The European Convention on Human Rights and the Control of Private Law

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This article explores the evolution of the European Convention [of Human Rights] applicability in private law through the development of the concept of positive obligations on state parties arising under the Convention. The article explores the case law of the European Court of Human Rights primarily through the case of Pla and Puncernau v Andorra, looking at the law of interpretation and the regulation of private transactions through the principles of "horizontal effect" and the Convention as a "living instrument", concluding with observations concerning the legitimacy of the European Court's position on this issue.

The influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) now extends beyond anything contemplated at the time it was agreed to in 1950.1 As a matter of geography this results from the stunning expansion of the Council of Europe after the demise of the Soviet bloc. But the Convention's reach has also expanded in terms of the kinds of activities subject to its rules. This is a result of the assertive jurisprudence the European Court of Human Rights has developed in the last 20 or so years. One ingredient of the latter is the Court's recognition of the "positive obligation" of states parties to take measures to enable the full enjoyment of Convention rights. This positive obligation has been held, in some circumstances, to include a duty to prevent interferences by private parties with the exercise of rights. It has opened up a wide range of new factual situations to evaluation by the Court.2 Since the same private interactions are usually the subject of domestic private law, the positive obligation has also created opportunities to test the relationship between that private law and the law of the Convention.

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2 e.g. A v United Kingdom (1998) 27 E.H.R.R. 611 at [22].

Such an inquiry was essential in the recent case of *Pla and Puncernau v Andorra* (the first merits judgment involving Andorra). The European Court held that the exclusion of an adopted son from rights in property bequeathed to "a son or grandson of a lawful and canonical marriage" was unjustifiable discrimination and thus a violation of Art.14 in connection with Art.8. The Court reached further than it ever had into the workings of domestic private law.

The applicant, Antoni Pla Puncernau, had been the losing party in a contest over the effect of a testamentary instrument of his adoptive father, Francesc Xavier Pla Pujol. The property in question had come to the father as a life estate bequeathed by his mother (the applicant's grandmother), Caroline Pujol Oller, in 1949 under a will she had executed in 1939. Under that will the father, Pla Pujol, was granted the property for life with a power to vest the reversion in "a son or grandson of a lawful and canonical marriage". The meaning of this proviso was the focus of judgments in the national courts and in the European Court. The Andorran High Court of Justice, reversing a judgment of the *Tribunal de Batles*, held that Pla Puncernau, as a son by adoption, did not qualify under the will's language and possession, therefore, reverted to his cousins.

In Strasbourg the Court, five to two, accepted the argument of the applicant that the judgment of the Andorran High Court effected an unjustified discrimination between biological and adoptive children. The European Court had held as early as 1979 that succession rights of family members were a feature of family life protected by Art.8. The discrimination therefore was with respect to a Convention right and created a violation of Art.14 ECHR in conjunction with Art.8.

There is a well-established line of Strasbourg cases considering intestacy laws favouring "legitimate" over "illegitimate" children. The Court has generally found such laws incompatible with Art.8, Art.14 or both. It has determined that such distinctions lacked the "objective and reasonable basis" necessary to justify them under Art.14.

These decisions have rested, in part, on the unreliability of stereotypes about unwed parents and on the unfairness of disadvantaging a child because of the circumstances of its birth. While there was no precedent dealing with discrimination between biological and adoptive children, the Court in *Pla and Puncernau* extended the reasoning in the illegitimacy cases to cover less favourable treatment of adopted children.

The difficulties of the judgment arise from the fact that the discrimination complained of was not, as in the illegitimacy cases, one resulting from an explicit decision of the state expressed in its law. Rather it appeared to be directed by the will of the original testatrix, Pujol Oller, as interpreted by the Andorran High Court. In fact, the instrument in question made no explicit reference to either adopted or biological children. The

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[3] (App. No.69498/01), judgment of July 13, 2004 (http://cmiskp.echrcoe.int). The widow of the deceased was also an applicant. She died before the judgment (see [10]).


5. The Court found it unnecessary to consider the separate claim under Art.8 alone (see judgment, n.3 above, at [64]).


7. Marckx v Belgium (1979) 2 E.H.R.R. 330 at [37]-[38].


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Tribunal de Batlles interpreted it in the context of the customary law prevailing at the time the will was executed. It understood that law to be a version of Roman law modified by canon law and local case law. Since Roman law vested full rights of inheritance in adopted children, the Tribunal determined that, in the absence of anything to the contrary, the testatrix's reference was not intended to exclude adopted children.

The judgment of the High Court of Justice, extensively quoted in the Strasbourg decision, dismissed the Roman law of adoption as having become irrelevant to Andorran inheritance law by the time the will was executed. In fact, in 1939 "adoption is practically unheard of in Andorra". The instrument had, moreover, been drawn in Spain and the deed of adoption of Pia Puncernau had referred to Catalan adoption law. Under the applicable Spanish and Catalan law, adoption vested the children with a legal relation to the adoptive parents but not to the family of those parents. The adopted children, therefore "were unconnected with the family circle [critically, in this case, the putative grandmother] both from a legal and a sociological point of view". Catalan law, moreover, had always treated family settlements as excluding adopted children in the absence of a clear indication otherwise. The "main factor [was] the testator's intention", and in this case that intention, "analysed in the light of the social, family and legal conditions in which she lived", did not "militate ... in favour of including the life tenant's adopted children". An appeal to the Andorran Constitutional Court was dismissed on the ground that any discrimination did not "derive from an act of the public authorities, that is from the judgment of the Civil Division of the High Court of Justice, but from the intention of the testatrix".

The European Court of Human Rights held that it had authority to re-examine the national court's interpretation of the testamentary disposition, as it appeared "blatantly inconsistent with the prohibition of discrimination established by Article 14". Since the national court could and should have interpreted the will to eliminate the discrimination, its judgment amounted to a "judicial deprivation of an adopted child's inheritance rights". And since the special treatment of adopted children was not justified by the pursuit of any legitimate aim, it was a violation of Art.14.

The judgment of the Court in Pia and Puncernau does two notable and related things. First, it displaces national rules on the interpretation of private instruments, dramatically enlarging a heretofore strictly limited right to review national courts' judgments on matters of national law. Secondly, its assumption of this authority, and the way it exercised it, raise the possibility that the Convention may apply, by its own force, to the relations of private parties inter se, again radically extending its reach.

The law of interpretation

At the centre of the holding in Pia is the finding that the High Court's interpretation of Pujol Oller's will was wrong. That interpretation turned on the Andorran court's judgment as to the most likely intent of the testatrix in using the words, "son or

10 See judgment, n.3 above, at [18].
11 ibid., at [59].
12 ibid., at [60].
13 ibid., at [61].
grandson". Based on its understanding of governing law and prevailing attitudes at the time the will was executed, it held that the term was not intended to include sons by adoption. The European Court effectively reversed this conclusion, but only after conceding that it was not "appropriate or even necessary to analyse the legal theory behind the principles on which the domestic courts...based their decision...That is a sphere which, by definition, falls within the jurisdiction of the domestic courts."14

Despite this caveat the European Court declared that it:

"...cannot agree with [the High Court's] conclusion...There is nothing in the will to suggest that the testatrix intended to exclude adopted grandsons. The Court understands that she could have done, but as she did not the only possible and logical conclusion is that this was not her intention."15

The certitude of this inference is remarkable as it is made in the teeth of the High Court's rather extended judgment that this was indeed the testatrix's intention. The Strasbourg Court summarily dismissed that conclusion as "overly contrived and contrary to the general legal principle that where a statement is unambiguous there is no need to examine the intention of the person who made it". Apart from the unexamined assumption that the will in this case was, in fact, unambiguous, this statement is in flat contradiction with the Court's own position quoted above that "the only possible and logical conclusion is that [excluding adoptive grandsons] was not her intention".16

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More notable than the Court's specific conclusions about the interpretation of Pujol Oller's will, is the unspoken assumption that there was a single and universally applicable way to understand legal instruments. It pronounced without qualification that an "unambiguous" text forecloses any other consultation of the maker's intention. Its sole support for this proposition was the Latin maxim: \textit{Quo in verbis nulla ambiguitas est, non debet admitti voluntatis quæstio}.16

The summary adoption of this dictum is unaccountable given Western law's long and still vital debate over the relative roles of subjective and expressed intention in the interpretation of legal texts. In fact, European legal systems do not consistently reject evidence of subjective intention in interpreting private instruments, even when a text may appear to be obvious. With respect to contract interpretation, French law is quite the opposite. Section 1156 of the Civil Code enjoins the judge to seek "the common intention of the contracting parties, instead of adhering to the literal meaning of the words".17 While the Civil Code does not duplicate this instruction with respect to wills, judicial practice has consistently treated the identification of intention of the testator as providing the master rule of interpretation.18 In interpreting "declarations of intention","
including wills, s.133 of the German Civil Code demands a search for “true intention ... without regard to the declaration’s literal meaning”.19

Reference to unexpressed intention is especially compelling for testamentary bequests. A will, arguably, is nothing other than the legal embodiment of the desires of the testator with respect to the disposition of his or her property after death.20 This is clear from the very use of the word “will” in common law jurisdictions, an identification even more obvious in some civil law systems (for example, acte de dernière volonté in French). The case for exclusive reliance on apparent meaning in other legal contexts is usually based on the interests of other parties who might have relied on the textual meaning. The reliance risk is substantially reduced in the case of wills since, before the testator’s death, bequests are inherently provisional. Moreover, there will be few people with an interest in the will who can be expected to rely merely on its words.21 This accounts for the different treatment of the interpretations of wills and contracts in German law.22

It is also quite clear that distinguishing between ambiguous and unambiguous terms is itself a matter of some subtlety. In Pla it took both domestic courts a good deal of time trying to figure out the meaning of “son”, indicating that they regarded that question as requiring more than a simple reading of the text.23 Courts in many jurisdictions have realised that it takes more than a mere inspection of the language to identify an ambiguity. Ambiguities may be “latent” in the sense that they only become apparent when the language is placed in the factual context in which it is supposed to operate.24 Recognition of that possibility explains the UK Parliament’s enlarging the permissible sources for will interpretation in the Administration of Justice Act 1982. That statute permits extrinsic evidence to clarify ambiguous terms of testamentary instruments and also to show “that the language used in any part of it is ambiguous in the light of surrounding circumstances”. This change in the law has been described as a compromise “between strict literalism and a more intentional interpretation”.25


20 Rieg, ibid., p.359 (referring to a will as “l’oeuvre d’une volonté souveraine qui régit l’avenir au-delà de la mort même du testateur”).

21 See W. McGovern and S. Kurtz, Wills, Trusts and Estates Including Taxation and Future Interests (3rd ed., 2001), p.259. See also Rieg, n.19 above, pp.372–373, 381–384. (The “objective” form of interpretation prescribed by the German Civil Code is reserved to contracts and other “actes des affaires”. Wills are the prime example of matters not falling in this class.)

22 ibid.


24 e.g. Cour de Cassation, Chambre civile 1, 2001-27-11, (unreported); BGH, 1982-08-12, 1983 NJW 672. An American court’s useful discussion of “latent ambiguities” is found in Rossetto v Pabst Brewing Co, 217 F3d 359 (7th Cir. 2000).


illustrative of a general trend in common law jurisdictions emphasising the testator's subjective intention over inferences restricted to the text of the will. Consistent with these developments, Alfred Rieg described the maxim cited by the Court in these terms:

“What, then, is the meaning of the Roman maxim, cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio? It simply expresses a presumption that clear terms express the true intention of the testator; that is to say that the judge may rely on these terms, just as does the heir who acquires the rights, but the presumption is not irrebuttable and accommodates proof to the contrary.”

These illustrations should suffice to show the complexity and richness of European law on the interpretation of wills. In light of this context, it is baffling how the European Court could so confidently assert that the text of Pujol Oller's will exhibited no ambiguity and that, absent ambiguity, no inquiry may be undertaken into the intention of the testatrix. Apart from the Andorran judgments, the Court made no reference of any kind to statutes, decisions or commentary on the interpretation of wills or other legal texts. Perhaps the Court, whose members include many international lawyers, was unduly influenced by the standard rules on interpretation of treaties that, for understandable reasons, place significantly less importance on the intentions of the parties.

The Court was not content, however, to read the Andorran law of interpretation as represented exclusively by this reductionist formula. It added a further judicial obligation to interpret private instruments in a dynamic sense. A national court should take into account any relevant “social, economic and legal changes” occurring between the time the instrument was executed and the time of interpretation. The Strasbourg Court referred to changes in European attitudes since 1939 that it felt militated in favour of an interpretation that would include an adopted son in the word “son”. It did not appear to notice that the process of updating the meaning of private instruments was at odds with the fidelity to unambiguous language that it had just endorsed. Again the Court cited no authority in national or international law for this progressive component of interpretation of wills.

The Court did refer to its own oft-repeated dictum that the Convention “is a living instrument, to be interpreted in the light of present-day conditions”. Whatever the merits of dynamic interpretation with respect to such instruments as constitutions and treaties, its application to private documents is much less appealing. Unlike those long-term and generally applicable public laws that may need to be “adapted to the various crises of human affairs”, it may be presumed that the makers of wills, conveyances,
contracts etc. have quite specific and fixed ideas of the states of affairs they wish to effect. Certainly it would wreak havoc in commercial transactions if contracts were to be treated as “living instruments”.

The Court further elaborated this method of interpretation of private instruments by stating that a court should take into account “the Convention as interpreted in the Court’s case-law”.31 That is, proper interpretation is not merely a matter of correct application of domestic law but, in some measure, also of European human rights law. This statement implies that all private law adjudications must refer to the standards of the Convention. The basis for this proposition is not explained. There are two possibilities: if it is supposed to be an interpretation of the Convention itself, it involves a radical enlargement of the idea of positive obligation; or, if it is an interpretation of domestic law, it presumes, without authority, a powerful horizontal effect of the Convention in every legal system.32

None of this is to say that a good argument might not have been mounted that, according to a proper reading of Andorran law, the Tribunal de Bâltes was right and the High Court of Justice was wrong. But there is not even the ghost of such an argument in the Strasbourg judgment and it cites not a syllable of Andorran law in support of its conclusion.33

The lapses and contradictions in the Court’s treatment of the national courts’ approach to interpretation are all displayed in the conclusion to its discussion:

"Any interpretation, if interpretation there must be, should endeavour to ascertain the testator’s intention and render the will effective, while bearing in mind that ‘the testator cannot be presumed to have meant what he did not say’ and without overlooking the importance of interpreting the testamentary disposition in a manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court’s case-law."34

To this point this article has considered only the European Court’s interpretation of Pujol Oller’s will. But, by purporting to be in a position to declare the priority of its interpretation over that of the High Court, the Strasbourg Court raised a more significant and more general difficulty. The subject in dispute, the way properly to interpret a legal text, is not some fact of nature that the European Court can identify and then apply under all skies and in all seasons. Legal texts have authority only as a consequence of and only to the extent allowed by the legal rules of the legal system in which those texts arose. The legal meaning of a document is, definitionally, exactly what it is determined to be under the relevant domestic law.

31 See judgment, n.3 above, at [62].
32 There is no reason to think that what the Court supposed about Andorran law would not apply to all the legal systems of the states parties. Both the expansion of states’ positive obligation to control private actions and the resulting horizontal effect of Strasbourg law are further elaborated in the next section.
33 A similar critique of the Court’s judgment in this regard is set forth in Staudinger, n.23 above.
34 See judgment, n.3 above, at [62].
The European Court has consistently declared its obligation to defer to national courts on the meaning of national law, a policy it reiterated in Pia. It cited three prior cases to the effect that "it is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law." The dissenting opinion of Sir Nicholas Bratza was largely based on the majority's failure to adhere to this practice.

One or another version of this abstention rule has been repeated in dozens of cases. Here is a typical formulation:

"The Court would recall that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention." 37

It should be noticed that the role accorded the national courts is "primary" but not exclusive. In some formulations the domestic court's authority is to interpret "in the first place", suggesting the possibility of some further Strasbourg review. 38

In fact, there are a number of occasions on which the Court cannot decide if there is a violation of the Convention without first knowing the content of domestic law. For example, to invoke the Strasbourg enforcement machinery an applicant must be a "victim", that is, he or she must show that he or she has suffered an injury. The Court has held this requirement may be satisfied by showing sufficient threat of a future injury. The reality of such a threat may depend on just what a challenged rule of law empowers the state to do. 39

More commonly, the violation may depend on whether or not the state has acted in accordance with national law. A detention violates the Art.5 right to liberty unless it is, inter alia, "lawful" and "in accordance with a procedure prescribed by law". Articles 8 to 11 (privacy and family life, religion, expression and association) and Art.1 of Protocol No.1 (property) allow infringements of the specified rights only if the state's action was, variously, "in accordance with law", "prescribed by Andorran law", "in conformity with domestic law", or "in accordance with the domestic law and as prescribed by domestic law". [35 ibid., at [43].

36 Partly Dissenting Opinion of Judge Bratza, at [6]-[14]. Judge Bratza did, however, leave open the possibility of the Court treating a domestic law interpretation as "manifestly unreasonable or arbitrary". As he found the interpretation in this case not to fit that description he did not elaborate its meaning. See also dissenting opinion of Judge Garlicki. This idea is more fully worked out in Staudinger, n.23 above, at 142-143.


38 The Court has often insisted that it does not judge the validity of state law; it only decides whether or not the applicant has suffered a violation of his or her Convention rights. E.g. Weh v Austria (2004) 40 E.H.R.R. 37 at [49]. On the narrowest view this would entail no consideration of the national laws at all, only an examination of the concrete injury sustained.

39 e.g. Rotaru v Romania (2000) 8 B.H.R.C. 449 at [34].

40 e.g. Marckx v Belgium (1979) 2 E.H.R.R. 330 at [27].
law”, or “subject to conditions provided by law”. In all of these cases it is impossible to know if this is the case unless we know what the law in force was at the time.

It would certainly be unsatisfactory if in such cases the European Court were bound by domestic courts’ interpretations of the relevant domestic law, no matter how unreasonable. A restraint on expression should not be treated as “prescribed by law” just because a national court decided that the whispered order of the President was satisfactory promulgation and publication of national law. The European Court, therefore, must have its own authority to decide if a legal basis for action existed. Most of the Court’s departures from the ordinary policy of leaving interpretation of national law to domestic courts, involve exactly these issues.

In the Pia case, on the other hand, there was no obvious need to review the Andorran courts’ compliance with domestic law. The Court appeared conscious of the novelty of its approach. This is reflected in the unusual words it used in its general statement about the interpretation of domestic law. The Court deviated in one respect from its usual practice of repeating previous discussions verbatim. Previously it had referred merely to the role of national “courts”. Now it specified the “courts of first instance and appeal”. The Court had already noted that “the Andorran courts gave two different interpretations”, each “based on factual and legal elements that were duly evaluated”, as if the Tribunal des Baillies’s interpretation were of equal standing to that of the High Court of Justice (and the Constitutional Court.)

The regulation of private transactions

It is not entirely clear from the judgment in Pia just who was discriminating. There are two possibilities: the testatrix in making the offending will or the High Court of Justice in misinterpreting the will. While it is most probable that the Strasbourg Court intended the latter, the dissenting opinion of Judge Garlicki assumed that “the real question” was the former. I will consider that possibility first.

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41 Karhuvaara and Iltalehti v Finland (App. No.53678/00), judgment of November 16, 2004, at [49] (http://cmiskp.echr.coe.int); Wittek v Germany (App. No.37290/97), judgment of December 12, 2002, at [49]. This is not to say there are no other occasions in which the Court has raised the question of its authority to interpret domestic law. But these cases are exceedingly few and, with respect to the purpose of such an inquiry, as mysterious as the Pia case. E.g. Prince Hans-Adam II v Germany (App. No.42527/98), judgment of July 12, 2001, at [50].

42 e.g. Gusinskiy v Russia (App. No.70276/01), judgment of May 19, 2004, at [66] (http://cmiskp.echr.coe.int).

43 It may be that, in light of the difficulties discussed below, the Court found it necessary to attribute the discrimination not to the private testatrix but to the High Court of Justice. See below.

44 See judgment, n.3 above, at [46]. I have found only one other case that used this phrasing. Gitonas v Greece (1997) 26 E.H.R.R. 691 at [44]. The reason for the unusual wording in that case is not clear to me.

45 Ibid., at [53].

46 Dissenting Opinion of Judge Garlicki. Judge Bratza’s dissent agrees that mere judicial enforcement of private action is not enough involvement to trigger the applicability of Convention rights but, presuming that the majority had attributed the result to the domestic court in light of its wrong interpretation, he went on to disagree with the Court’s conclusions on that latter point. Partly Dissenting Opinion of Judge Bratza, at [4]-[6].

Can the execution of a discriminatory will (or of a contract or of a deed) by a private person constitute a violation of Art.14? While there are no cases directly on point, the Court’s jurisprudence of “positive obligation” to secure rights suggests that such action could constitute a violation of sorts. While the distinction is not clear-cut, the Court has, from an early date, read the Convention’s creation of a right as doing more than prohibiting certain actions of a state. The right to respect for a person’s home includes the right not to have that home destroyed by agents of the state but also the right to have the state take action to alleviate excessive noise created by the operation of a nearby discotheque. The consequences of such reasoning have been thoroughly discussed in the literature, but a brief summary is in order to illustrate the issues raised by the *Pia* case.

Although positive obligations may take the form of requiring the state to undertake physical actions, in most cases its violation consists in failing to adopt legal measures to prohibit or to provide a remedy for invasions of rights by private parties. So, in an early example, a loophole in the criminal law of the Netherlands made it impossible to prosecute an accused rapist. The victim’s Art.8 rights were held to be violated because the state had failed in its positive obligation to maintain a legal system that deterred and punished assaults on the applicant’s private life.

This example illustrates the close connection between the positive obligation and the regulation of private conduct. To satisfy its obligation the state must put in place reasonable measures to prevent the immediate, private source of the injury. It is no great stretch, then, to say that Art.8 of the Convention prohibits rape by private individuals. By the same token, it prohibits discotheques from inflicting excessive noise on the occupants of neighbouring residences. And, returning to our case, it is not unreasonable to say that if Arts 8 and 14 imposed a positive obligation on Andorra to assure that biological and adopted children were treated equally in matters of inheritance, it would also (effectively) prohibit a private testator from making the same distinction.

It is now generally acknowledged that the European Convention has, to some degree, such a “horizontal effect”. The phenomenon has been properly compared to the German doctrine of *drittewirkung* whereby the principles of the Basic Law are treated as more or

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52 Both dissenting opinions take a generally sceptical approach to the enforcement of Convention rights in private transactions. But each also leaves open the possibility that a violation might occur where the private action is “repugnant to the fundamental ideals of the Convention... aim[s] at the destruction of the rights and freedoms set forth therein”. Partly dissenting opinion of Judge Bratza, at [4]; Dissenting opinion of Judge Garlicki. Just what this singularly unhelpful phrase denotes is impossible to say, but it raises the possibility of differential requirements of justification in the case of direct state action and a mere failure of the state to prevent private action, see Dissenting opinion of Judge Garlicki, that might be developed in all of the private action/positive obligation cases.

less absorbed into sub-constitutional law.\textsuperscript{53} After the adoption of the Human Rights Act 1998, scholars in the United Kingdom initiated a serious debate on the extent to which the Act was assertable against private persons.\textsuperscript{54} The South African Constitution has an explicit direction that constitutional rights may be asserted against private parties if “it is applicable taking into account the nature of the right and the nature of any duty imposed by the right”.\textsuperscript{55}

The advocates of a thorough application of Convention rights to private conduct sometimes fail to come to grips with one set of possible consequences. With limited exceptions, Convention rights are not absolute. They are explicitly defeasible if the interference is justified as “necessary in a democratic society” for certain purposes. Those specified purposes, however, cover just about every possible reason any state (or any individual) might have for trespassing on a right. The decision as to what is necessary for the chosen purpose, moreover, is far from precise. States are accorded a certain deference—a margin of appreciation—with respect to what satisfies the justification requirement. Again, the judgments of the Court make it obvious that the breadth of the margin of appreciation varies depending on a number of variables: the kind of right, the extent of infringement, the importance of the aim pursued.\textsuperscript{56}

Although less clear from the text, the Court has also held that much the same process is to be followed when the applicant complains of a state’s failure to satisfy its positive obligations.\textsuperscript{57} The sum of these considerations is that adjudication under the Convention inevitably comes down to a kind of all-things-considered balancing of the social and individual interests at stake.

The potential effect of this kind of adjudication when it is applied to private conduct was illustrated in the recent case of \textit{Appleby v United Kingdom}.\textsuperscript{58} The Court rejected a claim that Arts 10 and 11 gave the applicants the right to use space in a privately owned shopping mall to distribute leaflets and collect petition signatures on a public issue. Although the Court held for the Government, its analysis considered the following factors relevant: the importance of freedom of expression; the importance of the right to hold property; the physical layout and policies of shopping malls; changes in the “demographic, social, economic and technical” means of social interaction; and various

\textsuperscript{53} See Peter Quint, “Free Speech and Private Law in German Constitutional Theory” (1989) 42 \textit{Maryland Law Review} 247.


\textsuperscript{55} Constitution of the Republic of South Africa 1996, s.8(2). The courts are also granted express authority to effectuate the relevant right by developing rules of common law (s.8(3)).

\textsuperscript{56} See Janis, n.1 above, pp.146-148.


\textsuperscript{58} (2003) 37 E.H.R.R. 38. The case is also notable for the unprecedented and extensive citation and discussion of American constitutional law cases on the same issue (at [25]-[30], [47]-[48]).
alternative ways (acting with permission of individual stores in the mall, using the
town centre, door-to-door canvassing, seeking media exposure) of communicating the
applicants' views. Weighing all these factors, the Court found that the interests of the
government and the private property holder prevailed. The majority failed, however,
to convince Judge Maruste, who, taking into account those factors and some others (the
kinds of enterprises in the mall, the kind of issue that was being debated, the history
of the development of the mall), came to the opposite conclusion. The "old traditional
rule" of the private owner's right to exclude must, he contended, be subject to a "test of
reasonableness", presumably on each occasion.

The Court's "living instrument" jurisprudence further complicates these inquiries.
Acting under that doctrine, the Court has expanded the kinds of things that may be
plausibly classified as violations of Convention rights. One example will suffice. Article
8's right of respect for "private life" has recently been stated by the Court to include:

"... a person's physical and psychological integrity; the guarantee afforded by
Art.8 of the Convention is primarily intended to ensure the development, without
outside interference, of the personality of each individual in his relations with other
human beings. There is therefore a zone of interaction of a person with others, even
in a public context, which may fall within the scope of 'private life.'"59

There are few grievances that cannot be accommodated to a claim of interference
with this kind of interest. This is impressive enough when such an interest is assertable
against action of the state. Should it also govern private relations we could, effectively,
have a situation where the Convention obliges every person to respect every other
person's "physical and psychological integrity"—except when, all things considered, it
is better not to do so. That regime would bear little resemblance to what we recognise as
the rule of law. It is true that such authority would not displace other, non-objectable,
legal rules but it would supplement them by imposing an additional obligation of decent
behaviour on otherwise lawful conduct.60 The prospect of such pervasive but vague
authority being applied to national law by an external court is beyond contemplation.

Perhaps for this reason the European Court appears to have made a determined effort
to decide the Pla case on grounds that did not attribute the discriminatory act to the
private testatrix. The applicants' arguments, as reported in the judgment, were unclear
on the point. They attacked the High Court judgment as a matter of Andorran law
but also affirmed that the case implicated the "private sphere since it concerned the
freedom to arrange one's affairs in the form of a will". They further complained that
"it was neither for individuals nor the courts" to distinguish between biological and
adopted children.61 The Government also proceeded, at least in part, on the basis that

60 In UK law, the particular machinery of the Human Rights Act adds the complication that
Acts of Parliament are not subject to judicial nullification (s.4(6)). How this immunity would play
out with respect to arguably rights infringing private conduct that is authorised or regulated by
such legislation is entirely unclear. In practice, the problem might be alleviated by s.3's instruction
to construe such legislation as compatible with the Convention. But the troublesome judicial
power described in the text would then merely be exercised in a different form.
61 See judgment, n.3 above, at [31], [35].

the issue was the freedom of a testatrix to determine the succession to her property. In that respect it noted that “any entitlement under a will was, by definition discriminatory ...”. The European Court judgment did cite its “positive obligation” cases. It did not, however, cite the cases discussed above where the positive obligation related to the need to control offensive conduct by private persons.

On the whole, the judgment indicates that the offending actor in the case was the High Court of Justice. The European Court agreed that there was nothing discriminatory about the enacted law of Andorra. “Only the interpretation of the testamentary disposition falls to be considered.” Indeed, the “testamentary disposition” is never mentioned in the section of the judgment setting out the “Court’s Assessment”, other than as the object of the domestic court’s interpretation. By holding that the Andorran court’s interpretation was erroneous, the European Court severed the connection between the choices of the testatrix and the resulting discrimination. Now the offensive action was garden variety state discrimination disfavoring adopted children.

It is a convenient finding. The Court was able to invalidate the discriminatory succession without employing the horizontal effect of Convention rights on private conduct. It thus avoided effectively extending its equality jurisprudence to the sensitive field of family law. But the court’s technique has dangers of its own. The very same judicial action will or will not be a violation depending on a Strasbourg judgment as to its correctness as a matter of national law. That logic extends to every invocation of private law that has any impact on Convention rights. Given the elasticity of the Court’s interpretation of those rights, the prospects for European supervision of national law appear endless.

It is a daunting possibility, more so if we take seriously the European Court’s dictum in Pia that proper interpretations of private law instruments must take into account “the Convention as interpreted in the [European] Court’s case-law”. That element could conflate the process of interpretation of private law transactions with the investigation of interferences with human rights. The latter inquiry calls for balancing the invasion of a relevant right of the losing party against the justification for that infringement.

In the realm of private law the justification may be of two kinds. First, a private law result may promote a public purpose. Recognising the right of a mall owner to exclude political activity might be understood to reduce the opportunities for disorder or to promote local commerce. Review of this kind of social justification is the standard fare of European human rights judgments.

The principal countervailing interest in a private law dispute, however, is of the second kind. It is the private interest of the opposing litigant, perhaps through the medium of the Convention’s recognition of the state’s interest in the “protection of others”. In the case of the mall this would involve balancing the impact on the speakers’ freedom of expression against the mall owners’ right to control their property (a right, by the way, that is a convenient finding. The Court was able to invalidate the discriminatory succession without employing the horizontal effect of Convention rights on private conduct. It thus avoided effectively extending its equality jurisprudence to the sensitive field of family law. But the court’s technique has dangers of its own. The very same judicial action will or will not be a violation depending on a Strasbourg judgment as to its correctness as a matter of national law. That logic extends to every invocation of private law that has any impact on Convention rights. Given the elasticity of the Court’s interpretation of those rights, the prospects for European supervision of national law appear endless.

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also recognised in the Convention). Every disappointed litigant could raise a European human rights claim by asserting that the domestic courts committed error by slighting the ubiquitous Convention rights. In theory, every perceived personal wrong could, in the end, find its way to Strasbourg. We would thus arrive, by a different route, at the robust version of the state's positive obligation to prevent private interferences with protected rights. The unsettling effect on private transactions is not hard to imagine.

Of course, these are mere possibilities. The European Court of Human Rights has never suggested so extreme a reach for Strasbourg law. In fact, its rhetoric, as we have already seen, is quite to the contrary. But to reach the result in Plan, it was obliged to take steps that, rigorously applied, could lead to exactly this result. It was, perhaps, the apparent injustice to adopted children that encouraged the Court to stretch to this kind of analysis. If so, the judgment provides a cautionary tale on the risks of reaching just results at the expense of well considered and restrained application of legal rules.

The emergence of the authority of the European Court of Human Rights is one of the most remarkable phenomena in the history of international law, perhaps in the history of all law. No other tribunal exercises judicial authority as extensive and powerful as that of the Strasbourg Court without some association with a larger effective political regime to enforce its judgments. One of the great miracles of the Convention system is the record of compliance with the Court's decisions, even decisions denounced and despised by the respondent state. The reasons are no doubt multiple and complex, but one aspect is almost surely the respect the Court enjoys because it is a court of law. As such it relies on the perception that it applies pre-existing substantive standards with contents that roughly, at least, can be known in advance. It does not merely impose the will of the judges, and foreign judges at that. The Court that departs from that role to pursue a deeply felt, but only vaguely defined, idea of justice, puts this fragile legitimacy at risk.

67 In the actual case, although the Government raised the owners' rights, the judgment was based almost entirely on the conclusion that the applicants' right of expression had not been unduly burdened. Appleby v United Kingdom (2003) 37 E.H.R.R. 38 at [48].
69 See Janis, n.1 above, pp.4-8.