Darko Pavlovski[*]

THE LEGAL METHOD AND STRUCTURE OF THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The European Court of Human Rights is a cornerstone and a symbol of the human rights protection machinery centred around the European Convention on Human Rights, which 70 years since its signing, has remained innovative, progressive and inspirational world-wide.

Undoubtedly, the institutional set-up has enabled the Court to profile itself as a standard-setter with important achievements in judicial protection of human rights. But, is the Court's success predetermined by its institutional positioning and the place that it was given by the Contracting Parties in the European system of human rights protection? This paper argues that in addition to the place given by the States, the Court has, through its jurisprudence, developed its own 'legal method' that has proven instrumental to the institution's success. The paper will try to analyse the Court's legal method, understood as an entirety of legal reasoning, presentation of legal argumentation and structuring of decisions in individual applications. The legal method will be presented through the Court's approach in the establishment of the facts of the case, determination of the applicable law, characterization of the complaints, as well as some standard principles and doctrines usually applied in the Court's legal reasoning. These elements will be linked to the standard structure of the Court's decisions and drafting techniques.

The paper will demonstrate that the understanding of the Court's legal method and structure of its decisions is important in order to grasp the Court's logic and facilitate the 'reading', execution and further use of the Court's jurisprudence. The paper will show that the Court's legal method authentically integrates various European legal traditions and offers an important contribution to the pan-European space of legal culture and identity.

Keywords: legal method; European Court of Human Rights; legal tradition; legal reasoning; structure

I. INTRODUCTION

The European Court of Human Rights (the Court) is a cornerstone and a symbol of the human rights protection machinery centred around the European Convention on Human Rights (the Convention), which 70 years since its signing has remained innovative, progressive and inspirational world-wide.

[*] Darko Pavlovski, Magister Juris, e-mail: darko.pavlovski@gmail.com

Undoubtedly, the institutional set-up has enabled the Court to profile itself as a standard-setter with a remarkable history in judicial protection of human rights. During decades of work and through its jurisprudence, the Court has developed its own 'legal method', which has played an important role in the institution's success. The legal method, understood in this article as an entirety of legal reasoning, presentation of legal arguments and structuring of decisions, will be hereby analysed through the Court's standard approach in terms of 1) establishment of the facts of the case, 2) determination of the applicable law, 3) characterization of the complaints, 4) key principles and factors relied on by the Court in its reasoning, and all this in relation to 5) structure of the Court's decisions and drafting techniques.
Methodologically, this paper is based on the Convention, the case-law of the Court (in individual cases and not the inter-State applications) available on the HUDOC database and the Court Rules, as primary sources of information. The article also uses other/secondary resources such as handbooks, case-law guides, academic articles, textbooks and other editions focusing on the Convention and the Court.

II. WHAT IS MEANT BY 'LEGAL METHOD'?

As a starting point, it needs to be clarified what does 'legal method' mean for the purposes of this article.
There is no particular definition of the notion of' legal method'. The standard, dictionary definition of the term 'method' (for example, in Merriam Webster dictionary) determines this noun as a systematic procedure, technique, or mode of inquiry used by a particular discipline. Transferring it into a legal, or more specifically, judicial field, the notion basically comprises the *modus operandi* of the judicial institution in the discharge of its mandate of applying and creating the law. To be more precise, the legal method should be understood as an entirety of the standard legal reasoning, applied to the particular factual and legal situation (case), tabled for decision-making before a judicial body and articulated in judicial decisions. The legal method does not exist in isolation and in reality, it is actually the toolkit for making sense of how the law works.[1]
In light of this understanding, the analysis of the legal method of the European Court of Human Rights would therefore inevitably comprise of an overview of the Court's standard approach in what could be labelled business as usual for a judicial institution, namely: the fashion of establishing the facts of the case, determination of the applicable law, basic/standard principles and tests (the prism through which the case is looked through), as well as the typical structure of the Court's decisions rendered in cases of individual applications.
At this point, a distinction should be made between the Court's legal method understood as described above and the working methods used by the Court in its everyday functioning and case-processing. Although the two are inherently connected, the former, as purely legal, is the subject of this analysis while the latter (being more of an organizational or case management nature) is not treated in this paper.

III. DETERMINATION OF FACTS

The analysis of the Court's legal method should begin with some reflections on the Court's approach in establishing the facts relevant for the adjudication of a case. At the outset, it should be

[1] J Holland, J Webb 'Learning Legal Rules', 8th edition, Oxford University Press, 2013

emphasized that the Court does not necessarily aspire to determine some absolute truth and instead, it could satisfy and limit itself to the key factual circumstances necessary for its decision-making process. The Court is not bound by strict evidentiary rules and the Convention is rather silent on this point. Article 38 of the Convention stipulates that the Court examines the case together with the parties and, if need be, it may undertake an investigation. Additional evidence-related provisions are prescribed in the Court Rules especially in their Annex on the conduct of investigations, which provides for the Court to adopt any investigative measure which it considers capable of clarifying the facts of the case.[2] In practice, the Court primarily relies on the parties' observations and materials submitted to the Court. The procedure before the Court is adversarial – the cases which are not *de plano* declared inadmissible are communicated to the respondent Government for their response to the applicants' allegations/complaints, and in turn, the applicant is also given the opportunity to reply to the Government's positions. Basically, the procedure is designed in such a manner so as to supply the Court with the relevant information allowing for an informed decision. In any event, the Court is flexible when it comes to the establishment of facts and can go beyond what has been submitted by the parties by taking into consideration other (publicly available) information obtained *proprio motu*.[3] The Court, based on the materials before it, may also take into account the findings of other international organizations, States or other sources[4] in order to grasp the entirety of the facts needed for the case's proper adjudication.

As stated by the Court itself, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard because the Court's role is not to rule on criminal guilt or civil liability but on Contracting States' compliance with their international obligations under the Convention.[5]

In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established approach, proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[6] Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. Once it has sufficient elements, in its analysis the Court may conclude that there is *prima facie* evidence in favour of one party's version of events and that the burden of proof should shift to the other party. Similar approach is used when 'procedural' issues are under consideration, such as the admissibility criterion on exhaustion of domestic remedies when there is a disagreement about their effectiveness.

As mentioned above, the Court has mechanisms at its disposal which should facilitate the process of establishing the facts. The Court might conduct fact-finding missions, hear witnesses or experts.

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[2] Rule A1 – Investigative Measures, further elaborates that the Court's Chamber may, *inter alia*, invite the parties to produce documentary evidence, to hear witness or expert or in any other capacity any person or institution of its choice to express an opinion or make a written report relevant to the case.

[3] For example, in evolving situations such as those involving expulsion or extradition, it is inevitable for the Court to take into consideration the most recent developments and decide the case based on the facts at the moment of the Court's deliberations. See, for example, Saadi v Italy, ECHR 37201/06, para. 128.

[4] Ibid, paras. 42-63

[5] See, among many other authorities, Nachova v Bulgaria, ECHR 43577/98 and 43579/98, para. 147.

[6] Ibid

It should, however, be observed that the Court's use of these tools, the fact-finding missions, in particular, has significantly declined over time. This is partly explicable with the case-law development and the drawing of adverse presumptions when governments fail to cooperate or the facts relate to events in the distant past.[7] In cases in which there are conflicting accounts of events, when establishing the facts, the Court is inevitably confronted with the same difficulties as those faced by any national first-instance court. It is therefore not uncommon for the Court in its judgments to present the version of the applicant as well as the version of the facts presented by the Government thereby transparently illustrating the gaps and overlaps of the different narratives offered by the parties.[8]

In terms of the establishment of facts and the Court's competency in this regard, it needs to be clarified that the Court inevitably, as a starting point, looks into and relies on the facts established by the national authorities. This is in line with the Convention's underpinning principle of subsidiarity according to which the primary responsibility for the human rights protection lies with the States while the Convention system and the Court are of subsidiary character. As a supra-national, human rights court, the European Court is not the highest judicial instance above the national judicial hierarchy. The Court has no authority to quash national judicial decisions and rarely substitutes for the national courts' primary role in assessing evidence, establishing facts and determining law of the case. This does not mean, however, that the Court will uncritically accept any finding of fact reached by the domestic courts. It only means that as a rule, the Court will not intervene in the domestic authorities' assessment of the relevant facts in so far as their reasoning in this respect is not arbitrary or manifestly unreasonable.[9] This approach is very much evident when it comes to complaints under Article 6 (right to a fair trial). In the context of this Article, according to the Court's long-standing and established case-law, it is not for the Court to deal with alleged errors of law or fact committed by the national courts or act as a court of fourth instance.[10]

At the same time, it should also be highlighted that the Court's re-assessment of facts established by the national authorities, to some extent depends on the right/complaint at stake in the instant case. The cases concerning Article 2 (right to life), Article 3 (prohibition of torture) or other absolute rights protected under the Convention, call for more stringent assessment by the Court of the factual situation established by the domestic authorities, particularly where there is an allegation of the lack of an effective investigation.[11] The lack of effective investigation *per se* amounts to a violation of the Convention given that the facts (truth) have not been sufficiently established by the authorities.

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[7] D Harris, M O'Boyle, E Bates, C Buckley 'Law of the European Convention on Human Rights', 3rd edition, Oxford University Press, 2014, p. 144

[8] See, for example, El-Massri v Macedonia, ECHR 39630/09, paras. 17-41 and 154-167.

[9] N Mole, K Kamber, V Liaki 'Towards a More Effective National Implementation of the European Convention on Human Rights – a Guide to Key Convention Principles and Concepts and Their Use in Domestic Courts', AIRE Centre 2018, p. 83

[10] This formula is used in many cases, see for example: Bochan v Ukraine (no. 2), [GC] ECHR 22251/08, para. 61, and the references contained therein. It is routinely relied on for the rejection as inadmissible of the cases alleging domestic courts' errors of fact and law.

[11] Ibid [9]

IV. APPLICABLE LAW – SOURCES OF LAW AND THEIR INTER-ACTION

The next aspect of the Court's method that needs to be examined is the Court's approach in identifying the applicable law, i.e. the sources of law used and invoked by the Court in its decision-making and legal analysis.

According to the Court's settled case-law, the concept of "law" must be understood in its "substantive" sense, not its "formal" one. It, therefore, includes everything that goes to make up the written law, including enactments of lower rank than statutes, and the relevant case-law authority.[12] In other words, the Court's approach in this regard is again flexible and not constrained with some formal rules. The European Court understandably relies on various legal sources in order to establish the rules referential for the case under its consideration and it could be said that the Court applies, albeit seemingly inconsistently, the concept of de-formalization of legal sources.[13]

The text of the Convention and the national legislation provides the basic framework and starting point in the Court's analysis. Further, the Court takes into consideration the relevant case-law and the practice at a national level, including policy papers, legal commentaries and doctrinal positions. International legal materials are the next stop: international conventions, treaties, as well as the so called soft-law (recommendations, decisions, comments, opinions) made by various international organizations and standard-setting bodies. When talking about the international legal sources in the Court's jurisprudence, the Vienna Convention on the Law of Treaties stands out and should be highlighted as its Articles 31 to 33 codify the international customary law's principles on interpretation of international treaties. Article 31 (1) provides for interpretation of treaty provisions in good faith, in accordance with the ordinary meaning of the terms in their context and most importantly, in the light of the treaty's object and purpose. The Vienna Convention is, therefore, an important stone in the mosaic of the Court's legal method, having in mind that the Court's interpretation of the European Convention has been dominated by the purposive approach drawn from the Vienna Convention, consonant with the object and purpose of the European Convention as a human rights treaty.[14]

The comparative legal perspectives should be also mentioned in the context of applicable law as the Court uses them in an attempt to establish the so-called European consensus understood as the existence of a common approach in regulating some pending issue by the different existing regulatory regimes in Europe. The European consensus could be a helpful tool in the case analysis and adjudication as it is correlated to the wideness of the respondent State's margin of appreciation – the respondent State's discretion in taking actions encroaching a Convention right at stake.[15] In the absence of a European consensus, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one[16] and vice versa. Furthermore, the European consensus is also of relevance for the evolutive interpretation of the Convention and here it should be clarified that its impact goes both ways: in some instances, the European consensus has been

[12] Ebrahimian v France, ECHR 64846/11, para. 48

[13] For more on this, see the partly dissenting opinion of Judge De Pinto Albuquerque in Mursic v Croatia, [GC] ECHR 7334/13.

[14] B Rainey, E Wicks and C Ovey 'The European Convention on Human Rights', 6th edition, Oxford University Press, 2014, p. 65

[15] Ibid [7], p. 14

[16] Hamalainen v Finland, ECHR 37359/09, para. 75

approached as a sign for evolution while sometimes lack of consensus prevented the Court from using the evolutive interpretation.[17]

When it comes to the applicable law as an important element of the Court's legal method, it should be mentioned that the Court in its decisions heavily relies on its own jurisprudence and uses its case-law as a precedent for its decisions. This is a natural and self-explanatory legal reflex of an international tribunal that adjudicates on State's compliance with an international treaty whose text is rather basic and needs to be further complemented by jurisprudence. While it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.[18] Given the extensive case-law on a variety of issues, much of the Court's work nowadays is based on and consumed by the well-established case-law (WECL), namely, repetitive applications which usually are indicative of systemic failures and problems in the national legal orders. In the Court's legal method, these cases are deliberated in a shortened procedure before a Committee of three judges. Despite the fact that there is no doctrine of binding precedent in the sense that the Court is bound by its previous interpretations of the Convention,[19] the Court's approach anyhow relates significantly to the Anglo-Saxon legal tradition developed around the court precedents, where the judicial institutions do not only apply but also actively create the law. It could be said that the Court integrates the common-law philosophy with the positivistic, Euro-continental one, founded on the more traditional, typical normative sources of law. In light of the Court's European/international jurisdiction and impact, this combined approach towards the legal sources resonates all over the European continent and influences internal legal orders of individual Contracting Parties. As a consequence, national legal orders now frequently refer to or rely on both the Convention and the Court's jurisprudence which should be regarded as an integrated new whole or new *acquis* that needs to be studied, used and applied by the national authorities.[20] The Convention as well as its interpretation by the Court permeates most branches of the domestic law and is perhaps the only international instrument producing such an impact on domestic law.[21]

At the same time, as mentioned above, the national law is also an element that the Court takes into consideration in its reasoning and decision-making. Actually, this is inevitable given that references to [national] 'law' are embedded in the text of the Convention.[22] There is, therefore, a complex interaction between the Convention and Court's jurisprudence on one side and the national legal orders on the other. The relationship between the two does not fit into the classical legal theory of monistic-dualistic dichotomy that is traditionally used to explain the interaction between the national and international law. Instead, the relationship between the Convention and the national law is the one of fusion.[23] The mechanism for execution of the Court's judgments and compliance with the Convention's obligations certainly facilitates this fusion. The fusion is an important factor leading to the development of a pan-European legal culture and identity that

[17] K Dzehtsiarou European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, German Law Journal, Vol. 12, No. 10, 2011

[18] See, for example, Mursic v Croatia, ECHR 7334/13, para. 109, and the authorities cited therein.

[19] Ibid [7], p. 20

[20] Examples of incorporation and references to the Convention and Court's jurisprudence are available in Mole, K Kamber, V Liaki 'Towards a More Effective National Implementation of the European Convention on Human Rights – a Guide to Key Convention Principles and Concepts and Their Use in Domestic Courts', AIRE Centre 2018, p. 64.

[21] La Convention européenne des droits de l'homme a 70 ans : dates marquantes et grandes avancées - Propos introductifs de Linos-Alexandre Sicilianos Strasbourg, le 18 septembre 2020, p. 5

[22] See the references to 'law' in, for example, Articles 5, 8-11, or Article 1 of Protocol No. 1.

[23] Ibid [21]

incorporates the various European legal traditions and generates new quality and dynamics in the European legal space.

V. COMPLAINTS

The next aspect of the legal method that needs to be addressed is the way the Court analyses the complaints subject to its examination. In its everyday work, the Court considers a large volume of individual applications in which applicants raise particular complaints alleging various human rights violations. Despite the varying wording used in different documents and contexts, the complaints are basically allegations of violations of the Convention perpetrated by the Contracting Parties. The complaints, in combination with the alleged facts, are therefore the trigger for the Court's decision-making.

It is, again, inherent to the Court's method that the Court has always positioned itself as a master of the case in the sense that the case could be subsumed not necessarily under the Convention provisions invoked by the applicant, but under those provisions/rights that the Court finds most suitable to address the gist of the complaint and provide effective protection of human rights. According to the Court, the precise legal characterisation of the facts submitted to it by the parties falls within the Court's exclusive remit.[24] The Court has in principle been looking into the substance of the applicant's submissions and has been so doing by taking into consideration the particular grievances raised by the applicant in the context of the facts relevant to the substance of the complaints. In Guerra and Others v. Italy, para. 43, the Court clarified that "a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on". The Court has been therefore flexible and active in 'playing' with the complaints allowing for the Court's assertiveness and judicial activism in the protection of human rights. For its part, the Convention empowers the Court to adopt such a flexible approach. Namely, its Article 32 says that the Court's jurisdiction shall extend to all matters concerning the interpretation and application of the Convention and that in case of dispute the Court shall itself decide about its jurisdiction. This, inevitably, includes the 'understanding' of the complaints. Nonetheless, the Court needs to be mindful not to go *ultra petita* because an international tribunal is precluded from dealing with matters that are not the subject of the complaint brought before it as that would result with the Court acting *ultra vires*.[25]

How complaints are articulated by the applicant and how they are understood by the Court is of relevance to the scope of the case, which in turn affects its outcome especially with regards to the admissibility criteria that must be fulfilled for the case to be examined on the merits. Firstly, the complaints are important in the context of the requirement for exhaustion of domestic remedies. A complaint raised before the Court must have been (at least in substance) submitted before the national courts/authorities. Secondly, the Court accepted, very early, that it could entertain facts arising after the lodging of the application, provided they constituted an extension of the dispute or complaint initially submitted to the Court, for example in cases under Article 5 (right to liberty), where the impugned deprivation of liberty continues beyond the date of introduction of the application. [26] In this context, the six-month time-limit must be met; and if submitted at a later stage of the Court proceedings, depending on the circumstances, the new complaints may either

[24] Gutsanovi v. Bulgaria, ECHR 34529/10, para. 206

[25] See the separate opinion of judge Sir Fitzmaurice in Guzzardi v. Italy, ECHR 7367/76.

[26] The Concept of 'Complaint' and/or 'Subject Matter of the Dispute', Case-law Report of the Council of Europe/European Court of Human Rights, 2017 p. 8

be attached to the existing application (as mentioned above, when they constitute an extension of an ongoing case or concern a continuous violation of the Convention) or treated as new complaints that need to be addressed separately (usually rejected as inadmissible being out of the six-month time-limit). The Court may by exception consider a complaint although both the complaint and the violation are somewhat hypothetical and prospective, for example, in removal cases where the applicants had not been removed, the Court found that had the applicants been removed, the Convention would have been violated.[27] Thirdly, the scope of the case is shaped by the Court's consideration of whether the particular complaint substantially falls within the ambit of the Convention rights and therefore whether the complaint is justiciable before the Court (competence *ratione materiae*).

It is also part of the Court's approach applied in a countless number of cases to initially communicate to the respondent Government the same set of facts under various complaints raised by the applicant and then decide under which one(s) the case would ultimately be examined and adjudicated. In such cases, when multiple, closely related complaints are communicated under the same set of facts, it is common practice for the Court to conclude that having in mind the Court's finding under one/main complaint (which basically absorbs the others) there is no need to additionally or separately address the remaining complaint(s). This is quite common in instances of so-called, mixed or overlapping complaints. To illustrate, such mixed complaints are situations usually under Articles 6 (right to a fair trial) and 13 (effective remedy), or the procedural obligations under Articles 2 (right to life) or 3 (prohibition of torture) and Article 13, then the standard package of complaints under Article 6 (fair trial, civil), Article 13 and Article 1 of Protocol No. 1 (property) in private-law litigations etc.

It stems from the above that the concept of a complaint is more complex than it might seem. Furthermore, an evolution in the Court's case-law could be observed: in the past, the Court adopted a relatively flexible - and inclusive – approach, because it sought to attach a newly submitted complaint to the facts complained of by the applicant, or to identify in those facts the substance of the complaint in question. Nowadays the Court takes a stricter – and exclusionary – approach because it has focused on the legal arguments submitted by the applicant more than on the facts complained of.[28] This tendency is also manifested in the Court's requirement for the applicants' strict compliance with the Court Rule 47 which prescribes the contents of an individual application. Key element therein is the requirement for the applicant to set out a concise statement of alleged violations, from the very beginning of the proceedings and on the application form itself.

VI. THE GENERAL PRINCIPLES OF LEGAL REASONING COMMONLY APPLIED BY THE COURT

The Court bases its legal reasoning on a number of general principles, doctrines and tests that reflect the Court's judicial philosophy and assist its adjudication of cases and complaints. These general principles have been elaborated and applied in different contexts and on many occasions. To gain a better understanding of the Court's legal reasoning and the prism through which it sees the cases under its considerations, the key principles or doctrines are hereby listed without entering into extensive explanations:

[27] Paposhvili v Belgium [GC], ECHR 41738/10, paras. 206 and 226, Makhmudzhan Ergashev v. Russia, ECHR 49747/11, paras. 76-77

[28] Ibid [27]

- Principle of subsidiarity – the primary responsibility in securing the human rights is for the State, while the role of the Court and the Convention system is of subsidiary character;[29]
- Margin of appreciation – States' freedom to adopt whatever means they choose to safeguard the Convention rights;[30]
- Autonomous concepts – the meanings of the terms/notions used in the Convention are determined by the Court they are not necessarily the same with the ones used in the national context. Examples: criminal charge, civil right, deprivation of liberty, torture, slavery, possession, private life, family, home, tribunal etc.;
- Dynamic/evolutive interpretation of the Convention – the interpretation method used by the Court, according to which the content of the rights is not frozen because the Convention is a "living instrument" and the case-law is "dynamic and evolutive";
- Fourth-instance formula – the Court cannot substitute national courts and address errors of fact and law, thereby acting as a court of fourth instance within the national judicial hierarchy;
- Proportionality – the lawful interference with some Convention-protected human right must not result with an excessive burden for the individual vis-à-vis the legitimate aim that the State wants to achieve with the impugned measure. This is the standard test applied in qualified rights: 1) existence of an interference, 2) legal ground or lawfulness of the interference, 3) legitimate aim and 4) proportionality;
- Positive obligations – while the wording used in the provisions of the Convention usually requires from the States to refrain from interference with the protected rights, in some instances, the effective enjoyment of the protected rights requires State's action. The States are therefore under an active duty to balance competing rights of different categories or groups of potential victims of human rights violations;[31]
- Application and interpretation of the Convention in a manner which renders its rights practical and effective and not theoretical and illusory;
- Principle of rule of law – mentioned in the Preamble of the Convention but it is considered to be inherent in all articles of the Convention.[32] This principle should be understood as encompassing the requirements for lawfulness, legal certainty and no arbitrariness, which the Court has relied on in various circumstances and cases.[33]

Some of the principles and doctrines sketched above have been jurisprudentially developed (by the Court), while some are explicitly mentioned in the Convention itself (or will become part of it, such as the principles of subsidiarity and the margin of appreciation, as foreseen in the future Protocol No. 15 that *inter alia* will add these principles in the Preamble of the Convention). The above principles are horizontally applied in relation to almost all the provisions and rights under the Convention and they basically represent the general judicial philosophy exercised by the Court. Though linked, these principles should be distinguished from those pertaining to specific Convention rights, provisions and legal matters discussed by the Court both under the admissibility and the merits of the complaints.

[29] See the new Protocol No. 15 which amends the Preamble of the Convention.
[30] Ibid
[31] Ibid [9] p. 29
[32] Bocvarska v Macedonia, ECHR 27865/02, para. 83
[33] For example, "lawfulness" and "freedom from arbitrariness" is the terminology used in the context of Article 5, "devoid of arbitrariness", "denial of justice" and "legal certainty" are regularly invoked under Article 6 etc.

VII. STRUCTURE AND CONTENT OF THE COURT'S DECISIONS

After having analysed the key elements of the Court's legal method, namely, the facts, law, complaints and key principles/doctrines, what follows next is to present the typical structure of the Court's decisions (the term 'decision' is hereby used generically and covers judgments as well). The basic elements of the Court's decisions are prescribed in the Court Rules.[34] The standard parts of the Court's decisions generally correspond to the above-presented elements of the legal method:

- Introductory part with the procedural history of the case;
- The Facts part including the relevant law (with the different sources as described above);
- The Law part, with the alleged violation of the Convention, summary of the arguments of the parties and the Court's assessment;
- Just satisfaction and costs (in judgments and only if a violation of the Convention was found);
- Operative provisions (*dispositif*) which succinctly pronounce the Court's findings;
- Any separate opinion (dissenting or concurring).[35]

Quite often, the Facts part begins with background information that provides the wider social or political context of the case. This indicates that the Court is mindful of the bigger picture and that the Court's method ensures that no case will be considered in a bubble or in isolation. As for the analysis/assessment contained in the Law part of the decisions, here the Court usually recapitulates the relevant principles that it has developed in addressing various legal issues and interpreting the particular Convention provisions. These principles serve as a primary reference for the Court's assessment of the case and are linked to particular provisions which distinguish them from the general, commonly applied principles sketched in the previous section above. It should be noted that the relevant principles from the case-law are usually presented as an introduction to the analysis of each legal question or complaint. While the principles and standards are subject to development in accordance with the evolutive and dynamic interpretation of the Convention, at this point it needs to be emphasised that the Court is mindful of the importance to ensure consistency of its case-law. Having in mind the Court's specific legal method, the heavy case-load and the continuous influx of cases, it is necessary to have functional mechanisms for consistency of the Court's case-law. This is a complex, multi-layered task for an international Court composed of 47 judges organised in five sections, dealing with thousands of cases and a whole range of legal issues, simultaneously. The central role in ensuring consistency is given to the Court's Grand Chamber (composed of seventeen judges) and the Jurisconsult (an organizational unit of the Court's Registry).[36]

As previously indicated, the last part in the Court's judgments in which violation of the Convention was found, is reserved for addressing the issue of the just satisfaction for the applicants i.e. victim of human rights violation. The question of compensation of damages to victims of human rights violations is not an easy one in the human rights law theory and practice.[37] The Convention in Article 41 foresees that if the Court finds that there has been a violation of the Convention and if the internal law of the responding State allows only partial reparation to be made, the Court shall,

[34] See Rule 74.
[35] B Rainey, E Wicks and C Ovey 'The European Convention on Human Rights', 6th edition, Oxford University Press, 2014, p. 45
[36] See Article 30 of the Convention and Rule 18B.
[37] See the talk on just satisfaction of Dr V Fikfak, available on https://www.youtube.com/watch?v=Vjec-88mMnw&list=LL&index=20

if necessary, afford just satisfaction to the injured party. Despite the normative limitations contained in this provision (references to 'internal law' and 'necessity'), the Court however has again applied a somewhat flexible approach and exercised discretion when awarding the just satisfaction. Having found a violation, the Court has been willing to grant a remedy without requiring the applicant to return to the domestic system[38] and as a result, in most cases in which violation was found the Court awarded some monetary compensation to the applicant. The Court was careful to distinguish between the pecuniary and non-pecuniary damages, the latter ones being inevitably a matter of the Court's discretion and practice on an 'equitable basis'. There are however instances when the Court concludes that finding of a violation is in itself sufficient and there is no need to award some other/additional just satisfaction to the applicant. Furthermore, the just satisfaction should be regarded in the wider context of execution of the Court's judgments, because in addition to the individual measures (just satisfaction) aiming to compensate the individual applicant and provide for *restitutio in integrum*, there are also general measures that the respondent State should undertake to address some systemic failures and prevent other similar cases and violations.

As is the case with other judicial bodies (national and international), the Court's reasoning in its decisions is focused on the *ratio decidendi* or the central legal questions or issues pronounced by the Court. The readers of the case-law should, however, be mindful that the Court's decisions frequently contain *obiter dicta* i.e., additional observations which are not indispensable for or directly linked to the outcome of the case, but reflect the Court's position and send some message to the authorities of the respondent state. Sometimes these additional observations could be discreet and 'hidden', for example, when the Court refers to the national law provisions allowing for reopening of the domestic proceedings when the Court finds a violation of the Convention.[39] This is another important, educational aspect contained in the Court's decisions as well as another communication channel that the Court employs to signal the need for additional change in the respondent State's national legislation or practice.

The Court has a typical legal drafting technique consisting of specific jargon, style, reference and citation modality. The judgments, as well as longer decisions, are written in numbered paragraphs. The Court has its own templates that frame the structure and the look of the decisions, which is very much evident in repetitive and routine cases whose examination ends with decisions based on friendly settlement between the Parties or unilateral declarations in which the respondent Government recognises the alleged violation and provides for some compensation to the applicant. With regards to the language(s), the decisions are drafted in English and/or French language, depending on the internal, organisational considerations of the Court and the established practices in different Registry divisions. Much of the Court's case-law is translated in other languages and is made available through the Court's HUDOC base. The Grand Chamber judgments as the most important ones for the case-law development are always available in both English and French languages. The Court's bilingual *modus operandi* is another important aspect of its legal method as communicating various legal concepts and findings across the continent in two official languages inevitably influences the integration into and the creation of a single European legal space. Of course, the impact of the European Union with its legal multilingualism should, in this regard, also be taken into account. Namely, the European Union is both an integration of law as

[38] V Fikfak, 'Non-Pecuniary Damages before the European Court of Human Rights: forget the victim; it's all about the State', Leiden Journal of International Law, 2020, p. 339

[39] See, for example, Strezovski v North Macedonia, ECHR 14460/16, para. 11, or Papadakis v Macedonia, ECHR 50254/07, para. 74

well as legal integration among most of the Council of Europe Member States, resulting with a single legal space characterized with a pluralism of various legal traditions, families of laws and legal cultures: continental-European (German, French, Latin, East-European), Anglo-Saxon, Scandinavian etc.[40]

Last but not least, it should also be mentioned that the Court's decisions are co-signed by the Section President and Registrar, which is indicative of the shared role between the judges and the Registry in adjudicating and processing of the cases. Of course, it should be acknowledged that the decision-making process remains with the judges because they are elected officials who give legitimacy to the Court and therefore, they are primarily accountable for the institution's achievements as well as failures.

VIII. CONCLUDING REMARKS

It could be concluded that throughout years of intense work, relying on the Convention as a starting point, the Court has managed to develop its own authentic legal method combining elements from various legal traditions, cultures and practices existing on the European continent. The legal method has been profiled to serve the purpose, namely, to provide for better functionality of the Court, effectiveness of the decisions, as well as for some foreseeability and stability in its work. The Court's method and the structure of its decisions, facilitate the navigation, 'reading' and implementation of its jurisprudence. The flexibility and evolving character of the legal method helped the Court to advance human rights concepts beyond the normative framework, to set new standards as well as to optimise its work and impact in the European society. The approaches used by the Court in establishing the facts, identifying the relevant sources of law, asserting judicial activism or restraint, drafting techniques and multilingualism as well as other features of the legal method have all played their role and shaped the Court's success. One, however, has to remain cautious and realistic because the Court's legal method could easily work the other way around and undermine the institutional position of the Court. Keeping in mind that nothing is for granted, the human rights defenders and commentators must remain vigilant and critical towards the Court's functioning and role in the contemporary European society.

The legal method that the Court has designed for itself, is an instrument or *modus operandi* suitable for an international tribunal. As such, notwithstanding the model of fusion between the national law and the Convention, the Court's legal method is not meant to be replicated by individual countries or national jurisdictions. Of course, the legal method influences and inspires the countries and has become an important factor, which together with other legal and social realities in Europe (primarily the European Union and its *acquis Communautaire*) leads to the creation of a pan-European space of legal culture and identity. The emergence of pan-European legal space, however, should not be perceived as a melting-pot leading to legal uniformity. Instead, it could be observed that the Court's legal method has evolved into a relatively new and complex legal tradition, which, while incorporating the various European legal traditions, works towards sustaining diversity in law and facilitates the communication among the legal professionals.[41] This new legal tradition aims to bridge the legal differences to the extent needed for effective protection of human rights, thereby bringing the human rights idea in Europe to a new, higher level.

[40] K Ristova-Asterud, A Spasov 'Legal Multilingualism and Legal Semiotics of the European Union in the context of the European Integration of the Republic of Macedonia' in European Law, review of IRZ, no. 2/2017

[41] H P Glenn 'Legal Traditions of the World', Oxford University Press, 5th edition, 2014, p. 378