THE EUROPEAN COURT OF HUMAN RIGHTS: A CONSTITUTIONAL COURT ENDANGERING STATES' SOVEREIGNTY?

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A INTRODUCTION

The European Court of Human Rights (ECtHR or the Court) is in a time of major changes; the last two decades have seen a huge increase in the caseload of the Court, because of the enlargement of the Council of Europe and of the adoption of Protocol 11. These special circumstances, particularly the extreme success of the individual complaint procedure, have brought to the surface some underlying issues on the functioning, the aim and the nature of the ECtHR. Indeed the Court is potentially endangered by its obviously ever-increasing backlog and needs to redefine its procedures and therefore its purpose. So, in this time of change, which offers grounds for criticism but also enables potential ameliorations, it is interesting to discuss the nature of the ECtHR and its relation to states' sovereignty. One should indeed examine whether the Court is dispensing constitutional or individual justice and how the answer to that first question interrelates with the international nature of the European Convention on Human Rights (ECHR or the Convention) system, and more precisely, how it affects the contracting states' sovereignty.

This paper claims that while both individual and constitutional justice have been dispensed by the Court there is a trend towards constitutional justice. After highlighting the characteristics of constitutional and individual justice (B 1), this is demonstrated by looking at the purpose of the Convention system and at the Court's practice (B 2). In a second part, it is argued that not only does constitutional justice respect sovereignty but that it can also reinforce it. The particularity of human rights treaties regarding challenges to sovereignty will be examined. It will then be demonstrated that constitutional justice respects states' sovereignty because contracting states have consented to it (C 1) and that although the margin of appreciation of states seems to shrink, some is left to them (C 2). Finally, it will be suggested that, against all appearances, constitutional justice is less intrusive than individual justice and can even strengthen sovereignty (C 3).

To conclude, while acknowledging that constitutional justice respects the sovereignty of states, one must keep in mind that it is not the only issue at stake. Legitimacy and thus the actual efficacy of the system are not to be overlooked and they both weigh in favour of constitutional justice.

B CONSTITUTIONAL JUSTICE v INDIVIDUAL JUSTICE

1 Main Characteristics

In the ECHR system, the concept of constitutionality is approached in a specific manner.[1] Constitutional justice is described as the way the Court dispenses judgments on chosen cases of the 'most serious alleged violations'[2] and/or of special interest to fulfil its mission. These cases are selected for the opportunity they give the Court to strengthen the common values shared in Europe in the human rights field by allowing it to clarify, interpret or develop aspects of law, while having the maximum impact possible on some fundamental issues for the respondent state or for the whole community of member states.[3] In that sense, by holding the Convention as a superior set of values that contracting states have to implement in their national orders, the Court can be seen as a quasi-constitutional court – 'quasi' because it still evolves within a consent based international context.

Often opposed to that is the concept of individual justice where the Court, as a sort of additional layer of appeal, is meant to offer a potential redress to every meriting applicant in cases of human rights violations happening within the jurisdiction of its member states.[4] The Court then 'exists primarily to provide redress for Convention violations for the benefit of the particular individual making the complaint, with whatever constitutional or systemic improvements at the national level might thereby result.'[5]

2 Trend towards Constitutional Justice

The idea presented here is that, while the Court dispenses both constitutional and individual justice, as two sides of a same coin, a tendency exists towards constitutional justice. This does not question the right of individual applications *per se*, but more the use the Court has for them. Indeed, since the inter-state process has never worked very well (mainly because of the fundamental inadequacy of bringing a claim against another state with which shared values are to be developed),[6] the Court has needed individual cases to articulate its views.[7] Nevertheless, adjudication on a case by case basis is not seen as sufficient by the Court.[8] It might even be attracting the Court away from its vocation as '[its] judgements in fact serve not only to decide those cases brought before the Court but, more generally to elucidate, safeguard, and develop the rules instituted by the Convention.'[9]

The Court's role in the protection and promotion of human rights is to safeguard the Convention, which is a sort of 'constitutional charter', to reinforce principles that are common minimum standards and to further develop rules. While doing so, the Court is increasingly moving away from the idea of individualized redress. It abstractly examines national laws' compatibility with the Convention, essentially envisions its jurisprudence as applying *erga omnes* and tends to tell states what to do in order to redress violations, such as in the pilot cases.

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[1] S Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press Cambridge 2006) 172-173.

[2] S Greer 'What's Wrong with the European Convention on Human Rights?' (2008) 30 Human Rights Quarterly 680, 685.

[3] Greer (n 1) 166-167.

[4] P Mahoney 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002-2003) Penn State International Law Review 101, 104.

[5] Greer (n 2) 684.

[6] Greer (n 1) 317.

[7] Greer (n 2) 685.

[8] *Karner v Austria* Application n°40016/98 Judgment of 24 July 2003 final on 24 October 2003 26.

[9] *Ireland v United Kingdom* Application n° 5310/71 Judgment of 18 January 1978 154.

Purpose: Safeguard a 'Constitutional Charter' and Develop Values

First, from the inception, the Convention was meant to ensure a minimum standard of shared values in relation to human rights, not to provide redress for every well-founded application. Indeed, when the Convention was created in 1950, a year after its parent organization the Council of Europe, its aspiration was to respond to the main issue of the war aftermath, namely how to avoid such a catastrophe from ever happening again. In that sense, it was to 'provide a statement of common values... to reinforce a sense of common identity and purpose [and] to establish an early warning device' to spot a return of authoritarianism in Europe.[10]

Subsequently, since the end of the Cold War, the Court confirmed 'the Convention as a constitutional instrument of European public order *(ordre public).*'[11] The fall of the iron curtain questioned the raison d'être of the ECHR, which had been to create a common identity in opposition to the communist part of Europe. However, the enlargement of the Council of Europe, with the subsequently changed nature of some applications,[12] has in fact modified and further strengthened the original purpose. The identity expressed by the Convention system is not one of negative membership anymore but rather one of 'abstract constitutional' kind, especially for the newly democratic countries.[13] The Convention is thus envisioned as a set of minimum standards that the contracting states have to implement within their national order to develop common values as a basis for a wider European common identity. These circumstances added to the original purpose - a need to defend and clarify democratic values – which seemed to go without saying in Western Europe but are still being developed in transition countries.

Finally, the Court, in order to help these transition countries to become effectively democratic, has to 'generat[e] a case law embodying shared European values, identif[y] structural problems […] and scrutiniz[e] plausible allegations of serious human rights abuse even where those are not systemic in nature.'[14]

In addition to strengthening the minimum common values by making sure they are understood and implemented, the ECtHR has been developing rules, expanding the corpus of human rights protected. Even if it does not always explicitly acknowledge this role, it has done so - for example when including environmental considerations into the right to private life.[15] Through the 'living instrument' doctrine, according to which the Convention is to be interpreted 'in the light of present-day conditions[16]... the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment[17]... gradually extend[ing] and rais[ing] the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the "European public order."'[18]

Practice

[10] Greer (n 2) 681.
[11] *Loizidou v Turkey* Application n°15318/89 Judgment of 23 March 1995 (Preliminary Objections) 75.
[12] Mahoney (n 4) 104.
[13] Greer (n 2) 684.
[14] Greer (n 1) 171.
[15] For example *Lopez Ostra v Spain* Application n°16798/90 Judgment of 9 December 1994.
[16] *Loizidou* (n 11) 71.
[17] *Hatton and others v United Kingdom* Application n°36022/97 Judgment of 8 July 2003, Joint dissenting opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner 2.
[18] *Hatton* (n 17).

First, the Court has an increasing tendency to examine the law despite having repeatedly said that it was not to adjudicate on the law, but only to look at particular cases.[19] However, it has often discussed the source of a violation originating from national legislation and not only in the wrong application of a law.[20] Moreover, in the last two decades, it has started to examine the compatibility of national laws with the Convention, not even taking into account whether and how these laws were actually implemented, such as in the *Van de Hurk v Netherlands* case.[21]

The effects of the ECtHR's jurisprudence are, therefore, broadening. While the ECtHR's decisions are not meant to have an application *erga omnes*,[22] the Court tends to move towards holding contracting states responsible for verifying that their laws are compatible with the ECHR and the relevant jurisprudence.[23] Even though a decision of the Court traditionally only binds the respondent states[24] all states have to comply with the Convention and its latest interpretation. The role of the Court as the best qualified body to interpret – and develop – the Convention gives consequently to its jurisprudence *l'autorité de la chose interprétée*, which, in practice moves away from the traditional *autorité relative de la chose jugée*[25] towards *l'autorité absolue de la chose jugée*. For example, in the 1990s, the Court chose to condemn Cyprus on the argument that, even if it did not apply its laws criminalizing homosexuality anymore, it had not changed them.[26] This inaction amounted to a violation of article 8, as interpreted in the *Dudgeon* case.[27]

It is true that the Court does not have all the powers and prerogatives of certain constitutional courts; it cannot annul national legislation or decide that a case must be re-opened.[28] Due to the international nature of the system in which it is embedded, it has to rely on states to implement its decisions. However, it is moving away from purely declaratory judgments, towards judgments including precise steps as to how to comply with the Convention. The traditional credo that a state is to choose 'the [...] means to be utilized in its domestic legal system for performance of its obligation'[29] is weakened by the use of direct justice and the development of pilot cases. This in turn (as we will see later), superficially questions the Court's respect of its contracting states' sovereignty.

Finally, the practice of the pilot case is an additional sign of the 'constitutionalisation' of the ECtHR. The Committee of Ministers requested in 2003 that the Court use pilot judgments in order to determine repetitive cases. According to the pilot judgment procedure,

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[19] *McCann and others v United Kingdom* Application n°18984/91 Judgment of 27 September 1995 153.
[20] L Garlicki 'Broniowski and After : On the Dual Nature of "Pilot Judgments"' in *Liber Amicorum Luzius Wildhaber, Human Rights – Strasbourg Views/ Droits de l'homme – Regards de Strasbourg* Kehl: NP Engel Verlag (2007) 177, 183.
[21] *Van de Hurk v Netherlands* Application n°16034/90 Judgment of 19 April 1994 in JF Flauss 'La Cour Européenne des droits de l'homme est-elle une cour constitutionnelle ?' 36 *Rev Fr Dr Const* (1999) 711, 721.
[22] 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, Human Rights – Strasbourg Views/ Droits de l'homme – Regards de Strasbourg*, Kehl: NP Engel Verlag (2007) 65, 76.
[23] Flauss (n 21) 724.
[24] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 46 (1).
[25] Cabral Barreto (n 22) 76; F Sudre *Droit européen et international des droits de l'homme* (Presses Universitaires de France Paris 2006) 680-681.
[26] *Modinos v Cyprus* Application n°15070/89 Judgment of 22 April 1993.
[27] *Dudgeon v United Kingdom* Application n°7525/76 Judgment of 22 October 1981; Flauss (n 21) 724.
[28] Greer 'What's Wrong with the European Convention on Human Rights?' (n 2) 684; M Janis R Kay & A Bradley *European Human Rights Law: Text and Materials* (Oxford University Press Oxford 2008) 89; A Stone Sweet 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court" 80 *RTDH* (2009) 923-944.
[29] *Marckx v Belgium* Application n°6833/74 Judgment of 13 June 1979 58.

the role of the Court in such judgments is 'to identify the dysfunction under national law that is at the root of the violation; to give clear indications to the Government as to how it can eliminate this dysfunction [and]; to bring about the creation of a domestic remedy capable of dealing with similar cases.'[30]

This practice does not see individual redress through the ECtHR as the goal of the Convention system – it rather encourages redress through national remedies.[31] Indeed, '[p]ilot judgements were born out of a strong belief that it is not the function of an international court to act as a compensation commission examining large numbers of complaints raising exactly the same issue.'[32] Instead, pilot judgments address the roots of systemic issues by looking at the legal system and require that the state takes specific measures. For these reasons, they are part of the constitutional justice trend.

Pilot judgments are an innovative way to address the repetitive cases issues, as more than half of the ECtHR's judgments are related to a systemic problem already looked into in a previous judgment against the respondent state.[33] They can also make more time available for the Court to expand or clarify the content of the Convention.[34]

In conclusion, the original purpose of the Convention, its development after the end of the Cold War, and the recent practice, particularly pilot cases, show that the Court is meant to and has dispensed constitutional justice. This has been done alongside and through individual applications. Moreover, the Court is quite likely to move further towards choosing cases of special interest instead of seeing individual redress as its main goal, since it tends to be more 'concerned with assessing the adequacy of the system of remedies put in place at the national level [than to provide] remedies in individual cases.'[35]

C CONSTITUTIONAL JUSTICE AS A BETTER WAY TO RESPECT SOVEREIGNTY

Human rights treaties differ from most international agreements in the sense that they are not designed to regulate inter-state relations, but 'to hold governments accountable for purely internal activities.'[36] As such, they can be seen to represent a challenge to national sovereignty, especially when individuals are able to bring proceedings against a state. This is automatically the case in the ECHR treaty system since the adoption of Protocol 11. Moreover, as the Court has lately been ordering 'the State to undertake wide-reaching steps to

[30] ´The Pilot-Judgment Procedure - Information Note Issued by the Registrar´, <http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf> accessed 6 March 2012.
[31] J L Jackson 'Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court' (2006-2007) 39 *Conn L Rev* 759, 804.
[32] M O'Boyle 'On reforming the operation of the European Court of Human Rights'(2008) 13(1) *European Human Rights Law Review* 1, 6.
[33] Greer *The European Convention on Human Rights* (n 1) 39.
[34] L Wildhaber 'The European Court of Human Rights; The Past, the Present, the Future'(2006-2007) 22 *American University Law Review* 521, 525.
[35] R Harmsen 'The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform' in *Judges, Transition and Human Rights* (Oxford University Press Oxford 2007) 33, 44.
[36] A Moravcsik 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54(2) *International Organisation* 217.

redress the breach'[37] it is important to discuss whether the tendency towards constitutional justice respects states' sovereignty.

States have consented to constitutional justice, which as such is enough to demonstrate that their sovereignty is respected and, even in pilot cases, some margin of appreciation is left to them. Finally, constitutional justice, arguably less intrusive than individual justice, has the potential to strengthen states' sovereignty and is probably more efficient.

1 Consent

As stated by the Permanent Court of International Justice in the *Wimbledon* case, sovereignty consists, amongst other characteristics, of the right and competence to enter into international agreements with other entities.[38] States that decided to join the Council of Europe and thus to be party to the ECHR have done so voluntarily and have consequently undertaken to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'[39] They are also bound by the Court's judgments.[40] Hence, the respect of their sovereignty is not an issue as long as the Court does not abuse its mandate, which is to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols.'[41] The question here is whether the Court has gone beyond that which member states agreed to and whether constitutional justice falls within the framework of the Convention system.

Arguably, in order to effectively enhance the protection and promotion of human rights in Europe, and based on the doctrine of the Convention as a 'living instrument',[42] the Court had to move further away from individual justice and declaratory judgments. Indeed, the inflow of cases and change in the nature of violations due to the enlargement of the Council of Europe makes it impossible quantity-wise and inefficient content-wise to adjudicate on a case by case basis without pointing out the source of the issue. Moreover, the Court affirmed that 'in ratifying the Convention, [states] undertake to ensure that their domestic law is compatible with the Convention.'[43] It is logical that, in order to make the system efficient and to fulfil its mandate, the Court be able to verify it. States have neither rejected the living instrument doctrine nor have much complained about judgments including more direct ways of complying with them. This might be explained by the fact that generally some margin of appreciation has so far been left to them, as will be discussed here below.

In the international setting, states can verbally oppose supra-national decisions they see as threatening for their sovereignty. This does particularly happen when such decisions question their domestic actions. Hence, the witnessed silences amount to an implicit consent to the Court's function. Furthermore, compliance with the Court's judgments is fairly high[44] and domestic tribunals have rarely opposed this jurisprudence.[45]

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[37] W Sadurski 'Partnering with Strasbourg: Constitutionalization 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' (2008) 33 Working Paper European University Institute.
[38] *Case of the 'Wimbledon'* PCIJ Rep Series A, n°1.
[39] European Convention on Human Rights (ECHR) art 1.
[40] ECHR (n 39) art 46 (1).
[41] ECHR (n 39) art 19.
[42] *Tyrer v United Kingdom* Application n°5856/72 Judgment of 25 April 1978 [31].
[43] *Maestri v Italy* Application n°39748/98 Judgment of 17 February 2004 [47].
[44] LR Helfer & AM. Slaughter 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 296; Janis, Kay & Bradley (n 28) 74 and 89; Sudre (n 25) 686.
[45] Cabral Barreto (n 22) 75; L Garlicki, 'Cooperation of courts: The role of supranational jurisdictions in Europe', (2008) 6 *International Journal of Constitutional Law* 509, 517.

As for pilot cases, the Court based its practice on an explicit solicitation of the Committee of Ministers, the body in which the foreign minister of each member state sits. The Committee of Ministers has indeed requested the Court to render such judgments, by identifying 'what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution.'[46]

This is a strong political acknowledgment of the existence of the constitutional justice trend and of states' consent to it.[47] Indeed, one has to remember that, without having to produce full powers, foreign ministers are considered to represent their states and authorized to express the consent to be bound by a treaty.[48]

States have not opposed a more constitutional approach to justice dispensed by the ECtHR and have a history of high compliance - even requesting pilot cases, which are explicitly designed to 'achieve a solution that extends beyond the particular case or cases.'[49] The practice of pilot judgments has also been well endorsed by the Wise Persons Group[50] – a group set up in 2005 by the Heads of State and Government of the Council of Europe members, to examine the ECHR long-term effectiveness, particularly in relation to the increased workload. As a result of having consented implicitly or explicitly to it, states' sovereignty is not endangered by constitutional justice.

2 Margin of Appreciation

Pilot cases are a way for the Court to reaffirm that changes have to be made at the national level if actual compliance with a voluntarily endorsed treaty is to be reached; they put the state back at the centre of the human rights enforcement system. To do so, the Court points out structural problems within a contracting state's legal system and requires more or less specific actions to be taken.[51] This interference with their domestic legal system and the reduction of their margin of appreciation can be seen as problematic. But, in fact, the Court interferes with the national sphere only where a contracting state has not complied with both its substantive obligations and the obligation to 'secure the rights and freedoms.'[52] The ECtHR has moreover been careful to allow some margin of appreciation to the states where possible.

These aspects can be illustrated by the *Broniowski v Poland* pilot case, where the Court found Poland in violation of its obligations under article 1 Protocol 1 and held that it 'must either amend or create new legislation that would effectively eliminate the systemic dysfunction and allow for the realization of the property rights or compensate those who were affected with equivalent redress.'[53] The use of 'must' does not leave much latitude to Poland

[46] Resolution Res (2004) 3 of the *Committee of Ministers on Judgments Revealing an Underlying Systemic Problem* <https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=fr> accessed 6 March 2012.
[47] Sadurski (n 37) 23.
[48] Vienna Convention on the Law of Treaties (VCLT) art 7(2)(a). <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> accessed 6 March 2012
[49] 'The Pilot-Judgment Procedure - Information Note Issued by the Registrar' [2].
[50] *Report of the Group of Wise Persons to the Committee of Ministers* 15 November 2006 CM (2006) 203, available at <https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM> (last accessed 6 March 2012); O'Boyle, (n 32) 6.
[51] Jackson (n 31) 785.
[52] ECHR art 1.
[53] *Broniowski v Poland* Application n°31443/96 Judgment of 22 June 2004, holding 4 as presented in Jackson (n 31) 762.

as to whether to implement changes, but 'Poland had complete discretion in choosing how to best structure the remedy.'[54]

Moreover, the subsidiarity principle and thus the margin of appreciation are based on the assumption that the contracting state, more aware of its national particularities, will be able to find the most efficient ways to implement the Convention. However, an inflow of similar cases shows the existence of a systemic problem and the inadequacy of the ways in which the Convention is implemented at a national level - if not the inexistence of such ways altogether. It would be an absurd reasoning to hold that the Court cannot point out the systemic issues and solutions on the basis that the contracting state knows better. For the subsidiarity principle to enhance protection of human rights where they have the potential to be best secured, i.e. at the national level, the Court must '[emphasize a] better implementation of the Convention in the national legal systems'[55] and does so more efficiently through standard setting than individual relief.

In conclusion, pilot judgments are deem acceptable as long as they allow some margin of appreciation, the rationale of which, it must however be remembered, is to enhance efficacy, not to deter it.

3 Intrusiveness

Individual and constitutional justices are two means to a similar end, which is to promote human rights and a certain political system in Europe. The former type of justice may, at first, seem less intrusive in that respect for sovereignty is usually interpreted as not interfering with what falls exclusively within the national level - such as the adoption or modification of laws. However, finding a state in breach of the same international obligation over and over is likely to be more harmful to its reputation than determining once and for all that an aspect of its legal order violates the Convention and highlighting what can or must be done to remedy it. Furthermore, as clearly formulated by President Wildhaber, 'once the Court has established the existence of a structural violation or an administrative practice, is the general purpose of raising level of human rights protection in the State concerned really served by continuing to issue judgements establishing the same violation?'[56]

Furthermore, in an individual justice scheme, the Court acts as an additional level of appeal and thus creates a direct link between the individuals and the Convention system. The state's role is reduced to offer redress in individual situations. While this does not detract from sovereignty (since the state has, in one way or another, agreed to the right of individual petitions) one can argue that it does not offer to the state a positively active role. On the contrary, through constitutional justice, even if the state is put under more severe scrutiny, it can also be empowered. Indeed, by first developing, clarifying or interpreting fundamental issues of the law, the Court makes the system more predictable. Second, by clearly telling the contracting state what redress has to be implemented, it gives it some insight into the solutions to systemic problems. No state likes being found in violation of its obligations, particularly in relation to such a sensitive topic as human rights. Knowing what amounts to compliance and in case of violation, what has to be modified at the systemic level, are ways to increase both its domestic and international legitimacy. Constitutional justice is perhaps more challenging for the states at first, however, in the case of transition countries - which have

[54] Jackson (n 31) 762.
[55] P Mahoney 'Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order' in *Liber Amicorum Luzius Wildhaber, Human Rights – Strasbourg Views/ Droits de l'homme – Regards de Strasbourg*, (2007) Kehl: NP Engel Verlag 263, 271.
[56] L Wildhaber 'European Court of Human Rights' (2002) 40 *Can Y. Int'l L* 309, 318.

joined the ECHR in order to consolidate their new democratic values -[57] it allows them to better comply with the commitments they have made as sovereign entities.

D CONCLUSION

At first, one might think the Court, as an international structure, should only dispense individual justice and that it is more respectful towards sovereignty because it adjudicates on specific cases without discussing the reasons for the violation and the means to remedy it. However, it has been argued here that while the Court has dispensed both types of justice, its purpose and its practice, especially the development of pilot cases, show a trend towards a more constitutional approach of justice.

The sovereignty of contracting states is respected as states have consented to the Convention system and its further changes and have even requested the development of pilot cases. Moreover, it seems they have not complained about infringements of their sovereign rights and they have a high level of compliance with the Court's judgments. One cannot forget that a state can always leave an international treaty system (as Greece did in 1969, following the decision to expel it from the Council of Europe).[58]

Finally, it must be noted that the reality of the Court nowadays leaves little option but to choose constitutional justice - The ECtHR simply cannot handle the quantity of cases received. Even if an individual justice based system was desirable, it is not realistic. The Court risks losing further legitimacy if, as is now the unsustainable practice, it can logistically only adjudicate on the merits of a small percentage of the lodged cases, but plans on assessing them all – at least on questions of admissibility.[59] In this way it risks evolving to an efficient constitutional court. This is central, as, even if 'Contracting Parties are obligated under the Convention to comply with judgments, the [Court] has no coercive mechanism through which to ensure compliance.'[60] The efficacy of the Court thus relies on the willingness of the contracting parties to enforce the judgments. That in turn is directly related to how legitimate the Court is perceived to beij.[61] As Mahoney, the pro-constitutional justice Registrar of the Court said, '[u]ltimately it is only through preserving the force and consistency of its reasoning that the Court will be able to maintain the confidence of its national counterparts, and with it the wider credibility of the European human rights system. In this optic, the right of individual petition thus clearly remains an "indissoluble" part of the functioning of the system, but must not become its exclusive focus.'[62]

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[57] Moravcsik, (n 36) 219-220.
[58] Janis Kay & Bradley (n 28) 66.
[59] Greer *The European Convention on Human Rights* (n 1) 38-39; European Court of Human Rights '*Survey of Activities 2005*' <http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/2005_SURVEY__COURT_.pdf > accessed 6 March 2012, 33; The Right Honourable The Lord Woolf and others '*Review of the Working Methods of the European Court of Human Rights'* December 2005 <http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf> accessed 6 March 2012, 19.
[60] Jackson (n31) 782.
[61] Janis Kay & Bradley (n28) 109.
[62] Mahoney (n35) 37.