

The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)

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Summary¹

A quantitative and qualitative analysis of the separate opinions in the Grand Chamber of the European Court of Human Rights (n=106, from November 1998 until September 2006) reveals the following patterns: (a) judges elected in respect of the new member States of Central and Eastern Europe deliver significantly less separate opinions than judges elected in respect of the old member States; (b) national bias in the sense that the judges take a more benevolent position when their home country is the respondent State does in fact occur, and more so among *ad hoc* judges than among elected judges; and (c) the lawyer-statesman's perspective seems to prevail in the majority judgment while human rights activism finds an outlet in separate opinions. Interviews with (19) judges enrich these data with insights into the social and institutional context of judicial decision making in the Grand Chamber.

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Despite the fact we all come from different countries we are in the same discourse, and we enjoy it. Some of us swim better or faster than others but it is the same water we are in. Formulated from a negative point of view: there is almost no misunderstanding. You walk into the Grand Chamber and you do exactly the same thing you did at home, now with colleagues from other countries but at the same level of communication between professionals. It shows that the judging process is not nation-bound; it is cross-cultural and it has its own autonomy.

A Judge of the ECHR

Introduction

The European Court of Human Rights was set up in Strasbourg by the member States of the Council of Europe in 1959 in order to deal with alleged violations of the 1950 European Convention on Human Rights. Member States are obliged to accept the jurisdiction of the Court and individuals have the right to bring their case to the Court after all domestic remedies have been exhausted (Articles 34 and 35 of the Convention). Pursuant to Protocol 11, the Court became a single and permanent court in November 1998. The number of judges is equal to the number of member

States (Article 20). Article 23 of the Convention provides for a six-year term of office with the possibility of re-election. For the judges the working unit of the Court consists of the Chambers composed of seven judges, who are recruited from Sections.² Cases that raise serious interpretation problems are decided in an *ad hoc* Grand Chamber of 17 judges. Whereas the Sections meet once a week the average judge is only once in a while involved in the Grand Chamber. The Grand Chamber is more interesting and more relevant, however, as the critical mass for deliberations in small Chambers is insufficient because of case load pressure. The enlargement of the Court (24 old member States of the Council of Europe before the collapse of the Iron Curtain, and 20 new member States in 2006)³ justifies speaking in the plural, i.e. Grand Chambers, as complex procedural rules decide the *ad hoc* composition of the Grand Chamber, "having due regard to the need for a geographically balanced composition reflecting the different legal systems among the Contracting Parties" (*Rules of Court* 24 § 2 sub e). It is a growing concern of the Court how to guarantee consistent case law with five Sections and *ad hoc* Grand Chambers.

The research questions, the research site and the methods used

Article 45 § 2 of the Convention reads as follows: "If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." Rule 74 § 2 of the *Rules of Court* specifies: "Any judge who has taken part in the consideration of the case shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent." This provision makes it possible to compose profiles of individ-

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2 "The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties" (Rule 25 § 2). Sections are reshuffled once every three years.

3 The old member States (OMS) are: Andorra, Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. The new member States (NMS) are: Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine.

ual judges on a continuum of conformity with the majority judgment, thus resulting in an individual pattern of conformism vs. non-conformism. As expected the percentage of judgments with separate opinions in Grand Chambers is much higher than in Chambers: 78% of all Grand Chamber judgments compared to 42% of all Chamber judgments from 1960 to 1997.⁴

Article 27 § 2 of the Convention guarantees the *ex officio* presence on the bench of the judge elected in respect of the respondent State. One can hypothesize about a possible national bias or chauvinism in separate opinions in two ways. A first hypothesis concerns a strong national bias and suggests that a judge dissents more often if the majority find a violation of the Convention by his/her home country compared to violations by other countries.⁵ A second hypothesis concerns a weak national bias and suggests that the national judge as an expert in domestic law concurs more often when his/her home country is in the dock compared to other countries. A separate concurring opinion might thus be regarded as an effort to justify the majority judgment in terms domestically understood. The *ex officio* provision makes it possible to compare judges regarding their chauvinism. If the national judge cannot sit for some reason, the government has the right to appoint an *ad hoc* judge. This offers the opportunity to compare elected judges and *ad hoc* appointed judges in their loyalties to the Court or the respondent State.

With the very rare exception of the inter-State cases⁶ the party constellation is always the same: individuals complain about a violation by their government of the human

rights provisions in the Convention. The common distinction in constitutional law between judicial activism and judicial restraint returns in the Court in judges with human rights leanings and judges with a lawyer-statesman's perspective.⁷ One might expect that judges with human rights leanings tend to honour the applicant's claim whereas judges with a lawyer-statesman's perspective tend to agree with the respondent State.

*Judicial activism is taken in its sense of judges modifying the law from what it previously was or was previously stated to be in existing legal sources, often thereby substituting their decision for that of elected, representative bodies; and judicial self-restraint is taken in its sense of the requirement that judges (a) should exercise caution in the interpretation of fundamental rights out of deference to elected, representative bodies, who have the main responsibility in democratic society for enacting important legislative changes, and (b) should in particular refrain from stating any legal entitlements not already contained in the existing corpus of law.*⁸

The bias in this definition can be countered by the standard formula since *Tyrrer vs. UK* (25/04/1977), declaring that "the Convention is a living instrument which must be interpreted in the light of present-day conditions." Mahoney, the Court's former Registrar in fact, calls "the dilemma of activism versus restraint more apparent than real, in that activism and restraint are complementary components of the methodology of judicial review inherent in the very nature of the Convention as an international treaty intended to secure effective protection of human rights and fundamental freedoms" (59). This statement begs the third research question of this article. The very existence of separate opinions on this issue is a token of the fact that judges are not interchangeable. Take, for example, the case of *Fretté vs. France* (26/02/2002). The applicant was denied any possibility of adopting a child because of his homosexuality. By four votes to three the majority held that there had been no violation of Article 14 of the Convention (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life). The majority were guided by judicial restraint and subsidiarity as explained in § 41:

By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in

4 *Luzius Wildhaber*, Opinions dissidentes et concordantes de Juges individuels à la Cour européenne des Droits de l'Homme, in : Réne-Jean Dupuy (ed.), *Droit et Justice. Mélanges en l'honneur de Nicolas Valticos* (Paris 1999), 529-35, 530-531.

5 Kuijer discovered a national bias of about 10%: whereas the majority found a violation in 72% of all cases, the judge elected in respect of the respondent State agreed in 62% (n=375, time period: 1970-1994): *Martin Kuijer*, Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice, *Leiden J of International Law* 10 (1997), 49-67. Bruinsma and De Blois analyzed all Court judgments on the merits of the case from 1991 to 1995 (n=193) and did not find any token of a national bias in a quantitative sense: *Fred J. Bruinsma/Matthijs de Blois*, Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights, *Netherlands Quarterly of Human Rights* 15/2 (1997), 175-186. National bias in international or supranational courts is a well-known research topic: *Adam M. Smith*, Judicial Nationalism' in *International Law: National Identity and Judicial Autonomy at the ICJ*, *Texas International Law J.*, 40 (2005), 197-226.

6 There is only one inter-State case in my dataset of 106 Grand Chamber judgments, namely *Cyprus vs. Turkey* (10/05/2001). All cases are published according to the name of the applicant, the respondent State and the judgment date on the Court's website <http://echr.coe.int>.

7 *Anthony T. Kronman*, *The Lost Lawyer. Failing Ideals of the Legal Profession* (Cambridge Mass. 1993, 1995 3e).

8 *Paul Mahoney*, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, *Human Rights LJ* 1-2/11 (1990), 57-88.

the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.

In his concurring opinion Judge Costa wrote: “The conclusion reached depends on the angle from which the matter is viewed, namely whether the emphasis is put on the subsidiarity of the ECHR’s role or on the importance of the ‘European supervision’ it is supposed to carry out. Yet in the end everything holds together, for how can European supervision be given preference to subsidiarity when the right asserted by the applicant (...) is neither a right within the meaning of national law nor a freedom guaranteed by the Convention?” Interpretation is in the eye of the beholder, however. The three dissenters made short shrift of subsidiarity and the margin of appreciation declaring: “We believe that the rejection of the application for authorisation, based solely on the grounds of the applicant’s sexual orientation (emphasis in the original, FB), amounts to a breach of Article 14 of the Convention.” What makes the one judge more activist than the other?, is a key question in this article.

As they partly overlap it might be difficult to disentangle the three dimensions of (non)conformism, (non)chauvinism and restraint vs. activism in a particular dataset of judgments of the ECHR. Suppose that the case law of the ECHR is skewed towards the respondent States for example; this would mean that judges with a lawyer-statesman’s perspective have less reason to separate than their colleagues who are inspired by human rights activism, and a resulting lack of data might prevent discriminating between national bias and a lawyer-statesman’s perspective. In earlier research we tackled this research problem in a qualitative way, namely by means of close reading of the separate opinions of the judges *ex officio*.⁹

The increasing number of elected judges concomitant with the growing membership of the Council of Europe also hampers socio-legal research in another way. My data consist of all Grand Chamber decisions with separate opinions regarding the merits of the case from November 1998, when the Court became undivided and permanent, until September 2006, when the Court was enlarged with a fifth Section: a total of 106 majority judgments with at least one separate opinion. However, no less than 60 different judges

elected with respect to 44 member States were on the bench in numerous different formations of the Grand Chamber. This compares poorly to the data of the behavioural approach.¹⁰ With a small number of judges responsible for many decisions, the behavioural approach tries to establish statistical correlations between individual attributes as the independent variable and judicial behaviour as the dependent variable. In a similar vein Voeten keeps track of all dissents of the ECHR. Despite the impressive number of 7319 judgments between 1960 and 2006 the big picture gets lost in numerous dissents about minor issues. “For instance, judge Ferrari-Bravo issued 133 identical dissenting opinions on alleged article 6-1 violations, all in one day (February 28 2002)”.¹¹

Next to a dataset of 106 Grand Chamber judgments, I could rely on authorized interviews with 19 judges.¹² In the interviews the focus was on role perceptions: What does being a judge at the ECHR mean for you, exemplified with

10 See for example, spanning 20 years of empirical research, C. Neal Tate, Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in the Civil Liberties and Economics Decisions 1946-1978, American Political Science Review 2/75 1981, 355-367; Jeffrey A. Segal/Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge 2002).

11 Cf. Erik Voeten, What Motivates International Judges? Evidence from the European Court of Human Rights, paper Law and Society Conference, Berlin 25-28 July 2007, 12. Judge Ferrari-Bravo was the judge elected in respect of San Marino, but appointed *ad hoc* judge for Italy on many occasions. Article 6 §1 ECHR requires “a fair (...) hearing within a reasonable time by an independent and impartial tribunal”; no less than 70% of all ECHR judgments concern at least partially alleged violations of Art. 6 §1: *Ibid*, 7.

12 For the interview part of the research I received a grant from the SaRO, a Dutch foundation for innovative legal research. The willingness of the judges to participate was stimulated by an e-mail to all judges, from which I quote the last sentence: “It is of course up to each individual Judge whether she/he agrees to be interviewed, but the President takes the view that this is a genuine study potentially of considerable academic interest and he expresses the hope that, time permitting, you feel able to co-operate.” With the help of Professor S. Parmentier, Ms M.-L. Vermeulen and Mr P. Sardaro I conducted interviews with the following judges in order of precedence and between brackets the Section in the autumn of 2002 and the country concerned: Judges Mr L. Wildhaber (the Court’s President, Section II, Switzerland), Mr C.L. Rozakis (President Section I, Greece), Mr J.-P. Costa (President Section II, France), Mr G. Ress (President Section III, Germany), Mr G. Bonello (Section I, Malta), Mr L. Loucaides (Section II, Cyprus), Mr R. Türmen (Section III, Turkey), Ms F. Tulkens (Section I, Belgium), Mr M. Fischbach (Section IV, Luxembourg), Mr V. Bukevych (Section II, Ukraine), Mr J. Casadevall (Section IV, Andorra), Mr B. Zupancic (Section III, Slovenia), Mr J. Hedigan (Section III, Ireland), Ms W. Thomassen (Section II, The Netherlands), Mr R. Maruste (Section IV, Estonia), Mr E. Levits (Section I, Latvia), Ms S. Botoucharova (Section I, Bulgaria), Mr A. Kovler (Section I, Russia), and Mr L. Garlicki (Section IV, Poland). For various reasons 22 judges could not be interviewed. The interview with the President has been published, see Fred J. Bruinsma/Stephan Parmentier, Interview with Mr. Luzius Wildhaber, President of the ECHR, Netherlands Quarterly of Human Rights 21/2 (2003), 185-201.

9 Fred J. Bruinsma/Matthijs de Blois, Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights, Netherlands Quarterly of Human Rights 15/2 (1997).

activities, interests and priorities? One of the topics concerned separate opinions with the following specific questions: When do you write or join a separate opinion? Does it make a difference if the respondent State is your home country? And: Do you think you deliver more, less or about the same number of separate opinions compared to your colleagues? Compared to majority judgments, which are to some extent disembodied and soulless, separate opinions are personal statements. The very fact that separate opinions lack legal validity inspires the authors of separate opinions to highly individual expressions.¹³ Judge Bonello: “In a majority judgment you require language chosen with extreme precision and, possibly, caution. In a separate opinion one can afford to be more creative and controversial.” Fishing expeditions in the backwaters of separate opinions are a rich and reliable source of role perceptions.

With an eye on the third research question also the relevance of the respondent’s career path was discussed. Formative years as a trial judge, a law professor or an ambassador probably determine one’s role perceptions in the Court to some extent at least. “The former function of a judge explains 35% of the variation in judicial restraint in an Anova analysis”.¹⁴ As each candidate judge has to hand in a *curriculum vitae* I was able to ascertain what kind of previous professional experience seems to prevail, for individual judges and thus for the Court as such (see Table 3). Whereas in the behavioural approach causal links between individual attributes and voting patterns are established irrespective of the socio-cultural and institutional context,¹⁵ in my approach quantitative data and qualitative insights are combined following the strategy of triangulation and cross-validation.¹⁶ Whereas statistical correlations have no mean-

ing per se, triangulation and cross-validation suggest meaningful interpretations. To the best of my knowledge this is the first attempt regarding the ECHR to avoid the pitfall, which Shapiro warns about:

*There are to be sure some glaring weaknesses in the bulk of the attitudinal research that has been done so far, the most marked of which is its circularity. Observing that a certain judge always votes for the civil rights claimant, the attitudinal researcher says he has a ‘pro-civil rights attitude’ which is proposed as the cause of the pro-civil rights voting behaviour. Thus the behaviour under another name becomes its own explanation. At best this method is tautological.*¹⁷

Table 1: Majoritarian and Separatist Positions in the Grand Chambers

	Elected Judges*	Old Member States	New Member States	Ad hoc Judges**	Respondent Judges
Majoritarian	1246	711	535	12	566
Separatist	523	377	146	29	303
N	1769	1088	681	41	869

* Including 9 ad hoc appointments by other member States (see Table 2).

** In the inter-State case of *Cyprus vs. Turkey* (10/05/2001) both parties appointed an ad hoc judge.

In Table 1 the results are shown. The main arguments for civil law countries not to allow separate opinions are the fears that they complicate the decision-making process *in camera* and that they affect the authority of the majority judgment in the outside world.¹⁸ Following this connotation we might speak of a centripetal or majoritarian tendency (M) and a centrifugal or separatist tendency (S). Contrary to the legally correct usage, but in line with my

13 Flauss calls the first separate opinion of a newly elected judge a kind of maiden speech, a highly symbolic act: *J.F. Flauss, Les juges des pays d’Europe centrale et orientale à la Cour Européenne des droits de l’homme: vues de l’extérieur*, in: *Mélanges en hommage à Louis Edmond Pettiti* (Brussels 1998), 344-379.

14 *Erik Voeten, What Motivates International Judges? Evidence from the European Court of Human Rights*, paper Law and Society Conference, Berlin 25-28 July 2007, 10.

15 For example, career characteristics, such as judicial and/or prosecutorial experience had a statistically significant effect on the position which judges in the US Supreme Court took in cases regarding civil rights and liberties: “non-prosecutors are shown to be much more favorable toward civil liberties claims than their prosecutor colleagues, (...) while, among prosecutors, those with some judicial experience are likewise more favorable than those without it, reflecting the moderating influence of sitting on the other side of the bench”: *C. Neal Tate, Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in the Civil Liberties and Economics Decisions 1946-1978*, *American Political Science Review* 2/75 (1981), 355-367, 362.

16 *Eugene J. Webb et al., Unobtrusive Measures* (Thousand Oaks 2000, revised ed.).

17 *Martin Shapiro/Alec Stone Sweet, On Law, Politics, and Judicialization* (Oxford 2002), 40. Individual judges and commissioners have been classified as being on the axis of judicial self-restraint vs. activism by *Clovis C. Morrison, The Dynamics of Development in the European Human Rights Convention System* (The Hague 1981). The Court as such has been characterized as activist and guided by benevolent liberalism by *J.G. Merrills, The Development of International Law by the European Court of Human Rights* (Manchester 1995, 2ed.), ch.10. Furthermore, the judges of the new member States have been labelled ‘conservative’ or ‘progressive’ on the basis of their voting behaviour in various cases by Flauss: *J.F. Flauss, Les juges des pays d’Europe centrale et orientale à la Cour Européenne des droits de l’homme: vues de l’extérieur*, in: *Mélanges en hommage à Louis Edmond Pettiti* (Brussels 1998), 344-79.

18 The founding member States of the EU all belong to the legal tradition of civil law countries; as a consequence the ECJ was modeled after the French *Cour de Cassation*, with advisory opinions in advance by Advocate Generals but without the possibility of separate opinions: *Mitchel de S.-O.-L’E. Lasser, Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford 2004).

perspective, a unanimous decision is classified as a judgment without a separate opinion, dissenting or *concurring*. Table 1 informs us that the elected judge separates in almost one of the three controversial Grand Chamber cases (523 / 1769 or 30%); that OMS judges – shorthand for judges elected in respect of old member States, see fn. 3 – separate significantly more than N(ew) M(ember) S(tates) judges (34% vs. 21%)¹⁹; and that my respondents are the speaking minority (the 19 interviewees accounted for 58% of all separate opinions). National bias in the sense that the judges take a more benevolent position when their home country is the respondent State does in fact occur, and more so among *ad hoc* judges than among elected judges.

Individual differences among elected judges

Table 1 cannot but neglect individual differences within categories. Judge Hedigan elected in respect of Ireland scores even below the NMS average (31 times part of the majority as against a mere 8 separatist positions) whereas Judge Zupancic elected in respect of Slovenia scores far above the OMS average (26 separatist positions as against 25 majority positions). A different role perception explains these very different outcomes.

The practitioner's point of view is very well illustrated by Judge Hedigan (21 years experience at the Irish Bar) when he says: "Most of my best friends here in the Court are distinguished academics and I derive great value from them because they are so good at drawing the larger pattern in which the particularities of the case fit. But it is by individual cases we advance. There is so much determined by the particularities of the individual case. *Goodwin vs. UK* (11/07/2002) was a classic example of the incremental way in which our case law can develop. The last was a big step but it was the last step in a long journey." "You said earlier that according to you separate opinions are futile, so do you not write many of them." "Yes, that is right. It seems to me to be extremely unlikely that dissenting opinions have any effect at all. At the end of the day there is only the majority judgment. I am not saying I always agree, but I have to accept that I am a member of a collegiate body. However, I have agreed to do a few dissenting opinions in cases where I was of the opinion that the Court was not going down the right road. As a former practitioner I feel very much at home in procedural matters and that might explain some of my dissenting opinions here. Apart from that, in sensitive areas such as child custody in family law I take a strong view that we should be very slow to intervene. We should resist interposing our view on facts for that of the national

courts who are in a better position to evaluate these." "Do you think it is even more useless to write a separate concurring opinion?" "Probably. One agrees with the judgement, that is enough. I have always been a practitioner. So perhaps I am too practical, even prosaic, in this respect. When I came here I had serious doubts about how I could work in a court with so many professors. But in fact I found them very useful and helpful, and I get great benefit from them. In my common law background the divide between practitioners and professors is much larger than in the Europe of the civil codes. So, with apologies to them, yes I do feel writing a concurring opinion is rather useless."

Judge Zupancic (PhD thesis Harvard Law School, academic career at the University of Ljubljana, Constitutional Court of Slovenia and a member of the UN Committee against Torture) is an outspoken representative of the scholarly approach. "We perceive ourselves as a kind of neurosurgeon doing a very precise job on a specific question. You are in the head of somebody and you connect something to something else, and you are not concerned with the other parts of the human body. You simply do not have the time and it is not your task. (...) Compared to the average I write more and in particular longer separate opinions. I remember my concurring opinion in the case of *Krenz vs. Germany* (22/03/2001) in which I considered that the majority defined the case in terms of international law rather than in terms of the principle of legality. I wrote my 'exposé' on that.²⁰ What I am saying is that some cases do bring up interesting questions for a separate opinion. There is a special motive for a dissenting opinion, namely you are angry at the majority or – and that holds more true for me²¹ – you have your own explanation for the problem at hand." "Your style is rather academic, with references for example." "I firmly believe – and have done so throughout my legal career – that there is nothing as practical as a good theory, and I reject any firm distinction between theory and practice, especially in law where the descriptive and the

20 Other examples of his scholarly approach: "In my opinion the case has been erroneously circumscribed from the beginning and the central question, which ought to have been the main focus of the inquiry, has thus been diffused into a series of separate issues. (...) In order to see the issue in a proper perspective it has to be understood, of course, that the purpose of practically every legal norm – whether it is command, proscription or authorisation – is to *distinguish ...*" (*Chassagnou vs. France*, 25/04/1999). "The unacceptability of delay in private litigation is a logical consequence of the fact that the first act of the Hobbesian State is to prevent recourse to arms, as it leads, in the final analysis, to *bellum omnium contra omnes*, i.e., anarchy." (*Papachelas vs. Greece*, 25/10/1999). "In my opinion this case is the tip of a much larger iceberg than imagined either by the majority or by other dissenters. (...) It affects the whole philosophy of criminal procedure. I have written about that in an article entitled ..." (*Fitt vs. UK*, 16/02/2000).

19 Statistically significant in a Chi-squared test at p=.001.

prescriptive are mixed. I often perceive the errors of others in defining the problem because of an insufficient theoretical background.” “Judges who sparsely write separate opinions say that the judging process is a joint enterprise ending in a majority judgment. What is your answer to that?” “I think that is nonsense, because the majority judgment isn’t written by judges. To my regret almost all judgments are written by law clerks. Moreover, a joint enterprise presupposes a collective creativity but that is something that doesn’t exist. There is only a lowest common denominator in the majority decision.”

Both judges disagree fundamentally as to the mission of the Court and their role perception as a judge - a collegiate body delivering majority judgments or the search for a concise conceptual framework in human rights.²²

Another kind of difference, which is left out in Table 1, is the difference between individualists and lobbyists. “There seem to be two sorts of dissenters, the individualist like you and the lobbyist who tries to get support.” “Yes, you are right I am not interested in getting support. For two reasons: first of all I want to write my opinion in my way. Possible supporters might distort the identity of my dissenting opinion. Secondly, it is my conviction, that a dissenting opinion does not become more convincing or effective when it gets more support: it doesn’t really matter whether it is an individual opinion or a joint opinion.” (Judge Loucaides). The lobbyist disagrees. “The real work is to convince your colleagues, not to write dissenting opinions.” “Do you suggest that from a certain point of view a dissenting opinion refers to a failure?” “Absolutely. If I find myself in a minority I wonder what went wrong. I ask myself questions not only about the content of my opinion but also about my powers of persuasion.” “You wrote a separate opinion in the cases of *V. and T. vs. the UK* (16/12/1999) concerning delinquent minors ...” “Here you are: even in my field of specialisation I was not able to persuade

21 Examples: “I fully agree with the judgment in this case. I thought it might be useful, however, to make a few general observations concerning the procedurally idiosyncratic nature of cases such as the one we have decided today.” (*Scozzari vs. Italy*, 13/07/2000). “I concur with the majority’s opinion in this case. Here, I simply offer another example illustrating the appropriateness of the majority’s decision, namely a pertinent comparison deriving from a positive and recent source of public international law.” (*Al-Adsani vs. UK*, 21/11/2001). “I agree with the majority’s opinion albeit not for wholly identical reasons.” (*Calvelli vs. Italy*, 17/01/2002). “My concurring opinion relates to paragraphs 190 to 194 and to points 3 and 4 of the operative part of the judgement. (...) What I do not agree with is the ambivalent and hesitant rationale of the judgement.” (*Broniowski vs. Poland*, 22/06/2004).

22 Their joint concurring opinion with Judge Caflich is a rare event (*Wille vs. Liechtenstein*, 28/10/1999).

the other judges. I realized that I still have a lot to learn about collective bargaining and how to intervene effectively in chambers. It is a skill you do not practise in academia, and I was never a judge in my home country.” (Judge Tulkens).

National bias: elected and ad hoc judges compared

“There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge”, so reads Article 27 § 2 of the Convention. The words ‘in respect of’ are chosen carefully to guarantee impartiality vis-à-vis the respondent member States.²³ Table 2 reveals the facts in 105 Grand Chamber judgments.²⁴

Table 2: Positions of the Judge *ex officio*

	outsiders	former judges	judges from other member States	national judges
Majoritarian	5	4	3	38
Concurring	7	-	-	7
Dissenting	5	11	6	20
<i>M-violation</i>	5	11	6	12
<i>M-nonviolation</i>	-	-	-	8
	17*	15	9	65

* Including two separate opinions of the ad hoc judges in the inter-State case of *Cyprus vs. Turkey* (10/05/2001).

Whereas the elected judges in their capacity of judge *ex officio* join the majority in 38 cases and take a separate position in 27 cases, *ad hoc* judges, who are appointed by their government to sit on the bench for a particular case, distance themselves from the majority judgment in 29 cases and are part of the majority in 12 cases. *Ad hoc* judges demonstrate a much stronger national bias than the elected judges because they do not feel much solidarity with them and are, contrary to them, not exposed to group pressure. This effect of group pressure should not be underestimated. Judge Rozakis describes the socio-psychological reality of the elected judges as follows:

The Court has proved to be very independent, without any liability to the States. This is partly due to the fact that the

23 See also Art. 21 §2: “The judges shall sit on the Court in their individual capacity.”

24 In the case of *Elzholz vs. Germany* (13/07/2000) the first substitute judge completed the panel (the national judge couldn’t sit, and as the government did not reply within 30 days Germany was presumed to have waived the right to appoint an *ad hoc* judge, Rule 29 §2).

judges almost live in a vacuum and work in abstracto, far from their home countries in a detached environment. You forget the country you come from. Judges feel themselves assessed by their colleagues, they create their self-image in the eyes of their colleagues, and they run the risk of losing their respectability in their immediate environment if they pay too much attention to the interests of their home country.

The breakdown of the *ad hoc* judges in outsiders or strangers to the Court, former judges and judges elected in respect of other member States, shows the different ways certain respondent States exert influence if the national judge cannot sit. Nine times Judge Göküklü, the former judge in respect of Turkey was appointed, and Judge Ferrari Bravo, elected in respect of San Marino, was appointed *ad hoc* in seven cases against Italy. Their track record and previous career leave no doubt about their lawyer-statesman's perspective.

The hard core of national bias consists of judges dissenting from the condemning majority. In the Grand Chambers national bias is evident. In all 22 cases the *ad hoc* judge disagreed with the majority finding a violation, and in 12 cases the elected judge disagreed with the majority finding a violation. In eight cases however the elected judge disagreed with the majority who *did not* find a violation – a non-existent category among *ad hoc* judges.²⁵ An example of such a rare bird identifying with Convention values but overreaching in the eyes of the majority is the dissent of Judge Thomassen in the case of *Kleyn a.o. vs. the Netherlands* (06/05/2003). In four cases with a 9 to 8 division the judge *ex officio* had a pivotal role in preventing a majority judgment, which would otherwise have found a violation of the Convention.²⁶

The ECHR is an attempt to 'judicialise' violations of human rights by governments. In three meaningful cases the attempt already seems to fail in the mind and soul of the national judge.²⁷ "The frontier between the judicial and the

political is not what it was. Nor are the foundations of legitimacy, still less normativeness, which is becoming plural and increasingly diffuse." Thus quoting Lajoie, Judge Kovler, the judge elected in respect of Russia, begins his lengthy dissenting opinion in the case of *Ilascu a.o. vs. Moldova and Russia* (08/07/2004). He continues:

I have to express publicly (...) my deep disagreement with the Grand Chamber's judgment in the present case. (...) The sole aim of the really abnormal size of this part of the judgment (§§ 42 to 110) is manifestly to demonstrate Russia's participation in the conflict and its military support to the separatists. (...) Here I am reminded of La Fontaine: 'If it wasn't you, it must have been your brother.' 'I have no brother!' 'Well, it must have been one of your family anyway ...'

In the case of *Slivenko vs. Latvia* (09/10/2003) the government of Latvia appointed *ad hoc* Judge Maruste, the judge elected in respect of Estonia. He expressed Baltic sentiments in his dissenting opinion:

It is well known and recognised in international law that the Baltic States, including Latvia, lost their independence on the basis of the 'Hitler-Stalin Pact' between Nazi Germany and the USSR, which (...) was signed on 23 August 1939. (...) According to generally recognised principles of international law every internationally wrongful act of a State entails international responsibility and gives rise to the obligation of that State to restore the status quo ante. Consequently, the restoration of the independence of the Baltic States on the basis of legal continuity and the withdrawal of the Soviet-Russian troops has to be regarded as redress for historical injustice.

A similar national bias in this case – in the opposite direction of course – is reflected in the partly concurring and partly dissenting opinion of Judge Kovler. Judges Kovler and Maruste acted in these two cases as the *ad hoc* judges in the inter-State complaint of *Cyprus vs. Turkey*, i.e. in conformity with their national origin.²⁸ In inter-State cases and in cases that evoke political history the ECHR resembles the International Court of Justice. Posner and De Figueiredo conclude on the basis of 76 judgments of the ICJ: "Whereas judges vote in favor of a party about 50 percent

25 Concerning *ad hoc* judges the results of Kuijer and Bruinsma/De Blois were similar: *Martin Kuijer*, Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice, Leiden J of International Law 10 (1997), 49-67; *Fred Bruinsma/Matthijs de Blois*, Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights, Netherlands Quarterly of Human Rights, 15/2 (1997) 175-186. From 1970 to 1994 the *ad hoc* judges dissented from the condemning majority in 10 out of 23 cases (Kuijer); from 1991 to 1995 on 8 out of 12 occasions the *ad hoc* judges delivered a separate (concurring or dissenting) opinion; in 7 out of 11 cases the *ad hoc* judge dissented from a finding of a violation by the majority (Bruinsma/De Blois).

26 *Fitt vs. UK*, 16/02/2000 (*ad hoc* appointment of an outsider to the Court), *Labita vs. Italy*, 06/04/2000 (*ad hoc* appointment of Judge Ferrari Bravo), *Al Adsani vs. UK*, 21/11/2000 (elected Judge Bratza) and *Pedersen vs. Denmark*, 11/01/2006 (elected Judge Lorenzen).

27 Four if we include the case of *Žanoka vs. Latvia* (17/06/2004): Judge Levits wrote a dissenting opinion annexed to the Chamber decision, which was overruled in the Grand Chamber (16/03/2006) when Judge Levits had become a judge in the EJC, and an *ad hoc* judge was appointed.

28 Partly dissenting opinions in opposite directions of both *ad hoc* judges, who were appointed after some political skirmishes: Judge Türmen withdrew on his own initiative, and the first appointment of an *ad hoc* judge in respect of Turkey was criticized by Cyprus, and subsequently substituted by a new *ad hoc* judge. Judge Loucaides was asked to withdraw; and as the first *ad hoc* judge in respect of Cyprus had died, a second appointment of an *ad hoc* judge followed.

of the time when they have no relationship with it, that figure rises to 85-90 percent when the party is the judge's home state".²⁹ This kind of political case is exceptional at the ECHR, and the attempt to judicialise violations of the Convention is mostly successful.

Elected judges and the relevance of the previous career

In Recommendation 1429 (1999)³⁰ the Parliamentary Assembly of the Council of Europe (PACE) recommended the governments of the member States "to ensure that the candidates have experience in the field of human rights, either as practitioners or as activists in non-governmental organisations working in this area" (emphasis added, FB). The Court remarks disapprovingly:

The role of an activist is necessarily partisan: to espouse a cause, to take sides; whereas a judge on the Strasbourg Court has to set himself or herself above the parties, be impartial, weigh up the competing interests, notably those of the individual and the community at large, and decide judicially in the light of all the circumstances. (...) The Court has traditionally been composed of roughly one third professional judges, one third practitioners and one third academics. This blend of experience has proved its worth over the years.

It is worth noting that the Court and the Parliamentary Assembly acknowledge the formative effects of different career paths. On the basis of a careful reading of the *curricula vitae* the judges have been classified regarding their formative years.³¹

Table 3: Formative years before nomination to the ECHR

Formative years	1998	2001	2004	1998-2006	OMS (24)	NMS (21)
Administration	5	6	8	13.3%	4	4
Academia	12	11	11	26.6%	8	8
Const. Court	2	2	4	6.6%	1	3
Omni	9	10	8	23.3%	4	10
Bench	6	7	6	16.6%	9	1
Bar	5	5	7	13.3%	8	0
	39	41	44	99.7%	34	26

NB Two different career paths only suffice to qualify for an 'omni' background if it implies experience in switching from case particularities to policy arguments and *vice versa*.

29 Eric A. Posner and Miguel F.P. de Figueiredo, Is the International Court of Justice Biased?, *Journal of Legal Studies*, 34 (2005), 599-630, 601.

30 All Documents and corresponding Resolutions and Recommendations can be found on the Parliamentary Assembly's website <http://assembly.coe.int>.

31 Table 3 is based upon an appendix to a first draft of this article, which has been sent to all judges approached for an interview. Consequently, judges could check my label of their formative years.

Table 3 shows that the bar is underrepresented (less than 15%) whereas the administration (e.g. government agents and career diplomats) is not explicitly mentioned in the Court's opinion, but is just as present. The order of rows is from former administrators with a supposed lawyer-statesman's perspective to former practising lawyers with a supposed human rights perspective.³² Judges in the ECHR with their formative years as trial judges (bench, in Table 3) differ from former academics and administrators because they are used to thinking in terms of case particularities, and they differ from former practising lawyers (bar, in Table 3) because of their impartial approach. Former academics share with former administrators an interest in general issues and share with former trial judges a preference for distancing themselves from partisan arguments. Only practising lawyers had their formative years in partisan thinking on behalf of private litigants whilst the administrators introduce the outlook of the *raison d'état*. Whereas the former administrator can appeal to the former prosecutors in order to serve the interests of the respondent State, the human rights activist can hope for sympathy with the individual applicant's plight among the former judges and an intellectual affinity with the ideals of the Convention among former academics. The distinction between legal practice and legal scholarship in Article 21 of the Convention thus obtains a new connotation.³³ Legal practitioners are enmeshed in the details of the case and want justice to be done, irrespective of the consequences. Due to a less developed State independent legal profession of bar and bench in the new member States the non-diplomatic voice of human rights and justice in the case at hand is underrepresented in the Court as a whole. Lawyer-statesmen are very much aware that the Court cannot impose its will in an international arena of member States. A too outspoken human rights court risks becoming irrelevant because national authorities do not take it seriously.

By totalling the professional background of all judges elected since 1998 in each category - see the column with the heading '1998-2006' - the relative potential strength of the two perspectives can be estimated. Whether this potential is realized in fact depends on individual and institutional factors, such as persuasiveness and charisma, seniority and strategic positions. The President and the Section Presidents are members of the panel of five judges, which

32 Judging in a domestic constitutional court is a scholarly activity not very different from legal research.

33 Art. 21 of the Convention: "The judges shall be of a high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognized competence."

functions as a gatekeeper in party requests for the referral of Chamber judgments to the Grand Chamber (Article 43 § 2 ECHR). After accepting a referral request the five senior judges take part in the Grand Chamber and as a consequence they are in a much better position to influence the case law of the Court than the average judge.³⁴ It is worth noting in this respect that of the six judges who have been elected Court President (Judge Wildhaber) or Section President (Judges Costa, Rozakis, Ress (1998-2004), Palm (1998-2001), and Zupancic (since 2004)), only one judge (namely Sir Nicolas Bratza, since 2001) had his formative years in private practice. Moreover, the field of study of the academics (Judges Ress and Rozakis) and the professional background of Judges Wildhaber and Costa are public international law and constitutional law – areas with a crucial role for the State. Other areas, such as criminal procedure and human rights, for example, are more probable to result in empathy for the individual applicant. Although five judges from the new member States belonged to the first generation already present in Strasbourg before 1998, and another six judges from these countries assumed office in 1998, it took six years before Judge Zupancic (omni, elected in respect of Slovenia) was elected Section President, namely in 2004.

National judges in a supranational court differ in their role perceptions between ‘agents’ who act as ambassadors, and ‘trustees’ who act independently of their national governments (see the quote from the interview with Judge Rozakis, *supra*). Several factors explain a different outcome in this dilemma between the judges elected in respect of old member States (OMS) and new member States (NMS). Says Judge Levits, now a judge in the European Court of Justice: “For small countries, such as Latvia with only one university, one law faculty and a human rights department consisting of three lecturers, it is difficult to submit a list of three highly qualified candidates.” And Judge Maruste remarks: “From a university professor I was nominated straight to the post of president of the Supreme Court of Estonia – a career step you have to see in the context of the political developments at the time.” In conformity there-

with judges from the new member States are on the whole younger than judges from the old member States.³⁵ With an eye on the very attractive salary (189,349 Euro in 2004, free from income tax) a NMS judge who wants another term is clever enough not to disappoint his principal. Moreover, when it comes to writing separate opinions (see Table 1) insufficient language skills in the working languages of the Court (English and French) play their role. Former ECHR judges (namely Makarczyk (Poland), Kuris (Lithuania), Lõhmus (Estonia), and Levitz (Latvia) gratefully accepted the position of judge at the ECJ, a court with all EU languages as official languages, and under the cover of collegial decision making. In these circumstances conformism with the lawyer-statesmen in the Court is a decent and easy way to survive in a new and unfamiliar context.

Lawyer statesmen and human rights activists in the Grand Chambers

Awaiting the first decision Wessel predicts that the International Criminal Court will decide in line with a ‘progressive-cosmopolitan’ approach to the detriment of a ‘conservative-statist’ approach.³⁶ He expects this with reference to the professional background of the judges (academic or advocate, not one military) and to the institutional arrangements of the ICC, such as the discretionary powers of the Prosecutor’s Office. Following Rottleitner’s criticism of Dahrendorf’s analysis of the skewed social background of judges in domestic courts, this amounts in my view to jumping to conclusions: “He had never proved the impact of background patterns on the actual decisions of judges. For this would presuppose detailed analyses of the ‘internal’ content of judicial decisions.”³⁷ Steering a middle course between Shapiro’s warning against the Scylla of circular reasoning and Rottleitner’s warning against the Charybdis of background determinism I have tried to connect majority decisions and separate opinions with interview fragments and prior career paths.

In search of the two contrasting perspectives, i.e. lawyer-statesman’s restraint and subsidiarity vs. human rights activism and supervision, I found seven cases in which Judges Wildhaber, Costa and/or Türmen were

34 In the terminology of Bachrach and Baratz gatekeeping is a negative power, and judging is a positive power. Along two other avenues the Grand Chamber also receives cases: *Peter Bachrach/Morton S. Baratz, Two Faces of Power, American Political Science Review* 56 (1962) 947-8. Cases that were pending when the Court became permanent (November 1998) were referred to the Grand Chamber, and a Chamber can relinquish jurisdiction to the Grand Chamber in cases that raise serious questions about the interpretation of the Convention (Article 30). Some 47 of the 106 Grand Chamber judgments with separate opinions from November 1998 until September 2006 were pending cases, 30 were put on the agenda by means of referral and 29 by means of relinquishment.

35 The median year of birth is 1942 for judges from old member States, and 1950 for judges from new member States. Judge Jocienė, elected in 2004 in respect of Lithuania, and Judge Ziemele, elected in 2005 in respect of Latvia, are the youngest judges: they were both born in 1970.

36 *Jared Wessel, Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication, Columbia J of Transnational Law*, 2/44 (2006), 377-452.

37 Cf. *Hubert Rottleitner, Sociology of Law and Legal Practice, Onati Proceedings* 1 (1989), 77-82.

majoritarians and Judges Casadevall, Tulkens and/or Bonello had a separatist position, and three cases vice versa – two representatives of each perspective at a minimum. Even in the room at the top most disagreements are restricted to one or a few separatists.³⁸ The relevance of the two different perspectives, is however emphasized in the interviews with Judges Costa and Tulkens, opponents in the case of *Fretté vs. France* (supra). Says Judge Costa: “I am convinced that too much activism detracts from the credibility of the Court and a lack of activism undermines its legitimacy. We have to steer a middle course between judicial activism and supervision versus judicial self-restraint and subsidiarity.” In a similar but critical vein Judge Tulkens comments: “One can speak of judges who are concerned about problems of the *raison d'état* and others who sympathize with the applicants. The *raison d'état* is more present here than I would have thought possible, I may add.”

For example, in the case of *Chapman vs. the UK* (18/01/2001) Judges Wildhaber, Costa and Türmen were part of the majority of ten judges deciding that Article 8 (respect for private and family life) had not been violated.³⁹ A broad support inclusive of Judges Bonello, Casadevall, and Tulkens for a joint dissenting opinion was the answer:

*This is one of five cases brought about before our Court concerning the problems experienced by Gypsies in the United Kingdom. There are more awaiting our examination. All disclose elements of hardship and pressure on a vulnerable group within the community. (...) Our principal disagreement with the majority lies in their assessment that the interference was necessary in a democratic society'. (...) We find that the planning and enforcement measures exceeded the margin of appreciation accorded to the domestic authorities and were disproportionate to the legitimate aim of environmental protection.*⁴⁰

38 In 18 cases there was only one separatist judge, mostly the national judge, and in another seven cases there was no network in the sense of a joint separate opinion. The largest category consists of 52 cases with one joint separate opinion and one or more individual opinions. In 26 cases there were two joint separate opinions, and in three cases there were three joint separate opinions.

39 The other six judgments are *Aquilina vs. Malta*, 29/04/1999, *Sürek vs. Turkey-No.1*, 08/07/1999, *Labita vs. Italy*, 06/04/2000, *Ilhan vs. Turkey*, 27/06/2000, *Nachova vs. Bulgaria*, 06/07/2005, and *Ramirez vs. France*, 04/07/2006.

40 Judge Bonello wanted more. In an individual separate opinion he added: “Why a human rights court should look with more sympathy at the far-reaching breach of law committed by the powerful than at that forced on the weak has not yet been properly explained.”

An example of the opposite situation is the case of *Kress vs. France* (07/06/2001).⁴¹ A majority of ten judges, including Judges Casadevall and Tulkens, found a violation of Article 6 (fair trial) of the Convention “on account of the Government Commissioner’s participation in the *Conseil d'État's* deliberations”. Seven judges, among them Judges Wildhaber and Costa, disagreed fundamentally:

In a subsidiary system of human-rights protection the Court should have left intact an institution that has been respected and acknowledged for over a century and a half and has succeeded in working for the rule of law and human rights, while preserving objective appearances. (...) Have the limits of 'European supervision' in relation to characteristic national institutions – which are legitimate so long as they fulfil their Convention obligations to produce a specific result – not here been reached or overstepped?

What makes the one judge adhere to lawyer statesman’s restraint and the other to human rights supervision? My answer - the kind of formative years before nomination to the Court – is corroborated by the career paths and interviews with the representatives. A good example of a lawyer-statesman is the President of the Court at the time, Judge Wildhaber (omni, in Table 3):

Looking at my background, I have been a part-time judge for over 25 years. I had a lot of opportunities to reflect on what it is to be a judge. I have worked in the administration. I may strike you as an academic, which I am, but I could also strike you as a generalist. (...) I would not be pleased with someone who has never done anything else than human rights.

Judge Wildhaber has never been a judge in a first instance court, however, which is reflected in his writings about the Court’s future.⁴² Moreover, he implicitly criticises the career path of Judge Bonello (bar, in Table 3): “I spent a lifetime in human rights law, and I practised as a human rights lawyer at a time and in circumstances when it was not easy to be a human rights lawyer.”

Judges Türmen and Casadevall represent another pair of the two different perspectives. “I see my role as a judge with respect to Turkey not merely as a judge deciding cases, but also as an intermediary between the Court’s standards and the aspirations of Turkey to join the European Union.” Says Judge Türmen, who was a career diplomat before nomination to the ECHR (administration, in Table 3). Judicial restraint in the interpretation of the Convention is the consequence: “The Court relies more than any other court

41 The other two cases are *Karatas vs. Turkey*, 08/07/1999, and *Göz vs. Turkey*, 11/07/2002.

42 *Luzius Wildhaber, A Constitutional Future for the European Court of Human Rights?*, Human Rights LJ 5-7/23 (2002), 161-165.

on interpretation, in particular regarding the margin of appreciation. The Court should not introduce new obligations for the States by means of interpretation.”⁴³ A completely different background has instilled Judge Casadevall with judicial activism. “Thanks to my previous occupation at the bar I probably tend to side with the applicants, and I am an activist as to Article 6 with a bent to enlarge its scope.”

Judge Costa, the Court’s president since 2007, had his formative years in the French *Conseil d’État* (constitutional court, in Table 3), and Judge Tulkens’ career path was in academia; thanks to her specialization in criminology and juvenile justice her frame of reference is the individual applicant, not the respondent State, however.

My attempt to escape from the circular reasoning of the behavioural approach by means of cross-validation and triangulation cannot be completely successful as there is not a one-to-one relationship between a particular career path and a corresponding perspective.⁴⁴ But I want to sensitise the reader to the relevance of the formative years before nomination to the Court. A last token of the relevance is the fact that among the other judges composing the panel in these ten Grand Chamber decisions no former administrators support the separate opinions of the human rights activists as there are no former practising lawyers who support separate opinions of the lawyer-statesmen network. Potential candidates to support a separate opinion of each of the two networks are found among the former academics and former judges, and the non-specific ‘omni’ category.

Conclusion

A much cited quote is that ‘the Convention is a living instrument which must be interpreted in the light of present-day conditions’ (the standard formula since *Tyrer vs. UK*). After correcting for reification (‘living instrument’) the way is open for a socio-legal approach to the Court. In the final analysis it is not the Convention that is a living instrument, but the judges in the Court are legal professionals who interpret the Convention, in particular in the Grand Chambers. The approach to the majority opinion by means of the backdoor of separate opinions has disclosed that (a) judges elected in respect of the new member States of Cen-

tral and Eastern Europe deliver significantly less separate opinions than judges elected in respect of the old member States; and (b) national bias in the sense that the judges take a more benevolent position when their home country is the respondent State does in fact occur, and more so among *ad hoc* judges than among elected judges. For obvious reasons *ad hoc* judges and for less obvious reasons most new member State judges were found to make another choice in the dilemma between ‘agent’ and ‘trustee’ than judges elected in respect of old member States.

The institutional setting of the ECHR rephrases the distinction between judicial restraint and judicial activism in terms of subsidiarity and supervision. In search of an explanation for this cultural variation the divide between practitioners and scholars in Article 21 has been developed into a bifurcation of perspectives. The lawyer-statesman’s perspective has been put into words by the former President, Judge Wildhaber as follows: “(T)he place of individual relief, while important and particularly so in respect of the most serious violations, is secondary to the primary aim of raising the general standard of human rights protection and extending human rights jurisprudence throughout the community of Convention States. (...) Now I would be the first to admit that this analysis of the Convention system is not universally accepted.”⁴⁵

The last sentence refers to human rights activists. Human rights activism is not at ease with a Court that has only symbolic victories to offer to the individual applicants. The best example remains the *cri de cœur* of Judge Bonello in the case of *Aquilina vs. Malta* (29/04/1999):

The majority of the Court opted to recite that the finding of the violation in itself constituted just satisfaction. I do not share the Court’s view. I consider it wholly inadequate and unacceptable that a court of justice should ‘satisfy’ the victim of a breach of fundamental rights with a mere handout of legal idiom. (...) A moral thirst for justice is hardly different from a physical thirst for water. Hoping to satisfy a victim of injustice with cunning forms of words is like trying to quench the thirst of a parched child with fine mantras.

Looking at the background of most judges the lawyer-statesman’s perspective is expected to have a stronger appeal in the Court than human rights activism, and Sardo’s critical assessment of the Court’s case law (“ ‘minimalist’ approach, symptomatic of the structural inadequacy of the individual complaints mechanism”)

43 A good example of his judicial restraint occasioned by the international context of the Court is his dissenting opinion in the case of *Mamatkulov vs. Turkey* (06/02/2003). “I cannot find sufficient legal basis for holding that a power to order binding interim measures exists under the present Convention system. (...) If the Contracting States had the intention to attribute such a power to the Court, they would have said so explicitly in the Convention.”

44 Moreover, the examples of Judges Wildhaber and Tulkens make clear that the categories are not fine tuned enough.

45 *Luzius Wildhaber, A Constitutional Future for the European Court of Human Rights?*, Human Rights LJ 5-7/23 (2002), 161-165, 163.

should not come as a surprise.⁴⁶ Does the lawyer-statesman's perspective not carry too much weight in the Court?

A court that deals with alleged violations of human rights by member States will never function as an ordinary court. "The ECHR is successful precisely because the obligation of the member States is reduced to the level prevalent in international law from that prevalent in constitutional law".⁴⁷ The political rationale of the ECHR is that it lends legitimacy to the member States in occasional landmark cases in which particular member States are found to violate codified human rights.⁴⁸

A close reading of the case law reveals that (a majority in) the Court avoids a position of a supranational court of human rights that would enjoy the universal and undivided acclaim of human rights activists. Admittedly, the ECHR takes a firm stance with regard to the hard core of human rights (the right to life and the prohibition of torture, Articles 2 and 3), but the other individual freedoms are compromised by considerations of general interests, such as national security, public safety, and the protection of public order, health or morals (the standard clause in the second sections of Articles 8-11). The most daring landmark cases are violations of Article 8 (the right to respect for private and family life) where the stakes of a liberal State are low. The jewel in the crown (of the Council of Europe) as the epithet goes, is first and foremost an ideological beacon in the symbolic field of human rights lawyering.⁴⁹

46 *Pietro Sardaro*, Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court, *European Human Rights LJ* (2003), 601-630.

47 *Martin Shapiro/Alec Stone Sweet*, *On Law, Politics, and Judicialization* (Oxford 2002), 154.

48 *Ronen Shamir*, Landmark Cases' and the Reproduction of Legitimacy: the Case of Israel's High Court of Justice, *Law & Society Rev.*, 3/24 (1990), 781-805.

49 *Stuart A. Scheingold*, *The Politics of Rights. Lawyers, Public Policy, and Political Change*, New Haven etc (1974). *Pierre Bourdieu*, *The Force of Law: Toward a Sociology of the Juridical Field*, *The Hastings LJ* 38 (1987), 805-53.