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# *The Truth in Autonomous Concepts: How To Interpret the ECHR*

George Letsas\*

## **Abstract**

*This paper addresses the role of the European Court of Human Rights in interpreting the European Convention on Human Rights and attacks the standard image in the literature that pictures judges as having, by default, a great amount of discretion in interpretation and a power to create new law. The Court's notion of 'autonomous concepts' is presented and analysed thoroughly, to show that substantive disagreement is widespread in law and that judges must necessarily make choices precisely out of respect for what the ECHR grants. The paper draws resources from Ronald Dworkin's philosophy and shows the affinities between the theory of 'autonomous concepts' and Dworkin's 'semantic sting' argument. It is argued that all concepts in the ECHR are autonomous, in the following two senses: first, people do not share the same linguistic criteria on how to identify their meaning; second, the correct meaning may radically transcend the way the ECHR concepts are classified and understood within the national legal order. Judges therefore have to construct substantive theories that aim at capturing the nature or purpose of the right involved and of the ECHR more generally. The paper concludes by urging scholars and judges to stop raising the threat of judicial discretion and work out general theories of adjudication for the ECHR.*

## **1 Introduction**

A climate of hostility towards judicial creativity surrounds the role of the European Court of Human Rights (ECtHR) to interpret the European Convention on Human Rights (ECHR). Many people are uncomfortable with the idea of international judges deciding controversial matters that affect national governments. Other more passionate advocates of democracy dislike the judicial branch altogether because

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judges are unelected and accountable to nobody. Strasbourg judges have no friends among moral sceptics either: if human rights have no objective moral standing then the ECtHR merely exercises a power to impose the subjective preferences of a small group of people dressed in black robes.

There is, however, a more deeply-rooted source of hostility which figures prominently in the literature on the interpretation of the ECHR. Many scholars take vagueness or uncertainty to be an inherent feature of any legal rule that gives judges an illegitimate power of discretion, which must somehow be restrained. Paul Mahoney, for example, notes that, ‘the open textured language and the structure of the Convention leave the Court significant opportunities for choice in interpretation; and in exercising that choice, particularly when faced with changed circumstances and attitudes in society, the Court makes new law’.<sup>1</sup> In the same vein, we read that ‘most substantive provisions of the Convention leave much room for different interpretations. They are therefore a source of judicial discretion’<sup>2</sup> and that ‘the tribunals risk judicial illegitimacy whenever they depart from an interpretation based on the intent of the Convention’s drafters’.<sup>3</sup>

This paper is set to attack this way of theorizing about the ECHR. To do so, I shall draw resources from Ronald Dworkin’s philosophy and introduce what he calls the interpretive approach.<sup>4</sup> Unfortunately little work has been done in this direction and Dworkin’s work has not been adequately discussed in the context of the ECHR or international law in general. To the contrary, it has been suggested that Dworkin’s views are wholly inapplicable to the ECHR.<sup>5</sup>

My aim is twofold. First, to dispel a widely held prejudice regarding legal interpretation, namely that choice in interpretation marks a case for illegitimate judicial discretion. This prejudice, which I shall call the discretion-by-default thesis, is very often used to wave the flag of judicial self-restraint. To attack this outdated dogma I use the ECtHR case-law on autonomous concepts as a case-study in order to illustrate that choice in interpretation results, not from the open texture of language, but from the fact that legal practitioners do not share the same linguistic criteria on how to identify the truth of legal propositions and that disagreement in law is widespread and deep.

My second aim is to build up an interpretive approach for the ECHR, once the

<sup>1</sup> Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism’, 19 *Human Rights Law Journal* (1998) 2. See also *Idem.*, ‘Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin’, 11 *Human Rights Law Journal* (1990) 57: “Judicial activism” in the sense of making new law is therefore inevitable’.

<sup>2</sup> de Blois, ‘The Fundamental Freedom of the European Court of Human Rights’ in R. Lawson and M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe* (1994) 51. See also Ost, ‘The Original Canons of Interpretation of the European Court of Human Rights’, in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights*.

<sup>3</sup> Helfer, ‘Consensus, Coherence and the European Convention of Human Rights’, 26 *Cornell International Law Journal* (1993) 135.

<sup>4</sup> See R. Dworkin *Law’s Empire* (1986), at Chs 2 and 3. For a helpful overall view of Dworkin’s interpretivism see S. Guest, *Ronald Dworkin* (1997), at Ch. 2.

<sup>5</sup> de Blois, *supra* note 2, at 41.

picture of substantive disagreement has been revealed, and invite commentators to an interpretive discussion on the ECHR values. I examine the Court's case-law and identify two major interpretative poles, moral truth and consensus, arguing that the former better fits and justifies the history of the ECHR.

## 2 Autonomous Concepts and Violation of the ECHR

In 1971, Cornelis Engel and four other conscript soldiers serving in the Netherlands armed forces lodged an application with the ECtHR, claiming a violation in the imposition of penalties by military courts for military offences.<sup>6</sup> The applicants complained, among others, that the proceedings before the military authorities did not satisfy the requirements of Article 6 ECHR that reads as follows: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

The Government of the Netherlands responded that there had been no violation of Article 6, because the proceedings against the applicants involved the determination neither of 'civil rights and obligations' nor of 'any criminal charge' as the article requires. The Government argued that under Netherlands law, such military penalties constituted strictly disciplinary, and not criminal, offences and that therefore Article 6 of the ECHR was not at all applicable.

The ECtHR accepted that the distinction between disciplinary proceedings and criminal proceedings was sound and reflected a longstanding practice of distinguishing between disciplinary and criminal offences. The former were less severe, did not appear in the person's criminal record and entailed more limited consequences than the latter. The existence and distinctness of these two concepts was well established by reference to domestic legislations.

Given the distinctness of the two concepts in domestic legislation, one should expect that the guarantees of Article 6 do not extend to disciplinary charges but are limited to criminal charges and the 'determination of civil rights and obligations'. Since the distinctness of disciplinary offences was well established and the ECHR grants the right to fair trial for criminal offences alone, it would be natural to assume that the Convention provides no protection for military proceedings any more than it does for proceedings, say, before the Union of European Football Associations (UEFA).

Surprisingly, the Court did not end its judgment so quickly. It asked: 'Does Article 6 cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?'

The Court expressed the fear that some acts or omissions may be classified by the contracting state, either intentionally or innocently, as disciplinary offences in a way that escapes the guarantees of Article 6. A few paragraphs later the Court stated the

<sup>6</sup> *Engel and Others v the Netherlands* (1976) Series A no. 22.

principle behind this fear: 'If the Contracting Parties were able at their discretion to classify an offence as disciplinary instead of criminal ... the operation of the fundamental clauses of articles 6 and 7 would be subordinated to their sovereign will'.<sup>7</sup>

As a means to prevent contracting states from circumventing the Convention guarantees in this way, the Court employed a solution that had been previously developed by the Commission in some of its first resolutions. The solution is what I shall call, following the Court, the *theory of autonomous concepts*. What exactly is this theory?

In one of the first characterizations of autonomous concepts, the Commission noted that the Convention terms 'criminal charge' and 'civil rights and obligations' 'cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but relate to an *autonomous concept* which must be interpreted independently, even though the general principles of the High Contracting Parties must necessarily be taken into consideration in any such interpretation'.<sup>8</sup> The idea behind this passage implies a certain asymmetry or tension: on the one hand, the concepts of the Convention, and on the other hand the meaning that these concepts have in domestic law. The Commission grants that there is a lack of correspondence between the two and it makes a claim about their relation: domestic law classification is relevant but not decisive for the meaning of the concepts of the Convention. This is what the adjective 'autonomous' stands for: the autonomous concepts of the Convention enjoy a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law. In other words, 'ECHR criminal charge' does not necessarily mean 'domestic-law criminal charge'.

In *Engel*, the Court conceded this asymmetry between Convention and domestic meaning and went on to examine whether a situation that the respondent state classifies as a 'disciplinary offence' might turn out to be, in the sense of the Convention, a 'criminal offence', thus demanding higher protection.

Ever since *Engel*, the Court has developed the theory of autonomous concepts to make it a significant doctrine of its jurisprudence. The Court and the former Commission have so far characterized as autonomous a significant number of concepts that figure in the Convention: *criminal charge*,<sup>9</sup> *civil rights and obligations*,<sup>10</sup>

<sup>7</sup> *Ibid.*, at paras 80–81.

<sup>8</sup> *Twenty One Detained Persons v Germany*, EComHR (1968), Collection 27, at 97–116, para. 4 (emphasis added).

<sup>9</sup> *Demicoli v Malta* (1991) Series A no. 210; *Öztürk v Germany* (1984) Series A no. 73, *Campbell and Fell v UK* (1984), Series A no. 80; *Ravnsborg v Sweden* (1992) Series A no. 283-B.

<sup>10</sup> *X v Germany* (1972) Collection 40, at 11–14, EComHR; *König v Germany* (1978) Series A no. 27; *Sporrong and Lönnroth v Sweden* (1982) Series A no. 52; *F. v UK* (1986) unreported. *University of Illinois Foundation v Netherlands* (1988), unreported; *B v Netherlands* (1988), unreported.

possessions,<sup>11</sup> association,<sup>12</sup> victim,<sup>13</sup> civil servant,<sup>14</sup> lawful detention,<sup>15</sup> home.<sup>16</sup> In more recent decisions, almost 30 years after *Engel*, the Court qualified autonomous concepts as those whose 'definition in national law has only relative value and constitutes no more than a starting point'<sup>17</sup> and that 'must be interpreted as having an autonomous meaning in the context of the Convention and not on the basis of their meaning in domestic law'.<sup>18</sup>

There is something intuitively distinctive about the human rights violation that occurs in autonomous concepts. For at first sight the state appears to have provided in its legislation all the relevant guarantees, in terms of securing the enabling conditions for the exercise of the right. Take, for example, the right to fair trial that was the issue in the *Engel* case. Like any other right institutionally guaranteed, protection draws on all state acts and omissions that are necessary for securing it: inform the accused person promptly, give adequate time for the preparation of his defence, provide him with legal assistance, allow the examination of witnesses and the like. Such acts or omissions are enabling conditions for the exercise and the enjoyment of the right. Every failure by the state to meet these conditions will constitute a violation of the corresponding right.

In autonomous concepts cases, however, the violation does not at first glance concern whether the state has secured the enabling conditions for the exercise of a right under the ECHR. Rather, the problem here arises at a conceptual sub-level: the state has authoritatively qualified a Convention right such that some instances of it are explicitly excluded from its extension,<sup>19</sup> even though they should not be, in the Court's opinion. By the term 'authoritative' here, I mean that the classification is to be found explicitly in the legal sources of this country (statutes, Constitution, decrees, etc.) and has been judicially applied in the applicant's case.

Now, the question of a human rights violation under the ECHR arises because the

<sup>11</sup> *Gasus Dosier- Und Fordertechnik GmbH v Netherlands* (1995) Series A no. 306-B; *Pressos Compania Navera S.A. and others v Belgium* (1995) Series A n. 332; *Matos e Silva, Lda., and others v Portugal* (1996) Reports 1996-IV; *Iatridis v Greece* (1999) Reports 1999-II; *Beyeler v Italy* (2000) Reports 2000-I; *Former King of Greece and others v Greece* (2000) Reports 2000-XII.

<sup>12</sup> *Djavit An v Turkey* (1998), unreported; *Chassagnou and Others v France* (1999) 29 EHRR 615; *Karakurt v Austria*, unreported (1999).

<sup>13</sup> *Asselbourg and 78 Others and Greenpeace Association-Luxembourg v Luxembourg* (1999) Reports 1999-VI.

<sup>14</sup> *Pellegrin v France* (1999) Reports 1999-VIII; *Frydender v France* (2000) Reports 2000-VII.

<sup>15</sup> *Eriksen v Norway* (1997) Reports 1997-III; *Jeznach v Poland* (1999) unreported; *Witold Litwa v Poland* (2000) Reports 2000-III.

<sup>16</sup> *Khatun and 180 Others v United Kingdom* (1998), unreported.

<sup>17</sup> *Karakurt v Austria* (1999); *Chassagnou*, *supra* note 12, at para. 100.

<sup>18</sup> *R. L. v The Netherlands*, EComHR (1995), unreported.

<sup>19</sup> I here follow loosely the distinction between intension and extension, or sense and reference, as it was first drawn by Gottlob Frege in his 'On Sense and Reference' in P. Geach and M. Black (eds), *Translations from the Philosophical Writings of Gottlob Frege* (1980). Intention or sense is the meaning associated with a concept, i.e. its semantic content, its relation with other concepts, etc. Extension or reference is the object, person or situation in the world to which the concept uniquely applies. Note, however, that I am not also accepting Frege's view that sense determines reference. In fact, the theory of autonomous concepts is a refutation of this semantic view.

instances that have been authoritatively excluded from the extension of the concept do not enjoy full or adequate protection, as do the instances that remain within the extension. For example, since military offences in the Netherlands had been authoritatively excluded from the extension of a criminal charge, they did not enjoy the protection of Article 6 of the ECHR. Consequently people who faced a military trial were not able to seek the guarantees of a fair trial. Since the Court believes the excluded instances properly fall *within* the extension of the concept X, it reasonably goes on to find a violation of the Convention *right* to X.

There are four very interesting aspects in this ‘semantic’,<sup>20</sup> so to speak, violation, which I would like to highlight. The first is the *normative character of state classifications*. In the Court’s reasoning, it is possible for the state to go *wrong* in identifying an instance of a Convention concept, *despite the fact that this identification is officially made in some piece of legislation*. The second is what I shall call the *argumentative challenge*. It captures the fact that the applicant does not argue directly that his rights have been violated but is first interested in disputing the correctness of some official classification. This is natural for unless the classification is mistaken, the applicant enjoys no right under the ECHR. The challenge, moreover, is not austere; it is supported by arguments about what really counts as an instance of the relevant legal concept, not only in the applicant’s case but more broadly speaking. I shall call this the *substantive character* of the applicant’s challenge. The fourth and final point is the *interdependence* between the ECHR concepts and domestic legislation. The ECtHR does not take the concept that figures in domestic legislation to be identical to the one in the Convention, but it does not take it to be totally irrelevant either.

In a more recent case, *Chassagnou v France*, the applicants complained that compulsory membership of the Approved Municipal Hunters’ Association (Associations communales de chasse agréées — ‘ACCAs’), violated their freedom of association under Article 11 of the Convention. The applicants had been obliged, despite their opposition to hunting on ethical grounds, to transfer hunting rights over their land to the ACCAs and automatically become members of these associations. The applicants claimed a violation of their freedom of association by appealing to the well-established feature of some human rights, that a substantive part of the freedom is its negative side *not* to exercise an aspect of the right, if one does not want to. Consequently, compulsory membership of any association violates this particular aspect of the right, namely the freedom not to participate in any association whatsoever.

The respondent state did not question this latter argument at all. It did not argue that compulsory membership in this case is a legitimate limitation of freedom of association because of some outweighing public interest. Rather, it argued that in French law, the ACCAs were not associations *at all*, and thus no question of a violation *could* arise. The applicants, however, disagreed with this line of reasoning. They provided substantive arguments to the effect that a hunters’ association, even though

<sup>20</sup> For a full discussion of semantic theories in relation to legal theory and legal interpretation, see N. Stavropoulos, *Objectivity in Law* (1996), at Ch. 2.

approved by the public authorities, remained a purely private-law body. They pointed to the fact that it was presided over by a hunter who was elected by hunters, that they were not vested with any public-authority prerogative outside the scope of the ordinary law, and that the technique of official approval was not sufficient to transform a private-law association into a public administrative body — other things being equal.

The Court conceded that the applicants' point was reasonable and that the respondent government's argument was beside the point. It noted that *'the question is not so much whether in French law ACCAs are private associations, public or para-public associations, or mixed associations, but whether they are associations for the purposes of Article 11 of the Convention'*.<sup>21</sup> It furthermore reaffirmed the rationale behind the theory of autonomous concepts:

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.<sup>22</sup>

### 3 Theoretical Disagreement and Judicial Discretion

How is the autonomy of the Convention concepts from the domestic ones to be explained? How, if at all, is it possible on the Court's view that the state could make a *mistake* on what a criminal charge is? After all, many of the concepts that the Court dubs as autonomous are distinctively *legal* concepts: they are technical terms that are employed in legal sources and are invested with a special, non-ordinary, meaning. In fact, they often gain their meaning as a result of an authoritative stipulation: what is a criminal charge and what is not solely depends on how the relevant concept is used in legal sources. 'Criminal charge' is not like an everyday, layman's concept but it gains, as it were, its full life and meaning within law's eccentric vocabulary. Is it not the case that the only meaning these concepts can have is the one conventionally recognized by domestic law?

Matscher, one of the ECtHR judges, has similarly challenged the theory of autonomous concepts, repeatedly urging that this is indeed the case. He writes:

Even if it is necessary, for purposes of autonomous qualification of a concept in an international convention, to depart from the formal qualification given to an institution in the legislation of a given State and to analyse its real nature, this process must never go too far — otherwise there is a danger of arriving at an abstract qualification which may be philosophically valid, but which has no basis in law.<sup>23</sup>

<sup>21</sup> *Chassagnou*, *supra* note 12, at para. 100 (emphasis added).

<sup>22</sup> *Ibid.* (emphasis added).

<sup>23</sup> Dissenting Opinion of Judge Matscher, *Öztürk v Germany* (1984) Series A no. 73.

Leaving aside why on a judge's view legal reasoning need not be philosophically valid, Judge Matscher is here expressing a sceptical challenge to there being autonomous concepts. The idea is that every deviation from domestic classification carries the danger of going beyond law's boundaries, i.e. beyond what the law *is*. The danger involves going as far as creating a new, extra-legal concept that has little or nothing to do with the legal one. The sceptical challenge to autonomous concepts raises a threat of illegitimate judicial discretion: either authoritative sources in domestic law somehow exhaust the meaning of legal concepts or meaning degenerates into abstract theorizations about extending the law, which should be avoided.

The Court must somehow justify the use of the theory of autonomous concepts. Do autonomous concepts constitute a case of illegitimate judicial legislation? Do judges usurp their power by seeking an 'abstract qualification, which may be philosophically valid but which has no basis in law', as Judge Matscher put it?

Suppose that someone tried to undermine the significance of autonomous concepts on the basis that they are contingent, a mere particularity of international conventions. Imagine her argument going as follows: 'There is nothing special about autonomous concepts cases; they are just the result of the fact that Strasbourg adjudicates on cases coming from different jurisdictions, the ECHR being an international convention. Departure from domestic definitions may not only be acceptable, but also necessary for international instruments whose main aim is to coordinate different legal systems. Although the contracting parties had to share some legal concepts in order to draft the Convention in the first place, we should expect that there are still important differences as to how these concepts are understood and classified in each domestic law. States do not speak, as it were, the same legal language, both literally and metaphorically. Hence, since conformity to the classification of one state's domestic law would only constitute a violation of the classification of some other state's domestic law, departure from domestic definitions seems to be unavoidable. The Court, on this account, must necessarily have some *discretion* to legislate in these borderline cases.' Call this, the international theorist's argument.

The international theorist's argument cannot, however, explain away the presence of autonomous concepts that easily. For all the pertinent characteristics that I earlier pointed out (normative character of classification, argumentative challenge, substantive argument and interdependence) do not depart from some alleged divergence among contracting states. The Court concedes that the applicant is making a legitimate claim *before* considering whether the rest of the states diverge on the issue. Nor does the applicant argue his case in the way the international theorist's argument suggests. The applicant in autonomous concepts cases claims that the understanding of a legal concept that his country employs in domestic legislation does not capture what this concept amounts to within the meaning of the ECHR. He does not argue that his state's classification is problematic for the sole reason that there is no uniform understanding of this concept among contracting states.

For suppose the international theorist's explanation were valid. In this case the applicant's argumentative challenge would have to be driven by this alleged



divergence. It would go something along the following lines: 'I claim that my right to fair trial under the ECHR has been violated because there is no agreement among contracting states on some particular aspect of this right which applies to my situation'. Such an argument, though, is not only absent in the ECtHR legal practice, but is also totally foreign to how lawyers and judges understand human rights adjudication. No judge or other legal practitioner would be persuaded by this reasoning, because everyone would expect to hear much more about the particular situation in which the applicant was found and why this amounts to a violation of the right to fair trial.

Nor does the ECtHR take itself to use the theory of autonomous concepts as a tool of judicial discretion at the face of divergence. It does not picture autonomous concepts as an illegitimate power of discretion that is due to some conceptual differences among contracting legal systems. To the contrary, the Court has developed this theory to prevent contracting states from violating the Convention guarantees, *as a matter of what these legal standards have always amounted to*. The Court declared a violation and held contracting states accountable on the basis that the applicant had been denied a right which is embodied in the Convention, not on the basis that, absent a uniform understanding of the concept, the Convention grants no such right and judges have discretion to grant or deny it.

Autonomous concepts are not the result of certain contingent features of the ECHR. To be sure, it is often the case that contracting states diverge on how they classify legal concepts. The phenomenology of autonomous concepts, however, is indifferent to this factor. A different approach is needed in order to explain what is going on with autonomous concepts. We need to find the rationale behind the autonomy of these concepts by examining the relevance of domestic classification on the one hand and the applicant's correspondent claim of violation on the other.

Here is my suggestion: we can very easily re-describe this lack of convergence among national classifications as a *disagreement* between two or more individuals over the nature or character of a particular object or state of affairs. Take, for instance, the military punishment in the *Engel* case: one person, A, calls it a disciplinary offence, whereas another, B, calls it a criminal offence. That is, B insists that the law gives to people who have been charged with a military offence a right to a fair trial, whereas A thinks that the law denies them this right. Both of them argue their case as a matter of what the law allows, imposes, grants or denies.

We do not have to personify the contracting states for this picture to work: domestic classification is the result of real people (legislators, framers, judges, committee experts) drafting statutes, enacting laws or taking decisions that have a bearing on the meaning of these concepts. In fact, this synchronic disagreement is not that hard to imagine, for it actually takes place before the ECtHR in autonomous concepts cases. Recall that in these cases the applicant disputes his own state's classification of a concept and puts forward a different understanding of it, while the state insists that the applicant's conception is wrong. More importantly, the applicant *knows* that in his state, military offences are not considered criminal, yet disagrees that this classification is correct, as a matter of *law*, i.e. as a matter of what the ECHR entitles people.

To use a different vocabulary, applicants propose a different *conception* of what *counts* as an instance of a legal concept, say a criminal charge.<sup>24</sup> In *Engel* the state had a conception according to which disciplinary offences are not criminal, whereas the applicants' and the Court's conception was such that they are. Given that the ECHR provides protection for criminal offences alone, there is an open question of which conception of this concept is the legally correct one. It is not at all accidental that the Court terms these Convention concepts 'autonomous' and not totally *different* concepts from the domestic ones. For the fact that the translated domestic concepts bear the same name as the Convention ones would not normally guarantee that all are the same concepts.<sup>25</sup> The Court, however, said explicitly that, though the state classification is not decisive, it is still *relevant*, and this can only be the case if it is still an understanding of the same concept rather than an altogether different notion.

Seeing the matter in terms of disagreement also helps to understand better the initial suggestion that domestic legislations diverge on how they classify concepts. This idea of legal disagreement, i.e. disagreement over what the legal concepts mean and consequently what the law requires, is the best way to describe divergence between states. For even though it is an apparent fact that domestic legislations very often diverge on how they classify legal concepts, it is equally obvious *that it is the same concepts on which they diverge*. Unlike some philosophical views on the matter,<sup>26</sup> neither the Court nor lawyers and litigants think that contracting states have different concepts rather than different conceptions of the same concept. Everybody understands that states share the same legal concepts, even though they have different and competing understandings of them. It is precisely because we often take these various classifications among states to conflict, that it makes sense to say that they are different understandings of the same *thing* rather than different and incommensurable conceptual schemes.<sup>27</sup> We do not say, for instance, that in France, apart from associations, they have something called para-administrative institutions. Rather, we say that in France, unlike other countries, they do not think that hunters' unions are associations.

Still, why should it matter whether in France they call some union 'para-

<sup>24</sup> The *locus classicus* of this distinction is J. Rawls, *A Theory of Justice* (rev. ed., 1999), at 5 and Dworkin, *supra* note 4, at 90.

<sup>25</sup> Indeed, these may have been as close as 'river' banks are to 'saving' banks. I am grateful to Ronald Dworkin for pointing this out to me.

<sup>26</sup> There is an argument, traditionally associated with what Wittgenstein writes in *Philosophical Investigations*, on which there is no difference between following an interpretation of a certain concept and following a totally different concept. This tradition is largely due to Saul Kripke's seminal reading of Wittgenstein in his *Wittgenstein on Rules and Private Language: An Elementary Exposition* (1982).

<sup>27</sup> I here draw on Donald Davidson, 'On the Very Idea of a Conceptual Scheme', reprinted in his D. Davidson, *Inquiries into Truth and Interpretation* (2001) 183. Davidson has argued, against the idea of conceptual relativism across different languages, that there is no such thing as a non-translatable language. Translatability is a criterion of languagehood for one cannot drop his own language and compare conceptual schemes on some other basis to check whether they conflict. All conceptual schemes must be taken at large to be true and being true means being translatable.

administrative'? Why should it matter if the same situation is described differently by different legal systems? For in other contexts, we do not pay so much attention to such terminological differences. We do not really care for example that some herbal beverages are called 'teas' in some countries and 'infusions' in others.<sup>28</sup> It is, I believe, obvious what distinguishes disagreement in law from trivial terminological differences. In law, different institutional consequences follow if one classification is chosen instead of another. If we choose to call military proceedings disciplinary, Engel has no right to fair trial. If instead we choose to call them criminal the right is granted. Disagreement therefore operates on the background assumption that such classifications are not *neutral*. We might therefore qualify disagreement as not only about particular legal concepts but also about law itself, i.e. the entire legal practice. Litigants who disagree on whether a hunters' union is an association, disagree at the same time about what a particular legal practice grants people. In fact, it is plausible to say that they would not be having this disagreement had it not been for the fact that legal rights were at stake. We are particularly sensitive about what rights flow from our legislation. It makes, needless to say, a huge difference to people if the law requires or grants something than if it does not. Disagreement in autonomous concepts is, above all, disagreement about what the ECHR entitles people.

Let me now go back to the threat of judicial discretion.<sup>29</sup> Matscher's objection was centred on the idea that 'departure from the formal qualification given to an institution in the legislation of a given state' and 'analysis of its real nature' carries the danger of going beyond law. This idea now is beside the point. For once the situation is put in terms of disagreement, we can see that the threat of judicial discretion actually takes sides between competing conceptions of what the law requires. Take *Engel* for example; if we concede the threat and do not depart from domestic classification we would be taking sides on the question whether the law gives people charged with a military offence the right to fair trial. We would be choosing one conception over the other. This, however, would beg the question: there was a disagreement between two sides over what the law of the ECHR is and we are forced to choose one side on the grounds that this is what the law of the ECHR is. In other words, the threat of discretion assumes what needs to be proved. It assumes that the law of the ECHR does not grant people charged with military offences a right to fair trial, which is exactly what the disagreement is all about. Once the picture of disagreement is revealed, the threat of judicial discretion is idle. It is clear that we need a reason why the judges of the ECtHR should privilege one conception over another. But this reason cannot

<sup>28</sup> Cf. Dworkin, *supra* note 4, at 40–41: 'For sensible people do not quarrel over whether Buckingham Palace is really a house; they understand that this is not a genuine issue but only a matter of how one chooses to use a word whose meaning is not fixed at its boundaries'.

<sup>29</sup> I have to note here that the discretion-by-default thesis I am attacking is a reconstructed doctrine frequently invoked by judges or lawyers in order to uncritically support some crude version of judicial self-restraint; it is not a doctrine espoused by contemporary exponents of legal positivism, such as Joseph Raz or Jules Coleman, nor can it be attributed to them. I am grateful to an anonymous referee for helping to distinguish this. I do believe however that autonomous concepts pose independently some considerable difficulties to legal positivism, see *infra* note 34.

be, if we do not want to beg the question, that this is what the law of the ECHR demands.

In short, legal *disagreement*, rather than uncertainty, vagueness or linguistic divergence among contracting states, is the reason why judges must necessarily make choices in interpretation.

#### 4 The Semantic Sting at the International Level

The idea that legal concepts are autonomous, in the sense I have been exploring, is not new. The theory of autonomous concepts as developed by the Court is an illustrative case of what Dworkin has dubbed the ‘semantic sting’ argument.<sup>30</sup> This by now widely known argument is directed against any legal theory that holds that ‘lawyers and judges use mainly the same criteria in deciding when propositions of law are true or false’.<sup>31</sup> For Dworkin, propositions of law are ‘all the various statements and claims people make about what the law allows or prohibits or entitles them to have’.<sup>32</sup> Those theories, and legal positivism most notably, suffer from the ‘semantic sting’, i.e. they are premised upon a semantic theory that is unable to explain a certain kind of disagreement in law, namely theoretical disagreement. Theoretical disagreement is disagreement over what makes a proposition of law true or false. Lawyers disagree theoretically when they agree that a set of relevant empirical facts has taken place (the parliament voted, a statute has been enacted, a litigant acted in a certain way), yet still disagree on what the law allows, prohibits or entitles.

If the identification of true propositions of law turned on some criteria that all people shared, then — according to Dworkin — theoretical disagreement in law would be impossible: law would only cover what practitioners’ shared criteria provide, the rest, i.e. non-shared debatable cases, being beyond law, extra-legal as it were. Theoretical disagreement on this view would necessarily have to be a disguised disagreement about what the law *should* be: where shared criteria stopped, judicial discretion would begin.<sup>33</sup> Dworkin’s argument against this shared-criteria semantic image is twofold: first, when lawyers and judges have a theoretical disagreement, they do not take themselves to argue about what the law should be, but about what the law *already* is. They do not, that is, take choice in interpretation to signal a case for transgressing

<sup>30</sup> It is important, I believe, to explain in this section the affinities between autonomous concepts and Dworkin’s semantic sting argument for two reasons. First, since the ECtHR has already accepted the theory of autonomous concepts, it is important to show to the Court itself that this theory is of a more general applicability and cannot but apply to all the Convention concepts. Second, showing that the semantic sting argument finds ground on the Court’s case-law, provides practical support to the effect that the Dworkinian methodology in law is better, rather than just what one prefers.

<sup>31</sup> Dworkin, *supra* note 4, at 33.

<sup>32</sup> *Ibid.*, at 4.

<sup>33</sup> Hart famously developed this doctrine in H. L. A. Hart, *The Concept of Law* (1994), at Ch. 7. For a full discussion of Hart’s views on the indeterminacy of language, see Stavropoulos, ‘Hart’s Semantics’, in J. L. Coleman (ed.), *Hart’s Postscript* (2001) 59.

law's limits.<sup>34</sup> Recall that this is also the case in autonomous concepts cases: applicants strongly believe that their case had always enjoyed protection under the ECHR –notwithstanding domestic classifications. Second, Dworkin argues that no distinction can be made between cases covered by shared criteria and borderline ones that allow for disagreement and call for repair. Practitioners take the legal cases that they disagree theoretically about as being *testing* or *pivotal*:<sup>35</sup> they are pivotal in the sense that they involve disagreement over the whole point, nature or character of the law at issue rather than merely a borderline classification or instance of it. Since disagreement is precisely about the central point or character of the law, it could not be the case that core meaning is settled by shared criteria whereas marginal cases allow for disagreement. Disagreement is 'not just at the margin but in the core as well'.<sup>36</sup>

The theory of autonomous concepts illustrates, at the international level, this broader jurisprudential claim. It shows that legal practitioners disagree about what the legal concepts mean and do not share any common criteria to identify their meaning: they intelligibly challenge any part of the conventionally accepted meaning of a legal concept<sup>37</sup> and put forward fresh theories that try to capture the substance of the concept at issue. Judge Van Dijk has eloquently acknowledged this point in a dissenting opinion concerning the meaning of sex under Article 8 ECHR: 'I cannot see any reason why legal recognition of reassignment of sex requires that biologically there has also been a (complete) reassignment; the law can give an *autonomous meaning* to the concept of "sex", as it does to concepts like "person", "family", "home", "property", etc'.<sup>38</sup> 'Autonomous meaning' is here linked directly to the idea that in legal practice there are no shared-criteria or ready-made definitions.

Moreover, autonomous concepts portray vividly some challenging features that legal disagreement has at the international level and that are somehow obscured at the national level.

First, it may be the case that the legally correct meaning of an ECHR concept may significantly depart from the one used and accepted within the national legal order.

<sup>34</sup> This is where autonomous concepts pose a problem for legal positivists' views on discretion. Not because positivists are against judicial activism or provide a misguided theory of adjudication, but because they have difficulty explaining the sense in which law 'runs out' when shared criteria fade away. For an attempt to answer this difficulty, see Raz, 'Two Views on the Nature of the Theory of Law: A Partial Comparison', 4 *Legal Theory* (1998) 254. Unfortunately, further examination of this issue is beyond the scope of this article.

<sup>35</sup> Dworkin, *supra* note 4, at 41–42.

<sup>36</sup> *Ibid.*, at 43.

<sup>37</sup> Significant work in analytic philosophy has shown that no part of the meaning of a concept is secure from challenge. Leading work in this field is Saul Kripke's work on proper names, Hilary Putnam's work on natural kinds and Tyler Burge's theory of anti-individualism. These theories may all be grouped under the heading of *externalism*, the semantic view that meaning depends on factors external to the mind of the speaker. Externalism started to emerge in the mid-1960s as a criticism to the then dominant description theories of meaning. Stavropoulos gives an excellent overall account of externalism and discusses their implications with connection to law, see Stavropoulos, *supra* note 20, at 17.

<sup>38</sup> Judge Van Dijk Dissenting in *Sheffield and Horsham v United Kingdom* (1998) Reports 1998-V (emphasis added).

We may cast this in a more philosophical vocabulary by saying that legal truth *transcends* communal understanding and acceptance. The applicant disagrees with a conception that builds on a piece of national legislation and has been confirmed and supported by the judiciary of the country. Recall that normally the applicant is required to have exhausted domestic remedies, which secures that the state's judicial authorities have already ruled that the problematic classification captures precisely the way this concept is understood in that legal community. The applicant's challenge amounts to the claim that both the Courts and the legislature of that state, even the whole community of officials, may have been wrong about the classification. Disagreement, in other words, builds on the idea that the standard of legal correctness may radically transcend the applicant's legal community. The institutional loneliness of the applicant's situation thus marks the *depth* of disagreement. Persistence in the possibility of communal error within the national legal community is the driving force of the applicant's challenge.

Second, since there is usually divergence among contracting states on how they classify the relevant concept, the applicant's challenge will necessarily target those as well; it will be compatible with some but incompatible with others and disagreement will potentially become explicit if applicants from other countries decide too to go to Strasbourg. Disagreement is therefore *widespread* too. We should expect that legal practitioners (litigants, legislators, judges) hold and propose different understandings of legal concepts not only *within* the same legal order, i.e. vertically (applicant against his state) but also across *all* legal communities that are parties to the Convention. i.e. horizontally.

## 5 Interpretivism and the ECHR: Towards a Theory of Adjudication

I proposed a theory for explaining autonomous concepts and argued that it unmasks broader jurisprudential truths about the entire Convention. I have said nothing, however, about how the underlying disagreement is to be resolved. What could count as a reason why judges should choose one conception over the other? What could count as a justification for the way judges are to resolve disagreement? For, plainly, there are numerous possible ways to go about this and the justification we are seeking must be capable of choosing among them. Consider the following possibilities in *Engel*:

- (P1) The ECHR grants the right to fair trial to *whatever* the relevant state classifies as a criminal charge.
- (P2) The ECHR grants the right to fair trial to whatever *most* states classify as a criminal charge.
- (P3) The ECHR grants the right to fair trial to whatever the applicant believes is a criminal charge.
- (P4) The ECHR grants the right to fair trial to whatever is a criminal charge according to the morally best conception of the right, even if no one actually holds it or no piece of legislation or case-law expresses it.

- (P5) The ECHR grants the right to fair trial to whatever is a criminal charge according to the morally best conception of the right, as long as at least some officials in the contracting states hold it or is at least to be found in some piece of legislation or case-law.
- (P6) The ECHR grants the right to fair trial to whatever is a criminal charge according to the morally best conception of the right, even if it is not present in any legislation, as long as at least *some people* in the societies of the contracting states hold it.
- (P7) The ECHR grants the right to fair trial to whatever situations the drafters thought or would have wanted or expected it to apply.
- (P8) In the face of disagreement, the ECHR does not grant the right to fair trial. The matter should be deferred to the contracting states for them to decide whether military proceedings are criminal.

The list is neither exhaustive nor fully developed. It shows, however, that legal interpretation faces a rich set of choices all of which have a bearing on what legal rights people have, a set much richer in fact than the one the judicial discretion-by-default thesis worried about. As we saw, none of these choices may be discounted on the question-begging grounds that it goes beyond law's limits. The situation is such that judges need to make a choice in order to find what the law of the ECHR is, and choices do not come easily; whichever of the eight possibilities I listed judges might choose, there must be a reason why the rest were mistaken. Justification therefore must itself be rich enough to explain this.

We get closer to finding a justification if we notice a certain shift as we went along, between disagreement about the concept of a criminal charge (or right to fair trial more generally) and possible ways to understand what it is that the ECHR grants. Whereas the initial disagreement was over some legal concept, possible choices to resolve the disagreement turned on the broader point and purpose of the ECHR. For all the possibilities in the above list are also conceptions of the point and purpose of the ECHR. They all acknowledge that the ECHR is a human rights document that has been institutionalized and has created a legal practice that grants citizens of the Council of Europe some rights, but each one takes a different stance as to the nature, scope and value of these rights. On some, the point of the ECHR is to grant people a set of moral rights against their community, and regardless of what their community think; on others, that it is to grant only what rights the legal community expects or has explicitly agreed individuals should have.

The answer to specific questions regarding disagreement about legal concepts necessarily engages an answer to the broader question of what is the point of the law of the ECHR. For example, if Engel were denied the right to fair trial on the basis that no country classifies military offences as criminal, that would mean that the ECHR only grants rights that the legal communities have explicitly recognized. And *vice versa*: different theories of the point and purpose of the law of the ECHR will dictate different answers to what legal rights individuals that go to Strasbourg have. If, for example, the point of the ECHR is to grant citizens a set of universal moral rights regardless of

whether the legal community has explicitly considered and accepted all instances of these moral rights, then Engel has a claim to compensation, even if no official or citizen has ever taken military offences to be criminal. ‘Jurisprudence’, Dworkin remarks, ‘is the general part of adjudication, silent prologue to every decision of law’.<sup>39</sup>

It is therefore crucial that apart from being rich and subtle, justification is such as to elaborate on the nature and character of the ECHR more generally. It must take into account the place that human rights have within our political culture as well as the point of having an international treaty to protect them. It must examine whether there is, for instance, a difference between interpreting the ECHR and interpreting a domestic bill of rights, or whether all bills of rights should be read, regardless of their institutional status, as moral rights flowing from a particular theory of liberalism.

But now the question becomes: How do we find what the point of the ECHR itself is? Surely, the text of the Convention provides little help, since different conceptions of the ECHR rights all depart from the very same text; none of the above eight possibilities can be textually disqualified. Drafters’ intentions are equally of no help, for we would still need to know why intentions are relevant as well as which and whose intentions should matter. To be sure, the ECHR would never have existed if some officials in the contracting states had not intended to draft, sign and make it legally binding. Which is, however, more crucial, their intention to protect a list of fundamental freedoms whatever these may be, or their intention to protect what they, 50 years ago, believed these freedoms to be? Presumably, drafters had the former intention as much as they had the latter: they had a concrete idea of what human rights there are, but it was their more abstract belief in the moral objectivity and universality of these rights that led them to draft the ECHR following the Second World War atrocities. Objectivity, in turn, is a famously transparent concept: like most people, drafters may have been wrong about morality’s demands. Should we try to dig out their concrete intentions of what, they thought, these moral rights were, or should we turn to their more abstract intention of institutionalizing whatever moral rights really exist?<sup>40</sup> We cannot in any case find an answer to this question located *within* the drafters’ intentions: we need to know the way in which drafters’ intentions become relevant, and it becomes wholly circular to argue either way by saying that this is what the drafters intended.<sup>41</sup>

Dworkin employs a general methodology in order to circumvent all these circularities, which is to see law as an *interpretive* concept. A concept is interpretive when it targets a practice where people take part reflectively and try to come to an understanding of its real point and nature, an understanding that does justice to the history of that practice but may transcend what several practitioners now believe. The

<sup>39</sup> Dworkin, *supra* note 4, at 90.

<sup>40</sup> On the question whether we should treat bills of rights as transparent or opaque statements, see Brink, ‘Legal Theory, Legal Interpretation and Judicial Review’, 17 *Philosophy & Public Affairs* (1988) 105.

<sup>41</sup> For the view that originalism cannot even get off the ground as a method of interpretation, see Dworkin, ‘The Forum of Principle’, in his *A Matter of Principle* (1985), at 33–57; Dworkin, ‘Comment’ in A. Gutman (ed.), *A Matter of Interpretation* (1997), at 115. See also Lyons ‘Constitutional Interpretation and Original Meaning’, 4 *Social Philosophy and Policy* (1986) 85.



success of an interpretation of the point of a legal practice is measured in two scales, *fit* and *substance*. An interpretation must first fit the history of the practice in the sense of being an eligible explanation of at least some of the recognized past case-law (paradigms); it must then justify this explanation by showing that it is in substance superior from other eligible interpretations that fit the practice equally well.<sup>42</sup> If, for example, more than one of the above possibilities figure in the ECtHR case-law then the correct interpretation is that which is substantively superior in the sense of serving better a value of the legal practice.

We have the basic ingredients to construct such an interpretive theory for the ECHR. We know that our database is holistic, so to speak, in that it covers the whole of national and international standards and beliefs. Like Neurath's mid-sea boat that has to be repaired one plank at a time, *anything* in this database may be wrong but not *everything* at the same time. Legal correctness may transcend most legal communities that are parties to the ECHR but it cannot transcend *all* of them.

In the remaining part of this paper I shall try to show what legal principles Dworkinian interpretivism yields if applied to the ECHR. I shall use the Court's judgment in *Engel* to highlight two major interpretive poles that fit the ECtHR case-law: quest for moral truth and consensus. I shall call these the moral and the conventional reading of the ECHR, respectively.<sup>43</sup>

I shall try to identify which values lie behind each interpretive pole and argue that the moral reading is substantively superior to the conventional one.

## 6 Truth or Consensus?

### A *Fit*

Let us return to *Engel* and examine how it was decided. Having already departed from the classification of 'criminal charge' in Netherlands law, the Court ruled that autonomous concepts should be interpreted according to the '*common denominator of the respective legislation of the various contracting parties*'. The introduction of this standard echoes a requirement of *consensus*: in constructing the meaning of the ECHR concepts, the ECtHR must seek to respect and accommodate a certain convergence on meaning among the various contracting states.

There are some epistemic shortcomings when one tries to come to grips with the notion of a 'common denominator'. It seems unclear how this notion will help to reconcile a meaning discrepancy across the various domestic legislations. The problem with these concepts is precisely that *there is no common classification among contracting states*. It is the lack of something common that posed the problem in the first place. It would neither help the Court to sit down and find those and only those

<sup>42</sup> Dworkin, *supra* note 4, at 67.

<sup>43</sup> I borrow these labels from Dworkin's reading of the American constitution. See R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) 1.

instances that are commonly classified as criminal in all contracting states. The outcome of this process, though informative, would not on its own help: it would be a huge list of criminal offences, from murder and robbery to defamation and jaywalking. How does one go from this list to an answer on whether military offences are criminal?

But perhaps I was superficially unfair to the idea of a common denominator. On a different suggestion, the latter may simply mean how *most* states classify 'military offences', invoking some sort of a majority rule: the content of the concept is given by what the majority of domestic legislations takes the content to be. Judge Matscher gives the following characterization of the 'common denominator' approach:

One must look for the 'common denominator' behind the provisions in question ... this 'common denominator' can be found through a comparative analysis of the domestic law of the Contracting States. This being so, the result of such an investigation can never be a concept which is totally at variance with the legal systems of the States concerned.<sup>44</sup>

'What most states do' would then be a way to construe autonomous concepts in a way that is capable of resolving disagreement. That would in turn mean that in autonomous concepts the Court departs from domestic classification in a limited sense. It partly departs from a minority classification only to meet the standards of majority classification. Moreover, though the result of the 'common denominator approach' might surprise some contracting state (say, France on how it classifies the term association) it cannot surprise *most* of them.

Consensus, under the convenient metaphor of the common denominator approach, was further developed by the ECtHR in its *margin of appreciation* doctrine<sup>45</sup> and has become one of the Court's favourite, as well as controversial, interpretive tools. The Court has used this doctrine extensively, albeit not at all coherently, to grant contracting states an area of legislative power that escapes judicial review. It was first used in cases of derogation under Article 15 ECHR and was soon extended to Article 8 (private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of association), all of which have 'accommodation clauses', i.e. permissible restrictions of the rights for the protection of national security, public safety, public health or morals, etc. The standard approach in these cases has been the following: the more there is consensus among contracting states on whether some state act or omission counts as a human rights violation, the narrower the states' margin of appreciation to interfere with this right; in the absence of consensus the ECtHR has respectively granted states a wide margin of appreciation to legislate and withhold judicial review.

No doubt, consensus as an interpretative principle fits the ECtHR case-law. The margin of appreciation doctrine figures prominently in the Court's reasoning and it is often associated with the fact that the ECHR is an international convention whose aim

<sup>44</sup> Dissenting Opinion of Judge Matscher in *König v Germany* (1978) Series A n.27.

<sup>45</sup> See Macdonald, 'The Margin of Appreciation', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993) 83; for an account of the Court's case-law on the margin of appreciation see, H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996).

is to protect the individual on a *subsidiary* basis: the primary obligation to ensure the ECHR rights falls upon the contracting states and it is only when states fail that the ECtHR may play an actual role and intervene in the domestic legal order to protect the individual's right. Consequently, it is often argued that the status of the ECtHR is in some important sense *external* to the domestic constitutional arrangements and the democratic principles by which the latter are governed.<sup>46</sup> Judges therefore do well, on this view, to *defer* questions of human rights violations to national legislatures whenever there is no consensus and to act as an *agent* of these legislatures whenever widespread agreement in domestic societies is secured.

There are, however, two sides to every story. I shall argue that consensus is not the only interpretive theory in play. In a significant number of cases the Court's intuitions have moved away from consensus towards the moral truth of the protected rights. Consider *Engel* again. Having introduced the notion of a common denominator, the ECtHR explained why it held that military offences under Netherlands law were criminal rather than disciplinary. The Court noted that the very '*nature of the offence*' (emphasis added) was far more important than the domestic law classification. It argued that whether an offence is criminal or disciplinary depends on the degree of severity of the penalty and it added that, 'in a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental'.<sup>47</sup>

The Court then used the notions of the 'severity' of the penalty and of the 'nature' of the offence as criteria to examine whether the applicants had been faced with a criminal charge. It concluded that the four days of light arrest which the Supreme Military Court could impose as a maximum penalty for two of the five applicants were too short a duration to qualify as criminal. For the other three applicants, however, the threat of a penalty of three or four months' committal to a disciplinary unit was found to come within the criminal sphere because it aimed at 'the imposition of serious punishments involving deprivation of liberty'.

Nowhere did the Court attempt to provide a link between the criteria used and the majority of domestic legislations. Indeed, *no* state actually classifies criminal charges as those that inflict 'severe penalties', by way of officially recognizing this as a necessary condition. Furthermore, nowhere did the Court even imply that the threat of severe penalties constitutes a criminal charge *because* for the majority of the states criminal charges are severe. For by talking about the 'nature' of the offence, the Court implies that severe offences would still qualify as criminal, even if the majority of contracting states one day legislated that all severe penalties are disciplinary and not criminal. It appears that the Court is set to discover the real nature of a 'criminal offence': something constant and objective that is not dependent upon how most

<sup>46</sup> Mahoney emphasizes the point that the ECHR is not part of a broader constitutional arrangement, in 'Judicial Activism and Judicial Self-Restraint', *supra* note 1.

<sup>47</sup> *Engel*, para. 82.

domestic legislations define it. This is perfectly in line with what the Court said in another case:

The prominent place held in a democratic society by the right to a fair trial favours a ‘substantive’, rather than a ‘formal’, conception of the ‘charge’ referred to by Article 6; it impels the Court to look behind the *appearances* and examine the *realities* of the procedure in question in order to determine whether there has been a ‘charge’ within the meaning of Article 6.<sup>48</sup>

This urge to look behind appearances, towards the substantive truth of the right is also manifest in a series of judgments where the Court employed what came to be known as ‘evolutive’ interpretation, or ‘living-instrument’ approach. The method first appeared in *Tyrrer*,<sup>49</sup> where the Court had to decide whether judicial corporal punishment of juveniles amounts to degrading punishment within the meaning of Article 3 of the Convention. The punishment, having the form of bare-skin birching carried out by a policeman at a police station, was prescribed by law and practised in the Isle of Man, a dependent territory of the United Kingdom with a significant degree of legislative autonomy. At that time, judicial corporal punishment had been abolished in the rest of the United Kingdom and was neither to be found in the vast majority of the other contracting states. In his submissions, the Attorney-General for the Isle of Man put forward an interesting argument: judicial corporal punishment could not be considered degrading because it ‘did not outrage public opinion in the Isle of Man’.<sup>50</sup>

The Court took issue at this communitarian conception of degradation. I call it communitarian because it is premised on the view that degrading is whatever public opinion and the community at large *thinks* is degrading. In its ruling, the Court noted that public acceptance of judicial corporal punishment could not constitute a criterion as to whether it is degrading or not. This is so because one of the reasons why people favour this type of punishment may well be the fact that corporal punishment is degrading and can therefore operate as a deterrent. The Court, in other words, rejected the view that communal reactions provide some privileged insight to the truth of the protected right. A few lines earlier, the Court had noted that in assessing whether a particular punishment is degrading, one must look at all the circumstances of the case and ‘in particular the *nature* and context of the punishment itself and manner and method of its execution’.<sup>51</sup> There is a stark contrast here between what public opinion thinks about birching and what is the real character of this punishment.

The Court then went on to relate its reasoning with a different category of common beliefs. It said:

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly

<sup>48</sup> *Adolf v Austria* (1982) Series A no. 49, para. 30 (emphasis added).

<sup>49</sup> *Tyrrer v UK* (1978), Series A no. 26.

<sup>50</sup> *Ibid.*, at para. 31.

<sup>51</sup> *Ibid.*, at para. 30 (emphasis added).

accepted standards in the penal policy of the member States of the Council of Europe in this field.<sup>52</sup>

This piece of legal reasoning inaugurated the Court's extensive use of evolutive interpretation. It puts the emphasis upon present-day conditions as an important factor in interpreting the Convention and attaches great importance to the common standards that are found *in the legislation of the member states of the Council of Europe*, rather than anywhere else.

Surprisingly, however, the Court never made clear how the notion of a 'living instrument', applied in the case at issue, led to a specific decision. There was no reference to member states' criminal law, no comparative study done on judicial corporate punishment and no attempt to establish that the abolition of corporal punishment is a commonly accepted standard in the Council of Europe. Though there is a presumption that the Court might have taken this to be common knowledge, we find no explicit link in the judgment between what is commonly accepted regarding corporal punishment and the Court's reasoning in reaching its decision. The Court does not base its arguments on what is commonly accepted in any apparent way. For having elegantly pronounced the 'living instrument' approach, the Court went on to base its decision on purely substantive considerations. It said that 'the very *nature* of judicial corporal punishment is that it involves one human being inflicting physical violence on another human'<sup>53</sup> and that it is an institutionalized assault on a person's dignity and physical integrity, which is precisely what Article 3 of the Convention aims to protect. It further added that the institutionalized character of the punishment, the fact that it is inflicted by total strangers to the offender and the fact that it is administered over the bare posterior, all add up to the punishment being degrading. The Court accordingly found a violation of Article 3 of the Convention.

In *Marckx*,<sup>54</sup> decided just a few months after *Tyrer*, the applicants, a child born out of wedlock and his unmarried mother, complained — among others — that Belgian legislation violated their right to family life under Article 8 of the Convention, and discriminated against them contrary to Article 14 of the Convention. Belgian law at the time did not confer maternal affiliation by birth alone with respect to 'illegitimate children', contrary to the so-called 'mater certa semper est' maxim. Unlike the case of 'legitimate children', maternal affiliation between a child born out of wedlock and its mother could only be established either by voluntary recognition or by a court declaration.

The Court noted straightforwardly that Article 8 makes no distinction between 'legitimate' and 'illegitimate' family and that such distinction would anyway contradict Article 14 of the Convention, which prohibits any discrimination grounded on birth.<sup>55</sup> It then noted that 'respect for family life' may well impose positive

<sup>52</sup> *Ibid.*, at para. 31.

<sup>53</sup> *Ibid.*, at para. 33 (emphasis added).

<sup>54</sup> *Marckx v Belgium* (1979) Series A no. 31.

<sup>55</sup> *Ibid.*, at para. 31.

obligations on the part of the state and further argued that Belgian law puts illegitimate families under unfavourable and discriminatory conditions.<sup>56</sup>

At that point the Court was faced with an objection raised by the Belgian Government. The Government conceded that the law favoured the traditional family, but maintained that this was for the purpose of ensuring the family's full development as a matter of 'objective and reasonable grounds relating to morals and public order'.<sup>57</sup> The Court took issue at the Belgian Government's objection. While admitting that at the time that the Convention was drafted it was regarded permissible to distinguish between 'legitimate' and 'illegitimate' families, it emphasized that 'the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est"'.<sup>58</sup>

There is an important difference between *Tyrer* and *Marckx*. In the latter the Court went on to refer explicitly to two International Conventions (The Brussels Convention on the Establishment of Maternal Affiliation of Natural Children and the European Convention on the Legal Status of Children Born out of Wedlock) as a way to demonstrate the existence of 'commonly accepted standards'. In doing so, the Court moved away from construing commonly accepted standards as solely those found in the legislation of member states. This is because the two International Conventions were by no means signed by the majority of the contracting states. The Court noted that, 'the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.' It added further that Belgian law itself shows signs of this 'evolution of rules and attitudes'.<sup>59</sup>

This slide from commonly accepted standards in domestic legislations to signs of evolution of attitudes amongst modern societies is particularly noteworthy. For it seems that commonly accepted standards found in legislation were not, after all, a necessary condition within the meaning of present-day conditions. The Court was satisfied to show and to emphasize that the distinction between 'legitimate' and 'illegitimate' families was no longer regarded as appropriate in European societies. Whether or not this attitude is reflected in the majority of domestic legislation was not so decisive. In *Marckx*, 'living instrument' meant, above all, keeping pace with evolving European attitudes and beliefs rather than with some specific legislation to be found in the majority of member states.

The introduction of this vague standard of common European attitudes and beliefs indicates how loose the requirement of consensus became in *Marckx*. For there is an apparent difficulty in construing this 'common ground among modern societies'. Does it mean what all or most citizens accept? Or does it rather mean what reasonable and fully informed citizens would accept? Moreover, how is the Court to say when this common ground has been achieved? By consulting opinion polls? By relying on judges' limited personal experience? To be sure, none of these worries arose in *Marckx*.

<sup>56</sup> *Ibid.*, at paras 36–39.

<sup>57</sup> *Ibid.*, at para. 40.

<sup>58</sup> *Ibid.*, at para. 41.

<sup>59</sup> *Ibid.*

The Court did not explain how this common ground among societies is to be found. On the contrary, such assertion was a mere *addition* to a chain of substantive reasoning: the Court had said, independently, that the distinction between 'legitimate' and 'illegitimate' children is discrimination based on birth, that 'illegitimate' children were left motherless for a period of time and that illegitimate families faced unfavourable circumstances in law. The Court did not say that modern societies no longer accepted the distinction between 'legitimate' and 'illegitimate' families, *therefore* there was a violation of the right to family. Rather, the Court argued that the above distinction violates the right to life as a matter of what this right really amounts to and that, *in addition*, this is becoming common ground in modern societies.

In a series of later judgments, the Court proceeded in the exact same way: it examined the legal issue involved thoroughly, made claims and assumptions about the purpose of the protected right and explained in detail why governmental acts fall short of serving this purpose.<sup>60</sup>

Nowhere did it subscribe to a communitarian conception of interpreting: it is not the case that what constitutes a violation changes whenever rules and attitudes change. Its reasoning clearly implies the idea of a substantive *discovery*: the complaint behaviour has always constituted a violation, even when it was not considered to be so.

In the well-documented case of *Dudgeon*,<sup>61</sup> the main issue was whether penalization of homosexuality in Northern Ireland violated the right to respect for family life guaranteed by Article 8(1). The Court there ruled:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.<sup>62</sup>

It then went on to find a violation of the respective right. Though there is an apparent effort in the quoted passage to base its reasoning on what is now believed in the great majority of the member states, it is equally striking that the Court takes

<sup>60</sup> In *Guzzardi v Italy* (1980) Series A no. 39, for example, the Court had to decide whether compulsory residence on an island constitutes deprivation of liberty. The Italian Government argued that all the applicant had suffered was not a deprivation but a restriction of liberty, which is outside the scope of Art. 5. In response the Court held that 'the difference between deprivation and restriction is one of degree or intensity and not one of nature or substance', that deprivation may take several forms and that 'account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'. It concluded that the applicant's condition amounted to deprivation of liberty even though there was no physical barrier to the applicant's movement. Towards the end of its judgment the Court made a sophisticated reference to 'the notions currently prevailing in democratic states'. Again, it is difficult to see how the Court's substantive account was in any sense 'a prevailing notion'.

<sup>61</sup> *Dudgeon v UK* (1981) Series A no. 45.

<sup>62</sup> *Ibid.*, at para. 60.

contemporary understanding in member states to be *better* and not merely different than the time when anti-homosexual legislation was enacted. So it is not enough that a different understanding has evolved, this understanding must also be better, i.e. towards the truth of the substantive protected right.

The above case-law shows that the Court was primarily interested in evolution towards the moral truth of the ECHR rights, not in evolution towards some commonly accepted standard, regardless of its content. First, the Court does not take the time to look at domestic legislations in some comparative exercise and aggregate what most states do. Second, its reasoning is informed by substantive considerations about the protected right, not by a common denominator approach. Third, it emphasizes that evolution is important in that it results in a better understanding of the ECHR rights.

In sum, the Court applied a first-order *moral* reading of the ECHR rights, adding hesitant and redundant remarks about this being somehow commonly accepted. The above case-law suggests that (a) there is an objective substance or nature of the protected right; (b) evolution is important only because and so far as it gets closer to this substance; (c) for the evolution to constitute a standard of correctness for the ECHR, it is not necessary to establish an *explicit* consensus among the majority of contracting states. The idea is more that of a *hypothetical* consensus: given the principles now accepted in the Council of Europe, how would reasonable people agree to apply these principles to concrete human rights cases? A careful reading of the ‘living instrument’ approach thus reveals that it is nothing more than a reiteration of the Court’s principle in autonomous concepts cases: *the protected rights are not ‘theoretical or illusory but practical and effective’ and should not be subordinated to states’ ‘sovereign will’*.<sup>63</sup>

## B Substance

Now, can this trend in the ECtHR case-law outweigh the trend towards using consensus as an interpretive method? An interpretivist theory must prioritize the one that is *morally* superior. To figure this out, one must identify the values embedded in the legal history of the ECHR and measure which of the interpretative principles serves them better.

It cannot be denied that the institutionalization of human rights reflects a demand for justice, namely that individuals are morally entitled to a sphere of personal liberty that is immune from the will of the majority. All human rights documents rest on a theory of political morality according to which people have genuine moral rights against the state. Rights, as Dworkin puts it, *trump* collective goals:<sup>64</sup> though political fairness demands that decisions are taken on a majority rule, justice demands that these decisions respect individual rights. Something along the above lines explains why human rights were made legal in the first place. Having said that, however, it is obvious that justice cannot be the only moral value law recognizes. On the contrary, democracy rather than justice is often seen as the value lying at the heart of the

<sup>63</sup> *Supra* note 7.

<sup>64</sup> Dworkin, ‘Rights as Trumps’ in J. Waldron (ed.), *Theories of Rights* (1983) 153.



concept of law. And democracy is regularly regarded as a value that may pull law towards the opposite direction of justice: law is the product of elected majorities and there is no guarantee that it will fully conform to requirements of justice.

But we need not be puzzled here by any alleged conflict between democracy and the ECHR. First, it was democracy in the first place that enabled the institutionalization of human rights: the ECHR has been signed and ratified by the members of the Council of Europe, in accordance with their domestic democratic procedures. Second, it is the value of democracy again that, on the interpretivist account, forces us to examine past legislation, both national and international, in order to determine the correct interpretive principles. Had there been no past political decisions recognizing the moral dimension of the rights protected, we would be unable to bring justice in as a legally binding interpretative dimension. Third, we believe, independently of history, that it would be very difficult to accept that there can ever be democracy without people enjoying a sphere of personal liberty.<sup>65</sup>

Of course, as has been well pointed out, it does not follow logically from the moral value of human rights that courts — rather than some other institutional body — should have the power to decide on the content and limits of these rights.<sup>66</sup> In the long run courts may produce decisions that restrict fundamental rights rather than protect them, in which case there is a strong reason to reconsider allowing them the power of judicial review. But even when this occurs, taking the power of human rights protection away from courts would normally be justified on the grounds that some other body is likely to protect them better. And there is a strong reason here why this institutional body should not be national governments themselves, a strong reason why there should be some independent body with a power to review the decisions of the political branch. If human rights are rights of the individual against the majority then it is inconsistent to allow the majority itself to decide what rights individuals have in controversial legal cases. This is so for the following reason: it is common knowledge that the greatest danger of human rights violations in history has been the majority itself. As long as it can be shown historically that political majorities have it in their interest to restrict the rights of the individual, it makes no sense to assign them the power to decide on the content of these rights.<sup>67</sup> There is unquestionable evidence that the above reasoning currently represents legal practices, throughout the world. Judicial review has been widely institutionalized precisely because it is firmly believed that courts will protect human rights better than the political branch.

<sup>65</sup> For the claim that democracy is imperfect without individual liberties, see Dworkin, *supra* note 43, at 24 *et seq.*

<sup>66</sup> This point is made in detail by Wojciech Sadurski, in his 'Judicial Review and the Protection of Constitutional Rights', 22 *Oxford Journal of Legal Studies* (2002) 275. The leading critic of courts having the power of judicial review is Jeremy Waldron, see 'A Right-based Critique of Constitutional Rights', *Oxford Journal of Legal Studies* (1993) 18. See also more recently Waldron, *Law and Disagreement* (1999), at 232–254.

<sup>67</sup> This is more than an appeal to history; it further reflects the general moral principle that no-one should be judge in his own cause. It is counter-intuitive to grant that the majority must respect individual rights and then ask the majority itself to decide whether it has indeed respected them. For it is natural to assume that the majority will often judge itself to have done so, even when this is not the case.

In any case, the above considerations are more relevant when the question is how to construct from scratch a system of human rights protection that can be viable and effective given the various social and political circumstances.<sup>68</sup> This is not, however, the issue in our case. The ECHR has been in force for more than 50 years and the ECtHR has already declared hundreds of violations that national courts had failed to see; there can be no doubt that the ECHR has overall improved, rather than harmed, the protection of human rights in Europe. The institutional weight of judicial review is firmly exhibited in the right to individual petition under Article 34 ECHR, and the right to an effective remedy under Article 13 ECHR. Strasbourg organs themselves have stressed that the purpose of the ECHR was ‘to establish a common public order of the free democracies of Europe’ and that ‘the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.’<sup>69</sup> An interpretivist account of the ECHR cannot ignore these aspects of the history of the legal practice when it comes to assessing the role and limits of judicial review.

Now, does consensus serve any of the moral values embedded in a bill of rights? Do we have any *separate* reason to wait for a consensus to be formed before we grant what we firmly believe individuals are entitled to? It is difficult to set aside the fact that human rights are institutionalized in the first place as a refutation of a conception of political fairness that wants all decisions to be deferred to the political process. This being the case, there is an apparent reason to reject consensus as an interpretative principle in the ECHR context and human rights instruments in general. For by looking at what the majorities believe or have agreed to, consensus constitutes a direct appeal to fairness. If, however, the very presence of human rights in our legal culture is a restriction on fairness, how can fairness be reintroduced, under the guise of consensus, as an interpretative principle in human rights adjudication?<sup>70</sup> If it makes no sense to let the majorities decide what rights individuals have, then it makes no sense either to resolve legal disagreement in human rights cases by appealing to what the majorities now believe or have legislated.

What about the fact that the ECHR is an international convention and not a national bill of rights? Actually, this threatens rather than supports the appeal to consensus. We thought of human rights as being so fundamentally important to our culture that we did not entrust their protection solely to the national authorities but established for this purpose an international tribunal and gave people the right to individual petition. This is international consensus in principle, not a principle of international consensus. Member states came together some decades ago and decided

<sup>68</sup> For an in-depth comparative analysis of bills of rights, discussing arguments for and against constitutional entrenchment, see Darrow and Alston, ‘Bills of Rights in Comparative Perspective’, in P. Alston (ed.), *Promoting Human Rights through Bills of Rights* (1999) 465.

<sup>69</sup> *Austria v Italy*, App. No. 788/60, 4 *Yearbook of the European Court of Human Rights* (1961) 140.

<sup>70</sup> Dworkin, *supra* note 4, at 376–377.

to undertake the obligation to respect human rights; it would defeat their own more abstract intentions to say that they undertook the obligation to respect what, at each given time, their dominant majorities take these rights to be. True, an interpretive theory should not deny that the fact that the ECHR is an international convention may become crucial for matters of interpretation. For example, there could be a danger that if Strasbourg becomes too activist and does not wait for a consensus to be established, member states will stop enforcing its decisions, thus damaging the prospects of human rights protection. Again, though, even if this had been the case in the Court's early years, the institutional maturity of the majority of contracting states, imperfect as it may be, would hardly justify this fear now.

It is not the case of course that consensus may never serve law's values. Consensus carries the virtues of certainty and predictability, and these virtues are crucial in certain areas of law, criminal law most notably. Consensus is also important in private law, drawing on the basic moral idea that we should not take people by surprise and defeat the reasonable expectations they have created about their lives. Human rights, however, are again an exception. The only one whose expectations might be defeated by an unpredicted finding of a violation is a government that does not equally respect the freedom of its citizens. The expectations that the governing majorities have about how other individuals or minorities should live their lives are not reasonable and should not in any case be respected.

Why did the ECtHR ever turn to consensus in the first place? Consensus is often attractive for other reasons. Some of them are epistemological. Many people and many judges resort to what 'most states do' because they are not confident in the objectivity of moral reasoning. Other reasons flow from the traditional tendency to look at international law as consent-based relations among sovereign states, a tendency that forces some ECtHR judges to feel like the guardians of their country's sovereignty. None of these reasons, however, fits the history of the ECHR practice or serves some value embedded in that history.

The moral reading of the ECHR thus outweighs the pull towards consensus and should become the Court's principal theory of adjudication.<sup>71</sup> I may, of course, be wrong in this interpretive conclusion. But advocates of consensus now have a harder task. On the one hand, they can no longer rely on discretion to call for judicial restraint. On the other hand, they are invited to show either that the values of human rights are somehow better served if the ECtHR employs a policy of deference, or that the ECHR embodies, not what rights individuals *indeed* have, but what the majority *thinks* or *decides* these rights to be. So long as this task remains unfulfilled, as I believe it is, those who appeal to consensus misunderstand not only the nature of the ECHR, but also the very idea of human rights.

<sup>71</sup> I believe that international scholars move towards acknowledging this when they note that human rights treaties are *sui generis* treaties whose interpretation differs from traditional methods of treaty interpretation. See J. S. Davidson, *The Inter-American Human Rights System* (1997), at 77 *et seq.* See also Bernhardt, 'Thoughts on the Interpretation of Human-rights Treaties', in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension* (1990) 65.