Policing Separation of Powers: A New Role for the European Court of Human Rights?

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European Court of Human Rights – Separation of powers – *Stafford/Kleyn* and *A/Kart* strands of case-law – Problematic aspects of both strands – Limitations and institutional deficiencies of the Court in this area – Constitutionalisation of and shift in the role of the Court

Introduction

In 2002 the European Court of Human Rights (hereinafter also 'ECtHR' or the 'Strasbourg Court') for the first time explicitly relied on the notion of separation of powers in its substantive reasoning. More specifically, the Grand Chamber in *Stafford* v. *UK*, when examining the issue of compatibility of the judicial office with other tasks, stressed that 'the notion of separation of powers between the executive and the judiciary … has assumed growing importance in the case-law of the Court.'[1] Since then, both the Grand Chamber and various sections of the ECtHR have reaffirmed the importance of the principle of separation of powers[2] and, by now, this principle has become firmly anchored in the ECtHR's case-law.

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[1] ECtHR 28 May 2002, Case No. 46295/99, § 78, *Stafford* v. *United Kingdom* [GC], (reference to *Incal* v. *Turkey* [GC] omitted).

[2] ECtHR 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 193, *Kleyn and Others* [GC]; ECtHR 22 June 2004, Case No. 47221/99, § 29, *Pabla Ky* v. *Finland*; ECtHR 11 Sept. 2006, Case No. 65411/01, § 59, *Sacilor Lormines* v. *France*. *See also* ECtHR 17 Dec. 2002, Case No. 35373/97, §§ 75-78, *A.* v. *United Kingdom*; ECtHR 30 Jan. 2003, Case No. 40877/98, § 55, *Cordova* v. *Italy (no. 1)*; ECtHR 30 Jan. 2003, Case No. 45649/99, § 56, *Cordova* v. *Italy (no. 2)*; ECtHR 3 June 2004, Case No. 73936/01, § 49, *DeJorio* v. *Italy*; ECtHR 3 Dec. 2009, Case No. 8917/05, § 81, *Kart* v. *Turkey* [GC].

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This means that the ECtHR, intentionally or not, has increasingly intervened in the signatory states' separation of powers within the last decade.

To be sure, the ECtHR had reached several decisions touching on the separation of powers even before the turn of the century. As early as 1970, the ECtHR held in *Delcourt* v. *Belgium* that the independence and impartiality of the Belgian Court of Cassation was not adversely affected by the presence of a member of the Procureur Général's department, a person representing another branch of government, at its deliberations.[3] Two decades later, it changed its view in *Borgers* v. *Belgium* and said that 'the opinion of the Procureur Général's department cannot be regarded as neutral from the point of view of the parties to the cassation proceedings'[4] and concluded that the Avocat Général's participation in the Court's deliberations, coupled with the absence of an opportunity for the applicant to submit his observations on the *avocat général*'s arguments, was incompatible with Article 6(1) of the European Convention on Human Rights (hereinafter also the 'ECHR' or the 'Convention').[5] Since then the ECtHR has been on something of a quest against similar judicial officers in other member states of the Council of Europe (hereinafter also the 'CoE').[6]

However, the ECtHR's involvement in separation of powers issues has not been limited to advocates general. The ECtHR has held, among other things, that a mixing of the advisory and adjudicatory functions of the Council of State in Luxembourg vitiates the impartiality of the tribunal in question,[7] and that various courts martial in the United Kingdom are incompatible with the Convention.[8] Leaving aside the case-law affecting the judiciary, the ECtHR has been particularly active in discussing various facets of parliamentary immunity[9] that raised the

[3] ECtHR 17 Jan. 1970, Case No. 2689/65, §§ 27-38, *Delcourt* v. *Belgium*.

[4] ECtHR 30 Oct. 1991, Case No. 12005/86, § 26, *Borgers* v. *Belgium*.

[5] ECtHR 30 Oct. 1991, Case No. 12005/86, § 29, *Borgers* v. *Belgium*.

[6] *See* ECtHR 20 Feb. 1996, Case No. 15764/89, §§ 28-31, *Lobo Machado* v. *Portugal* [GC]; ECtHR 25 June 1997, Case No. 20122/92, §§ 40-42, *Van Orshoven* v. *Belgium*; ECtHR 20 Feb. 1996, Case No. 19075/91, § 33, *Vermeulen* v. *Belgium*; ECtHR 27 March 1998, Case No. 21351/93, § 43, *J.J.* v. *Netherlands*; ECtHR 27 March 1998, Case No. 21981/93, § 44, *K. D. B.* v. *Netherlands*; ECtHR 31 March 1998, Case Nos. 23043/93 and 22921/93, §§ 101-103, *Reinhardt and Slimane-Kaid* v. *France*; and ECtHR 8 Feb. 2000, Case No. 28488/95, *McGonnell* v. *United Kingdom*; ECtHR 7 June 2001, Case No. 39594/98, *Kress* v. *France* [GC]; and ECtHR 12 April 2006, Case No. 58765/00, *Martinie* v. *France* [GC]. For an overview of development of the Strasbourg jurisprudence on this issue, *see* N. Krisch, 'The Open Architecture of European Human Rights Law', 71 *Modern Law Review* (2008) p. 183.

[7] ECtHR 28 Sept. 1995, Case No. 14570/89, *Procola* v. *Luxembourg*. *See also* other cases discussed below in the section devoted to the *Stafford/Kleyn* strand of case-law.

[8] *See*, e.g., ECtHR 26 Feb. 2002, Case No. 38784/97, *Morris* v. *United Kingdom*; or ECtHR 16 Dec. 2003, Case No. 57067/00, *Grieves* v. *United Kingdom* [GC]. *Cf.* ECtHR 16 Dec. 2003, Case No. 48843/99, *Cooper* v. *United Kingdom* [GC].

[9] *See* the *A/Kart* strand of case-law discussed below.

issue of division of powers between the legislature and the judiciary. Similarly, when the ECtHR had to decide on whether 'statutory overrides'[10] (legislative intrusion into judicial decision-making) and binding opinions of the executive branch on the implementation and reciprocity of an international treaty[11] are compatible with the Convention, it took a stance on the separation of powers. Finally, the scope of the law-making power of judges also raises serious issues of separation of powers, albeit less visibly.[12]

Amazingly enough, despite decades of incessant talk about virtually every aspect of the Strasbourg case-law, little attention has been paid to its pronouncements on separation of powers. Most studies dealing with this issue in the Strasbourg case-law focus on particular judgments,[13] on their consequences in a particular country[14] or on a particular article of ECHR.[15] Other scholars discuss these issues briefly in footnotes.[16] Only a few authors have attempted to analyse this phenomenon systematically.[17] This apparent lack of interest in the separation of powers issues before the ECtHR can be partly explained by the fact that its case-law has been so far directed at only a part of the separation of powers doctrine, namely the separation of powers between the judiciary and the other branches of govern-

[10] *See*, e.g., ECtHR 19 April 1994, Case No. 16034/90, *Van de Hurk* v. *Netherlands*; ECtHR 6 Oct. 2005, Case No. 11810/03, *Maurice* v. *France* [GC]; and ECtHR 27 April 2004, Case No. 62543/00, *Gorraiz Lizarraga and Others* v. *Spain*.

[11] *See* ECtHR 24 Nov. 1994, Case No. 15287/89, *Beaumartin* v. *France*; or ECtHR 13 Feb. 2003, Case No. 49636/99, *Chevrol* v. *France*. On the autonomy of courts, *see also* S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford UP 2006) p. 58.

[12] For instance, the fact that the ECtHR accepts the case-law of national courts as a source of law (ECtHR 24 April 1990, Case No. 11801/85, § 29, *Kruslin* v. *France*) might have significant repercussions on separation of powers in many Continental legal systems.

[13] *See*, e.g., V. Berger, *Jurisprudence de la Cour Européenne des Droits de l'Homme* (Paris, Sirey 2007) p. 231 or p. 282-283.

[14] *See*, e.g., C. Dupré, 'France', in R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe*, (Oxford, Oxford University Press 2001) p. 331; D. Spielmann, 'Luxembourg', in ibid., p. 556-557; R. Blackburn, 'The United Kingdom', in ibid., p. 989-991; J. Callewaert, 'Au-delà des apparences… d'un revirement', *Revue trimestrielle des droits de l'homme* (1992) p. 204; E. Barendt, 'Separation of Powers and Constitutional Government', in R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (Dartmouth 2005) p. 291-292; or I. Cabral Barreto, 'Les effets de la jurisprudence de la Cour européenne des droits de l'homme sur l'ordre juridique et judiciaire portugais', in *Liber Amicorum Luzius Wildhaber* (Kehl/Strasbourg/Arlington, Engel Verlag 2007) p. 81.

[15] *See*, e.g., F. Sudre, *Droit européen et international des droits de l'homme*, 7th edn. (Paris, PUF 2005) p. 354; P. Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (Antwerp, Intersentia 2006) p. 582-589 and 612-623; and C. Ovey and R. White, *The European Convention on Human Rights*, 4th edn. (Oxford, Oxford University Press 2006) p. 181-185 or p. 231.

[16] *See*, e.g., J. Soeharno, *Judicial Integrity* (Farnham, Ashgate, 2009) p. 7, 12, 21 and 133.

[17] For notable exceptions, *see* S. Trechsel 2006, *supra* n. 11, ch. 3; and D. Popović, 'European Court of Human Rights and the Concept of Separation of Powers', in M. Prabhakar (ed.), *Separation of Powers: Global Perspectives* (Iefai University Press 2008) p. 194.

ment. The ECtHR Court has hardly ever expressed itself on division of powers between the legislature and the executive or on the vertical separation of powers,[18] which in constitutional theory by some are considered to be equally or even more important.[19] Nevertheless, this explanation does not fully explain why many fundamental questions regarding separation of powers issues before the ECtHR have not yet been answered and why some of them have not even been posed.

Among such fundamental questions are the following:

1. Does the ECtHR have sufficient expertise to decide on 'separation of powers' within the CoE member states?
2. Is the ECtHR's intrusion into 'separation of powers' within CoE member states legitimate?
3. Are there any inherent pitfalls or limits embedded in the institutional setting of the ECtHR, which can hear cases dealing with separation of powers only via individual complaints?
4. Does the ECtHR advocate a particular model of separation of powers?
5. Does it make a difference if the case before the ECtHR is viewed through a 'separation-of-powers' lens rather than through a (purely) 'human-rights' lens?
6. And finally, does the gradual intervention of the ECtHR into the realm of separation of powers imply a gradual shift in the role of the ECtHR as such, arguably towards a 'European Constitutional Court'?

This article cannot answer all of these questions. Rather, it aims to stir debate on these worrying issues. The underlying rationale of this article is that there is something disturbing in the fact that the Strasbourg court has become the forum for adjudicating separation of powers issues within the CoE member states. Even if we leave aside the lack of democratic legitimacy for such an endeavour, we must still critically examine whether the ECtHR has sufficient expertise to deal with these issues and, even more importantly, whether the ECtHR, given the institutional deficiencies addressed in more detail below, is a proper venue for deciding on the division of powers within the CoE member states.

It must also be noted that this article does not advocate a particular model of separation of powers being adopted by the ECtHR. For this reason, different theories of separation of powers (developed with regard to national systems) are not elaborated in detail here. The main point of this article is to show that the Strasbourg Court case-law has been increasingly affecting the division of powers

[18] Note that the ECtHR has consistently found the applications lodged by the decentralised organs inadmissible for incompatibility *ratione personae*; *See*, e.g., ECtHR 9 Nov. 2010, Case Nos. 1093/08 and others, *Demirbaş and others* v. *Turkey* (dec.).

[19] I am grateful for this observation to the anonymous reviewer.

within CoE member states and that this goes largely unnoticed. It argues that the ECtHR should take into account that there is a variety in separation of powers models in Europe and (unless it transparently develops its own theory of separation of powers) it should show a greater deference to the domestic actors, and to the national constitutional courts in particular, in these issues. In other words, the Convention should be interpreted so as to accommodate different concepts of separation of powers.

The structure of this article is as follows. It first contrasts the explicit jurisdiction of most European constitutional courts to adjudicate issues of separation of powers with the lack of such jurisdiction before the ECtHR, and briefly discusses the ECtHR's views on the concept of separation of powers. Subsequently, it is shown that, despite a lack of express competence in the Convention, the ECtHR has managed to intervene in separation of powers issues within CoE member states indirectly – via individual applications. To illustrate this phenomenon, two strands of the ECtHR's case-law, one concerning the institutional design of national judiciaries and the other dealing with parliamentary immunity, are analysed in detail. Based on this case study, the following section focuses on the structural problems and identifies several institutional limitations of the ECtHR in addressing issues of separation of powers within the CoE member states.

Separation of powers jurisdiction of the ECtHR

This section analyses the separation of powers jurisdiction of the ECtHR and subsequently addresses the ECtHR's position on the concept of separation of powers. The aim of this part is two-fold. First, it facilitates a deeper understanding of the ECtHR's case-law containing a separation of power element. Secondly, it identifies specific institutional features of the ECtHR that distinguish it from European constitutional courts and affect its ability to deal with issues of separation of powers.

(Lack of) separation of powers jurisdiction of the ECtHR

There is a stark contrast between the separation of powers jurisdiction of the ECtHR and that of most European constitutional courts. While European constitutional courts have been explicitly granted the power to decide on both horizontal and vertical separation of powers[20] and some of them were established

[20] *See*, e.g., Art. 93(1) sentence 1 of the German Basic Law; Art. 134 second indent of the Italian Constitution; and Art. 2(1)(d) of the Organic Law on the Constitutional Tribunal in conjunction with Art. 161(1)(d) of the Spanish Constitution. *See also*, V.F. Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) at p. 29 (with further references); and W. Sadurski, 'Twenty Years after the Transition: Constitutional Review in Central and

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primarily in order to police the division of powers,[21] the ECtHR has very limited competences in the area of separation of powers. More specifically, the ECtHR has limited powers to arbitrate conflicts among CoE member states (state-against-state conflicts) under inter-State cases jurisdiction[22] and minimal powers to police the division of powers between the CoE organs and the CoE member states (CoE-against-state conflicts) under its advisory opinion jurisdiction. It has no explicit jurisdiction to address competence conflicts *among* CoE organs (CoE-organ-against-CoE-organ conflicts) or *within* CoE member states (state-organ-against-state-organ conflicts).

Interestingly, if one looks at how the ECtHR fares in comparison to the Court of Justice, the highest judicial organ of the European Union (EU), one will see that the ECtHR's separation of powers jurisdiction lags even behind that of the Court of Justice.[23] The Court of Justice has powers to resolve conflicts arising between institutions of the EU, between EU institutions and EU member states as well as between EU member states themselves. The only competence which has not been conferred explicitly on the Court of Justice is that to arbitrate in conflicts between organs *within* EU member states. In a nutshell, while the 'constitutional court role'[24] of the Court of Justice is, in principle, limited to the European level and the EU-MS relationship, the ECtHR lacks even this separation of powers competence. In contrast to the Court of Justice, the Strasbourg court was originally meant to decide solely on fundamental rights cases and the drafters of the Convention did not envisage that the ECtHR would ever be involved with issues relating to the separation of powers.

Nevertheless, despite its limited – in fact non-existent – separation of powers jurisdiction, the ECtHR has been increasingly dealing with separation of powers issues. But how is this possible? Via which procedure? The answer to the second question is simple – via individual applications. The first question is more intriguing. A simple answer is that certain rights guaranteed in ECHR, such as the 'right

Eastern Europe', *Sydney Law School Research Paper* No. 09/69 (2009), and in particular the table at p. 38.

[21] *See* T. Ginsburg, 'The Global Spread of Constitutional Review', in K. Whittington et al. (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) p. 86.

[22] Note that the subject matter of inter-state cases under Art. 33 ECHR is limited to 'any alleged breach of the provisions of the Convention and the Protocols.'

[23] To be sure, it is not the ECtHR's fault that it does not have the power to decide on separation of powers issues. However, the fact that it decides solely on fundamental rights cases does not mean that it can ignore the consequences of its judgments on separation of powers within CoE member states.

[24] The Court of Justice has been labelled as the 'constitutional court for the EU' quite often. *See*, e.g., B. Vesterdorf, 'A Constitutional Court for the EU?', 4 *International Journal of Constitutional Law* (2006) p. 607; M. Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court', 4 *International Journal of Constitutional Law* (2006) p. 650; or Q.L. Hong, 'Constitutional Review in the Mega-Leviathan: A Democratic Foundation for the European Court of Justice', 16 *European Law Journal* (2010) p. 695.

to independent and impartial tribunal established by law' under Article 6 ECHR,[25] have an intrinsic separation of powers aspect. Nevertheless, separation of powers issues before the ECtHR have been raised under other rights and the first question thus cannot be answered in abstract. Before we provide an in-depth analysis of the ECtHR's case-law in two areas – incompatibility of the judicial office with other tasks and parliamentary immunity – it is first necessary to address the ECtHR's position on the *concept* of separation of powers.

The concept of separation of powers in the ECtHR's case-law

This analysis of the ECtHR's views on the concept of separation of powers can be very short for a simple reason – the ECtHR has avoided any theorising about separation of powers so far.[26] As was already mentioned, the ECtHR explicitly identified the growing importance of the notion of separation of powers for the first time in *Stafford* v. *United Kingdom* in the context of the compatibility of the judicial office with other tasks.

In *Kleyn and Others* v. *Netherlands*, the Grand Chamber revisited the same issue and this time it elaborated on the concept of separation of powers. More specifically, it held:

> Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (…), *neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction*. The question is always whether, in a given case, the requirements of the Convention are met. *The present case does not, therefore, require the application of any particular doctrine of constitutional law* to the position of the Netherlands Council of State.[27]

This position of the Grand Chamber was subsequently reaffirmed in other judgments dealing with the issue of compatibility of the judicial office with other tasks.[28]

[25] Note that this right in fact stipulates four requirements: (1) the decision-making body must be a 'tribunal'; (2) the tribunal must 'be established by law'; (3) the tribunal must be independent; and (4) the tribunal must be impartial. *See* Trechsel 2006, *supra* n. 11, p. 47-50.

[26] One may object that the ECtHR does not have to theorise about separation of powers because of its limited task, which is directed only at assessment of alleged violations of human rights. I disagree with this view. If the ECtHR wants to delete a particular institutional arrangement from the set of permitted choices, it *must* theorise about separation of powers.

[27] ECtHR 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 193, *Kleyn and Others* [GC] (emphasis added, citation omitted).

[28] *See* ECtHR 22 June 2004, Case No. 47221/99, § 29, *Pabla Ky* v. *Finland*; and ECtHR 11 Sept. 2006, Case No. 65411/01, § 59, *Sacilor Lormines* v. *France*.

However, apart from the above-mentioned *Stafford/Kleyn* strand of case-law on separation of powers, the ECtHR seems to have developed another, starting with *A.* v. *United Kingdom*.[29] The issue in *A.* v. *United Kingdom* was whether the absolute parliamentary privilege which protected the statements of MPs about the applicant in Parliament violated the applicant's right of access to a court under Article 6(1) ECHR. The ECtHR eventually found no violation of Article 6(1) ECHR and based its conclusion on, among other things, the ground that parliamentary immunity pursued the legitimate aim of 'maintaining the separation of powers between the legislature and the judiciary.'[30] Since then this reasoning has been accepted by various sections of the ECtHR[31] and, eventually, also by the Grand Chamber in *Kart* v. *Turkey*.[32]

Both these strands will be discussed in more detail in the section that follows. At this point, suffice to say that the ECtHR claims that it does not invoke any particular concept of separation of powers. However, it is necessary to add one caveat here. The fact that the ECtHR *says* that it is not invoking any particular concept of separation of powers does not necessarily mean that it is not *doing* so in practice, as will transpire in the following sections.

'Separation of powers issues' before the ECtHR

This section discusses how separation of powers issues reach the ECtHR in concrete cases, who sends them to Strasbourg, what potential traps are awaiting the ECtHR in adjudicating these issues and how inherent institutional limits may affect the ECtHR's functioning as an arbitrator of conflicts between branches within the CoE member states. As the scope of this article does not permit addressing the relevant case-law of the ECtHR in its entirety, only two subsets of cases dealing with the 'separation of powers' issues are examined. However, even these two subsets of cases suggest that the ECtHR has been increasingly called to assess institutional design issues that have serious repercussions for separation of powers within CoE member states, and that this goes largely unnoticed. The subsequent section then looks at the structural issues and addresses some of the big questions mentioned in the introduction of this article.

As suggested above, this section will discuss only two areas of ECtHR's case-law. These areas are the incompatibility of the judicial office with other tasks; and parliamentary privilege. These two areas coincide with the two strands of the

[29] ECtHR 17 Dec. 2002, Case No. 35373/97, *A.* v. *United Kingdom*.

[30] ECtHR 17 Dec. 2002, Case No. 35373/97, § 77, *A.* v. *United Kingdom*.

[31] ECtHR 30 Jan. 2003, Case No. 40877/98, § 55, *Cordova* v. *Italy (no. 1)*; ECtHR, 30 Jan. 2003, Case No. 45649/99, § 56, *Cordova* v. *Italy (no. 2)*; ECtHR, 3 June 2004, Case No. 73936/01, § 49, *DeJorio* v. *Italy*; ECtHR 8 July 2008, Case No. 8917/05, § 81, *Kart* v. *Turkey*.

[32] ECtHR 3 Dec. 2009, Case No. 8917/05, § 81, *Kart* v. *Turkey* [GC].

ECtHR's case-law identified in the previous section. The *Stafford/Kleyn* strand of case-law deals with the incompatibility of the judicial office with other tasks, whereas the *A/Kart* strand concerns parliamentary privilege. These two strands are singled out from the Strasbourg case-law for two reasons. First, the ECtHR explicitly addressed the separation of powers aspects in these cases and was most eloquent in reflecting upon them. Secondly, these two strands address issues that are relevant for most CoE states.

The analysis looks at the ECtHR's case-law from the separation of powers angle instead of the conventional human rights angle. As a consequence, it examines the ECtHR's case-law from the point of view of national 'constitutional engineers', who are concerned more about what the ECtHR requires the CoE member states to do in order to put their division of powers in conformity with the ECHR rather than under which article the ECtHR eventually tackled a particular 'separation of powers' issue.

The Stafford/Kleyn *strand of case-law: incompatibility of the judicial function with other tasks*

The first set of cases with a significant separation of powers dimension deals with an important issue of the 'judicial design', namely the incompatibility of the judicial function with other tasks. This *Stafford/Kleyn* strand of case-law is particularly interesting for two reasons. First, it goes to the heart of Council of State-like institutions, which combine a judicial role with an advisory role on legislation. For instance, the French *Conseil d'Etat* (Council of State), a 'sacred cow' of the French judicial system and an 'archetype' of many administrative tribunals throughout Europe, developed from an advisory body and still fulfils both advisory and adjudicatory roles.[33] Many councils of state, designed according to the French model, do so as well. Second, the issue of incompatibility of the judicial office with other functions arise in non-francophone jurisdictions too. In many civil law countries, judges can be temporarily assigned to the Ministry of Justice or may work simultaneously as arbitrators or consultants,[34] or members of the prosecution service or the Bar can on a temporary basis sit as (substitute) judges.

[33] On the importance of the French *Conseil d'Etat, See*, e.g., J.-P. Costa, *Le Conseil d'Etat dans la societé contemporaine* (Paris, Economica1993); M. Fromont, *Droit administratif des Etats européenes* (Paris, PUF 2006) p. 14-33; B. Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Cambridge, Polity Press 2010), available also in French (*La Fabrique de Droit: Une ethnographie du Conseil d'Etat*, Paris, La Découverte 2002); J. Massot and T. Girardot, *Le Conseil d'Etat* (Paris, Hachette 1999); B. Stirn, *Le Conseil d'Etat: Son rôle, sa jurisprudence* (Paris, Hachette 1991); or Collectif, *Deuxième Centenaire du Conseil d'Etat. Deux volumes spéciaux de la Revue Administrative* (Paris, PUF 2001).

[34] The recent report of the European Commission for the Efficiency of Justice (CEPEJ) provides a useful comparison of activities with which judges are allowed to combine their function in the

The ECtHR initially took a deferential stance towards incompatibility issues. The first case that raised these issues was *Campbell and Fell* v. *United Kingdom*,[35] where the Prison Board of Visitors found both applicants guilty of the disciplinary offences of mutiny and incitement to mutiny. In Strasbourg, Mr. Campbell alleged, among other things, that the Board of Visitors which heard his case was not an 'independent' tribunal within the meaning of Article 6(1) ECHR. He contended that the Boards were, in practice, an arm of the executive: as regards many of their functions, they were under the control of the prison authorities and had to accept the Home Secretary's directions.[36] The ECtHR disagreed and opined that

> [t]he impression which prisoners may have that Boards [of Visitors] are closely associated with the executive and the prison administration is a factor of greater weight, particularly bearing in mind the importance in the context of Article 6 of the maxim 'justice must not only be done: it must also be seen to be done,

but it added immediately that 'the existence of such sentiments on the part of inmates, which is probably unavoidable in a custodial setting, is not sufficient to establish a lack of "independence".'[37] Put differently, neither the accumulation of both adjudicatory and supervisory roles nor the frequent contacts between the boards and the authorities were found to be detrimental to judicial independence.

The institution of the Council of State was for the first time challenged in *Procola* v. *Luxembourg*.[38] The applicant association pointed out that four of the five members sitting on the Judicial Committee of the Conseil d'Etat when it ruled on Procola's application had previously sat on the advisory panel of the Conseil d'Etat which had given its opinion on the draft legislation applicable in the present case. As a result, it complained that the Judicial Committee of the Conseil d'Etat was not independent and impartial. The ECtHR eventually found that the Judicial Committee of the Conseil d'Etat was an independent tribunal.[39] However, it concluded that 'the mere fact that certain persons successively performed … [advisory and judicial] function[s] in respect of the same decisions is capable of casting doubt on the institution's structural impartiality'[40] and found a violation of Article 6 on this count.

CoE member states. *See* CEPEJ: *Evaluation of European Judicial* System, 4th edn. (2010) (2008 data) p. 220-222.

[35] ECtHR 28 June 1984, Case Nos. 7819/77 and 7878/77, *Campbell and Fell* v. *United Kingdom*.

[36] ECtHR 28 June 1984, Case Nos. 7819/77 and 7878/77, § 77, *Campbell and Fell* v. *United Kingdom*.

[37] ECtHR 28 June 1984, Case Nos. 7819/77 and 7878/77, § 81, *Campbell and Fell* v. *United Kingdom* (both citations).

[38] ECtHR 28 Sept. 1995, Case No. 14570/89, *Procola* v. *Luxembourg*.

[39] ECtHR 28 Sept. 1995, Case No. 14570/89, § 43, *Procola* v. *Luxembourg*.

[40] ECtHR 28 Sept. 1995, Case No. 14570/89, § 45, *Procola* v. *Luxembourg*.

Five years later, the ECtHR applied the *Procola* criterion to the institution of Bailiff at the Royal Court of Guernsey, in *McGonnell*. It stressed that 'in both cases a member … of the deciding tribunal had been actively and formally involved in the preparatory stages of the regulation at issue'[41] and then held 'that any direct involvement in the passage of legislation, or of executive rules [was] sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue.'[42] Since the Bailiff exercised both advisory and adjudicatory roles in the present case, the ECHR found a breach of Article 6(1) of the ECHR. As Popović aptly put it, the ECtHR made clear that 'a person could not conduct business of more than one branch of government.'[43]

In 2003, the Grand Chamber stepped in and pronounced its view on the subject. The case before the Grand Chamber, *Kleyn and Others* v. *Netherlands*,[44] concerned the role of the Dutch Council of State. The applicants complained that the Administrative Jurisdiction Division of the Council of State was not independent and impartial, because the Council of State exercised both advisory and judicial functions. More specifically, the Plenary Council of State advised on the Transport Infrastructure Planning Bill, and subsequently the Administrative Jurisdiction Division of the Council of State decided on the applicants' appeals against the routing decision, which is a decision taken on the basis of the procedure provided for in the Transport Infrastructure Planning Act.

The Grand Chamber defined the core question as follows – whether it was compatible with the requirement of the 'objective' impartiality of a tribunal under Article 6(1) of the ECHR that the Council of State's institutional structure had allowed certain of its ordinary councillors to exercise both advisory and judicial functions.[45] The answer in the abstract was yes, as long as the advisory opinion and the judicial decision did not involve 'the same case' or 'the same decision'.[46] This new criterion allowed the Grand Chamber to distinguish the instant case from the *Procola* and *McGonnell* judgments. The ECtHR held that, in contrast to

[41] ECtHR 8 Feb. 2000, Case No. 28488/95, § 55, *McGonnell* v. *United Kingdom*.

[42] ECtHR 8 Feb. 2000, Case No. 28488/95, § 55, *McGonnell* v. *United Kingdom*.

[43] Popović 2008, *supra* n. 17, p. 201. *See also* ECmHR 8 March 1989, Case No. 12170/86, §§ 43 and 49-58, *Jon Kristinsson* v. *Iceland* (the European Commission of Human Rights found the Icelandic system, where the offices of county and town magistrates were charged with the duties of both the judge and the chief of police, in breach of Art. 6(1) ECHR; note that the case was settled before the ECtHR).

[44] ECtHR 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98 and 46664/99, *Kleyn and Others* [GC].

[45] ECtHR 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 198, *Kleyn and Others* [GC].

[46] ECtHR 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 200, *Kleyn and Others* [GC].

situations examined in *Procola* and *McGonnell*, 'the advisory opinions [in *Kleyn*] given on the Transport Infrastructure Planning Bill and the subsequent proceedings on the appeals brought against the routing decision … [could not] be regarded as involving "the same case" or "the same decision".'[47]

Leaving aside the issue of whether the criterion of 'the same case' or 'the same decision' was interpreted too narrowly or not,[48] it is obvious that the Grand Chamber departed from ECtHR's position in the *Procola* and *McGonnell* judgments[49] and made clear that the consecutive exercise of advisory and judicial functions within one body *in itself* does not suffice to cast doubt on the institution's structural impartiality.[50] It will do so if and *only if* 'the same case' or 'the same decision' is involved. Therefore, it seems that the Grand Chamber narrowed the*ratio decidendi* of the *Procola* and *McGonnell* judgments and sent the message to the ECtHR's sections that they might have gone too far.[51]

The subsequent cases only confirmed this trend.[52] In *Pabla Ky* v. *Finland*,[53] decided just a few weeks after *Kleyn*, the ECtHR went even further and accepted the simultaneous exercise of legislative and judicial functions by the same person. As in*Kleyn*, the ECtHR invoked 'the same case' criterion and held that 'unlike the situation it examined in *Procola* v. *Luxembourg* … and *McGonnell* …, M.P.(that person) had not exercised any prior legislative, executive or advisory function in respect of the subject-matter or legal issues before the Court of Appeal for decision in the applicant company's appeal' and, therefore, '[t]he judicial proceedings … cannot be regarded as involving "the same case" or "the same decision".'[54] However, most intriguing is the addendum, where the ECtHR suggested that it was

[47] ECtHR 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 200, *Kleyn and Others* [GC].

[48] For more guidance on this issue, compare the concurring opinion of Judge Ress with the dissenting opinion of Judge Thomassen joined by Judge Zagrebelsky in *ibid*.

[49] *Cf.* ECtHR 28 Sept. 1995, Case No. 14570/89, § 45, *Procola* v. *Luxembourg*; and ECtHR 8 Feb. 2000, Case No. 28488/95, § 55, *McGonnell* v. *United Kingdom*.

[50] For a similar opinion, *See*, e.g., R. Mastermann, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Oxford, Oxford University Press 2011) p. 83.

[51] For a similar view, *see* Popović 2007, *supra* n. 18, p. 207-208.

[52] Apart from the judgments cited below, *see also* ECtHR 12 June 2003, Case No. 45681/99, *Gutfreund* v. *France*, where the applicant complained that the same judge had decided the same legal-aid application, both as president of the legal-aid office and as the authority that had heard the appeal against that decision. The ECtHR eventually held that Art. 6(1) ECHR was not applicable in the instant case.

[53] ECtHR 22 June 2004, Case No. 47221/99, *Pabla Ky* v. *Finland*, ECHR 2004-V.

[54] ECtHR 22 June 2004, Case No. 47221/99, § 34, *Pabla Ky* v. *Finland*, ECHR 2004-V (both citations).

> not persuaded that *the mere fact* that M.P. was a member of the legislature at the time he sat on the applicant company's appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal … [since the] principle [of separation of powers] is not decisive in the abstract.[55]

As the dissenting Judge Borrego Borrego pointed out, the latter view is not only problematic from a separation of powers point of view, but also runs against the previous case-law of the ECtHR.[56]

More recently, the ECtHR revisited the incompatibility issues in *Sacilor-Lormines* v. *France*.[57] The applicant company argued, among other things, that the Conseil d'Etat was not an independent and impartial tribunal on account, first, of the plurality of its functions; second, of the manner of appointment and the status of its members in general; and third, of the appointment of one of the members of the bench which delivered the impugned judgment (only seven days after rendering this judgment) to the post of Secretary General at the ministry (the Ministry for Economic Affairs, Finance and Industry) responsible for mining, when the applicant's activities, which had given rise to its litigation against the Government, fell within the purview of that very Ministry.

As to the first complaint, the ECtHR confirmed the restrictive trend since the *Kleyn* judgment. It invoked the 'same case' criterion and unanimously concluded that the consecutive exercise by the Conseil d'Etat of judicial and administrative functions had not, in the present case, entailed a violation of Article 6(1) ECHR. The second complaint was also rejected.[58] The chamber clashed only over the third issue. The ECtHR, by the closest possible vote, eventually found a violation of Article 6(1) ECHR on this count. The majority noted, in particular, that '[a]t the time of the deliberation in question, or even *perhaps* well before, one of the members of the bench had been under consideration for appointment to a senior position in the very ministry with which the applicant had a large number of significant disputes,'[59] and concluded that 'the said member could not have the appearance of neutrality *vis-à-vis* the applicant company, given the lack of safeguards

[55] ECtHR 22 June 2004, Case No. 47221/99, § 34, *Pabla Ky* v. *Finland*, ECHR 2004-V (emphasis added).

[56] *See* ECtHR 18 May 1999, Case No. 28972/95, *Ninn-Hansen* v. *Denmark* (dec.); and ECtHR 26 Aug. 2003, Case No. 10526/02, *Filippini* v. *San Marino* (dec.). *See also* European Commission of Human Rights, 18 Dec. 1980, Case Nos. 8603/79 and 8729/79, *Crociani and Others* v. *Italy*, Decisions and Reports 22, p. 191-231, p. 220.

[57] ECtHR 11 Sept. 2006, Case No. 65411/01, *Sacilor-Lormines* v. *France*.

[58] ECtHR 11 Sept. 2006, Case No. 65411/01, § 67, *Sacilor-Lormines* v. *France*.

[59] ECtHR 11 Sept. 2006, Case No. 65411/01, § 69, *Sacilor-Lormines* v. *France* (emphasis added).

against possible extraneous influence, since his appointment was already envisaged at the time he sat in his judicial capacity in April 2000.'[60]

Dissenting judges disagreed with the majority's assessment of the facts and asserted that the majority stretched the doctrine of appearances too far. They argued that '[a]ppearances have their own limits and have to be based on objective facts' and suggested that the factors on which the majority based their finding of a violation of Article 6(1) ECHR appeared to them to amount to pure conjecture.[61] Interestingly, neither majority nor minority questioned the most problematic feature of this case – the very fact that a judge of the top court can 'jump', all of sudden and without any notice, to another branch of Government.[62] Leaving aside the abuse of this practice by authoritarian and totalitarian regimes, such practice undermines public confidence in the judiciary. That is why some European countries banned such 'travelling among branches' altogether[63] or at least require that judges who campaign for political office are given leave without pay.[64] Nor does the ECtHR elaborate on whether such a judge may later resume his position or be reappointed to the Conseil d'Etat. It is thus not clear whether the ECtHR requires the appointment of a judge outside the judiciary to be a 'one-way path'[65] or whether it requires a certain amount of 'freezing time' before a judge temporarily designated to political office can return to the judicial ranks.[66]

The A/Kart *strand of case-law: parliamentary immunity*

The second set of cases discussed in this section, the so-called '*A/Kart* strand of case-law', deals with the compatibility of parliamentary immunity with the ECHR. The *A/Kart* strand of case-law is important for three reasons. First, it goes to the very heart of the democratic process in the CoE member states. Secondly, it questions a constitutional principle that has been embedded in national constitutions for centuries. Thirdly, this case-law has a particularly widespread impact on na-

[60] ECtHR 11 Sept. 2006, Case No. 65411/01, § 69, *Sacilor-Lormines* v. *France*.

[61] Joint partly dissenting opinion of Judges Zupančič, Bîrsan and Long in ECtHR 11 Sept. 2006, Case No. 65411/01, *Sacilor-Lormines* v. *France.*

[62] The fact that this is a common practice in France as well as in other civil law jurisdictions does not make this practice less problematic.

[63] *See*, e.g., Judgment of the Czech Constitutional Court No. Pl. 39/08 of 6 Oct. 2010, §§ 46-49 (which found temporary assignment of Czech judges to the Ministry of Justice unconstitutional).

[64] *See* J. Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge, Cambridge University Press 2006) p. 204 (who discusses this practice within the Spanish judiciary).

[65] This article does not claim that such 'travelling among branches' is in breach of ECHR *per se*, but rather suggests that the ECtHR should have taken a stance on this issue.

[66] For instance, should a Spanish judge happen to be appointed to some political post, then (s)he will be put into 'quarantine' for three years (with only basic pay) before being allowed to go back to active judicial life. *See* Bell 2006, *supra* n. 64, p. 204.

tional constitutional law since most, if not all, CoE member states have in place some form of immunity for members of their national legislatures.[67]

The first case before the ECtHR[68] involving parliamentary privilege was *A* v. *United Kingdom*.[69] At the critical time, the applicant, a young black woman, lived with her two children in Bristol in a house owned by the local housing association, where she moved following a report that she had been suffering serious racial abuse at her previous address. On 17 July 1996, the member of parliament (MP) for the Bristol North-West constituency initiated a debate on the subject of municipal housing policy in the House of Commons. During the course of his speech, the MP referred specifically to the applicant several times, giving her name and address and referring to her family as the 'neighbours from hell'. This phrase was subsequently picked up by local and national newspapers and used to describe the applicant in articles published about her. In addition to the press coverage, the applicant received "hate mail" and was also stopped in the street, spat at and abused by strangers as 'the neighbour from hell'. As a result of these events, the applicant and her children had to be re-housed and the children were obliged to change schools.

The applicant wanted to seek redress against the MP, whose remarks, she alleged, violated her rights to reputation and to privacy. However, immunity for speeches delivered in Parliament is absolute in the United Kingdom and, hence, she had no arguable claim before the domestic courts. Subsequently, she lodged the application to the ECtHR, where she argued that, due to parliamentary privilege, her right to access to a court was violated.[70]

The ECtHR avoided taking a stance on the precise relationship between parliamentary privilege and the right to access to a court[71] and moved directly to discussion of the compliance of parliamentary privilege with Article 6(1) ECHR. At the outset, the ECtHR accepted the dual rationale – the 'legitimate aims' in the Strasbourg parlance– of parliamentary privilege, namely the public interests of protecting free speech in Parliament and the separation of powers.[72] The former

[67] *See* ECtHR 17 Dec. 2002, Case No. 35373/97, § 80, *A.* v. *United Kingdom*.

[68] For an earlier view of the European Commission of Human Rights, *see Agee* v. *United Kingdom* (17 Dec. 1976, Case No. 7729/76, Decisions and Reports (DR) 7, p. 164). However, this case was overruled two decades later by *Young* v. *Ireland* (17 Jan. 1996, Case No. 25646/94, DR 84-A, p. 122).

[69] ECtHR 17 Dec. 2002, Case No. 35373/97, *A.* v. *United Kingdom*.

[70] She also invoked other provisions of the Convention (Art. 8 and Art. 14 in conjunction with Art. 6), but this article will leave these issues aside.

[71] The disputed issue was whether parliamentary privilege delimits the substantive content of the civil right to reputation in domestic law or whether it is rather a procedural bar on access to a court. *See* ECtHR 17 Dec. 2002, Case No. 35373/97, §§ 60-65, *A.* v. *United Kingdom*; *cf.* dissenting opinion of Judge Loucaides in *ibid*.

[72] *Ibid.,* § 77.

'allow[s] … members [of Parliament] to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority.'[73] The latter 'regulat[es] the relationship between the legislature and the judiciary.'[74]

Since the parliamentary immunity enjoyed by the MP in the present case pursued a legitimate aim, the ECtHR proceeded to an assessment of the proportionality of the immunity enjoyed by the MP.[75] The ECtHR first asked whether parliamentary privilege *in principle* imposes a disproportionate restriction on the right of access to a court as embodied in Article 6(1) ECHR. In answering this question, the ECtHR took into account the following factors: (1) the principle that 'the broader an immunity, the more compelling must be its justification' does not necessarily mean that absolute immunity is incompatible with the Convention; (2) the utmost importance of freedom of expression for an elected representative of the people; and (3) the widespread acceptance of parliamentary immunity among the CoE member states as well as in supranational parliamentary institutions.[76]

In view of these considerations, the ECtHR was of the opinion that

> a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot *in principle* be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1 … Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by signatory States as part of the doctrine of parliamentary immunity.[77]

However, the ECtHR did not stop here and added a few more paragraphs that addressed the *specific* characteristics of parliamentary privilege in the United Kingdom. These paragraphs are important for two reasons. They seem to narrow the bounds of the previous quotation and they elaborate on the separation of powers rationale of the parliamentary immunity. The ECtHR stressed, among other things, that the immunity afforded to MPs in the United Kingdom is narrower than in several other CoE member states, since it 'attaches only to statements made in the

[73] *Ibid.,* § 75.
[74] *Ibid.,* § 76.
[75] *Cf.* concurring opinion of Judge Costa in *ibid.*
[76] *Ibid.,* § 78-81.
[77] *Ibid.,* § 83 (emphasis added, references omitted). Here the ECtHR relied on *obiter dictum* in ECtHR 21 Nov. 2001, Case No. 35763/97, § 56, *Al-Adsani* v. *the United Kingdom* [GC].

course of parliamentary debates on the floor of the House of Commons or House of Lords,'[78] and that '[t]he absolute immunity enjoyed by MPs is … designed to protect the interests of *Parliament as a whole* as opposed to those of individual MPs [, which is] illustrated by the fact that the immunity does not apply outside Parliament.'[79] The ECtHR apparently considered these factors as mitigating and concluded that '*the application* of a rule of absolute Parliamentary immunity [*in the United Kingdom*] cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to a court.'[80] These quotations make clear that what the ECtHR considered to be at stake in this case was not only the *individual* right of the MP to exercise his freedom of expression, but also the *institutional* autonomy of the legislative branch.

To be sure, judges of the ECtHR were aware of the seriousness of the allegations made about the applicant and the unfortunate consequences of the MP's comments for the lives of the applicant and her children. Nevertheless, they were also wise enough to see that 'the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued.'[81] In other words, the very entry of courts into investigating and regulating abuse of parliamentary freedom of speech would erode this essential constitutional principle. This separation of powers rationale seems to have been critical for accepting the bright-line rule and rejecting the balancing exercise.[82] Furthermore, the majority took the institutional limits of the ECtHR seriously. Judge Costa was the most candid in admitting this in his concurring opinion, where he suggested that the freedom of expression of MPs should be reconciled with other rights and freedoms that are worthy of respect, but immediately added that

> [he was] not at all sure that it should be for a court, even one with the task of applying the Convention, 'an instrument of European public order … for the protection of individual human beings' … to impose *any particular model* on the Contracting States in such a politically sensitive field.[83]

[78] *Ibid.,* § 84.
[79] *Ibid.,* § 85 (emphasis added).
[80] *Ibid.,* § 87 (emphasis added).
[81] *Ibid.,* § 88.
[82] Note that even the dissenting judge Loucaides, who pleaded for a rigorous balancing exercise, accepted that 'absolute privilege in England serves the legitimate aim of protecting free debate in the public interest *and* of regulating the relationship between the legislature and the judiciary' (dissenting opinion of judge Loucaides, emphasis added).
[83] Concurring opinion of Judge Costa *in fine* in ECtHR 17 Dec. 2002, Case No. 35373/97, *A.* v. *United Kingdom*, (emphasis added; reference omitted).

The importance of *A* v. *United Kingdom* cannot be overestimated. This judgment laid out the framework for the subsequent litigation on parliamentary privilege. It is thus appropriate to summarise three main findings of this judgment. First, a rule of parliamentary immunity is not *in principle* a disproportionate restriction on the right of access to a court. Second, even the absolute parliamentary immunity, if narrowly construed, is compatible with the right of access to a court. Third, the principle of separation of powers was an important rationale for justifying the previous two conclusions, since the other rationale, protection of free speech in Parliament, could hardly do the job alone.[84] On the other hand, the ECtHR also implicitly suggested that a rule of absolute Parliamentary immunity, if applied broadly, might exceed the margin of appreciation allowed to States in limiting an individual's right of access to a court. Yet *A* v. *the United Kingdom* provided little guidance on the core question: how much immunity is *too* much to be compatible with the Convention? This question was left open for interpretation in subsequent cases.

The ECtHR revisited the answer to this question only a year later in the series of two cases against Italy, *Cordova* v. *Italy (no. 1)*[85] and *Cordova* v. *Italy (no. 2)*.[86] The first application of Mr Cordova, a prosecutor in high profile cases, concerned events which had occurred in 1993. The applicant investigated a person who had had dealings with Francesco Cossiga, a former President of Italy who had become a 'senator for life'. Mr Cossiga subsequently sent the applicant a number of sarcastic letters and various presents in the form of toys. The applicant considered that his honour and reputation had been injured and lodged a criminal complaint against Mr Cossiga, who was prosecuted for insulting a public official. Nevertheless, the Italian Senate considered that the actions of Mr Cossiga were covered by the parliamentary immunity provided for in Article 68(1) of the Italian Constitution, as his opinions had been expressed in the performance of his parliamentary duties. As a result, the case against Mr Cossiga was dismissed.

The second application of Mr Cordova concerned comments made by a member of the Italian parliament at two election rallies in 1994. While speaking at the rallies, the MP launched a personal attack on the applicant in offensive terms. Similarly to *Cordova* v. *Italy (no. 1)*, the applicant lodged a criminal complaint alleging aggravated defamation and applied to join the proceedings as a civil party. This time Mr Cordova was successful before the court of first instance, but the MP appealed to the Court of Cassation, which directed that the proceedings

[84] *See* in particular § 90, *supra* n. 74 and 79. It is also worthy of mention that, despite the seriousness of allegations made by the MP, the ECtHR dismissed the applicant's claim based on Art. 8 ECHR in two scant paragraphs (*ibid.,* §§ 102-103). One can hardly imagine this happening in the absence of argument on the separation of powers.

[85] ECtHR 30 Jan. 2003, Case No. 40877/98, *Cordova* v. *Italy (no. 1)*.

[86] ECtHR 30 Jan. 2003, Case No. 45649/99, *Cordova* v. *Italy (no. 2)*.

should be stayed and the matter referred to the Chamber of Deputies. The *Camera dei Deputati* (Chamber of Deputies) expressed the view that the MP had been acting in the performance of his duties. Subsequently, the *Corte di Cassazione* quashed the trial and appeal courts' decisions, holding that the *Camera*'s broad interpretation of the concept of 'parliamentary duties', encompassing all acts of a political nature, even outside Parliament, was not manifestly at variance with the spirit of the Constitution.

Even though the facts of both cases diverge significantly,[87] the reasoning of the ECtHR in both judgments is the same. In both judgments the ECtHR upheld the dual rationale of the parliamentary privilege and reiterated the main principles from *A.* v. *United Kingdom*. However, it eventually distinguished the two Cordova cases from *A.* v. *United Kingdom* on the ground that behaviour of Mr Cossiga in *Cordova* v. *Italy (no. 1)*, and the MP in *Cordova* v. *Italy (no. 2)*, '[were] not connected with the exercise of parliamentary functions in their strict sense [but rather] a personal quarrel.' Due to this difference, the ECtHR took the view that 'the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed,' and concluded that the applicant's right of access to a court had been violated.

In other words, under the revised position of the ECtHR, parliamentary immunity was compatible with Article 6(1) of the ECHR only if the impugned statements had a 'clear connection' with a parliamentary activity. This is a very narrow reading of *A.* v. *United Kingdom*. Furthermore, the *Cordova* judgments run flatly against *A.* v. *United Kingdom*, where the ECtHR stressed that 'the creation of exceptions to … [parliamentary] immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued.' In *Cordova* v. *Italy (no. 1)* and *Cordova* v. *Italy (no. 2)* the ECtHR not only created such exception, and thus seriously undermined the public interest in separation of powers between the legislature and the judiciary, but also imposed *a particular model* of parliamentary immunity on the CoE member states,[88] namely the 'non-violability' model.[89]

The next judgment of the ECtHR on parliamentary privilege, *DeJorio* v. *Italy*,[90] was a follow-up to the *Cordova* cases, where the ECtHR reaffirmed its revised position taken in the *Cordova* judgments. The ECtHR added something new on

[87] In fact, the first case begs the question why the ECtHR decided this case on the merits at all. One wonders whether it is really appropriate to spend the limited resources of the ECtHR on a petty personal quarrel between two political figures.

[88] Despite the warning of judge Costa in *A.* v. *United Kingdom* (*see supra* n. 83).

[89] On the distinction between the 'non-liability' model and the 'inviolability' model, *see* below.

[90] ECtHR 3 June 2004, Case No. 73936/01, *DeJorio* v. *Italy*.

parliamentary immunity only in *Tsalkitzis* v. *Greece*.[91] The facts of *Tsalkitzis* v. *Greece* are complex and it suffices to say that in contrast to previous cases the relevant events in *Tsalkitzis* had taken place three years before the defendant, Mr C. T., was elected to the Greek Parliament. This means that the defendant was not an MP when he committed the alleged offences and thus his actions could not be connected with the exercise of parliamentary functions at all. Relying on the ratio in the *Cordova* cases, this was an easy case for the ECtHR, which stressed the absence of a clear link with a parliamentary activity and found a violation of Article 6(1) ECHR. More interestingly, the ECtHR rejected the argument of the Greek Government that parliamentary immunity was only temporary, which meant that the applicant could renew his request for leave to prosecute once C.T.'s term of office ended. This is in fact a standard defence of the 'non-violability' model of parliamentary immunity that, under this view, protects the individual elected representatives from harassment during the exercise of their term. Furthermore, proceedings brought against an MP can affect the smooth operation of the parliament as a whole and disrupt its work. Nevertheless, the ECtHR simply noted that the Greek Constitution did not lay down any limits regarding the renewal of parliamentary office so C.T.'s term in office might be renewed several times and thus definitively deprive the applicant of his right to request the institution of criminal proceedings.[92] The whole argument was addressed in a single paragraph without any discussion of the repercussions on the separation of powers.

An interesting twist in the Strasbourg case-law on parliamentary immunity occurred in *Kart* v. *Turkey*. Until *Kart*, all the cases concerned the right to take legal action of persons who considered they had been wronged by the words or deeds of an MP. The *Kart* case was the first case in which an applicant *enjoying* parliamentary immunity had complained to the ECtHR of the effects of that immunity on *his* right of access to a court. The facts are as follows. Prior to his election Mr Kart practised as a lawyer and, in the course of his professional activities, two sets of criminal proceedings were brought against him, one for insulting a lawyer and the other for insulting a public official. Once he was elected to the National Assembly he still wanted to clear his name and thus he asked that his immunity be lifted, but the joint committee of the Assembly decided to stay the proceedings against him until the end of his term of office.

In Strasbourg, Mr Kart complained that he could not defend his name in criminal proceedings against him because, as an MP, he was subject to parliamen-

[91] ECtHR, 16 Nov. 2006, Case No. 11801/04, *Tsalkitzis* v. *Greece*.

[92] *Ibid.,* § 50. The ECtHR also added that suspending criminal proceedings against an MP during his parliamentary term of office resulted in a substantial amount of time elapsing between the commission of the offence and the institution of criminal proceedings, which rendered a prosecution uncertain (*ibid.*).

tary immunity. The Chamber in the four-to-three judgment found that that there had been a violation of Mr Kart's right to access to a court. The Chamber judges were particularly worried that no objective criteria had been established as regards the conditions for lifting parliamentary immunity and, as a result, the criteria appeared to them to be primarily political.[93] This lack of clearly defined, objective criteria as regards the conditions for lifting immunity, combined with the absence of any arguments showing the reasoning of the competent committee of the National Assembly, led the Chamber to the conclusion that 'all the persons concerned by the decision – in this case both the applicant and the victims of his alleged offences – [were deprived] of the means of defending their rights.'[94]

Nevertheless, the case was referred to the Grand Chamber, which reversed the Chamber's judgment and found no violation of Article 6(1) ECHR. The Grand Chamber conducted a thorough comparative analysis of parliamentary immunity and identified two categories of immunity for parliamentarians. The first category concerns the 'non-liability' of parliamentarians in respect of judicial proceedings for opinions expressed and votes cast in the discharge of their parliamentary duties, whereas the second category, the 'inviolability' or the 'immunity in the strict sense', shields parliamentarians from all arrest, detention or prosecution for offences unrelated to their parliamentary duties without the consent of the Chamber to which they belong.[95] Until the Grand Chamber ruling in *Kart* v. *Turkey*, the ECtHR accepted the 'non-liability' model,[96] but it significantly curbed the 'inviolability' model.[97]

In *Kart* the Grand Chamber reconsidered this view with regard to the 'inviolability' category of parliamentary immunity. It acknowledged that '[d]ifferent forms of parliamentary immunity may indeed serve to protect the effective political democracy,'[98] and that 'the regulation of parliamentary immunity belongs to the realm of parliamentary law, in which a wide margin of appreciation is left to member States.'[99] It eventually opined that 'the guarantees offered by *both types* of parliamentary immunity (non-liability and inviolability) serve the *same need* – that of ensuring the independence of Parliament in the performance of its task.'[100] The Grand Chamber also realised that not only 'non-violability' but also 'inviolability' protects the democratic process, since the latter 'helps to achieve the full independence of Parliament by preventing any possibility of politically motivated

[93] ECtHR 8 July 2008, Case No. 8917/05, § 88, *Kart* v. *Turkey*.
[94] *Ibid.,* § 89.
[95] ECtHR 3 Dec. 2009, Case No. 8917/05, § 44, *Kart* v. *Turkey* [GC].
[96] *See A* v. *United Kingdom*.
[97] *See* the *Cordova* cases and its progenies.
[98] ECtHR 3 Dec. 2009, Case No. 8917/05, § 81, *Kart* v. *Turkey* [GC].
[99] *Ibid.,* § 82.
[100] *Ibid.,* § 90 (emphasis added).

criminal proceedings … and thereby protecting the opposition from pressure or abuse on the part of the majority.'[101]

Most importantly, the Grand Chamber took separation of powers seriously and, in contrast to the earlier judgments of the ECtHR, addressed the institutional aspects of Mr Kart's case. By doing so the Grand Chamber revived the broader reading of *A* v. *United Kingdom* that had been eroded by the *Cordova* cases. More specifically, the Grand Chamber noted that 'bringing proceedings against MPs, together with the coercive measures that may entail, may *affect the very functioning of the Assembly* of which they are members and disrupt Parliament's work.'[102] It recognized 'the institutional aim of this prerogative, which is to guarantee the smooth functioning and the integrity of Parliament.'[103] This is, alongside protection of the opposition, the very institutional purpose of parliamentary inviolability accepted in most constitutional systems.[104]

Interestingly, the Grand Chamber paid lip service to the *Cordova* cases and reiterated that it attached importance to the extent to which the offence of which the MP was accused was linked to his parliamentary duties in their strict sense, but immediately added that 'the very nature of parliamentary inviolability … [prevented taking] the same approach … in the present case.'[105] Instead, it took the institutional path. It accepted that inviolability in Turkish law was not a personal privilege for the benefit of the MP but rather a privilege linked to his or her status, which is why it could not be waived by the beneficiary.[106] Furthermore, the scope of the protection of MPs in Turkey was found neither excessive nor at odds with the solutions adopted in most European parliamentary systems.[107] The Grand Chamber also rejected two main arguments that led the Chamber to find a violation of Mr Kart's right to access to a court. As to a lack of objective criteria, it made clear that decisions taken by parliamentary bodies, which are political bodies by definition, are political decisions by nature and thus they could not be expected to satisfy the same criteria as court decisions when it came to giving reasons.[108] The most problematic part of the Grand Chamber's ruling relates to the temporariness of parliamentary immunity. On this point, the Grand Chamber

[101] *Idem*.
[102] *Ibid.,* § 91 (emphasis added).
[103] *Idem,* § 91 (emphasis added). *See* also § 97, where the Grand Chamber opined that '[i]n order to make sure that the rule of law has been respected, the first step is to examine *the institutional configuration* of the system of parliamentary inviolability in Turkish law and the conditions of its implementation' (emphasis added).
[104] *Ibid.,* § 95.
[105] *Idem,* § 95.
[106] *Ibid.,* § 97.
[107] *Ibid.,* § 98.
[108] *Ibid.,* § 101.

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was not willing explicitly to overrule *Tsalkitzis* and thus it had no choice but to resort to intellectual gymnastics, which were rightly criticised by the dissenting judges.[109]

In a nutshell, the Grand Chamber in *Kart* resurrected the 'separation of powers paradigm' and swung the pendulum back closer to the position taken in *A* v. *United Kingdom*.[110] The dissenting judges strongly disagreed with the posture of institutional deference adopted by the majority and instead invoked the 'human rights paradigm' represented by the *Cordova* cases and its progenies. Their position was 'that there exist[ed] *no* general interest considerations sufficiently compelling to deprive the applicant of his fundamental right of access to a court.'[111] As a result, they implicitly suggested that it was the ECtHR's role to substitute its own assessment for that of the State in order to determine whether or not immunity is necessary or appropriate in a particular case.[112]

The Stafford/Kleyn *and the* A/Kart *strands of case-law reconsidered*

Both the *Stafford/Kleyn* and the *A/Kart* strands of the ECtHR's case-law serve as examples of the increasing involvement of the ECtHR in the realm of separation of powers within the CoE member states. These strands send a two-fold message to the CoE member states. Almost all cases in these two strands explicitly emphasise that the ECtHR does not advocate a particular model of separation of powers. But they also endorse the view that the fact that a particular case affects separation of powers within a CoE member state does not prevent the ECtHR from reviewing whether, in a given case, the requirements of the ECHR have been met. In other words, it means that 'the principle of the separation powers is not decisive in the abstract'[113] and the ECtHR will proceed on a case-by-case basis.

However, these strands also show that the notion of separation of powers plays divergent roles in the Strasbourg jurisprudence. In the *Stafford/Kleyn* strand the notion of separation of powers provides the bedrock for the principle of judicial

[109] *See* dissenting opinion of judge Bonello joined by judges Zupančič and Gyulumyan; and dissenting opinion of judge Power in *ibid.*

[110] But *cf.* ECtHR 6 April 2010, Case No. 2/08, *C.G.I.L. and Cofferati (No. 2)* v. *Italy*; and ECtHR 24 May 2011, Case No. 26218/06, *Onorato* v. *Italy*, (in these two cases, decided after the Grand Chamber judgment in *Kart* v. *Turkey*, the second section of the ECtHR barely mentioned the *Kart* judgment and, following the *Cordova* and *De Jorio* judgments, found a violation of Art. 6 ECHR). I am grateful for this information to Roberto Chenal.

[111] Dissenting opinion of judge Bonello joined by judges Zupančič and Gyulumyan in *ibid.*

[112] *Cf.* the joint dissenting opinion of judges Baka, Ugrekhelidze and Popović attached to the chamber judgment (ECtHR 8 July 2008, Case No. 8917/05, *Kart* v. *Turkey*).

[113] ECtHR Case No. 65411/01, § 59, *Sacilor Lormines* v. *France*. *See also* ECtHR 17 Dec. 2002, Case No. 35373/97, § 71, *A.* v. *United Kingdom*; and ECtHR 22 June 2004, Case No. 47221/99, § 34, *Pabla Ky* v. *Finland*.

independence and thus buttresses the right to an independent court stipulated in Article 6(1) of the ECHR. On the other hand, the *A/Kart* strand invokes the concept of separation of powers as a legitimate aim justifying interference with the right of access to a court guaranteed by the very same Convention article. One can thus see that the notion of separation of powers is a double-edged sword. It may either support or collide with the human rights enshrined in the Convention.

Finally, one may detect in both strands examples of different institutional approaches of the ECtHR that go beyond the issues of incompatibility or parliamentary immunity. On the one hand, in the *Cordova* cases, *Tsalkitzis*, *McGonnell* and *Procola*, the ECtHR relies primarily on a 'human rights paradigm' and acts as an 'old-fashioned' international human rights court. On the other hand, in *A* v. *United Kingdom* and in particular in the Grand Chamber judgments in *Kleyn* and *Kart*, it takes the 'separation of powers paradigm' seriously and thus its argumentation resembles the reasoning of a constitutional court. One may also see an emerging trend that, while seven-member chambers still act as an international human rights court, the Grand Chamber has been significantly 'constitutionalised'.

Problematic elements of the ECtHR's 'separation of powers agenda': structural issues

Leaving aside the substantive issues and potential inconsistencies in the ECtHR's case-law discussed in the previous section, this section, instead, focuses on structural issues related to the increasing involvement of the ECtHR in the realm of separation of powers within the CoE member states. This leads us back to the big questions regarding the institutional competence of the ECtHR posed in the introduction to this article.

First, it is important to recall the manner in which the cases raising separation of powers issues *within* CoE member states reach the ECtHR. We noticed that the ECHR does not grant *Organstreit*-style jurisdiction to the ECtHR and thus the only means by which separation of powers issues within CoE member states may reach the ECtHR is via individual complaints. The two parties before the ECtHR are the applicant and the High Contracting Party. The High Contracting Party is represented by Government Agents. The role of the Government Agents before the ECtHR is an under researched topic, but available literature on the subject suggests that most Government Agents operate under the auspices of the Ministry of Foreign Affairs or Ministry of Justice of a given CoE member state.[114] This means that although the Agent is supposed to represent the 'State', his/her

[114] *See* B. Aurescu, 'Organizational and Procedural Aspects of the Institution of State Agent before the ECHR and ICJ: Some Romanian Perspectives', 6 *Chinese Journal of International Law* (2007) p. 363, p. 368.

views might reflect[115] only the position of the executive branch.[116] But even if this is not the case, the Agent can hardly communicate the views of all three branches[117] and other potential actors[118] to the ECtHR, especially when these institutions hold opposing views.[119]

As a result, the ECtHR does not receive feedback from all the three branches and other relevant actors. This institutional deficiency becomes particularly troublesome when the Government disagrees with other domestic actors and instructs its Agent to pursue its own agenda exclusively. In such a scenario, the ECtHR can be provided with an incomplete or misleading picture of the issue at stake.[120] Yet another twist arises, when a member of one of the branches (for instance, an MP or a national judge) is in the position of the applicant. Then the applicant presents an argument that may have significant repercussions for separation of powers within his/her country[121] and the other branches are not

[115] It also depends on the decision-making powers and autonomy of the agent in a particular CoE member state. Furthermore, it might also matter whether the agent operates under the auspices of the Ministry of Justice (MoJ) or the Ministry of Foreign Affairs (MFA), since it can be plausibly argued that the agent working under the MoJ will be more protective of the judiciary than the agent working under the MFA. However, such issues are beyond the scope of this article.

[116] In fact, his/her views may reflect only the position of one of the 'heads' of the executive power. For instance, both the President of the Czech Republic and the Ministry of Justice are involved in appointment and promotion of judges and they may hold opposite views on both matters.

[117] Apart from the 'two-headed' executive (*see* the preceding note), the legislature may also consist of two or more chambers.

[118] These other actors may include, for instance, an ombudsman, a judicial council, election committees, lower courts, regional governments and the Attorney General.

[119] As mentioned above, this issue is under-researched in the Strasbourg context. However, the same issue has been discussed in the context of the Court of Justice; *see*, e.g., M.-P. Granger, 'When Governments Go to Luxembourg…: The Influence of Governments on the European Court of Justice', 29 *European Law Review* (2004) p. 1; and M.-P. Granger, 'States as Successful Litigants before the European Court of Justice: Lessons from the "Repeat-Players" of European Litigation', 2 *Croatian Yearbook of European Law* (2006) p. 27.

[120] As the anonymous reviewer rightly suggests, it is very important that national constitutional systems provide for sufficient 'checks' on the executive branch in relation to international law. However, such checks cannot solve the situations, when there is a genuine disagreement among the branches.

[121] These repercussions include, for instance, amending the constitutional provisions dealing with parliamentary immunity, changing the nature of administrative judiciaries following the 'francophone model' or significant changes in the role of advocates general and similar judicial officers across Europe. Lastly, some authors claim that the case law of the ECtHR on the 'incompatibility issues' contributed to the adoption of The Constitutional Reform Act 2005 in the United Kingdom, which, among other things, abolished the Appellate Committee of the House of Lords; *see*, e.g., C. Turpin and A. Tomkins, *British Government and the Constitution*, 6th edn. (Cambridge, Cambridge University Press 2007) p. 116-117; D. Woodhouse, 'The Constitutional Reform Act 2005 – Defending Judicial Independence the English Way', 5 *International Journal of Constitutional Law* (2007) p. 153, p. 154; or Popović 2008, *supra* n. 17, p. 213-215.

even heard.[122] This may again result in an incomplete or even distorted view of the case before the ECtHR.[123] It would therefore be wise to correct this institutional deficiency by amending the rules for legal representation before the ECtHR and/or for submitting *amici curiae*.

Nevertheless, judges of the ECtHR face further limitations. First, there is far less convergence on separation of powers issues than on human rights issues among the CoE member states.[124] Moreover, most scholarly writings, leaving aside archetypal systems such as the ones in France, Germany or in the United Kingdom, are accessible only in less widely spoken languages such as Czech, Hungarian, Finnish, Romanian or Slovak. Due to these two factors, the ECtHR's judges may have only a limited knowledge of the working of the doctrine of separation of powers in countries other than their own.[125] It is true that the missing piece of information can be transmitted to other judges by the ECtHR judge from a given country. But even if one presumes that this transmission always works smoothly, the problem does not fade away as there is always a danger of approaching a foreign legal system burdened by the conceptual framework of one's own. In order to understand the separation of powers in foreign countries, one must dig deeper into the minds of lawyers, and particularly those of legal thinkers, in foreign legal systems to see how *they* understand their doctrine of separation of powers and its place within their legal systems. In other words, one must 'try to understand the other legal system[s] on [their] *own terms.*'[126] As suggested above, to acquire such insight into the separation of powers within 47 CoE member states is a particularly demanding task in itself.[127] Given the limited input from domestic actors other than the executive in the Strasbourg system, it becomes almost impossible.

[122] This is in stark contrast with the national constitutional systems with a national constitutional court that does have the power to decide on the issues of competence and separation of powers, where there is always a possibility of involving the other branches in the procedure, either directly or as an intervening party.

[123] It would be naïve to think that the executive will always hold a view opposed to that of the applicant. For instance, the executive may side with 'their' MPs or with 'their' judges and pursue their agenda before the ECtHR.

[124] For a more detailed discussion of a limited convergence in separation of powers issues, *see* V. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, Oxford University Press 2009), ch. 8 (*see also* p. 53 and 67).

[125] With due respect, many judges of the ECtHR come from a public international law or a human rights law background and do not necessarily have sufficient expertise in separation of powers issues. Note that there is a group of ECtHR judges who are former judges of the constitutional courts and/or scholars of comparative constitutional law, but they are still in the minority.

[126] J. Komárek, 'Questioning Judicial Deliberations', 29 *Oxford Journal of Legal Studies* (2009) p. 805, 826 (referring to W. Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"', 46 *American Journal of Comparative Law* (1998) p. 701).

[127] In fact, the lack of such effort on part of the ECtHR is what irritates domestic actors most. *See*, e.g., F. Sudre, 'Vers la normalisation des relations entre le Conseil d'Etat et la Cour européenne

One may object to this stringent requirement and ask why the Strasbourg court should engage in this time-consuming comparative exercise at all. The ECtHR is a regional international court that is supposed to create a *pan-European* standard that does not endorse any particular concept of separation of powers. Why then should Strasbourg judges pay attention to the institutional design of separation of powers in *individual* CoE member states? There are two answers to this question. The pragmatic answer is that it is impossible to create a viable pan-European position towards separation of powers without knowing how separation of powers really works in the individual CoE member states. The second answer is normative. Supranational governance suffers from a democratic deficit and hence tying the development of international norms by the ECtHR back to democratically adopted constitutions renders such an undertaking more legitimate.

In addition, there is an inherent risk in looking at separation of powers solely through 'human rights lenses'.[128] The risk is that the ECtHR will see only a part of the problem or just one side of the coin. This seems to have happened in the *Cordova* cases and in *Tsalkitzis*, where the ECtHR adopted an extremely narrow conception of parliamentary immunity, which is incompatible with most constitutional systems within the Council of Europe and, what is more, which is potentially dangerous for the members of an opposition.[129] The administration of justice and the resulting incompatibilities with a judicial function relate to a deeper issue – the role of the judiciary in modern society. Given the disparity among the CoE member states on this issue,[130] and the deep historical and societal roots of a particular institutional configuration in each member state, this area is a potential minefield for the ECtHR.

In other words, there is no consensus among the CoE member states on the degree of separation of the judiciary from the other branches. This is perhaps the main reason why the Grand Chamber stepped back in *Kleyn* and moderated a bold position of Chamber judgments in *McGonnell* and *Procola*. Yet another example is a clash between judicial independence and judicial accountability. As mentioned above, Article 6 of the ECHR stipulates the right to an independent

des droits de l'homme', *Revue française de droit administratif* (2006) p. 286 (cited with approval in joint partly dissenting opinion of judges Costa, Caflisch and Jungwiert in ECtHR 12 April 2006, Case No. 58765/00, §§ 8-9 and §§ 13-14, *Martinie* v. *France* [GC]. *See also* Krisch 2008, *supra* n. 6, p. 191-196 (with further references); and J. Husa, 'Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?', 55 *Scandinavian Studies in Law* (2010) p. 101.

[128] For a similar claim, *see* Husa 2010, *supra* n. 127, p. 123.

[129] The latter is not, arguably, a major concern in established Western democracies anymore. However, protection of the opposition might still be critical in many CoE member states that are in the midst of a process of transition to democracy.

[130] Note that judicial supremacy and strong constitutional courts are not accepted in all CoE member states. *See*, e.g., Husa 2010, *supra* n. 127; or G. van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?', 11 *German Law Journal* (2010) p. 275.

tribunal and thus explicitly endorses the principle of judicial independence. However, judicial independence is not the sole virtue of the judiciary. In fact, it may clash with a competing principle of judicial accountability.[131] The problem is that judicial accountability does not appear in the Convention and, in fact, cannot be rephrased as a human right.[132] As a result the ECtHR must look beyond the text of the Convention in order fully to apprehend the consequences of its decisions.[133] All of the above-mentioned institutional limitations of the ECtHR hamper its dealing with issues of separation of powers and, as a result, call for greater deference to the domestic actors, and to the national constitutional courts in particular.

On a more general level, one may also persuasively argue that the division of powers in each state is a delicate system of checks and balances that consists of complex relationships between various constitutional actors. Each system not only reflects the historical, social and political development of a given country, but also operates as a 'package'. If one changes the powers of one institution, one must also re-adjust the powers of other institutions and, in fact, change the system as a whole.[134] The ECtHR may trigger such change, but it has very limited control over its actual execution. Hence, the Strasbourg court should keep in mind potentially the grave consequences of its judgments that touch upon separation of powers.

Finally, it has to be asked whether the intrusion of the ECtHR into the realm of separation of powers implies a gradual shift in the role of the ECtHR as such, arguably towards becoming a 'European Constitutional Court'. The literature on the 'constitutionalisation' of the ECtHR has burgeoned recently. On numerous occasions, it has been claimed that the ECtHR is a constitutional court.[135] Some

[131] On judicial accountability, *see*, e.g., G. Canivet et al. (eds.), *Independence, Accountability, and the Judiciary* (London, BIICL 2006); D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Ashgate 2010); or G. Di Federico, 'Accountability and Conduct: An Overview', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region* (Springer, forthcoming; cited by judge Sajó in his separate opinion in ECtHR 19 Nov. 2010, Case No. 20999/04, *Özpınar* v. *Turkey*). *See also* a reference in the following footnote.

[132] Unless we accept an argument that judicial accountability serves a higher end – the impartiality of courts – and hence it is a component of the right to an impartial court. *See*, e.g., S. Voigt, 'The Economic Effects of Judicial Accountability: Cross-Country evidence', 25 *European Journal of Law and Economics* (2008) p. 95, 96.

[133] This does not mean that the ECtHR should always side with the judicial accountability side of the coin. This article emphasises that the competing principle of judicial accountability must be taken as seriously as the principle of judicial independence, even though the former cannot be found in the Convention.

[134] For instance, the fact that the ECtHR accepts the case law of national courts as a source of law may erode the career model of the judiciary and eventually lead to politicisation of the judicial process.

[135] The most notorious is the position of the former President of the ECtHR, Luzius Wildhaber, who is on record as describing the Strasbourg court as a 'pretty much as a European constitutional

authors go even further and suggest that '[the ECtHR] is *widely recognised* as having features of a constitutional court.'[136] Others fight back and claim that, attractive as that narrative might be, the reality has always been different.[137] Unfortunately, this debate has been rather futile, since both camps rarely elucidate what they consider as the constitutive features of a 'constitutional court', what they take to be the properties of a 'constitution' and 'constitutional review', and what they mean by 'constitutionalism'.[138] It is not difficult to discern that where one stands on these issues determines one's position in the 'ECtHR-as-a-constitutional-court' debate.[139] Furthermore, this debate reflects the divide between the so-called 'Convention people' – the people directly involved in the Convention system and academics whose primary area of expertise has been the case law of the Strasbourg court – and the 'others'.[140]

This article does not take sides with the 'Convention people' and their allies, or with their critics. Nor does it stipulate what features a constitutional court must

court' (F.J. Bruinsma and St. Parmentier, 'Interview with Mr Luzius Wildhaber, President of the ECHR', 21 *Netherlands Quarterly of Human Rights* (2003) p. 185; *see also* L. Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Journal* (2002) p. 161). For similar views, *see* A. Stone-Sweet, 'Sur la constitutionnalisation de la Convention Européenne des Droits de l'Homme: Cinquante ans après son installation, la Cour Européene des Droits de l'Homme conçue comme une cour constitutionnelle', 80 *Revue trimestrielle des droits de l'homme* (2009) p. 923-944; E.A. Alkema, 'The European Convention as a constitution and Its Court as a Constitutional Court', in P. Mahoney et al. (eds.), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Cologne/Berlin/Bonn/Munich, Carl Heymans Verlag 2000) p. 41; or Steven Greer, 'What's Wrong with the European Convention on Human Rights?', 30 *Human Rights Quarterly* (2008) p. 701.

[136] R.C.A. White and I. Boussiakou, 'Separate Opinions in the European Court of Human Rights', 9 *Human Rights Law Review* (2009) p. 37.

[137] Krisch 2008, *supra* n. 6, p. 184. *See also* partly concurring, partly dissenting opinion of judge Zupančič in Case No. 35014/97, *Hutten-Czapska* v. *Poland* [GC] (19 June 2006), where judge Zupančič observed that '… our pronouncements are decisions concerning minimum standards, irrespective of how the violations happened in Iceland or in Azerbaijan. We are not and cannot be the constitutional court for the 46 countries concerned. The fears that we shall usurp that role are not realistic.'

[138] This lack of rigorous analysis is not limited to the debate about the role of the ECtHR. As Jeremy Waldron suggests, there is the potential for 'constitutionalism' to degenerate into an empty slogan; this potential is further exacerbated by the fact that this word is sometimes used in a way that conveys no theoretical content at all. *See* J. Waldron, 'Constitutionalism – A Skeptical View', in T. Christiano and J. Christman (eds.), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009) p. 267 et seq.

[139] For a similar observation, *see* W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', 9 *Human Rights Law Review* (2009) p. 397, p. 445.

[140] *See* S. Hennette-Vauchez, 'Divided in Diversity: National Legal Scholarship(s) and the European Convention of Human Rights', *EUI Working Paper* (RSCAS 2008/39) (2008) p. 24-25.

possess. What this article claims is that despite the lack of explicit competence in the Convention, the ECtHR has, intentionally or not, increasingly been affecting the allocation of powers within CoE member states. This development can also be seen as another example of the trend of the ECtHR to move away from an individualised justice to that of a systemic justice.[141] Put differently, even if the mandate of the ECtHR is to look at the working of the system from the perspective of its effects on individuals, there are still spill-over effects, in the sense that a change made to accommodate a requirement related to an individual can have effects on separation of powers within a CoE member state. As a result of this spill-over effect, the ECtHR has been assessing institutional design issues that go far beyond what it was ever meant to do. Hence, if one accepts that the 'constitutionality' of a court is a matter of degree,[142] the ECtHR as a whole, and its Grand Chamber in particular, *has* become more constitutional than before, whether one likes it or not.

Conclusion

This article has showed that the ECtHR has an extremely limited jurisdiction in matters of 'separation of powers', in stark contrast to the competences of most constitutional courts across Europe. But despite this limitation, the ECtHR has been increasingly intervening in separation of powers within CoE member states indirectly, via individual applications. To illustrate this phenomenon, the ECtHR's case-law dealing with the institutional design of national judiciaries and parliamentary immunity was analysed. This analysis revealed not only inconsistencies within the relevant Strasbourg case-law, but also, and more importantly, the institutional limits of the ECtHR in addressing separation of powers issues. Whether the Strasbourg judges would have decided any case differently, had they viewed it through a 'separation of powers' lens rather than through a 'human rights' lens, one cannot say does not know. What this article claims is that something is lost when issues of separation of powers are adjudicated before the ECtHR without the input of all three branches and other relevant actors in a given CoE member state. This institutional limitation calls for a particularly careful approach by the ECtHR and for a greater deference by the ECtHR to domestic actors, and to domestic constitutional courts in particular. Finally, this article suggests that even though the perception of the ECtHR as a 'European constitutional court' is subject to several caveats, the progressive intrusion of the ECtHR into the realm of separation of powers may imply a gradual shift in the role of the ECtHR.

[141] Sadurski 2009, *supra* n. 139, p. 450. For a more detailed discussion, *see* Greer, *supra* n. 139, p. 680.

[142] *See* Sadurski 2009, *supra* n. 135, p. 449.

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