

“Institutional Development through Crisis? An Analysis of the European Court of Human Rights’ Pilot Judgement Procedure addressing Systemic Human Rights Issues”



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Abstract

The thesis aims to investigate a new approach put to use by the European Court of Human Rights for the first time in 2004, known as the Pilot Judgement Procedure, and asks *whether this procedure contributes to the constitutionalisation of the human rights protection under the Court's jurisdiction*. It is widely claimed that the European Convention system has become a “victim to its own success”. After enlargements and Protocol No. 11, which made acceptance of the individual right to petition the Court mandatory on all Contracting States, the Court has seen a rise in application figures with which it has been unable to deal efficiently. The majority of applications are repetitive applications that originate in a structural problem in the given state, and in which precedent has already been established in the Court's case-law. The Pilot Judgement Procedure seeks to deal more efficiently with these cases by addressing the structural problem in which the applications originated.

The thesis assembles a theoretical framework of constitutional dimensions, encapsulating how the process of constitutionalisation may proceed. Constitutionalism entails that certain domains are fenced off from majoritarian control and given protection as higher-order norms, but the extent and scope may vary. Thus, constitutionalisation is conceptualised as the process of institutionalising higher-order norms, with which lower-order norms must conform. Furthermore, the special nature of legal systems' authority, their inherent powers to decide on their jurisdiction, and their lack of hard enforcement mechanisms may drive and obstruct constitutionalisation respectively. In form of an explorative case study thirteen judgements of the new approach are analysed and contrasted to the Court's traditional approach. The thesis finds that whereas the judgements of the European Court of Human Rights have traditionally only had individual redress, by ordering the states to give monetary compensation on individual basis for human rights violations, the Court now orders the states, in the formal binding part, to ensure that their domestic practices are in conformity with the principles of the Convention and the Court's case-law. In doing that, the Court has on several occasions ordered the states to bring concrete legislation into conformity with these principles, or has ordered the states to set up effective domestic remedies, in order to reach compliance with the Convention and the standards established in the Court's case-law, thus to a greater extent establishing these norms as higher-order norms. The findings indicate that this development has mainly been “court-driven”. Due to the recentness of the phenomenon, the thesis can only indicate the procedure's effectiveness based on the first docket of judgements. Thus, this aspect needs to be more systematically investigated as the number of judgements increases.

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List of abbreviations:

CoM	The Committee of Ministers
ECHR or “The Convention”	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR or “The Court”	The European Court of Human Rights
PJP	The Pilot Judgement Procedure
“The Commission”	The European Commission of Human Rights

Chapter 1 Introduction and research question

1.1 Introduction

The aim of this thesis is to investigate a new method of dealing with cases by the European Court of Human Rights (ECtHR or “The Court”), known as the Pilot Judgement Procedure, first put to use in 2004. The new method will be evaluated within a theoretical framework of constitutional dimensions, encapsulating how the process of constitutionalisation can proceed.

Post-war Europe has seen a development that has been referred to as “the new constitutionalism”, in that constitutional courts have been created in different forms in most countries on a continent where the constitutive principle of parliamentary sovereignty had long been the guiding principle of the political systems (Stone Sweet 2000: 1). Until World War II only two countries in the world, the US and Norway, had courts equipped with the power to throw out laws adopted by the national legislature. In sequential waves of democratisation on different continents, constitutional courts equipped with judicial review have now become a common feature in more than 80 countries of the world (Goldstein 2004: 612-613). A consequence of this development is that courts and judges now regularly intervene in politics, demanding that legislation must conform to the dictates of the constitution, or be invalid (Stone Sweet 2000: 1). Vanberg (2005: 1) claims that judicial review, the power of constitutional courts to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the constitution, has emerged as an almost universal feature of Western-style democracy, and that it would now be almost be unthinkable to draft a new constitution without creating a supervising body with jurisdiction over it. The increasing importance of legal institutions and legal norms can also be observed at the supranational level, where bodies like the European Court of Justice and the European Court of Human Rights have been created with jurisdiction over the participating countries in these regional forms of cooperation. As Shelton (2003: 95) points out, over the past half-century we have seen the development of complex systems of norms, institutions and procedures that have regionalized many aspects of human rights law in Europe.

The Pilot Judgement Procedure (PJP) forms part of a broader reform process of the European Convention system the last two decades. The main aim of the PJP is to deal more efficiently

with repetitive cases and human rights issues that originate in a structural problem in the respondent states. The procedure is one measure among others with the aim to secure the future effectiveness of the Convention-system, which in its present operation is facing major challenges.

In this thesis I seek to evaluate *whether the Pilot Judgement Procedure of the ECtHR contributes to the constitutionalisation of the human rights protection under the Court's jurisdiction*. I will further elaborate the research question in section 1.3, but first I will briefly highlight the context, in which the new procedure takes place.

1.2 The Convention system – “A victim to its own success?”

Ed Bates (2010: 5) points out how the birth of the European Convention of Human Rights (ECHR) emerged at what in several ways was a critical moment in European history. First and foremost, it was developed against the background of a terrible war on the continent. With the War's atrocities and crimes against humanity, the European countries felt compelled to press for international human rights guarantees as part of their reconstruction. By bringing attention to the Western European traditions of democracy, the rule of law, and individual rights, it was the goal that such a system could be successful in avoiding future conflicts and in stemming post-war revolutionary impulses backed by the Soviet Union (Shelton 2003: 96-97). The Convention was signed on the 4th of November, 1950 and entered into force on the 3rd of September, 1953. It established a basic catalogue of rights that were binding on the twelve signatories and created new institutions able to monitor and enforce compliance (Stone Sweet 2008:146). The drafting, signing, and ratification followed only some years after the 1948 Universal Declaration of Human Rights. As the European countries wanted to make a deeper commitment to fundamental human rights, it was felt necessary to give independent international bodies supervision over these rights to protect them (1998: 314). At this point in time, the Convention system represented a remarkable step in a new direction by establishing a binding treaty for the protection of individual rights against human rights violations by state organs, where independent institutions should supervise the effectiveness of the protection (Bernhardt 1995: 145).

The original intent of the ECHR was to establish minimal standards for basic human rights, to prevent future European wars, bolster liberal democracy and thereby oppose communism, as

well as to express a common European identity through this joint commitment to the protection of human rights (Keller and Sweet 2008: 13-14). It was first and foremost intended that such a system should work as an “early warning system” by which a drift towards authoritarianism in any member state could be detected and dealt with by complaints to an independent transnational judicial tribunal (Greer 2008: 681). The present operation of the Convention system has through institutional reforms and enlargements gone far beyond these intentions (Keller and Sweet 2008: 13-14).

The founding countries disagreed on the scope of the cooperation, especially with regard to whether one should create an independent court with authority to monitor and enforce compliance, something which led to optional protocols that made both acceptance for the Court’s authority and individual petition voluntary (Shelton 2003: 100). Here, it is important to highlight how the operation of the legal system changed drastically in 1998 with the signing of Protocol No. 11. With its ratification, all contracting states must accept individuals’ right to petition the Court directly, after exhausting domestic remedies (Stone Sweet 2008: 147). After that, all persons living under the Court’s jurisdiction had direct access to the ECtHR and could bring forward a claim against their own state.

The ECHR guarantees mainly civil and political rights (Leuprecht 1998: 315). The scope of the rights protected by the Convention has increased both as a result of the many protocol amendments and a result of the Court’s inherent powers to decide on the scope of its jurisdiction. As Shelton (2003: 100) points out, during the first half century, this rather modest system has undergone evolutionary, sometimes revolutionary changes. The Council of Europe has adopted 14 protocols to the Convention, which have deepened the human rights protection substantially and changed the supervisory system institutionally. This development will be dealt with more in detail in *Chapter 3*, as this development forms the context in which the new procedure takes place.

2010 marked the 60th anniversary of the Convention and in 2009 the 50th anniversary of the Court’s establishment was celebrated. Furthermore, in 2008 the Court delivered its 10,000th judgement (Bates 2010: 477). In many respects, the Convention system has been a success-story. It is widely regarded as the most successful experiment in transnational, judicial protection of human rights in the world (Bates 2010: 2; Greer 2008; Moravcsik 2000; Sadurski 2009: 406). At the same time the increased number of participating countries, the

increasing heterogeneity amongst the signatory countries, as well as the institutional and procedural changes over time, have created structural problems for this cooperation. The most pressing problem, as a combined effect of enlargement and Protocol No. 11, is the increase in applications rendering the Court's caseload unmanageable. This steep rise in individual applications is the biggest challenge facing the ECtHR. The Court is overloaded by cases, has a great number of pending cases and receives annually more cases than it can deal with efficiently (Greer 2008: 684; Paraskeva 2007).

This development has led to a widespread conclusion that the Convention-system has become "victim to its own success", and that in order for the Court to maintain and enhance its authority, or to secure the future effectiveness of the system, there is urgent need for further institutional development (Helfer 2008: 126; Paraskeva 2007: 215). The PJP takes place in this context, as one measure among others aimed at securing the future effectiveness of the Convention-system, and the interest in the research question originated from this background.

1.3 Research question

I will investigate *whether the Pilot Judgement Procedure of the ECtHR contributes to the constitutionalisation of the European human rights protection under the Court's jurisdiction*. The constitutionalisation debate has followed the Convention system at all stages of its development¹. As I will argue in the theoretical chapter, constitutionalisation may be seen as an incremental process with gradual development of a court's authority and jurisprudence. This debate was lit again with the ratification of Protocol No. 11 in 1998, which created a fully legalized system with an independent court to which individuals could petition directly (Hioureas 2006: 723).

From a political science perspective, the new approach is interesting from several perspectives. The procedure represents a significant institutional development in a system that has been in constant evolution and which in its current operation faces pressing structural problems. As expressed by the former president of the Court, a big burden could be taken of the Court's

¹ See Bates, Ed. 2010. *The evolution of the European Convention on Human Rights : from its inception to the creation of a permanent court of human rights*. Oxford; New York: Oxford University Press, Greer, Steven. 2008. "What's Wrong with the European Convention on Human Rights?" *Human Rights Quarterly* 30(3):680-702, Stone Sweet, Alec. 2009b. "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court." *Revue trimestrielle des droits de l'homme* 80 Available at: http://works.bepress.com/alec_stone_sweet/33 [01.06.2011].

workload if it can find an effective mechanism to deal with the increasing application numbers and the number of repetitive cases originating in a structural problem (Wildhaber 2009: 69). This way, the PJP is a legal measure seeking to deal with the pressing problem of the Court's case overload. Nonetheless, it has potential great political consequences, as it might expand the Court's jurisdiction on matters that have belonged to the discretion of domestic authorities.

The main characteristic of the procedure is that it addresses human rights issues that originate in a structural problem in the given respondent state. To avoid too many repetitive cases being brought to the Court, it issues general measures to be carried out in its judgements. Depending on how the Court does this, the judgements have potential to affect concrete legislation or acts in the respondent states. Therefore, the procedure has the potential to give the Court the role as a "negative legislator" (Stone Sweet 2002a: 81), issuing the respondent states to bring their legislation and practice into conformity with the principles embodied in the Convention.

The study takes place in a new subfield of political science, which investigates the increasing role of legal institutions and the role of judges from a political science perspective. Constitutional courts, or judiciaries in general, for long remained a forgotten branch of government in the social sciences (Dyevre 2010: 298). Research on the role of judiciaries has, however, been "at the heart of a new wave of political science, socio-legal, and public policy research around the globe" (Vallinder, cited in Kapiszewski and Taylor 2008: 741). Under the concept of "judicialisation of politics", the expansion of judicial power and the active role courts play in defending constitutional principles have received broad scholarly attention the last decades (Epstein 2001: 118). Courts have received increasing interest both at the micro and macro level. In particular, the factors that drive judicial decision-making, the role that judiciaries play in democratic politics, and the practical and political consequences of courts and legal norms have been examined (Kapiszewski and Taylor 2008: 741). An essential definition of judicialisation is as "the infusion of courts into political arenas" (Kapiszewski and Taylor 2008: 748). In other words, it refers to the process by which there is an increase in the impact of judicial decisions upon political and social processes, and where a regime's legitimacy is to a greater degree constructed on the basis of its ability to deliver the rule of law and rights protection (Domingo 2004: 110). Inherent in the concepts of judicialisation and constitutionalisation is an understanding that "law and politics should not be viewed as distinct realms, but rather as structurally coupled systems, where law is both a product of

political activity and an organizer of, and limitation on, political action” (Peters 2009: 407). In particular constitutional law is a branch of law very close to politics. They are mutually constitutive spheres, and constitutional law makes up the framework within which politics can take place. The development and expansions of constitutional law is, consequently, a political project, and with significant political consequences (Peters 2009: 407).

The thesis asks whether this new approach by the ECtHR can be seen as a move towards constitutionalism. The concept of constitutionalisation beyond the state was initially addressed in the context of European integration and has challenged the traditional description of international law as a “sort of constitutional wasteland or empty quarter” (Milewicz 2009: 414; Peters 2009: 398). The topic has received interest with regard to the development beyond the state of organisations with decision-making capacity, or regulatory institutions equipped with judicial review mechanisms similar to that of the modern state, and which has normally been associated with the supply of constitutional governance (Walker 2008: 519).

In order to evaluate this new adjudicative tool, and establish whether this can be understood as a move towards constitutionalism, I assemble an analytical tool in the form of a framework of constitutional dimensions. I start by discussing the key concepts: constitution, constitutionalism and constitutionalisation, both in terms of how they traditionally have been understood in political theory in relation to the modern nation state, as well as newer approaches to constitutionalism that try to overcome the sharp distinction between constitutional organized nation-states and international law. By developing this theoretical framework, I want to identify what can be considered as the core dimensions of constitutional government, to identify how the process of constitutionalisation can take form, and to evaluate how this resonates when applied to the international level.

„Constitutionalism” would arguably fall in the category of „essentially contestable concepts”². There are many different forms of constitutionalism, just as there is a great diversity in the conceptions of democracy. It would therefore, according to Sunstein (1988: 328), be a mistake to assume that constitutionalism must be identified with or compared solely to its eighteenth-century origin and the modern state. Nonetheless, the constitutionalist reading of international law has been met with the criticism of “stretching the concept”, to refer to the

² On “essentially contestable concepts”, see Fallon, 1997: 7

important question raised by Sartori (1970: 1034) about how far, and how, we can travel with the available vocabulary of politics. From the critics it has been claimed that the vocabulary of constitutionalism makes it virtually impossible to escape from the assumptions that accompany it, and that a more abstract understanding of constitutions and constitutionalism may lead us to find constitutions everywhere we see stable forms of social organization (Peters 2009: 400; Stone Sweet 2009a: 625). Against this criticism, Stone Sweet (1994: 469-470) has argued that the distinction between “law and order” domestic society and “anarchic” international society is a caricature, based on earlier realist assumptions not able to capture later developments in international law. He argues that within liberal international regimes, compliance with and enforcement of international law may be extremely high, and may have relatively more authority, legitimacy and status than legal norms in many domestic settings. Seen this way, constitutionalism should not be seen as a static concept associated solely with formal, written constitutions and the modern state, but focus should rather be directed towards the authority, status and legitimacy certain norms can obtain, irrespectively of at domestic or international level. In line with this, Sadurski (2009: 399) claims that analysing international law through the “prism of constitutionalism” may be a useful device to better account for evolution and changes in international law. Thus, if we acknowledge that constitutionalism is not a static concept, but one that may vary from context to context, it could serve usefully as a “hermeneutic device” both to understand the developments and changes as well as the challenges and limitations to the practical and political consequences of international law (Peters 2009: 405-407).

As the theoretical discussion suggests, the keystone in the discussion on constitutionalism and democracy is the proper relationship between law and politics, between the rigidity and constraining force of certain legal norms and rights in contrast to the principle of majoritarian, legislative politics. Consequently, the normative facets of constitutionalism may be impossible to detach from empirical evaluation. I agree with Ferejohn (1995 cited in Vanberg 2005:13), in that: «It seems impossible to engage in meaningful normative discourse - to criticize practices or give advice – without some conception of how political institutions either do or could be made to work». In this respect, the Convention-system and its development have been characterized as a *sui generis* – of its own class, and thus not easily comparable to other (Paraskeva 2008: 416). Against this background, I argue that analysing the recent development against a theoretical framework of constitutional dimensions is useful for two reasons. Firstly, it may contribute to better understand “what this [the Court’s

operation and role] is a case of". Secondly, it can contribute to a modern understanding of what constitutionalism itself entails. In line with this, my aim will be to "contribute to a flourishing scholarship on human rights and a growing scholarly interest in the influence that legal processes and courts, including international and supranational courts, can exert on states and national politics..."(Anagnostou 2010: 724).

1.4 Method and data

In social sciences it has been common to distinguish the variety of approaches under the two general "concepts" quantitative and qualitative research. Where quantitative methods turn to the statistical analysis of many units with the aim to uncover general and statistical significant correlations and to test hypotheses, qualitative methods has tended to focus on one or a small number of cases, to seek in-depth understanding and more substantial knowledge through the intensive study of few cases (King, Keohane and Verba 1994: 3-4). According to King, Keohane and Verba, academic debate in the political science has been polarized between these two main approaches, without to sufficiently acknowledging that their differences are of a technical nature, and that they share the same underlying logic of scientific investigation (1994: 3-4). This is, however, contested. As Ragin claims, case-oriented approaches are "better understood as a different mode of inquiry with different operating assumptions" (Ragin 2004: 124). In any case, in designing a social inquiry, our choice should be guided by which data best answer our questions (King, Keohane and Verba 1994: 68). This study asks whether the new adjudicative approach of the ECtHR can be seen as contributing to the constitutionalisation of the European Convention system. Consequently, the data for my analysis will consist primarily of judgements delivered by the Court. The procedure under study is a relatively new phenomenon, and the selection of judgements is still limited. This rules out more variable-oriented approaches: The number of units is still too low and the variation in variables that would be relevant to investigate would yet be limited.

1.4.1 The Case study

The abovementioned factors considered, I argue that an explorative, interpretative case-study is best suited to answer the research question.

Gerring (2004: 349) claims that in the variety of different approaches within the concept of a case study they in general enjoy a particular, natural advantage in research of an exploratory

nature. The advantage lies in that they allow for intensive examination of a case or cases, even with limited resources. Robert K. Yin also focuses on the possibility to analyse a phenomenon that takes place in a complex context. In his definition, a case study is “an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident” (Yin 2009: 18). Considering the research question of this study, it will be necessary to contrast and compare this new adjudicative approach with the earlier operations of the Court in similar cases. The context surrounding the new approach is also highly relevant for the investigation. Thus, it will be necessary to see the procedure in the context of the jurisprudential and institutional changes that have taken place over time in a system in constant development, that has gone through numerous institutional reforms since its inception, and that in its current operation faces great challenges related to the case overload.

The time dimension also plays a role for the procedure under study. Theories of institutional development in general, and of legal institutions’ development in particular, focus on the incremental nature of their development (Stone Sweet 2002c; Thelen 2003). According to Thelen (2003: 208), the issue of how institutions are themselves shaped and reconfigured over time has not received enough attention, despite their importance in structuring political life. To observe institutions’ gradual developments over time can also help us understand why institutional arrangements may come to serve functions quite different from those originally intended by their designers (Thelen 2003: 214). In this respect, I found it necessary to investigate earlier developments in the Court’s case-law in order to observe the development in the Court’s jurisdiction, and I will argue that the procedure can only be understood in light of the role the Court has traditionally had and how it through adjudication has developed central principles in its case-law. To observe what is new with this procedure, and how it can change the character of the system, it will be necessary to investigate how the Court has dealt with similar judgements earlier. Accordingly, the study will have natural comparative elements.

Skocpol argues that “In-depth case explorations, or comparisons of a similar phenomenon across a small to medium-sized number of contexts, should *not* be considered a mere second-best way to establish simple correlations among generally framed ‘dependent’ and ‘independent’ variables”(Skocpol 2003: 416). When confronted with a new phenomenon, intensive research of an exploratory nature is necessary in order to be able to formulate theory

and hypotheses. This contribution from case studies is also highlighted by King, Keohane and Verba: “Case studies are essential for description, and are, therefore, fundamental to social science. It is pointless to seek to explain what we have not described with a reasonable degree of precision” (1994: 44). Furthermore, in fields such as comparative politics or international relations, descriptive work is particularly important because there “is a great deal we still need to know, because our explanatory abilities are weak, and because good description depends in part on good explanation” (King, Keohane and Verba 1994: 44). As has already been highlighted, the Pilot Judgement Procedure is a new tool of the ECtHR, and little research has yet been published.

When performing intensive analysis of a single case, there will be an inevitable trade-off between internal and external validity. Cross-case research with many units is always more representative of the population of interest than case studies, as they seek to test theoretical propositions on a larger class of units drawn systematically from a population (2007: 43). Case studies, and in particular single-unit case studies, suffer by nature problems of representativeness because they include only one or a few number of cases. However, since case studies allow for extensive investigation of a single or a few cases they have a stronger potential to enhance internal validity, or validity for the case or cases under study. In line with my goal to evaluate how this recent development can change the character of the Convention-system, with no commitment to reach explanations of these institutions on a more general basis, an explorative, interpretative case-study will be best suited also in light of the trade-off indicated above. The Convention-system is unique in several respects, and the number of transnational legal systems with similar adjudicative and supervisory functions is itself limited. However, the theoretical framework in this analysis could be put to use in studies of similar institutions, such as the Inter-American Court of Human Rights.

This is mainly a study of the Court’s operation under this new adjudicative approach, with little regard to what happens to the judgements once they are issued by the court. The implementation of the judgements is of course highly relevant for their social and political impact – and cannot be taken for granted. In the next part, where I develop the theoretical framework, I argue that the special nature of constitutional courts’ power-base consists of a weak and a powerful side. The weak side of a constitutional system’s power is based on the fact that they have few sanctions if their judgements remain not respected, ignored or misapplied. That this is not the main focus here should be understood in the context of the

newness of this phenomenon. Most of the judgements are of recent date, and scarce data on implementation and compliance from the respondent states, combined with the limited number of judgements will permit only tentative conclusions on this matter. Hence, this study is first and foremost a study of the Court's operation under this approach.

1.4.2 Data

In the analysis I have relied mainly on official documents and literature.

Official documents

From the Council of Europe, I have used official documents like the Convention, annual reports and other formal documents such as resolutions and recommendations. Judgements delivered by the European Court of Human Rights³ form the main source of data. Since this new adjudicative approach only dates back to 2004, the number of judgements is still limited. My selection is quite exhaustive, and I have selected the judgements where the Court invokes a new interpretation of Article 46 and issues general measures, which make up two of the central features of the judgements. In addition, judgements from the earlier history of the Court have been chosen on basis of their importance and relevance to illustrate an important development in the Court's adjudication, development in its case-law and to illustrate the Court's traditional approach in dealing with cases.

Literature

In order to capture the political-legal context, in which the new procedure takes place I have used mainly studies of the Court's and Convention system's development, both from political science journals, law journals and human rights journals. Since the theoretical literature, legal and political philosophy and constitutional theory, lie at the intersection between law and politics, both political science journals and law journals have been used also here.

1.5 Structure of the thesis

Chapter two will form the theoretical basis for the analysis. I will develop a theoretical framework of constitutional dimensions, which will capture the dividing lines in the

³ All judgements from the ECtHR are available in the online database "HUDOC", Available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>. The judgements with application numbers will be listed separately in the bibliography.

theoretical discussion on constitutionalism, and how the process of constitutionalisation can take form.

Chapter three will be dedicated to the development of the Convention-system.

Since its inception, the Convention-system has developed along three axes: institutionally, jurisprudentially and geographically. Given that constitutionalisation is seen as an incremental process, the new method of adjudication at study must be understood in light of the development along these axes, both in terms of the gradual development in the Court's jurisdiction, and with regard to the new challenges after Protocol No. 11 and enlargement.

In *Chapter four* I will analyse the new approach with a dual objective. I seek to obtain an in-depth understanding of this new approach and how the Court has operated. I will contrast the PJP with the Court's traditional approach, and discuss the Pilot Judgements with regard to how the Court has operated in establishing the approach, as well as variations in the approach in the docket of judgements already delivered. Secondly, I evaluate this development in the Court's jurisprudence in light of the theoretical framework established, to assess to what extent this can be seen as a move towards constitutionalism.

Finally, *Chapter five* will give concluding remarks and indicate future research that can be done on the topic.

Chapter 2 – A framework of constitutional dimensions

In this chapter, I will develop the theoretical framework for the analysis. Acknowledging the breadth of different approaches to constitutionalism, I will try to identify the crucial elements of the concept and the dividing lines in the theoretical discussion on constitutionalism. I argue that the fundamental normative distinctions in constitutional theory can be constructed as an empirical analytical continuum, ranging from the rule of law conception of constitutionalism, with its emphasis on parliamentary sovereignty and close connection to majoritarian democracy, to the more substantial rights-oriented conception, where a more profound protection of individual rights has been institutionalised, and accordingly, where these higher-order norms place constraints on majoritarian, legislative politics. With movement in the direction of the more rights-oriented conception of constitutionalism, political institutions will increasingly be subject to constraints from higher-order norms. Building on Milewicz (2009) framework for analysing constitutionalisation beyond the state combined with Hart and Stone Sweet's perception of constitutional norms as higher-order norms⁴, I see constitutionalisation as the institutionalisation of these type of higher-order norms, norms that specify how lower-order legal norms are to be produced, applied, and interpreted in the legal system as a whole.

The special nature of the power-base of legal institutions with the mandate to adjudicate upon vague, constitutional documents also has to be considered in the theoretical framework. This will be discussed in section 2.2.4. From a theoretical point of view, the way a court uses its inherent powers can drive constitutionalisation, hence the distinction in constitutional theory between judicial activism and judicial restraint⁵. On the other hand, a Court would have to balance this authority against the danger that its interpretations and judgements will not be respected and implemented by other institutions, hence the distinction between a strong and a weak side of judicial power.

I start by presenting the main dividing lines in research done on constitutional courts in the social and legal science.

⁴ To describe higher-order norms, Hart uses the term "secondary rules", while Stone Sweet uses the term "metanorms". Still, they share the same perception of these as higher-order norms, to which lower order norms must conform for their validity.

⁵ See, Popovic, Dragoljub. 2009. "Prevailing of Judicial Activism over Self-restraint in the Jurisprudence of the European Court of Human Rights." *Creighton Law Review* 42:361-96.

2.1 Constitutional courts in the social science

The political role of constitutional courts and judicial review was early established by Robert A. Dahl. However, in his conception constitutional courts were not political actors in the traditional perception of *the political*, as competitive interest articulation. Rather, they have a political role in that the institutions take decisions on highly controversial issues, on which there is a great difference of opinions in the society. This recognition came from the fact that judicial institutions have jurisdiction over vague documents, like constitutions and bills of rights. The wording of the rights of a constitution or a bill of rights are general, vague, ambiguous, or not clearly applicable, and precedent may be found for either side in a dispute, which can leave a potential big leeway for the Court in their interpretation and decision-making (Dahl 1957: 279-280).

Peters and Armingeon point to the fact that the contrasting perceptions of constitutional courts traditionally have followed the academic divide between the legal discipline and political science:

“In contrast to legal scholars, social scientists tend to put emphasis on empirical rather than normative aspects of constitutionalism; they try to explain variations in constitutionalization or to identify the empirical impacts of constitutions beyond the nation-state” (Peters and Armingeon 2009: 386).

In line with this, political scientists have brought attention to the fact that constitutional courts and judges do not operate in a vacuum, isolated from political institutions or unaffected by public attention, public support and public opinion. This is reflected both in research at the micro-level (the judges) and macro level (the institution as a whole).

At the micro-level, this division has generally been reflected in the different perceptions of the judges' role, or the role they take on in a constitutional court. The *legal model* served in that respect as the starting point for the interest in judges' behaviour from the political science. It held that the judges of a constitutional court decide disputes solely in light of the facts of the case and established precedent, the plain meaning of the Constitution and statutes, as well as the intent of the framers (Segal and Spaeth 2002: 86). In the words of Montesquieu, constitutional judges were seen merely as “the mouth that pronounces the words of the law”

(Dyevre 2010: 299). With this view, the law was seen as a static construction which spoke directly to the judges.

Strategic accounts, most prominently the “attitudinal model”, came as a reaction to this, through the observation that even when judges were interpreting the same legal documents, they continuously reached different conclusions in their judgements. It was argued that the vagueness of constitutional documents provided leeway for judges to choose the interpretation closest to their policy preferences, and accordingly, that judges should be regarded as “policy-seekers” (Epstein 1998: 23). Consequently, a change in the composition of the court could lead to a change in judicial policies, thus giving an incentive for those in power to appoint judges that share their political preferences (Dyevre 2010: 301).

At the macro-level, the somewhat same division is reflected in the perceptions of constitutional courts as constrained or unconstrained actors respectively. With the perception of constitutional courts as unconstrained actors, the institution is seen as capable of being the final defence of constitutional principles, as an institution with the final say on matters that receive their attention (Epstein 2001: 124-125). They have, as Vanberg (2005: 169) points out, to a great extent been regarded as exogenous constraints to which political institutions must adjust.

In line with this perception, Stone Sweet (2002b: 203) has argued that law and politics have to a too great extent been distinguished as separate domains in academic work, where constitutional courts and political institutions have been treated separately. The perception of courts as constrained actors embraces Stone Sweet’s view, acknowledging that constitutional courts should not be seen as institutions unaffected by the political or social context in which they operate. With this perception, the courts must be attentive to preferences and likely actions of the other institutions in their systems of government, or the institutional context in which they operate (Epstein 2001: 123). Hönnige (2007: 242) has suggested that constitutional courts operate within a “triangle of mutual tension”⁶, where the interaction between the institutions is affected by different mechanisms that affect the extent to which the constitutional court can have the final say. In this configuration, the court is one player among others, where its influence is not always as the final interpreter, but rather dependent on the

⁶ My translation. Hönnige uses the term ‘Spannungsdreieck’.

preferences and actions of the other institutions in a “game of influence”. Following the same perception of constitutional courts as constrained actors, Vanberg (2005: 116) found in his study of the Federal Constitutional Court of Germany, that when reaching judgements on controversial political-legal issues, the judges of the court had to be attentive both to other political institutions as well as public opinion and attention in order for the judgements to be respected and complied with.

This perception indicates a point which will be more discussed later: In order for a constitutional court to have a practical and political influence, their judgements need to be respected, implemented and complied with by other institutions. From the acknowledgement of constitutional courts as constrained actors, the danger that their judgements will remain obstructed, ignored, or misapplied by political institutions subject to them appears arguably to a greater extent when at the supranational level (Carrubba, Gabel and Hankla 2008: 435).

2.2 Constitutionalism and constitutionalisation

In order to evaluate whether the Pilot Judgement Procedure (PJP) can be seen as a move towards constitutionalism, it is necessary to get a broad understanding of what is meant by the key concepts constitution and constitutionalism, and how the process of constitutionalisation can proceed.

Stone Sweet points to the lack of consensus in defining the concepts constitution and constitutionalism, and it may be impossible to define it in a consensual straight-forward way. He sees constitutionalism in terms of the degree of the commitment on the part of any given political community to be governed by constitutional rules and principles (2009a: 623-627). His definition emphasises the close connection between constitutionalism and the presence of a constitution, but also establishes that the concept constitutionalism entails something more than the mere presence of a constitution. What his definition does not speak to is the question of what we understand as constitutional rules and principles, which will be discussed in the coming sections.

In the next section I will proceed with the political theory and content of the term constitution, before I turn over to constitutionalism as seen in relation with the modern state and democracy. With regard to constitutionalism and the modern state I want to highlight two contradictory conceptions, *constitutionalism as rule of law* and *constitutionalism as*

protecting rights. Both conceptions are associated with the modern state, and they part on the crucial question to what extent higher-order laws should take priority over ordinary, legislative law or the principle of parliamentary sovereignty.

2.2.1 What do we mean by a Constitution?

Historically, the aspiration to make power impersonal has been the philosophical point at issue about constitutionalism (Castiglione 1996: 417), hence the classical distinction in political theory between government of laws versus government of men (Fallon 1997: 2-3). Their basic purpose was to make political power (the monarchy) subject to the law, and to establish certain material principles, most importantly the separation of powers and checks and balances (Peters and Armingeon 2009: 388).

This close connection between a constitution and the idea of curbing human power has existed since ancient times. Several constitutional checks were built into the structure of the Athenian democracy to safeguard it against hasty, irreversible decisions. The goal was to balance popular sovereignty with a constitutional framework capable of protecting enacted law (Held 1996: 27). In this context, new legislation was subject to control by the *nomothetai*, a group of individuals chosen by the Assembly with the authority to approve or reject laws passed by the Assembly (Elster 1988: 2).

Constitutions are conceptions of political power, and thereby conceptions of the nature of politics. They establish the rules of the game, or the framework, in which politics can take place. In a more modern understanding, it is generally accepted that “a constitution is a formal framework of fundamental law that establishes and regulates the activity of governing a state” (Loughlin 2005: 184). In the positive meaning, constitutions contain the formal characteristics of modern written constitutions. Since the end of the eighteenth century these have become fundamental documents with high symbolic and normative functions which give form and stability to the basic political structure of society (Castiglione 1996: 419).

One basic point of agreement among constitutional theorists is that the fundamental laws embodied in a constitutions are both constitutive and regulative (Castiglione 1996: 418). In the constitutive sense, a constitution is simply the law that establishes the general principles under which the country is governed. Seen this way, a constitution is constitutive of the legal and political structure of the given legal system (Raz 1998: 153). In Raz’s important

distinction between the term “constitution” in a thick and a thin sense, this is the thin sense. The thick sense of the concept is less clear, but Raz regards constitutions as defined by a combination of seven features. They are (1) constitutive of the legal and political structure, (2) stable, (3) written, (4) superior to other laws, (5) justiciable, (6) entrenched, and (7) expresses a common ideology. In other words constitutions have to set “the rules of the game”, serve as a stable framework for the political and legal institutions, they are normally enshrined in one or a small number of written documents, and ordinary laws that are in conflict with the constitution have to be brought into conformity with it. Furthermore, there have to exist judicial procedures through which the compatibility of laws and other acts with the constitution can be tested and declared invalid if found to be in conflict with the constitution. In addition there have to exist special procedures for amending a constitution, securing the higher-order status of constitutional norms to that of ordinary legislation. Finally, constitutions have to express a common ideology, in that they express the common beliefs of the population about the way their society should be governed.

These criteria are vague in application, Raz admits, but they are not meant to draw borderlines, but rather to focus discussion. Accordingly, there may be more or less of a constitution in the thick sense of the word. For an issue to be constitutional however, it is recognized that it has to be of higher order, taken of the agenda of normal politics, but this does not mean that constitutional norms are incapable of being changed (Craig 2001: 126; Sadurski 2009: 447).

Raz (1998: 153-154) also highlights the connection between constitutions and legitimacy: constitutions in the strongest and thickest sense tend to exist in societies that enjoy relative stability and a sense of common identity sufficient to ensure the durability and stability of the constitution. For its legitimacy, it has to possess a certain unity and an internal coherence, so that appeals to it become meaningful and capable of carrying conviction (Castiglione 1996: 419). This way, their legitimacy and authority come not only from their authors or founding fathers, but through practice and evolution. They are “self-validating, valid just because they are there, enshrined in the practices of their countries” (Raz 1998: 173). Constitutions are, in that respect, a balance between change and continuity. They embody fundamental constitutive principles, but are also “living expressions of some more fundamental principle of civil cooperation” (Castiglione 1996: 420).

2.2.2 Constitutionalism and the modern state

The ideal of constitutional constrained government has a long tradition in western political thought, but appeared not until the American independence and founding years as a practical political force (Starck 2007). The idea that the state is in need of limitation expanded as the role of public in human life expanded. As powerful and centralized nation-states emerged in the sixteenth and seventeenth centuries, political theory emerged to explain them (Kay 1998: 18). It is in other words impossible to neglect that the current understanding of constitution and constitutionalism has stood in a close relation to views of the modern nation state, parliamentary democracy, the rule of law and the market economy (Castiglione 1996: 417). Also Held (1996: 71) emphasises how the idea of the modern state in modern Western political thought is linked to the notion of an impersonal legal or constitutional order with the capability of administering and controlling a given territory.

Some definitions of constitutionalism focus solely on the presence of a constitution (Milewicz 2009: 419). However, those conceptions would not take us much further. A much more embraced view is that constitutionalism entails much more than the mere presence of a constitution. Constitutionalism has in this context been referred to as a “mindset”, referring not simply to having a constitution, “but to having a particular kind of constitution, however difficult it may be to specify its contents” (Peters and Armingeon 2009: 389). In that respect, constitutionalism asks for a legitimate constitution, the normative debate to which I now turn.

As indicated, the political theory of constitutionalism is founded on separation of power, rule of law and entrenchment of basic rights (Loughlin 2005: 192). However, the way to unite these broad principles has represented a normative dilemma in the constitutional discourse. In other words, the inherent tension between these broad principles, and how they are to be balanced in modern democracy, has led to different conceptions of constitutionalism. Hence, a very broad definition sees constitutionalism as referring to all the difficult philosophical issues that surround the existence of a constitution (Craig 2001: 127). This entails questions such as the relationship between constitutionalism and democracy, the legitimacy of laws and constitutions, or the legitimacy of higher-order law as contrasted to principles such as parliamentary/legislative supremacy (Alexander 1998: 1). However, most conceptions of the term share the essential feature that certain rights and structural aspects of politics, the rules of the game, are fenced off majoritarian control. It refers to limits on majority decisions that are

in some sense self-imposed (Elster 1988: 2). This represents the major point for discussion in the constitutional discourse. Slagstad further emphasises this by characterising constitutionalism as “a doctrine specifying which characteristics particular rules need to possess in order to be regarded as law” (1988: 106). In other words, constitutionalism centres around the discussion of the source to laws’ validity and legitimacy, and to what extent fundamental laws should be kept away from majority control with an independent constitutional court with the mandate to adjudicate upon these. Consequently, how the legitimacy of laws taken away from majoritarian legislative control is justified will vary according to the perceptions of constitutionalism.

I will try to capture this division by contrasting two different conceptualisations, namely constitutionalism as rule of law versus constitutionalism as protecting fundamental rights, which will form the basis for the next two sections. Under these main headings, parallel contrasted concepts are coupled. These are indicated in the figure, and the keywords and principles included there will guide the discussion in the next sections.

Figure 2.1: Constitutionalism in the normative discourse

Constitutionalism

	Rule of law	Protecting fundamental rights
<i>Constitution</i>	The formal constitution	The material constitution
<i>The 'modern state'</i>	The «formal Rechtsstaat»	The «material Rechtsstaat»
<i>Normative ideal</i>	Parliamentary sovereignty	Profound rights-protection
<i>School of thought</i>	Legal positivism	Natural law, liberalism, deliberative theories
<i>Objection</i>	Counter-majoritarian nature of constitutional constraints and individual rights	«Majority tyranny»
<i>Higher-order norms</i>	Institutionalisation of higher-order formal/procedural norms	Institutionalisation of higher-order formal and substantial norms

2.2.2.1 Constitutionalism as rule of law

The concept “Rule of law” is crucial to understandings of constitutionalism and serves as a starting point in the constitutional discourse. Without the rule of law, contemporary constitutional democracy would be impossible, but beyond that fact there is no consensus as to what precise characteristics the rule of law must possess in order to enhance the legitimacy and sustainability of constitutional democracy (Rosenfeld 2001: 1307).

The rule of law conception of constitutionalism originates from the British legal tradition, where the concepts constitutionalism and rule of law traditionally have stood in a close relation to each other. This conception is, however, closely associated with parliamentary sovereignty as the highest directing normative principle, and not a constitution. The supremacy of parliament was seen as the keystone of the constitutional system, where the supremacy of laws was, accordingly, seen as the supremacy of positive law enacted by parliament (Blaau 1990: 90). With that, constitutionalism as rule of law stands in a close relation to the formal conception of the “Rechtsstaat”. Fundamental aspects of the formal “Rechtsstaat” were the doctrines of separation of powers, administration according to the principle of legality and the independence of the judiciary. Laws had to be produced by an elected legislature, and interpreted and applied by an independent judiciary: the laws had to bind citizens and officials alike (Barber 2003: 446).

It has been argued that under this formal notion of legality, the law was stripped of its normative content. Law was seen purely as a product of legislation, and the legislature was bound by such legislation until it has been repealed or amended. In other words, as argued by legal positivists in the legal philosophy, every state was a “Rechtsstaat”, as long as the authorities acted within the formal legal framework established by legislative authorities, irrespective of the normative content of laws. Laws were enacted through legislative, majoritarian politics, hence their validity and legitimacy (Blaau 1990: 80).

Nonetheless, higher-order laws that constrain governing majorities can also play a role in the formal conception of the “Rechtsstaat”. Legislators can be bound by an independent judiciary with the mandate to protect higher-order norms, secured through a constitution or common law custom. However, and following the same logic of legality, such rights could be restricted as long as a legislative statute expressly provides for such restriction. Again the emphasis is

on the majoritarian-political premise that the validity of laws rests on the fundamental principle of parliamentary sovereignty and legislative enactment as the sole source for their validity and legitimacy (Blaau 1990: 82-83). Thereby, it rejects liberal conceptions claiming that laws' validity or legitimacy could be derived from any particular religion, or transcendental conceptions of ethics (Rosenfeld 2001: 1320). In this context, the criteria for fundamental, higher-order laws remain purely formal: all systems of government need some higher-order rules to formalize and institutionalise the framework, within which democratic politics can take place. These kinds of regulations are, therefore, not properly thought of as limits to majority rule, but rather regulations, without which majority rule could not exist (Elster 1988: 3). In any case, with the strong normative ideal of parliamentary sovereignty of the rule of law conception as presented here, the conception remains critical to further substantiate rights-protection by giving more substantive human rights status as fundamental law. In this sense, it is closely connected to the conception of democracy as majority rule, and, based on the counter-majoritarian dilemma, hosts a general scepticism to more substantial rights-protection (Gloppen 2000: 25).

Accordingly, the rule of law conception of constitutionalism is not a strong constitutionalism (Gloppen 2000: 24). Higher-order norms exist only so far as to lay down the formal rules of the game, to lay down the procedural framework within which majoritarian politics can take place.

2.2.2.2 Constitutionalism as protecting fundamental rights

If the notion of constitutionalism as rule of law evolved as a solution to unchecked or absolutist power, as seen in the distinction between “government of laws and not of men”, it could be claimed that the notion of constitutionalism as protecting fundamental individual rights has evolved as a historical lesson and solution to unconstrained majority power. A central question to this conception of constitutionalism is why a society would let courts and judges, rather than the majority in a political community, decide over certain questions, values or legislation. If we go back to Elster's definition of constitutionalism as constraints on majority decisions, the crucial question to the rights-oriented conceptions of constitutionalism is: if the legitimacy does not always come from the majority or the popular sovereignty, what is then the source of legitimate rule?

Liberal conceptions of constitutionalism seek to give answers to this question. In general, the liberal conception of constitutionalism is associated with the idea of power limitation through mechanisms such as the articulation and protection of fundamental rights, the separation of powers, checks and balances, and the general principle of government limited and regulated by law (Cohen 2011: 131).

Seen this way, the connection between liberal constitutionalism and the protection of human rights is inseparable. As Kay (2003: 117) claims, the protection of human rights in the world today is to an increasing extent a matter of declaring human rights in a written constitution giving them higher protection, and making that constitution enforceable against the state in some kind of law court.

In a liberal understanding, not just any kind of law can be regarded as law, implying that laws must fulfil specific criteria to be valid. As I pointed out in an earlier section, Slagstad (1988: 106) argues that constitutionalism may be characterized as a doctrine specifying what characteristics particular rules need to possess in order to be regarded as law. In the more rights-oriented conceptions the legitimacy of ordinary laws comes from above. Ordinary laws attain their democratic justification indirectly, “they inherit justification from above – by showing how they issued from accepted or acceptable higher-law scheme” (Michelman, cited in Vargova 2005: 370). This way, the higher-order norms of a constitution invest lower-order laws with authority and legitimacy (Stone Sweet 1994: 444).

Natural law plays an important role in the conception of constitutionalism as protecting fundamental rights. Natural law scholars claim that some moral and legal norms are common to all human beings, independent of time and space and local traditions. Certain rights, the natural rights, are universal, above man-made, positive law. These laws are claimed to have validity for all human beings, since all humans are equipped with the same reason (Bergem, Karlsen and Slydal 2004: 32).

Law in this sense is a product of reason, founded in eternal morals, and served through the establishment and implementation of just and equal laws (Sellers 1998: 15). Natural law plays with regard to constitutionalism an important role in two respects. Firstly, viewed substantial, it identifies important norms and inherent rights. Secondly, viewed formal, it represented for the first time the notion of a hierarchy of laws (Starck 2007: 13).

In modern political thought the liberal tradition is first and foremost represented by Thomas Hobbes and John Locke. For these philosophers within social contract theory, the individual is in the centre of attention, and especially the relationship between individuals and the state. Where earlier thoughts on natural law were connected with religion and certain rights created by and rooted in God, with Locke natural law and the inviolable rights connected to it were linked to the individual. For Locke, a well-organized political community was majority rule subject to certain regulations. All individuals should have certain rights upon which no ruler or government could infringe, and constitutional government was seen as a political community that sought to maximize the protection of individual freedom and individual rights (Skirbekk and Gilje 2000: 285-287).

Deliberative theories have found the legitimacy of substantial rights-protection to exist in the fact that the principles are political values that liberal societies have chosen to adopt. Thus, the protection of human rights comes into existence through societal agreement. They hold the legitimacy of fundamental, constitutional law as the expression of human rights values that have been agreed upon (Dembour 2010: 3). “We are the beneficiaries of three centuries of democratic thought and developing constitutional practice”, wrote John Rawls (1987: 2). Through practice, and in a tradition of democratic thought, it might be possible to reach an “overlapping consensus”, where the protection of fundamental rights are justified in terms of “certain fundamental intuitive ideas viewed as latent in the public political culture of a democratic society” (Rawls 1987: 6).

Ronald Dworkin has also been prominent in the discussion of the legitimacy of removing certain issues from majoritarian control and giving them status as higher-order law. He argues that the claimed tension between constitutionalism and democracy is grounded on false premises. There is, in his view, no incompatibility between certain fundamental rights being fenced off majority control and democracy. According to his definition of democracy, there might be a great difference between majority rule and *legitimate* majority rule. Democracy means government subject to conditions, what Dworkin calls “democratic conditions” that are of equal status for all citizens (Dworkin 1996: 17). Therefore, constitutionalism means a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise. The rights are there, rooted in a desire to protect democracy. The right to freedom of speech and the right to vote are obvious examples, and the fact that

such rights are given higher protection should not impair the democratic process (Sunstein 1988: 328). In other words, rule by law might easily become rule by bad laws in the sense of their failure to protect democratic political rights from “majority tyranny” (Stimson 2006: 325).

This emphasises an important aspect in the conceptualization of constitutionalism as the protection of fundamental rights. Its main focus is not on institutions and structures, but rather on ideas and values. The point made by Thomas Paine about a constitution as “a thing...in fact” highlights important formal characteristics of modern written constitutions (cited in Castiglione 1996: 418). His point was that a constitution must have a “real” and not simply an “ideal” existence, and that “whenever it cannot be produced in a visible form, there is none”. This conception must be seen as a product of the time, where constitutionalism still was limited to be part of the Enlightenment-thought, yet not to be realized in practice (Loughlin 2005: 184).

Castiglione (1996: 419) argues that the problem now with positive, formal definitions of constitution and constitutionalism, is how they may actually disconnect constitutionalism from certain ideas and values, and define as constitutions and constitutionally organized societies all cases where the machinery for and the procedures of government are fixed on paper. Unlike in the liberal conception, early positivist scholars like Hans Kelsen opted for a strict division between legal theory and political philosophy. For Kelsen, either every state was a “Rechtsstaat” or the concept was an aspect of political philosophy, which ought not to be mixed with legal scholarship (Barber 2003: 449).

The liberal conceptualisations of constitutionalism as protecting fundamental rights in general try to bridge the gap between constitutionalism and democracy. The counter-majoritarian dilemma is in their view exaggerated. Constitutionalism and democracy are not two opposing concepts, but a profound protection of individual rights is itself a vital part of democracy.

In this conception, constitutionalism is counter-majoritarian by nature: In order to protect individual rights against governmental interference, the higher-order norms have to be taken away from majority control and be granted higher protection.

To sum up, the legitimacy of giving certain issues status as fundamental law subject to supervision by an independent judiciary lies at the heart of the constitutionalism debate. The

concepts “rule of law”, “legality” and “legitimacy” receive different meaning in the two contrasted conceptions of constitutionalism. This shows how difficult it is to detach constitutionalism from normative issues. From a democratic accountability perspective, this relates to how strong constitutionalism should be. This is a normative dilemma which goes in both directions as both legislative majorities and independent judiciaries need to be held accountable.

The normative division between the two conceptualisations of constitutionalism is, in other words, reflected in their commitment to be subject to constraints from higher-order laws, as contrasted to the principles of majority rule and parliamentary sovereignty. I argue that constitutionalism seen as protection of fundamental rights is a stronger constitutionalism also empirically, since not only formal, procedural norms, establishing the framework within which politics can take place, but also substantive norms giving individual rights a higher-law protection have been institutionalised to have protection by court. On this basis, I justify seeing constitutionalism as a continuum: there may be more or less of it depending on the context, and the extent to which individual rights are given status as higher-order law and protected can vary.

2.2.3 Taking constitutionalism beyond the state

Since there is no strict line in the constitutional discourse between normative and empirical definitions of the concepts, and in light of the interdisciplinary nature of the topics international and constitutional law, it is a challenging task to make the concepts operational for empirical analysis (Milewicz 2009: 415-416). In 2009 the whole issue of *Indiana Journal of Global Legal Studies*, “Global Constitutionalism from an Interdisciplinary Perspective”⁷, was dedicated to this task. Milewicz (2009: 433-434) argues that studies concerned with global constitutionalism have mainly approached the topic from a normative angle, and mostly by international law scholars. In her contribution, she develops a “preliminary framework” for evaluating constitutionalisation beyond the state, where she sees the process of constitutionalisation as the “institutionalisation of formal and substantive norms at the international level” (Milewicz 2009: 416). I will draw on this framework, but will further specify what characteristics those norms need to possess in order for the process of institutionalisation of norms to be a constitutional one.

⁷ *Indiana Journal of Global Legal Studies*, Volume 16, Issue 2, Indiana University Press

For analytical purposes, I argue that the distinction drawn in the discussion of the two contrasting conceptions of constitutionalism can also be captured empirically in the evaluation of constitutionalism and constitutionalisation. The rule of law conception is a weaker form of constitutionalism empirically, where a society's commitment to be structured by constraints from higher-order laws is less rooted. Constitutionalism is stronger rooted where fundamental, higher-order norms, both formal and substantive, to a greater extent have been institutionalised in constitutional documents and through adjudicative practice. In other words, constitutionalism is stronger rooted where the higher-order norms are formally established and provided for, and to the extent that they are protected and respected in practice. By adopting that view, I follow Stone Sweet's argument that constitutionalism is a variable. The commitment to be governed by higher-order norms vary, the commitment can be strong or weak and its character can change over time (Stone Sweet 2009a: 626). Thus, constitutionalisation can be seen as the process of institutionalising formal and substantial higher-order norms, and constitutionalisation proceeds where these norms to a greater extent possess a higher-order status in a hierarchy of norms with which lower-order norms must be brought into conformity.

The constitutionalist reading of international law has again brought attention to the debate on whether international law can be considered as real law (Peters 2009: 405). One of the most recognized legal scholars of the last century, H.L.A Hart, argued in his book *The Concept of Law* that international law did not represent real law or a real legal system, but rather a *system of rules*. Hart defined a legal system as a union of primary and secondary rules. Within the system, primary rules require people to engage in or abstain from a certain conduct. In other words, they impose duties. Secondary rules, on the other hand, are rules about rules. They provide for how primary rules can be established, changed, or identified and control their operation. They are higher-order rules, to which primary rules must conform for their validity and legitimacy. Thus, their crucial function in a legal system is that they resolve disputes, where doubts about the content of primary rules could not be settled (Payandeh 2010: 973). In this distinction between primary and secondary rules, lies also Hart's distinction between a mere system of rules, and a legal system. In Hart's view, international law should be seen as a system of rules, but, due to the lack of effective second order rules, it is not a legal system. *The Concept of Law* was first published in 1961. The developments and advancements in international law in the second half of the 20th century could hardly have been envisaged at

that point. Yet, the distinction is interesting and relevant in relation to constitutional development. Since he reached the conclusion that international law did not represent a legal system, based on the simple fact that at that time the norms did not possess the qualities of secondary rules, this does not exclude the possibility that secondary rules could emerge at international level.

Stone Sweet builds his approach to constitutionalism and constitutions on the mentioned distinction made by Hart between primary and secondary rules, and he sees a constitution as “a body of meta-norms, rules that specify how legal norms are to be produced, applied, and interpreted” (1994: 444). Metanorms are in that respect not only higher-order but prior, organic norms that constitute a polity. They enhance the legitimacy of legal norms and make more transparent the process by which legal norms are produced, compliance is monitored, and infractions punished. Accordingly, they fix the rules of the game through investing lower-order norms with authority and legitimacy. By that, Alec Stone Sweet seeks to detach the notions of constitutionalism and constitutions from the state. As pointed out, he argues that within liberal international regimes, compliance with and consistent enforcement of transnational and international law may be extremely high, and the norms may have relative more status, autonomy and legitimacy than in many domestic settings, where legal norms are also produced, applied and interpreted in a world of politics and subject to contestation among societal actors (Stone Sweet 1994: 469-470). Consequently, constitutionalism is a variable also in this respect: The extent of hierarchical primacy and entrenchment of constitutional norms, the degree of precision and formality of legal obligations as well as the scope of independent, organizational capacity to monitor compliance with and enforce obligations are all factors that vary depending on the context where higher-order laws have been established and where a court adjudicates upon these broad principles (Stone Sweet 2009a: 622).

Coming back to Milewicz’ framework for analysing constitutionalisation beyond the state combined with this perception of constitutional norms, constitutionalisation proceeds to a greater extent when the norms possess these characteristics as identified by Hart and Stone Sweet.

Constitutionalisation beyond the state can then, as argued by Milewicz (2009: 416), be captured as the institutionalisation of international norms. This institutionalisation is the

process of the emergence, creation, and identification of constitution-like elements, and parallels the historical evolution of human rights in domestic law.

Furthermore, she identifies three fundamental constitutional elements that make it possible to transfer the framework of constitutionalism and constitutionalisation from domestic settings to the international level. This includes a formal dimension, a substantive dimension, and a time dimension. The formal dimension of the international rule of law includes procedural and institutional norms that structure the legal system as a whole. This gives international law its formal character, and implies that states are bound by their obligations from international law. Empirically, it refers to the institutionalisation of norms that legalize relations between nation-states (Milewicz 2009: 426-427). Second, constitutionalisation proceeds along a more substantive dimension representing the scope of the international fundamental human rights protection. This acknowledges that modern international law is no longer exclusively concerned with the regulation of state-to-state relations, but also with relations between the individual and the state, where individuals can claim rights against their own states at a higher level. Empirically, this dimension refers to the institutionalisation of human rights protection and individual rights at the international level (Milewicz 2009: 427-428). Third, the time element allowing for gradual constitutionalisation has to be considered. Constitutionalisation is in other words seen as a gradual and lasting process. In this framework, formal constitutionalisation is expected to emerge first and the institutionalisation of substantive rights at a second stage (Milewicz 2009: 416).

In line with these two dimensions, Milewicz presents a typology of constitutionalisation beyond the state, encompassing these discussed dimensions:

Figure 2.2: Constitutionalisation beyond the state

TABLE 1: Types of Global Constitutionalization

		Institutionalization of formal norms (procedural guidelines for interstate relations)	
		No	Yes
Institutionalization of substantive provisions (human rights for individuals)	No	No constitutionalization	I. Formal constitutionalization
	Yes	II. Substantive constitutionalization	III. Encompassing global constitutionalization

Source: Milewicz, Karolina, 2009

Following Hart and Stone Sweet’s perception of constitutional norms as higher-order rules, I argue that constitutionalisation proceeds to a greater extent where the institutionalised norms take the position of higher-order norms in a hierarchy of norms directing the application and validity of lower-order norms. In other words, constitutionalisation proceeds to the extent that formal and substantial higher-order norms are institutionalised at the international level, and to the extent that they take on a more superior role in a normative hierarchy.

Following that, we should to a greater degree, and regardless of at what level, look at the authority of legal rules and norms, their capability to constrain and direct political institutions, and to the extent that they serve the function as higher-order norms with which lower-order norms need to be brought into conformity.

The importance of the time dimension and evolution over time is also important to take into account. Constitutionalism beyond the state, as has been the case in domestic settings, should be viewed as an incremental process. This is in line with the acknowledgement that constitutionalism is not a dichotomy, but that the commitment from a society to be subject to constraints from higher-order norms can vary. Consequently, the intermediate steps representing the ongoing process of constitutionalisation must be considered also to be of great importance (Milewicz 2009: 426). In the analysis, I will investigate earlier developments in the case law of the ECtHR for this gradual development, where certain broad principles were established at the European level. The next section shows how the special

nature of constitutional courts' power, known as the inherent powers of legal systems, has the potential to drive the process of constitutionalisation in this respect.

2.2.4 The “dual nature” of Constitutional Courts’ power

The central dimension of constitutionalism is, as we have seen, the commitment of a society to let it be subject to constraints by higher-order norms of a constitution. The problem that arises once a constitutional system is created is therefore how the higher law's supremacy can be secured. The way to overcome this problem is to establish a judicial, third-party mechanism to assess the legality of all other legal norms with reference to the constitution, in other words by establishing a constitutional court that interprets the legality and conformity of other norms or decisions taken by other judicial institutions with the higher-order norms of the constitution (Stone Sweet 2009a: 640).

The power base of a constitutional court has been viewed to be of a special character, which needs to be taken into account in a framework of constitutional dimensions. As an independent institution, its power-basis could be claimed to have a “dual nature”, which includes a strong and a weak side. On the one hand, a constitutional court has the power to itself decide on its jurisdiction if there is a dispute over its jurisdiction when faced with a new issue. On the other hand, constitutional courts are dependent on the institutions subject to its judgements to respect, implement and comply with its judgements (Vanberg 2005; Vorländer 2006).

Many judicial institutions have evolved into strong institutions with great influence in society and able to constrain other branches of government. The U.S Supreme Court is the prime example. Its authority has steadily increased throughout the two centuries of its operation, after its power to perform judicial review was established by the Court itself in the landmark decision *Marbury v Madison* (U.S Supreme Court 1803). Furthermore, The Federal Constitutional Court of Germany and constitutional courts established in the post-communist countries serve as more recent examples of legal institutions that have in shorter time grown into institutions with strong constitutional review mechanisms⁸.

⁸ See Starck, Christian (2010) and Sadurski, Wojciech (2005), “Rights Before Court, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe”, Springer Publications

Despite their empirical strength, the source of authority, or power base of these institutions, has been characterized as a puzzle ever since the first constitutional courts were established (Vanberg 2005: 19). Already at the formation of what was to become arguably the most powerful and influential judicial institution in the world, the US Supreme Court, the institution was claimed to have:

“no influence of either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements” (1788).

The paradox is then that in protecting the fundamental norms of a constitution, constitutional courts are “dependent on the cooperation of governing majorities. . . to lend force to their decisions” (Vanberg 1999, cited in Epstein 2001: 125). Constitutional courts do not dispose of capabilities to sanction or force compliance from other institutions. Consequently, as claimed by Vorländer (2006: 15-16), the power base of constitutional courts needs to rest on other sources. Their power does not follow the logic of orders and obedience, but rather rests upon the discursive formations and social, economic and political structures in the society, and is dependent on a political culture and political institutions that recognize their role and authority, thereby providing them with authority and legitimacy.

This acknowledgement of the weakness of constitutional power has been claimed in domestic settings⁹, but is probably even more so true when applied to international legal systems and transnational courts. Shany (2009: 74-75) argues that for the better part of the twentieth century, the international rule of law has suffered from the absence of robust judicial institutions, incapable of fulfilling on a regular basis the traditional roles of national judiciaries: dispute settlement, law interpretation, and law application. Questions of authority and capacity to influence society are, consequently, arguably even more acute for courts at the international level, which additionally have to compete against national sovereignties and strong, well-established domestic legislative, judicial and administrative institutions, whose

⁹ Referring to the distinction discussed earlier in the thesis between the perception of constitutional courts as constrained and unconstrained actors respectively.

authority and legitimacy have been built up over decades. As Anagnostou (2010: 735) points out, it must be noted that a transnational court in particular, cannot be expected to have a direct and overpowering impact over national laws and policies given this subsidiary role, and that one must be aware of this inherent limitation defining judicial impact on politics more broadly.

The critics of a constitutionalist approach to international law point at the lack of hard enforcement mechanisms or possibilities to sanction non-compliance. However, as indicated in the introduction to the theory chapter, political scientists have in recent studies shown how constitutional courts should be viewed as constrained actors in general. Also in most domestic contexts, constitutional law is often not directly enforceable or directly applicable by courts, and its authority has to rest on other sources (2009: 405). In other words, that constitutional courts do not dispose of “either of the sword or the purse” is not a new realisation and did not appear with the establishment of international courts.

These abovementioned limitations to constitutional courts’ power represent the weak side of their power-basis. On the other hand, the danger that the judgements of a court will not be respected, ignored or misapplied by political institutions has to be balanced against the more powerful side of legal systems’ power-base, namely their inherent powers.

According to Vorländer (2006: 14), the power of a constitutional courts lies in their “power of interpretation” of the constitution. The difference from normal jurisdiction exists in the superior institutional rank of the norms embodied in a constitution, and in their vagueness. Constitutions and Bills of Rights are vague documents, and the principles established in the documents demand interpretation, concretization and application when applied to concrete cases.

The view that constitutionalisation is an incremental process builds on this specific power of interpretation. It focuses on a continuous process, where a constitution is an organic document and its principles can come to have different scope and meaning as the court sets new precedents and establishes new principles through its adjudication. As Milewicz argues:

“It is precisely this requirement for process over time that can be derived from the principle of constitutionalisation. Unlike the static language of the

formal and substantive characteristics that form the basis of constitutionalism, constitutionalisation indicates an underlying process. It embeds a time dimension, which means that a constitution or constitutional law can come into being as a part of a process over time. Constitutionalisation implies that a legal text can acquire or may eventually lose constitutional properties in a feedback process and can thus be a long-lasting development". (Milewicz 2009: 420)

Stone Sweet (2002c: 113-118) has developed a theoretical model that tries to capture how legal systems evolve through feedback processes. Inspired by path dependent theories and self-reinforcing processes in a political system, his main point is that once a legal system with the authority to adjudicate upon fundamental principles embodied in a constitution has been established, their continuous adjudication and resolution of disputes can strengthen or reinforce the normative basis on which the legal system relies for its future adjudication of cases. In that respect, legal institutions are path-dependent to the extent that any given area of the law at any given point in time, is fundamentally conditioned by how earlier legal disputes in that area of law were resolved. In other words, sustained and precedent-based adjudication leads to outcomes that are both indeterminate and incremental: Legal institutions' substantive law, "doctrines" and jurisdiction evolve through adjudication. Precedents from prior adjudication form what Stone Sweet calls "argumentation frameworks" or "doctrines" for the judges to guide their interpretation of new cases. When cases bring up new issues within the existing framework, this can lead to new interpretations and new frameworks, and thus for new extensions of the law. If such frameworks are path-dependent, the sequence litigation – judicial rule-making – subsequent litigation – subsequent rule-making can reproduce itself as a self-reinforcing process, and its potential is great where individuals can directly petition a court and bring new issues before it (Stone Sweet 2002c: 134).

The force that can drive this development is the specific power of legal systems referred to as the inherent powers of a court. If there is not clear whether a case falls under the court's jurisdiction, the court itself must have the power to decide whether there is a dispute and, if that is the case, whether the dispute is a legal one. Since a court is an independent institution, and when there exists a dispute to whether the court has the mandate to deal with a specific matter, it has to itself interpret and decide on the limits of its jurisdiction, within the legal framework (Shelton 2009: 546). This way, the continuous dispute-settlement of a court might

establish new principles and new extensions of the law, and both the scope of a court's jurisdiction and the scope of the rights provided for may expand as a result of its adjudication.

2.3 Chapter summary

Constitutionalism is a broad and contested concept in the political theory. As Raz points out, "the writings on constitutional theory fill libraries" (1998: 152). In the normative discourse on constitutionalism, the disagreement persists as to the legitimacy of giving certain issues status as higher-order law, hence removing them from majoritarian control. Thus, I have argued that constitutionalism can be viewed as an analytical continuum, ranging from the rule of law conception of constitutionalism to the conception of constitutionalism as protecting fundamental rights. These two conceptualizations reflect a different commitment to let government be subject to constitutional constraints from higher-order laws. When evaluating constitutionalisation empirically, the central feature is whether the norms protected by a court to a greater extent than before possess the properties of being higher-order norms for the legal system as a whole. This represents the formal side of constitutionalisation, or the extent to which certain domains are given the status as higher-order norms taken away from political control.

A framework of constitutionalism also needs to take into account the authority and compliance these norms can obtain from those subject to it. Thus, constitutionalisation represents the institutionalisation of formal and substantial higher-order norms and the extent to which these norms are capable of carrying conviction and be respected and complied with by those subject to them. In Hart's and Stone-Sweet's terms the crucial development is the extent to which these norms can direct or invest lower-order norms with authority and take on a more superior role in a normative hierarchy. The power-base of constitutional courts were conceptualised to be of a special character, or of a "dual nature". Due to the vagueness of the broad principles embodied in a constitution or a bill of rights, they demand interpretation when applied to concrete cases and if there is a dispute to whether a court has jurisdiction, it has itself the power to decide. Thus, constitutionalisation can proceed when the court uses its inherent powers to establish new principles and extensions of the law. On the other hand, a court do cannot force compliance of its decisions, and are dependent on the institutions subject to its decisions to carry them out. This represent the dimension of the factual impact constitutionalisation can have.

As noted, the phenomenon under study is a recent one. In the analysis attention will be brought to the formal side of constitutional power, namely the extent to which the adjudication of the court establishes these norms as higher-order norms, or common European standards with which the respondent states must comply. My aim is to get a deeper understanding of the Court's operation under this approach, and whether its operation under the new approach can be seen as a move towards constitutionalism, thus changing the character of the system. Due to the recentness of the procedure at study, and the limited selection of cases, complete analysis of compliance and implementation will only be possible as the case law on these judgements grows. The preliminary analysis presented here, based on the experiences from the earliest cases, can only give some indications to that question.

Chapter 3 – The development of the Convention-system

The aim of this chapter, leading up to the analysis of the Pilot Judgement Procedure (PJP), is to show how the procedure takes place in a broader context of the European Convention-system and a comprehensive reform work the last decades. As Buyse (2009: 1) points out, the Convention system has through its first sixty years of operation gone through immense changes. From a timid beginning the Court has grown into a full-time, independent institution dealing with thousands of cases every year. As Shelton claims, after the ratification of Protocol No.11 the states are now “locked into a system of collective responsibility for the protection of human rights, a system in which the jurisdiction of the Court provides the centrepiece” (2003: 101).

Helfer (2008: 126) divides the evolution of the Convention-system into development and expansion along three axes. Since the signing and ratification of the Convention, the system has expanded institutionally, jurisprudentially and geographically. It is my argument, that the PJP can only be understood in the context of these three “axes of development”. A closer examination of the development along these dimensions is therefore required.

First, I turn to the institutional development. Both the Convention itself and the institutional structure have been altered on several occasions in the system’s development. I will briefly describe the Convention and the protocols before turning to the institutional structure and working methods of the Court. With regard to the jurisprudential development, I will present some landmark judgements that established central principles for the Court’s adjudication. That section will include both the formal legal basis and more informal principles that have been established as a legitimate way for the Court to operate. At the end of the chapter, before turning to the PJP, I discuss the structural problems facing the current court. This is important as it forms the backdrop for the PJP. First and foremost, the procedure is one measure among others to reform a system facing pressing problems.

3.1 The Convention and the protocols

The preamble of the Convention states the general objective the founding Contracting States wished to achieve. Emphasising the common heritage of political traditions, ideals, freedom and the rule of law among the European countries, the goal was to “take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration” (Council of

Europe 2011b: 4). In line with this statement, Article 1 establishes this commitment even stronger, in that: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (Council of Europe 2011b: 4).

The drafters concentrated on rights considered to be fundamental elements of European democracies¹⁰, where they expected that an agreement could easily be reached about their formulation as well as about their international supervision, compliance and implementation. However, both the detailed formulation of these rights as well as the choice to create a supervisory mechanism in a binding treaty were revolutionary developments in international law at that time (Dijk et al. 2006: 5). At the time of the drafting and ratification of the Convention, international law regulated exclusively relations between states. The protection of individual human rights was the concern of every individual state and subject to national legislation. For the first time at international level, a human rights document was backed up by a fully sanctioned enforcement system, and for the first time individuals were given opportunity to bring claims against their own governments at international level (Paraskeva 2008: 416).

The Convention system has developed both quantitatively and qualitatively through the fourteen protocols amending the Convention¹¹. Several of these protocols have had a substantial character, deepening the human rights protection by adding new rights. The other amendments have been structural, with the aim to make more efficient a system subject to fundamental challenges derived from the geopolitical changes in Europe and the following enlargements of the Council of Europe. However, not all protocols have been ratified by all

¹⁰ The original convention contained the following rights and freedoms: Article 2: right to life, Article 3: freedom from torture and inhuman or degrading treatment or punishment, Article 4: freedom from slavery and forced or compulsory labor, Article 5: right to liberty and security of the person, Article 6: right to a fair and public trial within a reasonable time, Article 7: freedom from retrospective effect of penal legislation, Article 8: right to respect for private and family life, home and correspondence, Article 9: freedom of thought, conscience and religion, Article 10: freedom of expression, Article 11: freedom of assembly and association, Article 12: right to marry and found a family Dijk, Pieter Van, Fried Van Hoof, Arjen Van Rijn, and Leo Zwaak. 2006. *Theory and Practice of the European Convention on Human Rights*. Antwerpen - Oxford: Intersentia..

¹¹ The first Protocol added the right to property, a right to education, and the right to free and secret elections. Protocol No. 4 guaranteed the right to liberty of movement, prohibited the expulsion of nationals and the collective expulsion of aliens. Protocol No. 6 and No. 13 abolished the death penalty, first with an exception for wartime, later under all circumstances. Protocol No. 7 requires the states to accord aliens due process safeguards before they may be expelled from the country. Finally, Protocol No. 12 strengthened the non-discrimination guarantee by adding that “no one shall be discriminated against by any public authority” Shelton, Dinah. 2003. "The Boundaries of Human Rights Jurisdiction in Europe." *Duke Journal of Comparative & International Law* 13.

the Contracting States. In addition, as some new protocols have entered into force, earlier ones dealing with similar issues have been repealed (Dijk et al. 2006: 4).

With regard to the relationship between the Convention and domestic law, it is primarily the task of the national authorities of the Contracting States to secure the rights and freedoms set forth in the Convention, and the Convention does not impose upon the Contracting States an obligation to make the Convention part of domestic law or otherwise to guarantee its domestic applicability and supremacy over national law (Dijk et al. 2006: 26). Hence, the Convention System is meant to have a subsidiary role. The Convention requires the states to guarantee the conformity of domestic law and practice with the convention, but the manner in which this is to be achieved has traditionally been left to the discretion of the contracting states. In line with this principle of subsidiarity, the role of the ECtHR has been to give individual redress at the international level, where the states have failed to live up to their obligations (Paraskeva 2008: 415).

This has resulted in different ways of incorporating the Convention among the member states, and the legal status of the Convention within the contracting states' legal systems differ. This variation in the relationship between municipal law and international law, or the role of the Convention before domestic courts, can broadly be captured with reference to the theories of monoism and dualism (Wildhaber 2007: 217-218). Monoism expresses the view that international law and domestic law are part of the same system of law, and that the rights and freedoms guaranteed by a treaty can be applied by the courts immediately after ratification of a treaty. There are variations to these two concepts, and only a few countries can be classified as truly monoist (for example the Netherlands and Austria). In the dualist approach to international law, on the other hand, the legal norms of a treaty must be transformed or adopted in order to become applicable in domestic law. In other words, they have to be introduced in the legal system through laws. Anglo-Saxon and Scandinavian countries have traditionally supported the dualist approach. In light of the challenges the Convention-system is facing now, it is according to Wildhaber (2007: 217-219), more interesting to observe the extent, to which domestic courts apply not only the Convention text, but also the case law of the European Court directly. A former president of the Court emphasised this and argued that, "the success of the ECHR system will ultimately depend on whether or not there is some form of co-operation between domestic courts and Strasbourg institutions" (Ryssdal, cited in Paraskeva 2008: 421).

3.2 Institutional structure of the Court

From the coming into force of the Convention in 1954, it took another five years until the Court's establishment in 1959 (Greer 2006: 33). The Court's power is laid down in Article 19 of the Convention, which states that the Court is established "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" (Council of Europe 2011b: 8).

For the oncoming discussion on the problems facing the current Court it is of crucial importance to highlight the institutional transformations that have changed the operation of the system so drastically in particular during the last two decades. As I will indicate in section 3.4, the main challenges to the Court, the ever increasing numbers of incoming applications and accumulated backlog of cases, are to a large extent the direct result of the enlargement in the early 1990s onwards, combined with the changes introduced with Protocol No. 11, which established a fully judicial system to where all individuals under the Court's jurisdiction could petition it directly (Bates 2010: 477).

Bates (2010: 432, 462) claims that this reform represented the most significant structural reform of the Convention to date. In his eyes, this Protocol did not only reform the Court and the institutional balance in the supervisory system, but created a wholly *new* Court. I therefore make a distinction between the supervisory mechanism before and after the ratification of Protocol No. 11, which both established a new, single, permanent court and made acceptance of the individual application compulsory.

3.2.1 The supervisory mechanism until Protocol No. 11 (1998)

Until the entry into force of Protocol No. 11 two bodies, The European Commission of Human Rights ("The Commission") and the ECtHR, existed separately to ensure the rights and freedoms laid down in the Convention. Furthermore, the supervisory role in monitoring the judgements from the Court and the Commission was taken care of by the Committee of Ministers (CoM) and the Secretary General of the Council of Europe. These were set up specifically to ensure the observance of the engagements undertaken by the Contracting States to the Convention, while the CoM and the Secretary General were established by the Statute of the Council of Europe and not by the Convention (Dijk et al. 2006: 32).

Both the Commission and the Court were set up to supervise the observance and compliance by the Contracting States with the Convention, and they exerted supplementary functions. The Commission was a quasi-judicial, quasi-political body (no qualifications for membership were set out in the original text), whose main responsibilities were to receive applications and assess their admissibility. In other words, the Commission served as a filtering body, which controlled the docket of cases that could reach the Court. Additionally, it established the facts of admissible cases, tried to reach friendly settlements between parties, and, if the latter was not possible, it would draw up a full report stating its opinion as to whether the Convention had been breached. The report would then be directed to either the CoM or the Court for final decision. The Commission could receive applications from member States, or directly from individuals or groups of individuals, if the given Contracting State had accepted this right. No case could be brought before the Court unless it had been declared admissible by the Commission, and if a case was found to be inadmissible that decision was final and irrevocable (Dijk et al. 2006: 32-33).

The Court's role and importance grew steadily throughout the 1960s and 1970s, as the Commission to a larger extent referred cases to the Court. On the other hand, fewer and fewer cases were referred to the CoM, the political body. Consequently, the system evolved into a tripartite system of control between the Commission, the Court and the CoM. The Commission's role was to rule on the admissibility of cases, but it also enjoyed the competence to decide cases that did not bring up any new issues of interpretation. Consequently, all cases concerning questions of principle or questions of interpretation of the Convention were referred to the Court. Finally, the CoM's role was to supervise the execution of the judgements (Bates 2010: 410-416). In the early decades, the Commission brought a very small number of cases to the Court, even with regard to those states that had accepted the Court's jurisdiction. This changed drastically in the late 1970s and 1980s, as an increasing number of Contracting States sequentially declared their acceptance of the Court's jurisdiction and the individual petition to the Court. Additionally, in the late 1970s the Court delivered several landmark judgements that clearly brought more public attention to the system as to what could be achieved by lodging a complaint at the European level. Consequently, workload pressures were becoming evident, in particular since the Commission was only a part-time body. This institutional set-up remained too inefficient. Firstly, most of the applications were clearly inadmissible (up to 90 per cent). Further, in dealing with the

cases found admissible, the Commission had to try to reach friendly settlements, and if that proved to be impossible, it had to prepare a detailed report describing the facts of the case and stating its opinion as to whether the case constituted a violation of the Convention. After these resource-demanding procedures, the case had to be directed further to either the CoM or the Court for a final decision, procedures that also required a lot of time and resources with oral hearings and long discussions on the facts and principles raised in every given case. In other words, there was a great potential to streamline and make more efficient the procedures, as much of the work already done by the Commission had to be repeated at the level of the Court (1995: 146-147).

Protocol No. 8 offered some help, in letting the Commission decide on the admissibility of cases in smaller Committees of Three which could, if unanimous, declare cases inadmissible. Further, the Protocol allowed the Commission to split into two Chambers, which had the potential to double the output on cases that could be decided on the merits. Still, it was claimed that the changes introduced with this protocol only would provide short time relief, and that more fundamental changes of the Convention system was required. In this context, new attention was brought to earlier proposals to merge the Commission and the Court, and by that creating a new, separate Court (Bates 2010: 422-424).

3.2.2 The supervisory mechanism since Protocol No. 11 (1998)

In the two decades prior to the entry into force of Protocol No. 11 in 1998, there had been different proposals concerning the possibility to merge the Commission and the Court into a single body. However, it was not until the Vienna Summit in 1993 that the Contracting States were able to reach consensus on this question. The declaration from this summit resulted in the reform proposals of Protocol No. 11, but it took another five years before all the Contracting States ratified the Protocol in 1998 (Bates 2010: 456-466).

Paradoxical, as we will see in section 3.4 concerning the structural problems facing the current Court, one of the most important reasons for this reform was the need to make more efficient the hearing of cases, as the institutions' workload originating in the amount of incoming cases was steadily increasing. The argument in favour of a merger of the two institutions was that a single-body system would simplify and reduce the length of proceedings, compared to the more complex two-stage procedure (Paraskeva 2007: 200-201).

It was thought that the establishment of a single judicial body would decrease the time needed to deal with every single application, and that the reform could establish a system that could work efficiently and at acceptable costs with the challenges coming from the on-going and coming enlargements (Bates 2010: 453).

The most drastic change introduced by the amendment, was the abolishment of the Commission. The Court was transformed into a single, full-time court, to which individuals could file an application directly. As a measure directed at increasing outputs, the Court was structured in Chambers of seven judges and Grand Chambers of seventeen judges, where a case could be reheard by the Court sitting in a Grand Chamber if the case raised serious issues of interpretation or particularly important matters for the State concerned (Dijk et al. 2006: 35-38).

Where the earlier decades had seen a gradual legalisation of the system where the Court's importance grew steadily at the expense of the more political bodies, the changes introduced with Protocol No. 11 completed a fully legalised system, by taking away the "political dimensions" of the control system, as it was represented through the adjudicative role the CoM had had until then. The CoM lost its power to settle cases on the merits, and the Commission as a filtering body was abolished. In the early years the Commission had had to balance the legally desirable against the political acceptable when it came to deciding whether or not to refer sensitive cases to the Court. These features were seen as incompatible with the enhanced judicial complexion of the application process following the institutional reform, and the political role of the Commission and the CoM was seen as a feature incapable of securing fundamental human rights at the European level. All optional clauses, including the right of individuals to petition the Court directly, were made obligatory, and the role of the CoM in the judicial system was from this point on exclusively to supervise the execution of the Court's judgements¹² which remains a political process involving negotiation with the respondent state (Bates 2010: 465-466; Greer and Williams 2009: 465).

Summarized, this institutional development marked the shift to a fully legalized supervisory system, where the Contracting Parties from then on were "locked in" to a transnational system

¹² Prior to Protocol No. 11 the Commission could refer cases either to the Court or to the CoM. However, as Bates (2010: 415-416) points out, cases that fell within already established case-law and did not bring up any new issues concerning interpretation of the Convention, were de facto decided by the Commission itself and sent to the CoM for execution.

of rights protection managed and supervised by a supranational Court and where the competences that once were optional, such as the individual petition, now were mandatory on all Contracting Parties. By abolishing the Commission, removing the adjudicative powers of CoM, the political organ, it completed a fully legalised system (Keller and Sweet 2008: 14; Paraskeva 2007: 200-201).

3.2.3 Protocol No. 14 and other reform proposals

The most recent changes at the time of writing were introduced with Protocol No. 14, which came into force in June 2010 after a six year long ratification process.

The hope that the institutional changes from Protocol No. 11 would create a flexible and efficient enough system capable of dealing efficiently with the challenges coming from enlargement and the right to individual petition was not realized in practice. Despite the success of Protocol No. 11 in establishing a permanent court, it became clear almost immediately after its coming into force that it would be insufficient in managing the flow of cases (Caflisch 2006: 406). Only a year after the reform it was recognised by the President of the Court that the continuing steep increase of application was demanding further reforms in order to secure the future effectiveness of the system (Paraskeva 2007: 202).

In contrast to Protocol No. 11, Protocol No. 14 made no radical changes to the control system. The changes related more to the functioning of the system rather than its structure. By letting the Court deal with cases more flexibly and in smaller committees, the new procedures allow the Court to concentrate more on the most important cases which require in-depth examination (Greer 2006: 44). In short, the amendments concern the reinforcement of the Court's filtering capacity with regard to the vast number of clearly inadmissible applications, a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage, as well as measures for dealing with repetitive cases (Dijk et al. 2006-37).

3.3 Method of adjudication

In chapter four, in the analysis of the Court's operation under the PJP, I will outline the traditional approach of the Court as a contrast to the new one. Here, I will bring attention to

the role of the individual application in the Convention system, as well as the principles on which the Court relies in its adjudication of cases.

3.3.1 The Individual application

The individual application is the traditional way of bringing a case to the ECtHR. This important feature is established in Article 34 of the Convention stating that “the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties” (Council of Europe 2011b: 10). As seen through the institutional development of the Convention system, individuals’ right to directly petition the Court was among the changes introduced with Protocol No. 11, which firmly established this as a central feature of the system. Acceptance of this right had until then remained optional, but was now made obligatory on all Contracting States. The view of the individual application as an essential feature of the system is grounded on the fact that every individual citizen in a state bound by the Convention should have an effective and final remedy at the European level. Expressed by the Court itself, the individual application is considered to be a “basic feature of European legal culture” (cited in Egli 2008: 26).

3.3.2 Subsidiarity

The principle of subsidiarity has been a fundamental principle for the Court’s activity, and is formally rooted in the Convention. It establishes that the role of the Court is subsidiary to that of the member states. In line with this principle, it is intended that the Court’s role should be limited to considering Convention compliance in single cases, rather than to serve the function of a final court of appeal or fourth instance (at the top of a hierarchy). Consequently, it has in the whole history of the Convention system been an admissibility criterion that the applicants exhaust domestic remedies before petitioning the ECtHR (Council of Europe 2011b: 10).

The Court has held that it is fundamental to the effectiveness of the Convention-system that the national systems themselves provide redress for breaches of the Convention so that the Court can exert its supervisory role subject to the principle of subsidiarity (Wildhaber 2004: 83). Article 13 of the Convention is vital in that respect, and grants individuals the competence to claim their human rights under the Convention before national courts.

According to this article states are required to provide effective domestic remedies where individuals have arguable complaints that their Convention-rights have been violated. The object of Article 13 together with the object and purpose underlying the Convention set out in Article 1 is thereby, “to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaints before the Court” (Wildhaber 2004: 83). Together, these should, according to Wildhaber (2004: 83), form the framework of the Court’s judicial activity.

Closely associated to the principle of subsidiarity, is the more informal principle of “margin of appreciation”, which refers to the room for manoeuvre the Strasbourg institutions give to the national authorities in fulfilling their Convention obligations. The principle does not appear in the Convention-text itself, but has been developed gradually as a principle in the case law of the Court. It has been used as a technique to balance the respect given to Convention-rights while at the same time leaving room for legitimate public interests in the given respondent state. Under the principles of subsidiarity and “margin of appreciation”, the activities of the Court and the CoM are clearly separated. When the Court finds a violation in an individual case, it should be up to the respondent states, subject to supervision by the CoM, to give compensation in the individual case, and to find the appropriate measures at domestic level to restore the situation before the breach (Greer 2006: 222-223).

3.3.3 Informal principles established in the case-law of the Court

As argued in the theoretical part, constitutionalism does not represent a clear dichotomy, and constitutionalism and constitutionalisation are concepts best understood as incremental, continuous processes. In addition to the institutional development described in previous sections, the system has developed jurisprudentially through the Court’s continuous adjudication. The scope of the rights provided for in the Convention has beyond doubt developed gradually as the Court has sought to adapt the Convention to changing European values. The jurisprudential development of the Court’s operation and of the single rights provided for in the Convention is a vast topic. However, I will bring attention to key principles established in some landmark judgements, which have become guiding for the Court’s operation since. Principles that are now taken for granted in the Court’s adjudication, and common European values inherent in the Convention once had to be established by the Court in its case-law. In several judgements from the late 1970s onwards the Court took a

new approach to European human rights protection, established certain principles, and paved the way for a bolder and more activist Court (Bates 2010: 319-321).

In terms of the theoretical framework developed in Chapter 2, these principles are among the broad “doctrines” or “argumentation frameworks”, on which the judges can rely when new disputes arrive before the Court, and to which the Court has referred extensively in later judgements. That way they form part of the inherent power of the Court to decide on the scope of its jurisdiction. In these landmark judgements, different perceptions existed to the proper role and scope of the Court’s jurisdiction, where ultimately the Court itself had to decide. The Court has established these principles in its adjudication, and has relied on these principles when deciding cases that bring up new issues, where precedent in the case-law had yet to be established. In judgements from the late 1970s and onwards the Court developed key techniques for the interpretation and application of the Convention that set the Court up for new expansions of its case-law (Bates 2010: 356).

Moravcsik highlights the special nature of human rights treaties in general. In contrast to most international regimes, international human rights institutions are “not designed primarily to regulate policy externalities arising from societal interaction across borders, but to hold governments accountable for purely internal activities” (2000: 217). Rather than regulating the relations between states, they regulate the relations between governments and individuals subject to them, and their distinctiveness lies in their empowerment of individual citizens to challenge the domestic activities of their own government (Moravcsik 2000: 217). As will become evident, the ECtHR has itself used the argument of the special nature of the Convention to establish new principles in its case-law.

As a part of international law, the Court has established in its case-law that “the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part” (*Al-Adsani v The United Kingdom*, cited in Wildhaber 2007: 220). In that respect, the ECHR is subject to the rules of interpretation of treaties set out in the “Vienna Convention on the Law of Treaties”. The general rule of interpretation states that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (cited in Letsas 2010: 512). In other words, the rule consists of two important elements that can be weighted differently by a court, namely “the ordinary meaning” of a treaty, and “its object and

purpose”. In some cases, where the Court has taken a bolder approach, it has given more weight to the latter.

The Special Nature of the Convention, and its “Object and Purpose”

The Court has on several occasions pointed to the special nature of the Convention, and how this has implications for its operation. In the judgement *Ireland v the United Kingdom* (1978) the Court held that:

“Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates over and above a network of mutual bilateral undertakings, objective obligations which, in the word of the Preamble, benefit from a ‘collective enforcement’” (Ireland v The United Kingdom, 1978, para 239¹³).

In *Soering v United Kingdom* (1989) the Court referred to this statement from *Ireland v the United Kingdom* and held that this special character of a human rights treaty also had to be considered by the Court in its interpretation and adjudication of cases. The Court then stated that “the object and purpose” of the Convention as an instrument for the protection of individual human rights requires that its provisions be interpreted and applied so as to make its safeguards “practical and effective” (*Soering v United Kingdom*, 1989, para 87). This was a highly important statement, on which the Court has relied in later judgements. These statements now form what can be called “doctrines”, and have paved the way for a more progressive court.

Bates (2010: 321) refers to the use of these broad “doctrines” as “the teleological approach to interpretation”, which has been established gradually. The approach emphasises that the “object and purpose” of the Convention is to provide for the effective protection of the rights it is set up to secure. The principle is associated with a bolder, more activist Court, which does not have to stick rigidly to the Convention-text in its adjudication, focusing more on the latter wording from the “Vienna Convention on the Law of Treaties”. In the *Belgian Linguistic Case* (1968), the Court for the first time established that it did not have to stick rigidly to the Convention-text in its adjudication. Furthermore, the case established that a

¹³ All judgements from the European Court of Human Rights are listed in paragraphs. Thus, I will refer to the paragraphs (para) of the judgements, rather than by page numbers.

finding of a violation by the ECtHR could have legislative implications. The Belgian government claimed that the issue of the case was a “reserved domain” which fell entirely to legislative authorities to decide upon, but the Court rejected this view, claiming that it had to decide on the balance between the general interest of a community and fundamental individual rights, while giving special priority to the latter (Bates 2010: 230-236). Hence, the principle of “effective rights protection” was highlighted in this judgement. The Court established that:

”The general aim set for themselves by the Contracting Parties through the medium of the ECHR, was to provide effective protection of fundamental rights (...).The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental rights whilst attaching particular importance to the latter” (Belgian Linguistic Case, 1968, The Law, para 5).

Some years later, in the judgement *Golder v the United Kingdom* (1975), this approach was shown clearly. The case concerned whether the right of a prisoner to contact legal counsel could be read into the Article 6 of the Convention (the right to a fair trial), even if it was not textually provided for in the Article. The Court concluded that it could, and established that the Convention is a substantive text, and that the broad principles embodied in it may contain inherent rights. Furthermore, the case shows that a principle that now would be taken for granted, once had to be established in the case-law of the Court (Popovic 2009: 380). In the same vein, in the judgement *Tyrer v the United Kingdom* (1978) the Court held that the Convention “is a living instrument, which (...) must be interpreted in the light of present-day conditions” (*Tyrer v the United Kingdom*, 1978, para 31). The “living instrument doctrine” is now one of the best known principles of Strasbourg case-law. It expresses that the Convention is an organic document, where the principles of the Convention may receive new meaning and content with changes in the European societies and values (Wildhaber 2004: 84).

The judgement *Airey v Ireland* (1978) is also viewed as a landmark case, which further established the “effective protection of rights principle” as shown above in the *Belgian Linguistic Case* (1968). In a sentence that has been cited extensively in later judgements, the Court held that: “The Convention is intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective” (*Airey v Ireland*, 1978, para 24).

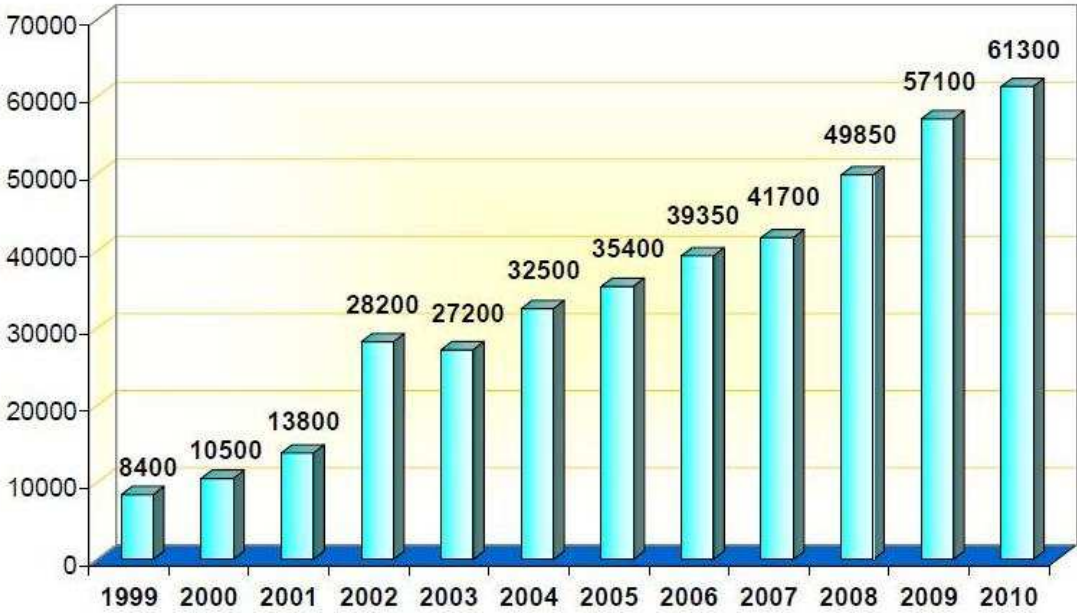
These cases give a few examples of how the Court has approached its mission. In particular since the late 1960s and in the 1970s the Court took a more progressive approach to the interpretation of the Convention (Bates 2010: 319-358). The jurisprudence of the ECtHR is a complex topic, and much more space would be required to cover the substantial development of the Convention rights embodied in the different articles. However, it is important to highlight how the scope of the Court's jurisdiction has been a gradual development. In the 1970s and 1980s, the Commission gradually referred more cases to the Court and the Court established new principles and deepened the substantive rights-protection by further developing the "teleological approach to interpretation" (Bates 2010: 383). The relevance of these judgements' broad principles is how they highlight the specific power of a legal institution to establish its jurisdiction on issues where it is not clear whether this is provided for in the Convention or not. If there is a dispute as to whether the Court has jurisdiction on a matter, the Court itself has to decide. The "object and purpose", "practical and effective" and "living instrument" are all examples of broad "doctrines" established in the Court's case-law. Since the Court first established these principles, they have been referred to extensively in later judgements and provided for new extensions for the substantive rights protection.

3.4 The structural challenges facing the current Court

Ed Bates (2010: 476) devotes his last chapter in the newly published book "The Evolution of the European Convention on Human Rights" to the challenges that have arisen from the combined effects of the entry into force of Protocol No. 11 and enlargement. This topic has received great attention from international law scholars, as the Convention system in several respects is at a crossroad for its further development. After fifty years of slow and steady evolution up to the ratification of this protocol in 1998, the last decade of the Convention's history has seen enormous change (Bates 2010: 476).

The greatest challenge is the steep rise in individual application. As a result, there is a considerable backlog of cases pending before the Court. After Protocol No. 11, the number of applications reaching the Court has increased steadily. Figure 3.1 shows the dramatic increase in applications after the right to individual petition the Court was made obligatory on all Contracting States.

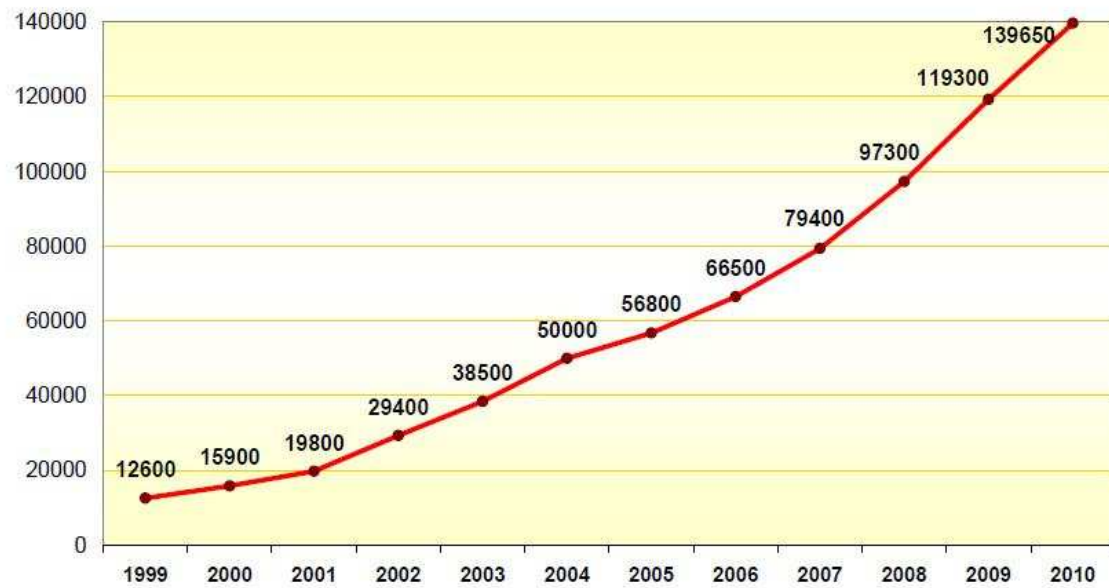
Figure 3.1 : Applications allocated to a judicial formation per year



Source: “Analysis of Statistics, 2010” (European Court of Human Rights 2011: 7)

The Court has not been able to deliver judgements in corresponding frequency. Despite the reform work done the last decade, the Court continues to receive annually more applications than it can manage. At the end of 2010, there were almost 140 000 cases pending before the Court, and this figure has also increased steadily since the entry into force of Protocol No. 11 (see figure 3.2). The numbers have continued to increase the last years, despite the efforts taken to deal with the problem. This poses a serious threat to the effectiveness of the system. The system has great difficulties in processing applications within a reasonable time. Bearing in mind that the applicants have to exhaust domestic remedies before they can petition the ECtHR, it usually takes years from a complaint is filed until a judgement is delivered at European level (Paraskeva 2007: 188-189).

Figure 3.2 Applications pending before a judicial formation

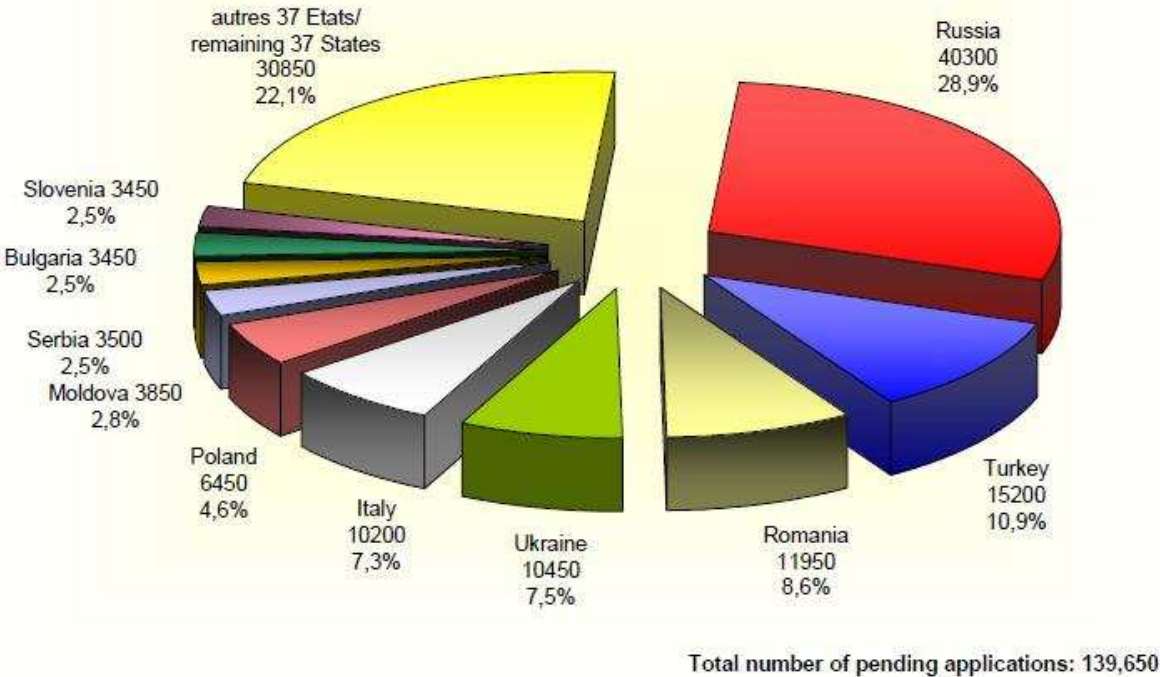


Source: “Analysis of Statistics, 2010” (European Court of Human Rights 2011: 7).

There are two main reasons for the steep increase in applications and pending cases. Before Protocol No. 11 and the abolishment of the Commission, the Commission brought a very small number of cases to the Court even from the states that had ratified the Court’s jurisdiction (Bernhardt 1995: 146). This is reflected in the number of judgements delivered by the Court. When the permanent Court was established in 1998, only 837 judgements had been delivered by the Court since its inception in 1959. Since Protocol No. 11 took effect the Court has pronounced more than 10 000 judgements and declared 188 000 applications inadmissible. The other main reason is enlargement, which has contributed not only quantitatively to the Court’s caseload. From the acceding states, new human rights issues have been brought before the Court, often leaving the Court to deal with far more serious and systemic human rights violations than before (2010: 477-482). According to Wildhaber (2004: 89), the nature of the cases coming before the Court reflects the changed composition of the Council of Europe, where a significant number of the states are still in many respects, and particularly with regard to their judicial systems, in transition. From the original ten signatory countries in the 1950s the system now counts 47 countries, including all the former communist states of Central and Eastern Europe except Belarus, and with Montenegro as the last country to join in 2007 (Greer and Williams 2009: 464). In addition, the decision for rapid enlargement has

undoubtedly had a great impact on the workload of the ECtHR also quantitatively. As shown in the figure below, the pending and incoming cases to a disproportionate extent come from the new countries from Central and Eastern Europe, where almost 88 per cent of the pending cases originate in these ten countries (Paraskeva 2007: 194).

Figure 3.3: High case-count states (more than 3000 applications pending before a judicial formation on 31 December 2010)



Source: “Analysis of Statistics, 2010” (European Court of Human Rights 2011: 7).

The qualitative change can be seen in the post-enlargement case-law. Judgements have revealed fundamental shortcomings in several of the newer States, especially in conjunction with Article 5 and 6, which touch upon fundamental issues of the rule of law, and, more generally, the respect that should be given to judicial authorities. Violations of Article 1 of Protocol No. 1, the right to the peaceful enjoyment of ones possessions, have also been prominent in the post-enlargement case-law, dealing with typical problems for the countries in transition from socialism to democracy. In such cases the Court has revealed systemic failures on the part of the State to effectuate compensation schemes for property loss, property that has been unlawfully confiscated and state-imposed rent controls (Bates 2010: 482-483).

Based on this, two categories of cases have contributed significantly to the increasing caseload of the Court. The first type are the so-called “committee cases”, which are all the applications declared inadmissible either because they are manifestly ill-founded or because they do not fulfil one of the other conditions of admissibility according to Article 35 of the Convention. These cases represent more than 90 per cent of all cases before the Court, and occupy much of the Court’s time. The second category is composed of the “repetitive cases”. These cases concern applications that derive from the same structural cause within a legal order of a member state, where the Court has already found a violation of the Convention in a similar judgement, but where its structural origin has not been dealt with at national level (Mantouvalou and Voyatzis 2009: 4-5). Of the cases that are declared admissible, around 60 per cent are of this character. It is clear that far too many cases come to the Court which should, in accordance with the principle of subsidiarity, have been resolved at domestic level (Paraskeva 2008: 439).

Protocol No. 14 which was ratified by all countries in 2010 can be seen as one measure to deal with applications more efficiently. The changes introduced with this protocol can, however, not be the solution to the problem alone, as the increasing application numbers, and their different character suggest. As Paraskeva (2008: 423) argues, only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the ECtHR’s present overload of cases. Through Protocol No. 14 it has been made more simple to handle the so-called “committee cases”, applications that are clearly inadmissible, where the Court can deal with these in smaller chambers. The other main problem, well founded but repetitive applications, have to be tackled another way. The former president of the Court, Luzius Wildhaber, has argued that one of the biggest problems facing the Court is how to deal with the large number of well-founded applications deriving from structural problems in certain countries. Hence, a big burden could be taken of the Court’s workload if an effective mechanism to deal with these repetitive cases is found (Wildhaber 2009: 69). This not only because of the high number of cases pending before the present court: An even bigger threat to the system is the number of potential applicants. If the Court continues to deliver individual judgements in cases where a systemic problem surely is the root to the violation, the number of potential applicants could be unconceivable. The need for a better implementation of the ECHR at national level has a central position to the aim of guaranteeing the long-term effectiveness of the ECHR system (Paraskeva 2008: 423). This is the aim of the PJP, to which I now turn.

3.5 The Pilot Judgements

3.5.1 Against the background of enlargement and increasing application numbers

The idea of a procedure to deal more efficiently with repetitive cases emerged at the same time as the drafting of Protocol No. 14 and other measures to secure the future effectiveness of the Convention-system. There were proposals to institutionalise the pilot judgements through Protocol No. 14, by that giving the Court an explicit legal mandate to deal with cases this way, but these efforts were unsuccessful. However, the opinion existed that such a procedure could be issued within the existing legal framework (Buyse 2009: 9).

Parts of the procedure's legal basis, on which the Court has relied when adjudicating the pilot judgements, springs out of a resolution and a recommendation from the CoM in May 2004. These texts were part of the package of measures adopted at the same time as Protocol No. 14, to guarantee the future effectiveness of the system.

In the resolution the CoM stated that it "recalls its mission to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention" (Council of Europe 2004b), and then invited the Court to:

"I. as far as possible to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments" (Council of Europe 2004b).

Simultaneously, the CoM issued a recommendation to all member states, encouraging them to:

"I. ascertain, through constant review, in light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective.." (Council of Europe 2004a)

“II. Review, following Court judgements which point to structural or general deficiencies in national law or practise, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court” (Council of Europe 2004a).

Where the resolution gave the Court an explicit mandate to deal with repetitive cases more efficiently in its judgements, the recommendation served as an explicit encouragement and reminder to the member states of the Council of Europe on how the system is intended to work in light of the principle of subsidiarity. It highlighted that the protection of the rights guaranteed by the Convention is a collective responsibility of all state parties, and how the states are obliged to provide for domestic legal remedies in cases where the Convention is violated (Paraskeva 2008: 432). As will be evident in the analysis, the Court has relied on these documents when establishing the new approach.

3.5.2 The characteristics of a Pilot Judgement: An introduction to the analysis

For the oncoming analysis, it is important to distinguish between two concepts related to the jurisprudence of the ECtHR, namely individual- and general measures. Individual measures concern the individual applicants and the state’s obligation to erase the consequences suffered by an individual applicant, whose human right was violated, or to give monetary compensation if the former is not possible. General measures, on the other hand, relate to the obligation on the states to put end to a continuing violation, in order to prevent similar violations in the future. Hence, “the obligation to take general measures may imply a review of legislation, regulations and/or judicial practice to prevent similar violations”(Council of Europe 2011a: 15-16).

A Pilot Judgement addresses a general problem by adjudicating a specific case. Instead of the mere determination that the Convention has been violated, the Court also gives general directions as to what actions the respondent state should take in order to deal with the underlying problem. Since these are general, often structural, problems in the respondent states, the judgements often necessarily have to include requirements for legislative changes, for example if there exist no remedies at the national level that can secure the rights under the

Convention, or if those that exist are insufficient to protect these rights. The Court selects, or singles out, one case deriving from this structural problem, and the state concerned is called upon to resolve comparable cases when the judgement is rendered. At the same time all the other similar applications are adjourned until the pilot case has been decided (Buyse 2009: 1-2).

The abovementioned characteristics of the Pilot Judgement Procedure are the prototype of the procedure. However, as an information note on the Pilot Judgements issued by the Court's registrar in 2009 indicates:

“The Court has used the procedure flexibly since it delivered the first pilot judgement in 2004. It is not every category of repetitive case that will be suitable for a pilot-judgement procedure, and not every pilot judgement will lead to an adjournment of cases, especially where the systemic problem touches on the most fundamental rights of the person under the Convention” (European Court of Human Rights 2009: 2).

This note was published in 2009, five years after the first Pilot Judgement was delivered. It indicates that the procedure has been put flexibly to use. Thus, it will be the aim for the next chapter to explore how the Court has operated under this approach, and whether it may be seen as a move towards constitutionalism.

Chapter 4 – The Pilot Judgement Approach

In order to investigate whether the new approach of the Court can be seen as a move towards constitutionalism, I seek to get an understanding of how this approach was established and how the Court has operated in dealing with the judgements under this new approach. This will be done mainly by analysing the operative parts of the judgements and the section leading up to the operative part, where the Court considers the obligations or implications arising from the facts of the case in light of the state's obligations under Article 46 of the Convention. These sections are relevant as they present the Court's reasoning under the new approach and can illustrate how the Court has been operating. In light of the special nature of courts' power to make interpretations and establish their jurisdiction when faced with new issues, these sections can help understand the Court's role in establishing the procedure.

The operative part is issued at the end of every judgement, and lists the violations and obligations and requirements on part of the state. These sections are also the formal binding parts of a judgement, and they are relevant with regard to how the procedure formally can change the character of the Court's operation, and whether it has taken on a more constitutional role. I analyse a selection of the Pilot Judgements delivered. The selection is quite exhaustive, depending on how the judgements are defined. As indicated in the information from the ECtHR, the procedure has been put flexibly to use. I seek to explore the Court's operation under this approach, and see whether the overall picture of the Courts' operation under this approach can be seen as a move towards constitutionalism.

I will start by giving a brief outline of the traditional approach of the Court. This will be a contrastive element to the Pilot Judgement Procedure (PJP), so it can be kept in mind how the Court traditionally has dealt with judgements as contrasted to the new approach. In section 4.2 I will analyse the Court's approach under the PJP. Finally, in section 4.3 I discuss whether this new approach of the Court can be seen as a move towards constitutionalism.

4.1 The traditional approach

A traditional perception of the status and reach of the judgements of the ECtHR, is that they carry purely individualised, specific implications. Linked with the individual right to petition the Court, and the guiding principle of subsidiarity, the perception of the Court has been as a kind of tribunal of last resort, limited to specific cases of rights violation after the exhaustion

of domestic remedies (Sadurski 2009: 412). This is formally established in Article 41 of the Convention, which states,

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party” (Council of Europe 2011b: 11).

As Colandrea (2007: 403-404) points out, the Court has traditionally adopted a restrictive attitude in assessing individual complaints, emphasising that it is not its task to value the abstract compatibility of domestic legal orders with the Convention. Rather, its role has been limited to verifying the existence of a violation in the specific complaint before it. In line with the principles of subsidiarity and “margin of appreciation”, it would fall to the respondent states to find the right measures to be utilised in their domestic system in order to secure compliance and conformity with the Convention. With this perception of individual redress at European level, it did not fall to on the Court to assess the validity of domestic laws themselves. The Court was restricted to consider acts and decisions rather than laws underlying the latter (Sadurski 2009: 412).

This approach has not prevented the Court, in certain circumstances, from directly taking into consideration the fact that a domestic law is incompatible with the Convention (Colandrea 2007: 304). This was for example the case already in 1968 in the discussed *Belgian Linguistic Case*. However, and despite the many requests from applicants to the Court to issue specific general measures to be carried out in the respondent states’ legal systems, the Court has rejected these, stating that a judgement that establishes a violation of the ECHR has a “declaratory” character. In this view, it is for the respondent state to choose the necessary measures to comply with the judgement, and it would fall to the CoM to supervise the compliance and conformity of the measures carried out. The Court has limited itself to ordering purely individual measures, most prominently in form of monetary compensation as “just satisfaction” (Colandrea 2007: 397).¹⁴

¹⁴ In some judgements, other individual measures have been necessary in order to achieve “restitutio in integrum”, or restoration to the original condition before the violation in the individual case. This has been done when the consequences of a violation for the applicant has not been adequately remedied by the Court’s just satisfaction award. Depending on the circumstances the obligation to achieve “restitutio in integrum” may require further actions like for example the re-opening of unfair criminal proceedings or the destruction of

A typical reasoning by the Court under this traditional approach would be as expressed in the judgement *Marckx v Belgium* (1979), a case which clearly had legislative implications beyond the violation on part of the individual applicant in the case. In this case, the Court reasoned,

“Admittedly, it is inevitable that the Court’s decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation, but the decision cannot of itself annul or repeal these provisions: the Court’s judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53” (*Marckx v Belgium*, 1979, para 58)

In other words, while the Court’s judgements formally are legally binding, they have remained essentially declarative. They have traditionally only been prescriptive insofar as they afford just satisfaction in form of monetary compensation to the individual applicant (Popovic 2009: 386). In this regard, the Court has repeatedly held that it has no competence to annul, repeal or modify statutory provisions or individual decisions taken by administrative, judicial or other national authorities (Paraskeva 2008: 430).

In the cases *F v Switzerland* (1987) and *Belios v Switzerland* (1988), this approach is also evident. The applicants requested the Court to require the Swiss government to take the necessary measures to end the source of the violations, which originated in different legislative acts, to which a larger class of individuals were, or could be, affected (*Belios v Switzerland*, 1988, para 77, *F v Switzerland*, 1987, para 42).

In both judgements the Court noted,

”that the Convention does not empower it to order Switzerland to alter its legislation; the Court’s judgement leaves to the State the choice of the means to

information gathered in breach of the right to privacy (Council of Europe, 2011a: 16). However, issuing just satisfaction has been the prominent way of dealing with violations under the traditional approach, and other individual measures to restore ”restitutio in integrum” were also on purely individual basis.

be used in its domestic legal system to give effect to its obligation under Article 53” (Belios v Switzerland, 1988, para 78)¹⁵.

In Akdivar and Others v Turkey (1998) the applicant requested the Court to issue various general measures on the Turkish government, since ”in their view such confirmation was necessary to prevent future and continuing violations of the Convention, in particular the *de facto* expropriation of their property” (Akdivar and Others v Turkey, 1998, para 45). Following the same line of reasoning, the Court then recalled,

”that a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach” (Akdivar and Others v Turkey, 1998, para 47).

However, it also made clear that

”the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. It falls to the Committee of Ministers acting under Article 54 of the Convention to supervise compliance in this respect” (Akdivar and Others v Turkey, 1998, para 47).

Summarized, the Court has under its traditional approach abstained from issuing general measures on the respondent states, and when a judgement has had root in a structural problem, the Court has held that it has no jurisdiction to require the measures to be taken by the state, and has only ordered the state to give compensation to the individual applicant.

¹⁵ In *F v Switzerland* the wording of the Court was not identical, but it noted ”that the Convention does not give it jurisdiction to order Switzerland to alter its legislation” (*F v Switzerland*, 1987, para 43). See also *Dudgeon v The United Kingdom*, 1983, para 11-15, *Campbell and Cosans v The United Kingdom*, 1983, para 16, *Le Compte, Van Leuven and De Meyere v Belgium*, 1982, para 13, *Pauwels v Belgium*, 1988 para 40-41 for similar statements made by the Court.

4.2 The Pilot Judgements – addressing systemic human rights violations

There exists no consensus to exactly what constitutes a Pilot Judgement, and the procedure has, as indicated, been put flexibly to use. Nonetheless, it is clear that they do address systemic problems, attention is called to these problems, and requirements to implement general measures are issued by the Court in the judgements. As a clear contrast to the traditional approach, general measures are included in the operative, formal binding part of the judgement. As seen in Chapter three, the procedure has emerged in the context of the structural problems coming from earlier institutional reforms and enlargement of the Council of Europe.

As the Court itself states it, one of the fundamental implications of the Pilot Judgement procedure is that the Court's assessment of the situation complained of in a given case,

”extends beyond the sole interest of the individual applicant and requires it to examine the case also from the perspective of the general measures that need to be taken in the interest of other potentially affected persons” (Hutten-Czapska v Poland, 2006, para 238; Greens and M.T. v United Kingdom, 2010, para 111, Maria Atanasiu and others v Romania, 2010, para 214¹⁶).

There are in other words two important general features of a Pilot Judgement. Firstly, the Court addresses a systemic problem in the respondent state, going beyond the single application before the Court. Secondly, the Court issues general measures to be carried out at domestic level. In selecting the judgements for the analysis, I have chosen on the basis of this feature, and included the judgements where the Court addresses general measures in the operative part. In addition, I have included two cases where the Court did not issue general measures in the operative part, since they contain all the other essential features of a Pilot Judgement. They are therefore interesting to the extent that they can indicate a lack of consistency in the Court's approach, and that they indicate the discretion the Court has to select cases.

¹⁶ When the Court makes an expression with the exact same wording across several judgements, as here, I include the references in the text. When, on the other hand, the Court expresses the same point across several judgements, but not with the exact same wording, I have referred to one judgement in the text, and put references for similar expressions by the Court in footnotes.

In the next section I will present the judgements I have included in the analysis. In the section thereafter, I will analyse the judgement *Broniowski v Poland* (2004) more in detail. In this judgement, the procedure was established, and subsequent Pilot Judgements have been crafted around this judgement. I then go on to discuss the Court's operation under this approach with reference to how the Court has operated in identifying a structural problem (section 4.2.3), how the Court has stated the aims and objectives of the approach (section 4.2.4). These sections are important in order to observe the Court's reasoning when establishing and further developing the approach. In section 4.2.5-4.2.7 I discuss variations of the approach in with regard to the formal binding part of the judgements, before discussing the Court's operation in establishing the approach in light of its "inherent powers" (section 4.2.8). Finally, I bring attention to the experience on implementation and compliance based on the first docket of judgements (section 4.2.9).

4.2.1 The cases in the analysis

I have analysed thirteen judgements, in which the Court invokes the new interpretation of Article 46, and, consequently, the legal obligations this new interpretation imposes on the respondent states. In the judgements, this new interpretation follows the identification of a structural problem affecting many applicants, and is a crucial feature of the new approach. The judgements are listed in figure 4.1.

Figure 4.1 – The cases in the analysis

Judgement	Country	Year	Articles violated
Broniowski	Poland	2004	Article 1 of Protocol No. 1
Burdov	Russia	2009	Article 1 of Protocol No. 1, Article 6, Article 13
Greens and M.T	UK	2010	Article 3 of Protocol No. 1
Hutten-Czapska	Poland	2006	Article 1 of Protocol No. 1
Lukenda	Slovenia	2005	Article 6(1), Article 13
Maria Atanasiu	Romania	2010	Article 1 of Protocol No. 1, Article 6(1)
Olaru and Others	Moldova	2009	Article 1 of Protocol No. 1, Article 6
Rumpf	Germany	2010	Article 6(1), Article 13
Scordino	Italy	2006	Article 1 of Protocol No. 1, Article 6(1)
Suljagic	Bosnia and Herzegovina	2009	Article 1 of Protocol No. 1
Urbaska Obec Trencianske Biskupice	Slovakia	2007	Article 1 of Protocol No. 1
Xenides-Arestis	Turkey	2005	Article 1 of Protocol No. 1, Article 8
Yuriy Ivanov Nikolayevich	Ukraine	2009	Article 1 of Protocol No. 1, Article 6(1)

In this selection of judgements the new member states are overrepresented. Only four out of the thirteen judgements come from the old member states, and the remaining nine judgements all come from states that acceded to the Council of Europe and signed and ratified the Convention and accepted the Court's jurisdiction after 1990.¹⁷ Two of the cases originate from the same state, Poland, while the remaining cases all come from different countries.

Furthermore, and to the substantial human rights issues covered by these cases, the Articles violated in the judgements indicate that these cases often do concern many of the most

¹⁷ Turkey is in this respect seen as an old member state. The Turkish Government ratified the Convention in 1954, but waited until 1987 and 1990 respectively to accept the once optional clauses of individual petition and the Court's jurisdiction. For more information on the High Contracting States' ratifications of the Convention, of Protocol No. 11 and acceptance for the Court's jurisdiction, see Council of Europe, Treaty Office, at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=155&CM=8&DF=18/09/2011&CL=ENG>

fundamental principles of democracy and rule of law, such as the right to property, the right to a fair trial or to an effective remedy within reasonable time, the right to respect for private and family life and the right to vote. In the Convention, these principles are embodied in Article 1 of Protocol No. 1, Article 6(1) and Article 13, Article 8 and Article 3 of Protocol No. 1 respectively (Council of Europe 2011b: 4-7).

Of the thirteen cases, four concern solely Article 1 of Protocol No. 1, namely the right to property, or "the peaceful enjoyment of ones possessions". Article 1 of Protocol No. 1 further proclaims that,

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties" (Council of Europe 2011b: 15).

Many of the judgements have dealt exactly with finding the right balance, or the "margin of appreciation" given to the respondent states, between these two competing interests: the individual right to property against the general interest of the public through different legislation or acts constraining this right¹⁸.

In five of the cases the Court deals with the right to property under Article 1 together with an alleged violation of Article 6(1), the "right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"(Council of Europe 2011b: 5). One common feature is that a great majority of the cases deal with topics related to states that have been or are in transition from socialist rule to capitalist democracy, and where rights to compensation from earlier expropriation or other sources to unlawful loss of property, have remained unenforced or obstructed.

¹⁸ In the judgements this is normally stated as "Any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim. By the same token, in cases involving a positive duty, there must be a legitimate justification for the State's inaction. The principle of a "fair balance" inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community." In all judgements concerning Article 1 of Protocol No.1 this is recognized by the Court, see: *Maria Atanasiu and others v Romania*, 2010, para 228 and 233, *Suljagic v Bosnia and Herzegovina*, 2009, para 41, *Hutten-Czapska v Poland*, 2006, para 167, *Broniowski v Poland*, 2004, para 148,182, *Urbarska Obec Trencianske Biskupe v Slovakia*, 2007, para 114.

Sections in the judgement of *Maria Atanasiu and Others v Romania* (2010) exemplify the recurrent nature of the violations addressed in Pilot Judgements, which has contributed so drastically to the Court's case load. Communist regimes in numerous central and eastern European countries that acceded to the Convention in the early 1990s and onwards conducted massive programmes of nationalisation and expropriation of immovable property, industrial, banking and commercial structures and agricultural structures. In the wake of democratization, restitution measures were adopted in many of these countries, whose political and legal situations differed (*Maria Atanasiu and Others v Romania*, 2010, para 85-86). Many of the repetitive cases that do combine the issues of Article 1 of Protocol No. 1 and Article 6(1), are claims brought against the failures to execute the obligations the states undertook through these compensation schemes, within reasonable time. Furthermore, on the interdependency of these issues, the Court in a later section in the same judgement stated that,

”As the issue of the length of proceedings is inherent in that of the effectiveness of the compensation mechanism, the Court will consider this complaint from the standpoint of the right to the peaceful enjoyment of possessions” (*Maria Atanasiu and Others v Romania*, 2010, para 110).

In other words, where the effectiveness of compensation schemes have led to a violation of Article 1 of Protocol No. 1, the right to property, a natural consequence has been a violation of Article 6(1) regarding length of proceeding-issues.

In some judgements there also a violation of Article 13 of the Convention has also been found in conjunction with other articles. Violations of this article, the right to an effective remedy at domestic level, are also a natural consequence of the systemic origin of the violations. The rights have been violated, and many people are affected, exactly because of the lack of an effective domestic remedy securing their right at domestic level. One judgement found a violation of Article 8 of the Convention, the right to respect for private and family life (*Xenides-Arestis v Turkey*, 2005, para 20). In *Burdov (No. 2) v Russia* (2009), Article 13 was found violated in conjunction with Article 6 and Article 1 of Protocol No. 1. The systemic nature of this case lied in the Russian authorities' recurrent failure to comply with domestic court judgements, and shows the interdependency of the articles violated. The main violation, the right to property, was acknowledged by domestic courts, but remained unenforced, hence the violations of both Article 6(1) and Article 13 (Philip Leach et al. 2010: 137).

Finally, one single judgement found a violation of Article 3 of Protocol No. 1, the right to free elections by secret ballot, where the Court found that the United Kingdom's denial of granting prisoners the right to vote was not justified under the obligations in the Convention (Greens and M.T v The United Kingdom, 2010, para 73).

4.2.2 Broniowski v Poland (2004) – the first Pilot Judgement

To better understand the Pilot Judgement Procedure, I will discuss the first judgement, where the Court established the approach. The Pilot Judgement Procedure is largely crafted around this judgement, to which it was first applied (Council of Europe 2004b; Philip Leach et al. 2010: 16). In *Broniowski v Poland* (2004), the Court established its mandate to deal with issues of a systemic character in its judgements, and established for the first time its competence to issue general measures in the operative part of its judgements.

As described in Chapter 3, the CoM issued in May 2004 two documents that together form part of the legal basis for the procedure. The Court draws on these two documents in its judgements and in its new interpretation of Article 46 when declaring its mandate to issue general measures that the respondent states have to implement.

In the resolution, the CoM invited the Court to identify the underlying systemic source to a violation in its judgement, and to assist, or indicate, to the states the appropriate measures to be taken in order to cope with the problem, and by that to avoid repetitive cases originating in the same structural problem to reach the Court. In the recommendation issued the same date, CoM reminded the member states on how the system is supposed to work in light of the principle of subsidiarity (Council of Europe 2004a; Council of Europe 2004b).

Broniowski v Poland (2004) concerned the failure to compensate individuals who had lost land in the course of the Second World War. Prior to World War II, provinces that today belong to Lithuania, Ukraine and Belarus, belonged to Poland. The applicant, whose grandmother was repatriated from one of these provinces (Lviv, now Ukraine), claimed a violation of Article 1 of Protocol No. 1 on his entitlement to compensation for property that his family had had to abandon after the war (*Broniowski v Poland*, 2004, para 3, para 10).

Based on the compensation schemes introduced by Polish legislation, the Grand Chamber of the ECtHR found that Broniowski had a "right to credit", a claim which had also been recognised by the Supreme and Constitutional Courts, but had remained delayed and obstructed by the authorities (Philip Leach et al. 2010: 16).

In its judgement the Court expressly drew attention to the existence of a systemic problem underlying the violation of the Convention. In Broniowski, and in all other judgements prescribing general measures, the systemic nature of the problem and the need for identifying general measures to be taken, are treated at the end of the judgements, where the Court sees the present case in relation to Article 46 of the Convention.

When dealing with the case under Article 46 of the Convention, the Court stressed that the existence and systemic nature of the problem had already been recognised by the Polish judicial authorities, and had been confirmed by a number of rulings by domestic judicial institutions (*Broniowski v Poland*, 2004, para. 189). Thus, the Court concluded that the facts of the case,

"disclose the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions" (*Broniowski v Poland*, 2004, para 189).

In other words, the Court highlighted how the deficiencies in national law and practise identified in this single case might give rise to numerous subsequent well-founded applications, and the Court called upon the Polish authorities to take the necessary measures to secure the property right in question also in respect of the other claimants (Buyse 2009: 3). By the date of *Broniowski v Poland* (2004, para 193), there were 167 similar cases pending before the ECtHR. However, the potential applicants could number as many as 80 000. This clearly highlights the preventive objective of the Pilot Judgements, and the aim to re-establish the principle of subsidiarity. Following a judgement by the ECtHR revealing a systemic problem, every individual whose right has been violated in a similar case should, according to this principle, have an effective domestic remedy where they could obtain redress for the violation. As pointed out, currently around 60 per cent of the cases that are declared admissible by the Court are repetitive cases that originate in a structural problem.

The paragraphs thereafter, the Court referred to the two documents issued by the CoM in 2004. First, it drew attention to the resolution from CoM "to identify in its judgements finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem" (Broniowski v Poland, 2004, para. 190). Secondly, it brought attention to the recommendation from the same date, emphasising that the states have a general obligation to solve the problems underlying the violation found. In light of this, and the facts revealed in the case, the Court considered the implications on the respondent State derived from Article 46 of the Convention in conjunction with Article 1. It stated that when identifying a systemic problem, it is the respondent state's obligation under article 46 to assure,

"not only to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found" (Broniowski v Poland, 2004, para 192).

The Court here made explicit the new interpretation of Article 46 in conjunction with Article 1 of the Convention. On the obligation to protect human rights, Article 1 states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms [...] of this Convention" (Council of Europe 2011b: 4). Article 46 states on the binding force and execution of the judgements that, "The High Contracting parties undertake to abide by the final judgement of the Court in any case to which they are parties" (Council of Europe 2011b: 12). In the new interpretation, the meaning of the sentence "the High Contracting Parties have undertaken to abide by the final judgements of the Court" received here a broader, more general, understanding, implying that the reach of the case tried goes beyond the individual case, and poses an obligation to deal not only with the individual case, but also with the structural problem at hand, by which a whole group of individuals are, or may be, denied their rights.

The abovementioned Resolution and Recommendation from the CoM form part of the legal basis for the new interpretation, and has been referred to extensively also in later judgements under the treatment of Article 46¹⁹.

In the operative part, the Court unanimously found a violation of Article 1 of Protocol No 1 and held:

”that the above violation has originated in a systemic problem connected with the malfunctioning of domestic legislation and practise caused by the failure to set up an effective mechanism to implement the Bug River claimants” (Broniowski v Poland, 2004, point 3 in the operative part²⁰).

”that the respondent State must through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu..” (Broniowski v Poland, 2004, point 4 in the operative part).

Thus, the Court ordered the Polish Government to secure the right found to be violated also in respect of other applicants suffering from the same systemic problem. The Court did not explicitly set a time limit, within which the measures had to be carried out, but

”invited the Government and the applicant to submit, within six months from the date of notification of this judgement, their written observation of the matter and, in particular, to notify the Court of any agreement that they may reach” (Broniowski v Poland, point 5b in the operative part).

This was a rather careful invitation, and as will become evident in the analysis of later Pilot Judgements, the Court has set time limits and given concretizations to the measures that need to be taken in a bolder way.

¹⁹ See for instance *Burdov v Russia*, 2009, para 41, *Lukenda v Slovenia*, 2005, para 28, *Maria Atanasiu and Others v Romania*, 2010, para 81-82, *Yuriy Ivanov Nikolayevich v Ukraine*, 2009, para 35-37.

²⁰ As noted earlier all judgements are listed in paragraphs. However, the operative part of a judgement comes at the end, where the Court orders the formal, legal obligations on part of the respondent state. This section is listed in points.

Summarized, the Court established in this judgement its new interpretation of Article 46. In all later Pilot Judgements the Court has invoked this interpretation²¹. In particular this relates to the Court's reasoning when revealing a violation with a structural origin. With the new interpretation it follows an obligation not only to compensate that single violation in terms of "just satisfaction", but also to select the appropriate general measures to be adopted in their domestic legal order to end the root to the violation (*Broniowski v Poland*, 2004, para 192).

Secondly, since the new interpretation of Article 46 made clear an obligation not only to deal with the single case, but also to solve the systemic problem in which the case originated, the Court also established in this judgement its right to issue general measures in the operative part. These two features represent the most important characteristics of the procedure, and this judgement has served as the model for subsequent Pilot Judgements. The Court follows the same general reasoning in all later judgements in the section leading up to the operative part, and the judgement has been referred to extensively in later Pilot Judgements²². Thus, the precedents the Court set in this judgement served as a framework for the further development of the procedure.

4.2.3 Identification of a structural problem

The identification of a structural problem by the Court is as pointed out a central feature of a Pilot Judgements. In the identification of a structural problem, the Court has invoked its new interpretation of Article 46. Thus, these sections may reveal the Court's reasoning behind invoking the new interpretation.

In the identification of a structural problem, the Court has focused mainly on two sides of the issue. On the one hand, it has brought attention to the large number of cases already pending before the Court, which originate in the same structural problem in the respondent state. In the

²¹ See *Yuriy Nikolayevich Ivanov v Ukraine*, 2009, para 78, *Xenides-Arestis v Turkey*, 2005, para 39, *Urbarska Obec Trencianske Biskupice v Slovakia*, 2007, para 149, *Suljagic v Bosnia and Herzegovina*, 2009, para 60, *Scordino v Italy*, 2006, para 60, *Rumpf v Germany*, 2010, para 59, *Olaru and others v Moldova*, 2009, para 49, *Maria Atanasiu and others v Romania*, 2010, para 210, *Lukenda v Slovenia*, 2005, para 97, *Greens and M.T. v United Kingdom*, 2010, para 106, *Burdov (no2) v Russia*, 2009, para 125, *Hutten-Czapska v Poland*, 2006, para 235-238.

²² See *Yuriy Nikolayevich Ivanov v Ukraine*, 2009, para 80, *Greens and M.T. v United Kingdom*, 2010, para 107,111, *Rumpf v Germany*, 2010, para 61,74, *Maria Atanasiu and others v Romania*, 2010, para 237, *Burdov (no2) v Russia*, 2009, para 126, *Xenides-Arestis v Turkey*, 2005, para 39, *Suljagic v Bosnia and Herzegovina*, 2009, para 61, *Scordino v Italy*, 2006, para 233, *Olaru and others v Moldova*, 2009, para 50, *Lukenda v Slovenia*, 2005, para 97, *Hutten-Czapska v Poland*, 2006, para 238.

judgement *Maria Atanasiu and Others v Romania* (2009), the Court pointed to the fact that it had already delivered several judgements concerning the same issue. However,

”Since those judgements the number of findings of a violation of the Convention has been constantly on the increase, and several hundred more similar applications are pending before the Court, which are liable to give rise to further judgements finding a breach of the Convention” (*Maria Atanasiu and Others v Romania*, 2009, para 216).

It has pointed to the lack of effective domestic remedies and shortcomings in administrative practice²³:

”The instant case demonstrates that the issue of the prolonged non-enforcement of final decisions and of the lack of effective domestic remedies in the Ukrainian legal system remain without a solution, despite the fact that there is a clear case-law urging the Government to take appropriate measures to resolve those issues (*Yuriy Nikolayevich Ivanov v Ukraine*, 2009, para 75,)

Finally, in some cases the Court has pointed at the incompatibility of concrete legislation or acts²⁴. In the second Pilot Judgement against Poland, the Court found that the origin of the violation originated in,

“the malfunction of Polish housing legislation in that it imposed [...] on individual landlords, restrictions on increases in rent for their dwellings, making it impossible for them to receive rent reasonably commensurate with the general cost of property maintenance” (*Hutten-Czapska v Poland*, 2006, para 235).

²³ In *Rumpf v Germany*, 2010, para 53, the Court stated that “the German legal system offered no effective domestic remedy, as required by Article 13 of the Convention, to prevent excessively long judicial proceedings”. See also *Burdov v Russia*, 2009, para 131.

²⁴ In several other judgements, the legislative origin of the violation was expressed by the Court. In *Olaru and Others v Moldova*, 2009, para 54 the Court stated that “the problem appears to have its origin in socially-oriented legislation enacted by Parliament or the Government, which bestows social housing privileges on a very wide category of persons at the expense of the local governments”. In *Lukenda v Slovenia*, 2005, para 93: “It is intrinsic to the Court’s findings that the violation of the applicant’s right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice”. In *Scordino v Italy*, 2006, para 229, the Court pointed to “a widespread problem arising out of a malfunction of the Italian legislation which has affected, and may still affect in the future, a large number of people...[and]... arises from the application of a law to a specific category of citizens”. A similar wording is also found in *Urbarska Obec Trencianske Biskupice v Slovakia*, 2007, para 148.

In the case of *Greens and M.T. v The United Kingdom* (2010), a case that dealt with the UK blanket ban for prisoners, the legislative implications were even clearer expressed by the Court. The judgement was a follow-up from the judgement *Hirst v The United Kingdom* (2005), where the Court had found that "the general, automatic and indiscriminate restriction on the right to vote imposed by section 3 of the 1983 Act must be seen as falling outside any acceptable margin of appreciation" (*Greens and M.T v The United Kingdom*, 2010, para 110). Consequently, the Court found that this blanket ban constituted a violation of Article 3 of Protocol No. 1 on the right to free elections by secret ballot. On the failure of the UK Government to implement the first judgement from 2005, the Court held that

"The failure of the respondent State to introduce legislative proposals to put an end to the current incompatibility of the electoral law with Article 3 of Protocol No. 1 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery" (*Greens and M.T v The United Kingdom*, 2010, para 111).

In *Hirst v the United Kingdom* (2005), the Court had left to the discretion of the respondent state as to how precisely to secure this right. However, in light of the lengthy delays for the implementation of that judgement, the Court found it in this case necessary to specify to the UK Government how to proceed in order to bring the electoral legislation act into conformity with the Convention (*Greens v The United Kingdom*, para 112). Ultimately, the Court held in the operative part that,

"the respondent State must (a) bring forward, within six months of the date upon which the present judgement becomes final, legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant; and (b) enact the required legislation within any such period as may be determined by the Committee of Ministers" (*Greens and M.T v The United Kingdom*, point 6 in the operative part).

This was a strong judgement. Not only did the Court require legislative changes to be made in order to bring domestic practice into conformity with the Convention. It also set a time limit

for the legislative proposals to be made. Furthermore, the Court gave examples in the judgement from its established case-law on the matter, and made clear that the legislative proposals had to be in conformity with the principles embodied in the ECtHR' case-law (Greens and M.T.v United Kingdom, 2010, para 112-114). Consequently, the Court made explicit that domestic legislation or acts must conform with the principles embodied in the Convention as well as the Court's established case-law on the issue, and that these must be treated as higher-order principles to that of the politically intended denial of granting prisoners the right to vote.

4.2.4 The objective of the PJP expressed by the Court

In all the judgements, the Court in one way or another emphasises the objectives of the new approach. The Court expresses this in the sections leading up to the operative part of the judgements, where the Court deals with the case in light of Article 46 of the Convention.

In legitimizing its new approach, the Court has brought particular focus to two interdependent goals. Firstly, the goal is to ensure the compatibility of domestic laws and practice with the Convention. As stated in Scordino, "under the Convention, particularly Article 1, in ratifying the Convention the Contracting States undertake to ensure that their domestic law is compatible with the Convention" (Scordino v Italy, para 234). Seen this way, the goal of the Pilot Judgements is to ensure that the Contracting States live up to their obligations and commitments under the Convention.

It has been emphasised repeatedly in the reform process of the Convention system that the main responsibility is located at the state level, in accordance with the guiding principle of subsidiarity. The Court states this objective in several of the Pilot Judgements,

"Another important aim of the pilot-judgement procedure is to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpins the Convention system" (Burdov v Russia, 2009, para 127, Olaru and Others v Moldova, 2009, para 51, Greens and M.T v The

United Kingdom, 2010, para 108, Suljagic v Bosnia and Herzegovina, 2009, para 62)²⁵.

Secondly, and related, there is certainly a preventive aim to this objective. This represents the other motivation behind pursuing the new approach. With regard to the number of applications pending before the Court, the Court has on several occasions stated,

”That is not only an aggravating factor as regards the State’s responsibilities under the Convention for a past or present situation, but is also a threat for the future effectiveness of the system put in place by the Convention” (Scordino v Italy, 2006, para 235, Greens and M.T. v United Kingdom, 2010, para 111, Broniowski v Poland, 2004, para 193, Suljagic v Bosnia and Herzegovina, 2009, para 63, Maria Atanasiu and others v Romania, 2010, para 217).

Hence, the Court has a dual objective when trying to implement the principle of subsidiarity, and to avoid too many repetitive applications to reach the Court. First, it poses a big problem that the states are currently not living up to their obligation, thus denying many people their effective Convention rights. Second, the rising application numbers pose a major threat for the future effectiveness of the Court.

When the Court has emphasised this preventive aim, it has drawn attention to the Resolution and Recommendation from the CoM, stating that in order to guarantee the long-term effectiveness of the Convention-system, domestic remedies must exist for anyone with an arguable complaint of a violation of the Convention (Council of Europe 2004a). Where the Court deals with the Resolution from CoM, it emphasises that, ”That resolution has to be seen in the context of the increase in the Court’s workload, owing to, *inter alia*, a series of cases resulting from the same structural problem” (Broniowski v Poland, 2004, para 190, Scordino v Italy, 2006, para 231).

²⁵ In *Lukenda v Slovenia*, 2005, para 94, the Court stated this obligation differently and more explicit: “By becoming a High Contracting Party to the European Convention on Human Rights, the respondent State assumed the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in Section 1 of the Convention. In fact, the States have a general obligation to solve the problems that have led to the Court finding a violation of the Convention. This should therefore be the primary goal of the respondent State”. In two other judgements, the Court stated this as the prime aim of the Pilot Judgement Procedure: “The pilot-judgement procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level...” (Maria Atanasiu and others v Romania, 2010, para 213, Hutten-Czapska v Poland, 2006, para 234).

In *Broniowski v Poland* (2004), the Court highlighted that as many as 80 000 could be affected by the shortcoming in the compensation scheme for expropriated property (*Broniowski v Poland*, 2004, para 189). In *Hutten-Czapska v Poland* (2006), a judgement that dealt with finding the right balance between public interest and landlords' right to control the rent under the Polish housing legislation, the Court pointed to the fact that as many as 100 000 landlords and from 600 000 – 900 000 tenants might potentially be affected by the housing legislation (*Hutten-Czapska v Poland*, 2006, para 235). In *Greens and M.T v The United Kingdom* (2010), the Court indicated that there were already approximately 2 500 applications in which a similar complaint was made, and around 1 500 of these were already registered and awaiting a decision. The Court further noted that there were around 70 000 serving prisoners in the UK, all of whom could be regarded as potential applicants²⁶ (*Greens and M.T v The United Kingdom*, para 111).

In two judgements this motivation is more clearly expressed:

”One of the relevant factors considered by the Court in devising and applying the procedure has been the growing threat to the Convention system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem” (*Maria Atanasiu and Others v Romania*, 2009, para 212, *Hutten-Czapska v Poland*, 2006, para 234).

In light of the repetitive nature of these applications, and the burden they put on the Court's workload, the Court has again, as seen in some landmark decision from its earlier history, brought attention to the ”object and purpose” principle of the Convention system. In several judgements, the Court has then pointed to,

”the Court's task, as defined by Article 19, that is to ’ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and

²⁶ In all the judgements the Court has highlighted the problem with the number of similar cases already pending before the Court, and in some it has indicated the number of potential claimants if the source to the violation is not dealt with. For further information on the numbers of applications pending before the Court in the given cases, see *Burdov (No2) v Russia*, 2009, para 133, *Lukenda v Slovenia*, 2005, para 92, *Maria Atanasiu and others v Romania*, 2010, para 217, *Olaru and others v Moldova*, 2009, para 53, *Rumpf v Germany*, 2010, para 69, *Scordino v Italy*, 2006, para 238, *Suljagic v Bosnia and Herzegovina*, 2009, para 63, *Xenides-Arestis v Turkey*, 2005, para 38, *Yuriy Nikolayevich Ivanov v Ukraine*, 2009, para 86.

the Protocols thereto', is not necessarily best achieved by repeating the same findings in large series of cases" (Yuriy Nikolayevich Ivanov v Ukraine, 2009, para 82, Suljagic v Bosnia and Herzegovina, 2009, para 62, Greens and M.T. v United Kingdom, 2010, para 108, Burdov v Russia, 2009, para 127).

The Court emphasises by this that it is unable to fulfil its role if it has to deliver judgement after judgement on a purely individual basis, without changes being introduced at domestic level. In order to deal with the pressing number of repetitive cases, the root of the violation has to be dealt with in line with the principle of subsidiarity.

The interdependency of the two goals is quite clear: in order to deal with the large numbers of pending cases, and in order to avoid too many repetitive cases being brought to the Court in the future, changes have to be introduced at domestic level. As pointed out in several judgements,

"The Court reiterates that the aim of the pilot-judgement procedure is to allow the speediest possible redress to be granted at domestic level to all the individuals suffering from the structural problem identified in the pilot judgement" (Maria Atanasiu and Others v Romania, 2010, para 237, Yuriy Nikolayevich Ivanov v Ukraine, 2009, para 95, Rumpf v Germany, 2010, para 74, Olaru and Others v Moldova, 2009, para 59, Burdov (No2) v Russia, 2009, para 142).

In later judgements (the judgements cited below are all from 2009 and 2010), as contrasted with the earliest ones, the Court has formally established this adjudicative approach, with emphasis on the phrase *may adopt*:

"In order to facilitate effective implementation of its judgements along these lines, the Court *may adopt* a pilot-judgement procedure allowing it to clearly identify in a judgement the existence of structural problems underlying the violations and to indicate specific measures or actions to be taken by the respondent state to remedy them" (Burdov v Russia, 2009, para 126, Rumpf v Germany, 2010, para 61, Greens and M.T. v United Kingdom, 2010, para 107, Yuriy Nikolayevich Ivanov v Ukraine, 2009, para 80, Suljagic v Bosnia and Herzegovina, 2009, para 61, *my italics*).

In these later judgements, the Court has institutionalised the procedure as an adjudicative tool to deal with cases originating in a structural problem, stating that it may adopt this approach. As already pointed out, the Court has in its judgements referred extensively to the precedents established in *Broniowski v Poland* (2004). In contrast, in the first judgements from 2004 and 2005, where the Court established the procedure, it did not explicitly refer to them as Pilot Judgements (*Broniowski v Poland*, 2004, *Lukenda v Slovenia*, 2005, and *Xenides-Arestis v Turkey*, 2005).

4.2.5 General measures are recommended, but not included in the operative part of the judgement

Looking at through Court's case-law the last decade there are several judgements that to a varying extent give the respondent state obligations to carry out general measures the same way as in *Broniowski v Poland* (2004). In this respect, I want to highlight two cases from the selection, where the Court identified a structural problem and invoked its new interpretation of Article 46, but nonetheless abstained from including these measures in the operative part of the judgement. As pointed out already in this chapter, only the operative part has a formal binding force. These two judgements can, consequently, not be seen as Pilot Judgements, as the inclusion of general measures in the operative part is one central feature. Still, I have included the judgements in the selection, since they highlight how the procedure has been put flexibly to use by the Court. Both these judgements were delivered after the PJP had been established in *Broniowski v Poland* (2004). Therefore, it remains a puzzle why the Court chose not to include these provisions in the operative part. In both judgements, *Scordino v Italy* (2006) and *Ubarska Obec Biskupice v Slovakia* (2007) the Court invoked the same interpretation of Article 46, and both judgements clearly highlighted the systemic nature of the problem.

In *Scordino v Italy*, the final a judgement was passed in March 2006. The case had then been dealt with twice already, since the Italian government passed it to the Grand Chamber, where the Court went on to invoke the new interpretation of Article 46 in its judgement (Leach et al: 116).

In an Interim Resolution by the CoM in 2005 concerning more than 2 000 cases against Italy relating to the excessive length of judicial proceedings, the CoM had made explicit a real

concern for the respect of the rule of law in Italy, and urged the Italian government "to meet their obligation under the Convention and the Court's judgement to secure the right to a fair trial within a reasonable time to all persons under Italy's jurisdiction" (*Scordino v Italy*, 2006, para 72). Later in the judgement, the Court referred to a well-established principle in its case-law that Article 6(1) imposes on the Contracting States to organise their judicial systems in such a way that their courts can meet the requirement to hear cases within a reasonable time (*Scordino v Italy*, 2006, para 183). In its treatment of the case in light of Article 46, the Court gave attention to the systemic problem, indicating how the case originated in "a widespread problem arising out of a malfunction of the Italian legislation which has affected, and may still affect in the future, a large number of people" (*Scordino v Italy*, 2006, para 229). In other words the case did, as *Broniowski v Poland* (2004), disclose the existence of a shortcoming of which an entire category of individuals had or were still deprived of their right. The Court did also refer to the resolution adopted by CoM in 2004 (*Scordino v Italy*, 2006, para 231). Drawing on Article 46, the Court reiterated the interpretation from *Broniowski v. Poland* (2004) that there exists an obligation to select the general measures to be adopted in their domestic legal order to put an end to the violation (*Scordino v Italy*, para 233). After these common features, the Court held that general measures at national level are undoubtedly called for, and gave indications to what such a measure should include (*Scordino v Italy*, 2006, para 236). Nonetheless, the Court chose not to include these general measures in the operative part of the judgement.

A similar case in this category is *Ubarska Obec Trencianske Biskupe v Slovakia* (2007), concerning a violation of Article 1 of Protocol No. 1, the right to property. Also in this judgement the Court gave attention to the systemic problem, the large number of individuals affected, the obligation to select and carry out general measures and gave some concretizations as to what such a measure should include in order to bring the legislation into conformity with the Convention (*Ubarska Obec Trencianske Biskupe v Slovakia*, 2007, para 148-150). Similar to *Scordino v Italy* (2006), the Court abstained from including the general measures in the operative part. Importantly, both these judgements were delivered years after the PJP was established in *Broniowski v Poland* (2004), and the Court gives no answer to why it chose not to apply the new approach in these cases. Hence, these two cases illustrate how the Court has put the PJP flexibly to use when dealing with systemic human rights violations, and that the procedure has been developing. Additionally, these two cases illustrate the discretion the Court has when selecting cases to be treated under the PJP.

4.2.6 General measures in the operative part

All the other judgements contain the vital characteristic that general measures are included in the operative part. The resolution from CoM, which forms part of the legal basis for the procedure, did not explicitly encourage the Court to include general measures in the operative part, but merely invited the Court to

”as far as possible to *identify*, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications” (Council of Europe 2004b: my italics).

Still, the Court has issued these measures in the formal binding part of the judgements, and in many cases gone much further to concretize the measures that need to be carried out at domestic level. As Paraskeva (2008: 440) points out, the PJP is still embryonic, and it is apparent that the Court has attempted to apply the formula from *Broniowski v Poland* (2004) in different situations, and that this might lead, and have led, to different types of Pilot Judgements. In some cases, the ECtHR goes further in specifying and concretizing the type of general measures, and in some it issues time-limits within which the measures need to be carried out. Thus, all the judgements contain to varying degree concretizations of the measures and time limits in the operative part, and it is not possible to give a consistent categorization of the judgements in this respect. The closest way to capture the variation in the judgement is to broadly distinguish between the judgements where the Court only issues general measures, and the judgements where the Court goes further in specifying these measures and includes time limits for the implementation.

Broniowski v Poland (2004) is in that respect a weak judgement. *Lukenda v Slovenia* (2005) falls in the same category. In both judgements, the Court held also in the operative part that the violation “originated in a systemic problem connected with the malfunction of domestic legislation and practice..” (*Broniowski v Poland*, 2004, point 3 in the operative part, *Lukenda v Slovenia*, 2005, point 4 in the operative part). In these judgements the Court issued general measures in the operative part, but left to the discretion of the respondent states to find the ways to bring domestic practice into conformity with the Convention, and the Court expressed

in *Lukenda v Slovenia* (2005) the same obligations as indicated in *Broniowski v Poland*²⁷(2004).

4.2.7 Concretization and time limits are included in the operative part

In other judgements the Court has gone further in specifying the measures and also on several occasions by issuing time-limits. There is a general tendency in the selection of judgements that the strong judgements are the later judgements, while the weak judgements are the ones issued in the early operation of the procedure.

In two of the judgements, *Hutten-Czapska v Poland* (2006) and *Greens and M.T. v United Kingdom* (2010), the Court went further in specifying the legislative dysfunction also in the formal binding part of the judgement. *Hutten-Czapska v Poland* (2006) considered domestic laws preventing landlords to increase the rents on their property, and the Court specified in the operative part how this legislation did not conform with the Convention and the principles established in the Court's case-law²⁸. In its judgement the Court found this legislation to violate Article 1 of Protocol No. 1, and that it failed to strike the right balance between the right to property and public interest. The Court held that the state had to establish a mechanism maintaining a fair balance between the interests of landlords and the general interest in the community (*Hutten-Czapska v Poland*, 2006: point 3 and 4 in the operative part). Again, as in *Greens and M.T. v United Kingdom* (2010), the Court stated, also here in the formal binding part, that this mechanism had to be in conformity with the established case-law of the Court under the standards of protection of property rights, thus significantly reducing the "margin of appreciation" for the respondent state to find ways to comply with the judgement (*Hutten-Czapska v Poland*, 2006, para 239 and point 4 in the operative part).

With respect to concrete legislative implications, the Court went the furthest in concretizing the measures to be carried out in *Greens and M.T v The United Kingdom* (2010). The judgement has already been discussed in that respect, and, as indicated, the Court required the

²⁷ And with the same wording. In *Lukenda v Slovenia* (2005) the Court held as in *Broniowski v Poland* (2004) that "the respondent state must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time" (Point 6 in the operative part).

²⁸ The Court held that, "the above violation has originated in a systemic problem connected with the malfunctioning of domestic legislation in that: (a) it imposed, and continues to impose, restrictions on landlords' rights, including the defective provisions on the determination of rent; (b) it did not and still does not provide for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance" (*Hutten-Czapska v Poland*, 2006, point 3 in the operative part).

state to bring forward proposals within six months as to how to change their electoral law in a manner which would bring it into compliance with the Convention and the principles established in the Court's case-law (*Greens and M.T v The United Kingdom*, 2010, point 6 in the operative part).

In several other judgements, the Court has held that the violation originated in a systemic problem due to the lack of an effective domestic remedy to secure the Convention rights²⁹. In these judgements, the Court has, in the formal binding part, ordered the states to set up domestic remedies, through which individuals affected by the structural problem can obtain redress at domestic level, and have their rights under the Convention secured.

As an example, *Burdov (No2) v Russia* (2009) was one of the judgements where the Court took this approach. The Court found that non-enforcement or delayed enforcement of domestic judgements by Russian authorities violated Article 13, Article 6(1) and Article 1 of Protocol No. 1 of the Convention, and held that:

“The respondent State must set up, within six months [...], an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgements in line with the Convention-principles as established in the Court's case-law”.
(*Burdov v Russia*, 2009, point 6 in the operative part)³⁰.

Furthermore, the Court made clear that such redress had to be granted to all victims within one year from the date of the judgement (*Burdov v Russia*, 2009, point 7 in the operative part). Hence, the Court made explicit that the Government had to establish an effective remedy, where the Convention right could be secured not only for the individual applicant in the given judgement, but for all other individuals suffering from the same violation. Furthermore, in several of these judgements the Court has gone on to issue time-limits on the respondent

²⁹ For detailed expressions by the Court *in the operative part* of the single judgements, see: *Burdov v Russia*, 2009, point 5, *Olaru and Others v Moldova*, 2009, point 3, *Rumpf v Germany*, 2010, point 3, *Suljagic v Bosnia and Herzegovina*, 2009, point 3, *Yuriy Nikolayevich Ivanov v Ukraine*, 2009, point 5.

³⁰ In the other judgements requiring this, the Courts findings in the operative part can be found in: *Olaru and Others v Moldova*, 2009, point 4 in the operative part, *Rumpf v Germany*, 2010, point 5 in the operative part, *Xenides-Arestis v Turkey*, 2005, point 5 in the operative part, *Yuriy Ivanov Nikolayevich v Ukraine*, 2009, point 5 in the operative part.

states' governments to carry out the general measures, as described in the judgements *Burdov v Russia* (2009) and *Greens and M.T. v United Kingdom* (2010)³¹.

As seen in the judgements dealt with until now, another important feature is that the Court in the operative part explicitly requires the respondent states to pay attention to the principles established in its case-law on the substantial human rights issue. In line with the principles of subsidiarity and "margin of appreciation", the Court does still leave discretion to the respondent states to find the appropriate ways to implement the judgement in their differing domestic orders, but it has significantly narrowed it down by ordering, in the formal binding part, that the measures must conform to the common standards of the Convention established by the Court in its case-law³². As described in Chapter 3, the Court has, through its "teleological approach" to interpretation of the Convention and the "living instrument" doctrine, since its inception continuously increased the scope of protection under the respective Convention articles as European values and societies have changed. The Court now orders the states to regard the principles established in the Court's case-law when finding the appropriate measures to bring their practices into conformity with the Convention. Thus, by ordering this the Court gives a clear message to the respondent states that its interpretations and standards established must be treated as higher-order norms, to which the states' practices must conform. As pointed out, the Pilot Judgement Procedure was established precisely as a tool to deal more efficient with repetitive applications, where the Court until the Pilot Judgement Procedure had to repeat its findings in all similar cases on an individual basis, where clear precedent was already established in its case-law.

One of the judgements revealing the lack of an effective domestic remedy, *Suljagic v Bosnia and Herzegovina* (2009), stands out with regard to concretizations. The judgement dealt with applicants' right to compensation for foreign currency savings that had been frozen since the

³¹ For the other judgements with time-limits within which the measures had to be carried out, see: *Maria Atanasiu and others v Romania*, 2010, point 6 and 7 in the operative part, *Olaru and Others v Moldova*, 2009, point 5 and 6 in the operative part, *Yuriy Ivanov Nikolayevich v Ukraine*, 2009, point 6 and 7 in the operative part, *Rumpf v Germany*, 2010, point 5 in the operative part, *Xenides-Arestis v Turkey*, 2005, point 5 in the operative part, *Suljagic v Bosnia and Herzegovina*, 2009, point 4 and 5 in the operative part.

³² When ordering the states to set up effective domestic remedies or to resolve legislative dysfunctions in order to resolve similar violations at domestic level, the Court has stated in the operative part that this measure has to be "in line with the Convention principles as established in the Court's case law" (*Burdov v Russia*, 2009, point 6 in the operative part). See also *Hutten-Czapska v Poland*, 2006, point 4 in the operative part, *Maria Atanasiu and others v Romania*, 2009, point 6 in the operative part, *Olaru and others v Moldova*, 2009, point 4 in the operative part, *Rumpf v Germany*, 2010, point 5 in the operative part, *Yuriy Ivanov Nikolayevich v Ukraine*, 2009, point 5 in the operative part, *Greens and M.T. v United Kingdom*, 2010, point 6 in the operative part.

socialist era (Philip Leach et al. 2010: 153). In this judgement, the Court even specified exactly what measures the State had to carry out in order bring domestic practice into compliance with the Convention.³³

Where the Court has issued time limits, it has also on several occasions put on hold the treatment of similar applications pending before the Court from the same country, awaiting implementation of the measures so that the applications put on hold could be resolved at domestic level, in line with the findings in the Pilot Judgements. In *Burdov (No2) v Russia* (2009) the Court included for the first time adjournment of similar applications in the operative part, and has in subsequent judgements made this a common feature of the procedure³⁴(*Burdov v Russia*, 2009, point 8 in the operative part).

In establishing its right to issue time-limits, and to put similar pending applications on hold, the Court has referred to the aim of the PJP, “to allow the speediest possible redress to be granted at domestic level to all the individuals suffering from the structural problem identified in the pilot judgement” (*Maria Atanasiu and Others v Romania*, 2010, para 237). Based on that aim, the Court concluded that it could decide to put similar applications on hold, awaiting the adoption of general measures to be implemented at domestic level. If, however, changes are not introduced at domestic level, the Court has stated that it has, “no choice but to resume the examination of all similar applications pending before it and to take them to judgment so as to ensure effective observance of the Convention” (*Yuriy Nikolayevich Ivanov v Ukraine*, 2009, para 100).

As seen in the analysis, there exists great variation as to how the procedure has been put to use in the first docket of judgements. In two judgements highlighted in the analysis, the Court chose not to include general measures in the operative part of, despite the fact that these judgements were delivered after the procedure was established in *Broniowski v Poland* (2004) and shared all the other characteristic features of a case suitable for the Pilot Judgement

³³ The Court issued on the Government to “ensure, within six months from the date on which the judgement becomes final [...] (a) that government bonds are issued in the Federation of Bosnia and Herzegovina; (b) that any outstanding installments are paid in the Federation of Bosnia and Herzegovina; (c) that the Federation of Bosnia and Herzegovina undertakes to pay default interest at the statutory rate in the event of late payment of any forthcoming installment.

³⁴ In four of the subsequent judgements, treatment of similar applications was adjourned. See *Maria Atanasiu and Others v Romania*, 2010, point 7 in the operative part, *Olaru and Others v Moldova*, 2009, point 6 in the operative part, *Suljagic v Bosnia and Herzegovina*, 2009, point 5 in the operative part, *Yuriy Nikolayevich Ivanov v Ukraine*, 2009, point 7 in the operative part.

Procedure. Furthermore, in some judgements the Court has included general measures in the operative part with no special concretizations or time limits, whereas it in other cases has gone further in concretizing the measures to be taken, sometimes pointing directly at concrete legislation or acts to be changed, and also in indicating how they should be changed in order to reach conformity with the principles of the Convention and the Court's case-law. Furthermore, in several judgements similar cases have been put on hold awaiting the changes to be carried out at domestic level. In other words, there could exist a lack of consistency in the Court's approach, and the procedure has been put to use very flexibly in the first docket of judgements. Thus, the Court has complete discretion to itself choose the judgements to be treated under the new approach, as well as to order general measures, concretizations and time-limits in a given judgement.

This fact was also recognised by the Council of Europe. At the Interlaken Declaration of 19th February 2010 the Conference stressed

“the need for the Court to develop clear and predictable standards for the ‘pilot judgement’ procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases, and to evaluate the effects of applying such and similar procedures” (Council of Europe 2010: 4).

The Court sought one year later, in February 2011, to clarify the operation of the procedure with the adoption of a new rule 61 of the “Rules of Court”. However, this rule did not bring much clarification. Rather, it established only formally that the Court *may* choose to include general measures in the operative part of the judgement, it *may* set time limits and it *may* choose to adjourn similar cases before the Court while awaiting the general measures to be adopted. Nor did it give any indications as to how the Court shall proceed when selecting cases for a Pilot Judgement (Council of Europe 2011c). The above, discussed variations in the approach, as well as the new Rule of Court that formalised the procedure, indicate the discretion the Court has both to apply the procedure to different cases and context as well as in its selection of judgements for PJP-treatment.

4.2.8 On the inherent powers of the Court

As was pointed out in the theoretical chapter, the inherent powers of judicial institution to themselves decide their competence or jurisdiction on certain issues is a potential great source of power. This was conceptualised to constitute the powerful side of legal systems' power-base and can drive their development. The inherent powers of courts give a great potential for institutional development in form of setting precedent and establishing principles, on which they in their later operation and adjudication can rely. There are, from the selection of judgements in the analysis, instances where the Court has used this power to both establish and further develop the PJP.

In the Convention system, the Court's inherent power is declared in Article 32 of the Convention, which establishes with regard to the jurisdiction of the Court, that "in the event of dispute as to whether the Court has jurisdiction, the Court shall decide" (Council of Europe 2011b: 10).

The resolution and recommendation from CoM has formed part of the legal basis of the Court's new approach, and they have been referred to extensively in the judgements. However, the Resolution only invited the Court to,

"identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution [...]" (Council of Europe 2004b).

In other words, the resolution did not explicitly tell the Court to issue general measures in the operative, formal binding part of the judgements, but merely to identify the structural problems in its judgements and assist the states in dealing with the problem. Nonetheless, that the Court orders general measures to be carried out at domestic level has become a common feature of the approach.

This fact has led to different opinions on the legal basis of the procedure. In a dissenting opinions in one of the first judgements, judge Zagrebelsky pointed to the fact that under this new approach the Court required the respondent state to "change the national system in law

and practice. Nothing more, nothing less” (Lukenda v Slovenia, 2005, Partly dissenting opinion judge Zagrebelsky³⁵). In his opinion, the inclusion of general measures in the operative part of the judgement fell outside the scope of a judgement of the Court. In another dissenting opinion from Zagrebelsky, in *Hutten-Czapska v Poland* (2006), he argued that these proposals to issue general measures in the operative part of the judgement were not included in Protocol No. 14 amending the Convention, even if this would have been possible and would have strengthened the legal basis of the procedure (*Hutten-Czapska v Poland*, 2006, Partly dissenting opinion of judge Zagrebelsky). In his view it should therefore still be ”up to the Committee of Ministers to identify, request, suggest, secure and monitor the measures which appear to be necessary” (Lukenda v Slovenia, 2005, Partly dissenting opinion judge Zagrebelsky). Against this criticism, the Court has on several occasions stated that,

”This adjudicative approach is however pursued with due respect for the Convention organs’ respective functions: it falls to the Committee of Ministers to evaluate the implementation of individual and general measures under Article 46 (2) of the Convention” (*Olaru and Others v Moldova*, 2009, para 50, *Greens and M.T. v United Kingdom*, 2010, para 107, *Suljagic v Bosnia and Herzegovina*, 2009, para 61).

In *Yuriy Ivanov Nikolayevich v Ukraine* (2009), the Ukrainian government objected to the use of the PJP, and ”suggested that the application of such a procedure in the present case would amount to the performance of supervisory functions by the Court” (*Yuriy Ivanov Nikolayevich v Ukraine*, 2009, para 77). In line with the argument from judge Zagrebelsky, the Government claimed that the application of the procedure interfered with the different responsibilities of the Convention-organs, which has traditionally implied that after the finding of a violation it falls to the respondent states, subject to supervision by the CoM, to find the appropriate measures to deal with the violation³⁶.

³⁵ As noted, the judgements are referred to in paragraphs. However, any dissenting or concurring opinions from the judges of the Court are included at the end of the judgements and are without page number or paragraphs.

³⁶ For Government’s submissions in other judgements, see *Hutten-Czapska v Poland*, 2006, para 227-228, *Burdov (No2) v Russia*, 2009, para 124, *Greens and M.T. v United Kingdom*, 2010, para 62, *Rumpf v Germany*, 2010, para 58, *Suljagic v Bosnia and Herzegovina*, 2009, para 59. In these judgements the Governments claimed that the case did not represent a structural problem. In *Maria Atanasiu and Others v Romania*, 2010, para 198-206 and *Olaru and Others v Moldova*, 2009, para 47-48 the Governments acknowledged the systemic problem and expressed willingness to let the case be subject for the Pilot Judgement Procedure.

However, the Court has in all these judgements argued against these objections and held that this procedure is not interfering with its and other institutions' role in the Convention-system. And, more importantly, the Court has continued to develop and expand the procedure to include concretizations and time limits in the operative part. For instance in the judgement where the Ukrainian Government objected to the use of the procedure, the Court held:

“Contrary to the Government's submissions, the application of the pilot-judgment procedure in the present case does not run counter to the division of functions between the Convention institutions. Although it is for the Committee of Ministers to supervise the implementation of measures designed to satisfy the respondent State's obligations under Article 46 of the Convention, it is the Court's task, as defined by Article 19 of the Convention, to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto” *and this task is not necessarily best achieved by repeating the same findings in large series of cases (...)*Therefore, in view of the recurrent problems with which the Court is dealing in the present case, it is within its competence to apply the pilot-judgment procedure in order to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at domestic level (Yuriy Ivanov Nikolayevich v Ukraine, 2009, para 82, *my italics*).

Using its inherent powers to decide on its jurisdiction, and with clear reference to the broad “doctrines” identified in Chapter 3 of the “object and purpose” of the Convention and that the Convention needs to be “practical and effective”, the Court concludes that this approach is well within its competence, in light of the Court’s task as defined by Article 19 of the Convention, or its “object and purpose”, and in light of the structural problems the Court is facing. With regard to the established “practical and effective” principle, the Court has in several of the judgements relied on this principle and highlighted the pressing number of similar judgements pending before the Court, and how the case overload threatens the effectiveness of the system as a whole. With regard to the number of repetitive applications, the Court has then stated in several of the judgements, that:

“This is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat

to the future effectiveness of the Convention machinery” (Maria Atanasiu and others v Romania, 2010, para 217, Suljagic v Bosnia and Herzegovina, 2009, para 63, Scordino v Italy, 2006, para 235, Greens and M.T. v United Kingdom, para 111, Broniowski v Poland, 2004, para 193).

As seen in the judgements, the Court has gone on to expand the procedure to include concretizations and time limits. These features of the PJP also have to be attributed to the inherent powers of the Court, as the Recommendation from the CoM merely invited the Court to identify structural problems in its judgements. In *Greens and M.T. v the United Kingdom* (2010), the Court went the furthest in specifying the measures to be taken in domestic legislation. The Court pointed in the judgement to the amount of similar applications before the Court, and to clear precedents in its case-law (Greens and M.T v The United Kingdom, 2010, para 111-113). Also in this judgement the Court reminded the respondent state on the ”object and purpose” of the Convention system and included the same reasoning in its judgement as the one cited above (Greens and M.T. v The United Kingdom, 2010, para 108).

Summarized, in establishing and further developing the approach, findings from these judgements suggest that the Court has to a great extent relied on its inherent powers and has brought attention to the broad principles established in Article 1 in conjunction with Article 46, as well as the broad principle established in Article 19. Furthermore, where the legal basis and applicability of the procedure has been challenged, the Court has, nonetheless, declared its mandate and pursued the approach.

4.2.9 Implementation of the judgements, a mixed picture

Seen formally, the Convention-system is very rigid. To alter the Convention or the rules of the Court it would require unanimity among the Contracting States. Another option would be to withdraw from the cooperation (Stone Sweet 2009a: 640). As pointed out in the theoretical chapter, a more obvious and greater danger for courts in general, and transnational courts in particular, exists in the fact that their judgements could remain not respected, ignored or misapplied by the institutions subject to them, hence the perception of courts as constrained actors (Carrubba, Gabel and Hankla 2008: 435).

The first Pilot Judgement, *Broniowski v Poland* (2004), was taken to a successful conclusion when new legislation was introduced and the pending cases were settled (European Court of Human Rights 2009: 2). A strike-out judgement the next year ended the matter, where similar applications could be resolved at domestic level, in line with the principle of subsidiarity. An applicant claimed that the compensation scheme introduced after *Broniowski v Poland* (2004) did not sufficiently protect his rights under the Convention. However, the Court rejected this claim in the admissibility decision, and expressed satisfaction with the implementation of the compensation schemes established after *Broniowski v Poland* (2004). Consequently, this and similar judgements were struck out of the list (Philip Leach et al. 2010: 51).

Whereas the Polish government was fully willing to cooperate in the *Broniowski v Poland* (2004), in *Hutten-Czapska v Poland* (2006), the second Pilot Judgement delivered against Poland, the same state contested that a pilot procedure should be used at all. Also in this case, the Polish government in the end brought their legislation into conformity with the Convention. Even if it took longer time than in *Broniowski v Poland* (2004), new legislation was finally introduced and implemented, and similar cases before the ECtHR were struck out of the list (Leach, Hardman and Stephenson 2010: 358). However, as Buyse (2009: 13) argues, one could question how willing a state is to comply with the judgements when it concerns issues with high political interests at stake. As pointed out, the violation found in *Hutten-Czapska v Poland* (2006) originated in a political intended legislation regulating rents on properties.

Also after *Lukenda v Slovenia* (2005), the Slovenian Government introduced new legislation as part of a reform package aimed at dealing with the structural problem of lengthy delays of legal proceedings. However, it is still not clear whether these changes at domestic level have been sufficient to give effective protection in line with the Court's findings (Philip Leach et al. 2010: 87-91).

In *Burdov (No2) v Russia* (2009) the case considered a wide-spread problem in Russia of the authorities' failure to enforce domestic court decisions. In the implementation process the Russian authorities have showed willingness to comply with the judgement, and have acknowledged the structural nature of the problem, a fact that the same Government rejected when the case was selected for the Pilot Judgement Procedure (*Burdov (No2) v Russia*, 2009, para 124). Furthermore, the Government have proved willing to pay compensation to

individuals in similar situations, but the legislative progress has been more problematic as the Government failed to introduce legislative proposals within the time limit set by the ECtHR (Philip Leach et al. 2010: 141, 168).

The case *Greens and M.T. v The United Kingdom* (2010), in which the Court found a violation of the right to vote for prisoners, the point made by Buyse (2009: 13) becomes more evident. Whether prisoners should be granted the right to vote had already been dealt with several times by the ECtHR. In particular, this judgement was a follow-up of *Hirst v The United Kingdom* (2005) and the lack of changes in UK legislation introduced after this judgement brought thousands of similar applications before the ECtHR. The legislative blanket ban on prisoners goes 140 years back in UK electoral law, and the judgement proved to be controversial. With an overwhelming majority, the UK Parliament voted in February 2011 to maintain the ban (Mail Online 2011a). In particular the fact that the judgement from the ECtHR required legislative changes caused controversy. The Prime Minister, David Cameron, commented he would rather pay compensation to prisoners whose right was violated than to try to pass legislation that had no chance of getting through the Parliament (Mail Online 2011b). Furthermore, Member of Parliament and the Conservative Party, Dominic Raab, stated in the debate that "It's time we send a very clear message: this House will decide whether prisoners get to vote, this house will decide the laws of the land" (cited in Mail Online 2011a). This judgement was arguably the strongest Pilot Judgement issued by the Court, where the Court held that the UK government had to bring forward proposals within six months as to how to change legislation so as to bring it into conformity with the Convention and the principles established in the Court's case-law. As the Parliament voted to maintain the blanket ban it becomes an urgent question for the effectiveness of the procedure to what extent the willingness and probability that the respondent states will comply with the judgements is contingent on the policy issue at stake.

It is also impossible to neglect that the PJP has emerged as a result of the pressing structural problems facing the Court in terms of the application overload. Erik Fribergh, the Court registrar, expresses in relation to the origin of the procedure some pessimism with regard to its effectiveness. According to him,

"the pilot judgement is an indication that the system doesn't work...the idea with the whole system should be that the Court delivers one judgement and then that

judgement should be properly enforced and executed by the state and supervised by the Committee of Ministers...” (Fribergh, cited in Philip Leach et al. 2010: 32).

In other words, he states the opinion that if the system would have worked the way it was intended, the procedure would itself not have been necessary. The states should themselves, in line with the principle of subsidiarity, resolve the origin of the violation, without the Court having to require this explicit in the judgements. This argument follows the same line as expressed by judge Zagrebelsky in his dissenting opinion in *Lukenda v Slovenia* (2005). He brought up the fact that the problem of repetitive and systemic human rights violations has been dealt with for many years already by the CoM, the supervisory institution, without too much success:

”Would a judgement like the present one add anything to the work of the Committee of Ministers? Would it make it easier and more effective? My answer is obviously not, and for that very reason this kind of judgement could ultimately run a real risk of undermining the authority of the Court” (*Lukenda v Slovenia*, 2005, partly dissenting opinion of judge Zagrebelsky).

The discussed judgement *Greens and M.T v United Kingdom* (2010) is illustrative in that respect. The legislative denial to grant prisoners the right to vote was an issue already dealt with by the Court in several judgements, among others in the mentioned *Hirst v United Kingdom* (2005), and caused controversy in the UK and implementation was, ultimately, voted down by the Parliament.

However, as Buyse (2009: 10) indicates, the new approach could also have a pedagogical effect by increasing the awareness of the states’ obligations under the Convention. The judgements do not only indicate what is wrong, but also make explicit to the respondent states their obligations under the Convention, and on the correct path to be taken by the states in order to live up to their obligations. As pointed out, several of the judgements *have* led to legislative changes and compliance from the states, and only future evidence of implementation of and compliance with these and coming judgements will be able to give clear answers to the effectiveness of the procedure.

4.3 A move towards constitutionalism? An answer to the research question

The thesis sought to investigate whether the PJP of the ECtHR contributes to the constitutionalisation of the human rights protection under the Court's jurisdiction. It was pointed out that evaluating this phenomenon within the framework of constitutionalism could serve usefully as an analytical device to understand both developments of and limitations to international law. In Chapter 2, I assembled a theoretical framework of constitutional dimensions, where it was established that constitutionalism entails that certain domains are fenced off from majoritarian control, but that the extent and scope may vary. Thus, I viewed constitutionalism as an analytical continuum, where it is stronger rooted to the extent that certain domains are taken away from majoritarian control and given protection as higher-order norms. Consequently, the process of constitutionalisation was viewed as the institutionalisation of higher-order norms, to which lower-order norms must conform. Furthermore, this process can take form both formal and substantive, through the institutionalisation of a formal institutional framework at the international level, and substantial through the institutionalisation and entrenchment of fundamental human rights as higher-order norms. The power-base of legal systems was conceptualized to be of a dual nature. Since a court resolves disputes with reference to broad principles that demand interpretation, application and concretization, this development can be driven by the Court. On the other hand, its judgements' political and societal impact can be obstructed by compliance and implementation problems, since courts do not dispose of capabilities to sanction or force compliance, and are dependent on the cooperation from the institutions subject to them to lend force to their decisions.

Chapter 3 was dedicated to the development of the Convention system. It was highlighted how the developments in the 1970s and 1980s and onwards saw the legalisation of the supervision system by gradually removing its political elements. This development culminated in Protocol No. 11 in 1998 which established the new Court and made acceptance for individual application mandatory on the states, thus completing a fully judicial system. Even when the aim of the protocol was to streamline the Court's operation, this could not outweigh the effects of enlargements and individual right to petition the Court directly. Consequently, the Court has seen application figures develop over the last decade, with which it has been unable to cope. The majority of incoming, admissible applications have been

repetitive applications that originated in structural problems, and in which precedent was already established in the Court's case-law. Chapter 3 also highlighted how the scope of the substantial protection of the values embodied in the single Articles of the Convention has been in gradual development, and new standards have been established in the Court's case-law throughout its continuous adjudication. Principles that now are taken for granted to fall in under the single Articles of the Convention once had to be established by the Court when faced with concrete cases. With the PJP, the Court now orders the states to pay close attention to these established standards, and requires them to secure this through legislative changes or the setting up of effective domestic remedies.

4.3.1 Institutionalisation of the procedure

Against this background, the findings from the analysis of the first docket of judgements reveal that the ECtHR formally has taken a step in constitutionalising the human rights protection under its jurisdiction. By contrasting the Pilot Judgements with the Court's traditional approach, the thesis finds that the Court has taken a fundamental new approach, and that in establishing this procedure as an adjudicative tool, this development has mainly been driven forward by the Court.

That its judgements could have legislative implications was established already in the Belgian Linguistic Case in 1968. However, under the traditional approach the Court recalled that it had no jurisdiction to order the respondent states to change or alter its legislation, or to make any declaratory statements in its judgements. Thus, until the Pilot Judgements, the Court dealt with applications exclusively on an individual basis, and it would fall to the discretion of the states to find the appropriate measures to be carried out at domestic level. The Court served the function as a "last resort", where individuals whose rights had been violated could obtain redress at the European level, and where monetary compensation was the normal redress to be ordered (Sadurski 2009: 412). As seen in the analysis, the Court has now ordered the states to alter legislation and to set up, through appropriate measures, effective domestic remedies that can secure the Convention rights not only for the applicant in the individual case, but for all similar applicants and potential applicants.

It is evident from the analysis that the Court has, through its practice in the first docket of judgements, formally institutionalised its competence to deal with cases in this manner. In

Broniowski v Poland (2004) the Court relied on the Resolution from the CoM and invoked the new interpretation of Article 46 in conjunction with Article 1. With the new interpretation, the Court established that the finding of a violation originating in a structural problem imposed on the states an obligation to deal with the structural problem, and secure the right not only for the individual applicant, but for all other applicants suffering from the structural problem that led to a violation.

After establishing this new interpretation, the Court has gone on to give concretizations and issue time-limits for the changes to be carried out. In subsequent judgements, it has relied on, and referred extensively to the precedents set in *Broniowski v Poland* (2004).

Through analysing the first docket of judgements, there is also evidence to suggest that the Court has relied heavily on the broad “doctrines” established earlier in its case-law in establishing the approach. Repeatedly in its reasoning, the Court has brought attention to the “object and purpose” of the Convention and that it needs to be “practical and effective”, and that it was unable to fulfil its objects efficiently until the Pilot Judgement Procedure, since it had to repeat its findings in a vast number of individual cases, where clear precedent was already established in its case-law. Accordingly, without these principles established earlier in the Court’s case-law, this approach would arguably not have been possible. The dissenting opinions from judge Zagrebelsky and the government objections have shown that there exists dispute to whether the Court actually has, or should have, this competence. Nonetheless, using its inherent powers to decide on its jurisdiction, the Court has held that the approach is within its competence, with reference to its new interpretation of Article 46, its “object and purpose” and in order for the Convention to remain “practical and effective”.

4.3.2 Higher-order norms, common European standards, and the Court as a “negative legislator”

The political consequences of this development, is that whereas the Court earlier addressed human rights issues exclusively on an individual basis, it now makes clear, ordering a direct legal obligation, that the Contracting States have to ensure that their domestic practices are in conformity with the Convention and the principles established in the Court’s case-law. As seen in the analysis, the Court has pointed directly at concrete legislation or acts, and/or ordered the states to set up effective domestic remedies that have to be in conformity with the

principles of the Convention and the standards established in the Court's case-law, and the Court has done this in the formal binding part. Thus, the responsibility to ensure this is located at domestic level, but the common standards are set by the ECtHR in its case-law, which have, as shown in Chapter 3, been subject to continuous development.

Where found to be necessary, the Court has gone on to concretize what these legislative changes or domestic remedies should include, and has made clear that they must be taken with respect to all individuals suffering from the structural problem. By that the Court is significantly narrowing the "margin of appreciation" for the respondent states to find the appropriate ways to deal with the structural problem revealed. The Court has established that for the states to fulfil their obligations, this may require the revision of legislation, and/or to establish effective domestic remedies that secure the right for all applicants. Thus, by performing this function, the Court clearly expresses to a greater extent, more directing, and more legally binding than before, that the principles of the Convention and the principles established in its case-law must be treated as higher-order norms, to which the respondent states' domestic practices must conform. By repeatedly referring to the Convention and its own case-law in the formal binding parts of the judgement, the Court expresses that the "margin of appreciation" on behalf of the states is only so wide as to find the appropriate ways to bring their practices into conformity with the Convention within the standards the Court has established and developed through its continuous adjudication. Thus, the standards established by the Court in its case-law must be regarded as minimum standards which are common to all the Contracting States, and the Court orders the governments to pay attention to these standards, as they have been developed in its case-law.

As seen in the analysis, the Court has on several occasions held that an important goal of the procedure is to "implement the principle of subsidiarity", so that individuals whose right has been violated can obtain redress for the violations at domestic level within reasonable time. According to this goal, domestic legislation and the domestic remedies needed to secure the rights, must, from the Court's viewpoint, live up to the standards established in its case-law and must, consequently, be regarded as higher-order norms. The logic behind this is that if this will not be the case, the Court has made clear that it has no other option than to repeat the findings in all individual applications at European level. Where the Court has established standards in its case-law as common European minimum standards under the Convention, it has to stick with these in its adjudication.

4.3.3 The effectiveness of the procedure

The power-base of legal systems was conceptualised to be of a “dual nature”. In the formal institutionalisation of the procedure, the analysis showed that the Court has played an active role when establishing the procedure and further developing it. On the other hand, the effectiveness of the procedure is dependent on the extent to which the respondent states respect and implement the Court’s decisions. As conceptualised in the theoretical part, in order for constitutionalism to be “deeply rooted”, and for its practical and political consequences, it is also necessary to take into account the effectiveness and authority these higher-order norms will be able to obtain from the institutions whose responsibility is to implement and put the judgements into effect. In other words, the success of the procedure is to a large extent dependent on whether the interferences from the ECtHR will be considered legitimate by the domestic authorities that have to implement the judgements. This was dealt with in the last section of the analysis.

Due to the recentness of the procedure, and the limited number of judgements delivered, it is too early to give any clear answers to the effectiveness of the procedure, and the experiences from the first judgements give a mixed picture. They can, however, give some indications, but would need to be more systematically investigated in later studies.

The reactions from the Polish government in the first two Pilot Judgements could indicate that the willingness of the respondent states to cooperate could be contingent on the policy issue at stake. Whereas the Polish government recognized the systemic problem in *Broniowski v Poland* (2004), in *Hutten-Czapska v Poland* (2006) the same Government disputed that the procedure should be used at all.

The reactions from the UK government after the judgement *Greens and M.T v the United Kingdom* (2010) clearly highlights the difficulties a transnational court can face if met with the perception that it has intervened to heavily in matters seen as part of the national, political domain. In this case, the European Court’s judgement caused great controversy and implementation was voted down by the UK Parliament. As seen through the statements of the Court registrar, Erik Friberg, and judge Zagrebelsky, the future effectiveness of the procedure could also be questioned due to the fact that the procedure has emerged as a result of that the system is not working, and facing pressing structural problems. As Buyse (2009: 8) indicates,

there is a danger that the procedure could become counterproductive. If the respondent states regard the Court's judgements to interfere too heavily in the legislative domain, do not implement the Court's judgement, or do not stick to the time limits the Court sets, its authority is explicitly challenged. It is still early to evaluate the real effectiveness of the procedure, but the experiences from the first judgements indicate the constrained environment, in which the Court operates. On the one hand its mandate is to secure to everyone under its jurisdiction the rights embodied in the Convention and according to the principles established in its case-law. On the other hand it is highly dependent on the cooperation of the respondent states for its success.

5.0 Concluding remarks

The starting point for this thesis was to investigate a recent institutional development of the European Court of Human Rights, established as the Pilot Judgement Procedure. As pointed out, the Convention system has been described as the most successful experiment in transnational, judicial protection of human rights in the world, but its effectiveness is challenged due to the rising application figures the last decades. Against this background, the thesis sought to investigate whether the Pilot Judgement Procedure contributes to the constitutionalisation of the European Convention system. As seen in the previous section, the thesis concludes that the Pilot Judgement Procedure has formally contributed to the constitutionalising of the human rights protection under the Court's jurisdiction, but, based on the experiences from the first docket of judgements, there exists uncertainty to its effectiveness. Furthermore, the findings from the thesis hold that this development has been mainly driven forward by the Court itself. To sum up from the previous section this is due to:

- The new interpretation of Article 46 establishing the new legal obligation this imposes.
- The further development and expansion of the procedure to include concretisations and time-limits.
- The Court has established all these features to be within its competence under this new approach.
- The Court's reasoning, reliance on, and interpretation of the broad "doctrines" .
- The questions surrounding the legal basis of the procedure.

Summarized, the procedure has enhanced the Court's constitutional role since:

- The Court may now addresses the cases on a general, rather than individual, basis, ordering the states to take measures to secure the right for everyone whose rights have been denied due to a structural problem.
- It follows a direct, formally binding legal obligation to ensure compliance on a general basis, and that this may include revision of legislation if necessary, and/or the setting up of effective domestic remedies.
- The domestic remedies or legislative changes must be in conformity with the Convention and the principles established in the Court's case-law, and the Court has on several occasions concretised the measures to be taken in that respect, thus

significantly narrowing the “margin of appreciation” on part of the states and to a greater extent establishing the principles of the Convention and the Court’s case-law as higher-order norms.

5.1 Further research

In light of these findings, future research should investigate its effectiveness more systematically, namely the extent to which the respondent states implement and comply with the judgements. Furthermore, in light of the conceptualised “dual nature” of legal systems’ power-base, and in light of the perception of courts as constrained actors, it should be systematically investigated whether, or to what extent, implementation and compliance is contingent on the salience of the policy issues at stake. The experience from the first judgements could suggest this, but it would need to be more systematically investigated as the number of judgements increases.

The thesis also indicated, based on this first docket of judgements, that there could be a lack of consistency in the approach, or a wide discretion on part of the Court in the way to apply it. In two judgements that shared the essential features for a case suitable for the PJP, the Court chose not to order general measures in the judgement, and gave no indications to why, even when these judgements were dealt with after *Broniowski v Poland* (2004). Furthermore, the Court has applied the procedure differently in different cases, also where it has ordered general measures to be carried out, sometimes by concretising the measures that need to be taken, and sometimes by issuing time-limits and by putting similar applications on hold. As seen in the analysis, the Court sought to formalise this by adding a new “Rule 61” of the “Rules of the Court”, but this did not bring much clarification. Given this discretion on part of the Court, it should be more thoroughly investigated how and when the Court selects applications to be treated under the new procedure. Following the same logic, coming studies should also investigate when, and contingent on which factors, the Court chooses the different lines.

6.0 List of judgements from the European Court of Human Rights³⁷

Airey v Ireland, No. 6289/73, 09.10.1979

Akdivar and Others v Turkey, No. 99/1995/605/693, 16.09.1996

Belgian Linguistic Case, No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23.07.1968

Belios v Switzerland, No. 10328/83, 29.04.1988

Broniowski v Poland, No. 31443/96, 22.6.04

Burdov v Russia (No. 2), No. 33509/04, 15.01.09

Campbell and Cosans v United Kingdom, No. 7511/76 and No. 7745/76, 23.03.1983

Dudgeon v United Kingdom, No. 7525/76, 24.02.1983

F v Switzerland, No. 11329/85, 18.12.1987

Golder v United Kingdom, No. 4451/70, 21.02.1975

Greens and M.T. v United Kingdom, No. 60041/08 and No. 60054/08, 23.11.2010

Hirst v The United Kingdom, No. 74025/01, 06.10.2005

Hutten-Czapska v Poland, No. 35014/97, 22.2.05; 19.6.06 (GC); 28.4.08 (GC)

Le Compte, Van Leuven and De Meyre v Belgium, No. 6878/75 and 7238/75, 18.10.1982

Lukenda v Slovenia, No. 23032/02, 06.10.05

Marckx v Belgium, No. 6833/74, 13.06.1979

Maria Atanasiu and Others v Romania, No. 30767/05 and 33800/06, 12.10.2010

Olaru and Others v Moldova, No. 476/07, 22539/05, No. 17911/08 and No. 13136/07, 28.07.2009

Pauwels v Belgium, No. 10208/82, 26.05.1988

Rumpf v Germany, No. 46344/06, 02.09.2010

Scordino v Italy, No. 36813/97, 29.03.2006

Suljagic v Bosnia and Herzegovina, No. 27912/02, 02.11.2009

Tyrer v United Kingdom, No. 5856/72, 25.04.1978

Urbarska Obec Trencianske Biskupice v Slovakia, No. 74258/01, 27.11.2007

Xenides-Arestis v Turkey, No. 46347/99, 22.12.2005

Yuriy Nikolayevich Ivanov v Ukraine, No. 40450/04, 15.10.2009

³⁷ Available at: HUDOC (<http://cmiskp.echr.coe.int/tpk197/search.asp?skin=hudoc-en>)

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