

IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE-LAW

A comparative analysis

Janneke GERARDS
Joseph FLEUREN
(eds.)



intersentia

Cambridge – Antwerp – Portland

CONTENTS

<i>Summary of Contents</i>	v
<i>Contributors</i>	xvii
<i>Abbreviations</i>	xix
Chapter 1. Introduction	
Janneke GERARDS and Joseph FLEUREN	1
1. Evolutive interpretation, national courts and the legitimacy of the European Court of Human Rights.....	1
1.1. The constitutional competences of national courts to implement the Court's case-law	6
1.2. Main research questions	8
2. Approach and methodology	9
2.1. Overall approach.....	9
2.2. The comparative analysis: selection of states and approach.....	10
2.2.1. Selection of states.....	10
2.2.2. Approach of the comparative study.....	11
3. Outline of the book.....	11
Chapter 2. The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility'	
Janneke GERARDS	13
1. Introduction.....	13
2. The Court's <i>raison d'être</i>	15
2.1. Introduction.....	15
2.2. Functions and tasks of the Court.....	15
2.3. Subsidiarity, primarity and diversity.....	17
2.4. 'The 'push' and 'pull' factors in the Court's work.....	19
3. The shared responsibility of the Court and the national courts	21
3.1. Introduction.....	21
3.2. <i>Erga omnes</i> effect and <i>res interpretata</i>	21
3.3. The national courts' obligation to comply with the Convention and the Court's interpretations.....	23
3.4. The margin of appreciation doctrine and its (ir)relevance for national courts.....	27

3.4.1.	Development and function of the margin of appreciation doctrine for the Court	27
3.4.2.	Influence of the margin of appreciation doctrine for national decision making.....	31
3.5.	'Shared responsibility': the national courts and the ECtHR as partners in guaranteeing the Convention.....	32
4.	Giving shape to shared responsibility: principles and methods of interpretation.....	35
4.1.	Introduction.....	35
4.2.	Basics of Convention interpretation.....	36
4.2.1.	Evolutive and consensus interpretation.....	36
4.2.2.	Practical and effective rights and meta-teleological interpretation.....	37
4.2.3.	Autonomous interpretation.....	39
4.3.	Strategic use of interpretative principles and methods of interpretation.....	40
4.4.	Criticism.....	41
4.4.1.	Meta-teleological interpretation and the risk of overreaching.....	41
4.4.2.	The disadvantages of consensus interpretation	44
4.4.3.	The problems of autonomous interpretation.....	45
4.5.	Enhancing shared responsibility?.....	46
4.5.1.	Introduction.....	46
4.5.2.	Lack of consensus: deliberate choice of a non-autonomous approach	47
4.5.3.	Dependency, or the 'in for a penny, in for a pound' approach	49
4.6.	Conclusion	51
5.	Procedural review and 'judicial minimalism'	52
5.1.	Introduction: substantive review and the need for a response	52
5.2.	Procedural review.....	52
5.2.1.	Advantages of the use of procedural review	52
5.2.2.	Going too far?.....	56
5.2.3.	The Court's response.....	59
5.2.4.	Conclusion	62
5.3.	Judicial minimalism: shallow, narrow and analogical reasoning	62
5.3.1.	Introduction.....	62
5.3.2.	Shallow reasoning	63
5.3.3.	Narrow reasoning, analogical reasoning and general principles.....	66
5.3.4.	Disadvantages of judicial minimalism.....	69
5.4.	Conclusion	70

6.	Judicial dialogue	71
6.1.	Introduction.....	71
6.2.	Dialogue by means of judgments	73
6.2.1.	Some background: constitutional dialogue and dialogue between courts.....	73
6.2.2.	Dialogue at the ECtHR: response to criticism and concerns expressed in domestic judgments	75
6.2.3.	Approval of national responses to the Court's judgments ..	78
6.2.4.	Requirements for a successful dialogue by means of judgments	80
6.2.5.	Conclusion	82
6.3.	Formal and informal dialogue between judges; advisory opinions	82
6.3.1.	Exchange of information between courts	82
6.3.2.	Advisory opinions	84
6.4.	Conclusion	85
7.	Dialogue and national political and media criticism	86
8.	Summary and conclusions.....	88
	Annex: questions for the interviews at the European Court of Human Rights.....	90
	Chapter 3. Belgium	
	Guan SCHAJKO, Paul LEMMENS and Koen LEMMENS	95
1.	Constitutional background	95
2.	Status of international law in domestic law	100
2.1.	Effects of treaty provisions and decisions of supranational bodies in the domestic legal order	100
2.2.	Primacy of international law over domestic law	104
3.	Judicial review	106
3.1.	Constitutional review	106
3.1.1.	<i>A priori</i> review by the Council of State	106
3.1.2.	<i>Ex post</i> constitutional review	107
3.1.2.1.	Legislative acts	107
3.1.2.2.	Administrative acts	109
3.2.	Review for conformity with international law	110
3.2.1.	Legislative acts	110
3.2.2.	Administrative acts	113
4.	Implementation of the European Convention on Human Rights by national courts	113
4.1.	The direct effect of the ECHR in the Belgian legal order	113
4.2.	The practice of the Belgian courts	116
4.2.1.	Practice with respect to legislative acts	116

4.2.2. Practice with respect to administrative acts.....	118
4.3. Interpretation of domestic law in conformity with the Convention.....	119
5. The impact of ECtHR judgments on national judicial decision making	123
5.1. Incorporation of ECtHR case-law into domestic case-law.....	123
5.2. Response to judgments of the ECtHR against Belgium	127
5.3. Response to ECtHR's judgments against states other than Belgium.....	129
5.4. Horizontal application of the ECHR	131
5.5. Belgian courts and the margin of appreciation doctrine	135
5.6. Belgian courts and the use of general standards developed by the ECtHR.....	137
5.7. Belgian courts and some of the specific interpretative techniques adopted by the ECtHR	138
6. Legitimacy of the ECtHR as an issue in public debate?	139
7. Conclusion	141

Chapter 4. France

Céline LAGEOT.....	145
--------------------	-----

1. Introduction: a brief characterisation of the French constitutional system	145
1.1. Separation and balance of powers	145
1.2. Unitariness and decentralisation	147
1.3. Organisation of the judicial power.....	148
1.4. Fundamental rights.....	151
2. Constitutional review in France: the role of the Constitutional Council	152
3. The status of international law and the ECHR in the French constitutional order	155
3.1. Monism and the binding character of international law	155
3.2. Status of international law in the hierarchy of norms.....	156
3.3. The direct effect of the ECHR and its substantive protocols	157
4. Judicial competences to review the compatibility of norms with international law	158
4.1. The development of decentralised 'conventionality' review.....	158
4.2. The role of the Constitutional Council: <i>a priori</i> review	160
4.3. The competence of the courts to give priority to international law	161
5. The application of ECHR provisions by French courts.....	162
5.1. Review of national legislation and decisions for compatibility with the ECHR	163

5.2. Construing national law in harmony with the ECHR	165
5.2.1. The Constitution as a vehicle to construe national law in harmony with the ECHR.....	165
5.2.2. EU law as a vehicle to construe national law in harmony with the ECHR.....	165
5.3. French courts and the application of the ECHR provisions in cases between private parties	166
5.4. Conclusion	167
6. Effects of the ECtHR case-law on national case-law, legislation and legal practice	168
6.1. Introduction.....	168
6.2. Referring to Strasbourg case-law and complying with the ECtHR's requirements	169
6.3. Responses to judgments against France	170
6.3.1. Changing interpretation and case-law.....	170
6.3.2. Liability claims.....	173
6.3.3. Reopening of criminal proceedings.....	173
6.4. Responses to ECtHR judgments against other states	174
6.5. Running ahead or staying in line?	174
6.6. Limitations and reluctance to follow the Strasbourg case-law	175
6.6.1. Legislative discretion and deference.....	176
6.6.2. Interpretative reservations.....	177
6.7. Degree of influence: adoption of 'typical' ECtHR methods of review?	178
6.8. Conclusion	181
7. The role and position of the ECtHR debated in the country	181
8. Conclusion	183

Chapter 5. Germany

Eckart KLEIN	185
1. The constitutional system	185
1.1. Basics.....	185
1.2. Federal organs	185
1.3. The Federation and the <i>Länder</i>	186
1.4. The court system	186
1.5. Constitutional rights of the individual	187
1.6. Constitutional openness to international law.....	189
2. Status of international law in domestic law	189
2.1. Position of international law in German law	189
2.2. Incorporation theories	190
2.3. EU law	191
2.4. Emanations of international organisations	191

2.5. International law in the domestic hierarchy of norms	192
2.6. Summary: a moderately dualist system.....	193
3. Judicial review	193
3.1. Constitutional review: the role of the Federal Constitutional Court.....	193
3.2. <i>Ex post</i> review as principle.....	194
3.3. Possible collisions between international and domestic law	195
3.4. Decisions of international organisations.....	196
4. Implementation of the European Convention on Human Rights by national courts	196
4.1. Direct applicability of Convention rights	196
4.2. Invocability of Convention rights.....	198
4.3. Harmonising interpretation of domestic law.....	199
4.4. Invalidation of domestic law conflicting with the Convention? ...	202
5. The impact of the judgments of the European Court of Human Rights on national judicial decision making	203
5.1. Status of ECtHR judgments in national law	203
5.2. Reaction to judgments directed against Germany	204
5.3. Reactions to judgments not directed against Germany	206
5.4. Meaning of 'taking into account' of the ECtHR judgments.....	206
5.5. The problem of <i>Drittewirkung</i>	208
5.6. Margin of appreciation doctrine.....	209
5.7. Reflections of standards and methods used by the ECtHR in domestic law.....	210
6. Legitimacy debates: the ECtHR and the national courts	211
6.1. Discussion on the role of the ECtHR in Germany.....	211
6.2. Discussions <i>de lege ferenda</i>	212
7. Conclusions	213
7.1. Connection between the features of the constitutional system and the impact of the Convention and the ECtHR judgments	213
7.2. Primary role of constitutional basic rights in daily practice	214
7.3. Impact of the discussions about the impact of the ECtHR on national case-law.....	215
7.4. Relation between the debate on the ECtHR and the domestic implementation of international law	216

Chapter 6. The Netherlands

Janneke GERARDS and Joseph FLEUREN	217
1. Introduction: constitutional background	217
2. Status of international law in domestic law	220
2.1. The constitutional system for giving effect to international law ...	220
2.2. Self-executing provisions	223

2.3. Judicial restraint	225
2.4. Judicial techniques	227
2.5. Horizontal effect	227
2.6. International law which is not embodied in self-executing provisions	229
2.7. EU law	230
3. Judicial review	231
4. Implementation of the European Convention on Human Rights by the Dutch courts	234
5. The impact of the judgments of the ECtHR on national judicial decision making	236
5.1. Introduction	236
5.2. Consequences for the Dutch courts of a judgment against the Netherlands: re-opening and liability	237
5.3. Complying with the judgments and decisions of the ECtHR	239
5.3.1. Application of standards developed by the ECtHR	239
5.3.2. Impact of the Court's standards – horizontal effect	241
5.4. 'Minimalist' readings of ECtHR precedents and translation of standards	242
5.5. Taking account of the role of the judiciary and the limited judicial competences	244
5.5.1. Refusing to set aside legislation and order changes of legislation	244
5.5.2. The Dutch 'mirror principle' approach	245
5.5.3. Varying the intensity of review: deference and judicial restraint	246
5.5.4. The role of the margin of appreciation doctrine	249
5.6. Conclusion	250
6. Debates about the ECtHR and the national courts	251
6.1. Development and locus of the Dutch debate on the role of the Court	251
6.2. Effects of the debate	254
6.3. Conclusion	256
7. Conclusions	256

Chapter 7. Sweden

Iain CAMERON and Thomas BULL	261
1. Introduction: constitutional background	261
1.1. General constitutional structure	261
1.2. Organisation of the judiciary	263
1.3. Protection of fundamental rights	265

2.	The status of international law in domestic law	266
3.	Constitutional review.....	270
4.	Implementation of the European Convention on Human Rights by Swedish courts	274
5.	The impact of the judgments of the ECtHR on national judicial decision making	276
5.1.	The ECHR and judicial interpretative techniques	276
5.2.	The practical impact of ECtHR case-law, particularly as regards constitutional review	278
5.3.	Responses to breaches of the ECHR	283
5.4.	Horizontal effects	286
6.	Legitimacy debates: the ECtHR and the national courts	287
6.1.	Some background	287
6.2.	Public debate regarding the role of courts	288
6.3.	More on the political and academic debate	290
7.	Concluding remarks	294

Chapter 8. The United Kingdom

	Roger MASTERMAN	297
1.	Introduction	297
2.	The status of international law in the United Kingdom	301
3.	Judicial review and the protection of human rights	302
3.1.	Constitutional review – an alien concept	302
3.2.	Civil liberties	304
3.3.	Constitutional common law rights	305
3.4.	Towards proto-constitutional review	306
3.4.1.	The influence of EU law	306
3.4.2.	The influence of the ECHR	307
4.	The implementation of the ECHR by national courts	308
4.1.	The Human Rights Act scheme	308
4.2.	The range of protected rights	310
4.3.	Legislative review under the Human Rights Act	311
4.3.1.	Interpretation	311
4.3.2.	Declarations of incompatibility	313
4.4.	Horizontality	315
4.5.	The extent of judicial enforcement powers	317
5.	The impact of ECtHR decisions on judicial decision making	318
5.1.	The relationships between national laws and the Convention rights	318
5.2.	The ‘mirror’ principle	322
5.3.	The margin of appreciation and deference	324

6.	Legitimacy debates: the European Court of Human Rights and national authorities	327
7.	Conclusions	330

Chapter 9. Comparative analysis

	Janneke GERARDS and Joseph FLEUREN	333
1.	Introduction	333
2.	The status of international law, in particular the ECHR, in the domestic legal orders	335
2.1.	Monist and dualist traditions	335
2.2.	A note on the law of the European Union	337
2.3.	The status of international law, in particular the ECHR, in the states under review	338
2.3.1.	Questions to be addressed	338
2.3.2.	Implementation of (the content of) international legal norms in the national legal order	339
2.3.2.1.	Customary international law	339
2.3.2.2.	Treaties	340
2.3.2.3.	Decisions of international organisations	341
2.3.3.	Direct effect	341
2.3.3.1.	The notion of direct effect or self-executing provisions of international law	341
2.3.3.2.	Direct effect of the ECHR	343
2.3.3.3.	Orders to legislate	344
2.3.3.4.	Self-executing provisions and horizontal effect ..	345
2.3.4.	Hierarchy and competence to review national legislation for compatibility with international law	346
2.3.5.	Harmonious interpretation and constitutional review ..	347
2.4.	Conclusion	348
3.	Dealing with the judgments and decisions of the Court	349
3.1.	Introduction	349
3.2.	The Court’s requirements	350
3.2.1.	<i>Res interpretata</i> : the interpretative force of the Court’s precedents	350
3.2.2.	The obligations imposed on the states by the Convention and the Court	351
3.2.3.	Consequences for the national courts	352
3.2.4.	Conclusion	355
3.3.	Synthesis of the findings of the national reports	355
3.3.1.	Introduction	355
3.3.2.	Formal powers to execute judgments against the State ..	356

3.3.3.	Frequency of references to Strasbourg case-law; acceptance of <i>res interpretata</i>	357
3.3.4.	Adjusting national case-law because of ECtHR precedents.....	358
3.3.5.	'Positive deviations' and the application of the 'mirror principle'	360
3.3.6.	Adopting typical Convention doctrines	361
3.3.7.	Taking constitutional competences seriously; judicial restraint.....	363
3.3.8.	Conclusion	364
4.	Debate about the Court and its case-law.....	366
4.1.	Introduction.....	366
4.2.	Dealing with national criticism and national debates by the Court	366
4.3.	Criticism in the states.....	368
4.4.	Conclusion	369
5.	Conclusions	370
	<i>Appendix</i>	375