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Dynamic and Evolutive Interpretation of the ECHR by Domestic Courts?

An Inquiry into the Judicial Architecture of Europe

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I. Introduction

1. Research Question

The relation between a word and its meaning is conventional and, therefore, determined by those using language. This insight has been fascinating and exciting for people reflecting on language from the end of the nineteenth century to this very day. But who is competent to establish or change the conventional relations between words and their meanings? René Magritte's first picture of his series 'the key of dreams' (1927) deals with that question. It displays four objects: a handbag, a pocket-knife, a leaf, and a sponge. Yet, Magritte attached different words to the objects: 'Le ciel' to the handbag, 'Loiseau' to the pocket-knife, 'La table' to the leaf and 'L'éponge' to the sponge. Apart from the sponge, all other painted objects are attributed to words that are not obviously connected to them. One way to read this painting is to see it as an attempt to change the meaning of words, to assort words to a representation that was previously not connected to them. Can Magritte, being a single person, an artist, do that? His contemporaries must have perceived this picture as a provocation.

A similar provocative question is brought up by scholars in relation to the European Convention on Human Rights (ECHR):¹ can national courts change the meaning of the terms of the ECHR through interpretation?² The purpose

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 5 ETS.

² R Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act' (2005) 54 ICLQ 907; E Cannizzaro, 'The Effect of the ECHR and Judgments of the ECtHR on National Law' (2009) 19 IYIL 173, 183; F de Londras and C Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall/Thomson Reuters 2010) 175–8; M Andenas and E Bjorge, 'National Implementation of ECHR Rights' in A Føllesdal, B Peters, and G Ulfstein (eds), *Constituting Europe: The European*

of this contribution is to expand on this innovative and interesting idea and to inquire into it in an empirical (heuristic) as well as in an analytical manner. To do so, it will be necessary to have a basic understanding of what evolutive interpretation actually means in the context of the ECHR (subsection 2). We will then look into how a judicial system comprising European and national elements can be constructed. On this basis, possible models of international and national judiciaries working together will be developed. Those models represent the judicial architecture (subsection 3). Based on the models, the practice of domestic courts in three member states will be reviewed in an in-depth analysis, namely in Germany, Ireland, and the United Kingdom (Section II). Following this, we will look at the problem from the European perspective (Section III) and think about the legal (subsection 1), institutional (subsection 2) and normative (subsection 3) aspects of the question. In conclusion (Section IV), the insights will be summarized by five themes.

2. Evolutive interpretation: the living instrument approach

To answer the question whether national courts are and should be competent to interpret the ECHR evolutively, it is first necessary to have a grasp of what evolutive interpretation means in the context of the ECHR.

In many instances, there is a need to determine the meaning of treaties in the process of their application. This process of attributing meaning to a treaty will be called interpretation.³ In practice, the European Court of Human Rights (ECtHR) has regularly defined certain terms in the Convention before looking at whether they apply to the case at hand. The Court has also revisited interpretive questions after a certain period of time asking whether it would have to change the meaning of the terms. The instances in which the Court has changed the meaning of a treaty are evolutive interpretations.⁴ This definition is restricted to changes in interpretation. All cases in which the meaning of the term is specified, rendered more concrete and tangible without changing it, are excluded from this definition. The term evolutive interpretation denotes only and exclusively that the meaning of the terms of a treaty transforms from one state into another. In *Tyrer* the ECtHR

Court of Human Rights in a National, European and Global Context (CUP 2013); for the judgments dealing with this question see Section II.

³ M Herdegen, 'Interpretation in International Law' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol 6, 260; J Pauwelyn and M Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 446; C Djéffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016) 8–13.

⁴ The term evolutive is used amongst others by G Nolte, 'Introduction' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 2; J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 379. Other terms used include evolutionary, evolutional, or dynamic interpretation. ILC Report 2013, ch 4, 24, Draft Conclusion 3, Commentary para 2; Djéffal (n 3) 18–21.

very early held that the ECHR is ‘a living instrument which ... must be interpreted in the light of present-day conditions’.⁵

From then on, the Court frequently discussed whether it should change the interpretation and in many instances it has done so.⁶ In the process of interpretation, the Court has generally relied on the rule of interpretation as contained in the Vienna Convention on the Law of Treaties (VCLT),⁷ even though in some instances the Court rather looked for the consensus of the parties.⁸ What we can take away from this, is that evolutive interpretations are possible under Convention law and frequently occur when the European Court interprets the Convention in an evolutive manner. So, the ECtHR is allowed to ‘play’ the ‘living instrument’ as a soloist. But could there also be a judicial orchestra, being comprised of several musicians, ie national courts as well as the ECtHR?

3. Macro and micro perspectives

This question relates to the relationship between courts beyond the national and the international. The metaphor ‘judicial architecture’ will help to grasp and better understand this. It ought to signify the way in which judicial institutions relate to each other on different levels in a multi-dimensional way. It also signifies that one can observe the judicial system from different angles. It is necessary at the beginning to distinguish a macro and a micro perspective in that regard. The macro perspective is the European (Convention) perspective and looks at the problem from above. The micro perspective takes the outlook of a single national judicial system.

From the macro perspective, we can think of three models. First, a *pluralist* model⁹ allowing all courts to interpret the Convention evolutively, be they national or international. Sharply opposed to this would be the *centralist* model that would allow only the ECtHR to interpret the Convention evolutively. A combination of those two models would be the *federalist* model:¹⁰ it generally accords the competence for the interpretation of the ECHR to the ECtHR and of national human

⁵ *Tyrer v the United Kingdom* (1978) Series A no 26, para 31.

⁶ *Matthews v the United Kingdom* ECHR 1999-I 251, paras 40–4; *Demir and Baykara v Turkey* ECHR 2008-V 333, paras 68–86; *Sigidur A Sigurjónsson v Iceland* (1993) Series A no 264, para 35. For a detailed analysis see Djefal (n 3) 272–347.

⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT). For the leading case see *Golder v the United Kingdom* (1973) Series A no 18, para 29.

⁸ *Demir and Baykara v Turkey* (n 6) para 84.

⁹ It is very important to keep in mind that we are not concerned with general theories of pluralism or fragmentation. The term pluralism attaches in our context only to the fact that more than one court is competent to interpret the ECHR evolutively.

¹⁰ It has been noted that ‘[a]t best, this sharing of monitoring and implementing functions between international and national judiciaries generates a functional synergy comparable to that found in a mature federal system, with national and provincial courts providing mutual reinforcement of essential norms while also protecting space for varied local experimentation and due deference to socio-cultural sensibilities.’ TM Franck and GH Fox, ‘Introduction: Transnational

rights law to national courts but links both legal orders in an effective manner. Under the federalist model, the legal orders are institutionally separate but substantively linked: the respective courts are competent to interpret the law of 'their legal order' but they can also take into account the other legal order. An international court could acknowledge national court decisions through subsequent practice as envisaged by Article 31(3)(b) VCLT. The decisions of international courts could influence the domestic courts in the process of interpreting their domestic bills of rights if national law allowed for it.

Looking at the whole problem from the micro perspective, ie the perspective of a national judicial system, there are at least three ways to link the national to the international judicial system. There is, first, the possibility of *coexistence*. For many years, there were states in which the ECHR was not even applicable such as Ireland, Norway, Sweden, and the United Kingdom. Those jurisdictions practically coexisted with the ECHR and the courts in those jurisdictions coexisted with the ECtHR.¹¹ They considered themselves as generally complying with the human rights standard in Europe without any substantive or institutional link to the Convention or its Court. Today, all member states of the Convention have established legal ties to it, yet, the way in which they have done so varies to some extent. In some judicial systems, there is a domestic bill of rights while the ECHR is a complementary standard. The relationship between the ECtHR and domestic courts in such systems has been described as '*perpetuum mobile*' as opposed to a pyramid.¹² We shall call those systems *cooperative*. Yet, in other cases, the ECHR is incorporated in a way that it effectively forms the bill of rights that is directly applied by courts. We shall call those systems *integrative*. To organize possible judicial architectures analytically in such a way helps to better understand and assess them. With this structure in the back of our minds, we can continue to look at the actual legal practice of the member states.

II. The Micro Perspective: Member States

The question of whether courts are competent to interpret the Convention evolutively will be encountered in a first step from the micro perspective, ie the perspective of the member states of the ECHR. The question will be determined by looking into the constitution and other instruments as well as the respective jurisprudence of national courts. Within the confines of this chapter, it is only possible to look at Germany, Ireland, and the United Kingdom.

Judicial Synergy' in TM Franck and GH Fox (eds), *International Law Decisions in National Courts* (Transnational Publishers 1996) 4.

¹¹ The terminology of cooperation and coexistence is voluntarily put in another context as compared to W Friedmann, 'The Changing Dimensions of International Law' (1962) 62 *Columb L Rev* 1147.

¹² A Voßkuhle, 'Pyramide oder Mobile?—Menschenrechtsschutz durch Europäische Verfassungsgerichte' (2014) 41 *EuGRZ* 165.

1. Germany

While the Federal Republic of Germany has been party to the ECHR since 1952, the courts did initially not apply the provisions in the ECHR as subjective and enforceable rights and there was a general debate how this could be achieved legally.¹³ In *Görgülü*, the Federal Constitutional Court (FCC) had to deal with a judgment of the regional court of appeal Naumburg (Oberlandesgericht Naumburg) which had flatly disregarded a judgment of the ECtHR.¹⁴ After a constitutional complaint was filed, the FCC pronounced upon the relationship of German law and the ECHR as well as that of German courts with the ECtHR. Through the assent of Parliament, the ECHR acquired the rank of an act of Parliament in Germany and was, therefore, binding upon all organs including courts, but still with a rank below the constitution.¹⁵ Yet, the FCC strengthened the domestic effect of the ECHR asserting the 'Basic Law's commitment to international law (*Völkerrechtsfreundlichkeit*)',¹⁶ which had the effect that German law, including the basic rights and constitutional principles, was to be interpreted in conformity with international law.¹⁷ The FCC found that judgments of the ECtHR reflected the current state of the ECHR and concluded from this that they were binding upon all organs of the German state. Since the ECHR left its internal enforcement to the member states, German organs were to comply with the Convention in as far as German law made them competent to do so.¹⁸ The FCC found that the minimum requirement for courts was to take the jurisprudence of the ECtHR into account.¹⁹ It also found that a failure to take into account or to disobey a judgment of the ECtHR by a German court would not only violate ECHR but also German basic constitutional rights as well as the principle of the rule of law (*Rechtsstaatsprinzip*).²⁰ This elevated the ECHR to a 'quasi-constitutional' status. While this can be considered as the general framework of the ECHR in German law, the FCC made some statements relevant for the general theme of the relationship between German courts and the ECHR. The first point of reference for the Court was clearly the German legal and constitutional order. The Court found that

[t]he Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself.²¹

¹³ See the careful analysis by R Uerpman, *Die Europäische Menschenrechtskonvention und die deutsche Rechtsprechung: Ein Beitrag zum Thema Völkerrecht und Landesrecht* (Duncker & Humblot 1993).

¹⁴ *Görgülü*, reprinted in BVerfGE 111, 307; an English translation is provided by the court at <http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html> accessed 27 September 2013.

¹⁵ *Görgülü* (n 14) [32].

¹⁶ *Görgülü* (n 14) [33].

¹⁷ *Görgülü* (n 14) [33].

¹⁸ *Görgülü* (n 14) [47].

¹⁹ *Görgülü* (n 14) [46].

²⁰ *Görgülü* (n 14) [60]–[63].

²¹ *Görgülü* (n 14) [34].

The Court also held that '[t]he decisions of the ECHR have particular importance for Convention law as the law of international agreements, because they reflect the current state of development of the Convention and its protocols'.²² Taken together, these quotes indicate that the FCC regards the ECHR as law of a separate sphere and attributes the development of European human rights primarily to the ECtHR. The FCC held that it was competent to review whether the other domestic courts complied with international treaties. In this context, it said that '[t]his applies in a particularly high degree to the duties under public international law arising from the Convention, which contributes to promoting a joint European development of fundamental rights (*gemeineuropäische Grundrechtsentwicklung*)'.²³ In this phrase, the FCC clearly acknowledged a common development of human rights in Europe. Yet, it transpires from the context that the focus is not on the development of the ECHR by domestic courts but rather on the development of the rights contained in the German basic law in line with the standards set by the ECtHR. This was reinforced by a decision concerning the constitutionality of subsequent security detentions.²⁴ The FCC emphasized that the ECHR was an aid to the interpretation of the basic law,²⁵ however, the Court explicitly acknowledged that there could be differences between the fundamental rights of the German Basic Law and the human rights enshrined in the ECHR.²⁶

From all this, we can see that for the FCC, the ECHR has a complementary function: it might effect changes in the interpretation of fundamental rights in Germany but belongs to a separate sphere. The jurisprudence of the FCC fits into the cooperative model. Further examples clearly show that the FCC develops fundamental rights without pointing to the jurisprudence of the ECtHR.

In a recent case, the Court extended its general jurisprudence on the prohibition of discrimination to income tax benefits that were available for married couples but not for registered (same sex) partners.²⁷ The Court could have noticed that it was acting within its margin of appreciation in relation to the ECHR but it did not. It stated that '[t]he Basic Law is intended to achieve comprehensive commitment to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law'.²⁸ The Court did not even mention related developments in the jurisprudence of the ECtHR.²⁹

From the perspective of the FCC, the ECHR functions as a minimum guarantee and not as a trigger for evolutive interpretation.³⁰ When the FCC had to deal with the constitutionality of a rule obliging transsexuals to divorce

²² *Görgülü* (n 14) [38].

²³ *Görgülü* (n 14) [62]. This term was not used subsequently by the FCC.

²⁴ *EGMR Sicherungsverwahrung* BVerfGE 128, 326; see also in the ILDC-Database: ILDC 1745 (DE 2011).

²⁵ *EGMR Sicherungsverwahrung* (n 24) [367].

²⁶ *EGMR Sicherungsverwahrung* (n 24) [370]. ²⁷ BVerfGE 124, 199.

²⁸ *Görgülü* (n 14) [36].

²⁹ Yet, even the ECtHR granted a wide margin of appreciation in those instances, *Schalk and Kopf v Austria* ECHR 2010-IV 409, para 108.

³⁰ *Unschuldvermutung* BVerfGE 74, 358 (370); *EGMR Sicherungsverwahrung* (n 24) (369).

their spouses before a sex change could be acknowledged, the Court held that this was a violation of several fundamental rights.³¹ The Court could have revisited the rich jurisprudence on transsexuals to show that its judgment is at least in line with a ‘joint European development of fundamental rights’,³² but it argued solely on the basis of German law. The same happened in a case concerning a rule excluding name changes of foreign transsexuals even though they resided legally and permanently in Germany.³³ An expert opinion provided the court with a large amount of comparative material which was not used by the Court.³⁴ Instead, the FCC looked exclusively to the Basic Law to determine the issue.

These examples show that changing and dynamic interpretations of human rights by German courts are generally based on the Basic Law. While the FCC generally has followed the judgments of the ECtHR, it has taken no active part in changing the interpretation of the Convention. If we apply the analytical categories developed above for the micro perspective, the FCC takes a cooperative position: it has reacted to developments in Convention law and has embraced a common development but has only actively engaged in the evolutive interpretation of the Basic Law.

2. Ireland

The Irish legal system is particularly interesting because it combines several features of systems of other member states of the Council of Europe in a unique way. Ireland has a constitution containing a bill of rights,³⁵ yet, the constitutional system is based on the common law tradition.³⁶ The rights conferred by the constitution are enumerated in Articles 40–44; however, Irish courts held that the personal rights as contained in Article 40(3) are to be interpreted as unenumerated rights.³⁷ Irish courts have also developed and changed the Irish constitution in an evolutive and dynamic manner.³⁸ Interestingly, Denham J held that the evolution of the Irish constitution was triggered by European as well as international law.³⁹

³¹ BVerfGE 121, 175; obtainable at <<http://www.servat.unibe.ch/dfr/bv121175.html>> accessed 27 September 2013.

³² See (n 23). The ECtHR dealt with a number of cases regarding transsexuals and interpreted evolatively in *Christine Goodwin v the United Kingdom* ECHR 2002-VI 1.

³³ *Transsexuelle IV* BVerfGE 116, (243). ³⁴ *Transsexuelle IV* (n 33) (246).

³⁵ Constitution of Ireland—*bunreacht na héireann 1937* (Irish Constitution).

³⁶ For a brief overview over the Irish constitution in our context see L Flynn, ‘Ireland’ in CA Gearty (ed), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers 1997) 177. For a more elaborate description of the Irish legal system see G Hogan and G White, *JM Kelly: The Irish Constitution* (4th edn, Tottel 2003).

³⁷ *O’Dlaigh CJ Ryan v AG* [1965] IESC 1 [22] reinforcing a High Court judgment.

³⁸ *McGee v Attorney General* [1974] IR 284, 319, Walsh J; *Byrne v Ireland* [1972] IR 241; *Best v AG* [1999] Denham J [32]; for general accounts of the rather activist jurisprudence of Irish courts see DG Morgan, *A Judgment too far? Judicial Activism and the Constitution* (Cork UP 2001).

³⁹ ‘Principles and rights have developed over the last seventy years, from roots in national society, the European Community, and international documents’. *A v The Governor of Arbour Hill Prison* [2006] IESC 45.

In contrast, the ECHR for a long time played only a marginal role in Irish courts since the Irish system is strictly dualist.⁴⁰

This changed in 2003,⁴¹ when the European Convention Human on Human Rights Act 2003 (ECHR Act) came into force.⁴² The Act in section 2 provides that all Irish law ought to be interpreted as far as possible in compliance with the ECHR. This means that the ECHR forms no standard for judicial review but influences the Irish legal system rather indirectly.⁴³ The ECHR Act interestingly also contains section 4 on the interpretation of the ECHR by Irish courts providing that

4.—Judicial notice shall be taken of the Convention provisions and of—

(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,

...

and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

It is not entirely clear how far the obligation for courts 'to take notice of' the decisions of Convention organs reaches; possibilities oscillate between an obligation of result and a mere aid to interpretation.⁴⁴ Taking notice seems to be far less than an obligation to follow the court based on the doctrine of formal precedent.⁴⁵ Besides, the ECHR Act in its other sections clearly defines the extent to which the ECHR impacts upon Irish law. While the ECHR has clearly no supreme status, a consistent interpretation of the ECHR Act suggests that Irish law is to be interpreted as far as possible as to comply with the Convention as provided for in section 2(1) ECHR Act.⁴⁶ However, section 4(a) ECHR Act could be read as limiting the influence of ECtHR judgments, since they would only have to be taken into account in as far as the ECtHR had jurisdiction. This could limit the impact of ECtHR judgments in two ways; it could free courts from accepting *ultra vires* judgments as the basis for their decision. Furthermore, judgments of the ECtHR in which Ireland was not a party could be disregarded due to the fact that they have only an *inter partes* effect. Yet, the end of the section clarifies that courts also have to take into account the underlying principles as elaborated by Convention organs. This means that Irish courts at least have to deal with the jurisprudence

⁴⁰ 29.6 Constitution provides that '[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.

⁴¹ For an overview of the significance of the ECHR in Irish courts before that date see Flynn (n 36).

⁴² Available at <<http://www.irishstatutebook.ie/2003/en/act/pub/0020/>> accessed 27 October 2013.

⁴³ J Harrington, 'Democratic Challenge of Incorporation: International Human Rights Treaties and National Constitutions' (2007) 38 Victoria University Wellington L Rev 217, 232.

⁴⁴ Londras and Kelly (n 2) 159.

⁴⁵ In favour of a presumption to follow the principles established by the ECtHR are Londras and Kelly (n 2) 168.

⁴⁶ *Mabon Tribunal v Keena & anor* [2009] IESC 64.

of the ECtHR. The ECHR Act certainly allows Irish courts to refer to the ECHR irrespective of whether the parties to the case relied on it.⁴⁷ In conclusion, Irish courts have to take notice of the ECHR and, therefore, to interpret it. In that process they have to have regard to the jurisprudence of the ECtHR in every case without being strictly bound by it.

The ECHR Act does not indicate whether Irish courts are competent to interpret the Convention evolutively. The most important precedent denies this: the case of *McD v L & anor* concerned the question whether the donor of a child had the right of contact with the child that was raised by two women living in a relationship. To determine this issue, the High Court had looked into the question whether the relationship between the women and the child would fall under the term family in Article 8 ECHR. Even though this was not acknowledged by the ECtHR at that point in time,⁴⁸ Hedigan J saw the ECHR moving in that direction and concluded that Article 8 ECHR should be interpreted that way.⁴⁹ The Supreme Court reversed this judgment on several grounds,⁵⁰ one of which was that Irish courts had no competence to interpret the Convention in an evolutive manner. Fennelly J termed it as follows:

It is vital to point out that the European Court has the prime responsibility of interpreting the Convention. . . . It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence. . . . None of the foregoing means that the present legal situation will continue unaltered at either international or national level. National legislation may address these difficult problems. Changes in the Strasbourg jurisprudence are to be expected. The legal principle is important. The courts must respect the boundaries laid down by Article 29 of the Constitution. The Act of 2003 does not provide an open-ended mechanism for our courts to outpace Strasbourg.⁵¹

Two aspects of this case deserve particular mention: first, Hedigan J did identify the general movement of the case law of the ECtHR but he did not really interpret the Convention according to the VCLT. This means that he decided based on an analysis of the respective case law and not on an interpretation proper. The fact that he chose this method may be linked to the second interesting feature: Fennelly J ruled out the authority to interpret evolutively only for cases in which the ECtHR had already dealt with the matter. Yet, changes in interpretation are not limited to overruling judgments. It is also possible that the interpretation is changed even though there was no judgment on the issue. Such a change could be made despite the fact that subsidiary means of interpretation such as the *travaux* indicate that the interpretation had been different previously.

⁴⁷ *Mahon Tribunal v Keena & anor* (n 46) [43]; *McD v L and anor* [2007] IESC 81, Murray CJ.

⁴⁸ This was explicitly acknowledged by the High Court, for the same conclusion see Londras and Kelly (n 2) 176.

⁴⁹ *McD v L & anor* [2008] IEHC 96.

⁵⁰ For detailed discussions of this case see Londras and Kelly (n 2) 176.

⁵¹ *McD v L and anor* (n 47) [104–5]. For reasons of clarity, it ought to be stated that the Supreme Court judgment just cited was delivered 10 December 2009 while the preceding High Court judgment quoted in (n 49) was delivered on 16 April 2008.

The referral to Article 29 of the Irish Constitution indicates that Fennelly J based his opinion on a dualist view that would not only separate national and international law but also link this to the national and international institutional structure: Irish courts are competent to interpret Irish law while international courts are competent to interpret international law. It is also interesting to note that the ECtHR in later cases held that same-sex relationships could be considered as family in the context of Article 8 ECHR.⁵²

Apart from this very general and clear statement, there are also two cases that at least give an indication how Irish courts would deal with such questions: the case *Zappone and anor v Revenue Commissioners and ors*⁵³ raised amongst other things the question whether the absence of same-sex marriage in Irish law could be considered as a breach of the Convention. While the High Court clearly denied a breach, it relied on a decision of an English court that looked for the European consensus on the respective question.⁵⁴ Thereby, it at least envisaged the possibility of changes in interpretation. On another occasion, the High Court was rather cautious when it came to changes in the interpretation of the Convention: the Court held in *Pullen & Ors v Dublin City Council* that national courts were not competent to declare that they had a 'margin of appreciation' regarding certain issues.⁵⁵ Even though the ECtHR 'recognise[d] that the Convention, as a living instrument, cannot be applied uniformly to all states and that its application may have to vary depending upon local needs and conditions' the ability to change the law through interpretation in relation to a particular country was considered to be a tool for international and not for national courts.⁵⁶

Summing up, there have been attempts and signs of the willingness to interpret the ECHR evolutively on the level of the High Court. *McD v L.*, which is considered to be the landmark case,⁵⁷ generally attributes the competence to interpret evolutively to the ECtHR. Based on this, one could say that Ireland generally could be categorized in the terms of this inquiry as being cooperative from the micro perspective.

3. The United Kingdom

The United Kingdom had not implemented the Convention into domestic law for many years. More significantly, it had for a long time managed without subjective enforceable human rights in its legal system. This situation changed remarkably when Parliament passed the Human Rights Act 1998. This act refers to the ECHR and thereby grants human rights for citizens.⁵⁸ It even allows courts to use the Convention rights as standard to review Acts of Parliament and to issue

⁵² *Schalk and Kopf v Austria* (n 29) paras 93–4; *X and others v Austria* App no 19010/07 (ECtHR, 19 February 2013), para 96.

⁵³ [2006] IEHC 404.

⁵⁴ [2006] IEHC 404.

⁵⁵ [2008] IEHC 379, 12. (c).

⁵⁶ [2008] IEHC 379, 12. (c).

⁵⁷ 'The manner in which recognition is given in national courts to judgments of the ECtHR has now been explicitly and authoritatively outlined'. *J McB v LE* [2010] IEHC 123 [102].

⁵⁸ Compare the Irish system in which the ECHR functions only as an aid to interpretation. For a historical overview of the previous situation see CA Gearty, 'The United Kingdom' in CA Gearty (ed), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers 1997).

declarations of incompatibility. While this formally upholds parliamentary sovereignty, it indirectly has questioned this major principle of the constitution of the United Kingdom. The Human Rights Act also gives some guidance for courts on how to interpret the ECHR. In its section 2, it provides as follows:

- (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
 - (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

..., whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.
- (2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules....

It transpires from the discussions in Parliament that this section was aimed at providing English courts with some leeway also in order to allow them to interpret the ECHR evolutively. An often quoted phrase in the white paper accompanying the Human Rights Act states:

The Convention is often described as a ‘living instrument’ because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.⁵⁹

Yet, Lord Bingham in the first and most prominent statement on the issue took another view, when he stated the following:

In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court. . . . This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.⁶⁰

⁵⁹ *Rights Brought Home: The Human Rights Bill*, 1997, Cm 3782, [2.5] <<http://www.archive.official-documents.co.uk/document/hoffice/rights/chap2.htm>> accessed 27 October 2013. For more on the drafting history of the Human Rights Act in that regard see F Klug and H Wildbore, ‘Follow or lead? The Human Rights Act and the European Court of Human Rights’ (2010) 6 EHRLR 621, 622.

⁶⁰ *R (Ullah) v Special Adjudicator* [2004] UKHL 26. For an ample discussion of this case as well as this statement see E Borge, ‘The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence’ (2013) 72 CLJ 289.

The approach of Lord Bingham in *Ullah* has subsequently been called ‘mirror principle’ since he indicated that the courts in the UK should reflect the current state of the law as determined by the ECtHR.⁶¹ While this statement of Lord Bingham is frequently cited, the principle and its underlying assumptions are still under discussion. This becomes very evident in *Ambrose*.⁶² In this case, the Supreme Court had to deal with a question whether it was a violation of the fair trial right as enshrined in Art 6(1) and (3) to rely on evidence in response to police questioning without access to a lawyer prior to detention in custody was violated. The ECtHR found such violations in cases in which the suspect was already in police custody, the Supreme Court had to decide on whether to interpret the law on the issue evolutively. The Justices could not agree on whether courts in the UK were competent to interpret the Convention evolutively and neither could the essays commenting upon the judgment:⁶³ Lord Hope found that courts did not have ‘the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court’.⁶⁴ Lord Brown agreed by stating that it seemed to him ‘quite wrong’ to go ‘any wider than Strasbourg has already clearly decided to be the case’.⁶⁵ Lord Dyson generally agreed with the ‘mirror-principle’ but distinguished cases in which Strasbourg has ruled on the issue while ‘there is no clear and constant line of authority’.⁶⁶ In the latter cases, in which the law was unclear, British courts could decide the question either way.⁶⁷ Lord Matthew Clarke seems to follow the same approach as Lord Dyson in that he openly posed the question whether to develop the law further.⁶⁸ He denied this for two reasons relating to the consequences of such a decision and, therefore, decided the case on substantive arguments and not only by referring to the jurisprudence of the ECtHR.⁶⁹ Lord Kerr, however, dissented and found that there was a legal obligation for domestic courts to decide upon the law including the ECHR and he very emphatically stated his belief that it was the duty of the court to pronounce upon the issue.⁷⁰ This general disagreement in *Ambrose* can also be traced in other judgments. The approach in *Ullah* was subsequently endorsed by several Justices.⁷¹

⁶¹ For a description see B Malkani, ‘A Rights-Specific Approach to Section 2 of the Human Rights Act’ (2012) 5 EHRLR 516, 517.

⁶² *Ambrose v Harris* [2011] UKSC 43; for a discussion of the case see M Andenas and E Borge: ‘Ambrose: Is the Ullah Principle Wrong?’ (2012) 128 LQR 319.

⁶³ In comments on the judgment, the view was expressed that the Ullah dictum ought to be understood as allowing for evolutive interpretation see Borge (n 60) 292. For an endorsement of Lord Kerr’s result on the basis that courts would interpret British rights rather than the ECHR see Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’, A lecture delivered under the auspices of the Bingham Centre hosted by UCL’s Judicial Institute at 6pm on Wednesday, 14 December 2011, <http://www.ucl.ac.uk/laws/events/docs/Lord_Irvine_Convention_Rights.pdf> accessed 18 August 2014, 12. For an essay agreeing with Lord Hope in *Ambrose* see P Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine’ [2012] PL 253.

⁶⁴ *Ambrose v Harris* (n 62) [19].

⁶⁵ *Ambrose v Harris* (n 62) [86].

⁶⁶ *Ambrose v Harris* (n 62) [102].

⁶⁷ *Ambrose v Harris* (n 62) [103].

⁶⁸ *Ambrose v Harris* (n 62) [104].

⁶⁹ *Ambrose v Harris* (n 62) [104].

⁷⁰ *Ambrose v Harris* (n 62) [129–30].

⁷¹ R Masterman, ‘Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the ‘Convention Rights’ in Domestic Law’ in H Fenwick, G Phillipson, and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 78.

However, there have been instances in which they went beyond the case law of the ECtHR by affording more protection as well as instances in which they afforded less protection.⁷²

Lord Hoffmann distinguished situations in which there was a margin of appreciation from situations like in *Ullah*.⁷³ It is even more significant that he took up the idea that the Human Rights Act had transformed Convention rights into UK rights.⁷⁴ Consequently, the rights created through the Human Rights Act could be changed without changing the ECHR.⁷⁵ Therefore, the Human Rights Act would amount to a British Bill of Rights. One argument also strengthening the position of Lord Hoffmann is that according to Article 53 ECHR the Convention 'shall not be construed as limiting or derogating from' human rights ensured under the laws of a member state to the ECHR. So if British courts grant a higher level of protection through evolutive interpretation, this would not be construed as breach of the Convention. Moreover, it could be argued that there were cases in which UK courts already surpassed the jurisprudence of the ECtHR.⁷⁶ To mention only one example, Lord Bingham had to consider whether Article 3 ECHR would also contain some minimum welfare guarantees for asylum seekers and held that it did which can be considered as evolutive interpretation of Article 3 ECHR.⁷⁷

There is not enough space to deal with the abundant case law on the issue,⁷⁸ it will suffice for the purposes of the present inquiry to look at the general evolution of the question in the UK. The wording of the Human Rights Act does not indicate how far the obligation of UK courts to 'take into account' ECtHR jurisprudence reaches. The *Ullah* principle established, contrary to the intentions of Parliament, that the courts in the United Kingdom were not competent to interpret the ECHR in an evolutive manner. This principle has continuously been questioned by UK courts and there are attempts to construct the Human Rights Act as incorporating the ECHR in a way that the rights enshrined in the Convention have an independent existence in the UK. This would allow the courts to interpret them evolutively without directly changing the content of the ECHR. As of now, there seem to be

⁷² For overviews see R Masterman, 'Mirror Crack'd' (*UK Constitutional Law Association*, 13 February 2013) <<http://ukconstitutionallaw.org/tag/ullah-principle/>> accessed 27 October 2013.

⁷³ *In re P and others (AP) (Appellants) (Northern Ireland)* [2008] UKHL 38 [31]–[32].

⁷⁴ For a detailed discussion of arguments related to that question see C Draghici, 'The Human Rights Act in the Shadow of the European Convention: Are Copyist's Errors Allowed?' (2014) 2 EHRLR 154 especially at 168.

⁷⁵ *In re P and others (AP) (Appellants) (Northern Ireland)* (n 73) [33].

⁷⁶ Cases in which the ECHR gives no clear guidance are, however, not to be considered as evolutive interpretation. They might entail important developments but no changes in the law. Examples for such developments are provided for by Klug and Wildbore (n 59) 627.

⁷⁷ *R (Limbuella) Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396 [6]–[7]. See the discussion by B Hale, 'High Points and Low Points in the First Ten Years: A View from the Bench' in N Kang-Riou, J Milner, and S Nayak (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge 2012) 53. He tried to distinguish a judgment of the ECtHR and support his decision by a broader principle, yet, he nevertheless went beyond the approach of the ECtHR.

⁷⁸ I refer to the analysis of several other cases by Klug and Wildbore (n 59); Masterman, 'Mirror Crack'd' (n 72); J Lewis, 'The European Ceiling on Human Rights' [2007] Public Law 720.

different concepts within the UK concerning the micro perspective. Accordingly, one could say that the law in this respect is in a state of flux between an integrative and a cooperative order. The approaches in judicial practice and legal scholarship vary to a great extent and this quite specific question has triggered a disagreement concerning the general relationship between the ECHR and domestic law in the United Kingdom.

III. The Macro Perspective: Europe

After looking at the problem from the micro perspective of three European jurisdictions, we will take the macro perspective, which is in this case a European (Convention) perspective and ask how the Convention in its normative environment constructs the judicial architecture between centralist, federalist, and pluralist stances. The respective possibilities would have consequences on different levels which is why the problem will be analysed from a legal, institutional, and normative standpoint.

1. The legal standpoint

Domestic courts can only interpret the ECHR in an evolutive manner, if they are competent to do so, ie if they have jurisdiction. The question of competence is a legal question in the first place.⁷⁹ Article 32 ECHR provides that '[t]he jurisdiction of the court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto ...'. This indicates that the ECtHR has the ultimate competence to deal with issues of interpretation and application of the Convention. The ECtHR established its autonomy by establishing the autonomy of the law in the ECHR. In *Engel v the Netherlands*, it found terms like 'criminal' not to depend upon the national classification but carrying an independent meaning.⁸⁰ Even if states had not designated a certain procedure as criminal, the ECtHR was competent to do so when assessing state conduct on the basis of the ECHR.⁸¹ The ECtHR has regularly stressed its exclusive competence to apply and interpret Convention law. Referring to Article 32 ECHR, the Court found itself to be the 'master of the characterization to be given in law to the facts of the case'.⁸² On another occasion it would 'reiterate, as clearly as possible, that it alone

⁷⁹ On the many other implications that jurisdiction can have using the policy science approach particularly with regards to the relationship of national and international courts see RA Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse UP 1964).

⁸⁰ *Engel and others v the Netherlands* (1976) Series A no 22, paras 81–2.

⁸¹ *Engel and others v the Netherlands* (n 80) paras 81–2. On the notions of autonomous meaning see A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 336; WJ Ganshof van der Meersch, 'Le Caractère "autonome" des termes et la "marge d'appréciation" des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme' in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymanns Verlag 1988) 221.

⁸² *Scoppola v Italy No 3* App no 126/05 (ECtHR, 22 May 2012) paras 53–4.

is competent to decide on its jurisdiction to interpret and apply the Convention and its protocols (Article 32 of the Convention)',⁸³

Yet there can be also legal argument in favour of a competence of domestic courts: Article 1 ECHR obliges member states to secure the rights enshrined in the Convention and Article 35 ECHR introduces a local remedies rule which makes the Convention machinery subsidiary to domestic proceedings. Yet, there is also a substantive aspect; the ECHR is only considered to be a minimum guarantee, a common human rights denominator shared by the member states of the Council of Europe.⁸⁴ Even though the ECHR presumes the domestic human rights protection to be more advanced, this does not necessarily mean that domestic courts are competent to elevate the whole standard of protection through evolutive interpretation. The special *problématique* in those cases is that questions of evolutive interpretations will often only arise when the existing jurisprudence on the matter is overturned by a judgment.⁸⁵ Furthermore, it would then be questionable whether national courts were competent to overturn an ECtHR judgment.

According to Article 46 ECHR, judgments are formally only binding upon the parties to the proceedings and there is, consequently, no formal doctrine of precedent.⁸⁶ Yet, the ECtHR is generally seen to actually take into account and cite previous decisions in a quasi-precedential manner.⁸⁷ It has developed a long-standing jurisprudence that

[w]hile the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.⁸⁸

The challenge to legal certainty and security is even greater when national courts overturn precedents. Nevertheless, a new legal rule will mitigate the problem substantially: Protocol 16 has introduced the possibility for constitutional and highest

⁸³ *Shamayev and others v Georgia and Russia* ECHR 2005-III 153, para 293.

⁸⁴ WJ Ganshof van der Meersch, 'Reliance, in the Case-Law of the European Court of Human Rights, on the Domestic Law of the States' (1980) 1 HRLJ 13. He draws on the preamble from which he derives that the ECHR would be something like a common law.

⁸⁵ This argument is better understandable if we keep in mind that evolutive interpretation is tied to a change in the meaning of the terms. One could illustrate this in that the meaning of a certain term changes from A to B after some time. This necessarily requires that the state of A is ascertainable. Since the *travaux préparatoires* carry less weight according to Art 32 VCLT, changes in meaning will often only be ascertainable if there is an actual decision by a court.

⁸⁶ H-J Cremer, 'Regeln der Konventionsinterpretation' in O Dörr, R Grote, and T Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2nd edn, Mohr Siebeck 2013).

⁸⁷ M Breuer, 'Art. 46' in U Karpenstein and F Mayer (eds), *EMRK—Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (Beck 2012); H-J Papier, 'Execution and Effects of the Judgment of the European Court of Human Rights from the Perspective of German National Courts' (2006) 27 HRLJ 1, 1.

⁸⁸ *Christine Goodwin v the United Kingdom* (n 32) para 74. Similar arguments are given in *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) para 98. This matter is generally discussed by G Nolte, 'Second Report for the ILC Study Group on Treaties over Time: Jurisprudence under Special Regimes Relating to Subsequent Agreements and Subsequent Practice' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 262.

courts to ask the ECtHR for advisory opinions in cases involving the interpretation or application of the Convention.⁸⁹ While Protocol 16 certainly creates only a possibility and no obligation for domestic courts to ask for advisory opinions, there would be at least one way to involve the ECtHR when they think about changing the interpretation of the ECHR.

From the opposite perspective, the ECtHR can take jurisprudence of national courts into account through subsequent practice as established by Article 31(3)(b) VCLT. This applies particularly when it comes to questions of static and dynamic interpretation. The ECtHR often follows subsequent practice,⁹⁰ but does not necessarily do so.⁹¹ Another mechanism allowing courts to develop the Convention is the margin of appreciation. The ECtHR in many situations grants some leeway to domestic institutions to determine certain questions.⁹² The consensus of the member states can widen as well as tighten the scope of the margin. At least within the margin of appreciation, member states are, therefore, free to change the meaning of the Convention.

None of the arguments from a legal standpoint is totally convincing. The ECtHR is competent to interpret the Convention, yet, there is nothing that indicates its exclusive competence. Domestic courts are necessarily involved due to the local remedies rule, but this does not empower them to interpret the Convention evolutively.

Yet, two arguments strongly emphasize the federalist conception: the preliminary reference mechanism as enshrined in Protocol 16 will allow national courts to involve the ECtHR in proceedings. Besides that, all jurisdictions under review at least take its jurisprudence into account. On the other hand, subsequent practice ensures that developments in national jurisdictions can feed into the process of interpreting the Convention.⁹³ The ECHR has a very wide understanding of subsequent practice and derives practice not only from situations in which the treaty is actively applied but also situations to which the treaty applies.⁹⁴ The ECtHR does not consider it necessary that a state organ actively interprets the Convention if there is an action within the application of the Convention. Like Article 31(3)(c) VCLT, subsequent practice could be denoted as 'principle of harmonisation',⁹⁵ since it facilitates the harmonization of interpretations of treaties by different actors in national and international law. This includes the competence of international

⁸⁹ Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms Strasbourg, 2 October 2013 (CETS No 214).

⁹⁰ *Loizidou v Turkey (Preliminary Objections)* (1995) Series A no 310, paras 79–89; *Bayatyan v Armenia* (n 88) paras 102–4, 109; *Soering v the United Kingdom* (1989) Series A no 161, para 103.

⁹¹ *Ferrazzini v Italy* ECHR 2001-VII 327, paras 28–9; *Soering v the United Kingdom* (n 90).

⁹² For an example of the margin applying to domestic courts see *Austin and others v the United Kingdom* ECHR 2012-II 423, para 61.

⁹³ Ganshof van der Meersch, 'Reliance, in the Case-Law of the European Court of Human Rights, on the Domestic Law of the States' (n 84) 16.

⁹⁴ See eg *STEC and others v the United Kingdom* ECHR 2005-X 321 para 50.

⁹⁵ Yet, Art 31(3)(c) VCLT does not strictly require a harmonization but only to take the rule into account. Similarly A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57.

courts to follow domestic courts by changing their own case law. This effect of subsequent practice reinforces the federalist model.⁹⁶

2. The institutional standpoint

The decisive problem concerning the institutional setting is the huge caseload and resulting from this, problems to manage the knowledge about the Convention. This is due to the creation of a single Court with automatic jurisdiction by Protocol 11. It was subsequently tried to mitigate the caseload by a reform in Protocol 14 but throughout the reform it was stressed that the Convention machinery could not deal with all violations of the ECHR. A more effective inclusion especially of domestic courts has been stressed on several occasions and at times very urgently.⁹⁷ This, however, leads to the first argument in favour of a plural system: if domestic courts had no possibility to attest changes of the meaning of the Convention even in obvious cases, domestic courts would not be effectively integrated in the Convention system. The local remedies rule would then only partly fulfil its function, and more cases than necessary would end up in Strasbourg.

From this, the second argument can be derived. As we have seen, the constitutional architecture concerning domestic courts varies to a certain extent. Some jurisdictions like the United Kingdom have integrated the ECHR into their legal system, others like Ireland only seek to harmonize domestic law with the ECHR. It is assumed by other jurisdictions that the ECHR is just a common minimal standard. While in cooperative systems like Ireland the courts could further develop their domestic law, integrated systems would be stuck to the common denominator without a way of advancing. This would not only freeze the development of human rights by national courts but also slow down European human rights development since the courts from those countries would never add to an emerging consensus. This could be a reason to attribute this competence to national courts and allow for a common evolution of human rights law in Europe. Yet, such a competence would have institutional consequences of its own.

Involving domestic courts in the enforcement of the Convention triggers the danger of divergent interpretations.⁹⁸ While judicial mechanisms are of course a prerequisite for the effective implementation of the law, they can also pose a threat; overlapping competences can create the danger of cherry picking as to divergent views of the judicial mechanisms. Moreover, overlapping competences also favour

⁹⁶ B Schlütter [Peters], 'Germany's Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht's Relationship with the European Court of Human Rights in the Preventive Detention Decision' (2012) 13 German LJ 757, 772.

⁹⁷ Several other endorsements in the process of drafting the protocol 14 are summarized and explained by M Eaton and J Schokkenbroek, 'Reforming the Human Rights Protection System Established by the European Convention on Human Rights' (2005) 26 HRLJ 1, 12.

⁹⁸ Council of Europe, Parliamentary Assembly, Legal Affairs Committee: 'Proposal to Confer on the European Court of Human Rights Power to Give Preliminary Rulings at the Request of National Courts (Study Prepared by AH Robertson)' AS/Jur 35 (19) 7 October 1983, 4–5. This report clearly states that '[t]he danger of divergent interpretations is obvious'.

the likelihood of power struggles between courts. They could result in conflicting interpretations of the ECtHR and national courts.⁹⁹ Divergences between different national courts might arise even more easily since national courts are closer to the influence of domestic politics.¹⁰⁰ These dangers apply in particular to evolutive interpretations since those often entail departures from previous judgments or decisions.¹⁰¹ Especially in sensitive areas judicial dialogue can easily turn into judicial argument. What makes it of even more concern is that the power to interpret evolutive would then not be limited to the highest or to constitutional courts but would apply to every domestic court. This reinforces the danger of polyphony in judicial dialogue. Even though the 'living instrument' doctrine of the ECtHR is a well-established part of its jurisprudence, the discourse about it has shifted: On the academic¹⁰² as well as on the practical level¹⁰³ several voices call for the limitation of evolutive interpretations in the Convention system. Judge Françoise Tulkens advocated restricting the competence for such interpretations to the Grand Chamber.¹⁰⁴

These arguments are again strengthened by concerns about the increase of cases and the respective problem to sustain a uniform application of the Convention; this concerns also the issue of knowledge management. With all courts potentially changing the content of the Convention, it could become impossible to know how the Convention is actually interpreted throughout Europe. It is significant that even now the registry has undertaken several initiatives in that regard: it prioritized cases¹⁰⁵ and issued guides to the case law.¹⁰⁶ If every domestic court could change the jurisprudence of the ECtHR and claim that this would be an interpretation of the Convention, there was a constant need to review the jurisprudence of the courts all over Europe. The ECtHR would need greater resources to ensure an overview of the activity of all domestic courts. The flipside of this argument is that domestic courts might also be overburdened as to their resources. When faced with a particular question, the ECtHR sometimes compares the law

⁹⁹ J Polakiewicz, 'The Application of the European Convention on Human Rights in Domestic Law' (1996) 17 HRLJ 405, 408.

¹⁰⁰ GJ Alexander, 'The Illusory Protection of Human Rights by National Courts During Periods of Emergency' (1984) 5 HRLJ 1, 1.

¹⁰¹ Roberts (n 95).

¹⁰² G Gaja, 'Does the European Court of Human Rights Use its Stated Methods of Interpretation?' in F Capotorti (ed), *Divenire sociale e adeguamento del diritto: studi in onore di Francesco Capotorti* (A Giuffrè 1999). JE Helgesen, 'What are the Limits to the Evolutive Interpretation of the European Convention on Human Rights?' (2011) 31 HRLJ 275.

¹⁰³ Several contributions to a conference on this topic are summarized here: Council of Europe (ed), *Dialogue between Judges, European Court of Human Rights: What are the Limits to Evolutive Interpretation of the Convention?* (Council of Europe 2011).

¹⁰⁴ F Tulkens, 'What are the Limits to Evolutive Interpretation of the Convention?' in Council of Europe (ed), *Dialogue between Judges, European Court of Human Rights: What are the Limits to Evolutive Interpretation of the Convention?* (Council of Europe 2011) 6 see also <http://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf> accessed 8 August 2014.

¹⁰⁵ Especially the database hudoc distinguishes between three importance levels, <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC/FAQ#n1355752400624_pointer> accessed 30 October 2013.

¹⁰⁶ <<http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=>> accessed 30 October 2013.

on the matter in a detailed fashion in order to ascertain the subsequent practice in line with Article 31(3)(b) VCLT or the relevant rules as envisaged by Article 31(3)(c) VCLT. If all courts had the competence to interpret the law evolutively, they would have to engage in these complex and time-consuming inquiries. Also, this would open the door widely for strategic litigation to influence the human rights system. Arguments between different courts could be deliberately created. In the absence of an effective link between domestic courts and the ECtHR, this could create uncertainty, polyphony, and a lack of uniformity and clearness of the law. The preliminary request procedure that will be introduced by Protocol 16 will at least in part mitigate the aforementioned problems.¹⁰⁷ However, this procedure will itself reinforce the ECtHR as the most important interpreter in the Convention system.

To sum up, we can see that a centralist as well as a pluralist model would have serious consequences. An exclusive competence would limit courts that apply the ECHR as human rights instrument in their system and make it also hard to include domestic courts convincingly into the machinery of the Convention. Yet, the plural vision faces the problem that it would be hard to sustain uniformity and clearness of the law since it would add to the proliferation of courts interpreting the Convention and this would make it difficult to monitor developments on the European as well as on the national level.

A federalist judicial architecture might mitigate between the problems of those models since it allows domestic courts at least indirectly to take part in the development of the Convention but generally reduces the implications since the spheres remain separated. However, there is one problem the federal system cannot solve: in so-called integrated systems, in which the ECHR functions as a bill of rights on the national plane, national courts will not be able to change the meaning of human rights in their jurisdiction. If they have no competence to change already existing interpretations of the convention, they will be stuck to its *acquis*. If for instance the courts of the United Kingdom will regard the rights incorporated by the Human Rights Act as something that exists independently in their jurisdiction, they will generally have to follow rather than to lead the development of human rights in Europe. Courts in integrated systems cannot create subsequent practice that feeds into changes in the meaning since they are bound to follow the current state of the law. This is a central weakness of the integrated model. The fact that there are integrated as well as cooperative systems makes the problem even worse since the courts from cooperative systems have a bigger impact than their counterparts from integrated systems.¹⁰⁸

Nevertheless, there are techniques whereby courts could express their views in a way in which it can be acknowledged as subsequent practice. In systems that rely upon binding precedents, it is allowed for lower courts to at least criticize the

¹⁰⁷ Yet, only constitutional courts and highest courts will be competent to ask for such opinions.

¹⁰⁸ But compare the judicial architecture in Latin America possibly moving towards an integrated *ius constitutionale commune americanum* with the general declaration on human rights in the centre; cf A Rodiles, 'The Law and Politics of the *Pro Persona* Principle in Latin America' in this volume, at 153, 156.

precedent and call for change without disobeying. Such statements could even be formalized in a way similar to section 4 of the Human Rights Act. Another way out of this dilemma would be to allow national courts in systems integrating the ECHR to allow for evolutive interpretations in exceptional circumstances.¹⁰⁹ All in all, every model has institutional consequences to be kept in mind.

3. The normative standpoint

It is as interesting as it is necessary to assess for the purposes of this inquiry the question also from a normative standpoint, analysing the question from moral considerations of human rights and democracy. Human rights transcend a merely legal analysis since they are also moral and ethical postulates. In this vein, we shall consider normative reasons that advocate the respective models.

The pluralist model grants all courts competence to interpret and thereby to change the meaning of the Convention. The fact that all courts should be capable and able to determine the content of human rights can be supported by a universalist argument. It is based on the insight that human rights attach to the *conditio humana* and are rights that should be conferred on human beings by their very nature. If all human beings have the same basic rights, those rights must be generally ascertainable. If this was the case, every court must be not only competent but also obliged to ascertain these universal rights. Since they are universal, they apply universally even if the court finding them is competent to speak only for a limited jurisdiction.

An argument that would challenge this contention and favour the centralist model relates to the democratic legitimacy of domestic courts interpreting the Convention. Judicial systems of European countries are organized differently.¹¹⁰ The organization of the judiciary has a substantial impact upon its democratic legitimacy.¹¹¹ From this point of view, every people makes a democratic choice how the judiciary is organized. It would be quite problematic to allow courts of a limited jurisdiction to interpret and change the meaning of the law that applies beyond their jurisdictional borders.

The choice between the pluralist and the centralist models reveals a normative tension between universal human rights and national democracy. This tension that has often been dealt with from very different perspectives cannot be explained away by a federalist model. However, this model can use the tension to create a dynamic and productive dialogue between the different layers of human rights adjudication. It departs from the general presumption that there is a superior and universal standard that is obligatory on the national as well as on the international plane. Yet, there is a certain leeway for national courts to adapt human rights to

¹⁰⁹ See (n 78).

¹¹⁰ For example, extensive comparative work is undertaken by the Venice Commission, see <<http://www.venice.coe.int/webforms/documents/?topic=27&year=all>> accessed 30 January 2014.

¹¹¹ A v Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 EJIL 7, 24.

their constituencies. This relativist element is not only a threat to universal and general human rights, it leaves some room for development and innovation. When national courts develop their human rights system, these developments are fed into the European system through the technique of subsequent practice as envisaged by Article 31(3)(b) VCLT. In this way, a federalist model does not favour universal human rights over democracy or vice versa but rather acknowledges the tension and attempts to make the best out of it.

IV. Concluding Themes

At the end of this contribution, I would like to reinforce the metaphor of judicial architecture. The question we have been dealing with can hardly be answered in terms of right and wrong from a legal perspective. All solutions have their upsides, but also have to deal with legal, institutional, and normative problems. Yet, there are five themes running through and deriving from the study that deserve notice:

First theme. Harmonization tools are available on different levels; subsequent practice is a tool for international courts to harmonize their jurisprudence with national courts.

On every level there are tools to harmonize interpretations of different actors that function in an equivalent manner: the German FCC developed a constitutional interpretive doctrine to take the jurisprudence of the ECtHR into account, in jurisdictions like Ireland and the United Kingdom the same goal is achieved through parliamentary laws. On the international legal plane, subsequent practice allows international courts to take into account national court practice. It is tempting to think of them as functional equivalents and emphasize the potential for harmonization in subsequent practice as laid out in Article 31(3)(b) VCLT since such a function is traditionally ascribed more to Article 31(3)(c) VCLT. One of the functions of subsequent practice is that it enables international courts to harmonize their jurisprudence with treaty interpretations of national courts.

Second theme. On the micro level there is a diversification of domestic rules of implementing international law.

A tendency that could be substantiated far beyond the present question is that there is an increasing trend towards not only *one place* but several *places of treaties* in domestic law. Many jurisdictions develop specific human rights regimes with particular rules of implementation, interpretation, and judicial review. When UK and Irish courts dealt with the question of whether they were competent to interpret the Convention evolutively, they limited this question to the ECHR. Many jurisdictions have specific provisions in the constitution or specific statutes for the implementation of the ECHR or human rights protection. The domestic rules regarding the implementation of international law have become more diverse.

Third theme. On the macro level there is a trend towards the problem of the '*choix d'acteur légitime*' to which a *dédoublement fonctionnel* is no solution.

In the international sphere, actors multiply. According to an often quoted idea of George Scelle, domestic agents should represent the interests of the international society in the absence of international agents (*dédoublement fonctionnel*).¹¹² Yet, Scelle considered this to be only the second-best solution. Would he still favour this idea if he lived today? In his days, there were very few actors stepping up for the concerns of the international society. In many areas there might be not too few but too many actors claiming to represent the interests of the international society. The field of human rights is an apt example for this problem: most treaties have a mechanism to interpret them. National actors are important for the enforcement, but they also represent a threat to the consistent interpretation of human rights. The *dédoublement fonctionnel* of national actors could trigger some of the problems described above. What might be necessary would in contrast be a '*choix d'acteur légitime*', ie to find out which actor can best represent the interests of the international society. This actor ought to be given the competence to fulfil a certain task in the first place.

Fourth theme. Linking judicial architectures through an international layer might create compatibility problems; internationalization is not equivalent to more dynamism!

The fact that some jurisdictions have integrated the ECHR into their legal system while others regard it as lowest common denominator and minimum guarantee causes frictions in the judicial human rights architecture. A consistent solution is needed. The hard question is whether the current trends to internationalize human rights protection and to allow national actors to take part in the evolutive interpretation should be supported or not. One of the results of this inquiry might sound counter-intuitive at least for some: the internationalization of human rights protection is not necessarily linked to more dynamism or better human rights protection. This argument is best understandable from its flipside: a separate human rights protection can create dynamism. When national courts interpret their human rights instruments evolutively and increase their standard of protection, this can have spill-over effects to international law. On the other hand, an internationalized protection of human rights can end in freezing the development of human rights. Take *Ullah* as an example: following this decision, domestic courts would not be able to interpret the Convention evolutively but rather adhere to the Strasbourg jurisprudence.

This is the symptom of another trend that might become relevant in the years to come: the dispersion of the ideal system to protect human rights. The institutional development of the ECHR can very well be told in the form of a linear ascending

¹¹² See generally HP Aust, 'Georges Scelle' in B Fassbender and HP Aust (eds), *Basistexte: Völkerrechtsdenken* (Nomos 2012). For a very good but forgotten overview see Scelle's preface in H Wiebringhaus, *Das Gesetz der funktionellen Verdoppelung: Beitrag zu einer universalistischen Theorie des Internationalprivat- und Völkerrechts* (West-Ost-Verlag 1955).

narrative: towards a single court with automatic and all-encompassing jurisdiction. This was achieved through several steps. It is far from clear where exactly the Convention should head now: extend the court and its chamber systems by taking on more judges and more staff? Strengthening national courts? All of it? The great success of the human rights movement might mean that it is now not entirely clear what developments would be considered as progress. This allows for different judicial architectures in the respective jurisdictions, but the differences must not be too significant for this might threaten European and international safeguards linking jurisdictions. It is a little bit like in architecture: there are different ways to build, there are also different styles. But if they are all in one building, they have to correspond to a certain extent.

Fifth theme. The notion of Judicial Architecture can serve as basis for modelling the questions of the relations between courts of different jurisdictions.

The judiciary uses architecture for its representation. This becomes evident in the very notion of a palace of justice, which automatically imports the notion of power and authority. The term judicial architecture has been used in a different way here. It described the institutional aspects of the legal system and in particular the system of courts. The beauty of the metaphor of architecture is grounded in its ability to describe the complex relationship between courts today. In contrast, simple drawings only express the hierarchy between them. Even within Europe, there are many different forms of judicial systems. Yet, the integration of international courts makes the architecture more complex. It is like merging different buildings that have been built separately but were then united to a common structure. Several buildings of law faculties can evidence such mergers. Take for example the Law Faculty of Humboldt-University of Berlin, merging three buildings including the old Prussian state library or the Faculty of Law of the University of Amsterdam or the famous RWI of the University of Zurich. Many interesting parallels could be drawn using judicial architecture as a metaphor. One could think in three dimensions, but also pay attentions to statics; justice might be the aesthetics of judicial architecture. Most importantly, it helps to grasp more complex structures such as the European system of human rights protection, a part of which is the question whether they can interpret the law evolutively.

The Interpretation of International Law by Domestic Courts

Uniformity, Diversity, Convergence

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