The Judicial Discretion of the European Court of Human Rights: The Years of Plenty, and the Lean Years

In this issue, we have the pleasure to host two thoughtful and expertly written guest editorials on judicial discretion exercised by the European Court of Human Rights (ECtHR, the Court). They approach this question from two different perspectives. The former ECtHR Judge and Vice President, Professor Françoise Tulkens, offers an authoritative view from within the ECtHR, informed by her rich experience, whilst Political Science Professor George Tsebelis applies his seminal game theoretic analysis on institutional decision-making within the ECHR system. The guest editorials have been an excellent source of inspiration for the brief thoughts that we are offering here, but before that, we would like to share with the readers that, after a long delay caused by the COVID-19 pandemic, on 4 July 2022, we celebrated the launching of the *ECHR Law Review* at the premises of the ECtHR. We are thankful to President Robert Spano and to the Registrar of the Court, Marialena Tsirli, for their warm hospitality and for their very kind and generous words on the journal, as we are also thankful to Judges Ineta Ziemele and Armen Harutyunyan – who have both contributed with guest editorials to previous issues of the journal – and to our publisher, Lindy Melman. They all participated at this event and spoke about their experience with the *ECHR Law Review*. One of the key aims of this law review is to act as a bridge between the system of the European Convention on Human Rights (ECHR, the Convention) and academia: engaging in a direct dialogue with the ECtHR is an excellent means to this aim.

Moving now to this editorial’s topic, namely the ECtHR’s judicial discretion, we start by noting that, *in principle*, rules shall be concrete and unambiguous.
This increases legal certainty and diminishes the discretion of the users of a rule who apply and interpret it. However, the degree of a rule's requisite precision also depends on the area of law and the issue that it regulates. In some areas, concreteness is essential. For instance, this applies in technical areas, such as tax law, or in driving regulations. To give an example, instead of setting 30 miles as the speed limit, a rule could read: drivers in urban areas must not drive fast and speed shall be duly adjusted to the circumstances, such as weather and traffic conditions. Such a rule would not regulate driving effectively and would be a cause of constant litigation. However, precise rules are not always the best option as they are inflexible and minimise the ability of interpreters to consider the complexity of unpredictable conditions. Some areas of law, such as human rights, can benefit from more abstract rules and regulations that allow interpreters to exercise wider discretion. Indeed, among other possible reasons, human rights rules are designed to be general enough so that they can find abundant applications in everyday life. They have to be flexible in order to remain relevant by accommodating multitudes of various sets of facts and circumstances and by applying to diverse contexts. This in turn can open the ‘floodgates’ of conceptualisations, delimitations, and, more generally, interpretations. For instance, we think that it is hardly contestable that the privacy of correspondence should equally cover emails as well as ‘classic’ postal letters. Other questions are, however, far from being equally uncontroversial. For example, should family rights equally apply to LGTBIQ+ families? Although we personally think that this question shall be answered in the affirmative, we must admit that this is pretty much a preference of ours. Other lawyers can rely upon the abstract text of the very same human rights rule to reach the opposite conclusion.

Alongside abstractness, another key element that determines the scope of discretion is what it takes to change a rule. Usually, to be amended, more important rules require more complex procedures and/or the consent of an increased number of involved actors (e.g., supermajorities or referenda). The example to give in this respect is national constitutions, in particular the more rigid ones, whose amendments may involve a lengthy process that demands the agreement/alliance of many actors. Let us think now of an absurd scenario: a very rigid constitution within which the – not-so-much ‘enlightened’ – elite of a nation would decide to include the abovementioned, vague rule on driving in urban areas. First, the rigid constitutional nature of that rule would mean that, amending it with a view of making it more concrete would

1 Abstract text in multilateral treaties is a means for the negotiating parties to reach an agreement. B Koremenos, The Continent of International Law: Explaining Agreement Design (Cambridge University Press 2016) 158–192.
be considerably more difficult than the amendment of an ‘ordinary’ rule. The ‘constitutionalisation’ of this silly rule would mean that we are stuck with it. Second, to make said rule more effective, we would have to rely on an authority (such as the police or the courts) interpreting it. The shaping of a rule by means of interpretation is a substitute to its amendment. Third, the combination of the abstract wording of the rule and rigidity in its amendment result in increased discretion by the interpreters of the rule, in particular by the courts. In the driving example, courts would be the ultimate decision-makers as to what driving ‘not fast’ would mean. Interpretation can metamorphose a rule, and the more abstract that a rule is, the higher degree of discretion that its interpreters possess.

Returning to human rights law, we note that human rights rules are more often than not ‘sealed’ into rigid, that is to say, difficult to amend, legal ‘boxes’, such as national constitutions and international instruments like the ECHR. Among other reasons, this happens because human rights are far too important to let them depend on occasional majorities or on the ‘water tides’ of public opinion. Unlike shoes or clothes, human rights should remain unaffected by ephemeral fashions. This, however, does not mean that human rights rules should remain still and frozen in time. To give an example, one can plausibly argue that the right to life shall be adjusted to modern values and, irrespective of being ‘a distortion of language’,2 it shall encompass the right to die in dignity through medically assisted suicide. Essentially, this argument amounts to the exercise of discretion resulting in the extension of the right to life. That said, as Judge Tulkens explains in her note, discretion does not always mean extension or expansion. One can use the right to bear arms under the American Constitution3 to justify the argument that rights can, and perhaps should be restricted. Among plenty other flaws of the right to bear arms (e.g., tension with the right to life), this argument would emphasise the blatantly anachronistic nature of this rule. Interpretation has the power to limit or even turn it fully inoperative and ineffective, albeit, formally, given how difficult it is to properly eradicate said rule by amending the US Constitution, it will remain valid.

The picture we have drawn thus far explains why human rights rules tend to be abstract and rigid. They are usually drafted in more abstract terms than other areas of law and, often, they are more difficult to amend through formal processes that reflect broader societal and political consensus. The combination of abstractedness and rigidity results in human rights often ‘changing’ through

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2 Pretty v the United Kingdom 2346/02 (ECtHR, 29 April 2002) para 39.
3 US Constitution, Second Amendment.
judicial interpretation. Courts can ‘translate’ abstract rules into contemporary norms, so that they can specifically apply to the day-to-day circumstances and reflect modern-day values. The combination of abstract text and rigidity in the amendment explains why judicial discretion is wide and difficult to be limited by other actors (e.g., lawmakers). It also explains why judicial self-restraint is the key limit to judicial discretion. In other words, courts can decide to set standards possibly, but not necessarily expanding the meaning of the abstract rules (which may lead to them being accused of activism), but they can also refrain from doing this so that other involved authorities (e.g., lawmakers) can assume that role. Judicial self-restraint is a type of judicial discretion. Although it sounds counter-intuitive that, in a sense, it is judicial discretion that limits judicial discretion, indeed, this is how things work in practice when factors like the ones that we have identified (abstractedness and rigidity) endow a court with wide discretion. Courts are not just the main interpreter of the legal text, they also set the boundaries of their competence themselves.4 What we describe here goes beyond the traditional concept of kompetenz-kompetenz; it concerns the substance of juris dicere by a court.

The question that begs an answer then is: what prompts a court that has ample discretion as to how to interpret an abstract and rigid human rights rule to exercise this discretion in the direction of self-restraint? Many factors determine this. Ideological preferences, in particular how strongly judges feel about a certain human rights issue, is one factor. Another one is how effective a standard-setting judgment can be. This is determined by a number of socio-political factors, including social consensus/support for the standard at issue and the power of the ones who are called to implement the standard. As Tsebelis’ analysis shows, this is also determined by the ability of the authorities to challenge the court that delivered the judgment by essentially entering into a game of chicken that tests how determined each party (the court that delivered the judgment and the authorities refusing to comply with the judgment) is to maintain its position and to lead the other party to ‘yield’.

The legal and social ‘ecosystem’ within which the ECtHR functions also encompasses a twilight zone between what it may do and what it can do in reality. The size of this zone also depends on the ‘pushback’ force against the Court. In principle, the ECtHR’s design gives wide discretion to the ECtHR to interpret the Convention and to transform the creative ambiguity that characterises its text into concrete, modern-day standards. In reality, the effectiveness of the standards depends on their endorsement and materialisation by 46 polities,

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4 According to Article 32 of the ECHR, the jurisdiction of the ECtHR extends to all matters concerning the interpretation and application of the Convention.
each one of which has its own institutional apparatus, idiosyncratic domestic legal order, economic means and level of development, and, most importantly its own demos, with its distinctive cultural/religious features, historical roots, narratives, sensitivities, fears and traumas, or collective imagination. This creates a narrow path for the ECtHR Judges to either insist on the unification of human rights standards at the European/international level or to leave them fragmented with different standards applicable in different national orders. The former favours common pan-European standards and regional integration, whilst the latter favours pluralism and national sovereignty through margin of appreciation and subsidiarity. This – inherent to international human rights adjudication – dilemma is complemented by other dilemmas that all national and international human rights courts face, such as the ones between parliamentary majorities versus the judiciary or the dilemma between human rights principles (in the Dworkinian sense) and majority rule.

How has the ECtHR responded to these dilemmas, and what choices has it made as to how it exercises its discretion? In navigating the narrow path between subsidiarity and supervisory supranationalism in human rights protection, the Court has strived to maintain due balance by demonstrating both self-restraint and standard-setting tendencies in a mixed manner. Within this environment, several factors have informed its decision-making, including the nature of the legal issue pending before it, how convincing the Court’s reasoning could be, but also the need to protect its reputation and, through it, its authority and gravitas as the ultimate human rights adjudicator in Europe. To that end, it has dexterously crafted purposefully ambiguous methods of interpretation such as proportionality, margin of appreciation, and European consensus.

Yet, although the outputs of the ECtHR have been mixed across time, combining both standard-setting and self-restraint, we can distinguish between two different eras in the modern history of the Court. The first era starts, more or less, with the enlargement of the Council of Europe towards the East and with the Protocol 11 reform that turned the Court into a protagonist. One of us had the chance to ask late Judge Benedetto Conforti, when, in the second half of 2000s, he gave a speech at the European University Institute in his capacity as a former ECtHR Judge, whether he thought that the ECtHR has in certain instances overreached with standard-setting. The answer by Judge Conforti

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5 As we argue in this note, presently, it is significantly narrow because the ‘pushback’ is particularly palpable, but in the past it was considerably wider.

6 G Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford University Press 2007) 99–119.
was that, for as long as the member states continue to implement the Court’s judgments without complaining or without withdrawing from the Council of Europe, then the Court is right to abstain from self-restraining its adjudicatory and standard-setting powers. These were the ‘years of plenty’. Judge Conforti was not only sincere in his answer, but also right and, in a sense, prophetic. The years of plenty have been followed by the era of subsidiarity. The Court continues to set standards when it deems it appropriate, as it also had to demonstrate many instances of self-restraint during the years of plenty. However, now, the Court has (been prompted to) become increasingly sympathetic to the national sensitivities and to local preferences. Comparing to the past, the ECtHR is more often inclined to favour the margin of appreciation, and it has also devised methods – such as procedural rationality – that help it to justify why on a particular occasion it may confine its scrutiny and defer to the authority of the national institutions of, admittedly, particular states.

What has prompted the Court to shift to increased subsidiarity? We think that one key reason, among other possible ones, has been the reaction and pressure from states which openly challenged, through varied avenues and means (including refusing to comply with ECtHR judgments), the Court’s standard-setting authority. The addition of the principle of subsidiarity and of the margin of appreciation to the text of the Convention through Protocol 15 is a constant reminder to the Court of the system’s architecture, of the limits of its powers, and of its supranational nature. Protocol 15 is the culmination of a tendency that started much earlier and which has several benchmarks, possibly including ‘fights’ over which the Court chose (or was forced) to compromise. An anecdotal example of such a battle is possibly the case of Lautsi, where the Court was called to decide whether crucifixes in Italian state schools violate freedom of religion. The Chamber answered this question affirmatively. The case has then been reviewed by the Grand Chamber, which openly – albeit

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7 R Spano, ‘Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity’ (2014) 14 Human Rights Law Review 487.
8 T Kleinlein, ‘The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution’ (2019) 68(1) International and Comparative Law Quarterly 91; J Gerards and E Brems (eds), Procedural Review in European Fundamental Rights Cases (Cambridge University Press 2017); P Popelier and C Van De Heyning, ‘Subsidiarity Post-Brighton: Procedural Rationality as Answer?’ (2017) 30(1) Leiden Journal of International Law 5.
9 Article 1 of Protocol 15 to the ECHR, amending the ECHR preamble.
10 Lautsi and Others v Italy [GC] 35814/06 (ECtHR, 18 March 2011).
unconvincingly as to the judgment’s reasoning – relented to the pressure applied by a number of states and other actors, including parliamentarians, aiming to defend a particular religious identity for Europe. Another example of what can possibly be seen as a compromise is the case law on the voting rights of prisoners, in particular in cases against the UK.\footnote{K Dzehtsiarou, \textit{Can the European Court of Human Rights Shape European Public Order?} (Cambridge University Press 2021) 135–136.}

We do not mean to give the wrong impression that the ECtHR is unconditionally favouring subsidiarity and/or sovereignty, or that it is systematically abstaining from duly exercising its supervisory functions. All we are saying is that, at this stage of the evolution of its practice, the Court is not as unoccupied as it used to be in the 1990s and 2000s with state sovereignty and with standard-setting at the national level. Some see this stance of the Court as a sign of weakness and dependence. Others see it as pragmatism and maturity within a constantly evolving sociolegal framework. Yet, it takes two to tango.

The Court is not alone in this ‘game’, and it definitely does not dance in the same way with all states. Some states (e.g., the UK) have seemingly more power and, most importantly, more legitimacy (because, \textit{inter alia}, of the maturity and quality of their democratic institutions and of their checks and balances) than other states (e.g., Azerbaijan or Turkey). States in the former category have more ‘weight’ and they can apply it to give a ‘tone’ in this tango dance, to push the ECtHR towards more self-restraint and deference. The powers of states can, however, also undermine the Court’s authority and hurt the broader system. Power comes with responsibility, and states in the former category that are more influential have a pedagogical role to play and shall stand as an inspirational model for other states rather than as an example to avoid. For, no one can predict what is the ultimate stress that a complex international socio-legal human rights system, such as the Council of Europe, can endure before it reaches its breaking point – in particular within a politically and economically
volatile environment, such as the one currently prevailing within Europe and in the world more generally.

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