Comparative Approach to Limitations: From European Standard to International Trend

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1 Introduction to Comparative Material in the ECtHR Case-Law

The European Convention on Human Rights is a living instrument. This dynamic feature of the interpretative doctrines refers often to a comparative analysis of the legal systems of the Contracting States. The European Court of Human Rights (ECtHR) has talked about the European consensus and relied upon European national standards. The landmark case of *Tyrer* showed the possibility to rely upon these standards as an inspiration to improve human rights protection in the field of corporal punishment.[1] In the *Ünal Tekeli* case, the Court noted that:

> "Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved."[2]

However, comparative material refers in this paper not only to national systems and their comparison. It is also relevant to take into account the influence of parallel international human rights systems whether universal (United Nations treaty bodies, international criminal courts (ICC, ICTY, ICTR) and Special Agencies like ILO) or regional (the Inter-American Court of Human Rights, the African Court of Human Rights) as part of the modern comparative approach. In a large number of human rights issues the European Union framework (the Court of Justice of the European Communities) provides an interesting addition to the range of external sources. The EU material has supported the development of the Strasbourg adjudication, for example, in the field of non-discrimination. The globalisation of human rights is a new phenomenon and appears with references to international trends, not just within the United Nations setting, but this kind of comparative material includes avant-garde cases from Supreme Courts situated outside of the Council of Europe jurisdiction.

The comparative interpretation is a part of the foundations of examining the compatibility of limitations. The necessity test has traditionally included the European Common ground as a relevant argument for deciding the scope of the margin of appreciation. The traditional approach to the scope of this margin is linked to the lack or existence of a European standard. The lack of any European standard corresponds to the wide margin afforded to the domestic authorities and the strict scrutiny of restrictions is founded on the emergence of European Common ground.[3]

In the Preamble of the Statute of the Council of Europe, it is mentioned that the aim of the Council of Europe is to achieve greater unity between its members

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1 *See* about the traditional comparative analysis e.g. Harris – O'Boyle –Warbrick. *Law of the European Convention on Human Rights.* 2nd edition. Oxford 2009, 8-10; Clare Ovey & Robin C.A. White. Jacobs & White, *The European Convention on Human Rights.* 4th edition. Oxford 2006, 48-50.

2 Ünal Tekeli v. Turkey (16 November 2004), § 54.

3 *See* P. van Dijk –G.J.H. van Hoof, T*heory and Practice of the European Convention on Human Rights*, 3rd edition, Kluwer 1998, p. 91.

for the purpose of safeguarding and realising the ideals and principles which are their common heritage. This aim and its doctrinal applications should be reviewed in light of the enlargement of the organisation – the Council of Europe has transformed from a mainly Western European organisation into an all-European organisation with 47 Member States and only Belorussia has excluded itself from the main European human rights organisation.

The doctrines established under the auspices of the 'old' Council of Europe need to be updated in order to respond to the change in the community of Member States. When previously a comparative approach was helping the Court to find a violation against the State which was an exception to the common European standard, the current community of States does not enable reaching a similar conclusion. Understanding a comparative method only in a strict sense would mean that it becomes only a method for self-restraining judicial policy. Thus, it would not provide any positive or innovative support to the argumentation of hard cases.

Recent judgments by the Court raise serious questions over the future of doctrinal development. The context oriented approach questions the idea of harmonising human rights protection and leads to different standards. There is a danger that the European human rights community would consist of countries with different protection according to their human rights records.[4] If these questions are not answered adequately it would severely challenge the authority of the Court's case-law. It is important to review the close relationship between the margin of appreciation doctrine and a comparative approach. This means drawing inspiration not only from parallel supervisory systems and global sources but also from legal scholars.

2 Four Models of Comparative Approach in the ECtHR Case-Law

The European Court of Human Rights has established a doctrine with four main models regarding the comparative method: Country based comparison, comparative support from other human rights treaties and treaty bodies, the European Union legal system as a source of reference and international trends. These methods can be applied simultaneously and they are often complementary to each other. The country based comparison is still the mainstream of the comparative approach. The use of material from other international human rights treaty bodies has become very common in Strasbourg case-law. The European Union references have been a phenomenon of the last 10 years. On the other hand the international trend references can be found only in a few isolated cases.

In the traditional approach the Court has tried to identify consensus or the lack of consensus among the Council of Europe Member States. This consensus approach has been used since the 1970's as a part of the evolutive interpretation,

4 *See* Jordan, Pamela A. (2003). *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*. Human Rights Quarterly 25, 660-688; Greer, Steven (2006). *The European Convention on Human Rights. Achievements and Prospects*. Cambridge University Press, p. 119-131.

focusing on the idea of the Convention as a living instrument. The emergence of European consensus would require reforms within the established interpretation. The country based comparison was the purest in the case of *Tyrer v. the United Kingdom* (1978). The Court had to decide over the compatibility of corporal punishment in the Isle of Man and the Court referred to developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in the field.[5] In the case of *Ünal Tekeli* (2004), the Court noted the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing. Of the Member States of the Council of Europe Turkey was the only country which legally imposed – even where the couple preferred an alternative arrangement – the husband's name as the couple's surname and thus the automatic loss of the woman's own surname on her marriage.[6]

However, these two cases do not constitute proof of a solid continuum based on a comparative activism. The use of comparative material is often minimalist i.e. the approach does not widen the established interpretation or provide arguments for a higher level of protection. In this minimalist approach the Court reaches the conclusion that there is a lack of consensus or the Member State in question is not in an isolated position. Therefore the Court affords the respondent State a certain or wide margin of appreciation. It is also typical that the distribution of burden of proof is not shifted to the Government.

In the case of *Stoll v. Switzerland* (2007), the Court used the Council of Europe comparative study by Mr. Pourgourides. This study supported the finding that disclosure of classified information appears to be punishable in all States, but the rules vary considerably not just in terms of how secrecy is defined and how the sensitive areas to which the rules relate are managed, but also in terms of the practical arrangements and conditions for prosecuting persons who disclose information illegally. This finding of the variety among the States led to the Court to conclude that a certain margin of appreciation should be given to States in this question. The Court found that there was no violation of Article 10 of the Convention (freedom of expression).[7] The minimalist use of the consensus approach is also distinctive in other freedom of expression cases. In *Egeland and Hanseid v. Norway* (2009), for example, the Court refers to a wide margin of appreciation, because Norway is not in an isolated position with regard to the prohibition to photograph charged or convicted persons in connection with court proceedings.[8]

A second type of a comparative approach is comparative support, which refers to other international human rights treaties and the case-law of treaty bodies supporting the Court's analysis with analogical cases. The Court finds regularly comparative support from the material introduced by the United Nations Treaty based system and related to the supervision of treaties like the

5 *See* Tyrer v. the United Kingdom (1978) § 31.

6 *See* Ünal Tekeli v. Turkey (2004) § 61.

7 *See* Stoll v. Switzerland (10 December 2007), § 107.

8 *See* Egeland and Hanseid v. Norway (16 April 2009), § 54.

CP-covenant (ICCPR), the Convention on the Rights of the Child (CRC) and the Convention against Racial Discrimination (CERD).

The Court has used both the UN and Inter-American case-law as an external source while dealing with human rights problems that are new in the European context. Some of these new questions, like involuntary disappearances, have been extensively examined by other supervisory systems. In the case of *Kurt v. Turkey* (1998) the Court mentions three cases decided before the UN Human Rights Committee (HRC)[9] and three judgments by the Inter-American Court of Human Rights concerning the same substance[10].

In the case of *Riener v. Bulgaria* (2006), for example, the Court referred to the CP-covenant and its provisions regarding the right to freedom of movement. The Court noted that Article 12 of the ICCPR served as a basis for the drafting of Article 2 of Protocol No. 4. The Court also used the HRC views in the case of *Miguel González del Río v. Peru*. According to the Committee, even where a restriction on the individual's freedom of movement was initially warranted, maintaining it automatically over a lengthy period of time may become a disproportionate measure violating the individual's rights. Transferring the HRC's approach to its own proportionality test, the Court found that there were several factors making the impugned measure disproportionate.[11]

A third category of comparative approach is the increasing relevance of the European Union legal system as a source of reference. EU law has brought inspiration to the Court's case-law especially in the field of non-discrimination law. In the Roma school children case of *D.H. and Others v. the Czech Republic* (2007) the Luxemburg Court's indirect discrimination case-law made a landmark contribution to the Strasbourg Court's argumentation. The Court referred to the leading equal treatment cases by the European Court of Justice like Sotgiu (Case 152/73 [1974]) and Bilka-Kaufhaus (Case 170/84 [1986]). These judgments and subsequent case-law established that discrimination, which entails the application of different rules to comparable situations or the application of the same rule to different situations, may be overt or covert and direct or indirect.[12]

Another frequently applied EU source is the European Union Charter of Fundamental Rights. In the case of *Christine Goodwin v. the United Kingdom* (2002), the Court noted that the text of the Charter departs from the wording of

9 *See* Quinteros v. Uruguay (107/1981) Report of the Human Rights Committee, GAOR, 38th Session, Supplement no. 40 (1983) Annex XXII, § 14; Mojica v. Dominican Republic, decision of 15 July 1994, Committee's views under Article 5 § 4 of the Optional Protocol to the ICCPR concerning communication no. 449/1991: Human Rights Law Journal ("HRLJ") vol. 17 nos. 1–2, p. 18; Bautista v. Colombia, decision of 27 October 1995, Committee's views under Article 5 § 4 of the Optional Protocol to the ICCPR concerning communication no. 563/1993: HRLJ vol. 17 nos. 1–2, p. 19).

10 Velásquez Rodríguez v. Honduras, judgment of 29 July 1988 (Inter-Am. Ct. H. R. (Ser. C) no. 4) (1988)); Godínez Cruz v. Honduras, judgment of 20 January 1989 (Inter-Am. Ct. H. R. (Ser. C) no. 5) (1989)); and Cabellero-Delgado and Santana v. Colombia, judgment of 8 December 1995 (Inter-Am. Ct. H. R.).

11 *See* Riener v. Bulgaria (23 May 2006), § 81.

12 *See* D.H. and Others v. the Czech Republic (13 November 2007), §§ 85-89 and 187.

Article 12 of the Convention. Also in the cases of *Vilho Eskelinen and Others v. Finland* (2007) and *Sørensen and Rasmussen v. Denmark* (2006), the Court was guided by the European Union's Charter of Fundamental Rights, even though the instrument was not binding.[13]

The fourth type of comparative approach is a distinctive product of the globalization of human rights law. The international trend and looking into other legal systems for guidance was introduced to resolve the evolutive deficit created by the traditional comparison and the lack any consensus among the community of Member States. The case of *Christine Goodwin v. the United Kingdom* (2002) illustrates this approach with an in-depth analysis of the treatment of transsexuals in a number of countries outside of the Council of Europe. Comparative material includes case-law from Canada, Australia and New Zealand. According to the comparative material presented to the Court there was the continuing trend towards the legal recognition of post-operative transsexuals following gender re-assignment surgery. This clear and uncontested international trend was vital for the Court's argumentation to support the European state of affairs.[14]

The Court has also taken guidance from other jurisdictions in subsequent cases. In *Allen v. the United Kingdom* (2002), for instance, the Court referred to Canadian judgments interpreting the right to silence where the informer subverted this right. In the case of *Pretty v. the United Kingdom* (2002), the Court deliberated extensively on the issue of euthanasia and especially the case of *Rodriguez v. the Attorney General of Canada* (1994)[15]. In *Ergin v. Turkey (No.6)* (4 May 2006), the Court derived support in its approach from developments over the last decade at international level, which confirm the existence of a trend towards excluding the criminal jurisdiction of military courts over civilians.[16] The question over the double-jeopardy rule was introduced in the *Sergey Zolotukhin* case (2009) with references to international instruments and other external sources like the case-law of the US Supreme Court. According to the Strasbourg Court, an analysis of the international instruments incorporating the *non bis in idem* principle in one or another form reveals the variety of terms in which it is couched. The Court emphasised that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" insofar as it arises from identical facts or facts which are substantially the same.[17]

13 *See* Demir and Baykara v. Turkey (12 November 2008), § 80, 128-130.

14 *See* Christine Goodwin (2002), §§ 84-85.

15 *See* Pretty v. the United Kingdom (29 April 2002), § 66.

16 *See* Ergin v. Turkey (No.6) (2006), § 45.

17 *See* Sergey Solotukhin v. Russia (10 February 2009) §§ 41-44.

3 Principle Ways of Using Comparative Human Rights Information

The comparative human rights information can be used in a number of different ways within the interpretative process. Three principle ways of using this material can be identified. These are supporting traditional treaty interpretation and its teleological and evolutive approaches, secondly avoiding conflicts with universal or EU human rights systems and finally gathering information related to human rights situation in foreign countries, which is linked to extradition and expulsion cases.

The interpretation of the European Court of Human Rights has closely followed the law of treaties and rules of interpretation described in the Vienna Convention on Law of Treaties (1969). This relationship was already mentioned before the Vienna Convention entered into force[18]. The Court developed its interpretative doctrine in the case of *Golder v. the United Kingdom* (1975). According to the Court, it should be guided by Article 31 and 33 of the Vienna Convention.[19] The Court makes its interpretation by reading the treaty provision in its context and having regard to the object and purpose of the Convention, a lawmaking treaty and to general principles of law.[20] The teleological approach, emphasising the object and purpose of the Convention, is closely related to the need for comparative material. The same is true of the evolutive approach, reading the Convention provisions in light of the present day conditions.

The comparative approach has had a significant role to play in *hard cases* where all the necessary information supporting the Court's analysis has to be taken into account. The Court relied on comparative information in the landmark case of *Marckx v. Belgium* (1979) concerning the discriminatory treatment of children born out of wed-lock. The Court stated that it cannot but be struck by the fact that the domestic law of the great majority of the Member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est".[21]

In the continuum of rights of transsexuals, the Court has recurrently (the cases of Rees, Cossey and Sheffield and Horsham) relied on the evidence of comparative material which did not provide support for the evolutive approach. The Court noted that it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States.[22] Only after a long period of evolutive deficit, was the Court ready to reverse its comparative approach and to use a wider scope of comparative material in the case of *Christine Goodwin v. the United Kingdom* (2002). The Court decided to "look at

18 The Vienna Convention entered into force on 27 January 1980.

19 *See* Golder v. the United Kingdom (21 February 1975) § 29.

20 *See* Golder v. the United Kingdom, § 36.

21 *See* Marckx v. Belgium (13 June 1979), § 41.

22 *See* Sheffield and Horsham v. the United Kingdom (30 July 1998), § 58.

the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention."[23] The judgment includes a special comparative consideration under a title "The state of any European and international consensus". The Court refers to a continuing international trend towards legal recognition of transsexuals following gender re-assignment.[24] This global sources trend seems to continue in many fields of law. Recently in the case of *A and Others v. the United Kingdom* (2009), the Court collected material concerning the non-disclosure of evidence in national security cases in the Supreme Courts of Canada and United States.[25]

The Court has also used a comparative approach if required to extend or update the scope of treaty provisions. One of the important cases in recent years was the *Hirst v. the United Kingdom* (No. 2) (2005). The Court had to decide whether restrictions related to convicted prisoners were compatible with Article 3 of Protocol No. 1. The Court found that automatic disenfranchisement of prisoners was not compatible with the Convention provisions. The comparative analysis did not give any affirmative result. It was a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. The Court determined that the margin of appreciation was wide, but it was not all-embracing.[26]

The Court has also updated the scope of slavery by using comparative material. In the case of *Siliadin v. France* (2005), the Court extended the scope of Article 4 of the Convention to prohibit domestic slavery. The Court considered that limiting the scope of the provision would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. The Court referred to the UN, ILO and the Council of Europe treaties and also to the Parliamentary Assembly (PACE) findings that that "today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers."[27]

The relationship between the Convention and national and other international human rights instruments is determined in Article 53 of the Convention. Nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which are under laws or other international treaty binding on the Contracting Party. The Court has tried to avoid conflicts with other international or regional human rights systems. This has meant that the Court is often either building the interpretation on consensus or the lack of consensus between the other supervisory systems.

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23 *See* Christine Goodwin v. the United Kingdom (11 July 2002), §75.

24 *See* Christine Goodwin v. the United Kingdom (11 July 2002), §§ 84-85. In subsequent case-law e.g. Grant v. the United Kingdom (23 May 2006), § 39, the Court reiterates the Christine Goodwin judgment and notes that "the state of European and international consensus" was an essential part of the Court's reasoning.

25 *See* A. and Others v. the United Kingdom (19 February 2009), §§ 111-112.

26 *See* Hirst v. the United Kingdom (No. 2) (6 October 2005), §§ 81-82.

27 *See* Siliadin v. France (26 July 2005), §§ 85-89.

In the cases of *T. and V. v. the United Kingdom* (1999), the Court considered the question of the age of criminal responsibility. The high profile case was about two ten-year-old boys who had killed a two-year-old child. After being convicted of the murder the applicants were sentenced to her Majesty's Pleasure. The question of the age of criminal liability was considered in light of the comparative evidence. This time the Court was using the comparative evidence in a minimalist manner. Although as a whole it seemed that the age limit was exceptionally low in the respondent State, the vaguely formulated international rules and diversity in European national legal systems allowed the Court to find for non-violation.

According to the Court *no clear tendency* can be ascertained from examination of the relevant international texts and instruments. Rule 4 of the Beijing Rules[28] which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low, and Article 40 (3) (a) of the UN Convention on the Rights of the Child requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no provision as to what that age should be. The Court also noted that there was *no clear common standard amongst the Member States of the Council of Europe* as to the minimum age of criminal responsibility. Even if England and Wales were among the few European jurisdictions to retain a low age of criminal responsibility, it cannot be said to differ disproportionately from the age limit followed by other European States. The Court concluded that the attribution of criminal responsibility to the applicant did not in itself give rise to a breach of Article 3 of the Convention.[29]

In the use of comparative material it has to be taken into account that the Court's deliberations differ to a certain point from the approach applied by other international supervisory bodies. The different method can be examined in light of the Danish hate speech case. The UN Committee on the Elimination of Racial Discrimination (CERD) had been active in demanding prosecution for incitement to racial hatred in its decisions. In the Jersild case, the domestic judgement had been presented by the Danish Government in a periodic report to the CERD. While some members of the CERD welcomed it as "the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression", other members considered that "in such cases the facts needed to be considered in relation to both rights".[30] It could be said that CERD is not a judicial organ and did not conduct any detailed examination of the particular circumstances of the Jersild case. The observations illustrated a line of judicial policy that should be followed not only in Denmark but also in other Contracting States. This different

28 United Nations Standard Minimum Rules for the Administration of Juvenile Justice adopted by the United Nations General Assembly on 29 November 1985 are known as the Beijing rules.

29 *See* T. v. the United Kingdom (16 December 1999), §§ 71-72.

30 *See* Jersild v. Denmark (23 September 1994), § 21.

approach made it easier for the Court to analyse the case before it without the fear of conflicting interpretation.

The Court's weighing in the Jersild case was founded on fundamental principles of the individual complaint system. The focus is on the applicant and his freedom of expression rather than focusing on the positive obligation to prevent incitement to racial hatred. However, the Court has been strict in hate speech cases and consistency with the hate speech continuum is also relevant to the interpretation as a whole. The Court has often considered hate speech cases inadmissible and relied on Article 17 of the Convention and considered that this form of speech falls within the scope of abuse of rights.[31]

According to the Court, the object and purpose pursued by the UN Convention (CERD) are of great weight in determining whether the applicant's conviction was in violation of Article 10. The Court also noted that Denmark's obligations under Article 10 (art. 10) must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention.[32] The Court avoided any precise comparative interpretation over Article 4 of the UN Convention[33], but the Court points out that the Article 4 and its due regard clause "is open to various constructions". The Court considered that its interpretation is compatible with Denmark's obligations under the UN Convention.[34]

The Court takes seriously the need to protect minorities against hate speech. But the interpretative equation is complex and cannot be assessed from the perspective of a single aspect. The focus in the Court's analysis was on the context where the news story of a racially motivated group was broadcast and whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.[35] The Court did not see any reason to question the news and information value of the impugned item and emphasised that it was broadcast as

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31 *See* e.g. Garaudy v. France, (Appl. 65831/01, 24 June 2003, inadmissibility decision) concerning a book denying the holocaust. *See* page 23. "The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.

Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity."

32 *See* Jersild v. Denmark (1994), § 30.

33 Article 4 of CERD: State Parties condemn all racial propaganda and all organisations … which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to …this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and rights expressly set forth in Article 5 of this Convention…

34 *See* Jersild v. Denmark (1994), § 30.

35 *See* Jersild v. Denmark (1994), § 33.

part of a serious Danish news programme and was intended for a well-informed audience.[36]

If the above-mentioned two principal ways of using comparative material are examined thoroughly in the context of limitations, it is reasonable to conclude that the positive effect of comparative material seems to be connected to using other international treaties and practice of supervisory organs as was the case in the Jersild judgment. The Court applied a comparative approach as an element of the interpretation as a whole. It attached more weight to the argument from another human rights treaty, but this element with comparative support does not prevail over every other argument. Consequently, the Court's comparative approach in its traditional version does not provide new perspectives on the interpretation; the development of doctrinal interpretation can be based on international treaties and other external sources.

The third principle way of using comparative information is typical to cases relevant to the extradition or expulsion of aliens. The Court has made good use of the information gathered by the UN agencies. The Country-of-Origin assessment by the UNHCR (United Nations High Commissioner for Refugees) has been used in a number of cases. In the case of *N. v. Finland* (2005), for instance, the Court had to examine the situation in the Democratic Republic of Congo. The applicant considered that he would be subjected to inhuman treatment if deported from Finland. In addition the Court also referred to assessment by the British Home Office.[37] Use of US State Department material has been part of the information gathering in certain cases. Different human rights NGOs are also vital for gathering information.[38]

The important case of *Saadi v. Italy* (2008) illustrates that gathering reliable information from many sources is fundamental in the days of the fight against terror, when, for example, disturbing methods of interrogation are practiced outside Europe. The Court has required that the deportation of terrorist suspects should not be based only on diplomatic assurances denying any mistreatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.[39]

4 The Comparative Approach and Criticism of the Margin of Appreciation Doctrine

The margin of appreciation doctrine is instrumental to the relationship between the Court and national authorities. It is not a typical principle of interpretation although it has an essential role within the Court's case-law. The doctrine is

36 *See* Jersild v. Denmark (1994), § 34.

37 *See* N. v. Finland (26 July 2005), §§ 117-122.

38 *See* e.g. Saadi v. Italy (28 February 2008), the Court examined the human rights situation in Tunisia and used Amnesty International and Human Rights Watch reports and report of the US State Department. The Court held that if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention.

39 Saadi v. Italy (28 February 2008), §§ 143-148.

based on the two main arguments. There are limitations to the scope of the Court's review related to the subsidiary role of the international machinery. The second argument formulated in the case law is that national authorities are in a better position than an international judge to access the necessity of interferences with the rights of individuals. The Court has reiterated that the scope of the margin will depend on several factors.[40] One of the reasons to use the margin of appreciation is difficulty in identifying common European conceptions on the extent of rights or restrictions in question. This is traditionally connected to difficulties in defining concept of morals.

The Court's doctrine over margin of appreciation was developed very early on and already in these first judgments references can be found to a comparative approach. In the *Handyside v. the United Kingdom* (1976), also known as the Little Red Schoolbook case, the Court decided on the censorship of a book that included chapters on sex education. According to the Court it was not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. Then the Court went on to reason that its subsidiary nature meant that the national authorities have margin of appreciation. The Court noted that by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The result of this reasoning is that the treaty provision leaves a margin of appreciation to domestic authorities both legislators and courts.[41]

The opponents of the current the margin of appreciation doctrine have put forward an argument that the problem is related to change in the European human rights community. The doctrine was developed in the context of reasonably homogeneous contracting parties. Within the common European human rights standard it was possible to allow national authorities to operate and the Court was able to speak about the subsidiary nature of its own supervisory role. The basic assumption is that within the margin left to national authorities there will be no major human rights violations. The doctrine does not work if the assumption over the slight consequences of the actions within the margin is not functioning.[42]

The comparative element often implies grounds to broaden the margin of appreciation rather than requiring more rigorous scrutiny. In a recent case, Egeland and Hanseid v. Norway (2009), Norwegian law prohibited photographing charged or convicted persons in connection with court proceedings. A comparative approach provided information that could be seen according to the perspective either as giving reason for a certain margin of appreciation or limiting the scope of the margin. A comparative approach

40 *See* more on the margin of appreciation doctrine in Jukka Viljanen (2003). *The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law*: Acta Universitatis Tamperensis 965, p. 247-258.

41 Handyside v. the United Kingdom (7 December 1976), §§ 48-49.

42 *See* concurring opinion of Judge Martens in the case of Brannigan and McBride v. the United Kingdom (26 May 1993).

showed that there were a couple other European States (Cyprus, England and Wales, and legal restrictions also apply in Austria and Denmark) that had similar prohibitions placed on photographing. So the Court noted that Norway was "not in an isolated position".[43]

What are the consequences of this information to balancing exercise between competing interests? Does the lack of a European consensus and small number of States following stricter rules against freedom of expression automatically mean a wide margin of appreciation? The Court decided that in light of comparative information the wide margin of appreciation was appropriate.[44] Judge Rozakis was very critical of this automatic application of the wide version of the margin of appreciation doctrine. In his concurring opinion he stated "the mere absence of a wide consensus among European States concerning the taking of photographs of charged or convicted persons in connection with court proceedings does not suffice to justify the application of the margin of appreciation".[45]

The application of different levels of the margin of appreciation doctrine seems to a certain extent to be inconsistent. There are examples of the use of comparative material and the lack of consensus argument that in the end do not allow a wide margin of appreciation. In the case of *TV Vest AS & Rogaland Pensjonistparti v. Norway* (11 December 2008), the Court decided to apply "a somewhat wider margin" referring to normally very strict margin concerning political freedom of expression.

In the TV Vest case, the Court applied comparative analysis when it had to decide whether a total ban on political advertising was violating rights of the applicant under Article 10. The Court noted the different systems concerning political advertisement between the States making up the Convention community. The Court had to examine the consequence of the lack of consensus. According to the Court "[i]n so far as this absence of European consensus could be viewed as emanating from different perceptions regarding what is "necessary" for the proper functioning of the "democratic" system in the respective States, the Court is prepared to accept that it speaks in favour of allowing a somewhat wider margin of appreciation than that normally accorded with respect to restrictions on political speech in relation to Article 10 of the Convention."[46]

When the Court chose to apply a "somewhat wider margin" but not a "wide margin", it subjected the Norwegian system to relatively thorough scrutiny. The Court follows in its reasoning the continuum established in the previous case of *Vgt Verein gegen Tierfabriken* (2001). The Court referred in that case to a certain margin which is particularly essential in the case of advertising and determined that the extent of the margin of appreciation was reduced, "since what is at stake is not a given individual's purely "commercial" interests, but his

43 *See* Egeland and Hanseid v. Norway (16 April 2009), § 54.

44 *See* Egeland and Hanseid v. Norway (2009), § 55.

45 *See* Egeland and Hanseid v. Norway (16 April 2009), Concurring Opinion of Judge Rozakis.

46 *See* TV Vest AS & Rogaland Pensjonistparti v. Norway (11 December 2008), § 65.

participation in a debate affecting the general interest".[47] A similar approach although now in the TV Vest case referred to as a somewhat wider margin led to a finding of a violation of Article 10 of the Convention. The Court rejected the Government view that there was no viable alternative to a blanket ban on political advertisement.[48]

Consequently, the Court used a comparative approach together with the margin of appreciation doctrine in a manner that makes the interpretative doctrines seemingly ambiguous. This development is contrary to the traditional use of a comparative approach in connection with evolutive and dynamic interpretation. Using the comparative approach only or at least dominantly in a negative or minimalist way means that the natural link between these interpretative principles is threatened. The progressive effect of comparative material, innovatively used, seems to be connected to introducing material from other international treaties and practices of supervisory organs and conversely the traditional effort to find the European consensus or the lack of that consensus is applied in a very restrained manner and generally leads to a finding of a non-violation.

5 Country Based Interpretation: The Case of Religious Symbols

One of the parallel issues related to the future of a comparative approach is the interpretation in light of different contexts. A context oriented approach is an essential part of the current doctrine of the European Court of Human Rights and is a counter force to the harmonization and integration aims of the Court's rulings. The crucial challenge is explicit in the Harman Report[49]:

> "The major challenge for the Court today is not only to maintain and develop the Convention standards but also to ensure that the Europe of human rights remains a single entity with common values."

There is growing concern whether this emphasis on the different contexts leads to inconsistent interpretation according to a State in question i.e. that a respondent State and its historico-political context become fundamental to the Court's analysis. This could imply that there is a need to assess any legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another.[50] If such an interpretative policy were implemented on a larger scale it would inevitably present a major conflict with the whole aim of the supervisory mechanism. As a presumption the Court should interpret the Convention in light of its object and purpose. The Court should also treat every

47 *See* Vgt Verein gegen Tierfabriken v. Switzerland (28 June 2001), § 71.

48 *See* TV Vest AS & Rogaland Pensjonistparti v. Norway, § 77.

49 *See* The Harman Report (Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, named after the chairman of an evaluation group) was presented 27.9.2001.

50 *See* Zdanoka v. Latvia (16 March 2006), §§ 115 (c) and 121.

country equally in its judgments, not giving favorable treatment to a particular state.

The interpretation as a whole and taking into consideration all relevant circumstances ultimately make it possible for the Court to have the necessary flexibility in its doctrines. It is sometimes logical that the Court applies a context oriented approach, thereby making it unambiguous that the same interpretation in other circumstances could lead to a different conclusion. This is in fact a certain type of anticipated distinction technique giving the Court a free hand when it approaches a similar question in different circumstances. I think the most striking example of this approach is the Turkish context. However, the anticipated distinction technique can easily be forgotten when the next link to an existing continuum is presented. I think the following example of religious symbols is important proof of such a doctrinal transfer from one context to a new one.

The Court established a stable continuum related to Turkish secularism. The cases of Refah Partisi and Others (2003), Leyla Sahin (10 November 2005) and Köse and Others (24 January 2006/Dec.) concentrated on the separation of the Turkish State and Islamic religion. The main focus in these cases has been on the particular circumstances in Turkey. The Refah case concerned the dissolution of the Welfare Party. The Leyla Sahin and Köse cases are related to the prohibition to use the Islamic headscarf in universities and secondary schools. In the Refah case, the Court took "into account the importance of the principle of secularism for the democratic system in Turkey", and considered that dissolution pursued a legitimate aim.[51] The Court even further emphasized taking account of the historical context in which the dissolution of the party concerned took place and the general interest in preserving the principle of secularism in that context in a country concerned to ensure the proper functioning of a "democratic society".[52]

However, this emphasis on the historical context did not prevent the Court from applying secularism as a main argument in another context. The case of Dahlab v. Switzerland (Appl. no. 42393/98, 15 Febrary 2001) and the cases of Dogru v. France (2008) and Kervanci v. France (2008) follow closely the reasoning elaborated in the Turkish secularism continuum. According to the Court, the protection of secularism in schools is also a valid argument in the Swiss and French context. The Court noted that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, particularly in schools.[53]

What remains rather ambiguous in the Court's reasoning is the reference to a diversity of approaches in Europe in relation to regulating the wearing of religious symbols in educational institutions. The Court makes a traditional comparative study among the European States. The Court notes that "rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights

51 *See* Refah Partisi and Others v. Turkey, (13 February 2003[GC]), § 67.

52 *See* Refah Partisi and Others v. Turkey (2003), § 105.

53 *See* Dogru v. France (4 December 2008), § 72.

and freedoms of others and to maintain public order".[54] However, the conclusions and the result of this diversity are not transparent in the analysis. The Court builds a solid continuum of secular case-law without referring to the major difference between the Turkish and French or Swiss systems, which should be rather obvious e.g. there is an Islamic majority in Turkey compared to a small Islamic minority in France and Switzerland.

In the case of religious symbols in the education system a comparative approach leads to a minimalist approach. Without consensus on Europe regulating the wearing of religious symbols, the Court leaves a wide margin of appreciation to national authorities. The Court noted that where questions concerning the relationship between State and religions are at stake, the role of the national decision-making body must be given special importance. According to the Court, having regard to the margin of appreciation which must be left to the Member States with regard to the establishment of the delicate relations between Churches and State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention.[55]

The Court examined whether the proceedings at the national level were balanced and found that more lenient measures were used which did lead to positive results. In addition the ban in the case of Dogru was limited to physical education classes. The Court also considered the question over the most severe penalty and noted that "it is not within the province of the Court to substitute its own vision for that of the disciplinary authorities which, being in direct and continuous contact with the educational community, are best placed to evaluate local needs and conditions or the requirements of a particular training."[56]

What makes this interpretation confusing is the fact that the Court combines the context oriented approach with a comparative approach. It is difficult to consider which approach dominates the interpretation. In the case of religious symbols in educational institutions these conflicting approaches support the same conclusion. Secularism strongly favours the minimalist use of a comparative approach with strong emphasis in certain countries especially to preserve secular schools despite the fact that in most of the countries there is no such a tradition.

It could be argued that States are not equal before the Court regarding their status. The approach raises several questions regarding the interpretative line of the Court. Is it decisive that France and not a smaller and less influential State has a certain tradition? There could be dire consequences to the generality of Strasbourg case-law if we reply that major European States have favourable treatment before the Court. Already in the previous case of *Odièvre v. France* (13 February 2003), the Court's arguments give rise to criticism. The Court observed that most of the Contracting States do not have legislation comparable that applicable in France. There was no common denominator between domestic laws. However, the Court was divided on this conclusion (10-7). The minority

54 *See* Dogru v. France (2008), § 63.

55 *See* Dogru v. France (2008), §§ 63 and 72.

56 *See* Dogru v. France (2008), § 75.

read the comparative study differently. The French system was quite unique and no other legislative system was so weighed in favour of maternal anonymity. The majority failed to refer to international instruments which play a decisive role in achieving a consensus.[57]

The mixed approach (context and comparison) also raises questions regarding the Court's interpretative methods. Could it imply that the Court has not followed the standard interpretative procedure in the French Islamic scarf cases? Instead of using all the relevant material in the decision process, there are first the conclusions of non-violation of Article 9 of the Convention and after that the choice has been made, the Court gathers all relevant and less relevant grounds supporting the finding of non-violation. This leads to a very restrictive use of the comparative method. It does not serve as an innovative interpretative tool, but it is made to maintain the consistency of case-law and to provide an opportunity to link a new decision into a context-oriented continuum.

6 Is There Evidence of Globalization of Human Rights Law?

One of the trends in recent human rights case-law is the increasing use of comparative material from other actors in the field of human rights supervision. This trend has links to the extended use of Internet sources and the possibility to consult different Internet databases. The question is also related to willingness to apply different sources quite flexibly without concentrating on the binding nature of the actual instrument.

The development of international human rights law has strong links to non-binding instruments like resolutions and declarations. The material which is commonly defined as "soft law" has an essential and growing role in the development of international human rights law.[58] Drafting human rights treaties starts with expert meetings and declaratory texts adopted at these international conferences. The binding treaty is an end-product of this long process. The international human rights discourse is also highly interactive. Sometimes a treaty text reflects already established practice by various international supervisory bodies. This same phenomenon is also relevant to human rights adjudication.

The most notable judgment in recent years where the Court has codified its established interpretative doctrine is *Demir and Baykara v. Turkey* (2008). The applicants claimed that their right to form trade unions and to collective agreements was infringed. The Court reiterated that the rules of interpretation are flexible. The Court refers to two forms of the comparative method. Firstly, the Court takes into account elements of international law while defining the meaning of terms and notions.

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57 *See* Odièvre v. France (13 February 2003), Joint Dissenting Opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

58 *See* more on soft law in Dinah Shelton. *International Law and 'Relative Normativity'*, p. 166-170, in Malcolm Evans (ed.). *International Law*. Oxford University Press. 2003, p. 145-171.

> "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values."

Secondly the Court can also use consensus emerging from *specialised international instruments and from the practice of Contracting States* may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.[59]

The Demir and Baykara case follows the continuum related to trade union rights. Significant developments emerged in the cases of *Sigurdur Sigurjonsson v. Iceland* (1993) and *Sørensen and Rasmussen v. Denmark* [GC] (2006). The Court construed negative freedom of association as an essential part of Article 11 of the Convention. In the Danish case, the Court made a very thorough comparative study to review both status in the Contracting States and seek other European instruments in the field of trade union rights. The Court found little support for the maintenance of closed-shop agreements. Moreover, the European instruments clearly indicated that the use of closed-shop agreements in the labour market is not an indispensable tool for the effective enjoyment of trade union freedoms.[60]

A comparative approach in the cases related to trade union freedoms is logical, because it is the field of human rights where there can be found international instruments that are either civil and political rights treaties or treaties focusing on economic, social and cultural rights. One of the recent comparative examples is the question of employment restrictions related to political views or working history under the previous regime. *Sidabras and Dziautas v. Lithuania* (2004) was one of the standard setting judgments. The Court used a comparative method with a combination of comparative analysis of states and other human rights treaties. Practices in Bulgaria, the Czech Republic and Latvia were examined as comparative material. The European Social Charter and the ILO convention No. 111 were mentioned as relevant treaties. The Court found a violation of Article 14 in conjunction with Article 8. The legislative scheme lacked the necessary safeguards for the former KGB employees. The Court made reference to the ILO Committee views over Latvia.[61] There have been many other similar types of restrictions that the Court has considered in its subsequent case-law.[62]

From the Strasbourg perspective the UN Treaty bodies and other international organs, especially international courts, present material that has

59 *See* Demir and Baykara v. Turkey, (12 November 2008), § 85.

60 *See* Sørensen and Rasmussen v. Denmark (11 January 2006), § 75. The closed shop problem originally surfaced in the case of Young, James and Webster v. the United Kingdom (13 August 1981).

61 *See* Sidabras and Dziautas v. Lithuania (27 July 2004), §§ 30-32 and 47.

62 *See* e.g. Rainys and Gasparavicius v. Lithuania (7 April 2005) and Žičkus v. Lithuania (7 April 2009).

been used consistently in numerous cases. Most of these cases are related to Article 2 (right to life) and Article 3 (prohibition of torture and inhuman treatment). A couple of examples related to globalization of human rights law can also be found in the limitation clause cases, but the comparative element often refers to positive obligations rather than to the elements of the limitation test.

In the case of *Bevacqua and S. v. Bulgaria* (2008), the Court used as comparative material a finding by the Special Rapporteur to the Commission of Human Rights who in his third report referred to a rule of customary international law that "obliges States to prevent and respond to acts of violence against women with due diligence". The analysis was based on the developments in the case-law of several international bodies including the Strasbourg Court (Osman v. the United Kingdom), the Inter-American Court (Velasquez Rodiriguez v. Honduras), the Inter-American Commission of Human Rights (Maria da Penha Maia Fernandez (Brazil)) and the CEDAW Committee (A.T. v. Hungary).[63] The Court referred under Article 8 to positive obligations towards victims of domestic violence and noted that the need for active State involvement in their protection has been emphasised in a number of international instruments.[64]

The interpretative doctrines codified in the *Demir and Baykara* case imply that the globalization of international human rights law is a strengthening interpretative trend which is becoming a regular interpretative tool in hard cases. There is mounting evidence of an interactive process of developing the Strasbourg doctrine in co-operation with other actors in the field of international human rights protection. Third-party interventions to gather the necessary information are essential to challenge the established line of interpretation.

In many substantive fields of the Strasbourg case-law the Court is still eclectic in using global comparison. This is the reason why there are so few limitation clause cases with elaborate references to international trends. It is not necessary to elaborate the reasoning with comparative elements if the conclusion can be reached through simplified argumentation. However, it was proven in the Christine Goodwin case that even the consistent interpretative continuums can be challenged by comparative material.

7 Future of the Comparative Approach

The Court's interpretative principles have been codified in the case-law. The academic discourse on the different principles is still in its early stages. The time is now ideal to review interpretative principles like a comparative approach in the scholarly discourse, too. The established doctrinal structures have been developed under the assumption of the homogeneity of the European human rights community. However, it is necessary to ask whether European legal cultures are fundamentally the same in practice. It should be questioned whether

63 *See* Bevacqua and S. v. Bulgaria (12 June 2008), § 53.

64 *See* Bevacqua and S. v. Bulgaria, § 65.

the comparative approach provides solutions to go beyond the assumption of similar legal cultures. This is one the most essential issues that should be addressed from the doctrinal perspective. I think it is necessary to define interpretative principles to meet these needs.

In recent academic texts a comparative approach has been regularly used to comprise two elements: relying on European national law standards and referring to international standards.[65] Steven Greer launched new innovative division of principles into two categories: Primary constitutional principles and secondary constitutional principles. In his primary principles are (1) the Rights Principle (effectiveness), (2) the Democracy Principle, (3) Legality, Procedural Fairness and Rule of Law and (4) Balancing and Priority-to-Rights. The secondary constitutional principles are subordinate to the primary principles and provide a complex web of overlapping support. Greer does not speak about a comparative approach, but uses the term principle of commonality together with the principle of evolutive/dynamic interpretation.[66]

I think that a comprehensive doctrinal structure of the European Court of Human Rights cannot exclude a comparative approach in one form or another. My definition is that first of all the comparative approach should be seen as an innovative element that connects the interpretative process to the European standard that has been created by the Court in its 50 years of existence. Secondly it links the interpretation to the surrounding dynamics, to the emerging European national law and European Union law standards. Thirdly it refers to the human rights network regionally and universally and the international human rights instruments parallel to the European system. And finally, it also refers to the global human rights discourse including different national jurisdictions outside of the territorial scope of the European Convention on Human Rights and also to the foundations of human rights development occurring with different actors and often before binding treaty mechanisms are involved.

If we try to identify the most complicated problems facing the comparative approach the focus should be on context-oriented interpretation and consensus (the lack of consensus) approach. Evidence can be found that heterogeneity has increased the contextual interpretation. In Zdanoka v. Latvia (2006) the Court refers to the historico-political context of Latvia as a reason for the non-violation in the case of restriction of the applicant's electoral rights. In the religious symbol cases (Leyla Sahin and Others, Köse and Others) the Court based its argumentation on the Turkish context, which did not prevent it from connecting French cases to the same interpretative continuum of protecting secularism.

From the judicial policy perspective there is a cumulative self-restraining trend. In addition to the context-oriented interpretation the consensus approach is also applied in a minimalist sense. The heterogeneity of the European human rights community leads regularly to a finding that there is the lack of consensus. This ruling affords a wide margin of appreciation and prevents evolutive

65 *See* Harris, O'Boyle and Warbrick (2009). *Law of the European Convention on Human Rights*, Oxford University Press, p. 8-14.

66 Steven Greer (2006). *The European Convention on Human Rights. Achievements, Problems and Prospects*. Cambridge University Press. p. 195-230.

interpretation. The lack of consensus thus excludes the use of evolutive and dynamic interpretation and reviewing the circumstances in light of present day conditions. It also creates evolutive deficits in the case-law which are difficult to remedy.

There are several alternatives and conflicting approaches to the use of a comparative approach as an interpretative tool. If the Court wishes to continue the positive development of its doctrines, it has to review its doctrinal approach and adapt it to comply with the requirements of the prevailing situation. If we consider that the comparative approach can be a vital part of the doctrine, it should be applied in an innovative way and support the object and purpose of the Convention (to achieve greater unity).

First of all we need to discuss the question of standards in the European human rights community. In the established case-law the Court has introduced a term "European standard". What does this concept mean in the aftermath of the enlargement? It is necessary that re-evaluation of the concept is made in light of the present-day conditions. If the European standard is examined in light of the object and purpose of the Convention, the European standard is capable of improvement. This is the message that the Court stated in its landmark Selmouni judgment concerning the scope of the prohibition of torture (Art. 3). The increasingly high standard required in the area of protection of human rights inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[67]

Thus, according to the Court, the European standard is intrinsically progressive and dynamic. However, there is contrary evidence that despite this established principle there is a chance that the European standard is not progressive but is even going in the opposite direction i.e. downwards. Within the European system the development might easily lead to double standards. The all-European system and the European Union system are potential places of divergence of the protection level. The European Union Charter of Fundamental Rights refers to the necessity to strengthen the protection of fundamental rights in light of changes in society, social progress and scientific and technological developments. The European Convention provides the minimum level of protection and nothing should have an adverse effect on human rights, but the Charter does not exclude more extensive protection in comparison to the level of international human rights treaties (Art. 52-53). If the application of a comparative approach is traditional and concentrates on the existing standard in Council of Europe Member States, the approach would emphasize the wide margin of appreciation and ultimately lead to a negative evolution.

A valid option seems to be a conscious shift within the comparative method towards international trends and strengthening the use of global sources of human rights law. This provides the only viable alternative to the opposite megatrend of a contextual approach. The Court has created very interesting links to international human rights law in order to find another way to achieve harmonisation of human rights standards in Europe. The quest for harmony has to be based on dialogue. However, the traditional dialogue on the European level

67 *See* Selmouni v. France (28 July 1999) § 101 and Demir and Baykara v. Turkey (2008), § 146.

does not provide the necessary tools to achieve the object and purpose of answering to the increased diversity between European countries and their legal systems.

The comparative dialogue also has to be reinvented in the field of limitations and their compatibility. The universal, regional and national human rights systems are not in competition. The new vision of a global human rights system has to be structured on an idea of a network of human rights instruments and the dialogue that different treaty bodies and national constitutional courts are having. This dialogue should be based on flexible rules of sources of international law. The ultimate aim of this network should be the effectiveness of human rights protection. Each protection system in this network should focus on the development of the rights of individuals and that these rights are practical and effective, not theoretic and illusory.