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Introduction

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1. The importance of 'shaping rights' – and the difficulties related to it

In fundamental rights adjudication, a court usually determines first whether the interest at stake is protected by a fundamental rights provision – i.e. whether it falls within the scope of the fundamental right that is invoked – before considering whether the right has been restricted and, if so, whether this restriction was justified. Sometimes this is easy and straightforward. For example, if the complaint concerns prohibited publication of a book in which state secrets are disclosed, it is relatively obvious that this prohibition affects the freedom of expression. In other cases, determining the applicability of fundamental rights provisions is much more difficult and controversial. It may be asked, for example, whether pure hate speech or fighting words are protected by the freedom of expression; or whether refusing to provide a detainee with dental care amounts to 'inhuman and degrading treatment'.

Answering such questions requires interpretation: the court will have to determine what the fundamental rights provision that is invoked really means, and what it is intended to protect. This interpretative task is a particularly difficult one, as fundamental rights provisions are notoriously formulated in a very general and abstract fashion. Thus the text of fundamental rights provisions offers little guidance to a court that has to determine whether a set of facts comes within the scope of their protection.

The courts' task is made even more difficult by the very nature of fundamental rights. It is well accepted that most fundamental rights are not absolutes, but can be limited if such limitations are sufficiently justified by objective and weighty reasons, such as the protection of other

Note to the reader: all judgments and decisions of the European Court of Human Rights to which reference is made in this work are easily accessible through the HUDOC database on the Court's website: www.echr.coe.int.

fundamental rights or of important general interests. One major question is whether the assessment of the reasonableness of an interference with a fundamental right could and should form part of the definition of that right, or whether definition and justification should be strictly separated. On one hand, it is clear that the actual meaning of a fundamental right in a particular case can only be determined by looking at the case as a whole, including the justification. When considering the prohibition of a book disclosing state secrets, in the end the actual scope of the freedom of expression is determined both by the definition of that freedom and the balance that is struck between that freedom and the state's interests in keeping state secrets. After all, authors only know the extent to which they can really exercise freedom of expression if the limits to the exercise of that right are delineated. If the definition of a fundamental right does not contain any express limitation clause, this is even more important. In determining the scope of the prohibition of inhuman and degrading treatment, it is seemingly inescapable that elements of justification will be included in the courts' interpretation. For example, to determine whether the use of violence to suppress a prison riot amounted to inhuman and degrading treatment, courts must determine whether the violence used was unavoidable and not excessive. Almost unavoidably, then, elements of reasonableness and justification enter the determination of scope. Simultaneously, it can be argued that definition of scope and assessment of reasonableness require very different methods of interpretation. Whilst it could be argued that the definition of fundamental rights must be determined using classic interpretation methods (textual interpretation, teleological interpretation), the test of reasonableness involves an assessment of the aim pursued, the necessity for interference to achieve the aim, and a test of balancing or reasonableness. Moreover, it has been contended that the burden of proof for the stage of definition should be different from that for the assessment of justification: where it is up to the applicant to demonstrate that a given act or omission really interferes with his or her fundamental rights, it is the government's task to provide an objective justification for this as soon as it is clear that such a right is indeed at stake.

Hence, the process of 'shaping rights' raises many important questions, both of a conceptual and theoretical nature and of a more practical, case-law character. From a conceptual perspective, for example, it obviously must be asked to what extent 'pure' definition of the scope of fundamental rights really can and should be distinguished from the assessment of

justification. Indeed, the question as to the most appropriate approach particularly arises in relation to 'absolute' rights (such as the prohibition of inhuman treatment) and in relation to notions such as that of positive obligations. Moreover, it can be queried whether it makes a difference if the case relates to 'classic' fundamental rights, such as the right to privacy or fair trial, or to fundamental rights of a social and economic character.

These questions are relevant for all fundamental rights provisions, regardless of whether they are laid down in national constitutions or in international treaties. For the European Convention on Human Rights (ECHR or Convention), however, they have particular importance. Whether or not an individual interest is brought within the scope or ambit of one of the fundamental rights protected by the Convention determines whether the European Court of Human Rights (ECtHR or Court) is competent to decide the merits of a case. Moreover, the questions raised have special relevance because the Convention contains both 'absolute' fundamental rights and fundamental rights with limitation clauses; the notion of positive obligations has been particularly strongly developed; and social and economic fundamental rights increasingly form part of the Convention rights. Especially in those situations, the conceptual questions how these rights should be 'shaped', and how the Court should proceed in these cases, are of great importance. And finally, discussions concerning the scope of the Convention are highly relevant to the Court's role and position as a supranational court. Some scholars and politicians have criticised the Court for widening the scope of the Convention to such an extent that even non-fundamental rights have now been included, and it has been questioned how legitimately a European human rights court may decide such cases.

Interestingly, however, legal doctrine has shown relatively little interest in the conceptual and practical issues related to the structure of fundamental rights and the process of 'shaping rights'. Thus far, academic literature has tended to focus either on the interpretative principles used by the ECtHR, or on the test of justification (including the test of proportionality and the margin of appreciation doctrine). Given the importance of the determination of scope to the Court's adjudication in fundamental rights cases, there is great value in bringing together the state of the art in legal scholarship on the fundamental questions surrounding the scope of fundamental rights.

2. Shaping rights: four central themes

The general theme of how to determine the scope of fundamental rights raises a wide variety of important scholarly questions having a very different nature, which should all be addressed in order to provide both in-depth and sufficiently broad insight into the theme as a whole. To address the topic of shaping rights by the ECtHR in a comprehensive, yet accessible, manner this volume centres around four central themes that merit in-depth exploration. Read in their entirety, the contributions relating to the four themes provide a broad and deep insight into how the scope of fundamental rights is determined.

2.1 Conceptual, structural and constitutional issues

The first issues to be addressed in a volume on the scope of rights are, of course, conceptual, structural and constitutional ones. As mentioned briefly above, there is much debate possible on whether elements of 'balancing' fundamental rights against other interests should play a role in determining the scope of rights; whether a 'bifurcated' approach is preferable; and how and to what extent the structure of fundamental rights provisions should affect the Court's assessment of individual applications. It is important to bring these various possible debates to the fore, as this will both give insight into, and enable sound criticism of, the way the Court defines and gives shape to the Convention.

Furthermore, opinions strongly diverge on how fundamental rights should be defined. Different views are possible as to the perspective that should be taken by the ECtHR in defining fundamental rights provisions. If the aim is to effectively protect individual rights, the scope of fundamental rights should be defined as widely as possible and the Court should declare almost all complaints with a fundamental rights aspect admissible as falling within the scope of the Convention. From a constitutional or institutional perspective, however, such a wide definition may bring about problems of division of competences between the ECtHR and national authorities.

For this reason, the scope of Convention rights should be studied from a normative, legal-theoretical and constitutional perspective, as well as from a descriptive and historical perspective. It is only possible to value the determination of fundamental rights by the Court if we see clearly how the ECtHR perceives its own role in this regard, how its

case law has developed over the decades and how its approaches can theoretically, conceptually and constitutionally be valued. This volume therefore starts with a number of contributions that specifically focus on these issues.

2.2 Developments in the case law of the European Court of Human Rights

Second, it is important to recognise that the European Court of Human Rights has created a large body of case law related to determining the scope of rights. It has developed economic and social guarantees as part of the classic rights protected by the Convention, it has broadened their scope by introducing procedural obligations into, for example, the right to life and the right to respect for one's private life, and it has defined substantive positive obligations in addition to the inherently negative obligations that were originally read into the Convention. The result of these developments is a significant expansion of the scope of the Convention, as well as an important change in the character of the obligations it places on states. When exploring how the Court gives shape to Convention rights, obviously it is of great interest to analyse such developments critically and evaluate their consequences for the protection of fundamental rights in Europe.

2.3 Similar issues in different systems – a 360° comparison

In European debates on fundamental rights, it is sometimes suggested that only the European Convention on Human Rights is strongly expanding and that only the European Court of Human Rights has to answer difficult questions relating to the definition and scope of human rights. Of course, this is far from true – similar issues arise at the national (constitutional) level, at the international level of human rights protection and at the level of the European Union. Moreover, international, national and EU laws on (the scope of) fundamental rights strongly influence the case law of the Court.

To obtain a complete picture of the way in which European fundamental rights are being shaped, to allow for relevant comparisons with the ECtHR's approach, and to estimate the importance of the Court's approach for the definition of fundamental rights by national and international courts, it is important to study the determination of

the scope of fundamental rights on these levels, therefore, and to look at the influence thereof on the case law of the Court. A '360° comparison' can enrich the debate on the shaping of rights by the Court, as well as provide a sound basis for further research into the definition of the scope of rights on the international, EU and national levels.

2.4 A closer look at specific Convention rights

Finally, it is interesting to see to what extent and in what manner the theoretical, national and international debates, as well as the impact of the general developments in the Court's case law, impact on that case law. This is true in particular since the impact appears to differ for the various Convention rights. For 'absolute' provisions, such as the prohibition of torture, defining the scope of a right is more important than for 'relative' provisions, such as the right to respect for one's private life. Moreover, even where the questions that have come up in relation to, for example, the Court's definition of private and family life overlap with questions that have arisen in relation to the prohibition of non-discrimination or the right to a fair trial, the case law on each of these provisions shows some very particular aspects. To obtain more insight into the explanations for differences in the Court's approach, several provisions of the Convention on which the case law discloses a strong extension of scope have been selected as case studies of a sort. For all of these, an analysis is made of the relevant case law to see whether explanations can be found for the expansion of scope as well as to provide a basis for conclusions to be drawn on the consequences and evaluation of such expansion. In all of these analyses, parallels are drawn between the case law of the Court and the conceptual, constitutional and theoretical issues discussed previously.

3. Findings: a compilation

This volume presents the insights and analyses of sixteen scholars on the four central themes discussed above. To do justice to the depth and richness of their writings, it is of course necessary to read their contributions in full. Nevertheless, a short compilation of the most important findings of all these chapters may provide a broader insight into the questions raised and (tentative) answers proposed relating to

the shaping of fundamental rights by the European Court of Human Rights.

3.1 Conceptual, structural and constitutional issues relating to the scope of rights

In his chapter, Alastair Mowbray sets the stage for the various conceptual, constitutional and analytical contributions by presenting a historical analysis of the development of the scope of the Convention by the ECtHR. Examining the process by which the Convention was drafted, Mowbray finds that, amongst the numerous stakeholders, there were both competing attitudes towards the ambit of the rights and freedoms guaranteed and divergent views of the ultimate objective(s) of the ECHR. He then identifies some of the major forces underpinning the Court's interpretation and application of the Convention to make it apt for modern European societies: technological progress, changing social relationships and the evolution of human rights standards. Mowbray argues that the Court has to steer a challenging path between judicial activism and judicial restraint, in which it generally interprets and applies the Convention in accordance with contemporary needs. However, where states have signalled their intention to revise the breadth of a Convention right through the process of negotiating and ratifying additional Protocols (for example regarding the death penalty), or where a particular Convention right was drafted with a clearly limited ambit and no subsequent enhancement of that right has conclusively emerged in the relevant practice of the Member States (e.g. sanctioning marriages between same-sex couples), the Court has been cautious not to interpret the Convention contrary to the will of the states.

George Letsas continues with a legal-theoretical and conceptual analysis of the structure of, and fundamental rights provisions under, the Convention. Starting from a number of hypothetical cases, he sets out to check the European Court's mode of judicial reasoning against an ideal model. He builds this model on the basis of theoretical insights concerning the nature of rights in general. In particular, he distinguishes between *prima facie* rights and *pro tanto* rights. He says that the former appear to be rights, i.e. to constitute reasons not to interfere with the right-holder's liberty, but that in the circumstances they are not rights. Once the circumstances surrounding the situation of the alleged right-holder are known, it transpires that there was actually no right and hence

no reason *not* to have interfered with someone's liberty. *Pro tanto* rights on the other hand are weighty reasons for others not to interfere with the right-holder in certain ways. But the weight need not be absolute. *Pro tanto* rights can be balanced against other *pro tanto* considerations. Letsas criticises the Court for failing to make this distinction, and on occasion upholding pseudo-rights. In addition, Letsas argues that the Court would risk making a second mistake, that of failing to take seriously some *pro tanto* rights, if it were to focus more on 'scope' analysis.

Gerhard van der Schyff also provides a legal-theoretical and conceptual analysis, but he focuses on the structure of Convention rights and the 'bifurcated' approach that distinguishes between *defining* fundamental rights (i.e. determining their scope) and *assessing the reasonableness* of interferences with such rights. In particular, van der Schyff is interested in answering the question whether, from a legal-theoretical perspective, Convention rights should be defined extensively or rather more narrowly. He starts out by distinguishing between one-stage, illimitable rights and two-stage, limitable rights, noting that in the ECHR the latter by far outnumber the former. He then argues that a narrow interpretation of scope may be appropriate for one-stage rights, yet is not desirable for two-stage rights. Following Alexy, van der Schyff submits that everything that exhibits at least one characteristic connected to the values of a right must be taken to form part of its protected conduct and interests. Formal interpretations must be followed by leaving aside value judgements as to the intended purpose, nature and quality of elements contending for protection. Engaging with opponents of his thesis, in particular Gerards, van der Schyff contends that as a rule narrow scopes come about through 'hidden' balancing, rendering legal reasoning non-transparent. He adds that the same phenomenon also implies that narrow scopes do not reduce the Court's case load.

Gerards enters into a debate with van der Schyff by arguing that legal-theoretical arguments should not be the only arguments to be taken into account by the ECtHR when defining Convention rights. In her view, the Court should also take account of constitutional, legal-political and subsidiarity considerations. Her chapter examines the argument according to which the problems caused by the Court's case load could in part be addressed by a more rigorous (narrow) interpretation of the scope of Convention rights. Gerards argues that there is not so much a direct, as an indirect relationship between the growing scope of the Convention and institutional concerns regarding the Court. Such concerns are mainly caused by the fact that, as a result of the widening of the

Convention's scope, the Court often admits individual complaints that require a complex assessment of national policies and an evaluation of intricate legal issues. Moreover, the number of individual applications may have increased as a result of relative lack of clarity offered by the Court on the precise scope of application of certain Convention rights. Therefore, Gerards proposes that the Court should limit its supervisory role to cases that concern core fundamental rights, that it should delineate new rights and obligations precisely and that it should formulate detailed and substantive standards for the applicability of specific Convention rights. In doing these things, the Court should employ a bifurcated approach, distinguishing the stage of definition clearly from the stage of justification. At this point, Gerards and van der Schyff appear to agree.

3.2 Scope and more – developments in the case law of the ECtHR

Over the years, the Court has come to deal with a great many cases on 'social' issues such as social welfare, health care, and the environment. A closer look, however, shows that often it does not define exactly what the Convention requires in these fields. In this light, Ingrid Leijten's chapter criticises the current approach taken by the ECtHR. She agrees with various other authors that usually the Court should start from a bifurcated approach, but she then goes on to argue that using such an approach is neither always desirable, nor always possible where requirements of a more economic and social kind are involved. For that reason, she searches for a different possible approach to be taken by the ECtHR in future cases on social and economic (aspects of) rights. Leijten finds inspiration for developing this different perspective in the context of the International Covenant on Social, Economic and Cultural Rights. In her view, the concept of 'minimum core obligations' developed by the Committee on Social, Economic and Cultural Rights can generate more workable definitions of rights. Adopting a similar approach might help the ECtHR to provide more clarity as to the meaning of fundamental rights, while not overstepping the boundaries of its difficult task.

The chapter written by Eva Brems throws light on the often-overlooked phenomenon of hidden procedural safeguards embedded in the substantive Convention rights. In numerous fields of its case law, the Court has in fact added a procedural layer to the scope of substantive Convention rights, by deriving state obligations of a procedural nature from substantive ECHR provisions. The main driver for this development appears to be the wish to make human rights guarantees more effective. The chapter

first clarifies the reach of procedural obligations under substantive Convention rights, distinguishing between the requirement that a procedure be available and the more specific procedural guarantees that the Court requires. It goes on to analyse the impact of the 'proceduralisation' of substantive rights and the role this plays within the Court's case law.

Since the breakthrough *Marckx* judgment, the Court has found positive obligations under almost every Convention right. Despite the widespread application of the positive obligations doctrine, the Court has stated that it does not have to develop a general theory of the positive obligations which may flow from the Convention. In his chapter on the way in which it 'shapes' positive obligations, Laurens Lavrysen submits that the Court's lack of a sound and general theory has resulted in a case-to-case-approach that goes too far in this direction and gives little guidance to national courts and practitioners. He argues that the Court should take a more structured approach. Taking into account the bifurcated nature of human rights, Lavrysen proposes to apply a symmetrical approach to positive and negative obligations. In this regard, he stresses that the scope of Convention rights should be kept 'clean', meaning that elements from the second stage of the analysis, in particular proportionality and legality, should not be introduced in the first stage.

Finally, Antoine Buyse focuses on the one particular Convention provision that is specifically intended to remove certain activities from its scope. This is the 'abuse clause' – Article 17 – which forecloses human rights protection when these rights are being used to deny (other people's) human rights. Although this provision would seem to offer the Court an opportunity to define clear borders for application of the Convention, Buyse shows that there are many practical and theoretical difficulties related to the case law on this article. In particular, he analyses the Court's application of Article 17 in the light of its case law on Article 10 ECHR, which protects the freedom of expression. He shows that, in applying the abuse of rights philosophy in its material assessment under Article 10, in fact the Court blurs categorical and balancing aspects of judicial decision-making. In his view, a different approach would be desirable, in which the Court would not apply Article 17 directly to place certain types of speech outside the scope of Convention protection, but rather use the abuse of rights element as a weighty argument in assessing the justification for limiting certain types of speech. If it would do this, and if the justification test would involve 'structured balancing of interests', Buyse holds, the disadvantages of the current uses of Article 17 would be offset.