

**The Principle of Dynamic Interpretation –
A Matter of Legitimacy**

**The ECHR Principle of Dynamic Interpretation from a
Constitutional Perspective**

Kandidatnummer: 208

Leveringsfrist: 15. januar 2009

Til sammen 27.511 ord

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1 Introduction

1.1 Object and Purpose of the Thesis

This thesis is a study of the principle of dynamic (or evolutive)¹ interpretation as applied by the European Court of Human Rights² in its interpretation of the European Convention of Human Rights³. The purpose of this study is to explore and reveal the principle's function and basis of legitimacy in the ECHR-system.

The principle of dynamic interpretation entails one of the most characteristic features of the ECtHR methodology. The Court has held that “the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions”.⁴ This statement contains the quintessence of the principle: That the rights and freedoms enshrined in the ECHR must adapt to contemporary society. By its effect of ‘up-dating’ the Convention the principle of dynamic interpretation is seen to contribute to expanding the constraints upon government activity within the Member States; an effect which has raised the question of whether the Court legitimately can be said to be interpreting the Convention, or whether it is bordering into illegitimate judicial activism.

Based on a research presumption, that the ECtHR is interpreting the ECHR, and not making law, the study seeks to examine what explains and thus legitimises how interpreting the rights and freedoms of the Convention can result in the same legal text

¹ The terms ‘dynamic’ and ‘evolutive’ are used synonymously by the European Court of Human Rights to characterise the same principle of interpretation. The thesis will in the same way use the terms interchangeably.

² Hereinafter ‘ECtHR’ or ‘the Court’.

³ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950. Entry into force 3 September 1953), (Hereinafter ‘ECHR’ or ‘the Convention’).

⁴ *Tyrer v. the United Kingdom* Judgment 25 April 1978 (Application no. 5856/72), § 31.

attaining new substantive content over time. In asking what legitimises the principle of dynamic interpretation, the study turns to theories of what can be described as ‘constitutional interpretation’. This approach is born out of two interrelated factors. First, the Convention’s specific function, namely that of protecting the rights and freedoms of individuals; rights which have traditionally been reserved for the domestic domain of constitutional law.⁵ Secondly, that constitutional theory specifically confronts the issue of interpretation, temporality and legitimacy. In short one can say that theories of constitutional interpretation and the interpretation of human rights share a common question: The question of how norms that regulate the legitimate relationship between government authorities and individuals maintain their normative function over time and how this is solved through interpretation.

In relation to the legitimacy of the principle of dynamic interpretation the question has two interrelated perspectives: First, under what conditions is the Court’s adjudication legitimate, and secondly, under what conditions is the protection afforded by the Convention legitimate. These two perspectives are, as will become clear, interdependent.

As a method of interpretation, the principle of dynamic interpretation is not exclusive to the ECtHR as several jurisdictions – both domestic⁶ and international⁷ – apply the principle in their adjudication. It can be said that international law is a dynamic project also outside the province of human rights law. Furthermore, the question of whether human rights treaties distinguish themselves in *kind* in such a way that general rules and principles governing

⁵ Max Sørensen. “Professor dr.jur. Max Sørensen: En bibliografi” (Aarhus: Aarhus 1988), 28.

⁶ *Hunter v. Southam Inc.* Judgment 22 November 1984 Canadian Supreme Court. Also, for comparative studies of dynamic interpretation, see e.g. Constance Grewe. *Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofes für Menschenrechte*, 61 ZaöRV vol. 2-3 459 (2001); William N. Eskridge. “Dynamic Statutory Interpretation” (Cambridge Mass.: Harvard 1994).

⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 16; **Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)**, ICJ Reports (1997) 7; *Arbitration regarding the Iron Rhine Railway (Belgium v the Netherlands)* PCA Reports (2005).

international law do not apply is a question frequently asked,⁸ an issue also referred to as the *specificity* of human rights adjudication.

The present study distinguishes itself from the general discussion of dynamic interpretation as such. The thesis' study is based on the notion that a court's methodology reflects the nature of its decision-making, and thus the nature of the law it bases its decisions upon. As pointed out by J.G. Merrills, as a court dealing with human rights the ECtHR is required to decide difficult and important issues between the individual and the State.⁹ It is the principle's significance in deciding such important matters which forms the background for this thesis.

Based on the Court's description, the principle is also known as the 'living instrument doctrine'. In this lays a characterisation of the Convention itself. Furthermore, a characterisation which can be said to inform the interpreter as *how* to interpret the ECHR, but moreover also informs the interpreter as to *what* the ECHR is, in other words the *nature* of the legal tool. As will be shown, these aspects can be seen to contribute to revealing the function and basis of legitimacy of the principle of dynamic interpretation.

1.1.1 Dynamic Interpretation and Constitutional Theory

The thesis reliance on constitutional theory in its analysis of the principle of dynamic interpretation is also chosen on the background of the effect the Court's application of the principle has on the Contracting Parties obligation under the convention by way of

⁸ Matthew Craven. "The Legal Differences and the Concept of the Human Rights Treaty in International Law" 11 EJIL 2000 489; Mark Toufayan. "Human Rights Treaty Interpretation. A Postmodern Account of its Claim to "Speciality"". Working-paper nr. 2, 2005, NYU Centre for Human Rights and Global Justice, available at < <http://www.chrgj.org/publications/wp.html>>; A. Orakhelashvili. "Restrictive Interpretation of Human Rights Jurisprudence of the European Court of Human Rights". 14:3 EJIL (2003), 529.

⁹ J.G. Merrills. *The development of international law by the European Court of Human Rights*, (Manchester: Manchester, 2nd ed. 1993), 9.

clarifying the limits for the exercise of public authority permitted under the Convention in the light of its present-day protection. The legal issues raised can be said to be analogous to those raised by a domestic court reviewing the constitutionality of acts of government. Application of the principle of dynamic interpretation can lead to the ECtHR overruling domestic majority discretion within the Respondent State. Moreover, it can lead to a overruling of domestic discretion previously deemed legitimate under the Convention. This judicial effect can be characterised as a sovereignty limiting effect.¹⁰

Illustrating the point at issue, the development of transsexual's rights under Article 8 of the Convention serves as a good example – and an example often referred to. In the light of present-day conditions, the right to full legal recognition of transsexual's post-operative gender has developed from being deemed a matter left to the national discretion of the Member State,¹¹ to being recognised as conferring a positive obligation under Article 8 on the same State 16 years later.¹²

Though formally a treaty, the constitutionalisation of the ECHR-system has increasingly become a topic of discussion; both in academia¹³ and within the Strasbourg-system itself¹⁴.

¹⁰ Laurence Helfer. *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell Int'l L J 133 (1993), 141.

¹¹ *Rees v the United Kingdom* Judgment 17 October 1986 (Application no. 9532/81); *Cossey v the United Kingdom* Judgment 27 September 1990 (Application no. 10843/84); *Sheffield and Horsham v the United Kingdom* Judgment 30 July 1998 (Application no.31-32/1997/815-816/1018-1019).

¹² *Christine Goodwin v the United Kingdom* Judgment 11 July 2002 (Application no. 289557/95); *I v the United Kingdom* Judgment 11 July 2002 (Application no. 28957/95).

¹³ Ian Cameron. *Protocol 11 to the ECHR: the European Court of Human Rights as a Constitutional Court?* 15 YEL 219 (1995); Stephen Greer. *Constitutionalizing Adjudication under the European Convention on Human Rights*, 23 Ox L J Stud No. 3 (2003) 405.

¹⁴ Lucius Wildhaber. *A Constitutional Future for the European Court of Human Rights?* HRLJ 2002 Vol. 23 No. 5-7, 161; Rolv Ryssdal. *On the Road to a European Constitutional Court*, Winston Churchill Lecture, Florence, 21 June 1991, available at Library of the European Court of Human Rights <<http://193.164.229.218/uhtbin/cgiisirsi.exe/t0LRc53Jkr/COURTLIB/160480009/123>>; European Court of Human Rights. *Memorandum to the 3rd Summit of the Council of Europe*, available at

In short, the discussion is founded on the view that States recognising human rights through adhering to the ECHR creates a hierarchical system for the protection of human rights in Europe.¹⁵ This discussion is embedded in the larger discussion of the constitutionalisation of international law as such. An aspect of this discussion is the view that as a consequence of a constitutionalisation of public international law there must be a corollary shift in methodology and legitimate authority.¹⁶

The thesis study touches on the question of whether it can be said that such a shift of methodology has occurred in the context of the ECHR. In the case of *Loizidou v. Turkey*¹⁷, for instance, the Court described the Convention as a “constitutional instrument of European public order” for the protection of individual human beings.¹⁸ Relevant to the thesis is how the Court relied on the constitutional function of the Convention as an argument to support the dynamic interpretation of a procedural provision to ensure the effectiveness of the individual’s right to application. In so doing, the Court revealed an aspect to the Convention determinative for its interpretation.¹⁹ A functional aspect, as the study will show, connected to the principle of dynamic interpretation.

<<http://www.echr.coe.int/eng/Press/2005/April/SummitCourtMemo.htm>>; Committee of Ministers of the Council of Europe. *Declaration to the, 114th Session*, 12 May 2004, available at

<<https://wcd.coe.int/ViewDoc.jsp?id=743337&Lang=fr>>.

¹⁵ Howard C. Yourow. “*The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*” 3 Conn. J. Int’l L. 1987-1988 111, 111.

¹⁶ Brun-Otto Bryde. “International Democratic Constitutionalism” in “Towards World Constitutionalism ..” (2005), 109.

¹⁷ *Loizidou v Turkey* (Preliminary Objections) Judgment 25 March 1995 (Application no. 15318/89)

¹⁸ *Ibid* § 75 and § 93.

¹⁹ It has been held that referring to the ECHR as “a constitutional instrument” was a project of former President of the Court, Luzius Wildhaber, and that the Strasbourg-organs have ceased to express themselves in these terms since the end of his term. Empirically, this argument is supported by the fact that all mention of the Convention as a constitutional instrument was during Wildhaber’s presidency. However, the Court still today relies frequently on the concept of a “European public order” as an argument when interpreting the Convention, *cf. Tănase and Chirtoacă v. Moldova* Judgment 18 November 2008 (Application no. 7/08).

1.1.2 A Political Concern

The relevance of the thesis' study of the principle of dynamic interpretation is to contribute to the understanding of which political implications the ECHR has on the Member States' internal affairs and the corollary jurisdiction of the ECtHR in deciding matters between governments and individuals.

The question of the legal consequences of States ratifying human rights conventions supervised by international tribunals has recently been a central topic of debate in Norway. An official report published in 2003 – following a national exposition on the state of 'power and democracy' in Norway – has conveyed the view that the internationalisation of human rights law, especially the ECHR and the final authority of the ECtHR as interpreter, has contributed to a restriction of the legislative supremacy of the Norwegian parliament.²⁰ The findings of the report have subsequently been addressed by the Norwegian Government²¹ and academics²².

In its response, the Government held that there are especially three interrelated factors connected to the ratification of human rights treaties which contribute to the restriction of popular sovereignty in Norway: The unclear wording used in treaties; the binding character of international obligations; and moreover, the methodology of international tribunals – especially *dynamic interpretation*.²³

²⁰ NOU 2003:19, 31-2.

²¹ St.meld. nr. 17 (2004-2005).

²² Makt- og demokratiutredningen: Høringsuttalelse fra Senter for Menneskerettigheter, UiO, 28 May 2004, available at <<http://www.humanrights.uio.no/omenheten/nasjonal/horinger/index.html>>; Geir Ulfstein. *Menneskerettigheter – en trussel mot demokratiet?*, Aftenposten 7 April 2005, available at <<http://www.dagbladet.no/kultur/2005/04/07/428157.html>>; Morten Kinander (ed.). "Makt og Rett: Om Makt- og demokratiutredningens konklusjoner (...)" (Oslo: Universitetsforlaget 2005).

²³ St.meld. nr. 17 (2004-2005), 61.

The issues raised by the Norwegian Government viewed in contrast to the ECtHR's mandate to "ensure the observance" of the rights and freedoms of the ECHR,²⁴ illustrates how the judicial development of the Convention can be deemed problematic or purposeful depending on the perspective taken. Problematic from the point of view of the autonomy of the signatory States and purposeful from the point of view of effective human rights protection. This tension between the interest of the State and the interest of the individual, it will be shown, lies at the heart of the ECHR and the Court's methodology in general, and the principle of dynamic interpretation specifically. On the grounds of the Convention's principle role as a system for the protection of human rights, the Court's commitment to respond to "any evolving convergence as to the [human rights] standards to be achieved"²⁵ is thus in a constant tension with the national decision-maker's autonomy.²⁶

Thus, the principle of dynamic interpretation can be seen as closely connected to the ECHR-system as a whole, and the general questions of what kind of treaty obligation the ECHR entails; what kind of rights are ECHR rights; and what is the character and function of the ECtHR supervisory review. It is on the background of these general, and important, questions, that the thesis chooses to look at one feature which highlights these issues, namely, the principle of dynamic interpretation.

1.2 Methodology and Sources

1.2.1 Methodology

The thesis seeks to conduct a descriptive legal analysis with the aim of uncovering and thus describing the function and basis of legitimacy of the principle of evolutive interpretation

²⁴ ECHR Article 19.

²⁵ *Christine Goodwin v. the United Kingdom*, § 74.

²⁶ Helfer. "Consensus, Coherence and the European Convention on Human Rights" 26 *Cornell Int'l J* (1999) 133, 149.

as a technique which contributes to the development of the ECHR-law. As mentioned, the thesis is based on the premise that the ECtHR works within its legitimate jurisdiction when applying the principle of evolutive interpretation. Though an important issue in itself, the thesis will not conduct a normative analysis of how the principle should or should not be applied when interpreting the Convention.

The thesis' analyses will examine the principle as developed and practiced by the Court and the former European Commission of Human Rights²⁷. It is the legal doctrinal response developed by the Strasbourg-system to contemporary human rights issues which the thesis seeks to clarify. For this purpose this dissertation will study the principle from two methodological perspectives. First, from the point of view of the Court's own methodology, thus studying the principle from the point of view of treaty interpretation. Secondly, from the point of view of what may be broadly termed constitutional methodology, to see if, and how, the principles behind this approach explain the function of the principle of evolutive interpretation. To enable this, the thesis will provide an extensive theoretical background on the relevant issues of constitutionalism related to international human rights adjudication. This approach is sought to provide a context for the thesis analytical approach.

1.2.2 Sources

The principle of evolutive interpretation has been established and developed through the Strasbourg case-law. On this ground, the primary source for the thesis analyses is the decisions and judgments of the Court and Commission through which the principle has been developed and applied. In this respect, the thesis does not attempt to conduct an

²⁷ Until the entry into force of Protocol 11 to the Convention 1 November 1998, the responsibility to ensure the Member States observance of their engagements under the Convention was divided between three supervisory bodies; the Commission, the former Court and the Committee of Ministers. The responsibility of the Commission pursuant to former Article 19 extended to pronouncing admissibility decisions.

exhaustive account of the principle's effect on the substantive scope of the rights and freedoms enumerated in the Convention. Rather, it will draw upon case-law which illustrates the central features and function of the doctrine of evolutive interpretation. In addition, the ECHR itself will provide a central source for the thesis analyses. As evidenced in the Strasbourg jurisprudence, the text of the Convention's provisions serves both as the starting point and as the ultimate limitation for the scope of the ECHR-law.

Recalling that the principle of evolutive (or, dynamic) interpretation is not exclusive to the ECtHR, the thesis will in some instances refer to case-law and theory related to other international jurisdictions, in as far as they contribute to the understanding of the content, purpose and justification for the principle. This will, however, not extend to a comparative study of these jurisdictions.

The normative basis and justification for the principle of evolutive interpretation is not expressly described in the Strasbourg case-law. It is therefore necessary for the thesis to refer to and build on arguments found in relevant academic legal literature to conduct its analyses. Statutes, declarations, recommendations and resolutions of the bodies of the Council of Europe that inform the thesis' subject-matter will also be referred to.

Regarding the question of what legitimises the principle of dynamic interpretation, the thesis will draw from constitutional theory. It is necessary to point out, however, that the thesis will not rely on a comparative analysis of constitutional methods applied within different domestic jurisdictions as this falls outside the scope and purpose of the thesis. Rather, the material will be relied on to extract what is deemed here to be the central issues regards constitutionalism and constitutional interpretation. Furthermore, as will become apparent, the sources relied on in this part of the thesis analyses are to a large extent related to the interpretation of the United States Constitution. This deserves a short remark. The question of how the US Constitution should be interpreted in the light of present-day society has received much attention, both by the US Supreme Court itself and by scholars. As the issues raised in relation to the US Constitution coincide with the legal issues raised

in relation to the principle of evolutive interpretation – from the perspective of democracy, from the perspective of fundamental rights and from the perspective of interpretation – they thus provide an important source to the thesis analyses.

1.2.3 The Sources of Law used for the Interpretation of the ECHR

The question of which sources of law are relevant to the interpretation of the ECHR is central to the question of dynamic interpretation as it calls for the Court to view the ECHR-law “in the light of present-day conditions”. What this entails in full will be explained further as the thesis progresses. In the following a general overview will be given of the sources of law the Court applies in its interpretation and application of the ECHR.

The term “sources of law” denotes which materials the Court can rely upon to provide authoritative evidence and arguments for the meaning given to the provisions of the Convention, both written and unwritten sources.

The principal source of law is the Convention’s text. In addition to its operative provisions, the Court relies on the preamble to inform its analyses as it forms “an integral part of the context”²⁸ in which the rights and freedoms must be read.²⁹ Furthermore, both the French and English texts are relied on as the Convention is equally authentic in both languages.³⁰

The question of which additional sources of law are relevant to the interpretation of the Convention arises when the text in itself does not resolve the question of how its rights and freedoms respond to a claimed right. In this regard the ECHR provides no express guidance, but, Article 38 of the ICJ Statute,³¹ is according to Ian Brownlie “generally

²⁸ *Golder v the United Kingdom* Judgment 21 February (Application no. 4451/70), § 34.

²⁹ VCLT Article 31(2).

³⁰ *Ibid*, Article 33(1).

³¹ Statute of the International Court of Justice (ICJ Statute), June 26, 1945.

regarded as a complete statement of the sources of international law”.³² However, the Court seldom makes express reference to Article 38 of the Statute of its UN ‘relative’, and does in any case not assign the sources the same weight as they are given in the ICJ Statute.

Though not strictly speaking a formal source of law,³³ according to Article 38 (1)(d) of the ICJ Statute, “judicial decisions” are relevant as “subsidiary means” of interpretation. The Strasbourg Court, however, depends considerably on its previous decisions as a primary source of arguments for the interpretation of the Convention.

As expressed in the case of *Al-Adsani v the United Kingdom*,³⁴ the Convention “cannot be interpreted in a vacuum” but “must also take the relevant rules of international law into account”.³⁵ Consequently, the Court relies on arguments derived from international treaties and general rules and principles of international law in its interpretation of the Convention.

Especially relevant to the principle of evolutive interpretation, is the Court’s use of sources which provide historical or contemporary interpretative arguments. In this regard the Court has relied both on the drafter’s intentions – as expressed in *travaux préparatoires*, and on subsequent State practice – predominantly in the form of domestic legislation and resolutions of the Committee of Ministers of the Council of Europe, to inform the Court as to the meanings to be given to the terms of the Convention. This will become evident as this study unfolds.

On summary, it is worth taking note of what can be classified as “intrinsic” and “extraneous” sources of law, denoting whether the interpretative argument derives from the Convention itself or from an external source.³⁶ Relevant to the thesis study in this regard, is how the principle of evolutive interpretation to a large extent guides the Court to look

³² Ian Brownlie. *Principles of Public International Law* (Oxford: Oxford, 6th ed 2003), 5.

³³ *Ibid*, 19.

³⁴ *Al-Adsani v the United Kingdom* Judgment 21 November 2001 (Application no. 35763/97)

³⁵ *Ibid* § 55.

³⁶ Ian Sinclair. *The Vienna Convention on the Law of Treaties* (Manchester: Manchester 2nd ed. 1984), 118.

outside the Convention itself to find arguments for its interpretation. This will be further explained in section 3.

1.2.4 Judicial Precedent in the Practice of the ECtHR

As pointed out in the introduction, illustrated by the development of transsexual's right under Article 8, the principle of evolutive interpretation can lead to a principled departure from the Court's earlier interpretations. In this context it is therefore relevant to address the issue of judicial precedent in the practice of the Court before the thesis analyses are carried out further.

Pursuant to Article 46 (1) of the Convention, the Court's decisions are binding only to the parties involved. Furthermore, as expressly held by the Court, it "is not formally bound to follow any of its previous judgments",³⁷ meaning that it is not bound by *stare decisis* – or, the doctrine of binding precedent.³⁸ Nevertheless, "in the interests of legal, certainty, foreseeability and equality before the law", the Court does "not depart, without cogent reason, from precedents laid down in previous cases".³⁹ In this way, as pointed out by J.G. Merrills, the Court justifies its decisions in a way "which treats its existing case-law as authoritative",⁴⁰ and are so in practice referred to and adhered to. This means that even if decisions are formally only binding between the Parties to the case, the Court is at the same time interpreting the Convention to all States that are party to it.⁴¹

³⁷ See amongst others: *Cossey*, § 35; *Christine Goodwin*, § 68; *Chapham v the United Kingdom* Judgment 18 January (Application no.) § 70; *Jane Smith v the United Kingdom* Judgment 18 January 2001 (Application no.) § 77.

³⁸ Brownlie (2003), 19.

³⁹ *Christine Goodwin*, § 68.

⁴⁰ Merrills (1993), 12.

⁴¹ Merrills (1993), 12.

To determine the relevance of earlier case-law, the Court will distinguish the case under examination with its earlier judgments and decisions, comparing the facts and law of the case before the Court with that of the earlier cases. By enhancing the differences the Court can explain why it chooses to follow an earlier interpretation, or why to decide differently.⁴² The considerations of legal certainty and legal consistency are important preconditions for the Court to treat equal things equally. However, as held in the case of *Christine Goodwin v. the United Kingdom*, on the grounds of the Convention's role as a system for the protection of human rights, the Court will depart from precedent in order to "respond, for example, to any emerging consensus as to the standards to be achieved".⁴³ Thus, the elements of precedent to be found in the Court's reasoning represent no real bar to its application of the principle of evolutive interpretation.

1.3 Overview

Chapter 2 of the thesis aims at providing a theoretical background for a study on the principle of dynamic interpretation by introducing central issues related to the ECHR and the interpretation of the Convention.

Chapter 3 is a descriptive analysis of the principle of dynamic interpretation as practiced in the ECtHR case-law. The aim is to give an overview of the principle's key components and characteristics.

Chapter 4 provides a theoretical introduction to the question of constitutionalism and the interpretation of sovereignty limiting norms over time.

Chapter 5 explores the function and basis of legitimacy of the principle of dynamic interpretation based on analytical criteria identified in chapter 4.

Chapter 6 will provide a summary and comment on the thesis findings.

⁴² *Sibson v the United Kingdom* Judgment 20 April 1993 (Application no. 14327/80) § 29; *Rowe and Davis v the United Kingdom* Judgment 16 February 2000 (Application no. 28901/95) § 66.

⁴³ *Christine Goodwin*, § 68.

2 Preliminary Issues

This chapter aims at providing a preliminary overview of characteristic features of the ECHR relevant to the study of the principle of dynamic interpretation. Based on the thesis' research question – explaining the principle's function and basis of legitimacy in the light of constitutional theory – the study places the interpretative method in a context of political theory. On this ground this section will both present issues relevant to the interpretation of ECHR rights and freedoms, but moreover also issues relevant to the question of what kind of treaty-obligation the ECHR entails for its signatory States. Section 2.1 thus aims at providing an introduction to the ECHR-system of protection and its value base, whilst section 2.2 aims at providing an introduction to the Court's general methodology.

2.1 The ECHR System of Protection

As an instrument of the Council of Europe and an agreement between its Member States the European Convention of Human Rights is formally an international treaty. The rights and freedoms protected by the ECHR are pursuant to Article 1 of the Convention *legal* rights, meaning that the Member States are legally bound to “secure” and thereby guarantee the rights to everyone within their jurisdiction.⁴⁴ Coupled with the Court's mandate pursuant to Article 19 to “ensure the observance” of the Member State's obligation, the signatory States' legal obligation is further evidenced by the mandatory right to lodge a complaint of State violation to the Court, either as an individual application under Article 34 or an inter-state application under Article 33. In the case of the Court finding a violation

⁴⁴ Christian Tomuschat. “Human Rights: Between Idealism and Realism” (Oxford: Oxford 2003), 2.

of the Convention, the Respondent State is bound by Article 46 to “abide by the final judgment of the Court”.

As the thesis places the study of the principle of dynamic interpretation in the context of constitutional theory, it is necessary to point out that the ECHR does not legally entail a vertical system of obligation. The ECHR system does not have the power to enforce its judgments, thus the signatory States’ execution of final judgments on domestic level are merely “supervised” pursuant to Article 46(2) by the Council of Europe Committee of Ministers. It is a system based and conditioned on the acceptance of the Member States of the Council of Europe. This is highlighted by Article 58 allowing States the right to denounce the Convention.

The aim and purpose of the ECHR in the European context is evidenced by its being an instrument of the Council of Europe. When enacted in 1949, the Council of Europe had as its broad concern in the reconstruction of Europe following World War II, to foster the growth and stability of democratic government in Europe.⁴⁵ The Council’s aim is thus to “achieve greater unity between its members” for the purpose of promoting and maintaining a peaceful society based upon justice and international cooperation,⁴⁶ an aim which, as expressed in the Preamble to the Convention:

“are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they deserve”.⁴⁷

The nature of the obligation and protection afforded by the ECHR will be address further on in the study, but on the basis of the Council of Europe’s aim, it is worth already now

⁴⁵ Ian Loveland. ”Constitutional Law, Administrative Law, and Human Rights – A critical introduction” (Oxford: Oxford 4th ed. 2006), 658.

⁴⁶ Statute of the Council of Europe Article 1.

⁴⁷ ECHR Preamble § 4.

taking note of a central feature of the ECHR protection. Human rights, by regulating how government bodies treat individuals within their jurisdiction, are by their very nature sovereignty limiting rights. Rights that reconcile the effectiveness of State power with the individual's protection against that same power, lays at the heart of liberal democracy.⁴⁸ Their purpose and function, to provide individuals and minorities with inviolable rights with which an illegitimate request of the State can be opposed,⁴⁹ has today been realised within most democratic states by the attainment of constitutional status. Human rights are thus increasingly understood and practiced as a tool for good governance, and are today valued as necessary and indispensable features of democratic rule.

The transposition of human rights to the international level, through the enactment of the ECHR and other major instruments (such as the United Nations Declaration of Human Rights (UNDHR) and the UN Convention on Civil and Political Rights (CCPR)), has moreover signified a departure from the traditional understanding of governance. By creating a mandate for the European community to uphold and enforce the rights and freedoms of the Convention, the relationship between the State and its citizens is no longer merely a matter of domestic law and supervision. As stated in the Preamble to the Convention, the ECHR entails a commitment to a "collective enforcement" of its rights and freedoms.⁵⁰ The question is how this aspect to the Member States' obligation has contributed to the Court's methodology. This question will be address in chapters 5 and 6 of the thesis, whilst features of the Court's methodology central to answering this question will be presented in section 2.2. In the following the thesis will look closer at the underlying ideology of the Convention.

⁴⁸ Tomuschat (2003), 7.

⁴⁹ Tomuschat (2003), 11.

⁵⁰ ECHR Preamble § 5.

2.2 The Ideology of the ECHR

Though the concept of human rights as such has evolved through a wide discourse of philosophical and political theories, as the above discussion illustrated, the human rights protection afforded by the ECHR can be said to reflect a particular European ideology: that of liberal democracy and the rule of law.⁵¹ Furthermore, the very idea of human rights “presupposes a certain idea of the human being”;⁵² a concept, it can be argued, that is intimately related to the Convention’s political function. The question is whether such ideals are present in the Court’s interpretation?

As evidenced in its case-law, the “common heritage” of the signatory States emphasised in the Preamble has been relied on by the Court to find “underlying values of the Convention” when interpreting its rights and freedoms.⁵³ In so doing, the Court can be said to read the text of the Convention within a broader context. On this ground this section will look at three central values that inform the Convention and the principle of dynamic interpretation, namely: democracy; human dignity; and the rule of law.

2.2.1 Democracy

As we’ve seen, as expressed in the Preamble, an “effective political democracy” is viewed as a precondition for the respect of human rights in Europe. The Court sees democracy as “the only political model contemplated in the Convention and the only one compatible with it”.⁵⁴ The Convention does not guarantee democracy as a ‘human right’, but the value of

⁵¹ L. Helfer and A.M. Slaughter. “*Towards a Theory of Effective Supranational Adjudication*” 107:2 YLJ (1997) 273, 276; M. Emberland. “*The Human Rights of Companies*” (Oxford: Oxford 2006), 32.

⁵² Tomuschat (2003), 2.

⁵³ *United Communist Party of Turkey v. Turkey* Judgment, § 45; *Soering v. the United Kingdom* Judgment 7 July 1989 (Application no. 14038/88), § 88.

⁵⁴ *Gorzelic and Others v. Poland*, Judgment 17 February 2004, §§ 89-90. See also: *United Communist Party of Turkey v. Turkey*, §§ 43-45; *Refah Partisi (The Welfare Party) and Others v. Turkey*, §§ 86-89.

democratic governance “is immersed” in the whole treaty.⁵⁵ The significance given democracy is clearly expressed in the Court’s methodology, holding that it must ensure that its interpretation is consistent with the “general spirit of the Convention, as an instrument designed to maintain and promote the ideals and values of a democratic society”.⁵⁶ Furthermore, several of the Convention’s provisions allow for a legitimate limitation of an individual’s rights and freedoms when “necessary in a democratic society”.⁵⁷ Serving as a general principle of Convention interpretation,⁵⁸ public interest is in this way also highly relevant when deciding the scope of the Convention’s protection. As such it is relevant to a study of the principle of dynamic interpretation.

2.2.2 Human Dignity

Though the Convention makes no express reference to the value of human dignity, it has been relied upon by the Court to inform its interpretation. As “[t]he very essence of the Convention is respect for human dignity and human freedom”,⁵⁹ it must be said to constitute an important Convention value. The Court has not elaborated on its specific meaning,⁶⁰ but there are two qualities that can be said to be imbedded in the concept of human dignity, that is ‘equality’ and ‘personal autonomy’.^{61, 62} Pursuant to Article 14, the value of equality is embedded in one of the central rights of the Convention; the prohibition

⁵⁵ Marius Emberland. “The Human Rights of Companies” (Oxford: Oxford 2006), 40.

⁵⁶ *Kjeldsen, Busk Madsen and Pedersen* Judgment 7 December 1976 (Application no. 5096/71; 5920/72; 5926/72), § 53.

⁵⁷ Second paragraph of ECHR Articles 8-11.

⁵⁸ Emberland (2006), 40.

⁵⁹ *Pretty v. the United Kingdom* Judgment 29 April 2002 (Application no. 2346/02), § 65; *I v. the United Kingdom*, § 70.

⁶⁰ Emberland (2006), 38.

⁶¹ *Christine Goodwin v. the United Kingdom*, § 90.

⁶² Georg Letsas. “A Theory of Interpretation of the European Convention on Human Rights” (Oxford: Oxford 2007), 5.

against discrimination. The principle of equality argues that the benefit of the rights and freedoms on the Convention should extend equally to all Europeans,⁶³ whilst the principle of personal autonomy embodies the view that the Convention should give effect to the individual's right and responsibility to "live one's own life as one chooses without interference"⁶⁴ and thus protects the individual from indefensible restrictions on his or her liberty.⁶⁵

2.2.3 The Rule of Law

The Rule of law, as stated in the Preamble, is a part of the "common heritage" of the governments of Europe.⁶⁶ It constitutes a fundamental principle of democratic society.⁶⁷ It forms a central principle of interpretation from which "the whole convention draws its inspiration".⁶⁸ The rule of law has somewhat different content depending on the legal tradition in which it exists, but broadly speaking one can say that the traditional definition of the rule of law is the democratic legal state;⁶⁹ a state which is built on the principle that "any power or any act of public authority be founded on the law".⁷⁰ In this way the principle is closely connected to securing effective protection against arbitrary interference by political authorities.⁷¹ An important aspect to the rule of law is thus independent courts

⁶³ Ibid

⁶⁴ *Sheffield and Horsham v. the United Kingdom*, §

⁶⁵ Letsas (2007), 5.

⁶⁶ ECHR Preamble § 5.

⁶⁷ *Klass and Others v. Germany* Judgment 6 September 1978 (Application no. 5029/71), § 55.

⁶⁸ *Engel and Others v. the Netherlands* Judgment 8 June 1976 (Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), § 69.

⁶⁹ D. Held. "Democracy and the Global Order" (Cambridge: Polity 1995), 157.

⁷⁰ Alkema (2000), 47.

⁷¹ *Sunday Times v. the United Kingdom* Judgment 26 April 1979 (Application no. 6538/74), § 34; *Silver and Others v. the United Kingdom*, § 90.

with the jurisdiction to check government action against the rights of the individual.⁷² As such it is a relevant principle of interpretation when the Court is asked to determine the scope of legitimate government activity under the Convention.

2.2.4 Constitutional Values?

As we have seen, the fundamental values that guide the Court in its interpretation of the rights and freedoms of the Convention are closely connected to what can be broadly termed as ‘good governance’ and the ideal of the democratic state. As observed by Georg Letsas, the ECHR can be seen as an agreement to be bound by the values of liberal democracy.⁷³ On this ground one can ask what kind of value are the Convention-values? In the case of *United Communist Party v. Turkey* the Court held:

“The Preamble to the Convention refers to the “common heritage of political traditions, ideals, freedom and the rule of law” of which national constitutions are in fact often the first embodiment.”⁷⁴

As the citation reveals, the Court draws a connection between the Convention-values and those which form the foundational values of a national constitution. The Member State’s commitment to political values can be said to give evidence that the realisation of the political ideology upon which the Convention is built is an important aspect of the Court’s adjudication. This aspect is relevant with regards to which weight the values are given when interpreting the scope of the Convention rights. This aspect will be discussed further as the study moves into questions of the interpretation of constitutional values.

⁷² Merrills (1993), 128.

⁷³ Letsas (2007), 8.

⁷⁴ *United Communist Party of Turkey v. Turkey*, § 28.

2.3 Interpreting the ECHR

The principle question in any case before the Court is whether a defendant State has violated the Convention rights. This answer depends on how the text of the ECHR is interpreted. This section aims at providing an overview of questions relating to the Court's interpretation of the ECHR relevant to the principle of dynamic interpretation. Before this the question of illegitimate judicial activism will be addressed.

Under Article 32, the Court is the authoritative interpreter of the Convention. Its jurisdiction “extends to all matters concerning the interpretation and application of the Convention and the protocols thereto”.⁷⁵ Thus the Court's material jurisdiction is positively delimited to the Contracting Parties' obligation as “defined” in the text of the Convention.⁷⁶ The question of whether the Court legitimately can be said to be interpreting the Convention or whether it is bordering into illegitimate judicial activism when applying the principle of dynamic interpretation relates directly to its jurisdiction. To provide insight into the question at hand – what the charge *illegitimate* judicial activism infers - the study will provide an introduction to so-called ‘judicial ideologies’; theories which explain the limitations of judicial discretion. This issue, as will be shown, is central to constitutional theories of interpretation.

2.3.1 Judicial Ideologies

The principle of dynamic interpretation can be said to reflect the general judicial attitude of the ECtHR with regards to the fundamental question which faces all courts; namely, whether to adopt a restrictive or activist approach to interpretation, otherwise known as the ideologies of judicial self-restraint and judicial activism. These theories relate to the boundaries of interpretation. Activism asks at what stage a court goes from interpreting the

⁷⁵ ECHR Article 32.

⁷⁶ ECHR Article 1.

law to transgressing into judicial legislation and policy-making. Self-restraint, asks the question of how restrictive a court can be in its interpretation before its adjudication becomes ineffective. The judicial ideologies, or attitudes, prescribe general premises, or strategies, a court will base its adjudication upon when faced with a question of interpretation to which the law does not provide an obvious answer.⁷⁷

The Court's general judicial attitude can be said to be illustrated by a statement given in the inter-state case of *Ireland v. the United Kingdom*⁷⁸ where, as a response to the question of whether the Court's jurisdiction extends to pronouncing "non-contested allegations", it held that:

"The Court's judgments 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, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties"⁷⁹

As evidenced in the citation, the Court sees the development of the ECHR as a central aspect of its adjudicative jurisdiction. The question raised in relation to activism, is whether the Court is *illegitimately* developing the law of the Convention, or whether by holding this attitude it stays within its jurisdiction pursuant to Article 32. The issue at hand is illustrated well by Judge Sir Gerald Fitzmaurice dissenting opinion in the abovementioned case. In his view, the Court considering development as a conscious aim, not only attributed itself "a teleological role" which in his view "it was not originally intended to have", but also attributed the Court's jurisdiction a "quasi-legislative" operation which exceeds the normal judicial function.⁸⁰ The reason for this view is provided in another dissenting opinion by Sir

⁷⁷ C.C. Morrisson. "The Dynamics of Development in the European Human Rights Convention" (Dordrecht: Martinus Nijhoff, 1981), Ch. 1.

⁷⁸ *Ireland v. the United Kingdom* Judgment 18 January 1978 (Application no. 5310/71).

⁷⁹ *Ibid.*, § 154.

⁸⁰ *Ibid.*, Sep.op. Judge Fitzmaurice § 6.

Fitzmaurice; in the case of *Golder v. the United Kingdom*.⁸¹ Judicial caution was especially important in relation to the ECHR, he expressed, on the grounds of the political impact of the Convention on its signatory States internal affairs. Making “heavy inroads” on “some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or domain reserve” the Court should be careful not to act as a judicial legislator.⁸²

The majority’s view in the *Ireland* case must be said to reflect the Court’s present-day legal doctrine. Judge Sir Gerald Fitzmaurice’s view, which it must be mentioned he later modified, is however relevant in as much as it corresponds with the democratic dilemma posed by the principle of dynamic interpretation in relation to the sovereignty of the signatory States.

It is not denied in either ideology that courts sometimes make law. Laws are not finished products and a development of law is, as expressed by J.G. Merrill, an “inescapable feature of the judicial process”.⁸³ The question is, as mentioned, how active a court in a given legal system can be?⁸⁴ On deciding this question, the distinguishing feature between the ideologies of self-restraint and activism lies in their relation to law as previously stated in existing legal sources.⁸⁵ Proponents of self-restraint see the law as a self-contained system, with strict adherence to the text, and where sources of law deemed relevant are those that provide evidence of the framers intentions. An activist court does not abandon this view entirely, but sees it only as a starting point as the law is not deemed an autonomous, or closed, system.⁸⁶ The answer provided by these ideologies lies in which sources of law that are deemed relevant, and the weight given to the different interpretative components, that decides how ‘active’ or ‘cautious’ a court is in its adjudication. The question of legitimacy

⁸¹ *Golder v. the United Kingdom* Judgment 21 January 1975 (Application no. 4451/70).

⁸² *Ibid*, Sep.op. Judge Fitzmaurice § 38.

⁸³ Merrills (1993), 230.

⁸⁴ Mahoney (1990), 60.

⁸⁵ *Ibid*, 60; Merrills (1993), 230 and 232.

⁸⁶ Merrills (1993), 232.

and the corollary question of why certain sources of law are viewed as authoritative and others not must however be sought on other grounds. This is the question addressed in chapter 4 of the thesis.

2.3.2 Traditional Rules of Treaty Interpretation

As an international agreement between States, the ECHR operates within the general system of international law.⁸⁷ That the Court views the interpretation of the Convention in this context is evidenced in the case of *Golder v. the United Kingdom* where the Court expressed for the first time the manner in which the Convention should be interpreted. The Court considered itself to be “guided by Articles 31 to 33 of the Vienna Convention (...) on the Law of Treaties”,⁸⁸ though the Vienna Convention (or, VCLT)⁸⁹ was not in effect at the time of the judgment. The rules were, however, deemed applicable by the Court as they “enunciate in essence generally accepted principles of international law” already relied upon by the Court in earlier cases.⁹⁰

In the *Golder*- case, the Court proceeded to describe the general rule of interpretation contained Article 31 of the VCLT, stating that the process of interpretation of a treaty:

“is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the article”⁹¹

⁸⁷ Herbert Golsong (1993), 147.

⁸⁸ *Golder v. the United Kingdom*, § 29.

⁸⁹ Vienna Convention on the Law of Treaties 23 May 1969, entered into force 27 January 1980, available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

⁹⁰ *Golder v. the United Kingdom*, § 29.

⁹¹ *Ibid*, § 30.

Placing the different means of interpretation “on equal footing”, the process of interpretation as described above by the Court can be termed as a ‘holistic’ approach as it does not prioritise certain interpretative means over others.⁹² It is worth taking note of the fact that the Court’s description coincides with that of the International Law Commission’s (ILC) commentaries to Article 31 of the VCLT.⁹³

The question is, however, whether the Court in fact follows a holistic approach, or, whether the ECHR as a human rights treaty has led to a ‘hierarchical’ system of interpretation, where the relative position of the interpretative factors are given different weight. Answering this question will provide guidance as to which attitude the Court will take when confronted with a particular interpretative problem.⁹⁴

An examination of the general methodology of the Court goes beyond the scope of the thesis. However, there is evidence in the Court’s case law that the Court does not apply the ordinary rules of treaty interpretation in a holistic manner. Relative to the principle of dynamic interpretation, there are especially three aspects which give evidence of a shift in the Court’s methodology in relation to the VCLT. These are: the Court’s predominant reliance on object and purpose (teleological, or functional interpretation); the way in which it relies on subsequent practice in the application of the treaty; and the way in which the Court relies on relevant rules of international law applicable in the relations between the parties. These questions will be addressed shortly.

It is relevant to point out, however, that the VCLT gives no directions to specific questions of interpretation, such as dynamic or static (or, historical) interpretation, or on the

⁹² M. Toufayan. “*Human Rights Treaty Interpretation. A Postmodern Account of its Claim to “Speciality”*”, 10. Working-paper nr. 2, 2005, NYU Centre for Human Rights and Global Justice, available at <<http://www.chrgj.org/publications/wp.html>>.

⁹³ Report of the International Law Commission vol. II (1966), 218-220.

⁹⁴ Toufayan (2005), 9.

interpretational differences between law-making treaties and contractual treaties.⁹⁵ This has been taken to mean by some authors that Articles 31-33 of the VCLT do not capture the specific requirements of human rights interpretation.⁹⁶ Such a view can find support in the Report of the Commission in the *Golder* case:

“The question of applying [the VCLT] and other commonly invoked principles of treaty interpretation to the Human Rights Convention should, however, be answered only after taking into account the special nature of this Convention.”⁹⁷

The statement reveals the view that the ECHR methodology is developed specifically to respond to the object and purpose of the treaty. As regards to the question of specificity in general, according to Ian Sinclair, the rules embodied in Article 31 to 33 of the VCLT do not give exhaustive account of techniques which may be adopted by the interpreter.⁹⁸ The articles, he holds, must be viewed as “an economical code of principles”. In this way they are seen as allowing for enough flexibility to “guide” the interpretation of the Convention,⁹⁹ and thus provide a starting point enabling a court to fashion its own reasoning.¹⁰⁰ The VCLT’s reference to object and purpose is on this ground held as the interpretative norm which will reveal “the specific interpretative requirements” of a human

⁹⁵ Franz Matscher. “*Methods of Interpretation of the Convention*” in Macdonald, Matscher & Petzold (eds.) “The European System of for the Protection of Human Rights” (Dordrecht: Martinus Nijhoff, 1993), 65.

⁹⁶ van Dijk & van Hoof. “The Theory and Practice of the European Convention on Human Rights” (The Hague: Kluwer, 3rd ed. 1998), 72; C. Ovey & R. White. “Jacobs & White: The European Convention on Human Rights” (Oxford: Oxford. 6th ed. 2006), 46.

⁹⁷ *Golder v. the United Kingdom* Report of the Commission 1 June 1973, § 44.

⁹⁸ I. Sinclair. “The Vienna Convention on the Law of Treaties” (Manchester: Manchester, 2nd ed. 1984), 153.

⁹⁹ R. Bernhardt. “*Thoughts on the interpretation of human rights treaties*” in Matscher & Petzold (eds.) “Protecting Human Rights: The European Dimension” (Cologne: Heymans 1988), 65.

¹⁰⁰ D. French. “*Treaty Interpretation and the Incorporation of Extraneous Legal Rules*” 55 ICLQ (2006) 281, 281-2.

rights treaty.¹⁰¹ The case-law of the ECtHR, as we have seen, gives evidence for such a view.

In the following an overview will be given of the three distinct features of the Court's methodology – that is, its reliance on object and purpose; subsequent practice; and general rule of international law – as they are intimately linked to the principle of dynamic interpretation and its function and basis of legitimacy.

2.3.3 Teleological Interpretation

Though guided by the general rules of treaty interpretation, as held, there is evidence that the Court adapts the process of interpretation contained in VCLT Articles 31 to 33 to the “special nature” of the ECHR as a human rights treaty. The question that follows is how this expresses itself in the Court's general methodology?

The general rule of treaty interpretation contained in VCLT Article 31(1) reads as follows:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”

The general rule of treaty interpretation seeks first and foremost to arrive at the “ordinary meaning” of the text, but to aid that process the rule also subscribes to contextual and object and purpose, or teleological, methods. The general approach underlying the Court's interpretation of the Convention can be said to be expressed in the case of *Wemhoff v. Germany*.¹⁰²

¹⁰¹ Bernhardt (1988), 65.

¹⁰² *Wemhoff v. Germany* Judgment 27 June 1968 (Application no. 2122/64).

“Given that [the Convention] is a law-making treaty, its is (...) necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the objective of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”¹⁰³

Herein the Court reveals three factors which are not only determinative to the interpretation of the Convention, but moreover inform the issue of dynamic interpretation. These are: the significance of the Convention as a law-making treaty; the Court’s reliance on object and purpose; and the Court’s view on restrictive interpretation with regards to state sovereignty. The different factors will be addressed in order.

The first point, as mentioned, relates to the ECHR as a “law-making” treaty. It is commonly recognised in international law that law-making treaties contain a temporal aspect determinative to their interpretation.¹⁰⁴ As defined by Ian Brownlie, law-making treaties “create legal obligations the observance of which does not dissolve the treaty obligation” and thus “create *general* norms for the future of the parties in terms of legal propositions”.¹⁰⁵ As such they are *continuous* obligations which contain norms of a general, rather than specific nature, and are most often meant to last for a long time.¹⁰⁶ In the context of the ECHR this means that the obligation undertaken by Contracting Parties’ is by *nature* evolving as opposed to static.

The second interpretative factor contained in the *Wemhoff* citation relates to the Court’s interpretative emphasis on object and purpose. In this regard, the citation reveals two

¹⁰³ Ibid, § 8.

¹⁰⁴ This factor has also been held as determinative for the interpretation of other law-making treaties. In the case of *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), the International Court of Justice held that the continuous character of a treaty regulating a system of dams between the countries “impose[d] a continuing—and thus necessarily evolving—obligation”¹⁰⁴ between the parties. ICJ Reports, 7, 78.

¹⁰⁵ Brownlie (2003), 12 (original emphasis).

¹⁰⁶ Sinclair (1984), 121.

important aspects. First, it reveals how, when there is conflict between relevant norms of interpretation, the Court will rely on the interpretative alternative which realises the object of the Convention. The issue before the Court in the *Wemhoff* case was whether there, following the applicant's arrest and detention, had been a violation of the applicant's right to a "trial" within "reasonable time" pursuant to Article 5 (3).¹⁰⁷ Here the Court relied on the object and purpose of the Convention to reconcile the interpretative difference between the English term "trial" and the French term "jugée"; terms equally authentic but not exactly the same. On the grounds that it would realise the object and purpose of the Convention, the Court chose the broader meaning provided by the French text. The second point revealed in the citation is how the Court ties the realisation of the object and purpose of the Convention, to its instrumental function; in other words, to ensure its operation as a human rights treaty.

The third and last point is how as a consequence of a teleological approach, the Court as a rule does not follow a restrictive interpretation. Its worth pointing out that sovereignty as principle of interpretation is in general no longer an accepted principle of treaty interpretation, and is not to be found in VCLT Articles 31 to 33.¹⁰⁸

The question thus arises of how the Court identifies object and purpose. In the case of *Ireland v. the United Kingdom* the Court held that the ECHR confers "objective obligations" upon its signatory states.¹⁰⁹ This has been taken to mean that the Court seeks an objective meaning of the Convention's object and purpose. The question of which yardstick the Court relies on to find objective meaning, as will be shown, is related to the principle of dynamic interpretation.

¹⁰⁷ *Wemhoff v. Germany*, § 4.

¹⁰⁸ Rudolf Bernhardt. (1967), 504.

¹⁰⁹ *Ireland v. the United Kingdom*, § 239.

2.3.4 Subsequent Practice and Relevant Rules of International Law

The VCLT 31(3) states that when seeking the ordinary meaning of the terms of a treaty there shall be taken into account “together with the context”:

“(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”

(c) any relevant rules of international law applicable in the relations between the parties”

Though the two rules of interpretation are logically distinct, they are presented together as they both permit taking into account later developments in the law when interpreting a treaty,¹¹⁰ as they both represent sources extraneous to the treaty itself. On this ground it is recognised by several theorists that the rules bring a dynamic element to the interpretation of the treaty text.¹¹¹ As expressed by Duncan French, relying on extraneous legal material when seeking to clarify the meaning of a legal text entails the interpreter to go beyond the text of the treaty so that “new norms” can be used when interpreting old treaty texts.¹¹²

As will become apparent as the study progresses, such extraneous sources of law are frequently relied upon by the Court in its interpretation. In this context it is relevant to ask whether they are given the same relevance and weight in the ECHR methodology as they have been given in the Vienna Convention. According to Ian Sinclair, the sources of law enumerated in Article 31(3) are seen as subsidiary components to the general rule of interpretation.¹¹³ The value of subsequent practice in the application of the treaty will depend on “the extent to which it is concordant, common and consistent”.¹¹⁴ Whilst rules

¹¹⁰ Bernhardt (1967), 496.

¹¹¹ *ibid*, 499; Sir Gerald Fitzmaurice (1957), 211 et seq.

¹¹² Duncan French. (2006), 285.

¹¹³ Sinclair (1984), 246.

¹¹⁴ *Ibid*, 137.

and principles of international law can be relied on to inform the interpretation as far as they are “relevant” and “applicable between the parties” to the case.

2.3.5 Key Interpretative Features of the ECHR

As evidenced in the case of *Ireland v. the United Kingdom* and *Wemhoff v. Germany*, it can be said that by recognising the *nature* of the Convention and the signatory States’ obligation, the Court has developed “appropriate method” of treaty interpretation specific to the ECHR.¹¹⁵ Relevant to the principle of dynamic interpretation, certain of these principles of interpretation will be introduced in the following.

2.3.5.1 Principle of Effectiveness

The principle of effective interpretation is frequently relied upon by the Court in its interpretation,¹¹⁶ and moreover, relied upon in connection to the principle of dynamic interpretation. This principle of effectiveness or *effet utile* is a well established principle of treaty law. Its interpretative function is to ensure that the provisions of treaties are to be interpreted “so as to give them their fullest weight and effect”,¹¹⁷ and is in so way recognised as being included in VCLT Article 31(1) reference to “object and purpose”.¹¹⁸ The Court has held on several occasions that the Convention “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.¹¹⁹ Coupling the principle to the realisation of the Convention’s object and purpose, the principle of effectiveness enables the Court to look beyond the formalities of the case, and to “focus on

¹¹⁵ Orakhelashvili (2003), 529.

¹¹⁶ van Dijk & van Hoof (1998), 74.

¹¹⁷ Fitzmaurice (1957), 211.

¹¹⁸ Bernhardt (1967), 504.

¹¹⁹ *Airey v. Ireland* Judgment 9 October 1979 (Application no. 6289/73) § 24.

the position of the individual”.¹²⁰ In this way the principle has contributed to expansive readings of the ordinary meaning of the Convention text, which has for instance resulted in reading in positive obligations in the provisions to ensure effective protection.¹²¹ Moreover, as evidenced in the Court’s case law, the principle of effectiveness has also been applied to interpret the procedural provisions of the Convention in an expansive manner.¹²² In this way the principle has contributed to ensure the effectiveness of the ECHR-system as such.¹²³

2.3.5.2 The Principle of Autonomous Concepts

The rights and freedoms enumerate in the Convention do not provide detailed rules of State conduct, but are legal standards formulated as “major principles in broad outline”.¹²⁴ Their open textured wording will seemingly leave a wide discretion to the interpreter, being it the Court or the signatory State. As aptly expressed by Sir Humphrey Waldock, the way in which the rights and freedoms are defined leaves them “too general (...) to be fully ‘self-executing’”.¹²⁵ On this ground in the capacity of its supervisory function, the Court interprets many of the Convention’s terms in an *autonomous* fashion. The meaning given to the terms is thus often independent from the meaning which identical or similar words have in the domestic law of the Contracting States.¹²⁶

The rationale given by the Court for this approach is two-fold. First, is the reason that if the terms were to be given the meaning as understood within the national law of each State

¹²⁰ van Dijk & van Hoof (1998), 70.

¹²¹ See: *Airey v. Ireland*; *Christine Goodwin v. the United Kingdom*.

¹²² See: *Loizidou v. Turkey*; *Mamatkulov and Askarov v. Turkey* Judgment 4 February 2005 (Application no. 46827/99, 46951/99).

¹²³ van Dijk & van Hoof (1998), 76.

¹²⁴ Sørensen (1988), 29.

¹²⁵ Sir Humphrey Waldock, *cited in* Mahoney (1990), 85.

¹²⁶ van Dijk and van Hoof (1998), 77.

concerned, the guarantees contained in the Convention would vary from State to State,¹²⁷ which in turn would undermine the principle of equality on which the Convention is built. Secondly, the Court has expressed that autonomous meaning is necessary for the effective operation of the Convention. An autonomous reading ensures that the effectiveness of the Convention is not “subordinated” to the sovereign will of the Contracting States, which might otherwise “lead to results incompatible with the purpose of the object of the Convention”.¹²⁸ In this way the rights and freedoms of the Convention are understood in an “international sense”.¹²⁹ The question this poses is how the Court clarifies and identifies autonomous meaning.

2.3.5.3 The Principles of Subsidiarity and Margin of Appreciation

The primary responsibility for securing the rights and freedoms of the Convention lays, as evidenced in Article 1, with the Contracting States. This gives the ECHR’s supervisory system a subsidiary character in relation to the domestic jurisdiction’s of the Contracting States, and is reflected in the Court’s interpretation as ‘the principle of subsidiarity’. In this lies that the Court must not function as a fourth instance of appeal by taking the place of the national authorities when deciding on matters brought before it. The Court’s task in exercising its supervisory function is to “review” in the light of the case as a whole whether the decisions taken on domestic level are in conformity with the rights and freedoms of the Convention.¹³⁰ As such deference to the decisions of the national authorities is an inherent

¹²⁷ Rudolf Bernhardt. “Comparative Law in the Interpretation and Application of the European Convention on Human Rights” in Busuttil (ed.) “Mainly Human Rights. Studies in Honour of J.J. Cremona” (Valetta: Foundation Internationale Malta 1999) 33, 37.

¹²⁸ *Engel and Others v. the Netherlands*, § 81.

¹²⁹ Bernhardt (1988), 66-7.

¹³⁰ See: *TV Vest AS & Rogaland Pensjonistparti v. Norway* Judgment 11 December 2008 (Application no. 21132/05), § 62.

aspect of very nature of the Convention,¹³¹ and can be said to reflect the Court's respect of sovereignty.¹³²

The Court's subsidiary and international role plays a great part in the Court's interpretative approach.¹³³ The legitimate area of the Court's review is intimately related to the legitimate area of discretion awarded the national authorities, also known as the margin of appreciation. The essence of the principle is that as it is the "primary task" of signatory State's to "decide on the measures necessary to secure Convention rights within their jurisdiction", they are awarded a 'margin' in which to exercise this discretion. This allows for the particular concerns, values, culture and interest of the individual States to be taken into account.¹³⁴

This power of appreciation is however "not unlimited", but "goes hand in hand" with the "European supervision" provided by the Court's review.¹³⁵ Relevant to the principle of dynamic interpretation is how the legitimate scope of deference awarded the States' at any time is not fixed but is reviewed in the light of "present-day conditions". In this way the principles of interpretation can be said to go hand in hand.¹³⁶ As the study will show, the variable scope of the margin afforded is reviewed in relation the existence of a European common ground.¹³⁷

¹³¹ Mahoney (1990), 81.

¹³² Eyal Benvenisti. "A Margin of Appreciation, Consensus and Universal Standards" 31 NYU J Int'l L & Pol (1998-1999) 843, 853.

¹³³ Emberland (2006), 24.

¹³⁴ *Christine Goodwin v. the United Kingdom*, § 85.

¹³⁵ *Handyside v. the United Kingdom*, § 49.

¹³⁶ Mahoney (1990),

¹³⁷ *Rasmussen v. Denmark* Judgment 28 November 1984 (Application no.

3 The Principle of Dynamic Interpretation – An Overview

3.1 Introduction

This chapter aims at providing an overview of the principle of dynamic interpretation as practiced by the ECtHR in its interpretation and application of the ECHR. The aim is to identify the principle's characteristics and purpose as a tool of interpretation. These aspects will be relevant when exploring the principle's function and basis of legitimacy later on in the study. The case-law relied upon is chosen on the background that it illustrates the central aspects of the principle, and is thus not meant to give an exhaustive account of the principle's effect on the rights and freedoms of the Convention.

3.1.1 The Emergence of the Principle

The principle of dynamic interpretation is today “firmly rooted” in the Court's case-law.¹³⁸ However, it was not until the 1978 case of *Tyrer v. the United Kingdom* that the Court expressly applied the principle, holding that:

“the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field”¹³⁹

¹³⁸ *Matthews v. the United Kingdom* Judgment 18 February 1999 (Application no. 24833/94), § 39; *Loizidou v. Turkey*, § 71.

¹³⁹ *Tyrer v. the United Kingdom*, § 31.

It is worth taking note of the fact that the principle was invoked 28 years after the drafting of the Convention, thus highlighting the reason for its appearance in the Court's methodology.¹⁴⁰ When deciding the question before the Court, whether the birching of an adolescent boy, administered as punishment for an offence committed at school, amounted to treatment prohibited under Article 3 of the Convention, the Court invoked the doctrine to determine the scope and meaning of the expression "degrading" treatment. The question is thus what necessitated application of the principle in this case and at this stage of the Court's case-law? In short, what was the 'dynamic' issue?

The Court, finding that the punishment did amount to a violation of the applicant's rights, relied on "developments and commonly accepted standards" in Europe at the time of the judgment as a factor for determining the scope and meaning of the expression "degrading". The Government was on this ground not heard with its argument that it was not in breach of the Convention as the treatment did not outrage the local public opinion. The circumstances of the case thus indicate that the principle was applied to up-date the protection afforded under Article 3.

The "power to up-date"¹⁴¹ implied in the *Tyrer* case was affirmed shortly after in the case of *Marckx v. Belgium*¹⁴². Finding a failure to recognise the maternal affiliation between an "illegitimate" mother and her child a violation of her "respect for family life" pursuant to Article 8, the Court expressly departed from the meaning given to the term "family" at the time the Convention was drafted:

¹⁴⁰ Prior to the *Tyrer* case, the notion of the Convention as a "living instrument" had only been mentioned by former President to the Court Max Sørensen in an address given in 1975 on the subject of the ECHR. See: Søren Prebensen. "Evolutionary interpretation of the European Convention on Human Rights", in Mahoney, Matscher, Petzold & Wildhaber (eds), "Protecting ..." (Cologne: Heymanns, 2000), 1124.

¹⁴¹ Mahoney (1990), 61.

¹⁴² *Marckx v. Belgium* Judgment 13 June 1979 (Application no. 6833/74).

“It is true, that at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the “illegitimate” and the “legitimate” family”¹⁴³

Relying on evidence of a full judicial recognition of in the domestic law of a great majority of the signatory States the Court held that the “illegitimate” family enjoyed the guarantees of Article 8 “on equal footing” with the traditional family.¹⁴⁴

On summary, the principle of dynamic interpretation thus allows for the scope and meaning of the Convention rights to be given a contemporary meaning, thus resulting in a departure from an established, or historical, meaning. Furthermore, as evidenced in the sources relied upon to provide such evidence, the principle takes the Court out of the ‘four corners’ of the Convention. In the following sections the thesis will explore these aspects further. The questions asked are what is the Court’s rationale for the principle, what are the criteria established by the Court for its application, and what qualifies a contemporary, or dynamic, reading of the Convention rights.

3.1.2 The Principle’s Rationale

Neither in the case of *Tyrrer* nor *Marckx* did the Court expressly justify its application of the principle nor its basis in the Convention. The maxim does, however, contain two informative factors. The first relates to the Convention itself; that the Convention is a “living instrument”, and the second is related to the context of the interpretation, that the rights and freedoms must be interpreted “in the light of present-day conditions”. The Court’s description of the Convention as a “living instrument” can be said to entail a characterisation pertaining to its temporal function. The Court’s reference to “present-day conditions” tells the interpreter where to look for authoritative evidence, or sources of law,

¹⁴³ Ibid, § 41.

¹⁴⁴ Ibid, § 40.

providing contemporary Conventional meaning. These aspects will be studied in further detail as the thesis progresses.

The question is whether the principle's rationale can be evidenced or has been expressed in later case-law. As a study of the principle in the Court's case-law will show that its application is not always coupled with a clear rationale. However, the Court has on several occasions made reference to the object and purpose of the Convention and the principle of effectiveness when applying the principle of dynamic interpretation.¹⁴⁵ Recalling how the VCLT Article 31(1) reference to object and purpose is said to contain the principle of effectiveness, the question is whether the principle of dynamic interpretation must also be said to derive from the Court's teleological approach.¹⁴⁶ The direct connection between these interpretative factors has been made in recent years. In the case of *Stafford v. the United Kingdom*¹⁴⁷ the Court held:

“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. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic approach would risk rendering it a bar to reform or improvement”¹⁴⁸

The principle is in this way closely connected with the teleological principle as it sees a present-day reading of the Convention as necessary for achieving effective protection. Worth taking note of at this stage, is the justification provided by the Court, that it should

¹⁴⁵ *Airey v. Ireland*, §§ 24, 26.

¹⁴⁶ *Bernhardt* (1967), 504.

¹⁴⁷ *Stafford v. the United Kingdom* Judgment 28 May 2002 (Application no. 46295/99).

¹⁴⁸ *Ibid*, § 68. See also: *Christine Goodwin v. the United Kingdom*, § 74.

not risk rendering it “a bar to reform or improvement”. This aspect will be addressed later in the study.

On the grounds of the principle’s effect of ‘up-dating’ the ECHR protection, the principle of dynamic interpretation can thus be said to be founded on the need to ensure effective realisation of its rights and freedoms over time.

At this point the thesis delimits itself to the issue of dynamic interpretation as a rights enhancing principle. Though raised in some judgments, the issue of whether the principle can lead to an “evolution downwards”¹⁴⁹ will therefore not be addressed.¹⁵⁰

3.2 The ‘Dynamic’ Criteria

Recalling how the question of legitimacy refers to the boundaries of interpretation, the question this section seeks to explore and identify is the principle of dynamic interpretation’s distinguishing features when applied in the interpretation of the ECHR rights and freedoms, and thus exploring whether the Court has established criteria for its application.

When deciding a case before it, the Court will view the circumstances of the case “as a whole” where the right under review, other rules of interpretation, and the facts of the case, will contribute to its decision.¹⁵¹ This raises the questions of how the principle relates to other interpretative arguments; in which way the nature of the right being interpreted

¹⁴⁹ Mahoney (1990), 66.

¹⁵⁰ Dissenting judgments that have accused the majority of the Court to apply the principle of dynamic interpretation to reduce the protection afforded: *Leyla Şahin v. Turkey*, Judgment 10 November 2005 (Application no. 44774/98), dis.op. Judge Tulkens; *Üner v. the Netherlands*, Judgment 18 October 2006 (Application no. 46410/99), dis.op. Judges Costa et al.

¹⁵¹ *Tyrrer v. the United Kingdom*, § 35.

contributes to a dynamic interpretation; and at the end of the day, what qualifies a dynamic interpretation.

3.2.1 The Principle in Relation to other Interpretative Arguments

3.2.1.1 The Ordinary Meaning of the Convention's Provisions

The scope of the Court's jurisdiction, to interpret and apply the rights and freedoms as "defined", delimits its interpretative discretion to the text of the Convention.¹⁵² The question is thus how the principle of dynamic interpretation relates to the general aim of treaty interpretation pursuant to VCLT Article 31(1); to establish the "ordinary meaning" of the terms of the treaty. To answer this, it is necessary with a study of some of the cases where the principle has been applied in the Court's adjudication.

Recalling how the rights and freedoms of the Convention are as a rule formulated as broad legal standards, *Tyrer v. the United Kingdom* reveals an important aspect to the application of the principle of dynamic interpretation. The Court holding that the broad meaning of the term "degrading" treatment necessitated that some "further criterion" be read into the text to avoid "absurd" interpretations, relied on the principle to supply such interpretative evidence.¹⁵³ From this one can infer that one of the reasons the Court invokes the principle is as a means to delimit this discretion and guide its interpretation.

The above example illustrates how the Court interprets the terms of the Convention in an autonomous manner. Article 8 of the Convention, containing such concepts, has frequently been interpreted in a dynamic fashion. As mentioned, the right to respect for one's "family", receiving a dynamic interpretation in *Marckx v. Belgium*, is such an example. A closer examination of the case illustrates the flexible nature of the Convention rights.

¹⁵² ECHR Article 1 and 32.

¹⁵³ *Tyrer v. the United Kingdom*, § 30.

The issue being reviewed before the Court was Belgium's legislation concerning affiliation between mother and child. Under Belgian law the maternal affiliation between an unmarried mother and her child was not recognised by birth alone, but required either a voluntary recognition or a court declaration. A married mother's affiliation to her child, on the other hand, was legally recognised merely by recording the birth certificate. As a consequence of the legislation the applicant was required to adopt her own daughter to establish such affiliation. The question was thus whether the manner establishing maternal affiliation amounted to discrimination contrary to Article 14 in conjunction with Article 8. Illustrating the point at issue, how the nature of the Convention rights contribute to establishing their "ordinary meaning", is how the concept of "family" is adaptable to be influenced by the view and values of its society. The Government arguing that the different treatment was founded on objective and reasonable grounds, relied on perceived differences between unmarried and married mothers as support for the Belgian legislation; one example, being the "uncertainty" of unmarried mothers' willingness to bring up their children.¹⁵⁴ By comparison, viewing the Government's argument in the light of the values of today's society, illustrates how the concept changes with time.

Terms such as "degrading" and "family" are thus flexible enough for their "ordinary meaning" to be adapted to contemporary standards. The question is then how the principle contributes to the Court's interpretation where the Convention is silent in relation to a claimed right?

Article 11 of the Convention guarantees the right to "freedom of association" and to "form and join trade unions", but does not contain the opposite; a negative freedom of association. The question of whether this right non-the-less was encompassed by Article 11 was addressed in the case of *Sigurdur A. Sigurjónsson v. Iceland*.¹⁵⁵ The applicant, a taxi driver, complained that the compulsory requirement for drivers to be a member of a trade

¹⁵⁴ Ibid, § 39.

¹⁵⁵ *Sigurdur A. Sigurjónsson v. Iceland* Judgment 30 June 1993 (Application no. 16130/90).

union as a condition for their attaining a licence constituted a violation of Article 11. Arguing against such a right were the *travaux préparatoires* to the Convention, which expressly omitted the right from the provision. The question was however not new to the Court. Already in the earlier case of *Young, James and Webster v. the United Kingdom*¹⁵⁶ the Court had recognised the existence of a “negative aspect” to the freedom of association,¹⁵⁷ but had in the meanwhile in the case of *Sibson v. the United Kingdom*¹⁵⁸ departed from this view. The Government thus submitted that the Court recognising a negative right as such to be covered by Article 11 would “mean a step further” from its earlier judgment.¹⁵⁹ The question was thus both whether a right not positively implied in the text, where there in addition existed proof of it being deliberately omitted, was covered by the text of the provision. The Court found evidence that the “laws of a great majority” of the signatory States and various international instruments contained safeguards guaranteeing the negative aspect. Furthermore, the Court did not see itself bound by the preparatory work, making point that in the earlier case of *Young, James and Webster* they had only been used as “working hypothesis”.¹⁶⁰ On the grounds of the Convention being a “living instrument” the Court found that Article 11 “must be viewed” as encompassing a negative right of association.¹⁶¹

The Court has on several occasions recognised positive obligations in the rights and freedoms of the Convention, rights which in addition requiring a State authority to refrain from an interference requires the State to take steps to “secure” the individual’s rights.¹⁶² The principle of dynamic interpretation’s contribution in this regard is illustrated in the case of *Airey v. Ireland*. The Court, relying on the principle of effectiveness, held that

¹⁵⁶ *Young, James and Webster v. the United Kingdom* Judgment 13 August 1981 (Application no. 7601/76).

¹⁵⁷ *Ibid* § 52.

¹⁵⁸ *Sibson v. the United Kingdom* Judgment 20 April 1993 (Application no. 14327/80).

¹⁵⁹ *Sigurdur A. Sigurjónsson v. Iceland*, § 34.

¹⁶⁰ *Sigurdur A. Sigurjónsson v. Iceland*, § 35.

¹⁶¹ *Ibid*

¹⁶² Merrills (1993), 106.

Article 6 (1) in the light of present-day conditions had to be read so as to include a right to free legal services in civil cases to secure the applicants effective access to court. A right which is pursuant to Article 6 (3) expressly only guaranteed in criminal cases, and in so way extending the scope of Article 6 (1).

As mentioned, a dynamic interpretation of the right to respect for “private life” has also conferred a positive obligation upon States’ to provide legal recognition of transsexuals’ under Article 8;¹⁶³ a right held by the Court as “a broad term not susceptible to exhaustive definition”.¹⁶⁴ These cases will be studied shortly.

Regarding how the Court’s interpretative discretion is limited to the rights as “defined” in the Convention, one can ask in what way the text *bars* an evolutive interpretation. Can an interpretation of the rights in the light of present day conditions extend the scope of the text beyond its “ordinary meaning”?

The question of the Convention’s textual limitations is especially present in cases involving companies as individual applicants. Many of the Convention’s provisions extend their protection to “everyone” within the jurisdiction of the signatory States. As such complaints of pro-profit companies have been recognised as admissible pursuant to Article 35. However, not all of the material rights and freedoms given their “ordinary” meaning seem at first-hand applicable to juristic persons. Does, for instance, a company have the right to respect for their “home” under Article 8? This was the question before the Court in the case of *Société Colas Est and Others v. France*.¹⁶⁵ Following administrative investigations of

¹⁶³ See: *Christine Goodwin v. the United Kingdom; I v. the United Kingdom; B. France* Judgment 25 March 1992 (Application no. 13343/87).

¹⁶⁴ *Marper v. the United Kingdom* Judgment 4 December 2008 (Application no. 30562/04 and 30566/04), § 66.

¹⁶⁵ *Société Colas Est and Others v. France* Judgment 16 April 2002 (Application no. 37971/97). For a further analysis of the case, see: Emberland, M. Protection against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: The Colas Est SA. V. France Approach, 25 Mich J Int’l L (2003-2004) 77.

their business premises, three companies complained that unwarranted raids and seizures carried out by government officials had violated their right to “home” pursuant to Article 8. Relying on the Convention as “a living instrument that must be interpreted in the light of present-day conditions” the Court held that the time had come to “in certain circumstances” afford a company’s business premises the rights guaranteed by Article 8.¹⁶⁶ Though relying mainly on earlier case-law to support its interpretation – which can be said to be distinguishable, the argument that permitted the coupling between business premises and the provision’s text, is the Court’s reliance on the broader meaning embedded in the French word “domicil”.¹⁶⁷

So far, the principle of dynamic interpretation seems to allow expansive readings of the Convention’s text, even beyond its ordinary meaning. There are several cases however, where the Court has disallowed a dynamic interpretation just on the grounds of a textual limitation.

In the case of *Johnston and Others v. Ireland*,¹⁶⁸ an applicant’s right to divorce was not recognised as being encompassed by the right to “marry” enshrined in Article 12 even though societal developments at the time of the judgment could prove its importance. Relying on VCLT article 31 (1), seeking to ascertain “the ordinary meaning to be given to the terms, the Court held that:

“It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions (...) However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This particularly so here, where the omission was deliberate.”¹⁶⁹

¹⁶⁶ Ibid, § 41.

¹⁶⁷ Ibid, § 40.

¹⁶⁸ *Johnston and Others v. Ireland* Judgment 18 December 1986 (Application no. 9697/82).

¹⁶⁹ Ibid, § 53.

Comparing the statement to the case of *Sigurdur A. Sigurdjónsson*, the question can be asked why the Court in this case felt restricted by the preparatory work so not to find that the right to marry also extended to their dissolution. In both cases the Court supported its interpretation on the object and purpose of the right at hand. Where as the compulsory membership in the trade union was seen to “strike at the very substance” of the right guaranteed in Article 11,¹⁷⁰ interpreting the right to divorce as not in accordance with the ordinary meaning Article 12, was deemed “consistent with its object and purpose” as expressed by the Convention’s drafters – even though this would effectively bar the applicants’ right to re-marry.¹⁷¹ Two factors seem to explain the Court’s restrictive attitude in the case of *Johnston and Others*. First, but not expressed, is the sensitive nature of the claimed right, and secondly, that the signatory States had made subsequent amendments to the Convention without including the right. The significance of these aspects in relation to the scope of the principle will be addressed as the thesis progresses.

Another Convention right, whose wording has excluded a dynamic interpretation on several occasions, is the right to “life” pursuant to Article 2.¹⁷² In the case of *Pretty v. the United Kingdom* the Court held that though the increasing acceptance of euthanasia in present-day society, Article 2 “cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die”.¹⁷³ Likewise has Article 2(1) express provision for capital punishment under certain conditions, disallowed interpreting a prohibition against the death penalty under Article 3 in the light of an almost unanimous abolition within the Member States.¹⁷⁴ Nor can the right to “family” pursuant to

¹⁷⁰ *Sigurdur A. Sigurdjónsson v. Iceland*, § 36.

¹⁷¹ *Johnston v. Ireland*, § 52.

¹⁷² See also: *V.O. v. France* Judgment 8 July 2004 (Application no. 53924/00): When the right to life begins; *Evans v. the United Kingdom* Judgment 10 April 2008 (Application no. 6339/05): IVF treatment.

¹⁷³ *Pretty v. the United Kingdom*, § 39.

¹⁷⁴ *Soering v. the United Kingdom* Judgment 7 July 1989 (Application no. 14038/88); *Öcalan v. Turkey* Judgment (Grand Chamber) 12 May 2005 (Application no. 46221/99).

Article 8 in the light of international conventions be interpreted to include the right to adopt.¹⁷⁵

On summary, one can hold that the principle of dynamic interpretation contributes to ‘fleshing out’ the meaning and scope of the text of the Convention. As evidenced, the Court will not apply the principle to go beyond the textual limitations so as to derive “a right that was not included (...) at the outset”.¹⁷⁶ The question must be asked where the difference lies between cases where the Court has extended the scope of protection beyond the ordinary meaning of the text and those cases where the Court has applied a strict interpretation.

3.2.1.2 The Court’s Earlier Case-Law

Recalling how the Court as a rule treats its pre-existing case-law as authoritative,¹⁷⁷ the question is how the principle of dynamic interpretation can contribute to a departure from the law as previously stated by the Court, law that the signatory States base its government activity upon. It is here, maybe, the most visible effect of the principle of dynamic interpretation comes to expression as a tool of interpretation.

A separate opinion in the 1975 case of *National Union of Belgian Police v. Belgium*,¹⁷⁸ illustrates well the issue at hand. The Court having reviewed the scope of the trade union rights protected under Article 11 had held that though the provision protected trade unions’ right “to be heard” by government agencies, the claimed right to consultation did not as such constitute an inherent element, leaving each State “a free choice of the means towards

¹⁷⁵ *Emonet and Others v. Switzerland* Judgment 13 December 2007 (Application no. 39051/03), § 66.

¹⁷⁶ *Ibid*

¹⁷⁷ Merrills (1993), 12.

¹⁷⁸ *National Union of Belgian Police v. Belgium* Judgment 27 October 1975 (Application no. 4464/70).

this end”.¹⁷⁹ In his separate opinion, Judge Zeika expressed that a “time may however come” when the right would be “taken for granted” as an inherent and inseparable component of trade union rights recognised under Article 11.¹⁸⁰ In other words, the possibility that the Court might have to depart from its earlier decisions is ever present in its case-law.

The changing scope and constituent elements of trade union rights has recently been under review in case in *Demir Baykara v. Turkey*,¹⁸¹ this time raising the question of whether Article 11 secured a right to enter into collective agreements and bargaining. The question before the Court was whether the Court of Cassation’s decision, that the applicant, a trade union, did not have the authority to enter into collective agreements as the Turkish law stood, amounted to a violation of the applicant’s rights. Under the legal issue, the Court considering its earlier case-law, recognised that the right to bargain collectively and to enter into collective agreements had until the present case not constituted “an inherent element” of Article 11.¹⁸² Pointing out that the list of essential elements of the right of association “is not finite”, but “subject to evolution”,¹⁸³ the Court expressed that they should therefore be reconsidered “so as to take account of the perceptible evolution in such matters”.¹⁸⁴ Relying on the developments evidenced in international and European legal instruments, and on the changes in the Turkish situation, the Court held that a right to bargaining collectively with the employer “has in principle, become one of the essential elements” of trade union rights;¹⁸⁵ the legal effect being a reduction in the signatory States’ “free choice” as how to guarantee trade union rights at national level.

¹⁷⁹ Ibid, § 39.

¹⁸⁰ Ibid, sep.op. Judge Zeika.

¹⁸¹ *Demir Baykara v. Turkey* Judgment 12 November 2008 (Application no. 34503/97).

¹⁸² Ibid, § 153.

¹⁸³ Ibid, § 146.

¹⁸⁴ Ibid, § 153.

¹⁸⁵ Ibid, § 154.

Cases where the principle of dynamic interpretation has contributed to a departure from the Court's earlier case-law can illustrate the process and factors involved in a judicial legal development. In this regard the cases involving transsexuals' rights provide a good example, and as such deserve a further study.

In the cases of *Christine Goodwin v. the United Kingdom* and *I v. the United Kingdom* the Court found that the lack of full legal recognition of the applicants' post-operative sex amounted to a failure to comply with the Respondent State's positive obligation to ensure the applicants' "respect" for their "private life" pursuant to Article 8. The same question had sixteen years earlier, in the case of *Rees v. the United Kingdom*, been deemed a matter falling within the State's margin of appreciation. What was the reason for the Court departing from this precedent? The main question in the cases was the existence and scope of a positive obligation upon the Respondent State to alter domestic legislation and birth-registers to fully recognise an individual's post-operative gender.¹⁸⁶ Mr. Rees, a female to male transsexual, complained that a failure to have his birth certificate altered to show his male sex caused distress in his private life as it resulted in him being treated as an ambiguous being. Though the Court did not address the applicability expressly, relying on the essential object of Article 8 – the protection of the individual against "arbitrary interference by public authorities", the Court found that for an effective respect for private life, the provisions may contain positive obligations.¹⁸⁷ The notion of "respect", however, being vague, required the Court to have regard "to the diversity of practices followed and the situations obtaining in the Contracting States".¹⁸⁸ Determining the existence of a positive obligation required that:

¹⁸⁶ *Rees v. the United Kingdom*, § 35.

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*, § 37.

“regard must be had to the fair balance that has to be struck between the general interest of the community and the interest of the individual, the search for which balance is inherent in the whole of the Convention”¹⁸⁹

Though several states had already given transsexuals the chance to change their gender-identity, the issue being new, and there being a lack of common ground in the signatory States, the Court, as stated, found the issue to be within the discretion of the State as the present birth-register system protected a legitimate public interest. Recognising the seriousness of the issue, the Court held:

“The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”¹⁹⁰

The ‘need for review’ resulted in a series of cases being brought before the Court. In the cases of *Cossey v. the United Kingdom* and *Sheffield and Horsham v. the United Kingdom* the Court did, however, not find “cogent reason” to depart from its *Rees* judgment to ensure that the interpretation of Article 8 remain “in line” with present-day conditions.¹⁹¹ Though there had been certain developments in the laws of signatory States, the Court in *Cossey* found that the diversity of practice still rendered the question a matter of the State’s discretion. In *Sheffield*, though a lack of noteworthy scientific developments, there had in the twelve years passed since *Rees* taken place further legal development in the field. Yet, the Court still upheld its precedent on the grounds of there being “no general shared approach” among the Contracting States.¹⁹² Four years later, the time came to decide the cases of *Christine Goodwin* and *I v. the United Kingdom*. Unlike in its previous cases, the Court reviewed present-day situation in depth; looking to medical and scientific

¹⁸⁹ *Ibid.*, § 37.

¹⁹⁰ *Ibid.*, § 47.

¹⁹¹ *Cossey v. the United Kingdom*, §§ 34, 40.

¹⁹² *Sheffield and Horsham v. the United Kingdom*, § 58.

considerations, European and international consensus and the impact a change would have on the birth register system. Though still no conclusive scientific findings on the matter of transsexualism, the Court, relying on the emerging consensus in Europe and corollary international trends, held that the question of full legal recognition no longer fell within the Respondent States margin of appreciation. To discern the factors which contributed to a departure from the *Rees* precedent, it is worth taking note of the fact that the level of legal recognition within Europe was the same as in *Sheffield and Horsham*. The factors distinguishing *Christine Goodwin* from the earlier case-law is the Court's reliance on the principle of human dignity, a principle embedded in Article 8, and on international consensus. The public interest which had earlier justified the birth register system had to subside to the interest of the applicant's right to private life.

The 'transsexual cases' can be said to highlight two central features to the principle of dynamic interpretation, and moreover, the ECHR-system itself. First, based on how the principle was not expressly invoked in *Rees*, the 'need for review' facilitated by the principle contributes to continuously providing interpretative arguments for the scope and meaning of otherwise vague Convention terms. Secondly, the review allows the Court to uphold the "fair balance" that must be struck between the public interest and the interest of the individual.

Seeing the principle of dynamic interpretation as an intrinsic aspect of the Court's supervisory review, the question arises whether clear evidence of a changed societal or legal development will always lead to a departure from the Court's case law.

Cases where there has been a risk of the applicant being subject to capital punishment following an extradition, provide an important example in this regard. The case of *Öcalan v. Turkey* concerned a prisoner having been sentenced to death by Turkish authorities. The question before the Court was whether the prohibition of torture in Article 3 could be interpreted as generally prohibiting the death sentence. At the time of the judgment there existed an "almost universal abolition" of the death penalty in Europe. As Article 2 (2) of

the Convention expressly regulates the use of “lethal force by State agents”, thus constituting an exception from the fundamental right to life,¹⁹³ to determine the relevance of this practice the Court had to answer two questions. First, whether the subsequent practice of the signatory States should be taken as “establishing an agreement to abrogate” the exceptions made to the right to life thus removing the textual limit, and secondly whether the practice meant that the prohibition of torture in Article 3 should be interpreted as prohibiting the death penalty. The same questions had, however, already been addressed in the earlier case of *Soering v. the United Kingdom*, where the Court had decided against such a dynamic interpretation. Recognising the ‘special character of the Convention as a human rights treaty, the Court’s rationale in relation to Article 2 was never the less based on the fact that at the time of the judgment a large number of the signatory States had signed and ratified Protocol No. 6, abolishing the death penalty in times of peace. This, the Court had taken to prove that the signatory States had adopted the “normal method of amendment of the text in order to introduce new obligations”, to the effect of barring a dynamic interpretation.¹⁹⁴ Furthermore, as the individual provisions of the Convention have to be interpreted in harmony, Article 3 could not be interpreted as generally prohibiting the death penalty. At the time of the *Öcalan* judgment, however, there had taken place further legal developments in the field. All signatory States except Turkey had now signed Protocol No. 6. In addition, Protocol No. 13, abolishing the death penalty in all circumstances, had been opened for signature. As it was not relevant for the decision, the question whether it was necessary to review the scope of Article 2 in light of an almost universal abolition of the death penalty was not resolved.

The cases of *Soering* and *Öcalan* reveal a very important point regarding its relation to the sovereignty of the signatory States. Based on its adherence to State practice in these cases, the Court seems to curb its judicial discretion when the signatory States’ have agreed among themselves how to develop the law.

¹⁹³ *Pretty v. the United Kingdom*, § 38.

¹⁹⁴ *Soering v. the United Kingdom*, § 103.

On summary, a study of the Court's case-law shows how the principle of dynamic interpretation is closely connected to the Court's supervisory function as such. In this way it can respond to the changing conditions and ensure a fair balance between the interest of the individual and the public interest. Furthermore, the case-law also reveals the interrelation between the principle of dynamic interpretation and the State's margin of appreciation.

3.2.1.3 The Convention's Object and Purpose

Recalling how the principle of dynamic interpretation is connected to the Court's teleological approach, the thesis' case-law analysis has illustrated how the principle can expand the meaning and scope of the ECHR rights so to fulfil their object and purpose. In this way it's worth taking a closer look at how the object and purpose of the Convention interacts with the principle.

An area where the object and purpose of the Convention has contributed quite extensively, one might say, is in relation to the Convention's procedural provisions. Though argued that the institutional Articles of the Convention should not be interpreted dynamically, there is now clear evidence in the Court's case-law to the contrary.¹⁹⁵ The living instrument doctrine has for instance been applied to interpret a signatory State's territorial restrictions in the case of *Loizidou v. Turkey*. The complaint, concerning an applicant's denial of her of access to her property in an area occupied by Turkish Cypriot forces, raised the question of whether the Turkish Government's territorial restrictions, limiting their jurisdiction to exclude the occupied territories, were valid. The issue at hand was thus the former Court and Commission's jurisdiction to examine the complaint. Though formally procedural, the restrictions were deemed effectively decisive for the substantive protection for the individuals' living on the occupied territory. Relying on the object and purpose of the Convention as a "constitutional instrument of European public order", the Court decided

¹⁹⁵ Alastair Mowbray. "The Creativity of the European Court of Human Rights" 5:1 HRLR (2005), 57, 62.

that in light of a “practically universal agreement” between the State parties to the effect of accepting the competence of the Strasbourg organs, the Turkish restriction’s were not recognised as valid.

The question can be asked whether the Convention’s object and purpose itself can *bar* a dynamic interpretation. Evidence to this effect can be found in the Court’s case-law.

As illustrated in the case of *Johnston and Others v. Ireland*, the object and purpose of the right to marry was decisive for finding that Article 12 did not protect the right to divorce.

The case of *Pretty v. the United Kingdom*, mentioned earlier, also serves as a good example. The question before the Court was whether the right to life pursuant to Article 2 contained a negative aspect; a right to die. The applicant, a woman suffering from an incurable degenerative disease, was prevented under English law from receiving euthanasia as it was illegal. The applicant argued that “a failure to acknowledge a right to die under the Convention would place those countries which do permit assisted suicide in breach of the Convention.”¹⁹⁶ The Court however deemed the question to be a matter for the national State to decide, relying on three factors to support its interpretation. Firstly the Court relied on the text of the Convention, holding that Article 2 (2) expressly regulates the use of “lethal force” by State agents. Secondly, the court found that the consistent emphasis of its case-law under the Article had been the obligation of the State to “protect” life.¹⁹⁷ And thirdly, and decisively, the Court relied on the object and purpose of Article 2 in the ECHR system. Constituting one of the “most fundamental” provisos of the Convention, upon which the enjoyment of any other Convention right depends.

In the light of these examples, the Court’s case law reveals how the object and purpose of the Convention seems to be decisive in relation whether or not present-day conditions can contribute to a judicial development of the rights and freedoms of the Convention.

¹⁹⁶ *Pretty v. the United Kingdom*, § 41.

¹⁹⁷ *Ibid*, § 39.

3.2.2 Evidence of Evolution

The previous sections have studied the principle of dynamic interpretation in relation to general sources of law relied on in the Court's methodology. Recalling how the principle calls for the Convention to be read "in the light of present-day conditions", this section seeks to clarify how the Court determines this requirement. As the question will be studied further in chapter 5 of the thesis when seeking to explore the principle's basis of legitimacy; the following thus seeks to identify the central characteristics and methodological questions related to this aspect.

This aspect, as mentioned, can be said to refer to the *interpretative context* of the principle. The question is *where* the Court will look for authoritative evidence of present-day Convention meaning. The above analysis has shown that the Court does not view the ECHR as a closed system. When seeking to determine the present-day understanding of the terms of the Convention, the Court relies in most part on consensus amongst the Council of Europe Member States, though additional sources are also sought depending on the issue at hand. For instance, in the cases determining transsexual's rights, the Court relied on medical and scientific considerations,¹⁹⁸ whilst in cases concerning trade union rights the Court has found evidence in universal labour instruments.¹⁹⁹ The 'dynamic sources of law' seem on the whole to be categories of empirical evidence comprising of legal consensus; expert consensus; and public consensus.²⁰⁰

The question is then what *qualifies* a change in the ECHR law? The Court has never expressly stated what is required to qualify a contemporary reading of the Convention

¹⁹⁸ *Christine Goodwin v. the United Kingdom*, §§ 81-83.

¹⁹⁹ *Damir and Baykara v. Turkey*, §§ 147-152.

²⁰⁰ Laurence Helfer. "Consensus, Coherence and the European Convention on Human Rights" 26 Cornell Int'l L.J. (1993) 133, 139.

rights. As a rule, the case-law reveals how the Court seeks the consensus of a “great majority” of the Member States before departing from earlier interpretations. Based on the chapter’s analyses, however, evidence of a normative change in society is not in itself enough to qualify a dynamic reading of the Convention’s text. Recalling how the Court will view the circumstances of the case “as a whole”,²⁰¹ other factors will contribute to the Court’s interpretation; most importantly, a development must find support in the pre-existing rights and object and purpose of the Convention.

There are especially two questions of interpretation raised by the Court’s reliance on “present-day conditions”. First, recalling how the Court is “guided” by the general rules of treaty interpretation,²⁰² the question arises how the *way* in which the Court relies on “present-day conditions” compares to the rules as expressed in the VCLT Article 31 to 33, and if the Court has adapted its approach to “special nature” of the ECHR as a human rights. Secondly, recalling how the ECHR confers “objective obligations” upon its signatory States,²⁰³ the question arises as how the principle of dynamic interpretation contributes to determine objective meaning. These questions will be address in the thesis chapter 5.

3.3 Conclusion

This chapter has shown how the principle of dynamic interpretation as applied by the ECtHR is closely connected to its teleological approach and thus receives its rational from the Convention’s special character as human rights treaty. Its function is to contribute to determining the law when deciding a case before the Court. By directing the interpreter out of the ‘four corners’ of the Convention, it allows the rights and freedoms to respond to societies changing conditions and in so way uphold the fair balance that must be struck

²⁰¹ *Tyrer v. the United Kingdom*, § 35.

²⁰² *Golder v. the United Kingdom*, § 30; *Demir and Baykara v. Turkey*, § 65.

²⁰³ *Ireland v. the United Kingdom*, § 239.

between the individual and the public interest. Its field of application, having been applied to substantial and institutional provisions, extends in principle to the entire Convention. Based on the Court's case-law, the principle is expressly invoked when the Court must consider whether or not to depart from an earlier understanding or interpretation. Though as evidenced by effect of its review function, the Court's search for present-day conditions will be ever-present.²⁰⁴ The criteria for when the Court will "up-date" the meaning and scope of the rights and freedoms are not clearly stated, though, based on the study of the Court's case-law the question will depend on the combination between clear empirical evidence of change, support in the text of the Convention, and support by the object and purpose of the Convention. On conclusion, relevant to a study of the function and basis of legitimacy of the principle of dynamic interpretation, it is worth highlighting the principle's close connection to the Court's supervisory function and the function of the ECHR itself.

²⁰⁴ As an example, in the recent case of *TV Vest AS & Rogaland Pensjonistparti v. Norway* the Court, without invoking the principle of dynamic interpretation, reviewed the consensus between the member States with regard to "the right to vote and the right to stand for election" under Article 3 of Protocol 1, *cf.* judgment's § 65.

4 Interpretative Legitimacy – A Constitutional Perspective

4.1 Introduction: Dynamic Interpretation and Constitutional Theory

As the thesis asks what explains and legitimises the principle of dynamic interpretation as applied by the ECtHR this section of the study turns to theories of constitutional theory in search of arguments relevant to the thesis analysis. This approach, as mentioned, is born out of the ECHR's "special character" as instrument for the protection of human rights; rules which have traditionally been reserved for the domestic domain of constitutional law, and furthermore out of the observation that constitutional theory specifically confronts the issue of interpretation of sovereignty limiting norms, and their temporality and legitimacy.

The aim of this chapter is to identify criteria which can be applied to the analysis of the principle of dynamic interpretation and the question of the principle's function and basis of legitimacy. To enable this, the study chooses to give a more in depth overview of the concept of legitimacy and constitutionalism as such. As the thesis approach is a new way of analysing the Court's methodology, the study hopes in this way to contribute insight to the larger context of interpreting sovereignty limiting norms in the light of time, thus providing a birds-eye view of the question at hand.

This analytical approach places the question of dynamic interpretation into the larger ongoing discussion regarding the Strasbourg-system's place in the European legal order. Though formally an international treaty and an international Court the ECHR and the ECtHR have increasingly been subject to a debate regarding the constitutional nature of the human rights protection afforded by the Strasbourg-system and the corollary nature of the Member States obligations. The Court and the Committee of Ministers of the Council of Europe have recently expressed:

“The Court would emphasise “the central role that the European Convention on Human Rights (ECHR) must continue to play as a constitutional instrument of European public order, on which the democratic stability of the Continent depends”²⁰⁵. Because of its pan-European dimension, moreover, the Strasbourg system provides the only framework within which it will be possible to develop a common European conception of human rights.”²⁰⁶

As evidenced and illustrated by the above statement, this notion can be said to have gained ground amongst the Strasbourg-organs themselves. As we recall, seeing the Convention as a “constitutional instrument of European public order” is furthermore evidenced in the Court’s case-law, as for instance in the case of *Loizidou v. Turkey*.²⁰⁷

Whether a constitutionalisation of the ECHR-system can be said to have taken place or not, and what this entails, is an ongoing discussion. However, it is held that a logical and important consequence to such a development is a corollary change in methodology. Where an international treaty subject States to what can be described as constitutional obligations, it is argued that the adoption of a legal doctrine which guides the interpretation must also be constitutionalised.²⁰⁸ Such an argumentation in relation to the ECHR builds on several presuppositions. First that the ECHR in fact contains ‘constitutional obligations’, secondly that one can discern a system of interpretation as ‘constitutional’, and thirdly that the ECtHR has the jurisdiction to review the constitutionality of domestic acts of government.

²⁰⁵ “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, Declaration of the Committee of Ministers of the Council of Europe, 114th Session, 12 May 2004,(original emphasis, italics added). Available at <<https://wcd.coe.int/ViewDoc.jsp?id=743337&Lang=fr>>.

²⁰⁶ Ibid; Memorandum by the European Court of Human Rights to the 3rd Summit of the Council of Europe, (italics added). Available at <<http://www.echr.coe.int/eng/Press/2005/April/SummitCourtMemo.htm>>.

²⁰⁷ *Loizidou v. Turkey*, §§ 75, 93.

²⁰⁸ Brun-Otto Bryde ”International Democratic Constitutionalism” (2005), 109.

A full inquiry into any one of these three questions goes beyond the scope of this study. Relevant in the context of dynamic interpretation, is how the above citation reveals how the Strasbourg-organs pay the ECHR a central role in the “democratic stability” in Europe and the role of the ECHR-system in developing a “common European conception of human rights”. Placing such political, and furthermore, democratic significance on the ECHR in the European context highlights the question of constitutionalism and the legitimate exercise of public authority, both on the hand of the signatory States and that of the Court. But moreover, and central to the thesis study is how the ECHR is held to contribute to “develop” democracy in Europe. The question thus arises of how such a development takes place, and how is this evidenced in the Court’s methodology.

4.1.1 Legitimacy

As the thesis ask what is the legitimate basis for the principle of dynamic interpretation, it is necessary to give a clarification of the meaning and significance of the concept of ‘legitimacy’. An introduction to the concept at this stage will also contribute to understanding the function of the principle of dynamic interpretation, and furthermore, the wider context of this study, that is, the significance of sovereignty limiting norms and the interrelated question of interpretative method.

At the outset, a clarification must be made between the concept of ‘legitimacy’ and that of ‘legality’. Though the terms are often used synonymously to describe when something is legal, the thesis delimits this meaning to be encompassed by the term ‘legality’. The concept of ‘legitimacy’, as will be shown, has a broader meaning, and relates, in short, to the justification of authority.²⁰⁹

²⁰⁹ Bodansky (1999). 601. Legality can, however, be a factor that justifies, or legitimises, authority.

As observed by Daniel Bodansky, the concept of legitimacy has traditionally been related to theories of democratic governance and authority.²¹⁰ Legitimacy, he holds, focuses on the problem of domination;²¹¹ the imposition of government will upon the will of the governed. The question is under what conditions is authority justified. The political ideology of democracy views the legitimacy of government authority as properly justified and sustained when the exercise of public power is based on “the consent of the governed”,²¹² most often expressed through a system of majority rule.

The concept of legitimacy in relation to domestic governance is furthermore intimately related to the concept of ‘constitutionalism’. A political model that justifies government authority exercised through majority rule raises yet a dimension to the question of legitimate rule: the question of how a majority can legitimately impose its will upon a minority. To ensure the maximum freedom of every citizen the ideology of constitutionalism seeks to limit democratically based state action by constraining its power by adherence to fundamental values. Constitutionalism can thus be said to address the legitimacy of democratic rule.

The obligation of States’ under international law has traditionally been founded on a strong consensualist basis.²¹³ The contractual nature of the interstate agreements have for this reason not raised issues of legitimacy, but rather those of legality, a feature determinative for developing traditional methods of treaty interpretation. Seeking to identify the ‘contractor’s’ intent, the methodology for classical international law has thus been private contractual law.²¹⁴ This approach to interpretation has been deemed important “in order to avoid creating obligations of the states’ without their consent”.²¹⁵ With the emergence of

²¹⁰ Ibid, 596.

²¹¹ Ibid, 597.

²¹² David Held. “Democracy and the Global Order” (Cambridge: Polity 1995), 43; Bodansky (1999), 596.

²¹³ Ibid, 597.

²¹⁴ Bryde (2005), 109.

²¹⁵ Ibid, 109.

treaty obligations, such as human rights, which contain obligations regulating the internal affairs of States and international institutions with the jurisdiction to supervise those same obligations, the issue of legitimacy has thus also entered the realm of international law. The individual as a subject of international law has questioned the notion that it is the consent of States that legitimise the international legal order. The question asked is whether norms that directly regulate the relation between the State and the individuals must be justified on other grounds.

The question of legitimacy, as we've seen, is intimately connected to the question of interpretation, and especially that of the interpretation of constitutional law. It has been held that in constitutional law "legitimacy precedes interpretation".²¹⁶ In this statement lies the notion that identifying what legitimises a constitution, or a constitutional norm, will contribute to understanding how the norm must be interpreted. This approach to interpretation has been coined by Jed Rubenfeld as "the methodology of legitimation".²¹⁷ This he describes as:

"The thought that constitutional interpretation must respond to the unique position of constitutional law"²¹⁸

The question of legitimacy in constitutional law from this point of view rests on two interrelated aspects of a constitution's position in a society. First, a constitution's *function* in society as foundational law, and secondly, a constitution's normative basis of *authority*.

²¹⁶ Jed Rubenfeld. "*Legitimacy and Interpretation*" in "Constitutionalism: Philosophical Foundations" L. Alexander (ed.) (Cambridge: Cambridge, 1998) 194, 198.

²¹⁷ Ibid, 209. It is necessary to point out that Jed Rubenfeld uses the term "the methodology of legitimation" specifically to describe his own theory of constitutional law. However, the author understands Rubenfeld's theory as built precisely on the commonly accepted understanding that legitimacy and interpretation go hand in hand as the basis for his own theory, and on this ground the term can be fairly used in this context.

²¹⁸ Ibid, 209.

These aspects can be called the *internal* and *external* aspects of constitutional legitimacy. The terms will be explained in further detail as the study progresses.

Related to the two aspects of constitutional legitimacy, constitutions raise two very distinct problems of interpretation. The first question is how norms that are meant to govern society over long periods of time can exert the same legitimate authority over time. Relating this back to the meaning and significance of legitimacy, the question is how old constitutional norms can justify the boundaries of legitimate government authority today, also described as “the constitutional problem of time”.²¹⁹ The second question relates to the particular situation of a court with the authority to check and even overrule an act of the political bodies on constitutional grounds.²²⁰ The question is how a non-elected judiciary can decide the limits of government action – especially in the light of time – without exceeding its judicial discretion. This aspect thus relates to an interpretative method’s consistency with democratic theory.²²¹ On view, the two questions of legitimacy related to the interpretation of constitutional norms thus both concern the legitimate exercise of authority, that on the one hand the political bodies and on the other the judiciary. But over and above, it must be kept in mind; the question of legitimacy relates, we recall, to the question of the justification of the imposition of government authority over the governed.

Relating these observations to the ECHR and the principle of dynamic interpretation, the legal issues and issues of interpretation raised by a court applying a constitution can be said to be analogous to those raised by the ECtHR’s interpretation and application of the Convention. The Court’s mandate Pursuant to Article 19 to “ensure the observance of the engagements undertaken” by the signatory States by its very nature entails a supervision of the Member States conduct towards individuals within their territory. On this basis the specific interpretive issues raised in constitutional law and in the context of the ECHR are

²¹⁹ Rubinfeld (1998), 209.

²²⁰ John Hart Ely. “Democracy and Distrust” (Cambridge, Massachusetts: Harvard 1980), 5.

²²¹ Ibid

comparable. As such the thesis seeks to draw from the arguments found in constitutional law regarding temporality and interpretation to inform its analysis.

It is hoped that placing the question of the dynamic interpretation of the ECHR within this larger theoretical landscape of constitutional law and the constitutionalisation of public international law, will contribute to illuminating the political significance of the ECHR in Europe and its corollary interpretation. To enable this, the following sections of the thesis will go more in depth into the concepts and discussions introduced above, namely constitutionalism, constitutional interpretation and review and their relation to international law and interpretative method. By so doing, it seeks to deduce the following: what are the arguments that defend or legitimise a constitutional method of interpretation. It is these factors the study seeks to apply to the analysis of the principle of dynamic interpretation's function and basis of legitimacy.

It might be timely to point out that placing the thesis study within a constitutional context lays strictly on the level of methodology. Even though referred to, the thesis does not address the questions of whether the ECHR can be seen as a constitution or the ECtHR as a constitutional court.

4.2 A Constitutionalisation of International Law?

The transfer of the constitutional idea and thus the use of constitutional language have become increasingly common not only in the context of the ECHR, but moreover in all fields of public international law which depart from a traditional understanding of interstate obligations. The constituent documents of international organisations such as the World Trade Organisation (WTO), the World Health Organisation (WHO) and the United Nations (UN) are frequently described as the “constitutions” of their respective

organisations.²²² As the ECHR system of human rights protection is finding itself within this discussion, it is worth looking briefly at what constitute the main issues and arguments of this –it should be added, contested – debate, and how it relates to interpretative method.

The concepts of ‘constitution’ and ‘constitutionalism’ derive from the theory of the state and are thus traditionally restricted to denoting the fundamental legal framework for the political life within a nation state.²²³ Thus, constitutions narrowly interpreted:

“present a complex of *fundamental norms* governing the *organization* and *performance* of governmental functions in a given State and *the relationship between* State authorities and citizens.”²²⁴

The concept of ‘constitutionalism’ relates to a “constitutional system of government” and the “adherence to constitutional principles”.²²⁵ The question posed by theories of international constitutionalism is whether there is any reason to reserve constitutional terminology to the nation state, or whether the terms have extended their meaning to fairly describe political orders formed beyond the national state which contain shared political values and political organization.²²⁶ It is especially States adherence to constitutional principles on an international level which lies at the heart of this discussion. The ongoing debate concerning the future of the legal order of the European Union (EU) and the

²²² De Wet “*The International Constitutional Order*” 55 ICLQ 2006 51-76, 53.; Bardo Fassbender “The United Nations Charter As Constitution of the International Community” 36 Colum. J. Transnat’l. L. (1998) 529-619, 538.

²²³ Douglas M. Johnston “World Constitutionalism in the Theory of International Law” in R.St.J. Macdonald and D.M. Johnston (Eds.) “Towards World Constitutionalism, Issues in the Legal Ordering of the World Community” (Leiden: Martinus Nijhoff, 2005), 16.

²²⁴ De Wet, 52 (emphasis added).

²²⁵ *Shorter Oxford English Dictionary on Historical Principles* vol. I (Oxford: Clarendon 3rd ed. 1980), 408.

²²⁶ De Wet, 52; Brun Otto Bryde “International Democratic Constitutionalism” in R.St.J. Macdonald and D.M. Johnston (Eds.) “Towards World Constitutionalism, Issues in the Legal Ordering of the World Community” (Leiden: Martinus Nijhoff, 2005), 103.

question of whether or not to create an European constitution illustrates well the actuality of the debate.

According to Bardo Fassbender, any fundamental legal order of any autonomous community or body politic can be described as a ‘constitution’.²²⁷ Normatively, “international constitutional law” distinguishes itself, in his view, from international law as such by its “fundamental character”.²²⁸ In other words, international obligations conferring long term rules of a higher legal rank containing political ethics enabling “constitutional order”.²²⁹ A constitutionalisation of the international legal order is furthermore held to entail a procedural, or institutional, aspect; described by Erika De Wet as the process of “(re-)organization and (re-)allocation of competence among the subjects of the international legal order”.²³⁰ Especially the shift in public decision-making from the nation State to international actors has signified such a reallocation of competence.²³¹

Relevant to the study of dynamic interpretation, are the argued *consequences* of a constitutionalisation of public international law. It is held that the recognition of States’ obligations towards human beings abandons a conception of international law as a “horizontal system of mutual obligations”, and as a consequence there needs to take place a shift in methodology and a shift in what is perceived as the source of legitimacy of international law.²³²

²²⁷ Bardo Fassbender “The Meaning of International Constitutional Law” in R.St.J. Macdonald and D.M. Johnston (Eds.) “Towards World Constitutionalism, Issues in the Legal Ordering of the World Community” (Leiden: Martinus Nijhoff, 2005), 838.

²²⁸ Fassbender (2005), 843.

²²⁹ Petersmann (1996), 403 and 426.

²³⁰ De Wet, 51.

²³¹ Ibid, 53.

²³² Bryde (2005), 109.

“With a changed structure of international law in which the interest of mankind is paramount and in which lawmaking is subjected to constitutional principles, the methodology, too, can and must be constitutionalised.”²³³

The shift in methodology is explained by Brun-Otto Bryde as interpretation which is directed towards “the attainment of the constitutional principles”. Furthermore, States are no longer deemed as being the sole authority of the international legal system. Rather, it is held, the new international legal order should be justified on basis of the subjects whose interest is affected. This would in the case of human rights law, for instance, render mankind itself as the source of legitimacy.²³⁴ Relating this to how legitimacy has traditionally been connected to democratic theory, the international discussion thus draws lines to the ideals of democratic governance.

4.3 The Concepts of “Constitution” and “Constitutionalism”

To enable an inquiry into theories of constitutional interpretation, it is necessary with a further overview of the function and character of a constitution and constitutional norms. As the study will show, their distinct features contribute to their interpretative method.

The terms ‘constitution’ and ‘constitutionalism’ are not based on any coherent idea,²³⁵ but certain main features can be discerned. As the discussion concerning international constitutionalism revealed, constitutions contain “fundamental norms” which deal with the structure and subdivision of, and the distribution of spheres of jurisdiction in a community.²³⁶ Another central feature to their fundamental character is that constitutions most often contain substantive superior principles of government, as expressed by Joseph

²³³ Ibid

²³⁴ Ibid

²³⁵ Fassbender (1998), 536.

²³⁶ Alfred Verdross, *cited in* Fassbender (2005), 842.

Raz as the “common ideology that governs public life”.²³⁷ This common ideology, or public morality, is most often expressed through a ‘bill of rights’ enumerating those fundamental values that belong to the inalienable ‘reserve’ of the individual and thus paced beyond majority control,²³⁸ in this way protecting the autonomy of individuals and minorities. Constitutions in this way contain a high level abstraction of policy rather than a detailed direction, setting standards flexible enough to adapt to the needs of society.

Though it is the state itself that has bound itself to higher constitutional norms, the values themselves cannot be justified by the same power that is bound by them. This might render them illusory. Thus, to ensure that government policy and acts comply with a constitution’s requirements, there are often judicial procedures to “implement the superiority” of the constitution,²³⁹ the process by which is referred to as ‘constitutional review’. This adds an institutional quality to a constitutional order.

Lastly, but central to the study at hand, constitutions are by their nature meant to last for a long time, thus containing a “generalization of a society’s vision of its past, present and future”.²⁴⁰ This gives them a stable, or perpetual, quality, but also a quality that if not balanced with the purpose of a constitution – setting limits for government action according to the fundamental values of its society – can lead to an outdated regulation.

On summary, one can detract three distinct features of constitutions relevant to their interpretation; that is, that they are ‘fundamental’, ‘perpetual’ and ‘supervised’. In the remainder of the thesis, the term ‘constitution’ will be used solely to describe its substantive ‘bill of rights’ as it is this aspect which is relevant to the methodological issue at hand.

²³⁷ Joseph Raz, “*On the Authority and Interpretation of Constitutions: Some preliminaries*” in Larry Alexander (ed.) “*Constitutionalism – Philosophical Foundations*” (Cambridge: Cambridge 1998), 153.

²³⁸ Ely (1980), 8.

²³⁹ Raz (1998), 153.

²⁴⁰ Philip Allott, *cited in* Macdonald (2005), 859.

4.3.1 Democracy and Constitutionalism – A Balance of Interests

The legal constraints a constitution's bill of rights – or human rights – prescribes on the State can be seen as conflicting with the democratic principles of majority rule and the supreme authority of the legislator.²⁴¹ The controversy, labelled by Alexander Bickel as “the counter majoritarian difficulty”,²⁴² concerns the supervisory context of judicial review and its potential effect of invalidating legislative and executive acts on the grounds of being unconstitutional.²⁴³ The two concepts must, however, be seen as two sides of the same political ideology, that is: constitutional democracy.²⁴⁴

Two main considerations explain why democracy cannot be seen merely as prescribing majority rule. Firstly, unrestricted majoritarianism undermines majorities and can at worst lead to tyrannical rule. And secondly, constitutional principles are necessary to protect the principles on which democracy itself is founded. On this ground, the political ideology of constitutional democracy recognises that for democratic governance to be legitimate it must assume certain fundamental values:

“notably that all citizens deserve equal concern and respect as autonomous rights-bearers and what we need is a constitution to ensure that even democratically made law adhere to them”²⁴⁵

²⁴¹ James Tully “*The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*” 65 Mod. L.R. (2002) 204.

²⁴² Alexander M. Bickel. “The Least Dangerous Branch”, cited in Barber and Fleming (2007), xv.

²⁴³ Barber and Fleming (2007), xv.

²⁴⁴ Ibid

²⁴⁵ Richard Bellamy (ed.), *Constitutionalism and Democracy* (Aldershot: Dartmouth/Ashgate Publishing Ltd, 2006).

The question of the democratic legitimacy of constitutionalism is therefore not whether it unjustly restricts popular sovereignty, but whether the balance between the two principles is upheld, thus preventing on the one hand “democratic deficit” in the form of a legislative judiciary or on the other hand a “tyranny of the majority” through the violation of individual rights.²⁴⁶ This balance reflects the political aspirations of a constitutional democracy, that is, a government that justifies its actions and prescribes to the rule of law, and that strives to sustain balance between the public interest on the one hand and the protection of the rights of individuals and minorities on the other.²⁴⁷ An innate aspect of judicial review is thus ensuring this balance when interpreting and applying a constitution.

The practice of constitutional review, conferring upon a court the important role of determining effective constitutional meaning, raises the question of how a judiciary can uphold this balance when applying the same constitutional norms through time. This is a question of interpretative method. The following sections of the study aim to illustrate how this question is answered in the methodology applied to the interpretation of written constitutions, broadly termed as ‘constitutional interpretation’.

4.4 Constitutional Interpretation

The aim of this section is to provide an introduction and overview of methods of interpretation applied to the interpretation of a written constitutional text, methods which are broadly termed as ‘constitutional interpretation’. In so doing, it is hoped to highlight two features relevant to the question of legitimacy and interpretation. First, how do methods of constitutional interpretation distinguish themselves from interpretative methods as such? And secondly, how and on what grounds do they respond to the question of interpreting sovereignty limiting norms in the light of time.

²⁴⁶ Tully (2002), 207.

²⁴⁷ Keith E. Whittington. “Constitutional Interpretation” (Kansas: University Press Kansas, 1999), 1.

The question of interpretative method is, we recall, central to constitutional adjudication first, and maybe most famously, because of the “tricky task” of unelected judges selecting and defining which values are to be placed beyond majority control,²⁴⁸ and secondly because of the important function of constitutional law in society. These two interrelated questions can be said to refer to the ‘supervised’ and ‘fundamental’ aspects of constitutions. The last section raised yet a third interpretative question – which lies at the heart of this study; that of the ‘perpetual’ nature of constitutions and the “constitutional problem of time”.²⁴⁹ This aspect can be said to connect the ‘supervised’ and ‘fundamental’ aspects as, we recall, it addresses the question of how to maintain the constitutional balance through time in the process of adjudication.

One of the features of a constitution as fundamental law, as seen earlier, is its high level abstraction of policy; a feature which most often comes to expression in the text of a constitution as standards formulated in broad meaning. The wide discretion seemingly left to the interpreter asks the question of which additional sources give evidence to the scope and content of the text. In this connection, the observations of Keith E. Whittington explain the importance of a defensible method of constitutional interpretation:

“interpretations of any legal text are not self-evident but require a method in order to develop them and an argument in order to defend them. The substance of a particular interpretation is often crucially affected by the prior choices of an interpretative method, and thus arguments over constitutional meaning have been forced into the prior ground of interpretative standards”.²⁵⁰

This statement contains three central points. First, that law is not merely the legal text itself; hence, finding the law contained in the text the interpreter needs additional sources of law. Secondly, it is the argument that defends, or explains, a method of interpretation

²⁴⁸ Ely, (1980), 8.

²⁴⁹ Rubinfeld (1998), 209.

²⁵⁰ Whittington (1999), 14.

that develops a particular system of interpretation, distinguishing it from other systems of interpretation but also, it can be added, reveals which interpretative sources are relevant. And thirdly, that the substantive outcome of an interpretation must be in accordance with the argument that defends the methodology, then too is the interpretation defensible, or in other words legitimate. The questions are thus, what is the argument that distinguishes constitutional interpretation from other systems of interpretation, and how does this develop the methodology?

Theories on how a domestic constitution should be interpreted vary vastly; termed as ‘subjective’; ‘textual’; ‘pragmatic’; ‘purposive’ and ‘moral-philosophical’ approaches, to mention a few. However, the theories do share a distinct commonality: their search for the *constitutional meaning* of the text whereby the interpretative result is recognised as *constitutional law*.²⁵¹ Thus, relating this back to Whittington’s observation, it is the attainment of the substance of interpretation that is the common point. How to get to this result, what the result should be, and what defends this result, is where the theories differ.

According to Paul Brest, the difference lies in “what is being interpreted”.²⁵² Apart from stating the obvious, that it is a constitutional text being interpreted, the answer can be brought back to the issue of which sources are deemed relevant, or authoritative, to the interpretation. Which sources are deemed the providers of constitutional meaning are answered by the different schools of interpretation by placing the constitution within a greater context of normative political theory – in other words, the context of constitutional democracy. Context in interpretation, as expressed by US Supreme Court Justice Antonin Scalia, “is everything”.²⁵³

²⁵¹ Whittington (1999), 5.

²⁵² Paul Brest. “The Misconceived Quest for the Original Understanding” 60 BUL L Rev (1980), 204 footnote 1.

²⁵³ Antonin Scalia. “A Matter of Interpretation” (Princeton: Princeton, 1997), 37.

Placing the question of “what is being interpreted” in the context of constitutional democracy takes us back to the question of legitimacy – rather, the question of what justifies the exercise of public power. It is just this point, or argument, that distinguishes, and thus defends the different methods. The question of “what is being interpreted” is based on what is deemed the authoritative source of constitutional meaning. In other words, what is the constitution’s base of legitimacy. The question is then, how are these sources identified and how do they distinguish the methods?

A full overview of this question goes beyond the scope and purpose of the thesis, and it must be pointed out that the issue is comprehensive. However, it is helpful to rely on Paul Brest’s delineation between “originalist” and “non-originalist” strategies of constitutional interpretation to illustrate the point at hand. Originalism is defined by Brest as an approach to constitutional interpretation that “accords binding authority to the text of the Constitution or the intentions of its adopter”.²⁵⁴ Its counterpart, non-originalism, is defined as an approach which “accords the text and original history presumptive weight, but do not treat them as authoritatively binding”.²⁵⁵ The presumptive weight given to the intentions of the author is characterised by Brest as being “defeasible”²⁵⁶ over time in the light of changing experiences and perceptions”.²⁵⁷ What is the reason for these differences?

Broadly speaking, the reason for giving different sources relevance, or authority, lies in different democratic considerations, hence political theory. An originalist approach deems democratic procedure and subdivisions of power as the base of constitutional legitimacy, thus the realisation of the text and authorial intent is decisive, curbing discretion and ensuring judicial self-restraint. Non-originalist approaches are based on serving “the ends

²⁵⁴ *ibid*, 204.

²⁵⁵ *Ibid*, 229.

²⁵⁶ The adjective “defeasible” describes something that is capable of being declared null or void. Thus, a “defeasible presumption” is a presumption which is capable of modification to the point of being declared void.

²⁵⁷ Brest (1980), 229.

of constitutional government”,²⁵⁸ seeking to secure the operative function of a constitution as fundamental law, thus taking on a more activist or purpose oriented approach. Here sources outside the ‘four corners of the document’ are relevant, as they can provide arguments for how the constitutional values are at the time of interpretation, where the base of legitimacy can, for instance, be the consent of the governed.

This brings us back to the view that in constitutional law legitimacy precedes interpretation. On this ground one can answer both the question of what distinguishes constitutional interpretation and the question of how they respond to the “constitutional problem of time”. The answer can be said to lie in the interpretative context: what is deemed the constitution’s function in society and its legitimate basis of authority; these are the arguments that justify an interpretative method. As illustrated, the constitutional context will decide which sources provide authoritative constitutional meaning and in turn decide how flexible the constitution is in the light of time. On summary, the argument that defends a method of constitutional interpretation will at the same time define a court’s judicial discretion when deciding the content and scope of a constitution’s text at the time of interpretation.

4.5 A Methodology of Legitimation

As held in the introduction to this chapter, the aim of presenting these theories has been to identify criteria which can be applied to an analysis of the function and base of legitimacy of the principle of dynamic interpretation as applied by the ECtHR. What has this chapter revealed?

In the greater context of international law the discussion concerning a constitutionalisation has brought to the forefront the notion of a shift in methodology and basis of legitimate authority to justify the law. In the field of traditional constitutional law, the study has

²⁵⁸ Ibid, 226.

shown how the interpretation of sovereignty limiting norms is intimately connected with the theory, or argument, that is considered as justifying the constitution itself. In both sectors it is the balance sought between the exercise of public power against the interest of the governed that is sought justified, where the legitimacy argument provides the yardstick.

Jed Rubinfeld's theory, "a methodology of legitimation" – that constitutional interpretation must respond to the unique position of constitutional law – contains a rationale for how to answer "the constitutional problem of time". Based on its rationale, the theory is as such a purposive approach to interpretation; a method of interpretation must ensure the function of the legal tool. The constitutional balance that must be upheld through interpretation, Rubinfeld holds, can be ensured if the methodology responds to the *internal* and *external* aspects of constitutional legitimacy. The internal answer refers to the internal institution of constitutional law: a method of interpretation must respond to the distinctness of the constitution; it must remain operative as foundational law. The external answer refers to "political theory as a whole"; interpretation must respond to the constitution's grounds of legitimate authority.

Based on the findings in chapter 3, how the principle of dynamic interpretation is connected to the realisation of the Convention's object and purpose, this two-fold rationale provides an analytical yardstick which can be applied to help find the principle's function and basis of legitimacy.

In asking what is the function and basis of legitimacy of the principle, the above rationale will be applied as analytical criteria. The first question is which role does the principle of dynamic interpretation have for the realisation of the Convention as a human rights treaty, in other words, its object and purpose. The second question is in which way the principle of dynamic interpretation reveals the Convention's legitimate authority. They will be explained in further detail as they are addressed.

5 A Methodology Of Legitimation

5.1 Introduction

The last chapter has looked to constitutional theories to identify how to solve the question of interpreting sovereignty limiting norms over time. Here it concluded that an interpretative method is legitimate when it responds to the function a constitution has in society as foundational law and its basis of legitimate authority. On this basis, two questions were identified which are hoped to contribute to exploring and revealing the principle of dynamic interpretation's function and basis of legitimacy. They are: first, which role does the principle of dynamic interpretation have for the realisation of the Convention's function as a human rights treaty, and secondly, in which way does the principle of dynamic interpretation reveal the Convention's legitimate authority.

As expressed earlier, a functional and source based rationale can be said to lie in the Court's description of the principle itself; that "the Convention is a living instrument which must be interpreted in the light of present-day conditions"; informing the interpreter of what *kind* of legal instrument is being interpreted and their interpretative *context*. This chapter will explore these questions further by first conducting a closer study on the relationship between the principle of dynamic interpretation and the Convention's role as a human rights treaty and an instrument of the Council of Europe, and secondly on a study how the principle of dynamic interpretation reveals the Convention's legitimate authority, and in which way the Convention system responds to this authority.

At the outset, it is necessary to clarify the term 'legitimate authority'. The term, as defined by Daniel Bodansky, means "justified authority", where theories of legitimacy seek to specify which factors might serve as justification for the exercise of authority.²⁵⁹

²⁵⁹ Bodansky (1999), 601.

5.2 An Internal Answer: Operative Instrumentality

In chapter 3 of the thesis, a descriptive analysis of the principle of dynamic interpretation as practiced by the Court in its adjudication revealed important aspects to the principle's function, a principle which allows for a continuous review of the scope and content of the rights, thus upholding the balance between the public interest and the individual.

Connected to the Convention's teleological interpretation, the following section will study this relation closer in answering the question of which role the principle of dynamic interpretation has for the realisation of the Convention's function as a human rights treaty. Here it will first look at the object and purpose of the Convention as such, followed by a study of selected case-law illustrating the issue at hand.

5.2.1 Instrumental Aspects to the ECHR

The *internal* aspect to constitutional legitimacy is answered, we recall, by an interpretative method responding to the distinctness of the constitution: it must remain operative as foundational law, in other words impose legitimate constraints upon the majority.²⁶⁰

Relating this to the ECHR, the question is which function is the system of human rights protection designed to fulfil?

The relevance in asking the question is related to the fact that the Convention's overall object and purpose can be said to be directly related to the nature of the obligation embedded in the ECHR.²⁶¹ Furthermore, recalling how in the case of *Stafford v. the United Kingdom* the Court held that:

²⁶⁰ Rubinfeld (1998), 209.

²⁶¹ Orakhelashvili (2003), 531.

“a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement”²⁶²

Herein the Court justifies the principle. Moreover, it seems to justify the principle in relation to the operation of the Convention as such.²⁶³ Recalling that how in constitutional interpretation it is the argument that defends the method that also legitimises the method, identifying the function of the Convention is therefore central to identifying the function of the principle itself.

Though primarily perceived as a system for the protection of the rights of individuals, there is evidence to show that the ECHR-system of protection extends beyond this primary function. Recalling how recent statements of the Court and Committee of Ministers have attributed the Convention a “central role” in the European public order, democratic stability and the development of a common understanding of human rights, it is worth exploring this aspect further.

When identifying the object and purpose of the ECHR, Marius Emberland observes that the Convention can be seen to have two functional aspects; referred to as “subjective” and “objective” approaches to Convention protection.²⁶⁴ This delineation, he holds, contributes to understanding the nature of protection afforded by the ECHR.²⁶⁵

The subjective approach, is seeing the ECHR as an instrument “whose reach is dependent on the legal interest of the individual applicant” bringing his or her complaint before the Court. An objective approach is, on the other hand, the view that the protection afforded one applicant “has ramifications for others or for society in general”,²⁶⁶ in other words that

²⁶² *Stafford v. the United Kingdom*, § 68.

²⁶³ See also: *Demir and Baykara*, §

²⁶⁴ Emberland (2006), 57. See also: Orakhelashvili (2003), 531.

²⁶⁵ Emberland (2006), 58.

²⁶⁶ *Ibid*, 59.

the benefit of the ECHR-system of protection reaches beyond the relief for the individual applicant.²⁶⁷

Though not denied that the Convention has a very important role in providing effective and practical Convention protection to the individual; as the Court seems to justify the principle of dynamic interpretation on the Convention's objective function, it is worth exploring the objective function further.

To this effect, the former Commission has held:

“the interest served by the protection of human rights and fundamental freedoms guaranteed by the Convention extend beyond the individual interest of the person concerned”²⁶⁸

Furthermore, as expressed by the Court in *Ireland v. the United Kingdom*:

“The Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’”²⁶⁹

The citations not only reveal that the Strasbourg-organs identify an objective aspect in the Convention protection. They moreover reveal an important aspect to the signatory States' obligation. As evidenced in the citations, the Convention infers a contractual obligation different in *kind*; that of a commitment to “collectively enforce” human rights. This aspect,

²⁶⁷ Former Precedent to the Court, Luzius Wildhaber, sees this dual aspect as the “fundamental dichotomy” of the Convention. On this ground he argues that the Convention's objective, or “constitutional”, purpose is its “primary purpose” and should be the main focus of the Court's adjudication. Wildhaber (2002), 162.

²⁶⁸ *HG & GW v. Germany* Report of the Commission (1965), cited in Emberland (2006), 60.

²⁶⁹ *Ireland v. the United Kingdom*, § 239.

as will be shown, is central to the function and basis of legitimacy of the principle of dynamic interpretation.

As the rights and freedoms of the Convention are phrased as obligations protecting the individual, the question is on what ground does the Court identify the Convention's objective function? The Convention's Preamble, as held in *Ireland v. the United Kingdom*, can provide such arguments. When viewed in light of the political commitment as expressed in the Preamble undertaken by Council of Europe Member States, the human rights protection takes on a different dimension.

Relating this aspect to the Court's methodology, the next question is how does the objective function of the Convention contribute to determine objective meaning? As observed earlier, the Court relies on the Preamble to find the "underlying values of the Convention" to inform its interpretation.²⁷⁰ Referring to the "common heritage of political traditions, ideals, freedom and the rule of law", it places the interpretation of the individual's rights and freedoms in a broader objective context.²⁷¹ The question is what is the nature of this context? The aim of the Council of Europe might shed some light on the issue. In the case of *Klass v. Germany*, the Court cited the Council's aim of maintaining a balance between an effective political democracy and a common understanding under its application of Article 8 and the question of whether legislation permitting surveillance measures was necessary in a democratic society. Furthermore the Court held that:

"some compromise between the requirements defending democratic society and individual rights is inherent in the system of the Convention"²⁷²

Recalling the discussion in chapter 4, the Court's interpretative goal bears strong similarities to the balance that is sought upheld by constitutional norms and constitutional

²⁷⁰ *United Communist Party of Turkey v. Turkey*, § 45; *Soering v. the United Kingdom*, § 88.

²⁷¹ ECHR Preamble § 5.

²⁷² *Klass v. Germany*, § 59.

review. The objective purpose of constitutional norms, norms which are a “generalization of a society’s vision of its past, present and future”,²⁷³ are, as held by Aharon Barak, the values and principles at the time of interpretation.²⁷⁴ Seeing the ECHR rights and freedoms in this way, as norms that contain societal values, the question is whether an objective function is reflected in the principle of dynamic interpretation’s application in the Court’s case law.

The Court’s case-law relating to transsexuals’ rights, as we’ve seen, revealed how the principle of dynamic interpretation allows the Court’s review to keep in touch with society norms at the time of interpretation and in so way maintain a “fair balance” between the general interest of the community and the interest of the individuals, “a search for which balance is inherent in the whole of the Convention”.²⁷⁵ Viewed in light of the justification given the principle in *Stafford* – that a dynamic interpretation is necessary for it to respond to “reform or improvement” – the principle’s effect, as seen in the Court’s case-law, gives evidence of an objective function.

In the following, the study will revisit some of the issues of interpretation raised in chapter 3 to see in which way the principle contributes to the realisation of the Convention’s objective function, or underlying values.

5.2.2 Ensuring Conventional Values

The thesis study of the principle of dynamic interpretation in chapter 3 revealed how the present-day conditions in some cases can contribute to extending the scope and content of the rights and freedoms of the Convention beyond their ordinary meaning, whilst in other cases being bared from developing the law. In the following, some of these cases will be

²⁷³ Philip Allott, *cited in* Macdonald (2005), 859.

²⁷⁴ Barak (2005), 154.

²⁷⁵ *Rees v. the United Kingdom*, § 37.

studies a new, especially with the question of if and how the underlying values of the Convention or values in society have contributed to the interpretative result.

The Court will often rely on democratic values to inform its interpretation. In the case of *Sigurdur A. Sigurjonsson v. Iceland* we recall how a compulsory trade union membership was seen to “strike at the very substance” of the right guaranteed by Article 11. In response to the applicants argument, that the compulsory nature of the membership limited his occupational freedom and freedom to disagree with the trade union, the Court looked to Article 9 and 10, the freedom of thought and the freedom of speech, to inform its interpretation, and on this ground recognising “the protection of opinion” also to be one of the purposes of the freedom of association.²⁷⁶ It can seem that by relying on the freedom of expression, a value which constitutes “one of the essential foundations of (...) society”,²⁷⁷ and the present-day understanding of trade union rights within the Member States, provided the Court with sufficient objective evidence in order to depart from the Drafters’ intentions.

When interpreting the right to respect for ones “home” pursuant to Article 8, it can be asked whether the Court in the case of *Soci t  Colas Est and Others v. France* relied on other factors than those expressed to contribute to the interpretative result. The case, we recall, concerned business premises’ protection from unwarranted searches and seizures. The Court, invoking the living instrument doctrine, but built its interpretation mainly on earlier case-law. Though not invoked, the essential object of Article 8 is protection from arbitrary interference by the public authorities,²⁷⁸ comprising the essence of the rule of law. Having regard to the increasing public regulation of pro-profit and corporate activity in Europe, one can ask whether this constitutes a new sector which should be encompassed by the object and purpose of Article 8, not because of its wording, but because of its objective function. Comparing this case to the Court’s approach in other cases where confronted with new societal regulations, can illustrate the issue at hand. In the case of *Matthews v. the*

²⁷⁶ *Sigurdur A. Sigurjonsson*, § 37.

²⁷⁷ *Handyside v. the United Kingdom*, § 49.

²⁷⁸ *Rees v. the United Kingdom*, § 35.

United Kingdom the Court had to consider whether the United Kingdom for not holding elections to the European Parliament in Gibraltar, could be held responsible for violation of Article 3 of Protocol 1 protecting the right to free elections,. The Government had argued that Article 3 did not encompass this new supranational legislature, and that the matter thus fell within the States' jurisdiction. Though Article 3 does not positively "secure" free elections, relying on the living instrument doctrine, the Court found the provision applicable, holding that the "mere fact that a body was not envisaged by the drafters ... cannot prevent a body from falling within the scope of the Convention".²⁷⁹ Comparing the Court's approach here to that in *Société Colas Est* brings to the forefront the significance Article 8 objective purpose for the interpretative result; the need for a restriction on the exercise of public power in relation to businesses in a ever growing public regulation.

Human dignity, freedom and autonomy are values that lie at "the very essence" of the Convention, but moreover constitute "core values of the democratic societies making up Council of Europe".²⁸⁰ As evidenced in *Pretty v. the United Kingdom*, the significance of the right to life under Article 2 in the Convention system barred an extensive interpretation. The Courts caution when interpreting this fundamental right is evident in other cases as well. A caution which can be said to reflect its position in society as a whole. In the case of *V.O. v. France* a foetus was not protected under the Convention and did as such not enjoy the right to life under Article 2. When the right to life begins could not be solved by the Court as it "had not been solved within the majority of Contracting States themselves".²⁸¹

As these examples illustrate, the effect of the principle of dynamic interpretation is intimately linked with how the underlying values of the Convention are perceived in society at the time of interpretation.

²⁷⁹ *Matthews v. the United Kingdom*, § 39.

²⁸⁰ *Pretty v. the United Kingdom*, § 65.

²⁸¹ *V.O. v. France*, §82.

5.2.3 Summary: An Objective Function

This section of the study has asked which role the principle of dynamic interpretation has for the realisation of the Convention's function as a human rights treaty. Relying on a delineation between the Convention's subjective and objective operative function has revealed how the principle enables the Court's interpretation to respond to the realisation of the Convention's fundamental values and the balance that must be struck between democracy and the rights of individuals. In this way it contributes to ensuring the operative function of the ECHR over time by imposing legitimate constraints upon the signatory State's exercise of public authority in relation to the individual. This side of the principle can by comparison to Jed Rubinfeld's theory of legitimation, be called the principle's *internal* base of legitimacy; that it responds to the Convention's purpose as human rights law.

This section has asked how the principle of dynamic interpretation contributes to determining objective meaning in the Court's adjudication. As the principle directs the interpreter out of the 'four corners' of the Convention, the question is which *external* sources give evidence of objective meaning. The next section of the study will look at the factors which provide the normative basis for evolution.

5.3 An External Answer: Legitimate Authority

The *external* answer to constitutional legitimacy is answered, as stated, by an interpretative method responding to the grounds of the constitution's legitimate authority: it must be justified by those who have consented to be governed. The emergence of legitimacy, we recall, has become an issue of international law following a development of international agreements which can be seen as establishing international governance. State's recognising obligations that directly touch the individual has raised claims that State's are no longer the

sovereign authority of the international legal order.²⁸² The question here is whether there has taken place such a shift of authority in relation to the ECHR. This section explores the question of how the principle contributes to reveal the Convention's legitimate authority, and in which way the Convention system responds to this authority.

5.3.1 Evidence of Authority

The question in the following is how the “present-day conditions” relied upon by the Court when applying the principle of dynamic interpretation give evidence of the Convention's legitimate authority.

When looking for present-day conditions, the Court has had recourse to a wide array of sources. When first invoking the living instrument doctrine, the Court in *Tyrer v. the United Kingdom* stated that it could not “but be influenced” by the developments and commonly accepted legal standards within the Member States of the Council of Europe.²⁸³ In addition, the Court refers to the societal values and practice of the Council of Europe Member States as well as the Council's instruments. Scientific and medical evidence is relied on, as in case in *Sheffield and Horsham v. the United Kingdom*²⁸⁴ when determining the scope of positive obligation under Article 8. The cases concerning trade union rights under Article 11 serve as good example of how the Court relies on international law, where ILO Conventions are frequently referred to. Developments on the domestic level are also relevant to inform the Court's interpretation. As mentioned in chapter three, these sources can be categorised as legal consensus; expert consensus; and societal consensus.

²⁸² Bryde (2005), 109.

²⁸³ *Tyrer v. the United Kingdom*, § 31.

²⁸⁴ *Sheffield and Horsham v. the United Kingdom*, § 60.

As evidenced by the sources themselves, the Court does not consider the ECHR a closed system of law, as was recently expressed by the Court in *Demir and Baykara v. Turkey*, holding that:

“the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein.”²⁸⁵

Which norms the Court will consider will depend on the circumstances of the individual case and the nature of the right being interpreted. The question is what is it that qualifies a change? Recalling how the Convention establishes objective obligations between the States, the evidence of evolving norms must also be objectively determined.

The objective yard-stick established by the Court is consensus. This was evidenced in the case of *Evans v. the United Kingdom* where the Court would not consider whether the right to private life pursuant to Article 8 encompassed IVF treatment as there was no international or European consensus on the matter.²⁸⁶ It is especially the Court’s recourse to the common legal standards and practices of the Council of Europe Member States and its recourse to public international law that gives rise to a development. In the case of *Demir and Baykara* the Court expressed on general terms how rules and principles accepted by a “vast majority of States (...) reflect a reality that the Court cannot disregard”.²⁸⁷

Comparing the manner in which the Court relies on extraneous sources of law to the rules contained in the VCLT Article 31 (3) is useful when seeking the Convention’s legitimate authority. Recalling how the value of “subsequent practice” pursuant to Article 31 (3) (b) depends on whether it is “concordant, common and consistent”,²⁸⁸ the Court’s reliance on

²⁸⁵ *Demir and Baykara v. Turkey*, § 67.

²⁸⁶ *Evans v. the United Kingdom*, § 59.

²⁸⁷ *Demir and Baykara v. Turkey*, § 76.

²⁸⁸ Sinclair (1984), 137.

“majority” consensus departs from this premise. Furthermore, according to paragraph (c), rules of international law can be relied on to inform the interpretation when they are “applicable in the relations between the parties”. As evidenced in *Evans*, the Court seems to seek majority consensus even in this regard, thus taking rules of international law into account even where the Respondent State is not party to the treaty. This was recently confirmed by the Court, stating that:

“in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.”²⁸⁹

The question is whether the sources relied on and the level of consensus required to develop the ECHR rights tells us something about the Convention’s legitimate authority. The rules of interpretation contained in the VCLT can be said to be justified on sovereignty considerations by requiring unanimity and consent. The shift evidenced in the Court’s methodology can suggest a departure from this basis. The question is then, if not sovereignty, what is the Convention’s legitimate authority?

Recalling how in constitutional theory, methodology is viewed in its larger normative context, placing the Convention within its context might like-wise inform the question of the Convention’s legitimate authority. The following section will look at the question of legitimate authority from the perspective of the ECHR-system of enforcement.

5.3.2 A Collective Enforcement

As the primary responsibility for securing the rights and freedoms of the Convention lies with the Contracting States, the Court’s supervisory review pursuant to Article 19 is secondary to the protection afforded on national level.²⁹⁰ As expressed by the Court:

²⁸⁹ *Demir and Baykara v. Turkey*, § 78.

“Through its system of collective enforcement of the rights established, the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level, but never limits it (Article 60 of the Convention)”²⁹¹

The citation can be said to reveal a ‘triangular’ interrelation between the States alone, the States among themselves, and to the Strasbourg-system. The following will look closer at a couple of central aspects of this interrelation that might inform the question of the Convention’s legitimate authority.

The interrelation between the domestic level of protection and the protection provided by the ECtHR comes to expression through the principle of the margin of appreciation. Deferring to the signatory States the responsibility of developing the ECHR rights, the review provided by the principle of dynamic interpretation enables the Court to “reinforce” the established protection at European level. One can say that the first hand interpretation and application of the Convention is at domestic level by the signatory States asserting the rights of individuals within their jurisdiction. As evidenced in the case of *Christine Goodwin v. the United Kingdom*, the deference allowed the United Kingdom regarding the legal status of transsexuals had to subside in light of “clear and uncontested” European and international recognition.²⁹²

As observed by Eyal Benvenisti, the Court’s decisions can in this way reflect a respect of national democracy.²⁹³ But moreover, based on the consensus yard-stick established by the principle of dynamic interpretation, one can ask whether there has also established itself a level of democracy on the European level in effect of the Court’s review between the

²⁹⁰ *Handyside v. the United Kingdom*, § 48.

²⁹¹ *United Communist Party of Turkey v. Turkey*, § 28.

²⁹² *Christine Goodwin v. the United Kingdom*, § 85.

²⁹³ Eyal Benvenisti. “Margin of Appreciation, Consensus, and Universal Standards” 31 NYU J Int’l L & Pol (1998-1999) 843, 853.

signatory States. The nature of the signatory States' obligation to collectively enforce human rights can in this way be seen to be justified on democratic considerations.

5.3.3 Summary: Democratic Authority

In exploring the question of how the principle of dynamic interpretation contributes to reveal the Convention's legitimate authority, and in which way the Convention-system responds to this authority, the study has shown how the Court's reliance on State consensus to determine present-day meaning reveals a shift from sovereignty based authority to a state-based democratic order.

5.4 Conclusion

The aim of this chapter has been to explore and reveal the function and base of legitimacy of the principle of dynamic interpretation by way of looking at the *internal* and *external* aspect of constitutional legitimacy, and in so doing it has uncovered central aspects to the principle and the Convention-system itself. The principle, by way of ensuring the objective function of the Convention's rights and freedoms over time, can be seen to respond to a democratically developed human rights protection both within Europe and internationally. The principle's basis of legitimacy is thus democracy; a collective state effort to enforce human rights, whereby its function is to ensure its operation over time.

6 Concluding Remarks

This object and purpose of the thesis has been to explore and reveal the principle of dynamic interpretation's function and basis of legitimacy in the ECHR-system. By studying the principle from a constitutional point of view central aspects to both the principle and the Convention have been exposed.

Central is how charges of illegitimate judicial activism can be answered. Theories of legitimacy in the study's analyses have revealed how the scope of the Court's jurisdiction is conditioned on the nature of the ECHR obligation towards the States' themselves. As the study has shown, a strict legalistic view of the Convention as a treaty obligation can fall short of understanding the function the ECHR-system has within Europe, and the reality of which actors in this context are developing the law and which actors are 'finding' and applying the law.

As the ECHR rights regulate the legitimate relationship between government authorities and individuals, placing the study in a constitutional context has contributed to understand the function of such norms and how a method of interpretation must respond to this function. Constitutional theory highlights how sovereignty limiting norms that are meant to last for a long time remain legitimate when they are accepted as justified by those whom it addresses. The way the Court applies the living instrument doctrine, by interpreting the ECHR in conformity with the practice of the great majority of its signatory States, can be seen to reveal two central features. Firstly that it is the signatory States themselves that are developing the law by applying the ECHR within their jurisdiction, and secondly that the ECHR seems to establish a democratic order amongst the States themselves that justifies the development reinforced by the Court in its interpretation.

This interaction between the States' and the Court in developing the law has come to expression in the Norwegian judiciary. The Norwegian Supreme Court, Høyesterett, has expressed how when following the Court's precedents the Supreme Court should take into consideration national interests and values when applying the ECHR at national level.²⁹⁴

The study's findings also address the discussion on the perceived consequences of a constitutionalisation of international law. The ECHR-system basing itself on State majority consensus can be said to have departed from a traditional understanding of sovereignty. Moreover, this base of legitimacy has shaped the methodology applied to the interpretation of the ECHR.

On conclusion, ratifying human rights treaties can be seen to entail a commitment which extends beyond the consent of the individual State.

²⁹⁴ Rt. 2000 s. 996; Rt. 2005 s. 833; Rt. 2002 s. 557; Rt. 2003 s. 359

7 Materials

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7.2 Table of Cases

7.2.1 European Court of Human Rights – Judgments

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7.2.2 European Court of Human Rights – Admissibility decisions

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7.2.3 European Commission of Human Rights – Admissibility decisions

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7.2.4 International Tribunals

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7.2.5 National Courts – Judgments

Canada

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Norway

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Rt. 2005 s. 833

Rt. 2002 s. 557

Rt. 2003 s. 359

7.3 Table of Legal Instruments

International

Charter of the United Nations – June 26, 1945

Convention for the Protection of Human Rights and Fundamental Freedoms – November 4, 1950

Statute of the Council of Europe – May 5, 1949

Statute of the International Court of Justice – June 26, 1945

Universal Declaration of Human Rights – December 10, 1948

Vienna Convention on the Law of Treaties – May 23, 1969

Norway

Lov om stryking av menneskerettighetenes stilling i norsk rett (menneskerettighetsloven)
no. 30 21 May 1999

7.4 Abbreviations

Journals

AJIL: American Journal of International Law

BYIL: British Yearbook of International Law

Chi L Rev: Chicago Law Review

Colum. J Transnat'l L: Columbia Journal of Transnational Law

EJIL: European Journal of International Law

HRLJ: Human Rights Law Journal

GLJ: German Law Journal

ICQL: International and Comparative Law Quarterly

Int'l & Comp. LQ: The International and Comparative Law Quarterly

Mich J Int'l L: Michigan Journal of International Law

NYU J Int'l L & Pol: New York University Journal of International Law and Policy

NYU L Rev: New York University Law Review

Ox J L Stud: Oxford Journal of Legal Studies

YLJ: The Yale Law Journal

ZaöRV: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Legal tools

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

ICJ: International Court of Justice

ILC: International Law Commission

PCA: Permanent Court of Arbitration

PCIJ: The Permanent Court of International Justice

VCLT: Vienna Convention on the Law of Treaties

