

Introduction: The Convention of Concepts and the Court as a Master of Conceptualisation

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Over time, the corpus of rights and obligations under the European Convention on Human Rights has developed into and is perhaps best understood as a system of autonomous concepts, with the European Court of Human Rights acting as its master of conceptualisation.

Broadly speaking, these concepts fall into two main categories. The first consists of concepts rooted directly in the text of the Convention. The second comprises those that do not appear in the Convention's wording. The Court, generally, views both categories of concepts as autonomous. As George Letsas puts it, the "autonomous concepts of the Convention enjoy a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law".¹

As regards the first category of concepts, ever since the *Engel* case,² the European Court of Human Rights has created its own definitions and meanings of almost all terms in the Convention, such as "life", "torture", "liberty", "fair trial", "expression", "possessions", "association", "victim", "home", "education", and "jurisdiction". As part of this category, there are also concepts that appear only in the Rules of Court, such as "interim measures" under Rule 39 of the Rules of Court.

Part of the function of international courts is to discern and clarify the meaning of legal text. In this vein, the Court exercises its essential interpretative function when establishing autonomous concepts. Yet, the term "concept" itself is a tricky concept,³ and Bernard Williams argues that sometimes in efforts to make the unclear clearer we end up making the clear unclear.⁴ Certainly, no concepts, including those contained in the Convention text, are

1 Letsas, G., "The Truth in Autonomous Concepts: How to Interpret the ECHR", 15 *EJIL* 2 (2004), p. 282.

2 See *Engel and Others v. the Netherlands*, nos. 5100/71 et al., 8 June 1976.

3 Ginsburg, T., Stephanopoulos, N., "The Concepts of Law" 84 *University of Chicago Law Review* 147 (2017), p. 150.

4 Williams, B., *In the Beginning was the Deed* (Princeton 2005), p. 64.

immune to ambiguity.⁵ However, it must be recalled that, in elucidating their meaning, the Court seeks not merely to enhance clarity but also to assign specific meaning to legal texts. This approach aims to promote uniformity, consistency, legal certainty, and a clearer understanding of the scope of the rights and obligations. In the context of the inherent indeterminacy of international law and the diverse legal traditions among the Contracting Parties, the evolution of the Convention concepts serves a purpose that extends beyond linguistic clarity – it ensures coherence and a harmonised interpretation of law.

As regards the second category of the Convention concepts, the Court has, through its case-law, interpreted and developed specific terms and notions, transforming them into established concepts of the Convention system. Over time, the Court has conceptualised such notions as the “very essence of a right”, “European consensus”, “margin of appreciation”, “living instrument”, and “vulnerability”. The first category of concepts can be viewed as those directly grounded in the legal text of the Convention, while the second category encompasses supportive concepts. These supportive concepts are designed to help enforce, understand, delineate, or navigate the scope of rights and obligations, as well as the Court’s principles and methods of interpretation. For example, the concept of “vulnerability” is crucial in interpreting the concept of “discrimination”. However, its application extends beyond this context, illustrating its broader significance.

Certainly, the division between the two categories is not always clear as some concepts are only partially or implicitly rooted in the Convention text, such as “access to a court”, and others have initially developed through the Court’s case-law and later migrated to the Convention text, such as “subsidiarity”.

The emergence, application and interplay of different categories of concepts are crucial for understanding not only the ever-evolving scope of rights and obligations but also the functioning of the Convention system as a whole. For instance, in cases involving the “vulnerability”, a concept not explicitly mentioned in the text of the Convention but applicable across various rights, the Court applies a higher level of scrutiny and affords greater protection to the individual.

The purpose and application of such concepts can be viewed from different perspectives. On the one hand, it can be argued that a well-defined catalogue

5 d’Aspremont, J., Singh, S., “Introduction: Concepts for International Law: Contributions to Disciplinary Thought” in: d’Aspremont, J., Singh, S. (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham 2019), p. 22.

of concepts establishes a system of predictable outcomes, informing the exercise of judicial discretion in adjudication. While all concepts are, to various degrees, inherently vague and open to interpretation, a deeper understanding of the Convention concepts and their interrelations enhances our ability to predict how case-specific facts will influence the outcome. On the other hand, some may perceive the self-referential system of the Convention concepts as rhetorical tools or “commonplaces” (*topoi*)⁶ of persuasion, which provide judges with considerable discretion to shape outcomes based on the concepts they “choose” to apply. Andrea Bianchi reminds us that the game of interpretation involves strategic manoeuvres by different players, each employing their own “cards” to achieve desired outcomes.⁷ Within this framework, the second category of the Convention concepts can be seen as the cards used to shape outcomes related to the first category of concepts.

This book does not aim to engage in an evaluative, comparative, or normative assessment of the Convention concepts. Instead, it seeks to identify and understand what these concepts are, how they have evolved, and how they have been applied by the Court. Given that autonomous concepts are a by-product of the Court’s jurisprudence, our objective is to analyse and explain how the Court has developed and utilised these concepts. That said, this book is also concerned with institutional framework of the Convention system. It explores Convention-related institutions, mechanisms, and procedures that are integral to the Convention system, such as the “Grand Chamber”, “Registry of the Court”, and “Committee of Ministers”.

The book thus presents the first compilation and analysis of ECHR concepts, institutions, and procedures based on notions that have legal significance in the Convention, the Rules of Court, or the Strasbourg Court case-law. As such, it covers *procedural* and *institutional* issues (for example, “communication to government”, “Rule 47”), *admissibility issues* (for example, “matter already examined by the Court”, “manifestly ill-founded”), *substantive issues* (for example, “effective investigation”, “legitimate aim”, “negative obligation”), as well as *principles* and *methods* (for example, “subsidiarity”, “margin of appreciation”, “harmonious interpretation”). Despite our efforts, it is inherently unfeasible to provide an exhaustive list of all ECHR concepts, institutions, and procedures within a single volume. Moreover, the dynamic nature

6 On *topoi*, see Viehweg, T., *Topics and Law: A Contribution to Basic Research in Law*, translated by Eva-Maria Viehweg, E., and Durham Jr. W.C. (Peter Lang 1993).

7 Bianchi, A., “The Game of Interpretation in International Law: The Players, The Cards, and why the Game is Worth the Candle” in: Bianchi, A. et al. (eds), *Interpretation in International Law* (Oxford 2015).

of the Convention as a “living instrument” means that new concepts and mechanisms continue to evolve and emerge over time. For instance, while this book does not include the concept of “proximity” in relation to jurisdiction of a State for the purposes of the Convention or issues of standing before the Court, its application in diverse cases – ranging from cross-border shootings to climate change – suggests that it may eventually crystallise into a self-standing concept within the Convention system.⁸ However, new development of concepts will have its foundational basis in the existing concepts expounded in this volume. This volume can thus serve as a guidebook to navigate the evolving jurisprudential landscape of the Court.

The book features nearly 300 contributions written by 89 authors. It opens with a chapter on democracy and the rule of law, in which former President Robert Spano eloquently highlights the intrinsic connections and interdependence between the trinity of human rights, the rule of law, and democracy. The remaining contributions offer concise entries on Convention concepts, institutions and procedures.

Each entry has been authored by one of the leading experts on the topic, including current and former judges as well as senior lawyers of the Court, and other esteemed practitioners and scholars in the field of ECHR law. The contributors come from all parts of Europe, represent various levels of seniority, and include a balance of male and female authors. To ensure consistency throughout the book, the authors were asked to begin by explaining whether the legal notion they discuss originates from the text of the Convention or has been developed by the Court. They were also entrusted with outlining the existing standards and approaches related to the respective notion, as well as identifying any (in)consistencies. Each entry is designed to be short and concise, typically spanning one to five pages, and aims to present the state of the art regarding the given ECHR notion as understood within the Convention system. However, a few entries extend to between five and ten pages. These exceptions were made for particularly complex concepts and notions, where additional space was deemed necessary to preserve clarity and depth.

The purpose of this book is to assist academics, judges and practitioners who specialise in certain articles of the Convention and may require a trusted guide to specific notions which they encounter in their work. It is also designed to serve newcomers to the ECHR, such as students or public authorities, as a companion in their journey toward acquiring general or specialised know-

⁸ See e.g. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021, paras 131–132; *Carter v. Russia*, no. 20914/07, 21 September 2021, para. 161; *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024, paras 472, 493, 512–513.

ledge in this area. We also hope that this project will inspire greater interest in and foster critical research across diverse schools of thought and legal methodologies, focusing on the development, interaction, and application of the Convention's concepts.

A few final words of appreciation are in order. First and foremost, we extend our heartfelt gratitude to each author for placing their trust in this project. When we embarked on this journey, we could not have anticipated such an overwhelmingly positive response from nearly every author we approached. As editors immersed in ECHR law, we initially counted on a number of friends and colleagues for support. However, even in our most ambitious plans, we did not foresee the remarkable collaboration with so many sitting and former judges, senior academics, and practitioners with expertise in ECHR law. For this, we are profoundly grateful. A special thanks is owed to several authors who graciously took on the challenge of contributing a large number of entries, and especially to Kristaps Tamužs for his support in reviewing a number of entries. Second, we extend our sincere thanks to Lindy Milman and Bea Timmer from Brill for their patience, guidance, and unwavering support throughout the publication process. We are very grateful also to Tamar van de Gronden from the Utrecht Centre for Accountability Law for her invaluable assistance with style checks during the critical final months of the project.

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