkey (*Grand Chamber*), 12 November 2008, appl. no. 34503/97, http://www.echr.coe.int/eng. The approach by Strasbourg is also acknowledged in the literature. *See, e.g.,* Thienel, *supra* note 84, at 551 and Erdal, *supra* note 85, at 81–82.

[102] Thienel, *supra* note 84, at 552.

[103] *Id.*

[104] Faigman, *supra* note 5, at 1528; Thienel, *supra* note 84, at 553; Kokott, *supra* note 87, at 40.

In section 3, it has been shown that the Court often either ignores or insufficiently deals with the definition stage or that it mixes the two stages. Due to the connection between the structure of Convention rights and the burden of persuasion, these approaches affect the latter as well. Without properly addressing both stages, the allocation of the burden of persuasion is muddled, and it becomes unclear who should bear this burden. This state of affairs also constitutes a problem from the perspective of the guiding role of the Court. If the Court fails to respect the different adjudicative stages and, as a consequence, fails to provide guidance to the national courts on the allocation of the burden of persuasion, national courts are very much left on their own. The risk is that Strasbourg's nebulous approach will be copied by national courts in their application of the Convention, which might result in undesirable confusion regarding the burden of persuasion at national level.

Another problematic consequence of an unclear burden of persuasion has been described by Faigman.[105] The crux of the problem is that when the division of the burden of persuasion becomes unclear an unequal burden might be placed on the parties. According to Faigman, this is generally to the detriment of the individual applicant. Confusion of the two stages leads to confusion regarding the type of argument that plays a role in each phase. This could mean that governmental interests are taken into consideration when defining the scope of the right.[106] Generally, the applicant is required to bear the burden of persuasion in showing the applicability of a fundamental right; however, this becomes an increasingly heavy, if not impossible, burden if governmental interests are incorporated in this stage. Instead of the government's having to show that its interests justify an interference, the applicant must refute the public interest as a relevant argument for determining the scope of the provision. In the case law of the European Court, this risk is mainly visible in cases concerning positive obligations, where it is unclear in which phase the meaning of the right is established. As a result, public interests in some cases play a role in defining the scope of the rights in question. Consequently, applicants in individual cases might be held responsible for failing to show that a certain public interest does not render the provision inapplicable. This can be detrimental for the effective protection of individuals.

In cases concerning both negative and positive obligations, the preferable approach would be one in which, first, the definition of the right is spelled out and, subsequently, the justification for the interference in the case is considered. The burden of persuasion would then be clearly divided. Such an approach would enhance the consistency in fundamental rights adjudication at both the Strasbourg and the national level and avoid detrimental consequences to the effectiveness of fundamental rights protection. In section 5, this solution will be explored further.

[105] Faigman, *supra* note 5.

[106] *Id.*, at 1524.

4.4. Consequences for the margin of appreciation doctrine

Like many national courts, the European Court of Human Rights usually shows a certain degree of deference toward the national authorities. It does so by leaving the national authorities a "margin of appreciation," which may be quite narrow or rather wide depending on the circumstances of the case. The primary justification that the Court has given for its margin of appreciation doctrine is that the national authorities, usually, are better placed than the European Court to assess the necessity of certain limitations of fundamental rights.[107] In addition, the doctrine enables the Court to pay respect to the primacy of the national authorities in protecting fundamental rights.[108] Because of this rationale it is not surprising that the doctrine usually comes into play when the appropriateness and reasonableness of a justification are examined, or if the Court is asked to give an opinion about the proportionality of a certain national measure.[109] These standards all require some opinion to be given about national policy decisions and about the necessity and appropriateness of certain measures to pursue important public interests.

Given the Court's subsidiary position it is reasonable that the Court goes to some lengths in respecting the national authorities' opinions as regards the justifiability of limitations. It would be rather strange, nonetheless, if the doctrine were applied to the definitional stage of the Court's review.[110] From the Convention provisions regarding the jurisdiction of the Court it may be concluded that the Strasbourg Court is entrusted with the final authority to interpret the Convention. According to article 32 of the Convention, the jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention. It is contested whether this jurisdiction means that the

[107] *See,* already, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) § 48 (1976); Ireland v. United Kingdom (IRA case), 25 Eur. Ct. H.R. (ser. A) § 207 (1978). *Cf. e.g.* Johan Callewaert, *Quel avenir pour la marge d'appreciation?*, *in* Protecting Human Rights: The European Perspective—Studies in Memory of Rolv Ryssdal, 147, 150 (Paul Mahoney ed., 2000).

[108] *See,* already, the so-called *Belgian Linguistics Case* (Case "Relating to certain aspects of the laws on the use of language in education in Belgium" v. Belgium, 6 Eur. Ct. H.R. (ser. A) (1968); *cf.* Lord Mackay of Clashfern, *The margin of appreciation and the need for balance*, *in* Protecting Human Rights: The European Perspective 837, 840 (Paul Mahoney ed., 2000); Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 Hum. Rts. L.J. 1, 2 (1998) and Sweeney, *supra* note 30, at 472.

[109] *Cf.* Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 Hum. Rts. L.J. 30, 31–32 (1998) and *see* R. St.J. Macdonald, *The Margin of Appreciation*, *in* The European System for the Protection of Human Rights 83, 123 (R. St.J. Macdonald, F. Matscher & H. Petzold eds., 1993) ("the margin of appreciation . . . is more a principle of justification than interpretation"). Rather surprisingly, this element is hardly explored in legal scholarship about the margin of appreciation doctrine. Most legal commentators seem to start from the view that the doctrine applies to the justification or limitation stage of the Court's review, but this is seldom stated expressly.

[110] *Cf.* Steven Greer, The Margin of Appreciation: Interpretation and discretion under the European Convention on Human Rights 22 (Human Rights Files No. 17, 2000), Greer, *supra* note 69, at 698 and Callewaert, *supra* note 107, at 163.

states have lost their power, fully, to define the scope and meaning of Convention rights to the European Court of Human Rights.[111] The Court itself has never clearly expressed itself on this sensitive issue. Nonetheless, it is rather obvious that it assumes it holds the final authority to explain the terms of the Convention and to determine the scope of its application.[112]

This point is demonstrated, in particular, by the Court's autonomous interpretation of a variety of central Convention notions such as "civil rights and obligations," "property," or "criminal charge." Although the Court has expressly adopted an autonomous interpretation only with respect to relatively clear, procedural notions, it has also provided uniform definitions of such sensitive and substantive notions as "family life" and "private life."[113] The Court has explained in a number of judgments that such autonomous and uniform definitions are necessary to avoid the possibility that the protection offered by the Convention (along with the ability to have standing before the ECtHR) would come to depend on definitions given to these notions by the forty-six states of the Council of Europe.[114] It would not be acceptable, for example, if social security claims were protected by the right to property in Sweden, and a Swedish victim could bring such a claim before the European Court, while the same kind of claims could be

[111] *See, e.g.*, Ostrovsky, *supra* note 10, at 48–49 ("the doctrine of the margin of appreciation places the court as the secondary interpreter of these rights, after the Contracting State itself").

[112] This position of the Court also finds support in the preamble to the Convention, which refers to the importance of a "common understanding and observance" of the rights protected by the Convention; *see* Callewaert *supra* note 107, at 154 and 163. *See also* Tanja Goldman, Vo v. France *and Fetal Rights: The Decision Not To Decide*, 18 *Harv. Hum Rts. J.* 277, 279 (2005).

[113] *See* François Sudre, *Le recours aux 'notions autonomes'*, *in* L'INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 93, 116–118 (François Sudre ed., 1998). Perhaps the best example of a uniform (albeit not "autonomous") definition of a sensitive notion is the case of *Pretty* (Pretty v. United Kingdom (*Grand Chamber*), 2002-III Eur. Ct. H.R.), in which the Court explained that the notion of private life includes the right to personal autonomy and self-determination. Sudre has rightly stated that the Court would probably not classify this definition as autonomous itself; in his opinion, the Court reserves the notion for "rule of law"–related or procedural notions. However, the case of *Stec* illustrates that this is not entirely true, since the Court there expressly gave an autonomous definition of the notion of property in a case wholly unrelated to classic rule of law or procedural issues (Stec v. United Kingdom (*dec., Grand Chamber*), 2005-X Eur. Ct. H.R. at § 49). The question as to when the Court expressly adopts an autonomous definition in some cases and in other cases a uniform but not autonomous definition, therefore, remains something of an enigma.

[114] *See, e.g.*, Chassagnou v. France, 1999-III Eur. Ct. H.R. § 100 ("If Contracting States were able, at their discretion, by classifying an association as 'public' or 'para-administrative,' to remove it from the scope of article 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective"). *See also* Judge Martens in his dissenting opinion to the Cossey case (Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) § 3.6.3 (1990)); *cf.* R. Bernhardt, *Thoughts on the interpretation of human rights treaties*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 65, 67 (R.St.J. Macdonald, F. Matscher & H. Petzold eds., 1993) and Sudre, *supra* note 113, p. 94.

put completely outside the scope of the Convention and the Court's jurisdiction as a result of a different definition in Finland or Denmark.[115]

On a more principled and fundamental level, it could also be argued that the rights enjoyed by the citizens of whatever country in the Council of Europe must be the same.[116] Of course, it is important to respect cultural diversity and variation, and it is not desirable to strive for complete uniformity in the protection of fundamental rights.[117] However, in order to avoid cultural relativism and to guarantee fundamental rights at a proper level,[118] it is advisable to take national differences in circumstances, tradition, and culture into account only when deciding about the justification of a concrete interference with a certain right.[119]

All this would seem to imply that the Court should allow no margin of appreciation to the member states concerning the definition of the terms of the Convention. It is unfortunate, therefore, that the European Court has applied, rather frequently, the doctrine at the definitional stage, although this occurs only rarely in cases concerning negative interferences.[120] The foremost

[115] *See* Stec v. United Kingdom (*dec.*, *Grand Chamber*), 2005-X Eur. Ct. H.R. §§ 49–50 ("It is . . . important to adopt an interpretation of article 1 of Protocol No. 1 which avoids inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable").

[116] *Cf.* Sweeney, *supra* note 30, at 460ff. and Ost, *supra* note 38, at 305.

[117] *Cf.* Mahoney, *supra* note 109, at 3.

[118] *See,* especially, Eyal Benvenisti, *Margin of appreciation, consensus, and universal standards*, 31 N.Y.U. J. Int'l L. & Pol. 843, 844 (1998–1999); *see also* Sweeney, *supra* note 30, at 460 (speaking of the "tolerance trap" in relation to the argument that local differences of opinion should be respected).

[119] *See* Sweeney, *supra* note 30, at 469–471 (explaining that the recognition of the universality of human rights should not be equated with uniformity: "even whilst maintaining 'universal' human rights, there may be some defensible local qualification"). His argument seems to support the statement that uniformity or universality may reasonably be found on the level of the definition of rights, since it is then stated in a rather general way that certain rights are to be protected throughout the Council of Europe. It is also relatively easy to find agreement and consensus on such a general, abstract level, which makes it easier to provide uniform and autonomous definitions. Such agreement is much more difficult to reach when the reasonableness of interferences is concerned, since opinions may reasonably differ on the acceptability of certain reasons to justify the limitation of fundamental rights. To that extent, it seems reasonable to take account of local differences and variations only when scrutinizing the justification for an interference.

[120] *Cf.* Schokkenbroek, *supra* note 109, at 32, pointing out that the Court will leave a margin of appreciation when the Court must assess whether the term in question applies to the facts of the case or what requirements flow from it. As an example he mentions the term "respect" in article 8 § 1, which clearly pertains to the definition of the right under discussion. Noticeably, however, he admits that a margin of appreciation is usually left in cases concerning positive obligations, in which the two stages of review are generally confused anyhow. It is, therefore, questionable whether the Court will really leave a margin of appreciation as regards the definition of Convention terms outside this complex field of positive obligations. See also Sudre, *supra* note 113, at 108, who even states that the Court never resorts to a margin of appreciation in determining the applicability of the Convention.

example of the recognition of a "definitional margin of appreciation" can be found in the notorious case of *Vo v. France*, in which the Court flatly refused to give an autonomous definition of the right to life.[121] The Court considered that there are so many different opinions within the Council of Europe that it would not be possible for it to rule in an authoritative manner on when the right to life begins. Instead, the Court left an interpretative margin of appreciation to the states, which means that they can now decide for themselves how the scope of the right to life should be defined. The result is that the right to life of unborn children is protected in some states, and not in others.[122]

However, even though this case is of great importance for the applicability of the margin of appreciation doctrine to the stage of rights definition, it may be argued that it is a specific and probably unique decision.[123] After all, the case concerned a right that is absolute in character, except for some highly specific exemptions. As a result, the Court was confronted with a dilemma—if it had ruled that the right to life starts at birth, it would have offended national sensibilities in quite a number of states, whereas it would have ruled out any possibility of allowing abortion if it had said the right to life starts at conception.[124] Because of the specific nature of the right to life and the intense controversy surrounding the issue of abortion, this judgment may be considered an unrepresentative exception to the rule that no margin is given with respect to the definition of fundamental rights.

Perhaps rather unexpectedly, however, the Court also frequently applies the margin of appreciation doctrine to the definition of the scope of nonabsolute fundamental rights. Examples of this are relatively rare where negative interferences with fundamental rights are concerned;[125] however, they are abundant in cases concerned with positive obligations. In section 3, we have

[121] Vo v. France (*Grand Chamber*), 2004-VIII E. Ct. H.R. See also the annotation by Jacco Bomhoff in European Human Rights Cases 2004, no. 86 (showing that the Court normally does not recognize a margin of appreciation in defining (interferences with negative) fundamental rights). Given the limitation of this paper to nonderogable rights (see the introduction), the case of *Vo* is really out of place in this section but, since it is the only example of the express use of the margin of appreciation doctrine, the case cannot be ignored.

[122] It is clear from later cases decided by the Court that it is, indeed, unwilling to address any issues under article 2 that concern the right to life of unborn children; *see, e.g.,* Evans v. United Kingdom (*Grand Chamber*), 10 April 2007, app. no. 6339/05, http://www.echr.coe.int/eng.

[123] Although article 2 contains a number of possibilities for limitation, these possibilities have been defined very strictly. Apart from these very limited limitation clauses, the text of article 2 does not leave any room for justification.

[124] However, it must be noted that various alternatives are feasible and have been advocated by both dissenting judges (*e.g.* Judges Ress, Rozakis and Costa) and legal commentators (*see, e.g.,* Trees A. M. te Braake, *Does a Fetus have a Right to Life? The Case of* Vo. v. France, 11 *Eur. J. Health L.* 381, 387 (2004) and Goldman, *supra* note 112, at 281).

[125] *But see* Schokkenbroek, *supra* note 109, at 32.

already discussed the case of *Hatton v. United Kingdom*, concerning sleep disturbance caused by night flights at Heathrow airport.[126] According to the applicants, the national authorities had insufficiently investigated sleep disturbance by aircraft noise and had failed to set reasonable limits on nightly air traffic. It may be repeated, here, that the Court did not expressly find that article 8 was applicable to claims about sleep disturbance, restricting itself to stating that "Article 8 *may* apply in environmental cases. . ." and that "[r]egard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole."[127] Interestingly, the Court subsequently left a margin of appreciation to the national authorities to define the positive obligations inherent to article 8:

> Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation, the Court's supervisory function being of a subsidiary nature and thus limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.[128]

In addition, the Court stated that the scope of the margin of appreciation could be determined only by reference to the context of the particular case.[129] The Court then tested whether the national authorities had struck a reasonable balance between the individual and governmental interests concerned. In the end, it did not find that "[i]n substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home, and the conflicting interests of others and of the community as a whole."[130] The quoted considerations show that the Court wanted to restrict itself to reviewing the "fairness" of the balance of interests struck by the national government. Although a large part of the judgment is devoted to determining the exact scope of the margin that should be given to the states, the Court did not reach a conclusive judgment on the issue. However, the general result of the Court's approach was that the national authorities were actually given much latitude in determining the scope and meaning of article 8.

Admittedly, it is fully reasonable that the national authorities should be left with a substantial margin of appreciation in determining the need for measures against sleep disturbance, especially since important economic interests

[126] Hatton v. United Kingdom (*Grand Chamber*), 2003-VIII E. Ct. H.R.

[127] § 98, emphasis added.

[128] § 123.

[129] § 104.

[130] § 129.

were involved, and the case concerned difficult issues of social and planning policy. Indeed, the margin of appreciation doctrine is designed precisely to deal with this type of situation. It may be argued, however, that allowing a broad margin of appreciation is reasonable only at the stage of *justification*, not at the stage of *defining* the rights protected by the Convention.[131] The ECtHR has never given any sound reason why it would consider the national authorities to be "better placed" than itself in defining the scope of fundamental rights, or why there is no need for autonomous definitions in the sphere of positive obligations. Furthermore, it is far from clear at what point the Court deems the national authorities competent to give an interpretation to the Convention by means of a balancing of interests (which will only be marginally reviewed by the Court) and when it will take over and establish its own autonomous and uniform interpretation. For national courts that have to apply Convention rights, the case law about the margin of appreciation and autonomous interpretation of the Convention may be incomprehensible indeed.

Finally, and perhaps most importantly, the Court seems inclined to allow a considerable margin of appreciation in almost every case concerning positive obligations, regardless of the importance of the individual right at stake. In cases that deal with negative obligations, the Court first defines the individual right that has been interfered with (although, as demonstrated in section 3, it often pays little attention to the definition), and only then will it consider the justification. The intensity of the Court's scrutiny of the justification will be in line with the margin of appreciation that is left to the state. The margin of appreciation itself is determined by a number of factors, one of which is the nature of the affected individual right.[132] This is clearly apparent in article 10 cases, in which the Court considers it relevant to the margin of appreciation that a core aspect of the right has been limited (such as freedom of the press).[133] In such cases, stricter scrutiny will be applied than if only the periphery of the right has been affected (as in cases about commercial speech).[134] This means

[131] *Cf.* (rather implicitly) Greer *supra* note 69, at 698.

[132] *Cf., e.g.,* Buckley v. United Kingdom, 1996-IV E. Ct. H.R. § 75: "The scope of this margin of appreciation is not identical in each case but will vary according to the context. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned." *See also* Janneke Gerards, Judicial Review in Equal Treatment Cases 187ff. (2005). *Cf.* Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 Hum. Rts. Q. 474, 492–493 (1982), Schokkenbroek, *supra* note 109, at 35 and Søren C. Prebensen, *The Margin of Appreciation and Articles 9, 10 and 11 of the Convention*, 19 Human Rts. L.J. 13, 17 (1998).

[133] *See, e.g.,* Autronic AG v. Switzerland, 178 E. Ct. H.R. (ser. A) § 61 (1990): "Where . . . there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question. . . ."

[134] *See, e.g.,* Markt Intern Verlag v. Germany, 165 E. Ct. H.R. (ser. A) (1989) and Wabl v. Austria, 21 March 2000, app. no. 24773/94, http://www.echr.coe.int/eng.

that the definition of the right is, normally, considered to be of value to the scope of the margin of appreciation and the intensity of the Court's justification test. It is, therefore, rather curious that, in many cases about positive obligations, the individual right is not at all defined. The meaning of the Convention rights in these cases seems to depend on the reasonableness of the balance struck at the national level between the various interests, a balance that is itself scrutinized often rather marginally.[135] Exactly how the margin of appreciation is determined in these cases is unclear;[136] regardless, it will be quite difficult to take the importance of the individual right into account if no such right is defined in the first place. This is all the more problematic since the importance of the individual right concerned might invite the application of a stricter test, which means that the national balancing of interests will be examined more critically. It is not improbable that, at least in some cases, a different outcome would be reached if the individual right concerned were expressly recognized and defined as a first step.[137] The Court's confusion between the first and second stage of fundamental rights review thus hampers a sound application of the margin of appreciation doctrine and, consequently, may result in judicial review that is not sufficiently strict.

[135] *See also* François Sudre, *Les "obligations positives" dans la jurisprudence européenne des droits de l'homme ["Positive obligations" in European human rights jurisprudence], in* Protecting Human Rights: The European Perspective—Studies in Memory of Rolv Ryssdal 1359, 1373 (Paul Mahoney ed., 2000) (stating that, in general, the test applied in cases about positive obligations is a general balancing test that is generally not very strict, that is somewhat rashly applied, and that is much more vague than the test applied to negative obligations).

[136] In fact, it is often noticed that (generally) the margin of appreciation allowed in cases about positive obligations is rather broad—*see, e.g.,* Sudre, *supra* note 135, at 1369 (although this is debated, *see, e.g.,* Clare Ovey, *The Margin of Appreciation and Article 8 of the Convention*, 19 Hum. Rts. L.J. 10 (1998)). Interestingly, the example of *Hatton* makes clear that the Court is well aware of the problem; in this case, the Court did pay attention to the individual interests concerned in determining its margin of appreciation. Unfortunately, in the end it did not provide any clarity as regards the ambit of the margin of appreciation, since it considered that the margin was closely linked to the facts of the case at hand (*Hatton*, §§ 103–104). This is a general problem regarding the margin of appreciation doctrine; it occurs altogether too often that the Court leaves the question as to the scope of the margin undecided (*cf.* Gerards, *supra* note 132, at 196). We will leave this issue aside in our paper since the problem is not closely related to the Court's structural confusion.

[137] *Cf.* the dissenting opinion of (former) Judge Martens in *Cossey*, in which he also makes clear that it may make a difference to the structure of the Court's review and to the application of the margin of appreciation doctrine whether the case is framed as a case concerning positive obligations or as a case concerning a negative interference (Cossey v. United Kingdom, 184 E. Ct. H.R. (ser. A) (1990). In most cases it is rather easy to define the case in both ways (*cf.* Sudre, *supra* note 35 at 1362). This means that the same claim might invite a stricter test if defined as a negative interference than if defined as a failure to respect positive obligations. It is clear that there is no logical or reasonable explanation to be given for such a difference in approach. See also the dissenting opinion of Judge Wildhaber in Stjerna v. Finland, 299-B E. Ct. H.R. (ser. A) (1994) and see, critically, Sudre, *supra* note 135, at 1374.

5. Conclusion

The foregoing sections have made clear that it is important to distinguish clearly between the definition of the scope of fundamental rights and the test of justification. Furthermore, it appears that, from this perspective, the approach followed by the European Court of Human Rights falls short. In many cases, the Court either skips the first stage or pays scarce attention to the definition of the right at issue. In other cases, the Court confuses or merges the first and second stages of review, thus blurring the line between definition and justification. It has been argued in this paper that this approach causes serious problems from the perspective of the clarity of the Court's case law, the division of the burden of proof in (national) fundamental rights cases, and the application of the margin of appreciation doctrine.

Much would be gained if the Court took more seriously the bifurcated approach toward fundamental rights. The clarity and insightfulness of the Court's case law could be much improved if—taking a more structural approach—it articulated its reasoning in two argumentative stages, paying closer attention to each. In the first stage, the Court could refer systematically to classic methods of interpretation in order to determine whether the Convention applies to the individual complaint at hand. In light of the Court's quasi-constitutional role, it is not sufficient merely to state that both parties agree that the Convention is applicable or to conclude that it "evidently" applies. Even in cases that do not raise any new definitional questions, the Court should refer to earlier cases in which the issue of scope was decided. In cases raising new definitional issues, the Court should reason in a convincing manner as to why the claim does (or does not) come within the scope of the Convention, for example, by seeking analogies to earlier cases, by referring to the text and aims of the Convention, or by using other classical methods of interpretation.

In cases concerning positive obligations, additionally, the Court could take the definition of the scope of the right at hand more seriously.[138] In the *Hatton* case discussed in sections 3 and 4.4, which concerned the state's alleged failure to protect the people living in the neighborhood of Heathrow against aircraft noise, it is possible, for example, to reason that the right to respect for one's private life also covers the right to peaceful and undisturbed sleep, having regard to the underlying values of the Convention and to earlier cases in which similar claims have been considered. If the scope of the right has been defined in this manner, the next step is to examine if it was reasonable for the government to interfere with this right by deciding to maintain certain noise

[138] See also the dissenting opinion of Judge Wildhaber in Stjerna v. Finland, 299-B E. Ct. H.R. (ser. A) (1994). *Cf.* also Van Dijk, *supra* note 33, at 25, although he suggests a different solution in which there is less of a place for the concept of positive obligations as such.

levels and to conduct only a limited amount of research into sleep disturbance patterns.[139] Thus, the question to be answered at this stage is whether due respect for the established Convention right would have demanded a certain action from the authorities. In deciding this, the Court could allow a margin of appreciation to the national authorities in order to accommodate their particular needs and abilities in evaluating facts and making policy choices.

Such a two-stage approach, which should also be applied by the national courts, would enhance the quality of both national and transnational or supranational argumentation in fundamental rights cases. It would provide clarity about the respective roles of national and supranational courts regarding both the way in which fundamental rights should be applied by the courts and the division of the burden of proof. In the complex world of human rights law that would be beneficial to all parties concerned.

[139] *Cf.* Sudre, *supra* note 135, at 1374, who explains that it would be desirable to use the term "interference" not only in the negative sense (*i.e.,* to describe an active interference with a right) but also in a positive sense (*i.e.,* to describe inaction by the state that allegedly results in a lack of protection of a fundamental right). Sudre refers to "normalisation méthodique ensuite: pour toute ingérence, qu'elle que soit active où passive, la Cour devrait rechercher si les conditions figurant dans la clause d'ordre public (base légale, but légitime, nécessité) sont remplies [standardization of methodology so that, for any interference—be it active or passive, the Court should ascertain whether the conditions contained in the law and order clause (legal foundation, legitimate aim, necessity) have been met]."