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Article 53 ECHR and Minimum Protection by the European Court of Human Rights

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Abstract

It is often emphasised that the European Convention on Human Rights (ECHR or Convention) offers only minimum protection and states are allowed to offer additional guarantees. Indeed, Article 53 ECHR obliges the European Court of Human Rights (ECtHR) to respect such national guarantees if they go beyond the Convention. Similar provisions are usually included in human rights treaties as 'priority clauses', which mean that human rights bodies should respect more protective national laws. In such a reading, Article 53 could both add to and detract from the protection offered by the Convention, especially in cases where national and Convention rights clash. Based on an analysis of the Court's case law, this paper shows that the Court does not rely on Article 53 in such conflicting rights cases, but rather prefers to use avoidance and balancing strategies. Instead, the Court uses Article 53 to reinforce national fundamental rights protection, thereby reducing the risk of harming the minimum level of protection provided by the Convention.

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Keywords

minimum protection of fundamental rights – Article 53 ECHR – European Court of Human Rights – subsidiarity – most favourable treatment – priority – conflicts of rights – balancing – reinforcement interpretation

1 Introduction

One of the main objectives of the European Convention on Human Rights (ECHR or Convention) is to offer a minimum level of protection of fundamental rights in all Convention states.[1] The Convention thus constitutes the minimum common denominator – or 'floor'[2] or 'bottom line'[3] – of what can be expected of states in terms of respect for and protection of fundamental rights and freedoms.[4] Based on Article 1 ECHR and in line with the primarity and subsidiarity principles, the Convention states have committed themselves to securing that level of protection to every person under their jurisdiction.[5] As a supervisory body, the European Court of Human Rights (ECtHR or Court) can check if the contracting states have complied with the Convention obligations

1 See, for example, R Spano, 'Universality or Diversity of Human Rights – Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487, 493; R Lawson, 'Beyond the Call of Duty? Domestic Courts and the Standards of the European Court of Human Rights', in *Content and Meaning of National Law in the Context of Transnational Law,* H Snijders and S Vogenauer (eds), (Otto Schmidt/De Gruyter 2009) 21, 22–23. See further, for instance, B Çalı, 'The Purposes of the European Human Rights System: One or Many?' (2008) 3 *European Human Rights Law Review* 299; F de Londras and K Dzehtsariou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 523, 526.

2 E Brems and J Vrielink, 'Floors or Ceilings: European Supranational Courts and their Authority in Human Rights Matters', in *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens,* A Dewaele and others (eds), (Intersentia 2019) 281, 282. See also, *GIEM Srl and Others v Italy* 1828/06 and others (ECtHR, 28 June 2018) Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, para 86.

3 E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 *Human Rights Law Review* 349, 353.

4 On defining minimum (as opposed to uniform) fundamental rights standards by the ECtHR, see, for example, D McGoldrick, 'A Defence of the Margin of Appreciation Doctrine and an Argument for its Application by the Human Rights Committee' (2016) 65 *International & Comparative Law Quarterly* 21, 36–37; JH Gerards, 'Uniformity and the European Court of Human Rights', in *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens,* A Dewaele and others (eds), (Intersentia 2019); Lawson (n 1) 23.

5 P Pinto de Albuquerque, 'Plaidoyer for the European Court of Human Rights' (2018) 2 *European Human Rights Law Review* 119, 125. See also, P Lemmens, 'Reply to the Statement by Mr Jean Marc Sauvé', in *Dialogue Between Judges* (European Court of Human Rights 2015) 41.

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in concrete cases.[6] The Court is also competent to interpret and refine these obligations based on Articles 19 and 32 ECHR.[7] By doing so, it can clarify the minimum level of protection that states must guarantee.[8]

The nature of the Convention obligations as minimum obligations is further emphasised by Article 53 ECHR:

> Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

This provision is often referred to as a 'most protective' clause or 'priority rule', since it allows the highest available level of fundamental rights protection to prevail.[9] As such, and in line with the principles of primarity and subsidiarity,

6 See, Article 34 ECHR.

7 Article 19 ECHR establishes the Court, while Article 32 ECHR stipulates that its jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto. See also, C Rozakis, 'Is the Case-Law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order?' (2009) 2 *UCL Human Rights Review* 51.

8 On the need to do so to avoid the minimum level becoming too low, see, for example, Brems (n 3). On the dynamics of the Court's development of minimum norms and standards, see, for example, De Londras and Dzehtsariou (n 1); Rozakis (n 7); E Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights' (2020) 31 *European Journal of International Law* 73; M Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication Within a Cooperative Conception of Human Rights' (2015) 15 *International Journal of Constitutional Law* 393, 408; P Łącki, 'Consensus as a Basis for Dynamic Interpretation of the ECHR – A Critical Assessment' (2021) 21 *Human Rights Law Review* 186.

9 Such provisions are a common occurrence in international human rights treaties. For some examples, see: European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) ETS 35 Article 32; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 Article 5(2); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 Article 5(2); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 Article 1; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 Article 41; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December, entered into force 4 January 1969) 660 UNTS 195 Article 23; Charter of Fundamental Rights of the European Union [2000] OJ 326/02 Article 53. They are also known under many other names, such as 'most favourable treatment clauses', 'no-pretext clauses', 'savings clauses', 'subsidiarity clauses', or 'no prejudice clauses'. See, for instance, B Saul, D Kinley, and J Mowbray, *The International Convenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford

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Article 53 allows states to create or maintain their own higher levels of protection of fundamental rights, for instance in their national constitutions or by means of ratifying international treaties.[10] Article 53 would thus seem to be conducive to guaranteeing a high level of protection of fundamental rights and freedoms in the contracting states. After all, it expressly allows them to go beyond the minimum required by the Convention and offer more robust protection.

At the same time, it could be argued that Article 53 constitutes a potential risk from the very same perspective of the level of protection of rights. This risk is particularly present in cases on conflicting fundamental rights. In such cases, a state may choose to guarantee one specific fundamental right – such as the freedom of expression – at a very high level, as permitted by Article 53. By doing so, however, it may infringe another right – such as the right to reputation or the prohibition of discrimination – to a degree that is not permitted by the Convention.[11]

University Press 2014) 240; EA Alkema, 'The Enigmatic No-Pretext Clause: Article 60 of the European Convention on Human Rights', in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag,* J Klabbers and R Lefeber (eds), (Martinus Nijhoff 1998) 41; J Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 *Common Market Law Review* 1171, 1186; W Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 902; P Alston and G Quinn, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 208; LFM Besselink, 'Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629, 657. Generally, such clauses are considered to constitute a kind of priority or conflict rule: if there is a conflict between two sets of rules or norms regarding the same material issue, priority needs to be given to the provision that offers strongest protection to a fundamental right. On this, see the sources mentioned above in addition to, for instance, C Van de Heyning, 'No Place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights', in *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts,* P Popelier, C van de Heyning, and P van Nuffel (eds), (Intersentia 2011) 72; J De Meyer, 'Brèves réflexions à propos de l'article 60 de la Convention européenne des Droits de l'Homme', in *Protecting Human Rights: The European Dimension,* F Matscher and H Petzold (eds), (Carl Heymanns 1990) 125.

10 In doing so, they are bound to comply with the Convention and they are not allowed to fall below the minimum level of protection offered by the ECtHR to the Convention rights. See, *Ilnseher v Germany* [GC] 10211/12 and 27505/14 (ECtHR, 4 December 2018) Dissenting Opinion of Judge Pinto de Albuquerque, Joined by Judge Dedov, para 68. See also, Pinto de Albuquerque (n 5) 126, and, in comparison, P Mahoney, 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments' (1997) *European Human Rights Law Review* 364, 369.

11 On this particular risk and the lack of guidance that Article 53 offers in this respect, see, Alkema (n 9) and Lawson (n 1).

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In light of these opportunities and risks, it may be considered surprising that little attention has been paid to Article 53 in legal scholarship and in case law.[12] To fill this gap, the twofold aim of this paper is to explore (1) what role Article 53 ECHR has played in the case law of the ECtHR so far, and (2) whether it has any tangible impact on minimum Convention protection.

In view of this aim, a systematic case law analysis has been conducted,[13] concentrating on two different functions that Article 53 ECHR can arguably have.[14] This paper presents the results of that analysis.

First, as mentioned above, it is often suggested in scholarly literature that Article 53 could serve as a *priority rule*.[15] This means that the highest level of protection of a fundamental right should prevail in concrete cases, whether this is the national or the ECHR protection. Section 2 examines whether the Court has applied Article 53 in this particular reading and finds that – so far – this is not the case. A likely explanation for this is that the priority reading is not well-suited to dealing with conflicts of fundamental rights and its application may have more risks than benefits where the minimum protection of

12 However, see, De Meyer (n 9); Alkema (n 9); Lawson (n 1); Van de Heyning (n 9).

13 The main part is based on a case law analysis using the present author's database of ECtHR judgments and decisions, which contains structured summaries of the Court's judgments since 2012. Based on the literature, it has been presumed that Article 53 can mainly play a role either in conflicting rights cases or cases in which higher protection is offered but other rights have been insufficiently protected. Other cases in which a national right gives higher protection than the Convention will rarely come before the Court as they are not likely to result in an actionable interference with a Convention right. The database has then been searched for relevant related keywords, including, for instance, 'minimum', 'Article 53', 'constitution', 'national/domestic protection', 'conflict', and 'in for a penny, in for a pound'. The search has been supplemented by a systematic HUDOC database search for judgments and decisions referring to 'Article 53' in their text and a study of judgments and decisions on Article 53 and/or conflicts of rights that have been referred to in the available English language literature. The various judgments and decisions have been analysed to obtain a substantive insight into the type of cases in which domestic protection of fundamental rights seems to clash with the ECtHR's protection, and how the Court deals with such cases in its reasoning. The results of that analysis are summarily presented in this paper, also building on the author's previous work in the field and the scholarly literature on the topic. The author's own work is mostly referred to in footnotes in relevant places, but it should be noted that some of the findings also build on her Dutch-language commentary to Article 53. See, JH Gerards, 'Artikel 53. Waarborging van bestaande rechten van de mens', in *Sdu Commentaar EVRM – Deel 2,* JH Gerards and others (eds), (Sdu 2020) 452 (JH Gerards, 'Article 53. Respect for Existing Human Rights Guarantees', in *Sdu ECHR Commentary – Part 2*, JH Gerards and others (eds), (SDU 2020) 452 (author's translation)).

14 For these functions, see the sources cited above (n 9).

15 Ibid.

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rights is concerned. As section 2 demonstrates, the ECtHR tends to rely on alternative approaches to deal with conflicts between national and European fundamental rights instead.

Second, the situation can be distinguished where a high degree of protection is offered to a fundamental right at the national level, without there being a conflict of rights. Section 3 will demonstrate that in such cases, Article 53 has a *complementary or reinforcement function*. This means that it can form the basis for recognising the national protection offered to a certain fundamental right, and for complementing and reinforcing this protection by adding specific elements of Convention protection. Section 3 also shows that this particular application of Article 53 can contribute to upholding and even adding to the minimum level of Convention protection, although there are some exceptions to the reinforcement case law that are difficult to explain.

Based on these findings and reasoning from the perspective of the need to uphold a minimum level of fundamental rights protection, the concluding section, section 4, submits that Article 53 cannot be expected to play a role as a priority principle in conflicting rights cases. However, this is different for reinforcement cases. For those cases, Article 53 arguably provides a useful tool that could be relied on more often in order to bring national and Convention protection closer together.

2 Article 53 ECHR as Priority Rule in Conflicting Rights Cases

2.1 *Introduction*

Many international human rights treaties contain ‘most protective’ clauses such as Article 53 ECHR. They are usually read as meaning that the highest level of protection offered to a fundamental right should prevail, whether this protection is offered by the international treaty or in the domestic legal order.[16] The benefit of such ‘most protective’ clauses is that they allow states to highlight and maintain rights that are of special importance to them, such as a full prohibition of all forms of censure,[17] the right to protect unborn life, or certain social and economic rights.[18] The ‘most protective’ (or ‘no prejudice’) clauses

16 Ibid.

17 As is the example famously given for the Netherlands. See further on this, Alkema (n 9).

18 As Alkema has explained, the *travaux préparatoires* to the Convention offer very little useful information about the intentions of the drafters in inserting Article 53. See, Alkema (n 9) 42.

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ensure that international human rights treaties do not stand in the way of such national protection.[19]

Regardless of their widespread occurrence in international human rights treaties, priority clauses are seldom applied in practice.[20] Various scholarly analyses have shown that, when framing these clauses, the drafters probably had a rather theoretical and abstract image in mind of how international treaties and national constitutions would interact.[21] To the extent that drafters considered concrete cases of the application of these norms, they seem to have considered relatively straightforward situations.[22] For example, it is easy for an international instrument to give way to a national constitution if the nationally protected right – such as a right to environmental protection – has not found a place in the international instrument at all. The same may be true if the international and national norms are complementary and only the norm as such is considered. For example, if there is a full prohibition of censure at the national level and only an incomplete protection of the freedom of expression at the level of an international treaty, and an individual claims the higher national protection before an international body, such higher protection can be granted without any particular risks or costs.[23]

However, as mentioned in the introduction to this paper and as has been pointed out in most scholarly analyses, the interpretation of provisions like Article 53 ECHR as 'priority' clauses can create difficulties in cases disclosing a clash between different rights, values, or interpretations which seemingly have a similar value.[24] One may think here of classic cases of conflicts between the right to freedom of expression and the right to protection of one's reputation, the prohibition of discrimination and the freedom of expression, or different aspects of the right to respect for one's family life and the rights of the child. In practice, each of these conflicting rights cases is different. For example, reputation damage may be done by maliciously reporting incorrect information about a private individual, but also by a well-researched and nuanced disclosure of information about abuse of authority by a head of state. In light of the differences between such cases, the outcome of a test of reasonableness or proportionality of limitations will not be the same. It is for this reason that they are often dealt with by means of an *ad hoc* balancing test.

19 Ibid.
20 See the sources cited above (n 9).
21 Ibid.
22 See, Alkema (n 9) 49.
23 Ibid.
24 See, in particular, Alkema (n 9); Lawson (n 1).

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These differences between conflicting rights cases make it difficult to solve them by applying Article 53 ECHR as a priority rule, since that application would result in a rather absolute 'one size fits all' approach. Consider, for example, the hypothetical situation in which a national constitution gives very strong protection to the right to reputation and the private life of the head of state by strictly prohibiting all forms of *lèse majesté*. This could be considered a fundamental right that is protected to a high level by national law, as, according to the text of Article 53 ECHR, it cannot be 'limited or derogated from' by the Convention and therefore would need to be respected by the Court. However, the obligation to accept such rather absolute national protection would be difficult to reconcile with the high minimum level of protection that the Convention offers to the conflicting freedom of expression.[25] Moreover, such an absolute reading of Article 53 would stand in the way of engaging in *ad hoc* balancing in the actual case, which would make it impossible to take account of factual particularities and differences.

In view of this, it is perhaps not surprising that the Strasbourg organs do not usually refer to Article 53 ECHR in dealing with cases where national and Convention rights come into conflict.[26] Nevertheless, in light of the scholarly explanation of Article 53 ECHR, the application of this provision as a priority rule warrants a more detailed study. To explain how the Strasbourg organs have used the provision in this type of situation, it is useful to first discuss two (rare) cases in which the respondent government expressly invoked Article 53 and analyse how these were dealt with at the Strasbourg level. Thereafter, section 2.2 will confirm that, indeed, the ECtHR tends to evade having to apply Article 53 ECHR in these cases. Subsequently, section 2.3 discusses two alternative approaches taken by the Court in dealing with a conflict between a Convention right and a (highly protected) national fundamental right. Section 2.4 briefly summarises the findings and places them in light of the need to uphold a minimum level of Convention rights protection.

25 See, for example, *Colombani and Others v France* 51279/99 (ECtHR, 25 June 2002) paras 66–68; *Otegi Mondragon v Spain* 2034/07 (ECtHR, 15 March 2011) para 56; *Eon v France* 26118/10 (ECtHR, 14 March 2013); *Ömür Çağdaş Ersoy v Turkey* 19165/19 (ECtHR, 15 June 2021) para 58.

26 There are a few cases in which Article 53 was invoked, but the Court did not expressly refer to it in its judgment. An example is *Gustafsson v Sweden* [GC] 15573/89 (ECtHR, 25 April 1996), where the Court accepted the Swedish argument that the national protection of labour rights should prevail over the ECHR protection of negative freedom of association rights without referring to Article 53 ECHR. The reason for this can be seen in the dissenting opinion by Judge Martens, joined by Judge Matscher, where they claimed that the national interest did not come within the category of 'human rights and fundamental freedoms' as laid down in Article 53 (para 13). See, Liisberg (n 9) 1185.

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2.2 *Express Invocation of Article 53 – The Strasbourg Approach*

The first conflict of rights case in which Article 53 was expressly invoked by the respondent government is *Glimmerveen and Hagebeek v the Netherlands*.[27] The case concerned the conviction of two members of a neo-nazist political party for distributing leaflets, which the national court found to be inciting to racial discrimination. The applicants had complained about the resulting interference with the freedom of expression as protected by Article 10 ECHR, but the Netherlands government defended the conviction by explaining that it was necessary to protect against discrimination. The government thereby drew the attention of the European Commission of Human Rights to the Dutch obligations under the International Convention on the Elimination of all Forms of Racial Discrimination (CERD). It pointed to Article 53 to underpin its argument that its international obligations to protect individuals and society against racial discrimination would need to be given priority over its obligation under the Convention to respect the freedom of expression.[28] In the end, the Commission chose to declare the case inadmissible based on Article 17 ECHR, which prohibits the abuse of fundamental rights such as the freedom of expression. Consequently, it did not have to address the government's arguments concerning the CERD and its relationship to Article 10 and Article 14 ECHR.

Another case on conflicting rights in which the respondent state relied on Article 53 is *Open Door and Dublin Well Woman v Ireland*.[29] The case concerned a conflict between the right to access to information about the possibilities of having an abortion in another country, which is protected by Article 10 ECHR, and the rights of the unborn child, which were very strongly protected by the Irish Constitution. The Irish government had argued that the national constitutional right would be severely impeded if Article 10 ECHR were interpreted as meaning that women should be allowed to have access to information about abortions abroad. Expressly invoking Article 53 ECHR, the government alleged that Article 10 'should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law'.[30] However, the Court held that it was '… not the interpretation

27 *Glimmerveen and Hagenbeek v the Netherlands* 8348/78 and 8406/78 (ECmHR, 11 October 1979). On this case, see also, Alkema (n 9) 47.

28 Glimmerveen and Hagenbeek (n 27) 196.

29 *Open Door and Dublin Well Woman v Ireland* 14234/88 and 14235/88 (ECtHR, 29 October 1992). See also, Liisberg (n 9) 1184.

30 Ibid para 78.

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of Article 10 but the position in Ireland as regards the implementation of the law that [made] possible the continuance of the current level of abortions obtained by Irish women abroad'.[31] It thus did not need to answer the question as to whether the case concerned a real conflict between a Convention right and a constitutional right, and it did not have to explain the role to be played in such conflicts by Article 53 ECHR.[32]

Obviously, both cases concerned a conflict between a Convention right and a nationally or internationally protected fundamental right. Moreover, in both cases the respondent states invoked Article 53 as a priority rule. However, the Commission and the Court declined the invitation to decide on the meaning of Article 53 ECHR. Their reluctance is understandable in light of the theoretical objections set out in section 2.1. Reading Article 53 ECHR as a priority rule in such cases would mean that a higher national level of protection would always have to prevail over the Convention level, regardless of the circumstances of the case.[33] Indeed, the Court would unconditionally and automatically have to accept and respect the national protection of a certain fundamental right, regardless of how it relates to other Convention rights and to its own case law.[34] In a case like *Open Door and Dublin Well Woman*, for example, the Court would have to accept that a national constitutional right to protect unborn life would always prevail over the Convention right to information, regardless of the circumstances of the case. Such absolute priority for very high levels of national protection of fundamental rights is difficult to defend, since the result might impinge on the minimum level of protection of Convention rights, such as under Articles 8 and 10. This would be hard to reconcile with the principle of effective protection that is at the very heart of the Convention system.[35]

In addition, a priority reading of Article 53 ECHR in such conflicting rights cases would not sit easily with the Court's role in the Convention system.

31 Ibid para 79.

32 See also, Liisberg (n 9) 1183. The Court was criticised for taking this escape route by a few dissenting judges, who stated that the Court should have more substantively replied to the reasoning invoked by the government to explain why they had to conform to the Convention, regardless of their strong national protection of the right to life of the unborn (*Open Door and Dublin Well Woman* (n 29) Dissenting Opinion of Judges Pettiti, Russo, and Lopes Rocha, Approved by Judge Bigi).

33 Alkema (n 9) 48.

34 Ibid.

35 Compare sources mentioned earlier (n 1). On the effectiveness principle, see, for instance, JH Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 3.

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Articles 19, 32, and 34 ECHR suggest that the Court should always be able to act as a supervising body to determine whether the Convention rights have been duly respected by the national authorities.[36] A clear national choice to offer a particularly strong protection to one of the rights or interests at stake could hamper the Court's ability to engage in a full review of the reasonableness of certain interferences and thereby unduly limit its supervisory role.

It can be concluded from this that in conflicting rights cases, Article 53 ECHR cannot operate properly as a priority rule without posing a risk to the minimum protection of Convention rights and the Court's supervisory role.[37]

2.3 *Alternative Approaches to Dealing with Conflicting Rights Cases*

As is shown by the above discussion of the Court's (limited) practice, Article 53 does not appear to play any role of importance as a priority rule in cases where Convention rights and national fundamental rights and freedoms come into conflict. Nevertheless, the question may arise as to how, then, the Court strives to reconcile, on the one hand, the need to guarantee a minimum level of Convention protection and, on the other hand, the need – still implied by Article 53 ECHR – to respect a national choice to give additional weight to a right or freedom that is dearly held and highly protected at the national level.

To understand the approach that the Court has taken in this regard, it is important to note that in many cases, nationally protected fundamental rights and interests may be covered by the wide notion of 'the rights and freedoms of others' or one of the other legitimate aims that – according to most limitation clauses in the Convention – can serve to justify a limitation of a Convention right.[38] Such exemption clauses, in particular the proportionality and balancing standards implied therein, allow the Court to examine if a

36 See, with many references, JH Gerards and LR Glas, 'Access to Justice in the European Convention on Human Rights System' (2017) 35 *Netherlands Quarterly of Human Rights* 11–30.

37 See also Lawson (n 1) 28; Alkema (n 9) 51 and 55.

38 See the limitation clauses of Articles 8–11, Article 1 Protocol No 1, and Article 2 Protocol No 4 ECHR. On the notion of the 'rights and freedom of others', see further, J Bomhoff, 'The Rights and Freedoms of Others: The ECHR and its Peculiar Category of Conflicts Between Fundamental Rights', in *Conflicts Between Fundamental Rights,* E Brems (ed), (Intersentia 2008). On the approach the Court can take in this category of conflicting rights cases, see also, O De Schutter and F Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in *Conflicts Between Fundamental Rights,* E Brems (ed), (Intersentia 2008) 216, section II.1. It seems no longer entirely true, however, that in such cases the Court relies on a justification rather than a balancing approach (as the authors argued, based on the case law as it stood in 2008), as is shown in the present section.

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nationally claimed (fundamental) right or interest can reasonably prevail over a Convention right.[39]

The objective of the current section is to show how the Court uses the exemption clauses to deal with claims made by national authorities to the effect that nationally protected fundamental rights and freedoms should be given priority over the Convention, as seems to be permitted by Article 53 ECHR. The analysis of the Court's case law shows that the Court can deal with the difficulties involved in such cases in different ways. An important and well-known approach is by leaving states a certain margin of appreciation and thereby offering them leeway to give strong protection to certain national interests; another one is by focussing on compliance with procedural standards, which allows the Court to avoid having to engage in a substantive analysis of a conflict of rights. Since these two techniques and their pros and cons have been extensively discussed elsewhere,[40] the current section largely leaves them aside. Instead, it concentrates on two specific strategies – one of balancing (section 2.3.1) and one of avoidance (section 2.3.2) – and the way in which they are applied in the particular situation of a conflict between a Convention right and a nationally protected right.

2.3.1 Balancing

The first strategy to deal with conflicts between Convention rights and national rights entails that the Court holds that a national right or value is similar to a Convention right and then engages in much the same type of balancing review that it normally conducts in cases concerning conflicting Convention rights.[41]

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39 On the way the Court uses notions such as proportionality, balancing, and necessity in its reasoning, see further, for instance, Gerards (n 35) Chapter 10.

40 See, among many other authorities and referring to many other sources, E Brems, 'Positive Subsidiarity and its Implications for the Margin of Appreciation Doctrine' (2019) 37 *Netherlands Quarterly of Human Rights* 210; JH Gerards, 'Dealing with Divergence. Margin of Appreciation and Incrementalism in the Case-Law of the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 495; P Agha (ed), *Human Rights Between Law and Politics: The Margin of Appreciation Doctrine in Post-National Contexts* (Bloomsbury/Hart 2017); JH Gerards and E Brems, *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017); LM Huijbers, *Process-Based Fundamental Rights Review: Practice, Concept and Theory* (Intersentia 2019).

41 On this general balancing approach in conflicting rights cases, see, for example, S Smet, *Resolving Conflicts Between Human Rights: The Judge's Dilemma* (Routledge 2017). For some methods other than 'pure' balancing to review the justification for an interference with a fundamental right, see also, Gerards (n 40); Agha (n 40); Gerards and Brems (n 40). On balancing national interests to supranational fundamental rights, see, for example, Besselink (n 9) 639. On 'reversibility' (and for criticism of the Court's approach in this respect), see, I Leigh, 'Reversibility, Proportionality, and Conflicting Rights. *Fernández*

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An example of this approach can be seen in *Ebrahimian v France*, which concerned the non-renewal of the contract of a social worker in a psychiatric unit of a public hospital for wearing a veil. The Court accepted that this had affected the applicant's freedom to manifest her religion as protected by Article 9 ECHR. It also noted that the non-renewal of her contract was based on legislation that followed directly from the principle of secularism laid down in Article 1 of the French Constitution and the resultant principle of neutrality in public services.[42] The Court equated this principle to fundamental rights and freedoms, holding that it '… is clear from the case file that it was indeed the requirement of protection of the rights and freedoms of others … which lay behind the contested decision'. Subsequently, it reviewed the balance that had been struck between these interests at the national level. It thereby found that '… the fact that the domestic courts attached greater weight to this principle and to the State's interests than to the applicant's interest in not limiting the expression of her religious beliefs does not give rise to an issue under the Convention'.[43]

Hence, not only did the Court accept that a national constitutional principle was at play, but it also regarded it as a weighty interest similar to a 'right'.[44]

Martínez v. Spain', in *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?,* S Smet and E Brems (eds), (Oxford University Press 2017) 218, 229, explaining that 'the reversibility test requires the Court to ask whether another identifiable victim would have an admissible Convention claim if the State were to "reverse" the outcome by giving priority to the less favoured right'. This is what the Court seems to do in some of these cases, albeit that it does not – as Leigh advocates – only engage in actual balancing when it is clear that the nationally protected right *is* a Convention right (at 236), but also if it can be considered *similar* to a Convention right, as this section will demonstrate.

42 *Ebrahimian v France* 64846/11 (ECtHR, 26 November 2015) para 63.

43 Ibid paras 67 and 71. A similar approach can be seen in *SAS v France* [GC] 43835/11 (ECtHR, 1 July 2014), which concerned the prohibition of wearing face-veils in public places. Even if the Court did not expressly refer to a national constitutional right in its judgment, it did consider that the French government could 'find it essential to give particular weight in this connection to the interaction between individuals' (para 141) and held that the law 'can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others"' (para 154).

44 The Court often takes a similar approach in conflicting rights cases where one of the rights is not as such protected by the ECHR but is recognised in another international human rights treaty, such as the Convention on the Rights of the Child (n 9). See, for instance, *Tlapak and Others v Germany* 11308/16 and 11344/16 (ECtHR 22 March 2018) para 79. In those cases, it standardly engages in balancing review, for instance to see if the child's best interests should have prevailed over the right to family life of a parent. See, *Olsson (No 2) v Sweden* 13441/87 (ECtHR, 27 November 1992) para 90; *Elsholz v Germany* [GC] 25735/94 (ECtHR, 13 July 2000) para 50. In those cases the Court has neither linked

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This allowed it to balance it against Article 9 ECHR in much the same way as it would do in a case on conflicting Convention rights.[45] In addition, the judgment shows that the state was given considerable leeway to decide whether and under what conditions the national fundamental principle could be made to prevail over a Convention right.[46] Taken together, this permitted the Court to allow for special protection of the national principle, without having to rely on or refer to Article 53 ECHR.

The Court took a slightly different, yet comparable approach in the case of *A, B and C v Ireland*.[47] At issue in this case were abortion regulations in Ireland, which meant that the applicants could not obtain an abortion for health or well-being reasons. In justification of these restrictions, and expressly referring to Article 53 of the Convention, the Irish government had pointed at 'profound moral values deeply embedded in the fabric of society in Ireland', which found expression in the Irish Constitution.[48] The Court first considered that the restrictions 'pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect'.[49] It then continued to reason that it:

> must examine whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn.[50]

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this need for balancing to Article 53 ECHR nor qualified children's rights as rights that have to be respected on the national (and therefore the ECHR) level because a state has also ratified the UN Children's Rights Convention.

45 See sources cited earlier (n 42). For a similar approach, see, *Polat v Austria* 12886/16 (ECtHR, 20 July 2021) paras 86, 89, and 91, where the Court first found that the freedom of science in Austria is constitutionally guaranteed and the national interpretation of this freedom is closely related to positive obligations the Court has accepted under Articles 2 and 8 ECHR, and then required the national authorities to balance this constitutional freedom and the rights and freedoms it represented to the Convention rights claimed by the applicants.

46 For criticism of this lenient approach in freedom of religion related cases, see, for example, Brems and Vrielink (n 2).

47 *A, B and C v Ireland* [GC] 25579/05 (ECtHR, 16 December 2010).

48 Ibid para 180.

49 Ibid para 227.

50 Ibid para 230.

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Although the Court did not expressly qualify this case as a conflicting rights case, it can be derived from its reasoning that it regarded the right to life of the unborn as a right that was equivalent to Convention rights. The Court then engaged in a review of the national interference with the applicants' Article 8 rights, leaving a wide margin of appreciation to the state and concluding that the prohibition struck a fair balance between the right to respect for the applicants' private lives 'and the rights invoked on behalf of the unborn'.[51] The Court thus applied a type of balancing review, similar to the one usually applied in cases on conflicts between Convention rights.[52] This shows that the Court does not apply Article 53 ECHR as such in these cases, probably because that provision would entail that the national fundamental right should automatically be given priority. Instead, it engages in *ad hoc* balancing in each individual case, which may imply that occasionally the Convention right at stake is given priority over a conflicting national right.

2.3.2 Avoiding Balancing

In other cases where national fundamental rights have been invoked to justify an interference with the Convention, the Court has avoided the need to balance that national right against a Convention right. An example of this can be seen in *Bayev v Russia*, which concerned a prohibition of so-called 'homo propaganda'.[53] The Russian government had defended the prohibition by pointing out that it was necessary to protect 'the private lives and rights of minors', thereby claiming that the prohibition stemmed from a conflict of fundamental

51 Ibid para 241.

52 See further on the approach taken in these sensitive cases, NR Koffeman, *Morally Sensitive Issues and Cross-Border Movement in the EU: The Cases of Reproductive Matters and Legal Recognition of Same-Sex Relationships* (Intersentia 2015) Chapters 2 and 7. This approach can also be observed in similar cases, such as cases on access to the institute of marriage. In many states the institute of marriage is reserved for couples of different sex for reasons of 'protecting the family in the traditional sense', which the Court deems, in principle, a legitimate and weighty interest (see, for example, *Vallianatos and Others v Greece* [GC] 29381/09 and 32684/09 (ECtHR, 7 November 2013)). However, it has accepted that an alternative institution should then be available that offers sufficient legal recognition and protection of same-sex partnerships. In finding out if such an alternative is offered, the Court may engage in balancing review. For example, in *Hämäläinen v Finland* [GC] 37359/09 (ECtHR, 16 July 2014), the Finnish legislation required persons who had undergone a gender transition to divorce their original (different-sex) partner and then enter a civil union. Accepting the perceived importance of safeguarding the traditional marriage as an institution, the Court examined if the obligation struck a fair balance between the national interest and that of the individuals concerned and found that it did (paras 81–88).

53 *Bayev v Russia* 67667/09, 44092/12, and 56717/12 (ECtHR, 20 June 2017).

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rights.[54] The government argued that statements such as 'homosexuality is natural', 'homosexuality is normal', or 'homosexuality is good' would place psychological pressure on children, influence their self-identification, and intrude into their private lives.[55] In response to this, the Court chose not to regard the claimed rights as constituting a national constitutional right worthy of being balanced against the freedom of expression as protected by the Convention.[56] Instead, it found that the government's position was based on assumptions that could be regarded as manifestations of predisposed bias.[57] Moreover, based on what is known about the influence of providing science-based information to minors about homosexuality, the Court concluded that the measures were in fact 'likely to be counterproductive in achieving … the protection of rights of others'.[58] Thus, it could find a violation of Article 10 ECHR without having to balance the claimed national protection of the fundamental rights of minors against the Convention's freedom of expression as if they were co-equal rights.[59]

The Court took a comparable approach in *Zhdanov and Other v Russia*, which concerned the Russian refusal to register LGBT organisations as 'public associations' because, among other things, the government found that they might 'jeopardise the constitutionally protected institutions of family and

54 Ibid para 50.

55 Ibid para 65.

56 In a way, this can be seen to reflect the position that Judges Martens and Matscher already took in their dissenting opinion in the *Gustafsson* case of 1996, where they reasoned that an interest that is 'incompatible both with the rule of law and with a proper protection of the individual's … rights under … [the Convention]. Having created a right that is thus essentially flawed, [the Government] should not be allowed to pass it off as a human right or fundamental freedom within the meaning of those terms in the context of [Article 53 of] the Convention (*Gustafsson* (n 26) Dissenting Opinion of Judge Martens, Joined by Judge Matscher).

57 *Bayev* (n 53) paras 77–82.

58 Ibid para 83.

59 A similar approach was taken in *Beizaras and Levickas v Lithuania* 41288/15 (ECtHR, 14 January 2020), where national courts had qualified a Facebook post containing a photo showing two kissing men as 'eccentric behaviour' and upheld the refusal to constitute an investigation into the many negative and threatening comments on the post by pointing at the great importance that was attached in Lithuania to 'traditional family values'. The Court found that '[i]n the present case, although the Klaipėda District Court cited the alleged incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality, the Court sees no reason to consider those elements as incompatible, especially in view of the growing general tendency to view relationships between same-sex couples as falling within the concept of "family life"' (para 122). For that reason, it discounted this interest as a factor relevant to its judgment on the reasonableness of the lack of a proper investigation.

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marriage'.[60] In light of what it had held in *Bayev*, the Court found that these constitutionally protected institutions could not be considered to be really affected by the LGTB organisations. Instead, it noted that the national authorities' refusal to register the association appeared to be founded in an alleged 'right not to be confronted with any display of same-sex relations or promotion of LGBT rights or with the idea of equality of different-sex and same-sex relations'.[61] In response to this, the Court emphasised that 'the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions' and showed itself 'not convinced that the refusals to register the applicant associations could be considered to pursue the legitimate aim of the protection of the rights of others'.[62] Consequently, the Court did not have to pronounce its views on whether these rights, as protected at the national level, should be given priority over Article 11 ECHR.

One final example of the avoidance strategy can be found in *Fedotova and Others v Russia*.[63] The case concerned the lack of any form of legal recognition of same-sex unions, which the Russian government sought to justify by pointing at the opposition of a large percentage of the Russian population to same-sex marriages and the leeway that Russia should be given to develop its own policy 'in line with its traditional understanding of marriage'.[64] The Court acknowledged that in 2020, the right to protect the traditional marriage had been laid down in the Russian Constitution. This could make it a national constitutional right of co-equal value to the Convention rights, which, at least potentially, could raise questions under Article 53 ECHR. Moreover, unlike in *Bayev* and *Zhdanov*, the Court conceded that this constitutional value constituted 'in principle [a] weighty and legitimate interest'.[65] However, the Court further reasoned that it did not 'discern any risks for traditional marriage which the formal acknowledgment of same-sex unions may involve, since it does not prevent different-sex couples from entering marriage, or enjoying the benefits which the marriage gives'.[66] Consequently, it could not 'identify any prevailing community interest against which to balance the applicants' interests as identified above'.[67] Thus, even though the Court recognised the national constitutional right as weighty and legitimate, it did not accept that it should

60 *Zhdanov and Others v Russia* 12200/08 and others (ECtHR, 16 July 2019) para 119.
61 Ibid para 157.
62 Ibid paras 158–159.
63 *Fedotova and Others v Russia* 40792/10 and others (ECtHR, 13 July 2021).
64 Ibid paras 33 and 35.
65 Ibid para 54.
66 Ibid.
67 Ibid para 55.

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play any role in justifying the interference with a Convention right because of the manifest unsuitability of the means used to protect it.

Hence, in all three cases the Court reasoned that the fundamental rights or principles claimed by the government did not amount to 'rights of others' that could be reasonably invoked in justification of the interference with a Convention right. Consequently, the Court did not have to examine the reasonableness of giving priority to such a right over one of the rights protected by the Convention, and could avoid having to answer the question raised by Article 53 of whether the protection of the Convention would 'limit or derogate from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party'.

2.4 *Avoiding Article 53 and Ensuring a Minimum Level of Protection in Conflicting Rights Cases*

The analysis provided in sections 2.2 and 2.3 shows that the Court has generally avoided the application of Article 53 ECHR in cases on conflicting Convention and national rights and values. Moreover, the judgments discussed in section 2.3 may serve to show that there is no need for the Court to rely on Article 53 in most cases involving conflicts between Convention rights and national fundamental rights and freedoms. The Court can either avoid having to deal with the interrelationship between Convention and national rights by disqualifying a national interest as one that is capable of justifying a restriction of a Convention right, or resort to the well-known balancing approach that it also uses in cases on conflicting Convention rights.

In addition, the approaches discussed in section 2.3 enable the Court to define and sustain the necessary minimum level of Convention protection.[68] Perhaps this is not self-evident, as the Court's willingness to accept certain national principles as equal to fundamental rights and grant a wide margin of appreciation to the states in balancing them against Convention rights may have the effect of giving lesser protection to certain Convention rights than to particular national values.[69] However, the judgments discussed in section 2.3.2 show that the Court does not uncritically accept all national principles or interests as equal to Convention rights. It may hold that certain national values, rights, or principles do not constitute legitimate or relevant interests that it should take into account in its balancing review, however important these interests might be deemed to be at the national level. Such judgments signify

68 See also, Van de Heyning (n 9) 68.
69 Compare the argument made by Brems and Vrielink (n 2).

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that the Court firmly holds on to its competence to determine the minimum level of protection of Convention rights in deciding when and to what degree national values can be given priority over Convention rights in concrete cases.

It can further be derived from the examples discussed in this section that even if a Convention right is given a lower degree of protection in a concrete case in order to more fully guarantee the effective exercise of a national fundamental right or principle, this will hold only for one particular situation of conflict. For example, the principle of secularity may prevail in one case on limitations of religious manifestations, yet in the next one, depending on the facts and circumstances of the case, the freedom of religion may be given precedence.[70] Overall, therefore, it may be expected that the Court's approach will result in the protection of Convention rights to a degree above the required minimum, even if in some concrete cases, national fundamental rights or principles can be seen to outweigh a Convention right.[71]

Finally, the analysis shows that Article 53 has no tangible role to play in finding the delicate balance between respecting national protection of fundamental rights and offering a sufficiently high level of Convention protection.[72] If anything, the examples demonstrate that the Court actively avoids applying Article 53 (even if it is expressly invoked by a respondent government) and prefers to rely on alternative techniques. As was explained in section 2.1, this is understandable in light of the absolute nature of Article 53 as a priority clause in conflicting rights cases. Once it would be accepted that a claimed national right or interest is 'fundamental', it should be given priority over the Convention rights. From the perspective of upholding a minimum level of protection of Convention rights, it is likely that the Court prefers to resort to its more common case-by-case balancing approach for that reason.

3 Article 53 as a Basis for Offering Complementary Convention Protection

3.1 *Introduction*

In section 2, it was explained that Article 53 ECHR does not play any significant role in the Court's case law on conflicting national and Convention rights. Instead, tests of legitimacy, suitability, and balancing are central in reconciling the need to offer a minimum level of protection to the Convention rights with

70 See, in comparison, Leigh (n 41) 228.
71 Compare, Van de Heyning (n 9) 81.
72 See, in comparison, Alkema (n 9) 55.

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the obligation to respect national fundamental rights and freedoms. At the same time, this invites the question of whether Article 53 can play any other useful role in the Court's case law and, if so, how that role relates to the principle of minimum Convention protection. The answer to this question can be found in the Court's judgments about Article 53 in cases where no conflict of rights arises but national law still provides for a stronger protection of fundamental rights than is strictly required by the Convention.[73] The current section aims to present an analysis of these judgments, which will show that in some cases the Convention can usefully complement and add to the heightened protection given at the national level. To illuminate the role played by Article 53, the Court's complementary or 'reinforcement' approach is discussed in section 3.2, whilst some exceptions to it are set out in section 3.3. Section 3.4 concludes by explaining the compatibility of the reinforcement interpretation of Article 53 ECHR with the need to provide for minimum Convention protection.

3.2 *'In for a Penny, in for a Pound': Embracing and Reinforcing National Protection*

As mentioned above, whereas Article 53 is seldom relied on in cases on *conflicting* rights, the Court has more frequently referred to it in cases where national law is *complementary* to the Convention. Most examples in this respect relate to Article 6 ECHR. To understand this, it may be useful to recall that the scope of application of Article 6 is limited to disputes on civil rights and obligations and criminal charges. The Court has given a wide, autonomous and evolutive meaning to these notions, but Article 6 still has its limitations. It does not, for example, apply to judicial proceedings on issues of immigration, elections, or taxation,[74] or oblige the contracting states to set up courts of appeal or cassation.[75] Furthermore, the list of procedural rights and guarantees contained in Article 6 is not exhaustive, and there are some gaps that may be filled at the national level. Indeed, the notion of minimum protection – as confirmed by Article 53 ECHR – allows the states parties to add to the material scope of

73 See also, Lawson (n 1); Van de Heyning (n 9); Gerards (n 35); De Meyer (n 9) 129; Alkema (n 9) 47.

74 See, for example, ECtHR, 'Guide on Article 6 of the Convention – Right to a Fair Trial (Civil Limb)' (updated 31 December 2020): <www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> paras 66–76.

75 See, for example, *Shamoyan v Armenia* 18499/08 (ECtHR, 7 July 2015) para 29. For criminal matters, this gap has been filled by Article 2 of Protocol No 7, but this Protocol has not been signed by all Convention states, nor does it provide for the same right in civil and administrative proceedings.

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protection afforded under Article 6 and guarantee additional procedural rights, for example in cases on taxation or procedures before an appeals court.[76]

The Court has confirmed several times that Article 53 ECHR allows for such additional national protection. In *Gestur Jónsson and Ragnar Halldór Hall v Iceland*, for example, the Court noted that 'nothing prevents the Contracting States from adopting a broader interpretation entailing a stronger protection of the rights and freedoms in question within their respective domestic legal systems (Article 53 of the Convention)'.[77] Moreover, in line with the text of Article 53 ECHR, the ECtHR has held that the Convention cannot be read as detracting from such additional protection if it is offered on the domestic level. In the Court's words:

> The Court does not countenance the view that human rights protection in any particular area should be weaker in Strasbourg than it is in domestic tribunals. That being so, the Court notes that the concept of "civil right" under Article 6 § 1 cannot be construed as limiting an enforceable right in domestic law within the meaning of Article 53 of the Convention …'.[78]

Instead, in the Court's view, the nature of the Convention in offering a collective guarantee to the protection of fundamental rights means that '… the Convention *reinforces*, in accordance with the principle of subsidiarity, the protection at national level'.[79]

In most such cases, this 'reinforcement' means that the Court accepts that a certain procedure or right (which is not normally protected under Article 6) should also meet the other requirements of Article 6 ECHR.[80] For example, even if it is not obligatory under Article 6 to set up an appeals court or a court of cassation, if such a court has been established at the national level, the procedures before it should comply with the Court's case law on the right to a fair

76 For example, see, *Di Martino and Molinari v Italy* 15931/15 and 16459/15 (ECtHR, 25 March 2021) para 3; *Budak v Turkey* 69762/12 (ECtHR, 16 February 2021) para 87.

77 *Gestur Jónsson and Ragnar Halldór Hall v Iceland* [GC] 68273/14 and 68271/14 (ECtHR, 22 December 2020) para 93.

78 *Micallef v Malta* 17056/06 (ECtHR, 15 January 2008) paras 44–45.

79 Ibid para 45 (emphasis added by the author). See more recently, *Di Martino and Molinary* (n 76) para 39.

80 For example, *Gajtani v Switzerland* 43730/07 (ECtHR, 9 September 2014) para 74; *Shamoyan* (n 75). For a slightly different formulation, see, for example, *Yevdokimov and Others v Russia* 27236/05 and others (ECtHR, 16 February 2016) para 34.

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trial.[81] As the Court has mentioned, this line of reasoning has the function of strengthening the national protection of Convention rights.[82]

In a series of judgments, the Court has extended this interpretation of Article 53 ECHR to some other Convention provisions, notably Article 14 ECHR (the prohibition of discrimination). For Article 14, this can be illustrated by *EB v France*, which concerned the refusal of a request to adopt a child by a single woman.[83] According to well-established case law on Article 8 (covering the right to respect for one's family life), this provision only covers *existing* family life – the right to *create* a family, for instance by means of adoption, falls outside its scope.[84] In France, however, a certain degree of protection was offered in domestic law by recognising the right to adopt a child for couples. Although the legislation clearly constituted discrimination against singles, it could be argued that the Court could not deal with the case and would have to declare it inadmissible *ratione materiae*, since the discrimination did not concern one of the rights protected under the Convention. In its judgment in *EB*, however, the Court reasoned as follows:

> The present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. Whilst Article 8 of the Convention is silent as to this question, the Court notes that French legislation expressly grants single persons the right to apply for authorisation to adopt and establishes a procedure to that end. Accordingly, the Court considers that the facts of this case undoubtedly fall within the ambit of Article 8 of the Convention. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 ….[85]

81 For example, *Gajtani* (n 80) para 74.
82 See sources cited earlier (n 80).
83 *EB v France* [GC] 43546/02 (ECtHR, 22 January 2008). On this case, see also, Lawson (n 1) 24; JH Gerards, 'Judicial Minimalism and "Dependency": Interpretation of the European Convention in a Pluralist Europe', in *Fundamental Rights and Principles,* M van Roosmalen and others (eds), (Intersentia 2013) 73; Van de Heyning (n 9) 74.
84 See, for example, *Fretté v France* 36515/97 (ECtHR, 26 February 2002). See also, *EB* (n 83) para 41.
85 *EB* (n 83) para 49.

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If a certain fundamental right is recognised in domestic law and falls within the wider 'ambit' of a substantive Convention law provision, the Court thus considers itself competent to review the national legislation for its compatibility with the right to non-discrimination.[86] In other words, if a state voluntarily decides to offer more or higher protection than is strictly required by the Convention – proverbially meaning that it is 'in for a penny' –, it should also be 'in for the pound' of accepting that its higher protection should comply with the Convention obligation not to discriminate against certain persons or groups.[87] Over time, the Court has used this approach to decide many more cases that concern 'new', often delicate issues – such as reproductive rights, abortion, or the rights of same-sex couples –, which Article 8 of the Convention does not clearly cover, but may be protected by states beyond the requirements of the Convention.[88]

Similarly, the Court has applied its reinforcement approach in relation to cases under Article 5 ECHR, which protects the right to liberty and habeas corpus.[89] This can be illustrated by the Court's judgment in *Suso Musa v Malta*,

86 Arguably the additional protection offered in Article 14 cases such as *EB* is not (only) due to the Court's reinforcement reading of Article 53, but it is (also) related to the Court's wide 'ambit' approach in these cases (on that approach, see, for instance, OM Arnardóttir, 'Discrimination as a Magnifying Lens: Scope and Ambit Under Article 14 and Protocol No. 12', in *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights,* E Brems and JH Gerards (eds), (Cambridge University Press 2013) 330–349). However, it is still notable that the Court expressly referred to Article 53 in its reasoning and, apparently, did see a function for it. Considering the similarity of the situation in *EB* to that in the Article 6 cases, it is likely that the Court – by including its reference to Article 53 – hinted at the same 'reinforcement' function that it has accepted in these procedural cases.

87 Elsewhere I have also termed this the 'dependency' approach. See, Gerards (n 83) 74. On this notion and other, similar notions (such as the 'latex' nature of the Court's approach), see also, Lawson (n 1) 26; Koffeman (n 52) 637. The Court has equally applied this method in cases on social security and social benefits. See, for example, *Carson v the United Kingdom* [GC] 42184/05 (ECtHR, 16 March 2010) paras 64–65, and more recently, *Molla Sali v Greece* [GC] 20452/14 (ECtHR, 19 December 2018) para 123; *Popović and Others v Serbia* 26944/13 and others (ECtHR, 30 June 2020) para 49).

88 For example, *Tysiąc v Poland* 5410/03 (ECtHR, 20 March 2007); *Schalk and Kopf v Austria* 30141/04 (ECtHR, 24 June 2010); *PB and JS v Austria* 18984/02 (ECtHR, 22 July 2010); *RR v Poland* 27617/04 (ECtHR, 26 May 2011); *X and Others v Austria* [GC] 19010/07 (ECtHR, 19 February 2013); *Pajić v Croatia* 68453/13 (ECtHR, 23 February 2016) para 80; *Aldeguer Tomás v Spain* 35214/09 (ECtHR, 14 June 2016) para 76; *AH and Others v Russia* 6033/13 (ECtHR, 17 January 2017) para 381. See also, Gerards (n 83) 82–83.

89 For example, *OM v Hungary* 9912/15 (ECtHR, 5 July 2016) para 47.

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which concerned an asylum seeker who had been detained on Maltese territory pending his asylum claim.[90] The Court emphasised in its judgment that such detention is not unlawful under Article 5 ECHR as long as it aims 'to prevent [an individual] effecting an unauthorised entry into the country'.[91] However, it also considered that a state may go:

> beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – [by enacting] legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application.[92]

In such a situation, the Court reasoned, 'an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f)'.[93] Hence, the Court connected the protection offered by Article 5(1) ECHR to the national, wider understanding of the notion of an unauthorised stay. After a further examination of the national interpretation and the facts of the case, it concluded that Article 5(1) ECHR had been violated in respect of the applicant's immigration-related detention, even though that provision normally would not have applied.[94] Again, this shows that the Court may use Article 53 to embrace the protection offered at the national level and then add to it by connecting the Article 5 requirements to the rights voluntarily recognised in domestic law.

The complementary or reinforcement reading of Article 53 can thus have the function of increasing the level of protection offered to a fundamental right. It should be noted, however, that Article 53 can only serve this function as long as a state – voluntarily – decides to provide such higher protection. This can be derived from *Filat v Moldova*, which was another case on Article 5 ECHR.[95] Originally, Moldovan legislation extended the scope of the procedural guarantees offered for pre-trial detention to detention following a 'conviction by a competent court' within the meaning of Article 5(1)(a) of the Convention.[96] As explained by the Court, this is not as such required by

90 *Suso Musa v Malta* 42337/12 (ECtHR, 23 July 2013); *Aboya Boa Jean v Malta* 62676/16 (ECtHR, 2 April 2019). In a different context, see, *Norik Poghoshyan v Armenia* 63106/12 (ECtHR, 22 October 2020).
91 *Suso Musa* (n 90) para 90.
92 Ibid para 97.
93 Ibid.
94 *Suso Musa* (n 90) para 107.
95 *Filat v Moldova* 11657/16 (ECtHR, 7 December 2021).
96 Ibid para 31.

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Article 5(4) ECHR.[97] However, in Filat's case it turned out that the legislation had just been amended and no longer provided for any more far-reaching protection and procedural possibilities. Filat had complained about this, but the ECtHR held that the Moldovan legislature had been free to make this choice. It observed that Article 5(4) imposed no restriction on the freedom of states to decide whether or not to introduce additional safeguards to those required by that provision.[98] It therefore declared the complaint inadmissible. It can be concluded from this that the reinforcement interpretation really is connected to an existing national 'surplus' of protection. Once this surplus ceases to exist, the additional Convention protection can no longer be attached to it.

3.3 *Exceptions to the 'Reinforcement Interpretation' of Article 53 ECHR?*

In a few cases, the Court appears to have accepted exceptions to the Article 53 ECHR approach sketched in section 3.2. It did so, first, in an admissibility decision in another case on Article 5 ECHR: *Borg v Malta*.[99] This case concerned the amount of compensation that had been offered in relation to a period of unlawful detention. According to the applicant, the amount had been too low, since the calculations did not include a period of house arrest, which, in his view, formed part of his detention. The Court observed that according to its own case law, Article 5 does not apply to periods in which an individual is not strictly detained, but is released on bail and only has to meet particular conditions, such as not leaving their home at night.[100] However, the Court also noted 'the peculiarity of the present case in that the Constitutional Court did find a violation'.[101] The Court recalled its reinforcement case law under Article 53 and emphasised that the Constitutional Court had awarded the applicant compensation for the entire period of their detention, including the period of house arrest. Based on the case law discussed in section 3.2, it might be expected that the Court would then connect its own review to this and assess whether the compensation offered had been fair in light of Article 5(5) ECHR. However, the Court decided differently, noting that:

> … in the circumstances of the present case, and specifically the fact that the circumstances which led the Constitutional Court to find a violation of Article 5 do not constitute a deprivation of liberty in the Court's view, it

97 Ibid para 32.
98 Ibid para 33.
99 *Borg v Malta* 39783/15 (ECtHR, dec, 5 September 2017).
100 Ibid para 35.
101 Ibid para 37.

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> would not be appropriate for the Court to examine whether the compensation awarded by the Constitutional Court was disproportionate in the light of the order to pay costs, given that such an award would not have been made under the Convention. It suffices for the Court to find that the applicant had an enforceable right to compensation, which he pursued successfully. It follows that this complaint is also manifestly ill-founded ….[102]

Apparently, the Court did not see any reason to apply its reinforcement approach.[103] Similarly, it has sometimes held that even if a state has voluntarily offered a wider protection in respect of procedural rights than would strictly be required by Article 6, this does not necessarily mean that the Court is competent to deal with a complaint related to the violation of such additional rights.[104] Instead, it may hold that the non-obligatory award of compensation or procedural rights falls within the state's own responsibility and cannot be reviewed by the Court.

Another deviation from the Court's reinforcement case law can be seen in a decision in *Krombach v France*.[105] Krombach had been suspected of rape and murder of his stepdaughter, but the criminal investigations had been dropped due to a lack of evidence. A few years later, the biological father of the stepdaughter abducted Krombach to France, where Krombach was still suspected and was soon arrested. Krombach alleged before the Court that the prosecution in France amounted to *bis in idem*, but the Court emphasised that the relevant Convention provision – Article 4 of Protocol No 7 ECHR – only applied to prosecutions which take place in one Convention state. It also mentioned that both France and Germany were members of the European Union, which might imply that specific rules on *ne bis in idem* applied that could offer a higher degree of protection than that strictly required by Article 4 of Protocol No 7. Referring to its case law on Article 53, the Court emphasised that the

102 Ibid.

103 It should be noted, moreover, that the Court reverted to its previous approach in *Norik Poghoshyan* (n 90), which also concerned the right to compensation under Article 5(5) in relation to a case of detention that would not have been unlawful under the Court's own case law on Article 5(1) ECHR (para 32). Noting that the applicant's detention 'was rendered unlawful within the meaning of domestic law following his acquittal and considered as such by the domestic courts', the Court concluded 'that, in the particular circumstances of the case, a breach of the guarantees of Article 5 § 1 has been established in substance at the domestic level and that, consequently, Article 5 § 5 is applicable to the applicant's case' (para 36).

104 For example, *Demin v Russia* 66314/11 (ECtHR, dec, 6 October 2020) para 53.

105 *Krombach v France* 67521/14 (ECtHR, dec, 20 February 2018).

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Convention 'reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level, without ever imposing limits on it'.[106] In light of the approach discussed in section 3.2, it could be expected that the Court would continue to hold that the additional guarantees offered by Article 4 of Protocol No 7 applied. However, the Court reached a different conclusion, repeating that Article 4 of Protocol No 7 did not preclude a person from being criminally prosecuted or punished by the courts of a Convention state for an offence for which he or she had been acquitted or convicted by a final judgment in another state, and deciding that the Convention did not apply to the case for that reason.[107] The Court thus accepted that the Convention states alone were responsible for deciding on the degree to which the *ne bis in idem* principle ought to be guaranteed in their national legal systems.

It is not easy to explain these exceptions to the Court's reinforcement case law.[108] An explanation for the *Krombach* approach can possibly be found in the EU law aspect in the case, which might invite a greater degree of judicial restraint so as to allow for states' need to comply with their EU obligations. This might make it more difficult for the Court to oblige them to provide for additional procedural guarantees. Nevertheless, all exception cases have in common that the states had voluntarily – or based on EU law – decided to offer additional protection and it was possible to find a certain connection to the procedural rights guaranteed by the Convention. Theoretically, therefore, in all of these cases the Court could have applied its reinforcement approach. At this moment, without further clarification in the Court's judgments, the reasons for not applying the reinforcement approach in these cases remain obscure.

3.4 *Reinforcement Interpretation of Article 53 and the Minimum Level of Protection*

It can be seen from the analysis provided in sections 3.2 and 3.3 that in many (but not all) cases of additional national protection of fundamental rights, the Court uses Article 53 to ensure that these rights are guaranteed in a procedurally fair and non-discriminatory manner, compatible with the Convention. The interpretation of Article 53 as connecting non-discrimination and procedural guarantees to higher levels of national protection has two important consequences in relation to the need to offer a minimum level of protection.

106 Ibid para 39.
107 Ibid para 40.
108 Even more so because *Borg* seems to have been a single deviation. See, *Demin* (n 104).

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First, the Court's reinforcement interpretation of Article 53 ECHR could cause differences in the protection of Convention rights.[109] Higher levels of protection offered to certain rights at the national level may lead a Convention state to provide for a higher level of guarantees of equality and procedural rights, while a similar level may not be required in states that do not offer any additional protection of rights in the first place. Moreover, it is clear that a state can freely decide to reduce a high level of protection that it previously offered in its legislation. Seen from the perspective of the Court's need to offer a minimum level of protection perspective, this is, however, not an issue, since accepting more encompassing obligations for some states certainly does not detract from that minimum level, and the level provided after a national reduction of an existing 'surplus' must still be consistent with the Convention. Quite to the contrary, the Court's case law generally may be seen to amplify the national protection of fundamental rights to the standards required in its case law, even for rights that are not as such within the scope of protection of the Convention.[110] This is much in line with a reading of Article 53 as allowing for an additional, high degree of national protection.

Another consequence of the Court's complementary approach to Article 53 ECHR is related to its jurisdiction. In cases in which the Court applies reinforcement interpretation, it implicitly considers itself competent to rule on the compatibility of domestic legislation with the guarantees offered by Articles 5, 6, and 14 ECHR, even if – strictly speaking – the legislation falls outside the scope of the Convention. Consequently, the 'in for a penny, in for a pound' approach brings along a greater degree of Court supervision of national law.[111] This may sit uneasily with the Court's need to respect national sovereignty and play a subsidiary role. This might be the reason why it has expressly mentioned in some sensitive cases that they remain within the national authorities' own remit and responsibility, and why it has refrained from applying its reinforcement approach in such cases.[112] As mentioned in section 3.3, however, the

109 Put differently, it can be qualified as contrary to (Van de Heyning (n 9) 77) or as an exception to or limitation of (Gerards (n 83) 74) the notion of autonomous interpretation.

110 The approach thus operates 'one way only' (see, Lawson (n 1) 27). An indirect consequence can be (but not necessarily is) a gradual harmonisation or convergence of national law, as has been shown to exist by Koffeman for cases on same-sex unions and reproductive rights (see, Koffeman (n 52) 643).

111 Compare, JH Gerards, 'The European Court of Human Rights and the National Courts – Giving Shape to the Notion of 'Shared Responsibility'', in *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis,* JH Gerards and J Fleuren (eds), (Intersentia 2014) 13, 50.

112 As mentioned in section 4.3, however, this is speculative, as it is not clear why the Court has deviated from its reinforcement approach in the cases discussed in that section.

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reasons for the non-application of the approach in some cases are not entirely clear.

4 Conclusion

It is generally accepted that the Convention offers minimum protection to fundamental rights. States are free to provide a higher degree of protection to such rights in their own domestic law, as is expressly confirmed by Article 53 ECHR. Although this makes Article 53 an interesting provision from the perspective of the respective roles of the Court and the contracting states in protecting the Convention rights, its precise function and meaning have remained underexplored.[113] For that reason, this paper has taken a closer look at it, analysing the Court's (non-)application of Article 53 and relating it to the notion of minimum Convention rights protection.

Section 2.1 has shown that in many, if not most, of the fundamental rights cases, it is theoretically difficult to defend that a 'most protective' clause, such as Article 53, is read as a priority rule. Such a reading would mean that the highest level of protection given to a fundamental right automatically prevails, whether it is the protection given at the international (or ECHR) level or that provided by national law. Such an understanding of Article 53 could be troublesome in cases in which a high degree of national protection of a particular fundamental right or constitutional value would clash with the protection of a Convention right.

Indeed, the case law analysis presented in section 2 shows that Article 53 hardly plays a role in such conflicting rights cases. Instead, the Court appears to solve such cases in one of two ways; the Court either avoids the issue of deciding on the relationship between the national and Convention rights altogether, or it assimilates the national right to a fundamental (Convention) right and then engages in a balancing exercise to establish which right could reasonably prevail in the circumstances of the case. Both of these approaches can be seen to be in line with the need to offer a minimum level of Convention protection required by the Convention. This is particularly true given that the Court has firmly held on to its competence to decide which national rights and principles can be regarded as tantamount to fundamental rights and can therefore reasonably be balanced against Convention rights.

113 Alkema (n 9).

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The situation is different for a second possible reading of Article 53 ECHR, which has been termed the 'reinforcement reading'. As explained in section 3, if a state voluntarily decides to adopt a higher level of protection than is strictly required by the Convention, the Court – often making express reference to Article 53 ECHR – usually holds that such additional protection must be granted in accordance with the Convention guarantees of procedural fairness and non-discrimination. This 'in for a penny, in for a pound' or reinforcement approach allows the Court to offer protection of fundamental rights over and above the minimum level that is strictly required under the Convention. At the same time, it provides the Court with an additional competence to deal with national fundamental rights issues, which might explain why, so far, it has refrained from consistently applying this reinforcement approach in all cases in which this would have been possible.

It can be concluded from this that Article 53 ECHR may have a useful function in allowing states to adopt and maintain their own, high levels of protection of fundamental rights. It can only have that function, however, if it is not understood as a priority rule, but if the Court's own 'reinforcement' approach is followed. In that application, there is no risk of Article 53 resulting in the undermining of the minimum protection offered by the Convention. To the contrary, in these cases – where no conflict of rights occurs – Article 53 can serve to complement and strengthen the higher national protection by adding specific, procedural, and non-discrimination aspects of Convention protection. Hence, in the reinforcement interpretation, Article 53 can be seen to offer a valuable, flexible treaty basis for integrating national and Convention rights,[114] which may help to give shape to the notion of shared responsibility for the protection of these rights by both the ECtHR and national actors.[115] This may result in an increase in the minimum protection offered to the Convention's fundamental rights, even if only for those states who decide to offer extra protection from their own motion.

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114 See, Alkema (n 9) 51.
115 See also, Gerards (n 111).

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