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

Intersentia Publishing Ltd.
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Email: mail@intersentia.co.uk

Distribution for the UK:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law. A comparative analysis
Janneke Gerards and Joseph Fleuren (eds.)

Artwork on cover: © Alinari Archives, Florence - Umberto Boccioni (1882-1916), Dynamism of a human body

ISBN 978-1-78068-217-4
D/2014/7849/29
NUR 828

This publication is an adapted version of the report 'Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak. Een rechtsvergelijkend onderzoek', which was commissioned by the Netherlands Research and Documentation Centre (WODC) © WODC, Ministry of Security and Justice, the Netherlands, copyrights reserved.

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

SUMMARY OF CONTENTS

CONTENTS

CONTRIBUTORS

Prof. Dr. T. (Thomas) Bull
Judge of the Supreme Administrative Court of Sweden, former Professor of Constitutional Law at Uppsala University, Faculty of Law

Prof. Dr. I. (Iain) Cameron
Professor of Public International Law, University of Uppsala, Faculty of Law
Member of the Council of Europe Commission on Democracy through law

Prof. Dr. J.H. (Janneke) Gerards
Professor of Fundamental Rights Law, Radboud University Nijmegen

Dr. J.W.A. (Joseph) Fleuren
Associate Professor of Jurisprudence, Radboud University Nijmegen

Prof. Dr. E. (Eckart) Klein
Professor of Constitutional, International and European Law, University of Potsdam, Centre for Human Rights (*Menschenrechtszentrum*)

Dr. C. (Céline) Lageot
Senior Lecturer in Public Law, University of Poitiers, Faculty of Law and Social Sciences, Research Centre for International Legal Cooperation (*Centre d'Etudes sur la Coopération Juridique Internationale*)

Prof. Dr. K. (Koen) Lemmens
Professor of Human Rights Law, University of Leuven, Leuven Institute for Human Rights and Critical Studies
Professor of Press Law, Free University of Brussels

Prof. Dr. P. (Paul) Lemmens
Professor of Human Rights Law, University of Leuven, Leuven Institute for Human Rights and Critical Studies
Judge at the European Court of Human Rights

Prof. R. (Roger) Masterman, LLB, LLM, AKC
Professor of Law, Durham University, Human Rights Centre

G. (Guan) Schaiko
Member of the Brussels Bar, researcher and teaching assistant at the Leuven Institute for Human Rights and Critical Studies, University of Leuven

ABBREVIATIONS

AB	AB Rechtspraak Bestuursrecht
ABRvS	Afdeling bestuursrechtspraak van de Raad van State
AC	Appeals Cases
AD	Arbetsdomstolen
AJDA	Actualité juridique de droit administratif
All ER	All England Law Reports
Appl.	Application
Arr. Cass.	Arresten van het Hof van Cassatie
Ass.	Assemblée
Ass. plén.	Assemblée plénière
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BL	Basic Law (Grundgesetz)
Bull.	Bulletin
Bull. civ.	Bulletin civil
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BVerwG	Bundesverwaltungsgericht
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts
Cass.	Cour de cassation
Cass. civ.	Cour de cassation, Chambre civile
CC	Conseil constitutionnel
CDDH	Steering Committee for Human Rights of the Committee of Ministers
CE	Conseil d'Etat
Ch	Chancery
Civ.	Chambre civile (de la Cour de cassation)
CJEU	Court of Justice of the European Union
Concl.	Conclusion
Cons. const.	Conseil constitutionnel
Const.	Constitution
Const. Ct.	Constitutional Court
Crim.	Criminal
CRvB	Centrale Raad van Beroep
Ct.	Court

D	Dalloz
DC	Décision du Conseil (constitutionnel)
Dec.	Decision on admissibility
Décis.	Décision
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECLI	European Case Law Identifier
ECR	European Court Reports
ESC	European Social Charter
ETS	European Treaty Series
EU	European Union
EWCA Civ	England and Wales Court of Appeal, Civil Division (neutral citation)
EWHC	England and Wales High Court (neutral citation)
FCC	Federal Constitutional Court
FSR	Fleet Street Reports
GC	Grand Chamber
HFD	Högsta förvaltningsdomstolen
HL	House of Lords
HL Debs	House of Lords Debates
HR	Hoge Raad
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IG	Instrument of Government (Regeringsformen)
ILDC	Oxford Reports on International Law in Domestic Courts
JORF	Journal officiel de la République Française
KB	King's Bench
NILR	Netherlands International Law Review
NJ	Nederlandse Jurisprudentie
NJA	Nytt Juridisk arkiv
NJW	Neue Juristische Wochenschrift
NYIL	Netherlands Yearbook of International Law
nyr	Not yet reported
Parl. Doc.	Parliamentary Document
Pas.	Pasicrisie belge
prop.	Proposition
QB	Queen's Bench
QBD	Queen's Bench Division
QPC	Question prioritaire de constitutionnalité
RÅ	Regeringsrättens Årsbok
Rec.	Recueil Lebon

Rec. Cons. const.	Recueil du Conseil constitutionnel
RFDA	Revue française de droit administratif
s.	Sida (page)
Sect.	Section
SFS	Svensk författningssamling
SLT	Scots Law Times
SOU	Statens offentliga utredningar
St Tr	State Trials
SvJT	Svensk Juristtidning
TA	Tribunal administratif
TFEU	Treaty on the Functioning of the European Union
TGI	Tribunal de grande instance
TI	Tribunal d'instance
Trb.	Tractatenblad
UKHL	United Kingdom House of Lords (neutral citation)
UKSC	United Kingdom Supreme Court (neutral citation)
VCLT	Vienna Convention on the Law of Treaties
WLR	Weekly Law Reports

CHAPTER 1
INTRODUCTION

Janneke GERARDS and Joseph FLEUREN

1. EVOLUTIVE INTERPRETATION, NATIONAL COURTS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights (ECHR or Convention) has great impact on national law. Important areas of law (e.g. criminal law, family law, administrative law, immigration law, social security law) have changed as a result of the influence of the ECHR and the case-law of the European Court of Human Rights (ECtHR or Court). National courts frequently refer to the ECtHR's case-law and their methods of review and argumentation in cases about fundamental rights increasingly appear to be modelled on the standards developed by the Court.[1]

The influence of the Convention on national law seems to be at least partly due to the authoritative role played by the Court and the interpretative mechanisms and techniques developed in its case-law. The Court's jurisdiction extends to all issues concerning the interpretation and application of the Convention.[2] Although its main function is to decide on individual applications,[3]

---

1 For recent overviews, see e.g. H. KELLER and A. STONE SWEET, eds., *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press 2008); G. MARTINICO and O. POLLICINO, eds., *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen, European Law Publishing 2010). See also e.g. E. BJORGE, 'National supreme courts and the development of ECHR rights', 9 *International Journal of Constitutional Law* (2011), pp. 5–31 and L.R. HELFER, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *European Journal of International Law* (2008) pp. 125–159.

2 Article 32 ECHR.

3 Cf. Articles 34 and 46 ECHR and see e.g. P. LEACH, 'On reform of the European Court of Human Rights', 6 *European Human Rights Law Review* (2009) p. 725; H. KELLER, A. FISCHER and D. KÜHNE, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', 21 *European Journal of International Law* (2010) p. 1025; Report of the Committee of Minister's Steering Committee for Human Rights

the Court has accepted that its role is, more generally, to elucidate and develop the meaning of the rights protected by the Convention.[4] In many of its cases the Court provides for abstract and general definitions and it has developed many standards and criteria that can be applied in broad categories of cases. Moreover, the Court has consistently repeated that it will not depart, without good reason, from its own precedents.[5] Interpretative principles and standards developed in the Court's case-law can be said to have *res interpretata* or 'interpretative authority'.[6] This implies that the meaning of the Convention provisions is shaped by the interpretations developed in the case-law of the ECtHR and, accordingly, the states are bound to comply with the Convention provisions as they are interpreted by the Court.[7]

Of equal relevance to the importance of the Convention is that the Court has always interpreted the Convention rights in an evolutive and dynamic manner. In the words of the Court, the Convention is interpreted 'in the light of present day conditions' to allow individuals to exercise their rights 'in a practical and effective manner'.[8] Using these principles as guidance, the Court has explained

---

(CDDH) on measures requiring amendment of the European Convention on Human Rights (Strasbourg, February 2012, CDDH(2012)R74 Add. I). See also P. EGLI, 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?', 17 *Journal of Transnational Law and Policy* (2007) p. 1.

4 e.g. *Ireland* v. *the United Kingdom*, ECtHR 18 January 1978, appl. no. 5310/71, para. 154.

5 e.g. *Herrmann* v. *Germany*, ECtHR (GC) 26 June 2012, appl. no. 9300/07, para. 78. On the Court's use of precedent, see further e.g. Y. LUPU and E. VOETEN, 'Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', APSA 2010 Annual Meeting Paper, <http://ssrn.com/abstract=1643839>.

6 See already S.K. MARTENS, 'Het Europees Hof voor de Rechten van de Mens en de nationale rechter' [The European Court of Human Rights and the national courts], *NJCM-Bulletin* (2000) p. 756, and J. VÉLU, 'Considérations sur quelques aspects de la coopération entre la Cour européenne des droits de l'homme et les juridictions nationales', in P. MAHONEY et al., eds., *Protecting Human Rights: The European Perspective* (Köln, Carl Heymanns Verlag 2000) p. 1511, at p. 1521. This was expressly recognised by the Parliamentary Assembly of the Council of Europe in 2000 (PACE Resolution 1226/2000, *Execution of judgments of the European Court of Human Rights*, 28 September 2000 (30th Sitting), para. 3). See also L. GARLICKI, 'Contrôle de constitutionnalité et contrôle de conventionalité. Sur le dialogue des juges', in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (Paris, Dalloz 2011) p. 271, at p. 280, and, in the same volume, A. DRZEMCZEWSKI, 'Quelques réflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg', at p. 246. The Court itself mentioned this in *Opuz* v. *Turkey*, ECtHR 9 June 2009, appl. no. 33401/02, para. 163.

7 The issue of *res interpretata* is discussed in more detail in chapter 2 of this book.

8 For the 'evolutive and dynamic approach', see e.g. *Tyrer* v. *the United Kingdom*, ECtHR 25 April 1978, appl. no. 5856/72 and, more recently, *Demir and Baykara* v. *Turkey*, ECtHR (GC) 12 November 2008, appl. no. 34503/97. For 'practical and effective' interpretation, see already *Airey* v. *Ireland*, ECtHR 9 October 1979, appl. no. 6289/73 and, more recently, *Mamatkulov and Askarov* v. *Turkey*, ECtHR (GC) 4 February 2005, appl. nos. 46827/99 and 46951/99. For a recent and elaborate analysis of the interpretative principles of the ECtHR, see H.C.K. SENDEN, *Interpretation of Fundamental Rights in a Multilevel Legal System. An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Antwerp, Intersentia 2011).

the Convention as covering a wide array of individual rights, ranging from classic rights such as freedom of expression to rights in the field of environmental protection and social security.[9] In addition, the Court has read many positive obligations into the Convention, which the national authorities have to comply with to enable individuals to effectively enjoy their Convention rights.[10]

The combination of the acceptance of the interpretative authority of the Court's judgments and the use of extensive interpretative techniques is often considered to be the main explanation for the significance of the Court's case-law. However, it seems that an equally important explanation for the impact of the Convention on national law can be found on the domestic level. If national authorities had simply ignored the Court's judgments and interpretations, they never could have been so influential. In most Convention states, the authorities endeavour to comply with the Court's judgments and loyally implement the Court's interpretations in their legislation, case-law and administrative decisions. They appear to have accepted that the Court has an important standard-setting and agenda-setting role to play alongside its supervisory role in individual cases.[11] In recent declarations the government leaders of the Convention states have expressly embraced the interpretative task of the Court and they have reaffirmed the need to seriously consider the effects of all of its judgments for their own case-law, as well as the need to implement the Court's judgments.[12]

The corollary of the endorsement of Convention standards and principles by the national authorities is that they have allowed the Convention to become deeply embedded in national law, national policy and national case-law.[13] The influence of the Convention and the Court's case-law on national law generally seems to be well accepted and, on the whole, favourably received. Over the past few years, however, some national politicians, judges and scholars have come to

---

9 See e.g., with references, J.H. Gerards, 'The prism of fundamental rights', 8 *European Constitutional Law Review* (2012) pp. 173–202.

10 See elaborately e.g. D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Londen, Routledge 2012).

11 B. Çali, A. Koch and N. Bruch, *The legitimacy of the European Court of Human Rights: the view from the ground* (UCL, Strasbourg 2011), via <http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf>.

12 See most recently the Brighton Declaration, adopted by the High Level Conference on the Future of the European Court of Human Rights on 19–20 April 2012, para. 9. See earlier in particular the Interlaken Declaration, adopted by the High Level Conference on the Future of the European Court of Human Rights on 19 February 2010, para. 4: 'The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to: ... taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system'.

13 See further Helfer, *supra* n. 1.

stress the downside of the Convention's impact on national law and policy. Perhaps surprisingly, such criticism has mainly come from 'old' States Parties to the Convention. It is particularly strong in some Western European democracies where the ECHR is robustly incorporated in the national legal systems and the overall level of compliance is generally high. In these systems critical voices have been raised to question the degree of the Court's influence on national law and politics and the Court's legitimacy to exert such influence.[14] In the view of the Court's critics, the sovereignty of parliament, as well as national sovereignty more generally, are negatively affected by the importance of the Strasbourg judgments for domestic law. Others disapprove of the proliferation of the ECHR rights, which is said to be the result of the Court's evolutive interpretation and the acceptance of positive obligations. These critics argue that the expansion of the scope of the Convention and the jurisdiction of the Court have reduced the freedom for the national legislature and the national policy-makers to act in accordance with their own needs and preferences.

Hence it seems that the Court's evolutive and dynamic approach and its general interpretations and standards, which have determined its success and impact for a very long time, may now turn against it. At least in some states, the willingness to implement each and every judgment is decreasing and new principles and standards developed in the Court's rulings are ever more critically assessed. In particular in the United Kingdom, some of the Court's recent judgments have caused great fury, such as its judgments about voting rights for prisoners[15] and the expulsion of terrorist suspects.[16] The Court is said to have set requirements in these judgments which conflict with long-established and widely accepted British notions of democracy and social responsibility. Such judgments have been very negatively received by the media and by certain politicians, and efforts have been openly made to avoid their consequences.[17] But perhaps even more important is that the critical attitude in

14 For an overview of the criticism, see T. Zwart, S. Flogaitis and J. Fraser, eds., *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (London, Edward Elgar 2013).

15 The controversial voting rights judgments are *Hirst* v. *the United Kingdom*, ECtHR (GC) 6 October 2005, appl. no. 74025/01; *Frodl* v. *Austria*, ECtHR 8 April 2010, appl. no. 20201/04; *Greens and M.T.* v. *the United Kingdom*, ECtHR 23 November 2010, appl. nos. 60041/08 and 60054/08; *Scoppola* v. *Italy (No. 3)*, ECtHR (GC) 22 May 2012, appl. no. 126/05.

16 Particularly controversial is the Court's judgment in *Othman (Abu Qatada)* v. *the United Kingdom*, ECtHR 17 January 2012, appl. no. 8139/09.

17 For a short overview of the debate, see *The Economist* 10 February 2011, 'Britain's mounting fury over sovereignty', <www.economist.com/blogs/bagehot/2011/02/prisoners_voting_rights>. After the Grand Chamber judgment in *Scoppola* (see *supra* n. 15), the following quote from the Prime Minister's Question Time in the House of Commons (23 May 2012) may illustrate the British government's attitude towards the Court: 'Nigel Dodds MP: Will the PM give an undertaking that he will not succumb to the Diktat from the European Court of Human Rights in relation to prisoners' voting, that he will stand up for the resolution that was passed in this House by an overwhelming majority, and that he will stand up for the

the United Kingdom has resulted in a number of proposals that would curtail the Court's ability to render far-reaching judgments and give high-impact interpretations. An example of this is the original British proposal to lay down the so-called margin of appreciation doctrine in the Convention, which aims at giving states more leeway to regulate fundamental rights matters in a way they think is appropriate and necessary, without too much interference by the Court.[18] Presently many also favour a proposal to replace the Human Rights Act 1998 (which implements the Convention in the UK legal system) by a UK Bill of Rights, which, at least in the eyes of some supporters, would offer the national authorities more leeway to steer their own course as regards the protection of fundamental rights.[19]

Although there is much controversy on these proposals, their very existence signals discontent with the impact of the European Convention on national law. Such discontent is also noticeable elsewhere, although it is usually of a different nature and intensity. The former president of the Belgian Constitutional Court, for example, has expressed scepticism of the Court's interpretative work, arguing that the Court has gone too far in extending the scope of the Convention to immigration law and social security issues.[20] In the Netherlands, the previous minister for foreign affairs supported proposals comparable to those made in the UK and there is an ongoing political debate on the question of whether the Court has gone too far in developing the Convention.[21] The existence of such

---

sovereignty of this House and the British people? David Cameron MP (Prime Minister): Well the short answer to that is Yes. I have always believed that when you are sent to prison you lose certain rights, and one of those rights is the right to vote. And crucially I believe this should be a matter for Parliament to decide, not a foreign court. Parliament has made its decision and I completely agree with it.' This debate is further addressed in chapter 8, section 6. In response to the *Abu Qatada* judgment (see *supra* n. 16), at one point proposals were made to withdraw from the Convention in order to enable the British authorities to ignore the ruling and expel the terrorist suspect anyway – see e.g. *The Guardian* 24 April 2013, 'UK may withdraw from European rights convention over Abu Qatada', <www.guardian.co.uk/law/2013/apr/24/european-rights-convention-abu-qatada>.

18 See the Draft Brighton Declaration, which was drafted under the British chairmanship of the Council of Europe, <www.coe.int/t/dgi/brighton-conference/default_en.asp>. For a short analysis, see e.g. L. Helfer, 'The Burdens and Benefits of Brighton', 1 *ESIL Reflections* (2012). Other proposals were made by the British think tank Policy Exchange: M. Pinto-Duschinsky, *Bringing Rights Back Home. Making human rights compatible with parliamentary democracy in the UK* (London, Policy Exchange 2011). The proposal has now resulted in the adoption of a new Protocol to the Convention in which the margin of appreciation is indeed codified (Protocol No. 15, *ETS* No. 213).

19 Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us – Volume 1*, December 2012. The report was very divided, however, on the exact reasons to favour a UK Bill of Rights; see in particular paras. 79ff.

20 M. Bossuyt, 'Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations', 28 *Human Rights Law Journal* (2007) p. 321; M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', *Inter-American and European Human Rights Journal* (2010) p. 47.

21 See further chapter 6, section 6.

debates has led many authors to conclude that the Court is in turmoil and that its legitimacy is under pressure.[22]

1.1. THE CONSTITUTIONAL COMPETENCES OF NATIONAL COURTS TO IMPLEMENT THE COURT'S CASE-LAW

Much has been written on the effects of national controversies and criticism on the work of the European Court of Human Rights, as well as on its future effectiveness. Mostly legal scholarship focuses on the Court's position and caseload, the procedure before the Court, the Court's argumentative methods and, more generally, the legitimacy of the Court and its judgments. The present volume takes a different approach.

To explain the focus of the book, it is important to stress that much of the criticism of the Court relates to the argument that the Court exercises an altogether too important role by its particularly influential and activist interpretative principles and doctrines, such as evolutive interpretation and positive obligations, which are considered to have great impact on national case-law. Perhaps even more importantly, it seems to be felt by many critics that the Court's interpretations have compelled as well as empowered national courts to adopt methods of interpretation similar to those of the Court, which may easily invite national courts to overstep the limits of their judicial competences. In fact, many of the debates on the Court and the Convention appear to be debates on the application of Convention doctrines and criteria *by national courts*. If the criticism is analysed, it can be seen that the critics often employ classical separation of powers arguments, referring to the counter-majoritarian dilemma, democracy and sovereignty of parliament, as well as to equally classical debates on national sovereignty and popular sovereignty. These arguments now only have a different guise, as they focus on the role that is played by the European Court of Human Rights and the influence this Court has on national judicial decision-making. In fact, however, many of the debates are not so much about the Court's legitimacy or the legitimacy of its judgments, as about the interaction between different constitutional actors and their proper place and behaviour.

Another important factor to be mentioned here is that the present discourse on the Court appears to be based on two important implied assumptions and intuitions.

---

22 J.P. Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments', 7 *European Constitutional Law Review* (2011) pp. 173–182; N. Bratza, 'The relationship between the UK courts and Strasbourg', 5 *European Human Rights Law Review* (2011) pp. 505–512; Çali, Koch and Bruch, *supra* n. 11; Zwart, Flogaitis and Fraser, *supra* n. 14.

It is felt, firstly, that the European Court of Human Rights exercises such great influence that national courts have to act as marionettes – they must follow the Court's movements, even if they want to act differently. As a result, the argument runs, they may easily overstep the limits of their judicial competences.

The second assumption is that this marionette behaviour and its constitutionally questionable consequences are facilitated and accommodated by the legal and constitutional mechanisms determining the national courts' competences. In the Netherlands, for instance, it is assumed that the great impact of the Convention on national law is caused by its strongly monist constitutional system, which allows national courts to review all Acts of Parliament and even the Constitution for their compatibility with the Convention provisions, and obliges them to disapply such Acts if this is necessary to avoid a violation of the Convention. Some Dutch critics therefore envy more dualist systems, such as the United Kingdom, where the competences of the national courts have been restricted by the legislation incorporating the Convention. In the United Kingdom, in turn, critics appear to think that their legal and constitutional system is responsible for the increased influence of the Court's judgments on national law, since the Human Rights Act compels the national courts to take the Court's case-law into account. If only for that reason, some have embraced the idea of introducing a purely national Bill of Rights.

Clearly, therefore, the legal and constitutional system is often 'blamed' for the impact of ECtHR case-law on national law, particularly through the role of the national courts, but the correctness of the underlying assumptions and intuitions may be questioned. It is far from certain, for example, that the national courts really are *required* to act as the ECtHR's marionettes. In particular, it is questionable whether it is correct to say that the national courts frequently transgress their constitutional competences because the Court's case-law obliges them to do so. Moreover, the assumption that the impact of Convention law on national law is determined by the constitutional mechanisms determining the national courts' competences is as yet unproven.

The importance of such unproven assumptions underlying the political and legal debates on the role of the Convention, as well as the entanglement of these debates with classical constitutional debates on sovereignty and the interaction between the powers of government, go to show that there is a need for greater insight into the mechanisms determining the implementation and application of the Court's case-law by national courts. In the current project, we aim to offer such insight by disentangling and illuminating the different elements underlying the interrelationship between the Court and national case-law. Our objective is to distinguish between: the requirements set by the Convention; the constitutional powers and competences of national courts to interpret and apply the Convention; the way in which these courts actually use these competences to deal with the Court's interpretative approaches; and the type of criticism that is

levelled at the Court's case-law and its influence on constitutional debates on the role of the courts. By analysing these elements separately, we think it is possible to arrive at a fruitful assessment of their interrelationship. In turn, we hope this will contribute to a constructive debate on the implementation of the Convention in national law, which is based on sound constitutional foundations rather than assumptions and intuitions.

1.2. MAIN RESEARCH QUESTIONS

As mentioned above, the main objective of the present book is to disentangle the different strands of the constitutional debate about the implementation of the ECHR and the case-law of the Court by national courts. Inspired by the analysis of the debate presented above, the research leading to the current volume has centred around four sets of research questions:

(1) What requirements have been formulated by the ECtHR in relation to the implementation of the ECHR in national law and the application of ECtHR case-law by national courts? To what extent and how does the ECtHR allow for national peculiarities and deviations? How does the Court interact with national authorities, in particular national courts?
(2) What powers and techniques do national courts use to ensure that the State complies, or to motivate it to comply, with its obligations under international law more generally, and the Convention in particular? How are these powers and techniques embedded in the constitutional law of the State in question? How do the national courts' interpretation and application of the Convention relate to the role of national fundamental rights (e.g. constitutional rights)?
(3) How do national courts deal with the case-law of the Court? What is the influence of specific Convention doctrines (e.g. evolutive interpretation and the margin of appreciation doctrine) on national case-law? Do national courts act as 'marionettes' of the Court, and how do they use the leeway left by the ECtHR? To what extent and how do national courts employ judicial and constitutional techniques to avoid transgression of their constitutional powers, while trying to comply with the Convention's demands?
(4) To what extent does the effect of the Court's interpretation on national case-law cause debate about the role of national courts, and about the role of the Court? To what extent does such debate exist independently from the Convention, e.g. because of classic separation of powers doctrines? What is the impact of these debates on national constitutional law? Do they impact the way in which the national courts decide their cases? Do they result in proposals made for constitutional change?

Given the central objectives and the background of the current project, a deliberate choice was made to focus on the implementation of the ECHR and the judgments of the ECtHR. There are certainly indirect effects of EU law on the national implementation of ECHR law and, indeed, such indirect effects have been taken into account. However, EU law as such and its implementation by national courts is not a focal point of this book. The reason for this is that, from a constitutional law perspective, the implementation of EU law is of a very different nature than the implementation of international law, such as the ECHR. EU law is given direct effect and priority based on the case-law of the European Court of Justice or specific constitutional provisions, and as far as there are any relevant constitutional mechanisms dealing with implementation of EU law, they are of a very special nature. Studying the mechanisms related to EU law would therefore not add very much to the study of the implementation of the ECtHR and could even distract from the focus on the implementation of the Convention.

2. APPROACH AND METHODOLOGY

2.1. OVERALL APPROACH

To answer the research questions defined in section 1.3 in the light of the main focus and objectives as mentioned in section 1.2, the research project leading up to the current book consisted of two different, yet interconnected, studies:

(1) Study of the case-law and approach of the Court
Firstly, a study was made of the case-law and approach of the Court and the Court's response to national criticism and debates. This study was meant to test the assumption that the impact of the Convention and the case-law of the Court is (at least partly) due to the requirements set by the Court, as well as to its use of high-impact principles of interpretation such as evolutive interpretation and autonomous interpretation. Moreover, it aimed to uncover the dynamics between, on the one hand, the Convention and the Court and, on the other hand, the states (in particular the national courts).

This study included extensive desk research of literature and of the Strasbourg case-law of the past fifteen years. This was supplemented by a series of qualitative interviews with six of the Court's judges and three of its registrars. Further details as to the methodology of this part of the study is provided in chapter 2, where the results of this study are presented.

(2) Comparative study into the implementation of the ECHR in national case-law
Secondly, a comparative study was made of the way in which the Convention and the case-law of the ECtHR have their effect on national case-law. Based on an detailed questionnaire, experts on six different states (Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom) investigated the powers and competences of the national courts to review Acts of Parliament and administrative Acts for their compatibility with international law (the Convention in particular) and the national constitution; the status of international law in the national legal order; the powers and competences of national courts to apply the case-law of the ECtHR in national law; and the way in which these powers and competences are used. In addition, they examined whether there is a debate on the position of the ECHR and, if so, what shape such debate has taken. The study thereby focused on the relationship between such debates and debates on the position of the national judiciary and national constitutional law.

2.2. THE COMPARATIVE ANALYSIS: SELECTION OF STATES AND APPROACH

2.2.1. Selection of states

Given the particular objectives of this book, the choice was made to make an in-depth study of the constitutional systems of Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom. These six states make an ideal set for assessing the interrelationship between constitutional mechanisms for the implementation of international law, the effects of the Convention and the case-law of the Court for national judicial decision-making, and the existence of the debate on the Convention and its impact. All the selected states have a well-established tradition of Convention application, and in all of these states there is an interesting discourse on constitutional review and the implementation of international law by national courts. Moreover, the role of the courts and the judgments of the Court tend to cause controversy in all of these states, although the intensity and nature of the debates may be very different. Finally, the selection represents a great diversity in constitutional systems for implementation of international law and judicial review. It includes three states with a (relatively) monist system (Belgium, France and the Netherlands) and three states with a (relatively) dualist system (Germany, Sweden and the United Kingdom). Whereas all three monist systems accept decentralised judicial review of the compatibility of Acts of Parliament with the Convention, the three dualist systems show great variation. In Germany, only the Federal Constitutional Court is competent to assess the compatibility of Acts of Parliament with the Convention; in Sweden, all courts can disapply Acts

violating the Convention; and in the United Kingdom, the highest courts are competent to render a declaration of incompatibility if they find a violation of the Human Rights Act. And finally, the six states are very different in their systems of constitutional review. The United Kingdom and the Netherlands have no constitutional court, nor any competence for constitutional review; such constitutional review is permitted in Belgium, France, Germany and Sweden, but their systems are organised very differently. In this respect, the selection enables a fruitful, relevant and valuable legal comparison to be made.

2.2.2. Approach of the comparative study

For the comparative part of the research project, the national experts on fundamental rights and implementation of European fundamental rights case-law were asked to prepare reports on the basis of a detailed questionnaire.[23] The questionnaire was drafted on basis of preliminary research into the impact of international law (in particular ECHR law) on national law and the application of international law by national courts. It was intensively discussed in a roundtable session to ensure that the relevant questions were asked and that the questions were clear and understandable for all different systems. In a second roundtable session the answers given to the questionnaires were compared and discussed. Moreover, possible explanations were explored for differences in national approaches and interrelationships between different elements of the debate were analysed. These discussions provided the basis for chapters 3–8 of this book as well as for the synthesis and conclusions presented in chapter 9.

3. OUTLINE OF THE BOOK

The studies into the implementation of the Convention and the case-law of the Court in national law, in particular national case-law, have resulted in seven different reports: one report about the Convention and the judgments of the Court and six national reports. These reports are presented in chapters 2–8. Chapter 9 contains a comparative analysis of the findings of chapters 2–8, as well as the main findings and conclusions of the research project.

Chapter 2 presents the study of the role played by the European Court of Human Rights. This chapter explains the extent to which the Court compels national courts to apply the Convention and the doctrines developed by the Court. It also provides an overview of the interpretative techniques the Court has developed, discussing the principles of evolutive, autonomous and effective protection, as well as a number of other important interpretative techniques. In

[23] See Appendix: Questionnaire for national reports.

the light of the objectives of the project, it is investigated to what extent the claim holds that the Court compels national courts to adopt certain judicial strategies and to accept the Court's interpretations, and to what extent the Court leaves leeway to the states to follow their own course. To this end the chapter also presents an analysis of the Court's efforts to co-operate with the national courts by means of a dialogue between judges. Finally, attention is paid to the way in which the Court has responded to the national criticism on its judgments.

Chapters 3–8 present the studies into the impact of the Convention and the Court's case-law on national case-law, the constitutional mechanisms used for the implementation of the Convention and the impact of criticism on the courts' application of fundamental rights provisions and precedents. The structure of the chapters is similar, as they are all based on the same questionnaire. Each chapter contains a descriptive analysis of national constitutional mechanisms for giving effect to international law more generally and to the ECHR more specifically, of the way in which these constitutional mechanisms are applied in practice by the national courts (in particular in cases relating to ECHR rights), and of the scope and nature of the criticism that has been directed at the ECHR and the ECtHR. Each chapter also contains a concluding section which reflects on the central questions of the project.

Chapter 9 brings together the findings of chapters 2–8, searching for interrelationships and connections and looking for answers to the main questions of this project. The chapter compares the constitutional mechanisms for the implementation of the ECHR (and international law more generally), paying attention to the status of the ECHR in the national hierarchy of norms as well as the ways in which the ECHR can have effect in national case-law. Subsequently, the chapter focuses on the implementation of the judgments and decisions of the ECtHR, addressing the requirements imposed by the ECtHR as well as their implementation in the legal orders of the six states compared. This chapter further discusses the impact of debates and controversies regarding the judgments of the ECtHR and their implementation by national courts. The comparative synthesis is concluded by a section answering the central questions of this study.

CHAPTER 2

THE EUROPEAN COURT OF HUMAN RIGHTS AND THE NATIONAL COURTS: GIVING SHAPE TO THE NOTION OF 'SHARED RESPONSIBILITY'

Janneke GERARDS

1. INTRODUCTION

As was mentioned in the introduction of this book, the case-law of the European Court of Human Rights (ECtHR or Court) has considerable impact on national case-law and this impact has sometimes given rise to (severe) criticism of the Court's work. The national reports in chapters 3–8 of this volume explain how domestic courts in six Western European states have generally responded to the Court's case-law and how they deal with the principles and techniques of interpretation developed in the Court's case-law. Moreover, these chapters address the nature and intensity of the criticism of the Court's work and position, as well as the national effects thereof.

The present chapter aims to illuminate the other side of the issue, i.e. the Court's own relationship with the domestic courts. In the light of the objectives of the present book, the questions raised are how and to what extent the Court obliges national courts to adopt its argumentative methods and principles; how, to what extent and by which means it respects national particularities and traditions; and how it has responded to national political and judicial criticism. By answering these questions and explaining the principles and methods of interpretation that are typical of the Court's case-law, the chapter first aims to provide a general basis for the national reports, the particular objective being to illuminate the way the Court uses these methods and principles to interact with national authorities. This will make it possible to assess to what extent the Court gives the national courts leeway to give shape to Convention terms and provisions as they see fit.

Secondly, the chapter aims to analyse and explain the relationship of the Court with the national courts. Special focus is placed thereby on the notions of

'shared responsibility' and the notion of (judicial) dialogue, as these notions can help to understand how the Court aims to position itself vis-à-vis the states. In turn, this makes it possible to answer the question of whether the Court really wants the national courts to copy its own argumentative approaches and act as marionettes, as sometimes seems to be assumed, or rather has very different expectations.

The research conducted for the purposes of this chapter included an analysis of relevant case-law of the Court of the past fifteen years and of the pertinent literature. To give more depth to the analysis of the various methods and mechanisms, interviews were conducted in September 2012 with six judges and three registrars of the Court. It was agreed with the judges and registrars that their input into the research project would be kept anonymous. Therefore, the insights derived from the interviews are incorporated in the form of a general explanation of the Court's use and application of various methods and its response to national criticism. The questions presented to the interviewees are annexed to this chapter.

The findings of the case-law analysis and the interviews are presented in an integrated manner. To provide a solid foundation for the specific methods, techniques and doctrines used in the Court's reasoning, this chapter starts with a brief survey of the basic tasks of the Court and the general principles underlying its work, as well as their interaction (section 2). A separate section (section 3) is then devoted to the obligations and requirements the Court has imposed on the national courts. Section 3 also explores the notion that is central to this report, viz. the notion of 'shared responsibility' between national courts and the ECtHR for the protection of the Convention. Subsequently, sections 4, 5 and 6 focus on a number of principles, methods and techniques the Court uses in its reasoning, with special attention to their function in the relationship between the Court and the national authorities. Section 4 focuses on the meaning and development of the principles of evolutive interpretation, of effective protection of fundamental rights, and of autonomous interpretation. These principles are said to have inspired the great expansion of the Court's case-law and they appear to lie at the very heart of most of the criticism aimed at the Court. Attention is thereby also paid to the methods of consensus argumentation and meta-teleological reasoning. Section 5 highlights two methods of argumentation that are of particular relevance to the impact of the Court's case-law, viz. procedural review and the use of 'shallow' and 'narrow' reasoning. Section 6 addresses the notion of judicial dialogue and the way it has found its way into the case-law and the working methods of the ECtHR. Finally, section 7 discusses the Court's particular responses to the national criticism of it, based on the information derived from the interviews held in the Court. A résumé of the most important findings of the report, as well as some concluding remarks, can be found in section 8.

2. THE COURT'S *RAISON D'ÊTRE*

2.1. INTRODUCTION

The Court operates in a highly complex context. It is asked to hand down binding judgments in thousands of cases brought by individuals from all over Europe. These cases are of a widely varying nature – they may relate to racial violence,[1] the loss of a social security benefit,[2] or a prohibition of pre-natal screening of embryos.[3] In all these cases, the Court must determine which interferences amount to genuine violations of fundamental rights, which cannot be condoned, and which interferences cannot be regarded as acts that contravene the Convention. In doing so, the Court must continuously pay heed to national diversity and national sovereignty – after all, the Court is 'only' an international court with a subsidiary position.

As mentioned above, the objective of this chapter is to analyse how the Court deals with the complexities of its situation and how it interacts with the national courts. This can only be done, however, if the basic principles governing the Court's work and their interrelationship are well-understood. For that reason, this section provides a brief summary of the main principles underlying the Convention, focusing on the influence they may have on the Court's jurisprudence. Based on this brief survey, attention is subsequently paid to the 'push' and 'pull' factors determining the Court's relationship with the national authorities.

2.2. FUNCTIONS AND TASKS OF THE COURT

The Court's major task is to come to the assistance of individuals who have been harmed by violations of their fundamental rights by national governments or government agents.[4] As a completely external, independent and uninvolved

1 See e.g. *Fedorchenko and Lozenko* v. *Ukraine*, ECtHR 20 September 2012, appl. no. 387/03.

2 See e.g. *Czaja* v. *Poland*, ECtHR 2 October 2012, appl. no. 5744/05.

3 See e.g. *Costa and Pavan* v. *Italy*, ECtHR 28 August 2012, appl. no. 54270/10.

4 This is generally regarded as the most important function of the Court, which is always emphasised in reports related to the Court's reform; see e.g. P. LEACH, 'On reform of the European Court of Human Rights', 6 *European Human Rights Law Review* (2009) pp. 725–735; H. KELLER, A. FISCHER and D. KÜHNE, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', 21 *European Journal of International Law* (2010) pp. 1025–1048; Report of the Committee of Minister's Steering Committee for Human Rights (CDDH) on measures requiring amendment of the European Convention on Human Rights (Strasbourg, February 2012, CDDH(2012)R74 Addendum I). See also H. KELLER and A. STONE SWEET, 'Introduction: The Reception of the ECHR in National Legal Orders', in H. KELLER and S. STONE SWEET, eds., *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press 2008) pp. 3–28 at p. 11.

institution, the Court is well placed to decide whether a state has failed to comply with its obligations under the Convention. The essential function of individual protection of fundamental rights may explain many of the Court's interpretative approaches and techniques. The Court regards it as its primary role to assess all individual cases on their merits, looking at the particular circumstances of the case to evaluate whether there is a violation.[5] This finds its expression in a strongly case-based case-law in which 'judicial minimalism' and *ad hoc* balancing play an important role – the Court primarily decides its cases based on consideration of 'all circumstances of the case' (see below, section 5.3). As a corollary, the Court demands that the national authorities, in their role as primary guarantors of fundamental rights, offer such individual protection at the domestic level. Increasingly, the Court requires judicial review in concrete cases and rejects general legislation or blanket rules that do not allow for concretisation. This is further elaborated below in section 5.2.

The second function of the Court is to determine a minimum level of protection of fundamental rights which should be guaranteed in all Convention states.[6] This function is expressed clearly in the text of the Convention: the Preamble stresses the importance of a system of collective enforcement of fundamental rights.[7] Given the fundamental character of the Convention rights, it would not be acceptable if their exercise were to depend on where the individual happens to live. Someone living in the Ukraine should have an equal right to remain free of torture or discrimination, or to express himself freely, to someone living in the Netherlands or in France.[8] Only a central institution such as the ECtHR can uniformly establish the meaning of fundamental rights and define a minimum level of fundamental rights protection that must be guaranteed in all the states of the Council of Europe. This means that the Court has an essential role to play in standard-setting, even if states may always provide additional protection (Article 53 ECHR).[9] The Court has explained the consequences of this function for its case-law in the case of *Soering* v. *United Kingdom*:

---

5 See already *Sunday Times* v. *UK*, ECtHR 26 April 1979, appl. no. 6538/74, para. 65.

6 Cf. J.H.H. Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press 1999) at p. 105; J.W. Nickel, *Making Sense of Human Rights*, 2nd edn. (Malden, Blackwell 2007) p. 36.

7 See also T. Hammarberg, 'The Court of Human Rights versus the "Court of Public Opinion"', in *How can we ensure greater involvement of national courts in the Convention system?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 30–36 at p. 31.

8 Cf. Weiler, *supra* n. 6, p. 105; D. Galligan and D. Sandler, 'Implementing Human Rights', in S. Halliday and P. Schmidt, eds., *Human Rights Brought Home. Socio-Legal Studies of Human Rights in the National Context* (Oxford, Hart 2004) p. 31; Nickel, *supra* n. 6, at p. 36.

9 A. Stone Sweet, 'The European Convention on Human Rights and National Constitutional Reordering', 33 *Cardozo Law Review* (2012) pp. 1859–1868, calling this the Court's 'oracular' or 'law-making' function.

'87. ... the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".'[10]

This means that the Court cannot limit its work to deciding individual cases on their merits. In accordance with Article 32 of the Convention, the Court has continually stressed that its task is 'not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention'.[11] The notion of providing a minimum level of protection and the need to provide generally applicable interpretations informs many of the argumentative approaches adopted by the Court, especially the evolutive and autonomous interpretation of the Convention. These general principles and doctrines are illuminated in section 4.2. Moreover, the unifying approach of the Court can only be effective if it is endorsed by national courts, i.e. if national courts are willing to apply the Court's interpretations, based on these general interpretative principles, within their own national legal systems. Albeit rather implicitly, the Court has accepted that national courts should follow the Court's argumentative approach and they should apply the interpretations and standards expressed in its case-law. This particular fact, which relates to the so-called *res interpretata* effect of the Court's judgments, is discussed separately in section 3.2.

2.3. SUBSIDIARITY, PRIMARITY AND DIVERSITY

Guided by the Court's standards, it is the national authorities' task to guarantee the Convention rights and to protect them at a level that is at least equal to that provided by the ECtHR. The Court has stated time and again that the national authorities are generally better placed than the Court to make policy choices and protect fundamental rights in a way that fits well with national law and national constitutional traditions.[12] Moreover, the Court has stressed that the principle of subsidiarity means that the national authorities should offer primary

10 *Soering* v. *UK*, ECtHR 7 July 1989, appl. no. 14038/88; see also, more recently, *Rantsev* v. *Cyprus and Russia*: 'Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States' (ECtHR 7 January 2010, appl. no. 25965/04, para. 197).

11 e.g. *Ireland* v. *UK*, ECtHR 18 January 1978, appl. no. 5310/71, para. 154.

12 See already *Handyside* v. *UK*, ECtHR 7 December 1976, appl. no. 5493/72, para. 48.

protection.[13] This principle of primarity is of great importance, as it defines the Court's own role, which is first and foremost one of supervision.[14] Both the principle of subsidiarity and that of primarity will even be laid down in the Preamble to the Convention following the entry into force of Protocol No. 15.[15]

In addition, it is important to recall that the ECtHR is a *court* and, as a consequence, it has to operate under the same constitutional restrictions that are in effect in national courts.[16] Accordingly, it has accepted that it should respect the notion of the separation of powers and it should not stretch the rights and obligations under the Convention to the extent that *de facto* new norms are created.[17]

Finally, the Court has constantly demonstrated its awareness of national diversity and has tried to respect deeply felt national sensitivities and national (legal, political and social) traditions. It has thereby always accepted and stressed its subsidiary role, as is apparent from one of its earliest landmark cases, the *Belgian Linguistics* case of 1968:

> '[T]he Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.'[18]

These considerations highlight the impact of the subsidiarity principle on the Court's argumentation methods, which has been further developed in subsequent case-law. The Court will only accept new interpretations or apply

---

13 See F. Tulkens, *How can we ensure greater involvement of national courts in the Convention system?* Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 6–10 at pp. 6–7. See especially *Fabris* v. *France*, ECtHR (GC) 7 February 2013, appl. no. 16574/08, para. 72: 'where the applicant's pleas relate to the "rights and freedoms" guaranteed by the Convention the courts are required to examine them with particular rigour and care and … this is a corollary of the principle of subsidiarity'.

14 See e.g. *Demopoulos and Others* v. *Turkey*, ECtHR (GC) 1 March 2010 (dec.), appl. nos. 46113/99 and others, para. 69. On the principle of 'primarity', see also *in extenso* J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston, Martinus Nijhoff Publishers 2009).

15 Protocol No. 15 introduces a paragraph to the preamble to the Convention in which both the principle of subsidiarity and the primary responsibility of the states are emphasised.

16 See e.g. C. McCrudden, 'Judicial Comparativism and Human Rights', in E. Örücü and D. Nelken, eds., *Comparative Law: A Handbook* (Oxford, Hart 2007) pp. 371–398 at p. 376.

17 See e.g. *Quark Fishing Ltd.* v. *UK*, ECtHR 19 September 2006 (dec.), appl. no. 15305/06, para. 53.

18 *Belgian Linguistics Case*, ECtHR 23 July 1968, appl. no. 1474/62, para. I.B.10. See also Christoffersen, *supra* n. 14, at p. 248.

intensive scrutiny to a justification if there is sufficient consensus on a certain topic, or if the Court is at least as well placed as the national authorities to decide a case.[19] It will also usually leave a margin of appreciation to the case, applying a deferential test that leaves sufficient leeway to the states to take their own decisions and express their own policy preferences.[20] Moreover, the principle of subsidiarity leads the Court to apply such methods as autonomous interpretation, procedural review and case-based decision making to minimise intrusion into national policy and domestic law.[21] This leaves the national authorities, including the national courts, with much freedom to decide how they want to comply with the Convention obligations. This freedom is limited, however, by the main objective of the Convention, viz. the objective to provide effective protection to fundamental rights. In its case-law, the Court may applaud national authorities for the way they have dealt with fundamental rights issues, but it may also be very critical of the remedies and guarantees offered to individuals. By formulating positive procedural obligations, the Court may encourage the states to respect the Convention, while permitting the Court itself to remain at a distance and exercise only deferential, substantive review.

2.4. THE 'PUSH' AND 'PULL' FACTORS IN THE COURT'S WORK

The basic principles governing the Court's work can be easily derived from what was discussed in the previous subsections.[22] In order to provide effective enjoyment of fundamental rights, which is the core objective of the Convention:

(1) states have the primary obligation to respect and protect Convention rights;
(2) the minimum level of protection they have to guarantee is determined by the ECtHR, which is competent to interpret the Convention;
(3) the Court has a supervisory role and can decide if the states have complied with their obligations in individual cases.

Theoretically, the three functions of the Court and the ECHR system of supervision, as well as these main principles, are complementary. In practice, however, such complementarity appears to be very difficult to achieve. National sovereignty and deeply felt national constitutional values may result in strong disagreement with the level of protection the Court has defined. It is often

19 Cf. STONE SWEET, *supra* n. 9, at p. 1863.
20 See *infra*, section 3.4.
21 See *infra*, sections 4 and 5.
22 For similar summaries, see STONE SWEET, *supra* n. 9, at p. 1861 and HAMMARBERG, *supra* n. 7, at pp. 30–31.

stressed that fundamental rights can be guaranteed and protected in different ways, and that a particular national situation may merit a special interpretation or justify special restrictions on their exercise.[23] Indeed, it has sometimes been argued that the Court's legitimacy depends on its preparedness to respect the diversity of fundamental rights standards in Europe.[24] Others have argued that such differences should not be taken into account, since it is only the effectiveness of the Convention rights that counts.[25] Thus, there appears to be an almost inherent conflict between its task to provide effective protection of the Convention, and the need to respect national values and national traditions.[26]

In reality, rather than complementarity there seems to be an unavoidable tension between the national desire to protect fundamental rights in a way the state thinks fit (which could be regarded as the Court's 'pull factor'), and the ECtHR's task to supervise the compliance of national fundamental rights protection with the Convention (the Court's 'push factor').[27] Indeed, much of the national criticism of the Court can be traced back to this tension, which also underlies and informs all of the Court's interpretative activities, as well as the extent to which it is able to influence national judicial decision making. For that reason, the push and pull factors of the Convention system figure prominently in this report as a background to the analysis of the Court's activities.

---

23 See e.g. S. GREER, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge, Cambridge University Press 2006) p. 224; J.H. GERARDS, 'Pluralism, Deference and the Margin of Appreciation Doctrine', *European Law Journal* (2011) pp. 80–120; Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia 2002) p. 241; P. MAHONEY, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', 19 *Human Rights Law Journal* (1998) p. 1 at p. 12; A. OSTROVSKY, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals', 1 *Hanse Law Review* (2005) p. 47 at p. 57.

24 J.V.A.G. PIRET, 'Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law', in J. TEMPERMAN, ed., *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Martinus Nijhoff Publishers, Leiden 2012) pp. 59–89 at p. 77.

25 On this, see e.g. J.A. SWEENEY, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', 54 *International Comparative Law Quarterly* (2005) p. 459; G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, Oxford University Press 2007) p. 123.

26 See also M. DELMAS-MARTY, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, trans. N. NORBERG (Oxford/Portland, Hart Publishing 2009) and H.P. GLENN, *Legal Traditions of the World*, 4th edn. (Oxford, Oxford University Press 2010).

27 See for this terminology also M. ANDENAS and E. BJORGE, 'National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention', University of Oslo Faculty of Law Legal Studies Research Paper Series, No. 2011–15, <http://ssrn.com/abstract=1818845> pp. 7 and 8.

3. THE SHARED RESPONSIBILITY OF THE COURT AND THE NATIONAL COURTS

3.1. INTRODUCTION

Section 2 has discussed the main principles of the Convention system and has explained that these principles are only rarely complementary. In most cases, the Court has to deal with a certain amount of tension between the need to provide effective protection of the Convention and the need to respect national sovereign powers and national constitutional values. There is more to be said about the Court's role, however, than only that it has to deal with a situation of tension and complexity. Important other elements defining the Court's present position and jurisprudential approach are the development of the so-called doctrine of *res interpretata* (i.e. the binding character of the Court's interpretations as part of the states' Convention obligations) and the development of particular obligations for national courts under the Convention. This section explains that the combination of these various aspects of the Convention means that, in the Court's view, the national courts and the Court have a 'shared responsibility' to protect the Convention. It is from this perspective of shared responsibility that many of the obligations, interpretations and standards imposed on the national courts can be understood, as is further explained in sections 4 and 5. In turn, the notion of shared responsibility also determines the amount of leeway the national courts have in applying the Convention rights.

Section 3.2 of this chapter sets out the legal notions and concepts informing the notion of shared responsibility, i.e. the notions that provide the foundation for national judicial compliance with the Court's precedents. The obligations on the national courts that actually result from the Convention and the Court's case-law are then explored in section 3.3, as well as the question of how and to what extent the Court's margin of appreciation doctrine might be relevant to the national courts' work (section 3.4). This is particularly relevant given the focus of this book on the national implementation of Convention obligations and the extent to which national courts are obliged by the Court to behave in a certain way. By way of conclusion, the notion of shared responsibility is further explained in section 3.5.

3.2. *ERGA OMNES* EFFECT AND *RES INTERPRETATA*

The Court's judgments are officially only binding on the parties to the case (see Article 46 of the Convention). Thus, strictly speaking, if a violation has been found in a case against the Netherlands, the other 46 States Parties do not have

to comply with the judgment or even bother to read it.[28] If a state refuses to accept a judgment handed down in a case to which it was not a party, there are no means to force the state to accept it. The only option is for an individual citizen to lodge an application regarding the same matter against his own government, thus triggering the Court to hand down a judgment that is binding on the state in question.[29] It has become accepted, however, that this limitation of the binding effect of the Court's judgments is only relevant in the concrete evaluation of an alleged violation and its justification, i.e., the operative part of the judgment.[30] The Court's interpretations of the notions contained in the Convention are of a general nature and they can be regarded as determining the meaning of the various terms and concepts contained in the Convention.[31] In the Interlaken Declaration of 2010, the European government leaders even committed themselves to 'taking into account the Court's developing case-law, also with a view to considering the conclusions drawn from a judgment finding a violation of the Convention by another State, where the same problem exists within their own legal system'.[32] Indeed, a different view of this would be difficult to reconcile with the Court's function of creating a uniform minimum level of protection throughout Europe. This function requires at the very least

---

28 Cf. E. KLEIN, 'Should the binding effect of the judgments of the European Court of Human Rights be extended?', in P. MAHONEY, ed., *Protecting Human Rights: the European Perspective* (Köln, Heymanns 2000) pp. 705–713 at p. 706; G. RESS, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order', 40 *Texas International Law Journal* (2005) p. 359 at p. 374.

29 See, in particular, S. BELJIN, '*Bundesverfassungsgericht* on the status of the European Convention of Human Rights and ECHR decisions in the German legal order. Decision of 14 October 2004', 1 *European Constitutional Law Review* (2005) p. 553 at pp. 558–559; RESS, *supra* n. 28, p. 37.

30 Cf. L. GARLICKI, 'Contrôle de constitutionnalité et contrôle de conventionalité. Sur le dialogue des juges', in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (Paris, Dalloz 2011) pp. 271–280 at p. 280 and, in the same volume, A. DRZEMCZEWSKI, 'Quelques reflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg', pp. 243–248 at p. 246.

31 See already S.K. MARTENS, 'Het Europees Hof voor de Rechten van de Mens en de nationale rechter', *NJCM-Bulletin* (2000) p. 756 at p. 756, and J. VÉLU, 'Considérations sur quelques aspects de la coopération entre la Cour européenne des droits de l'homme et les juridictions nationales', in P. MAHONEY et al., eds., *Protecting Human Rights: The European Perspective* (Köln, Carl Heymanns Verlag 2000) pp. 1511–1525 at p. 1521; this was expressly recognised by the Parliamentary Assembly of the Council of Europe in 2000: 'The principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice' (PACE Resolution 1226/2000, *Execution of judgments of the European Court of Human Rights*, 28 September 2000 (30th Sitting), para. 3). See also M. MARMO, 'The Execution of Judgments of the European Court of Human Rights – A Political Battle', 15 *Maastricht Journal of European and Comparative Law* (2008) pp. 235–258 at p. 242–243.

32 High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010 – Action plan, para. B.4.c.

the acceptance that an interpretation given in one case, which establishes a certain minimum level of protection, is equally pertinent and applicable in all similar cases.

This effect, which is commonly called the *res interpretata* of the Court's interpretations, has expressly been embraced and underlined by the Court,[33] as witnessed by the lists of general interpretative principles with which the Court habitually starts its judgments on the merits.[34] Only after setting out well-established case-law and stressing the general applicability of certain interpretations, will the Court apply these general principles and standards to the facts of the case.[35] In addition, the *res interpretata* effect is implicit in the Court's acceptance of 'autonomous interpretations' of the Convention, which means that an interpretation is given to Convention terms (e.g. 'tribunal' or 'family life') that is transversely applicable to all the states and does not depend on the meaning of such terms in national law.[36] Given such autonomous interpretations and the transverse relevance of the Court's general principles of interpretation, it is not surprising that it is now accepted that the states must abide by them.[37]

3.3. THE NATIONAL COURTS' OBLIGATION TO COMPLY WITH THE CONVENTION AND THE COURT'S INTERPRETATIONS

The *res interpretata* effect of the Court's judgments implies that all national authorities, including national courts, have to comply with the Convention as explained by the Court in its case-law, even if their state was not a party to the case in which a certain definition or application was given. Indeed, the aim of establishing a uniform minimum level of protection of fundamental rights

33 Cf. *Opuz* v. *Turkey*, ECtHR 9 June 2009, appl. no. 33401/02, para. 163 and *Rantsev* v. *Cyprus and Russia*, ECtHR 7 January 2010, appl. no. 25965/04, para. 197. See also GARLICKI, *supra* n. 30, at p. 280; DRZEMCZEWSKI, *supra* n. 30, at p. 246; C. VAN DE HEYNING, *Fundamental Rights lost in complexity* (PhD thesis University of Antwerp 2011), available via <http://ir.anet.ua.ac.be/irua/handle/10067/895430151162165141>, p. 180.

34 See further on these lists e.g. J.H. GERARDS, 'Judicial minimalism and "dependency": interpretation of the European Convention in a pluralist Europe', in M. VAN ROOSMALEN, et al., eds., *Fundamental rights and Principles* (Antwerp, Intersentia 2013) pp. 73–92, section 3.2; F.M.J. DEN HOUDIJKER, *Afweging van grondrechten in een veellagig rechtssysteem* [Balancing fundamental rights in a multi-layered legal system] (Nijmegen, WLP 2012) section 10.2.

35 See also *infra*, section 5.3.3.

36 See *infra*, section 4.2.3.

37 See the above-mentioned Interlaken Declaration, para. B.4.c. See further on the national implementation and acceptance of this aspect of the Interlaken Declaration: CDDH, Drafting Group A on the Reform of the Court (GT-GDR-A), *Draft CDDH Report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations*, GT-GDR-A(2012)R2 Addendum 1, 7 September 2012, paras. 71–95.

throughout Europe can only be realised if all national courts are prepared to adopt the Court's interpretations of the Convention. However, as the national reports in chapters 3–8 of this book show, the national courts may have different competences to accommodate and facilitate the implementation of the Court's interpretations in national law.[38] Some national courts have the power to implement ECtHR case-law directly in their national law, e.g. by means of Convention-conforming interpretation of national law or even by setting aside or disapplying national legislation if it conflicts with a specific ECtHR interpretation of the Convention. Other national highest courts have more difficulty in following the Court's lead, for example because they lack the competence to review the conformity of national legislation with Convention rights.

In this respect, it is important to note that the Court has always held that the Convention does not impose a certain constitutional structure on the states and, more importantly, it does not require that the states make the Convention directly enforceable through the national courts. As early as the case of *Swedish Engine Drivers' Union* v. *Sweden*, the Court clarified that 'neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention'.[39] In the case of *James and Others* v. *United Kingdom* the Court specified that the Convention does not require direct applicability of the Convention in the national courts:

> 'The Convention is not part of the domestic law of the United Kingdom, nor does there exist any constitutional procedure permitting the validity of laws to be challenged for non-observance of fundamental rights. There thus was, and could be, no domestic remedy in respect of the applicants' complaint that the [contested] legislation itself does not measure up to the standards of the Convention and its Protocols. The Court, however, concurs with the Commission that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms.'[40]

The Court's case-law on the national obligations to respect the Convention, as interpreted by the Court, reflects an approach strongly oriented towards international law. The state as such is responsible for compliance, as is apparent from Article 1 of the Convention, which is an obligation of result.[41] The states

---

38 See also Stone Sweet, *supra* n. 9, at p. 1866–1867; for further detail, see Keller and Stone Sweet, *supra* n. 4, and G. Martinico and O. Pollicino, eds., *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen, European Law Publishing 2010).

39 *Swedish Engine Drivers' Union* v. *Sweden*, ECtHR 6 February 1976, appl. no. 5614/72, para. 50.

40 *James and Others* v. *UK*, ECtHR 21 February 1986, appl. no. 8793/79, para. 85.

41 Cf. J. Polakiewicz, 'The Status of the Convention in National Law', in R. Blackburn and J. Polakiewicz, eds., *Fundamental Rights in Europe. The European Convention on Human*

remain free to decide how they want to meet this obligation, although the Court generally requires the state to organise its internal structure in such a manner as to be able to meet its treaty obligations.[42] This is very clear from the case of *Assanidze* v. *Georgia*, in which the Grand Chamber of the Court posited that:

> 'for the purposes of the Convention, the sole issue of relevance is the State's international responsibility, irrespective of the national authority to which the breach of the Convention in the domestic system is imputable'.[43]

Accordingly, the Court never expressly held that national courts (or, for that matter, any other national organs, institutions or administrative bodies) should have certain competences or be able to adopt certain approaches.

Nevertheless, the Court may condemn the state if a violation of the Convention results from a lack of competence to disapply or nullify legislation that is contrary to the Convention.[44] This is readily apparent from the Court's case-law. In the case of *Losonci Rose & Rose* v. *Switzerland*,[45] the Swiss federal court found that an Act of Parliament violated the principle of gender equality, but it also noted that Parliament had expressly decided against an amendment of the relevant legislation to bring it in line with the federal constitution. Under Swiss constitutional law, this meant that the federal court lacked the competence to make any modifications to the Act to bring it in line with the right to equal treatment: Parliament's view had to prevail. The question arose before the Court as to whether Switzerland could be blamed for this, since the federal court had had no means to avoid the violation of the Convention. The Court gave a clear answer, based on the international law argument of state responsibility: 'Ceci [i.e. the specific division of competences in Switzerland] ne change toutefois en rien la responsabilité internationale de la Suisse au titre de la Convention'.[46] Consequently, it found a violation of the Convention. Although in subsequent cases compliance with the conformity might be guaranteed by not adopting legislation that violates fundamental rights in the first place, this judgment might be regarded as an invitation to introduce a system of judicial review that

---

Rights and its Member States, 1950–2000 (Oxford, Oxford University Press 2000) pp. 31–53 at p. 32–33.

42 Cf. KLEIN, *supra* n. 28, at p. 709.

43 *Assanidze* v. *Georgia*, ECtHR 8 April 2004, appl. no. 71503/01, para. 146.

44 The Court has always stressed, for example, that 'neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction' (*Urban and Urban* v. *Poland*, ECtHR 30 November 2010, appl. no. 23614/08, para. 46); it usually adds to this, however, that regardless of the constitutional system, '[t]he question is always whether, in a given case, the requirements of the Convention are met'.

45 ECtHR 9 November 2010, appl. no. 664/06.

46 *Idem*, para. 50 ('This changes nothing as regards the international responsibility of Switzerland under the Convention').

allows the national courts to assess the Convention conformity of national legislation.

Furthermore, it is clear that the states are not completely free in meeting their overall obligation to respect the Convention. Several judgments disclose that the Court increasingly sets higher requirements for the national courts to meet. In particular, it follows from cases such as *Pla and Puncernau* v. *Andorra* that the national courts are obliged to take the Convention into account in interpreting national law and even national contracts.[47] In this case the Court found a violation of the Convention because the national courts had interpreted a testamentary provision in accordance with the (supposed) intent of the testator. The Court found this unacceptable, since the interpretation was contrary to the non-discrimination principle laid down in the Convention. In quite general terms, it held that national courts will always need to strive for an interpretation that is in accordance with the Convention, and even that they thereby have to adopt an evolutive approach:

> '62. The Court reiterates that the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-day conditions ... Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949 ... Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities ... [A]ny 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 the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.'

It is clear from this ruling that the states can be held responsible for interpretations and judgments of the national courts, and that the national courts have to copy the Court's own evolutive approach to comply with the minimum standards of the Convention.[48]

---

47 ECtHR 13 July 2004, appl. no. 69498/01. In similar vein, see *Khurshid Mustafa and Tarzibachi* v. *Sweden*, ECtHR 16 December 2008, appl. no. 23883/06. See also, outside the sphere of contractual obligations, *Paulić* v. *Croatia*, ECtHR 22 October 2009, appl. no, 3572/06, para. 42: 'no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention'.

48 See also E. Bjorge, 'National supreme courts and the development of ECHR rights', 9 *International Journal of Constitutional Law* (2011) pp. 5–31, giving examples of cases from which it appears that national courts must apply the principle of evolutive interpretation; see Garlicki, *supra* n. 30, at p. 274–275; and, for more examples, C. de Kruif, *Onderlinge*

Moreover, in the case of *Fabris* v. *France*, the Court's Grand Chamber held that the national courts generally have an obligation to ensure that national legislation is in conformity with the Convention.[49] In particular, it held that this imposes special requirements on the courts if a state has introduced new legislation to implement an earlier judgment of the ECtHR. Such legislation should comply with the state's Convention obligation, but the national courts also have a special role in safeguarding Convention compliance:

> 'This imposes an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court.'[50]

This consideration of the Court implies that, if states are confronted with legislative provisions that can be interpreted in different ways, they should use their interpretative competence to ensure that their case-law is in conformity with the standards formulated by the ECtHR. Moreover, one may even read the case as implying that national courts should set aside national legislation that clearly conflicts with ECHR provisions as interpreted by the ECtHR.[51]

Hence, there are increasingly strong obligations in the Court's case-law on national highest courts to refuse to apply national legislation that is contrary to the Convention and to interpret such legislation in conformity with the Court's case-law.[52] Even if there is no general requirement to incorporate the Convention in national law and allow individuals to invoke the Convention directly before the national courts,[53] this means that the Convention has a huge impact on national law, national judicial decision making and national constitutional division of competences.

3.4. THE MARGIN OF APPRECIATION DOCTRINE AND ITS (IR)RELEVANCE FOR NATIONAL COURTS

3.4.1. Development and function of the margin of appreciation doctrine for the Court

In relation to the principle of subsidiarity, and given the push and pull factors mentioned in section 2.4, the Court has developed its famous margin of

---

overheidsaansprakelijkheid voor schendingen van Europees recht [Mutual state responsibility for violations of European Law] (Apeldoorn/Antwerpen, Maklu 2012) pp. 27 ff.

49 *Fabris* v. *France*, ECtHR (GC) 7 February 2013, appl. no. 16574/08, para. 72.

50 *Idem*, para. 75.

51 See further on this reading the case-note by GERARDS to the case in *European Human Rights Cases* 2013/88 (in Dutch).

52 See also STONE SWEET, *supra* n. 9, at pp. 1866–1867.

53 Cf. e.g. REss, *supra* n. 28, at p. 374; VÉLU, *supra* n. 31, at pp. 1515–1516.

appreciation doctrine.[54] The existence of this doctrine can only be understood against the background sketched in section 2. As mentioned there, the Court acknowledges that the national authorities have the primary responsibility to safeguard the Convention rights. As long as they respect the limits set by the Convention and the case-law of the Court, i.e. as long as they do not fall below the minimum level of Convention protection, they have great freedom to make their own choices and decide which restrictions or exceptions are necessary and reasonable. Indeed, as expressed in the Court's 'better placed' argument, they are usually in the best position to make these choices and decisions.[55] The national authorities know the national circumstances and traditions best, they have better means than the Court has to gauge public and political support for decisions in delicate socioeconomic fields, and they can better appraise the pertinent individual and general interests.

The 'better placed' argument has proved very important in defining the Court's judicial strategy. The Court itself has often stressed that, given the better position of the national authorities to regulate fundamental rights issues, it should only exercise a subsidiary and supervisory role.[56] It is this recognition of the primary role of the national authorities and the subsidiary role of the Court that underlies the Court's well-known margin of appreciation doctrine. This is well expressed in one of the Court's early landmark cases, *Handyside* v. *United*

54 The doctrine and its effect have been analysed and discussed extensively; for a few of the most important contributions, see T.A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly* (1982) pp. 474–496; R.St.J. Macdonald, 'The Margin of Appreciation', in R.St.J. Macdonald et al., eds., *The European System for the Protection of Human Rights* (Dordrecht/Boston/London, Martinus Nijhoff 1993) pp. 83–124; E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996) pp. 240–350; N. Lavender, 'The Problem of the Margin of Appreciation', 4 *European Human Rights Law Review* (1997) p. 380; J.G.C. Schokkenbroek, 'The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 19 *Human Rights Law Journal* (1998) pp. 30–36; E. Benvenisti, 'Margin of appreciation, consensus, and universal standards', 31 *New York University Journal of International Law and Politics* (1999) p. 843; M.R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', 48 *International Comparative Law Quarterly* (1999) p. 641; S. Greer, *The Margin of Appreciation: interpretation and discretion under the European Convention on Human Rights*, Human Rights Files No. 17 (Strasbourg, Council of Europe Publishing 2000); Lord Mackay of Clashfern, 'The margin of appreciation and the need for balance', in P. Mahoney, ed., *Protecting Human Rights: The European Perspective* (Köln, Heymanns 2000) p. 837; Arai-Takahashi, *supra* n. 23; Ostrovsky, *supra* n. 23; Sweeney, *supra* n. 25; G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) pp. 705–732; Christoffersen, *supra* n. 14; Gerards, *supra* n. 23; J. Kratochvíl, 'The inflation of the margin of appreciation by the European Court of Human Rights', 29 *Netherlands Quarterly of Human Rights* (2011) pp. 324–357; D. Spielmann, 'Allowing the right margin. The European Court of Human Rights and the national margin of appreciation doctrine: waiver or subsidiarity of European review?', CELS Working Paper 2012, via <www.cels.law.cam.ac.uk>.

55 See *supra*, section 2.3.

56 See *supra*, section 2.3.

Kingdom, which concerned the conformity of a limitation of the freedom of expression with Article 10(2) of the Convention:[57]

> 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. ...
>
> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. ... [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.
>
> Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'.[58]

Although the application of the doctrine is often blurred and unclear (and the doctrine has been criticised for that reason), its theoretical importance for the Convention system as a whole is undisputed.[59] In practice, the doctrine functions as a yardstick for the intensity of the Court's scrutiny of arguments advanced in justification of an interference.[60] The Court thereby uses a sliding scale model, with only a relatively clear difference between the ends of leaving a 'wide margin of appreciation' and leaving a narrow one.[61] If a wide margin is permitted to the national authorities, the Court usually only superficially and rather generally examines the choices made by the national authorities to see whether the result is (clearly) unreasonable or disproportionate, or places an excessive burden on the applicant.[62] By contrast, if a narrow margin is left, the Court generally closely

---

57 *Handyside* v. *UK*, ECtHR 7 December 1976, appl. no. 5493/72.

58 *Idem*, para. 48.

59 See in particular the sources mentioned in n. 54 *supra*.

60 Although it is precisely here that there is some confusion on the effect of the doctrine. Some scholars have rightly stated that the determination of the scope of the margin of appreciation is sometimes presented as an outcome of substantive assessment of a justification, rather than as a tool to determine the intensity of review in a preliminary stage; see in particular LETSAS, *supra* n. 54.

61 On the problematic translation from margin of appreciation into standards of review, see *in extenso* CHRISTOFFERSEN, *supra* n. 14, at p. 265 and LAVENDER, *supra* n. 54, at p. 387. For the factors determining the scope of the margin of appreciation, see e.g. BREMS, *supra* n. 54, ARAI-TAKAHASHI, *supra* n. 23 and GERARDS, *supra* n. 23.

62 A classic example of deferential review is the case of *James and Others* v. *UK*, ECtHR 21 February 1986, appl. no. 8793/79, in which the Court allowed the national authorities a wide margin of appreciation in the context of property regulation. This wide margin corresponded to a lenient test of necessity: the Court explained that '[i]t is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way' (para. 51). For other examples, see *Rasmussen* v.

considers the facts of the case. It then carefully determines the interests at stake and decides for itself where the balance between the conflicting interests should have been struck. The national authorities then bear the burden of showing that the limitation of rights was based on careful and objective assessment of facts and interests and, more generally, that it was reasonable.[63] Furthermore, in many of these cases the Court applies a strict test of necessity or subsidiarity, often mentioning the availability of less intrusive measures to underpin its judgment that the interference cannot be held to be justified, or criticising the lack of possibilities for individualised judgments on the national level.[64]

For the states, therefore, the margin of appreciation doctrine literally determines the margins within which they can freely take decisions. For the Court, the doctrine determines the strictness of its review and thus the intensity with which it scrutinises national legislation and decisions. For that reason, some governments, such as those of the Netherlands and the United Kingdom, have advocated that the Court should leave a wider margin of appreciation to the states.[65] By doing so, in their view, the Court would be more respectful of national sovereignty and the fact that national authorities are best placed to apply the Convention in the national context. Nevertheless, scholars have argued that it is primarily the flexibility of the doctrine that gives it its force and impact.[66] By narrowing the margin of appreciation in cases where core fundamental rights are at stake or where the interference is particularly serious, the Court can exercise effective supervision and control over national acts and

---

Denmark, ECtHR 28 November 1984, appl. no. 8777/79, para. 41; *Fretté* v. *France*, ECtHR 26 February 2002, appl. no. 36515/97, para. 42; *Pla and Puncernau* v. *Andorra*, ECtHR 13 July 2004, appl. no. 69498/01, para. 46; *Anheuser-Busch Inc.* v. *Portugal*, ECtHR (GC) 11 January 2007, appl. no. 73049/01, para. 83; *Bulgakov* v. *Ukraine*, ECtHR 11 September 2007, appl. no. 59894/00; *Kearns* v. *France*, ECtHR 10 January 2008, app. no. 35991/04, paras. 80–84; *A. and Others* v. *UK*, ECtHR (GC) 19 February 2009, appl. no. 3455/05, para. 176; *A., B. and C.* v. *Ireland*, ECtHR (GC) 16 December 2010, appl. no. 25579/05, paras. 233 et seq. On this, see also J.H. GERARDS, *Judicial Review in Equal Treatment Cases* (Leiden, Martinus Nijhoff 2005) p. 155; P. MAHONEY, 'Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin', 11 *Human Rights Law Journal* (1990) p. 57 at pp. 78 and 87.

63 See e.g. *Connors* v. *UK*, ECtHR 27 May 2004, appl. no. 66746/01, para. 94. See also *Makhmudov* v. *Russia*, ECtHR 26 July 2007, appl. no. 35082/04.

64 See e.g. *Informationsverein Lentia* v. *Austria*, ECtHR 24 November 1993, appl. no. 13914/88, paras. 39 and 42; *Fuentes Bobo* v. *Spain*, ECtHR 29 February 2000, appl. no. 39293/98, para. 49; *S. and Marper* v. *UK*, ECtHR 4 December 2008, appl. nos. 30562/04 and 30566/04, paras. 119–120.

65 This was expressed by the Dutch government, for example, in a letter to the Dutch Parliament in which it explained its ideas on the future of the ECtHR; see (in Dutch) *Kamerstukken II* 2011/12, 32735, no. 32. The Senate responded to this by adopting a resolution, almost unanimously, in which it asked the government to abandon the issue of advocating a greater margin of appreciation for the states (*Kamerstukken I* 2011/12, 32735, no. C). For the UK, see in particular the leaked version of the British draft declaration for the intergovernmental conference in Brighton in April 2012: <www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft>, paras. 15–19.

66 See the various contributions cited *supra* n. 54.

decisions.[67] Only if it remains the Court's prerogative to determine the scope of the margin of appreciation, and only if the Court does do so consistently and diligently, can the doctrine play its crucial role in negotiating between the need to respect national sovereignty and national diversity, and the need to protect fundamental rights at a reasonable level.[68]

3.4.2. *Influence of the margin of appreciation doctrine for national decision making*

Although the margin of appreciation doctrine is considered fundamental to the system of Convention supervision as a whole, the question is sometimes raised as to what extent the doctrine may (or must) influence national judicial decision making. This influence proves to be very limited indeed. The margin of appreciation doctrine is an instrument of the Court to determine its relationship with the states. Given the Court's reliance on the international law notion of state responsibility, the doctrine is not to have any impact on the internal division of competences or the separation of powers.[69] The margin is accorded to the states as a whole, regardless of their internal structure or division of competences.[70] This means that the doctrine as such is also applicable to the national courts, meaning that they, just as much as the national legislature or national administrative bodies, have a certain amount of discretion to offer judgment in accordance with national law. In the case of *A. and Others* v. *United Kingdom*, the Court clarified that 'the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation'.[71]

Thus, if a wide margin of appreciation is accorded to the states, the national courts have more leeway to assess the reasonableness and proportionality of interferences with fundamental rights than if a narrow margin is left. There,

---

67 See in particular MACDONALD, *supra* n. 54, at p.123; ARAI-TAKAHASHI, *supra* n. 23, at p. 236; OSTROVSKY, *supra* n. 23, at p. 58, GERARDS, *supra* n. 23, at p. 105.

68 On this special value of the doctrine, see more elaborately also GLENN, *supra* n. 26, ch. 10.

69 See also *supra*, section 3.3.

70 Mostly the Court only mentions that '*Contracting States* must have a broad margin of appreciation' (e.g. *MGN Limited* v. *UK*, ECtHR 18 January 2011, appl. no. 39401/04, para. 142, emphasis added). Sometimes the Court makes clear which State body should be accorded a margin of appreciation, which makes clear that, in practice, the margin is accorded to all State organs, including the courts; see e.g. *Pye* v. *UK*, ECtHR (GC) 30 August 2007, appl. no. 44302/02, para. 71 (margin of appreciation is accorded to the legislature); *Buckley* v. *UK*, ECtHR 25 September 1996, appl. no. 20348/92, para. 75 (the local bodies taking a planning decision); *MGN Limited* v. *UK*, ECtHR 18 January 2011, appl. no. 39401/04, para. 150 (the national court); *Von Hannover (No. 2)* v. *Germany*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08, par. 105 (the national court and the national legislature jointly). On this, see more elaborately (in Dutch) N. JAK and J. VERMONT, 'De Nederlandse rechter en de *margin of appreciation*. De rol van de *margin of appreciation* in de interne horizontale relatie tussen de rechter, de wetgever en het bestuur' [The Dutch courts and the margin of appreciation. The role of the margin of appreciation in the internal horizontal relationship between the judiciary, the legislature, and the executive], 32 *NJCM-Bulletin* (2007) p. 125.

71 *A. and Others* v. *UK*, ECtHR (GC) 19 February 2009, appl. no. 3455/05, para. 176.

however, the relevance of the doctrine to national law ends. Importantly, the doctrine says nothing about the way national courts should behave towards other branches of government. In other words, if there is a wide margin of appreciation under the Convention, this does not imply that the *national* court must show judicial restraint towards the legislature or the administrative bodies.[72] The Court's Grand Chamber stressed this in *A. and Others* v. *United Kingdom*, where it said that '[t]he doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level.'[73]

Whereas the national courts are held to implement the Court's interpretations and, to some extent, copy its interpretative approach, as has been explained in section 3.3, this does not imply that they are at all required to duplicate the Court's application of the margin of appreciation doctrine. On the contrary: given the primary responsibility of the state for the protection of the Convention rights, it may be important for the national court to carefully assess the reasonableness of interferences with Convention rights by the legislature or administrative organs.[74] Of course, there may be good reason for the national courts to defer to the legislature or the executive by exercising restraint in fundamental rights cases. In such cases, however, the intensity of the national courts' review is not determined by the margin of appreciation case-law of the Court, but by national standards for deference, even if these standards may seem similar to those applied by the Court to determine the scope of the national margin of appreciation. If national courts were to automatically translate a wide margin of appreciation to deferential judicial review, this would be a misinterpretation of the doctrine. Indeed, the notion of 'shared responsibility', discussed below, can only be effective if the national courts adequately exercise their supervisory and corrective tasks and do not hide behind a doctrine that is not applicable at the domestic level.

3.5. 'SHARED RESPONSIBILITY': THE NATIONAL COURTS AND THE ECtHR AS PARTNERS IN GUARANTEEING THE CONVENTION

It is clear from the discussion above that the national courts have a very important role to play in guaranteeing the primary protection of the Convention.

---

72 See also JAK and VERMONT, *supra* n. 70, at p. 133; SPIELMANN, *supra* n. 54 at pp. 24–26; VAN DE HEYNING, *supra* n. 33, p. 203.

73 *A. and Others* v. *UK*, ECtHR (GC) 19 February 2009, appl. no. 3455/05, para. 184; see also SPIELMANN, *supra* n. 54 at p. 24.

74 See also JAK and VERMONT, *supra* n. 70, at pp. 132–133.

The state can be held accountable before the Court if national courts have not met their duty to guarantee the compliance of national law with the Convention, either from because of an oversight or because of a lack of competence. The important role of the national courts is also apparent from the Convention text. Article 35 stipulates that the Court can only review applications on their merits if all national remedies have been exhausted.[75] The Court has made clear that this provision aims to offer a possibility for reparation and correction of flawed legislation or administrative acts, which the states should fully use to comply with their primary obligation under Article 1 of the Convention to guarantee the Convention rights.[76] Only if national judicial proceedings have not offered redress may the Court take a second look at the case. This division of competences between the national courts and the ECtHR evidently places a rather heavy responsibility on the national courts. They have to make sure that the Court's case-law is implemented and respected in their own judgments and decisions and they have to make full use of their competences to secure compliance with the Convention.

However, it must be remarked that there is another side to this coin. It is likely that national courts will not always be willing or able to meet these obligations, for example if they disagree with the Court's findings, or if they lack the competence to comply. If that situation arises, it is obvious that the Court finds itself in a rather weak position, as it lacks strong powers to force the states into compliance – finding a violation against the state may often not be enough to bring about structural change.[77] Here, the tension between the push and pull factors discussed in section 2.4 is at its strongest. In fact, thus, the Court depends on constructive collaboration with the national courts and on the persuasiveness

75 On this, see also TULKENS, *supra* n. 13, at p. 6.

76 See in particular, and very explicitly, the Grand Chamber's judgment in *Demopoulos and Others* v. *Turkey*, ECtHR (GC) 1 March 2010, appl. nos. 46113/11 and others: '69. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system ... The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions.'

77 Cf. KELLER and STONE SWEET, *supra* n. 4, at p. 14.

and quality of its interpretations: it has to persuade and cajole national courts into compliance, rather than force them.[78]

It is to be understood in this light that the Court has expressly accepted that there must be a kind of 'shared responsibility' for guaranteeing the rights of the Convention, and it has stressed the importance of active involvement of national courts in the Convention system.[79] The Court wants to ensure that the national courts become its allies in a common project of protecting fundamental rights. Thus, the notion of 'shared responsibility' or 'partnership' can be seen as an expression of the Court's desire to deal with the tension between its push and pull factors in an adequate manner, i.e. protecting fundamental rights effectively while respecting national legal traditions and national diversity.

The notion of shared responsibility offers a useful lens to look at the interaction between the Court and the states from the purposes of this study – the more the Court's work contributes to shared responsibility, the more important the role of the national courts will be. For that reason, the subsequent sections will further discuss the Court's interpretative techniques and the principles developed in its case-law from the perspective of shared responsibility.

---

78 A.M. Slaughter, 'A Typology of Transjudicial Communication', 29 *University of Richmond Law Review* (1994) pp. 99–137 at p. 124–125; H. Keller and A. Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems', in Keller and Stone Sweet, *supra* n. 4, pp. 677–712 at p. 707; G. Lübbe-Wolf, 'How can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System?', in *How can we ensure greater involvement of national courts in the Convention system?* Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 11–16 at p. 11. See also J.H. Gerards, 'Argumentatie in een pluralistisch rechtssysteem – de uitdaging voor de Europese hoven' [Argumentation in a pluralist legal system – the challenge for the European courts], in E. Feteris et al., eds., *Gewogen oordelen. Essays over argumentatie en recht* [Balanced judgment. Essays about argumentation and law] (Amsterdam, Boom 2012) pp. 21–40 at p. 24–25; Gerards, *supra* n. 34.

79 The Court expressly mentioned the need for 'shared responsibility' in its *Preliminary Opinion in preparation of the Brighton Conference*, adopted by the Plenary Court on 20 February 2012, para. 4. See also N. Bratza, 'The relationship between the UK courts and Strasbourg', 5 *European Human Rights Law Review* (2011) pp. 505–512 at p. 511; N. Bratza, 'Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year', in *How can we ensure greater involvement of national courts in the Convention system?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 24–29 at p. 26–27; Tulkens, *supra* n. 13, at p. 8. See further Letsas, *supra* n. 25, at p. 83. This also has practical advantages, as stressed by Helfer and Arai-Takahashi – if domestic judges and authorities act as 'first-line defenders' of Convention rights, this will enhance judicial expediency and efficiency on the level of the ECtHR. Having regard to its limited resources, such a division of labour is of great value to the ECtHR; see Helfer, *supra* n. 1, at pp. 128 and 135 and Arai-Takahashi, *supra* n. 23.

4. GIVING SHAPE TO SHARED RESPONSIBILITY: PRINCIPLES AND METHODS OF INTERPRETATION

4.1. INTRODUCTION

The acceptance and application of general interpretative principles such as evolutive, practical and effective interpretation, and autonomous interpretation have led the Court to give a rather generous reading of many Convention rights, in particular Articles 3 (prohibition of torture), 8 (privacy and family life) and 1 First Protocol (property). It is because of its use of these principles that the Court is so often accused of activism and overreaching. At the same time, the Court can also use these methods to emphasise the importance of shared responsibility. In practice, the Court's methods and principles of interpretation can play an important role in shaping the interrelationship between the Court and the national courts, in particular in determining the leeway left to the national courts to give their own interpretation to the Convention.

This section aims to highlight the use the Court makes of these principles and methods of interpretation to enhance collaboration between national courts and the Court. After a general description of the meaning of the various principles and methods, the Court's strategic use of them is highlighted, as well as the effects of the use of these principles for the interrelationship between the Court and the domestic level.[80] Particular attention is thereby paid to the criticism that is directed at the Court's approach, as well as to the Court's response to this.

Before exploring these issues, it is important to stress that the Court uses many methods of interpretation that are not discussed in this section. In accordance with the general rules of interpretation mentioned in the Vienna Convention on the Law of Treaties, the Court often relies on classical methods of textual and systematic interpretation, or interpretation based on the *travaux préparatoires* of the Convention.[81] These methods are not specifically interesting to this chapter, however, as it is mainly concerned with the special way the Court gives shape to the Convention and the way it interacts with national authorities in this respect. For that reason they will not be addressed further here.

---

80 See also N. KRISCH, 'The Open Architecture of European Human Rights Law', 71 *Modern Law Review* (2008) pp. 183–216 at p. 206.

81 See in more detail, in Dutch, J.H. GERARDS, *EVRM – algemene beginselen* [ECHR – General Principles] (The Hague, Sdu 2011) ch. 1.

4.2. BASICS OF CONVENTION INTERPRETATION

4.2.1. Evolutive and consensus interpretation

The understanding of fundamental rights is continually changing as a result of societal and technological developments and changes in views on fundamental rights.[82] While it was long accepted, for example, that the notion of 'inhuman and degrading' treatment only related to extreme situations of ill treatment, the Court has now recognised that caning in schools also comes within the prohibition of degrading treatment in Article 3 ECHR.[83] In so doing, the Court mentioned expressly that 'the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field.'[84] Likewise, it has gradually come to accept that the death penalty cannot be reconciled with the underlying values of the Convention,[85] and that conscientious objections to compulsory military service must be recognised.[86] Thus, changes in societal and legal views on a certain topic are reflected in the Court's interpretations. The rationale for adopting such an evolutive approach is obvious: if the Court were not to take developments in opinions and views into account, the Convention would quickly fall out of step with national fundamental rights law and policy, and the Court would have great difficulty in fulfilling its function to provide a pan-European minimum level of protection of fundamental rights.

Evolutive interpretation also means that the interpretation of the Convention must be adapted to technological, factual and legal developments. The right to respect for an individual's privacy is now held to cover not only classic searches in one's home and telephone tapping, but also, for example, the placement of GPS instruments in one's car.[87] Similarly, the right to physical integrity, protected by Article 8, nowadays also covers DNA samples.[88] And in the same vein, the Court has accepted that the availability of the internet has led to new fundamental rights issues that are covered by the right to privacy (e.g. the long-term availability of personal data and difficulties related to not being able to fully remove personal information from the internet or databases),[89] and freedom of

82 J. MAHONEY, *The Challenge of Human Rights. Origin, Development and Significance* (Malden, Blackwell 2007) p. 97. For a good analysis of the evolution of the Convention, see also E. BATES, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, Oxford University Press 2010) in particular ch. 9.

83 *Tyrer* v. *UK*, ECtHR 25 April 1978, appl. no. 5856/72.

84 *Idem*, para. 31.

85 *Al-Saadoon and Mufdhi* v. *UK*, ECtHR 2 March 2010, appl. no. 61498/08, para. 120.

86 *Bayatyan* v. *Armenia*, ECtHR 27 October 2009, appl. no. 23459/03.

87 *Üzun* v. *Germany*, ECtHR 2 September 2010, appl. no. 35632/05.

88 *S. and Marper* v. *UK*, ECtHR (GC) 4 December 2008, appl. nos. 30562/04 and 30566/04.

89 See e.g. *Khelili* v. *Switzerland*, ECtHR 18 October 2011, appl. no. 16188/07.

expression (e.g. the possibility of placing information on the internet).[90] Such evolutive interpretations are almost unavoidable, given the Court's task to provide an adequate minimum level of protection.

To adapt its interpretations to present-day societal and legal views and opinions, the Court uses a special interpretative method, namely 'common ground' or 'consensus' interpretation.[91] The method implies that the Court will usually accept a novel (mostly wider) interpretation of the Convention if there is a sufficiently clear European consensus on the classification of a certain aspect of a right as part of a Convention right.[92] Using this approach, for example, the Court has come to accept that Article 8 of the Convention (protecting the right to respect for one's private life) covers assisted suicide[93] and abortion,[94] a right to procreation[95] and a right to legal recognition of gender transformation.[96] To discover if there is a sufficient consensus (or rather: convergence of legal views in Europe) to support a novel Convention interpretation, the Court looks at comparative studies (either produced by one of the intervening parties or, especially in Grand Chamber cases, by the Court's registry),[97] at international treaties[98] and reports of international organisations,[99] and at EU law.[100, 101] Clearly, this reliance on changes, developments and trends in national and international law leads to a dynamic and evolutive reading of the Convention.

4.2.2. Practical and effective rights and meta-teleological interpretation

The Court does not restrict the basis for its interpretation to evolutive interpretation and the need to attune its interpretation to the views and opinions expressed in the various European states. It also frequently stresses that the

90 See e.g. *Mouvement Raëlien Suisse* v. *Switzerland*, ECtHR (GC) 13 July 2012, appl. nos. 16354/06 and 16354/06.

91 On this method, see *in extenso* (and with many references) H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System. An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Antwerp, Intersentia 2011).

92 Cf. *Christine Goodwin* v. *UK*, ECtHR (GC) 11 July 2002, appl. no. 28957/95, para. 74: 'the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved'.

93 *Haas* v. *Switzerland*, ECtHR 20 January 2011, appl. no. 31322/07.

94 *A., B. and C.* v. *Ireland*, ECtHR (GC) 16 December 2010, appl. no. 25579/05.

95 *S.H. and Others* v. *Austria*, ECtHR (GC) 3 November 2011, appl. no. 57813/00.

96 *Christine Goodwin* v. *UK*, ECtHR (GC) 11 July 2002, appl. no. 28957/95.

97 See recently e.g. *Costa and Pavan* v. *Italy*, ECtHR 28 August 2012, appl. no. 54270/10; see classically also *Christine Goodwin* v. *UK*, ECtHR (GC) 11 July 2002, appl. no. 28957/95.

98 e.g. *Mamatkulov and Askarov* v. *Turkey*, ECtHR (GC) 4 February 2005, appl. nos. 46827/99 and 46951/99; *Demir and Baykara* v. *Turkey*, ECtHR (GC) 12 November 2008, appl. no. 34503/97.

99 e.g. *Opuz* v. *Turkey*, ECtHR 9 June 2009, appl. no. 33401/02.

100 e.g. *Micallef* v. *Malta*, ECtHR (GC) 15 October 2009, appl. no. 17056/06; *Neulinger and Shuruk* v. *Switzerland*, ECtHR (GC) 6 July 2010, appl. no. 41615/07.

101 See more extensively e.g. Senden, *supra* n. 91.

central aim and purpose of the Convention is to guarantee fundamental rights to individuals in a practical and effective manner.[102] It thereby frequently refers to the general objectives and fundamental principles underlying the Convention as a whole, such as notions of respect for human dignity, personal autonomy, democracy, the rule of law, and pluralism.[103] The protection of those values is central to the Convention system as a whole, as is clear from its Preamble and from the Statute of the Council of Europe. Not surprisingly, therefore, the ECtHR strives to give a reading to the Convention rights that fits the underlying values of the Convention. The interpretative technique used in this regard has been termed 'meta-teleological interpretation'.[104] In applying this technique, the Court does not so much refer to the concrete aim of certain provisions of the Convention (as would be the case with 'teleological' interpretation), but rather to the wider, general purpose and objective of the Convention.[105] The use of meta-teleological interpretation fits well with the general requirements for treaty interpretation that have been defined in Article 31 of the Vienna Convention on the Law of Treaties, which stipulates that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[106] The meta-teleological interpretation gives shape to the notion of 'object and purpose', as the Court explicitly mentioned in *Soering* v. *United Kingdom*:

> '87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"'.[107]

---

102 See already *Airey* v. *Ireland*, ECtHR 9 October 1979, appl. no. 6289/73, para. 24 and, more recently, *Mamatkulov and Askarov* v. *Turkey*, ECtHR (GC) 4 February 2005, appl. nos. 46827/99 and 46951/99. See more extensively SENDEN, *supra* n. 91, at p. 73.

103 Cf. O. DE SCHUTTER and F. TULKENS, 'Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution', in E. BREMS, ed., *Conflicts between Fundamental Rights* (Antwerp/Oxford/Portland, Intersentia 2008) pp. 169 at p. 214; F. OST, 'The Original Canons of Interpretation of the European Court of Human Rights', in M. DELMAS-MARTY and C. CHODKIEWICZ, eds., *The European Convention for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1992), pp. 283–318 at p. 295; SENDEN, *supra* n. 91, at p. 199. For examples, see *Pretty* v. *UK*, ECtHR (GC) 29 April 2002, appl. no. 2346/02, para. 64 (reference to human dignity); *Jehovah's Witnesses of Moscow* v. *Russia*, ECtHR 10 June 2010, appl. no. 302/02 (reference to personal autonomy); *United Communist Party of Turkey* v. *Turkey*, ECtHR (GC) 30 January 1998, appl. no. 19392/92, para. 45 (reference to democracy).

104 M. LASSER, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, Oxford University Press 2004).

105 Cf. SENDEN, *supra* n. 91, at p. 204.

106 See further on this, with references, SENDEN, *supra* n. 91, at p. 93.

107 ECtHR 7 July 1989, appl. no. 14038/88.

This consideration demonstrates that meta-teleological interpretation, consensus interpretation and evolutive interpretation are closely intertwined. In fact, they are different aspects of the same overall desire to do justice to the essential object of the Convention, i.e. to effectively protect individual fundamental rights and to guarantee a reasonable minimum level of protection of fundamental rights throughout the Council of Europe.

4.2.3. *Autonomous interpretation*

The Convention contains many notions and concepts that are also used in national constitutions and legislation, such as 'privacy', 'property', 'court' or 'marriage'. The precise legal meaning of such notions can differ in each individual legal system.[108] For example, what constitutes 'property' in Denmark can be different from what constitutes property in Greece, and while disciplinary proceedings may be conducted before a court in one state, they may not form part of the regular judicial system in another.[109] When interpreting or defining central Convention notions, the Court must choose between respecting the national meaning of such a notion, and adopting a European definition. The Court has stressed that a European, *autonomous* definition should usually prevail.[110] This is understandable from the perspective that the Convention should guarantee an equal level of protection for all States Parties.[111]

In providing an autonomous interpretation of the Convention, the Court uses different methods of interpretation, varying from textual interpretation to consensus interpretation. In the latter situation, the Court searches for the largest common denominator with respect to the notion that has to be defined and bases its own Convention definition on the interpretation thus found. Meta-teleological interpretation may also help in arriving at an autonomous reading: the Court will usually try to give an autonomous definition that fits well with the general principles and notions underlying the Convention. Indeed, the Court has expressly stated that the integrity of the objectives of the Convention would be endangered if the Court were to take the national level of protection, or the national definition of certain notions, as a point of departure for its own case-

---

108 Cf. R. BERNHARDT, 'Thoughts on the interpretation of human rights treaties', in R.ST.J. MACDONALD et al., eds., *The European System for the Protection of Human Rights* (Dordrecht, Martinus Nijhoff 1993) pp. 65–71 at p. 67.

109 See further BERNHARDT, *supra* n. 108, at p. 67.

110 Cf. F. SUDRE, 'Le recours aux "notions autonomes"', in F. SUDRE, ed., *L'interprétation de la Convention européenne des droits de l'homme* (Brussels, Bruylant 1998) p. 93 at p. 117; see also elaborately SENDEN, *supra* n. 91, at p. 177.

111 F. MATSCHER, 'Methods of Interpretation of the Convention', in R.ST.J. MACDONALD et al., eds., *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993) p. 63 at p. 73; SUDRE, *supra* n. 110, at p. 94; SENDEN, *supra* n. 91, at p. 178 and, more elaborately, pp. 294–295.

law.[112] In particular, there would then be a risk that states would try to evade supervision by the Court by giving a narrow definition to terms and notions that determine the Convention's applicability.[113]

4.3. STRATEGIC USE OF INTERPRETATIVE PRINCIPLES AND METHODS OF INTERPRETATION

The previous section has shown that the Court's development of interpretative principles and methods is mainly based on principled considerations regarding the role and function of the Convention. Besides this, the Court may have more strategic reasons to use such methods of interpretation. Consensus interpretation and autonomous interpretation, for example, allow the Court to demonstrate its willingness to take national law as guidance when interpreting important notions of the Convention, and thus to demonstrate its respect for what is accepted and acceptable at the national level.[114] Consensus interpretation may also enable the Court to arrive at (autonomous) definitions and interpretations that can be relatively easily implemented in national law, since definitions may be chosen that lie close to what is already known and accepted at the national level.[115] Furthermore, and perhaps more importantly, the ECtHR has traditionally been able to use consensus interpretation to respond to national concerns regarding the expansive protection of fundamental rights. In particular, as is further discussed below (section 4.5.2), it can refuse to give a new interpretation to the Convention due to the absence of sufficient support in the law of the Member States. In a few judgments it has even refused to give an

112 See e.g. *Engel and Others* v. *the Netherlands*, ECtHR 8 June 1976, appl. nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para. 81; *Chassagnou* v. *France*, ECtHR (GC) 29 April 1999, appl. no. 25088/94, para. 100. See also G. LETSAS, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *European Journal of International Law* (2004) pp. 279–305 at pp. 282–283 and SENDEN, *supra* n. 91, at p. 298.

113 Cf. OST, *supra* n. 103, at p. 306; LETSAS, *supra* n. 112, at pp. 282–283; LETSAS, *supra* n. 25, at p. 42; SENDEN, *supra* n. 91, at p. 178. See also the dissenting opinion of Judge Martens in the case of *Fischer* v. *Austria*, ECtHR 26 April 1995, appl. no. 16922/90, para. 9.

114 Cf. P.G. CAROZZA, 'Propter Honoris Respectum: uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights', 73 *Notre Dame Law Review* (1998) p. 1217 at pp. 1226–1228; A.R. MOWBRAY, 'The Creativity of the European Court of Human Rights', 5 *Human Rights Law Review* 57 (2005) p. 69.

115 For the EU, where a similar approach is used, see K. LENAERTS, 'Interlocking Legal Orders in the European Union and Comparative Law', 52 *International and Comparative Law Quarterly* (2003) p. 873 at pp. 880–881. It is important to note, however, that this advantage will be a relative one – whether a definition will really fit in well with national law will depend on the level and the nature of the consensus and on the extent to which the meaning of a notion in the law of a specific Member State already resembles the ECtHR definition. See also M. CARTABIA, 'Europe and Rights: Taking Dialogue Seriously', 5 *European Constitutional Law Review* (2009) pp. 5–31 at p. 18.

autonomous reading altogether, leaving the definition of rights issues to be decided by the states. In such cases, the need to respect diversity and national legal traditions trumps the desire to provide a high level of protection. Using the method in this manner the Court may try to ward off accusations of activism[116] and it may display its willingness to do justice to the call for respect for national diversity in regard to sensitive fundamental rights issues.[117] Moreover, it can thereby respect the principle of subsidiarity and make the national authorities responsible for compliance with the Convention. Thus, such methods of interpretation are for the Court an important instrument to negotiate between the 'pull' and 'push' factors discussed in section 2 and to give expression to the notion of 'shared responsibility' for compliance with the Convention.

The same is true of meta-teleological interpretation. The Convention's general principles and objectives are very similar to principles that are mentioned in many national constitutional preambles or that find expression in national constitutional texts. By referring to such principles, the Court refers to a logical point of connection between the Convention and national constitutions, making it very clear that the Court respects such principles, rather than interferes with them.[118] Secondly, there is strong rhetorical force in the use of this method. If the Court closely connects any novel interpretation of Convention rights to the central values of the Convention, national authorities are almost obliged to agree with the reasonableness of such an interpretation. After all, since the national authorities have willingly and knowingly accepted the central aims and objectives by signing and ratifying the Convention, they logically also have to accept obligations and rights directly flowing from its central aims.[119]

4.4. CRITICISM

4.4.1. Meta-teleological interpretation and the risk of overreaching

Although there is great substantive and strategic value to the various principles and methods discussed above, the Court is frequently criticised for its use of these methods and the effects thereof. Indeed, there are some inherent risks for

116 See e.g. LENAERTS, *supra* n. 115, at p. 879.

117 Cf. CARTABIA *supra* n. 115, at p. 20; see also WEILER, *supra* n. 6, at 102.

118 Cf. M. KUMM, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) pp. 262–307 at 290–291.

119 On this, much has been written in relation to a similar approach employed by the Court of Justice of the EU; see e.g. U. EVERLING, 'Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft', 55 *JuristenZeitung* (2000) pp. 217–227 at p. 223 and (though less explicit) E. PAUNIO and S. LINDROOS-HOVINHEIMO, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law', 16 *European Law Journal* (2010) pp. 395–416 at p. 412.

the Court in using precisely these methods. The pull towards practical and effective, evolutive protection of rights appears to be so great as to easily cause the Court to 'overreach'.[120] Referring to the aims and objectives of the Convention and the need for effective protection, for example, the ECtHR has imposed numerous positive obligations on the states to invest in the effective protection of fundamental rights, besides the classic negative obligations to refrain from interfering with these rights.[121] Although many of these obligations are very valuable and even essential in terms of respect for human dignity and democracy, such positive obligations have effected a great expansion of the Convention's scope. In this respect, the criticism has sometimes been raised that evolutive interpretation, however much supported by the Convention's aims and underlying principles, has made it very difficult for the states to foresee the obligations resulting from the Convention.[122] Moreover, meta-teleological and evolutive interpretation have led to accusations of activism and intrusion upon national sovereignty and national policy choices.[123]

Some of the more controversial of the Court's recent judgments evidently result from the Court's reference to the underlying principles of the Convention. Its acceptance of the overriding importance of the value of state neutrality in the case of *Lautsi* v. *Italy* – which concerned the obligation to have crucifixes in

120 See further SENDEN, *supra* n. 91, at p. 76. See also M. BURSTEIN, 'The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights', 24 *Berkeley Journal of International Law* (2006) pp. 423–443 at p. 431; L.R. HELFER and A.-M. SLAUGHTER, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Review* (1997) p. 273 at p. 315; and, in relation to the EU, where similar problems exist, P. CRAIG, 'The ECJ and *ultra vires* action: a conceptual analysis', 48 *Common Market Law Review* (2011) pp. 395–437 at p. 397.

121 Originally, the Court found the basis for the positive obligations doctrine in Article 1 of the Convention in combination with the notion of effective protection; see e.g. *Marckx* v. *Belgium*, ECtHR 13 June 1979, appl. no. 6833/74, para. 31 and more recently and more explicitly: *Kontrová* v. *Slovakia*, ECtHR 31 May 2007, appl. no. 7510/04, para. 51. For a review of the kind of positive obligations accepted by the Court, see e.g. A.R. MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court on Human Rights* (Oxford, Hart 2004). For a more recent review as well as critical insight into the problems related to the doctrine (which are also concerned with overreaching), see D. XENOS, *The Positive Obligations of the State under the European Convention of Human Rights* (London, Routledge 2012).

122 This is true, in particular, of the cases in which the Court has decided that a state is responsible under the Convention for acts that have occurred before the Convention came into force in a respondent state. See in particular *Šilih* v. *Slovenia*, ECtHR (GC) 9 April 2009, 71463/01 and, more recently, *Janowiec and Others* v. *Russia*, ECtHR 16 April 2012, appl. nos. 55508/07 and 29520/09. See critically on this Baroness Hale of Richmond, in *What are the limits to the evolutive interpretation of the Convention?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2011) pp. 11–18 at pp. 14–15.

123 For this type of criticism, see in particular M. BOSSUYT, 'Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations', 28 *Human Rights Law Journal* (2007) pp. 321–332 and M. BOSSUYT, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', *Inter-American and European Human Rights Journal* (2010) p. 47.

classrooms of public primary schools – caused an outrage in many European states.[124] Surprisingly to some, perhaps including the Court, the comment was made that state neutrality should not imply interference with national culture and traditions.[125] Indeed, the Grand Chamber thought it wise in this case to stress the margin of appreciation of the states and to correct the Chamber's strongly meta-teleological interpretation of the Convention.[126] Likewise, the fact that the Court relied on the absolute value of the prohibition of torture in the case of *Othman (Abu Qatada)* v. *United Kingdom*, basing itself on the underlying values of the Convention system, did not convince those who would like to see terrorist convicts expelled or extradited to states where they risk torture or a trial in which there is a great likelihood that evidence will be used that has been obtained by torture.[127] Similarly, referring to the importance of the right to vote to guarantee a democratic state governed by the rule of law did not make the judgments in the *Hirst* and *Scoppola No. 3* cases more acceptable to the United Kingdom, where different views are held on participation in the government by those who have violated the basic rules of that same democracy.[128] And even in sensitive cases such as those relating to assisted suicide or abortion, where reactions to the Court's use of meta-teleological interpretation have been surprisingly mild, that is probably mainly due to the fact that the Court has compensated for the widening of scope in these cases by allowing a wide margin of appreciation for restrictions.[129]

Clearly, thus, the 'magic' of relating new interpretations to central aims, principles and values of the Convention wears off easily and in the end may cease to convince the audience. Moreover, it seems clear that the persuasive force of meta-teleological and evolutive interpretation is reduced if political and popular opinions on certain issues are deeply felt. References to underlying principles cannot compensate for the feeling that an outsider intrudes on national values and sentiments that are considered to be of great importance. In these cases, the

124 ECtHR 3 March 2009, appl. no. 30814/06.

125 For a discussion of the criticism, see e.g. D. McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?', *Human Rights Law Review* (2011) pp. 451–502, and Piret, *supra* n. 24.

126 ECtHR (GC) 18 March 2011, appl. no. 30814/06.

127 *Othman (Abu Qatada)* v. *UK*, ECtHR 17 January 2012, appl. no. 8139/09. See in particular the critical response by UK Prime Minister Cameron: <www.number10.gov.uk/news/european-court-of-human-rights/>.

128 For the judgments, see *Hirst* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01 and *Scoppola (No. 3)* v. *Italy*, ECtHR (GC) 22 May 2012, appl. no. 126/05. For a brief review of the debate in the UK, see *The Economist* 10 February 2011, 'Britain's mounting fury over sovereignty' <www.economist.com/blogs/bagehot/2011/02/prisoners_voting_rights>; see also D. Nicol, 'Legitimacy of the Commons debate on prisoner voting', *Public Law* (2011) pp. 681–691; S. Briant, 'Dialogue, diplomacy and defiance: prisouers' voting rights at home and in Strasbourg', *Human Rights Law Review* (2011) pp. 247–249.

129 See e.g. *A., B. and C.* v. *Ireland*, ECtHR (GC) 16 December 2010, nr. 25579/05; *Haas* v. *Switzerland*, ECtHR 20 January 2011, appl. no. 31322/07.

pull factor of national sovereignty is very powerful and the Court should tread carefully so as not to offend national views. If it makes strategic mistakes in this respect, and if it does so too often, it may trigger sharp criticism and accusations of political case-law and activism.

4.4.2. The disadvantages of consensus interpretation

Consensus interpretation may also be risky from the perspective of legitimating the Court's interpretations. This type of interpretation is especially vulnerable if it is used to support an interpretation where there is no clear convergence of national law or if there is no clearly discernible common denominator.[130] The problems related to the method can be illustrated by an example of one of the contentious cases of the last years, *Demir and Baykara* v. *Turkey*.[131] Central to this case was the question of whether freedom of association – more specifically the right to become a member of a trade union – should apply to civil servants. A number of international treaties stipulated that this should be the case, and since these treaties had been ratified by nearly all Member States of the Council of Europe, the Court found that there was sufficient consensus to support a new reading of Article 11 of the Convention. Accordingly, the provision was interpreted as meaning that all employees, including civil servants, have the right to be members of a trade union. The respondent state, however – Turkey – had expressly and deliberately refused to sign or ratify any of the relevant conventions and treaties, since it explicitly did not want its civil servants to have access to trade unions. This raised the question of whether the sole fact that most European states support a certain interpretation suffices to legitimise the imposition of such an interpretation on states that expressly reject that interpretation.[132] Such use of the consensus method might be interpreted as forcing a majority opinion on a minority, neglecting national particularities and national sovereignty, and changing the central rules of international treaty law.[133]

---

130 Cf. LENAERTS, *supra* n. 115, at p. 886, arguing that it is more likely that a judgment will be accepted if it is supported by closer convergence.

131 *Demir and Baykara* v. *Turkey*, ECtHR (GC) 12 November 2008, appl. no. 34503/07.

132 See the (Dutch language) case note of J.H. GERARDS in *European Human Rights Cases* 2009/4, paras. 11 and 12. Cf. also LETSAS, *supra* n. 112, at p. 303, and S. VAN DROOGHENBROECK, 'Les frontières du droit et le temps juridique: la Cour européenne des droits de l'homme repousse les limites', 79 *Revue Trimestrielle des Droits de l'Homme* (2009) p. 811; they argue that the Court's approach would be more acceptable if it were fitted into a (meta-)teleological, moral argumentation; after all, it is then not so much the pure majority argument that counts, but rather the underlying reasons for adopting it. It is doubtful, however, whether such an application can still be considered an example of purely consensus-based reasoning.

133 D. SHELTON, 'The Boundaries of Human Rights Jurisdiction in Europe', 13 *Duke Journal of Comparative and International Law* (2003) p. 95 at p. 134.

Legal scholars have pinpointed many other problems related to consensus interpretation.[134] It is clear, for instance, that legal comparisons are difficult to make, especially if one delves a little deeper than a perfunctory assessment of national constitutions or statutory provisions.[135] While consensus is easy to discover at a high level of abstraction, differences soon become visible if one has regard to more specific applications by the administration or by the courts. Moreover, even superficial and general reviews of the legal practice within the 47 States Parties usually make it possible to trace as many similarities as differences, depending on the precise criterion chosen for comparison.[136] This may attract accusations of 'cherry picking': it is easy to blame the Court for finding precisely the type of consensus it needs to support a certain desired outcome.[137] Such accusations are also sustained by another difficulty of the method, which is that it is very difficult to determine when exactly there is 'consensus'. Complete or true consensus rarely exists, except perhaps at a very high level of generality.[138] Hence, incomplete consensus or tendencies to convergence may suffice as a basis for common-ground interpretation, but there is then still uncertainty about the degree to which a predominant trend or uniform tendency really should be visible to warrant a new interpretation. All in all, it will be difficult for the Court to indicate with any precision why it has considered that a certain amount of agreement or disagreement can support a new interpretation of a fundamental right, or the recognition of a new aspect of a fundamental right. Such practical difficulties and the ensuing uncertainty threaten the legitimacy-enhancing character of the method.[139]

4.4.3. The problems of autonomous interpretation

Finally, autonomous interpretation may result in some problems of its own. Autonomous determination of the meaning of central fundamental rights notions may create the perception that the Court is striving to empower itself, to the detriment of the states. In this respect, again, there is a risk of overreaching.[140] Although autonomous interpretations are essential from the perspective of

134 See e.g. OST, *supra* n. 103, at p. 307; L.R. HELFER, 'Consensus, Coherence and the European Convention on Human Rights', 26 *Cornell International Law Journal* (1993) p. 133 at p. 140; CAROZZA, *supra* n. 114, at p. 1225; SENDEN, *supra* n. 91, at pp. 123 and 265–266.

135 See e.g. K. DZEHTSARIOU, 'European Consensus: A way of reasoning', UCD Research Paper No. 11/2009, via <http://ssrn.com/abstract=1411063>.

136 Cf. P. MAHONEY, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in G. CANIVET, M. ANDENAS and D. FAIRGRIEVE, eds., *Comparative Law Before the Courts* (BIICL 2004) p. 135 at p. 149.

137 e.g. J.H. GERARDS, 'Rechtsvinding door het Europees Hof voor de Rechten van de Mens' [Legal reasoning of the European Court of Human Rights], in T. BARKHUYSEN et al., eds., *55 Jaar EVRM* [55 Years ECHR], *NJCM-Bulletin (special)* (2006) pp. 93–122.

138 Cf. DZEHTSARIOU, *supra* n. 135, at p. 2; SUDRE, *supra* n. 110, at p. 123.

139 Cf. CAROZZA, *supra* n. 114, at p. 1231.

140 Cf. SENDEN, *supra* n. 91, at p. 183.

uniform protection of fundamental rights, such interpretations may result in an expansion of the Convention's scope and, accordingly, a stronger role for the Court to decide on the reasonableness of national decisions and measures affecting fundamental rights. The wide and autonomous definition the Court has given to rights, such as the right to property, may serve to illustrate this risk.[141] As a result of its interpretative approach in these cases, the ECtHR can now decide on a wide variety of issues that many consider to be reserved to national policy and decision making, such as inheritance law or social security and social benefits cases.[142] A frequently mentioned example in this context is the *Stec* case, in which the Court expressly used an autonomous interpretation to bring all social benefits, even those paid out of general taxation, within the scope of the right to property protected by Article 1 of the First Protocol to the Convention.[143] The consequence of this judgment, as well as of recent judgments in similar cases, is that typically 'national' policy domains such as immigration law, social security and housing are increasingly becoming Europeanised and national authorities seem to be losing their freedom to design their own policies in these domains.[144]

Moreover, autonomous definitions may cause legal problems, since 'European' definitions of certain notions may come to co-exist with national definitions of the same terms. As has been stressed in legal scholarship, this may lead to problems of fragmentation, inequality and legal uncertainty.[145] Moreover, the European definition may start from a different conception of a certain notion than that used at the national level, which may make it difficult for states to understand and implement the European conception in a logical manner.[146] Again, this may not contribute to the willingness of national authorities to implement the Court's case-law in their own legislation, policies or case-law.

4.5. ENHANCING SHARED RESPONSIBILITY?[147]

4.5.1. Introduction

Sections 4.3 and 4.4 demonstrated that the Court's interpretative principles and methods may be very useful tools in regulating the interrelationship between the

141 Cf. Bossuyt 2007, *supra* n. 123, p. 321–332; Sudre, *supra* n. 110, at p. 113.

142 On this, see Bossuyt 2007, *supra* n. 123, and Sudre, *supra* n. 110, at p. 113.

143 *Stec and Others* v. *UK*, ECtHR (GC), 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, paras. 49–53.

144 Particularly critical in this respect is Bossuyt 2007, *supra* n. 123; see more generally on the development M. Cousins, *The European Convention on Human Rights and Social Security Law* (Antwerp, Intersentia 2008) and K. Kapuy, 'Social Security and the European Convention on Human Rights: How an Odd Couple Has Become Presentable', 9 *European Journal of Social Security* (2007) pp. 221–241.

145 See in particular Cartabia, *supra* n. 115, at p.18.

146 See in particular Letsas, *supra* n. 25, at pp. 51–53.

147 This section is partly based on Gerards 2013, *supra* n. 34.

level of the Court and the domestic level, but also that they may sometimes backfire, especially if they are not applied with sufficient caution. Interestingly, over the past ten years the Court seems to have developed two novel applications of consensus and autonomous interpretation that make these methods more suitable for application in a context of tension, and which fit well with the general desire to strive towards shared responsibility: first, the Court may deliberately opt for a non-autonomous approach, and secondly, the Court may connect the protection offered by the Convention to national law.[148] In both situations, an interpretation that is dependent on national law seems to be the starting point, rather than a purely 'European', uniform interpretation. Even though the Court's judges, according to the interviews conducted for this project, do not explicitly recognise these developments as 'new', or as consciously developed by the Court to deal with national sensitivities, it will be shown below that the Court may easily use them to this end.

4.5.2. Lack of consensus: deliberate choice of a non-autonomous approach

In several important cases the Court has accepted that there is such wide divergence within the Council of Europe on the meaning of certain notions that an autonomous definition is not warranted.[149] The best example of this is apparent from the Court's approach to the notion of 'person' contained in Article 2 of the Convention (right to life). In the case of *Vo* v. *France* the question raised related to the moment from which a human being should qualify as a 'person' in the meaning of this provision.[150] According to some this should be from the moment of conception, while others have argued that the right should only apply from the moment of birth. In its judgment in *Vo*, the ECtHR expressly refused to resolve the issue, referring to the divergence of popular and scientific opinions within and between the European states. As a result of this refusal to give an autonomous reading, the states may give their own definitions of the notion. This means that the scope of application of Article 2 may differ from one European state to the other.[151] This may be difficult to accept in terms of equality

148 Thirdly, it is clear that the Court does not use autonomous interpretation in respect to all provisions of the Convention. It is disputed, however, whether this is intentional or incidental; the Court itself has not expressed reasons for this (see further SENDEN, *supra* n. 91, at pp. 180–181). For this reason, these 'silent' forms of non-autonomous interpretation are not discussed in this paper.

149 No attention is paid here to the particular situation in which provisions of the ECHR expressly refer to national law, as in the case of Article 12; in such cases it would be neither logical nor appropriate for the Court to provide an autonomous definition, although it has stressed that even then it will 'police the borders' to see if a minimum level of protection is sufficiently guaranteed and the very essence of the right is not impaired – see *Parry* v. *UK*, ECtHR 28 November 2006 (dec.), appl. no. 42971/05.

150 *Vo* v. *France*, ECtHR (GC) 8 July 2004, appl. no. 53924/00, paras. 82–85.

151 See *Evans* v. *UK*, ECtHR 7 March 2006, appl. no. 6339/05, para. 46. This has been critically assessed by some; see e.g. T. GOLDMAN, '*Vo v. France* and Fetal Rights: The Decision Not To

and uniformity, yet it is justifiable in that it respects national diversity on highly sensitive moral issues.

Although the *Vo* case may be regarded as a singular example, there are more cases in which the Court takes national diversity into account in defining Convention rights. In *Kimlya* v. *Russia*, for example, the Court pointed out that, '[i]t is clearly not the Court's task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a "religion" within the meaning of Article 9 of the Convention. In the absence of any European consensus ... the Court considers that it must rely on the position of the domestic authorities in the matter and determine the applicability of Article 9 of the Convention accordingly'.[152] The Court did not offer an autonomous definition of 'religion' in this case, rather referring back to the national definition and determining the applicability of Article 9 on that basis. Similarly, in the case of *Boulois* v. *Luxembourg* the Grand Chamber recalled that, in determining whether Article 6 is applicable to the 'determination of civil rights and obligations', the starting point for its definition must be the provisions of the relevant domestic law and their interpretation by the domestic courts.[153] Even though in this case it carefully evaluated whether the national definition of a certain discretionary power could not be defined as a 'right' for the purposes of Article 6, it is clear that the definition in this case is a dependent rather than an autonomous one.[154]

Hence, even though autonomous interpretation can still be regarded as the 'gold standard' for the Court and recent case-law, and the Court has reiterated the importance of such autonomous definitions for the protection offered by the Convention,[155] the judgments discussed in this section demonstrate that the Court sometimes may decide not to apply the method. By doing so it affords the national authorities great leeway to regulate the relevant topics as they think most appropriate, and to national judges to give their own interpretations of the Convention.

Decide', 18 *Harvard Human Rights Law Journal* (2005) p. 277 at p. 279.

152 *Kimlya and Others* v. *Russia*, ECtHR 1 October 2009, appl. nos. 76836/01 and 32782/03, para. 79. See also SENDEN, *supra* n. 91, p. 296.

153 *Boulois* v. *Luxemburg*, ECtHR (GC) 3 April 2012, appl. no. 37575/04, para. 91; for a similar example, see *Roche* v. *UK*, ECtHR (GC) 19 October 2005, appl. no. 32555/96, para. 120. Evidently, the Court also does not rely on an autonomous approach if the Convention expressly refers to national law, as is the case with Article 12 (right to marry); see in particular *Schalk and Kopf* v. *Austria*, ECtHR 24 June 2010, appl. no. 30141/04, para. 61.

154 For a similar example in which the Court relied at least partly on national definitional elements, see *Vilho Eskelinen* v. *Finland*, ECtHR (GC) 19 April 2007, appl. no. 63235/00, para. 61 – here the Court gives a sort of 'semi-autonomous' interpretation. See further SENDEN, *supra* n. 91, p. 295.

155 e.g. *Micallef* v. *Malta*, ECtHR (GC), judgment of 15 October 2009, appl. no. 17056/06.

4.5.3. *Dependency, or the 'in for a penny, in for a pound' approach*

Another sign of care in the use of autonomous interpretation is visible in a rather new approach of the Court, which might be described as its 'in for a penny, in for a pound' approach.[156] An example may serve to illustrate this. The case of *E.B.* v. *France* concerned a conflict on the desire of a single, lesbian woman to adopt a child.[157] In a long line of cases the Court has given an autonomous reading to the notion of respect for family life, protected by Article 8 of the Convention, to the effect that this notion only covers established family life. The creation of a family, either through adoption or otherwise, does not come within the scope of the Convention. French legislation, however, did recognise a right to adoption and even a right to adoption for singles. In its judgment in *E.B.*, the Court's Grand Chamber held that *because* this right was recognised in French law, it should be guaranteed in conformity with the Convention. This implied, for example, that the right should be granted non-discriminatorily, which in this case meant that E.B.'s homosexuality ought not to have played a decisive role in the refusal of her adoption request. The protection of the Convention in this case clearly depended on the existence of a right recognised in national law. The Court has also applied this line of reasoning to social security law, extending the Convention's protection to 'those rights for which the State has voluntarily decided to provide',[158] and to cases concerning sensitive issues such as abortion[159] or special provisions for cohabiting partners.[160]

The 'in for a penny, in for a pound' approach does not reflect an autonomous interpretation of the Convention, but evidently relies on an approach that

156 Although the Court often refers to older case-law as a basis for the use of this approach (mostly only the *Belgian Linguistics* case (ECtHR 23 July 1968, appl. nos. 1474/62 and others)), it has only really developed this approach since the case of *Stec and Others* v. *UK*, where it was applied rather implicitly (ECtHR (GC), 6 July 2005 (dec.), appl. nos. 65731/01 and 65900/01, in particular paras. 51 and 55). See further on this also (all in Dutch) R.A. Lawson, 'Boven het maaiveld. Over de "ruimhartige" toepassing van het EVRM door nationale rechters' [Above the ground level. About the 'generous' application of the ECHR by national courts], in: T. Barkhuysen et al., eds., *Geschakeld recht. Verdere studies over Europese grondrechten ter gelegenheid van de 70ste verjaardag van Prof. Mr. E.A. Alkema* [Interconnected law. Further studies about European fundamental right at the occasion of the 70th birthday of Prof. Dr. E.A. Alkema] (Deventer, Kluwer 2009) pp. 307–323; the case note of N.R. Koffeman to *Schalk and Kopf* v. *Austria*, *European Human Rights Cases* 2010/92; and Gerards, *supra* n. 81, at pp. 58–62. Van de Heyning has also written on the topic, but she has connected it more closely to Article 53 ECHR; see *supra* n. 33 at p. 191.

157 *E.B.* v. *France*, ECtHR (GC) 22 January 2008, appl. no. 43546/02.

158 See e.g. *Moskal* v. *Poland*, ECtHR 15 September 2009, appl. no. 10373/05, para. 38; *Carson* v. *UK*, ECtHR (GC) 16 March 2010, appl. no. 42184/04, para. 63; *Andrle* v. *Czech Republic*, ECtHR 17 February 2011, appl. no. 6268/08; *B.* v. *UK*, ECtHR 14 February 2012, appl. no. 36571/06.

159 e.g. *Tysiac* v. *Poland*, ECtHR 20 March 2007, appl. no. 5410/03, and *R.R.* v. *Poland*, ECtHR 26 May 2011, appl. no. 27617/04.

160 e.g. *P.B. and J.S.* v. *Austria*, ECtHR 22 July 2010, appl. no. 18984/02, para. 33.

depends on national law. This may result in differences in the scope and level of protection between the various States Parties, especially where some states have created and recognised many more rights than others. On the other hand, it fits well with a perspective of shared responsibility between the states and the Court for compliance with the Convention. By signing and ratifying the Convention, the states have agreed to respect the fundamental rights contained therein for all of their acts.[161] It would be hard to deny, then, that such rights are applicable to all government measures and policies that fall within the general scope of the Convention, regardless of whether the Convention itself imposes an obligation on the state to provide certain rights. It would be impossible to reconcile such selective applicability of the prohibition of discrimination, the right to an effective remedy or the right to a fair trial with the primary obligation of the states under Article 1 of the Convention to respect fundamental rights.[162] The 'in for a penny, in for a pound' approach builds on this by simply requiring the state to accept the consequences of regulating a matter that touches on fundamental rights.[163] Simultaneously, it allows the Court to supervise the compliance with Convention rights, thus enabling it to strive for a reasonable level of protection of Convention rights in all states. Thus, the method reconciles the desire for national sovereignty (states may decide, after all, *not* to provide certain rights or benefits) and the need to safeguard fundamental rights.

---

161 In the *Belgian Linguistics* case (ECtHR 23 July 1968, appl. nos. 1474/62 and others), the Court gave the following arguments for an approach such as is now commonly followed by the Court: 'persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14 ... To recall a further example ... Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14 ..., were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions. In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations'.

162 The Court confirmed in *G.R. v. the Netherlands* that the right to an effective remedy 'guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order' (ECtHR 10 January 2012, appl. no. 22251/07, para. 44).

163 In a rather similar vein, the Court has sometimes held that States that have set certain standards for fundamental rights protection can be required under the Convention to respect their own standards, even if they may not be standards that the Convention itself has set – see e.g. *Orchowski v. Poland*, ECtHR 22 October 2009, appl. no. 17885/04, para. 123 and *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 250.

4.6. CONCLUSION

This aim of this section was to highlight the Court's use of evolutive and autonomous interpretation, employing such methods as consensus and meta-teleological interpretation to arrive at interpretations that protect Convention rights in a practical and effective manner, while respecting the national courts' obligation to provide for definitions and interpretations which fit in well with their own legal and constitutional systems. It has been demonstrated that these methods and principles are well chosen from the perspective of fulfilling the main functions of the Court, as described in section 2.3, but if they are not carefully applied they may easily backfire. Much of the criticism levelled at the Court is inspired by judgments in which consensus interpretation, autonomous interpretation or meta-teleological interpretation play a significant role. The magic of referring to underlying values seems to have worn off and it has become obvious that consensus interpretation may be equivalent to 'cherry picking'. Thus, there is a need for the Court to tread carefully and avoid overreaching.

Over the past fifteen years, however, the Court has developed new applications of its 'classical' methods that seem to be more in line with the notion of shared responsibility between the Court and the national courts to safeguard fundamental rights. The Court has made it clear that a lack of consensus may sometimes imply that no autonomous interpretation is adopted, thereby accepting that national authorities (including national courts) give their own interpretations. In other cases, it has done no more than connect the Convention's protection to rights already and voluntarily provided and protected by national authorities.

Thus, even if the Court still adheres to its main principles of evolutive and autonomous interpretation, it now often gives room to the states to protect the Convention in their own way. Seen in terms of the desire to treat national authorities as allies in the project of protecting the Convention, these are important and interesting developments, which could help reduce the tension between the Court and the national authorities. Moreover, these developments demonstrate that the Court does not want to oblige the national courts to act as its marionettes – rather, it encourages the national courts to provide for independent and high-level protection of Convention rights in a manner which is compliant with their constitutional and legal systems.

5. PROCEDURAL REVIEW AND 'JUDICIAL MINIMALISM'

5.1. INTRODUCTION: SUBSTANTIVE REVIEW AND THE NEED FOR A RESPONSE

The previous section discussed the use of 'classical' methods of interpreting the Convention and their development and use by the Court. Much of the current debates about the Court and its case-law are expressly related to the application of these methods and the corresponding expansion of the Convention, as well as increased control by the Court. There is much more to be said about the legal argumentation of the ECtHR, however. In interpreting and applying the Convention in pursuance of the aims described in section 2 above, the Court has always shown great awareness of the difficulties of its supranational and subsidiary position and it has developed several techniques that are particularly helpful in positioning itself. The two judicial techniques used most frequently in this respect are procedural review and 'judicial minimalism', i.e. the choice of 'narrow' and 'shallow' reasoning. These methods help the Court to avoid profound, substantive and moral choices in sensitive issues and delicate cases, and they also prevent it from exercising a role as a 'court of fourth instance'. Moreover, they are useful to the Court if it is internally divided over certain cases, e.g. because some judges would like to go further than others (offering more protection to fundamental rights).

This section discusses the capacity of these two mechanisms to reduce the tension between the supranational and the national level and the way the Court has used them to empower the national courts and facilitate their co-responsibility for the protection of Convention rights. The downside of the use of both methods is also discussed: the Court sometimes uses the techniques in such a way that they attract national criticism and are at odds with the achievement of the Convention's main objectives.

5.2. PROCEDURAL REVIEW

5.2.1. Advantages of the use of procedural review

Instead of assessing the substantive reasons provided by the states in justification of an interference with a fundamental right, the Court increasingly focuses on the quality and transparency of the national procedures and judicial remedies that have been used in relation to the disputed decision or rule.[164] The first variant of this technique of 'procedural review' focuses on the national

[164] This section is loosely based on GERARDS, *supra* n. 81, section 2.8.

procedures for decision making or legislation. If it is clear that a decision or rule is prepared and adopted with the greatest care and after extensive deliberation, in an open or transparent decision making process, the Court will quite readily accept the conformity of such a decision or rule with the Convention. It will then simply accept that sound decision making procedures usually result in acceptable and permissible outcomes. An example of this is visible in the case of *Maurice* v. *France*,[165] which related to the very sensitive and complex issue of compensation in cases of wrongful birth. The applicants argued that the relevant legislation, the *Loi Perruche*, violated their rights under Article 8 of the Convention because it offered a generally lower level of compensation than they could have obtained under the former case-law of the French courts. In its judgment in the case the Court paid close attention to the quality of the process that had led to the adoption of the *Loi Perruche*. It stressed that there had been a 'stormy nation-wide debate' on the issue, in which politicians, interest groups and individuals had participated, and that close attention had been paid to all relevant legal, ethical and social considerations. It concluded that 'there is no serious reason for the Court to declare contrary to Article 8 ... the way in which the French legislature dealt with the problem or the content of the specific measures taken to that end'.[166] The Court did not address the substantive issues of reasonableness and proportionality of the interference, rather restricting its review to purely procedural matters.

By contrast, in the case of *Hirst* v. *United Kingdom*,[167] the Court found it problematic that the British parliament had never expressly and extensively deliberated on the choice to exclude all prisoners (regardless of the duration of their sentence or the nature of the crimes committed) from the right to vote. It seemed that, regardless of the substantive reasons for and against such a complete, blanket prohibition, the Court would not have accepted the legislation for the lack of procedural safeguards surrounding its adoption.[168] Again, thus, the Court (at least partly) avoided a substantive assessment of the reasonableness of the exclusion of prisoners by relying on procedural arguments.

---

165 *Maurice* v. *France*, ECtHR (GC) 6 October 2005, appl. no. 11810/03.

166 *Maurice*, *supra* n. 165, para. 124.

167 *Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01.

168 This is apparent in particular from the following considerations: 'As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. ... [I]t cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote. It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was generally seen as a matter for Parliament and not for the national courts. The court did not, therefore, undertake any assessment of proportionality of the measure itself.' (*Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01, paras. 79–80).

A second variant of the Court's procedural approach is visible in relation to national judicial remedies. There are many cases in which disagreement and conflict about the outcome is not so much related to the proper interpretation of fundamental rights, as to different views on the weight of the interests concerned and the way they should be balanced. Cases of defamation and the publication of photographs are notorious examples: if there is a conflict between the right to reputation and the right to freedom of expression, the weight accorded to the various interests determines the outcome, but views on what the appropriate weight should be almost unavoidably differ.[169] Moreover, in some cases the 'better placed' argument is of particular importance.[170] Cases relating to family law matters, such as care orders and visiting rights, or immigration cases, such as cases relating to expulsion, often involve evaluations of facts and weighing of interests. In such cases, national authorities often have more direct access to evidence and expert opinions and they may be in a better position to gauge the possible consequences of a certain decision. In such cases, the Court increasingly does not give its own opinion on the balance to be struck between the interests concerned. Instead, it checks whether sufficient procedural guarantees have been offered and whether the national courts have respected all the requirements of a fair trial.[171] In particular, the Court requires that they apply the Convention standards as developed in the Court's case-law. If the national courts have done so, this means that the Court will not readily overturn their decisions for substantive reasons, as it made clear in the case of *Von Hannover (No. 2)* v. *Germany*:

> 'Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.'[172]

---

169 See also S. Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict', 26 *American University International Law Review* (2010) pp. 183–236.

170 On this argument, see section 2.3.

171 For some recent examples, see *Kopf and Liberda* v. *Austria*, ECtHR 17 January 2012, appl. no. 1598/06 (visiting rights); *Y.C.* v. *UK*, ECtHR 13 March 2012, appl. no. 4547/10 (placement order); *Ahrens* v. *Germany*, ECtHR 22 March 2012, appl. no. 45071/09 (paternity); *Stübing* v. *Germany*, ECtHR 12 April 2012, appl. no. 43547/08 (sexual relation between siblings); *Nacic and Others* v. *Sweden*, ECtHR 15 May 2012, appl. no. 16567/10 (expulsion). For older examples, see e.g. *Olsson (No. 2)* v. *Sweden*, ECtHR 27 November 1992, appl. no. 13441/87; *Hokkanen* v. *Finland*, ECtHR 23 September 1994, appl. no. 19823/92; *Haase and Others* v. *Germany*, ECtHR 12 February 2008 (dec.), appl. no. 34499/04; *Koons* v. *Italy*, ECtHR 30 September 2008, appl. no. 68183/01 (visiting rights).

172 *Von Hannover No. 2* v. *Germany*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08, para. 107; for earlier examples, see e.g. *Hacquemand* v. *France* (ECtHR 30 June 2009 (dec.), appl. no. 17215/06); *White* v. *Sweden*, ECtHR 19 September 2006, appl. no. 42435/02; *Balsyte-Lideikiene* v. *Lithuania*, ECtHR 4 November 2008, appl. no. 72596/01; *Aksu* v. *Turkey*, ECtHR 15 March 2012, appl. nos. 4149/04 and 41029/04; *MGN Limited* v. *UK*, ECtHR 12 June 2012, appl. no. 39401/04. On this, see also Tulkens, *supra* n. 13, at p. 9.

Although the Court still re-assessed the facts and interests at stake in the case, it is clear that this method of procedural review may help the Court to avoid the type of criticism related to substantive review.[173] Moreover, it can help it to limit the number of applications relating to these 'fine-tuning' issues, as this case-law makes clear that they can just as well be resolved at the national level.[174]

The Court's procedural case-law also shows its willingness to follow national judicial interpretations of the Convention that are based on national (constitutional) law provisions that correspond with Convention's provisions. This is readily apparent from the case of *Urban and Urban* v. *Poland*,[175] where the Polish constitutional court had found the regulations for 'assessors', a type of quasi-independent judges, to be in violation of the Polish constitution. The Polish government disagreed with this finding and tried to entice the ECtHR to find that the Convention did not require the high level of protection of the right to an independent court that was set by the Polish constitutional court. The ECtHR disagreed:

> '51 ... [T]he Court observes that in constitutional complaint proceedings the Constitutional Court has no jurisdiction to review the compatibility of legislation with international agreements, including the Convention ... The important consideration for this Court is that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under Article 45 §1 of the Constitution, guarantees which are substantively identical to those under Article 6 §1 of the Convention. It would be justified for the Court to reach a contrary conclusion only if it was satisfied that the national court has misinterpreted or misapplied the Convention provision or the Court's jurisprudence under that provision or reached a conclusion which was manifestly ill-founded.'

This shows that the Court will be reluctant to rectify a national interpretation of the Convention if the national constitutional court has made a clear effort to take the Court's jurisprudence into account.[176] In fact, it will only do so if the national court's interpretation is clearly in violation of the ECtHR's own interpretation. This is true even if the Court's interpretation is not directly based on the Convention, but rather on national constitutional law, as long as the Court's case-law is taken into account.

Conversely, the Court actually requires that national procedures meet the demands of fairness, transparency and openness. If a judicial procedure lacked equality of arms, if a national decision was insufficiently reasoned, or if investigations into a possible violation were insufficiently expeditious and

173 See also GERARDS, *supra* n. 78, at pp. 173–202.
174 Cf. KELLER and STONE SWEET, *supra* n. 78, at p. 700.
175 ECtHR 30 November 2010, appl. no. 23614/08.
176 See also VAN DE HEYNING, *supra* n. 33, p. 209.

independent, the Court may find a violation of substantive provisions of the Convention, even if the shortcomings were primarily procedural in nature.[177] Requirements of a fair trial (Article 6 ECHR) or an effective remedy (Article 13) are frequently incorporated and translated into positive obligations on the government.[178] By meeting such procedural requirements the states can more easily comply with their primary obligation to protect the Convention rights, which would imply that the Court would have to intervene less often in the future. By adopting such a procedural approach, the Court therefore clearly expresses the notion of shared responsibility.[179] Moreover, it leaves much leeway to the national authorities, even if it, at the very same time, obliges them to take the Convention really seriously and to apply the standards developed by the Court.

5.2.2. Going too far?

Regardless of the great advantages of procedural review from the perspective of enhancing shared responsibility for compliance with the Convention, there are some significant difficulties related to the particular use of this form of review by the Court. This is already apparent from the contentious case of *Hirst* v. *United Kingdom*, which appears to lie at the heart of the recent British criticism of the Court.[180] Clearly, relying on procedural review did not help the Court to arrive

---

177 For some examples, see *Sayoud* v. *France*, ECtHR 26 July 2007, appl. no. 70456/01, paras. 22–24; *Lombardi Vallauri* v. *Italy*, ECtHR 20 October 2009, appl. no. 39128/05, paras. 52–55; *Fatullayev* v. *Azerbaijan*, ECtHR 22 April 2010, appl. no. 40984/07, para. 124; *Sapan* v. *Turkey*, ECtHR 8 June 2010, appl. no. 44102/04, paras. 38–40; *Özpinar* v. *Turkey*, ECtHR 19 October 2010, appl. no. 20999/04, paras. 77–78.

178 For some examples, see e.g. *Grosaru* v. *Romania*, ECtHR 2 March 2010, appl. no. 78039/01, para. 47 and, more recently, *G.R.* v. *the Netherlands*, ECtHR 10 January 2012, appl. no. 22251/07; *Szerdahelyi* v. *Hungary*, ECtHR 17 January 2012, appl. no. 30385/07; *I.M.* v. *France*, ECtHR 2 February 2012, appl. no. 9152/09; *Y.C.* v. *UK*, ECtHR 13 March 2012, appl. no. 4547/10; *K.A.B.* v. *Spain*, ECtHR 10 April 2012, appl. no. 59819/08; *Plesó* v. *Hungary*, ECtHR 2 October 2012, appl. no. 41242/08; *Singh and Others* v. *Belgium*, ECtHR 2 October 2012, appl. no. 33210/11.

179 See also L. Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Journal* (2002) p. 161 at p. 162.

180 *Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01. For a short overview of the debate, see *The Economist* 10 February 2011, 'Britain's mounting fury over sovereignty' <www.economist.com/blogs/bagehot/2011/02/prisoners_voting_rights>. After the most recent Grand Chamber judgment in *Scoppola*, the following quote from the Prime Minister's Question Time in the House of Commons (23 May 2012) may illustrate the current British government's attitude to the Court: 'Nigel Dodds MP: Will the PM give an undertaking that he will not succumb to the Diktat from the European Court of Human Rights in relation to prisoners' voting, that he will stand up for the resolution that was passed in this House by an overwhelming majority, and that he will stand up for the sovereignty of this House and the British people? David Cameron MP (Prime Minister): Well the short answer to that is Yes. I have always believed that when you are sent to prison you lose certain rights, and one of those rights is the right to vote. And crucially I believe this should be a matter for Parliament to decide, not a foreign court. Parliament has made its decision and I completely agree with it.' See also <www.guardian.co.uk/law/2012/may/23/uk-resist-prisoners-vote-european-court>

at a persuasive and acceptable decision. This may have to do with one particular element of the case, which is the criticism the Court levelled at the British choice of a blanket rule that was to be applied indiscriminately to all prisoners. The Court not only criticised the limited discussions in Parliament that preceded the adoption of this blanket rule, as mentioned above; it also rejected the very idea of adopting blanket rules in this type of case. It held that legal classifications, especially if legislation interfered with fundamental rights, should be as precise as possible and should be proportionate to the aim pursued. If legislation is overly broad or over-inclusive, excluding a very large and indeterminate group from exercising a fundamental right, this is not acceptable. In the later case of *Frodl* v. *Austria* the Court stressed this even more strongly, actually requiring individual judicial review in all cases where prisoners were excluded from the right to vote:

> '33. As regards the conditions for disenfranchisement set out in section 22 of the National Assembly Election Act, the Court finds that the provision in question is more detailed than the ones applicable in *Hirst* ... It does not apply automatically to all prisoners irrespective of the length of their sentence and irrespective of the nature or gravity of their offence, but restricts disenfranchisement to a more narrowly defined group of persons since it applies only in the case of a prison sentence exceeding one year and only to convictions for offences committed with intent.
> 34. Nevertheless, the Court agrees with the applicant that section 22 of the National Assembly Election Act does not meet all the criteria established in *Hirst* ... Under the *Hirst* test, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions ...
> 35. The essential purpose of these criteria is to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary, taking the above elements into account.'[181]

The Court here appeared to require individual court judgments in each and every case of prisoner disenfranchisement, rather than the application of a general rule, even if such a general rule differentiated between different groups of prisoners according to the type of offence or the duration of their sentences. There are many more situations in which the Court has expressly asked for such an individualised form of decision making by the Courts.[182] Especially in the area

---

and <www.independent.co.uk/news/uk/politics/david-cameron-to-fight-prison-voting-plan-7781521.html>. See also NICOL, *supra* n. 128, at pp. 247–249.

181 *Frodl* v. *Austria*, ECtHR 8 April 2010, appl. no. 20201/04.

182 See also STONE SWEET, *supra* n. 9, at p. 1863. For a few examples, see *Dickson* v. *UK*, ECtHR (GC) 4 December 2007, appl. no. 44362/04; *Kubaszewski* v. *Poland*, ECtHR 2 February 2010,

of family law,[183] the Court has stressed time and again that legislative presumptions are problematic and should be replaced by particularised judicial decision making.[184] A case in point is *Schneider* v. *Germany*,[185] which related to a legal presumption that the mother's husband is the legal father of the child, even if another man claims to be the biological father and even if he has recognised the child. According to the Court such general legal presumptions are untenable in present day conditions:

> '100. ... Having regard to the realities of family life in the 21st century ..., the Court is not convinced that the best interest of children living with their legal father but having a different biological father can be truly determined by a general legal assumption. Consideration of what lies in the best interest of the child concerned is, however, of paramount importance in every case of this kind ... Having regard to the great variety of family situations possibly concerned, the Court therefore considers that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of the case.'[186]

Thus, the Court seems to depart from a general presumption that individualised judicial decision making is to be favoured over legislative rules in which classifications are made to which a certain legal regime applies.[187] Exceptions to this general presumption are visible mainly in those cases where moral issues are at stake and legal certainty would seem to prevail over individual justice,[188] or in

---

appl. no. 571/04; *M.D. and Others* v. *Malta*, ECtHR 17 July 2012, appl. no. 64791/10; *Godelli* v. *Italy*, ECtHR 25 September 2012, appl. no. 33783/09.

183 But certainly not limited to that – see e.g. *Bjedov* v. *Croatia*, ECtHR 29 May 2012, appl. no. 42150/09, a case that related to the occupation of a social tenancy flat.

184 Moreover, other demands have been made which the states may find difficult to meet; in the case of *C.A.S. and C.S.* v. *Romania*, for example, the Court found that there is a positive obligation on the state to provide counseling and psychological assistance to a child that has fallen victim to violence (ECtHR 20 March 2012, appl. no. 26692/05).

185 ECtHR 15 September 2011, appl. no. 17080/07.

186 For similar examples, see *M.D. and Others* v. *Malta*, ECtHR 17 July 2012, appl. no. 64791/10 and *Godelli* v. *Italy*, ECtHR 25 September 2012, appl. no. 33783/09.

187 See also *Ādamsons* v. *Latvia*, ECtHR 24 June 2008, appl. no. 3669/03.

188 See e.g. *Evans* v. *UK*, ECtHR (GC) 10 April 2007, appl. no. 6339/05; in this case, it turned out that all decisions that could be taken in an individual cases would harm the interests of another individual, making general legislation just as arbitrary as individual decision making, but more certain and predictable nonetheless; for a similar example, see *S.H. and Others* v. *Austria*, ECtHR (GC) 3 November 2011, appl. no. 57813/00; on this, see also J. Bomhoff and L. Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights', 2 *European Constitutional Law Review* (2006) p. 424 at pp. 429–430 and (in Dutch) J.H. Gerards, 'Concrete redelijkheidstoetsing en de rechtspraak van het EHRM. Over "mandatory rules", individuele gerechtigheid en de eisen die het Hof stelt aan de nationale rechtstoepassing' [Concrete reasonableness review and the case-law of the ECtHR. About 'mandatory rules', individual justice and the Court's requirements for national adjudication], in T. Barkhuysen et al., eds., *Geschakeld recht. Verdere studies over Europese grondrechten ter gelegenheid van de 70ste verjaardag van Prof. Mr. E.A. Alkema* [Interconnected law. Further studies about European fundamental rights on the occasion of the 70th birthday of

cases concerning social security and planning issues.[189] Indeed, the Court's desire for proportionality review by national courts may be beneficial to its own position, since in such cases it can easily defer to the national courts and rely on their protection of fundamental rights.[190] Nevertheless, as the responses to the *Hirst* sequel illustrate, the Court's desire for individual justice may be at odds with national constitutional values and national legal traditions.[191] The choice of rules and legislation rather than individual and particularised decision making may be inspired by a strong constitutional tradition favouring the sovereignty of Parliament and formalist values such as legal certainty, predictability and transparency.[192] Although much can be said in favour of non-formalist values such as flexibility, openness and individual balancing, it is difficult to maintain in general that individualised decision making should always prevail over legislative rules and formalism. If that is true, it is certainly understandable that states in which sovereignty of parliament is very important and in which judicial review of legislation, or judicial *ad hoc* balancing, are disfavoured, find it difficult to accept that a supranational court would dictate a constitutional approach that is contrary to their own.[193] In trying to impose judicial individualised decision making, and especially in trying to do so in the case of prisoners' voting rights, the Court seemed to overreach. Trying to achieve a high level of fundamental rights protection while disregarding national constitutional values simply will not do – if anything, it will lead to reluctance at the national level to accept and implement the ensuing Strasbourg judgments.

5.2.3. The Court's response

Although the Court is reluctant to respond directly to national political criticism (see below, section 7), it appears to be sensitive to comments on its judicial approach and it takes them to heart in subsequent judgments. A clear example of this seems to be the case of *Scoppola No. 3* v. *Italy*, which again related to the issue of prisoners' voting rights.[194] This case was different from the case of *Hirst*[195] to the extent that some differentiation was visible in the relevant legislation. The legislation distinguished between two different groups of

Prof. Dr. E.A. Alkema] (Deventer, Kluwer 2009) pp. 169–188. However, the case-law is not entirely consistent here; see e.g. *Dickson* v. *UK*, ECtHR (GC) 4 December 2007, appl. no. 44362/04.

189 See e.g. *Twizell* v. *UK*, ECtHR 20 May 2008, appl. no. 25379/02; *Maggio and Others* v. *Italy*, ECtHR 31 May 2011, appl. no. 46286/09 and others.

190 See above, section 5.2.1 and see KELLER and STONE SWEET, *supra* n. 78, at p. 701.

191 See extensively on this (in Dutch) GERARDS, *supra* n. 188, pp. 169–188.

192 GERARDS, *supra* n. 199; see also GERARDS, *supra* n. 78, at p. 199.

193 On this, see also KELLER and STONE SWEET, *supra* n. 78, at p. 695, explaining that the strong demands the Court has made in relation to criminal procedure have sometimes proved difficult to digest for the states.

194 *Scoppola (No. 3)* v. *Italy*, ECtHR (GC) 22 May 2012, appl. no 126/05.

195 *Hirst (No. 2)* v. *UK*, ECtHR (GC) 6 October 2005, appl. no. 74025/01.

prisoners: prisoners with a sentence of less than three years were deprived of the right to vote for five years, while prisoners with longer sentences completely lost their right to vote. Except for this differentiation there was no room for individualised judicial decision making on disenfranchisement – the Italian courts simply had to apply the legislative rules. If the Court were to have decided on this case in line with *Frodl* and the aforementioned general requirement of individualised proportionality review, it would have had to find that this did not meet the requirement for individualisation defined in that case.[196] Instead, the Court held that the legislation disclosed a sufficient amount of differentiation to meet the test of *Hirst*. Criticising the Chamber's findings in the *Frodl* case, it considered that:

> '99. ... the *Hirst* judgment makes no explicit mention of the intervention of a judge among the essential criteria for determining the proportionality of a disenfranchisement measure. The relevant criteria relate solely to whether the measure is applicable generally, automatically and indiscriminately within the meaning indicated by the Court ... While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.'

Recalling that the arrangements for restricting prisoners' voting rights vary considerably from one national legal system to another, the Court then stressed that the states should be free to adopt legislation on the matter in accordance with historical development, cultural diversity and political thought within Europe. It continued, emphasising that:

> '102. ... In particular, ... the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction.'

Although it is difficult to know whether this reasoning is a direct response to the criticism of the Court's preference for individualised decision making, it is obvious that the Grand Chamber's judgment heeds the differences in national constitutional traditions and accepts that some states will favour legislation over individualised judicial balancing. It even leaves a very wide margin of discretion to the states to decide on this, though it ends its considerations by stressing that it

196 See *Frödl* v. *Austria*, ECtHR 8 April 2010, appl. no. 20201/04.

would remain competent to decide if national legislation would be sufficiently precise, proportionate and differentiated to meet the Convention's requirements. In a more recent judgment in *Animal Defenders International* v. *United Kingdom*, the Grand Chamber even went as far as to stress that there is really no need for individualised decision making in all situations.[197] In its judgment it expressly recognised that there may be very good reason for general measures and blanket bans and it indicated how it would assess their compatibility with the Convention:

> '108. It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it ... The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation ... It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess ... A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty ..., of litigation, expense and delay ... as well as of discrimination and arbitrariness ... The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality ...
> 109. It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case. ...
> 110. ... [T]he core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it'.

Clearly, thus, the Court now accepts that there may be good reason to adopt a blanket rule. In the light of what was analysed in section 5.2.2, however, it is also interesting to note that the Court stressed the importance of diligent parliamentary preparation of such general measures. This may be understood as an effort by the Court to explain that the violation found in the *Hirst* case really did not follow from the general character of the exclusion of prisoners from the right to vote, but in the lack of sufficient parliamentary debate about the legislation. It may even be speculated that the Court may use this kind of argument in favour of the United Kingdom if new voting rights legislation is adopted which is sufficiently well prepared and debated, even if the substance of the legislation is not so very different from the present situation.

Accordingly, even though the Court has not expressly recognised this, and even if it does not at all follow this new approach in all its cases,[198] the judgments in *Scoppola No. 3* and *Animal Defenders International* can be easily regarded as a response to national criticism. They seem to stem from a conscious effort by the

197 ECtHR (GC) 22 April 2013, appl. no. 48876/08.

198 Some examples have been given above; see in particular *Godelli* v. *Italy*, ECtHR 25 September 2012, appl. no. 33783/09.

Court to search for a proper balance between its desire to protect fundamental rights and the need to respect national particularities, making use of the argumentative tool of procedural review.

5.2.4. Conclusion

The aim of this section was to highlight the Court's use of procedural review as an alternative to substantive review of justifications and substantive balancing. Procedural review can help the Court to avoid having to take a moral stand on delicate and controversial matters, such as compensation for wrongful birth or consent requirements in IVF cases. Moreover, in cases where views on the reasonable outcome of a case may conflict, such as cases of defamation or immigration law, procedural review may help the Court to avoid taking sides. In both types of situation, the use of procedural review is clearly in accordance with the principle of primarity, which holds that it is up to the states to regulate and decide matters in accordance with the Convention.

Procedural review also helps the Court avoid exercising the role of a 'court of fourth instance'. Usually, after all, no renewed assessment of the facts and interests is needed if the Court needs only to determine whether sufficient procedural safeguards were present and if the contested decision or measure has come into being as a result of transparent, open and fair decision making procedures.

Given the growing importance of procedural review, it is understandable that the Court has also translated such review into obligations and requirements of a procedural nature – it needs procedural standards for its own assessment and it has to make clear to the states what thresholds of procedural fairness must be set. Nonetheless, the Court sometimes seems to go too far in defining such standards, as in the situation of requiring individualised decision making by the national courts. It is important to note for the purposes of this chapter, however, that the Court appears to be very much aware of the criticism of this approach. The *Scoppola No. 3* and *Animal Defenders International* judgments of the Grand Chamber both expressly underline that particularised decision making is not always needed, even though the ECHR standards should always be respected. By taking this new approach, the Court evidently leaves more latitude to the national authorities.

5.3. JUDICIAL MINIMALISM: SHALLOW, NARROW AND ANALOGICAL REASONING

5.3.1. Introduction

The second interpretative device discussed in this section is not often mentioned in the literature on the Court's methods of interpretation, nor has the Court

expressly referred to it. Looking at the Court's case-law, however, it is clear that 'judicial minimalism' plays an important role, and has done so for a very long time. This section analyses the Court's *de facto* use of 'shallow' and 'narrow' reasoning, i.e. reasoning based on superficial arguments, and reasoning that is strictly limited to the facts of the case at issue. The following discussion also goes into how the Court can use this device to its own benefit, i.e. to manoeuvre between the requirements of effective protection of fundamental rights and respect for national constitutional values and national diversity, as well as to reduce tension within the Court itself. Attention is further paid to the disadvantages of judicial minimalism, which can be found in general values such as the certainty and predictability of the Court's judgments.

5.3.2. *Shallow reasoning*

The notion of 'judicial minimalism' was coined by Cass Sunstein.[199] He explained that it is often difficult for courts deciding on sensitive cases to provide 'deep' and 'wide' reasoning. In controversial fundamental rights cases, people can sometimes agree on a rather abstract or 'shallow' level that a certain fundamental right exists and should be respected, even if they have different opinions on the underlying reasons and arguments. In such a situation, a court such as the ECtHR could try different approaches to justify its choice of a certain reading of a fundamental right. On the one hand, it might underpin its finding by referring to 'deep', moral, highly principled arguments. Given the diversity of opinions of people on such arguments, the judgment might then be difficult to accept for some. On the other hand, the Court may rely on 'shallow' reasoning, limiting itself to superficial remarks on the general importance of a certain right in light of the underlying principles of the Convention or developments in Europe, while leaving fundamental issues undecided and trusting the general acceptance of a certain abstract definition.[200] The judgment may then be acceptable and convincing, even if it does not provide much clarity as to its underlying reasons, precisely because no real debate on such reasons can ensue from the judgment.[201]

The Court uses shallow reasoning in many of its cases.[202] Good examples are visible in relation to the application of the classical methods referred to above: in

199 C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York/Oxford, Oxford University Press 1996) pp. 4–5.

200 Cf. also H.-M. ten Napel and F. Theissen, 'The European Court of Human Rights' Jurisprudence on Religious Symbols in Public Institutions In Comparative Perspective: Maximum Protection Of The Freedom Of Religion Through Judicial Minimalism?', in S. Ferrari and R. Christofori, eds., *Law and Religion in the 21st Century* (Farnham, Ashgate 2010) pp. 313–322 at p. 315.

201 Sunstein, *supra* n. 199, at pp. 4–5.

202 See also S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights', 23 *Oxford Journal of Legal Studies* (2003) pp. 405–433 at p. 407; Mowbray,

applying evolutive interpretation the Court usually restricts itself to very general, abstract references to accepted values such as human dignity or democracy, to European consensus or to international standards, rather than to detailed moral arguments and presumptions.[203] In some cases, the Court even merely presents the outcome of its deliberations without providing any detailed argumentation.[204] In addition, the Court seldom offers a broad definition based on high-level principles. It usually builds on previous case-law, drawing together small pieces of argumentation that it has previously provided, and combining them into a set of general principles or criteria.[205] Although the result of this approach may be a rather 'deep' definition, the Court tends to stress that this is the unavoidable outcome of small definitional steps taken in previous cases.[206]

---

supra n. 114, at p. 61. For the difference between 'shallowness' and 'hollowness', see C.R. SUNSTEIN, 'Beyond Judicial Minimalism', Harvard University Law School Public Law & Legal Theory Research Paper No. 08-40 (2008), <http://ssrn.com/abstract=1274200> at pp. 5 and 8.

203 See e.g. *Demir and Baykara* v. *Turkey*, ECtHR (GC) 12 November 2008, appl. no. 34503/97; *Bayatyan* v. *Armenia*, ECtHR (GC) 7 July 2011, appl. no. 23459/03. Many cases in which the Court refers to 'classic' methods of interpretation, such as textual interpretation or systematic interpretation may also be regarded as shallow to the extent that such methods allow the Court to escape from the need to provide substantive, moral arguments. These cases are not discussed in detail in this paper; for a good example, however, see *Pretty* v. *UK*, ECtHR 29 April 2002, appl. no. 2346/02.

204 See e.g. *Von Hannover (No. 2)* v. *Germany*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08, in which the Court found the right to respect for one's private life to be applicable to photos in the following brief consideration: '96. Regarding photos, the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof (see *Reklos and Davourlis* v. *Greece*, cited above, §40).' Perhaps one might expect that a fuller account of the arguments for the applicability could found in *Reklos and Davourlis* v. *Greece*, ECtHR 15 January 2009, appl. no. 1234/05, but the paragraph referred to is virtually identical to the one in *Von Hannover*. This seems to match Sunstein's 'constructive use of silence' to avoid conflict over the outcomes (SUNSTEIN, *supra* n. 199, at p. 39).

205 See e.g. *United Macedonian Organisation Ilinden and Others* v. *Bulgaria (No. 2)*, ECtHR 18 October 2011, appl. no. 34960/04, where the Court provided a rather strong and general formulation of the notion of pluralism, which was based on a reference to a previous case (*United Macedonian Organisation Ilinden and Others* v. *Bulgaria*, 19 January 2006, appl. no. 59491/00), where it referred back to *Gorzelik* v. *Poland*, ECtHR (GC) 17 February 2004, appl. no. 44158/98, paras. 89-93), in which the Court defined pluralism mainly by reference to what it has held in earlier case-law. This is what Sunstein has described as 'conceptual ascent', 'in which the more or less isolated and small low-level principle is finally made part of a more general theory' (SUNSTEIN, *supra* n. 202, at p. 17).

206 Various scholars have remarked that most definitions of central notions, such as 'democracy' or 'human dignity' are rather 'thin' or hollow, being limited to largely formalistic and minimalist requirements; cf. for democracy: S. MARKS, 'The European Convention on Human Rights and its "Democratic Society"', 66 *British Yearbook of International Law* (1995) pp. 209-238 at pp. 231-234; GREER, *supra* n. 212, at p. 200, and for human dignity: C. MCCRUDDEN, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law* (2008) pp. 655-724. Some do not agree, however: Ten Napel finds that the combination between the notions of democracy and pluralism in the Court's

Mostly, moreover, the definitions are given at such a high level of abstraction and generality that it would be difficult to disagree with them.[207]

Interestingly, the Court can also use this approach to 'repair' mistakes of 'deep' reasoning in earlier judgments if it appears that the deep reasoning had indeed divided the audience. A case in point is the Chamber judgment in the *Lautsi* case concerning crucifixes in public schools.[208] The Chamber underpinned its findings in this case on rather deep, moral and principled grounds, referring to principles of state neutrality and secularism, rather than by reference to earlier case-law. It is well known that the Chamber judgment led to a stormy European debate on whether the Court actually could take such a strongly moral position and simply discard national traditions and national culture.[209] The case was sent to the Grand Chamber and it may come as no surprise that the Grand Chamber replaced the deep approach with a shallow one that was reasoned on the basis of careful references to national traditions, the margin of appreciation doctrine, and previous judgments of the Court.[210] Indeed, the general meta-principles on which the Chamber had based its judgments no longer had a place in the Grand Chamber's judgment. Moreover, it is difficult to discern on the basis of the Grand Chamber's judgment how subsequent cases concerning religious expressions in public places will be decided, which is certainly a hallmark of judicial minimalism.

'Shallow' judicial minimalist reasoning, based on precedent and references to external factors (such as European consensus), thus usually forms the basis for the Court's approach, rather than deep, moral and principled arguments.[211] The

---

case-law results in a rather 'thick, inclusive conception of democracy' (H.-M. TEN NAPEL, 'The European Court of Human Rights and Political Rights: The Need for More Guidance', 5 *European Constitutional Law Review* (2009) pp. 464–480 at p. 465); this still is the result, however, of a 'conceptual ascent', rather than of a wide and deep definition in one individual judgment. Moreover, Ten Napel has conceded that much of the Court's case-law is not in line with this thick concept, but sets only minimal requirements with respect to internal constitutional relations (*idem* at 479).

207 Not surprisingly, the definitions given by the Court are criticised because of their vagueness and multi-interpretability – see e.g. A.J. NIEUWENHUIS, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', 5 *European Constitutional Law Review* (2007) pp. 367–384 at pp. 383–384. A good example of an interpretation that is not supported by deep arguments, but that is still persuasive because of the high level of agreement on an abstract level is *Jalloh* v. *Germany*, ECtHR (GC) 11 July 2006, appl. no. 54810/00, where the Court held that the use of evidence obtained by torture always renders a trial unfair (para. 105).

208 *Lautsi* v. *Italy*, ECtHR 3 November 2009, appl. no. 30814/06.

209 For a discussion of the debate, see MCGOLDRICK, *supra* n. 125, at p. 470 and PIRET, *supra* n. 24.

210 *Lautsi* v. *Italy*, ECtHR (GC) 18 March 2011, appl. no. 30814/06, in particular para. 68, where the Court expressly referred to the lack of a European consensus to justify a wide margin of appreciation and to justify that it did not opt for a substantive argumentation based on state neutrality or secularism.

211 Some have severely criticised the Court for using this approach, instead of some form of moral reasoning; see in particular LETSAS, *supra* n. 25, at pp. 123–126.

advantage of this in pluralist Europe is that the Court can maintain a relatively high standard of protection without having to take sides on deeply felt controversies or delicate and sensitive fundamental rights issues. Indeed, it is obvious that the Court may run into trouble if it forgets this and bases its reasoning on deeply principled arguments – in a diverse Europe, this may clearly lead to difficulties of acceptance, of which the Court has to take careful account.

5.3.3. Narrow reasoning, analogical reasoning and general principles

Following Sunstein's argument, it is also advisable for the Court to limit its interpretations to the bare facts of the cases presented to it, rather than provide a general interpretation of the Convention. Such 'narrow' interpretations can easily be understood from the facts of the case and may therefore be fairly acceptable to the Court's audience. On the other hand, 'wide' interpretations, or the establishment of general interpretative criteria, may attract strong criticism if they are not generally agreed. Another great advantage of a line of reasoning that is closely geared to the individual facts of the case is that it does not set too strong a precedent. Thus, if it were to appear that a certain judgment is hard to digest for the states, or that hindsight shows it was wrongly decided, subsequent cases can be easily distinguished on the facts and a different line of reasoning can be adopted. Finally, 'narrow' judgments can have the advantage that all judges within a Chamber or Grand Chamber agree on them. Especially if a case were to require an extension of previous case-law, or if there is substantive disagreement on the appropriate balance that should have been struck between competing interests, the judges may disagree on the line that should be adopted. Especially as a 'narrow' judgment hardly sets a precedent and does not create widely applicable standards, the judges may agree on such a judgment much more easily than if the judgment had far-reaching consequences for decision making in a range of similar cases.

It is not surprising, therefore, that the Court's interpretations are usually closely aligned with the facts of the individual case, even though there are many examples of cases in which the Court has given a general definition of autonomous Convention notions.[212] Usually the Court does not even give a real definition of the right at issue. In many of its cases, especially in more recent years, it simply provides an overview of previous case-law in which it has recognised certain aspects of rights being protected by the Convention. Subsequently it holds that a similar issue is (or is not) at stake in the present case and that, accordingly, the Convention right applies (or not).[213] Indeed, even

212 See already Ress, *supra* n. 28, at p. 719–744. For the exceptions, see in particular the sections in this report on autonomous decision-making and evolutive interpretation (4.2.1 and 4.2.3).

213 For an empirical study of the extent to which the Court grounds its judgments in precedent in order to legitimise its judgments, see Y. Lupu and E. Voeten, 'Precedent on International

though this manner of reasoning is usually not presented as a specific argumentative approach, stating general principles and applying them to the individual case is now the Court's prevailing argumentative approach.

But there is more to the Court's minimalism than narrow, fact-based reasoning. Interestingly, the case-law of the Court discloses a very frequent use of analogical reasoning, even if commentators hardly ever seem to notice this interpretative technique and the Court does not refer to it explicitly.[214] Nevertheless, it is evident that Court actually decides most cases by comparing the facts of the case before it to the facts of cases that it has decided previously, looking for analogies, similarities and differences.[215] In some cases, it finds that the similarities are sufficiently clear to justify extending a certain line of case-law or a certain interpretation to a new, slightly different set of facts. In other cases, there may be a reason to distinguish the facts of the case, stopping the development of the case-law in a certain direction.[216] In all such cases there is no need to provide profound theoretical or substantive arguments for the new approach.[217] Pointing to similarities in facts and arguments and referring to previous judgments provides sufficient justification for reaching a certain outcome.[218] It is here too that the second 'supranational' advantage of narrow decision making is visible: not only does this technique have the advantage that profound moral arguments can be avoided, it also limits the precedential value of judgments. Accordingly, as mentioned above, if reactions to a certain judgment seem to make it clear that the Court has overreached and an extension of a line of case-law is difficult for certain states to digest, the Court may just as easily in a subsequent case make it clear that the previous judgment was based on a very particular set of facts and no similar judgment is called for in other cases.[219]

Courts: A Network Analysis of Case Citations by the European Court of Human Rights', APSA 2010 Annual Meeting Paper, <http://ssrn.com/abstract=1643839>.

214 Cf. SUNSTEIN, *supra* n. 199, at p. 32: 'Analogical reasoning is the key to legal casuistry'.

215 Cf. SUNSTEIN, *supra* n. 199, at p. 65.

216 For an example in the Court's case-law, see the case of *Vajnai* v. *Hungary*, ECtHR 8 July 2008, appl. no. 33629/06, para. 49), where the Court distinguished the case (which concerned a prohibition of the wearing of a communist red star) from a previous case on limitations of freedom of expression in Hungary (*Rekvényi* v. *Hungary*, ECtHR 20 May 1999, appl. no. 25390/94), holding that in the current case and after twenty years of democracy, it was no longer necessary to allow Hungary additional leeway to combat the danger to democracy that might be constituted by certain forms of speech.

217 SUNSTEIN, *supra* n. 199, at p. 68.

218 SUNSTEIN, *supra* n. 199, at p. 67–68.

219 Apparently, this occurred after the case of *Nunez* v. *Norway*, ECtHR 28 June 2011, appl. no. 55597/09, in which the Court had given a rather lenient interpretation of Article 8 in a case concerning the extradition of an illegal immigrant with a minor child. This was carefully distinguished from in the more recent case of *Antwi* v. *Norway*, ECtHR 14 February 2012, appl. no. 26940/10, paras. 100–101. In doing so, the Court implicitly made it clear that the approach in *Nunez* will be strictly limited to a very narrow set of factual circumstances, making the case far less relevant as a precedent.

One possible disadvantage of 'narrow' reasoning is the lack of predictability and legal certainty in which it results; indeed, entirely particularised decision making may result in arbitrariness. The Court avoids this in part by relying on the strongly precedent-based approach mentioned above, which allows it to develop consistent, relatively predictable lines of case-law. Moreover, since searching for analogies is very similar to searching for common principles and elements in the Court's own case-law, the Court's approach may even help to clarify the general meaning of the Convention rights. If a line of case-law is sufficiently clearly established, the Court can distil the common elements and criteria that it has used to decide on such cases and it can reformulate them in the shape of 'general principles derived from the Court's case-law'.[220] In some situations, lines of case-law are brought together by the Grand Chamber, which may use previous case-law as a basis to draw up authoritative lists of general criteria which may subsequently be used by the Court (as well as national courts) to determine the applicability of the Convention.[221] These principles and criteria may serve as standards or yardsticks to be applied by the Court as well as national authorities, doing justice to the Court's task to 'elucidate, safeguard and develop the rules instituted by the Convention'.[222] A good example is the case of *Ananyev*, where the Grand Chamber, on the basis of a large number of previous judgments, defined a list of standards to be applied to determine whether prison conditions transgress the 'minimum level of severity' of the prohibition of inhuman and degrading treatment.[223] Such lists of standards, which the Court by now provides in almost all of its judgments, may help to create the reassuring impression that the Court's decision making is based on a transparent set of well-established, coherent general principles.

---

220 Cf. Ress, *supra* n. 28, at p. 726. This can be done since, as Sunstein notes, 'analogical reasoning cannot proceed without identification of a governing idea – a principle, a standard, or a rule – to account for the result in the source and target cases' (Sunstein, *supra* n. 199, at p. 65).

221 For a recent example, see *Kotov* v. *Russia*, ECtHR (GC) 3 April 2012, appl. no. 54522/00, paras. 92–107, where the Court, on the basis of earlier case-law, formulated a list of criteria to be taken into account in determining if someone has acted as a private person or a State agent.

222 See recently *Konstantin Markin* v. *Russia*, ECtHR (GC) 22 March 2012, appl. no. 30078/06, para. 89, in which the Court also stressed that '[a]lthough the primary purpose of the Convention is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States'. As was mentioned in the previous subsection, the Court may even arrive at a rather wide and deep interpretation of the Convention using this approach in the form of 'conceptual ascent', i.e. by bringing small definitional steps of a substantive nature together in the shape of a wider set of general starting points for the Court's review. For the value of this approach to the legitimacy of the Court, see Lupu and Voeten, *supra* n. 213, at p. 6.

223 *Ananyev and Others* v. *Russia*, ECtHR (GC) 10 January 2012, appl. nos. 42525/07 and 60800/08, paras. 141–159.

5.3.4. *Disadvantages of judicial minimalism*

Although judicial minimalism has the obvious advantage of flexibility, it clearly also has some drawbacks.[224] Perhaps the most important problem is that there is no clarity as to the final aim of analogical reasoning. If each individual case is decided on its own facts, without a clear sense of direction, the Court may sometimes end up by having to provide a rather general interpretation that is difficult for the states to digest.[225] An additional disadvantage is that it can take a long time before it becomes clear what the general principles for applicability of a certain Convention provision really are.[226] This may result in a lack of transparency as well as in uncertainty and confusion.[227] For example, in the Grand Chamber case of *Gillberg*, the question that arose was whether the right to freedom of expression also covers a 'negative' aspect, i.e. a right to refuse to make certain information available.[228] Although the Grand Chamber admitted that previous case-law on the issue was scarce and did not give an answer to this question, it opted for a narrow approach, mentioning that '[t]he Court does not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case'.[229] From the judgment it appears that no such negative right was accepted, but it will require many more cases to determine when a negative right can be recognised.[230] If the Court had provided a general definition of the right based on substantive criteria, albeit shallowly reasoned, it would have provided national authorities with a stronger foundation

224 For a general review, see e.g. SUNSTEIN, *supra* n. 199, at pp. 72–74.

225 Cf. SUNSTEIN, *supra* n. 202, at p. 2: 'Minimalism might be easiest in the short-run, but in the long-run, it can be extremely destructive'. See also GERARDS, *supra* n. 78.

226 Cf. TEN NAPEL and THEISSEN, *supra* n. 200, at p. 316, arguing that this may be a reason why the Court has not yet developed a satisfactory philosophy to underpin its judgments on freedom of religion.

227 Cf. SUNSTEIN, *supra* n. 202, at p. 14. The Court's judges have sometimes also noted this risk – see e.g. the dissenting opinion of Judge Martens in the case of *Fischer* v. *Austria*, ECtHR 26 April 1995, appl. no. 16922/90, para. 16. Another risk was pointed out by RESS, who mentioned that states may be less willing to implement the Strasbourg case-law if they are led to believe that each judgment is solely applicable to the particular facts of the case presented and does not set a generally applicable precedent (RESS, *supra* n. 28, at p. 722).

228 *Gillberg* v. *Sweden*, ECtHR (GC) 3 April 2012, appl. no. 41723/06.

229 *Idem*, para. 86.

230 There are more recent Grand Chamber cases in which the Court gives a rather narrow judgment that is closely aligned to the facts of the case at issue, even though all of them contain at least some arguments that are of more general applicability. See e.g. *Kononov* v. *Latvia*, ECtHR (GC) 17 May 2010, appl. no. 36376/04; *Taxquet* v. *Belgium*, ECtHR (GC) 16 November 2010, appl. no. 926/05; *Perdigao* v. *Portugal*, ECtHR (GC) 16 November 2011, appl. no. 24768/06; *Giuliani and Gaggio* v. *Italy*, ECtHR (GC) 24 March 2011, appl. no. 23458/02; *Palomo Sanchez and Others* v. *Spain*, ECtHR (GC) 12 September 2011, appl. no. 28955/06.

on which to base their own Convention case-law.[231] Moreover, some scholars have argued that the need for such clear and general judgments has become even greater over the last decade. In the context of a large, heterogeneous group of states, the Court should sometimes take on a 'pedagogical role', rather than one limited to case-based decision making.[232] The Court thus needs to weigh carefully the advantages of minimalist decision making against the desire for general principles and clear criteria.

5.4. CONCLUSION

This section has shown that the Court often uses two important judicial techniques that are not frequently discussed in the academic literature and that do not belong to the typical 'Convention canon' of interpretation methods. Nevertheless, it is obvious that the Court can benefit from the use of both techniques from the perspective of shared responsibility. The method of procedural review serves to avoid the need for substantive decision making by the Court. Instead, the Court bases its judgments on the quality of national decision making processes, procedural remedies and safeguards. By stressing the need for procedural justice, as well as by respecting the outcome of careful national decision making, the Court can give clear expression to the notion of subsidiarity. The method therefore seems ideally suited to enhance shared responsibility and stress the primarity of national decision making. Nevertheless, the reactions to some of the Court's judgments show that procedural review does not always work and states can feel offended by its application. Thus, as was concluded for the methods discussed in section 4, it is important that the Court should avoid overreaching when applying procedural review. As was mentioned in section 5.3, however, the Court appears to be well aware of this risk, and it seems to have tried to repair some of the aspects of procedural review that have been strongly criticised. By doing so, it shows its responsiveness to national criticism and its willingness to leave the states sufficient leeway to protect

231 Concerning the desirability of such guidance, see e.g. E.A. ALKEMA, 'The European Convention as a Constitution and its Court as a Constitutional Court', in P. MAHONEY et al., eds., *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdal* (Cologne/Berlin/Bonn/Munich, Carl Heymans 2000) pp. 41–63 at p. 60, and D. NICOL, 'Lessons from Luxembourg: federalisation and the Court of Human Rights', 26 *European Law Review – Human Rights Survey* (2001) p. HR/9; see also Judge Martens' dissenting opinion in the case of *Fischer* v. *Austria*, ECtHR 26 April 1995, appl. no. 16922/90, para. 16) and his dissenting opinion in *Fey* v. *Austria*, ECtHR 24 February 1993, appl. no. 14396/88, para. 1. For criticism of the Court's current approach, see B. HALE, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?', 12 *Human Rights Law Review* (2012) pp. 65–78 at p. 68.

232 R. HARMSEN, 'The European Convention on Human Rights after Enlargement', *International Journal of Human Rights* (2001) pp. 18–43; GREER, *supra* n. 202, at p. 407; M. EUDES, *La Pratique Judiciaire Interne de la Cour Européenne des Droits de l'Homme* (Paris, Editions A. Pedone 2005) p. 292.

Convention rights as they think best, although it will of course always want to make sure that the minimum level of protection of the Convention rights is respected.

Further, this section has shown that the Court often relies on 'judicial minimalism' by consistently using shallow, narrow or analogical reasoning. It also has been demonstrated that judicial minimalism, just like procedural review, is an important and useful tool to search for shared responsibility and a good balance between fundamental rights protection and subsidiarity. This is all the more so now that clarity and consistency in the Court's interpretations are safeguarded by identifying 'general principles' that can be derived from its case-law. Nevertheless, especially in cases where clarity and generality of interpretation are needed, as is often the case where novel questions arise regarding the scope of the Convention, the Court may prefer to base its judgment on general criteria and substantive arguments, rather than on an analogical approach or an analysis of the facts of the case at issue. Argumentation based on meta-teleological or consensus reasoning is to be welcomed in such landmark cases, even if narrow and analogical argumentation may be preferred in many other cases. After all, even if the Court wants to respect national value choices in many cases, it still has to heed its interpretative and standard-setting tasks, marking the boundaries of the national authorities' discretion and creating general principles and criteria that the national courts can apply in their own case-law.

6. JUDICIAL DIALOGUE

6.1. INTRODUCTION

In section 3.5 it was explained that the Court regards the protection of Convention rights as a shared responsibility or a partnership between itself and the national courts. The Court supervises compliance with the Convention and protects fundamental rights in the last resort, yet it is up to the national courts to guarantee protection of the Convention rights in the first place. The previous sections have shown that the Court may be quite demanding in this respect. The national courts are asked to adopt the Court's autonomous and evolutive definitions of Convention rights and apply them in their own case-law. If they do not do so, or lack the competence to set aside national legislation, the state may be held accountable for a violation of the Convention. By copying the Court's interpretative approach, the national courts can avoid the occurrence of such violations. Viewed in terms of the Convention's overall objective, which is to arrive at an adequate level of protection of fundamental rights throughout Europe, this is clearly desirable.

It has also been shown that the Court has used its argumentative tools in such a way that national (judicial) choices are respected. By using procedural review, judicial minimalism and interpretations that depend on national law, the Court expressly endorses the value of national compliance with the Convention and stresses the subsidiary character of its own supervisory task. Indeed, the Court often shows lenience and expresses its approval if the national courts have fulfilled their obligations, accepting a substantive outcome rather than re-balancing the interests at issue.

The situation of shared responsibility between the Court and the states (the national courts in particular) is often expressed in terms of constitutional or judicial 'dialogue'.[233] The notion of dialogue was originally developed to analyse the relationship between national constitutional courts and the national legislature ('constitutional dialogue'),[234] but it has also been used to describe contacts between highest national courts; between national courts of different states; between national courts and the EU Court of Justice; between various international courts and supervisory bodies; etc.[235] The notion of dialogue is also used to describe a wide variety of 'contacts' and interaction. It may relate to strictly regulated constitutional procedures between courts and Parliament (such as the possibility of a 'constitutional override' in Canada or the 'declaration of incompatibility' in the United Kingdom); to mechanisms that can be used to deal with diversity in pluralist legal systems (such as the 'margin of appreciation' doctrine); and even to informal forms of exchange of 'good practices'.[236] In fact, the notion of dialogue is so wide as to cover virtually all forms of interplay and interaction between courts *inter se* or between courts and other institutions.[237]

Precisely because of the wide meaning of the 'dialogue' notion, it may not appear to be a very useful tool to analyse the relationship between the ECtHR and the national courts. Nonetheless, the notion may help to understand the importance of procedures and mechanisms that inform the states' (in particular the national courts') implementation of the Convention. The Court's pilot judgment procedure, for example, has been shown to have many elements of dialogue, both between the Court and the national authorities (including national courts) and between the Court and the Council of Europe's Committee of Ministers, and even between the Committee of Ministers and the states. Likewise, the doctrine of the margin of appreciation, the method of procedural

233 See e.g. BRATZA 2011, *supra* n. 79, at p. 511; BRATZA 2012, *supra* n. 79, at pp. 26–27; TULKENS, *supra* n. 13, at p. 8; LÜBBE-WOLF, *supra* n. 78, at p. 11.

234 Particularly influential is P. HOGG and A. BUSHELL, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't a Bad Thing after All)', 35 *Osgoode Hall Law Journal* (1997) p. 75.

235 See below, section 6.2.1.

236 See e.g. SLAUGHTER, *supra* n. 78, at pp. 99–137; GERARDS, *supra* n. 23. See also M. CLAES et al., eds., *Constitutional Conversations in Europe* (Antwerp, Intersentia 2012).

237 For a good review of different dialogue theories and claims, see TORRES PÉREZ, *supra* n. 86, at p. 106.

review and judicial minimalism, and the reliance on comparative arguments and national case-law can all be construed in terms of facilitating dialogue and interaction between the states and the Court.

Nevertheless, such a broad analysis of judicial dialogue would not be very useful in the light of the objectives of this report. Many of the Court's mechanisms and procedures involve only relatively indirect forms of dialogue; others have already been well analysed and charted in different studies. For that reason, this section focuses on a limited number of direct forms of judicial dialogue, which were mentioned in interviews with the Court's judges and registrars as important examples of interaction between national courts and the ECtHR, and which have remained relatively under-studied. First, attention is paid to dialogue by means of case-law, in which the Court by means of its own judgments expressly responds to national judgments, and vice versa. Secondly, attention is paid to informal and formal procedures for dialogue, including the envisaged system of advisory opinions.

6.2. DIALOGUE BY MEANS OF JUDGMENTS

6.2.1. Some background: constitutional dialogue and dialogue between courts

In many national constitutional systems, constitutional or highest courts lack the competence or willingness to set aside Acts of Parliament because of incompatibility with the national constitution. Given their position in the constitutional system as a whole, and their specific legitimacy in relation to that of the legislature, constitutional and highest courts often restrict themselves to expressing clear criticism of the legislature on a certain piece of legislation, rather than using powers such as setting aside legislation or even declaring legislation null and void. After such judgments, it is up to the legislature to respond to the criticism, e.g. by amending or replacing a piece of legislation.[238] If amendments have been made, but only to a limited extent, this may trigger new cases to be brought before the courts, which will then have to pronounce judgment on the compatibility of the new legislation with fundamental rights provisions. It is said that this process constitutes some kind of 'dialogue' between the highest court and the legislature: the court speaks, the legislature replies, and this might go on until the moment arrives that both the court and the legislature are content with the outcome.[239] The so-called 'declaration of incompatibility' in the United Kingdom is a good example of such a dialogue.[240] Here, the Supreme

238 Cf. L.B. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', 3 *International Journal of Constitutional Law* (2005) pp. 617–648 at p. 623.

239 See e.g. R. Dixon, 'Weak-Form Judicial Review and American Exceptionalism', 32 *Oxford Journal of Legal Studies* (2012) pp. 487–506 at p. 496.

240 See section 4 of the UK Human Rights Act 1998.

Court may find that an Act of Parliament is contrary to the Human Rights Act, yet such an incompatibility can only be removed by Parliament itself. In its judgment the Supreme Court will have to set out the problems and flaws of the Act very clearly in order to enable Parliament to remove the violation, thus stimulating a response by the legislature.[241] In quite a different way, the Canadian Supreme Court may find a violation of the constitution in an Act of Parliament, but then Parliament may decide that the legislative provision shall operate nonetheless.[242] Although the legislature seldom uses this power of 'legislative override', it appears that the courts are more careful in their own approach towards legislation, deferring to the legislature more frequently, especially if the legislature, in one way or another, has responded to an earlier judgment in which a conflict with fundamental rights was found.[243]

In both examples, there is genuine interaction between the highest court and Parliament, based on an explicit finding of a fundamental rights problem in an Act of Parliament. The highest court explains where the problems are located and the legislature responds. It has been argued that there is great value in such forms of constitutional dialogue and they are to be preferred over 'strong' forms of judicial review, which imply that the court really has the final say and that the legislature is simply bound to follow the court's judgment.[244] Dialogical constitutional systems do justice to democratic legitimacy and they are said to encourage a keen judicial eye for flaws in the legislative process, which may lead to improvement of the overall quality and legitimacy of the outcomes.[245]

Of course, such a dialogue between Parliament and the judiciary is difficult to envisage in respect of the ECtHR, as there is no legislative counterpart that could act as its interlocutor. Nevertheless, dialogue theory has proved sufficiently flexible to extend to inter-judicial relations, including relations between national and supranational or international courts.[246] The main characteristic of dialogue

241 On the dialogical quality of the 'declaration of incompatibility' and other mechanisms contained in the Human Rights Act 1998, see in more detail e.g. T.R. HICKMAN, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998', *Public Law* (2005) pp. 306–335 and A. KAVANAGH, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press 2009) pp. 128 and 408.

242 See section 33(1) of the Canadian Charter of Rights and Freedoms, the so-called 'notwithstanding' clause. Similar provisions can be found in other Commonwealth countries, such as Australia and New Zealand. For a review, see DIXON, *supra* n. 239, at p. 490.

243 Cf. DIXON, *supra* n. 239.

244 For this notion, see in particular M.V. TUSHNET, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries', 38 *Wake Forest Law Review* (2003) pp. 813–838.

245 On the value of dialogue-based systems, see e.g. HOGG and BUSHELL, *supra* n. 234, and R. DIXON, 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited', 5 *International Journal of Constitutional Law* (2007) pp. 391–418. For a more critical view, see TREMBLAY, *supra* n. 238, pp. 617–648.

246 See generally SLAUGHTER, *supra* n. 78, at pp. 99–137; A.M. SLAUGHTER, 'A Global Community of Courts', 44 *Harvard International Law Journal* (2003) p. 191; R.B. AHDIEH, 'Between Dialogue and Decree: International Review of National Courts', 79 *New York University Law*

then is that it is avoids any court having the final say, but the courts respect each other's position and, by means of their judgments, try to arrive at outcomes that are acceptable to both levels.[247] Acceptance of judicial dialogue may prevent the occurrence of situations of real conflict between national and European courts and thereby help to reduce the tension described in section 2.4. The notion of dialogue thus fits well with the general notion of shared responsibility.

Effective dialogue presupposes the existence and use of judicial instruments that can be used to bolster the cooperation and voluntary acceptance of interpretations and findings by both national courts and the ECtHR. As has been shown in sections 4 and 5, the instruments developed and commonly used by the ECtHR can in principle foster effective dialogue, even if such methods have some advantages and risks.[248] Interestingly, however, besides the use of such 'dialogical' methods and techniques of argumentation, several examples can be found in the Court's case-law of even more articulated use of the possibilities of judicial dialogue, or rather of dialogue by means of judgments. This section highlights two particular examples: the express response by the Court to criticism and concerns expressed in national case-law (section 6.2.2), and the express acceptance of changes in case-law that have been made in response to one of the Court's judgments (section 6.2.3).

6.2.2. *Dialogue at the ECtHR: response to criticism and concerns expressed in domestic judgments*

Especially in recent years the Court has encountered clear criticisms of its case-law in the judgments of national (highest) courts. Perhaps the best example of this relates to the use of hearsay evidence or evidence obtained from absent witnesses who cannot be questioned in criminal proceedings.[249] In a sequence of cases, in particular in the case of *Al-Khawaja and Tahery* v. *United Kingdom*,[250] the Court had ruled that the use of statements of such absent witnesses would violate the right to a fair trial (Article 6 ECHR) if it were the 'sole or decisive evidence' against the suspect in the criminal case. In the United Kingdom, however, there is a longstanding tradition of using of hearsay evidence, even if it is the only evidence against the suspect. Instead of completely rejecting the

---

Review (2004) pp. 2029–2163. On dialogue between the national courts and the Court of Justice of the European Union, see in particular CLAES et al., *supra* n. 236, and V. SKOURIS, 'The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Courts', *Zeitschrift für öffentliches Recht* (2005) p. 323 at p. 328.

247 In more detail, see the sources mentioned in the previous footnote and GERARDS, *supra* n. 23, at p. 83. It is argued there that this interrelationship could better be described in terms of 'dialectics' than 'dialogue' (see also AHDIEH, *supra* n. 246, at pp. 2033 and 2088), but since the term 'dialogue' is more commonly known, it has been used throughout this report.

248 See also GERARDS, *supra* n. 23, at pp. 84–85.

249 Cf. BRATZA, *supra* n. 79, at p. 27.

250 ECtHR 20 January 2009, appl. nos. 26766/05 and 22228/06.

evidence, as was advocated by the Court, an intricate set of requirements have to be met to guarantee a fair trial; if these requirements are met, the evidence may still be used. Given this domestic legal system, the UK courts found that the Court's interpretation of Article 6 was too strict and it did not do justice to the safeguards inherent in the British system. For this reason, Lord Phillips of the (then) House of Lords (now the Supreme Court) expressly stated in the case of *Horncastle* that it would not accept the Court's reading of the Convention:

> 'The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.'[251]

Lord Phillips went on to argue that the 'sole or decisive rule' had been introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle, applicable equally to the civil and common law jurisdictions; that English law would, in almost all cases, have reached the same result in those cases where the Strasbourg Court has invoked the 'sole or decisive rule'; that the 'sole or decisive rule' would create severe practical difficulties if applied to English criminal procedure; and that, therefore, the sole or decisive rule should not be applied in English law.

The Court thus faced a clear rejection of its 'sole or decisive' rule by the UK Supreme Court. Of course, the Court could ignore such a rejection and maintain its own interpretation and rule, but that approach would not be likely to be very successful – if the UK courts were stubbornly to refuse to adopt the Court's case-law, the result would be a stalemate.[252] Instead, however, the Court appeared to regard the judgment in *Horncastle* as an invitation to a dialogue between highest courts. In its Grand Chamber judgment on the matter, the Court expressly responded to the House of Lords' concerns and criticism.[253] It acknowledged that '[d]rawing on the judgment of the Supreme Court in *Horncastle and Others*, the Government challenge the sole or decisive rule, or its application by the

251 *R (Horncastle and Others)* [2009] UKSC 14 (*per* Lord Phillips), para. 11.

252 Perhaps except for the rather unlikely situation in which the Committee of Ministers would take political action towards the United Kingdom to force it to adopt the Court's interpretation.

253 *Al-Khawaja and Tahery* v. *UK*, ECtHR (GC) 15 December 2011, appl. nos. 26766/05 and 22228/06.

Chamber in the present cases, on four principal grounds'.[254] The Court then extensively discussed all four grounds, thereby reaffirming the principles the Chamber had previously defined and defending the 'sole or decisive' rule.[255] Importantly, however, the Court concluded by adding a significant nuance: it accepted that inflexible application might have unwarranted outcomes.[256] It acknowledged that the use of hearsay evidence as sole or decisive evidence would not immediately violate the right to a fair trial if there are sufficient counterbalancing factors and strong procedural guarantees that permit a fair and proper assessment of the reliability of such evidence. It concluded that the safeguards developed in the United Kingdom were, in principle, sufficiently strong, even if it might hold differently in concrete cases.[257]

Treading very carefully, the Court thus entered into a well-articulated, elaborately reasoned dialogue with the highest court in the UK. It directly responded to the Supreme Court's criticism, it provided a clarification and a better foundation for its own case-law, and it even conceded (to some extent) the Supreme Court's approach by admitting that, in some situations, exceptions should be allowed to the 'sole or decisive rule'. Indeed, the former President of the Court, Sir Nicolas Bratza, expressly confirmed in his concurring opinion in the case that the judgment should be read as a response to the *Horncastle* judgment:

> 'The present case affords, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention to which Lord Phillips was referring. The *Horncastle* case was decided by the Supreme Court after delivery of the judgment of the Chamber in the present case, to which I was a party, and it was, in part, in order to enable the criticisms of that judgment to be examined that the Panel of the Grand Chamber accepted the request of the respondent Government to refer the case to the Grand Chamber.'[258]

Of course, it remains to be seen how the British courts will respond to the Grand Chamber's judgment and whether they will accept the Court's slightly modified reading of the 'sole or decisive rule'. If they do, the dialogue will be closed; but if they do not, it is possible that a new case will reach the Court and it will have to find a new response to the UK courts' arguments. The interplay or dialogue by

254 *Idem*, para. 129.
255 *Idem*, paras. 130–146.
256 *Idem*, para. 147.
257 The Court also applied the new standards to the facts of the cases of Al-Khawaja and Tahery; thereby it found no violation of Article 6 in the case of Al-Khawaja, but it did find a violation in the case of Tahery – the requirement of sufficient counterbalancing factors and strong procedural safeguards was not met in his case.
258 *Al-Khawaja and Tahery v. UK*, ECtHR (GC) 15 December 2011, appl. nos. 26766/05 and 22228/06, concurring opinion of Judge Bratza, para. 2.

means of judgments can then easily continue until such time as one court accepts the other's position.

6.2.3. *Approval of national responses to the Court's judgments*

In the case of hearsay evidence, the dialogue by means of judgments is one in which the Court responded directly to criticism rendered by a national court. In other cases, the dialogue is of a different nature. Here, the Court uses its judgments to express its approval of the response a national highest court has given to an earlier judgment of the Court.[259] In this situation, the national court seeks to comply with the Convention rather than stressing its disagreement with the Court's approach. Perhaps this may seem surprising, but it appears that engaging in a 'constructive dialogue' with the Court on the standards to be applied by national courts may be a good way to influence the Court's case-law as well as protect their own position.[260] This can be illustrated by a series of judgments against Germany on the publication of photographs of celebrities in the tabloid press. The German courts had long held that publication of such photos could be published, even if they disclosed the private life of public figures, as long as the celebrities were regarded as '*absolute Personen der Zeitgeschichte*' (translated by the ECtHR as 'figures of contemporary society "*par excellence*"'). The Court found very differently in its first judgment in the case, *Von Hannover*.[261] It held that the standards applied by the German courts offered too much protection to the freedom of expression of the tabloid press, and too little to the privacy interests of public persons. In the Court's view, a different standard should be applied, based on the nature and general importance of the information disclosed by the photos: if the aim of publishing pictures was only to satisfy the readers' curiosity, the interest of freedom of expression could not easily outweigh the privacy interests of the persons depicted, but it could be different if the photos were part of a debate on a topic of general interest.

This judgment of the Court, which held an express rejection of a longstanding interpretation by the German constitutional court, encountered fierce criticism in Germany.[262] Nevertheless, the highest German courts conceded to the Court's

259 This situation is similar to the 'second look' cases in constitutional dialogue: there, it may happen that a court has found a violation of a fundamental right by legislation and has ordered the legislature to amend the relevant law, but after amendment a new case may be brought in which the legality of the amended legislation is again contested. The court then has to decide if the amended legislation is compatible with the Convention. Arguably, the review must then be more deferential than in 'first look' cases – see DIXON, *supra* n. 245, at p. 393.

260 See further on this STONE SWEET, *supra* n. 9, at p. 1867.

261 ECtHR 24 June 2004, appl. no. 59320/00.

262 Indeed, it has been said that the judgment is the main cause for the principled stance the German Federal Constitutional Court took in the case of *Görgülü*, in which it stressed that it would normally readily comply with the Court's judgments, but in cases of clear conflict

judgment, accepting that their own standards should be replaced by the Court's.[263] One main question remained, however, which was whether the new interpretation given by the national courts was really in line with the Court's case-law. An opportunity for the Court to respond to the national response to its judgment arose when a new case on the publication of photos of celebrities in their private capacity reached the Court: *Von Hannover (No. 2)* v. *Germany*.[264] In its judgment on the case, the Grand Chamber of the Court made good use of the occasion to explicitly analyse and accept the new German standards:

> '125. The Court ... observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the *Von Hannover* judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.
> 126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.'

In this case, thus, the national highest courts responded to the Court's criticism of their earlier case-law by modifying their standards to meet the Strasbourg requirements. In turn, the Court explicitly responded to this by evaluating and finally accepting the new case-law. A similar approach is visible in a series of other cases against Germany, related to preventive detention of dangerous criminals.[265] Again, this could be seen as a form of dialogue by means of judgments.

---

between the Court's standards and the standards reflected in the German Constitution, the latter would prevail (Order of the German Constitutional Court, BVerfG, 2 BvR 1481/04 of 14 October 2004, especially paras. 49–50); on this judgment, see also H.-J. PAPIER, 'Execution and effects of the judgments of the European Court of Human Rights from the perspective of German national courts', 27 *Human Rights Law Journal* (2006) p. 1. See further e.g. G. MARTINICO, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts', 23 *European Journal of International Law* (2012), pp. 401–424, at p. 410, and B. RUDOLF, 'Council of Europe: *Von Hannover v. Germany*', 4 *International Journal of Constitutional Law* (2006) pp. 533–539 at p. 533.

263 See the judgments of the German High Court (BGH 6 March 2007, no. VI ZR 51/06.ß) and the Federal Constitutional Court (BVerfG 26 February 2008, nos. 1 BvR 1626/07 and 1 BvR 1602/07).

264 ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08.

265 For this dialogue, see in particular *M.* v. *Germany*, ECtHR 17 December 2009, appl. no. 19359/04; *Haidn* v. *Germany*, ECtHR 13 January 2011, appl. no. 6587/04; *Kallweit* v. *Germany*, ECtHR 13 January 2011, appl. no. 17792/07; in the latter two cases, the Court expressly welcomed the response by the German courts to its judgment in *M.* v. *Germany*: 'It notes that several Courts of Appeal, as well as a senate of the Federal Court of Justice, on the contrary, have considered it possible to interpret German law in accordance with the Convention ...

6.2.4. *Requirements for a successful dialogue by means of judgments*

In the examples of dialogue by means of judgment discussed in sections 6.2.2 and 6.2.3, there is a relatively direct interaction between national (highest) courts and the ECtHR on the interpretation and application of the Convention. This kind of dialogue is very favourably received by the Court, as the interviews conducted with a number of judges and registrars made clear. Dialogue by means of judgments is regarded as a very good way to give shape to the notion of 'shared responsibility' for guaranteeing the Convention rights. Indeed, one can easily understand why this form of dialogue is attractive. The criticism and responses voiced in the national case-law are framed in legal terms that are easy for the Court to understand, and they are directed to concrete issues of Convention interpretation and application. Speaking the same kind of language certainly facilitates an effective dialogue.[266] Moreover, political scientists have stressed that domestic judiciaries are the most important domestic allies for the implementation of the Court's rulings, since they apply European human rights law to the domestic legal context and thereby provide a local resource for individuals.[267] For that reason, too, there is good cause for the Court to collaborate with the national courts, and to regard them as co-equal partners, rather than supervising and correcting them from a hierarchical position.[268]

Perhaps one would therefore expect such 'dialogues' to be frequent and visible. Nevertheless, such explicit examples as were given in sections 6.2.2 and 6.2.3 are relatively rare, and they seem to be limited to cases from Germany and the United Kingdom. There may be other cases where the Court responds to national concerns expressed in judgments, but such responses are far more implicit, and it would require a sharp eye from the reader of the judgment to discern that the Court is actually responding to a national judgment.[269]

---

and that the Government in the present proceedings agreed with that view. In the light of the foregoing, the Court does not consider it necessary, at present, to indicate any specific or general measures to the respondent State which are called for in the execution of this judgment. It would, however, urge the national authorities, and in particular the courts, to assume their responsibility for implementing and enforcing speedily the applicant's right to liberty, a core right guaranteed by the Convention' (*Kallweit*, para. 83). See in more detail C. MICHAELSEN, '"From Strasbourg, with Love" – Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights', 12 *Human Rights Law Review* (2012) pp. 148–167 and ANDENAS and BJORGE, *supra* n. 27, pp. 30–36.

266 Cf. SLAUGHTER, *supra* n. 78, at p. 125.

267 See e.g. C. HILLEBRECHT, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights', *Human Rights Review* (2012), DOI 10.1007/s12142.012.0227.1.

268 This element of relative co-equality is of great importance for a successful dialogue – see further on this SLAUGHTER, *supra* n. 78, at p. 122; L.R. HELFER, 'Forum Shopping for Human Rights', 148 *University of Pennsylvania Law Review* (1999) pp. 285–400 at p. 349; AHDIEH, *supra* n. 246, at p. 2088; TORRES PÉREZ, *supra* n. 86, at p. 123.

269 Nevertheless, many of the Court's judgments, in particular those in which it consciously applies procedural review or a consensus-based interpretation, can be regarded as examples

Nevertheless, even such 'hidden', implicit dialogues can be very effective, as long as the result is to enhance the shared responsibility of the Court and the national courts.

For a dialogue by means of judgments to be effective, it is not necessary that the Court explicitly mentions the element of dialogue, or even expressly refers to a national judgment. What is essential is that the national courts express any concerns, criticism and questions in such a way that the Court is effectively enabled to respond.[270] If national courts have great difficulty in fitting a typical Convention interpretation into their own national law, yet do not say so and just try, it may simply not be clear to the Court that there is an invitation to dialogue. Similarly, if national courts do not speak with one voice, and one high court tends to accept the Court's interpretation while another rejects it, it may be difficult for the Court to know where it should respond to. What the examples given in sections 6.2.2 and 6.2.3 have in common is that they concern clearly expressed judgments by national highest courts, which either made it very clear that there are difficulties related to a line of Strasbourg case-law, or that the courts have adapted their case-law and are now asking for approval by the Court.

Thus, as the interviewees also stressed, if national courts want to contribute to the process of giving shape to the Convention and want to engage in a process of dialogue and shared responsibility for Convention application and interpretation, they would need to express themselves clearly and unequivocally, and they would need to offer elaborate, well-considered arguments for disagreement or doubt. Having a constitutional court with strong competences for reviewing national legislation and interpretation of international treaties may be helpful in this respect, but it is possible to start a dialogue even in states without constitutional review, or without a single highest court. The provision of clearly expressed, well-reasoned questions and arguments is sufficient.

The respondents to the interviews confirmed that it would be desirable if courts in other states than the United Kingdom and Germany were to make better use of the possibilities offered by dialogue by means of judgment. More equal participation in the dialogue might help to prevent a bias in the Court's case-law towards the national law and traditions of the states where the judges express their criticism and complaints most eloquently.[271] Especially given the *res interpretata* of the Court's judgments, an interpretation given in a case such

---

of implicit dialogue, as these judgments can be seen as clear responses to judgments by the national courts, or as invitations to national courts to respond to the Court's judgment.

270 As has been mentioned by Ahdieh, this requirement presupposes the strong embedding of the Convention in national law; in states where the Convention is not (yet) regarded as a logical, self-evident legal source that has to be taken into account, there is less chance of an effective dialogue; cf. AHDIEH, *supra* n. 246, at p. 2155. Furthermore, it must of course be stressed that there are more prerequisites for effective dialogue than are mentioned here; for these, see in particular the sources mentioned *supra* n. 256.

271 It has been shown, after all, that national legal rules and principles may spread through the medium of ECtHR judgments in which a response is given to these rules, particularly as a

as *Al-Khawaja and Tahery*, which is now well aligned to the British common law approach to hearsay evidence, is also relevant to all other European states. Thus, the response given by the Court to criticism in one state may have effects in all 46 others. If the Court is asked to respond to national criticism in this manner by only one or two states, the effect might be that typical elements of their legal systems are addressed more frequently and more explicitly than those of others, and thereby have more effect on the Court's overall interpretation of the Convention. Of course the Court can use strategies of procedural review and judicial minimalism to avoid such effects, yet it is clear that its case-law might be more balanced if it had to engage in dialogue with other states with different constitutional and legal traditions.

6.2.5. *Conclusion*

Dialogue by means of judgments is an important mechanism for safeguarding the Convention, expressing as it does the national courts' and the Court's shared responsibility in this respect. If national courts criticise the Court's approach, the Court can respond by modifying or re-establishing its case-law, and if national courts are in doubt about the conformity with the Convention of a certain line of case-law, they can ask the Court to deny or confirm their reading of the Convention. By inviting such national criticism and by responding to it openly and extensively, the Court may also find a way out of the conundrum of having to respond to national criticism while needing to protect the Convention. Simultaneously, by empowering the national courts to make use of this avenue of judicial dialogue, states may create a counterbalance against the power of the Court to interpret the Convention in an autonomous and evolutive fashion.

6.3. FORMAL AND INFORMAL DIALOGUE BETWEEN JUDGES; ADVISORY OPINIONS

6.3.1. *Exchange of information between courts*

Many forms of dialogue are conceivable between the Court and national judges. Interaction can, for example, be facilitated by comparative interpretation or procedural review. Interestingly, moreover, there are several direct forms of dialogue which can be helpful in relation to the shared responsibility for the effective application of the Convention. In particular, the importance of meetings and exchange of knowledge and experience between judges has been emphasised in legal scholarship, as well as in the interviews conducted at the

result of *res interpretata*; see also SLAUGHTER, *supra* n. 78, at pp. 111–112. On the importance of equal participation, see also TORRES PÉREZ, *supra* n. 86, at p. 126.

Court.[272] It appears to be very useful for the Court to exchange views with judges of national courts, since it thereby gains direct access to information on the national legal situation, particular lines of case-law that are difficult to apply in national law, and concerns about certain interpretations. It may not always be able to respond directly to such concerns or such information in its judgments, but the exchanges can help the Court know which case-law needs further clarification or which cases should go to the Grand Chamber. The national judges may also benefit from such exchanges of information. Of course, the benefit is greatest if their concerns are translated into new interpretative approaches by the Court. Equally valuable, however, is that direct information can give them clarity about the underlying reasons for certain decisions, or the way they could implement the Court's case-law in their own judgments. Such informal contacts benefit an effective cross-fertilisation, as well as increase the embedding of the Court's case-law in national law.[273] Nevertheless, such exchanges of information can sometimes be counterproductive. If national judges leave with the impression that their concerns have not really been heard, or if the exchange remained superficial, such visits can be considered fruitless.[274]

Exchange visits between (highest) courts and the Court are not at present organised systematically. Some national courts engage in regular exchange visits, others (also) participate in associations or networks of highest courts that do as such have contact with the Court, while still other courts only rarely have contact with the Court. Several interviewees at the Court stressed that the value of these informal visits is such that it would be valuable to organise them on a more regular basis. Indeed, it may also be beneficial because (just as with the dialogue by means of judgments) there is a risk of bias in the Court's interpretations towards those states whose judges frequently discuss Convention interpretation with the Court, as compared to states whose judges hardly ever visit the Court. For the Court itself, however, this is difficult to organise – the possibility of regular scheduled meetings has to be accommodated by, for example, the Council of Europe.[275]

Some respondents in the interviews at the Court also stressed that it would be advantageous to the 'shared responsibility' of protecting the Convention if

272 SLAUGHTER, *supra* n. 78, at p. 103. See also e.g. BRATZA 2012, *supra* n. 79, at p. 27.

273 See SLAUGHTER, *supra* n. 78, at pp. 103 and 117; on the value of networks between national judges and international courts, see also E. MAK, *Judicial Decision-Making in a Globalised World. The Views and Experiences of Highest Court Judges in Five Western Countries* (Oxford, Hart 2013), ch. 3 section 2.

274 Cf. the experiences of national judges chronicled by MAK, *supra* n. 273, ch. 3 section 2.

275 Of course, there is the annual seminar 'Dialogue between judges', where presidents of national highest courts and senior judicial officials visit the Court (on this, see <www.echr.coe.int/echr/en/header/reports+and+statistics/seminar+documents/dialogue+between+judges>). This meeting is valuable as an opportunity for contacts, but the exchange of information there is obviously not as deep and detailed as when a judicial delegation from one particular state visits the Court.

there were not only interaction between the national courts and the Court, but also between the various national courts *inter se*. If Dutch judges could discuss Convention interpretation and implementation with Polish judges, for example, or Russian judges with Austrian ones, it could result in an exchange between equals of good practices and practical solutions. This could contribute to the proper application of the Convention at the national level, or, eventually, in a clear judicial invitation to the Court to dialogue by means of judgments. Indeed, networks between judges already exist, but they do not specifically relate to fundamental rights and they are usually limited in their geographical scope.[276] The establishment of networks for judges with a special focus on Convention law could be very valuable, but again, the Court is unable to provide this itself.

6.3.2. *Advisory opinions*

In the future the dialogue between the national courts and the Court could be further facilitated by the introduction of a procedure for advisory opinions. Based on the political agreement expressed in the Brighton Declaration of 2012,[277] an optional protocol (Protocol No. 16) has been opened for signature that makes it possible for national highest courts to refer a question of interpretation or application of the Convention to the Court.[278] Somewhat similar to the Court of Justice of the EU in preliminary reference cases, the Court may then provide a direct answer to such a question, which could then be used by the national court in its own judgments. Thus, in a situation such as that of the publication of photos of celebrities in the tabloid press, it would not be necessary to wait for an individual case to be brought before the Court to ask it expressly or implicitly for approval of a new standard or a new line of case-law.

This procedural mechanism would open a new avenue for judicial dialogue, which could be very effective.[279] In a reflection paper on the topic the Court welcomed the introduction of the procedure for this reason.[280] Nevertheless, it is

276 MAK, *supra* n. 273, ch. 3 section 2.

277 High Level Conference on the Future of the European Court of Human Rights – Brighton Declaration, 19–20 April 2012, para. 12d.

278 *ETS* No. 214. The idea of a preliminary reference or advisory opinions procedure was already advanced by the Group of Wise Persons who advised on the future of the Court in 2006; see Report of the Group of Wise Persons to the Committee of Ministers, 979*bis* Meeting, 15 November 2006, para. 78f. For the further history of the proposal, see the Draft CDDH Report on the proposal to extend the Court's jurisdiction to give advisory opinions, DH-GDR(2011) R8 Appendix VII, 9 November 2011.

279 Cf. TULKENS, *supra* n. 13, at p. 10; J.-P. JACQUÉ, 'Preliminary references to the European Court of Human Rights', in *How can we ensure greater involvement of national courts in the Convention system?*, Dialogue between judges (European Court of Human Rights, Council of Europe 2012) pp. 17–23 at p. 20; see also the speech of ECtHR president Spielman to the CDDH, 27 June 2013, #4439316.

280 ECtHR, *Reflection paper on the proposal to extend the Court's advisory jurisdiction* (2012) #3853038, para. 4.

acknowledged that there may be disadvantages to such a formal and institutionalised dialogue.[281] Doubts have been expressed as to the efficiency of the procedure (especially as compared to the current dialogue by means of judgments),[282] the legal and practical effects of advisory opinions, as well as the impact of the new procedure on the Court's working methods.[283] Moreover, the same kind of issues arise as are presently visible in relation to dialogue by means of judgments: it may be that some courts ask questions much more frequently than others (particularly since the Protocol is optional), which may result in a bias towards the legal systems of such states: their particular legal characteristics may be taken into account much more explicitly and more frequently than those of non-referring states. Thus, even if the advisory opinions may be promising in terms of channelling and accommodating judicial dialogue, much is still needed to shape the process into a smoothly operating mechanism.

6.4. CONCLUSION

Using all the mechanisms and instruments analysed in sections 4 and 5, the Court often engages in judicial dialogue with national courts. It sometimes does do so expressly by means of its judgments. It may respond to national criticism by adapting, explaining or reconfirming its own interpretations of the Convention, or by evaluating whether a national judicial standard (adopted in response to the Court's case-law) is in line with the Convention. Other forms of dialogue are more informal, such as exchange visits between national courts and the Court or networks of national judges for the exchange of good practices. In the future there will be a more formal mechanism for dialogue in the shape of the advisory opinions procedure.

These forms of dialogue may be favourably considered as ways to effectively protect the Convention rights in line with national legal traditions and national legal systems. Thus, judicial dialogue is conducive to reducing the tension between the pull and push factors inherent in the ECHR system and to fostering shared responsibility between the Court and the states. Nevertheless, it has also

281 See e.g. LÜBBE-WOLF, *supra* n. 78, at p. 13.

282 LÜBBE-WOLF, *supra* n. 78, at p. 13.

283 For a review of the pros and cons of the procedure, see generally Draft CDDH Report on the proposal to extend the Court's jurisdiction to give advisory opinions, DH-GDR(2011) R8 Appendix VII, 9 November 2011 and ECtHR, *Reflection paper on the proposal to extend the Court's advisory jurisdiction* (2012) #3853038. See also K. DZEHTSARIOU, 'Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy', in S. FLOGAITIS, T. ZWART and J. FRASER, eds., *The European Court of Human Rights and its Discontents. Turning Criticism into Strength* (Cheltenham, Edward Elgar 2013) pp. 116–146 and N. O'MEARA, 'Reforming the European Court of Human Rights through Dialogue? Progress on Protocols 15 and 16 ECHR', *UK Constitutional Law Blog*, 31 May 2013, <http://ukconstitutionallaw.org>.

been submitted in this section that judicial dialogue will only be successful if the national courts express their views and concerns in an explicit manner, underpinning them with sound arguments, and if the Court takes good care to avoid bias in its own interpretations towards the states where the most eloquent and understandable criticism is voiced.

7. DIALOGUE AND NATIONAL POLITICAL AND MEDIA CRITICISM

The previous section dealt with the interaction between the Court and national courts, and the way the Court can respond to criticism of its judgments voiced by national judges. In recent years, however, the Court also has been confronted with criticism by national politicians (members of Parliament, government members) and criticism in the national media. In itself, this is nothing very new – the Court has always been criticised. Perhaps it is even self-evident that there will always be criticism of an 'outsider' such as the Court. It is, after all, an international, remote judicial institution, lacking democratic legitimacy, which has to decide on sensitive issues, and which aims to protect the rights of those whom many members of society would prefer to be cast out (such as suspects of crimes, members of minority groups who are discriminated against, persons expressing shocking and distressing opinions). To some extent, therefore, criticism is unavoidable. It is also important to note, moreover, that such criticism has not thus far affected the overall acceptance of the Court and its competence – the legitimacy of the Court and the authority of its judgments have long remained unquestioned.

It therefore came as a surprise that by the end of the 2000s, in the Netherlands and the United Kingdom some politicians, academics and media began to question the very foundations of the system, as was explained in the introduction to this book.[284] The criticism of the late 2000s seems to be of a more fundamental, deeper nature than criticism expressed in earlier times. Of course, this raises the question of how the Court should respond to such criticism, which, after all, is directed at its own work and position.

As was confirmed in the interviews, the recent criticism has had no direct impact on the Court's case-law. The Court has always been aware of its delicate relationship with the states, as witnessed by its use of consensus and meta-teleological interpretation, its reliance on 'judicial minimalism' and its frequent references to the primary responsibility of the states to protect the Convention. Over the past few decades, relatively new approaches such as procedural review and the 'in for a penny, in for a pound' approach have been added. These

284 For a recent discussion of the criticism in the UK and the Netherlands, see chapters 6 and 8 of this book.

adjudicative approaches bear witness to the Court's desire to encourage a 'shared responsibility' approach to the protection of fundamental rights – it needs to collaborate with national courts if it is to succeed in achieving its purpose of safeguarding the Convention rights. These approaches have not really changed since the criticism in the United Kingdom and the Netherlands came up. The only tell-tale sign of the Court's sensitivity to the criticism is that it seems to stress even more explicitly than before that a certain change of approach is a response to national case-law, that a lack of European consensus demands a wide margin of appreciation, or that the Court 'would need strong reasons' to strike a different balance between conflicting interests than the national courts have done. Moreover, it is easy to read judgments in cases such as *Scoppola No. 3*, *Lautsi* and *Animal Defenders International* in the light of the criticism levelled at earlier judgments, and to regard them as a response. But even if the signs in such judgments seem obvious, there may many different explanations for them, and they may even not reflect real changes at all. It may well be that it is mainly perception and expectation that make such changes visible: if the court watcher expects a change as a result of criticism, he can easily read in all judgments a confirmation of this expectation, and vice versa. Indeed, the interviewees at the Court all confirmed that there is no conscious, intentional effort by the Court to change its approaches and methods in response to the recent criticism. The respondents agree that it is hard to ignore the criticism, as it forms part of the general context in which the Court has to decide its cases. Yet the Court always aims to decide on the basis of the facts of the case and the reasonableness of an interference, rather than on the basis of strategic and political arguments related to its position vis-à-vis the states.

The response by the Court to the criticism is really of a different nature. The two former Court presidents have written papers for academic law journals to explain the Court's work, to clarify the reasons behind its case-law and to rebut some of the criticism levelled by politicians, academics and journalists. Various judges and registrars have acted as ambassadors of the Court in speeches and public lectures, in newspapers and in television interviews. On an official and formal level, the Plenary Court has been involved in preparing the intergovernmental conference on the Court's future, reflecting on the various proposals made, inter alia, by the British government. Indeed, the interviewees indicate that such relatively informal responses are the only ones that are fitting for the Court. Moreover, various respondents stress that it is hardly possible to respond differently. A court such as the ECtHR can respond well to national judicial criticism, which is given in legal terms and relates directly to specific interpretations and lines of case-law. The criticism offered by politicians and the media in the debate referred to above is much more diffuse and lacks a clear sense of direction. Moreover, it is difficult to respond to the criticism as it is unbalanced: it comes from a limited number of states, while other states embrace

the Court and even use the Court's judgments as leverage to effect legal and constitutional change in their own legal systems.[285] It would be rather awkward, then, if the Court were to respond in any way other than by carrying on doing its work and explaining the importance of the Convention system in extra-judicial speeches and media efforts. It is simply hoped that the storm will blow over and it is sufficiently clear to the people living in the 47 states of the Council of Europe that there is great value in an effective European court that can correct national governments if they do not sufficiently protect fundamental rights.

8. SUMMARY AND CONCLUSIONS

The aim of this report was to analyse the Court's case-law to examine the extent to which the Court endeavours to influence national judicial decision making, to estimate the degree to which it respects national sensitivities and traditions, and to make visible how it responds to national criticism (either political or judicial). In section 2 it was explained that the Court's function is threefold: it is there to protect Convention rights in individual cases; to provide a minimum level of protection; and to do so in a way that is complementary and subsidiary to the protection offered by the national authorities. Taken together, these three principles should help to guarantee fundamental rights to all individuals living in Europe. In practice, however, it appears that there is a clear tension between the desire to protect fundamental rights (the 'push factor') and the desire of the states to do so as they think fit (the 'pull factor'). In giving shape to the Convention, the Court has to find a balance between respecting national sovereignty and national diversity on the one hand, and protecting Convention rights on the other.

Section 3 clarified that the Court increasingly undertakes its task of guaranteeing Convention rights in close collaboration with the national courts. The Court requires national courts to adopt and apply its interpretations and adjudicative methods, even if they have been given in cases against other states. Thus a situation of 'shared responsibility' is created, whereby the national courts are just as responsible for safeguarding the Convention as the Court is. This results in a number of obligations on the national courts, such as the obligation to adopt the Court's evolutive and autonomous interpretations. It is questionable, however, if these obligations necessarily result in 'marionette' behaviour by the national courts. It is clearly not the intention of the Court to achieve such a situation. Instead, it aims to cooperate with the national courts as equal partners

285 See, for example, A. GARAPON, 'The limits to the evolutive interpretation of the Convention', in *What are the limits to the evolutive interpretation of the Convention?*, Dialogue between judges (European Court of Human Rights, Council of Europe, 2011) pp. 29–38, on the changes that were brought about in French criminal procedure as a consequence of a number of recent ECtHR judgments.

in a shared project of protecting the Convention rights. This can be seen from the fact that the Court often defers to the national authorities and in particular to the national courts, as was explored in sections 4, 5 and 6.

Sections 4 and 5 provided an analysis of the different judicial techniques that shape the current situation of 'shared responsibility'. It has been shown how the Court can employ the various techniques to negotiate between the need to provide a sufficiently high minimum level of human rights protection and the need to respect national diversity and national sovereignty. The Court often employs these methods to encourage the national courts to accept their share of the responsibility under the Convention. This is true in particular of procedural review, judicial minimalism and the 'in for a penny, in for a pound' approach – all of which help to make the national authorities, and national courts in particular, responsible for the implementation of the Convention. Moreover, by providing evolutive and autonomous interpretation, and lists of general criteria to be applied by national courts, to be respected by national decision-makers, the Court is able to guarantee a minimum level of protection. In combination, the Court's development and use of interpretative principles confirm that, on the one hand, the national courts are stimulated to adopt the Court's standards and principles and act as 'Convention courts'. On the other hand, however, the national courts are granted much latitude to apply these standards and principles in the way they think is the most appropriate.

Section 6 dealt with the notion of judicial dialogue and its application in the Convention context. It was explained that, especially in more recent years, the Court has given elaborate and explicit responses in its own judgments to criticism and concerns raised by national (highest) courts. Moreover, the Court sometimes evaluates and approves the changes made by national courts in response to the Court's own case-law. This 'dialogue by means of judgments' is supplemented by various forms of informal dialogue and, in the future, it will be further added to by the introduction of a system of advisory opinions. The various forms of dialogue enhance collaboration between the national courts and the Court and they contribute to the 'shared responsibility' for compliance with the Convention.

Finally, section 7 addressed the Court's concrete response to the political and media criticism of the past few years. It was explained that the criticism has had no visible or measurable impact on the Court's argumentative approach and its adjudicative methods. Responses are only visible in the extra-judicial sphere, viz. in articles written and speeches given by judges and registrars, or in the position papers written on proposals for change.

Based on all of this, it can be concluded that, on the one hand, the Court places high demands on national judges. The Court asks national courts to apply its case-law and even copy its argumentative approaches. This may be problematic, especially where such interpretations are far-reaching, or where the

Court's requirements conflict with national judicial competences. On the other hand, the Court often defers to national law and national judgments. It avoids giving deeply reasoned and excessively wide interpretations and argumentation, allowing the national courts some leeway to adhere to their own views and legal traditions. It applauds states for introducing procedural remedies that enable the courts to take the Court's general principles into account in deciding individual cases, and it actively responds to national judicial criticism and concerns.

In fact, therefore, the Court seems to regard the national (highest) courts as national extensions, which can help it to implement the Convention and to protect the Convention at a grassroots level. Indeed, it is logical that it would take this view, as the national courts are, like itself, *courts*, which speak the same language and are characterised by the same kind of legal reasoning. It is therefore very interesting to see whether the national courts are able to meet the expectations that are implicit in the Court's idea of shared responsibility, i.e. if they are really able and willing to follow the Court's lead, or engage in dialogue where needed. This is one of the central questions in the various national reports presented in chapters 3–8. In those chapters, attention is both paid to the national courts' competences to comply with the states' obligations under the Convention and to implement the Court's case-law in their own judgments, and to the national courts' willingness and preparedness to do so.

ANNEX: QUESTIONS FOR THE INTERVIEWS AT THE EUROPEAN COURT OF HUMAN RIGHTS

1. EVOLUTIVE AND DYNAMIC INTERPRETATION

It is well known that the Court is at present struggling with its enormous backlog and caseload. However, the difficulties that confront it are also more fundamental in nature. It appears that there is increasing national criticism of its judgments, which are sometimes considered to conflict with national interests and sensitivities. It is often thought and said that the criticism of the ECtHR is connected to the Court's extensive interpretations of the Convention, which are the effect of the use of 'activist' interpretation methods such as evolutive interpretation, autonomous interpretation and consensus interpretation, and of the use of doctrines such as the positive obligations doctrine.

a. Do you agree that the scope of the Convention has greatly expanded over recent decades?
b. If so, to what extent do you think the expansion is the effect of the use of interpretative approaches and doctrines by the Court? Are other explanations possible?

c. Is the choice of evolutive interpretation a conscious one? i.e. if a case requires a novel or more expansive interpretation of Convention rights, is this expressly taken into consideration in the deliberations?
d. Do you think that, over the past decade, there has been a change in the opinions and views within the Court on the use of evolutive and dynamic interpretation, and on the expansion of scope more generally (e.g. is there more internal debate on the use of these methods, is there more criticism or disagreement in concrete cases)? If so, how can that be explained?
e. Do you think the Court should decide primarily on the facts of the individual case, or rather that it should 'elucidate, safeguard and develop the rules instituted by the Convention'? What do you think is the general view in the Court? Do you think choosing one perspective or the other makes a difference in the way cases are decided and judgments are reasoned?

2. NATIONAL CRITICISM AND THE LEGITIMACY CRISIS

In recent years the Court's work has been criticised by certain national politicians, national media and national scholars. The current and previous presidents of the ECtHR have defended the Court against such criticism,[286] but others have spoken of a 'backlash crisis' or a 'legitimacy crisis' that threatens the future effectiveness and authority of the Court.[287] The question that then arises is if the criticism affects the Court's work, and if so, how. The next few questions relate to this issue.

a. Do you think there really is an increase in the national criticism of the Court? If so, do you think there is a difference in the tone or intensity of the criticism compared to earlier times? Is the criticism now voiced by different countries than before? When do you think the criticism started to intensify or change?
b. In your view, what are the main causes of criticism directed at the Court's legitimacy?
c. Does the Court have to take the criticism seriously, i.e. do you think it is necessary to take action in response to the criticism?
d. Do you think there is a response in the form of changes in the Court's argumentative approach? For example:
   - Increased use of non-substantive, rather procedural forms of review (checking the quality of national decision making instead of substantive justification review);

---

286 J.P. Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments', 7 *European Constitutional Law Review* (2011), pp. 173–182; Bratza 2011, *supra* n. 79.

287 L. Helfer, 'The Burdens and Benefits of Brighton', 1 *ESIL Reflections* (2012) (1); see also the various contributions in T. Zwart, S. Flogaitis and J. Fraser, eds., *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (London, Edward Elgar 2013).

- Paying more explicit attention to national arguments; showing greater understanding of national difficulties and national values;
- Showing more deference, i.e. applying a wide margin of appreciation more frequently;
- Making more use of lists of 'general principles derived from the Court's case-law' to demonstrate that the judgments fit into a longer line of case-law and is not really new;
- Referring more often to other international instruments supporting the Court's judgments;
- Making fewer explicit references to evolutive and dynamic interpretation;
- Declaring more cases inadmissible *ratione materiae* because they do not really concern a Convention right; etc.?

e. Do you think the Court should respond more explicitly to national criticism?
   - If yes, should it do so mainly by means of its judgments? What should be changed in your opinion?
   - If yes, should it do so by other means, e.g. by such means as journal articles written by judges and registrars, by giving interviews and lectures, etc.?

3. DIALOGUE BETWEEN THE COURT AND NATIONAL COURTS

Much of the criticism of the Court currently appears to come from national politicians and national media, rather than national courts. There are some notorious examples, however, of national courts which have expressly held that they will not accept judgments of the Court that clearly conflict with national (constitutional) values. Examples are the UK Supreme Court in *Horncastle* and the German Federal Constitutional Court in *Görgülü*. An important question that is central to this research project is how and to what extent national courts apply the Convention notions and interpretative principles, as well as if and to what extent they sometimes refuse to do so. The reverse side of this issue is just as interesting: how does the Court respond to national judicial unwillingness to implement the Court's interpretations?

a. What is your opinion of such principled refusals by national courts to comply with the Court's interpretations?
b. Do you regard this type of principled resistance as a threat to the effective implementation of the Convention, or as problematic for other reasons?
c. Does the Court make a conscious effort in the argumentation of its judgments to facilitate national judicial application of its argumentative

methods and interpretations? If so, what instruments does it mainly use to make it easier for national courts to adopt and use ECtHR interpretations in their own case-law?

In the context sketched above, it is often said that there is a 'dialogue' between the national court and the ECtHR: the national court gives a certain interpretation to the Convention, the court is corrected by the ECtHR, the national court accepts (or refuses to accept) this correction and gives a new (or the same) interpretation, the ECtHR gives its views on the national interpretation, etc. (cf. *Von Hannover Nos. 1 and 2*; *M. v. Germany* and *Haidn/Kallweit*; *Al-Khawaja and Tahery*; *Hirst*; and *Scoppola No. 2*).

d. What is your view of this type of dialogue? Is it valuable that it exists?
e. Are there any problems related to this 'dialogue'?
f. What kind of results do you think the Court's response to critical national judgments produces?
g. Do you think the dialogue between national courts and the ECtHR can be improved and, if so, how?

CHAPTER 3
BELGIUM

Guan SCHAIKO, Paul LEMMENS and Koen LEMMENS

1. CONSTITUTIONAL BACKGROUND

The Belgian Constitution defines the organisation of the State, determines the attribution of competences between the various levels of authority and ensures the protection of a number of fundamental rights and freedoms.[1] When the Constitution was adopted in 1831, it constituted a synthesis of the 1815 Constitution of the United Kingdom of the Netherlands and of the French Constitutions of 1791 and 1830, making it a unique and innovative legal document, of which the most important elements are still in force.[2] In 1831, the young Belgian State was conceived as a parliamentary democracy in a constitutional monarchy in the form of a decentralised unitary state.[3] As a result of several constitutional revisions, the most important being the revisions of 1970, 1980, 1988 and 1993, the unitary state has been transformed into a 'federal State composed of Communities and Regions'.[4]

Apart from the federal authority, the State comprises three communities (the Flemish Community, the French Community and the German-speaking Community)[5] and three regions (the Flemish Region, the Walloon Region and

1 The Constitution consists of the following titles: Title I: 'On federal Belgium, its components and its territory'; Title I*bis*: 'On the general policy objectives of federal Belgium, the Communities and the Regions'; Title II: 'On the Belgians and their rights'; Title III: 'On the powers'; Title IV: 'On international relations'; Title V: 'On finances'; Title VI: 'On the armed forces and the police service'; Title VII: 'General provisions'; Title VIII: 'On the revision of the Constitution'; Title IX: 'The entry into force and transitional provisions'.

2 See in general A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht* [Handbook Belgian Public Law] (Malines, Kluwer 2011) pp. 289–293.

3 The original Constitution was adopted by the National Congress on 7 February 1831. A new, coordinated version has been adopted by Parliament on 18 February 1994. An English version of the Constitution is available at <www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf>.

4 Art. 1 of the Constitution.

5 Art. 2 of the Constitution. For a map, see D. BATSELÉ, T. MORTIER and M. SCARCEZ, *Initiation au droit constitutionnel* (Brussels, Bruylant 2009) p. 79.

the Brussels Region),[6] on the basis of four linguistic regions (the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region).[7] Whereas the competences of the communities relate to personal matters, such as culture, education and youth policy, the regions are competent in territory-bound matters, such as economic affairs, urban planning and tourism. A number of important competences, such as foreign policy, justice and public order, and social security, remain within the exclusive power of the federal authority. In addition, all the residual powers of the State remain, for the time being, with the federal authority.[8]

Chapter IV of Title III of the Constitution defines the attribution of public powers between the various levels of authority. The federated entities, i.e. the respective communities and regions, exercise their constitutional powers on an equal footing with the federal authority. The legal norms issued by the federated entities have a force of law that equals that of the legal norms of the federal authority. Conflicts between the various norms are resolved, not on the basis of a hierarchy of norms, but on the basis of rules of competence. These rules of competence are enacted in the Special Act of 8 August 1980 on Institutional Reform (*Bijzondere Wet op de Hervorming der Instellingen*) and are supervised, as will be explained below, by the Constitutional Court.[9]

Institutionally, as already mentioned, Belgium is a parliamentary democracy in a constitutional monarchy. The exercise of public authority at the federal level is currently distributed among the following three federal organs:

- the federal legislative power is exercised jointly by the King, the 150-seat House of Representatives and the 71-seat Senate,[10] or exceptionally by the King and the House of Representatives only (in the matters referred to in Article 74 of the Constitution);
- the federal executive power is entrusted to the King,[11] whose acts, by reason of his inviolability and unaccountability, are co-signed by a minister or a federal secretary of State.[12] Ministers are accountable to the House of Representatives.[13]

6 Art. 3 of the Constitution. For a map, see *ibid.*, p. 78.

7 Art. 4 of the Constitution. For a map, see *ibid.*, p. 77.

8 According to Article 35 of the Constitution the federal authority only has competence in matters that are formally assigned to it by the Constitution. However, this constitutional provision, which completely reverses the current principle, has not yet entered into force.

9 Special Act of 8 August 1980 on Institutional Reform [*Bijzondere Wet op de Hervorming der Instellingen*], *Official Gazette*, 15 August 1980, amended on several occasions.

10 Art. 36 of the Constitution. According to a new institutional reform, currently the object of discussion within the Houses of Parliament, the Senate's role would be significantly reduced.

11 Art. 37 of the Constitution.

12 Art. 88 in combination with Arts. 96 and 104 of the Constitution.

13 Art. 101 of the Constitution.

– the judicial power is exercised by the courts of the judiciary, i.e. the ordinary courts.[14]

The communities and the regions each have their own legislature and executive. They can create judicial bodies with specific, limited jurisdiction. This has happened, for instance, in the Flemish Region in the field of urban planning, which is an exclusive competence of the regions.[15]

The 1831 Constitution guaranteed the classical liberal political and civil rights and liberties, which were primarily intended to protect the individual against the State. Due to several constitutional reforms, Title II of the Belgian Constitution, on 'The Belgians and their rights', now guarantees to the Belgian citizens a larger number of rights and freedoms, including also some economic, social and cultural rights.[16] Article 191 of the Constitution extends the protection of most of these rights and freedoms to foreigners on Belgian soil.[17]

These constitutional rights and freedoms have two main features.[18] First, the Constitution generally forbids preventive restrictions of rights. Thus, according to Article 25 of the Constitution, for example, 'the press is free; censorship can never be introduced; no security can be demanded from authors, publishes or printers'.[19] In addition, the Constitution requires a formal statutory basis in the legal order for any restriction. According to Article 15 of the Constitution, for instance, 'no house search may take place except in the cases provided by law'.[20]

---

14 Art. 40 of the Constitution. See also below, with respect to the Constitutional Court and the administrative courts. All these courts, while set up by a federal act, have jurisdiction not only in matters belonging to the competence of the federal authority, but also in matters belonging to the competence of the communities and the regions.

15 See Const. Ct. 27 January 2011, n° 8/2011.

16 The rights and freedoms protected in the Constitution are the following: the principles of equality before the law (Article 10) and non-discrimination (Article 11); the principle of equality between men and women (Article 11*bis*); the right to individual liberty (Article 12); the right of access to court (Article 13); the principle of legality in criminal matters (Article 14); the abolition of the death penalty (Article 14*bis*); the inviolability of the home (Article 15); the protection of property (Article 16); the right to freedom of belief, religion and expression (Articles 19 and 20); the protection of private life and family life (Article 22); the protection of the rights of the child (Article 22*bis*); the right to live in dignity, including the right to employment and to the free choice of an occupation, the right to social security, to health care and to social, medical and legal aid, the right to decent housing, the right to the protection of a healthy environment and the right to cultural and social fulfilment (Article 23); the right to education (Article 24); the freedom of the press (Article 25); the right of assembly (Article 26); the right of association (Article 27); the right to address petitions to the public authorities (Article 28); the confidentiality of letters (Article 29); the right to free use of languages (Article 30) and the right of access to administrative documents (Article 32).

17 See in general BATSELÉ, MORTIER and SCARCEZ, *supra* n. 5, at pp. 68–69.

18 See ALEN and MUYLLE, *supra* n. 2, at p. 795 *et seq.*

19 See on the subject J. VELAERS, '"De censuur kan nooit worden ingevoerd". Over de motieven van het censuurverbod' ["Censorship can never be introduced". On the reasons for the prohibition on censorship], in *Censuur* [Censorship] (Brussels, Larcier 2003) pp. 13–50.

20 See for another example, Const. Ct. 21 December 2004, n° 202/2004, on Art. 22 of the Constitution and Art. 8 §2 of the ECHR.

By contrast, there are very few substantial conditions for restrictions of fundamental rights: they are in fact left to the interpretation by the courts.

As regards the judiciary, Belgium has a dualist system of jurisdiction, including the ordinary courts, established by federal law, and administrative courts, established by federal, community or regional law, each with their own organisation.

According to Article 144 of the Constitution, disputes involving 'civil rights' fall exclusively within the jurisdiction of the ordinary courts.[21] The competence in criminal matters is not explicitly mentioned in the Constitution, but it is generally accepted that the ordinary courts also have the exclusive competence in respect of such matters. Sometimes the explanation for this is that a criminal judgment may affect a person's civil rights in the sense of Article 144 of the Constitution, such as the right to personal freedom, to property, etc.[22] According to Article 145, administrative disputes concerning 'subjective rights' of a 'political' nature belong in principle to the competence of the ordinary courts, but the legislature is free to bring them under the jurisdiction of administrative courts.[23] Administrative disputes concerning the legality of administrative acts are considered to fall outside the framework of the 'subjective rights' disputes[24] (Articles 144 and 145), and the legislature is therefore free to bring them under the jurisdiction of administrative courts.

The ordinary courts are organised in a hierarchical structure. At the top of the judiciary stands the Court of Cassation, whose jurisdiction covers the entire territory of Belgium. The Court of Cassation heads all the courts of the judiciary; it does not deal with the substance of a case but examines whether the decision referred to it contravenes the law or the rules of procedure.[25] Court hearings are held in public, unless this is considered prejudicial to public order or morals.[26] Every judgment is reasoned. Formally, judgments are pronounced publicly,[27] but

21 One of the elements of the current institutional reform process provides for an amendment of Art. 144 of the Constitution, in order to make it possible for the legislature to grant the Council of State and other administrative courts the competence to attach civil effects, including a financial compensation, to the annulment of an administrative act (*Parl. Doc.*, Senate, 2012–13, n° 5–2242/1).

22 See in general J. VELAERS, *De Grondwet en de Raad van State Afdeling wetgeving* [The Constitution and the Legislative Section of the Council of State] (Antwerp, Maklu 1999) p. 466 *et seq.*

23 See in general I. SIRJACOBS and H. VANDEN BOSCH, 'Inleiding over het administratief contentieux' [Introduction to administrative justice], in *De administratieve rechtscolleges in België sinds 1795* [The administrative courts in Belgium since 1795] (Brussels, Algemeen Rijksarchief, 2006) pp. 27–83.

24 According to the Court of Cassation a legal norm may only result in subjective rights if a specific legal duty is imposed directly on a third party by a rule of objective law, in which the claimant has an interest. See e.g. Cass. 20 December 2007, *Pas.* 2007, n^{os} 655 and 656, opinions advocate-general T. Werquin.

25 Art. 608 of the Judicial Code.

26 Art. 148 §1 of the Constitution.

27 Art. 149 of the Constitution.

in reality publication is ensured in other ways. Judges are independent in the exercise of their jurisdictional competences. The public prosecutor is independent in conducting individual investigations and prosecutions, without prejudice to the right of the competent minister to order a prosecution (not to stop a prosecution) and the right of the Minister of Justice and the chief prosecutors to promulgate binding directives on criminal policy, including the policy on investigations and prosecutions.[28] All judges are appointed by the King, upon presentation by the High Council of Justice.[29] The salary of members of the judiciary is fixed by statute.[30]

In addition to the ordinary courts, there is a Constitutional Court for the whole of Belgium.[31] Established in 1980, the Constitutional Court was conceived as a specialised judicial authority, independent of the legislature, the executive and the judiciary, to supervise the observance by the various legislatures of the constitutional division of powers between the federal authority and the federated entities. The initial name of the Constitutional Court was therefore 'Court of Arbitration'. By constitutional amendment of 15 July 1988, the competence of the Court of Arbitration was extended to review legislative acts of the different legislatures on conformity with Articles 10 and 11 (principles of equality and non-discrimination) and Article 24 of the Constitution (right to education). As a result of a constitutional amendment of 23 March 2003, the supervisory competence of the Constitutional Court was further extended to the entire Title II of the Constitution (all fundamental rights), in addition to Articles 170 and 172 (tax principles) and 191 (rights of aliens) of the Constitution.[32] In 2007 the name of the Court of Arbitration was changed to 'Constitutional Court'. The organisation, jurisdiction, functioning and procedure of the Court and the effects of its judgments are regulated by the (repeatedly amended) Special Act of 6 January 1989 on the Constitutional Court (*Bijzondere Wet op het Grondwettelijk Hof*).[33]

The third important judicial body mentioned in the Constitution is the Council of State. There is a Council of State for all of Belgium, the composition, competences and functioning of which are determined by law.[34] The Council of State was established by Act of 23 December 1946, i.e. before it was mentioned in the Constitution.[35] The organisation, jurisdiction and functioning of the Council of State are now laid down in the Coordinated Laws on the Council of State

28 Art. 151 §1 of the Constitution.
29 Art. 154 §4 of the Constitution.
30 Art. 154 of the Constitution.
31 Art. 142 §1 of the Constitution.
32 Art. 142 §2 of the Constitution.
33 Special Act of 6 January 1989 on the Constitutional Court (*Bijzondere Wet op het Grondwettelijk Hof*), *Official Gazette*, 7 January 1989.
34 Art. 160 of the Constitution, inserted (as Art. 107*quinquies*) in 1993.
35 Act of 23 December 1946, *Official Gazette*, 9 January 1947.

(*Gecoördineerde Wetten op de Raad van State*) of 12 January 1973.[36] The Council of State acts in two capacities, namely in a non-jurisdictional one (as an advisory body in legislative and regulatory matters)[37] and in a jurisdictional one (as the Supreme Administrative Court, which may suspend and annul administrative acts that violate higher norms,[38] and which may review the internal and external legality of decisions of some lower administrative jurisdictions).[39]

2. STATUS OF INTERNATIONAL LAW IN DOMESTIC LAW

2.1. EFFECTS OF TREATY PROVISIONS AND DECISIONS OF SUPRANATIONAL BODIES IN THE DOMESTIC LEGAL ORDER

The Constitution does not contain a specific provision on the status of international law in the domestic legal order. It provides, however, that in general a treaty must be approved by both the Senate and the House of Representatives at the federal level and/or the Parliaments on the federated levels and be published in the Official Gazette to take effect and become part of the domestic legal order in its entirety.[40] A treaty that has not been approved by each of the respective parliaments will not have binding force in the internal legal order and may not be applied by the courts.[41]

With respect to the relationship between international law and domestic law, the Belgian legal order is generally conceived as a monist system, despite having some dualist elements.[42] This monist character of the Belgian legal order is to a great extent the result of some ground-breaking judgments of the Court of Cassation.

As early as in 1906, the Court of Cassation ruled that customary international law is part of the Belgian legal order, without any requirement of approval by the

36 *Official Gazette*, 21 March 1973.

37 Art. 2 of the Coordinated Laws on the Council of State.

38 Art. 14 §1 of the Coordinated Laws on the Council of State.

39 Art. 14 §2 of the Coordinated Laws on the Council of State.

40 Art. 167 §§2 and 3 of the Constitution; Cass. 11 December 1953, *Pas.* 1954, I, p. 298.

41 This is so even if the treaty has in the meantime been ratified by Belgium and become binding at the international level. See Cass. 12 March 2001, *Pas.* 2001, n° 126, opinion first advocate-general J.F. Leclercq.

42 See in general J. Wouters and D. Van Eeckhoutte, 'Doorwerking van internationaal recht in de Belgische rechtsorde. Een overzicht van bronnen en instrumenten' [The legal effect of international law in the Belgian legal order. A survey of sources and instruments], in J. Wouters and D. Van Eeckhoutte, *Doorwerking van internationaal recht in de Belgische rechtsorde* [The legal effect of international law in the Belgian legal order] (Antwerp, Intersentia 2006) pp. 3–82.

legislature or publication.[43] In addition, the Court of Cassation in its landmark *Franco-Suisse le Ski* judgment of 27 May 1971 held that provisions of international treaties with direct effect take precedence over conflicting norms of national law.[44] The Court held that 'where there is a conflict between a norm of domestic law and a norm of international law that has direct effect in the domestic legal order, the rule established by the treaty shall prevail; that this pre-eminence stems from the very nature of conventional international law'.[45] According to the Court of Cassation, the priority of international law over domestic law therefore stems from the presumption that the Belgian legislature, in adopting a legislative act, did not wish to violate norms of international law that are binding on Belgium; in case of a treaty, a contracting party may not unilaterally change its obligations. It is therefore 'the nature of international law as created by the treaty' that is the basis for its priority over domestic law.[46] There is no written provision of Belgian law that establishes such priority. Notwithstanding the specific European context in which the aforementioned judgment was rendered, and the absence of a written provision of Belgian law that establishes such priority of international law over domestic law, it is now a well-established general principle of law that a national judge is under the obligation to refuse to apply a norm of national law, including a statutory norm, that is not in conformity with a norm of international law that has direct effect in the internal legal order.[47] Norms of international law therefore rank higher than national legislative and administrative acts.[48]

---

43 Cass. 25 January 1906, *Pas.* 1906, I, p. 95. The Court of Cassation motivated this principle by referring to the English and American legal order: 'Attendu qu'à des degrés divers le Droit des Gens forme partie du Droit respectif des Nations; Que ce principe est si vrai que Blackstone déclarait que la Loi des Nations, c'est-à-dire le Droit des Gens, quand il s'élève une question qui est de son ressort, doit, en Angleterre, être adopté dans toute sa plénitude par la loi commune et être regardé comme faisant partie de la loi du pays; Que, de même, aux Etats-Unis le droit des Gens est considéré comme formant partie intégrante de la loi du pays, ainsi que l'attestaient déjà Thomas Jefferson et Daniel Webster, qui tous deux ont rempli des fonctions de secrétaire d'Etat; Que la Cour suprême y a placé le droit des gens coutumier au même rang que le droit des gens conventionnel, et a proclamé que les Cours fédérales doivent respecter le droit des gens comme une partie du droit national; Attendu que ce principe est également vrai en Belgique'. See on the status of international law in the Belgian legal order WOUTERS and VAN ECKHOUTTE, *supra* n. 42, at p. 15.

44 Cass. 27 May 1971, *Pas.* 1971, I, p. 886, opinion advocate-general W.J. GANSHOF VAN DER MEERSCH. See for more recent applications of the principle established in the aforementioned judgment Cass. 4 April 1984, *Pas.* 1984, I, p. 920; Cass. 10 May 1989, *Pas.* 1989, I, n° 514; Cass. 17 December 2002, *Pas.* 2002, n° 649.

45 The authors' translation from: 'lorsque le conflit existe entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir; que la prééminence de celle-ci résulte de la nature même du droit international conventionnel'.

46 *Ibid.* See in particular the opinion of advocate-general W.J. Ganshof van der Meersch, at pp. 896–897.

47 Cass. 5 December 1994, *Pas.* 1994, I, n° 533; Cass. 3 November 2000, *Pas.* 2000, n° 593.

48 See e.g. on the pre-eminence of the ECHR over national law, Cass. 14 March 1991, *Pas.* 1991, I, n° 368.

It is, in principle, for the national courts to decide whether an international law provision has direct effect, i.e. whether they can give it a direct effect. The conditions for 'direct effect' have been set out by the Court of Cassation in the following terms: 'the notion of "direct effect" ... implies that the obligation undertaken by [the] State is expressed in a complete and precise way and that the contracting parties had the intention to give to the treaty the purpose of granting subjective rights or imposing obligations on individuals'.[49] Thus, the Court of Cassation lays down two separate and cumulative conditions for the direct effect of a treaty provision: a subjective element, i.e. whether the authors of the treaty in question intended to grant subjective rights to the individuals, and an objective element, i.e. whether the provision in question is sufficiently complete and clear such that it can be invoked before a national judge. Generally speaking, a legal norm may only result in subjective rights if a specific legal duty is imposed directly on a third party by a rule of objective law, in which the claimant has an interest.[50]

The fact that the Court of Cassation makes the existence of a 'subjective right' a condition for the 'direct effect' of a treaty provision leads it to make a distinction between negative obligations and positive obligations deriving from treaty provisions. Where, for instance, a treaty provision imposes on the states a duty not to interfere with a fundamental right, it has direct effect; where the same treaty provision imposes a positive duty on the states to take measures to protect that fundamental right, thereby leaving the states various possibilities to achieve the required result, it does not have direct effect.[51]

It should be noted that the other supreme courts generally or occasionally adopt a different approach to the notion of direct effect. The Council of State indeed sometimes holds to a broader definition of 'direct effect'. For the Council of State, in a number of cases, the direct effect of a treaty provision is not limited to the mere question of whether the provision grants subjective rights to the individual; a norm of international or supranational law has direct effect 'in case that norm can be applied in the internal legal order without any substantive internal implementing measure'.[52] Where a norm imposes upon the states a sufficiently precise duty to refrain from taking certain action, it may therefore, by virtue thereof, have direct effect.[53] In other cases, however, the Council of State adopts a view that is comparable to that of the Court of Cassation, where it links

49 Cass. 21 April 1983, *Revue critique de jurisprudence belge* (1985), p. 22.

50 See e.g., with respect to Art. 144 Const. (disputes over civil (subjective) rights), Cass. 20 December 2007, *Pas.* 2007, nos 655 and 656, opinions advocate-general T. WERQUIN.

51 See, with respect to Art. 8 ECHR, Cass. 10 May 1985, *Pas.* 1985, I, n° 542, and *Arr. Cass.* 1984–85, n° 542, opinion advocate-general A. Tillekaerts; Cass. 6 March 1986, *Pas.* 1986, I, n° 433. For other cases in which the direct effect has been denied to treaty provisions imposing positive obligations on the states, see Cass. 17 January 2002, *Pas.* 2002, n° 36; Cass. 25 September 2003, *Pas.* 2003, n° 454; Cass. 26 May 2008, *Pas.* 2008, n° 314.

52 Council of State 5 July 2001, n° 97,477; Council of State 27 January 2009, n° 189,802.

53 Council of State 28 April 2008, n° 182,454.

the direct effect to the creation by the relevant treaty provision of subjective rights for the individuals.[54] It should be noted, however, that when the Council of State is called upon to examine pleas for the annulment of administrative acts, its competence is confined to verifying the conformity of administrative acts with higher norms, including norms of international law, such as the European Convention on Human Rights.[55] The question of whether or not individuals can derive subjective rights from international treaty provisions does therefore, in principal, not arise before the Council of State. Some authors therefore argue that the Council of State should completely abandon the condition pertaining to the existence of subjective rights for international law provisions that are binding upon Belgium.[56] The opinion of these authors is in line with the broad approach taken by the Constitutional Court.

For the Constitutional Court the question whether a provision of international law has direct effect – in the limited sense of creating subjective rights – does not arise at all. In cases where it has to rule on the conformity of national legislation with fundamental rights provisions guaranteed in the Constitution, read in light of international law provisions, the Constitutional Court has stated several times that it does not need to examine the question of whether a treaty has such direct effect in the internal legal order, since it only has to rule on the question of whether the legislature violated the international obligations of Belgium.[57] For the Constitutional Court to be able to examine whether a provision of national law is compatible with a treaty provision, it is therefore sufficient that the treaty is binding on Belgium.[58]

The case-law of the Court of Cassation has the effect of narrowing the notion of 'direct effect' of a norm to the capability of the norm to create subjective rights for individuals. Norms of objective law, however, can be applied – and thus have 'effect' – outside the context of subjective rights. Norms can indeed be relevant, not because they give rise to subjective rights (and corresponding obligations), but because they place limits on the powers of public authorities. Where such limits are imposed by norms of international law, they can be applied directly in the domestic legal order, as is accepted by the Constitutional Court and, in

54 See e.g. Council of State 16 October 1997, n° 68,914; Council of State 28 May 2002, n° 107,085.

55 According to Art. 14 of the Coordinated Laws on the Council of State, the Council may suspend and annul unlawful administrative acts (*administratieve handelingen*) that violate higher norms, including international law provisions. An administrative act which is incompatible with a right or freedom guaranteed by the ECHR can be suspended or annulled. The focus is on the legality of the challenged act.

56 See P. MARTENS and B. RENAULD, 'L'interprétation et la qualification de la norme de contrôle et de la norme contrôlée' [The interpretation and the qualification of the controlling norm and the norm controlled], in A. ARTS et al., eds., *De verhouding tussen het Arbitragehof, de Rechterlijke Macht en de Raad van State* [The relationship between the Court of Arbitration, the Judiciary and the Council of State] (Bruges, Die Keure 2006) p. 19.

57 Const. Ct. 22 July 2003, n° 106/2003; Const. Ct. 19 July 2004, n° 92/2004; Const. Ct. 24 November 2004, n° 189/2004.

58 See e.g. Const. Ct. 15 July 1993, n° 62/93; Const. Ct. 20 February 2002, n° 41/2002.

certain cases, the Council of State. It seems that in that sense they have 'direct effect', notwithstanding the fact that they do not create subjective rights.

With regard to decisions/resolutions of international organisations, it is generally accepted that they form part of the national legal order, as far as and to the extent that they are binding.[59]

Judgments of international courts, such as the European Court of Human Rights, by contrast, are formally not part of the Belgian legal order.[60] The Court of Cassation nevertheless accepts that the interpretation of a treaty provision by an international judge is part of the norm itself, thus giving those judgments an interpretative authority or a *res interpretata* effect.[61]

2.2. PRIMACY OF INTERNATIONAL LAW OVER DOMESTIC LAW

As indicated above, the *Franco-Suisse le Ski* case-law of the Court of Cassation provides for the principle that international law has primacy over domestic law. While this principle is unwritten when it comes to legislative acts, it finds a constitutional basis in Article 159 of the Constitution insofar as it relates to acts of administrative authorities. According to that provision, 'courts apply general, provincial or local decisions and regulations only if they are in accordance with the law'. The latter term can be understood as including norms of international law, such as the ECHR. Thus, notwithstanding that the Belgian Constitution remains silent with regard to the relationship between domestic law and international law, it is generally accepted that a norm of international law with direct effect ranks higher than a norm of domestic law. As already mentioned, according to the Court of Cassation, this pre-eminence of international law, which amounts to a general principle of law, stems from the very nature of international law.

The question now arises as to whether the primacy of international law over domestic law applies to the Constitution as well, i.e. whether international law takes precedence over the Constitution.[62]

---

59 See e.g. Cass. 9 January 2002, *Pas.* 2002, n° 17. See in general WOUTERS and VAN EECKHOUTTE, *supra* n. 42, at p. 18.

60 WOUTERS and VAN EECKHOUTTE, *supra* n. 42, at p. 17.

61 See, for instance, Cass. 10 June 2009, *Pas.* 2009, n° 392, opinion advocate-general D. Vandermeersch, in which the Court of Cassation held that because of the authority of the interpretation attached to a given judgment of the ECtHR, and of the primacy over domestic law of a rule of international law stemming from an international treaty ratified by Belgium, it was obliged to set aside statutory provisions insofar as they confirmed a principle that was in contradiction with the judgment of the ECtHR.

62 For an extensive answer to this question see P. POPELIER, 'De verhouding tussen de Belgische Grondwet en het internationaal recht' [The relationship between the Belgian Constitution and international law], in R. ANDERSEN et al., eds., *En hommage à Francis Delpérée. Itinéraires*

From a formal point of view, this question does not arise before the Constitutional Court, since its competence is limited to the review of legislative acts for conformity with the Constitution. However, the competence of the Court includes the review of acts approving a treaty, by virtue of which the Court may carry out an indirect constitutionality review of the provisions of that treaty.[63] According to the Court, the review of an act approving a treaty – which merely states that the treaty in question 'shall produce its full and entire effect' – entails an examination of the content of the relevant provisions of the international instrument. The legislature may not pass legislation that violates the Constitution, either directly or indirectly, by consenting to a treaty that would infringe the Constitution.[64] It has therefore been argued that, accordingly, the Constitution takes precedence over international law provisions. The Constitutional Court nevertheless takes into account the fact that 'the measure under review is not a unilateral sovereign act but a convention that also produces legal effects outside the domestic order'.[65] Whatever the exact relationship between the Constitution and international treaties may be, it should be noted that not a single treaty provision has been found unconstitutional so far.

The Court of Cassation for its part has endorsed the priority of international law over the Constitution on several occasions. In a judgment of 9 November 2004, the Court of Cassation explicitly held that 'the ECHR takes precedence over the Constitution'.[66] In two judgments of 16 November 2004 the Court added that 'the treaty with direct effect has priority over the Constitution'.[67]

According to the Legislation Section of the Council of State, the provisions of a treaty that is the object of a draft act approving that treaty must be in conformity with the Constitution, since it is by virtue of the Constitution that those provisions will take effect in the internal legal order. If the treaty appears to be in conflict with the Constitution, the legislature should refrain from approving it.[68] The Administrative Litigation Section of the Council of State, on

---

d'un constitutionnaliste (Brussels, Bruylant 2007) pp. 1231–1254; A. ALEN and J. CLEMENT, 'De hiërarchie der rechtsnormen' [The hierarchy of legal norms], in A. ALEN and P. LEMMENS, *Staatsrecht* [Public Law] (Bruges, Die Keure, 2006) pp. 5–26.

63 See for the first judgment on the issue Const. Ct. 16 October 1991, n° 26/91. According to Art. 3 §2 of the Special Act on the Constitutional Court, 'actions for full or partial annulment of a statute, decree or rule referred to in Article 134 of the Constitution by which a convention is ratified shall only be admissible insofar as they are instituted within sixty days after the publication of the statute, decree or rule referred to in Article 134 of the Constitution'.

64 Const. Ct. 3 February 1994, n° 12/94.

65 Idem; see also Const. Ct. 4 February 2004, n° 20/2004.

66 Cass. 9 November 2004, *Pas.* 2004, n° 539.

67 Cass. 16 November 2004, *Pas.* 2004, n^{os} 549 and 550, opinions advocate-general P. Duinslaeger.

68 Council of State, Legislation Section, opinion of 6 May 1992, *Parl. Doc.*, House of Repres., 1991–92, n° 482/1, pp. 69–72; Council of State, Legislation Section, opinion of 21 April 1999, *Parl. Doc.*, Senate, 1999–2000, n° 2-329/1, pp. 95–99.

the other hand, seems to have endorsed the priority of international law, once approved and in force in the Belgian legal order, over the Constitution.[69]

The existence of diverging views of the three supreme courts may at first sight seem contradictory, but it is, in fact, a question of chronology rather than priority. Indeed, it is by virtue of the acts of approval that international treaties receive binding effects in the domestic legal order. The *a priori* and *a posteriori* constitutional review of these acts by the Council of State viz. the Constitutional Court relates to the question of whether or not Belgium acted in conformity with its Constitution when bringing the international treaty into the domestic legal order. Once the treaty has become part of the domestic legal order, Belgian courts seem to accept the priority of international law over domestic law, including the Constitution, and their correlative duty to refuse the application of a conflicting norm of domestic law.

3. JUDICIAL REVIEW

The issue of reviewing national legislation (in the broad sense) in light of the Constitution and/or norms of international law is a complex and quite recent phenomenon in the Belgian legal order. In addition to an *a priori* review of certain legislative and administrative acts by the Legislation Section of the Council of State, the Belgian system includes an *ex post* review of legislation by the Constitutional Court, the ordinary courts and the Council of State, each within their own competence.

3.1. CONSTITUTIONAL REVIEW

3.1.1. A priori *review by the Council of State*

The Legislation Section of the Council of State exercises *a priori* review of legislation in the form of advisory opinions to the executives and the parliamentary assemblies on the conformity of draft legislation and draft regulations with the higher norms in the legal order, including the Constitution and norms of international law.[70] The Council of State is consulted on bills to be sent to parliament, including draft acts of approval of international treaties; for draft regulations, the consultation of the Council of State is required in principle, but the enacting executive may invoke urgency as a justification for not

69 See Council of State 5 November 1996, n° 62,922, as discussed in POPELIER, *supra* n. 62, at pp. 1239–1240.

70 See Title II of the Coordinated Laws on the Council of State.

consulting the Council of State.[71] This *a priori* review by the Council of State is necessarily abstract in nature.

3.1.2. Ex post *constitutional review*

3.1.2.1. Legislative acts

With respect to the *ex post* constitutional review of *legislative acts* the Belgian legal order combines a centralised review mechanism (entrusted to the Constitutional Court) with a decentralised system of preliminary rulings (by the other courts).[72] The Constitutional Court rules, by means of judgments, on conflicts of competence between legislative acts adopted by different legislatures, and on the conformity of legislative acts with the provisions of Title II[73] and Articles 170, 172[74] and 191[75] of the Constitution.[76] A case can thus be brought before the Constitutional Court directly, by way of an action for annulment, by certain authorities designated by statute or by any person who has a justifiable interest (centralised review mechanism), or, for a preliminary ruling, by any other court (decentralised review mechanism).

Actions for annulment can be instituted before the Court by means of a petition which, as the case may be, is signed by the Prime Minister, by a member of a community or regional government, by the president of a legislative assembly, or by a party with a justifiable interest.[77] These actions must, in general, be lodged within six months after the publication of the act in the Official

71 The obligation for the executives to consult the Council of State on draft legislation does in practice not pose a problem in terms of compliance with that obligation. With respect to administrative acts, however, the Court of Cassation and the Council of State sometimes are confronted with unjustified failures to consult the Council of State, which lead to the annulment or the non-application of the act in question. See e.g. Cass. 19 September 2012, *Pas.* 2012, n° 472, and Council of State 11 April 2011, n° 212,592.

72 See in general P. POPELIER, *Procederen voor het Grondwettelijk Hof* [Litigation before the Constitutional Court] (Antwerp, Intersentia 2008) p. 426.

73 Title II of the Constitution enumerates the rights and freedoms of the Belgians.

74 Articles 170 and 172 of the Constitution set the principles of legality *viz.* non-discrimination in tax related matters.

75 Article 191 of the Constitution extends the protection of most of the rights and freedoms to foreigners on Belgian soil.

76 Prior to the creation of the Constitutional Court, the national courts had to interpret legislative acts in conformity with the Constitution (see e.g. Cass. 20 April 1950, *Pas.* 1950, I, p. 560, opinion procurator-general L. CORNIL); however, if they were unable to give legislative acts an interpretation in conformity with the Constitution, they had no competence whatsoever to annul them or to set them aside. See, in general J. VELAERS, *Van Arbitragehof tot Grondwettelijk Hof* [From Court of Arbitration to Constitutional Court] (Antwerp, Maklu, 1990) p. 50; I. VEROUGSTRAETE and A. DE WOLF, 'De wet uitgelegd door de rechter: een neveneffect van de democratie' [The law interpreted by the courts: a side effect of democracy], in ARTS et al., *supra* n. 56, pp. 55–72 at pp. 64–65.

77 Art. 5 of the Special Act on the Constitutional Court.

Gazette.[78] If the action is well-founded, the challenged legislative act will be entirely or partially annulled.[79] The annulment of a legislative act has a retroactive effect, i.e. effects *ex tunc*, which means that the annulled provisions must be deemed never to have existed, thus having effects *erga omnes*. However, according to Article 8 §2 of the Special Act, the Constitutional Court may, where it so deems necessary, specify which effects of the nullified provisions are to be considered maintained or provisionally maintained for the period determined by the Court.[80] The judgments delivered by the Constitutional Court whereby actions for annulment are dismissed are binding on the courts with respect to the points of law settled by those judgments.[81]

In addition to an action for annulment, the Constitutional Court may be asked to rule on the conformity of a legislative act with the Constitution by way of a preliminary ruling. Thus, if a question comes up before an ordinary or administrative court on the conformity of a legislative act with the rules that have been established by or in pursuance of the Constitution to determine the respective powers of the State, the communities and the regions, or with a right or freedom guaranteed in Title II of the Constitution, or with Articles 170, 172 and 191 of the Constitution, that court is in principle under a duty to address a preliminary question to the Constitutional Court.[82] Indeed, a court is generally under an obligation to refer the issue to the Constitutional Court if a question on the constitutionality of a legislative act arises before it. The Special Act nonetheless provides for several exceptions to the foregoing rule, some of which do not apply to the Court of Cassation and the Council of State.[83] The court which referred the preliminary question and any other court passing judgment in the same case have to comply with the ruling given by the Constitutional Court in the settlement of the dispute in connection with which the preliminary question was asked.[84] If the Constitutional Court decides that the act in question conflicts with the above-mentioned provisions of the Constitution, the referring

78 Art. 3 §1 of the Special Act. An action for full or partial annulment of a legislative act by which a treaty is approved, on the contrary, is only admissible if it is lodged within sixty days after the publication of that act in the *Official Gazette*.

79 Art. 8 §1 of the Special Act. An action for annulment does not automatically suspend the effect of the challenged act. In case the applicant can prove that the act under challenge may cause an irrevocable prejudice the Constitutional Court can, in accordance with Art. 19 *et seq.* of the Special Act, order the entire or partial suspension of that act pending the examination of the merits.

80 POPELIER, *supra* n. 72, pp. 370–378.

81 Art. 9 §2 of the Special Act.

82 According to Art. 30 of the Special Act, a decision to refer a question to the Constitutional Court for a preliminary ruling has the effect of suspending the proceedings and the time limits for proceedings and limitation periods from the date of that decision until the date on which the ruling of the Constitutional Court is notified to the court that posed the preliminary question.

83 Art. 26 §2 of the Special Act.

84 Art. 28 of the Special Act.

court must no longer take this act into consideration in its further adjudication of the case. The act in question will formally be maintained in the legal system, but a new six-month term commences in which an action for annulment of the act can be brought by the federal Council of Ministers, by any government of a community or region, by the presidents of the respective legislative bodies upon request of two thirds of their members, and by any party with a justifiable interest.[85] Significantly, though, the acts of approval of a treaty establishing the European Union or the ECHR and its protocols cannot be the object of a request for a preliminary ruling.[86]

Thus, as far as the constitutional review of legislative acts is concerned, the Constitutional Court has the exclusive competence to review those acts on conformity with the Constitution. Whenever a question arises on the conformity of a legislative act with the Constitution, all courts must in principle refer the case to the Constitutional Court for a preliminary ruling.

3.1.2.2. Administrative acts

As to the constitutional review of administrative acts, the situation is quite different. According to Article 159 of the Constitution, 'courts apply general, provincial or local decisions and regulations only if they are in accordance with the law.'[87] The 'law' includes the provisions of the Constitution. Ordinary courts of the judiciary as well as administrative courts and the Council of State must therefore refuse to apply an administrative act that violates the Constitution.[88] The refusal by a court to apply an administrative act that violates the Constitution has implications *inter partes* only. The act remains part of the internal legal order and remains in principle applicable in other disputes.

In addition to such 'plea of illegality', which, as explained, may be raised before and by any ordinary court of the judiciary as well as the administrative courts and the Council of State, the exclusive competence to annul administrative acts on the account of a violation of the Constitution lies, in principle, with the Administration Section of the Council of State as the Supreme Administrative Court[89] and, as the case may be and to the extent that they are competent, with other administrative courts. The annulment of

---

85 Art. 4 §2 of the Special Act.

86 Art. 26 §1*bis* of the Special Act.

87 J. Theunis, *De exceptie van onwettigheid* [The exception of illegality] (Bruges, Die Keure 2011) p. 777.

88 According to the case-law of the Council of State, Article 159 of the Constitution does not apply to individual decisions (see e.g. Council of State 14 October 2004, n° 136,037). The Court of Cassation holds the opposite view (see e.g. Cass. 2 December 2002, *Pas.* 2002, n° 646).

89 Art. 14 §1 of the Coordinated Laws on the Council of State.

an administrative act normally has an *ex tunc* effect. However, like the Constitutional Court, the Council of State may specify, in relation to administrative acts of a rulemaking nature,[90] which effects of a nullified provision are to be considered maintained.

3.2. REVIEW FOR CONFORMITY WITH INTERNATIONAL LAW

3.2.1. Legislative acts

Whereas the exclusive competence to review legislative acts on conformity with constitutional provisions lies with the Constitutional Court, all courts may assess the compatibility of a legislative act with provisions of international law.

Given the limited jurisdiction of the Constitutional Court, as defined in Article 1 of the Special Act on the Constitutional Court, it does, in principle, not have any competence to rule directly on the conformity of national legislative acts with provisions of international law; its only task is to rule on the constitutionality of legislative acts. The Constitutional Court nevertheless deems itself competent to read constitutional provisions guaranteeing fundamental rights in combination with analogous norms of an international treaty. In its case-law, the Constitutional Court has consistently stated that where such an analogy exists, 'the guarantees laid down in that treaty provision ... form an inextricable whole with the guarantees that are laid down in the constitutional provisions. The Court therefore, when reviewing the conformity with these constitutional provisions, takes into account the international provisions that guarantee analogous rights or freedoms.'[91] In addition, where a fundamental right is invoked that is not included in Title II of the Constitution, but is nevertheless guaranteed in a norm of international law, the Constitutional Court can perform an indirect review of compatibility with that norm of international law, through a review of compatibility with Articles 10 and 11 of the Constitution, read in combination with the relevant norm of international law. Articles 10 and 11 of the Constitution guarantee equality and non-discrimination, respectively. According to the Court, where there is a difference in treatment between two categories of persons, and where the treatment of one group violates international law, the difference in treatment cannot be justified and constitutes discrimination.[92]

---

90 The ongoing reform of the institutions aims at providing for an extension of this possibility to individual decisions.

91 See, among many others, Const. Ct. 22 July 2004, n° 136/2004; Const. Ct. 14 December 2005, n° 189/2005.

92 Const. Ct. 13 October 1989, n° 23/89. See in particular Const. Ct. 23 May 1990, n° 18/90, as to treaty provisions.

All other courts, i.e. the ordinary courts and the administrative courts, can, as a consequence of the *Franco-Suisse le Ski* case-law of the Court of Cassation, review the compatibility of legislative acts with treaties, decisions or resolutions adopted by international organisations and customary international law. As mentioned before, the foregoing obligation amounts to a general principle of law. The refusal to apply a legislative act that violates a provision of international law has implications *inter partes*, which means that the act remains part of the internal legal order.

The foregoing leads to a variety of competences with respect to the review of legislative acts. Whereas the ordinary and administrative courts are under an obligation to refuse the application of a legislative act that is in violation of a norm of international law, they do not have the competence to review the same act on conformity with the provisions of the Constitution. Only the Constitutional Court may exercise constitutional review of legislative acts.

Until 2004, this scheme did not cause too many difficulties. Whenever a question came up on the conformity of a legislative act with a fundamental right protected in both the Constitution and an international treaty, i.e. in the event of a 'concurrence of fundamental rights', it was common practice to refer the case to the Constitutional Court for a preliminary ruling.[93] In 2004, however, the Court of Cassation altered its position and immediately exercised its competence to review a legislative act on conformity with the ECHR.[94] The Court of Cassation found no violation of the ECHR and, moreover, did not see the need to refer the case to the Constitutional Court for a constitutional review, thus bypassing the Constitutional Court's exclusive competence on this point. The Court of Cassation reasoned that 'a treaty with direct effect takes precedence over the Constitution; that, when the Constitution ... imposes no further requirement than a treaty provision with direct effect, a review on conformity of the law with the treaty is sufficient and further constitutional review of the law is not useful.' This judgment led to tensions between the two courts, following which a symposium was organised between the Constitutional Court, the Court of Cassation and the Council of State in 2005, resulting in a compromise, which ultimately led to the introduction of a priority rule in Article 26 §4 of the Special Act of 6 January 1989 on the Constitutional Court.[95] That provision reads as follows:

93 See on the issue J. VELAERS, 'The Protection of Fundamental Rights by the Belgian Constitutional Court and the Melki-Abdel Judgment of the European Court of Justice', in M. CLAES, M. DE VISSER, P. POPELIER and C. VAN DE HEYNING, eds., *Constitutional Conversations in Europe* (Cambridge, Intersentia 2012) pp. 323–341; M. BOSSUYT and W. VERRIJDT, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment', *European Constitutional Law Review* (2011) pp. 355–391.

94 Cass. 16 November 2004, *Pas.* 2004, n^{os} 549 and 550, opinions advocate-general P. Duinslaeger.

95 Art. 26 §4 as inserted by Art. 2 of the Special Act of 12 July 2009, *Official Gazette*, 31 July 2009.

'§4. Where it is argued before a court that a statute, decree or rule referred to in Article 134 of the Constitution infringes a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, the said court shall first refer the question of compatibility with the provision of Title II of the Constitution to the Constitutional Court for a preliminary ruling.

By way of derogation of the first paragraph, the obligation to refer a preliminary question to the Constitutional Court shall not apply:
1° in the cases referred to in paragraphs 2 and 3;
2° if the court finds that the provision of Title II of the Constitution has manifestly not been infringed;
3° if the court finds that it appears from a judgment delivered by an international court that the provision of European or international law has manifestly been infringed;
4° if the court finds that it appears from a judgment delivered by the Constitutional Court that the provision of Title II of the Constitution has manifestly been infringed.'

Thus, where it is argued before an ordinary or administrative court that a statute infringes a fundamental right which is guaranteed by both the Constitution and a provision of European or international law, the court must, in principle, first refer the question of compatibility with the Constitution to the Constitutional Court for a preliminary ruling. An 'entirely analogous right' is a right with equal scope and equal conditions of restriction; a 'partially analogous right' is a right with a (partially) equal scope, and/or with different conditions of restriction.[96] Article 26 §4 of the Special Law nevertheless makes some exceptions to the foregoing obligation:

- if the Constitutional Court has already ruled on a question or appeal on an identical subject;
- if there is an *'acte clair'*, i.e. if the court dealing with the case finds that the provision of Title II of the Constitution has manifestly not been infringed;
- if there is an *'acte éclairé'*, i.e. if that court finds that it appears from a judgment delivered by an international court that the provision of European or international law has manifestly been infringed or if the court finds that it appears from a judgment delivered by the Constitutional Court that the provision of Title II of the Constitution has manifestly been infringed.

96 J. Velaers, 'Artikel 26, §4 van de bijzondere wet op het Grondwettelijk Hof: naar een nieuw evenwicht tussen de rechtscolleges bij samenloop van grondrechten' [Article 26, para. 4 of the Special Act on the Constitutional Court: towards a new balance between the courts in case of concurrence of fundamental rights], *Tijdschrift voor bestuurswetenschappen en publiekrecht* (2010) pp. 387–410.

3.2.2. *Administrative acts*

Regarding administrative acts, all ordinary and administrative courts must, pursuant to the so-called 'exception of illegality' ex Article 159 of the Constitution, refuse to apply administrative acts that violate a provision of international law. The exclusive competence to declare null and void an administrative act that violates international law provisions rests nonetheless with the Council of State and, as the case may be and to the extent that they are competent, other administrative jurisdictions. As to the effects of a refusal to apply an illegal administrative act and of an annulment of such an act, reference can be made to what has been set out above with respect to the review of the constitutionality of administrative acts.

4. IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY NATIONAL COURTS

4.1. THE DIRECT EFFECT OF THE ECHR IN THE BELGIAN LEGAL ORDER

On 14 June 1955 the Kingdom of Belgium ratified the ECHR.[97] The incorporation of the ECHR in the internal legal order set a new challenge to the Belgian courts. Not only were they being faced with a whole new corpus of human rights law, the existence of a parallel and competing European system, with its own principles, court and case-law, introduced a potentially destabilising factor to the Belgian constitutional order, which already comprised of two, later three, jurisdictional orders, headed by the Court of Cassation, Council of State and the Constitutional Court respectively.

Meanwhile, sixty years have elapsed, years in which the national courts needed to find their own way to deal with the ECHR and the case-law of the ECtHR. In this section an attempt will be made to assess where the Belgian courts stand, what challenges they have overcome and what challenges remain.

There is unanimity in legal doctrine that most provisions of the ECHR and the additional protocols have direct effect, in the broad sense, i.e. that the provisions of the Convention can be directly invoked and applied, in some way or another, in the domestic legal order.[98] The recognition of the direct effect of the provisions of the ECHR and the Protocols by the courts, in particular the Court

---

97 The Convention was signed by the Kingdom of Belgium on 4 November 1950 and ratified on 14 June 1955, after adoption of the consenting law of 13 May 1955, *Official Gazette*, 19 August 1955. The Convention entered into force in the Belgian legal order on 14 June 1955.

98 See E. Claes and A. Vandaele, 'L'effet direct des traités internationaux. Une analyse en droit positif et en théorie du droit axée sur les droits de l'homme', *Revue belge de droit international*

of Cassation and the Council of State, can be either an explicit recognition of the direct effect of the provision in question by the respective courts or an implicit endorsement of the direct effect of a provision by applying that provision to the facts of the case.

Based on the foregoing, almost all provisions of the ECHR and the Protocols that have binding force in the Belgian legal order have direct effect.[99] Some authors have expressed doubts about the direct effect of Article 13 of the ECHR, but recent case-law of both the Court of Cassation and the Council of State shows that the direct effect of Article 13 ECHR has meanwhile been accepted.[100] The provisions of the ECHR may thus be invoked before a Belgian court without the need for any national implementing measure.

The fact that the provisions of the ECHR have direct effect, however, does not necessarily mean that they result in subjective rights. As explained above, the Court of Cassation makes a distinction between negative obligations and positive obligations deriving from treaty provisions. Where a Convention provision imposes on the states a duty not to interfere with a fundamental right, it (clearly) has direct effect; where the same Convention provision imposes a positive duty on the states to take measures to protect that fundamental right, thereby leaving the states various possibilities to achieve the required result, it does not seem to have direct effect.[101]

That being said, in some cases the State may be obliged to take positive measures, and in such a situation the State can normally choose between various means to achieve the result required under the ECHR or a protocol. In a judgment of 28 September 2006, the Court of Cassation held that the State can incur liability for not having taken any (adequate) measure.[102] The Court of

(2001) pp. 411–491; J. VANDE LANOTTE, *Handboek EVRM, part 1. Algemene Beginselen* [Handbook ECHR, part 1, General Principles] (Antwerp, Intersentia 2005) p. 95.

99 For a review of the case-law on the direct effect of Arts. 2 to 12 and 14 of the Convention and Arts. 1 and 2 of the First Protocol, see K. RIMANQUE, *De toepassing van het Europees Verdrag voor de Rechten van de mens door de nationale rechter* [The application of the ECHR by the national judges] (Wilrijk, UIA 1987). See in addition Council of State 14 February 2006, n° 154,954 (Art. 1 ECHR); Council of State 4 July 2002, n° 109,864 (Art. 2 ECHR); Council of State 2 March 2001, n° 93,713 (Art. 3, First Additional Protocol); Council of State 28 October 2008, n° 185,919 (Art. 3 of Protocol No. 4); Council of State 4 July 2003, No. 121,320 (Art. 2 of Protocol No. 4); Council of Alien Disputes 11 May 2009, n° 27,142 (Art. 4 of Protocol No. 4); Court of Appeal Mons 14 November 2012, *Le Pli Juridique* 2013, n° 24, p. 39 (Art. 4 of Protocol No. 7).

100 See, among others, Cass. 16 March 2000, *Pas.* 2000, n° 183 (violation of Arts. 6 and 13 ECHR) and Council of State, 5 March 2012, n° 218,306 (application of Art. 13 ECHR to the case).

101 See, with respect to Art. 8 ECHR, Cass. 10 May 1985, *Pas.* 1985, I, n° 542, opinion advocate-general A. Tillekaerts; Cass. 6 March 1986, *Pas.* 1986, I, n° 433. For other cases in which the direct effect has been denied to treaty provisions imposing positive obligations on the states, see Cass. 17 January 2002, *Pas.* 2002, n° 36; Cass. 25 September 2003, *Pas.* 2003, n° 454 and *Arr. Cass.* 2003, n° 454, opinion advocate-general G. Bresseleers; Cass. 26 May 2008, *Pas.* 2008, n° 314.

102 Cass. 28 September 2006, *Pas.* 2006, n° 445, opinion first advocate-general J.F. Leclercq. See on State responsibility for the acts of the legislature P. VAN OMMESLAGHE and J. VERBIST,

Cassation held that the State was responsible for failing to comply with its positive obligations under Article 6(1) ECHR[103] and stated that the separation of powers, which guarantees a balance between the different powers of the State, does not entail any general exemption for the State from the obligation to repair all damages caused to a third party in the execution of its legislative powers. Therefore, a court that receives a claim for damages caused by a wrongful interference with a right laid down in a higher norm that imposes a specific duty on the State, such as Article 6(1) ECHR, is competent to examine whether the legislature has exercised its powers appropriately even if the legislature has been allowed a certain margin within which it may decide how to ensure compliance with that norm.

In the aforementioned hypothesis, the reparation by the State takes, in general, the form of a financial compensation, for national courts under Belgian law do not have any competence to order the State to adopt a specific legislative measure. The Constitutional Court nevertheless developed a practice whereby a lacuna in the legal order may, under certain conditions, amount to a violation of the Constitution, possibly read in conjunction with provisions of the ECHR and its Protocols, thus obliging the legislature to take specific measures to put an end to the unconstitutionality.[104] The Constitutional Court ruled, for instance, that the national legislation according to which a child is obliged to reside in a federal refugee centre amounted to a violation of Article 22 of the Constitution (right to respect for private life and family life), read in combination with Article 8 ECHR, due to the absence of a statutory provision which allowed the parents to reside in the same centre.[105] In another case the Constitutional Court ruled that the absence of a statutory provision that would allow the judge to charge to the claimant (in civil proceedings) or the civil party (claiming damages in criminal proceedings) the fees and expenses necessary for the defence of the respondent (in civil proceedings) or the defendant (in criminal proceedings) if they lost the case, was in violation of Articles 10 and 11 of the Constitution (principles of equality and non-discrimination), read in combination with Article 6 ECHR.[106] A third example relates to the Act of 16 June 1993 on the punishment of serious breaches of international humanitarian law.[107] In a 2005 judgment, the Constitutional Court held that there was no reasonable justification for the fact that only the Federal Prosecutor was entitled to decide whether or not to initiate proceedings for certain international crimes, without any supervision by an independent,

---

'Overheidsaansprakelijkheid voor het optreden van de wetgevende macht' [State liability for acts of the legislature], *Tijdschrift Bestuurswetenschappen en Publiekrecht* (2009), pp. 3–24.

103 Cass. 28 September 2006, mentioned above.

104 See in general J.-C. SCHOLSEM, 'La Cour d'arbitrage et les "lacunes législatives"' in ARTS et al., eds., *supra* n. 56, pp. 213–237; POPELIER, *supra* n. 72, p. 65 *et seq.*

105 Const. Ct. 19 July 2005, n° 131/2005.

106 Const. Ct. 19 April 2006, n° 57/2006.

107 *Official Gazette*, 5 August 1993.

impartial judge of his decision not to initiate proceedings. The absence of such a review amounted to a violation of Articles 10 and 11 of the Constitution, read in the light of Article 6 ECHR.[108]

Thus, although formally the Constitutional Court does not have the competence to order the legislature to adopt specific legislative measures, its finding of a lacuna has comparable effects. Indeed, the Court may sometimes even go as far as to indicate rather specifically, in the reasons for its judgment, what kind of measure the legislature should take in order the fill the gap.[109]

4.2. THE PRACTICE OF THE BELGIAN COURTS

The Belgian courts have a reputation of taking the Convention rights seriously. This is, among others, evidenced by the frequency by which provisions of the ECHR are invoked or applied by the Belgian courts and the growing importance thereof. According to numbers cited by Popelier, between 2009 and 2010 the ECHR was invoked or applied in some 15.5% of the (published) cases before the Court of Cassation and in some 32% of the cases before the Constitutional Court.[110]

4.2.1. Practice with respect to legislative acts

Given the general attitude of Belgian courts vis-à-vis the Convention, it should not come as a surprise that they set aside, annul or refuse to apply national legislation that is not in conformity with the ECHR on a rather frequent base.[111]

---

108 Const. Ct. 23 March 2005, n° 62/2005. The Court annulled the provisions granting an exclusive right to the Federal Prosecutor. It maintained the effects of these provisions until 31 March 2006, in order to allow the legislature to amend the act and render the system compatible with the Constitution.

109 See, e.g., with respect to the impossibility for prosecutors *viz.* auditors in the Council of State to challenge decisions by their hierarchical superiors that are alleged to be 'veiled' disciplinary measures, Const. Ct. 18 February 2009, n° 27/2009, and Const. Ct. 10 March 2011, n° 36/2011. In both cases the Court, after having identified the lacuna, indicated that the legislature had to provide a possibility for judicial review. These judgments were not based on the ECHR, but the same approach could of course also be taken in cases where the complainant invoked a violation of an article of the Constitution in combination with an article of the ECHR.

110 P. POPELIER, 'Judicial Conversations in Multilevel Constitutionalism', in M. CLAES, M. DE VISSER, P. POPELIER and C. VAN DE HEYNING, eds., *Constitutional Conversations in Europe* (Cambridge, Intersentia 2012) p. 81.

111 Both the Court of Cassation and the Council of State endorsed the public order character of the ECHR, or at least some of its provisions. As a consequence, a court may have to raise a plea based on a violation of the ECHR on its own motion. In addition, it is sometimes possible to raise such a plea for the first time during the cassation proceedings. See in general O. DE SCHUTTER and S. VAN DROOGHENBROECK, *Droit international des droits de l'homme devant le juge national* (Brussels, Larcier 1999) at pp. 23–24, referring to Cass. 18 September 1981, *Pas.* 1982, I, p. 98, and Council of State 8 October 1991, n° 37,832. See in addition P. LEMMENS,

It should nevertheless be recalled that, under Belgian law, if before an ordinary or administrative court a question arises on the conformity of a legislative act with a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by the ECHR, the said court must first refer the question of compatibility with the provision of Title II of the Constitution to the Constitutional Court for a preliminary ruling. The Constitutional Court will then read the constitutional provision in light of the ECHR. In what follows we will, by way of example, examine some rulings of each of the highest courts.

Although formally the Constitutional Court does not have the competence to annul national legislation for lack of conformity with the ECHR, its jurisprudence contains numerous examples of cases in which national legislation was annulled because of a conflict with a provision of Title II of the Constitution read in combination with and interpreted in light of the corresponding provision of the ECHR. In a 2010 judgment, for instance, the Constitutional Court held that an absolute and permanent prohibition on advertising by political parties on radio and television constituted an unjustified restriction on the right to freedom of expression, as protected under Article 19 of the Constitution and Article 10 of the ECHR in so far as it could have the effect of denying certain groups access to an important means for making their positions known to the public.[112] In a 2011 judgment, the Constitutional Court held that the legal situation whereby a child could no longer challenge the presumption of paternity on the part of his mother's husband after the age of 22 or after the year following his discovery of the fact that his mother's husband is not his father, cannot be justified by the desire to protect family peace given the non-existence of any family links. It therefore held that the statutory scheme violated a number of provisions of the Constitution, read in combination with Articles 8 and 14 of the ECHR.[113] In the same year the Constitutional Court ruled that a temporary exemption from the entry into force of a smoking ban in favour (only) of liquor outlets also offering pre-packed foods with a storage period of three months, as well as in favour of casinos, violated a number of provisions of the Constitution, read in combination with Article 8 of the ECHR.[114]

The Court of Cassation ruled in several judgments that the former Article 185 §2 of the Code of Criminal Procedure, which imposed an obligation on the accused to appear in person before the trial court, violated Article 6(1) and (3)(c) of the ECHR, according to which the accused may appear through legal assistance

'De Raad van State en de internationale verdragen over de rechten van de mens' [The Council of State and the international human rights treaties], *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (1987) p. 368.

112 Const. Ct. 22 December 2010, n° 161/2010.

113 Const. Ct. 31 May 2011, n° 96/2011.

114 Const. Ct. 15 March 2011, n° 37/2011.

of his own choice.[115] As a consequence, the criminal courts had to allow the accused to be represented through legal assistance, even if he was not in a position to appear in person. Article 185 of the Code of Criminal Procedure has in the meantime been amended to make it compatible with Article 6 of the ECHR.[116]

In sum, it is clear, on the one hand, that the ordinary and administrative courts do not hesitate to set aside, annul or refuse to apply national legislation that violates Convention rights. As a result of the above-mentioned *Franco-Suisse le Ski* judgment of the Court of Cassation and Article 159 of the Constitution, they are, as a matter of fact, under an obligation to do so. No decision is known to us whereby a court, having found a violation of the ECHR, declares itself incompetent to draw the necessary conclusions from that finding.

On the other hand, the ordinary and administrative courts do not have the power to order the legislature to change a statute: they can only set aside legislative acts that violate provisions of the ECHR. The Constitutional Court, however, is competent to declare statutory acts null and void, both directly on the basis of the Constitution and indirectly on the basis of the ECHR. The reaction of the legislature will depend on the reasoning in the Court's judgment and the consequences of the judgment. While the Constitutional Court does not have the competence to formally order the legislature to amend existing legislation or to adopt new legislation,[117] it may, as indicated above, find a lacuna in the legislation resulting in a violation of the Constitution, and such a finding obliges the legislature to take the necessary measures in order to fill the gap.

4.2.2. Practice with respect to administrative acts

As to the review of administrative acts, the ordinary courts and the administrative courts, in particular the Council of State, may directly review these acts for conformity with both the Constitution and the ECHR. Where there is relevant case-law of either the ECtHR or the Constitutional Court, the other courts may prefer to rely on the text for which there is clarifying case-law.[118] To give one example of a decision directly based on the ECHR, in a case in which an official was removed from office by a an administrative decision because of some statements he had made to a local newspaper, the Council of State held that the removal was a disproportionate sanction in the light of

115 Cass. 16 March 1999, *Pas.* 1999, n° 158; Cass. 4 September 2001, *Pas.* 2001, n° 443. See in addition Cass. 9 March 1999, *Pas.* 1999, n° 142 (relating to the incompatibility with Art. 6 of the ECHR of Art. 421 of the Criminal Code).

116 Art. 7 of the Act of 12 February 2003, *Official Gazette*, 28 March 2003.

117 See F. Delpérée, 'Le suivi de la jurisprudence constitutionnelle par les Chambres législatives', *Chroniques de droit public* (2010) p. 378 *et seq.*

118 See for instance Council of State 1 October 2009, n° 196,540, where the applicants in a case relating to environmental protection invoked an infringement of Art. 23, third paragraph, 4°, of the Constitution (right to protection of the environment) and Art. 8 of the ECHR, but where the Council of State reviewed the decision only in light of Art. 8 of the ECHR.

Article 10(2) of the ECHR and therefore amounted to an unlawful restriction of the agent's right to freedom of expression.[119]

4.3. INTERPRETATION OF DOMESTIC LAW IN CONFORMITY WITH THE CONVENTION

The Convention-friendly stance of the Belgian courts is not only evidenced by the frequent reference to the ECHR, but also the willingness of the courts to interpret the constitutional rights in light of the provisions of the Convention. The Constitutional Court attaches particular importance to the provisions of the ECHR and the jurisprudence of the ECtHR for the interpretation of the rights and freedoms in the Constitution that are guaranteed entirely or partially in a similar manner, since it reads the constitutional rights in combination with the (analogous) provisions of the Convention. According to its consistent case-law, as indicated above, 'where a treaty provision that binds Belgium is similar in scope to one or more of the ... constitutional provisions, the guarantees established by that treaty provision form an inseparable whole with the constitutional guarantees.'[120] The interpretation of constitutional rights in conformity with the Convention is thus, one can say, institutionalised in the case-law of the Constitutional Court.

In addition, it must be recalled that the Constitutional Court has the exclusive competence to review the conformity of a legislative act with the Constitution and, as explained above, this sort of review has to be given priority in cases before an ordinary or administrative court where a question arises with respect to the compatibility of a legislative act with both the Constitution and the Convention. In practical terms, the court would have to refer the case (if need be on its own motion) to the Constitutional Court for a preliminary ruling, whenever the violation of one of the following rights is invoked:[121]

- Articles 10 and 11 of the Constitution (principles of equality and non-discrimination), as these articles are entirely analogous to Article 14 of the ECHR;
- Article 12 of the Constitution (right to liberty), as this article is partially analogous to Article 5 of the ECHR;
- Article 13 of the Constitution (right of access to a court), as this article is partially analogous to Article 6(1) of the ECHR;

119 Council of State 12 March 2007, n° 16,8781.

120 Const. Ct. 14 December 2005, n° 189/2005.

121 See J. VELAERS, 'Samenloop van grondrechten: het Arbitragehof, titel II van de Grondwet en de internationale mensenrechtenverdragen' [Concurrence of fundamental rights: the Court of Arbitration, Title II of the Constitution and the international human rights treaties], *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2005) at p. 304 *et seq.*

- Article 15 of the Constitution (inviolability of one's home), as this article is partially analogous to Article 8 of the ECHR;
- Article 16 of the Constitution (protection against expropriation), as this article is partially analogous to Article 1 of Protocol No. 1 to the ECHR;
- Articles 19 and 25 of the Constitution (freedom of religion and speech, and freedom of the press), as these articles are partially analogous to Articles 9 and 10 of the ECHR;
- Article 22 of the Constitution (right to protection of private and family life), as this article is partially analogous to Article 8 of the ECHR;
- Article 24 of the Constitution (right to education), as this article is partially analogous to Article 2 of the Protocol No. 1 to the ECHR;
- Article 27 of the Constitution (freedom of association), as this article is partially analogous to Article 11 of the ECHR;
- Article 29 of the Constitution (inviolability of the confidentiality of letters), as this article is partially analogous to Article 8 of the ECHR.

The Constitutional Court will interpret the relevant constitutional provisions in the light of the corresponding provision of the Convention. This means that under the current constitutional system virtually all constitutional rights should normally be interpreted in harmony with the Convention. It should be noted, however, that if the Constitutional Court does not find a violation of the Constitution, the ordinary or administrative court will still have to examine the legislative act for compatibility with the analogous provisions of the ECHR, and in so doing could come to a different finding than the Constitutional Court, with respect to the analogous fundamental right guaranteed in the Convention.[122]

Some Convention rights are not protected in an analogous way by the Constitution. This is the case for the rights enshrined in Article 2 of the ECHR (except for the prohibition of the death penalty), in some parts of Article 6 of the ECHR, in Article 12 of the ECHR, and in Article 3 of Protocol No. 1 to the ECHR. Where it is argued before an ordinary or administrative court that a legislative act infringes one of these provisions of the ECHR, there will be no room to refer the question to the Constitutional Court for a preliminary ruling. In such a case, the court will nevertheless be under an obligation to adopt, if possible, an interpretation that makes the statutory provision compatible with the ECHR.

Like the Constitutional Court, the Council of State reads constitutional provisions in accordance with the ECHR.[123] The Council, for instance, reads the principle of proportionality of Article 8(2) ECHR into Article 23, third paragraph, 2° and 4° of the Constitution (right to health and right to a healthy

122 See e.g. Council of State 2 July 2010, n° 206,397.

123 See in general, on the application of the ECHR by the Council of State, LEMMENS, *supra* n. 111.

environment).[124] Moreover, the Council of State often refers to the case-law of the Constitutional Court for the interpretation of constitutional rights. Since the Constitutional Court reads the constitutional provisions in accordance with analogous provisions of the ECHR, the Council of State's interpretations of these provisions are presumably also in harmony with the ECHR.[125]

Likewise, the ordinary courts and the other administrative courts are under an obligation, where possible, to interpret domestic law in such a way that its provisions are compatible with relevant treaty provisions.[126] Where it is impossible to interpret domestic law in conformity with provisions of international law, which have direct effect in the domestic legal order, the courts must refuse to apply the provisions of domestic law.[127] Thus, in interpreting domestic law, they must have regard to the ECHR where applicable.

In sum, the possibilities for a Belgian court to avoid conflicts with the ECHR are to a large extent determined by the combination in the Belgian legal order of a mechanism of central constitutional review falling within the exclusive competence of the Constitutional Court (at least as far as legislative acts are concerned), with a more diffuse system of review in the light of international treaties, as a result of the Court of Cassation's jurisprudence, according to which any court may review national law in the light of international law provisions. In order to avoid conflicts with the ECHR, the Belgian legislature has opted for a cooperation mechanism between the ordinary and administrative courts and the Constitutional Court, in which the Constitutional Court holds the primary competence to review national legislation on compatibility with the Constitution (in the light of analogous provisions of the ECHR), whereas the other courts, in subsidiary order, may review the legislation in the light of the ECHR, provided they interpret the legislation in conformity with the ECHR, if that is possible.

Finally, a few words should be devoted to the relevance of the EU Charter in this respect. Given that the provisions of the ECHR all have direct effect and that the Constitutional Court, as the supreme interpreter of the Constitution, considers the guarantees established by the Convention to form an inseparable whole together with the constitutional rights, there is in principle no need for Belgian courts to use EU law as a vehicle to review the compatibility of domestic

124 Council of State 17 November 2008, n° 187,998.

125 See e.g. Council of State 9 March 2009, n° 191,162 (on the principle of legality in criminal matters, as guaranteed by Art. 12 of the Constitution).

126 Cass. 12 February 2003, *Pas.* 2003, n° 98, opinion procurator-general J. du Jardin. See in general J. Wouters and D. Van Eeckhoutte, 'Doorwerking van internationaal recht voor de Belgische hoven en rechtbanken' [The legal effect of international law before Belgian courts], in *De nationale rechter en het internationale recht* [The national courts and international law], *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, no. 131 (2005) pp. 145–243.

127 Cass. 20 April 1950, *Pas.* 1950, I, p. 560, opinion procurator-general L. Cornil.

law with fundamental rights that are also guaranteed by the ECHR. Besides, the protection offered by EU law only applies in cases where EU law is implemented or executed, and is therefore far more limited in scope than the ECHR. This has been confirmed in a recent ruling of the Court of Cassation,[128] where the Court referred to Article 51 of the Charter and recalled that the Charter provisions invoked by the applicants, i.e. Articles 3 (right to integrity of the person) and 24(2) and (3) (rights of the child) of the Charter, did not have direct effect in the internal legal order. This does not mean that the EU Charter is irrelevant. A sample of recent case-law of the Belgian courts shows that the provisions of the EU Charter are invoked and/or applied in cases where there is no equal or analogous protection in the ECHR. This is the case with the provisions on protection against unlawful dismissal,[129] protection of the rights of the child,[130] and protection in tax affairs.[131] Moreover, as far as anti-discrimination is concerned, and in particular in cases related to professional activities, EU law may prove to be more effective than the ECHR. The Belgian anti-discrimination legislation constitutes an implementation of the relevant EU law.[132] In such cases, Belgian courts do not hesitate to refer to EU law and the case-law of the Court of Justice of the European Union (CJEU).[133] In addition it should be mentioned that Article 26(4) of the Special Act on the Constitutional Court, quoted above, may not jeopardise the obligation of domestic courts to apply EU law directly and to refer the case to the CJEU for a preliminary ruling if need be. This has been reaffirmed by the CJEU in a judgment handed down at the request for a preliminary ruling by a Belgian court.[134] In other words, Article 26 §4 of the Special Act must be read in light of EU law.[135]

128 Cass. 2 March 2012, *Pas.* 2012, n° 145.

129 Const. Ct. 13 October 2011, n° 156/2011; Labour Ct. appeal Antwerp 14 November 2011, *Sociaalrechtelijke kronieken* (2012) p. 46.

130 Court of First Instance Nivelles 6 April 2011, *Tijdschrift voor vreemdelingenrecht* (2011) p. 345.

131 Const. Ct. 22 December 2011, n° 197/2011.

132 See in general I. Verhelst and S. Raets, 'Discriminatie op de arbeidsplaats: gewikt en gewogen. Een overzicht van de rechtspraak van de arbeidsgerechten betreffende de antidiscriminatiewetten van 10 mei 2003' [Discrimination at work weighed. A survey of the case-law of the labour courts concerning the anti-discrimination laws of 10 May 2003], *Oriëntatie* (2011) no. 4, p. 90 *et seq.*

133 See e.g. Labour Ct. Brussels 19 October 2004, *Sociale Kronieken* (2005) p. 16 *et seq.*, referring to the provision currently contained in Art. 157 of the Treaty on the Functioning of the EU and the judgment of the CJEU of 8 April 1976, Case 43/75, *Defrenne v. Sabena.*

134 CJEU 22 June 2010, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli.*

135 See on the issue Theunis 2011, *supra* n. 87, at pp. 262 *et seq.*

5. THE IMPACT OF ECtHR JUDGMENTS ON NATIONAL JUDICIAL DECISION MAKING

5.1. INCORPORATION OF ECtHR CASE-LAW INTO DOMESTIC CASE-LAW

The practice of the Belgian courts, and of the Constitutional Court in particular, shows that they often rely on the case-law of the ECtHR. Frequently, reference is made to judgments of the ECtHR when interpreting ECHR provisions, albeit with some reluctance on the part of the Court of Cassation and the Council of State. The Constitutional Court attaches particular importance to the case-law of the ECtHR.[136] There are numerous judgments in which the Constitutional Court refers to the case-law of the ECtHR.[137] According to figures given by Popelier, in 30.6% of the cases in which the ECHR was invoked or applied in 2009 and 2010, the Constitutional Court referred to judgments of the ECtHR.[138] The Constitutional Court does not merely refer to the case-law of the ECtHR, it ensures that its own case-law is in conformity with it. As an example, we can refer to a 2007 judgment, where the Court ruled that the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in combination with the right to a fair trial (Article 6(1) ECHR), were violated by a legislative provision requiring the courts to impose fines equivalent to ten times the amount of excise duty evaded, doubled for a repeat offence. The Court considered that the provision did not permit the criminal courts to reduce the fine in the event of mitigating circumstances and could have disproportionate effects, since it failed to set a maximum fine or a minimum one.[139] As a result of the *Mamidakis* v. *Greece* judgment of the ECtHR of 11 January 2007, the Court reopened the proceedings in the case, which had already been pleaded, and invited the parties to submit their comments on the impact of the said ECtHR

136 See in general, P. MARTENS, 'L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur la Cour constitutionnelle', *Publiekrechtelijke Kronieken* (2010) pp. 350–358.

137 See e.g. the case-law cited in A. ALEN, K. MUYLLE and W. VERRIJDT, 'De verhouding tussen het Grondwettelijk Hof en het Europees Hof voor de Rechten van de Mens' [The relationship between the Constitutional Court and the European Court of Human Rights], in A. ALEN and J. THEUNIS, eds., *Leuvense staatsrechtelijke standpunten* [Constitutional viewpoints from Louvain] (Bruges, Die Keure 2012) at footnote 94.

138 POPELIER, *supra* n. 110, at p. 85. By way of example, we can refer to a 2009 judgment, where the Court had to rule on a preliminary question of the Council of State relating to the constitutionality of a legislative provision allowing a political party to be temporarily deprived of part or all of the public subsidy to which it would normally be entitled, on the grounds of its manifest hostility to the rights and freedoms secured by the ECHR. In that judgment, the Court referred to up to 18 judgments of the ECtHR (Const. Ct. 3 December 2009, n° 195/2009).

139 Const. Ct. 7 June 2007, n° 81/2007. See for some earlier judgments Const. Ct. 28 March 2002, n° 60/2002; Const. Ct. 14 September 2006, n°138/2006; Const. Ct. 8 November 2006, n° 165/2006.

judgment.[140] In another case, relating to the constitutionality of a statute providing an automatic deprivation of the right to vote and to stand for election (for six or twelve years) where a person had been sentenced to prison for more than four months, without such deprivation resulting from any specific court decision, the Constitutional Court held that this provision was discriminatory in the way it undermined that person's right to vote and to stand for election, referring to the ECtHR's Grand Chamber judgment in *Hirst* v. *United Kingdom (No. 2)*.[141] One of the Constitutional Court's judges recently stated that the Constitutional Court had postponed the treatment of the case awaiting the Grand Chamber judgment.[142] In fact, it is not unusual for the Constitutional Court to quote quite extensively from ECtHR judgments.[143] Finally, it should be noted that the Constitutional Court not only adopts the ECtHR's interpretation of the rights and freedoms guaranteed in the ECHR: it also makes use of the ECtHR's interpretative methods, such as the proportionality principle.[144] While the Constitutional Court thus appears to adopt a positive attitude vis-à-vis the ECtHR, there are some commentators who criticise this 'blind submissiveness' by the Constitutional Court[145] or the straightforward application of the ECtHR's case-law by the Constitutional Court without taking the specific circumstances of the case into account.[146]

It is interesting to note that, no doubt because of this positive attitude of the Constitutional Court, the ECtHR until 2012 found that its judgments violated the ECHR on only three occasions.[147] This is not to say that the Constitutional Court never shows reluctance. In particular in the field of immigration law and social security, the Constitutional Court sometimes expresses a certain hesitation in following the case-law of the ECtHR.[148] In such cases, however, the

---

140 For additional examples in the field of family law, see ALEN, MUYLLE and VERRIJDT, *supra* n. 137, at pp. 27–29.

141 Const. Ct. 14 December 2005, n° 187/2005.

142 MARTENS, *supra* n. 136, at p. 352.

143 See e.g. Const. Ct. 12 February 2009, n° 17/2009.

144 See Const. Ct. 6 June 2007, n° 81/2007, referring to *Mamidakis* v. *Greece*, ECtHR 11 January 2007, appl. no. 35533/04. See in general MARTENS, *supra* n. 136, at p. 356.

145 See for a critical reflection on some recent judgments of the Constitutional Court in the field of family law, P. SENAEVE, 'Kan er inzake afstamming nog zinvol wetgevend werk verricht worden?' [Does it still make sense to legislate in matters of parentage?], *Tijdschrift voor Familierecht* (2011), pp. 171 *et seq.* The comments relate to Const. Ct. 3 February 2001, n° 20/11; Const. Ct. 31 May 2011, n° 96/2011; Const. Ct. 7 July 2011, n° 122/2011.

146 F. SWENNEN, 'Afstamming en Grondwettelijk Hof' [Parentage and the Constitutional Court], *Rechtskundig Weekblad* (2011–12) p. 1102; P.F. DOCQUIR, 'Accès à la tribune médiatique par la voie publicitaire: l'annulation de l'interdiction de la publicité politique dans les médias audiovisuels n'était pourtant pas nécessaire', *Revue de jurisprudence de Liège, Mons et Bruxelles* (2011) p. 505.

147 ALEN, MUYLLE and VERRIJDT, *supra* n. 137, at pp. 40–43, referring to *Pressos Compania Naviera S.A. et al.* v. *Belgium*, ECtHR 20 November 1995, appl. no. 17849/91, *Hakimi* v. *Belgium*, ECtHR 29 June 2010, appl. no. 665/08 and *Faniel* v. *Belgium*, ECtHR 1 March 2011, appl. no. 11892/08.

148 ALEN, MUYLLE and VERRIJDT, *supra* n. 137, at pp. 31–32.

Court provides extensive reasoning as to why it does not fully follow the case-law of the ECtHR.[149]

More generally, the Court of Cassation accepts that judgments of the ECtHR are considered to have *res interpretata*[150] and Belgian courts in principle have to comply with judgments of the ECtHR, even if they are not handed down against Belgium.[151] In a 1989 judgment the Court of Cassation held that, by ratifying the ECHR, Belgium accepted the ECtHR's mission to interpret the ECHR.[152] In its 2011 annual report, moreover, the Court of Cassation stated that it must attune its case-law to the case-law of the ECtHR.[153] On some occasions, the Court of Cassation showed itself to be even more generous in the interpretation of the ECHR than the ECtHR.[154] Nevertheless, the Court of Cassation does not have a tradition of citing case-law of courts in general, and of the ECtHR in particular. In only 5.8% of the cases in which the ECHR was invoked or applied in 2009 and 2010, the Court of Cassation referred to case-law of the ECtHR.[155] The Court of Cassation often refers in a general way to the position of the ECtHR with respect to the interpretation of an ECHR provision, without mentioning specific cases.[156] This is probably due to the brevity of the statements of reasoning given by the Court of Cassation in general.[157] In other cases, the Court summarises the argument of the appellant, who referred to ECtHR judgments, without

149 See e.g. Const. Ct. 13 December 2007, n° 153/2007, referring to *Koua Poirrez v. France*, ECtHR 30 September 2003, appl. no. 40892/98.

150 See F. Tulkens and S. Van Drooghenbroeck, 'La Cour de cassation et la Cour européenne des droits de l'homme. Les voies de la banalisation', in *Imperat Lex. Liber Amicorum Pierre Marchal* (Ghent, Larcier 2003) pp. 121–141. See also opinion of procurator-general J. Velu preceding Cass. 14 April 1983, *Pas.* 1983, I, p. 866, at pp. 892–897, nos 23–28.

151 See C. Van de Heyning, 'Grondwettelijke conversaties: een meerwaarde voor de bescherming van fundamentele rechten? De interpretatie en toepassing van fundamentele rechten in een complexe context van gelaagde bescherming' [Constitutional conversations: added value for the protection of fundamental rights? The interpretation and application of fundamental rights in a complex context of layered protection], *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2012) p. 406, with reference to Cass. 28 May 2008, *Pas.* 2008, n° 323, opinion advocate-general D. Vandermeersch. It should, however, be noted that, while the Court of Cassation in the latter case referred to judgments of the ECtHR in general, the case before the Court of Cassation concerned in fact applicants who had been also involved in the case before the ECtHR which the Court of Cassation purported to follow.

152 Cass. 10 May 1989, *Pas.* 1989, I, p. 948, opinion advocate-general J.M. Piret.

153 *Hof van Cassatie, Jaarverslag 2011*, available at <www.cassonline.be/uploads/397/cass2011nl.pdf>, p. 14.

154 See examples cited in J. Velu, 'A propos de l'autorité jurisprudentielle des arrêts de la Cour européenne des droits de l'homme: vues de droit comparé sur des évolutions en cours', in *Nouveaux itinéraires en droit. Mélanges en hommage à F. Rigaux* (Brussels, Bruylant 1993) pp. 535–536.

155 Popelier, *supra* n. 110, at p. 85.

156 See e.g. Cass. 5 May 2009, P.08.1853.N (on Art. 6 ECHR); Cass. 5 April 2011, *Pas.* 2011, n° 247 (on Article 6(1) and (3)(c) ECHR); Cass. 24 May 2011, *Pas.* 2011, n° 346 (on Art. 6(1) and (3) ECHR); Cass. 20 December 2011, *Pas.* 2011, n° 698 (on Art. 5(1)(e) and (4) ECHR); Cass. 17 April 2012, *Pas.* 2012, n° 228 (on Art. 6 ECHR).

157 See Van de Heyning, *supra* n. 151, at p. 406.

explicitly referring to any of those cases.[158] However, in cases to which Belgium has been a party, the Court of Cassation tends to refer to these specific cases.[159]

When the Council of State has to interpret a provision of the ECtHR, it tends to refer to case-law of the ECtHR.[160] In a recent case, for example, in which the defending party raised some objections based on a restrictive interpretation of the procedural rules for the Council of State, the latter referred to four judgments of the ECtHR from which it concluded that such restrictive interpretations of the procedural rules would be in violation of Article 6 of the ECHR, as interpreted by the ECtHR, and it therefore rejected the objections in question.[161] The General Assembly of the Council of State, in a judgment of 21 December 2010, rejected a request for the suspension of a municipal decision prohibiting the expression by teachers of religious symbols within the walls of a school and outside the walls of the school in their public function, referring to five judgments of the ECtHR, including the Grand Chamber judgment in *Lautsi* v. *Italy*.[162] In a similar and more recent case, where the Council of State dismissed an action for annulment of a city council regulation prohibiting the wearing of conspicuous religious, political or philosophical symbols in public secondary

158 See P. POPELIER, *supra* n. 110, at p. 87, with reference to Cass. 11 March 2009, *Pas.* 2009, n° 194; Cass. 24 February 2010, n° 125; Cass. 23 March 2010, *Pas.* 2010, n° 209; Cass. 31 March 2010, *Pas.* 2010, n° 237; Cass. 5 May 2010, *Pas.* 2010 n° 316, opinion advocate-general D. Vandermeersch; Cass. 22 June 2010, n° 445; Cass. 23 November 2010, *Pas.* 2010, n° 690, and *Arr. Cass.* 2010 n° 690, opinion advocate-general P. Duinslaeger; Cass. 7 December 2010, *Pas.* 2010, n° 714. In each of these cases the appellants referred in particular to *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02.

159 See *inter alia*, Cass. 11 February 2009, *Pas.* 2009, n° 114, referring to *Delespesse* v. *Belgium*, ECtHR 27 June 2008, appl. no. 12949/05; Cass. 17 November 2009, *Pas.* 2009, n° 673, Cass. 10 February 2010, *Pas.* 2010, n^{os} 94 and 96, and Cass. 17 March 2010, *Pas.* 2010, n° 191, referring to *Taxquet* v. *Belgium*, ECtHR 13 January 2009, appl. no. 926/05; Cass. 26 March 2010, *Pas.* 2010, n° 223, quoting from *Aerts* v. *Belgium*, ECtHR 30 July 1998, appl. no. 25357/94; Cass. 18 October 2011, *Pas.* 2011, n° 556, opinion advocate-general D. Vandermeersch, referring to *Taxquet* v. *Belgium* ECtHR (GC) 16 November 2010, appl. no. 926/05.

160 See, *inter alia*, LEMMENS, *supra* n. 111 at p. 369 *et seq.*, referring to Council of State 7 August 1969, n° 13,680; Council of State 26 September 1984, n° 24,689; Council of State 20 December 1985, n° 25,995. Some recent examples include Council of State 1 December 2008, n° 188,389, referring to *Vilho Eskelinen and Others* v. *Finland*, ECtHR 19 April 2007, appl. no. 63235/00 (on Art. 6 ECHR); Council of State 20 December 2004, n° 138,684, referring to *Entreprises Robert Delbrassine S.A. and Others* v. *Belgium*, ECtHR 1 July 2004, appl. no. 49204/99, (on Art. 6 ECHR); Council of State 25 May 1999, n° 80,385, referring to *Gallo* v. *Italy*, ECtHR 2 September 1997, appl. no. 25575/94 (on Art. 6 ECHR).

161 Council of State 21 November 2011, n° 216,368, referring to *Miragall Escolano and Others* v. *Spain*, ECtHR 25 May 2000, appl. nos. 38366/97 et al., *Běleš* v. *Czech Republic*, ECtHR 12 November 2002, appl. no. 47273/99 and *L'Erablière A.S.B.L.* v. *Belgium*, ECtHR 24 February 2009, appl. no. 49230/07.

162 Council of State 21 December 2010, n° 210,000, referring to *Sunday Times* v. *United Kingdom*, ECtHR 26 April 1979, appl. no. 6538/74, *Kruslin* v. *France*, ECtHR 24 April 1990, appl. no. 11801/85 *Kokkinakis* v. *Greece*, ECtHR 25 May 1993, appl. no. 14307/88, *Buscarini and Others* v. *San Marino*, ECtHR 18 February 1999, appl. no. 24645/94 and *Lautsi* v. *Italy*, ECtHR 3 November 2009, appl. no. 30814/06.

schools, reference was made to no less than six judgments and one decision of the ECtHR, all scrupulously scrutinised by the Council of State.[163] In some cases, the Council of State refers to the interpretation of the ECtHR in general, without mentioning any specific cases.[164]

To sum up, the Constitutional Court frequently refers to the case-law of the ECtHR, irrespective of whether Belgium was a respondent party or not in the case at hand. The Court of Cassation and the Council of State do take the case-law of the ECtHR into account, but in general tend to refer to the jurisprudence of the ECtHR *in abstracto* only. Cases to which Belgium was a party, however, are often mentioned *nominatim*.

5.2. RESPONSE TO JUDGMENTS OF THE ECtHR AGAINST BELGIUM

The Belgian courts generally comply with the ECtHR's judgments in cases to which Belgium was a party. It is common practice of the Belgian courts to change their interpretation of the ECHR or domestic law, if necessary, after a condemnation of Belgium by the ECtHR. Thus, the Constitutional Court does not hesitate to modify its case-law where this has been found by the ECtHR to be in violation of the ECHR. In a 1995 case relating to a Belgian statute, which retroactively excluded the liability of organisers of pilot services for damage resulting from negligence by pilots in the exercise of their functions, the Constitutional Court ruled that only acquired property enjoyed the protection of the right of property, guaranteed by Article 16 of the Constitution and Article 1 of Protocol No. 1.[165] In the subsequent proceedings before the ECtHR the applicants invoked a violation of Article 1 of Protocol No. 1, which the ECtHR held to be well founded.[166] Since then, the Constitutional Court has accepted that a financial claim may, under certain circumstances, fall within the scope of Article 1 of Protocol No. 1.[167]

The same holds true for the Court of Cassation in cases where its interpretation of a norm of domestic law has been found to result in a violation

---

163 Council of State 27 March 2013, n° 223,042, referring to *Sunday Times* v. *United Kingdom*, ECtHR 26 April 1979, appl. no. 6538/74, *Kruslin* v. *France*, ECtHR 24 April 1990, appl. no. 11801/85, *Lautsi* v. *Italy*, ECtHR 3 November 2009, appl. no. 30814/06, *Pichon and Sajous* v. *France*, ECtHR 2 October 2001 (dec.), appl. no. 49853/99, *Leyla Sahin* v. *Turkey*, ECtHR (GC) 10 November 2005, appl. no. 44774/98, *Mann Singh* v. *France*, ECtHR 13 November 2008 (dec.), appl. no. 24479/07 and *Dahlab* v. *Switzerland*, ECtHR 15 February 2001 (dec.), appl. no. 42393/98.

164 See e.g. Council of State 25 June 2008, n° 184,745 (on Art. 7 ECHR).

165 Const. Ct. 5 July 1990, n° 25/95; Const. Ct. 22 November 1990, n° 36/90.

166 *Pressos Compania Naviera SA and Others* v. *Belgium*, ECtHR 20 November 1995, appl. no. 17849/91.

167 Const. Ct. 21 December 2004, n° 210/2004.

of the ECHR. When the ECtHR held that the advocates-general at the Court of Cassation could no longer participate in the deliberations of the Court, the Court immediately changed its practice.[168] Recently, following the ECtHR Grand Chamber judgment in *Taxquet* v. *Belgium*, in which the ECtHR held that the absence of reasons in verdicts of assize courts violated Article 6 of the ECHR,[169] the Court of Cassation, after a period of hesitation,[170] changed its case-law,[171] even without awaiting the final judgment of the Grand Chamber.[172]

In addition, the newly inserted Articles 442*bis et seq.* of the Code of Criminal Procedure make it possible for the Court of Cassation to order the reopening of criminal proceedings following a judgment of the ECtHR finding a violation of the ECHR in the original proceedings.[173] For instance, following the aforementioned judgment of the Grand Chamber in *Taxquet* v. *Belgium*, the Court of Cassation ordered the reopening of the proceedings, quashed the judgment of the Assize Court of Liège, and sent the case for a new trial at the Assize Court of Namur.[174]

The Council of State also reconsidered its interpretation of domestic law in response to a judgment where this interpretation had been held to give rise to a violation of the ECHR. Following a condemnation of Belgium by the ECtHR due

168 Practice followed since the day the ECtHR handed down its judgment in *Borgers* v. *Belgium*, ECtHR 30 October 1991, appl. no. 12005/86. See also Cass. 13 September 1999, *Pas.*, 1999, n° 455, where the Court of Cassation changed its restrictive position on the possibility for parties in civil proceedings to reply to an opinion of the '*ministère public*' to a court, following several judgments against Belgium, including *Borgers* v. *Belgium*, ECtHR 30 October 1991, appl. no. 12005/86 and *Vermeulen* v. *Belgium*, ECtHR 20 February 1996, appl. no. 19075/91.

169 *Taxquet* v. *Belgium*, ECtHR 13 January 2009, appl. no. 926/05.

170 Cass. 27 January 2009, *Pas.* 2009, n° 69.

171 See e.g. Cass. 14 October 2009, *Pas.* 2009, n° 581, opinion advocate-general D. Vandermeersch, and n° 582, opinion advocate-general D. Vandermeersch.

172 *Taxquet* v. *Belgium*, ECtHR 13 January 2009, appl. no. 926/05. It is interesting to note that the Grand Chamber softened the decision of the chamber, by allowing that the reasons could also result from other elements than a formal reasoning of the verdict. Meanwhile, the Belgian Code of Criminal Procedure had already been amended, in order to meet the ECtHR's chamber judgment. See Act of 21 December 2009 reforming the Assize Court, *Official Gazette*, 11 January 2010.

173 Articles 442*bis et seq.* of the Code of Criminal Procedure were inserted by the Act of 1 April 2007 amending the Code of Criminal Procedure to allow the reopening of criminal proceedings, *Official Gazette*, 9 May 2007. See in general K. Lemmens and P. Lemmens, 'De herziening of heropening van de strafprocedure: een passend middel tot herstel van een schending van fundamentele rechten?' [The revision or reopening of criminal proceedings: an adequate remedy to redress a violation of fundamental rights?], in *Liber Amicorum A. De Nauw* (Bruges, Die Keure 2011) pp. 571–590.

174 Cass. 18 October 2011, *Pas.* 2011, n° 556, opinion advocate-general D. Vandermeersch. See in addition, Cass. 9 April 2008, *Pas.* 2008, n° 214, opinion advocate-general D. Vandermeersch, following *Da Luz Domingues Ferreira* v. *Belgium*, ECtHR 24 May 2007, appl. no. 50049/99; Cass. 17 June 2008, *Pas.* 2008, n° 379, following *Göktepe* v. *Belgium*, ECtHR 2 June 2005, appl. no. 50372/99; Cass. 11 February 2009, *Pas.* 2009, n° 114, opinion advocate-general D. Vandermeersch, following *Delespesse* v. *Belgium*, ECtHR 27 June 2008, appl. no. 12949/05; Cass. 23 February 2011, *Pas.* 2011, n° 161, following *Hakimi* v. *Belgium*, ECtHR 29 June 2010, appl. no. 665/08.

to the very restrictive interpretation by the Council of State of the conditions for the admissibility of pleas of nullity by non-profit organisations,[175] the Council relaxed its interpretation of the admissibility conditions in subsequent cases, explicitly referring to the case-law of the ECtHR.[176]

The current practice of the Belgian courts therefore seems to be that they generally comply with the judgments of the ECtHR in cases to which Belgium has been a party. They do not seem to limit the effect of these judgments. This has not always been the case. After the *Le Compte I* judgment of the ECtHR,[177] holding that disciplinary proceedings before the disciplinary courts of the *Ordre des médecins* had to be held in public if the doctor in question requested publicity, the Court of Cassation flatly refused to follow the ECtHR's judgment and maintained its opposing position.[178] A year later, in *Le Compte II*, the ECtHR reaffirmed its position.[179] From then on, the Court of Cassation generally followed the case-law of the ECtHR, relying on the authoritative interpretation of the judgments of the ECtHR.[180]

5.3. RESPONSE TO ECtHR'S JUDGMENTS AGAINST STATES OTHER THAN BELGIUM

Since the ECtHR's interpretation of a right results from an *in concreto* review of the case, taking into account all the circumstances of that case, the extent to which an interpretation of the ECtHR can be transposed to the Belgian legal order depends on a number of factual and legal circumstances, the exact formulation of the relevant principles of domestic law, the scope of application *ratione materiae* of the constitutionally protected rights and freedoms, etc. In general, however, national courts, and especially the higher courts, try to adopt a strict 'mirror principle' approach: they follow the interpretations of the ECHR by the ECtHR.[181] As far as the Court of Cassation is concerned, however, there are indications that it sometimes may interpret the ECHR provisions in a more limited way than the ECtHR has done in cases involving states other than Belgium. Indeed, one can argue that this has been the case with the recent case-

175 *L'Erablière A.S.B.L.* v. *Belgium*, ECtHR 24 February 2009, appl. no. 49230/07.

176 See e.g. Council of State 21 November 2011, n° 216,368.

177 *Le Compte, Van Leuven and De Meyere* v. *Belgium*, ECtHR 23 June 1981, appl. nos. 6878/75 and 7238/75.

178 Cass. 21 January 1982, *Pas.*, 1982, I, p. 623, opinion procurator-general F. Dumon.

179 *Albert and Le Compte* v. *Belgium*, ECtHR 10 February 1983, appl. nos. 7299/75 and 7496/76.

180 Cass. 14 April 1983, *Pas.*, 1983, I, n° 441, opinion advocate-general J. Velu.

181 By way of example, the case-law of the Court of Cassation on freedom of the press can be mentioned. The Court of Cassation does not refrain from quashing judgments that do not sufficiently demonstrate the need to restrict freedom of the press. As such, according to commentators, the Court of Cassation has completely incorporated the Strasbourg Court's case-law (D. Voorhoof and P. Valcke, *Handboek Mediarecht* [Handbook Media Law] (Brussels, De Boeck 2011) pp. 36–67).

law of the Court of Cassation relating to the effects of the *Salduz* v. *Turkey* judgment of the ECtHR. Until the legislature adapted Belgian law to the requirements following from that judgment (with respect to assistance by a lawyer in the initial stages of criminal proceedings), the Court of Cassation adopted a restrictive interpretation of the ECtHR's judgment, for instance with respect to the role of the lawyer during interrogations by the police.[182] The Court of Cassation thereby explicitly referred to the existence of certain guarantees offered by Belgian law to suspects, which in the Court's view would be at risk if one were to follow the ECtHR's case-law without reservation,[183] or which at least compensated for the absence of a lawyer during the suspect's initial interrogation.[184] This is not to say that the Court of Cassation's intention was to show hostility to the ECtHR's case-law. In restricting the effects of the *Salduz* judgment, the Court of Cassation perhaps wanted to comply as far as possible with the Strasbourg case-law, while at the same time, for pragmatic reasons, trying to avoid complicating criminal proceedings to such an extent that, until further action by the legislature, investigators would be faced with practical difficulties of considerable importance. It remains to be seen whether this approach, now outdated as a result of the changes in legislation, can stand the test in Strasbourg. In some other cases, the restrictive approach of the Court of Cassation has led to a divergence in case-law between the Court of Cassation and the Constitutional Court and to a condemnation of Belgium precisely because of the restrictive interpretation of the Court of Cassation.[185]

The Council of State seems to follow the judgments of the ECtHR in cases to which Belgium has not been a party, without trying to limit their effects in the Belgian legal order.[186]

While the Belgian courts in general do not seem to limit the requirements laid down in the Strasbourg case-law, they also do not seem to be inclined to go further than needed. This may occasionally be different for the Constitutional Court. The generosity with which it embraces the case-law of the ECtHR may have led it to apply the ECtHR's case-law to cases with different factual and legal

182 See e.g. Cass. 24 January 2012, n° 64, in which the Court held that the merely passive role attributed to the lawyer did not violate Art. 6 ECHR. See in general F. SCHUERMANS, 'Cassatie tempert Salduz-commotie' [Cassation mitigates Salduz commotion], in *Juristenkrant* 2010, no. 207, p. 3, referring to Cass. 23 March 2010, *Pas.* 2010, n° 209, and Cass. 31 March 2010, *Pas.* 2010, n° 237; S. DE DECKER, 'Salduz: een regen van arresten in Straatsburg, slechts druppels in Brussel?' [Salduz: it's raining cases in Strasbourg, but only a few drops are falling in Brussels?], in F. GOOSSENS, H. BERKMOES, A. DUCHATELET and F. HUTSEBAUT, *De Salduzregeling: theorie en praktijk, vandaag en morgen* [The Salduz rules: theory and practice, today and tomorrow] (Brussels, Politeia 2012) pp. 83–94.

183 Cass. 26 May 2010, *Pas.* 2010, n° 366.

184 Cass. 23 November 2010, *Pas.* 2010, n° 690.

185 See the case-law cited by ALEN, MUYLLE and VERRIJDT, *supra* n. 137, at pp. 35–40.

186 See, for a recent example, Council of State 1 October 2013, n° 224,915 (annulment of a decision authorising the extradition of the applicant, on the basis of the principles set out in *Saadi* v. *Italy*, ECtHR 28 February 2008, appl. no. 37201/06).

circumstances, thus offering more protection than strictly required by the ECtHR.[187] In cases where the Constitution fully ensures broader protection, the Constitutional Court will follow the constitutional provision.[188] In a recent case it justified this approach by referring to the fact that the ECtHR itself had noted a lack of consensus on the subject by the States Parties to the ECHR, thus leaving to each of them a wide margin of appreciation.[189] A typical situation where the Constitution offers additional guarantees is that of the rights for which it provides that limitations must be based on a formal 'law', i.e. an Act of Parliament, while the Convention merely requires that limitations should be provided by 'law', in the sense of a general norm, but not necessarily a statutory one. Another interesting example of a constitutional provision that offers broader protection than the ECHR is Article 25 of the Constitution, which explicitly prohibits prior censorship of printed materials, while Article 10 of the ECHR (freedom of expression) does not formally prohibit preventive measures.

It also happens that lower courts interpret the ECHR in a broader way than the ECtHR.[190] This may sometimes be due to a lack of satisfactory understanding of the case-law of the ECtHR.

5.4. HORIZONTAL APPLICATION OF THE ECHR

While the horizontal application of fundamental rights principles, in the sense of an application to relationships between private parties, may be considered revolutionary at the European level, that concept is not entirely new to the Belgian legal order. The current Article 29 of the Constitution, which guarantees the inviolability of the confidentiality of letters, has been applied by the Belgian

187 See e.g. the criticism by SWENNEN, *supra* n. 146, at pp. 1102 *et seq.*, referring to Const. Ct. 3 March 2011, n° 20/2011, and Const. Ct. 7 July 2011, n° 122/2011, in which the Constitutional Court held some provisions of the Civil Code to be in violation of Art. 22 of the Constitution read in combination with Art. 8 of the ECHR and the judgment of the *Mizzi* v. *Italy*, ECtHR 12 January 2006, appl. no. 17320/10. See in addition ALEN, MUYLLE and VERRIJDT, *supra* n. 137, at pp. 29–31.

188 See e.g. Const. Ct. 26 April 1994, n° 33/94, on the non-applicability of Art. 6 §1 ECHR to a dispute involving a court registrar.

189 Const. Ct. 7 March 2013, n° 29/2013.

190 See e.g. Justice of the Peace Mouscron 12 April 2010, *Revue de jurisprudence de Liège, Mons et Bruxelles* 2010, p. 1120, Justice of the Peace Furnes 30 April 2009, *TGR-TWVR (Tijdschrift voor Gentse en West-Vlaamse Rechtspraak)* 2009, p. 228 and Justice of the Peace Furnes 30 April 2008, *Revue Copropriété et Droit Immobilier* 2009, no. 4, p. 44, where the courts accepted that the right to have a pet fell within the ambit of Art. 8 of the ECtHR *ratione materiae*; Justice of the Peace Tirlemont 2 June 2009, *Revue Copropriété et Droit Immobilier* 2009, no. 4, p. 40 and Justice of the Peace St.-Josse-ten-Noode 20 May 2009, *Revue Copropriété et Droit Immobilier* 2010, no. 2, p. 36, where the courts accepted that the prohibition in the statutes of a co-ownership to place a satellite dish could infringe Article 10 of the ECHR; Justice of the Peace Courtrai 30 November 2009, *Tijdschrift van de Vrederechters* 2002, p. 289, where the court dismissed a request to appoint an administrator over a person's goods, as such an appointment would *de facto* restrict the liberty of that person, in violation of Article 5 §1 ECHR.

courts, including the Court of Cassation, to cases between private parties, long before the theory emerged at the European level.[191]

As to other fundamental rights and freedoms, including the provisions of the ECHR, recent examples of case-law of the Court of Cassation and the Constitutional Court reveal that the horizontal effects of fundamental rights are becoming increasingly accepted. Notwithstanding the lack of competence to rule on disputes between private parties, the case-law of the Constitutional Court is of particular importance in this regard. Indeed, in some recent judgments, the Constitutional Court seems to advance a theory on the foundations of the horizontal effect of anti-discrimination law which could be generalised and applied to fundamental rights in general.[192] In a 2009 judgment the Constitutional Court held that the 'principle of equality and non-discrimination is not a mere principle of good legislation and good administration. It is one of the foundations of a democratic state based on the rule of law'.[193] The Court went on to add that the decisive criterion to find that a private individual is bound by the prohibition of discrimination is not the fact that he has taken any normative action (which a private person obviously cannot), but his 'dominant position, in fact or in law,' which would allow him to violate the rights of others in a discriminatory manner. Thus, according to the Constitutional Court, the principle of equality and non-discrimination applies not only to public authorities, but it also imposes obligations on private individuals, whenever they hold a dominant position. One could deduce from the foregoing a general legitimation of the horizontal effect doctrine. It remains to be seen, however, whether the Court will extend the 'dominant position' criterion to other fundamental rights.

The case-law of the Court of Cassation reveals a more cautious approach. On several occasions the Court of Cassation has applied both constitutional and ECHR rights to private disputes, albeit not in a general or systematic manner.[194] Most cases relate to criminal proceedings, where the Court had to

---

191 See P. LEMMENS and N. VAN LEUVEN, 'Les destinataires des droits constitutionnels', in M. VERDUSSEN and N. BONBLED, eds., *Les droits constitutionnels en Belgique*, Vol. 1 (Brussels, Bruylant 2011) pp. 131 *et seq.* See Cass. 27 February 1913, *Pas.* 1913, I, p. 123, opinion advocate-general C. PHOLIEN; Cass. 12 February 1951, *Pas.* 1951, I, p. 381; Cass. 21 October 2009, *Pas.* 2009, n° 599.

192 LEMMENS and VAN LEUVEN, *supra* n. 191.

193 Const. Ct. 12 February 2009, n° 17/2009.

194 For a comprehensive review, see N. VAN LEUVEN, 'Derdenwerking van mensenrechten in de Belgische rechtsorde' [Third party effect of human rights in the Belgian legal order], in WOUTERS and VAN EECKHOUTTE, eds., *supra* n. 42 at p. 167; V. VAN DER PLANCKE and N. VAN LEUVEN, 'La privatisation du respect de la Convention européenne des droits de l'homme: faut-il reconnaître un effet horizontal généralisé?', in A. SCHAUS, ed., *Entre ombres et lumières: cinquante ans d'application de la Convention européenne des droits de l'homme en Belgique* (Brussels, Bruylant 2008) p. 247. See e.g. Cass. 6 April 1960, *Pas.* 1960, I, p. 915, opinion advocate-general P. Mahaux, on Article 16 of the Constitution (right to property); Cass. 29 September 1967, *Pas.* 1968, I, p. 132 (application of the right of access to a court in a

rule on the validity of evidence gathered by private parties, in light of Article 8 of the ECHR.[195] In a recent case, in which the applicant raised a violation of Article 4 of the ECHR, the Court of Cassation held that a contractual clause that entailed restrictions on a contracting party's right to freely exercise a professional activity (restrictions that went further than those provided by law), was null and void.[196] Although the Court did not explicitly refer to any fundamental right that would guarantee the freedom to exercise a professional activity, it is evident from the applicant's plea that the Court referred to, *inter alia*, Article 4 of the ECHR.

In the case-law of the Court of Cassation, one can distinguish between two separate techniques to give horizontal effect to fundamental rights, including provisions of the ECHR.[197] In some cases, the Court relies on the direct horizontal effect (*unmittelbare Drittwirkung*) of fundamental rights. This is the case when it derives legal effects from a fundamental right, which are directly applicable to private law relationships, without any need for an implementing measure. By way of example, reference can made to a 1981 judgment, in which the Court ruled that a private entity's restrictions on the freedom of association, beyond the limits of the restrictions set by the Act of 24 May 1921 guaranteeing freedom of association, could constitute a violation of this freedom.[198] In other cases, the Court reverts to the indirect horizontal effect of fundamental rights (*mittelbare Drittwirkung*). This is the case when it applies a specific fundamental right through the traditional channels of private law, e.g. by interpreting and applying private law provisions in light of these fundamental rights. An example is the above-mentioned judgment of the Court of Cassation, in which it was held that any contractual clause that, beyond the restrictions provided by law, restricted the freedom to exercise a professional activity had an illegal cause and therefore was null and void.[199]

Given the lack of statements of principle on the part of the Court of Cassation, lower courts do not have any clear guidelines on how to apply fundamental rights provisions, including the ECHR, to disputes between private parties.[200] Some lower courts, for example, consider that fundamental rights do not apply to

---

contractual relationship between a company and its suppliers); Cass. 27 April 1981, *Pas.* 1981, I, p. 964 (application of the right to freedom of association as protected under Article 27 of the Constitution between an employer and his employees).

195 Cass. 9 January 2001, *Pas.* 2001, n° 7; Cass. 27 February 2001, *Pas.* 2001, n° 117; Cass. 2 March 2005, *Pas.* 2005, n° 130, opinion advocate-general D. Vandermeersch. See also Cass. 9 June 2004, *Pas.* 2004, n° 314.

196 Cass. 29 September 2008, *Pas.* 2008, n° 511, opinion advocate-general J.M. Genicot.

197 See LEMMENS and VAN LEUVEN, *supra* n. 191, at p. 141.

198 Cass. 27 April 1981, *Pas.* 1981, I, p. 964.

199 Cass. 29 September 2008, *supra* n. 196

200 See LEMMENS and VAN LEUVEN, *supra* n. 191, at p. 142.

private disputes at all.[201] Other lower courts revert to the direct[202] or indirect[203] horizontal effect of ECHR provisions. In legal doctrine, there seems to be a clear preference for the indirect horizontal effects of fundamental rights.[204] By way of example of cases accepting a horizontal effect of provisions of the ECHR, the following cases can be mentioned:[205]

- Article 3 of the ECHR has been applied to disputes between private individuals on the supply of electricity or gas. Thus, the Court of Appeal of Brussels ruled that the discontinuation of supply of electricity and gas could affect human dignity, notwithstanding the fact that human dignity did not require free delivery.[206]
- As to Article 6 of the ECHR, the Brussels Court of Appeal ruled that a contractual clause that imposed an obligation to settle matters before an arbitrator, and which therefore implied a restriction on the right of access to a court, amounted to a violation of said provision.[207]
- A stalemate in the general assembly of a homeowner association could not deprive an individual co-owner from his fundamental right to lodge a claim under Article 6 of the ECHR.[208]
- The right to legal assistance, as protected under Article 6 of the ECHR, has been applied to a legal insurance.[209]

---

201 See case-law cited in VAN DER PLANCKE and VAN LEUVEN, *supra* n. 194, at pp. 247 ff.

202 *Ibid.*

203 *Ibid.*

204 K. RIMANQUE, 'Nationale bescherming van grondrechten' [National protection of fundamental rights], *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (1981) p. 41; K. RIMANQUE and P. PEETERS, 'De toepasselijkheid van grondrechten in de betrekkingen tussen private personen – algemene probleemstelling' [The appliciability of fundamental rights in the relationships between private persons – general problem statement], in K. RIMANQUE, ed., *De toepasselijkheid van de grondrechten in private verhoudingen* [The applicability of fundamental rights in private relations] (Antwerp, Kluwer 1982) p. 19; E. DIRIX, 'Grondrechten en overeenkomsten' [Fundamental rights and contracts], in K. RIMANQUE, ed., *De toepasselijkheid van de grondrechten in private verhoudingen* [The applicability of fundamental rights in private relations] (Antwerp, Kluwer 1982) p. 49.

205 For a review of relevant case-law, see VAN LEUVEN, *supra* n. 194 at p. 167; VAN DER PLANCKE and VAN LEUVEN, *supra* n. 194, at pp. 247ff; P. BEKAERT, 'De toepassing van het EVRM door de Belgische rechtbanken op vlak van strafrecht en burgerlijk recht' [The application of the ECHR by the Belgian courts in the field of criminal and private law], in *Recht in beweging, 13de VRG Alumnidag 2006* [Law on the move, 13th VRG Alumni Day 2006] (Antwerp, Maklu 2006) pp. 266–298.

206 See e.g. Court of Appeal Liège 30 January 1985, *Journal des tribunaux* 1985, p. 526; Court of Appeal Brussels 25 February 1988, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 1989, p. 1132.

207 Court of Appeal Brussels 4 October 1993, *Journal des procès* 1993 (247), p. 25.

208 Justice of the Peace Malines 23 January 2013, *Revue Copropriété et Droit Immobilier* 2013, no. 3, p. 56.

209 Justice of the Peace Marche-en-Famenne 19 February 1991, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 1991, p. 478.

- A violation of Article 8 of the ECHR has been raised in a case relating to a journalist's right to freedom of expression and the right of private individuals to privacy.[210]
- A private contract with the purpose of secretly photographing individuals was held to be incompatible with Article 8 of the ECHR and thus could not serve as a basis for a private detective to recover his salary.[211]
- In trade union disputes Article 11 of the ECHR has sometimes been relied on.[212]

Since disputes relating to the legality of an administrative act concern the vertical relationship between an individual and the State, the question about the horizontal effects of fundamental rights principles does, in principle, not arise before the Council of State and other administrative jurisdictions.

Finally, it should be noted that the federal legislature also seems to accept the horizontal effect of most fundamental rights. That is at least what could be concluded from a 2007 report of a parliamentary working group charged with studying possible amendments to Title II of the Constitution. That working group was in favour of inserting a 'transversal clause' into the Constitution. Referring to the three traditional obligations of the State with respect to fundamental rights (to respect, to realise and to protect), it suggested laying down explicitly in the Constitution the doctrine of positive obligations and of horizontal effect.[213] However, no further action has been taken on this issue.

5.5. BELGIAN COURTS AND THE MARGIN OF APPRECIATION DOCTRINE

While the margin of appreciation doctrine is used by the ECtHR in the context of its relationship with all national authorities, including domestic courts, that notion is sometimes also relied on by the Belgian courts in the context of their relationship with non-judicial public authorities. The margin of appreciation is then used as an aspect of the principle of separation of powers, comparable to the notion of 'discretionary power' in administrative law.

Where the margin of appreciation is referred to, it is usually part of the 'necessity' or proportionality test. The Constitutional Court, for instance, accepts that the legislature enjoys a margin of appreciation, even a wide one, in certain areas. This does not, however, rule out the possibility that a legislative act may be

---

210 See e.g. Court of First Instance Brussels 21 November 1990, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 1991, p. 24.

211 Justice of the Peace Roeselare 24 June 1988, *Tijdschrift van de Vrederechters* 1988, p. 319.

212 See e.g. Court of Appeal Brussels 22 March 2010, *Sociaalrechtelijke Kronieken* 2011, p. 71.

213 *Parl. Doc.*, House of Representatives, 2006–2007, no. 51–2304/002, p. 4.

disproportional and amount to an unjustified interference with a right or freedom if the measure imposed by that act does not strike a fair balance between the demands of the general interest and the requirements to protect that right.[214] On some occasions, the Court links the existence of a wide margin of appreciation for the legislature to a corresponding limitation of the scope of its own review. In particular, since the 'general interest' is a broad and vague notion, the legislature enjoys a wide margin of appreciation to carry out an economic and social policy. The Court accordingly considers that it has to respect the way the legislature implements the requirements of the public interest or the general interest, unless the legislature's judgment is manifestly without reasonable ground.[215]

There does not seem to be any (recent) case-law of the Court of Cassation that explicitly refers to the margin of appreciation doctrine of the ECtHR.

Not many cases have come before the Administrative Litigation Section of the Council of State that refer to any margin of appreciation for the authorities. This can perhaps be explained by the fact that the Council of State is very much used to the term 'discretionary power' and similar expressions, which have sometimes been interpreted by the Council in the same manner as the margin of appreciation as explained by the ECtHR.[216]

An interesting example of the use of the term 'margin of appreciation' in the sense of the ECtHR's case-law, i.e. relating to the subsidiary role of the ECHR control system, can be found in a number of opinions of the Legislation Section of the Council of State. These opinions concern draft legislation or regulation aimed at restricting the wearing of religious symbols in the public sphere. In these opinions the Council of State noted that according to the case-law of the ECtHR the states enjoy a wide margin of appreciation in this area. As a result,

214 See e.g. Const. Ct. 22 June 2005, n° 107/2005, and Const. Ct. 24 April 2008, n° 72/2008 (wide margin of appreciation in tax related matters, referring *inter alia* to *Gasus Dosier- und Fördertechnik GmbH* v. *Netherlands*, ECtHR 23 February 1995, appl. no. 15375/89, *S.A. Dangeville* v. *France*, ECtHR 16 April 2002, appl. no. 36677/97, *Buffalo srl* v. *Italy*, ECtHR 3 July 2003, appl. no. 38746/97 and *M.A. and E. Imbert de Tremiolles* v. *France*, ECtHR 4 January 2008, appl. nos. 25834/05 and 27815/05); Const. Ct. 30 March 2010, n° 32/2010 (wide margin of appreciation again in tax related matters, referring to *Dukmedjian* v. *France*, ECtHR 31 January 2006, appl. no. 60495/00, and *Tardieu de Maleissye and Others* v. *France*, ECtHR 15 December 2009 (dec.), appl. no. 51854/07); Const. Ct. 22 October 2008, n° 139/2008 (wide margin of appreciation in social, economic and tax measures, referring to *Former King of Greece and Others* v. *Greece*, ECtHR 23 November 2000, appl. no. 25701/94).

215 See Const. Ct. 3 December 2008, n° 173/2008, and Const. Ct. 31 May 2012, n° 71/2012 (referring to *James* v. *United Kingdom*, ECtHR 21 February 1986, appl. no. 77033/01, *Mellacher* v. *Austria*, ECtHR 19 December 1989, appl. nos. 10522/83, 11011/84 and 11070/84, *Former King of Greece and Others* v. *Greece*, ECtHR 23 November 2000, appl. no. 25701/94, *Bäck* v. *Finland*, ECtHR 20 July 2004, appl. no. 37598/97, *Hutten-Czapska* v. *Poland*, ECtHR 22 February 2005, appl. no. 35014/97, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd* v. *United Kingdom*, ECtHR 30 August 2007, appl. no. 44302/02, and *Gauchin* v. *France*, ECtHR 19 June 2008, appl. no. 7801/03).

216 Council of State 17 November 2008, n° 187,998.

the Council focused on the constitutional provisions rather than on the ECHR.[217]

5.6. BELGIAN COURTS AND THE USE OF GENERAL STANDARDS DEVELOPED BY THE ECtHR

The extent to which the Belgian courts apply standards developed by the ECtHR in its interpretation and application of the ECHR is to a considerable degree determined by the specificities of the Belgian constitutional legal order.

Firstly, the competence of reviewing the compatibility of legislative acts with the rights and freedoms guaranteed in the Constitution lies exclusively with the Constitutional Court. The Constitutional Court reads the constitutional provisions in combination with analogous provisions of the ECHR, paying particular attention to the case-law of the ECtHR and the standards developed therein. When deciding on the compatibility of a legislative act with a fundamental right, the Constitutional Court therefore follows a similar review scheme as the one applied by the ECtHR. An interference with a fundamental right, for instance, must in general be based on a sufficiently accessible and precise law, be necessary in a democratic society, correspond to a pressing social need and be proportionate to the aims pursued by the legislature.[218] The Constitutional Court thereby takes into account the specific standards developed by the ECtHR on specific topics, such as the right to property[219] or the right to a fair trial.[220] It also applies the ECtHR standards with respect to states' positive obligations under the ECHR.[221]

Secondly, the Constitution requires a statutory basis for restrictions of certain rights and freedoms. In that case, and in accordance with the principle that the broader protection prevails, a restriction of that right or freedom must have the formal basis as required by the Constitution and in addition meet the more substantive requirements laid down in the ECHR.[222] The right to respect for private life, for instance, is guaranteed by both Article 22 of the Constitution and Article 8 of the ECHR. An interference with the right to respect for private life

---

217 See e.g. Council of State, Legislation Section, opinion of 20 April 2010, n° 48,022/AG, *Parl. Doc.*, Wall. Parl. 2009–10, n° 99/2, discussed in Council of State, *Jaarverslag 2009–2010*, available at <www.raadvst-consetat.be/?lang=nl&page=about_annualreports>. See in addition, Council of State, Administrative Litigation Section, 21 December 2010, n° 210,000, referring to this opinion.

218 Const. Ct. 6 December 2012, n° 145/2012. Although the precise wording may vary from one judgment to the other, the Constitutional Court ensures that the qualitative requirements laid down in the case-law of the ECtHR are respected.

219 See e.g. Const. Ct 30 June 2004, n° 115/2004; Const. Ct. 14 October 2010, n° 113/2010.

220 See e.g. Const. Ct. 16 December 2010, n° 148/2010.

221 See e.g. Const. Ct. 12 July 2012, n° 93/2012.

222 Const. Ct. 21 December 2004, n° 202/2004.

under Belgian law is therefore justified only if it is based on a statutory provision that is foreseeable,[223] if it pursues a legitimate aim and if it is necessary in order to achieve that aim, which entails a reasonable balance between the consequences of the interference for the person concerned and the general interests of society.[224]

Given that the ordinary and administrative courts may not deviate from a preliminary ruling of the Constitutional Court and that judgments of the ECtHR in the Belgian legal order are endowed with the authority of *res interpretata*, standards developed by the ECtHR are taken into account by both the Court of Cassation[225] and the Council of State,[226] including the standards developed by the ECtHR for specific topics, such as the right to property.[227]

5.7. BELGIAN COURTS AND SOME OF THE SPECIFIC INTERPRETATIVE TECHNIQUES ADOPTED BY THE ECtHR

As indicated above, Belgian courts try to interpret the ECHR in such a way that their interpretation is in line with the ECtHR's interpretation. They do not seem to venture themselves in the direction of an evolutive interpretation, and do not seem to search for any consensus among the Member States of the Council of Europe. The advantage of this judicial strategy is obvious – at least from the domestic courts' perspective. Indeed, instead of taking the risk of by themselves giving a new interpretation to legal provisions, they prefer to await new developments at the European level, and then to introduce them domestically. Even where a Belgian court would adopt an evolutive interpretation of the ECHR, it is not likely that this would emerge from the reasoning of its decision. The style of judgments is such that the hesitations of the judges, or the techniques used to come to a given interpretation, are generally not disclosed. Although this arguably could be different with respect to the ECHR, no relevant examples were found.

223 Const. Ct. 13 January 2011, n° 1/2011.

224 See e.g. Const. Ct. 18 March 2010, n° 29/2010.

225 See e.g. Cass. 27 September 2012, *Pas.* 2012, n° 495, opinion advocate-general A. Henkes (on the requirements of a "necessity in a democratic society").

226 See e.g. Council of State 27 March 2013 (gen. ass. Adm. Litig. Section), n° 223,042 (on the lessons to be drawn from *Lautsi* v. *Italy*, ECtHR (GC) 18 March 2011, appl. no. 30814/06).

227 See e.g. Cass. 4 December 2008, *Pas.* 2008, n° 696; Council of State 29 April 2008, n° 182,593.

6. LEGITIMACY OF THE ECtHR AS AN ISSUE IN PUBLIC DEBATE?

In recent times, there has been some discussion in Belgium, mainly in Flanders, about the role of the ECtHR. Criticism of the Court is voiced by scholars such as Marc Bossuyt, the President of the Constitutional Court,[228] and Matthias Storme, a scholar who declares himself a 'conservative'.[229] However, this discourse does not seem to have been picked up by the general media. In fact, the media pay relatively little attention to the functioning of the ECtHR. What we can ascertain is that they will report particular judgments – mostly concerning Belgium – on controversial issues.[230] They do not systematically follow or criticise the ECtHR.

The ECtHR is not the object of a wide political debate either, although politicians who do not agree with the Court's rulings may occasionally express their dissatisfaction. A more general reaction came from the extreme-right party Vlaams Belang, which tabled draft resolutions in the federal House of Representatives and the Senate aimed at preventing the ECtHR from turning itself into a *gouvernement des juges*. The party also would like to see the ECtHR

228 See, *inter alia*, M. Bossuyt, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant* (Brussels, Bruylant 2010); M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', *Inter-American and European Human Rights Journal* 2010, pp. 3–48; M. Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', *European Constitutional Law Review* 2012, pp. 203–245. The author criticises in particular the case-law of the ECtHR with respect to rejected asylum seekers, which he describes as a slippery slope. The opinion of Bossuyt received some media attention. See J. De Wit, 'Bossuyt: 'Mensenrechtenhof gaat boekje te buiten in asielzaken' [Human Rights Court transgresses powers in asylum cases], in *Gazet van Antwerpen* 11 May 2010, available at <www.gva.be/nieuws/experts/johndewit/bossuyt-mensenrechtenhof-gaat-boekje-te-buiten.aspx>. Bossuyt also criticised the expansion by the ECtHR of the scope of the ECHR so as to include social rights: M. Bossuyt, 'Should the Strasbourg Court Exercise More Self-restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations', *Human Rights Law Journal* 2007, pp. 321–332.

229 See, e.g., H. Rijkers, *Discrimineren is een Mensenrecht. Interview met Matthias Storme* [To discriminate is a human right. Interview with Matthias Storme], available at <www.storme.be/IntStormeKN21012005uitgebreid.pdf>.

230 For example, a recent case in which Belgium was convicted for the degrading treatment of internees (*L.B. v. Belgium*, ECtHR 2 October 2012, appl. no. 22831/08) received a lot of attention in major Belgian newspapers. See for instance for Flanders M. Eeckhaut, 'België veroordeeld voor behandeling geïnterneerden' [Belgium convicted for treatment of internees], in *De Standaard* 4 October 2012, available at <www.standaard.be/artikel/detail.aspx?artikeli d=DMF20121003_00321546&word=Hof+Rechten+Mens>. Less attention was given to this case in the French-speaking part of Belgium. See for instance X., 'Des détenus réclament 1,5 million d'euros à la Justice', *Le Vif Express* 8 October 2012, available at <www.levif.be/info/actualite/belgique/des-detenus-reclament-1-5-million-d-euros-a-la-justice/article-4000189650663.htm#>.

stop 'broadening' the scope of the ECHR.[231] These resolutions have not been discussed, however.

Where the ECtHR is criticised, the criticism pertains essentially to two issues. In the first place – and this is essentially Bossuyt's criticism – it is stressed that the ECtHR has a tendency to enlarge the scope of the ECHR. Secondly, there is an argument based on a lack of respect for the subsidiarity principle. It is said that the ECtHR goes too far into purely 'domestic' matters, in violation of both its mission (which is essentially of a subsidiary nature) and national sovereignty. The argument here is that the judges in Strasbourg tend to behave as legislators, without enjoying legitimacy.[232]

The criticism, however limited its impact may be, is a fairly new development. Traditionally, the ECtHR has been viewed positively in Belgium. Nevertheless, this positive attitude may have somewhat changed. There are perhaps two elements that can explain this development. In the first place, there is the criticism already referred to, by some scholars like Bossuyt and Storme. Most probably, that criticism gained visibility after the debate initiated by Baudet, Zwart and others in the Dutch general media. These views seem to be part of a wider European debate on the future of 'European integration', the concept of national sovereignty, the importance of subsidiarity and the margin of appreciation of states in their relation to international supervisory bodies. Secondly, at the same time, the ECtHR also delivered some judgments with far-reaching consequences or which at least had a serious impact on the Belgian legal order. Relevant examples here are the judgments in *Salduz* v. *Turkey*[233] and *Taxquet* v. *Belgium*[234] (even if the Grand Chamber judgment in the latter case softened the impact of the Chamber's judgment). These judgments reminded the public at large of the potentially significant impact of the Strasbourg Court's decisions.[235]

---

231 Draft resolution concerning the transgression of jurisdiction by the European Court of Human Rights, *Parl. Doc.*, House of Repres. 2011–12, n° 53–1949/1; draft resolution concerning the transgression of jurisdiction by the European Court of Human Rights, *Parl. Doc.*, Senate 2011–12, n° 5–1448/1.

232 See, apart from the draft resolutions of the 'Vlaams Belang' mentioned in note 231, J. De Wit, 'Steeds meer kritiek op het Mensenrechtenhof in Straatsburg' in *Gazet van Antwerpen*, 1 August 2012, available at <www.gva.be/nieuws/experts/johndewit/aid1216391/steeds-meer-kritiek-op-mensenrechtenhof-in-straatsburg.aspx>.

233 *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02. The *Salduz* judgment had a vast influence on Belgian criminal procedure. As mentioned above, it led to a number of judgments of the Court of Cassation and later to an amendment of the Code of Criminal Procedure. The effects of the *Salduz* judgment received a lot of media attention.

234 *Taxquet* v. *Belgium* ECtHR (GC) 16 November 2010, appl. no. 926/05. Again, this judgment led to a number of judgments of the Court of Cassation (see e.g. Cass. 3 May 2011, *Pas.* 2011, n° 292) and to an amendment of the Code of Criminal Procedure.

235 These developments are in reality not very new. In the past the ECtHR also received a lot of attention for some of its judgments, as in the cases of *Marckx* v. *Belgium*, ECtHR 13 June 1979, appl. no. 6833/74 (and its impact on family law) and *Le Compte, Van Leuven and De Meyere* v.

As indicated above, the courts traditionally comply closely with the case-law of the ECtHR.[236] It does not appear that the recent critique on the ECtHR has changed this attitude. There is indeed no evidence that Belgian courts comply less with the ECHR than before the open criticism of the ECtHR started.

Moreover, the official policy of Belgium, as expressed by the Ministers of Foreign Affairs and Justice, is to comply with its obligations under the ECHR, and to support the ECtHR. This was confirmed, for instance, when the adaptation of Belgian law to the ECtHR's *Salduz* judgment was discussed in Parliament. While some members of Parliament voiced critical comments about the ECtHR, the Minister of Justice stated unambiguously that the ECtHR should be able to decide cases completely independently, and that its judgments had to be given full effect, even if there could be a discussion on what this meant in practice. Notwithstanding the far-reaching consequences of the *Salduz* judgment, this was not a reason to question the ECtHR's authority.[237] It should also be noted that after the Brighton Conference on the future of the ECtHR (April 2012), the Minister of Justice declared in Parliament that she was satisfied with the outcome of the Conference, and mentioned some points of the Brighton Declaration on which the Belgian government had made efforts to soften the text as it had been submitted by the host government.[238] The fact that the Belgian government recently decided to extradite a person suspected of being involved in the preparation of terrorist attacks to the United States, despite a request by the ECtHR not to do so until it had had the opportunity to examine his application, came as a surprise, as such a decision was hardly in line with the stated policy.[239]

7. CONCLUSION

It seems to us that Belgian courts, all in all, seem to comply with the ECtHR's case-law without much hesitation. It is clear that the courts refer very frequently to the ECHR. This is obvious for the Constitutional Court, which considers the constitutional rights and the analogous rights of the ECHR as a whole. In fact, the ECHR plays a key role in the interpretation of fundamental rights by the Constitutional Court. The situation may be slightly different for the ordinary

Belgium, ECtHR 23 June 1981, appl. nos. 6878/75 and 7238/75 (and its impact on disciplinary law).

236 This is evident as far as the Constitutional Court is concerned. See ALEN, MUYLLE and VERRIJDT, *supra* n. 137, at pp. 19–33 and 44.

237 Declaration by the Minister of Justice, report of the Commission of Justice, *Parl. Doc.*, Senate, 2010–11, n° 5–663/4, p. 17.

238 Declaration by Ms Turtelboom, Minister of Justice, *Annales*, Senate, 2011–12, 26 April 2012, n° 5–57, pp. 31–32.

239 Extradition of Mr Trabelsi on 3 October 2013. The event received a lot of coverage in the media. It was also the object of a parliamentary question (oral question by M. MAINGAIN, *Annales*, House of Representatives, 2013–14, 10 October 2013, n° CRIV 53 PLEN 160, pp.31–34).

courts and the administrative courts (mainly the Council of State). It is important, though, to understand that attorneys, when developing a legal argument, tend to base it on as many provisions as possible. Here again, constitutional provisions and provisions of the ECHR are often invoked together. The case-law shows that there is a clear influence of the ECHR and the ECtHR's case-law on the interpretation of fundamental rights.

The current status of the ECHR in the domestic legal order is the result of a number of developments in the Belgian constitutional system over the last forty years.

In the first place, it should be recalled that the Court of Cassation decided in 1971 – albeit within the field of EU law – that self-executing provisions of international law had priority over national legislation. Since then, the priority of international law is considered to be a general principle of Belgian law. Pursuant to that principle, ECHR provisions have on many occasions received priority over domestic legislation. Although rather controversial at that time, the principle is one of the key elements of Belgian law.

For roughly twenty years since 1971, the ECHR was in practice the main source of fundamental rights law, as there was no constitutional review of legislative acts and there was no Constitutional Court. Before the creation of the Constitutional Court, constitutional rights had gone into a sort of 'dormant existence'. Fundamental rights issues were dealt with almost exclusively from an ECHR perspective. The ECHR being an international treaty, the Belgian courts could directly review legislative and administrative acts and judgments of lower courts for compatibility with the ECHR. As far as constitutional review was concerned, only administrative acts and judgments could be the object thereof, and even then there was some reluctance to do so, since such a review could be considered a disguised form of constitutional review of the underlying legislation.

The creation of the Constitutional Court, including the introduction of the preliminary ruling system, made legislation subject to a constitutionality review. From that moment on did national constitutional rights (again) play an important role in the Belgian legal system. Concepts such as the 'constitutionalisation of private law' illustrate this relatively new phenomenon. The constitutional basis for a Constitutional Court was created in 1980; the Court became operational in 1984 and in 1989 it became competent to review legislative acts in the light of certain constitutional provisions guaranteeing fundamental rights. It goes without saying that the creation of such a court was a paradigm shift in the Belgian legal system, as the idea of the 'sovereignty of the law' was abandoned. The creation of the Constitutional Court drew attention (back) to the Constitution. However, since the Constitutional Court considers that the constitutional provisions on fundamental freedoms have to be read in the light of the ECHR, the ECHR did not lose any of its relevance.

On the contrary, the ECHR became 'constitutionalised', in the sense of incorporated in the Belgian constitutional design.

In theory, there could have been notable differences between the interpretation of the national constitutional rights and the rights of the ECHR. In practice, there are no serious conflicts. This is due mainly to a dual mechanism: on the one hand, the Constitutional Court reads the Constitution and the ECHR as a whole, and on the other hand, there is a dialogue between the Constitutional Court and the other courts through the preliminary ruling system.

One can argue that the Belgian constitutional model is based on the idea that international law should prevail over national legislation, as well as on the concept of constitutional review of legislative (and administrative) action. In such a model, the ECHR and the case-law of the ECtHR have been integrated without major difficulties into domestic law and continue to influence the development of Belgian law and legal practice.

CHAPTER 4
FRANCE

Céline LAGEOT

1. INTRODUCTION: A BRIEF CHARACTERISATION OF THE FRENCH CONSTITUTIONAL SYSTEM

1.1. SEPARATION AND BALANCE OF POWERS

After the events in Algeria – more precisely the beginning of the civil war in November 1954 in the Aurès – and the subsequent collapse of the Fourth Republic (1946–1958), France adopted a new Constitution in 1958 and asked General de Gaulle to become the Head of State. The Constitution of the Fifth Republic, which is a written constitution, explicitly promoted the principle of separation of powers between the three branches of the State, namely the executive power (the Head of State and the Government), the legislative power (Parliament) and the judicial authority (Title VIII).[1] In fact, the system of separation of powers (*trias politica*) has prevailed in France since the adoption of the Revolutionary Act of 16 and 24 August 1790 on the Separation of Administrative and Judiciary Bodies. Nevertheless, the balance of power has always been strongly in favour of the executive, although the system is clearly also based on the principles of a parliamentary regime.[2] The French Constitution was amended in 2008 to reduce some of the very important powers granted by the architects of the Constitution to the executive power.[3] In

1 It must be mentioned that the Constitution did not set up the 'judicial power' in the same way as it sets up the two other powers, i.e. the 'executive power' and the 'legislative power'. Title VIII only sets up a 'judicial authority', not a 'judicial power'.

2 The political responsibility of the government is set up in Article 20 of the Constitution.

3 Constitutional Revision of 23 July 2008, which has modified some provisions of the Constitution; Constitutional Law no. 2008-724 of 23 July 2008, <www.legifrance.gouv.fr/affichTexte.do;jsessionid=06388990C38517F5937BDB4153673822.tpdjo11v_2?cidTexte=JORFTEXT000019237256&dateTexte=&oldAction=rechJO&categorieLien=id>, <www.textes.justice.gouv.fr/lois-et-ordonnances-10180/loi-constitutionnelle-de-modernisation-des-institutions-15626.html and www.conseil-constitutionnel.fr/conseilconstitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>.

essence, however, the existing imbalance was not reversed by the changes of July 2008.

The executive power is exercised by both the Head of State (the President of the Republic) and the Prime Minister, who each exercises specifically allocated powers.[4] Until 1962, the President was elected every seven years by an assembly of so-called 'greater electors', who were mainly local elected officials who came together in a 'great assembly' to cast their votes. Charles de Gaulle changed the type of election in order to reinforce the power of the Head of State as a prominent figure of the regime.[5] Since this major constitutional reform, the President has been directly elected by the people. A major impact of this reform was that it led to the so-called 'majority fact': the coincidence of majorities elected for the executive and the legislature. The 'majority fact' can occur because, immediately after the election of the President, French electors are also asked to vote for the deputies of the National Assembly (see below). It is therefore quite logical that the electors would vote for the same political party for the National Assembly as they did in the presidential elections.

Until 2000, the mandate of the President was for seven years. Since the Constitutional Revision of 24 September 2000, the term has been reduced to five years, in order to avoid the risk of a 'cohabitation' or non-coincidence of the majorities in the executive and the legislature. France has known three such periods of *cohabitation*, from 1986 to 1988, from 1993 to 1995 and from 1997 to 2002. During these *cohabitation* periods, the President was politically opposed to the Prime Minister, who was himself supported by a majority of the National Assembly. The Constitutional Revision of 24 September 2000 reduces the risk of such *cohabitation* as the mandates of the President and the deputies now coincide (five years each) and because the election of the President generally leads to new election of deputies, of whom the majority are in favour of the Head of State. Another consequence of the reduction of the presidential mandate to five years is the intensification of presidential primacy, which is one of the explanations for the still existing imbalance between the powers of government.

When the President of the Republic enters office, the first thing he or she has to do is to appoint the Prime Minister. The Head of State is not bound by anyone for this appointment; the Constitution refers to 'proper power' or *pouvoir propre* (Article 8 para. 1). *De facto* this means that the Prime Minister is subordinate to the President.

Beyond the power to choose the Prime Minister, the President also has, as 'proper powers', the capacity to dissolve the National Assembly (Article 12), to exercise their full powers in emergency situations (Article 16), to send messages to Parliament (Article 18), to organise legislative referenda (Articles 11 and

4 See Titles II and III of the Constitution.

5 Constitutional Act of 6 November 1962, <www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068219>.

88–5), to nominate three members of the Constitutional Council (one of whom is its President) (Article 56) and to refer ordinary acts and international treaties to this Council for judicial review of their constitutionality (Articles 61 and 54).

Despite these strong presidential powers, which are common to presidential systems, the French system also meets the main criterion of a parliamentary regime: the Prime Minister is, as Head of Government, politically accountable to the National Assembly, which can dismiss the Prime Minister and the entire Government. However, the conditions of the motion of censure are so strict in the French Constitution that only one Government has been dismissed by the National Assembly, on 5 October 1962. As mentioned, therefore, the balance definitely tips in the advantage of the executive power.

The legislative power is exercised by a Parliament composed of two houses, the National Assembly and the Senate. Members of the National Assembly (deputies or *députés*) are directly elected by the citizens for five years, whereas members of the Senate (*sénateurs*) are elected for six years by a board of local representatives.[6] The two houses are not equal in terms of representation or powers: the National Assembly represents the people, while the Senate represents the local communities. The National Assembly has more power than the Senate in general, in particular to expand, amend and improve parliamentary acts, because the Government can give the final say to the Assembly in case of disagreement between the two houses of Parliament. Moreover, as mentioned previously, theoretically the Assembly can dismiss the Government. The only real power which remains in the Senate's hands is the power of veto, which it can use during the procedure of revision of the Constitution.

All this makes the French regime quite singular, a very odd mixture of parliamentarian and presidential systems. The most recent constitutional revision of 23 July 2008 has not changed that.

1.2. UNITARINESS AND DECENTRALISATION

Thanks to Napoleon I, France has long been a unitary state and a highly centralised country with elements of de-concentration. From 1980 onwards, however, the country started to change this tradition to become decentralised. As a result, according to the Constitution, French public administration is structured between, on one hand, a central administration with de-concentrated bodies and, on the other hand, a decentralised administration. It was under the presidency of François Mitterrand that local democracy, in terms of autonomy of competencies and finances, became real. The 2 March 1982 Act remains one of

6 An organic law of 30 July 2003 reduced the mandate of the Senators from nine to six years; see <www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070239&idArticle=LEGIARTI000006353647&dateTexte=20131010>.

the most important legislative measures of the first mandate of President Mitterrand. From then on, the *communes*, *départements* and regions, together commonly called local bodies (*collectivités locales*) or territorial communities (*collectivités territoriales*), have received proper competences and greater autonomy in areas such as local finance. The *communes* are given charge of proximity actions (*actions de proximité*), the *départments* take on the social actions (such as the so-called 'personalised social assistance measures' or MASP), and the regions are responsible for the economic ones (such as guarantee schemes and business development services). All local measures are administrative and executive in nature.

In 2003, a constitutional revision, largely supported by former Prime Minister Jean-Pierre Raffarin, consolidated the 1982 Act on Decentralisation. At the level of the *collectivités locales* and under certain conditions, the Act introduced the referendum, the right to petition and greater autonomy for public bodies, without, however, providing for any supplementary financial means. Local finances were finally dealt with in a specific statute in a constitutional revision of 29 March 2003.[7] As a result of these revisions, the principle of autonomy of local bodies is now stated in the Constitution for every local and regional level.

In 2010, another revision, promoted by President Nicolas Sarkozy, reinforced decentralisation in France. The 2010 Act on Decentralisation aims at the simplification of all territorial levels, a reduction of their numbers, and the clarification of competences and financial means. General Councillors and Regional Councillors have been replaced by new Territorial Councillors, who are elected for six years by majority vote and who sit on both General and Regional Councils.[8] This revision has proven to be insufficient, however, to really simplify the very complex administrative organisation of France. Another project is currently being discussed by the President, François Hollande, and his Prime Minister, Jean-Marc Ayrault.

1.3. ORGANISATION OF THE JUDICIAL POWER

The judicial power[9] is exercised by the courts of law, courts of first instance, courts of appeal and supreme courts. France has had a dual judicial system ever since the Revolutionary Act of 1790 on the separation of administrative and

7 Constitutional revision of 29 March 2003, <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000601882&dateTexte=&categorieLien=id>.

8 The reforms of 16 December 2010 had also a political, less neutral target: to reduce the power of local opposition for the right wing; see <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023239624&dateTexte=&categorieLien=id>.

9 Note that it is not mentioned as such in the French Constitution, but only under the reference of 'Judicial Authority', as mentioned before.

judicial bodies. On one hand, there is the administrative organisation of justice, with Administrative Tribunals (*Tribunaux administratifs*, TA) as courts of first instance, Administrative Courts of Appeal (*Cours d'appel administratives*, CAA), and the highest administrative court, the Council of State (*Conseil d'Etat*, CE). On the other hand, there is the 'judicial' administration of justice, which has the same structure: there are tribunals of first instance, appeal courts and a court of cassation (the *Cour de cassation*, CCass).

The judiciary is divided into a civil and a criminal division. In the civil division, the first instance is represented by the High Tribunal of Instance (*Tribunal de grande instance*, TGI) or Tribunal of Instance (*Tribunal d'instance*, TI) for minor cases. In the criminal division it is necessary to determine whether the offence is a minor one (*contravention*), an indictable offence (*délit*), or a crime (*crime*). In the first case, the Police Tribunal (*Tribunal de police*) is competent, in the second case it is the Correctional Tribunal (*Tribunal correctionnel*), and in the third case it is the Assizes Court (*Cour d'assises*), which is a court based on laymen's judgments. At the upper levels, there are civil and criminal divisions for both the Appeal Courts and the Court of Cassation. It was only in 2000, however, that the Appeal Courts became competent to rule on an appeal for the Assizes Courts. For a long time, the thought held sway that verdicts given by citizens could not be appealed.

Judicial review of administrative decisions has a long tradition in France, but was also confronted at times with challenges. The *Conseil d'Etat* was created by the political regime named the Consulate in 1799;[10] Napoleon Bonaparte set up the very new administrative institution, which, at first, he gave only consultative powers. It may be almost surprising that the Revolutionaries did not think of such an institution earlier. Seemingly they had infinite trust in the Administration and they did not want any judge to control public bodies. Furthermore, in each French department, the *28 pluviose an VIII* Act created a prefectural council. The prefectural council was competent at first instance for an application for judicial review, the 'remedy for abuse of power' (*recours pour excès de pouvoir*).[11] It was also an appeal institution for the purpose of challenging the decisions taken by the ministers or the decisions provided by the prefectural council. It was finally a supreme court for all decisions given by such jurisdictions.

In 1953, by Order of 30 September, the old system was revised to establish a system of administrative tribunals (*Tribunals administratifs*, TA). The *Conseil d'Etat* then won its independence from the executive power and became a proper court in its own right. In fact, the judicial competence of the *Conseil d'Etat* has been subject to three major reforms. Firstly, after the end of the Second Empire, it received the power to judge by itself and absolutely, meaning that the Head of

10 Constitution of 22 frimaire An VIII.

11 Its direct competence for such a remedy stems from the Act of 7–14 October 1790.

State had no longer the power of veto on its decisions.[12] That is well known as the change from 'retained justice' (*justice retenue*) (i.e. judicial powers are retained by the Head of State) to 'delegated justice' (*justice déléguée*) (i.e. judicial powers are delegated to the *Conseil d'Etat*). Even though the Head of State previously did not use its power of control in reality, this reform has been a major one: the *Conseil d'Etat* obtained full and supreme jurisdiction from 24 May 1872. Indeed, on 22 July 1980, the Constitutional Council ruled in its Validation Acts Decision that the independence conferred by the Act of 1872 is one of the 'fundamental principles recognised by the republican Acts'.[13] Secondly, in 1889, as an effect of its judgment in the *Cadot* case, the *Conseil d'Etat* became the normal judge of first instance cases in administrative law.[14] Later, in 1953, this competence was transferred to the new administrative tribunals. Finally, the *Conseil d'Etat* was largely discharged of its appeal competence by the 31 December 1987 Act. It still remains nowadays the supreme administrative judge of judicial review. Nowadays, both the existence and the independence of the administrative courts and the *Conseil d'Etat* are constitutionally proclaimed by the constitutional decisions of, respectively, 23 January 1987 (*Conseil de la concurrence*)[15] and 22 July 1980 (*Lois de validation*).[16]

In order to decide which of the judicial or administrative judges would be competent in some debatable cases, a Conflicts Tribunal (*Tribunal des conflits*) was set up initially in 1848, under Article 89 of the Constitution of the Second Republic. The Conflicts Tribunal was abolished by the Second Empire, but was restored by the Act of 24 May 1872. This court still has significant jurisdictional competence.

The power of the administrative tribunals is significant. When decrees, orders and delegated legislation developed (in French, these are exercises of the *pouvoir réglementaire*), they were increasingly challenged before the administrative courts, in particular after the Second World War. This has been a major effect of the executive gaining the power to enact law. The French Constitutions of the Third Republic (1875–1940) and the Fourth Republic (1946–1958) had given the executive the competence to enact secondary legislation, but it remained for a large part subject to the will and control of Parliament. In the Fifth Republic, things have changed radically. Parliament can no longer legislate in any field: its competence is strictly controlled by Article 34 of the French Constitution (in French law, this is called attribution competence or *compétence*

12 Act of 24 May 1872.

13 <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1980/80-119-dc/decision-n-80-119-dc-du-22-juillet-1980.7775.html>.

14 <www.conseil-etat.fr/fr/presentation-des-grands-arrets/13-decembre-1889-cadot.html>.

15 <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1987/86-224-dc/decision-n-86-224-dc-du-23-janvier-1987.8331.html>.

16 <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1980/80-119-dc/decision-n-80-119-dc-du-22-juillet-1980.7775.html>.

d'attribution). On the contrary, Article 37 empowers the Government to enact law in any other field (autonomous regulatory powers or *pouvoir réglementaire autonome*). The results of such executive action are called autonomous decrees (*décrets autonomes*). All the decrees, however, have to be in conformity with higher norms: the Constitution and the fundamental rights which were a part of it from the start; the treaties that followed; and later the statutory acts enacted by Parliament. The administrative courts are competent to review the conformity of all decrees with the higher sources of law, but it is the constitutional court or *Conseil constitutionnel* (CC) that is competent to review the conformity of Acts of Parliament with constitutional norms.

Finally, the Constitutional Council (*Conseil constitutionnel*) is an institution separate from the ordinary courts and the administrative courts. Some scholars have argued that the CC does not form part of the judiciary,[17] as it is supposed to exercise judicial review of the constitutionality of statutes and treaties, as well as monitor the integrity of national elections. Nevertheless, its decisions are supposed to bind every single court, even the supreme court in civil and criminal cases, i.e. the Court of Cassation (*Cour de cassation*, CCass), and the highest administrative judicial body, i.e. the Council of State (*Conseil d'Etat*, CE).[18] Considering the growing and central role that the Constitutional Council plays nowadays in France, more and more scholars consider the institution to be a judicial one. With the QPC procedure set up in March 2010 (see below),[19] individuals can bring their case before the Constitutional Council, if the supreme courts allow them to do so. However, its actual judicial character remains debatable because of its composition, as the nomination of the nine members still depends on political will, the President of the Republic, the President of the National Assembly and the President of the Senate.

1.4. FUNDAMENTAL RIGHTS

Fundamental rights are rarely found in the sections of the constitution,[20] but rather in the Preamble to the Constitution of 1958, which incorporates the 1789 Declaration of the Rights of Man and of the Citizen, the Preamble to the Constitution of 1946, and the 2004 Environmental Charter. The Preamble to the Constitution of 1946 itself refers to the Fundamental Principles Recognized by

17 Some authors deny such qualification to the Constitutional Council because for a very long time, it could not be seized by any citizen. With the priority preliminary ruling on the issue of constitutionality – QPC reform – it can no longer be true: Constitutional Council can be seized by both the Court of Cassation or the Couucil of State, themselves seized by a plaintiff.

18 Article 62 of the Constitution.

19 See section 2, 'Constitutional review in France: the role of the Constitutional Council'.

20 Constitutional sections dealing with fundamental rights are very rare. Exceptions can be found in Articles 3, 4, 34, 53, 72–75.

the Laws of the Republic (PFRLR) and to the principles particularly necessary to our times. All these sources of fundamental rights were incorporated into what is called the 'bloc of constitutionality' (*bloc de constitutionnalité*) by the Constitutional Council in 1971.[21] Since then, the Council has constantly referred to an evolutionary and 'non-crystallised' conception of the Constitution. The Constitutional Council has had the tendency to develop the fundamental rights as much as it could by giving the broadest interpretation possible to norms and provisions contained either in the Declaration of 1789 or in the Preamble of the Constitution of 1946. Such an approach means that the constitutional jurisdiction now relies on a set of norms with external references other than the Constitution. These bridge the gap between the past (the provisions of the Declaration of the Rights of Man and of the Citizen of 1789 and of the Preamble to the Constitution of 1946) and the present (the influence of European norms on normative constitutional law). However, the European Convention on Human Rights, in common with every international source, is still not considered part of the bloc of constitutionality. Therefore, the ECHR does not have a constitutional value; rather, its value is treaty-based, as is further explained below (section 3).

2. CONSTITUTIONAL REVIEW IN FRANCE: THE ROLE OF THE CONSTITUTIONAL COUNCIL

The previous section has provided a more general overview of the organisation of the French constitutional system. In order to provide more insight into the implementation of the European Convention on Human Rights in French case-law, it is important, however, to discuss the special French system for constitutional review in more detail.

To start with, it should be recalled that France has three superior courts (the Constitutional Council,[22] the Council of State,[23] and the Court of Cassation).[24] Of these courts, the Constitutional Council is the only institution entitled to exercise judicial review of constitutionality of Acts of Parliament as well as international treaties and, to some extent, European Union Directives. This is called the system of constitutional review or judicial review of constitutionality. By exercising this review, the French Constitutional Council can ensure that Acts of Parliament, treaties and (to some extent) European Union Directives, comply with the French Constitution.

Judicial review of constitutionality in France is a system of concentrated review, which means that the Constitutional Council is the only court empowered

21 Decision no. 71–44 DC of 16 July 1971.

22 *Conseil Constitutionnel*, i.e., the French Constitutional Court.

23 *Conseil d'État*, i.e., France's highest administrative court.

24 *Cour de Cassation*, i.e., France's highest judicial court.

to review the compatibility of Acts of Parliament and treaties with the Constitution. The Constitutional Council can exercise its powers of constitutional review both before an act is adopted under the procedure of Article 61 of the Constitution (*a priori* review) and after an act is adopted in exercise of its powers under the aforementioned QPC procedure of Article 61–1 of the Constitution (*a posteriori* review).[25] *A priori* review, in Article 61, means that:

> 'Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution. To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators. In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days. In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation.'

Before an Act is promulgated by the President and after it is voted on, the bill thus can or has to be transmitted to the Constitutional Council for constitutional review. It is obligatory to involve the Constitutional Council to ensure that the Constitution is not violated by institutional acts, bills based on Article 11 of the Constitution (i.e. bills resulting from a legislative referendum) or National Assembly regulations.[26] In any other case, *a priori* constitutional review by the Constitutional Council is not mandatory. Until 1974, a *priori* review could only be requested by the President of the Republic, the Prime Minister, and the Presidents of the National Assembly and the Senate. Since 1974, in addition to the above, a small parliamentary group from the opposition, i.e. either sixty members of the National Assembly or sixty members of the Senate, can also initiate such a review. The review carried out by the Constitutional Council is necessarily an abstract review, and is coupled with a review by way of action (*contrôle par voie d'action*).[27] If the Constitutional Council considers that an act is unconstitutional, it is declared null and void, in whole or in part.

---

25 Or *ex post* review.

26 Each assembly (both National Assembly and Senate) has its own regulations which detail procedural rules and the composition of different institutions. The regulations are the main source of parliamentary procedure and internal organisation. As soon as they are adopted by the assembly, they become binding rules for this assembly, which has to respect every provision.

27 Way of action is the opposite of way of exception. With the first type of review set up in the French system, the main purpose is to invalidate the act in order that it could not product anymore effect for anyone and in any case. With the way of exception, if a Constitutional Court (which is not the case of the Constitutional Council) declares the act unconstitutional, it will cease to product some effects but just for the present case.

The system for constitutional review has recently changed significantly. The institutional act of 10 December 2009 regarding Article 61-1 of the Constitution introduced the priority preliminary ruling on the issue of constitutionality (*question prioritaire de constitutionnalité*, QPC). The legislature thereby confirmed the so-called *IVG* (*interruption volontaire de grossesse*) precedent. In the *IVG* decision of 1975, which is discussed further below (section 4.1), the Constitutional Council proclaimed itself the only court able to exercise *constitutional* review, whereas ordinary courts can exercise any other type of review. The introduction of the QPC to the French legal system confirmed this clear specialisations of judges, i.e. ordinary judges exercise any type of review except constitutional review, while constitutional judges exercise exclusively constitutional review.

With the implementation of the reforms in March 2010 and the introduction of the QPC system, *a posteriori* review has been set up for laws which would infringe a liberty or fundamental right. Article 61-1 of the Constitution sets out the following procedure:

> 'If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council which shall rule within a determined period.'

The QPC system is based on two straightforward principles: the possibility for individuals to indirectly approach the Constitutional Council and the existence of a dual filter. If during judicial proceedings, the court of first instance considers that an individual request for referral of a concrete case is justified, the court will hand the case over to the competent higher court, i.e. the Council of State for administrative law cases and the Court of Cassation for all other cases (including civil and criminal cases). If the higher court also considers the request justified, it will hand over the case to the Constitutional Council within three months. The latter has three months to rule on the constitutionality of the legislative act and carry out an abstract review by means of action. The Constitutional Council may declare the act null and void, in whole or in part, even if it has already produced legal effect. As a result of the constitutional reforms (including one of 23 July 2008), the constitutional review powers of the Constitutional Council have been strengthened. It has more opportunities to check whether or not acts infringe fundamental rights and it may give its own interpretation of fundamental norms. The reform thus effectively made the Constitutional Council a constitutional court. Its role is not, however, to deal with issues regarding conformity with treaties: it is the sole constitutional judge of Acts and nothing more. The Council of State and the Court of Cassation are and remain the two superior courts entitled to review the conformity of Acts of Parliaments with treaties, as is discussed in more detail in section 3. As treaties are supposed

to be compatible with the Constitution, however, these courts exercise an indirect sort of judicial review of constitutionality.

It has already been explained above that the constitutional question in the QPC procedure is concrete in nature, i.e. has its source in a concrete case. Nevertheless, the Constitutional Council's review in these cases will be abstract rather than concrete in nature. Since the implementation of the reforms in March 2010 and the introduction of the QPC system, *a posteriori* review has been used to enhance *a priori* review, but only for laws which would infringe a liberty or fundamental right.[28] The QPC system thereby creates *erga omnes* effect, as the Constitutional Council may declare the act null and void, in whole or in part, even if it has started to exert some effects. This makes the QPC radically different from most mechanisms existing elsewhere in Europe.

3. THE STATUS OF INTERNATIONAL LAW AND THE ECHR IN THE FRENCH CONSTITUTIONAL ORDER

3.1. MONISM AND THE BINDING CHARACTER OF INTERNATIONAL LAW

In section 2, it was already mentioned that French constitutional law makes an important distinction between constitutional review and review of Acts of Parliament on conformity with international law. To explain the status of international law in the French constitutional order, it must first be stressed that France is a monist state with primacy of international law, which means that international rules do not need to be transposed in order to be enforceable in domestic law. All international treaty provisions form part of the law of the land. This is true for treaties, customary international law, and to a lesser extent, resolutions by international organisations. Under Article 55 of the Constitution, treaties have 'a superior authority to that of laws' if they have been ratified and approved through the regular procedure of parliamentary ratification and are subject to reciprocity.[29] This provision is considered to apply *mutatis mutandis* to customary international law. Regarding secondary international legislation (e.g. resolutions by international organisations), ordinary resolutions[30] are not legally

28 The problem remains that it does not exist in French law such legal definition of 'liberties and fundamental rights'. Therefore, the Constitutional Council draws the limits of this field thanks to its case-law.

29 The superior force of the treaty among the acts in French law is bound to the principle of reciprocity: the binding force of the treaty depends on its application by the other party/ parties.

30 i.e., resolutions which are not adopted by an institution of the EU.

binding on the French State, with the exception of resolutions by the UN's Security Council taken under Chapter 7 of the UN Charter.

Since the French State is a monist state with primacy of international law, it considers judgments of international courts that have had their jurisdiction approved under a treaty that has been duly ratified and approved (e.g. ECtHR, ICJ, etc.) to be binding, regardless of whether they are handed down in an inter-state dispute or in cases brought by individuals exercising their right to individual application under an international treaty. In compliance with the 1966 ICCPR, France does not consider final observations made by the Human Rights Committee to be legally binding. This does not mean, however, that it does not respect such views. On the contrary, having acknowledged that the Committee has authority to gather individual communications, France makes sure that it adopts all necessary measures to give effect to the Committee's conclusions by repairing the individual consequences of a violation, but it does not always adopt the general measures to prevent further violations from occurring. For example, a view of 4 February 2013 in which the Committee denounced the fact that France gave a disproportionate sentence to a Sikh student who had been expelled from his school for refusing to remove his Sikh turban[31] did not trigger an amendment to Act no. 2004–228 of 15 March 2004 relating to religious symbols in public schools.[32] Similarly, France sometimes takes the recommendations made by the Human Rights Committee into account, but does not consider itself bound by them. Thus, the Committee has recommended for several years that France 'officially' recognises ethnic, religious or linguistic minorities, in accordance with Article 27 of the Pact, but France refuses to comply with this recommendation.[33]

3.2. STATUS OF INTERNATIONAL LAW IN THE HIERARCHY OF NORMS

International law occupies the second level of the hierarchy of norms, below the constitutional rank and above the legislative one. The hierarchy of norms in French law is hence as follows: at the top of the hierarchy comes the Constitution (cf. Article 54 of the Constitution); then come treaties (cf. Article 55 of the Constitution); then Acts of Parliament or statute law; then orders and decrees; and at the lowest level come contracts and individual acts.

As mentioned in section 3.1, international law does not have to be incorporated into domestic law in order to be given effect in the French legal system. The courts can apply treaty provisions directly. According to the

31 CCPR/C/106/D/1852/2008.

32 Nevertheless, it should lead to instructions to head teachers to exercise tolerance.

33 See CCPR/C/FRA/CO/4 of 31 July 2008.

principle of direct applicability of international law, individuals can directly invoke a rule of international law (specifically treaty provisions previously ratified by France) before national jurisdictions, provided that the provisions invoked in support of their action expressly confer rights on them (because they are not supposed to be subjects of international law) and impose clear, precise and unconditional obligations on states (for instance, see some provisions of the United Nations Convention on the Rights of the Child). In section 4, the competences of the various courts in relation to review of the compatibility of legislative and administrative acts with international legal provisions are discussed in more detail. In that section, it will be seen whether French courts, and if so which ones, are empowered to review the compatibility of norms with the Constitution, Acts of Parliament, lower legislation, and other decisions taken by public authorities with treaties, decisions and resolutions adopted by international organisations and customary international law.

France is not a party to the Vienna Convention on the Law of Treaties. However, since many of the provisions of this Convention merely codify customary norms, France is obliged to act in accordance with all the rules laid down by this Convention concerning the interpretation, amendment and demise of treaties.

3.3. THE DIRECT EFFECT OF THE ECHR AND ITS SUBSTANTIVE PROTOCOLS

All substantive human rights provisions of the ECHR and its substantive protocols have been granted direct effect in the French legal system. In the *Raspino* case of 3 June 1975, the Criminal Chamber of the Court of Cassation established the direct applicability of the ECHR by judging that:

> 'the Indictment Chamber had to decide according to the provisions of the European Convention on Human Rights and Fundamental Freedoms which, regularly promulgated in France, confers direct rights to individuals under French jurisdiction.'

Neither the French judicial courts, who paved the way in the *Raspino* case, nor the administrative courts have found it difficult to admit the direct applicability of the ECHR as a whole.[34] The provisions of the ECHR have always been recognised as sufficiently precise, both in their object and in their form, to be directly applicable in the French legal order without any additional measures for execution. This applies to the provisions contained in Title 1 of the ECHR and in its Protocols 1, 4, 6 and 7. One might wonder whether Article 13, which

[34] See the reports of R. ABRAHAM and F. SUDRE, 'Le juge administratif et la CEDH', *Revue Universelle de Droits de l'Homme* (1991), pp. 275 and 259.

guarantees the right to an effective remedy in the domestic legal order, has direct effect because the exercise of this right requires that a remedy has been previously established in domestic law. Nonetheless, the domestic courts have accepted that Article 13 can be invoked directly.[35]

4. JUDICIAL COMPETENCES TO REVIEW THE COMPATIBILITY OF NORMS WITH INTERNATIONAL LAW

4.1. THE DEVELOPMENT OF DECENTRALISED 'CONVENTIONALITY' REVIEW

French courts, that is to say ordinary or judicial and administrative courts (i.e. not the Constitutional Council) are competent to carry out both treaty review (for statutory legislation) and judicial review (for lower legislation and administrative acts). They will check that all rules below treaties in the hierarchy of norms comply with these treaties. If they do not, they can disapply a national legislative provision in the situation of conventionality review, or as far as other rules, e.g. regulations, are concerned, declare them null and void via judicial review.

Although international treaties – such as the European Convention on Human Rights – have an 'authority superior to that of laws' under Article 55 of the French Constitution, they are not assimilated to constitutional provisions, and the Constitutional Council has no jurisdiction to decide whether the law conforms to treaties.[36] Indeed, since 1975, the Council has considered that, under Article 61 of the French Constitution and as part of the *a priori* judicial review of constitutionality of laws, it is not its role to examine the compatibility of statutory acts with France's international and European commitments. With this 1975 decision, the Constitutional Council thus empowered both judicial and administrative courts to decide on the issue of the conformity of acts with treaties and, if they consider that an act is contrary to a treaty, to implement the latter rather than the former. This is what is called in France the judicial review of conventionality,[37] i.e. judicial review of conformity with treaties.

The Constitutional Council, in a decision of 15 January 1975 pertaining to the Voluntary Termination of Pregnancy Act (the famous *IVG* case), found that, in spite of the principle of primacy of treaties over Acts provided by Article 55 of the Constitution, it was not entitled to ensure that Acts of Parliament comply with France's international agreements, including the ECHR. 'It is therefore not for the Constitutional Council, when a referral is made to it under Article 61 of

35 For instance, CE 26 February 2003, *Merkhantar*, no. 241385.

36 15 January 1975, *IVG*, *AJDA* 1975, p. 134, note Rivero.

37 In French, '*contrôle de conventionalité*'.

the Constitution, to consider the consistency of a statute with the provisions of a treaty or an international agreement'.[38] This decision is based on one major argument, i.e. Article 61 of the Constitution:

> 'Article 61 of the Constitution does not confer on the Constitutional Council a general or particular discretion identical with that of Parliament, but simply empowers it to rule on the constitutionality of statutes referred to it.'[39]

In its subsequent decisions, the Council explained what was only implicit in the *IVG* case: if the review of the compatibility of statutory legislation with treaties cannot be carried out as part of a constitutionality review of legislation, it must be carried out by ordinary courts under the control of the Court of Cassation and the Council of State. 'It is indeed ... for the different institutions of the State to ensure that the international conventions are applied, within their respective jurisdictions'.[40]

The Court of Cassation responded very promptly to this invitation in the 24 May 1975 case, not long after the Constitutional Council's 1975 decision. The Court of Cassation considered that Article 95 of the old EEC Treaty (by now replaced by the EU Treaty), which prohibited any obstacle to fair competition, had to prevail over legislative provisions providing for the taxation of imported coffee, even though these legislative provisions had been adopted subsequently to the Treaty of Rome.[41]

The Council of State, which has always been more respectful of the law's sovereignty, took far longer (almost fifteen years) to acknowledge the superiority of a treaty over a subsequent Act of Parliament. However, in its plenary decision of 26 October 1989, the Council of State considered that the EEC Treaty had to prevail over an Act of 1977 relating to the organisation of the European parliamentary elections, even though this act was subsequent to the treaty.[42] With the *Nicolo* case of 1989, the Council of State has finally followed the Court of Cassation and its *Jacques Vabre* case of 1975. The consequences of this rallying case-law have been considerable.[43] It has allowed the full introduction into French law of EU law and ECHR law. The ECHR has indeed revolutionised the proceedings of administrative courts, especially with Article 6 and fair trial

38 Cons. const. Décis. No. 74-54 DC of 15 January 1975, *Rec. Cons. const.* 19.

39 Ibidem.

40 Cons. const. Décis. No. 86-216 DC of 3 September 1986, *Rec. Cons. const.* 135; Cons. const. Décis. No. 89-268 DC of 29 December 1989, *Rec. Cons. const.* 110.

41 Chambre Mixte 24 May 1975, *Société des Cafés Jacques Vabre, D.*, 1975, p. 497, concl. Touffait.

42 Ass. plén. 20 October 1989, *Nicolo, Rec.* p. 190, concl. Frydman.

43 For instance, Ass. plén. CE 8 February 2007, *Gardedieu, Rec.* p. 78: a plaintiff may claim damages in front of a court for a prejudice resulting of a parliamentary act, or law, contrary to an international agreement, or treaty.

which generalised the principle of public hearing, or aliens law, with the right to lead normal family life based on Article 8.[44]

4.2. THE ROLE OF THE CONSTITUTIONAL COUNCIL: *A PRIORI* REVIEW

Clearly, thus, in relation to 'conventionality' review, the main role is played by the ordinary and administrative courts. Nevertheless, there is an important role for the Constitutional Council to play, too. If the Constitutional Council, with its competence to review the compatibility of treaties with the Constitution, holds that a treaty contains a provision contrary to the Constitution, the Constitution may be amended to allow the treaty to be ratified. If this does not happen, the treaty will never be applicable because it is not ratified. This is expressed in Article 54 of the Constitution:

> 'If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.'

This article clearly does not expressly stipulate that the Constitution prevails over all norms. Nevertheless, it allows for the reading that if a treaty contains a provision that is unconstitutional and is considered as such by the Constitutional Council, and if the Constitution is not amended after constitutional review, the treaty in question will never be ratified and the Constitution will prevail in any case. This is what in France is called the *a contrario* reading of Article 54.

As a result of this reading, in the French system, the determination of compatibility of treaties with the Constitution falls within the sole jurisdiction of the Constitutional Council. If a treaty did not appear to be unconstitutional at the time it was ratified, but turns out later to be contrary to the Constitution, nothing can be done *a posteriori* by the Constitutional Council. However, in such a case and only in such a case, nothing prohibits judges from reviewing the constitutionality of a treaty provision and from applying the Constitution, which prevails over treaties.

Thus, there is a dual system of judicial review in relation to international treaties – *a priori* there is review of the constitutionality of treaties by the Constitutional Council, and *a posteriori* the ordinary and administrative courts

44 Ass. plén. CE 19 April 1991, *M. Belgacem & Mme Babas*, *Rec.* pp. 152 and 162: an alien who was suposed to be expelled would be able to remain in the territory of the host country if there would otherwise be disproportionate violations to the right to lead a normal family life.

have the competence to do so. In addition, the ordinary and administrative courts are competent to review the compatibility of French acts of Parliament with international treaties *a posteriori*. The only requirement for this is that the international treaty provision invoked has direct effect. Importantly, the Council of State has recently given an extensive interpretation of the notion of direct effect.[45] The Council of State found that an international convention normally has direct effect except if it has 'for [its] exclusive purpose the governance of the relationships between States' and even if 'the stipulation commits the States Parties to perform the obligation it defines'. From now on, it is clear that the direct effect is not dependent on the intention of the parties, as expressed in a treaty's wording and that there is a presumption of direct effect rather than of a lack of it.

4.3. THE COMPETENCE OF THE COURTS TO GIVE PRIORITY TO INTERNATIONAL LAW

The French ordinary and administrative courts are competent to give priority to international law if domestic statutory law conflicts with treaties, binding resolutions adopted by international organisations and/or customary international law. As mentioned previously, this competence stems from Article 55, which expresses the traditional position of France based on the notion of *pacta sunt servanda*. The competence of French jurisdictions is based on this Article and this Article alone:

> 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'

In the particular case of a QPC, the Constitutional Council has the possibility under Article 61-1, as amended by the institutional act of 10 December 2009, to postpone the effects of the review of an Act of Parliament in order to allow Parliament to adopt another act in the interim. Nevertheless, this is a clear exception to the rule. Whether the Constitutional Council decides on a complete or partial repeal of an Act by *a priori* or *a posteriori* review, this repeal in principle has immediate effect.

Judicial review also allows the administrative courts to repeal any administrative decision that might contravene a rule with which it has to comply in the hierarchy of norms. The administrative courts cannot go beyond this jurisdiction. This means that there is a competence for the courts to review national administrative decisions for their compatibility with provisions of

[45] CE. Ass. 11 April 2012, *Gisti*.

international law, which also have priority over such decisions. The administrative courts are also entitled to require the French administration, for example, to take a new measure that will be more appropriate than the previous one.

Provisions of international law do not have priority over the Constitution. On the basis of Article 55, the Council of State, in a plenary decision of 30 October 1998 in the case of *Sarran, Levacher and Others*,[46] clearly established the principle that:

> 'the supremacy conferred [by Article 55 of the Constitution] to international agreements does not apply, in the domestic legal order, to constitutional provisions.'

The Court of Cassation has handed down a similar decision.[47] By recognising the Constitution as the superior norm in the French legal order, the superior courts refuse to commit themselves to reviewing the conformity of the Constitution with international conventions, i.e. to reviewing the conformity of a constitutional provision with a conventional one.

It is up to neither Parliament nor the Government to say, when legislation has been adopted, that it is not in conformity with the Constitution or with international law. The *référé législatif* (i.e. a suspended judgment in order to ask Parliament for clarification about the meaning or interpretation of an act) disappeared in France after the full recognition of Article 4 of the 1804 Civil Code and its invitation to judges to interpret the statutes concerned. Indeed, nowadays 'a judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice'.

5. THE APPLICATION OF ECHR PROVISIONS BY FRENCH COURTS

In accordance with the competence of ordinary and administrative courts to carry out a review of the conformity of laws with international conventions, the French courts have never hesitated to apply the provisions of the ECHR and to have this Convention prevail over a French Act that does not comply with it. This section sets out various aspects of the courts' application of the ECHR in more detail. First, some examples are discussed of cases in which the French courts have actually set aside, disapplied or declared null and void national legislation or decisions because of their incompatibility with the Convention

46 That is to say, in French, '*arrêt d'Assemblée*', which means a decision taken by the whole institution.

47 Cass. Ass. Plén. 2 June 2000, *Fraisse*.

(section 5.1). Subsequently, the practice of interpretation in harmony with the Convention is explored. It is thereby particularly interesting that national courts often give effect to the Convention and the judgments of the ECtHR by means of constitutional review, which in itself is informed by the interpretations provided by the ECtHR (section 5.2). An interesting direct application of the ECHR is to be seen in cases between private parties, which is addressed in section 5.3.

5.1. REVIEW OF NATIONAL LEGISLATION AND DECISIONS FOR COMPATIBILITY WITH THE ECHR

There are various examples of French cases in which legislation or decisions have been set aside, declared null and void or disapplied because of a conflict with the ECHR. The judicial review of conformity of laws with the ECHR has become a daily task of the judicial and administrative courts. Questions as to this matter are now very frequently raised before the courts, especially with respect to Article 6 of the ECHR relating to the right to a fair trial. Indeed, administrative or judicial courts do not hesitate to disapply a legislative provision on the grounds of its *inconventionnalité*, that is to say the fact that it is contrary to the ECHR. Following the *Zielinski and Others* case of the ECtHR, for example,[48] several ordinary courts have set aside the application of the litigious validation act, as it was contrary to Article 6 of the ECHR.[49] Another example concerns the position of ordinary courts in the *Kress* and *Martinie* v. *France* cases.[50] These cases affected the foundations of justice in France as they involved procedural characters which had long been considered 'exemplary' (*commissaire du gouvernement*[51] and *avocat général*).[52] Administrative and judicial proceedings were eventually amended by new national legislation as a result of many debates among both judges and academics.

Nevertheless, although setting aside a litigious validation act because of its incompatibility with the ECHR has occurred frequently in the past, it is nowadays rare. This can probably be explained because Parliament and the

48 ECtHR (GC) 28 October 1999, appl. nos. 24846/94 and others.

49 CA (*Cour d'appel*) de Limoges 13 March 2000, *Polyclinique Saint-Damien* v. *CMSA Corrèze*, *D*, 2000, Information rapide, 127; CAA (*Cour administrative d'appel*) Nancy 5 December 2000, *Caisse primaire d'assurance maladie de Metz and Caisse régionale d'assurance vieillesse d'Alsace-Moselle*, *AJDA* 2001, 278, note P. Rousselle; *RFDA* 2001, 752, obs. D. Giltard.

50 ECtHR (GC) 7 June 2001, appl. no. 39594/98 and ECtHR (GC) 12 April 2006, appl. no. 58675/00, respectively.

51 Who is a member of the French administrative jurisdiction whose mission consists, during public hearings, of analysing the dispute and offering a solution.

52 Who is a representative of the French Public Prosecutor before the Court of Cassation, the courts of appeal and the French *Cours d'assises*.

public authorities now take better account of the provisions of the ECHR and the ECtHR's case-law in drawing up new rules. Moreover, since the QPC was introduced in France in 2008 and implemented in 2010, some violations of ECHR rights are now no longer presented as such, but are rather framed as constitutional cases and hence can be dealt with via constitutional review. In this way, the Constitutional Council has reinforced its influence in comparison with the ordinary and administrative courts. Still, it seems that the ECHR serves as a constant interpretive reference for the Constitutional Council. This can be explained by the fact that the ECHR rights are still more concrete and offer more protection to individual rights in comparison to the French Constitution, especially because the Court has offered extensive interpretations of these rights. Even when constitutional review is possible, the Constitution therefore remains less often used than the ECHR by the Constitutional Council as a basis for holding that legislation or decisions do not comply with fundamental rights norms.

The European Court has also sometimes found a relay in the intervention of the administrative or ordinary judge. What is revealing in this regard is that the courts' intervention in summary freedom proceedings is binding for the administration, except when there are imperative demands of law and order, in order to enable it to comply with an interim measure of the ECtHR indicating, in application of Article 39 of the Rules of Court, that it should not proceed with the deportation of a foreign person during proceedings before the Court.[53] The Council of State in this case really used the Constitution as a vehicle to avoid a violation of the Convention. In recent years, especially during the presidency of Nicolas Sarkozy from 2007 to 2012, French law has been toughened in order to limit migratory flux. The period for intervention of ordinary courts has been lengthened from 48 hours after the foreign person has been arrested to five days. The ECHR and some of the decisions of the Court concerning aliens' law have then provided good checks and balances to severe French provisions.

The ordinary courts have also implemented requirements laid down by Article 5 of the Convention in several cases in which eventually the Court of Cassation had to give a ruling. The issue of granting compensation for harm caused by people inadmissibly being detained in psychiatric hospitals against their will has given the ordinary courts the opportunity to interpret, under Article 5 of the ECHR, rules on the four-year term applicable to claims against the State, especially for persons who are hospitalised on inappropriate grounds and who are thus victims of an illegal deprivation of liberty.[54]

53 CE ordonnance 30 June 2009, *Ministre de l'Interieur* v. *Beghal*.

54 Civ. 1ère 31 March 2010, pourvoi n° 09–11.803.

5.2. CONSTRUING NATIONAL LAW IN HARMONY WITH THE ECHR

5.2.1. The Constitution as a vehicle to construe national law in harmony with the ECHR

The French courts strive to interpret national law, including the national Constitution, in harmony with the ECHR. National courts generally try to avoid conflicts with the ECHR and the case-law of the ECtHR, by means of constitutional review and by means of construing national law in conformity with the constitution. The Constitutional Council tends to do so via *a priori* constitutional review or the QPC, and ordinary courts via judicial review of conformity of laws with treaties. In this regard, it should not be forgotten how close the rights and freedoms guaranteed by the Constitution and those guaranteed by the Convention are today. The Convention covers more or less all fundamental rights as they stem, in France, from the 1958 Constitution and its Preamble, the 1789 Declaration, the Preamble to the 1946 Constitution and the fundamental principles recognised by the French laws to which they refer. At the same time, the Constitutional Council has deduced rights recognised by the ECHR and the precedents of the Court, from these texts. The Constitutional Council ensures that its review power is fully coherent with that of the Strasbourg Court. In 2010, for instance, the Constitutional Council had to recognise special pension schemes applicable to immigrants from countries and territories that used to be under French sovereignty.[55] The Constitutional Council then declared that the contested provisions, which provided different revaluation conditions for pension holders living abroad depending on whether they were French or foreign, were unconstitutional, as they conflicted with the principle of equality. Here, the case-law of the Strasbourg Court was one of the central elements in the Council's reasoning.

In the 2010 case, the Constitutional Council was thus led to censure four provisions that had previously been declared compatible with the ECHR but that were criticised as part of a QPC. These four QPCs led to the repeal of the contested provisions. This shows that conventional and constitutional protections are not in conflict, but rather are complementary: the two types of protection share the same conception of the scope of rights and freedoms and lead to consideration of the case-law of the Court as an important source of interpretation of the French constitution.

5.2.2. EU law as a vehicle to construe national law in harmony with the ECHR

Another issue that could arise in relation to the national judicial application of the Convention and the ECtHR's case-law is whether national courts use EU law

55 No. 2010–1 QPC, 28 May 2010.

as a vehicle to review the compatibility of national law with the ECHR or construe national law in conformity with the ECHR. As matters currently stand, however, French judges refer to the ECHR more often than to the EU Charter of Fundamental Rights. One first important explanation for this may be in the scope of the Charter, which clearly is only applicable when it concerns the implementation of European Union law. The interpretation considered in such provisions is that given by the CJEU, as well as the one given by the domestic courts. The issue of the applicability of the Charter depends on this point.

In French law, an unusual case of the Criminal Chamber of the Court of Cassation,[56] concerning the principle of proportionality of penalties, should be noted. This principle, provided in Article 49 para. 3 of the Charter, was invoked before the Criminal Chamber of the Court of Cassation in a case regarding the performance of a European arrest warrant. In that case, the EU Charter of Fundamental Rights was preferred over application of Article 6 of the ECHR, only because the latter does not provide this principle. It could indeed be argued in this case that the national court used the vehicle of the EU Charter to implement safeguards really provided by the ECHR, simply because the ECHR was not applicable in this case and the French Constitution not relevant either.

5.3. FRENCH COURTS AND THE APPLICATION OF THE ECHR PROVISIONS IN CASES BETWEEN PRIVATE PARTIES

As was set out in section 3.3, it is generally recognised in France that the substantive provisions of the ECHR have direct effect. This direct effect has a very concrete result, because French courts have to apply the provisions of the ECHR not only in relations between the State and citizens, but also in relationships between individuals. The jurisdiction of the domestic courts in applying the ECHR is not subject to the same conditions as the jurisdiction of the European Court, including the admissibility of the request. Nothing therefore prevents the French courts from applying the Convention to private disputes. They have done so for a long time, fully taking account of the case-law of the ECtHR, including the doctrine of 'positive obligations'. Moreover, the courts have to interpret civil law (e.g. provisions of the Code Civil) and even contractual clauses in line with the case-law of the ECtHR. Besides such rather indirect forms of application in private law relationships, direct applicability is accepted. The question of the 'horizontal effect' of the Convention is merged here with the question of the direct applicability of the Convention provisions in the domestic law and their application by national courts to private disputes. As Professor Coussirat-Coustère puts it:

56 28 June 2011; <http://legimobile.fr/fr/jp/j/c/crim/2011/6/28/11-84233/>.

'the Convention is part of the legality the judge has to comply with and, therefore, the direct effect of the guaranteed rights is not only vertical (litigation in public law) but also horizontal (litigation in private law).'[57]

There is direct horizontal effect, therefore, since the Court of Cassation can apply the provisions of the Convention not only to relations between the State and citizens, but also to private relationships (i.e. between individuals/companies). In this respect one can mention relationships between employees and employers in litigation over the right to respect for the home and the necessary geographic mobility of companies; relationships between co-owners of apartments in an apartment block, where it is necessary to reconcile the respect for religious liberty guaranteed by Article 9 of the ECHR and the collective life in the apartment block; and relationships between parents and children, when, in the event of separation, it is necessary to decide on the exercise of parental authority while ensuring that family life is respected.[58] Indeed, the Court of Cassation has provided a direct application of Article 8 of the ECHR to private relationships.[59] Admitting that contract law is covered by the Convention, the Court of Cassation considered that the provisions of a lease agreement cannot, 'under Article 8 para. 1 of the ECHR, have the effect of depriving the tenant of the possibility to accommodate his/her kin'.[60]

5.4. CONCLUSION

The French courts generally are not very reluctant to apply provisions of the Convention as interpreted by the Court. Indeed, the Convention is even directly applied in cases between private parties. There are various examples of legislative provisions and administrative decisions which have been set aside because of their incompatibility with the Convention. There is also a clear tendency to construe national law in conformity with the Convention. Interestingly, the French courts tend to use the Constitution as the main vehicle for doing so, preferring a national constitutional provision to apply rather than the Convention as such. The applicable constitutional provision in itself is then usually construed in line with the Convention. There appears to be no true

57 'Convention européenne des droits de l'hommes et droit interne: primauté et effet direct', in L.E. PETTITI et al., eds., *La Convention européenne des droits de l'homme* (Némésis, 1992) p. 14.

58 For instance, Civ. 1ère 17 January 2006, pourvoi n° 03-14.421, *Bull. civ.* I, n° 10.

59 Cass. civ. 1ère 23 October 1990, *Bull.*, I, n° 222, p. 158: infringement of the respect for private life by a news agency and Article 8; Cass. civ. 1ère 27 February 1991, *Camuset v. Casino Guichard-Perrachon*, *Bull.*, III, n° 67, p. 39: damages in case of eviction when a commercial lease is not extended.

60 Cass. 3ème civ. 6 March 1996, *OPAC de la ville de Paris* v. *Mme Mel Yedei*, *D*, 1997, 167, note B. DE LAMY.

preferential order in the use of techniques (i.e. treaty conform interpretation, setting aside national law, ordering the legislature to amend legislation, constitutional review) to avoid violations of the ECHR in France. It is not really a hierarchy of different techniques, but rather the choices made by the court involved that allow problems to be solved. Nevertheless, it should be recalled that the Constitutional Council is the competent court for the judicial *a priori* review of constitutionality or for answering a QPC. The other courts then carry out a conventionality review which will result in making the interpretation of the Convention prevail, and any national law which is contrary to a treaty will be set aside if need be. As a result, it seems that harmonious interpretation in practice is the best used technique.

6. EFFECTS OF THE ECtHR CASE-LAW ON NATIONAL CASE-LAW, LEGISLATION AND LEGAL PRACTICE

6.1. INTRODUCTION

In section 5, it was discussed in general terms whether and to what extent the French courts use their competences to guarantee that the obligations following from the Convention are complied with. The current section specifically focuses on the way in which the courts deal with the judgments of the European Court of Human Rights and the competences they have and exercise in this respect. Thus, it can be discovered to what extent the French courts really are influenced by the Strasbourg case-law and whether their own approaches have changed as a result.

To this end, this section will first discuss whether the French courts actually refer to judgments of the ECtHR when interpreting and applying Convention provisions; also it looks in general at the ways in which courts deal with judgments of the Court finding a violation (section 6.2). Subsequently, the national courts' instruments to respond to such judgments are addressed in more detail – one may think of reconsidering a case after reopening or changing interpretation of national law in similar cases. In section 6.3, the specific possibilities for response to ECtHR judgments against France are addressed, while section 6.4 concentrates on responses to judgments against other States Parties.

Although the French courts often respond favourably to the ECtHR's judgments, they are generally not prepared to run ahead of the ECtHR, but they rather only 'mirror' the Court's approach, as is clarified in section 6.5. Sometimes they even decline to follow up on the Court's judgments, as is set out in section 6.6.

The depth of European Court's impact can finally only be gauged by assessing the embeddedness of the Court's particular interpretative approaches and devices in national case-law. For that reason, section 6.7 assesses whether and to

what extent specific Court doctrines, such as the margin of appreciation doctrine and evolutive interpretation, are applied by the French courts.

6.2. REFERRING TO STRASBOURG CASE-LAW AND COMPLYING WITH THE ECtHR'S REQUIREMENTS

French courts, when interpreting and applying ECHR provisions, refer to judgments or decisions of the ECtHR almost standardly. It used to make a difference if France was not a respondent party to the case at hand, but this has changed. Courts generally refer to the case-law of the Court as a whole nowadays (*res interpretata* effect), whereas in the past, special importance was attached to the judgments or decisions to which the state was a party.

More specifically, it can be stated that French courts usually take action if the ECtHR has found a certain situation to be in violation of the Convention. The ordinary courts have never hesitated to refer to the ECtHR's case-law when domestic law was lacking or was incompatible with the ECHR. One example can be given concerning the 'reasonable time' requirement of Article 6(1) of the Convention. After French councillors and barristers had pointed out that administrative procedures were not in conformity with Article 6(1) ECHR on this point, changes were made to French administrative law to reduce delays.[61] Another example is when the ECtHR found against France in the *Brusco* case because of the incompatibility of its police custody system with many of the provisions of the ECHR.[62] The Court of Cassation did not hesitate to respond quickly to the prescriptions of the *Brusco* case, in an important decision taken only six days after the ECtHR handed down its decision. The Court of Cassation did not hesitate therefore in that emblematic case to set aside national legislation.[63]

Even though the administrative courts have traditionally shown greater reluctance to conform to the ECtHR's decisions, they too finally sanctioned, for instance, some removal orders because they enabled the collective expulsion of aliens, which is prohibited by Article 4 of Protocol No. 4 to the Convention. That was in 1988. Concerning the right to respect for private and family life, the Council of State took an important decision in its *Beldjoudi* case on 18 January 1991, which was also made in order to respect the European case-law in this area. It is also applied for disciplinary law, which complies with all the provisions of Article 6(1) of the ECHR.[64] The French courts in these cases expressly refer to ECtHR precedents.

---

61 Versailles, Chambre d'accusation, 13 July 1989, *Gazette du Palais*, 4 and 5 October 1989, note L.E. PETTITI.

62 ECtHR 14 October 2010, appl. no. 1466/07.

63 CCass, ch. crim. 19 October 2010, <www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/arrets_rendus_17837.html>.

64 CE, Ass 3 December 1999, *Didier*, *AJDA* 2000, p. 126.

6.3. RESPONSES TO JUDGMENTS AGAINST FRANCE

6.3.1. Changing interpretation and case-law

Judges in both the administrative and judicial bodies are considered as the *juges conventionnels de droit commun* (ordinary judges in charge of implementing international law) in that they are the first to apply the ECHR. In practice, they often seem inclined to change their case-law approaches and judicial techniques in response to judgments of the Court against France. A few examples may serve to illustrate this point.

First of all, when the French system of custody appeared to have become inconsistent with the case-law of the Court,[65] the Constitutional Council hastened to declare several provisions of the French Criminal Code contrary to the Constitution,[66] while the French legislature, sanctioned by the conventional authority which confirmed the declaration of unconstitutionality,[67] reformed the legislation (14 April 2011 Act) to ensure that a lawyer is present from the first hour of custody. The Court of Cassation, following in the footsteps of the declaration of the Constitutional Council, hastened to have the ECHR prevail over some criminal custody provisions. Indeed, in three cases of 19 October 2010, the Criminal Chamber of the Court of Cassation, ruling in Plenary Session,[68] considered that some current rules pertaining to custody did not comply with the requirements of Article 6 of the ECHR as interpreted by the European Court.

Further, since the late 1980s, the Strasbourg Court has progressively applied Article 6 to procedures before constitutional courts, initially in relation to the requirement of a reasonable time frame, then in relation to other guarantees of a fair trial. This applicability was established in the *Ruiz-Mateos* v. *Spain* case concerning a request for a preliminary ruling.[69] Until now this case-law has not been applicable to the Constitutional Council. On the one hand, the question of the application of Article 6(1) does not arise for the *a priori* and abstract review of constitutionality that the Constitutional Council carries out before the publication of Acts. Indeed, there are no 'civil disputes', nor 'parties'. On the other hand, the Strasbourg Court considered that the Constitutional Council is not subject to its control when the latter rules as an electoral judge. This analysis has been repeated with the adoption of the QPC and Article 61-1 of the Constitution which was passed in 2008 and entered into force in 2010. The Constitutional Council established rules that are directly inspired by the case-law of the

65 *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02; *Dayanan* v. *Turkey*, ECtHR 13 October 2009, appl. no. 7377/03.

66 Cons. const. 30 July 2010, n° 2010-14/22, QPC.

67 *Brusco* v. *France*, ECtHR 14 October 2010, appl. no. 1466/07.

68 That is to say, in French, '*arrêt d'Assemblée*' which means a decision taken by the whole institution.

69 ECtHR 23 June 1993, appl. no. 12952/87.

Strasbourg Court: for reasonable time frames, impartiality, right of access, equality of arms and public hearings. For instance, concerning reasonable time frames, the legislator tried to protect the QPC from criticism for taking an unreasonable amount of time. The judge *a quo* shall rule 'without delay' on a QPC (section 23–2 of the institutional ordinance of 7 November 1958). The Council of State and the Court of Cassation shall rule on a QPC within three months (sections 23–4 and 23–5). After that time, the QPC 'shall be transmitted to the Constitutional Council' (section 23–7). Finally the Constitutional Council shall give its ruling within three months (section 23–10). All these periods, at all stages of the proceedings, are of course in conformity with Article 6(1) of the ECHR.

Another example relates to the case-law of the Constitutional Council on 'legislative validations' (the means by which the French legislator intervenes, retroactively or preventively, to validate an administrative act that has been previously or is likely to be cancelled). When this case-law was undermined by the *Zielinski, Pradal, Gonzalez et al.* v. *France* case,[70] the guardian of the Constitution immediately re-examined its requirements to review this method affecting the separation of powers. The prevalence of the European Court's point of view only emerges, however, where there is a difference of interpretation with the domestic courts. For the French lawyer, the Court's judgment will prevail and dominate its own reasoning in cases where this reasoning was justified by 'overriding reasons in the general interest' with regard to the Convention or by 'sufficient general interest' on a constitutional level. Pursuant to the *Zielinski, Pradal Gonzalez and Others* v. *France* case, the Constitutional Council has indeed altered its previous precedents following the same line as the Court.[71] The Council of State followed suit in its *Société Laboratoire Génévrier* case on 23 June 2004 in the same way: 'overriding reasons in the general interest' have been invoked by the supreme administrative court.[72]

One further example is that, when the French legislation on hunting was directly condemned by the *Chassagnou et al.* v. *France* case,[73] both the French legislator[74] and the supreme administrative judge[75] immediately agreed to conform to the conventional standard, with the result that the Council of State from that moment onwards applied the exact standards formulated by the ECtHR.

Examples of judicial follow-up of ECtHR judgments against France can also be found in administrative case-law. For example, whereas the Council of State first considered that the decree-law of 6 May 1939 concerning foreign publications was in accordance with Article 10 of the ECHR, which protects freedom of

70 ECtHR (GC) 28 October 1999, appl. nos. 24846/94 et al.

71 Cons. const. 21 December 1999, N99–422 DC; Cons. const. 29 December 1999, N99–425 DC.

72 For a more recent application, the reader may refer to CE, sect. 10 November 2010, *Commune de Palavas-les-flots*.

73 ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95 and 28443/95.

74 Voynet's Act, 26 July 2000.

75 CE 9 November 2007, *Lasgrezas et Association pour la protection des animaux sauvages*.

expression and freedom of opinion,[76] it refused to repeal this decree illegal[77] after the conviction by the Strasbourg Court in the case of *Association Ekin*.[78]

Similarly, the *Mme Vignon* case of the Council of State[79] followed the conviction of France by the Strasbourg Court due to the 10 July 1964 Property Act's excessive violation by of Article 1 of Protocol No. 1 to the ECHR on the right to peaceful enjoyment of possessions.[80] This conviction also led to the reform of the 1964 Act by a statute of 24 July 2000 pertaining to hunting matters.

Sometimes, the response to the requirements of the Convention can even trigger the courts to create new law. In the *Garde des Sceaux, Ministre de la Justice* v. *M. Magiéra* case, the Council of State considered that 'when the right to be judged within a reasonable time was not complied with and caused damage to people subject to legal proceedings', they were entitled to be awarded compensation for the damage caused by the defective functioning of the public service of justice.[81] The European case-law concerning the right to be judged in a reasonable time frame thus led to the creation of a new regime of liability of the State for this kind of malfunctioning of the public service of justice.

Finally, there are several cases where a decision by the Council of State was taken more spontaneously: where the French judge decided to adopt the European case-law without waiting to be actually forced to do so by a judgment of the ECtHR against France. In certain cases, the administrative judge has thus decided to strengthen its conventionality review of legislative validations, giving priority to the review of these legislative validations with the ECHR, either concerning the right to a fair trial protected by Article 6(1)[82] or concerning the right to peaceful enjoyment of possessions.[83] The aforementioned *Société Laboratoire Génévrier* case of 23 June 2004 took into account the requirement of a compelling motive of public interest, thereby showing that the Council of State is willing to adopt the exact mode of reasoning of the European judges as found in the *Zielinski, Pradal, Gonzalez and Others* v. *France* case of 28 October 1999. This desire was clearly reaffirmed in the advisory opinion in *Provin* of 27 May 2005 which provides on this matter instructions which constitute an almost exact summary of the ECtHR's case-law.[84]

It can thus be concluded that French courts usually amend their interpretations and case-law in order to comply with judgments of the ECtHR

76 CE 9 July 1997, *Association Ekin*.

77 CE 7 February 2003, *GISTI*.

78 ECtHR 17 July 2001, appl. no. 39288/98.

79 CE 27 October 2000, n° 172639, p. 467.

80 *Chassagnou and Others* v. *France*, ECtHR (GC) 29 April 1999, appl. nos. 25088/94, 28331/95 and 28443/95.

81 CE 28 June 2002.

82 CE 5 December 1997, *Mme Lambert*.

83 CE 11 July 2001, *Ministre de la Défense* v. *Préaud*.

84 <www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008216271>; advisory opinion given by the Council of State.

against France. Interestingly, French courts hardly ever try to modify or limit the effect of the Court's judgments or decisions, e.g. by modifying the Court's interpretation to fit in as far as possible with the national legal system and the national legal traditions. The examples given above show that the French courts usually follow the Court's judgments quite carefully.

6.3.2. *Liability claims*

A separate question is whether judgments of the ECtHR may give rise to successful liability claims against the State. Interestingly, the conventionality review of legislative validations established a new State liability regime since the previous legislation ignored France's international commitments. On 8 February 2007, the Council of State decided on an important case – *Gardedieu*[85] – and established a new regime of responsibility for France. Pursuant to the *Nicolo* judgment of 1989, France could adopt a statute contrary to an international agreement but surprisingly could not be sanctioned for the non-application of the treaty. Indeed, the Council of State did not allow itself to sanction France for not respecting its international agreements. The Council of State changed that radically in the *Gardedieu* case. In that case, the supreme administrative court obliged France to award the sum of €2,800 to an injured person for the damage suffered as a result of the adoption of a legislative validation contrary to Article 6(1) ECHR.[86] In principle, however, the Council of State strictly restricts the scope of any final judgment made by the ECtHR to the parties involved.[87]

6.3.3. *Reopening of criminal proceedings*

As regards the reopening of criminal proceedings, the criminal division of the Court of Cassation previously considered that a sentence by the ECtHR, 'while allowing the claimant to ask for damages, does not affect the validity of the procedures in the domestic law'[88] or, more generally, has 'no direct impact on the decisions of national courts in the domestic law'.[89] By incorporating a reconsideration of a criminal procedure which led to a finding of a violation by the ECtHR into domestic law in 2000, the French lawmaker had invited the criminal division of the ordinary courts to reconsider its position. Article 626-1 of the French Code of Criminal Procedure now reads:

---

85 CE Ass., 8 February 2007, *Gardedieu*, *RFDA* 2007, p. 361, concl. L. Derepas.

86 For further details, CE Ass. 8 February 2007, *Gardedieu*, *RFDA* 2007, p. 361, concl. L. Derepas.

87 See as an example, CE 24 November 1997, *Société Amibu Inc.*, *RFDA* 1998, p. 978.

88 Crim. 3 February 1993, *Kemmache*, *D*, 1993, p. 515, note J.-F. Renucci.

89 Crim. 4 May 1994, *Saïdi*, *JCP G* (*Juris Classeur Périodique – La Semaine Juridique – édition générale*), 1994, II, 22349, note P. Chambon.

'The reconsideration of a final criminal decision may be requested for the benefit of any person judged guilty of an offence, where this conviction is held, in a judgment given by the European Court of Human Rights, to have been declared in violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, or its additional Protocols, and where the declared violation, by its nature or seriousness, has led to harmful repercussions for the convicted person, which the "just satisfaction" granted under Article 41 of the Convention cannot bring to an end.'

Similar possibilities for reopening do not exist in civil or administrative law cases.

6.4 . RESPONSES TO ECtHR JUDGMENTS AGAINST OTHER STATES

Even though states that are not directly connected with Strasbourg judgments do not necessarily have to comply with them, more and more states in fact do try to avoid a potential sentence from the Strasbourg Court by conforming to its case-law. Therefore, the authority of the cases of the Strasbourg Court plays a significant role, at least *de facto*, even for those states that are not party to a dispute. French courts follow this overall tendency.

Today, it seems that France's highest courts are inspired by and rely on the case-law of the Strasbourg Court, including cases on violations committed in other states. In France, for instance, as regards respect for private and family life (Article 8 of the Convention), the courts have taken into account the ECtHR's case-law on the law relating to aliens, with the Council of State basing its position on the ECtHR's case-law which protects the rights of aliens forcibly expelled from national territory. In the light of the 1988 *Moustaquim* v. *Belgium* case,[90] the Council of State amended its case-law on the deportation of aliens in 1991. Another example is that the Council of State adopted without question the solution chosen by the ECtHR in the *Vilho Eskelinen and Others* v. *Finland* case, in which the Court held that the right to a fair trial and access to court (Article 6 ECHR) should normally apply in cases concerning civil servants.[91] From 12 December 2007 onwards, the *Siband* case[92] allows the applicability of Article 6 to the disputes judges have to deal with.

6.5. RUNNING AHEAD OR STAYING IN LINE?

It is clear from the above that the national courts generally try not to fall below the standards indicated by the ECtHR. However, they do not normally try to run

90 ECtHR 18 February 1991, appl. no. 12313/86.

91 ECtHR 19 April 2007, appl. no. 63235/00.

92 CE 12 December 2007, *Siband*, n° 293301, T. pp. 853–928.

ahead and offer additional protection. Instead, the French courts aim to 'copy' or 'mirror' the Court, even though it depends on the subject matter as to how far judges appear to be prepared to go. In this regard, one should also consider the declaration made by the First President of the Court of Cassation in 2010, in which he asserted that the domestic judge:

> 'shall apply the domestic law according to the provisions of the Convention as interpreted by the ECtHR and, should this consistent interpretation be impossible, quite simply ignore the inconsistent rule, whether legal or regulatory, recent or old'.[93]

This clearly expresses the desire to 'mirror' the Court's approach. On the other hand, mirroring does not only mean 'acting in compatibility with the Convention', but also 'not running ahead' and offering more protection than is actually required by the Court. Indeed, this aspect of the mirror principle is also used in France, mainly because of the notion of separation of powers. In principle, additional protection can only be offered by the legislature, not by the courts. The decision to refuse an authorisation of adoption on the grounds that the claimant is homosexual is an illustration of this. In this case, the administrative supreme court did not wish to anticipate a change in the legislation and on the contrary left it up to Members of Parliament to set new regulations that would correspond with how social mores were evolving.[94] This was exactly what happened in France with the recent adoption of the Wedding for Everybody Act 2013. In its 1996 decision, the Council of State opted for a cautious position in contrast to the administrative court of first instance (TA of Paris) which granted the request to Mr Fretté.[95] Indeed, by granting Mr Fretté's claim to adopt a child despite the fact that he had declared his homosexuality to the French administration, the Administrative Court was running ahead of the ECtHR. Until the reversal of case-law in *E.B.* v. *France* on 22 January 2008,[96] the ECtHR did not allow homosexual people to adopt and did not consider that this constituted discrimination under Article 8 of the ECHR.

6.6. LIMITATIONS AND RELUCTANCE TO FOLLOW THE STRASBOURG CASE-LAW

In the above it was demonstrated that French courts usually do not hesitate to apply the Convention directly, even to cases between private parties, and they

---

93 G. Canivet, 'La Cour de cassation et la Convention européenne des droits de l'homme', in C. Teitgen-Colly, *Cinquantième anniversaire de la Convention européenne des droits de l'homme* (Nemesis-Bruylant, 2002) p. 260.

94 CE 9 October 1996, *Departement de Paris* c. *Fretté*, *Lebon* p. 390.

95 TA Paris 25 January 1995, *Petites Affiches* 30 June 1995, n° 78, p. 20.

96 ECtHR (GC) 22 January 2008, appl. no. 43546/02.

are empowered to set aside provisions of the Convention. There are also examples, however, where the courts have declined to use their competence to set aside national legislation or decisions in order to respect separation of powers or the sovereignty of Parliament. An example is the *Asnar* v. *France* case of the ECtHR, which required that a magistrate's statement must be communicated to the plaintiff[97] even when it does not contain any new element. This judgment did not lead the administrative court to modify its practice.[98] Indeed, this is understandable, since the non-communication of superfluous statements would slow down proceedings unnecessarily. Another example is a case where the Council of State specified which doctors were authorised to provide a detailed medical certificate. As a consequence of its judgment, the Prefect may decide to allow an 'expert doctor' to compulsorily hospitalise a person suffering from mental disorder without requiring this medical certificate, under any circumstances, even though the ECtHR requires the certificate to be provided.[99] And finally, while the Constitutional Council understands the notion of 'security detention' as a security measure, the ECtHR understands it as a sentence.[100]

These examples reveal that the French courts do not blindly follow the ECtHR, but sometimes prefer to give their own interpretations. Hereinafter, some specific situations are discussed in which the national courts have declined to adapt their own approaches to those preferred by the ECtHR.

6.6.1. Legislative discretion and deference

Firstly, reluctance to set aside legislation may often be related to the discretion of the legislator in drafting its legislation and the deference to be paid by the courts in this respect. In its QPC decision of 6 October 2010, for example, the Constitutional Council recalled that it is not entitled to substitute the view of the legislator with its own understanding. On 9 July 2010, according to the conditions established by Article 61-1 of the Constitution, the Court of Cassation submitted to the Constitutional Council a QPC requested by Mrs Isabelle D. and Mrs Isabelle B., concerning the conformity of Article 365 of the

97 ECtHR 18 October 2007, appl. no. 12316/04. The Government Commissioner has now the obligation to communicate before the hearing the 'general sense' of his conclusions to the party making such a request.

98 The case concerned the unfairness of a procedure of rights and obligations of civil nature in front of the Council of State in 1999, and in particular the violation of the contradictory principle because of the lack of communication of the memorandum in reply of the defendant to the plaintiff (violation of Article 6(1)). The ECtHR mentioned that this memorandum contained a reasoned opinion on the well founded claim of the plaintiff whom therefore had to be transmitted to him.

99 CE sect. 9 June 2010, *Lavallé*; to be read together with *Winterwerp* v. *the Netherlands*, ECtHR 24 October 1979, appl. no. 6301/73 and *Varbanov* v. *Bulgaria*, ECtHR 5 October 2000, appl. no. 31365/96.

100 Cons. const. 21 February 2008, n° 562 DC, *Rec. Cons. const.* 89.

Civil Code with the rights and liberties guaranteed by the Constitution.[101] The Constitutional Council considered that, by maintaining the principle according to which the ability to adopt as a couple is allowed only to spouses, the legislator estimated, in the exercise of its competence granted by Article 34 of the Constitution, that the difference in situation between married and unmarried couples could justify, in the interests of the child, different treatment as regards adoption of underage children. The legislator had stressed that the Constitutional Council could not substitute its understanding for that of the legislator of the consequences of the particular situation of children raised by two persons of the same sex. Thus the Constitutional Council concluded that the complaint of a breach of Article 6 of the 1789 Declaration had to be set aside. The Constitutional Council also considered that Article 365 of the Civil Code was not contrary to any right or liberty guaranteed by the Constitution.

In its QPC decision of 28 January 2011, regarding the request for same-sex couples to be granted access to the status of marriage, the Constitutional Council upheld this case-law, which is respectful of legislative competences and the separation of powers. This case was brought to the Constitutional Council by the Court of Cassation on 16 November 2010, under the terms of Article 61-1 of the Constitution.[102] This was done in reference to a QPC introduced by Ms Corinne C. and Ms Sophie H., regarding compliance with the rights and liberties laid down in Articles 75 and 144[103] of the French Civil Code and guaranteed by the Constitution. The Constitutional Council dismissed the claim and recalled that freedom to marry did not restrain the power conferred by Article 34 of the Constitution on the lawmaker to set the conditions for marriage, provided that in the exercise of this power the lawmaker does not deprive constitutional requirements of their legal guarantees.

6.6.2. Interpretative reservations

French courts are not competent to order the national legislature to make national law conform to the ECHR by means of amending or introducing legislation. The reason why courts do not enjoy this jurisdiction is that they cannot act in contradiction with the principle of separation of powers. When the Constitutional Council exercises its control on organic laws, ordinary laws or standing orders of Assemblies (National Assembly or Senate), it has only one option: to declare a provision compatible or incompatible with the Constitution. However, on its own initiative, the Constitutional Council has found an intermediate solution, which allows it to escape from this rather harsh

101 Case No. 12143 of 8 July 2010.

102 Civ. 1ère, Case No. 1088 of 16 November 2010.

103 Article 75 of the French civil code settles provisions which must be read by the legal officer on a wedding day: names of the adults, witnesses, contract of mariage, commitment, etc. Article 144 defines the legal age to get married, namely 18 years old.

restriction. It is called the technique of interpretative reservations. This technique allows the Constitutional Council to declare a provision compatible with the Constitution, provided that the provision is interpreted or applied in the way the Constitutional Council proposes. This technique was developed very early on, in a 1959 decision concerning the standing orders of the National Assembly.[104] It is not unique to France: Italian, German and Spanish judges also use this technique. The first use of this technique by the French Constitutional Council occurred in its decision of 30 January 1968 concerning local taxes. The technique developed considerably later on, especially since the decisions concerning the Security-Liberty Act of 20 January 1981 and the Press and Media Enterprises Act 1984.[105]

6.7. DEGREE OF INFLUENCE: ADOPTION OF 'TYPICAL' ECtHR METHODS OF REVIEW?

One final question which may arise in relation to the application of ECtHR case-law is whether the French courts actually directly and autonomously apply certain methods or approaches developed by the ECtHR. One such method might be the margin of appreciation doctrine, which for the ECtHR serves the purpose of helping find an appropriate standard of review in dealing with reasonableness and proportionality issues. The Council of State in particular considers this margin as a way of avoiding protectionist inconsistencies[106] with the ECHR. The Council of State does not want to adopt a protectionist attitude in favour of national law, as to do so might risk potential European sanctions later on. Most of the time it confines itself to considering the provisions of the ECHR as well as the decisions of the ECtHR that help to solve the problem at the national level. The margin of appreciation doctrine is therefore hardly mentioned and used in France as a *national* jurisprudential device.

Nevertheless, there is a degree of variation in the intensity of review in fundamental rights cases, using and developing typical national standards. The intensity with which French courts review legislation and/or administrative decisions on their conformity with the ECHR, might be illustrated by the case-law concerning the right of aliens. Traditionally showing great reserve in its review, since the mid-1970s the administrative courts have undertaken a review limited to manifest errors of appreciation, for instance a review of decisions taken on grounds of public policy leading to the deportation of an alien.[107] The courts then undertook a full review of motives of decisions concerning aliens, by verifying, for example, proportionality between the violations of the alien's

104 2 DC 17 June 1959.

105 11 October 1984.

106 i.e., a way to prefer and favour national point of view instead of ECHR and ECtHR position.

107 CE 3 February 1975, *Min de l'Int.* v. *Pardov*, *Rec.* p. 83.

family life brought about by police measures and the public interests that motivate these measures, in order to give full effect to the provisions of Article 8 of the ECHR. At first, the courts' approach was very restrained but later on (in the late 1980s and beginning of the 1990s), the courts became more active.[108] This precedent has been extended, without following a European demand, by the generalisation of a so-called normal review[109] of immigration policy.[110] This change can be explained by the initial reticence of the administrative judge to take account of the case-law of the ECtHR and the change by the end of the 1990s because of the intensification of immigration controls, and consequently the increase in violations of fundamental rights. It can also be explained in terms of the will of judges to reinforce human rights guarantees in a field particularly subject in recent years to tough political measures.[111]

In practice, proportionality review is enforced by the ordinary courts, whether it is in the criminal or the civil domain. These courts apply the Court's standards and instruments in much the same way as the ECtHR does. In applying the specific provisions of aliens' rights, for example, a court of appeal was sanctioned for ignoring 'provisions of Article 8 of the ECHR even though, on hearing a request for a sentence of a permanent ban from the French territory made by a claimant invoking the right to respect for private and family life to be overturned, the court did not check to see whether upholding the measure in question respected an appropriate balance between the right mentioned and the requirements of Article 8.2 of the aforesaid Convention'.[112]

The Council of State mobilises the special features of treaty provisions as they are interpreted by the European Court in order to define the scope and the degree of intensity of its own review. A judgment of 26 October 2007 in the case of *Association de défense contre les nuisances aériennes* clearly bears testimony to this, on two scores. First because the Council of State, after having hesitated to adjudicate distinctly, applies Article 8 of the Convention as far as environmental protection is concerned, following a particularly extensive interpretation by tbe ECtHR, which includes the right to life in a healthy environment within the scope of the right to a private and family life. Secondly because the Council of State takes care to adapt its review to that carried out by the ECtHR, which conducted a review of the balance of measures taken or refused in the field of environmental protection. Renouncing an asymmetric review (i.e. a control which would not be the same as that applied by the ECtHR), practiced until now on the use or non-use of the power of the special police force of the

108 CE 19 April 1991, *Mme Babas*, *Rec.* p. 162 et CE Ass. 19 April 1991, *Belgacem*, *Rec.* p. 152.

109 In French administrative law, normal review means that the judge controls both the external (procedure/competence/forms) and internal (error of law/ error of facts) legality of the act.

110 CE, sect. 17 October 2003, *Bouhsane*, *Rec.* p. 413.

111 Cf. O. Lecucq, *La rétention administrative des étrangers – Entre efficacité et protection* (L'Harmattan, Bibliothèques de droit, 2011).

112 Crim. 25 May 2005, pourvoi n° 04-85.180.

administrative authority to restrict airport use, the Council of State, on the same lines as the European precedents, chose a normal review which led it to appreciate 'the right balance between the people's right for a private and family life and the interests – particularly economic interests – linked to nocturnal activities of an airport'.

It is also the conventional requirement for an 'unlimited jurisdiction' review, stated by the ECtHR under 'the right to a tribunal', that encourages the Council of State, as part of an *ultra vires* action, to practice an intensive test of proportionality on professional sanctions imposed by an administrative authority that are brought in civil matters under Article 6.

The Court's point of view only starts to prevail when there is a difference of interpretation with the domestic judge. As soon as a proportionality review is implemented there can be different judgments. For the French lawyer, the field of divergence has been whether a legislative validation was justified by 'overriding reasons in the general interest' with regard to the Convention (the ECtHR's point of view) or by 'sufficient general interest' on a constitutional level (the French Constitutional Council's point of view). In such cases, the Court's judgment has in the end prevailed. But, as opposed to the criterion laid down by the ECtHR, for a long time the Constitutional Council contented itself with 'reasons of public interest', in this sense being less demanding than the ECtHR, while applying a review on a manifest error of assessment.[113]

Thus, it may be concluded that strict review of proportionality is usually only applied if the case-law of the ECtHR forms a sufficient basis for it.

In answer to the question of whether the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation (interpretation 'in the light of present day conditions') or consensus interpretation, it might be said that judges do what French doctrine sometimes calls 'constructive interpretation'.[114] Frédéric Sudre defined it thus:

> 'The domestic judge does not hesitate to give a constructive interpretation of the provisions of the Convention, using the potential offered by the conventional instrument dynamically in its conventionality review. ... The judge can do this in two ways. Either the domestic judge makes an extensive interpretation which leads him/her beyond the European interpretation, and one will consider that the judge carries on a dialogue with the European Court. Or the domestic judge gives an innovative interpretation in the absence of European precedents, and one will consider that the judge is thereby starting a dialogue with the European Court, who may or may not respond.'[115]

---

113 This control is less demanding than the normal one. French courts just check in such a case that the most obvious errors of assesment have not been commited.

114 In French, known as the '*interprétation constructive*'.

115 F. Sudre, 'Convention européenne des droits de l'hommes et droit interne: primauté et effet direct', in L.E. Pettiti et al., eds., *La Convention européenne des droits de l'homme* (Némésis, 1992) p. 14.

However, the courts sometimes prefer to use 'classical' methods of interpretation, such as teleological or historical interpretation. They also base a novel interpretation on a simple reference to a judgment of the ECtHR.[116]

6.8. CONCLUSION

The French courts are usually inclined to follow the case-law of the European Court of Human Rights carefully. Especially following ECtHR cases against France, but also pursuant to cases against other states, the courts are often prepared to change their own interpretations and judicial approaches. Some of the Court's doctrines, such as the requirement of proportionality review, are consistently applied in French case-law. Moreover, in specific cases the French courts may provide for compensation or they may reopen (criminal) proceedings.

Nevertheless, it is equally clear that the French courts do not uncritically apply the Strasbourg case-law and do not follow up on the Court's judgments without questioning their reasonableness. There are several examples in which the national courts declined to use available constitutional competences for conventionality review because of the perceived need to pay deference to the legislature. Moreover, the judicial techniques used in fundamental rights review are clearly not dominated by the Court's approach – in fact, the French courts usually apply their own doctrines of intensity of review and their own interpretative mechanisms, even if they will use such doctrines as much as possible to achieve the end result of Convention compatibility.

7. THE ROLE AND POSITION OF THE ECtHR DEBATED IN THE COUNTRY

Given the present practical impact of the Convention on French case-law, the question arises as to whether this impact is generally met with enthusiasm, or if there is a more critical attitude towards the Convention and the ECtHR's case-law. In this regard, it should be stressed that, until France finally ratified the ECHR in 1974 and accepted the individual right to apply directly to the Court in 1981, the impact of the Convention was limited. After the first condemnation of France in 1986 in the famous *Bozano* case,[117] involving criminal procedure and a violation of Article 5(1) of the ECHR, France was quite often pointed out as a bad student. After this first condemnation of France, some criticism immediately emerged, in particular from academics, because France had been convicted by an international

116 Court of Cassation, chambre commerciale, 12 July 2004, n° 01-11403, *Bull. Civ.*, IV, n° 153, p. 167; CE 25 May 2007, *Courty*, *AJDA* 2007, 1424, concl. R. Keller.

117 *Bozano* v. *France*, ECtHR 18 December 1986, appl. no. 9990/82; see also G. COHEN-JONATHAN, 'La France et la CEDH, L'arrêt Bozano', *Revue Trimestrielle de Droit Européen* (1987) p. 255.

court and by a system which the State took time to ratify. The enlargement of the Council of Europe in the 1990s has probably created a certain amount of scepticism for some people, but this does not seem to have had a major impact on the perception of the Court and its work. The criticism mainly visible in France nowadays comes from the courtroom, politics[118] (denouncing the length of European procedures) and the police (because of the reform of the custody in France),[119] but it remains marginal. When criticism occurs in politics from national parties,[120] disrespect for national sovereignty is generally pointed out. Presently, the media can be considered to be the voice of this marginal criticism.

Concerning the marginal criticism from judges, this became visible from 1998, when the present system of supervision was introduced by Protocol No. 11 to the Convention.[121] Since then, some judges of the Council of State have been mildly critical of the meaning given to the *res interpretata* authority even if at the end of the day the *erga omnes* effect[122] of the European case-law is applied by the supreme administrative court.[123] The 'judges' dialogue' (*dialogue des juges*) introduced by President Bruno Genevois,[124] regarding relations between domestic courts and the European Court of Justice, has spread to relations between the ECtHR and the Constitutional Council. This reveals the extent to which any existing judicial criticism is marginal, even though it comes from a few members of the Constitutional Council.[125] Moreover, it makes it clear that such criticism is not only addressed to the ECtHR. The clearest criticism was offered by Ronny Abraham[126] in his conclusions as the government commissioner in the *Bitouzet* case,[127] but it remains isolated and circumstantial.

---

118 Bernard Accoyer, the President of the National Assembly has surprised everyone in February 2011 when he criticised in an interview for the Figaro (*Le Monde* 28 October 2011) the audacity of the European Court.

119 Since the condemnation of France in 2010 in the *Brusco* case (ECtHR 14 October 2010, appl. no. 1466/07), the defendant can be represented by its legal representative from the first hour of police custody. The police have criticised this new reform by saying that it does not help the search for the truth.

120 Mainly the *Front national* of Marine Le Pen (FN) and the *Front de gauche* (union of PCF and PG and other leftwing parties).

121 Denoix de St Marc was one of the first to denounce the more and more important influence of the ECHR and its court because of the application of Protocol No. 11 and the transformation of the Court into a permanent, obligatory and unique jurisdiction.

122 CE Ass. 30 November 2001, *Diop*, *Rec* p. 605 concl. Courtial.

123 <www.conseil-etat.fr/fr/discours-et-interventions/conferences-du-conseil-d-etat-sur-le-droit-europeen-des-droits-de-l-homme.html>.

124 President of the Council of State from 1999–2006.

125 For instance, Denoix de St Marc, who mainly criticises the enlargement of the influence and the expansion of scope of the ECtHR, which is a bit different from the questioning of some of the members of the Council of State.

126 Abraham was at the time government commissioner. Since then he has been a judge at the ICJ. In the *Bitouzet* case, he criticised the fact that when direct effect is lacking, the Council of State limits the effect of international agreements. He suggested at the time that international agreements should always product the maximum effects and should always bind the states.

127 CE Sect. 3 July 1998, *Bitouzet*, *RFDA* 1998, p. 1243, concl. R. Abraham.

Political criticism of the kind pointed out above became visible from the 1990s, when unemployment increased. The National Front party (FN), whose leader is nowadays Marine Le Pen, exploited the unemployment crisis, and today the economic crisis, to denounce Europe as responsible for everything going wrong. The National Front is nowadays considered the third most important political party in France after the Socialist Party (PS) and the Conservatives (UMP). The National Front, which is a populist party, is able voice its criticism against Europe thanks to the media.

The marginal criticism does not affect in France the status of the ECHR and the ECtHR's judgments or decisions in judicial decision making. The relatively mild criticism of the Court may also show that there are no intentions on the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR. On the contrary, the QPC vastly extends the applicability of the ECHR by the Constitutional Council, especially Article 6(1) ECHR. This was not the main intention, but it is essential: the application of the ECHR is reinforced.

8. CONCLUSION

In order to understand to what extent there is a connection between, on the one hand, the main features and characteristics of the French constitutional system and the status of international law in the national legal system, and on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case-law, the following can be noted.

First of all, the connection between the main features and characteristics of the French constitutional system and the status of international law is due to the constitutional provisions which confirm the existence of a monist system with primacy of international law in the French legal order. It is also due to the 'steamroller effect' of the ECHR and the decisions of the Court: basically, sooner or later the European argument wins out and the courts give in. Every single French court is influenced sooner or later by the reasoning of the ECtHR and is nowadays prepared to apply national law in conformity with the prescriptions of ECtHR. French judges, although initially somewhat suspicious, today appear more willing to collaborate in what some, such as Laurence Burgorgue-Larsen and others, call the 'dialogue of judges'.[128] All judges are equally concerned by this Europeanisation of the law.

---

128 See concerning the dialogue of judges: L. GARLICKI, 'Contrôle de constitutionnalité et contrôle de conventionnalité. Sur le dialogue des juges', in *La Conscience des droits. Mélanges en l'honneur de J-P Costa* (Paris, Dalloz 2011) p. 271 and, in the same volume, B. GÉNEVOIS, 'Cour européenne des droits de l'homme et juge national: dialogue et dernier mot', p. 281, and M. GUYOMAR, 'Le dialogue des jurisprudences entre le Conseil d'Etat et la Cour de

With the QPC system now in place, the Constitutional Council is increasingly integrating European human rights law into its reasoning and decisions, so much so that it anticipates possible convictions of France in Strasbourg. Even if the ECHR is still not part of the 'bloc of constitutionality' and still not considered an imperative norm with constitutional value, with the introduction of the QPC, it is gradually becoming a persuasive element of this bloc. The ECHR has undoubtedly helped to better guarantee human rights in France through domestic case-law. In this regard, too, it can be said that there has been Europeanisation of protection: European law is now integrated into all judges' reasoning, including that of the Constitutional Council. It can even be considered that European human rights law is implicitly placed on the same level as constitutional rules. Indeed, one might think that European human rights law, implicitly placed on the same level as constitutional rules thanks to the mode of reasoning adopted by the Constitutional Council, may one day be explicitly incorporated into the bloc of constitutionality. In reality, that would mean that international norms would obtain constitutional force and constitutional review would be reinforced because conventional review would disappear. The role and review of the Constitutional Council would then become crucial in comparison with ordinary courts. Nevertheless, the Constitutional Council is still reluctant at this point: whereas it interprets constitutional principles in the light of fundamental rights guaranteed by the ECHR, it still refuses to widen the norms it refers to (bloc of constitutionality) when carrying out a review of the Convention. The question that arises is therefore whether the Constitutional Council should not in future do explicitly what it has already done implicitly, that is, interpret the preamble of the Constitution in the light of the Convention.

The constitutional system of monism with primacy of international law has undoubtedly played a role in encouraging very extensive integration of the European Court's reasoning into French case-law. It is also clear, however, that this integration is not very strongly criticised. In France, until now, debates have given preference to the ECHR and the ECtHR, in spite of a few marginal and isolated instances of europhobic behaviour. This tendency shows no sign of reversing at the time of writing. Moreover, it is clear that French courts have found ways to apply the judgments of the European Court of Human Rights in order to duly comply with the Convention, without impeding their own constitutional competences and without really limiting their judicial autonomy. Thus, indeed, there seems hardly any reason why a debate on the 'overly strong' impact of the Convention in France should really exist.

Strasbourg: appropriation, anticipation, émancipation', p. 311. See also *Le dialogue des juges. Mélanges en l'honneur de B. Genevois* (Paris, Dalloz 2009).

CHAPTER 5
GERMANY

Eckart KLEIN

1. THE CONSTITUTIONAL SYSTEM

1.1. BASICS

While state constitutions generally intend to pave the nation's way for the future, they do so by responding to the experiences of the past. In particular, the Basic Law (BL), the constitution of the Federal Republic of Germany, tries to draw legal consequences from the experiences of the first half of the 20th century, the two World Wars, the failed Weimar Republic, the totalitarian Nazi regime based on excessive nationalism, racism and a complete denial of the individual's dignity, finally culminating in the Holocaust. By contrast, the Basic Law founds the German State on the respect for the dignity and fundamental rights of all human beings, on organisational principles such as democracy, separation of powers and the rule of law, and on the repudiation of nationalistic exclusivity by declared openness to international law and the international community.

1.2. FEDERAL ORGANS

The Basic Law, which entered into force on 23 May 1949, has been amended nearly sixty times since then, but has not lost the features that characterised it from its beginnings.[1] Germany is a parliamentary democracy and a Republic, as its official name indicates. The Head of State is the Federal President (*Bundespräsident*), elected for five years by the Federal Convention (*Bundesversammlung*), consisting of the members of the Federal Parliament and an equal number of representatives elected by the parliaments of the *Länder* (*Landtag*). The Federal President is elected by a majority vote of all the members of the Federal Convention and can be re-elected only once (Article 54). Generally

[1] The reunification of Germany did not result in major changes of the constitutional system since the former communist German Democratic Republic acceded to the Basic Law (*Grundgesetz*) according to the original version of Article 23 BL.

speaking, the President has only representative competences. The legislative power is exercised on the federal level by the Federal Diet or Parliament (*Bundestag*) and the Federal Council (*Bundesrat*) through which the states (*Länder*) participate in the legislation and administration of the Federation and in matters concerning the European Union (Article 50). The Federal Government (*Bundesregierung*), chaired by the Federal Chancellor (*Bundeskanzler*), represents the executive power, the Chancellor determining the general guidelines of policy (Article 65). The judiciary composed of independent judges is made up by the courts of the Federation and the *Länder* (*Bundesgerichte, Landesgericht*).[2]

1.3. THE FEDERATION AND THE *LÄNDER*

The horizontal separation of powers is supplemented by a vertical separation resulting from the simultaneous existence of the Federation and the 16 *Länder*, which themselves are organised according to the separation of powers principle, having a government (*Landesregierung*) and a parliament (*Landtag*).[3] Regarding the relationship between the Federation and the *Länder*, Article 30 Basic Law determines that the exercise of state powers and the discharge of state functions is a matter for the *Länder* except as otherwise provided or permitted by the Basic Law. Therefore the Basic Law thoroughly defines the legislative and administrative powers of the Federal State.[4] If the Federation is empowered to act, federal law takes precedence over *Land* law (Article 31 Basic Law), provided that it is in conformity with the Federal Constitution.

1.4. THE COURT SYSTEM

While there is a fairly clear distribution of powers based on matters of substance in the legislative and administrative field, the court system is organised quite differently. Although the judiciary, too, is composed of organs of the *Länder* and the Federation, the courts' competencies within the several branches are not divided along the lines of subject matters, but the *Länder* courts always form the lower courts while the federal courts are established as supreme courts of ordinary, administrative, financial, labour, and social jurisdiction (Article 95, paragraph 1, Basic Law).[5] The Federation and all the *Länder* have their own

2 See *infra*, section 1.4.

3 While the Basic Law (Art. 28, para. 1) prescribes the general legal principles for the *Land* constitutions, the details are autonomously regulated by the 16 *Land* Constitutions themselves.

4 See particularly Art. 73 and 74 and Art. 83 to 91 BL.

5 Federal Court of Justice (*Bundesgerichtshof*), Federal Administrative Court (*Bundesverwaltungsgericht*), Federal Finance Court (*Bundesfinanzhof*), Federal Labour Court (*Bundesarbeitsgericht*), Federal Social Court (*Bundessozialgericht*).

constitutional courts. The Federal Constitutional Court (FCC; *Bundesverfassungsgericht*) performs its duties according to the powers assigned to it by the Basic Law or other federal laws, especially the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*).[6] The competences of this Court are very broad.[7] They comprise, inter alia, abstract and concrete norm control, resolution of disputes between the Federation and the *Länder* and between the *Länder* themselves, disputes between federal organs, prohibitions of political parties and forfeiture of basic rights. Of particular importance is the constitutional complaint procedure (*Verfassungsbeschwerde*), enabling any person who claims that one of his or her constitutional basic rights has been violated by a public authority, including the legislative power, to lodge a complaint of unconstitutionality with the Federal Constitutional Court. More than 96% of all procedures coming before this Court involve such individual complaints, which emphasises the general awareness of the importance of basic rights protection in Germany.[8] The constitutional courts of the *Länder* are established by the *Land* constitution or other *Land* law.[9] According to these rules only some of them have the power to decide on individual constitutional complaints relating to alleged violations of basic rights protected under the *Land* constitution. A *Land* constitutional court can never decide on a violation of a basic right contained in the Basic Law. On the other hand, it is possible for an individual to claim that a decision of a *Land* constitutional court violates the (perhaps quite similarly framed) fundamental right of the Basic Law and lodge a complaint with the Federal Constitutional Court.[10]

1.5. CONSTITUTIONAL RIGHTS OF THE INDIVIDUAL

The Basic Law and most *Land* constitutions contain quite comprehensive catalogues of fundamental rights. The catalogue at the federal level is quite similar to that of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Both catalogues originate from the immediate post-war period and are clearly influenced by the Universal Declaration of Human Rights, adopted by the UN General Assembly in December 1948. Unlike

6 The law dates from 1951, but has often been amended.

7 A full and detailed account of all the powers of the Federal Constitutional Court is given by E. BENDA, E. KLEIN and O. KLEIN, *Verfassungsprozessrecht*, 3rd edn. (Heidelberg, C.F. Müller 2012).

8 *Idem*, p. 597. From 1951 to 2010 188,810 cases were brought before the Court, of which 96.47% were individual complaints. However, the success rate is lower than 5%.

9 A detailed review is presented by C. PESTALOZZA, *Verfassungsprozessrecht*, 3rd edn. (München, C.H. Beck 1991) pp. 372 ff.

10 Sometimes very difficult issues arise in this context; for a more detailed discussion see BENDA and KLEIN, *supra* n. 7, pp. 18–29 and *infra* section 3.1.

the Basic Law, which, apart from very few exceptions, focuses on civil and political rights, many *Land* constitutions also enshrine economic, social and cultural rights. As long as those rights are in conformity with federal law they remain in force (Article 142 Basic Law).

The list of rights contained in the Basic Law starts with the proclamation of the inviolability of human dignity and the obligation of all state authority to respect and protect it (Article 1, paragraph 1). According to Article 1, paragraph 2, '[t]he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world', and paragraph 3 of the same provision determines that the 'following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law'. Article 2 of the Basic Law generally guarantees the right to personal development, the right to life and personal integrity. Article 3 contains the equality and non-discrimination clauses. The following articles enumerate the classic freedom rights as, for example, freedom of religion, faith and conscience, of expression and information, of assembly, association, correspondence, movement, privacy, property, etc.[11] The basic rights usually entitle as subjective rights all individuals, thus not distinguishing between German nationals and non-nationals. Some rights, however, are restricted to Germans, namely the rights to assemble peacefully, to form corporations and other associations, to move freely throughout the federal territory, and to choose any occupation and profession.[12] In fact, this does not exclude non-nationals from the enjoyment of these rights, as they may claim the general right to the free development of their personality (Article 2, paragraph 1), which also entitles them to lodge a constitutional complaint with the Federal Constitutional Court.[13] Further, according to legislative provisions, aliens enjoy all the rights which are reserved to German nationals on the basis of the Constitution. Apart from this, because of the prohibition of discrimination on the ground of nationality (Article 18 TFEU), all nationals of other states belonging to the European Union must not be treated differently in the enjoyment of the rights, with the sole exception of the right to vote (Article 38 Basic Law). Even here, on the basis of European Law, other EU citizens have the right to vote at the county and municipal level.[14] However, foreigners from other countries are generally excluded from the right to vote.[15]

11 The basic rights are contained in Arts. 1 to 19, 20 para. 4, 33, 38, 101, 103 and 104 BL.

12 Arts. 8, 9, 11 and 12 BL.

13 J. Gundel, 'Der grundrechtliche Status der Ausländer', in J. Isensee and P. Kirchhof, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. IX, 3rd edn. (Heidelberg, C.F. Müller 2011) p. 843 at p. 846–7.

14 Art. 28, para. 1, BL.

15 BVerfG 31 October 1990, *BVerfGE* 83, 60 (71 et seq.).

1.6. CONSTITUTIONAL OPENNESS TO INTERNATIONAL LAW

The last characteristic of the Basic Law to be mentioned here is its openness to and its preparedness for respect for international, including European, law. This characteristic is discussed in more detail in the next section.

2. STATUS OF INTERNATIONAL LAW IN DOMESTIC LAW

2.1. POSITION OF INTERNATIONAL LAW IN GERMAN LAW

The Basic Law contains specific rules on the status of general rules of international law and international treaties within the German legal order. According to Article 25, clause 1 Basic Law, general rules of international law, comprising customary international law and general principles of law,[16] are an integral part of the national law.[17] If these rules entitle individuals, they directly create rights and duties for the inhabitants of the federal territory.[18] As to international treaties, Article 59, paragraph 2, clause 1 Basic Law provides that treaties regulating the political relations of the Federation or relating to areas of federal legislation, which, e.g., includes human rights treaties such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights, have to be consented to by the relevant legislative bodies (*Bundestag, Bundesrat*) in the form of a federal law (statute). This law is understood as legal basis for the incorporation (or adoption) of the treaties into domestic law.[19]

16 Cf. Art. 38, para. 1, of the Statute of the International Court of Justice.

17 Art. 100, para. 2, BL: 'If, in the course of litigation, doubt exists whether a rule of international law is an integral part of the federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court'.

18 Art. 25 para. 2 BL.

19 The ECHR does not itself order its incorporation into domestic law, even not on the basis of its Art. 13; see *James and Others* v. *the United Kingdom*, ECtHR 21 February 1986, appl. no. 8793/79; *contra*, based on Art. 31, para. 3(b), Vienna Convention on the Law of Treaties of 1969, J.M. Hoffmann, 'Die Pflicht der Staaten zur Übernahme der Rechte der Europäischen Menschenrechtskonvention in das innerstaatliche Recht', 16 *MenschenRechtsMagazin der Universität Potsdam* (2011) p. 129 at p. 131.

2.2. INCORPORATION THEORIES

Since the Basic Law itself does not determine how the incorporation of international treaties operates, different opinions can exist on this issue. Formerly this incorporation or adoption process for the general rules of international law and international treaties was interpreted as one of transformation, meaning that the international norm, on the basis of Article 25 itself or on the basis of the federal statute consenting to the treaty according to Article 59, paragraph 2 Basic Law, passed into a national norm (of course without losing its international nature on the international plane). Thus being part of domestic law, general rules of international law and treaties had naturally to be applied by all State organs to all suitable cases (*Transformationstheorie*).

Nowadays,[20] incorporation is instead understood as being based on an order for the application of the international norms automatically given by the Basic Law itself (Article 25) or the federal statute (Article 59, paragraph 2). However, this theory (*Vollzugslehre*)[21] can only be applied if the international norm itself is willing and able to produce immediate legal effect, meaning that it is sufficiently precise for direct application. Otherwise the norm has to be implemented by an applicable national norm.

Apart from this situation, it is a fairly academic question as to whether international norms are transformed into domestic law or an order of national application is given to the international norm. In the latter case the norm retains its international nature, i.e. it is applied as an international legal rule within the domestic legal order. The advantage of this view is that the rules of treaty interpretation and the other rules provided in the Vienna Convention on the Law of Treaties of 1969 can be used directly or because they reflect customary law, and also the denunciation of the international treaty by Germany would automatically bring its internal application to an end. The *Vollzugslehre* is therefore generally more adequate for the explanation of the incorporation or adoption process. On the other hand, it must be said that the same results, though through more sophisticated deliberations, can also be achieved if the transformation theory is applied.[22]

---

20 This is today not only the prevailing opinion of lawyers, but also of the Federal Constitutional Court, see, e.g., BVerfG 13 December 1977, *BVerfGE* 46, 342 (363).

21 Sometimes also called '*Anwendungsbefehlslehre*'.

22 See on the whole problem R. GEIGER, *Grundgesetz und Völkerrecht*, 3rd ed. (München, C.H. Beck 2010) pp. 154–161; H. STEINBERGER, 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen', 48 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1988) p. 1 at p. 4.

2.3. EU LAW

Concerning European law (EU law) the same method applies for the founding treaties (Article 59, paragraph 2, in conjunction with Article 23 Basic Law). If the wording of the treaty provisions is sufficiently clear, they can be directly applied.[23] Secondary law (regulations, directives, decisions) becomes applicable according to the treaty rules. Regulations and decisions are directly applicable, while directives require the creation of national legal provisions.[24]

2.4. EMANATIONS OF INTERNATIONAL ORGANISATIONS

In contrast to general international law and treaties, the Basic Law does not provide specific rules concerning emanations of international organisations other than the European Union to which sovereign powers may be transferred according to Article 24 Basic Law. This is true, for example, for binding as well as non-binding resolutions of the UN Security Council or other UN organs. In order to gain legal effect in national law the rules contained in the resolution must be transformed into national law, for example a Security Council resolution ordering sanctions according to Article 41 of the UN Charter. Actually, the Charter itself does not pretend to have immediate effect in the national sphere. As a general rule, public international law leaves the issue of how to comply with its rules to its subjects, notwithstanding existing international rules for non-compliance.

In principle, the same is true in relation to (internationally) binding and non-binding decisions of international courts or quasi-judicial bodies as treaty bodies. Judgments of the European Court of Human Rights as such, whether immediately directed at Germany or at another state, are not automatically incorporated into domestic law, but they obtain effect through the provisions of the Convention which they are interpreting and which are directly applicable.[25] In the same way, the legally non-binding views, concluding observations and general comments of the UN Human Rights Committee or other treaty bodies may also gain legal effect in the national legal order.[26]

---

23 The European Court of Justice (CJEU), in its jurisprudence, has identified many treaty provisions which can (and must) be directly applied and even take direct effect, i.e., individuals are entitled to invoke them before the national law applying bodies, especially courts.

24 Art. 288 TFEU.

25 See *infra* section 4.1.

26 See more closely R. UERPMANN, 'Implementation of United Nations Human Rights Law by German Courts', 46 *German Yearbook of International Law* (2003) p. 87 at p. 94; A. SEIBERT-FOHR, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para. 2', 5 *Max Planck Yearbook of United Nations Law* (2001) p. 399 at pp. 417 ff.

2.5. INTERNATIONAL LAW IN THE DOMESTIC HIERARCHY OF NORMS

Being part of the law of the land does not answer the question of the rank international norms or decisions hold within the national hierarchy of norms. The German hierarchy of norms is primarily characterised by the division between federal and *Land* law. Article 31 BL states that federal law shall take precedence over *Land* law. The Basic Law forms the peak of the federal law.[27] Since treaties approved by the legislature (Article 59 BL) as well as general rules of international law (Article 25 BL) form part of the federal law, they take precedence at any rate over the law of the *Länder*. Further, the parliamentary approval by law confers on international treaties, again including human rights treaties, the rank of a federal Act of Parliament (statute), and therefore such treaties trump all federal law below this rank and all prior law.[28] It is true that this position makes treaties vulnerable in relation to later federal statutes (*lex posterior* rule), but there is a legal assumption, based on the principle of the Basic Law's friendliness or openness to international law (*Völkerrechtsfreundlichkeit*),[29] that the legislature does not wish to violate international obligations. Thus only if it is impossible to interpret a later statute in conformity with the treaty provisions will the later rule prevail, which of course creates an

27 This view is only disputed as far as (secondary) EU law is concerned which, according to the jurisprudence of the ECJ, prevails over any national norm, including the national constitution. The Federal Constitutional Court, at least in principle, still claims that the Basic Law shall prevail if the EU organs act outside their competences (*ultra vires*) or if the constitutional principles framing the identity of Germany are not respected; BVerfG 30 June 2009, *BVerfGE* 123, 267 (332, 348, 353); BVerfG 6 July 2010, *BVerfGE* 126, 286 (302).

28 BVerfG 26 March 1987, *BVerfGE* 74, 358 (370); BVerfG 14 October 2004, *BVerfGE* 111, 307 (317) (*Görgülü*). This opinion is based on Art. 59, para. 2, BL. It is argued that the treaty cannot have a higher rank than the statute by which the Parliament consents to the treaty. This argument is disputed by some authors, e.g. N. Sternberg, *Der Rang von Menschenrechtsverträgen im deutschen Recht unter besonderer Berücksichtigung von Art. 1 Abs. 2 GG* (Berlin, Duncker & Humblot 1999) p. 219; T. Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten', in R. Grote and T. Marauhn, eds., *EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Tübingen, Mohr Siebeck 2006), p. 61 at pp. 84 ff. See also the references given by K. Mellech, *Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung* (Tübingen, Mohr Siebeck 2012) pp. 43–51.

29 BVerfG 26 March 1957, *BVerfGE* 6, 309 (363); 111, 307 (317); 112, 1 (26); BVerfG 4 May 2011, *BVerfGE* 128, 326 (369). See further H. Sauer, 'Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur. Zur Bindung deutscher Gerichte an die Entscheidungen des Europäischen Gerichtshofs für Menschenrechte', 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) p. 35 at p. 46; A. Proelss, 'Der Grundsatz der völkerrechtsfreundlichen Auslegung im Lichte der Rechtsprechung des BVerfG', in H. Rensen and S. Brink, eds., *Linien der Rechtsprechung des Bundesverfassungsgerichts – erörtert von den wissenschaftlichen Mitarbeitern* (Berlin, De Gruyter Recht 2009) p. 553; F. Schorkopf, 'Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts', in T. Giegerich, ed., *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren* (Berlin, Duncker & Humblot 2010) p. 131.

internationally wrongful act, leading to international responsibility. General rules of international law have a rank between the Federal Constitution and a federal statute (Article 25 cl. 2 BL). They therefore take precedence over the latter, but not over the Basic Law itself.[30] No conflict in this respect has emerged as yet.

2.6. SUMMARY: A MODERATELY DUALIST SYSTEM

In sum, one may characterise the German system as moderately dualist. It is dualist because a clear and principled distinction is made between the international and national legal order. But it is a moderately dualist system because the national law contains many precautions for incorporating international norms into the domestic legal order and to avoid possible differences or, if they should nevertheless occur, to overcome them.[31]

3. JUDICIAL REVIEW

3.1. CONSTITUTIONAL REVIEW: THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT

Since the judiciary is bound by law and justice (Article 20, paragraph 3 BL), each court has to make sure that the legal rules applicable to the case at hand are in conformity with higher legal rules and particularly with constitutional law. However, as far as Acts of Parliament (statutes) are concerned, the decision on this question is left to the constitutional courts.[32] The Federal Constitutional Court is competent to review federal and *Land* statutes against the yardstick of the Basic Law and, as for *Land* law, other federal law. The *Land* constitutional courts are empowered to review *Land* law against the yardstick of the relevant *Land* constitution. Only the constitutional courts may declare a statute

30 This includes also peremptory norms of general international law. On the basis of the constitutional principle of openness to international law some argue in favour of an equal rank of the general rules of international law with the Basic Law and even some for a rank of international law higher than the Basic Law, but these opinions have not been accepted; see H. STEINBERGER, 'Allgemeine Regeln des Völkerrechts', in J. ISENSEE and P. KIRCHHOF, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII (Heidelberg, C.F. Müller 1992) p. 525 at pp. 551–558. Further *BVerfGE* 111, 307 (318).

31 *BVerfGE* 111, 307 (318). For the theory of moderate dualism, see W. RUDOLF, *Völkerrecht und deutsches Recht* (Tübingen, Mohr Siebeck 1967) p. 135; E. LAMBERT ABDELGAWAD and A. WEBER, 'The Reception Process in France and Germany', in H. KELLER and A. STONE SWEET, eds., *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, OUP 2008) p. 107 at p. 117.

32 The reason for this is respect for parliament as the representation of the people directly constituted by popular vote.

unconstitutional and null and void.[33] This means that all the other courts, if they are convinced that the (federal or *Land*) statute is violating the (federal or *Land*) constitution, have to ask for a preliminary binding ruling of the relevant constitutional court (*konkrete Normenkontrolle*). In the case of Acts of Parliament, therefore, one has to speak of a centralised system of judicial review, always taking account of Germany's structure as a federal state. Where, however, legal rules with a lower rank than statutes are concerned, the review system is decentralised, as all courts may come to the conclusion that the norm violates a higher rule. In this case the courts have to refrain from applying the norm to the concrete case, but they are not competent to hand down a general decision on the unconstitutionality and invalidity of the norm.[34]

Besides the concrete norm control procedure initiated by courts, the Federal Constitutional Court may also be asked by other applicants to consider the conformity of a legal provision with the Basic Law. Thus, in the event of disagreement or doubts concerning the formal or substantive compatibility of federal law or *Land* law with the Basic Law, or compatibility of *Land* law with other federal law, the Federal Government, a *Land* government or one quarter of the members of the Federal Parliament may apply to the Court in the abstract norm control procedure (*abstrakte Normenkontrolle*).[35] Individuals, too, by means of the constitutional complaint procedure (*Verfassungsbeschwerde*), may claim that any legal norm violates their basic rights under the Basic Law. However, this is only possible when the applicant has exhausted all the existing remedies, and the norm is directly and presently of concern to the applicant himself.[36]

3.2. *EX POST* REVIEW AS PRINCIPLE

The opportunity for constitutional review arises in principle with the coming into existence of a legal provision. A federal Act of Parliament exists when it is promulgated, i.e. when it is signed into law by the Federal President and

33 If the FCC finds a legal rule unconstitutional, this rule is generally declared null and void *ex tunc*. The Court may, however, set time limits for the legislature to make amendments before the norm loses its legal effect because otherwise the legal situation would become still more detrimental. In these cases the FCC restricts itself to a mere declaration of unconstitutionality; e.g., BVerfG 25 March 1992, *BVerfGE* 85, 386 (402).

34 Only exceptionally such a power regarding norms having a rank below parliamentary law of the *Land* has been transferred to normal courts, see Section 47 Code of Procedure for Administrative Courts (*Verwaltungsgerichtsordnung*) of 19 March 1991, Federal Gazette (*Bundesgesetzblatt*) Part I, p. 686.

35 Article 93, para. 1 cl. 2, BL.

36 Article 93, para. 1 cl. 4a, BL; Section 90, para. 2, Law on the FCC. Abstract norm controls and, quite often, individual complaint procedures are provided for in the *Land* constitutions, too.

published in the Federal Law Gazette (*Bundesgesetzblatt*).[37] The entry into force is not essential for this purpose, since the relevant date is part of the content of the law and may be reviewed as such.[38] According to the jurisprudence of the Federal Constitutional Court there is only one exception to the *ex post* review rule, and this concerns a federal statute by which the legislature consents to an international treaty.[39] In this case an *a priori* review is admissible, meaning that the review does not have to await the promulgation of the law, but may start immediately when the legislative procedure, including the participation of the Federal Council, has been concluded (Article 78 Basic Law). The reason for this is to avoid the situation that Germany might become internationally bound by the treaty before the Federal Constitutional Court has had the chance to examine the accepted obligations. This could easily happen, since the promulgation of the law and ratification of the treaty lie exclusively in the hands of the executive and can be done quite expeditiously. Thus Germany might run the risk of being constitutionally impeded from fulfilling its treaty obligations and therefore become internationally responsible under the rules on state responsibility.[40] The Federal Constitutional Court has held that its *a priori* review is indirectly in the service of the implementation of public international law, and reduces the risk of Germany violating its international commitments.[41]

3.3. POSSIBLE COLLISIONS BETWEEN INTERNATIONAL AND DOMESTIC LAW

The possibility that domestic legal rules may collide with norms of international law cannot be excluded. If the issue arises it must be assessed, as far as the national level is concerned, by the courts. The principles of judicial review as just described will *mutatis mutandis* be applied here, too. This means that consequences have to be drawn from the position of the international rules in the domestic hierarchy of norms, in order to identify the applicable legal yardstick.[42] It further means that only the Federal Constitutional Court has the power to decide on a collision between an international rule and a national law. The ordinary courts would always have to apply the higher norm or, if the conflicting

37 Article 82 BL.

38 BVerfG 26 July 1972, *BVerfGE* 34, 9 (23); BVerfG 22 May 2001, *BVerfGE* 104, 23 (29).

39 See Article 59, para. 2, BL.

40 See UN Doc. A/RES/56/83, Annex (28 January 2003): Responsibility of States for internationally wrongful acts.

41 BVerfG 23 June 1981, *BVerfGE* 58, 1 (34); BVerfG 14 October 2004, *BVerfGE* 111, 307 (328); BVerfG 26 October 2004, *BVerfGE* 112, 1 (25). See also E. KLEIN, 'Die Völkerrechtsverantwortung des Bundesverfassungsgerichts – Bemerkungen zu Art. 100 Abs. 2 GG', in: H.-W. ARNDT et al., eds., *Völkerrecht und deutsches Recht. Festschrift für Walter Rudolf* (München, C.H. Beck 2001), p. 293 at p. 294.

42 See *supra* section 2.5.

norms have the same rank, the *lex posterior*. If they come to the conclusion that, for example, an international treaty (or more exactly: the parliamentary law consenting to the treaty) with the rank of a federal law is violating the Constitution, they are obliged to bring the case before the Federal Constitutional Court (*konkrete Normenkontrolle*).[43] Also individuals may lodge a constitutional complaint against a treaty provision with the Federal Constitutional Court. If the Court finds a violation of the Basic Law, it would declare the parliamentary statute unconstitutional and, generally, null and void, thus destroying the basis of the treaty's applicability in Germany. If the ordinary courts have doubts as to whether a rule of general international law exists at all or what its legal meaning is, they also have to ask the Federal Constitutional Court for a preliminary decision (*Völkerrechtsverifikation*).[44] All these acts of judicial review are based on national law which, according to the Federal Constitutional Court, has to be interpreted as far as possible in favour of international law.[45] However, the national hierarchy of norms would prevent a ruling that a provision of the Basic Law could be found invalid or not applicable because it conflicts with an international norm. This will not exclude any serious attempt of the Court to harmonise the relevant constitutional provision with the international norm.[46]

4.4. DECISIONS OF INTERNATIONAL ORGANISATIONS

Decisions of international organisations and bodies as such are not suitable yardsticks. They may, however, influence the interpretation of the applicable international norm and thus become indirectly important in the review process. An exception has to be made, however, as to EU law.[47]

4. IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY NATIONAL COURTS

4.1. DIRECT APPLICABILITY OF CONVENTION RIGHTS

International treaty provisions are directly applicable by the executive and the courts if they are framed in a sufficiently precise and unconditioned way, making them suitable for direct application, and if this effect also corresponds with the intention of the treaty. For all the substantial provisions of the

43 Article 100, para. 1, BL.
44 Article 100, para. 2, BL.
45 See *supra* at n. 29 and *infra* sections 4 and 5.
46 See *infra* section 4.3.
47 *Supra*, n. 24.

European Convention, including its various Protocols, this assessment can be affirmed. Hence it follows that the courts as well as the executive have to apply the Convention provisions in all appropriate cases.[48] It is true that in some cases the courts have in fact openly refused to take the ECHR into account (and the relevant jurisprudence of the ECtHR), arguing that the obligations arising from the Convention would be addressed only to the State (Germany) as such and not the courts. The Federal Constitutional Court, in its famous *Görgülü* judgment (2004), clearly rejected this untenable view and obliged the courts to apply the articles of the ECHR (in compliance with the jurisprudence of the ECtHR).[49]

It should nevertheless be noted that some provisions of the ECHR expressly or implicitly refer to domestic law. Thus, for example, Article 12 (right to marry) refers 'to the national laws governing the exercise of this right', Article 2 (right to education) of the First Protocol presupposes institutions for education (schools), and Article 3 (right to free elections) of this Protocol requires the establishment of a parliamentary body and appropriate election laws. In all these cases the provisions of the ECHR do not replace domestic rules that may possibly be lacking, since they must always be created by the national legislature. The Federal Constitutional Court, on the basis of the constitutional basic rights read in the light of the ECHR provisions, in such cases would have to find a violation of the Basic Law and, indirectly, the Convention.[50]

Article 13 (right to effective remedy) ECHR can be similarly assessed. The norm is directly applicable, but it cannot replace the formal enactment of a statute necessary to immediately cease the violation by closing an existing procedural gap in the domestic law.[51] It is the national legislature which has to become active. On the other hand, Article 5(5) ECHR (enforceable right to compensation in cases relating to deprivation of liberty) presents an immediate legal basis for a compensation claim, even if corresponding national rules do not exist.[52] If domestic rules do exist, they are to be interpreted in the light of Article 5(5) ECHR, meaning that these rules are applied by analogy.[53] Consequently there will usually be no need for the ECtHR to afford just

48 See *supra* section 2.1.

49 *BVerfGE* 111, 307 (317); E. KLEIN, 'Anmerkung', 59 *Juristenzeitung* (2004) p. 1176; see also *infra* section 5.1.

50 As to the possible consequences of such a finding see *infra*, text accompanying n. 76.

51 *Sürmeli* v. *Germany*, ECtHR (GC) 8 June 2006, appl. no. 75529/01; M. BREUER, in U. KARPENSTEIN and F.C. MAYER, eds., *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Kommentar* (München, C.H. Beck 2012), p. 321 at p. 324; GIEGERICH, *supra* n. 28, p. 70.

52 BGH 4 November 1950, *BGHZ* 45, 46; BGH 4 November 1950, *BGHZ* 45, 58; BGH 29 April 1993, *BGHZ* 122, 268: including compensation for immaterial damage; B. ELBERLING, in KARPENSTEIN and MAYER, *supra* n. 51, p. 93 at p. 132.

53 *BGHZ* 45, 58.

satisfaction according to Article 41 ECHR in this respect, but the possibility cannot be categorically excluded.[54]

4.2. INVOCABILITY OF CONVENTION RIGHTS

Direct applicability of legal rules does not necessarily imply that individuals are entitled to invoke these provisions. In Germany, however, it is generally agreed that the substantive norms of the European Convention[55] are not only part of the objective law, but contain subjective rights whose protection can be claimed by individuals as holders of the rights against everybody who is obliged by these rights, particularly public authorities like administrative bodies and courts.[56] The judiciary is bound 'by law and justice' (Article 20, paragraph 3 BL), the Convention being part of the applicable law.

The fact that all the substantial rights enshrined in the European Convention can be directly applied by and invoked before the courts does not exclude the possibility, as has been previously indicated, that it may become necessary to enact or amend a law to terminate the violation of a Convention right (e.g. the creation of a new remedy in cases of undue length of the judicial procedure or a new law regarding preventive detention for reasons of public security). In those cases the ordinary courts cannot order Parliament to legislate. Only the Federal Constitutional Court may do this, requesting enactment within a certain period of time and reserving the competence for transitional regulation if the legislature does not comply with this order.[57] But it is important to note that the Court would have to base this order on a violation of the Basic Law; a violation of the Convention would only materially suffice if it reflects a violation of the Constitution itself. It should be mentioned in this context that the constitutional rights have to be interpreted in the sense of the respective articles of the Convention.[58] In this way, the right to a fair procedure (Article 6 ECHR), apart from its direct applicability, has been connected with particular provisions of the Basic Law, especially Articles 101 (right to the lawful judge), 103 (right to a hearing) and 97 (independence of judges) in conjunction with the state-of-law

54 *Neumeister v Austria*, ECtHR 7 May 1974, appl. no. 1936/63. Article 41 judgments are not directly enforceable; if the State is not paying, the applicant has to institute proceedings against the State before the ordinary courts. See BGH 24 March 2011, IX ZR 180/10, *WM (Zeitschrift für Wirtschafts- und Bankrecht)* 2011 p. 756, para. 15 et seq.

55 The same is true for most other human rights treaties.

56 Of course, the legislature is also committed, but it should be noted that domestically the treaty obligations have an equal rank with federal statutes and that only the FCC could enforce the Convention articles against the legislature on the basis of parallel rights existing under the Basic Law; see *infra* chapter 4, para. 4.

57 BVerfG 30 April 2003, *BVerfGE* 107, 395 (418).

58 *BVerfGE* 74, 358 (370), and *infra* chapter 4, para. 3.

principle ('constitutional state principle', *Rechtsstaatsprinzip*).[59] Thus through the text of the Basic Law (or rather the interpretation of its provisions by the FCC) the Convention may become the reason for an order of the Federal Constitutional Court to bring the law into conformity with Germany's international obligations. To give another example: the ECtHR has for quite a long time held that Germany is violating Article 6 ECHR because of the lack of an effective remedy if judicial proceedings (including proceedings before the Federal Constitutional Court) are unduly prolonged.[60] Nevertheless, for years the rather hesitant attempts by the legislature to improve the situation had achieved no positive results. By a resolution of the plenary of the Federal Constitutional Court in 2010, strong pressure was exerted on Parliament,[61] and the relevant statute finally entered into force on 24 November 2011.[62] Similarly, the Federal Constitutional Court's judgment of 4 May 2011 cleared the way for a new law on preventive detention (*Sicherungsverwahrung*), after the ECtHR had found violations of Article 5 and 7 ECHR.[63] On the other hand, claims against the legislature for compensation because it did not enact the necessary provisions in time, are generally not admissible,[64] for two main reasons. First, the German compensation system is based essentially on the wrongful acts of office holders (*Amtsträger*), while Members of Parliament have a mandate and do not hold an office. Second, even if it could be argued that Members of Parliament have to perform duties of office (*Amt*), such duties would lack another requirement, namely that they are related to specific persons (*Drittbezogenheit*). Members of Parliament, however, have to fulfil their functions for the general good and not vis-à-vis certain individuals.[65]

4.3. HARMONISING INTERPRETATION OF DOMESTIC LAW

As national courts are obliged to follow the rule of law, the rights of the Convention have to be applied whenever they fit the case at issue. Applicable

59 BVerfG 3 June 1969, *BVerfGE* 26, 66 (71); BVerfG 3 June 1992, *BVerfGE* 86, 288 (317); BVerfG 8 June 2010, *NJW* 2011, 591 (592).

60 See the *Sürmeli* case, *supra* n. 51. For the issue that the German compensation law does not present a remedy in the sense of Article 13 ECHR concerning undue delay cases see M. Breuer, *Staatshaftung für judikatives Unrecht* (Tübingen, Mohr Siebeck 2011) pp. 328 ff.

61 Resolution of 10 March 2010 (unpublished).

62 Federal Gazette (*Bundesgesetzblatt*) 2011 Part I p. 2302.

63 *BVerfGE* 128, 326; *M. v. Germany*, ECtHR 17 December 2009, appl. no. 19359/04. Further Mellech, *supra* n. 28, p. 182.

64 Exceptions exist for expropriations directly by law (Article 14, paragraph 3, BL) and for violations of EU law on the basis of the *Francovich* jurisprudence of the European Court of Justice; see A. Haratsch, C. Koenig and M. Pechstein, *Europarecht*, 8th edn. (Tübingen, Mohr Siebeck 2012) p. 277.

65 See F. Ossenbühl, *Staatshaftungsrecht*, 5th ed. (München, C.H. Beck 1998) p. 105.

national norms must be interpreted in conformity with the ECHR.[66] This is an obligation based not only on international law, but the Constitution itself. The constitutional basis here is the principles of the *Rechtsstaat* and the openness or friendliness of the Basic Law to international law; the Federal Constitutional Court additionally quotes Article 1, paragraph 2 Basic Law.[67] The Federal Constitutional Court applies this perception to its own interpretation of the Basic Law.[68] An example can be found in the decisions of the Federal Administrative Court using Article 6(2) ECHR in applying the presumption of innocence principle (Article 6(2) ECHR) to disciplinary proceedings.[69] A failure of courts to apply the law in conformity with the ECHR can therefore be claimed to be a violation of the corresponding constitutional basic right in conjunction with the *Rechtsstaat* principle in a constitutional complaint procedure.[70] Thus, though only indirectly (because always in conjunction with the Basic Law), the Convention rights have slowly developed into a legal yardstick of domestic law. The possibility that the attempt for harmonisation might fail cannot be excluded, but this is not very probable.[71]

According to the Federal Constitutional Court, the principle of proportionality is an especially suitable instrument to take account of the values contained in the Convention.[72] If an ordinary court finds that a harmonising interpretation would be inadmissible,[73] then constitutional review in the form of the concrete norm control procedure is certainly the most common way to clarify the compatibility of the norm with a higher norm, especially the Basic

66 *BVerfGE* 111, 307 (324) and *infra* chapter 5, para. 1; GIEGERICH, *supra* n. 28, p. 71; J.M. HOFFMANN, *Die Europäische Menschenrechtskonvention und nationales Recht. Ein Vergleich der Wirkungsweise in den Rechtsordnungen des Vereinigten Königreichs und der Bundesrepublik Deutschland* (Köln, Carl Heymanns Verlag 2010) p. 97.

67 Article 1, para. 2, BL reads: 'The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.' See *BVerfGE* 111, 307 (329).

68 *BVerfGE* 74, 358 (370); 111, 307 (317); BVerfG 7 December 2011, *BVerfGE* 130, 1 (30). In many cases the courts apply the national basic right, briefly mentioning the relevant Convention right and stating that the rights are in full harmony with each other; e.g., BVerfG 14 July 1999, *BVerfGE* 100, 313 (363) concerning Article 10 BL and Article 8 ECHR.

69 BVerwG 7 December 2006, 2WDB3.06; BVerwG 12 February 2003, 2WD8.02; U. WIDMAIER, 'Der Einfluss der EMRK auf das (nationale) öffentliche Dienstrecht', in A. HÖLAND, ed., *Wirkungen der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im deutschen Recht* (Berlin, Berliner Wissenschaftsverlag 2012) p. 147 at p. 149.

70 *BVerfGE* 111, 307 (329); BVerfG 4 November 2009, *BVerfGE* 124, 300 (319).

71 *BVerfGE* 111, 307 (318); further *BVerfGE* 128, 326 (400).

72 *BVerfGE* 128, 326 (371 et seq., 389); BVerfG 20 June 2012, *BVerfGE* 131, 268 (296).

73 For the limits of an interpretation that takes account of the international norm see *BVerfGE* 128, 326 (371): the limits are reached where the generally recognised methods of legal interpretation do not permit the harmonising interpretation. See further: R. BERNHARDT, 'Völkerrechtskonforme Auslegung der Verfassung? Verfassungskonforme Auslegung völkerrechtlicher Verträge?', in H.-J. CREMER et al., eds., *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* (Berlin, Springer 2002) p. 391.

Law or, indirectly, as has just been pointed out, the Convention. Therefore, using the corresponding constitutional right, the courts may ask for a preliminary ruling in order to gain clarity not only on the constitutionality of a (federal) statute but, implicitly, also on its conformity with the Convention. The same result may be achieved by construing the norm in conformity with the Basic Law,[74] always on the condition that the Basic Law can be successfully interpreted in the light of the ECHR. Since the issue of compatibility with the Basic Law will be in the foreground in all these cases, the courts' intention to avoid a simultaneous conflict with the Convention will generally not made explicit.[75] By a judgment finding a violation of the Basic Law (indirectly the Convention), the Federal Constitutional Court would declare the relevant norm null and void or, possibly, merely unconstitutional, permitting the further application of the norm for a transitional period of time and setting a time limit for the enactment of a new law or provision.[76]

Different from the constitutional rights corresponding with the Convention rights, neither the EU Charter of Fundamental Rights (Article 52, paragraph 3 and Article 53) nor the general principles of EU law (Article 6, paragraph 3 EU Treaty) have been used by German courts as a means to enhance the legal importance of the European Convention within domestic law by letting the Convention participate in the higher rank of the EU law and enabling it to become a yardstick in a review procedure.[77]

The Federal Constitutional Court has held that a Convention right cannot be applied to a case if the application would result in limiting or derogating from any human right guaranteed under another human rights instrument or under the Basic Law.[78] The same idea is expressed by Article 53 ECHR. If many national judgments do not refer to provisions of the Convention, the usual reason will be that the courts are convinced that the Convention rights provide not more but

74 For an example that this is not possible see *BVerfGE* 128, 326 (400).

75 It might happen more often that a person in a constitutional complaint procedure claims a violation of a Convention right together with the fundamental right of the Basic Law, but in such a case the FCC would have to say that the complaint is inadmissible insofar as it is based on the Convention, but the rights protected by the Basic Law have to be understood in the light of the Convention; e.g., BVerfG 13 January 1987, *BVerfGE* 74, 102 (128); BVerfG 8 July 1997, *BVerfGE* 96, 152 (170); *BVerfGE* 111, 307 (317).

76 e.g. *BVerfGE* 128, 326 (332); cf. also Sections 78 and 35 of the Law on the FCC.

77 An interesting case, however, is the preliminary procedure instituted by the Tribunale di Bolzano (Italy); CJEU 24 April 2012, case C-571/10, paras. 59–63. Cf. also CJEU 26 February 2013, case C-617/10, Akerberg Fransson, where it is clearly stated that as long as the EU has not acceded to the ECHR the law of the Union does not regulate the relationship between the Convention and the legal orders of the EU Member States (para. 44). See also generally G. MARTINICO, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts', 23 *European Journal of International Law* (2012) p. 401–424.

78 *BVerfGE* 111, 307 (317); 128, 326 (371); 131, 268 (295).

rather less protection than the rights enshrined in the Basic Law as interpreted by the Federal Constitutional Court.[79]

4.4. INVALIDATION OF DOMESTIC LAW CONFLICTING WITH THE CONVENTION?

According to the foregoing comments, federal statutes cannot be invalidated or set aside merely because of a violation of the Convention. But, as has been explained above,[80] the Federal Constitutional Court is interpreting the fundamental rights of the Basic Law in the light of the ECHR, thus trying, as far as possible, to harmonise both of them. Therefore, but only indirectly, the rights of the ECHR may have an invalidating effect. This has actually happened, for example, when the Federal Constitutional Court declared unconstitutional several sections of the Criminal Code that violated Article 2, paragraph 2, cl. 2 and Article 104, paragraph 1 Basic Law, on the basis of the ECtHR's finding that keeping the applicant in preventive detention (*Sicherungsverwahrung*) after serving his sentence violates Article 5(1) and Article 7(1) ECHR.[81] The example shows that in fact the constitutional review plays the decisive role, but this does not mean that Convention rights are excluded from this process. Concerning *Land* law, which can be examined against federal law (and therefore against the ECHR having the same rank), a violation of the Convention would give the Federal Constitutional Court a good reason to declare it null and void, but as far as I can tell, no relevant case has come up at the time of writing.

Administrative acts must comply with the applicable law, of which the ECHR is part. Therefore, the competent domestic administrative authorities and the courts (generally the administrative courts)[82] are obliged to examine whether these acts are in conformity with the Convention rights and, if not, to strike them down.[83] The Federal Administrative Court, for example, applies Article 3 (prohibition of torture) ECHR in cases regarding the expulsion or extradition of aliens.[84] The relevant domestic law itself refers to the provisions of the Convention.[85]

---

79 Today most judges know the ECHR, even if probably not yet sufficiently. By contrast the provisions of the ICCPR are still not very well known, even in the judiciary.

80 *Supra* chapter 4 para. 3.

81 BVerfG 4 May 2011, *BVerfGE* 128, 326 (331); *M. v. Germany*, ECtHR 17 December 2009, appl. no. 19359/04. See also M. ANDENAS and E. BJORGE, 'Preventive Detention', 105 *American Journal of International Law* (2011) p. 768–774.

82 See Section 40 Administrative Court Procedure Act (*Verwaltungsgerichtsordnung*).

83 Section 113, paragraph 1, Administrative Court Procedure Act; see also *BVerfGE* 111, 307 (325); MELLECH, *supra* n. 28, p. 10.

84 BVerwG 16 December 1999, *BVerwGE* 110, 203 (210); BVerwG 24 May 2000, *BVerwGE* 111, 223.

85 Section 60, para. 5, Law on Residence of Aliens (*Aufenthaltsgesetz*) of 2004, Federal Gazette (*Bundesgesetzblatt*) 2004 Part I p. 1950.

5. THE IMPACT OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON NATIONAL JUDICIAL DECISION MAKING

5.1. STATUS OF ECtHR JUDGMENTS IN NATIONAL LAW

Generally speaking one may clearly say that the impact of ECtHR judgments on domestic judicial decisions is becoming more and more evident. According to the jurisprudence of the Federal Constitutional Court, the relevant judgments of the ECtHR always have to be taken into account by national courts whenever provisions of the Convention have to be applied to the case at issue. The reason for this is that these judgments reflect the present state of development of the Convention and its Protocols.[86] The courts would disrespect the Convention rights if they were to not apply them, as they have to be understood at the time of their application. The failure to take the ECtHR's jurisprudence into account may therefore pave the way for an individual constitutional complaint alleging that the corresponding constitutional right (which must be seen in the light of the Conventional right) and the *Rechtsstaat* principle have been violated.[87] In fact, after some early hesitation, the German courts refer with increasing frequency to the Convention and the European Human Rights Court's judgments.[88] Between 1 January 2005 and 21 January 2012 alone, the Federal Court of Justice (*Bundesgerichtshof*) referred in 127 cases to judgments of the ECtHR, and the Federal Constitutional Court referred to 83 judgments between 14 October 2004 and 7 February 2012.[89]

One has to add, however, that the taking into account of the European Court's judgments cannot extend the legal effects of the Convention itself. This means that if the interpretation of the rights under the Convention by the Court contradicts the provisions of the Basic Law (as interpreted by the Federal Constitutional Court), the national courts would be constitutionally prevented from applying the European Human Rights Court's interpretation. Such a situation is, of course, not very probable, but cannot be completely ruled out on the basis of the dualist perception of the relationship between international and national law which is prevalent in Germany.[90]

---

86 *BVerfGE* 111, 307 (319).

87 *BVerfGE* 111, 307 (329). It is quite interesting to note that not only the FCC supports the implementation of ECtHR judgments. Vice versa the ECtHR held that Article 6, paragraph 1, ECHR is violated if the State does not abide by a binding order of the FCC; *K. v. Germany*, ECtHR 13 January 2011, appl. no. 32715/06,.

88 This is also the assessment of MELLECH, *supra* n. 28, p. 206.

89 For the FCC this means 2–3% of all cases; see INSTITUT INTERNATIONAL DES DROITS DE L'HOMME, *Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im Bundesgerichtshof und Bundesverfassungsgericht* (Strasbourg 2012) pp. 16 and 73–77. For some older cases see STERNBERG, *supra* n. 28, p. 62.

90 See *supra* n. 31 and 78.

Presumably, judgments directed against Germany will primarily be taken into account by the domestic courts. However, legally speaking, there is no difference between judgments directed against Germany[91] and judgments addressed to other States Parties to the ECHR, because in all cases the judgments reflect today's understanding of the Convention rights.[92] Therefore all judgments of the ECtHR have the same central function: to provide orientation for and lead the interpretation of the Convention (*Orientierungs- und Leitfunktion*) by all its applying bodies or courts, which goes far beyond the respect of the *res judicata* principle.[93] The Federal Constitutional Court argues that this view is helpful in order to avoid conflicts between the international obligations of the Federal Republic of Germany and decisions of international courts that have at least precedential effects. The openness of the Basic Law to international law mirrors a perception of sovereignty that not only does not impede further developments of international and supranational obligations for Germany but even presupposes and expects them.[94] Still in some respect it is necessary to distinguish between judgments directed against Germany and those directed against other parties to the Convention.

5.2. REACTION TO JUDGMENTS DIRECTED AGAINST GERMANY

As to judgments directed against Germany, a distinctive feature is certainly their binding force according to Article 46(1) ECHR. States are legally obliged to abide only by final judgments of the European Human Rights Court if they themselves are parties to the case. Formerly, the implementation of this provision created some problems, because the cases decided by the ECtHR had already been finally decided by the domestic courts on the basis of the exhaustion of local remedies principle (*res judicata*). The result was that, notwithstanding the ECtHR's judgment finding a violation of the Convention, a given case could not be reopened, regardless of the nature of the judicial procedure (private, administrative or criminal). Thus, for example, individuals who had been convicted and sentenced had only the change to be pardoned and/or to receive *ex gratia* compensation.[95]

---

91 Without regard to the *res iudicata* effect flowing from Article 46, para. 1, ECHR.

92 Actually, the cases to which the Federal Court of Justice and the FCC have referred (*supra* n. 89) comprise more judgments delivered against other states than against Germany.

93 Limited to the same facts and the same parties to a given case; see also *BVerfGE* 128, 326 (368).

94 *BVerfGE* 128, 326 (369): 'Die Völkerrechtsfreundlichkeit des Grundgesetzes ist damit Ausdruck eines Souveränitätsverständnisses, das einer Einbindung in inter- und supranationale Zusammenhänge sowie deren Weiterentwicklung nicht nur nicht entgegensteht, sondern diese voraussetzt und erwartet'.

95 See also in this context Article 41 ECHR (just satisfaction).

Nowadays, this problem has been resolved. A new section included in the Criminal Procedure Code (*Strafprozessordnung*) in 1998[96] provides that a case may be reopened in favour of the convicted person if the ECtHR has found a violation of the Convention (or its Protocols) and the national judgment rests on this violation.[97] In 2006 an analogous provision was included in the Civil Procedure Code (*Zivilprozessordnung*).[98] Since all the other Codes of Procedure (for administrative, financial, labour, social courts) refer to the Civil Procedure Code, the provision extends to the judgments of all the other courts. Only the decisions of the Federal Constitutional Court are not covered.[99] However, in a newer judgment this Court has held that judgments of the ECtHR should be equated with legally relevant changes of the factual or legal situation which may overcome the *res judicata* effect of its own judgments and, by the same token, the legal force which Federal Constitutional Court decisions have obtained in norm control and constitutional complaint procedures.[100]

It should be noted that the opportunity to reopen a case on the basis of the amendment of the Civil Procedure Code is excluded for cases which received *res judicata* status prior to 31 December 2006. The Federal Labour Court has held that this limiting provision neither violates the Basic Law nor the ECHR, as the latter does not require restitution as reaction to a violation.[101]

The opportunity to reopen a case is restricted to the individual who has won his or her case in Strasbourg, i.e. where the ECtHR has found a violation of the Convention, and the domestic court's decision rests on this mistake. The reopening procedure thus cannot be transferred to any parallel cases, notwithstanding whether they have been decided against Germany or any other state.

It may be said that the German courts generally comply with ECtHR judgments. However it has happened that courts have resisted compliance. For example, in a spectacular case the Higher Land Court (*Oberlandesgericht*) in Naumburg openly refused to comply with a judgment of the ECtHR in a dispute on parental care and visiting rights of one parent, arguing that the well-being of

96 Federal Gazette (*Bundesgesetzblatt*) 1998, Part I, p. 1802.

97 Section 359 no. 6 Criminal Procedure Code.

98 Section 580 no. 8 Civil Procedure Code, Federal Gazette (*Bundesgesetzblatt*), Part I, 2006, p. 3416. For this development see H.-J. CREMER, 'Die Verurteilung der Bunderepublik Deutschland durch den Europäischen Gerichtshof für Menschenrechte als Wiederaufnahmegrund nach §153 Abs. VwGO i.V. mit §580 Nr. 8 ZPO', in P. BAUMEISTER et al., eds., *Staat, Verwaltung und Rechtsschutz. Festschrift für Wolf-Rüdiger Schenke* (Berlin, Duncker & Humblot 2011) p. 649. The claim to reopen the case is not put under any time limit.

99 For the reasons see KLEIN, *supra* n. 7, p. 41.

100 See *BVerfGE* 128, 326 (364–5) and Section 31, para. 2, of the Law on the FCC; see also HOFFMANN, *supra* n. 66, p. 97. Similarly, the general binding effect of FCC decisions according to Section 31, para. 2, Law on the FCC is held to be 'loosened'; see KG Berlin 29 October 2004, 9 W 128/04, *NJW* 2005, p. 605 at p. 606.

101 BAG 22 November 2012, 2 AZR 570/11, 39 *Europäische Grundrechte Zeitschrift/EuGRZ* (2010) p. 767, relating to *Schüth* v. *Germany*, ECtHR 23 September 2010, appl. no. 1620/03.

the child had to be viewed differently from the ECtHR's assessment. The Federal Constitutional Court (on the basis of a constitutional complaint procedure) had to hand down several rulings until the ordinary court gave in.[102] Moreover, administrative courts arguing that the ECtHR would overstretch Article 3 ECHR as a limitation for expulsion or extradition did not initially apply the Court's jurisprudence to parallel proceedings.[103] But there was no resistance to compliance with the judgment in the case directly decided by the ECtHR. However, it should be mentioned that it took quite some time before the judgments of the European Court of Human Rights on preventive detention (*Sicherungsverwahrung*) and the creation of remedies regarding the undue length of judicial procedures were taken up by the legislature. Likewise different assessments by the jurisprudence of the Supreme Court (*Bundesgerichtshof*) and the Federal Constitutional Court on the one hand and the European Court of Human Rights on the other as to the correct balancing of the freedom of the press with the right to privacy took time to become settled.[104]

5.3. REACTIONS TO JUDGMENTS NOT DIRECTED AGAINST GERMANY

As has already been pointed out, judgments not directly addressed to Germany are not legally binding for the country in the sense of Article 46 ECHR, but have still generally to be taken into account in all cases in which rights under the Convention to which these judgments relate have to be applied. Such judgments cannot, however, form a legal basis to reopen a case that had been differently decided by German courts. The only options that exist are the possibility of pardon and *ex gratia* compensation.

5.4. MEANING OF 'TAKING INTO ACCOUNT' OF THE ECtHR JUDGMENTS

Since the jurisprudence of the European Court of Human Rights reflects the present understanding of the rights under the Convention, it must be taken into account irrespective of whether the Court's judgments are directed against Germany or another state. This may raise the issue of how the interpretation of

102 See only *BVerfGE* 111, 307 (*Görgülü*).

103 See BVerwG 15 April 1997, *BVerwGE* 104, 265 (269); later on the Federal Administrative Court (*Bundesverwaltungsgericht*) adopted the jurisprudence of the ECtHR; see BVerwG 16 December 1999, *BVerwGE* 110, 203 (210); 111, 223; BVerwG 7 December 2004, *BVerwGE* 122, 271 (*Kalif von Köln*); see also C. WALTER, 'Anmerkung', 60 *Juristenzeitung* (2005) p. 788 at p. 790.

104 See *infra* section 5.4.

the Court fits the existing national legal order, its rules and traditions. 'Taking into account' means that the courts have to seriously consider the ECtHR's judgments and decisions and, if they do not comply, give convincing reasons for their attitude.[105] In this context the Federal Constitutional Court has held that the judgments of the ECtHR must be carefully introduced by the courts into the relevant area of the legal order and adapted to the principles governing the specific field of law; it could not be the task of the ECtHR itself to make this adaption.[106] Although this is a fundamentally reasonable approach, it creates the risk that the courts might on this basis try to avoid the consequences of the ECtHR's judgments.[107] This may happen especially when different fundamental rights positions (*mehrpolige Grundrechtsverhältnisse*) must be balanced, e.g. the right to freely express opinions or the freedom of the press with the right to be let alone (right to privacy), and there are different opinions on how to balance these rights.[108] The *Caroline of Monaco/Von Hannover* v. *Germany* case decided by the ECtHR[109] and the previous and later domestic court decisions demonstrate on the one hand that such situations can in fact be addressed differently, but show on the other hand that the view of the ECtHR finally prevailed: the ordinary courts as well as the Federal Constitutional Court changed their former jurisprudence, having basically provided less protection for persons of contemporary history (*Personen der Zeitgeschichte*).[110] Later judgments of the ECtHR, although shifting a little back to a more favourable position to the press, affirmed this new balance.[111] In the preventive detention case (*Sicherungsverwahrung*), the Federal Constitutional Court, insisted against the qualification of the ECtHR, on its opinion that this kind of detention has to be assessed as a special measure, not a penalty.[112] However, the FCC followed the ECtHR's judgment as far as a violation of the principle of proportionality is concerned and therefore held the relevant domestic provisions to be unconstitutional.[113]

105 *BVerfGE* 111, 307 (324).

106 *BVerfGE* 111, 307 (327); 128, 326 (371).

107 See the critical remarks by J.A. Frowein, 'Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte', in K. Dicke et al., eds., *Weltinnenrecht. Liber amicorum Jost Delbrück* (Berlin, Duncker & Humblot 2005) p. 279 at p. 284; Mellech, *supra* n. 28, p. 102.

108 *BVerfGE* 111, 307 (324–5).

109 *Von Hannover* v. *Germany (no. 1)*, ECtHR 24 June 2004, appl. no. 59320/00.

110 BGH 6 March 2007, *BGHZ* 171, 275 (278, 283); BVerfG 26 February 2008, *BVerfGE* 120, 180 (203, 211 et seq.).

111 *Von Hannover* v. *Germany (no. 2)*, ECtHR (GC) 7 February 2012, appl. no. 40660/08, 60641/08; *Axel Springer AG* v. *Germany*, ECtHR (GC) 7 February 2012, appl. no. 39954/08. See on this J.-P. Costa, 'The Relationship between the European Court of Human Rights and the National Courts', 13 *European Human Rights Law Review* (2013) p. 264 at p. 272.

112 Being a penalty the preventive detention would certainly be covered by the *nullum crimen, nulla poena* rule.

113 *M.* v. *Germany*, ECtHR 17 December 2009, appl. no. 19359/04; *BVerfGE* 128, 326 (376); 131, 268 (286).

If the Federal Constitutional Court has found a legal provision unconstitutional, it may under certain circumstances order its further application.[114] However, such a ruling is not possible if the European Court of Human Rights has already held this provision to violate the Convention. In this case it is up to the Federal Constitutional Court to order a transitional norm until the legislature has created a new provision.[115]

5.5. THE PROBLEM OF *DRITTWIRKUNG*

The aforementioned *Caroline of Hannover* v. *Germany* case points to a more general problem. While many, perhaps most, claims regarding the ECHR directly concern alleged violations by public authorities (administrative and criminal cases), conflicts between private parties may also fall within the ambit of the Convention, because these conflicts may arise and must be settled on the basis of legal rules interpreted and applied by (national) courts, thus involving public acts and authorities too. In these cases the question arises as to whether the domestic law is in conformity with the Conventional requirements for respect and protection of fundamental rights and whether the courts have failed to interpret and apply the law in conformity with the articles of the Convention. Although the jurisprudence of the ECtHR does not disclose a direct horizontal effect of the Convention, its influence on the legal settlement of private conflicts has been established by the Court through its understanding of the rights containing not only so-called negative rights (*status negativus*) but also positive commitments obligating the States Parties to protect the values contained in the ECHR.[116]

Considered in light of their protective requirements, the Convention rights as directly applicable rules may in fact play an important role in private legal disputes. Interesting areas of reference are labour law,[117] family law[118] and the right to privacy.[119] The legal situation of the domestic basic rights is very similar. These rights entitle individuals, but do not obligate them; they do not have immediate horizontal effect (*unmittelbare Drittwirkung*). On the other hand, the fundamental rights contain objective values which must be protected by the State authority as the addressee of the rights against interference from wherever

114 See *supra* n. 33.

115 BVerfG 21 July 2010, *BVerfGE* 127, 132 (163 et seq.).

116 See G. Ress, 'The Duty to Protect and to Ensure Human Rights under the European Convention on Human Rights, in E. Klein, ed., *The Duty to Protect and to Ensure Human Rights* (Berlin, Berlin Verlag 2000) p. 165–205.

117 A. Nussberger, 'Auswirkungen der Rechtsprechung des Europäischen Gerichtshofs für die Menschenrechte auf das deutsche Arbeitsrecht', 65 *Recht der Arbeit* (2012) p. 270, with many references.

118 See the famous case *Görgülü* v. *Germany*, ECtHR 26 February 2004, appl. no. 74969/01.

119 *Von Hannover* v. *Germany (No. 1)*, ECtHR 24 June 2004, appl. no. 59320/00.

it originates. Thus the constitutional rights, even if only indirectly, take effect in horizontal relationships (*mittelbare Drittwirkung*).[120] This understanding also paves the way for taking account of the Convention rights in relations between private parties. This means that the values enshrined in the Convention rights have to be protected by all State authorities, including the courts, which have to interpret the norms that regulate private relationships in conformity with these values. In this sense the domestic courts apply the rights of the Convention (at least in principle in the interpretation of the ECtHR),[121] and very often do so, though they may fail to apply them correctly.[122]

5.6. MARGIN OF APPRECIATION DOCTRINE

National courts might be tempted to use the European Court's margin of appreciation doctrine as an instrument to minimise the impact of the Convention rights on domestic law. However, as far as can be seen, no practical example can be found to verify such a possible presumption. On the other hand, the legal literature has taken up the idea of substantive subsidiarity to which the jurisprudence of the ECtHR should be submitted.[123] The margin of appreciation doctrine is certainly relevant in this context, but it must be understood that an essential part of the doctrine is that the ECtHR has always claimed to have the final say on its limits.[124] Application of the doctrine which, by the way, is itself by no means undisputed[125] would therefore not really help the national courts in the end to escape from the ECtHR's jurisprudence. It should be added that the rights enshrined in the Convention are usually mirrored by the rights protected by the Basic Law to which the margin of appreciation doctrine – being a device to determine the international in relation to the national jurisdiction – is not at all suited. Thus the effects of the constitutional rights could at any rate not be limited.

---

120 For the problem of Drittwirkung see W. Rüfner, 'Grundrechtsadressaten', in J. Isensee and P. Kirchhof, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII, 3rd edn. (Heidelberg, C.F. Müller 2011) p. 793 at p. 823; H.-J. Papier, 'Drittwirkung', in D. Merten and H.-J. Papier, eds., *Handbuch der Grundrechte in Deutschland und Europa*, Vol. II (Heidelberg, C.F. Müller 2006) p. 1331 at p. 1342.

121 See *supra* section 5.1.

122 See in this context also *supra*, text accompanying n. 48.

123 G. Lübbe-Wolff, 'How can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System?', 32 *Human Rights Law Journal* (2012) p. 11 at p. 14.

124 E. Klein, 'Der Schutz der Grund- und Menschenrechte durch den Europäischen Gerichtshof für Menschenrechte', in D. Merten and H.-J. Papier, eds., *Handbuch der Grundrechte in Deutschland und Europa*, Vol. VI/1 (Heidelberg, C.F. Müller 2010) p. 593 at p. 619.

125 See O. Gross and F. Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights', in 23 *Human Rights Quarterly* (2001) p. 625.

5.7. REFLECTIONS OF STANDARDS AND METHODS USED BY THE ECtHR IN DOMESTIC LAW

Since according to the jurisprudence of the Federal Constitutional Court the fundamental rights under the Basic Law have to be interpreted in the light of the Convention rights, the substantial elements and standards developed by the European Court of Human Rights concerning these rights must also be taken into account. This can be shown using the example of the *Caroline von Hannover* case. The former German jurisprudence relating to so-called persons of contemporary history (*Personen der Zeitgeschichte*) no longer corresponded with the standards regarding the balance of their rights with the rights of the press as established by the European Court, and was therefore abandoned and replaced by a new assessment of the German courts in conformity with that of the European Human Rights Court.[126] Another example is the Federal Constitutional Court's understanding of Article 5(1)(a) and (c) ECHR based on judgments of the European Court of Human Rights in the context of the preventive detention cases (*Sicherungsverwahrung*).[127] However, it has to be underlined in this context that the very broad and sophisticated jurisprudence of the Federal Constitutional Court especially concerning fundamental rights will not give rise to many cases where the judgments of the European Court of Human Rights would change the standards underlying the Basic Law or its interpretation by the Federal Constitutional Court. At least it will be very difficult to find out whether standards developed by the European Human Rights Court or by the Federal Constitutional Court are applied.

Similarly, the national courts do not explicitly refer to the methods of evolutive interpretation or consensus interpretation used by the ECtHR, but they apply the rights of the Convention in the way this Court has interpreted them using its special interpretative techniques. In other words the courts usually accept the interpretative result (and have to accept it up to the limits of possible interpretation already mentioned)[128] without questioning the methods by which the result was obtained. The view according to which teleology is an acknowledged element in the interpretative theory is generally shared and applied. This means that the fundamental rights of the Basic Law (and inherently the Convention rights) have to be interpreted under present day conditions[129]

126 See *supra* n. 110 and 111.

127 See *BVerfGE* 128, 326 (391 et seq.) and particularly the extensive reasoning in *BVerfGE* 131, 268 (297–305) where the FCC arduously tries to base its judgment regarding the at the time of the conviction 'reserved preventive detention' (*vorbehaltene Sicherungsverwahrung*) on the existing jurisprudence of the ECtHR.

128 See *supra* section 5.1.

129 e.g. BVerfG 15 December 1983, *BVerfGE* 65, 1 (43): right to informational self-determination (*Grundrecht auf 'informationelle Selbstbestimmung'*); BVerfG 27 February 2008, *BVerfGE* 120, 274 (302): right to confidence and integrity of technological information systems

and that these rights (as objective norms) permeate the whole domestic legal order with the result of permanent development and change.[130] Of course, this attitude does not prevent some specific cases decided by the European Court of Human Rights from being criticised, alleging too broad an interpretation.[131] In this respect the European Court shares the same fate with all the other courts, domestic or international.

6. LEGITIMACY DEBATES: THE ECtHR AND THE NATIONAL COURTS

6.1. DISCUSSION ON THE ROLE OF THE ECtHR IN GERMANY

There is no fundamental or widespread public criticism in Germany of the role of the ECtHR, but it is true that it arises from time to time, created by individual judgments.[132] This criticism is mainly found in scholarly writings, the authors sometimes being (high) judges themselves.[133] The mass media do not dedicate many basic contributions to this topic, and politicians are quite hesitant to criticise judgments, which will usually be in favour of individuals. Thus one cannot say that the jurisprudence of the ECtHR is a matter of general discussion; it is certainly less so than decisions of the Federal Constitutional Court.

If criticism is raised, it does not take the view that the ECtHR disrespects the national sphere in a general way, but is rather addressed to some alleged insensitivity of the Court regarding legal views which have evolved over time and were (more or less) recognised by the national courts and academia. A good example is that of the *Caroline von Hannover* case.[134] According to the domestic jurisprudence, supported by the Federal Court of Justice (*Bundesgerichtshof*) as well as the Federal Constitutional Court, the right to privacy of 'persons of contemporary history' is more restricted than that of other individuals. The ECtHR did not take this view. While the media reported the judgment, there was no genuine storm of indignation. However, the case was discussed intensely by academics, the pros and cons being generally fairly balanced,[135] which led to

(*Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme*).

130 e.g. right to personality, data protection, sexual orientation, transsexualism etc.

131 For this kind of criticism see *infra* section 6.1.

132 LÜBBE-WOLFF, *supra* n. 123, p. 14.

133 See the former President of the FCC, H.-J. PAPIER, 'Execution and Effect of the Judgments of the European Court of Human Rights From the Perspective of German National Courts', 27 *Human Rights Law Journal* (2006) p. 1.

134 See references *supra* nn. 109–111.

135 For references to this discussion see A. ZIMMERMANN, *Grundrechtsschutz zwischen Karlsruhe und Straßburg* (Berlin, Walter de Gruyter 2012) p. 25 at n. 73.

an interesting exchange of views between the President of the FCC and the President of the ECtHR.[136] At the end of the day, the Federal Court of Justice and the Federal Constitutional Court accepted the opinion of the Strasbourg Court and changed their jurisprudence accordingly. The same happened concerning the ECtHR's judgments on preventive security. Here again the Federal Constitutional Court finally accepted the position of the Strasbourg Court and obliged the legislature to enact a new law.[137]

The until now quite moderate criticism expressed in Germany concerning relatively few judgments of the ECtHR is not a completely new phenomenon. But it should perhaps be said that the *Caroline* case especially has brought the ECtHR to the attention of the general public.[138] However, this effect was probably based more on the celebrities involved than on the legal and institutional issues concerned. In the preventive detention case large numbers of the public were and still are afraid that people who have served their sentence for rape or sexual abuse of children might become recidivists and therefore a danger to the public once again.

There is no indication that the criticism mentioned above has led to any kind of hostile attitude to the ECtHR. As long as the highest domestic courts, including the Federal Constitutional Court, accept its jurisprudence, resistance from the lower courts is fairly improbable, even if possible, at least partially.[139] The courts generally enjoy rather a good reputation in Germany, and the ECtHR is included in this assessment.

6.2. DISCUSSIONS *DE LEGE FERENDA*

On the political level there are no intentions to amend the Basic Law or to enact laws to change the courts' competencies in relation to the interpretation and application of the ECHR. But discussions do take place at a high academic level aimed at reducing the controlling power of the ECtHR vis-à-vis decisions of the Federal Constitutional Court. Three main proposals are made in this respect. First, starting from the margin of appreciation doctrine of the ECtHR, a kind of a 'corridor solution' is suggested, according to which, when two rights conflict, e.g. freedom of the press and right to privacy, a margin of national discretion should be recognised and thus the balancing of the rights and interests should be

136 See the controversial interviews of H.-J. PAPIER, in *Frankfurter Allgemeine Zeitung* 9 December 2004 and L. WILDHABER, in *Der Spiegel* 47/2004.

137 See *supra* n. 63; ZIMMERMANN (*supra* n. 135) refers to some examples of political reaction.

138 B. RUDOLF, 'Council of Europe: Von Hannover v. Germany', in 4 *International Journal of Constitutional Law* (2006) pp. 533–539.

139 There is no formal legal rule of precedent (*stare decisis*) in Germany, although the decisions of the FCC are generally binding; see Section 31, paragraph 2, Law on the FCC.

definitively left to the domestic courts.[140] Similarly, a second proposal wants to restrict the competence of the ECtHR to fundamental decisions indicating the general direction, while the national (constitutional) courts should be responsible for the establishment of individual justice by balancing the rights at stake.[141] Finally, it is suggested that the ECtHR's *Bosphorus* jurisprudence,[142] which relates to the relationship between the Strasbourg and the Luxemburg Court, should be transposed to the relationship between ECtHR and Federal Constitutional Court.[143] This would likewise result in a wider exemption from the controlling power of the ECtHR. Apart from the fact that the first two proposals mentioned above are hardly compatible with the Convention, it must be stressed that apparently none of these suggestions has gained considerable support, either in the political or the academic arena.

7. CONCLUSIONS

7.1. CONNECTION BETWEEN THE FEATURES OF THE CONSTITUTIONAL SYSTEM AND THE IMPACT OF THE CONVENTION AND THE ECtHR JUDGMENTS

The characteristics of the Basic Law which have already been described above[144] certainly have a significant impact on the influence of the ECHR and the jurisprudence of the ECtHR on national case-law. It must be said, however, that the signals emanating from the Basic Law may be considered ambivalent.[145] On the one hand, the Basic Law has established a reasonably comprehensive catalogue of civil and political rights, strongly enriched and developed by well-known, fairly sophisticated jurisprudence of the Federal Constitutional Court over a period of sixty years. It is this richness of substantial and procedural

140 In this sense two judges of the FCC: G. Lübbe-Wolff, 'Der Grundrechtsschutz bei konfligierenden Individualrechten. Plädoyer für eine Korridorlösung', in M. Hochhuth, ed., *Nachdenken über Staat und Recht. Kolloquium zum 60. Geburtstag von Dietrich Murswiek* (Berlin, Duncker & Humblot 2010) p. 193; J. Masing, 'Vielfalt nationalen Grundrechtsschutzes und die einheitliche Gewährleistung der EMRK', in U. Blaurock et al., eds., *Festschrift für Achim Krämer* (Berlin, Walter De Gruyter 2009) p. 61.

141 In this sense the former President of the FCC, H.-J. Papier, 'Gerichte an ihren Grenzen: Das Bundesverfassungsgericht', in M. Hilf, J. A. Kämmerer and D. König, eds., *Höchste Gerichte an ihren Grenzen* (Berlin, Duncker & Humblot 2007) p. 135 at pp. 155–56.

142 *Bosphorus* v. *Ireland*, ECtHR (GC) 30 June 2005, appl. no. 45036/98.

143 In this sense again two judges of the FCC, H.-J. Papier, 'Das Rechtsprechungsdreieck Karlsruhe-Luxemburg-Straßburg', 89 *Speyerer Vorträge* (2006) p. 18; U. Steiner, 'Zum Kooperationsverhältnis von Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte', in S. Detterbeck et al., eds., *Recht als Medium der Staatlichkeit. Festschrift für Herbert Bethge* (Berlin, Duncker & Humblot 2009) p. 653 at p. 663.

144 See *supra* section 1.

145 Cf. Hoffmann, *supra* n. 66, p. 115.

basic rights protection at the national level that created, at least for quite a long time, a certain defensive or at any rate hesitant attitude regarding norms and mechanisms of international human rights protection. The perception was that this kind of protection was rather superfluous in and for Germany. On the other hand, a principal feature of the Basic Law is its friendliness and openness to international law, particularly human rights, as is clearly emphasised in Article 1, paragraph 2 BL.[146] This openness to international influence relatively slowly started to bear fruit. Only after Germany had recognised the opportunity to bring individual complaints before the ECtHR, and especially after the Protocol No. 11 to the Convention entered into force, did the whole importance of the Convention and the jurisprudence of the ECtHR become clear (also under the quantitative aspect), and the Federal Constitutional Court also became increasingly involved. Today it is just the FCC that contributes consistently to the recognition of the provisions of the Convention and the Strasbourg Court's judgments and their implementation, even if disputes remain concerning the 'final say' of the German Constitutional Court in the dialogue between the national and international courts[147] and the correct balancing of rights of individuals in some cases.[148] However, as has been shown, these judicial reservations have a more theoretical importance than a practical impact. At any rate, general awareness of the Convention has grown considerably over the years, despite or perhaps even because of some much discussed and even disputed judgments of the ECtHR and the Federal Constitutional Court.

7.2. PRIMARY ROLE OF CONSTITUTIONAL BASIC RIGHTS IN DAILY PRACTICE

Although the application of the ECHR by domestic courts has become increasingly common over the years, there is no doubt that national fundamental rights still play the primary role in the relevant case-law.[149] Even if Convention rights are applicable, they usually do not immediately govern the case, as long as a national fundamental right exists that does not grant less protection. They may, however, influence the interpretation of the national rights, as these rights have

146 See *supra* n. 29.

147 *BVerfGE* 128, 326 (369).

148 See the cases *Von Hannover* and *Görgülü*, discussed *supra* section 5.4; C. GRABENWARTER, 'Das mehrpolige Grundrechtsverhältnis im Spannungsfeld zwischen europäischem Menschenrechtsschutz und Verfassungsgerichtsbarkeit', in P.-M. DUPUY et al., eds., *Common Values in International Law. Essays in Honour of Christian Tomuschat* (Kehl, N.P. Engel Verlag 2006) p. 193.

149 LAMBERT ABDELGAWAD and WEBER, *supra* n. 31, p. 159: '[T]he ECHR thus remains supplementary to German constitutional rights.'

to be viewed in the light of the rights under the Convention.[150] But it thus by no means follows that the national fundamental rights become displaced by the rights under the Convention.

7.3. IMPACT OF THE DISCUSSIONS ABOUT THE IMPACT OF THE ECtHR ON NATIONAL CASE-LAW

The discussions of the importance of the Convention and the role of the ECtHR and also the more focused debates on particular judgments have certainly contributed to enhancing the awareness of the public in general, but especially the judiciary, of the Convention's existence, its direct applicability and the vast jurisprudence of the ECtHR. This has been particularly true since 2004, when the Federal Constitutional Court handed down its landmark decision in the *Görgülü* case.[151] For a long time the question from the courts (and of politicians!) was: 'What will Karlsruhe (i.e. the Federal Constitutional Court) say about it?' Increasingly another question is being asked: 'What will Strasbourg (i.e. the ECtHR) say about it?' At least the legal community has learnt that the Convention and the Strasbourg Court have come to stand in between Karlsruhe and the blue sky. For some (not least the judges of the FCC) this was a hard lesson to learn.[152] Therefore today these two questions are conjoined. A good example is the current discussion about a possible new trial before the Federal Constitutional Court aimed at prohibiting a political party, the National Democratic Party (NPD), which is on the very right wing of the political spectrum. Because of the failure of a first attempt for procedural reasons in 2003,[153] understandably a very great deal of attention is being given to the fulfilment of all procedural and constitutional requirements in such difficult and politically risky proceedings. But the attention goes beyond the constitutional hurdles, and the question of what the ECtHR would probably say after the FCC has decided on the unconstitutionality of the party has been discussed openly and from the beginning it has been included in the assessment of the pros and cons of any possible application. There is no doubt that the Federal Constitutional Court itself will, as far as it can, examine the already existing relevant jurisprudence of the ECtHR and its special focus on the importance of the

150 Therefore it is important that the courts should always take account of the Convention rights including the jurisprudence of the ECtHR in order to ensure that this influence will actually be respected; see E. KLEIN, 'Die Grundrechtsgesamtlage', in M. SACHS et al., eds., *Der grundrechtsgeprägte Verfassungsstaat. Festschrift für Klaus Stern* (Berlin, Duncker & Humblot 2012) p. 389 at p. 391.

151 *BVerfGE* 111, 307.

152 Of course the same problems arose with regard to EU law and the jurisprudence of the Court of Justice of the European Union.

153 BVerfG 18 March 2003, *BVerfGE* 107, 339.

principle of proportionality and a reduced national margin of appreciation in this area.[154]

7.4. RELATION BETWEEN THE DEBATE ON THE ECtHR AND THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL LAW

All the various debates on the ECHR and the ECtHR, notwithstanding all the critical remarks on some judgments, have increased knowledge of the meaning of international law in the national legal order and the awareness that national law can no longer be seen in splendid isolation but is firmly embedded in international and supranational contexts. The general preparedness to accept this phenomenon and its further evolution is certainly closely connected to the historical experiences that Germany underwent in the last century. Not going its way alone, but together with other states, and respect for international law, general rules of international law or treaties, are among the lessons the Basic Law has tried to draw from the World Wars and the existence of right and left extremist dictatorships in Germany. The debate on the Convention and the ECtHR has supported this widely shared attitude. The far-reaching preparedness to respect and implement the provisions of the Convention is a reflection of this general view on the one hand and, by the same token, strengthens it on the other.

154 Cf., e.g., *Refah Partisi and Others* v. *Turkey*, ECtHR 13 February 2003, appl. no. 41340/98 et al.; see also O. KLEIN, 'Parteiverbotsverfahren vor dem Europäischen Gerichtshof für Menschenrechte', 34 *Zeitschrift für Rechtspolitik* (2001) p. 397.

CHAPTER 6
THE NETHERLANDS

Janneke GERARDS and Joseph FLEUREN

1. INTRODUCTION: CONSTITUTIONAL BACKGROUND

The territory of the Kingdom of the Netherlands (*Koninkrijk der Nederlanden*) is partly situated in Europe and partly in the Caribbean. The Kingdom has a federal structure: it consists of four autonomous political unities, i.e. component states (*landen*): (1) the Netherlands, including the Caribbean islands of Bonaire, Sint Eustatius and Saba; (2) Aruba; (3) Curaçao; and (4) Sint Maarten. The highest constitutional law is the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*). In addition, each political unity has its own constitution. The constitutions of Aruba, Curaçao and Sint Maarten are called *staatsregelingen*. The constitution of the Netherlands is laid down in the Constitution for the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*). However, the latter constitution is hybrid in nature. It is the constitution of the Netherlands and at the same time a constitution for the Kingdom. This has to do with the atypical structure of the Kingdom. Because the Netherlands form the largest part of the Kingdom in terms of both territory and population, the most important public bodies of the Netherlands (the King, the Government, the Parliament, the Council of State, and the Supreme Court) also function as public bodies of the Kingdom. For this reason the Charter for the Kingdom of the Netherlands leaves the organisation and the competences of these bodies largely to the Constitution of the Kingdom of the Netherlands. Therefore, to the extent that the Charter leaves the regulation of Kingdom affairs to the Constitution for the Kingdom, the latter contains provisions of constitutional law which apply to the Kingdom as a whole.

The Netherlands itself is a decentralised unitary state, organised on three different levels: the State (i.e. the level of central government), the provinces, and the municipalities. In 2010 the Caribbean islands of Bonaire, Sint Eustatius and

Saba each became a public body similar to a municipality and were politically integrated into the Netherlands. The other parts of the Kingdom, viz. Aruba, Curaçao and Sint Maarten, have autonomous status; they are not municipalities, nor are they split up into provinces or municipalities.

The Kingdom of the Netherlands has a parliamentary system of government. Although, according to the Constitution, the King (who is the Head of State) is a member of the Government, the government's decisions are taken by ministers and secretaries of state, who together form the Cabinet (presided over by the Prime Minister). The Prime Minister, the other ministers and the secretaries of state are accountable to both Houses of Parliament (*Staten-Generaal*) for the exercise of their powers. Should the Cabinet or an individual minister or secretary of state lose the confidence of the majority of the 150 members of the Lower House (*Tweede Kamer*, elected by popular vote) then the Cabinet, minister or secretary of state has to resign. It is generally assumed that the same holds when the Cabinet or an individual minister or secretary of state is faced with a lack of confidence by a majority in the Senate (*Eerste Kamer*; the 75 members of which are elected indirectly by popular vote).

The cooperation of both Houses of Parliament as well as the Government is necessary in order to adopt an Act of Parliament (*wet in formele zin*). The procedure for adopting such an act is rather lengthy. In principle the Council of State (*Raad van State*, an independent body of eminent jurists and some former politicians, who are – with exceptions – appointed for life by the Government) has to be consulted on every bill. Bills which are submitted to the Lower House, either by one of its members or by the Government, may be amended by the Lower House and will only become Acts of Parliament after they have been passed by both Houses and ratified by the Government. This affords the Government the power to prevent a private member's bill or an amended bill which is contrary to the national interest or conflicts with international law from gaining the force of statutory law. The vast majority of bills are submitted by the Government.

An amendment of the Constitution for the Kingdom of the Netherlands requires a bill which has in two separate readings to be passed by both Houses of the Parliament and to be ratified by the Government. At the second reading, which will only take place after new elections have been held for the Lower House, the bill – which at this stage may not be amended by the Lower House – requires a majority of at least two thirds of the votes cast in both Houses before it can be adopted. In this respect the Constitution is quite rigid.

The judiciary is independent: judges are appointed for life by the Government and do not have to tolerate any interference from the executive in pending cases. There are courts of first instance, courts of appeal, special courts of appeal for administrative cases, and a Supreme Court (*Hoge Raad*). The Supreme Court functions as a court of cassation. Its main responsibility is to annul judgments

handed down by lower courts in criminal, civil and tax cases which have infringed the law. Furthermore, in criminal matters the Supreme Court has the power to order a retrial in cases where there may have been a miscarriage of justice and in cases where a violation of the ECHR or its Protocols has been found by the ECtHR.[1] There are three special courts of appeal for administrative cases, each with their own jurisdiction.[2] The judgments of these courts are not open to review in cassation by the Supreme Court.[3] However, in order to promote the unity or development of their case-law, these courts may refer cases to a 'Grand Chamber' (*grote kamer*, composed of five judges), in which judges from the other two special courts participate.

The main sources of fundamental rights in the Netherlands are the Constitution for the Kingdom of the Netherlands and human rights treaties. The most important human rights treaties to which the Kingdom of the Netherlands is a party are the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Social Charter (ESC), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Courts may also derive fundamental rights from customary law.[4] Since October 2012 compliance with human rights is being monitored and promoted by the Netherlands Institute for Human Rights (*College voor de rechten van de mens*), an independent body that has been established by law which, *inter alia*, can advise public authorities about human rights issues, submit reports on specific questions and problems, and provide information to the general public.[5]

1 Art. 457 *Wetboek van Strafvordering* [Code of Criminal Procedure]. See further section 5.2.

2 Viz. the Central Appeals Tribunal (for the public service and social security matters) (*Centrale Raad van Beroep*), the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) and the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*).

3 The only exceptions are judgments of the Central Appeals Tribunal regarding the interpretation and application of certain legal concepts that are used in social security law as well as in tax law.

4 *Hoge Raad* [Supreme Court, HR], 7 November 1986, *NJ* 1987, no. 226 (*Hoogovens*); HR 9 January 1987, *NJ* 1987, no. 928 (*Edamse bijstandsvrouw*), para. 4.4; HR 1 December 1993, *AB* 1994, no. 55 (*Gelijkheidsbeginsel*); HR 15 April 1994, *NJ* 1994, no. 608 (*Valkenhorst*).

5 *Staatsblad* [Bulletin of Acts and Decrees, *Stb.*] 2011, no. 573; *Stb.* 2012, no. 414.

2. STATUS OF INTERNATIONAL LAW IN DOMESTIC LAW

2.1. THE CONSTITUTIONAL SYSTEM FOR GIVING EFFECT TO INTERNATIONAL LAW

The Constitution of the Netherlands is quite flexible towards international law. Ever since its articles on foreign relations were significantly amended in 1953, they open with the constitutional duty of the Government to promote the development of the international legal order (Article 90 Const.).[6] As a basic rule the Government shall not consent to a treaty[7] or denounce it without the prior approval of both Houses of Parliament (Article 91(1) Const.). This approval may be granted either explicitly by an Act of Parliament, or tacitly. When the Government has submitted its intention to consent to, or to denounce, a treaty to Parliament for tacit approval, this approval is automatically granted after thirty days, unless in the meantime either House or one fifth of its members has requested the Government to apply for explicit approval. Furthermore, the Constitution allows for exceptions to the requirement of approval or prior approval (Article 91(1), which exceptions have been laid down in an Act of Parliament.[8] The Kingdom may even become a party to treaties that are inconsistent with the Constitution, provided such treaties have been approved by both Houses of Parliament with a majority of at least two thirds of the votes cast (Article 91(3) Const). Hence the rigid and time-consuming procedure that has to be followed in the event of a revision of the Constitution is no impediment to entering into treaties which depart from the Constitution. However, since the Charter for the Kingdom of the Netherlands does not contain a provision similar to Article 91(3) of the Constitution, it must be presumed that the Kingdom may not become a party to a treaty which departs from the Charter until the Charter is amended.[9]

---

6 For an analysis of this provision see L.F.M. BESSELINK, 'The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution', 34 *Netherlands Yearbook of International Law* (2003) pp. 89–138.

7 In Dutch constitutional law the concept of a treaty has the same (broad) sense as in international law. A treaty in this sense may be defined as 'an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law' (P. REUTER, *Introduction to the Law of Treaties*, 2nd edn. (London, Kegan Paul International 1995) p. 30).

8 *Rijkswet goedkeuring en bekendmaking verdragen* [Kingdom Act on Approval and Publication of Treaties]. Cf. J. KLABBERS, 'The New Dutch Law of the Approval of Treaties', 44 *International and Comparative Law Quarterly* (1995) pp. 629–643.

9 *Kamerstukken* [Parliamentary Papers] *I* 1955/56, 4133 (R 19), no. 151, p. 3; ibid., no. 151a, p. 3; *Handelingen* [Parliamentary Proceedings] *I* 1955/56, p. 387; *Kamerstukken I* 1956, 4402 (R 43), no. 7a, p. 2. Cf. J.W.A. FLEUREN, 'Verdragen die afwijken van de Nederlandse Grondwet' [Treaties which depart from the Dutch Constitution], in D. BREILLAT, C.A.J.M. KORTMANN

Rules of international law (treaties, resolutions of international organisations, rules of customary international law) are part of the law of the land as soon as they have become binding on the Kingdom of the Netherlands. From time immemorial, the Dutch courts have been applying treaty law[10] and customary international law. Although dualist theories have been heavily debated in Dutch legal doctrine during the last decades of the 19th, and the first decades of the 20th century,[11] those theories have always remained foreign to Dutch case-law. The only lasting impact that dualist theories have had on Dutch case-law was that they made the courts all the more aware of the fact that they were applying treaties and other rules of international law *as such*, i.e. as international law. In two landmark judgments from 1906 and 1919 the Supreme Court made it abundantly clear that it did not wish to yield to dualist doctrines.[12] By the time the constitutional articles on foreign relations were amended in 1953, dualist sentiments in legal literature had died out. By this amendment the monist tradition in Dutch constitutional law was clearly endorsed and further developed. That Dutch courts and other public authorities apply international law *as such* has never been disputed since then and is now and again confirmed by court ruling.[13]

As may be inferred from the legal history of the 1953, 1956 and 1983 amendments of the Constitution, law of domestic origin is subordinate to treaty law and customary international law. In the Kingdom of the Netherlands international law outranks national legal rules in the hierarchy of law, including the Constitution and (it must be assumed) the Charter for the Kingdom.[14]

---

and J.W.A. Fleuren, *Van de constitutie afwijkende verdragen* [Treaties departing from the constitution] (Deventer, Kluwer 2002) p. 43 at pp. 77–78. A different view is expressed by the Minister of Foreign Affairs in a letter of 23 May 2002 to the Chairman of the Standing Committee on Foreign Affairs in the Lower House, *niet-dossierstuk* 2001/02 (*Tweede Kamer*), buza020253.

10 In this chapter 'treaty law' is used as an umbrella term for both treaties and resolutions of international organisations (which are adopted in persuance of a treaty).

11 For instance, the question of whether the application of treaties in Dutch case-law should be construed according to dualism or according to monism, was discussed by the Netherlands Lawyers' Association (*Nederlandse Juristen Vereniging*) at its annual meeting of 1937 on the basis of reports presented by Telders and Verzijl (see 67 *Handelingen der Nederlandsche Juristen-Vereeniging* (1937), part I. An English translation of the latter report is included in J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. I (Leiden, Sijthoff 1968) pp. 106–146.

12 *Hoge Raad*, 25 May 1906, *W* (*Weekblad van het Recht*) 8383 (*Rechtsvorderingsverdrag 1896*); *Hoge Raad*, 3 March 1919, *NJ* (*Nederlandse Jurisprudentie*) 1919, p. 371 (*Grenstractaat Aken*). For the historical context of these judgments see J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* [Treaty provisions that are binding on all persons] (The Hague, Boom Juridische uitgevers 2004) pp. 98–121. The T.M.C. Asser Institute at The Hague maintains freely accessible online data bases with sources and abstracts (including many abstracts in English) of Dutch case-law concerning questions of public international law. See www.asser.nl.

13 e.g. HR 10 November 1989, *NJ* 1990, no. 628.

14 Fleuren, *supra* n. 12, pp. 338–340; J.G. Brouwer, 'The Netherlands', in D.B. Hollis, et al., eds., *National Treaty Law and Practice* (Leiden, Nijhoff 2005) p. 482 at pp. 498–499.

However, although all rules of international law that are binding on the Kingdom of the Netherlands take hierarchical precedence over law of domestic origin, this does not necessarily imply that the Dutch courts are empowered to test domestic law against international law. According to the 1953 amendment of the Constitution, national legislation – including the Constitution itself, Acts of Parliament and subordinate legislation – was inapplicable if application would be incompatible with treaties and resolutions of international organisations which had been published, no matter whether the legislation had come into force before or after the publication of the treaty or resolution.[15] Only three years later, in 1956, this 'supremacy clause' was limited to self-executing provisions of treaties and resolutions of international organisations. As a result of this new amendment, the Constitution for the Kingdom of the Netherlands has become a little less friendly or open towards international law. From this new amendment the Supreme Court has inferred *a contrario* that since 1956 the Dutch courts are no longer at liberty to review Dutch law for compatibility with non-self-executing provisions of treaties and of resolutions of international organisations or with customary international law.[16]

In 1983 the Constitution underwent a general revision. Since then the 'supremacy clause' is contained in Article 94 of the Constitution. An attempt made by some Members of Parliament on that occasion to extend the 'supremacy clause' to all provisions of treaties and of resolutions of international organisations as well as to general rules of international law (*algemene regels van volkenrecht*) failed. Consequently the power of the courts to disapply the Constitution, Acts of Parliament and subordinate legislation in cases where application would be inconsistent with rules of international law, is still restricted to those rules that are embodied in self-executing provisions of treaty law.[17] In legal doctrine there has been some disagreement on the question of whether this power of review extends to domestic legal rules laid down in the Charter for the Kingdom of the Netherlands, but the connection between the Charter and the Constitution seems to imply an affirmative answer.[18]

---

15 Arts. 65 and 67(2) Const. (1953).

16 HR 6 March 1959, *NJ* 1962, no. 2 (*Nyugat II*). For a translation in English see 10 *NILR* (1963) p. 82.

17 See, e.g., HR 18 September 2001, *NJ* 2002, no. 559 (*Bouterse*) (for a translation in English see *ILDC* 80 (NL 2001)); HR 8 July 2008, ECLI:NL:HR:2008:BC7418 (for a translation in English see ECLI:NL:HR:2008:BG1476). Dutch case-law that has been provided with an European Case Law Identifier (ECLI) may be accessed via www.rechtspraak.nl.

18 For an affirmative answer see FLEUREN 2004, *supra* n. 12, pp. 341–342 (with further references); A.B. VAN RIJN, 'De plaats van Nederland en de Caribische partners in de buitenlandse betrekkingen en de verdragsrelaties van het Koninkrijk' [The place of the Netherlands and the Caribbean partners in the foreign affairs and the treaty relations of the Kingdom], in L.J.J. ROGIER and H.G. HOOGERS, eds., *50 jaar Statuut voor het Koninkrijk der Nederlanden* [50th anniversary of the Charter for the Kingdom of the Netherlands] (The Hague, Ministry of the Interior and Kingdom Relations 2004] p. 89. For a negative answer see H.G. HOOGERS, *De normenhiërarchie van het Koninkrijk der Nederlanden* [The hierarchy of

The competence of the courts to disapply Dutch law, including constitutional law, in case of conflict with self-executing provisions of treaty law, does not depend on the answer to the question of whether this treaty was or should have been approved by Parliament. The courts are not empowered to examine whether or not the Government and Parliament have complied with the constitutional provisions regarding the approval of treaties. So the courts have to test the Constitution against self-executing provisions of treaty law even when the treaty at issue has not been submitted for approval by a qualified majority in both Houses of Parliament because it was not considered to deviate from the Constitution.[19]

2.2. SELF-EXECUTING PROVISIONS

Since the concept of a self-executing provision of treaty law plays a vital role in the relationship between Dutch law and international law, it may be useful to explain briefly the Dutch approach to defining the notion of self-execution provisions. According to the Dutch Constitution, provisions of treaties and resolutions of international organisations, *which may be binding on all persons by virtue of their content*, shall become binding on all persons (i.e. shall have force of law in regard to all natural and legal persons) after they have been published (Article 93). As soon as such provisions have become binding on all persons, they may prevent the application of national legislation (Article 94). Although the italicised phrase was introduced in the 1956 amendment in order to limit the scope of (the present) Articles 93 and 94 to self-executing provisions of treaty law,[20] it has not been very helpful. In fact, the phrase has caused much debate on its precise meaning and scope. In the 1950s and 1960s it was not uncommon to consider the intention of the contracting parties to be decisive in reference to the question of whether a provision of treaty law was self-executing (i.e. directly applicable by the courts). Nowadays this criterion has lost much of its former importance. According to the Supreme Court, the question of whether or not the contracting parties intended a provision of treaty law to be self-executing (i.e. to have direct effect) is only relevant when they either clearly wanted the provision to have direct effect, or, on the contrary, clearly agreed that no such direct effect should be given.[21] Except for this situation, the content of the provision is decisive. The accepted standard is that there is no direct effect if the provision

law in the Kingdom of the Netherlands] (Nijmegen, Wolf Legal Publishers 2009) pp. 49–53 (with further references).

19 Article 120 Const.; HR 31 August 1972, *NJ* 1973, no. 4 (for an English translation see 4 *NYIL* (1973) p. 392); FLEUREN, *supra*, n. 12, pp. 163–176.

20 See, e.g., *Kamerstukken II* 1955/56, 4133 (R 19), no. 4, pp. 13–15.

21 HR 30 May 1986, *NJ* 1986, no. 688 (*Spoorwegstaking*) (for a translation in English see 18 *NYIL* (1987) p. 389); HR 18 April 1995, *NJ* 1995, no. 619.

entails an obligation on the Dutch legislature to adopt statutory regulations along the lines indicated by the provision. If the provision can in itself operate as law (*objectief recht*) within the domestic legal order, direct effect is accepted. It might be inferred from a 2011 judgment of the Supreme Court that this will be the case if the provision is unconditional and sufficiently precise to be applied by the courts.[22]

The test whether the provision is unconditional and sufficiently precise to be applied by the courts, is borrowed from the case-law of the European Court of Justice on the direct effect of EU law. The explicit reference to this test in the 2011 judgment of the Supreme Court is in fact a perfect illustration of the increasing influence this case-law is having on the ways in which Dutch courts deal with the question of whether a provision of treaty law has direct effect in other contexts than that of EU law. How far this influence will go has still to be seen. The European Court of Justice adopts a relative approach to the question of direct effect. According to this approach a provision of EU law which provides no suitable basis for claiming individual or subjective rights may nevertheless have direct effect in the sense that it can be invoked by individuals before the national courts in order to prevent the application of domestic legislation which is inconsistent with this provision.[23] In addition, in the event a Member State has failed to implement a provision of EU law which – if implemented correctly – would have resulted in the creation of individual rights, but at the same time lacks direct effect in the sense that the national courts cannot remedy this omission by applying the provision itself, the Member State may be held responsible before the national courts for a breach of EU law.[24] In the past there have been some experiments in which Dutch courts also applied a relative approach to provisions of treaty law other than EU law. These experiments had seemed to have died down, but since the aforementioned 2011 judgment of the Supreme Court, they have popped up again.[25] However, Dutch courts still seem to be reluctant to apply the doctrine of state responsibility for violating non-self-executing provisions of treaty law in other contexts than that of the law of the EU, although the Supreme Court sometimes accepts state responsibility while remaining silent on the question of whether the provision of treaty law that has been violated by the public authorities has direct effect or not.[26] Generally it can be said that a relative approach is only occasionally applied, and is certainly not dominant, in Dutch case-law. The Dutch courts commonly regard a provision of

22 HR 1 April 2011, ECLI:NL:HR:2011:BP3044.

23 S. PRECHAL, 'Does Direct Effect Still Matter?', 37 *Common Market Law Review* (2000) pp. 1047–1069.

24 Joined Cases C-6/90 and C-9/90 *Francovich* [1991] *ECR* I-5357; Case C-178/94 *Dillenkofer* [1996] *ECR* I-4845.

25 ABRvS 7 February 2012, ECLI:NL:RVS:2012:BV3716; Hof Den Haag 26 March 2013, ECLI:NL:GHDHA:2013:BZ4871 (*Rookverbod*).

26 HR 11 June 1993, *AB* 1994, no. 10 (*Roosendaal-methode*); HR 21 September 2012, ECLI:NL:HR:2012:BW5328.

treaty law as either having direct effect or not, regardless of the circumstances of the case in which the provision is invoked.

2.3. JUDICIAL RESTRAINT

The reason why the 'supremacy clause' (currently Article 94 Const.) was limited to self-executing provisions of treaties and resolutions of international organisations in 1956 had to do with the separation of powers. The framers of the 1956 amendment wanted to prevent the courts from having to disapply national law even in those cases where the treaty or resolution in question did not itself contain any rules which the courts could apply instead of this law. In such cases a legal vacuum might arise which the courts could only fill by creating law themselves and thus making choices that should be left to the legislature.[27] However, at this point the introduction of the self-executing provision concept in the Constitution has only in part achieved its purpose. Since the 1980s the impact of human rights treaties on Dutch case-law has strongly increased.[28] This was triggered by the fact that the European Court of Human Rights considered the ECHR as a living instrument and was reading positive obligations for the States Parties in some of its provisions, as well as the fact that on 11 March 1979 the Kingdom of the Netherlands had become a party to the ICCPR, which added some extra protection in addition to the ECHR (such as a provision on the right to appeal in criminal cases and a general and non-accessory prohibition of discrimination). These developments have prompted the Supreme Court to create a doctrine of judicial restraint in cases where the removal of inconsistencies between Dutch law and self-executing provisions of the ICCPR and of the ECHR would involve political choices that should preferably be made by the legislature. According to this doctrine the courts can rectify any discrepancies between the law embodied in an Act of Parliament and a self-executing treaty provision if there is a possible solution for the discrepancy at hand that fits in with the history and system of the law in question and if the consequences of this solution are foreseeable. On the other hand, when several solutions are possible and none of them meets this test, the courts tend to refrain from choosing between them.[29] But should the legislature continue to do

---

27 *Kamerstukken II* 1955/56, 4133 (R19), no. 4, pp. 13–14. See also H.F. VAN PANHUYS, 'De regeling der buitenlandse betrekkingen in de Nederlandse grondwet' [Regulating foreign relations in the Netherlands Constitution], *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* No. 34 (1955) p. 28 at p. 50.

28 P. VAN DIJK, 'Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary. The Dutch Case', in M. NOWAK et al., eds., *Fortschritt im Bewußtsein der Grund- und Menschenrechte. Progress in the Spirit of Human Rights* (Festschrift Ermacora) (Kehl am Rhein, Engel 1988) pp. 631–650.

29 See, e.g., HR 12 October 1984, *NJ* 1985, no. 230; HR 23 September 1988, *NJ* 1989, no. 740; HR 19 January 1990, *NJ* 1991, no. 213; HR 16 November 1990, *NJ* 1991, no. 475; ABRvS 29 October 2003, ECLI:NL:RVS:2003:AM5435; HR 16 June 2009, ECLI:NL:HR:2009:BF3741.

nothing about the problem, then there may be a point at which the courts themselves will provide a solution.[30] Consequently, the courts are empowered to remove any inconsistencies between Dutch law and self-executing provisions of treaty law, but may sometimes consider it prudent to leave a solution to the legislature, at least *pro tempore*.[31] So the introduction of the self-executing provision concept in the 1956 amendment of the Constitution has not prevented the courts from sometimes being confronted with cases in which they cannot avoid or remedy a violation of treaty law without having to make choices that are normally up to the legislature. Obviously this is a consequence of the 'either/or' approach the Dutch courts tend to apply to this concept. In a relative approach a provision of treaty law would be self-executing to the extent that it can be applied by the courts without infringing the domain of the legislature.

In developing this doctrine of judicial restraint the Supreme Court has defined the position of the courts vis-à-vis the legislature. Especially when the legislative bodies are already preparing legislation in order to comply with obligations resulting from human rights treaties, the Supreme Court seems to be reluctant to run ahead of things. There are various examples of cases in which the Supreme Court actually exercised judicial restraint by refusing to remedy a violation of an international human rights treaty. A case in point is a 1988 case in which the Supreme Court had to rule on a legislative provision according to which a child born out of wedlock had to bear the surname of the father who had acknowledged the child (even if the parents wanted the child to keep the mother's surname). Although the Supreme Court held that the relevant provision of the Dutch Civil Code was incompatible with the principle of non-discrimination embodied in Article 26 of the ICCPR, it nevertheless refused to disapply the provision. According to the Supreme Court it was up to the legislature to choose between several systems that would guarantee parents the right to determine whether their children would bear the mother's or the father's surname. When this judgment was handed down, a draft bill had already been introduced to amend the law on surnames. Apparently the Supreme Court did not want to hamper the legislature's activities and therefore chose to exercise restraint.[32] Since 1 January 1998 the law on surnames has been brought into conformity with the principle of non-discrimination.

30 HR 12 May 1999, *Beslissingen in Belastingzaken. Nederlandse Belastingrechtspraak* 1999, no. 271 (*Arbeidskostenforfait*).

31 Cf. S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter' [The limits of the law making task of the courts], 75 *Nederlands Juristenblad* (2000), pp. 747–758.

32 HR 23 September 1988, *NJ* 1989, no. 740 (*Naamrecht*). By then it was established case-law that Article 26 ICCPR was self-executing.

2.4. JUDICIAL TECHNIQUES

On the whole Dutch courts use a variety of methods and techniques to prevent or remedy any violations of self-executing provisions of treaties or resolutions of international organisations. Very often they apply and construe national law in such a way that a violation of international law will be avoided. Sometimes they extend the scope of legal provisions in order to make sure that the State complies with its obligations under provisions of treaty law which have direct effect. For example, in order to comply with Article 26 of the ICCPR, the Central Appeals Tribunal (*Centrale Raad van Beroep*) ruled in 1988 that widowers were entitled, on the same conditions as widows, to benefits under the General Widows' and Orphans' Benefits Act (*Algemene Weduwen- en Wezenwet*), thus bringing a new category of persons under the scope of this Act. In this case the Central Appeals Tribunal did not consider the fact that a private member's bill had already been submitted to the Lower House in order to redress the exclusion of widowers from benefits under this Act to be a reason for judicial restraint. On the contrary, it rather strengthened, in its view, the argument that the limited scope of the Act in question was inconsistent with Article 26 ICCPR.[33] The Tribunal was not even put off by reports suggesting that the question of whether the Netherlands could denounce the ICCPR and then ratify it again, while making a reservation regarding the (non-)applicability of Article 26 to social security, was investigated by the Government.[34] Unsurprisingly, this investigation led to nothing.

The actual disapplication of a legal provision is thus only one of the methods or techniques used by courts to avoid or remedy a violation of a self-executing provision of treaty law. In many cases this technique is inadequate either because it does not remove the inconsistency or because it can be replaced by a technique that respects the law in question but applies and construes it in the light of the treaty obligation. Generally speaking, in cases where primary legislation is at stake, courts seem to be less inclined to solve a conflict with self-executing provisions of treaty law by disapplying the former than in cases where subordinate legislation is at stake.

2.5. HORIZONTAL EFFECT

According to the Constitution a provision of treaty law which has direct effect is binding on all (natural or legal) persons (Article 93 Const.). Depending on its content, such a provision may be invoked by a person against a public body (e.g.

33 CRvB 7 December 1988, *RSV* 1989/67 (*Weduwnaarspensioen*).

34 13 *NJCM-Bulletin* [Netherlands Journal of Human Rights] (1988) pp. 284–285 and 732–733; A.W. Heringa, 'Judicial Enforcement of Article 26 of the International Covenant on Civil and Political Rights in the Netherlands', 24 *NYIL* (1993) pp. 139–182 at 169–172.

self-executing provisions of treaties regarding social security or regarding the avoidance of double taxation), by a public body against a person (e.g. self-executing provisions of treaties or resolutions regarding extradition and surrender of accused persons), or by one person against another (e.g. self-executing provisions of treaties on private international law or uniform private law). Human rights treaties are textbook examples of treaties which, insofar as they have direct effect, may be relied on by individuals vis-à-vis public authorities. But sometimes the self-executing nature of a provision of a human rights treaty may also have the effect that this provision affects legal relations between private parties. When a provision of a human rights treaty entails a (positive) obligation for the States Parties to recognise or ensure rights which individuals should be able to exercise towards other persons, the qualification of this provision as self-executing may even enable the courts to apply it in cases between individuals.[35] The Supreme Court had, for example, recourse to this technique after attempts by the legislature to give a statutory basis to the right to strike had failed. It ruled that Article 6(4) ESC (in which the contracting parties recognise 'the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike') had direct effect and trade unions could therefore rely on this provision whenever the lawfulness of a strike was contested by employers in court. The Supreme Court used the general limitation clause of Article 31 ESC (presently Article G) to specify the conditions for a lawful exercise of the right to strike.[36]

Yet the application of self-executing provisions of human rights treaties in horizontal relationships is not without pitfalls. The rights and especially the limitation clauses in those treaties will normally have been designed in regard to the States Parties, who have to guarantee that these rights may be enjoyed by individuals and who have to decide which restrictions to these rights they deem necessary. Therefore the application of these rights in disputes between private parties may now and again require some law creation by the courts. It is quite common to avoid – or mitigate – this problem by applying and construing national law in such a way that the treaty obligations of the State are met. In doing so the courts are giving indirect horizontal effect to treaty obligations of the State, e.g. by interpreting provisions of private law in the light of fundamental rights.[37]

---

35 J. Fleuren, 'The Application of Public International Law by Dutch Courts', 57 *Netherlands International Law Review* (2010) p. 245 at 257–258.

36 HR 30 May 1986, *NJ* 1986, no. 688; 18 *NYIL* (1987) pp. 389–397 (*Spoorwegstaking*); HR 11 November 1994, *NJ* 1995, no. 152; HR 28 January 2000, ECLI:NL:HR:2000:AA4618 (*Douwe Egberts*). Cf. L. Verburg, 'Grondrechten in het arbeidsrecht' [Fundamental rights in labour law] in J.H. Gerards and C. Sieburgh, eds., *De invloed van fundamentele rechten op het materiële recht* [The impact of fundamental rights on substantive law] (Deventer, Kluwer 2013) p. 67 at p. 75–77.

37 M. Claes and J.H. Gerards, 'National report – The Netherlands', in J. Laffranque, ed., *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of*

2.6. INTERNATIONAL LAW WHICH IS NOT EMBODIED IN SELF-EXECUTING PROVISIONS

The method of harmonious interpretation and application of national law is also frequently used by Dutch courts – even in disputes between private parties – to make sure that the decision in the case under consideration is not in conflict with international obligations of the State which are not embodied in self-execution provisions of treaty law. In a 1990 judgment the Supreme Court has explicitly held – without making a distinction between provision that have direct effect and other provisions – that the Dutch courts 'should, as far as possible, construe and apply Dutch law in such a manner that the State complies with its treaty obligations'.[38] Even in 1919 the Supreme Court had already formulated the rationale of the method of harmonious interpretation and application of statutes:

> 'It certainly cannot be assumed that the Dutch legislature should in any act have deviated unilaterally and high-handedly from that which has been agreed upon in a ratified treaty with a foreign Power, unless the text of the act compels this assumption.'[39]

If the quoted phrase from the 1990 judgment is taken seriously, one might infer that the question of whether a provision of treaty law has direct effect is only relevant if there are not enough leads in domestic law to comply with this provision by means of the method of harmonious interpretation and application. 'Domestic law' evidently is a very wide notion, including primary and subordinate legislation, principles of law, customary law as well as discretionary powers of administrative authorities. Therefore a logical conclusion would be that an affirmative answer to the question of whether a provision of treaty law is self-executing is only imperative to the extent that a violation of this provision cannot be avoided by a harmonious interpretation and application of written and unwritten legal rules, principles of law and discretionary powers. Indeed, in numerous cases Dutch courts have used this technique to comply with a provision of treaty law that lacks direct effect or to avoid a ruling on the question of whether the provision at issue has direct effect. Nevertheless, courts occasionally dismiss a plea that is based on a provision of treaty law because they hold the provision to be non-self-executing, without examining whether there might be other means to take the provision into account. In practice courts seem to consider it to be within their discretion to decide whether or not to use this technique to avoid or remedy discrepancies between domestic law and non-self-

Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, Reports of the XXV FIDE Congress Tallinn, Vol. 1 (Tartu, Tartu University Press 2012) pp. 613–677 at pp. 628–633.

38 HR 16 November 1990, *NJ* 1992, no. 107.

39 HR 3 March 1919, *NJ* 1919, p. 371 (*Grenstractaat Aken*).

executing provisions of treaty law.[40] Only in cases where legislation is at stake that has been adopted to implement such a provision is it quite usual to construe this legislation in the light of the underlying international obligations.[41]

Non-binding decisions of international organisations obviously do not entail legal obligations for the Kingdom of the Netherlands and are consequently not considered to be part of the law of the land. For this reason, for example, none of the provisions of the Universal Declaration of Human Rights create rights that individuals may enforce before Dutch courts.[42] However, this does not imply that the courts turn a blind eye to recommendations of international organisations and other instruments of international soft law. Although the courts are not obliged to comply with them,[43] they frequently refer to such instruments when interpreting and applying binding rules of international law. In particular, the recommendations, views and general comments of human rights bodies which have been established to supervise the compliance of States Parties with human rights treaties are taken into account when the courts have to interpret and apply those treaties.[44]

2.7. EU LAW

According to established case-law of the European Court of Justice, the law of the European Union is a part of the legal order of every of its Member States and has supremacy over their domestic law, including their constitutional law. Dutch courts have accepted this case-law from the very beginning. At first it was assumed that this case-law could easily be complied with because of the constitutional articles on self-executing provisions of treaties and resolutions of international organisations. But more recently the courts have tended to endorse a doctrine that renders these articles virtually irrelevant when it comes to EU law. This doctrine points out that, according to the case-law of the European Court of Justice, EU law has direct effect and supremacy pursuant to the founding treaties of the EU and not by virtue of the constitutions of the Member

40 FLEUREN, *supra* n. 35, pp. 259–261.

41 For an extensive discussion of case-law see J.W.A. FLEUREN, 'Directe en indirect toepassing van international recht door de Nederlandse rechter' [Direct and indirect application of international law by the Dutch courts], *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* No. 131 (2005) p. 69 at pp. 85–98.

42 HR 7 November 1984, *NJ* 1985, no. 247; 17 *NYIL* (1986) p. 253.

43 Cf., e.g., *Afdeling bestuursrechtspraak Raad van State* [Administrative Jurisdiction Division of the Council of State, ABRvS], 22 June 2011, ECLI:NL:RVS:2011:BQ8830, para. 2.4.1.

44 See, e.g., *Gerechtshof 's-Gravenhage* [Court of Appeal of The Hague], 20 December 2007, ECLI:NL:GHDHA:2007:BC0619, *NJ* 2008, no. 133, upheld by HR 9 April 2010, ECLI:NL:HR:2010:BK4547 (*SGP*); *Voorzieningenrechter Arrondissementsrechtbank Utrecht* [Judge in interlocutory proceedings of the District Court of Utrecht], 6 April 2010, ECLI:NL:RBUTR:2010:BM0846.

States. From this it is inferred that the articles in the Constitution on the effect of self-executing provisions of treaty law (Articles 93 and 94) have no impact on the duty of the courts to apply EU law with supremacy over national law. Consequently the practical importance of these constitutional articles is nowadays limited to treaties and resolutions which are not part of EU law.[45]

3. JUDICIAL REVIEW

As a general rule every Dutch court is empowered to disapply a legal provision or declare such a provision non-binding if it is in conflict with higher law. However, in regard to primary legislation there are some important exceptions to this. Under Article 120 of the Constitution the courts are prohibited from reviewing the constitutionality of Acts of Parliament. So they are not empowered to test an Act of Parliament against any clause of the Constitution for the Kingdom of the Netherlands. This ban on constitutional review dates back to the 1848 revision of the Constitution. The Minister of Justice at the time, who was the *auctor intellectualis* of the ban, used to say that 'a tyranny of judges was the worst of all tyrannies'.[46] Although from the very beginning scholars have criticised this ban, it has remained unquestioned by the government and Parliament for more than a century. This did not change when in 1949 the courts were given the power to test primary legislation and even the Constitution itself against the Netherlands Indonesian Union Statute, including the catalogue of fundamental rights that was attached to it (in 1956 the Statute became ineffective)[47] or when in 1953 the supremacy of treaties and of resolutions of international organisations over national legislation was laid down in the Constitution. But from the 1960s onwards the prohibition on constitutional review has increasingly been questioned by scholars, judges, legal practitioners and politicians. Of course those who advocate the ban on constitutional review point out that the courts have already the power to examine primary legislation for compatibility with fundamental rights, viz. the rights that are embodied in international treaties such as the ECHR and the ICCPR. Yet the fact that the courts are at the same time obliged to test an Act of Parliament against the ECHR (or the ICCPR) and forbidden to test it against fundamental rights in the Constitution, strikes many as paradoxical.

---

45 HR 2 November 2004, ECLI:NL:HR:2004:AR1797 (*Rusttijd*).

46 G.J.T. Beelaerts van Blokland, *De onschendbaarheid der wet* [The inviolability of Acts of Parliament] (Leyden, Van Doesburgh 1868) p. 209.

47 Art. 18 Netherlands Indonesian Union Statute, 69 *United Nations Treaty Series* (1950) p. 1 (no. 894). The Statute entered into force on the same date (27 December 1949) that the Kingdom of the Netherlands officially recognised Indonesia as an independent and sovereign State. In 1956 Indonesia withdrew from the Union. See *Tractatenblad* [Treaty Series, *Trb.*] 1976 no. 35.

In 2009 a private member's bill which intended to empower the courts to review Acts of Parliament for conflict with fundamental rights in the Constitution, passed its first reading.[48] This initiative gained strong support from a government committee which was set up in order to advise about the necessity of some constitutional changes, and which in its 2010 final report unanimously expressed itself in favour of (at least partially) deleting the prohibition on constitutional review.[49] Nevertheless, at the time of writing a majority of two thirds of the votes cast in both Houses of Parliament, which is necessary for the adoption at the second reading, is lacking. For the time being the prohibition on constitutional review is withstanding any challenges.

The ban on constitutional review is not the only exception to the general rule according to which the courts are empowered to test legislation against higher law. In its *Harmonisatiewet* judgment the Supreme Court inferred from the legal history of the Constitution and the Charter for the Kingdom that the courts are not entitled to review Acts of Parliament for conflict with (unwritten) fundamental principles of law or the Charter of the Kingdom.[50] Although some scholars have shown the reasoning underlying this prohibition on testing primary legislation against the Charter to be flawed, this has been established case-law ever since.[51] Consequently the power of the courts to review legislation for compatibility with the Constitution, the Charter and fundamental principles of law is limited to subordinate legislation, such as government decrees, ministerial decrees, provincial and municipal regulations and by-laws.

Yet another exception has to do with international law and was discussed already in section 2. Under Article 94 of the Constitution, provisions of treaties and of resolutions of international organisations which have direct effect shall in case of conflict prevail over any kind of national legislation, including primary legislation, the Constitution itself and the Charter for the Kingdom. According to the text of Article 94, courts as well as administrative bodies have to refrain from applying a national law if application would be inconsistent with a self-executing provision of treaty law which 'is binding on all persons', i.e. has direct

48 *Staatsblad* 2009, no. 120.

49 *Rapport Staatscommissie Grondwet* [Report of the Government Committee on Constitutional Revision] (The Hague, Staatscommissie Grondwet 2010), *Kamerstukken II* 2010/11, 31570, no. 17, addendum, pp. 43–47.

50 HR 14 April 1989, *NJ* 1989, no. 469; 21 *NYIL* (1990) p. 362 (*Harmonisatiewet*). However, the courts are allowed to disapply a provision of an Act of Parliament in individual cases because of general principles of law, if this is prompted by extraordinary circumstances of the case at issue, which have not been foreseen by the legislature. This does not prejudice the binding effect of the provision itself. See para. 3.9 of the judgment mentioned.

51 J.W.A. Fleuren, 'Voorrang van rijksrecht op Nederlands recht in historisch perspectief. De wordings- en interpretatiegeschiedenis van de artikelen 5 lid 2 en 49 van het Statuut voor het Koninkrijk' [Supremacy of Kingdom law over Dutch law in a historical perspective. The legal history of Articles 5(2) and 49 of the Charter for the Kingdom of the Netherlands], 173 *Rechtsgeleerd Magazijn Themis* (2012) pp. 15–29.

effect.[52] As mentioned in section 2, the Supreme Court has inferred *a contrario* that the courts – and administrative bodies, one may add – are not at liberty to review 'Dutch' law for conflict with non-self-executing provisions of treaty law or with customary international law.[53] It is consistent case-law that not only primary legislation but also subordinate legislation is excluded from judicial review for compatibility with provisions of treaty law which lack direct effect. It is generally assumed that the same holds for judicial review for compatibility with customary international law.

It should be emphasised that these exceptions to the principle of judicial review do not prejudice the fact that according to Dutch constitutional law customary international law, non-self-executing provisions of treaty law, the Charter for the Kingdom, the Constitution and fundamental principles of law take hierarchical precedence over Acts of Parliament. They only mean that the courts are not competent to test Acts of Parliament against these legal norms and principles. Instead, it is the duty of the Government and both Houses of Parliament to prevent the adoption of primary legislation that is inconsistent with them and it is not for the courts to question their decision. In this respect the role of the Council of State should be stressed. Legislative bills are examined by the Council of State – an independent public body of eminent lawyers and some former politicians, which are (with exceptions) appointed for life by the Government – for both efficiency and compatibility with the Constitution, the Charter for the Kingdom, legal principles and the international obligations of the State. The Council of State's opinions on legislative bills are not binding, but are nevertheless authoritative. But whether an opinion actually influences the view of the Government or the Houses on the compatibility with higher law is finally decided by these political bodies themselves.

Given the exceptions to the principle of judicial review, it is hardly surprising that the courts refrain from ordering the political bodies to enact legislation, even if otherwise a norm of higher law remains unimplemented. The courts do not consider themselves competent to order the State or its bodies to adopt an Act of Parliament or other legislative measures requiring the cooperation of the people's representatives, regardless of whether the claim is based on a self-executing provision of treaty law, another rule of international law, or even a rule of EU law.[54]

---

52 Strictly speaking, the power of the courts is limited to refraining from applying – or prohibiting public authorities from applying – legal rules in the specific case presented to it in which such application would contravene self-executing provisions of treaty law. In practice, this may partly or even completely deprive a legal rule of its binding effect, since the courts will usually follow precedent and disapply the rule in all similar cases. The courts have no authority, however, to declare a legal rule null and void if it is in conflict with international law. Only the public organ that adopted the rule has the competence to remove it from the body of law.

53 HR 6 March 1959, *NJ* 1962, no. 2 (*Nyugat II*).

54 HR 21 March 2003, *NJ* 2003, no. 691 (*Waterpakt*); HR 1 October 2004, *NJ* 2004, no. 679; HR 9 April 2010, ECLI:NL:HR:2010:BK4547 (*SGP*).

4. IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE DUTCH COURTS

Although the Kingdom of the Netherlands was one of the states whose governments signed the European Convention on Human Rights on 4 November 1950 at Rome, it did not manage to finish the process of parliamentary approval in time to belong to the group of states who became a party to the Convention on the date of its entering into force, i.e. 3 September 1953. Instead the ECHR, together with its Protocol (No. 1), entered into force for the Netherlands on 31 August 1954.[55] At first the Government hesitated as to whether it should recognise the competence of the European Commission of Human Rights to deal with complaints of (groups of) individuals and NGOs claiming to be a victim of a violation of the Convention by the Netherlands and whether it should accept the compulsory jurisdiction of the European Court of Human Rights – some argued it would be enough that, according to the Constitution, alleged victims could invoke the Convention before the Dutch courts.[56] Nevertheless, on 5 July 1960 both the right of individuals to complain in 'Strasbourg' and the compulsory jurisdiction of the ECtHR were finally recognised by the Netherlands.[57]

The Kingdom of the Netherlands has become a party to all the Protocols to the ECHR, except for Protocol No. 7, which it never ratified. The ECHR and the Protocols that have entered into force for the Kingdom of the Netherlands are also applicable in the Caribbean parts of the Kingdom. The substantive provisions of the ECHR and the Protocols to which the Netherlands is a party are considered by the courts to be 'binding on all persons' within the meaning of Articles 93 and 94 of the Constitution. In other words, they are self-executing or having direct effect.[58] In the past the

55 *Trb.* 1954, no. 151. Since 31 December 1955 the ECHR and the Protocol (No. 1) thereto had also entered into force for the transatlantic parts of the Kingdom, viz. Suriname and the Netherlands Antilles (*Trb.* 1956, no. 5; *Trb.* 1956, no. 6). On 25 November 1975 the Republic of Suriname became an independent State. The ECHR was never made applicable to Dutch New Guinea, which belonged to the Kingdom of the Netherlands until 1962.

56 Y.S. KLERK and L. VAN POELGEEST, 'Ratificatie à contre coeur: de reserves van de Nederlandse regering jegens het Europees Verdrag voor de Rechten van de Mens en het individueel klachtrecht' [Ratification à contrecoeur: the hesitations of the Dutch Government regarding the European Convention on Human Rights and the individual right to complain], *Rechtsgeleerd Magazijn Themis* (1991) pp. 220–246.

57 *Trb.* 1961, no. 8. This recognition of the individual right of complaint and of the compulsary jurisdiction of the ECtHR was extended to Suriname as from 31 August 1964 (*Trb.* 1964, no. 163) and to the Netherlands Antilles as from 31 August 1974 (*Trb.* 1974, no. 215).

58 This is not to say that the non-substantive provisions of the ECHR and its Protocols are not-self-executing, but rather that the distinction between self-executing and non-self-executing provisions of treaty law does not apply to provisions about the entering into force, the interpretation and the application of (the substantive provisions of) the instrument in question. See FLEUREN, *supra* n. 35, p. 256.

courts used to rule that Article 13 ECHR was lacking direct effect,[59] but this case-law is outdated.[60]

The fact that the substantive provisions of the ECHR and these Protocols are binding on all persons implies that they have to be applied by administrative authorities and courts in cases where such an application is necessary to prevent or remedy a violation of the ECHR or the Protocols by the State, even if this means that primary legislation or the Constitution have to be disregarded (see further section 5.2). Sometimes a remedy will be given by means of compensation for damages. In short, under Dutch constitutional law the substantive provisions of the ECHR and the Protocols entail a right to observance of the Convention by the State and all its public bodies. The extent to which the Convention is also taken into account by the courts when dealing with legal relationships between private parties, is discussed in sections 2.5 and 5.2.2. Nonetheless, there is an important qualification to this 'right to observance'. As has already been pointed out, the courts may consider it to be prudent to abstain from remedying a violation of a Convention right if otherwise they would have to make choices which should, at least *pro tempore*, be left to the legislature (see sections 2.3 and 5.4.1).

Until the end of the 1970s, cases in which the Convention was successfully invoked before a Dutch court, were quite rare.[61] Obviously the Convention was not part of the daily routine of the judges. In 1968 a subdistrict court judge (*kantonrechter*) even blamed the absence of the text of the ECHR in the courthouse for the delay in delivering his judgment; as one of the parties had invoked the Convention, he had to ask the Ministry of Justice for a copy![62] But since the 1980s the impact of the ECHR on Dutch case-law has been growing continuously. In 1976 and 1979 the first judgments in which the Netherlands were condemned for a breach of the Convention had been handed down by the

59 HR 24 February 1960, *NJ* 1960, no. 483; HR 18 February 1986, *NJ* 1987, no. 62; *Afdeling rechtspraak van de Raad van State* [Judicial Division of the Council of State, ARRS], 29 July 1980, *Rechtspraak Vreemdelingenrecht* 1980, 46; ARRS 26 July 1983, *AB* 1984, no. 20.

60 ABRvS 9 June 1994, *AB* 1995, no. 238; ABRvS 16 June 1994, 19 *NJCM-Bulletin* (1994) p. 981 (*Van Baggum*); ABRvS 16 June 1994, 19 *NJCM-Bulletin* (1994) p. 987 (*Valkenier*). Cf. FLEUREN, *supra* n. 12, p. 269–270.

61 For an overview of the older Dutch case-law on the ECHR and other human rights treaties see A.W. HERINGA and J.G.C. SCHOKKENBROEK, eds., *Repertorium Nederlandse Rechtspraak Mensenrechtenverdragen* [Repertory for Dutch case-law on human rights treaties] (Leiden, Stichting NJCM-Boekerij 1993).

62 Kantongerecht Den Helder 24 December 1968, *Verkeersrecht* 1969, no. 20, quoted by E. MYJER, 'Pro Justitia. Over hoe EVRM verzeild raakte in de Nederlandse strafrechtspleging en aan wie dat valt toe te rekenen' [Pro Justitia. How ECHR ended up in the Dutch administration of criminal justice and who is responsible for this], in A.W. HERINGA, J.G.C. SCHOKKENBROEK and J. VAN DER VELDE, eds., *40 jaar Europees Verdrag voor de Rechten van de Mens. Opstellen over de ontwikkelingen van het EVRM in Straatsburg en in Nederland 1950–1990* (Leiden, 1990) (special issue of *NJCM-Bulletin – Nederlands Tijdschrift voor de Mensrechten*) p. 271 at p. 275.

ECtHR.[63] In 1979 these wake-up calls were followed by the *Marckx* judgment against Belgium,[64] which would soon have a tremendous impact on Dutch rulings in family law cases.[65] From 1980 the Supreme Court began to develop its case-law on the requirement of adjudication of criminal cases within a reasonable time as referred to in Article 6 ECHR.[66] In 1985 the case of *Benthem* v. *The Netherlands* made clear that the right to court, as established in the *Golder* judgment,[67] also extended to important parts of Dutch administrative law.[68] By now every Dutch lawyer had become aware of the meaning and potential of the ECHR and its Protocols for virtually all areas of domestic law. Since then the number of cases in which the Convention is invoked or taken into account has risen steadily. Nowadays the courts seem to be even more familiar with the rights entailed in the Convention than with the rights embodied in the Constitution.[69]

5. THE IMPACT OF THE JUDGMENTS OF THE ECtHR ON NATIONAL JUDICIAL DECISION MAKING

5.1. INTRODUCTION

For Dutch courts, the ECHR is a very important instrument. As section 4 served to demonstrate, the Dutch constitution allows the national courts to apply the provisions of the EHCR directly and even obliges them to disapply Acts of Parliament (and even the Constitution) if this is necessary to avoid a violation of the Convention. If only for that reason, the ECHR is often invoked before Dutch courts, even to such an extent that it has been said that, for the Netherlands, the ECHR has come to serve as a substitute constitution.[70] Another explanation for the importance of the ECHR can be found in the relative clarity of its provisions (in comparison with the provisions of the Dutch Constitution) and the elaborate

63 *Engel and Others* v. *the Netherlands*, ECtHR 8 June 1976, appl. no. 5100/71 et al.; *Winterwerp* v. *the Netherlands*, ECtHR 24 October 1979, appl. no. 6301/73.

64 *Marckx* v. *Belgium*, ECtHR 13 June 1979, appl. no. 6833/74.

65 HR 4 May 1984, *NJ* 1985, no. 510; HR 21 March 1986, *NJ* 1986, no. 585.

66 HR 23 September 1980, *NJ* 1981, no. 116; HR 4 November 1980, *NJ* 1981, no. 117; HR 9 March 1982, *NJ* 1982, no. 409; HR 7 April 1987, *NJ* 1987, no. 587; HR 16 December 1997, *NJ* 1998, no. 811.

67 *Golder* v. *the United Kingdom*, ECtHR 21 February 1975, appl. no. 4451/70.

68 *Benthem* v. *the Netherlands*, ECtHR 23 October 1985, appl. no. 8848/80.

69 J.H. Gerards, 'Oordelen over grondrechten – rechtsvinding door de drie hoogste rechters in Nederland' [Judicial decision making in fundamental rights cases – judicial reasoning by three highest courts in the Netherlands], in H. den Tonkelaar and L. de Groot, eds., *Rechtsvinding op veertien terreinen* [Judicial reasoning in fourteen fields of law] (Deventer, Kluwer 2012) pp. 9–51.

70 Claes and Gerards 2012, *supra* n. 37, at p. 628–633.

case-law of the ECtHR.[71] Two recent studies demonstrate that these are the main factors explaining the frequency with which the ECHR is invoked in Dutch courts, even in cases where the prohibition of constitutional review does not apply (e.g. cases about administrative decisions).[72]

This section analyses how the Dutch courts cope with the frequent appeals made to the Convention. Whereas the previous sections focused on the constitutional and legal instruments permitting Convention review in the Netherlands, this section concentrates on illuminating how the Dutch courts deal with judgments against the Netherlands and other states, how the Convention standards influence the Dutch judicial standards, to what extent Dutch courts are ready to adopt and copy the interpretations provided by the Court and how the national courts negotiate between the need to implement the Convention requirements and the need to respect the limits of their judicial task.

As a preliminary remark, it is important to note that Dutch courts generally accept the *res interpretata* of the ECtHR's judgments.[73] They usually do not distinguish between judgments against the Netherlands and judgments rendered against other states, but generally accept that all the Court's precedents have equal interpretative force. As soon as a precedent appears to be relevant for the Dutch situation, for example because it concerns a legal constellation similar to one existing in Dutch law, it is taken into account. For that reason no principled distinction is made in this section between the way in which the courts deal with judgments against the Netherlands and other states and the implementation of interpretations and standards are discussed in an integrated manner. Nevertheless, for the sake of clarity, the section starts out by briefly describing the direct consequences for the Dutch courts of a judgment rendered against the Netherlands.

5.2. CONSEQUENCES FOR THE DUTCH COURTS OF A JUDGMENT AGAINST THE NETHERLANDS: RE-OPENING AND LIABILITY

The Dutch courts can become involved in the execution and implementation of Strasbourg judgments against the Netherlands in various ways. First and

71 See e.g. L. VERHEY, 'Het grondwettelijk beschermingssysteem: handhaving of herbezinning?' [The constitutional system of protection: keeping it or changing it?], 28 *NJCM-Bulletin* (2003) pp. 216–232; G. VAN DER SCHYFF, 'De beperkingssystematiek van de Nederlandse grondrechten: kanttekeningen bij het rapport van de Staatscommissie Grondwet' [The system for limitations of Dutch fundamental rights: critical comments to the report of the Government Commission for Reform of the Constitution], 2 *Tijdschrift voor Constitutioneel Recht* [Constitutional Law Review] (2011) pp. 186–194.

72 See further GERARDS 2012, *supra* n. 69, pp. 9–51; J.H. GERARDS and C. SIEBURGH, eds., *De invloed van fundamentele rechten op het materiële recht* [The impact of fundamental rights on substantive law] (Deventer, Kluwer 2013).

73 For a further explanation of this notion, see chapter 2, section 3.2.

foremost, and in response to invitations made by the Council of Europe institutions, possibilities have been introduced to re-open national proceedings. Article 457 of the Code of Criminal Procedure allows criminal proceedings to be reopened after a judgment in which the Court has found a violation of the Convention. This possibility is limited, however, to the individual applicant who has brought the complaint against the Netherlands before the ECtHR. Other persons, even if they find themselves in a legally or factually comparable position, cannot request reopening.[74]

At present there are no provisions for revision or reopening of proceedings in civil and administrative law. In civil law, revision is only possible in situations related to fraudulent behaviour by one of the parties to the case.[75] In administrative law, the General Administrative Law Act provides for revision of final judgments if new facts have become known that would have led to a different outcome if the court had been aware of them.[76] Thus far, however, posterior judgments of the ECtHR have not been considered a 'novum' in the sense of this provision.[77]

Another remedy available to successful applicants in Strasbourg is to bring tort proceedings against the State.[78] State liability in these cases is not easily accepted, however: the criterion is that the Dutch courts which dealt with the case in the first place must have grossly neglected fundamental principles of law.[79] If the court accepts state liability for the damage effected by the violation, this may result in an obligation on the State to pay compensation, but the applicant may also request, for example, immediate release from prison.[80]

---

74 See further T. BARKHUYSEN and M.L. VAN EMMERIK, 'Rechtsherstel bij schending van het EVRM in Nederland en Straatsburg' [Legal remedies in case of ECHR violations in the Netherlands and Strasbourg], 31 *NJCM-Bulletin* (2006) pp. 39–64 at p. 59.

75 Article 382 *Wetboek van Burgerlijke Rechtsvordering* [Code of Civil Procedure].

76 See Article 8:88 *Algemene wet bestuursrecht* [General Administrative Law Act].

77 See R.J.N. SCHLÖSSELS and S.E. ZIJLSTRA, *Bestuursrecht in de sociale rechtsstaat* [Administrative Law in the Social Welfare State] (Deventer, Kluwer 2010) p. 1344 (para. 24.120). However, judgments of the ECtHR can possibly be considered as new and relevant facts ('nova') for another provision of the General Administrative Law Act, i.e. Article 4:6. Based on that provision, an individual can request the competent administrative body to revise an administrative decision (or take a new decision) because new relevant facts have become known. Given that this possibility does not involve the courts, however, it is not discussed further here. See e.g. R. STIJNEN, *Rechtsbescherming tegen bestraffing in het strafrecht en het bestuursrecht: een rechtsvergelijking tussen het Nederlandse strafrecht en bestaffende bestuursrecht, mede in Europees perspectief* [Legal protection against punishment in criminal law and administrative law: A legal comparison between the Dutch criminal law and punitive administrative law, also in European perspective] (Deventer, Kluwer 2011) at p. 724–725 and BARKHUYSEN and VAN EMMERIK, *supra* n. 74, at p. 55.

78 Based on Article 6:162 *Burgerlijk Wetboek* [Civil Code]; see further BARKHUYSEN and VAN EMMERIK, *supra* n. 74, at p. 57.

79 HR 1 February 1991, *NJ* 1991, no. 413; see also HR 18 March 2005, *NJ* 2005, no. 201; see further BARKHUYSEN and VAN EMMERIK, *supra* n. 74, at p. 56–57.

80 e.g. HR 31 October 2003, *NJ* 2005, no. 196.

Finally, it is possible for courts to change their interpretation of national law in accordance with a new judgment of the Court, and in fact this often occurs. Over time, for example, Dutch courts have introduced systems to offer compensation in case of delays in judicial proceedings in response to judgments of the ECtHR.[81] Other changes to national case-law in response to ECtHR judgments (both against the Netherlands and other states) are visible in relation to youth detention,[82] the application of the *lex mitior* principle,[83] the use of evidence from witnesses who could not be questioned at trial,[84] and numerous other cases.[85] The way in which the national courts endeavour to comply with the Strasbourg case-law through such changes and adaptations of judicial standards is further explored in the next section.

5.3. COMPLYING WITH THE JUDGMENTS AND DECISIONS OF THE ECtHR

5.3.1. Application of standards developed by the ECtHR

As was mentioned before, the Convention is often invoked before the courts and the popularity of the Convention clearly finds its way into their judgments. All the Dutch courts – lower courts as much as higher courts – refer often to relevant ECtHR judgments and decisions in cases in which a Convention right has been invoked. It happens quite frequently that a court disapplies subordinate legislation or annuls a decision of a public body due to a conflict with the ECHR or its Protocols. Cases in which a court actually disapplies an Act of Parliament in order to avoid – or to remedy – a violation of the Convention are relatively rare. The vast majority of cases in which the courts have applied the Convention or have otherwise taken the Convention into account, did not require the disapplication of an Act of Parliament. Nevertheless, such cases may have a powerful impact on the interpretation and scope of statutory provisions.[86]

---

81 See e.g. HR 17 June 2008, ECLI:NL:HR:2008:BD2578; ABRvS 26 March 2008, ECLI:NL:RVS:2008:BC7604; CRvB 23 January 2008, ECLI:NL:CRVB:2008:BC2942.

82 HR 24 June 2011, ECLI:NL:HR:2011:BQ2292, in response to *S.T.S. v. the Netherlands*, ECtHR 7 June 2011, appl. no. 277/05.

83 HR 12 July 2011, ECLI:NL:HR:2011:BP6878, in response to *Scoppola v. Italy*, ECtHR (GC), 17 September 2009, appl. no. 10249/03.

84 HR 29 January 2013, ECLI:NL:HR:2013:BX5539.

85 For more examples, see GERARDS, *supra* n. 69, at p. 32.

86 J.C. DE WIT, *Artikel 94 Grondwet toegepast. Een onderzoek naar de betekenis, de bedoeling en de toepassing van de woorden 'vinden geen toepassing' in artikel 94 van de Grondwet* [Applying Article 94 of the Constitution. A study into the meaning, the intention and the application of the words 'shall not be applicable' in Article 94 of the Constitution] (The Hague, Boom Juridische uitgevers 2012). For an extensive analysis of the case-law in this regard, see also GERARDS 2012, *supra* n. 69, at p. 31.

In addition, the courts frequently use the standards that have been developed by ECtHR for particular types of fundamental rights cases.[87] This is illustrated, for example, by many cases relating to defamation and insult, where the ECtHR case-law on the topic is consistently cited and where the ECtHR's standards in the field are applied (albeit not always very diligently and precisely).[88] When reviewing national measures or decisions interfering with fundamental rights or interests, the courts usually test their effectiveness, necessity and proportionality, mostly referring explicitly to the necessity test of the ECHR.[89]

Accordingly, the concrete standards and criteria developed in the Court's case-law, such as the test of necessity or concrete factors relevant to specific situation types (e.g. defamation cases or cases about expulsion), are almost standardly applied in Dutch case-law. By contrast, the influence of the Court's general principles of interpretation on Dutch case-law is much less obvious and rather indirect. This is due at least partly to the fact that Dutch courts usually pay little attention to the determination of the scope of fundamental rights provisions.[90] Instead, they usually simply hold that a ECHR provision does (or does not) apply, referring to their own previous judgments on the matter or to the judgments of the ECtHR.[91] The Dutch courts thereby may implicitly acknowledge and apply new interpretations provided by the ECtHR (which may be based on consensus or evolutive interpretation), but they will hardly ever refer to the interpretative principles and methods on which the interpretation is based.[92] Only exceptionally, some courts refer to meta-teleological interpretation, i.e., they refer to the underlying aims and principles of the ECHR to underpin a certain judgment. An example is a line of case-law of the Central Appeals Tribunal (*Centrale Raad van Beroep*) granting special social assistance benefits (*bijzondere bijstand*) to particularly vulnerable groups of (illegal) immigrants. The Central Appeals Tribunal grounded its judgments in these cases not only on references to case-law of the ECtHR, but also on references to the 'very essence' of the ECHR, mentioning in particular the principles of human dignity and personal autonomy.[93]

The method of consensus interpretation is not used in national case-law in the way the ECtHR uses it. Although the Dutch courts may refer to foreign case-

87 See further Claes and Gerards, *supra* n. 37, p. 640–642.

88 For some recent examples, see Hof Amsterdam, 13 October 2009, ECLI:NL:GHAMS:2009:BK0003; HR 18 September 2009, ECLI:NL:HR:2009:BI7191; Hof Amsterdam, 8 March 2011, ECLI:NL:GHAMS:2011:BP6989.

89 For recent examples see ABRvS 14 July 2010, ECLI:NL:RVS:2010:BN1135; CRvB 21 September 2010, ECLI:NL:CRVB:2010:BN8775.

90 Gerards, *supra* n. 69.

91 In more detail, see Gerards, *supra* n. 69.

92 Ibidem.

93 For some examples, see CRvB 22 December 2008, ECLI:NL:CRVB:2008:BG8776; CRvB 20 October 2010, ECLI:NL:CRVB:2010:BO3581; CRvB 4 August 2011, ECLI:NL:CRVB:2011:BR5381.

law or legislation as sources of inspiration,[94] they hardly ever rely on an 'emerging consensus' or the need to respect 'present day conditions' to underpin a novel interpretation of the Convention or the Constitution. As is explained below, in section 5.4, this may be the result of the tendency of Dutch courts to carefully follow and apply the Strasbourg interpretations without outpacing the ECtHR by adopting a more far-reaching interpretation. This approach reduces the need to rely on strongly evolutive techniques of interpretation, and encourages a direct reliance on Strasbourg case-law rather than providing independent ECHR interpretations.

5.3.2. Impact of the Court's standards – horizontal effect

The impact of the Convention on Dutch law is particularly apparent in private law. The case-law of the Court includes (positive) obligations on national courts to apply the Convention in relations between private parties (i.e. horizontal relationships). Courts must refrain from interpreting contractual obligations in violation of the Convention, and when deciding on horizontal conflicts between rights they have to take account of its provisions.[95] The Dutch courts have shown themselves willing to comply with these positive obligations. They do not hesitate to take account of the provisions of the Convention – as they are construed by the Court – in cases between private parties. If the Court has construed a provision in such a manner that it imposes on the States Parties an obligation to recognise or ensure rights which individuals should be able to exercise in respect of other persons, then the self-executing nature of the provision will have the effect that the relevant rights and positive obligations recognised by the Court are enforceable before the Dutch courts. For example, to the extent that according to the case-law of the ECtHR Article 8 of the Convention entails the right of access to one's children, one parent may invoke the right to respect for his or her family life against the other parent before the courts.[96] The ECHR may further affect the interpretation and enforceability of a contract between private parties.[97] It is not always clear whether the civil courts apply the ECHR directly in these cases or rather base their judgments on the (often open-ended) clauses of private law, such as clauses on torts and due

---

94 On this, see in particular E. MAK, *Judicial Decision-Making in a Globalised World. The Views and Experiences of Highest Court Judges in Five Western Countries* (Oxford, Hart 2013), Chapter 4.

95 See in particular ECtHR 13 July 2004, appl. no. 69498/01, *Pla and Puncernau* v. *Andorra* and ECtHR 16 December 2008, appl. no. 23883/06, *Kurshid Mustafa and Tarzibachi* v. *Sweden*.

96 See, e.g., HR 22 February 1985, *NJ* 1986, no. 3. Cf. FLEUREN, *supra* n. 35, pp. 257–258.

97 e.g. *Rechtbank* [District Court] *'s-Hertogenbosch*, 26 October 2011, ECLI:NL:RBSHE:2011:BU2938, citing *Kurshid Mustafa and Tarzibachi* v. *Sweden*, ECtHR 16 December 2008, appl. no. 23883/06; the district court ruled that Article 10 of the ECHR prevented the enforcement of an (alleged) contractual obligation to remove a satellite dish.

care, interpreting these in line with the Court's case-law (indirect horizontal effect).[98]

In practice, the Convention rights are often invoked in private law conflicts and they have strongly shaped the case-law on, for example, family law and defamation; they also increasingly have effects for fields such as labour law and company law.[99] The only limitations on the willingness of the courts to apply fundamental rights (as interpreted by the ECtHR) to legal relationships between private persons seem to result from the separation of powers doctrine. An individual cannot successfully invoke the Convention (or, more generally, the fundamental rights principles embodied in the Convention and the ECtHR's case-law) in order to close a gap between Dutch law and the Convention if this involves choices which should be left to the legislature. This is discussed further in section 5.5.1.

5.4. 'MINIMALIST' READINGS OF ECtHR PRECEDENTS AND TRANSLATION OF STANDARDS

Although Dutch courts generally loyally and carefully apply the Court's case-law, which overall results in the Convention standards having a strong impact on national case-law, the courts may sometimes give minimalist readings to the Strasbourg judgments, attempting to keep the response to ECtHR judgments as narrow as possible.

A case in point is the reaction to the Court's *Salduz* judgment, which related to the right of suspects to be assisted by a lawyer in the context of police interrogations.[100] This judgment sparked intense debate over the Court's interpretation of the Convention and many voiced their profound disagreement with the judgment. Perhaps to meet the concerns of scholars and legal practitioners, the Supreme Court has given a rather restrictive reading to the

98 On this, see further CLAES and GERARDS, *supra* n. 37, at pp. 628–633. It is explained here that there are also some other conceivable scenarios that would give horizontal effect to ECHR provisions and the case-law of the ECtHR (it is conceivable, for example, that a legislative act governing a horizontal situation is disapplied for incompatibility with an ECHR provision, and that this will have consequences for the horizontal relationship), but the case described above is the most common one.

99 Further analyses of the impact on these areas of law can be found in GERARDS and SIEBURGH, *supra* n. 72.

100 *Salduz* v. *Turkey*, ECtHR (GC) 27 November 2008, no. 36391/02; see extensively on this debate F.P. ÖLÇER, 'Schrapping van de rechtmatigheidstoetsing eerste termijn inverzekeringstelling in het wetsvoorstel Rechtsbijstand en politieverhoor. Een mensenrechtelijke quid pro quo, of: de keerzijde van vroege rechtsbijstand?' [Removal of judicial review of the first stage of police custody in the legislative proposal Legal assistance and police interrogation. A human rights quid pro quo, or: the downside of early legal assistance?], 36 *Nederlands Tijdschrift voor Mensenrechten* [Netherlands Journal of Human Rights] (2011), pp. 561–574.

case, decreasing the judgment's impact on Dutch criminal procedure.[101] It is still not certain if this approach would be considered by the ECtHR to be in conformity with the Convention.

Another example is a case similar to one decided by the Court in 2012, i.e., *Vidgen* v. *the Netherlands*.[102] Both cases related to the right to a fair trial in criminal proceedings where witness statements were used as evidence without the defence having the full possibility of questioning the witnesses at trial. The ECtHR held in *Vidgen* that the Dutch rules in this respect were too restrictive and harmed the interests of the defence, in violation of Article 6. In its post-*Vidgen* judgment, the Supreme Court explicitly recognised that the approach it had hitherto followed could no longer be maintained.[103] It therefore changed its settled case-law to make it consistent with the requirements following from the ECtHR's judgment. Nevertheless, the Supreme Court's reading of the Strasbourg case-law is arguably relatively restrictive. For example, it stressed the possibilities for exceptions to the rules defined by the ECtHR, thereby implying that it would be ready to use them in future cases. Thus, even if the Supreme Court closely followed the ECtHR's interpretation in this judgment, it did so in a rather minimal way.

The Dutch Supreme Court recently took an even bolder approach by actually setting aside an interpretation of Dutch law given by the ECtHR in a case against the Netherlands.[104] According to a judgment rendered by the ECtHR in the case of *Van der Velden* v. *the Netherlands*, the Dutch judicial approach to the issue in question (i.e. the competence to decide on the extension of a 'TBS order', which would allow psychiatric confinement of a dangerous convict) was not in accordance with domestic law as interpreted by the ECtHR, and therefore violated Article 5 of the Convention (the right to *habeas corpus*).[105] Although the Supreme Court did not expressly state that the ECtHR's interpretation was incorrect or mistaken, and although it did not expressly set aside the ECtHR's judgment, it did rule that the relevant provision of domestic law had to be interpreted in a different manner than the Court had done.

Furthermore, it appears that national courts often transform the Convention standards to standards that are more easily applicable in domestic law. An example is visible in the case-law on defamation, where the national courts had already defined their own set of factors to balance freedom of expression and reputation and privacy rights before the Court started to develop its case-law in the field. In many recent defamation cases, a sort of hybrid mixture can be seen of the original factors and the factors added to these by reference to the Court's

101 HR 30 June 2009, ECLI:NL:HR:2009:BH3079.
102 ECtHR 10 July 2012, appl. no. 29353/06.
103 HR 29 January 2013, ECLI:NL:HR:2013:BX5539, para. 3.3.3.
104 HR 12 February 2013, ECLI:NL:HR:2013:BY8434.
105 ECtHR 31 July 2012, appl. no. 21203/10.

case-law.[106] Another example is the case-law on special social assistance benefits (*bijzondere bijstand*) for illegal immigrants. Although the Central Appeals Tribunal in its first judgment on the issue expressly referred to standards and criteria developed in the ECtHR's judgments, it slightly adapted them to construe a set of specialised criteria to meet the demands of the particular situation type.[107] Clearly, thus, Dutch courts often use the Court's case-law mainly to supplement, build and refine their own sets of standards, rather than applying them exactly as they have been formulated by the Court. If this is done, moreover, in subsequent cases, the courts tend to refer to their own precedents (in which these standards have been 'transformed') rather than the judgments of the ECtHR.[108]

Hence, it is clear that Dutch courts do not always strictly follow the ECtHR's interpretations and precedents. Although they regard the interpretations as highly influential and valuable, they assess them critically to see how they should be implemented in national case-law and, where this is considered necessary or desirable, they provide for a minimalist interpretation or a transformation in Dutch judicial standards.

5.5. TAKING ACCOUNT OF THE ROLE OF THE JUDICIARY AND THE LIMITED JUDICIAL COMPETENCES

5.5.1. Refusing to set aside legislation and order changes of legislation

One of the questions that may arise in relation to the application of Convention standards by the Dutch courts is whether following the lead of the Court may compel (or invite) them to transgress the borders of their judicial competences. In the Netherlands, however, the courts use various mechanisms and instruments to avoid having to take Convention protection further than they consider to be consistent with their constitutional role vis-à-vis the legislature (see section 2.3).

In particular, there are examples where a court has declined to use its competence to set aside national legislation in order to respect separation of powers. In section 2.3, an example of such judicial restraint was already provided with respect to the ICCPR, but similar examples can be found in relation to the ECHR. A famous case in this regard is the *Kroon* case, which eventually resulted in a judgment of the ECtHR. Mrs Kroon had been married from 1979 until 1988, but the marriage had broken down and she and her husband had been living

106 e.g. HR 18 January 2008, ECLI:NL:HR:2008:BB3210 and HR 25 March 2008, ECLI:NL:HR:2008:BB2875.

107 e.g. CRvB 22 December 2008, ECLI:NL:CRVB:2008:BG8776 and CRvB 4 August 2011, ECLI:NL:CRVB:2011:BR5381.

108 See further GERARDS 2012, *supra* n. 69, p. 33–36.

apart since 1980 (from January 1988 even his whereabouts were unknown). Mrs Kroon started a new relationship, from which a child was born in 1987. According to the law that was applicable at the time, her husband was legally the father of the child. Although the Civil Code provided a husband with certain possibilities to deny being the father of a child that was born during the marriage, a wife could not legally dispute his paternity. As a consequence Mrs Kroon's new partner was not allowed to acknowledge the child. Both complained that this was a violation of Articles 8 and 14 ECHR. However, the Supreme Court refused to take a position on this issue, because it could not solve the problem without stretching its law-developing role (*rechtsvormende taak*) too much. A legislative proposal on the law of descent had already been submitted to the Lower House and the Supreme Court clearly did not want to interfere with the law-making process.[109] Such sensitivities were of no concern to the ECtHR, which simply held that in this case the legal presumption that the husband is the father of a child which is born during marriage 'flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone' and held that Article 8 had been violated.[110] But this did not change the position of the Supreme Court. Only eight days after the *Kroon* judgment of the ECtHR the Supreme Court upheld in another case its earlier ruling.[111] Nevertheless, in the end Mrs Kroon and her partner got what they wanted. The registrar of births, deaths and marriages decided, without any further court intervention, to comply with their wishes.[112]

In addition to this, the courts do not consider themselves competent to order the State or its representative bodies to adopt or amend Acts of Parliament or other legislative measures, even if such amendment would be necessary to comply with the State's obligations under the Convention.[113] It thus remains fully within the discretion of the legislative bodies to decide how they want to change the legislation in order to solve the violation (see section 3).

5.5.2. The Dutch 'mirror principle' approach

In a 2001 judgment, the Supreme Court pointed out that Article 53 ECHR allows the national authorities to provide a higher level of protection of fundamental rights than is prescribed by the Convention.[114] It concluded, however, that Article 94 of the Constitution did not allow it to accept such additional

109 HR 16 November 1990, *NJ* 1991, no. 475.

110 *Kroon and Others* v. *the Netherlands*, ECtHR 27 October 1994, appl. no. 18535/91, para. 40.

111 HR 4 November 1994, *NJ* 1995, no. 249.

112 J. DE BOER, 'De broedende kip in EVRM-zaken' [The sitting hen in ECHR cases], 70 *Nederlands Juristenblad* (1995) pp. 1027–1034 at p. 1033.

113 HR 21 March 2003, *NJ* 2003, no. 691 (*Waterpakt*); HR 1 October 2004, *NJ* 2004, no. 679.

114 HR 10 August 2001, *NJ* 2002, no. 278.

protection if this did not follow directly from a judgment of the ECtHR.[115] In the absence of a clear ECtHR judgment, the Supreme Court held that it would be up to the legislature to decide if a level of protection exceeding that required by the ECtHR should be provided.

Given that this is well-established case-law, this means that, in effect, Dutch courts will not provide more protection than is strictly mandated by the ECtHR. This clearly demonstrates that the Dutch Supreme Court is well aware of its constitutional mandate and that it is prepared to leave important political and value choices to be made by the legislature. Nevertheless, the courts sometimes go one step further than is supported by the case-law of the ECtHR.[116] It may happen occasionally that a court, without a clear basis in the rulings of the ECtHR, uses the ECHR to remedy a legal vacuum or a legal consequence that is considered to be inappropriate.[117] It is important to note, however, that such judgments are rare.

5.5.3. Varying the intensity of review: deference and judicial restraint

The Dutch courts may also heed their particular constitutional role by varying the intensity of their review, in particular by exercising judicial restraint. In many cases the courts do not pay express attention to the intensity of their scrutiny, but simply apply the ECHR standards without referring to any discretion for the legislature.[118] This is usually different, however, if the case necessitates judicial review of either administrative decisions or legislation. This can be explained by the fact that, in cases where administrative decisions or legislation are reviewed, considerations of separation of powers and (indirect) democratic legitimacy are relevant to defining the court's position and competences.

In cases where the intensity of review is expressly referred to, two different 'levels' of intensity can be distinguished: 'strict' or 'full' review (*volle toetsing*) and deferential review (*marginale toetsing*). An intermediate version is

115 See para. 3.9: 'Article 53 of the Convention allows the national legislator the freedom to provide more far-reaching protection than is afforded by the provisions of the Convention. However, the Dutch courts are bound by Article 94 of the Constitution, under which statutory regulations in force within the Kingdom are not applicable if such application is in conflict with the provisions of treaties or of decisions by international institutions that are binding on all persons. Such an incompatibility cannot be assumed solely on the basis of an interpretation by the national (Dutch) courts of the term family life in the light of recent legislation, which results in a more far-reaching protection than can be assumed on the basis of the case law of the European Court of Human Rights in relation to Article 8 of the Convention' (translation taken from 35 *NYIL* (2004) p. 441 at p. 446).

116 See, e.g., HR 28 March 2008, ECLI:NL:HR:2008:BC2255.

117 See, e.g., HR 8 July 2005, ECLI:NL:HR:2005:AO9273, para. 3.6: 'It should be noted that the right which is laid down in Art. 6(1) ECHR is conferred on everyone by this provision, therefore also on public bodies'.

118 e.g. HR 27 May 2005, *NJ* 2005, no. 485.

sometimes also apparent, but this is not an 'official' category. The level of intensity of review is mainly reflected in the test of proportionality of an interference with fundamental rights. If strict review is applied, the reasons for interfering with a fundamental right must be convincing and weighty; the necessity and suitability of the means chosen are reviewed (although not always) and the reasonableness and proportionality of sanctions are strictly assessed. If deferential review is chosen, the courts tend to use a standard of reasonableness or a prohibition of arbitrariness: an administrative decision or legislative act will only be considered to be in violation of a fundamental rights provision if it is manifestly unreasonable.[119] In practice, such manifest unreasonableness is hardly ever established.[120]

In administrative law, the intensity of review and, relatedly, the degree of judicial restraint to be exercised is very much determined by the way the powers of the competent administrative bodies are defined. If the legislature aimed to offer wide discretionary powers to an administrative body (i.e. by indicating that it is up to the administrative body to decide when and if a certain power can be used), the administrative courts usually exercise restraint. It is then considered that administrative bodies are better suited to determining and evaluating relevant facts and that they have greater legitimacy than the courts to take policy decisions.[121] Moreover, the review of proportionality is usually highly deferential; here, too, the standard is that of reasonableness.[122] If, by contrast, the administrative body has no such discretion, the courts have more opportunity to test their actions for conformity with the relevant legislation and fundamental rights provisions, resulting in stricter review.[123] In particular, there is no discretion (and therefore 'full' review) in case of interpretation of statutory law and establishment of facts.[124] Such strict review

119 ABRvS 9 May 1996, *AB* 1997, no. 93 (*Maxis-Praxis*); for a more recent example, see HR 18 October 2013, ECLI:NL:HR:2013:917, para. 4.2.1. See further e.g. B.W.N. DE WAARD, 'Marginale toetsing en evenredigheid' [Deferential judicial review and proportionality], in *Getuigend staatsrecht. Liber Amicorum A.K. Koekkoek* (Nijmegen, Wolf Legal Publishers 2005) at p. 369. For more detail, see also J.H. GERARDS, 'Het evenredigheidsbeginsel van art. 3:4 lid 2 Awb en het Europese recht' [The proportionality principle of Article 3:4 General Administrative Law Act and European law], in T. BARKHUYSEN, W. DEN OUDEN and E. STEYGER, eds., *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG-recht* [Effectuating European Law. General administrative law as instrument for the effective execution of EC law] (Alphen aan den Rijn, Kluwer 2007) pp. 73–113 at p. 108.

120 Ibidem.

121 See expressly ABRvS 9 May 1996, *AB* 1997, no. 93 (*Maxis-Praxis*).

122 See further GERARDS, *supra* n. 119, p. 109.

123 See in particular E. HELDER and R.J. JUE, 'Belangenafweging in het bestuursrecht' [Balancing in administrative law], *Bestuurswetenschappen* 1987, pp. 25–41 and W. DUK, 'Beoordelingsvrijheid en beleidsvrijheid' [Factual and policy discretion], *Rechtsgeleerd Magazijn Themis* (1988), p. 156–169. See for a more recent overview SCHLÖSSELS and ZIJLSTRA, *supra* n. 77, pp. 408–413.

124 SCHLÖSSELS and ZIJLSTRA, *supra* n. 77, p. 409.

is, moreover, almost always apparent in cases relating to punitive sanctions (e.g. administrative fines).[125]

If courts (either civil, administrative or criminal) are asked to review legislation for its conformity with fundamental rights provisions (in particular the ECHR), the intensity of their review is also often determined by the margin of appreciation the ECtHR tends to leave on certain topics (as discussed in the next section), as well as by considerations of the relationship between and the respective roles of the courts and the legislature. The courts frequently consider that the legislature is better placed to strike difficult balances of interests and take political decisions than the courts are, and that it has the primary responsibility and legitimacy to do so; consequently, judicial review of legislation should generally be deferential.[126] Again, the standard usually appears to be that of reasonableness.

Only on rare occasions may other considerations influence the intensity of review. In some cases, for example, the courts have intensified their review because of the severity of a certain breach of fundamental rights;[127] and sometimes their review is stricter because of the importance of the fundamental right concerned (e.g. the right to access the court).[128]

Although it is difficult to estimate the overall result of the exercise of judicial restraint, it appears that many of the frequent appeals made to Convention rights in Dutch courts are unsuccessful. A recent study demonstrated that in such fields as environmental law, educational law and tax law, the courts are hardly ever prepared to find that legislation and administrative decisions unjustifiably interfere with Convention rights.[129] Even though Dutch courts in these cases often expressly refer to Court judgments and employ typical Convention standards such as proportionality review or an 'individual and excessive burden' test (which in fact means that there must be a manifest violation of individual rights), and even if there are famous examples of intensified review or setting aside of national legislation, the net effect of judicial review against the Convention appears to be relatively limited.

---

125 There is some debate on 'automatic' sanctions, such as are visible in systems where either a legislator (in an act, decree or regulation) or an administrative body (in by-laws) has created categories of behaviour that attract certain sanctions. It now seems to be accepted that the courts may also assess the reasonableness of imposing such sanctions, but there is still uncertainty surrounding the issue. On this, see Schlössels and Zijlstra, *supra* n. 77, pp. 414–416.

126 See e.g. HR 10 November 2000, *NJ* 2001, no. 187; ABRvS 20 July 2005, ECLI: NL:RVS:2005:AT9708; CRvB 15 May 1995, *RSV* 1996, no. 170.

127 e.g. ABRvS 3 September 2008, *AB* 2008, no. 335.

128 For this example, see HR 30 September 1992, *NJ* 1994, no. 495, about the level of court fees; the judgment is rather vague, however.

129 Gerards and Sieburgh, *supra* n. 72.

5.5.4. *The role of the margin of appreciation doctrine*

Finally, an interesting role is played in Dutch case-law by the margin of appreciation doctrine. The application of this doctrine neatly demonstrates the tendency of the Dutch courts towards loyal application of Convention notions as well as the courts' awareness of their own constitutional position and their relationship with other powers of government. Although the margin of appreciation doctrine is clearly developed as an instrument for the European Court to give shape to its subsidiary and supervisory role, as was explained in Chapter 2 of this volume, and it is not at all intended to be applied by national courts, all Dutch courts appear to mention this doctrine frequently, copying the approach taken by the ECtHR.[130] They hold, for example, that because the ECtHR has left a wide margin of appreciation to the states in a certain type of case (e.g. cases relating to social security or environmental law), their own review of the reasonableness or justifiability of an interference with a fundamental right should be restrained.[131] For example, since the ECtHR generally leaves a wide margin of appreciation to the states in matters of planning policy, social security, environmental law, immigration and asylum law and property law, Dutch courts do so too.[132]

As mentioned in section 5.3.3, the Dutch application of the margin of appreciation doctrine tends to result in highly deferential judicial review of legislation or administrative decisions. Dutch courts do intensify their scrutiny if the case concerns a subject where the ECtHR only allows a narrow margin of appreciation, as, for example, in cases concerning discrimination on suspect grounds (e.g. nationality)[133] or family law cases, but this only rarely occurs.

It seems that, in general, Dutch courts carefully copy the approach taken by the ECtHR and do not accept a wider or a narrower margin of appreciation than is provided in the Court's case-law. However, it is questionable whether the approach taken by Dutch courts is compatible with the margin of appreciation doctrine as such, given the special function the doctrine has in the Strasbourg case-law.[134] The fact that the Court may leave a wide margin of appreciation to the states because it feels that national authorities are better placed to assess the necessity or suitability of certain decisions does not automatically imply, after all, that *national* courts are also less well-placed to assess such decisions. Indeed, especially in cases where national courts have to assess whether administrative

130 See further on this GERARDS, *supra* n. 69, p. 37–48.

131 For some examples, see HR 2 October 2009, ECLI:NL:HR:2009:BI1909; ABRvS 14 July 2010, ECLI:NL:RVS:2010:BN1135; CRvB 5 August 2011, ECLI:NL:CRVB:2011:BR4785.

132 For some examples, see HR 20 March 2009, ECLI:NL:HR:2009:BG9951; HR 2 October 2009, ECLI:NL:HR:2009:BI1909; ABRvS 17 March 2010, ECLI:NL:RVS:2010:BL7842; CRvB 5 August 2011, ECLI:NL:CRVB:2011:BR4785.

133 See, for example, CRvB 15 July 2011, ECLI:NL:CRVB:2011:BR1905.

134 For more detail, see Chapter 2 of this volume.

decisions are compatible with the Convention, i.e. if administrative bodies have exercised their discretionary powers in conformity with fundamental rights, the tendency to always leave a wide margin of appreciation (because such a wide margin is permitted by the Court) may result in a judicial review that is less strict and searching than the circumstances of the case might warrant.

5.6. CONCLUSION

Although the Convention is clearly of great importance for Dutch law and it is often invoked before the domestic courts, the above analysis revealed that its actual impact on the Dutch courts is nuanced. On the one hand, it is clear that Dutch courts loyally endeavour to apply the Convention provisions as construed by the Court. If it is found that certain precedents are relevant to Dutch law, they will almost always be followed and implemented in some way or another. In extraordinary cases this may lead to the disapplication of national law, but the large majority of cases, violations of Convention rights are avoided by construing national legislation in light of the Convention. This is especially so when this legislation consists of an Act of Parliament. Moreover, in many cases, including cases between private parties, the Convention standards and interpretations have become strongly intertwined with national law. Usually the national courts adopt the Court's interpretations without a moment's hesitation, and the standards for review, such as factors to be considered relevant in a balancing exercise, are often modelled after the standards developed by the Court.

This is not to say, however, that the Court's judgments and standards are uncritically applied. The standards in fundamental rights cases often have a different character than the original Convention standards as a result of adaptations made by the courts. Moreover, Dutch courts actually appear to limit the effect of the Convention if this is considered necessary, either for reasons of constitutional limitations to the powers of the courts, or for reasons of a seeming misfit between a Court precedent and national law. Examples have been mentioned of the national courts giving a minimal reading to Court precedents and even replacing them with a different reading of the relevant legislation. Moreover, the courts often exercise judicial restraint and they allow much leeway to the legislature and administrative bodies. They often rely on the Court's own margin of appreciation doctrine to justify this approach, thereby at once demonstrating the tendency to adopt Convention standards and the desire to apply them in a restrained manner. As was mentioned above, this has the result that the actual impact of the Court's standards and requirements on substantive Dutch law in many fields appears to be relatively limited, even if the review exercised by the courts is strongly infused by Convention terminology and even if legal practitioners frequently appeal to the Convention.

6. DEBATES ABOUT THE ECtHR AND THE NATIONAL COURTS

6.1. DEVELOPMENT AND LOCUS OF THE DUTCH DEBATE ON THE ROLE OF THE COURT

The Netherlands has always strongly supported international human rights protection and in particular the European Convention on Human Rights. Indeed, the country was proud to host the event in 2010 at which the Court received the Four Freedoms Award for its achievements in the field of human rights protection.[135] For many it therefore came as a surprise that, in the autumn of 2010, a critical debate about the Court emerged. The debate was fuelled by an opinion published in a newspaper in November 2010 by a young academic, Thierry Baudet, who criticised the Court for being overly intrusive and for violating national sovereignty.[136] This opinion immediately sparked a heated debate on the Court's role and legitimacy, which was partly conducted in the media and academia, and partly in the political arena. Many scholars wrote opinions and contributions, both in the national newspapers (mostly quality newspapers, such as *NRC Handelsblad*, *de Volkskrant* and *Trouw*) and academic journals, either defending the Court or stressing its lack of legitimacy.[137]

---

135 See <www.fourfreedoms.nl>.

136 T. BAUDET, 'Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie' [The ECtHR greatly interferes with democratic principles], *NRC Handelsblad* 13 November 2010.

137 The most important contributions to the debate are J. PETERS and L.-A. KAPPER, 'Eurohof beschermt tegen overheid, maar Nederlandse rechters volgen EHRM veel te slaafs' [Euro court protects against the state, but Dutch judges are too obedient], *NRC Handelsblad* 15 November 2010; B. OOMEN, 'Versterk liever de Grondwet dan kritiek te leveren op het Hof' [Strengthen the Constitution instead of criticising the Court!], *de Volkskrant* 24 November 2010; M. DE WERD, 'Uit Straatsburg komt veel goeds' [Much good comes from Strasbourg], *de Volkskrant* 1 December 2010; S. DIMITROV, 'Straatsburgs hof ondermijnt de soevereiniteit van de lidstaten' [Strasbourg Court undermines member states' sovereignty], *NRC Handelsblad* 9 December 2010; T. ZWART, 'Bied dat mensenrechtenhof weerwerk' [Counterbalance that human rights court!], *NRC Handelsblad* 17 January 2011; R.A. LAWSON, 'Het Mensenrechtenhof beschaaft Hongarije en Griekenland' [The human rights court civilises Hungary and Greece], *NRC Handelsblad* 25 January 2011; S. WYNIA, 'Losgezongen' [Broken free], *Elsevier* 27 January 2011; T. BAUDET, 'Brits verzet tegen het Europees Hof is terecht' [The British are right to resist the European Court], *NRC Handelsblad* 14 February 2011; T. BAUDET, 'Crucifixen in klaslokalen, adoptie, verbod op kraken...; Wat heeft dit nog te maken met 'universele mensenrechten'? Terecht protesteren de Britten tegen de tentakels van Straatsburg' [Crucifixes in classrooms, adoption, prohibition of squatting...; Does this still have anything to do with 'universal human rights'?], *NRC.Next* 15 February 2011; J.P. LOOF, 'Lees eerst eens goed wat het EHRM zegt' [Please read what the Court says first], *NRC Handelsblad* 24 February 2011; S. BLOK and K. DIJKHOFF, 'Leg het Europees Hof aan banden' [Bridle the European Court!], *de Volkskrant* 7 April 2011; E. DOMMERING, W. HINS, R.A. LAWSON and J. PETERS, 'Met Europees Verdrag voor Mensenrechten is niets mis' [There is nothing wrong with the European Convention], *de Volkskrant* 11 April 2011; T. SPIJKERBOER, 'Het Hof in Straatsburg blijft cruciaal' [The Strasbourg Court retains its crucial function],

It seems that there was fertile ground for debate, given the political atmosphere of the time. For example, a difficult issue came up in autumn 2010 concerning the expulsion of a group of Iraqi asylum seekers. After the Government had decided that the asylum seekers should be expelled, the Strasbourg Court blocked the decision by granting interim measures. When it was informed of the resolution to expel the asylum seekers, the Court sent a letter in which it prohibited the Minister from doing so for a period of three weeks.[138] It seems that this direct interference by the Court did not sit very well with the very strict migration policy favoured by the then sitting Cabinet (which was supported by the populist anti-migration party PVV).[139] Moreover, there was also political disagreement with the Court's judgments on the issue of social security measures. While the Government – the liberal party VVD in particular – intended to fight the economic crisis by cutting social security benefits, national courts held that some of these measures were not in conformity with the Court's case-law on Article 1 of Protocol No. 1 to the Convention.[140] These national judicial decisions caused a great deal of disagreement, since some Members of Parliament blamed the Court for the judicial interference with national economic and social security policy.[141]

Initially, the Cabinet appeared to support at least part of the criticism expressed in the media and by Members of Parliament. At the time, the Dutch

---

NRC Handelsblad 31 January 2012; T. Zwart, 'Politici kunnen problemen van het Hof oplossen' [Politicians can solve the Court's problems], *NRC Handelsblad* 31 January 2012. Contributions to the debate can also be found in the Dutch Human Rights Law Journal (*Nederlands Tijdschrift voor de Mensenrechten* (*NTM/NJCM Bulletin*)) 2010 (35–8), p. 975ff and 2011 (36–1) and in the Dutch Law Journal (*Nederlands Juristenblad, NJB*) (E. Hirsch Ballin, 'De rechtsstaat: wachten op een nieuwe dageraad?' [The *Rechtstaat*: waiting for a new dawn?], 86 *NJB* (2011) p. 71–73; J.H. Gerards, 'Waar gaat het debat over het Europees Hof voor de Rechten van de Mens nu eigenlijk over?' [What is the debate on the ECtHR really about?], 86 *NJB* (2011) pp. 608–612; T. Baudet, 'Dik of dun?' [Thick or thin?], 32 *Recht der werkelijkheid* (2011) no. 2, pp. 74–79; J.H. Gerards, 'De waarde van een Europees mensenrechtenhof' [The value of a European human rights court], 32 *Recht der werkelijkheid* (2011) no. 2, pp. 65–73; T. Spijkerboer, 'Het debat over het Europese Hof voor de Rechten van de Mens' [The debate about the ECtHR], 87 *NJB* (2012) pp. 251-261; T. Spronken, 'Het EHRM in dialoog' [The ECtHR in dialogue], 87 *NJB* (2012) p. 443; G.J.M. Corstens and R. Kuiper, 'Help! Het EHRM verdrinkt!' [Help! The ECtHR is drowning!], 87 *NJB* (2012) pp. 667–668). See also the contributions by Tom Zwart (in: *Onbetwistbaar recht* [Indisputable law], Teldersstichting (113), January 2012) and the former Dutch ECtHR judge Egbert Myjer (*Het leest als een boek* [It reads like a book], Nijmegen: WLP 2011).

138 For an overview of the relevant documents, including the letter sent by the Court, see the letter from the State Secretary for Immigration and Asylum to the Lower House: *Kamerstukken II* 2010/11, 19637, no. 1368.

139 Rather indirectly, this can be inferred from an emergency debate between the State Secretary for Immigration and Asylum and the Lower House; *Handelingen II* 2010/11, no. 18.

140 e.g. Rechtbank Den Haag 3 January 2012, ECLI:NL:RBSGR:2012:BU9921. See also Hof Den Haag 5 June 2012, ECLI:NL:GHSGR:2012:BW7457.

141 MP Stef Blok (liberal party, VVD) in particular was highly critical; see, e.g., S. Blok, K. Dijkhoff and J. Taverne, 'Verdragen mogen niet langer rechtstreeks werken' [Treaties should no longer have direct effect], *NRC Handelsblad* 23 February 2012.

position for the intergovernmental conference on the future of the ECtHR in Brighton, in April 2012, was being debated. In October 2011, the Dutch Cabinet presented a Cabinet view to Parliament, in which it argued that the Court should take more care to act in line with the principle of subsidiarity and should be encouraged to leave a wider margin of appreciation to the states.[142] The Cabinet also made a number of proposals to enhance the future effectiveness of the Court, but these proposals were very controversial as they seemed to have a negative impact on the individual right of complaint, such as proposals to sanction lawyers bringing unwarranted claims and restricting the possibility for the Court to impose interim measures under Rule 39. These proposals seemed to have the support of a majority of the Lower House, but they were strongly criticised by a majority of the Senate.[143] After several debates in early spring 2012, the Cabinet softened its position in response to the criticism raised by the Senate and it took a relatively mild stance in the Brighton conference.[144]

After the conference, significant new developments occurred: the Rutte-I Cabinet fell in April 2012 and after the parliamentary elections of September 2012 a new coalition Cabinet was formed, consisting of the liberal party VVD and the social-democratic party PvdA. In the elections the PVV lost much of its previous support. Moreover, the electoral debates centred on the economic crisis, expenditure cuts and the future of the European Union, rather than on immigration issues or the position of the Court. The debate seemed to lose part of its urgency as a result.

---

142 Cabinet letter to the Parliament of 3 October 2011, *Kamerstukken II* 2011/12, 32735, no. 32.

143 For the debates in the Senate, see *Handelingen I* 2010/11, no. 25, pp. 2–30, 42–57 and 68–87 (culminating in a resolution in favour of the ECtHR adopted by a large majority of the Senate (*Kamerstukken I* 2010/11, 32502, no. B)) and *Handelingen I* 2011/12, no. 22, item 3 (resulting in an almost unanimously adopted resolution, asking the Cabinet to keep on supporting the ECtHR and to abandon the issue of advocating a wider margin of appreciation for the states (*Kamerstukken I* 2011/12, 32735, no. C). A resolution was presented in the Lower House in which members of parliament pleaded for an obligation on the Court to leave a wider margin of appreciation to the states (*Kamerstukken II* 2010/11, 32500 VI, no. 29). Another resolution, adopted in the Senate, requested the Cabinet to respect the Court's autonomy and express its support for the ECHR system of protection (*Kamerstukken I* 2010/11, 32502, no. B), but it was rejected by the Lower House, albeit by a small majority (*Kamerstukken II* 2010/11, 32502, no. 11). A debate in the Lower House on the Cabinet position was held in Spring 2012, but was not completed; it was decided to continue the debate (*Kamerstukken II* 2011/12, 32317, no. 108), but since the fall of the Cabinet it has been put on hold and has not been resumed at the time of writing. On March 13, 2013, another plenary debate took place in the Lower House on the position and the work of the ECtHR; for more information on this, see text accompanying n. 145 *infra*.

144 The Cabinet especially made some concessions during the debate in the Senate of February 2012; see *Handelingen I* 2011/12, no. 22, item 3. In May 2012 the Cabinet informed parliament about the results of negotiations in Brighton (Letter of the Minister for Security and Justice of 11 May 2012 to Parliament, *Kamerstukken II* 2011/12, 30481, no. 9). There is no response to this by the Lower House, but the Senate is still monitoring developments, asking the Cabinet for more information about the decisions taken at the Brighton conference in June 2012 (*Kamerstukken I* 2011/12, 33000-V, no. AE); the information was provided in July 2012 (Letter of the Minister for Security and Justice to the Senate, *Kamerstukken II* 2011/12, 33000-V, no. AE).

Nevertheless, it seems that the debate has not fully subsided, as in March 2013 another parliamentary debate took place in the Lower House.[145] This debate was triggered by a judgment of the ECtHR on the so-called TBS system in the case of *Van der Velden*, discussed in section 5.4. During the debate most political parties stressed their support for the work of the ECtHR. The liberal party VVD was more critical, however, also of the role of national courts in applying the Convention. The PVV even proposed a resolution (*motie*) to the government to denounce the European Convention on Human Rights, but the proposal was rejected by all other parties in the Lower House.[146] It is likely that new debates of the same nature will emerge in the future, especially if the Court hands down further controversial judgments.

Both the political criticism and the criticism expressed in (scholarly) opinions concentrate on the intrusive character of the judgments of the ECtHR, the Court's position as an international court and its inherently undemocratic character.[147] Contributors to the debate frequently stress that the scope of the ECHR has been over-extended and that the Court is deciding many cases that are not actually related to fundamental rights issues. In such cases, the critics state, the Court is simply imposing its own view on national authorities, disrespecting national sovereignty and the democratic legitimacy of national legislation. They clearly regard the Court as an anti-majoritarian body; as an outsider meddling with national policy choices with a disregard for national traditions and opinions. In particular, this sort of criticism is voiced in relation to the Court's activities in the field of social security law and immigration law.

6.2. EFFECTS OF THE DEBATE

As was mentioned in section 6.1, the debate on the ECtHR initially seemed to have an impact on the Dutch position in the 2012 high level conference on the Court's future. In the end, however, the Senate succeeded in convincing the Cabinet of the need to support the Court's work and the Cabinet mitigated its proposals. There are also only few concrete proposals to change legislation or the Constitution which can actually be regarded as a consequence of the debate on the Court. Most proposals for change rather result from an ongoing debate on reform of the Constitution and adaptation of the fundamental rights chapters to the necessities of modern times.

145 Lower House debate 13 March 2013, *Handelingen II* 2012/13, no. 61, item 3.

146 *Handelingen II* 2012/13, no. 63, item 12.

147 For a brief summary in English of the debate, see J.H. GERARDS and A.B. TERLOUW, 'Solutions for the European Court of Human Rights: The *Amicus Curiae* project', in T. ZWART, S. FLOGAITIS and J. FRASER, eds., *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (London, Edward Elgar 2013). See also the various contributions to the debate in the Lower House of 13 March 2013.

There is one exception to this, however, which also goes to demonstrate that the debate on the Court can be placed in a wider context. On 6 September 2012 a private members' bill (the 'Taverne bill') to amend Articles 93 and 94 of the Constitution for the Kingdom of the Netherlands was submitted to the Lower House. This bill aims to reinforce the primacy of the legislature by stripping the courts of their power to disapply Acts of Parliament and the Constitution itself in the event of conflict with self-executing provisions of treaty law. In addition, the Taverne bill originally intended to empower the legislature to render a provision of treaty law, which would otherwise be self-executing, inapplicable by the courts, but this part of the proposal has been dropped.[148]

The Taverne bill should be understood against the background of the dynamic interpretation of the ECHR by the ECtHR and the competence of the Dutch courts to apply the Convention as construed by the ECtHR, even if this implies that they have to thwart one or more provisions of an Act of Parliament which the Government and the majority in both Houses of Parliament did not consider to be incompatible with the Convention. Some politicians are quite dissatisfied with this situation, obviously including the Members of Parliament who drafted the bill.[149]

It seems very unlikely that the Taverne bill will be passed in two readings, however. The bill is rather a warning shot intended for the ECtHR and the Dutch courts than a serious attempt to strip the latter of their exclusive competence to determine whether a provision of treaty law is self-executing and may thus prevail over national law.

Thus far, there does not seem to be any apparent or measurable impact of the criticism of the Court's work on judicial decision making. There are no references made in case-law to the criticism, nor are there any signs that the courts are less willing to review national decisions or legislative acts for conformity with the Convention. Although the Supreme Court recently handed down a judgment in which it deviated from an interpretation given by the ECtHR (which was discussed in section 5), there is no sign in the judgment that this has to do with criticism of the Court or its work. On the contrary: in the Supreme Court's 2011 annual report the President of the Supreme Court expressly mentioned the value of the loyal implementation of the judgments of the European Court of Human Rights[150] and in the annual report of 2012 he

148 *Kamerstukken II* 2011/12, 33359 (R 1986), nos. 1–3 and *Kamerstukken II* 2013/14, 33359 (R 1986), nos. 4–7. For a critical discussion of this bill and the accompanying Explanatory Memorandum see J. Fleuren and J. de Wit, 'Het voorstel-Taverne. Schrapping van de rechterlijke bevoegdheid om wetten aan verdragen te toetsen' [The Taverne Bill to delete the judicial power to review Acts of Parliament for conflict with treaties], 87 *NJB* (2012) pp. 2812–2818.

149 *Kamerstukken II* 2011/12, 31570, nos. 22 and 23.

150 *Jaarverslag Hoge Raad 2011* [Annual Report Supreme Court 2011], <www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/jaarverslag-2011.pdf>, p. 4.

stressed the undesirability of the Taverne bill, as well as underlined the importance of dialogue with the Court.[151]

6.3. CONCLUSION

The criticism of the ECtHR in the Netherlands has been severe, especially in 2011 and part of 2012. By now the critical wind seems to have subsided, however, although there are still important debates about the Court's judgments in Parliament. It is difficult to assess the impact of these debates on legislation and case-law. There are hardly any apparent results, such as changes made to legislation or the constitution, the allocation of powers to the courts, or methods and techniques of Convention application. This is not to say that there may be no 'invisible' or indirect effects. It may certainly be the case that national courts have been alerted by the criticism to their use of Convention standards, which may cause them to use these more carefully and perhaps with increased judicial restraint. Moreover, it is clear that the debate on the Court has also renewed the debate on the more general topic of judicial review of legislation. The Taverne bill in particular illustrates that, in the Netherlands, the debates on judicial review, the role of international law and the impact of the Convention are strongly intertwined.

7. CONCLUSIONS

The relationship between international law and the law of the Kingdom of the Netherlands may be defined as monist. Insofar as treaties, resolutions of international organisations and customary international law are binding on the Kingdom, they are as such – i.e. as international law – part of the law of the land. In the hierarchy of law within the Netherlands, treaties, resolutions of international organisations and customary international law take precedence over law of domestic origin, including the Constitution for the Kingdom of the Netherlands and the Charter for the Kingdom of the Netherlands. However, the power of the courts to review constitutional law and primary and subordinate legislation for conflict with international law is limited to international obligations of the State that are laid down in self-executing provisions of treaties and of resolutions of international organisations. According to Articles 93 and 94 of the Constitution such provisions are 'binding on all persons' and have supremacy over any legislation in force within the Kingdom of the Netherlands,

151 *Jaarverslag Hoge Raad 2012* [Annual Report Supreme Court 2012], <www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/Jaarverslag-HR-2012.pdf>, p. 6.

regardless whether these provisions are laid down or based on a treaty that has been approved by Parliament or not.

On the other hand, the courts are not allowed to test Acts of Parliament against the Constitution for the Kingdom of the Netherlands, the Charter for the Kingdom of the Netherlands and (unwritten) fundamental principles of law.

The tremendously important role the ECHR plays in the Netherlands appears to be due to the intricate combination of a prohibition of constitutional review, a lack of substantive constitutional standards for judicial review, a very short catalogue of fundamental rights and the priority of self-executing provisions of international law. Combined with the ready availability of concrete, practical standards developed by the European Court of Human Rights, these factors have resulted in the ECHR becoming almost a substitute bill of rights.[152] It is applied in the same way as the constitution is applied in other states, while the Constitution itself does not have a great role to play. Dutch constitutional provisions are not often referred to in case-law, although there are some exceptions, usually concerning typically Dutch characteristics, such as the freedom of education (on which the Dutch constitution contains a very special provision with long historical origins) or the prohibition of prior restrictions of the freedom of expression (where the Dutch constitution clearly provides more protection than the ECHR).[153] In all other cases, however, the ECHR provides the main source of fundamental rights.[154]

This situation has attracted sharp criticism, either because the Strasbourg Court is considered to have had too great an impact,[155] or because it is held that more attention should be paid to national constitutional values and constitutional traditions.[156] Thus far, however, few endeavours have been made to make the kind of amendments to the Constitution that would be needed to give it a stronger position.[157] In particular, as long as constitutional review is

152 For this analysis, see also CLAES and GERARDS, *supra* n. 37.

153 See further, with examples, CLAES and GERARDS, *supra* n. 37, and, for an analysis of the fundamental rights case-law and advisory opinions of the Council of State, J.H. GERARDS, W.J.M. Voermans et al., *Juridische betekenis en reikwijdte van het begrip "rechtsstaat" in de legisprudentie & jurisprudentie van de Raad van State* [Legal meaning and scope of the notion of 'Rechtsstaat' in the legisprudence and case-law of the Council of State] (The Hague, Council of State 2011).

154 Although it should be stressed that references are often supplemented by references to international human rights treaties, especially if they offer more concrete protection, and increasingly by references to the EU Charter of Fundamental Rights.

155 See the criticism discussed in relation to the questions of Part 3.

156 See in particular the report by the Government Commission on Reform of the Constitution, The Hague, November 2010, *Kamerstukken II* 2010/11, 31570, no. 17, addendum.

157 Some proposals have been made, in particular by the Government Commission on Reform of the Constitution (see previous footnote), but there is no intention to follow up on these – see the Cabinet views on the report of 24 October 2011, *Kamerstukken II* 2010/11, 31570, no. 20. Furthermore, although a bill introducing the possibility of constitutional review has been adopted in a first reading (see *supra*, section 3), it is still pending; see most recently *Kamerstukken II* 2013/14, 32334, no. 7.

prohibited and the constitutional fundamental rights provisions are not redesigned and augmented to make them more suitable for judicial review, there is little chance that national courts will start to refer to the Constitution rather than the Convention.

The question remains to be answered, moreover, if the impact of the Convention is really so strong as to validate the assumption that the national courts behave as the Court's marionettes, as some critics have alleged, rather than as independent national courts, and that they are allowed and stimulated to do so by the specific constitutional competences they have. It has been demonstrated in this chapter that this is far from true for Dutch courts and that, in reality, the situation is much more nuanced.

On the one hand, it is evident that the national courts loyally follow the Court's precedents and aim to implement its judgments as carefully as possible. Judgments in cases in which fundamental rights have been invoked almost standardly contain references to Strasbourg cases and courts constantly employ terminology that is reminiscent of the language used by the Court. In many fields of law, the Court's standards and criteria have deeply influenced national standards and, more generally, colour the legal and judicial discourse on fundamental rights. Moreover, it is indeed true that the national courts sometimes set aside legislation because it unjustifiably interferes with a Convention right, although it happens more often that they try to avoid such a finding by construing a statutory provision in line with the Convention and the Court's case-law.

On the other hand, it is obvious that the courts do not apply Convention terms and standards uncritically. Highest courts in particular often transform the Court's standards into national standards, adapting them to fit in with already existing lines of case-law and thereby creating new, national precedents they can refer to in later cases. Moreover, precedents of the Court are always carefully assessed for their 'fit' with national law and constitutional standards. This may sometimes result in rather narrow compliance with the Court's requirements if this is necessary to minimise interference with national legal traditions. In other cases, but only very rarely, the courts actually engage in a dialogue with the Court about the reasonableness of its interpretations, sometimes even setting aside an interpretation given by the Court in an earlier case. And finally, the impact of the Convention and the Court is nuanced by the caution all national courts exercise to avoid transgressing the limits of their judicial role. The Dutch courts will not easily set aside legislation (particularly primary legislation) because it seems to violate the Convention, and if this happens at all, the courts refuse to give any orders to the legislature as to how the violation should be remedied. The judicial restraint exercised by Dutch courts in fundamental rights cases is also particularly apparent from its frequent (though often incorrect) references to the 'margin of appreciation' of the legislature or the administrative authorities. In cases about violations of core fundamental rights the courts' review may be intensified, but

usually it defers to the democratically elected or democratically accountable bodies if a case concerns political or policy choices.

In conclusion, Dutch courts can be said to deal with Convention issues in a very sensible manner. They feel the need to implement the Convention and they understand the necessity and value of adopting the standards developed in Strasbourg case-law, but at the same time they are very sensitive to their own position in the constitutional order of the Netherlands and they pay heed to this as much as is possible.

In the light of these conclusions, it may seem surprising that the political debate on the position of the ECtHR has spilled over to a debate on the role of national courts in implementing international law, as is witnessed mainly by the Taverne bill. Nevertheless, there is, at least to a certain extent, a connection between the debate on the evolving interpretation of the ECHR by the ECtHR on the one hand, and the constitutional system on the other. Because courts are prohibited from reviewing Acts of Parliament against the Constitution, the Charter for the Kingdom and (unwritten) fundamental principles of law (section 3), they have to have recourse to the Convention (or other human rights treaties) in the event that an application of an Act of Parliament infringes fundamental rights or fundamental principles of law. Consequently, the evolving interpretation of the Convention by the Court is readily blamed for interfering with the primacy of the national legislature. The case-law on Article 1 of Protocol No. 1 to the Convention may serve as an example. Some critics have pointed out that a provision protecting property rights has been turned by the Court into a shield against abrupt changes in the law which would diminish or even bring an end to benefit entitlements, whereupon it has been used by Dutch courts to examine the lawfulness of measures to restructure social security legislation which have been adopted by Parliament.[158] In stressing that the ECtHR imposes its own values on Dutch law, these critics ignore that similar restrictions on the lawfulness of such measures might follow from fundamental rights and principles of Dutch law, especially the principle of legal certainty.[159]

Thus the criticism in the Netherlands appears to bring together all the different elements discussed in this book: the constitutional mechanisms for implementation of international law, the impact of the Court and its case-law, and the interrelationship between the judiciary and the legislature. It is clear, however, that at least for the Netherlands, the criticism is unfounded. Whatever one's assessment of this development in the case-law of the ECtHR,[160] the criticism obscures the fact that the Court as well as national constitutional law

158 BLOK, DIJKHOFF and TAVERNE, *supra* n. 141, p. 16.

159 See e.g. HR 14 April 1989, *NJ* 1989, no. 469; *NYIL* (1990) p. 362 (*Harmonisatiewet*), para. 3.1.

160 For a critical analysis of the mechanisms underlying such developments in the case-law of the ECtHR see J.H. GERARDS, *Het prisma van de grondrechten* (inaugural address), Nijmegen, Radboud Universiteit 2011, also available in English: 'The prism of fundamental rights', 8 *European Constitutional Law Review* (2012), no. 2, pp. 173–202.

allow the national courts their own role to play and that they in fact use this leeway to find an adequate balance between following the Court's lead and respecting the legitimate exercise of powers by their co-equal constitutional partners.

CHAPTER 7
SWEDEN

Iain CAMERON and Thomas BULL

1. INTRODUCTION: CONSTITUTIONAL BACKGROUND

1.1. GENERAL CONSTITUTIONAL STRUCTURE

There are four documents in Sweden which have constitutional status: the Instrument of Government (*Regeringsformen*, IG), the Freedom of the Press Act (*Tryckfrihetsförordningen*, TF), the Freedom of Expression Act (*Yttrandefrihetsgrundlag*, YGL), and the Succession Act (*Successionsförordningen*, SO), governing the succession of the Head of State (the monarch). The Instrument of Government corresponds to what most countries would regard as the constitution. It was adopted in 1974, totally replacing the earlier version from 1809.[1]

The IG can be amended by simple majority, although there must be a general election between the first and second reading of an amendment bill, meaning that the process is time-consuming.[2] In practice, all constitutional amendments are the product of a consensus among the political parties. The most recent reform was in 2010. The 15 chapters of the IG set out the basic rules governing Parliament and the Government, their composition, relationship inter se, law-making, budgetary and treaty-making powers, the functions and competence of the courts and the administrative agencies, constitutional control mechanisms and emergency powers.

Sweden is a unitary state with a parliamentary, democratic system of government. The monarch is Head of State but has as such only symbolic powers. Instead, the central constitutional institution is the unicameral Parliament, the *Riksdag*. The *Riksdag* consists of 349 MPs who are elected proportionally from party lists for four-year terms and the main tasks of Parliament are to pass

1 We refer to the Chapter number and section number, thus IG Chapter 12 section 2 is referred to as 12:2.

2 IG 8:14.

legislation, control the State budget and to appoint a Prime Minister to lead the Government. Since the 1950s the parliamentary situation in the *Riksdag* has often created coalition governments in Sweden. Presently (2013) eight parties are represented in Parliament and the Government is formed on the basis of four of these parties.

According to IG Chapter 6, the Prime Minister appoints the Cabinet and distributes tasks to ministers as he sees fit. Members of the Cabinet cannot at the same time hold a seat in Parliament. Sweden does not have ministerial government, as is common in many states. Instead, IG 7:3 stipulates that all government decisions (with a few exceptions) are collective cabinet decisions, even if they are prepared within specific ministries. Individual ministers of government thus wield little formal public power and the government is characterised by formal decision-making in the cabinet as a whole.

The bulk of administration in Sweden is performed by the 290 local authorities, and, in the areas of transport and health care, by the 21 provincial authorities. There are also a large number of national administrative agencies which operate in relative independence from the government, but which are accountable to it. These are steered in a number of ways by government instructions and ordinances, the power of appointment of the director of the agency, budgetary means and informal advice. However, under the IG (12:2), the government is specifically prohibited from deciding individual cases before administrative authorities, except in the – relatively – rare cases where a law specifies that the government itself is the final administrative decision-making body. The administrative agencies in Sweden are thus not exercising their powers per delegation from the minister of a particular ministerial department, but are seen as acting only on the basis of legal provisions granting them power in specific areas. Ministers – and the government – are therefore not legally responsible for actions taken by the administration in concrete cases of exercises of public power. Instead, public officials have rather extensive criminal responsibilities for their acts in the line of duty and are precluded from blaming instruction from 'above'. Except in cases where administrative authorities are specifically given oversight or appeal functions, they are not in any hierarchical position vis-à-vis one another.

Regarding the exercise of legislative powers, IG Chapter 8 specifies that the enactment of rules involving the creation of *duties* for individuals requires authority in the form of a statute. It is moreover stated that certain areas of law, among these, civil law, criminal law and procedural law, are generally to be regulated by statute. However, Chapter 8 also provides for exceptions in a number of areas, allowing a statute to delegate to the government the power to issue more specific regulations by means of ordinances and/or to sub-delegate this power to administrative agencies or local authorities. Where a statute provides for sub-delegation, only fines, not imprisonment, can be provided for as

a penalty for breaches of that sub-delegated rule. Under IG 8:7 and 8:11, the government also has an independent power to issue ordinances in areas not specifically reserved for statutes and may sub-delegate this power to administrative agencies.

1.2. ORGANISATION OF THE JUDICIARY

The judicial branch of government consists of the courts and is constitutionally regulated in IG Chapter 11. Sweden has a parallel system of two main court organisations: ordinary and administrative courts. There are also some specialist courts in a number of specific areas, e.g. labour law, migration law, environmental law that we leave outside of this brief introduction. The ordinary courts have exclusive jurisdiction over private law and criminal law matters.[3] There are 48 district courts (*tingsrätter*), six appeal courts (*hovrätter*) and a Supreme Court (*Högsta domstolen*). There is a general right to appeal decisions of a district court, but in some categories of cases, including trivial ones, an appeal to the Court of Appeal requires permission to appeal. A trial in the Court of Appeal is a full retrial, of issues of fact and law. A case may only be heard by the Supreme Court if this court gives leave to appeal. The Supreme Court, in principle, only rules on points of law, not questions of fact. The administrative court system deals with challenges to de decisions of administrative agencies. There are 12 administrative district courts (*förvaltningsrätter*) and four administrative courts of appeal (*kammarrätter*) and a Supreme Administrative Court (*Högsta förvaltningsrätten*). As in the system of ordinary courts, leave to appeal is necessary for some types of cases already in order to get a new trial in the Administrative Court of Appeal and such leave is necessary in all cases before the Supreme Administrative Court.

As regards the relationship between the courts at different levels it must be noted that there is no formal system of precedent (*stare decisis*) in the Swedish judicial system. However, in practice the Supreme Administrative Court and the Supreme Court's decisions command high authority and are followed, as their constitutional role is to give guidance to the courts below. Only selected decisions of the Courts of Appeal or Court of Administrative Appeal are published and unpublished cases have only a limited precedent value. A district

[3] The autonomous concept of a 'criminal charge' under Article 6 of the ECHR has caused problems in relation to Swedish public law sanctions (tax penalties, environmental penalties etc.). Appeals against such penalties are brought before the administrative courts. However as explained in more detail below, both the ordinary and administrative courts have had to consider the issue of whether the imposition of such a public law sanction – where it is regarded as a criminal charge – rules out subsequent prosecution for an offence concerning the 'same activity'. See further the discussion *infra*, text accompanying nn. 48–54 and n. 65.

court or a district administrative court judgment has little or no precedent value, and is rarely quoted as an authority in legal textbooks.

The judiciary in Sweden is a career judiciary. To become a judge one must have a law degree (which is four and a half years' full-time study) followed by three years clerking at the courts. There are around 1,000 judges, of which some 600 positions have full tenure. A tenured judge can only be removed from office if he has been convicted of a serious crime or if through 'gross or repeated neglect of his official duties he has shown himself or herself to be manifestly unfit to hold the office' (IG 11:5).[4] Discharge of judges on these grounds – which hardly ever occurs – is an issue of labour law, with the final decision lying with the Labour Court. The relatively large number – 400 – of other judges are mainly junior judges at the beginning of their careers. They are only covered by the ordinary labour law protections against dismissal, although having said that, these protections are relatively strong. There is no prohibition on judges being politically active, even if this is relatively rare. Many of the more senior judges are appointed after they have served a considerable amount of their time as civil servants in government departments, usually investigating the need for law reform or drafting legislation. While this provides them with valuable insights into the legislative process, it is open to the criticism that it gives them a one-sided, and restricted, view of the judicial function. It is not unusual for a junior judge to be 40–45 years old before he obtains full tenure. This relatively long period during which junior judges are supervised by their superiors, tends to make them keen not to stick out and so more cautious.

At present, all the more important judicial appointments are made by the government, although it follows the recommendations of an independent commission on judicial appointments.[5] In fact, it has yet not happened that the government has appointed anyone not recommended by the commission. On paper, the protection of judicial independence for the large category of not-yet tenured judges in Sweden is weaker than in many other countries. However, judicial appointments are not politically motivated and even judges without strong tenure behave with full independence from the executive. Having said this, their lack of tenure may serve to make them more cautious (and so less inclined to find creative solutions to ECHR and constitutional problems, see further below).

4 A decision to prosecute a judge of the Supreme Court and Supreme Administrative Court for an offence committed in the course of his/her duties is made by the senior government legal officer, the Chancellor of Justice, and tried by Supreme Court. The Supreme Court also determines whether such a judge is for any other reason incapable of performing his/her duties (IG 12:8).

5 This category includes all Supreme Court and Supreme Administrative Court judges, as well as the presidents and chamber presidents of the courts of appeal.

1.3. PROTECTION OF FUNDAMENTAL RIGHTS

When it comes to protection of fundamental rights, the situation in Sweden is rather unique, as two constitutional documents are devoted to the protection of free expression and an 'ordinary' catalogue of rights is placed in IG Chapter 2. Of these documents, the Freedom of the Press Act holds a special place in the constitutional structure of Sweden. The original version dates back to 1734 and it governs freedom of expression in printed media while the later adopted Freedom of Expression Act governs the electronic media. While many states provide for constitutional protection of freedom of expression, Sweden is unusual both in the significance it gives to this right over other rights and to the level of detail in the constitutional system of regulation. Both acts provide for exhaustive lists of criminal offences which can be committed by means of the printed, respectively electronic media. The rights set out in the Freedom of the Press and Freedom of Expression Acts can only be altered by constitutional amendment. However, the Freedom of Press Act holds a special place of reverence and respect in the political and legal culture of Sweden, making any inroad into the rights protected by the act controversial and difficult.

As mentioned, in addition to the rights set out in the Freedom of the Press and Freedom of Expression Acts, IG Chapter 2 sets out a catalogue of civil and political rights. These rights are split into two categories: rights the limitation of which requires constitutional amendment and 'relative' rights. The category of relative rights can be restricted by an ordinary statute, passed by simple majority in the parliament. For most relative rights, the statute must satisfy a proportionality test.[6] The category of relative rights includes the freedoms from search, seizure, telecommunications and mail interception and other major restrictions in personal integrity (section 6), from deprivation of liberty (section 8) and the right of access to court to challenge detention (section 9) and the right to a fair trial (section 11).[7] Three rights included in IG Chapter 2 are of the kind that demand constitutional amendment to effect any limitation: the prohibitions of the death penalty (section 4), inhuman or degrading punishment (section 5) and retroactive criminal law (section 10). All bills involving limitations in constitutional rights, or otherwise raising issues under the Constitution, are sent to the parliamentary Committee on the Constitution, which makes a report on the issue. These reports have significant importance both in the debate in Parliament and in media and in any subsequent legal proceedings in which the

6 There are also procedural safeguards for rights-limiting legislation. Such a statute can be blocked for a period of a year by a minority of MPs, a mechanism designed to allow the mobilisation of public opinion. The legislative process, and the political consensus which lies behind much Swedish legislation, means that this mechanism is used only rarely.

7 In 2011, fair trial within a reasonable time and a general protection of personal integrity were added.

constitutionality and interpretation of statutes limiting constitutional rights are in focus.

The final elements of rights protection under Swedish law are the European Convention on Human Rights (ECHR) and, since the Lisbon treaty entered into force, the EU Charter of Fundamental Rights and Freedoms. The latter of course only applies when Swedish institutions act within the framework of EU law. Sweden has ratified a large number of regional and universal human rights treaties. The ECHR was ratified in 1953 but it was only incorporated into Swedish law (by means of an statute) in 1995.[8] Having said this, the ECHR has been an important influence on the extent, and scope, of the rights protected in the IG. Several of the rights in IG have been added, or reformulated, so as to comply better with the ECHR by means of constitutional reforms in 1979, 1995 and 2010. Moreover, the ECHR has a special constitutional status by virtue of IG 2:19 (added at the time of incorporation of the ECHR in 1995) which provides that 'a law or other regulation may not be issued in conflict with [the Convention]'. This provision means that if a norm violates the ECHR (as interpreted by the ECtHR), it also violates the Constitution and so, in accordance with the provision on constitutional review in IG 11:14 (see below, section 3) should not be applied. IG 2:19 is, however, primarily directed to the legislature and pre-legislative scrutiny of statutes is the primary mechanism for avoiding conflicts with either the Constitution or the ECHR. If, for some reason, this scrutiny has failed to detect a conflict, or a conflict has later arisen as a result of later case-law (see below, sections 4 and 5), IG 2:19, together with IG 11:14 gives the Swedish courts the power, and the duty, to refuse to apply the offending norm. Thus, in practice, the ECHR has 'quasi-constitutional' status in Sweden, as is discussed in further detail in section 3.

2. THE STATUS OF INTERNATIONAL LAW IN DOMESTIC LAW

Sweden is a dualist state, meaning that, even if ratification of a treaty has been approved by Parliament, it still has to be incorporated in some way into the Swedish law (usually by statute) before it can create rights (and, obviously, duties) for individuals. Incorporated treaties have only the rank that the instrument of incorporation gives them. Whether or not a statute is necessary, or whether a treaty can be incorporated by a government ordinance is regulated in IG Chapter 8.

Originally, all approved treaties were published in the official legislative gazette, *svensk författningsamling*, specifically in order to ensure that all organs of the State complied with these. However, a new gazette was started in 1912 only

8 *SFS* 1994:1219. Sweden is bound by Protocols Nos. 1, 4, 6, 7 and 13, but not Protocol No. 12.

for treaties, *Sveriges överenskommelser med främmande makter* (now *Sveriges internationella överenskommelser*, SÖ) and so treaties increasingly only came to the attention of specialised groups. With the rise of parliamentarism, it was no longer acceptable that treaties concerning issues of importance were not subject to parliamentary approval. Nonetheless, the issue of whether treaties could be self-executing did not arise squarely before the courts, and thus was unresolved until the early 1970s, just before the adoption of the new IG, when the Swedish courts ruled that, in the absence of legislation converting it to Swedish law, the European Convention on Human Rights did not create direct rights capable of being invoked before national courts.[9]

Thus, the dualism of the Swedish legal order is a creation of case-law. Having said this, dualism is implicit in the structure of IG, particularly the provisions dealing with transfer of legislative power, which are based on a conceptual distinction between the realms of international law and domestic law – a distinction which all international lawyers know is increasingly difficult to sustain. While it is still open to the courts to take account of *non*-incorporated treaties by means of the principle of treaty conform construction,[10] such treaties have little significance in practice in legal argumentation before the courts.

Similarly, decisions/resolutions by international organisations (other than the EU) are, in themselves, not the 'law of the land'. Thus, resolutions of the UN Security Council also have to be incorporated into Swedish law to have any legal force. In practice, resolutions introducing sanctions (which require national enforcement) are incorporated into an EU regulation, and so are automatically applicable.[11]

The government has the competence to enter into a treaty (IG 10:1). IG 10:2 specifies situations – covering all important treaties – where the consent of Parliament must be sought in advance.[12] The question of whether or not a treaty is sufficiently important or not is a political determination by the government,

9 *RÅ* 1974 ref. 61. Cases from the Supreme Court are cited from the semi-official series, *Nytt Juridisk arkiv* (NJA) with the year and the page number (sida, s.) while cases from the Supreme Administrative Court are officially cited HFD (*Högsta förvaltningsdomstolen*) after the reform 2010 are cited with the year reference number. Cases from HFD before that time are officially cited *Regeringsrättens Årsbok* (RÅ). In Sweden, all judgments are available on demand in pdf format. From the preparatory legislative works, we refer either to the bill (proposition, prop.) presented to parliament, or the official inquiry series (*Statens offentliga utredningar*, SOU). The year (for bills, parliamentary year) is followed by the page number.

10 It has gradually been established that this applies generally, to all treaties, not simply human rights treaties. See, e.g. Prop. 1999/2000:61 s. 71–73, *NJA* 1988 s. 572, *NJA* 1991 s. 188, *NJA* 1992 s. 532 and *NJA* 2005 s. 805.

11 Penalties (including criminal penalties) for violation of the sanctions are to be found in the section 8 of the International Sanctions Act, *SFS* 1996:95. The uncritical EU implementation of UN sanctions, which led to litigation lasting more than 12 years, and culminating in the *Kadi* case (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, CJEU 18 July 2013, nyr), was the subject of much academic and media criticism in Sweden.

12 See I. CAMERON, 'Swedish Parliamentary Participation in the Making and Implementation of Treaties', 74 *Nordic Journal of International Law* (2005) pp. 429–483.

under responsibility to the parliament. Thus there is relatively strong democratic control over treaties. There is, however, a continuing debate over the adequacy of the Swedish Parliament's insight into, and influence over, the Swedish government's input to the EU legislative process.[13]

The practice which has developed requiring conversion of treaties to national law is somewhat wider than simply treaties creating rights or, naturally, duties for individuals. As already mentioned, IG Chapter 8 sets out inter alia which rules should be in statute form. Treaties which require the enactment of rules governing the activities of local authorities, or which grant new powers to administrative authorities, especially this activity vis-à-vis individuals, should also be incorporated in statute form, unless there is a rule in an existing statute which provides for delegation or sub-delegation.

Although Sweden is generally dualist, there are a few examples of 'sector monism' where a statutory provision explicitly provides the courts with a 'channel' for incorporation of customary international law or treaties, e.g. the statute implementing the Vienna Convention on Diplomatic Relations and other treaties providing for immunities.[14] This statute also includes a 'priority' clause, providing that the law applies over possibly contrary provisions in other statutes. Another example of sector monism is Chapter 22, section 6 of the Criminal Code, which provides that it is a criminal offence to violate the Geneva Conventions or general principles of international humanitarian law – in other words, the content of the offence in both cases is defined by international law. This provision has been criticised as being contrary to the principle of legal security. It has been recently proposed that this latter provision be replaced with a new law, specifying in detail what these offences are.

The constitutional basis for the binding force of EU law in Sweden is IG 10:6, which permits Parliament to delegate normative power to the EU. This power of delegation is made subject to certain limits, namely respect for constitutional rights and the rights in the ECHR, and respect for fundamental aspects of Swedish constitutional law. If these limits are not respected by the EU legislature in a specific case, then the Swedish courts are competent to rule that Swedish constitutional law must be given preference over the EU norm in question. Thus, this rule is an expression of the 'Solange' principle, and at odds with the view of the Court of Justice of the EU (CJEU) on the matter which accepts no exceptions to the primacy of EU law.[15] This Swedish rule has, to date, never been successfully invoked before the Swedish courts. Bearing in mind the EU protection of the principle of subsidiarity, and the creation of a mechanism in the Lisbon treaty for national parliaments to signal to the EU legislature that they regard a matter

13 S. Ahlbäck Öberg and A.C. Jungar, 'The Influence of the Swedish and Finnish Parliaments Over Domestic EU-policies', 32 *Scandinavian Political Studies* (2009) pp. 358–381.

14 *SFS* 1976:661.

15 See, for a recent example, Case C-399/11, *Melloni*, CJEU 24 March 2013, nyr.

as being within national competence, the main function of the Swedish constitutional rule in practice is as a reminder to the EU legislature to respect human rights.

The situation regarding whether or not customary international law is automatically incorporated into Swedish law is unclear. IG 1:1 refers to the need for support 'in law' for the exercise of public power. As it is Parliament which passes 'laws' (IG 1:4), this provision would appear to rule out, or severely limit, the courts' ability to have recourse to customary international law. There are a nonetheless a few cases where the Swedish courts have taken account of developments in customary international law, indicating that custom *may* form part of the law of the land. The inherent uncertainty which surrounds the content of much customary international law supports a cautious and case by case approach by the Swedish courts, even if some Swedish international lawyers might complain. In any event, even if custom is part of the law of the land, it would not be applied if it was in conflict with the provisions of a statute or even an ordinance.

Claims that the Swedish government, the administration or parliament is not complying with an international obligation, can be brought before the courts assuming that the person bringing the claim can show some sort of personal interest in the matter (a cause of action) within the meaning of the Code of Judicial Procedure 13:2. However, there is an obstacle to claiming damages on the basis that a ratified, but unincorporated, treaty has not been properly implemented in Sweden.[16] Even if such an obstacle does not apply the courts are – with the exception of cases concerning the ECHR – invariably very sceptical to such a claim.

It should be stressed that, in Sweden, the first argument against letting a ratified but unincorporated treaty create rights for individuals is not so much democracy in the sense of parliamentary control over governmental treaty-making, because, as already mentioned, this is relatively strong, but constitutional notions of the domestic division of powers between parliament and government on the one hand and the courts on the other. The second argument relates to legal certainty (*rättssäkerhet*), an important concept in Swedish legal thinking. This involves not simply the foreseeability of particular norms but also, for want of a better term, 'system coherence'. This requirement of coherence is something which is particularly important in codified legal orders. It can, of course, be argued that legal certainty is not a good reason for denying a

16 Cf. Tort Liability Act 1972:207, 3:7, providing that a damages claim may not be brought against Parliament or the government for a decision taken by them (including the adoption of a norm) unless the decision in question has been annulled or changed (either voluntarily or after a successful legal challenge on other grounds). Attempts to claim damages on the basis that the government or Parliament has failed to implement a treaty provision have failed (see e.g. *NJA* 1978 s. 125).

right to an individual exercisable vis-à-vis the State, as opposed to another individual.

On the other hand, at the end of the day, rights cost money. Allowing unincorporated/untransformed treaties to create rights would still mean that the Swedish courts would have to decide which rights in a treaty were sufficiently clear, complete etc. to be self-executing. This would, in the Swedish legal tradition, be regarded as a usurpation of the role of Parliament.[17] Even if arguments could be found that the Swedish courts should take such a power, it is clear that this would lead to costs to society in the form of litigation, ineffective use of scarce judicial resources, and risks of conflicting findings in the administrative and ordinary courts.

Nowadays, the coherence of the Swedish dualist position is undermined a little by the wholesale incorporation of EU law, and the incorporation rather than transformation of the ECHR. As shown below, Swedish judges are now a little more familiar with using 'foreign' texts and 'foreign' case-law.

3. CONSTITUTIONAL REVIEW

There is no specialised constitutional court in Sweden. Instead, all the courts in Sweden have a power of constitutional review (IG 11:14) of legislation and ordinances. Sweden has thus been spared the conflicts which have characterised the relationships between certain constitutional courts and supreme courts.[18] Moreover, because the Swedish system is 'diffuse', there has been no difficulty to cope with the demands which EU law places on the ordinary courts to check national law for compatibility with EU law, including, after the Lisbon treaty, the EU Charter of Fundamental Rights.[19]

The Swedish system is in fact extremely diffuse: administrative authorities have the power of constitutional and EU review as well (IG 12:10). Having said this, it is usually only the highest courts – the Supreme Court and the Supreme Administrative Courts – where this power is exercised, and then only rarely. The Supreme Administrative Court has been somewhat more active than the Supreme Court in this area and, in a dozen or so cases, found that delegated

17 There has been a long discussion as to whether the whole UN Convention on the Rights of the Child should be incorporated into Swedish law. As regards asylum issues, the 'best interests of the child' rule has been incorporated, but the rest of the treaty has not, and the courts – rightly or wrongly – do not take very seriously arguments based on it. A commission of inquiry is examining the question at the present time.

18 L. Garlicki, 'Constitutional courts versus supreme courts', 5 *International Journal of Constitutional Law* (2007) pp. 44–68.

19 For a discussion of the French reaction see A. Dyevre, 'The Melki way: The Melki case and everything you always wanted to know about French judicial politics (but were afraid to ask)', in M. Claes, M. de Visser, P. Popelier, C. Van de Heyning, eds., *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Antwerp, Intersentia 2012).

powers of legislation had been used wrongly or otherwise transgressed the statutory limits of delegation. None of these cases was particularly politically controversial. The Supreme Court has only once explicitly found a law to be contrary to the constitution and that was on a rather technical issue of retroactive effects of tax law, although as noted further below, it has also very occasionally found that a *provision* in a law cannot be applied; a so-called 'partial' norm conflict.[20]

The effect of the power of constitutional review is *in casu* – the offending provision is not applied in the concrete case. It does not in itself lead to the offending statute or ordinance being a nullity. Until the constitutional reform of 2010, the power of constitutional review was circumscribed. The courts had to disregard a *statute or government ordinance* only if it was 'manifestly' in breach of the constitution. For administrative regulations issued by administrative agencies or local authorities there was no such limit to the courts' constitutional review. This limit to constitutional review of statutes and ordinances was abolished from 1 January 2011. This reform could be made only after the dominant political party in Sweden, the Social Democratic Party (SDP), had changed its traditionally sceptical attitude towards constitutional review. The SDP lost political power in 2006, and this change of heart fits in with the theory that constitutional review is easier to accept for a political party which knows it runs the risk of losing governmental power (a form of 'insurance' policy for politicians).[21] There are, however, other explanations for a – possible – growth in constitutional review (see further below, section 6).

Instead of the 'manifest' breach, the current wording is simply a reminder *both* of the democratic legitimacy of Parliament and the principle that laws may not be in conflict with the constitution. In the only case so far concerning a constitutional review of a law decided after the reform in 2010, the Administrative Court of Appeal in Stockholm found that a provision on mandatory sterilisation when a person undergoes a sex change was unconstitutional.[22] In support of its conclusion, it referred inter alia to two official inquiries, one public inquiry and a departmental inquiry, both of which had come to the conclusion that the provision in question should be abolished. It can be expected that the cautious attitude of Swedish courts in this area will change only slowly, if at all. Having said this, Parliament has, when it adopted the latest constitutional change, approved the passage in the bill encouraging the courts to be (a little) more

---

20 For a detailed treatment, see K. Åhman, *Normprövning: Domstols kontroll av svensk lags förenlighet med regeringsformen och europarätten 2000–2010* [Constitutional Control: The courts' control of constitutionality and compatibility with EU law 2000–2010] (Stockholm, Norstedts 2011).

21 See, e.g., T. Ginsburg, 'Economic Analysis and the Design of Constitutional Courts', 3 *Theoretical Inquiries in Law* (2002) pp. 20–50.

22 See Administrative Court of Appeal in Stockholm, decision in case 1968–12, 19 December 2012.

activist as regards applying the constitution.[23] And even before this, there was undoubtedly a trend during the 2000s for the Swedish courts to refer more frequently to the IG and the ECHR than before.[24] These cases are, however mostly not about constitutional review as such but more about the interpretation of Swedish laws in the light of the IG or ECHR.

The main mechanism in Sweden for avoiding legislative clashes with constitutional rights, and for ensuring that legislation is well thought-out, coherent, and (hopefully) effective is – and will continue to be – the legislative process itself. It is a long-standing tradition to have any issue of upcoming legislation examined by a commission of inquiry. The constitutional basis for this is the requirement in IG 7:2 that all governmental business should be well prepared before the government takes any decision. A general directive to all commissions is to report on the constitutional (and financial) implications of their proposal. Every year about 100 such reports are published in the series *Statens offentliga utredningar* (hereafter SOU), some of which attract a lot of media coverage. An alternative to the commission is a departmental inquiry, usually used for more technical issues of law reform. The report is then – once again in accordance with IG 7:2 – sent for comments (*remiss*) to a wide range of institutions and organisations. This includes governmental agencies, courts, and universities, but will also include unions and NGOs. Strong and unified criticism from influential institutions and organisations can lead to changes being made in the bill, or even, though more rarely, that a proposal is quietly dropped. If the proposal is not dropped, the relevant ministry prepares a draft bill which is sent to the Law Council (*lagrådet*).[25]

The Law Council normally consists of six people, of whom four should be acting judges of the Supreme Courts.[26] The remaining two can be retired judges from the same courts. The courts choose who to send to the Law Council, not the Government, and this is usually done so that each judge will take his or her 'turn' of serving one year on the Council. The Law Council normally works in two sections with three members in each. In accordance with IG 8:19, the Law Council's scrutiny of draft bills is focused on five specific issues: the effect on the Constitution, the coherence of the proposal with the existing system of legal regulation, the likely impact on the principle of legal certainty, if the law is

23 Bill 2009/10:80 s. 147.

24 See, e.g., *NJA* 2012 s. 400 (Manga-style comics), *NJA* 2007 s. 1037 (agents provocateurs) and *NJA* 2005 s. 805 (incitement to hatred) as well as *RÅ* 2009 ref 94 (double punishment), HFD 2012 ref 70 (access to nature) and HFD 2013 ref 42 (personal freedom). See further *infra*, sections 4 and 5.

25 For more detail, see T. Bull and I. Cameron, 'Legislative review for human rights compatibility: A view from Sweden', in M. Hunt, H.J. Hooper and P.W. Yowell, eds., *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford, Hart 2014).

26 It can be mentioned that the supreme courts of course do not let members that have commented upon draft legislation as members of the Law Council later on take part in a judgment on the constitutionality of that same law.

constructed in a way that will make it possible to achieve its underlying objectives and, finally, to detect issues that may become problematic in practice.

From this list, it is clear that the Law Council can be said to fulfil two different tasks: The first is quite technical, concerning the logic of law and its effects; ensuring that terms and concepts are consistent with existing law, proposing new wording of individual provisions if they are imprecise or unintelligible, etc. The second task is quite different: the Law Council should check any upcoming legislation against constitutional law and the principle of legal certainty. This involves the constitutional rules on the delegation of legislative powers to the Government and local authorities, the protection of constitutional rights and the general principle that legislation should be introduced in a foreseeable way. This kind of scrutiny – especially when the principle of proportionality is taken into account – comes much closer to the sensitive boundary between law and politics. Here we can talk about the Law Council as a form of judicial preview.[27]

In practice, the scrutiny by the Law Council consists of a civil servant of the government making a presentation on the draft bill before the council, after which the council will make a written statement on the issues mentioned above. In most cases this statement will be very short, but in cases of complicated legislation and/or controversial constitutional or other issues (EU law), the statement can be very extensive and quite detailed.

The Government is never bound by the opinion of the Law Council. Moreover, although the Law Council should be heard, if for some reason it has not,[28] then this in itself is no reason for not enacting the law. The Law Council is thus only an advisory body, and its opinions have no formal legal effect. However, that is not to say that the statements of the Law Council have no or little effect. If the Council would find a draft bill unconstitutional in some respect there is sure to be media coverage of this, as the statements are public. The government will get a lot of bad publicity if it tries to push through legislation criticised by the Law Council, if it does not at least make some changes to accommodate the council. And furthermore, if a court later on has to try a case in which the Law Council had expressed serious doubts about the legislation's constitutionality (or compatibility with EU law or ECHR), the fact that three of the most senior judges in the land have had such views can influence the court in its decision on constitutional review according to IG 11:14. So there is a tangible connection between the pre-view of the Law Council and the constitutional review of the courts.

---

27 See T. Bull, 'Judges without a court: judicial preview in Sweden', in T. Campbell et al., eds, *The legal protection of Human rights; Sceptical essays* (Oxford, OUP 2011).

28 IG 8:19 provides that there is no need to send a draft bill to the Law Council if the change in the law in question is of minor importance (i.e. it is a minor technical issue) or if submitting the draft bill would delay the legislation such that major negative consequences would follow. The latter exception is occasionally invoked regarding taxation legislation.

Assuming the relatively high quality of pre-legislative scrutiny continues to apply, we think that it is unlikely that the recent removal of the limits in IG 11:14 will in itself lead to more constitutional review. The removal of this limit in theory also makes it easier for the courts to engage in review of statutes and ordinances on the basis of the ECHR. But for the same reasons, this is also unlikely to increase significantly. And, as we will come back to below, Swedish courts have adopted another mechanism for self-restraint as regards review based on the ECHR.

4. IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY SWEDISH COURTS

Sweden was relatively late in incorporating the Convention into national law. The two main reasons for incorporation were that the other Nordic states had done so, or were about to do so, and that, with EU membership, an inconsistency would arise in how Swedish administrative agencies, and the Swedish courts, treated the Convention. They would be obliged to apply it as part of the general principles of EC law, when acting within the scope of EC law, but – without incorporation – would not be obliged to take account of it in areas falling outside the scope of EC law.

Sweden chose to incorporate the whole Convention, and its Protocols, rather than simply the substantive rights and the general limitation provisions.[29] There is little explanation for this in the *travaux préparatoires*. The main reason appeared to have been that the other Nordic states had incorporated the whole treaty or were planning to do so.[30] The wholesale incorporation showed how little thought had been given to the issues of 'effective remedies' and 'just satisfaction' at the national level.

The constitutional *lex superior* rule in IG 2:19 (originally IG 2:23, before the sections were renumbered in 2010) was the subject of protracted discussions between the political parties. It was intended that the rule was to be used sparingly, as a last resort. Parliament made clear in the *travaux préparatoires* that the primary responsibility for ensuring that Sweden complied with the Convention rested with it. The courts were encouraged instead to solve the problem of possible conflicts with other Swedish norms by the application of certain principles of interpretation. These were named as *lex specialis*, *lex*

29 Sweden has ratified all the protocols to the Convention providing for additional substantive rights, with the exception of Protocol No. 12. The reason for this is that a legally enforceable *open-ended* right of non-discrimination would greatly increase the number of decisions by local authorities and administrative authorities which could be attacked in the courts.

30 *SOU* 1993:40 s. 126.

posterior, the principle of 'treaty conform' (or harmonious) construction and a rather novel variant of it proposed by the Supreme Court when commenting on the legislative proposal, namely the principle that 'human rights treaties should be given special significance in the event of a conflict with other norms'.[31]

The possible problems which can arise when there are different rights catalogues, overlapping with one another, were played down in the *travaux préparatoires*. These stated simply that the highest common denominator of protection for the individual should apply.[32] But while this is obviously the correct general approach, the issue is complicated by the fact that rights often involve balancing individuals' interests against each other, not simply against State interests, e.g. the interest in freedom of expression and the interest in not being defamed. As the practice of above all the CJEU has shown, different rights catalogues can prioritise amongst interests in different ways, either by formulating the rights differently, or through case-law.[33]

As already noted, the constitutional rule IG 2:19 gives the ECHR quasi-constitutional status, but if the Constitution requires another result than that arguably required by the ECHR, the Constitution is to be preferred. So far, there has been only one case where this issue has arisen squarely.[34] It concerned a clash between two rights: the Convention right to personal integrity and the constitutional right of freedom of information (the exhaustive listing of grounds in the Freedom of the Press Act for keeping personal data confidential). The Supreme Administrative Court found it impossible to reconcile these two rights, and so preferred the latter. This is not to say that the ECtHR would come to a different conclusion: it may weigh the competing rights in the same way.

Constitutionally speaking, giving primacy to the Constitution is correct and in line with the idea that it is the legislature which is mainly responsible for ensuring that Sweden complies with the ECHR. If the above case had gone further to the ECtHR, and it had found that the application of the constitutional provision violated the ECHR, the Swedish Parliament would either amend the Constitution (if the conflict was unavoidable, as the Supreme Administrative Court found in the case) or provide some sort of balancing test to avoid future conflicts in similar cases.

The question of whether the ECHR requires constitutional amendment to be made arose following *Holm* v. *Sweden*,[35] when the composition of the jury (jury

31 The difficulties involved in solving problems by the use of these principles quickly became apparent, see I. CAMERON, *An Introduction to the European Convention on Human Rights*, 6th edn. (Uppsala, Iustus 2010) pp. 186–191.

32 Prop. 1993/94:117 s. 37.

33 For a discussion of this problem, see I. CAMERON, 'Competing Rights?' in S. DE VRIES, U. BERNITZ and S. WEATHERILL, eds., *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford, Hart 2013).

34 *RÅ* 2008 ref 87.

35 23 November 1993, A/279-A.

trial only applying to freedom of the press cases in Sweden) was found to violate the fair trial requirement of Article 6. However, on later analysis, the conflict could be resolved by bringing the ECtHR judgment to the courts' attention, and encouraging the courts to apply the rules on excluding jurors for lack of independence.

There is an ongoing discussion (see further sections 5 and 6) whether the case-law on positive obligations requires Sweden to legislate to provide for remedies for individuals whose personal integrity has been infringed by other individuals or companies, using print media or the internet. At the present time, if the paper or website has an official permission to publish, it can only be prosecuted for a limited number of offences (including defamation) in a special procedure.

The main means of ensuring compliance with the ECHR is treaty-conform construction.[36] This issue, and the issues of deferential review, the margin of appreciation, and indirect ECHR review using the vehicle of EU law are intimately linked to the issue of the impact of the ECHR on judicial decision making, and are accordingly treated together in the next section.

5. THE IMPACT OF THE JUDGMENTS OF THE ECtHR ON NATIONAL JUDICIAL DECISION MAKING

5.1. THE ECHR AND JUDICIAL INTERPRETATIVE TECHNIQUES

In cases where the ECHR is of importance for the outcome, Swedish courts routinely make reference to major cases from the ECtHR and national standard literature on the Convention.[37] The highest courts have a particular role in interpreting new case-law from ECtHR and evaluating its impact on Swedish legislation and legal practice. Controversial issues on Swedish laws' compatibility with the Convention almost invariably end up in one of the supreme courts and their decision will (of course) be guiding the courts below. Criminal procedure, tax-law issues and issues on children's welfare (custody, maltreatment) are examples of areas of law that often involve the Convention and in particular the

36 See R. Lavin, 'Högsta förvaltningsdomstolen och Europakonvention' [The Supreme Administrative Court and the ECHR], *Förvaltningsrättslig tidskrift* (2012) pp. 339–355; Åhman, *supra* n. 20, p. 209; I. Cameron, 'The Influence of European Human Rights Law on National Law', in E. Hollo, ed., *National Law and Europeisation* (Helsinki, Suomalainen Lakimiesyhdistys 2009).

37 It should be stressed that in everyday legal practice before the courts, constitutional and ECHR issue are relatively unusual: most ordinary cases can be solved without any considerations of fundamental rights.

application of the principle of proportionality. In other areas of law the ECHR is less often of practical importance to the courts, such as social welfare, building-permits and contractual disputes.

In cases where Sweden has been a party before the ECtHR, the Swedish courts of course pay particular attention to the judgment of the Strasbourg court. This does not mean that cases concerning other countries are ignored or considered uninteresting. It only reflects the practical effect that a case concerning Sweden puts a much clearer spotlight on a domestic issue that could have been controversial or uncertain until the decision of the ECtHR. Guidance from the ECtHR in cases involving Sweden is always followed by national courts by, if necessary, changing traditional legal interpretations of national law and/or making other assessments of the proportionality of national measures.[38] Cases concerning other states, with the exception of cases concerning the very similar judicial systems of the other Nordic countries, are usually more difficult to assess and 'convert' to the Swedish context for the national courts, so judges tend to be cautious when they confront claims that a law or practice is contrary to the Convention. In legal practice, the 'ECHR objection' involves an uncomfortable feeling of uncertainty for the national judge. The process of interpretation of judge-made law is rather different from that of most statutory law, where, at least in Sweden, the *travaux préparatoires* are easily the most important interpretative source. The ECtHR collected case-law (the ECtHR '*acquis*') consists of thousands of cases, from which can be distilled a large number of principles. The judge must try to realise these principles by concretising them in the particular case. The starting point at the abstract level is simple enough, but where do you go from there? Furthermore, the ECHR *acquis*, unlike the EU *acquis* with direct effect, does not displace the national law. Rather the national law is to be applied in the light of the *acquis*, through the lens of the acquis, by means of the principle of treaty-conform construction or harmonious interpretation. This principle is a form of purposive (or teleological) construction. One then has not simply to *identify* the scope of the law, but actively to *develop* it, something which goes to the constitutional role of the judge.

The historical/subjective approach (relying on the *travaux préparatoires* to legislation) and the objective wording approaches to interpretation are clearly dominant in Swedish case-law. This is another reason for the caution shown as regards the teleological/evolutive approach. However, it is at the same time clear that the supreme courts have at times been more adventurous and applied national law in the light of the ECHR, as shown by the Supreme Courts' decision in *NJA* 2005 s. 805 and the Labour Courts' decision in *AD* 74/2012.[39] In general

38 See e.g. *RÅ* 1997 ref 6, *NJA* 2002 s. 288 and *NJA* 2005 s. 462.

39 For *NJA* 2005 s. 805, see *infra*, section 5.2. In *AD* 74/2012, the Labour Court held that the Convention hindered the court from enforcing damages against an employer for being in breach of a collective agreement as that agreement was in part contrary to the Convention.

national courts will as far as possible try to apply the same line of reasoning as the ECtHR would do if a question concerning the ECHR does arise and cannot be avoided by a purely 'national' solution that is considered to be adequate also from the perspective of the Convention. This is particularly obvious in cases concerning the application of the principle of proportionality, in which the courts have paid close attention to the structure and content of the reasoning of both European courts.[40]

5.2. THE PRACTICAL IMPACT OF ECtHR CASE-LAW, PARTICULARLY AS REGARDS CONSTITUTIONAL REVIEW

When it comes to the issue of the attitude of the Swedish courts towards the case-law of the ECtHR and the practical impact they are ready to give those judgments, the picture is not simple to paint. In all likelihood there is no single approach to the many different and sometimes very complex issues that the impact of the ECHR raises when translated into the domestic legal system in connection with rulings in concrete cases before a national court. To further complicate matters, trying to describe how national courts handle cases from the ECtHR is to a certain extent trying to paint a picture of a moving target, as there is continuous (and not always linear) development. So a diverse and somewhat incoherent picture is to be expected.

Firstly, it can be noted that in certain areas such as criminal procedure and access to court – i.e. rights connected with Articles 6 or 13 ECHR – the Swedish courts (and especially the Supreme Court) have been willing to not only follow but also expand the substance of the Convention as interpreted by the ECtHR.[41] The great majority of cases concerning the ECHR before the Swedish courts have raised issues under Article 6. This is not surprising. Article 6 is, relatively speaking, detailed and so more easily made 'operative' as compared to, e.g. Article 8. It deals with procedural issues with which the courts are very familiar and, until 1 January 2011, there was no equivalent constitutional right to a fair trial. In other areas, such as the rights connected to Articles 8, 9 and Article 1 Protocol No. 1, the courts have been less willing to give the Convention an extensive (or even modest) effect if that would be in conflict with the established practice and interpretations of Swedish law, as can be shown by reference to both national case-law and the ECtHR. Examples

40 See *RÅ* 1999 ref 76 and *NJA* 2006 s. 467 (especially the reasoning of the dissenting judge, Victor, which became part of the majority decision in *NJA* 2007 s. 805).

41 See for example *NJA* 2009 s. 463 (a remedy in damages for breach of the ECHR was also available against local authorities, not just the State).

include issues such as secret security files, home-schooling and enforced sale of property.[42]

There are two cases of which we are aware where the Swedish courts can either be seen to have followed a 'reductionist' interpretation of a statute on the basis that this was required by the ECtHR case-law, or can even be seen to have refused to apply the statute in question (i.e. having engaged in constitutional review). The dividing line between the two is very thin. One case concerned a person who objected to paying the obligatory church tax. The circumstances were almost identical to *Darby* v. *Sweden*,[43] where the ECtHR had recently ruled that there was a violation of Article 9. The Supreme Administrative Court applied the *Darby* case, and excused the person in question from paying the church tax.[44] In the *Pastor Green* case, an evangelical preacher had, in the course of a sermon, gravely insulted homosexuals. He was prosecuted for incitement to hatred. The courts took the position that the restriction in the right of freedom of expression in question was, in the concrete circumstances of the case, in compliance with the constitution. Parliament had added the ground of 'sexual preference' to the offence only a few years before, and the Law Council had not considered that there were any constitutional problems with this. However, they found that the restriction was not in accordance with the ECHR as interpreted by the ECtHR. The courts accordingly refused to apply the criminal statute and so the pastor was not convicted.[45]

Secondly, and more importantly, Swedish courts take different approaches depending on whether an issue of ECHR can be solved by interpretation of the national law or by assessing administrative practice in the light of the ECHR or – on the other hand – whether their only choice is to find national law in breach or in conformity with the Convention. In the former type of situation, courts have no difficulty in giving the ECHR and the case-law of the ECtHR considerable impact on their decisions. They are even prepared to go beyond what is a minimalistic interpretation of the convention, and not only in areas covered by Articles 6 and 13.[46] In the latter type of situation however, someone is arguing that Swedish law cannot be interpreted in conformity with the ECHR, but instead that it is in violation of the ECHR, as interpreted by the ECtHR, with the consequence that the law cannot be applied. Here, the courts have designed a 'test' of clear support (*klart stöd*) in ECtHR case-law in order to find that the

42 See for example *NJA* 2001 s. 339 (Article 1 Protocol No. 1 ECHR); *Segerstedt-Wiberg* v. *Sweden*, ECtHR 6 June 2006, appl. no. 62332/00 (Article 8 ECHR); *R.C* v. *Sweden*, ECtHR 7 March 2010, appl. no. 41727/07 (Article 3 ECHR, discussed further *infra*); HFD 6107–12, 1 July 2013, nyr (Article 9); *Rousk* v. *Sweden*, ECtHR 25 July 2013, appl. no. 27183/04 (Article 1 Protocol No. 1 ECHR).

43 23 October 1990, A/187.

44 *RÅ* 1997 ref. 68.

45 *NJA* 2005 s. 805. See further *supra*, n. 55.

46 See *NJA* 2005 s. 805 and *RÅ* 2006 ref 65.

ECHR demands a ruling contrary to Swedish law. The most prominent example of this would be the first response of the Supreme Court and the Supreme Administrative Court to the issue of double punishment for tax law violations (*ne bis in idem*).[47] This evidential threshold has an effect *either* analogous to giving the Swedish government or Parliament a margin of appreciation *or* of a form of 'deferential' scrutiny. It can be noted here that the Norwegian courts had earlier developed a very similar approach to ECtHR case-law, on the basis that it was not for the Norwegian courts actively to develop the Strasbourg case-law. Interestingly, by 2008, the Norwegian Supreme Court had definitely abandoned this self-imposed limitation.[48]

However, during late 2012 and 2013 the courts – and particularly the Supreme Court – appear to have re-evaluated their earlier case-law. The first indication of this is a judgment from the Supreme Court concerning damages.[49] Here, the Supreme Court goes into considerable detail as to how to provide a remedy for trials in criminal cases which have been unduly prolonged, in particular, when damages should be available in addition to providing for the primary remedy when there is a conviction – reduction of sentence – and how to go about calculating damages in these cases, and in cases where there is no conviction. The 'clear support' test is mentioned, but only in passing. The detailed guidance given by the Supreme Court goes beyond the Strasbourg case-law. Whether or not this case signals a new approach is difficult to say, because what should be remembered is that there is now a constitutional right to fair trial within a reasonable time. This judgment can be seen as an example of harmonising this new constitutional right with the Strasbourg case-law.

The second development involves us going into some detail regarding the parallel Swedish systems of administrative penalties in tax law and criminal penalties (imprisonment etc.) for tax offences. Sweden introduced a system of administrative penalties in tax law partly in order to de-criminalise the area and partly for reasons of administrative convenience. These are used when a person has filed an inaccurate tax return which would result in him paying less tax than he should. Where the tax authority determines that this has occurred, an administrative penalty is imposed, calculated on the basis of the assets which had not been correctly declared. The imposition of, and level of, the penalty can be appealed against to the administrative courts. Such penalties are relatively common. If the tax authority considers, perhaps after some time, having looked at further documentation, that the tax subject has wilfully misled the tax authority, then it may hand over the case to a criminal prosecutor. If the prosecutor brings a case and the person is convicted in the ordinary courts for a

47 *RÅ* 2009 ref 94 and *NJA* 2010 s. 168.

48 M. Andenas and E. Bjorge, 'National Implementation of ECHR Rights', in A. Føllesdal, B. Peters and G. Ulfstein, eds., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge, CUP 2013) p. 181 at pp. 197–202.

49 *NJA* 2012 s. 211 and *NJA* s. 1038.

tax offence, the earlier tax penalty is deducted from the criminal sanction imposed. There are about 400 such convictions per year. These parallel systems are time-consuming, and can mean the tax subject being in a state of uncertainty for several years. From the perspective of the State, they have certain advantages: the criminal justice system is not deluged in cases, tax can be gathered in more speedily, the burden of proof is less in the administrative proceedings, and it allows the experts (the tax inspectors and the criminal prosecutors on the one hand, the administrative and ordinary courts on the other) to stay within their respective areas of expertise.

The ECtHR had previously found the Swedish parallel systems of criminal and administrative penalties to be compatible with the ECHR. The older case-law indicates that it might be permissible to make an exception to the principle of *ne bis in idem* and impose two penalties where this is foreseeable and there is a sufficiently strong link in time and subject matter between the two penalties imposed.[50] But the Grand Chamber judgment in *Zolotukhin* v. *Russia*[51] clearly changed the earlier ECtHR case-law on *ne bis in idem*. After *Zolotukhin* (but before the Swedish legislature had a chance to investigate the issue) the question came up (in different cases) before both the Swedish Supreme Administrative Court and the Supreme Court.[52] The Supreme Administrative Court found, in a summarily reasoned judgment, that the Swedish system was not in violation of the ECHR on the ground that there was no 'clear support' for the view that ECtHR had changed its opinion of the Swedish system. A majority of three judges in the Supreme Court also found (albeit with some misgivings) that there was no 'clear support' on the basis of ECtHR case-law that the Swedish system was in violation of the ECHR. One of these judges conceded that there was probably a problem with Convention compatibility, but if so, it was for parliament to legislate to deal with it. A minority of two judges held that *Zolotukhin* was to be regarded as clear support and therefore reached the conclusion that the parallel systems of sanctions were incompatible with the Convention.

These cases show that, where the courts are faced with making a judgment with wide-ranging political and economic implications – involving an important part of the tax system – they prefer to leave the issue to the legislature unless more or less forced to do otherwise. This is, of course, partly for reasons of democratic legitimacy, but probably more for reasons of institutional competence. They also showed that the judges were in agreement that a test of clear support was to be used in such instances (but not on how to evaluate what can be such support). One remaining uncertainty was whether the courts interpreted the demand for clear support as meaning that a case *against Sweden*

50 *Nilsson* v. *Sweden*, ECtHR 13 December 2005, appl. no. 73661/01.

51 ECtHR 10 February 2009, appl. no. 14939/03.

52 *RÅ* 2009 ref. 96, *NJA* 2010 s. 168 I–II.

was necessary in order to reach the conclusion that Swedish law (as such, not only its application) was in breach of ECHR.

There was academic criticism of the thinness of the reasoning of the majority. This in itself is not very unusual. The government did not ask a commission of inquiry to investigate the need for legislation, even though there was already such a commission of inquiry investigating tax law (though not this particular issue).[53] The government inactivity (which has cost it dear) is hard to understand. It can probably be explained by the split competences in the present system. Another factor is that tax law lies largely within the sphere of influence of the powerful Ministry of Finance, which knows little about the ECHR.

But what was most unusual was the reaction of the lower courts. Some of these refused to follow the Supreme Courts' decisions, finding them unpersuasive and in conflict with the recent case-law from ECtHR. Moreover, a district court situated close to the Finnish-Swedish border asked the CJEU for a preliminary ruling on the Swedish system's compatibility with the EU Charter, which also contains a *ne bis in idem* protection (Article 50). One of the questions the district court asked was whether it was permissible to apply a 'clear support' threshold when it came to applying the Charter.

The CJEU held that it was for the national court to determine whether successive penalties violated the ne bis in idem rule, but that the 'criminal penalty' criteria devised by the ECtHR were to apply.[54] Thus, in this part of its ruling, the CJEU simply confirmed the ECtHR test. It ruled that a national court may not apply a 'clear support' test under which it was conditional upon the infringement being clear from the text of the Charter or the case-law relating to it, since this would withhold from the national court the power to assess fully whether that provision is compatible with the Charter.

This judgment led to the Supreme Court, in plenary composition, taking up the issue again.[55] It held that due to new circumstances since its ruling in 2010, there was now clear support for the conclusion that Swedish law was incompatible with the ECHR as regards the dual sanctions of criminal and tax law.

One interpretation of the Supreme Court's judgment would be that it has taken the stance that the clear support-test does not need a case against Sweden, but rather just a more convincing argument for the incompatibility than was present in 2010. This would be beneficial, because, as mentioned, the lower Swedish courts are sometimes overly cautious in using the Convention to overturn legislation (outside of the established area of Article 6) and this doctrine provides a further excuse for the lower courts not to bother overly much about the ECHR. Furthermore, if national courts fail to look at the substance of

53 This Commission of Inquiry concluded, after two years, that some sort of new legislation was probably necessary and that a new commission of inquiry should investigate this. The new commission reported very recently (September 2013), *SOU* 2013:62.

54 Case C-617/10, *Åkerberg-Fransson*, CJEU 26 February 2013, nyr.

55 *NJA* 2013 s. 502.

an issue, by invoking something like the margin of appreciation, it will be very difficult for the government in subsequent proceedings which might be brought in Strasbourg to argue non-exhaustion of domestic remedies, or otherwise convince the Court that an issue has been properly aired at the national level before it went to Strasbourg. Serious reflection on issues raised by the application of the ECHR can be helpful in showing that the national legal system is aware of these issues and not trying to avoid them.[56]

As a concluding remark on the impact of this case on the 'clear support' test, it can be said that objectively speaking, the support has not got any clearer between 2010 and 2013. What has become clear was that the CJEU – a court which is much more difficult to ignore than the ECtHR – takes the same approach to what is a criminal penalty as does the ECtHR. One can possibly argue that what has changed (in 2011) was the removal of the 'manifest' breach requirement in IG 11:14. One interpretation of the judgment is that this has encouraged the Supreme Court to *lower* the threshold of what is 'clear support'. On the other hand, this might be reading too much into the judgment. A simpler explanation is that the Supreme Court simply did not want to say that it had got the issue wrong in 2010.

If the clear support is retained unchanged, then further problems can be expected in the future. Constitutionally speaking, there is a paradox. As already mentioned, the duty to comply with the ECHR is a part of the IG (2:19). Thus, the retention of the clear support test means that there would be a difference between the threshold of constitutional review according to IG 11:14 and the threshold of review of the compatibility between Swedish law and the ECHR. Moreover, it is difficult to have two different tests in European law, one applying to review against the ECHR, and one to review against the EU Charter of Rights.

5.3. RESPONSES TO BREACHES OF THE ECHR

Under Swedish law, there are more or less three different possible responses from the courts to a breach of the convention: reinterpretation of national law on appeal, reopening of cases and awarding damages. As mentioned above, paying damages are now a regular part of the remedies available to individuals and can be relatively easily obtained through a special procedure before the Chancellor of Justice (more on this below).[57]

---

56 For such a successful national defense of criminal law see one of the 'follow-up' cases to *Pastor Green*, also involving incitement to hatred, but this time resulting in a conviction, because the religious element was absent: *Vejdeland and Others* v. *Sweden*, ECtHR 9 February 2012, appl. no. 1813/07.

57 For a brief summary of the Swedish system, see *Eriksson* v. *Sweden*, ECtHR 12 April 2012, appl. no. 60437/08.

Generally speaking an administrative agency in Sweden has a duty to reconsider a decision it has made should new facts come to light, or where circumstances otherwise call for this, and this can be done quickly and simply and without any disadvantage to an individual. This is particularly so in cases in which the individual concerned appeals the decision, as the administrative law makes it compulsory to make a renewed assessment of the decision before handing it over to the appropriate court.[58] A court might of course make another interpretation of the demands of the Convention than the administrative agency and on appeal from the (administrative) district court a higher court might also take another view. The ordinary system of appeal thus provides a basic tool for responding to breaches of the Convention. It should be mentioned that interim injunctions (*inhibition*) might conceivably be required in some cases, other than deportation cases, where there is a specific provision on the matter. Anyhow, changing the interpretation of national law in similar cases coming up after decisions of ECtHR has been known to occur, for example in the context of determining whether certain national institutions could be classified as a 'court' or not for the purposes of Article 6 of the ECHR.[59]

The reopening issue has only recently arisen squarely in Sweden, following the Supreme Court's new lines of case-law on double punishment (see above, section 5.2).[60] As far as administrative courts are concerned, where an administrative judgment is *res judicata* (*'vunnit rättskraft'*), reopening it is possible under section 37b of the Administrative Procedure Act where, 'because of particular circumstances, there are special reasons for doing so'. Reopening in civil and criminal cases is somewhat more awkward. For a court to miss, or even ignore, case-law from a 'higher' court is not normally considered to be a 'fundamental error of law' so as to justify reopening according to the Code of Judicial Procedure.[61] The case-law on reopening civil and criminal cases is, bluntly put, very restrictive.[62] On the other hand, there is no obvious hindrance to consider disregarding clear case-law from the ECtHR to be sufficiently serious to qualify for reopening as manifestly incorrect application of the law (Code of Judicial Procedure 58:1, para. 4, *'uppenbart felaktig rättstillämpning'*). That is also the view of the Supreme Court in its decision on reopening of Swedish

58 Administration Act, 1986:223, section 27.

59 *NJA* 2002 s. 288. For a similar issue in the context of EU law, see Case C-407/98, *Abrahamsson* [2000] *ECR* I-5539.

60 Reopening is not a remedy which needs to be exhausted before taking a case to Strasbourg but if it is applied for, and granted, in a particular case, then this will solve the issue at the national level and will usually mean that the person will no longer be a 'victim' of a Convention violation. Under Swedish law reopening is categorised as an extraordinary remedy.

61 See HD Ö 698-00, decision 12 October 2001 and I. Cameron, 'A Survey of ECHR Case law and the question of remedies', in I. Cameron and A. Simoni, eds., *Dealing with Integration, vol. 2* (Uppsala, Iustus 1998) pp. 53–64.

62 See *NJA* 1981 s. 350 and *NJA* 2011 N 26.

criminal cases following its decision on ne bis in idem.[63] The Supreme Court, however, based its decision not only on national procedural law, but also made particular reference to Article 13 of the Convention in order to interpret the Code of Judicial Procedure in a novel way.[64] It constitutes an implicit recognition of the approach which the ECtHR has recently made explicit in its case-law: that there is an obligation on the national courts under Article 1 of the ECHR to take account not simply of the case-law concerning their own State, but even that of other states.[65] One might suspect that one motive behind this bold – and not uncontroversial – step has been to keep Sweden from appearing before the Strasbourg Court in a long number of rather uninteresting cases, saving both national prestige and the strained resources of ECtHR.[66]

As already mentioned, in criminal cases, violations of the reasonable time requirements of Article 6 can often be taken into account at the sentencing stage where a person is convicted, or compensated for by damages where the person is acquitted.[67] The Tort Liability Act (1972:207) provides for only very limited possibilities of obtaining damages for pure economic losses from the State, let alone non-pecuniary damages (*ideellt skadestånd*), but the Supreme Court has now indicated that courts should in national proceedings for damages for alleged Convention breaches award damages even for non-pecuniary losses (and not limited to cases where people have earlier brought proceedings before the ECtHR). The ECtHR case-law indicates that damages, including non-pecuniary damages, should be available at the national level for *certain types* of Convention violation (primarily violations of Articles 2, 3, 5 and 6).[68] However, with the exception of cases concerning trial within a reasonable time, determining *how much* compensation should be payable, and for exactly *what*, is no easy business. Causality is a large and complicated area of the law of damages, but the idea of obtaining damages for breaches of human rights is relatively new in Sweden and so there are many unanswered questions.

63 See *NJA* 2013 s. 746.

64 As late as in January 2013, the same court found that a change in case-law from the CJEU was not reason enough to reopen cases decided in national court according to older case-law, see case Ö 4578–11, decision of 31 January 2013.

65 See, e.g., *Opuz* v. *Turkey*, ECtHR 9 June 2009, appl. no. 33401/02.

66 This decision specifically, and the new approach it represents in general, has important implications for the administrative courts. In accordance with IG 11:1, the Supreme Court and the Supreme Administrative Court have the possibility (since 1 January 2011) to appoint *ad hoc*, judges from the other court, when a 'cross-cutting' issue arises for decision. However, implementing legislation has not yet been passed.

67 See *RH* 2000:96, *RH* 2000:98 (*Rättsfall från hovrätterna* (RH): cases from the Court of Appeal). The Criminal Code already allows for adjustment of sentencing, BrB 29:5, 30:4.

68 See I. Cameron, 'Skadestånd och Europakonventionen för de mänskliga rättigheterna', *SvJT* (2006) pp. 553–588 and, in detail, H. Andersson, *Ansvarsproblem i skadeståndsrätten* [Liability problems in tort law] (Uppsala, Iustus 2013).

5.4. HORIZONTAL EFFECTS

The Supreme Court has found that the ECHR cannot be given direct horizontal effect.[69] The fact that a violation was found by ECtHR in *Khurshid Mustafa and Tarzibachi* v. *Sweden*[70] also shows the resistance the courts have to taking the ECHR into account in private relationships. In this case, the applicants had been evicted from their flat because they had a satellite dish on the balcony of the building which they used to receive TV programmes in Arabic and Farsi. The tenants tribunal (*hyresnämnd*), in a decision later confirmed by the Court of Appeal, simply found that the eviction was lawful because the antenna was in breach of the tenancy agreement. The landlord had a legitimate interest in maintaining the safety of the building. The applicants had, however, offered to pay for a safety check on the satellite dish. The Court found that, by confirming the eviction, without even considering the applicants' rights of freedom of expression, and whether these could be reconciled with others' legitimate interests, Sweden had violated Article 10.

At least in contract law, there is a 'general clause' allowing contracts to be (re-)interpreted when this is equitable, so the resistance the courts are showing is due to their unfamiliarity with this way of reasoning, and the caution usually shown by the lower courts in developing the law. The courts are uncertain as to the extent to which they must/should take the ECHR into account, i.e. what does this mean in an individual case? The strengthening of the right of personal integrity (IG 2:6) from 2011 does not change this, as the right is exercisable only vis-à-vis the State. There are protections available both under private law and criminal law (defamation etc.) which will cover most situations in which the ECHR could be said to impose positive obligations to protect individuals from other individuals. The question is what the courts can or should do in the exceptional situation where no such specific protection is available.[71] However, in specific areas of law, the ECHR has had a more profound effect on legal relationship between private parties. Particularly the Labour Court (*Arbetsdomstolen*) should be mentioned, as it has recognised a horizontal effect of the Convention for some time.[72] It should be noted that the Labour Courts' willingness to apply the ECHR between private parties has been based on the

69 *NJA* 2007 s. 747 and *NJA* 2008 s. 946.

70 No. 2388/05, 16 December 2008.

71 See *RÅ* 2008 ref 87 and the Swedish case recently decided by the Grand Chamber of the ECtHR, *Söderman* v. *Sweden*, ECtHR 12 November 2013, appl. no. 5786/08 (where the Chamber, by 4 votes to 3, found no violation of the ECHR). Another problem regarding the lack of a general protection against attacks against personal integrity made by other individuals has been caused by *Von Hannover* v. *Germany*, ECtHR 24 June 2004, appl. no. 59320/00, and not solved by *Von Hannover* v. *Germany (No. 2)*, ECtHR (GC) 7 February 2012, appl. nos. 40660/08 and 60641/08. The Commission of inquiry which investigated whether it was necessary to amend TF and YGL could not agree (*SOU* 2012:55).

72 *AD* (*Arbetsdomstolen*, Yearbook of the Labour Court) 17/1998, *AD* 83/2002 and *AD* 74/2012.

fact the Convention is law in Sweden, so it is not an instance of 'direct' application of the treaty itself.

6. LEGITIMACY DEBATES: THE ECtHR AND THE NATIONAL COURTS

6.1. SOME BACKGROUND

Swedish courts have traditionally not had a very high profile in public life in Sweden. Judges are almost always unknown to the public and legal decisions have seldom been at the centre of public discussion or attention. A certain historical scepticism towards courts as being conservative institutions paired with a conception of law as a tool for the lawmaker to achieve political goals has contributed to the development of a rather technical and impersonal legal culture in Sweden. Sweden was transformed to a social welfare state during the long period of Social Democratic Party (SDP) rule. The courts have not been able, nor have they strived, to change the ambitious socialising policies of the SDP, as was the case in some other jurisdictions (most notably the USA during president Roosevelt's New Deal in the 1930s). The Constitution was primarily seen as being an instrument for regulating the relations between government and legislature. As such its norms were not seen as having, in practice, a higher value than parliamentary legislation. At least during the 1950s and 1960s, Sweden was not alone in Europe in regarding its constitution as not really being something justiciable.[73] The legal technique of loyally following the *travaux préparatoires* and a general 'positivistic' attitude in the legal profession are other parts of the explanation for this development. Sweden's parliamentary democracy had not collapsed in the 1930s under the threat from the left and the right, and it had not been occupied during World War II. The consequent interest in individual rights, and in binding or constraining parliamentary sovereignty which had arisen in other European states in the post war years largely passed Sweden by.[74]

As anecdotic evidence of the Swedish approach, it can be mentioned that when the legal scholar Gustav Petrén in the 1950s suggested that the courts could find a law unconstitutional and refuse to apply it. Foreign Minister Östen Undén answered in no uncertain terms how totally unacceptable such an idea

---

73 GARLICKI, *supra* n. 18, p. 47 refers to a 'European tradition [that] national constitutions were regarded mainly as political instruments rather than as the supreme law of the land'. It was when these constitutions began incorporating individual rights catalogues, and a dedicated judicial mechanism (the constitutional court) was created that this first changed.

74 J.W. MÜLLER, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven, Yale University Press 2011).

was.[75] It took another 25 years – and a change of government – for the concept of constitutional review to gain some political acceptance and another 30 years until the courts were trusted to be able to handle this power without special constitutional limits (see above, section 3).

Even today the Swedish approach does not stick out much if put in Nordic perspective: the Norwegian courts have a bit more activist approach, but constitutional review by courts is very rare in Finland and Denmark.[76]

6.2. PUBLIC DEBATE REGARDING THE ROLE OF COURTS

Even today, the role and position of Swedish courts are not at the centre of public attention, even if some (primarily criminal) cases are extensively covered by the media. There are however a few exceptions to this rather uninterested attitude towards the courts and their role. We will here only cover the most well-known examples in which the issue of courts' constitutional role and functions can be said to have the theme of more general debate in society, in some of which the ECHR has had a role.

In sex-related criminal cases (rape etc.) the courts' role has been discussed extensively during a large number of years starting in the 1990s, as public opinion has viewed the courts' handling of evidence in such cases as conservative and prone to put guilt on the victim rather than on the accused. This debate has, however, had little or no effect on the courts' practical evaluation of evidence; if anything the Supreme Court has taken steps to ensure that the burden of proof in such cases are not lax in comparison to other crimes.[77] The debate, however,

---

75 Undén was a professor of civil law and member of different SDP governments between1917 and 1962, usually as Foreign Minister. Due to his professional background and extensive experience of government, he was a dominant figure in Swedish politics until his retirement. The debate can be found in the leading Swedish legal journal, *SvJT* 1955 s. 618, 1956 s. 260 and 1956 s. 500. Petrén went on to become parliamentary ombudsman and Justice of the Supreme Administrative Court, so the clash with the mighty Undén did not hurt his career in any obvious way, giving some support for the claim we made above (section 1) that appointment of judges has been merit-based and not politically motivated. We can also note that it was Undén who was the obstacle to Sweden accepting the competence of the ECtHR to receive individual complaints: this was recognised by Sweden shortly after Undén retired.

76 For Norway, see Andenas and Bjorge, *supra* n. 48. For Denmark, see J.E. Rytter and M. Wind, 'In need of juristocracy? The silence of Denmark in the development of European legal norms,' 9 *International Journal of Constitutional Law* (2011) pp. 470–504; for Finland see J. Lavapuro, T. Ojanen and M. Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review', 9 *International Journal of Constitutional Law* (2011) pp. 505–529. An interesting attempt at comparative discussion and analysis can be found in R. Hirschl, 'The Nordic counternarrative: Democracy, human development, and judicial review', 9 *International Journal of Constitutional Law* (2011) pp. 449–469.

77 *NJA* 2009 s. 447.

still prevails and decisions from the ECtHR are part of the arguments critics of Swedish legislation and legal practice are making.[78]

The Supreme Administrative Court had to decide a case in 1999 on whether legislation providing for the closure of all nuclear power plants in Sweden, and a government decision based on this to close one particular power plant, was unconstitutional, contrary to EU law or incompatible with the ECHR. The case was very politically sensitive as a referendum had been held in Sweden in the 1980s with the result that nuclear power should be phased out as soon as possible. The government's belated measure to implement that decision was challenged in court. The court suspended execution of the decision while it considered its judgment. It eventually ruled that there was no legal basis on which to fault the legislation or the decision, but the mere thought that a court could put a decision on hold which had been made by the government, implementing a law made by parliament, and supported by a referendum was a dramatic and novel idea in the Swedish context and proof of a new role and position for courts in general.[79]

The already noted *Pastor Green* case in 2005 is the first time a Swedish court's application of the ECHR was of major interest to the public (and an international public).[80] The court was criticised for applying the Convention without clear support in case-law from ECtHR for its conclusion and for making it possible to hide behind religious motives in order to offend and threaten LGBT people. Since then, a number of cases have confirmed the position of the court, but also shown that the fears were exaggerated: the circumstances under which one can avoid conviction are very narrow.[81]

Quite recently, in 2012, the Supreme Court took a number of decisions on sentencing in cases of narcotic crimes. The result was that, in some cases of possession of narcotics, the level of punishment would be reduced substantially. Criticism was initially expressed for reforming a system 'from the bench' without any political signal that such a change was approved. The debate was, however, short-lived as the court in later cases could show that it had, rather than inventing a new approach, taken the *travaux préparatoires* to the legislation on sentencing more seriously and corrected the sentencing practices of the lower courts, which had occasionally been leading to disproportionately long prison sentences. Thus, rather than acting contrary to the motives of the legislature, the

78 *M.C.* v. *Bulgaria*, ECtHR 4 December 2003, appl. no. 29392/99, stirred up a debate on the compatibility of Swedish legislation on rape with the ECHR, a debate which is still continuing despite recent réform.

79 *RÅ* 1999 ref 76.

80 The same year also saw important developments in how the Swedish courts approached EU law issues. See J. Nergelius, '2005 – The Year when European Law and its Supremacy was Finally Acknowledged by Swedish Courts', 2 *Swedish Studies in European Law* (2008) pp. 145–156.

81 See *NJA* 2006 s. 467 and *NJA* 2007 s. 805 and *Vejdeland and Others* v. *Sweden*, ECtHR 9 February 2012, appl. no. 1813/07.

Supreme Court had adjusted the practice of the courts to be in accordance with them.

The already mentioned about-face of the Supreme Court in the double punishment cases was given quite some attention in the Swedish media, but mainly not concerning the role of ECtHR or the legally interesting details on when and how a supreme court should change its position in a legal issue, but rather from the point of view that convicted white collar criminals had now 'got off the hook' and even may receive economic compensation if they had served time in prison as well as having been the target of tax law sanctions. A lot of public indignation was voiced over this, but neither the Swedish courts nor the role of the ECtHR were discussed much. Academic and practicing lawyers however continue to debate on how and to what extent changes in ECtHR case-law should be reflected in national systems and, as discussed below, a certain criticism against the ECtHR for being 'fickle' can be discerned in that discussion. The opinion has also been expressed by one judge that the above mentioned case-law on 'clear support' for rulings against well-established Swedish legal solutions that may be contrary to the ECHR might be seen as a consequence of this criticism.[82]

To summarise, the role and position of Swedish courts have been more generally discussed on and off and an increase of such critical debate can be seen in more recent years. However, it is not clear that this increase has an obvious connection to issues of constitutional rights or the ECHR per se, as many of the discussions are focused on other themes. We now turn our attention more particularly to those areas where we think there has been such a connection and we focus on political and academic debates rather than the (very limited) discussion there has been in the mass media.

6.3. MORE ON THE POLITICAL AND ACADEMIC DEBATE

Academic debate on the role and position of courts in Sweden can roughly be divided into two camps. The first consists mainly of political scientists who use a rather narrow definition of democracy as an analytical instrument and who are critical towards giving the courts any role which goes beyond faithfully implementing the legislation of Parliament. Separation of powers and an active role for the courts, in this academic tradition, is not something desirable, but rather a sign of a dysfunctional democracy. This perspective reduces the courts to having a technical and 'fine-tuning' role.[83] The main focus of this critical debate in Sweden has, however, not been the ECtHR but rather the CJEU, its role

82 See, e.g. LAVIN, *supra* n. 36.

83 HOLMSTRÖM, *Domstolar och demokrati* [Courts and democracy] (Uppsala, Acta universitet upsaliensis 1998) p. 462.

and position in general and its decision in the *Laval* and *Viking* cases in particular.[84] The central part of the discussion is whether the internationalisation and judicalisation of politics is a threat to democracy itself, turning the system of government into an elitist and expert-driven form of governance.

The other camp consists more of legal academics and lawyers, who generally speaking are more positive to the idea of separation of powers and less worried by the growing influence of international and European law. This perspective instead focuses on the empowering features of such collaboration, making it possible for small states like Sweden to participate in and influence political decisions from which we would otherwise be excluded. The loss of national independence must, according to this view, be weighed against the gains of spheres of influence, room to manoeuvre and arenas to act upon that international law brings. This debate is, as can be imagined, inconclusive and still on-going.

However, there has been some criticism towards the ECtHR in particular,[85] and, as is usual in the European legal context, it has been in areas that are for some reason sensitive in the national context. As mentioned above, the issue of double punishment brought out a debate on the foreseeability of the case-law from Strasbourg.[86] It was felt that the ECtHR too easily changed its position on issues that national courts had come to rely on in their earlier decisions. At the same time a more general critique of the quality of the ECtHR judgments could be heard, as in particular Swedish judges found it difficult to follow the not always so short and stringent reasoning of the Court in cases concerning foreign legal systems. It has been felt that it is very hard to find what the 'central message' of a particular case is, when it is presented in the form of a list of factors to be taken into account, which are weighed within an inherently unclear framework, namely that of the margin of appreciation. The ECtHR must – often – give the respondent state a margin of appreciation because it knows best how to make the ECtHR judgment fit the national context. At the same time, when it is left up to the national courts to work out the implications of the judgment for future cases, perhaps similar, but not identical to the ECtHR case which led to the finding of the violation, the margin of appreciation means less, even much less, concrete guidance. Swedish courts seem to want to know what to do, at the same time as they (naturally) do not want their freedom of action to be too limited. In other words, they want to have their cake, and they want to eat it, too.

Two further examples can be enough to support the claim that there are instances of national critique of the ECtHR. In Sweden, many issues of

---

84 See Case C-438/05, *Viking Lines* [2007] *ECR* I-10779 and Case C-341/05, *Laval* [2007] *ECR* I-11767.

85 Holmström, *supra* n. 83, is one of the critics of ECtHR as an undemocratic institution, beyond the control of parliaments or governments.

86 See S. Hecksher, 'Finns det en europeisk rätt?' [Is there European law?], in *Festskrift till Per Ole Träskman* (Stockholm, Norstedts 2011) p. 229.

employment law are regulated by collective agreement. The parties in the labour market are thus largely left free to use their economic muscle to force agreements on one another. However, it would seem to follow from *Gustafsson* v. *Sweden*[87] that should trade unions try, by boycott or blockade, to force an employer to join an employer's association bound by a collective agreement, or to force him to be bound by this agreement independently, and should the trade unions not have legitimate reasons for taking this industrial action (i.e. the protection their members' interests) then the state is obliged to provide the employer with a remedy before the courts. The courts must be entitled to review the reasonableness of the trade unions' action in the circumstances and order them to cease, or restrict, their industrial action where this is not reasonable/proportionate. An employer in the above circumstances affected by a trade union blockade or boycott is therefore entitled to bring an action against the trade union in the courts relying upon Article 11 ECHR and the Swedish courts should, if all the above (admittedly very demanding) requirements are satisfied, issue an injunction or other such measure, notwithstanding the lack of specific statutory authority to do so. In *AD* 1998/18, the Labour Court made it easy for itself by reaching the conclusion that the trade union had a legitimate basis for its actions in that the employment conditions in the company were not as advantageous to the workers as those provided by the collective agreement (particularly as regards overtime, which was not paid by the company). Accordingly, the union, which had two members working for the company, was entitled to take the blockade action. One judge dissented from this finding. While the trade union thus won in this case, the issue is by no means dead. Even the possibility that the Convention gives the courts the possibility (indeed, duty) to intervene and determine whether a trade union blockade is proportionate or not has led to an overreaction from some Swedish trade union figures. One went so far as to call for the denunciation of the Convention, and its re-ratification with a reservation, mirroring the response of some right-wing Members of Parliament in the United Kingdom following the *McCann* case.[88]

In *Evaldsson* v. *Sweden*,[89] the ECtHR returned to this sensitive area. The case concerned a fee which workers in the building sector who were not union members were nonetheless obliged to pay to the building workers' union. This fee was supposed to cover the union's expenses in negotiating and monitoring compliance with collective bargaining agreements, something of benefit to both unionised and non-unionised labour. However, there was a lack of clarity in how this fee was calculated. The ECtHR found that this lack of clarity was in breach of Article 1 Protocol No. 1 ECHR. The judgment was not well received in

87 ECtHR 25 April 1996, appl. no. 15573/89.

88 *McCann and Others* v. *the United Kingdom*, ECtHR 27 September 1995, appl. no. 18984/91. For the Swedish reaction see *Svenska dagbladet* 23 February 1998.

89 ECtHR 13 February 2007, appl. no. 75252/01.

Sweden, where most academics and politicians were surprised by the Court's willingness to extend the effect of Article 1 Protocol No. 1 to the results of collective bargaining on the labour market, as well as a bit annoyed about the outcome as such. Such monitoring fees are seen as a necessary part of the regulation of the building sector in Sweden (where there can otherwise be tendencies to 'cut corners' with corresponding dangers for health and safety) and few had believed that they were contrary to human rights. The *Evaldsson* case was also perceived as an insensitive intrusion into a delicate balance of interests that the national system had evolved during almost a century. It also provoked some reactions as to whether the ECtHR actually understood the national context it judged upon and whether it was able to distinguish 'real' infringements of human rights from mere quibblers.

The ECtHR took another nationally controversial decision in *R.C* v. *Sweden*, in which it held that expulsion of an Iranian man back to Iran would be in conflict with Article 3.[90] Of particular importance in that case was that the man had provided some medical evidence that supported an account of being tortured in Iran. The majority of the ECtHR found that the Swedish authorities had not given this piece of evidence sufficient weight and that the respondent state in such a case had the burden of proof to dispel any doubts about the risk of being subjected to torture again.[91] The Migration Authority lawyers, and judges in the Migration Courts, were annoyed at the ECtHR's willingness to sweep aside the evidential assessments of national authorities as well as at the far-reaching implications of the court's sweeping statements on burden of proof. It was felt that the Court had overstepped its role as an international tribunal and acted more like a court of 'fourth instance'. On the other hand, the Court was applauded by other observers, such as practicing lawyers and academics involved in migration law who have been critical of the Migration Authority, so there was no single 'Swedish' reaction and the debate was not wholly negative towards the Court's intrusive stance.

In summary, there is a historical scepticism towards 'activist' courts in Sweden, closely connected with a long and stable democratic regime in which the courts have more of a role as technical helping hand to the political power than as a controlling mechanism for the protection of individual rights. Debate on the role and functions of courts in general has occurred on and off after WWII, even if it cannot be said to be frequent or particularly 'hot'. Such debate appears in mass media and politics sporadically, but is more regularly to be found in academic or professional arenas, particularly among political scientists and academic lawyers. The ECtHR is seldom if ever criticised in the media. It is

90 ECtHR 9 March 2010, appl. no. 41827/07. See also, for a similar difference in how evidence was evaluated, *I* v. *Sweden*, ECtHR 5 September 2013, appl. no. 61204/09.

91 The Swedish judge Fura dissented on grounds that the court was not in a better position than the national authorities to assess the credibility of evidence in a case such as that at hand.

also clear that the national institutions – the Supreme Court and the Supreme Administrative Court – have been more debated than the ECtHR or lower national courts. The highest courts' interpretation, and sometimes development, of the ECHR have been both criticised and applauded and there is no obvious 'front' of anti-ECHR public opinions in Sweden as have been noted in other European countries such as the United Kingdom. Rather, there are instances of reluctance or scepticism in both public opinion and in professional discourse but the overall trend is an embracing of the ECHR as a normal and important part of the Swedish legal system. The CJEU is the more contested institution in this sense, again showing that the issue of fundamental rights and constitutional review in that context is not a common theme for public discourse in Sweden.

7. CONCLUDING REMARKS

There has been no extensive public debate surrounding the ECHR in Sweden. There has been rare criticism of the lack of clarity of ECtHR case-law by judges, as well as its appropriateness (as regards labour relations), but the general reaction, amongst both practitioners and the media, is positive. The reaction of the Swedish courts to the incorporated ECHR cannot be described as hostile. It is clear that the Convention has been given considerable significance, particularly by the highest courts. The lower courts have been cautious, at times it is fair to say outright sceptical to Convention-based arguments. But we do not consider that it is surprising that the highest courts have taken the lead in making the ECHR a living part of the Swedish legal order, bearing in mind Swedish judicial traditions, the work-load of the lower courts and the importance traditionally given to the *travaux préparatoires* in legal interpretation.

There has been, on the part of even the highest courts, a definite reluctance to accept arguments that laws should not be applied on the basis that they (allegedly) violate the ECHR. Having said this, the constitutional review situations have been relatively few. This reluctance is not surprising either: the Swedish courts are reluctant in general to engage in rights-based constitutional review, whether the rights in question are in IG Chapter 2 or the ECHR. There is, quite simply, no tradition of activist constitutional rights interpretation to fit the Convention into. In the Swedish system, the big balancing processes are for the legislative process and the courts are technicians and fine tuners.

One can have different views on whether this judicial restraint is a good or a bad thing. In the context of a well-functioning democracy, with a good system of law preparation, we would say that it is the correct approach. Protection of human rights should not be seen as the same thing as judicial protection of human rights. The Swedish experience is that there can be high level of factual

enjoyment of human rights, with 'good' criminal and administrative laws in general, without a strong (purely) legal system for individual protection of constitutional or human rights as such, as long as there quality assurance mechanisms in place in the legislative process, and a political and legal culture that respects human rights.

However, the recent double punishment cases illustrate several things. The government and the parliament will have to improve its system of scrutiny of ECHR case-law. The generally good system of law preparation is based on an expert commission of inquiry being appointed in good time, in order to forsee possible problems. The teleological approach of the ECtHR means that it is necessary to leave a 'margin of uncertainty' when making proposals. Even so, the Swedish courts will still – albeit exceptionally – be faced with problems where the ECtHR interprets the Convention to place new and unexpected requirements on states, e.g. by departing from established case-law. The – apparent – continued judicial support for the 'clear support' doctrine is a little surprising bearing in mind the removal of the 'manifest breach' requirement for review of statutes and ordinances vis-à-vis the constitution. It can probably be explained by the – relatively speaking – lack of clarity surrounding the implications of ECtHR case-law, as compared to the Swedish *travaux préparatoires*. But we think it doubtful that the 'clear support' test will survive much longer. The impact of the ECHR through the medium of the EU Charter is greater in that the 'clear support' doctrine does not apply. In the same way that EC/EU membership required, in effect, incorporation of the Convention, the EU Charter probably means that the 'clear support' test will have to be abandoned. The Convention will continue to be given significance by the Swedish courts through the medium of the principle of treaty-conform construction. Whether or not the 'clear support' test is retained, the cautious approach of the Swedish courts to Convention-based constitutional review is likely to remain.

CHAPTER 8
THE UNITED KINGDOM

Roger MASTERMAN

1. INTRODUCTION

As is well known, the constitution of the United Kingdom[1] is 'unwritten' or – more accurately – 'non-codified.'[2] The United Kingdom's systems and institutions of government have, rather than being designed and created in the aftermath of a revolutionary moment, emerged and evolved over time. As Ivor Jennings memorably observed, the construction and reconstruction of the constitution has been an iterative process:

> 'The building has been constantly added to, patched, and partially reconstructed, so that it has been renewed from century to century; but it has never been razed to the ground and rebuilt on new foundations.'[3]

Though lacking an authoritative documentary source, the United Kingdom's constitutional norms derive from a multitude of sources including statute, common law, prerogative, constitutional convention and – more recently – from extra-jurisdictional sources including the European Union and ECHR.

At the level of constitutional principle, the constitution is animated by the tension between the claimed legal sovereignty of Parliament and the aspiration of government according to law. The doctrine of parliamentary sovereignty empowers government and 'is (from a legal point of view) the dominant

1 Interpreted by the House of Lords Select Committee on the Constitution to be 'the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.' (House of Lords Select Committee on the Constitution, *Reviewing the Constitution: Terms of Reference and Method of Working* (HL11), July 2001 at [20]).

2 On which see: A. KING, *The British Constitution* (Oxford, Oxford University Press 2007) ch. 1.

3 W.I. JENNINGS, *The Law and the Constitution*, 4th edn. (London, University of London Press 1956) p. 8.

characteristic of [the United Kingdom's] political institutions'[4] while the rule of law has come to be seen as the 'ultimate controlling factor on which [the] constitution is based.'[5]

In practice, the United Kingdom operates under a parliamentary ('Westminster') system of government. While the monarch is Head of State, it is Parliament that is the dominant legal entity, with supreme law-making competence. Beneath this, it is common for governments to exercise significant control over the agenda and powers of the legislature; the (majoritarian) first past the post electoral system has a tendency to generate governments with healthy majorities in the House of Commons,[6] while the Standing Orders of the House of Commons afford priority to government business 'in every sitting.'[7] Though the United Kingdom Parliament is bicameral,[8] it is the House of Commons that is legally and politically dominant.[9]

The Westminster model of government has been traditionally associated with a strong, centralised, administration. However, since 1999, power has been devolved from Westminster to sub-national administrations in Scotland, Wales and Northern Ireland.[10] England has no equivalent devolved body, and proposals for regional assemblies were abandoned in 2002 following their conclusive rejection at a pilot referendum held in the North East of England. Though the devolved Parliament – in Scotland – and Assemblies – in Northern Ireland and Wales – are legally limited legislatures (their powers are both allocated and defined by primary legislation) there is a degree of debate over the extent to which their democratic and representative nature confers characteristics which would otherwise be associated with sovereign institutions.[11] In addition,

4 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn. (London, Macmillan 1915), ch. I.

5 *R (Jackson)* v. *Attorney-General* [2005] *UKHL* 56; [2006] 1 *AC* 262 at [107].

6 The experience between 1979 and 2010 is illustrative of this phenomenon; for 31 consecutive years the government of the United Kingdom was formed by either the Conservative (1979–1997) or Labour (1997–2010) parties. Only once during this period – in 1996–1997 under the Conservative Prime Minister, John Major – did the largest party lack an overall majority in the House of Commons (and this was not the direct result of a General Election).

7 Standing Orders of the House of Commons, SO 14.

8 The two Houses of Parliament are the House of Commons (comprised of 650 MPs, directly-elected from single member constituencies) and the House of Lords (comprised of 761 largely-appointed Peers).

9 The House of Commons enjoys an electoral mandate, while members of the House of Lords are largely appointed, and enjoys legal superiority over the House of Lords by virtue of the Parliament Acts 1911 and 1949.

10 See Scotland Act 1998; Scotland Act 2012; Northern Ireland Act 1998; Northern Ireland (St Andrews Agreement) Act 2006; Northern Ireland Act 2009; Government of Wales Act 1998; Government of Wales Act 2006.

11 See, e.g., *AXA General Insurance Ltd* v. *Lord Advocate* [2011] *UKSC* 46 at [46], [49]; *Adams* v. *Scottish Ministers* 2003 *SC* 171 at [62]: '[an Act of the Scottish Parliament is] of a character which has far more in common with a public general statute than with subordinate legislation.'

constitutional conventions have emerged safeguarding the devolved areas of competence from unilateral interference by the (formally sovereign)[12] United Kingdom Parliament. The union between England, Scotland, Wales and Northern Ireland therefore remains intact,[13] but the notion of the unitary state has been modified as a result of the quasi-federal dynamics of devolved government.[14]

As a result of the pervasive influence of the doctrine of parliamentary sovereignty – under which ultimate legal authority is vested in one dominant institution – there has been no clear, or doctrinal, separation of powers between the three branches of government.[15] The structural hallmark of the Westminster model of government is instead the 'fusion'[16] of the executive and legislative branches and, as such, the core executive (Cabinet) is drawn from the ranks of the legislature. The absence of a documentary constitution has also resulted in a lack of clarity, or precision, in the allocation of governmental functions. A basic separation is said to exist:

> 'It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.'[17]

A more exacting division of governmental functions has, however, proved elusive[18] with the resulting uncertainty prompted by the fact that the division of powers in practice rests upon 'inference rather than express provision.'[19]

Though the judiciary has not, however, been historically regarded as being a fully-autonomous branch of government, for pragmatic purposes judicial independence *has* been protected by statute since at least the Act of Settlement 1701 (which provides that senior judges should hold office *quamdiu se bene gesserint* and should be removable only on an address to both Houses of

12 See e.g. section 28(7) Scotland Act 1998.

13 Though a referendum is scheduled to be held in Scotland on the 18 September 2014 on the question of whether Scotland should be an independent nation.

14 See N. WALKER, 'Beyond the Unitary Conception of the United Kingdom Constitution?' *Public Law* (2000) p. 384.

15 See R. MASTERMAN, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge, Cambridge University Press 2011) ch. 1.

16 W. BAGEHOT, *The English Constitution* (Oxford World's Classics edition) (Oxford, Oxford University Press 2001) p. 11.

17 *R* v. *Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 *AC* 513, 567 (Lord Mustill).

18 G. MARSHALL, *Constitutional Theory* (Oxford, Clarendon Press 1971) ch. 5.

19 Dame Mary ARDEN, 'Judicial Independence and Parliaments' in ZIEGLER et al., eds., *Constitutionalism and the Role of Parliaments* (Oxford, Hart Publishing 2007) p. 192.

Parliament). Two particular obstacles can be cited as evidence of significant (structural, though now historical) obstacles to the notion of an independent judicial arm – or branch – of government: (i) the office of Lord Chancellor (a member of the Executive, Speaker of the House of Lords and Head of the Judiciary in England and Wales) and (ii) the Appellate Committee of the House of Lords (until 2009 the United Kingdom's apex court was technically a Committee of the House of Lords comprising peers – Lords of Appeal in Ordinary – appointed to undertake the judicial functions of the House under the Appellate Committee Act 1876).

The Constitutional Reform Act 2005 largely removed judicial functions from the powers of the Lord Chancellor and saw an institutionally separate United Kingdom Supreme Court established. Since 2009, the United Kingdom Supreme Court has been the court at the apex of the United Kingdom's three jurisdictions ((i) England and Wales; (ii) Northern Ireland; and (iii) Scotland) each of which enjoy distinctive features and court structures. It is a court of general jurisdiction, responsible for the determination of legal disputes in all areas of law with the exception of criminal appeals originating in Scotland.[20] Having been allocated jurisdiction for the determination of competence disputes arising as a result of devolution, and with a jurisdiction relating to the fundamental rights given effect by the Human Rights Act 1998 (hereafter HRA), the United Kingdom Supreme Court has begun to display some of the characteristics associated with continental constitutional courts.[21]

Standard accounts of the constitution have placed Parliament – and the practical processes of politics – at the heart of the United Kingdom's constitutional scheme. The role of the courts in this 'political constitution'[22] has been firmly secondary[23] – including in the recognition and protection of fundamental rights. In the implementation of norms arising in international law (including in giving effect to the United Kingdom's obligations attendant to the European Convention on Human Rights), this hierarchy has been clearly evident, with the responsibility and competence to do so lying firmly in the hands of the legislature. But recent constitutional change has recalibrated this constitutional equilibrium, permitting the courts a more significant role in the enforcement of fundamental rights norms originating in international law against both executive and legislature.[24]

---

20 Act of Union 1707.

21 See R. MASTERMAN and J.E.K. MURKENS, 'Skirting Supremacy and Subordination: The Constitutional Authority of the United Kingdom Supreme Court', *Public Law* (2013) p. 800.

22 J.A.G. GRIFFITH, 'The Political Constitution', 49 *Modern Law Review* (1979) p. 1.

23 See M. LOUGHLIN, 'Wither the Constitution?', in C. FORSYTH, ed., *Judicial Review and the Constitution* (Oxford, Hart Publishing 2000) p. 425: 'it would hardly be an exaggeration to suggest that Bagehot attributes greater weight to the Corporation of the City of London than to the judiciary in providing a bulwark for English liberties.'

24 MASTERMAN and MURKENS, *supra* n. 21, p. 800.

2. THE STATUS OF INTERNATIONAL LAW IN THE UNITED KINGDOM

The United Kingdom is formally a dualist legal system. On the orthodox account, provisions of international law,[25] unincorporated treaties[26] and resolutions taken by international organisations[27] will not be given effect in domestic litigation even though they may be binding upon the State itself. Such an approach is attributable to, and in accordance with, the position held by the doctrine of parliamentary sovereignty in the United Kingdom constitution:

> '[I]f domestic legislation clearly conflicts with a treaty obligation which has not been statutorily incorporated into domestic law, the courts are constitutionally bound to give effect to the domestic provision, even though this involves a breach of the state's obligations in international law.'[28]

Exceptions to the orthodox dualist approach, however, do exist. International law obligations may guide the judicial interpretation of statute in the event of an ambiguity; the courts will assume that Parliament intended to legislate compatibly with the United Kingdom's obligations in international law,[29] may consider international law where 'statute requires decisions to be taken in accordance with an international treaty,'[30] and have made reference to general principles of international law when asked to construe the meaning and effect of non-incorporated provisions of the ECHR.[31]

The domestic influence of customary international law is also slightly at tension with the prevailing dualist approach. Historically, customary international law was declared to be a part of the common law.[32] More recent judicial decisions – taken in the light of the significant expansion of the reach of customary international law – have considered that obligations arising out of customary international law are a part of domestic law only to the extent that

---

25 *Mortensen* v. *Peters* (1906) 14 *SLT* 228.

26 *Cheney* v. *Conn* [1968] 1 *All ER* 779. And see *R (on the application of Chester)* v. *Secretary of State for the Home Department; McGeoch* v. *The Lord President of the Council* [2013] *UKSC* 63 at [110]: 'the constitutional status of treaties in the United Kingdom is that they are not a source of rights or obligations in domestic law unless effect is given to them by a statute.'

27 *R (on the application of the Campaign for Nuclear Disarmament)* v. *Prime Minister and Others* [2002] *EWHC* 2777 (Admin) at [61].

28 M. Hunt, *Using Human Rights Law in English Courts* (Oxford, Hart Publishing 1997) p. 7.

29 *R* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 *AC* 696.

30 *R (on the application of the Campaign for Nuclear Disarmament)* v. *Prime Minister and Others* [2002] *EWHC* 2777 (Admin) at [61]. And see: *Occidental Petroleum* v. *Ecuador* [2005] *EWCA Civ* 1116; [2006] 2 *WLR* 70;.

31 *R (on the application of Al-Skeini)* v. *Secretary of State for Defence* [2007] *UKHL* 26; [2008] 1 *AC* 153 (on the interpretation of the term 'jurisdiction' in Article 1 ECHR).

32 W. Blackstone, *Commentaries on the Laws of England*, 1st edn. (Oxford, Clarendon Press 1765–1769) Vol. IV, 67.

they can be clearly ascertained[33] and to the extent that their enforcement via the common law would not require the courts to exercise illegitimate law-making powers.[34]

Though courts are formally permitted to review the compatibility of Acts of Parliament with the requirements of provisions of international law – including treaty obligations – only to the extent permitted by primary legislation, this is not to say that the influence of international law over the development of the United Kingdom's constitution has not been extensive. Significant obligations arising under treaty agreements have, in practice, been given effect in national law via statute; the two core examples of this can be found in the provisions (as interpreted) of the European Communities Act 1972 and the HRA 1998. Even so, in the event of domestic implementation by statute, the nature of the obligation arising might not be readily described as 'incorporation'. As Lord Hoffmann outlined in the House of Lords decision of *R* v. *Lyons*:

> '[I]t is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them ... Parliament may pass a law which mirrors the terms of the treaty and in this sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law.'[35]

The now extensive influence of both European Union and European Convention jurisprudence has diluted the traditional dualist orthodoxy, to the extent that some commentators suggest that domestic law should be interpreted in the light of the United Kingdom's international obligations (even in the absence of statutory incorporation).[36]

3. JUDICIAL REVIEW AND THE PROTECTION OF HUMAN RIGHTS

3.1. CONSTITUTIONAL REVIEW – AN ALIEN CONCEPT

The centrality of the legal supremacy of Parliament to the United Kingdom Constitution has ensured that the courts lack competence to review Acts of

33 See *R (European Roma Rights Centre and Others)* v. *Immigration Officer at Prague Airport* [2004] *UKHL* 55; [2005] 2 *AC* 1 at [24]-[27] (Lord Bingham).

34 See, e.g., *R* v. *Jones (Margaret) and Others* [2006] *UKHL* 16; [2007] 1 *AC* 136 (in which the House of Lords declined to recognise that 'international crimes of aggression' formed a part of the common law on the basis that the creation of criminal offences should be a matter for the legislature).

35 *R* v. *Lyons* [2002] *UKHL* 44; [2003] 1 *AC* 976 at [27].

36 R. Singh, 'The Use of International Law in the Domestic Courts of the United Kingdom', 56 *Northern Ireland Legal Quarterly* (2005) p. 119 at p. 122.

Parliament for compliance with constitutional standards.[37] As a result, the courts enjoy no general power to invalidate, or otherwise question the validity or legality, of primary legislation. In the words of Ungoed-Thomas J in *Cheney* v. *Conn*:

> 'What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.'[38]

The review of legislation for compliance with constitutional norms is therefore, in the United Kingdom, a slightly alien concept. Two important qualifications to this orthodox approach to the *ex post* review of primary legislation arise in respect of directly effective principles of EU law, and the ability of higher courts to declare legislation incompatible with the Convention rights under the HRA.[39] Both are considered below.

While a separate and distinct system of *droit administratif* was not a historic characteristic of the United Kingdom Constitution,[40] a common law jurisdiction of judicial review of administrative action was well-developed by the latter years of the twentieth century. The common law model of judicial review was a largely procedural device, permitting review of the process of executive decision making on grounds of 'legality', 'procedural impropriety' and 'irrationality'[41] (the latter otherwise known as *Wednesbury* unreasonableness)[42] rather than allowing challenge to the substance of governmental decisions. Judicial review is not a process by which an administrative decision can be appealed against, and therefore 'reflects a conception of limited judicial authority, recognising that in most cases a public authority may exercise a genuine choice between competing public policy objectives and contrasting methods of implementation.'[43]

---

37 See, e.g., *R* v. *Jordan* [1967] *Crim LR* 483.

38 *Cheney* v. *Conn* [1968] 1 *WLR* 242, 247. See also *Pickin* v. *British Railways Board* [1974] *AC* 765.

39 Legislation passed by the devolved legislatures in Wales, Scotland and Northern Ireland *may* be the subject of judicial review proceedings. The devolved legislatures are legally limited, and legislation which is *ultra vires* (either for the reason that it is contrary to EU law, contrary to the requirements of the Convention Rights, or for the reason that it interferes with an area of competence reserved to Westminster) may be struck down. The devolution Acts provide that the legality of devolved legislation might be judicially-assessed prior to, or following, enactment.

40 DICEY, *supra* n. 4, ch. XII.

41 *Council for the Civil Service Unions* v. *Minister for the Civil Service* [1985] *AC* 374, 410–411 (Lord Diplock).

42 *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 *KB* 223, 228.

43 T.R.S. ALLAN, 'Human Rights and Judicial Review: A Critique of "Due Deference"', *Cambridge Law Journal* (2006) p. 671 at p. 679.

3.2. CIVIL LIBERTIES

For a long time, protection for fundamental freedoms was to be found in both primary legislation (positive, statutory, rights)[44] and in decisions taken at common law (civil liberties).[45] But until the implementation of the HRA 1998 there existed no general constitutional or statutory instrument (equivalent in content, if not status, to a Bill of Rights) permitting the legal protection of individual rights in the United Kingdom. Domestic protection for fundamental rights was therefore, historically, piecemeal, relying on specific legislation and judicial decisions rather than a single overarching instrument. The ability of the courts to protect civil liberties via the mechanism of the common law was however limited by the higher normative authority attributed to primary legislation. Civil liberties were essentially residual – permitting individuals to engage in activity to the extent that it was not prohibited or regulated by statute – as Lord Brown-Wilkinson noted in *Wheeler* v. *Leicester City Council*:

> Basic constitutional rights in this country such as freedom of the person and freedom of speech are based not upon any express provision conferring such a right but on the freedom of an individual to do what he will save to the extent that he is prevented from doing so by the law ... These fundamental freedoms therefore are not positive rights but an immunity from interference by others.[46]

As with much of the content of the constitution, so-called civil liberties were inferred, lacked a foundation in positive law and were – as a consequence – highly susceptible to legislative erosion.

Though the United Kingdom has been a signatory to the ECHR since 1951 and has permitted the right of individual petition to the European Court of Human Rights – following the exhaustion of domestic remedies – since 1966, the doctrine of dualism effectively precluded explicit reliance on the Convention standards in domestic litigation. In the absence of primary legislation giving domestic effect to the Convention rights, the ECHR protections could only be utilised by the domestic judiciary in limited circumstances – for instance, in the event of an ambiguity in primary legislation[47] – on the basis that only Parliament possessed constitutional authority to permit the courts to give effect to the obligations contained within the Convention. The ability of the courts – prior to the adoption of the HRA – to give effect to the State's obligations under the Convention was severely curtailed by the failure of Parliament take such a step. As Lord Donaldson starkly noted in the then leading decision of *Brind*:

---

44 e.g. Murder (Abolition of Death Penalty) Act 1965; Sex Discrimination Act 1975; Race Relations Act 1976; Police and Criminal Evidence Act 1985; Disability Discrimination Act 1995.

45 e.g. *Entick* v. *Carrington* (1765) 19 *St Tr* 1030; *Beatty* v. *Gilbanks* (1882) 9 *QBD* 308.

46 *Wheeler* v. *Leicester City Council* [1985] *AC* 1054, 1065.

47 *R* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 *AC* 696.

> 'the duty of the English Courts is to decide disputes in accordance with English domestic law as it is, and not as it would be if full effect were given to this country's obligations under the Treaty ... It follows from this that in most cases the English courts will be *wholly unconcerned* with the terms of the Convention.'[48]

In practice, the application of the doctrine of dualism essentially barred those applicants who sought to explicitly invoke the provisions of the Convention in domestic litigation from so doing.[49]

3.3. CONSTITUTIONAL COMMON LAW RIGHTS

The mid- to late-1990s saw the judicial articulation and application of a species of rights recognised at common law. These 'fundamental constitutional rights' (for instance, the right of access to a court[50] and freedom of expression)[51] functioned as restraints on the ability of Parliament to legislate in contravention of a recognised right in the absence of a clear and explicit indication of such an intention. This common law 'principle of legality' was fully articulated by Lord Hoffmann in the House of Lords decision in *Simms*:

> 'parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'[52]

As a result of this nascent jurisdiction of constitutional rights – Hoffmann continued – the English courts 'apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'[53] Though the common law principle of legality sought to impose limitations on Parliament's ability to override rights recognised by the common law – as Hoffmann himself

48 *R* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 *AC* 696, 718 (emphasis added).

49 See, e.g., *Malone* v. *Metropolitan Police Commissioner (No. 2)* [1979] *Ch* 344; *Kaye* v. *Robertson* [1991] *FSR* 62.

50 *R* v. *Lord Chancellor, ex parte Witham* [1998] *QB* 575.

51 *R* v. *Secretary of State for the Home Department, ex parte Simms* [2000] 2 *AC* 115.

52 Idem, at 131.

53 Idem, at 131.

recognised – its ability to do so would ultimately have to cede to evidence of clear parliamentary intent.

3.4. TOWARDS PROTO-CONSTITUTIONAL REVIEW

Two statutes – the European Communities Act 1972 and the HRA 1998 – have placed de facto practical restrictions on the legislative competence of the Westminster Parliament. In so doing, both have weakened the claim of the United Kingdom Parliament to be able to legislate 'subject to no constitutional reservations'[54] and have significantly enhanced the ability of the courts to see government *and* Parliament subject to law.

3.4.1. The influence of EU law

EU law has effect in the United Kingdom as a result of the European Communities Act 1972. In order to vindicate the supremacy of EU law, in the event of a clash between a domestic statute and directly effective provisions of EU law, United Kingdom courts are empowered to 'disapply' the offending provisions of primary legislation.[55] In the seminal House of Lords decision in *Factortame (No. 2)*, Lord Bridge argued that – in adopting the European Communities Act 1972 – Parliament had voluntarily accepted to subject national laws to the 'well established' supremacy of European Community law.[56] In some quarters, the decision in *Factortame (No. 2)* has been regarded as amounting to a 'revolution' in the United Kingdom's constitutional fundamentals.[57]

That the obligations imposed by EU law are, in this sense, only applicable in the domestic system as a result of primary legislation has recently been reiterated in section 19 of the European Union Act 2011: '[d]irectly effective or directly applicable EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act...'

Though the potential to utilise principles of EU law as a vehicle to bolster the protections offered to individual rights under the HRA may be tactically appealing (for the reason that domestic courts are able to disapply primary legislation which is inconsistent with directly-effective EU law), the Convention rights – as applied under the HRA – are utilised far more frequently than EU law

54 MARSHALL, *supra* n. 18, p. 74.

55 *R* v. *Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] 1 *AC* 603.

56 Idem, at 658–659.

57 H.W.R. WADE, 'Sovereignty – Revolution or Evolution?', 112 *Law Quarterly Review* (1996) p. 568. Cf. T.R.S. ALLAN, 'Parliamentary Sovereignty: law, politics and revolution', 113 *Law Quarterly Review* (1997) p. 443.

in order to vindicate individual rights. Some evidence exists to suggest that the standards of legality imposed by the Convention rights are regarded as being more exacting; in the 2007 decision *R (Countryside Alliance)* v. *Attorney-General*, Lord Brown observed that he 'would have thought interferences with the fundamental rights and freedoms guaranteed by the Convention more ... difficult to justify than restrictions on the merely economic rights of free movement of goods and services provided for by the Treaty.'[58] To date the influence of the EU Charter on Fundamental Rights has not been fully felt in the United Kingdom.[59]

3.4.2. The influence of the ECHR

As a result of the HRA 1998, courts are empowered to give effect to certain of the rights contained in the European Convention on Human Rights as a standard of legality utilised against public bodies[60] and through interpretative powers which might be used in order to render legislation Convention-compliant. Given that the United Kingdom's constitutional model has traditionally regarded the legislative authority of Parliament as being unquestionable, it is the latter which is most notable. The relevant governing provision – section 3(1) HRA – reads as follows:

> 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

In the event that it is impossible to interpret legislation in order to achieve compatibility with the requirements of the Convention rights, higher[61] domestic courts enjoy competence to issue a 'declaration of incompatibility' in the event of a conflict between primary legislation and the Convention rights.[62] Though judicial use of either section 3(1) or the issue of a declaration of incompatibility will not affect the 'validity, continuing operation or enforcement'[63] of the impugned provision(s), the HRA nonetheless permits the courts to exercise powers which they were 'effectively constitutionally barred'[64] from exercising prior to the implementation of the Act.

---

58 [2007] *UKHL* 52; [2008] 1 *AC* 719 at [163].

59 For a recent example see: *R (on the application of Chester)* v. *Secretary of State for the Home Department; McGeoch* v. *The Lord President of the Council* [2013] *UKSC* 63.

60 Section 6 HRA.

61 Essentially, the High Court, Court of Appeal, Judicial Committee of the Privy Council, and United Kingdom Supreme Court.

62 Section 4(2) HRA.

63 Sections 3(2)(b) and 4(6) HRA.

64 F. Klug, 'The Human Rights Act – A "Third Way" or "Third Wave" Bill of Rights', *European Human Rights Law Review* (2001) p. 361 at p. 370.

While legislative review on the HRA model is of a different order to the ability of courts to 'disapply' – and effectively therefore render invalid – primary legislation as a result of the influence of European Union Law, it can nonetheless be seen to operate as a form of proto-constitutional review in a system which has historically eschewed subjecting the legislature to any explicit form of judicial/legal control. Both the influence of EU law and that of the Convention Rights can therefore be seen to dilute the orthodox operation of the doctrine of dualism in the United Kingdom Constitution.

4. THE IMPLEMENTATION OF THE ECHR BY NATIONAL COURTS

4.1. THE HUMAN RIGHTS ACT SCHEME

The implementation of the HRA has seen the courts empowered to enforce certain of the rights originating in the European Convention on Human Rights against both executive and legislature in the United Kingdom since coming fully into force in 2000.[65] The Convention rights given effect under section 1(1) of the HRA are enforceable against public authorities,[66] and against private bodies exercising public functions,[67] and are to be used as interpretative aids to ensure the compatibility of primary legislation with the Convention requirements.[68] Given that the orthodox approach to the sovereign power of Parliament saw the courts treat statutory language with a degree of 'sanctity',[69] the extent of this latter power should not be understated; for the first time, the HRA 1998 saw courts invested with a general power to test primary legislation for compliance with human rights standards.[70] Given also that the law of judicial review of executive action had also resisted the adoption of proportionality as a head of review[71] – preferring to gauge administrative decisions on the basis of the *Wednesbury* test for reasonableness[72] – the HRA also prompted greater intensity

65 The rights given effect by the HRA 1998 were enforceable as against the devolved bodies in Scotland, Wales and Northern Ireland since those institutions had come into being in mid-1999. The HRA came in to full effect in England and Wales on 2 October 2000.

66 Section 6(1) HRA.

67 Section 6(3)(b) HRA. See A. Williams, 'A fresh perspective on hybrid public authorities under the Human Rights Act 1998: private contractors, rights-stripping and "chameleonic" horizontal effect', *Public Law* (2011) p. 139.

68 Section 3(1).

69 Marshall, *supra* n. 18, p. 74.

70 There is debate over whether review under the HRA should be considered to be a species of 'constitutional' review (see: A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press 2009).

71 *R* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 *AC* 696, 749–750, 762–763 and 766–767.

72 *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 *KB* 223, 228.

of review as against the actions of the executive branch through permitting review on grounds of proportionality.[73]

In parallel, however, the Act also saw attempts made to preserve the decisional autonomy, and authority, of the legislature. First, the Convention rights are *not* directly enforceable against the legislature for acts and omissions.[74] Secondly, the HRA provides the courts with no power to strike down legislation, instead permitting only declarations of incompatibility to be issued by courts in respect of primary legislation which cannot be interpreted in a way which will achieve compatibility with the Convention rights.[75] Thirdly, the extent to which the Act permits courts to interpret legislation in order to render it compatible with the Convention rights is limited by the clause requiring all interpretations to be 'possible.'[76] The 'genius' of the HRA has therefore been argued to lie in those provisions of the Act which eschew the 'orthodox precedents' of constitutionalised Bills of Rights by placing limitations on the courts' abilities to act as final arbiters of the protected rights.[77]

The HRA scheme was clearly intended to ensure that responsibility for the vindicating the Convention rights was distributed across the three branches of government. To this end, the Act encourages mechanisms of 'political rights review' to be built into the policy-making and legislative processes. Section 19 HRA requires that, upon introducing a bill into Parliament, the responsible Minister make a statement certifying the compatibility of the proposed legislation with the Convention rights, or a statement indicating that – though doubts may exist over the compatibility of the proposal with the Convention rights – the Government nonetheless wishes to proceed with the Bill.[78] Section 19 HRA is designed to ensure that the potential impact of government initiatives on the Convention rights is explicitly built into *both* the policy-making and legislative processes. In addition, since 2001 the parliamentary Joint Committee on Human Rights has also carried out an oversight and scrutiny role, examining matters relating to human rights in the United Kingdom and the rights implications of legislative proposals and legislation designed to remedy incompatibilities with the Convention rights.

---

73 See *R (on the application of Daly)* v. *Secretary of State for the Home Department* [2001] *UKHL* 26; [2001] 2 AC 532; I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg', *Public Law* (2002), p. 265.

74 Section 6(3) HRA.

75 Section 4 HRA.

76 Section 3(1) HRA.

77 C. Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press 2006) pp. 94–98.

78 This latter course of action has been infrequently used. For one notable example, see the Communications Act 2003 (which banned political advertising on television) and the subsequent decision of the House of Lords in *R (on the application of Animal Defenders International)* v. *Secretary of State for Culture, Media and Sport* [2008] *UKHL* 15.

The clearest evidence that the enforcement of the Convention rights under the HRA was not to be a judicio-centric exercise can be found in the fact that the issue of a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement' of the provision(s) in respect of which it is made.[79] The issue of a declaration under section 4 of the HRA does not therefore compel the executive or legislature to enact remedial legislation to address the incompatibility – and, as a result, is not therefore regarded as an 'effective remedy' for the purposes of the Convention organs[80] – but instead places the elected branches of government under political pressure to remedy the apparent breach.

The HRA therefore promotes a model of rights protection which places burdens on both the judicial *and* elected branches to scrutinise government and legislation on the basis of the Convention rights.[81] The HRA is therefore a statutory bill of rights adhering to what Stephen Gardbaum has termed the 'new Commonwealth model'[82] of constitutionalism on the basis that it seeks to occupy a middle ground between the traditional understanding of parliamentary sovereignty and judicial supremacy over questions of rights. Rather than empower the judicial branch at the explicit expense of the political, the intent behind the HRA was to encourage protection of, and sensitivity to, rights through 'institutional balance, joint responsibility and deliberative dialogue.'[83]

4.2. THE RANGE OF PROTECTED RIGHTS

Specified provisions of the ECHR are given legal effect in the United Kingdom as a result of the HRA 1998. Those provisions given effect are detailed in schedule 1 to the HRA to include: Articles 2–12, 14, 16, 17, 18, Articles 1–3 of Protocol No. 1, Article 1 of Protocol No. 13. While the Convention rights are not 'incorporated' fully into domestic law – in the sense that they have become free-standing norms of general application – they remain standards of legality against which the actions (and inactions) of public bodies can be tested[84] and on the basis of

79 Section 4(6) HRA. Further evidence of the HRA's collaborative scheme can be found in the fact that the Government may be invited to join proceedings in which the compatibility of a statute with the Convention rights is at issue; section 5 HRA permits the Crown – defined to include a Minister of the Crown, Member of the Scottish Executive or Northern Ireland Executive – the ability to intervene in proceedings, and make arguments relating to the Convention rights, in which a court is considering issuing a declaration of incompatibility. The court retains ultimate discretion over whether a declaration of incompatibility should be issued.

80 *Burden* v. *United Kingdom*, ECtHR (GC) 29 April 2008, appl. no. 13378/05.

81 See generally J. Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?', 69 *Modern Law Review* (2006) p. 7.

82 S. Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge, Cambridge University Press 2013).

83 See S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 *American Journal of Comparative Law* (2001) p. 707 at p. 710.

84 Section 6 HRA.

which primary legislation can be subject to review.[85] In order to assert a Convention right against a public authority the applicant must be regarded as a 'victim' of the alleged contravention of the Convention right, or rights.[86]

Though the HRA gives 'further effect' to many of the rights and freedoms contained in the Convention, a number of the elements of the Convention are omitted. Article 1 ECHR was not included in the text of the HRA for the reason that it was felt to impose an obligation on the State as a whole rather than any of its specific component parts. Article 13 ECHR – the right to an effective remedy – was similarly omitted due to the inclusion of a specific (and broad)[87] remedies clause in the HRA.[88] Article 15 ECHR is not included in the provisions scheduled to the HRA, though contains a domestic parallel in section 14 HRA.

4.3. LEGISLATIVE REVIEW UNDER THE HUMAN RIGHTS ACT

The core provisions of the HRA governing the approach of the courts to legislative review are sections 3 and 4. Section 3(1) HRA directs courts to interpret primary and secondary legislation in order to achieve compatibility with the Convention rights so far as it is possible to do so. If Convention-compliant interpretation is not 'possible', higher courts have the discretion to issue a 'declaration of incompatibility'; a non-coercive declaration highlighting a potential inconsistency between the requirements of the Convention rights and the statutory provisions at issue.

4.3.1. Interpretation

The changes brought about to the techniques of statutory construction as a result of the HRA can be seen to operate at two levels. At the general level, the HRA is judicially-regarded as enjoying constitutional status.[89] Two consequences flow from this. The first is that the HRA is, as a so-called 'constitutional statute', immune from implied repeal (i.e., will not be overridden by subsequently-enacted, contrary, legislation unless by express direction).[90] The second is that, as a constitutional measure, the HRA is entitled to be interpreted using 'generous and purposive' methods of construction in order to fully vindicate the rights to

85 Sections 3 and 4 HRA.

86 Section 7(1) HRA.

87 Section 8(1) HRA provides that a court might 'grant such relief or remedy, or make such order, within its powers, as it considers just and appropriate' in the event that a public authority has been found to have acted unlawfully.

88 Section 8 HRA.

89 See, e.g., *McCartan Turkington Breen* v. *Times Newspapers* [2001] 2 *AC* 277, 297 (Lord Steyn); *Brown* v. *Stott* [2001] 2 *WLR* 817, 835 (Lord Bingham), 839 (Lord Woolf).

90 *Thoburn* v. *Sunderland City Council* [2003] *QB* 151.

which it gives further effect.[91] For a jurisdiction in which the judicial method has traditionally been characterised by formalist and/or literal approaches to statutory construction,[92] recognition of specific methods of 'constitutional' interpretation is a significant development.

In the application of section 3(1) HRA this 'generous and purposive' approach to the interpretation of statutes can be most readily observed in the technique of reading words or provisions into statutes in order to achieve compatibility with the Convention rights ('reading in'). 'Reading in' permits judges to infer words, phrases, or perhaps even provisions, into the text of statutes in order to render them Convention compliant. In the leading case of *Ghaidan* v. *Godin-Mendoza*, for instance, a majority of the House of Lords was able to interpret the words 'as his or her wife or husband' to read '*as if they were* wife or husband' in order to extend protections found in the Rent Act 1977 to same-sex couples (and to avoid an incompatibility between that legislation and Articles 8 and 14 of the Convention).[93]

'Reading down' also involves a departure from literalist techniques of statutory construction by permitting courts to adopt narrow or restrictive interpretation of a statute in order to avoid a clash with the requirements of the Convention rights. In *R* v. *Lambert* a majority of the House of Lords was able to 'read down' provisions of the Misuse of Drugs Act 1971 in order to interpret a reverse onus clause as imposing an evidential (rather than a legal) burden on the accused.[94]

Both techniques are available to the courts seeking to invoke section 3(1) HRA, but only to the extent that their use would not amount to an overt act of judicial legislation; section 3(1) 'does not entitle judges to act as legislators'.[95] In order to remain within the permissible realms of 'interpretation', adopted meanings must 'go with the grain'[96] of the legislation under scrutiny (in other words, must not undermine a 'fundamental feature'[97] of the statute under consideration). As Lord Rodger outlined in *Ghaidan* v. *Godin-Mendoza*:

> 'using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.'[98]

---

91 *R* v. *Director of Public Prosecutions, ex parte Kebeline* [2000] 2 *AC* 326, 375 (Lord Hope).

92 For a historical survey see: R. Stevens, *The English Judges: Their Role in the Changing Constitution* (Oxford, Hart Publishing 2005).

93 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557.

94 *R* v. *Lambert* [2001] *UKHL* 37; [2002] 2 *AC* 545.

95 *R* v. *S (Complainant's Sexual History)* [2001] *UKHL* 25; [2002] 1 *AC* 45, 87 (Lord Hope).

96 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [121] (Lord Rodger).

97 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [33] (Lord Nicholls).

98 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [121] (Lord Rodger).

Nor does section 3(1) entitle courts to take decisions 'for which they are not equipped', such as decisions requiring a legislative response due to their far-reaching ramifications, decisions with a significant social policy element, or decisions which the judicial process is ill-equipped to resolve.[99] These limitations notwithstanding, the potential for section 3(1) to be used to significant effect has been acknowledged in that it empowers courts to 'modify the meaning, and therefore the effect, of primary and secondary legislation'[100] in order to achieve Convention compliance.

4.3.2. Declarations of incompatibility

The HRA does not empower courts to declare statutes to be null and void in the event that a contravention of the Convention rights cannot be remedied by way of interpretation. Should a higher court find that it is not possible to interpret primary legislation in a way which is compatible with the Convention rights it may choose to issue a 'declaration of incompatibility' under section 4 HRA. The effect of such a declaration is to highlight an inconsistency between domestic law and the requirements of the Convention rights, but to leave the decision over how – or whether – the inconsistency should be remedied to the executive and legislature.

As a matter of law, courts under the HRA do not enjoy competence to compel the legislature to bring national law into conformity with the Convention rights; a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement' of the provision(s) in respect of which it is made.[101] Such a declaration is therefore designed to respect, rather than undermine, the United Kingdom's particular separation of powers as it reserves the choice over whether to amend judicially-declared incompatible legislation to Parliament. Parliamentary sovereignty is – at least formally – upheld under the terms of the HRA.

However, numerous declarations of incompatibility have been issued in respect of legislation deemed to be inconsistent with the requirements of the Convention rights.[102] The Ministry of Justice publishes statistics relating to the

99 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [33] (Lord Nicholls).

100 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [33] (Lord Nicholls).

101 Section 4(6) HRA.

102 See for instance: *R (on the application of Anderson)* v. *Secretary of State for the Home Department* [2002] *UKHL* 46 which saw the Crime (Sentences) Act 1997, section 29, declared incompatible with Art. 6 ECHR on the basis that the Home Secretary (who was empowered by the Act to set the custodial tariff to be served by adults convicted of murder) was not an independent and impartial tribunal. The incompatibility was remedied by the passing of the Criminal Justice Act 2003 (sections 303(b)(i), 332, schedule 37, part 8); *Bellinger* v. *Bellinger* [2003] *UKHL* 21 which saw section 11(c) of the Matrimonial Causes Act 1973 declared incompatible with Arts. 8 and 12 on the basis that the law as it stood could not extend to recognising a marriage between two people who were of the same sex at birth. The incompatibility was remedied by the Gender Recognition Act 2004; *A* v. *Secretary of State for the Home Department* [2004] *UKHL* 56 in which provisions permitting the indefinite detention without trial of non-nationals suspected of terrorist offences (contained in the

overall number of declarations of incompatibility issued by the higher courts under the HRA; by September 2012 the total number (including those subsequently overturned on appeal) stood at 27.[103]

The precise coercive effect of a declaration of incompatibility on the elected branches of government, however, remains a point of contention. The effect of a declaration of incompatibility is, at very the least, to alert the elected branches to a potential breach of the Convention and to leave the decision over how to address the inconsistency with the executive and Parliament. There is evidence that the intention of the enacting government was that the issue of such a declaration would – in all but extreme circumstances – prompt a legislative response.[104]

As a matter of constitutional practice all but one of the declarations which have become final (that is, have not been overturned on appeal) have been addressed in subsequent primary legislation or through use of the 'remedial order' procedure contained in section 10 HRA.[105] While some commentators have been able to point to the existence of a 'practice' under which the 'elected branches do not reject'[106] declarations of incompatibility there is insufficient evidence to date to establish a binding convention in this regard.[107]

The significant exception to this trend of positive action in response to section 4 declarations can be found in the ongoing saga relating to prisoner voting rights.[108] The relevant provisions of the domestic legislation – the Representation of the People Act 1983 – were declared to be incompatible with the requirements of Article 3 of Protocol No. 1 in the 2007 decision in *Smith* v. *Scott*[109] on the basis of the prior decision of the European Court of Human Rights in *Hirst* v. *United Kingdom (No. 2)*.[110] Since then – and in spite of repeated consultation exercises and the decision of the European Court of Human Rights in *Greens and M.T.* v. *United Kingdom*[111] – the United Kingdom Government

---

Anti-Terrorism, Crime and Security Act 2002) were declared incompatible with Articles 5 and 14. The legislative response came in the Prevention of Terrorism Act 2005, itself the subject of subsequent litigation relating to Convention compliance (see *Secretary of State for the Home Department* v. *MB* [2007] *UKHL* 46; [2008] 1 *AC* 440; *Secretary of State for the Home Department* v. *AF (No. 3)* [2010] 2 *AC* 269).

103 <www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf>, visited March 2013.

104 HC Debs, Vol. 317, Col.1301 (Jack Straw MP).

105 A so-called Henry VIII clause which permits primary legislation to be modified by secondary legislation.

106 A. Kavanagh, 'Deference or defiance? The limits of the judicial role in constitutional adjudication' in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, Cambridge University Press 2008) p. 214.

107 *Burden v. United Kingdom*, ECtHR (GC) 29 April 2008, appl. no. 13378/05.

108 For the latest instalment, see *R (on the application of Chester)* v. *Secretary of State for the Home Department; McGeoch* v. *The Lord President of the Council* [2013] *UKSC* 63.

109 2007 *SC* 345.

110 *Hirst* v. *United Kingdom (No. 2)*, ECtHR (GC) 6 October 2005, appl. no. 74025/01.

111 ECtHR 23 November 2010, appl. nos. 60041/08 and 60054/08. See also the judgment of the Grand Chamber in *Scoppola* v. *Italy*, ECtHR (GC) 22 May 2012, appl. no. 126/05.

and Parliament have resisted the pressure to bring domestic law in line with the requirements of the Convention.

There is some dispute as to which of the two processes – achieving Convention compliance by judicial interpretation or by legislative amendment – is constitutionally preferable. Many hail the 'declaration of incompatibility' innovation as the unique design feature of the HRA which is broadly consistent with the idea of the 'political constitution' and allows the Act to sidestep the 'counter-majoritarian' criticisms which have been levelled at other (constitutional) rights instruments. In theory at least, section 4 HRA permits the ultimate resolution of rights questions to be handed back from courts to the elected branches of government. However, while section 4 may enjoy democratic credibility, its remedial effectiveness is open to doubt for the reason that it does not compel a response from the executive and/or legislature.

It is perhaps for this reason that the intentions of the enacting government appeared to endorse the preferential use of section 3(1); as the then Lord Chancellor, Lord Irvine of Lairg QC, outlined in 1998 'in 99% of the cases that will arise [under the HRA], there will be no need for judicial declarations of incompatibility.'[112] Early in the life of the HRA it was clear that at least some support for this view existed amongst the senior judiciary; in *Ghaidan* v. *Godin-Mendoza*, Lord Steyn described section 3(1) as the 'prime remedial measure' in the HRA, and a declaration of incompatibility as a 'measure of last resort.'[113] In practice, however, declarations of incompatibility have been issued in a far greater number of cases than government predictions seemed to indicate.[114]

4.4. HORIZONTALITY

Though the HRA is silent on the specific question of whether the Convention Rights should apply in litigation between private parties (i.e. horizontally) the Act is of practical horizontal utility and the Convention rights have been relied upon, and influenced the development of the law, in cases involving only private parties. Where the relevant area of law is governed by statute, the Convention Rights (indirectly) apply horizontally for the reason that section 3(1) HRA draws no distinction between private and public law disputes, simply declaring that *all* 'primary legislation and secondary legislation must be read and given effect in a way which is compatible with the Convention rights.' As a result, section 3(1) has

112 HL Debs, Vol. 423, Col. 840 (5 February 1998).

113 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [46] (Lord Steyn).

114 G. PHILLIPSON, 'The Human Rights Act, Dialogue and Constitutional Principles' in R. MASTERMAN and I. LEIGH, *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives (183 Proceedings of the British Academy)* (Oxford, Oxford University Press 2013) pp. 33–38.

been relied on in cases dealing with, *inter alia*, landlord and tenant disputes,[115] contractual disputes,[116] and employment law.[117]

At common law, the Convention rights have indirect horizontal effect as a result of section 6 HRA. The Convention rights are not explicitly made applicable as between private parties. However, as the courts are deemed to be public authorities under the provisions of the Act, they are placed under an obligation not to act incompatibly with the requirements of the Convention. This has been interpreted to mean that, in giving effect to the common law, courts should seek to apply (and develop) the law in a way which is compliant with the Convention rights.[118]

The most significant developments in this field have seen the modification of the common law breach of confidence doctrine into a remedy capable of protecting against disclosures of private information by the press.[119] Prior to the enactment of the HRA – and in the absence of primary legislation affording protection and conscious of the limited law-making capacity of the common law – the courts had found themselves powerless to develop the law in order to restrain overly intrusive journalistic practices.[120] Since the implementation of the Act the breach of confidence remedy – renamed post-*Campbell* v. *Mirror Group Newspapers* as the tort of 'misuse of private information' – has been the vehicle via which the protections afforded by Article 8 (and those afforded by Article 10) have been accommodated into the domestic common law; the effect being that domestic common law provides far greater protection for personal privacy – even taking under consideration the protections afforded by Article 10 – than had been capable of being judicially-engineered in the pre-HRA era.

It should also be noted however, that the development of the common law's ability to offer protection to personal privacy has been singularly pronounced; in other areas of the common law the influence of the HRA has been far less marked.[121]

115 See *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30.

116 See *Wilson* v. *First County Trust* [2003] *UKHL* 40.

117 See *X* v. *Y* [2004] *EWCA Civ* 662.

118 Though it should be noted that considerable disagreement exists over the precise obligations imposed on the judiciary in this respect (cf. M. Hunt, 'The "Horizontal Effect" of the Human Rights Act 1998', *Public Law* (1998), p. 423; G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A bang or a whimper?' 62 *Modern Law Review* (1999) p. 824; W. Wade, 'Horizons of Horizontality', 116 *Law Quarterly Review* (2000) p. 217).

119 See *Campbell* v. *Mirror Group Newspapers* [2004] *UKHL* 22; [2004] 2 *AC* 457.

120 *Kaye* v. *Robertson* [1991] *FSR* 62.

121 See J. Steele, '(Dis)owning the Convention in the Law of Tort' in J. Lee, ed., *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford, Hart Publishing 2010).

4.5. THE EXTENT OF JUDICIAL ENFORCEMENT POWERS

In the event that compliance with the Convention requires legislative action, domestic courts are unable to *compel* the government to introduce remedial legislation. While the absence of Article 13 has otherwise not 'posed a significant hurdle in the way of the courts' ability to give effective protection to the Convention rights in domestic law'[122] courts are not competent to require the enactment of legislation designed to bring the United Kingdom into conformity with the requirements of the Convention. Should it be impossible to interpret existing legislation in a manner which would achieve compatibility with the Convention the courts' powers are limited. As Laws LJ noted in *R (on the application of Chester)* v. *Secretary of State for Justice*:

> 'Under the Human Rights Act 1998 the minister has no obligation to act on a declaration of incompatibility. If he does not, the complainant's remedy is to take proceedings in Strasbourg where he will be able to deploy the domestic court's judgment to the effect that his Convention rights have been violated. And failure by a member state of the Council of Europe to give effect to a decision of the European Court of Human Rights sounds at the political level; it is not as such amenable to sanctions in the national courts.'[123]

By contrast, the courts do however have power to declare decisions taken by public authorities to be *ultra vires* on the basis of an incompatibility with the Convention rights.[124] In practice, this happens relatively frequently, though – as covered below – the courts may recognise that a degree of deference may be due to such decisions on the basis of the relative institutional competence of the primary decision-maker.

The implementation of the HRA itself was designed to reduce the occasions on which the United Kingdom was found to be in breach of the obligations imposed by the ECHR. The Labour government which proposed the HRA, and piloted the Human Rights Bill through Parliament, was explicitly motivated by 'the number of cases in which the European Commission and Court have found that there have been violations of the Convention rights in the United Kingdom.'[125] The *obligations* which the HRA, in turn, imposes on domestic courts – relating to the interpretation of legislation, policing the legality of public body decision-making and the exercise of their own powers – underpins the suggestion that the application of the Convention rights might be described

---

122 J. Beatson, S. Grosz, T. Hickman, R. Singh and S. Palmer, *Human Rights: Judicial Protection in the United Kingdom* (London, Sweet and Maxwell 2008) p. 37.

123 *R (on the application of Chester)* v. *Secretary of State for Justice* [2010] *EWCA* Civ 1439; [2011] 1 *WLR* 143 at [27].

124 Section 6 HRA.

125 *Rights Brought Home: The Human Rights Bill* (Cm. 3782), October 1997 at [1.16].

as acting as the United Kingdom's equivalent to an explicit system of constitutional review.[126]

Treating the HRA as the United Kingdom's concerted attempt to avoid incompatibilities between domestic law and the ECHR, violations between statute law and the Convention rights can be judicially-remedied (utilising section 3(1) HRA) or might be remedied by the elected branches following the judicial issue of a declaration of incompatibility. While the HRA is – as indicated above – silent on the precise relationship between the Convention rights and the common law, the courts have (broadly) sought to interpret the common law in compliance with the requirements of the Convention. In the event that a declaration under section 4 is issued, the incompatibility might be addressed by way of primary remedial legislation, or as a result of the remedial order procedure contained in section 10 HRA. Regardless of the specific type of remedial action taken, in all but one case the declaration of incompatibility has resulted in a legislative response designed to bring national law into conformity with the requirements of the Convention.

Research published in 2007 indicated that the HRA can overall be seen to have had a positive effect in addressing concerns over the frequency with which the United Kingdom was found to have breached the ECHR and highlighted a 'definite reduction in the number of applications declared admissible and the number of judgments where at least one violation of the ECHR has been found.'[127] This can at least partially be attributed to the courts' positive engagement with, and responsiveness to, the requirements of the Convention rights in both cases of statutory interpretation and common law adjudication.

5. THE IMPACT OF ECtHR DECISIONS ON JUDICIAL DECISION MAKING

5.1. THE RELATIONSHIPS BETWEEN NATIONAL LAWS AND THE CONVENTION RIGHTS

The impact of decisions of the European Court of Human Rights on the domestic application of the Convention rights pursuant to the HRA has been extensive. The governing provision, section 2(1) HRA, provides:

> 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c)

126 KAVANAGH, *supra* n. 70.

127 M. AMOS, 'The impact of the Human Rights Act on the United Kingdom's performance before the European Court of Human Rights', *Public Law* (2007) p. 655 at p. 675.

> decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.'

In cases concerning the Convention rights – whether governed by statute or arising at common law – the courts are therefore obliged to 'take into account' relevant Strasbourg authority. A degree of initial scepticism on the part of some judges aside,[128] since the full implementation of the HRA in October 2000 the jurisprudence of the European Court of Human Rights has been routinely engaged with in decisions of the higher courts. In an early assessment of the HRA, Kier Starmer wrote that:

> 'Between October 2000 and April 2002, the ECHR was substantively considered in 431 cases in the High Court or above. In 318 of those cases, it affected the outcome, reasoning or procedure.'[129]

This stands in sharp contrast to the pre-HRA position:

> 'Research published in 1997 revealed that in the 21 years from July 1975 to July 1996, the ECHR was substantively considered in 316 cases in the High Court or above and affected the outcome, reasoning or procedure in just 16.'[130]

A Government review of the operation of the HRA conducted in 2006 found that UK courts tend to pay 'close analytical attention' to decisions of the ECHR.[131] Though prior to the implementation of the HRA it was easy to find judicial suggestions that the Convention case law had little to add to the protections afforded domestically by the common law,[132] occasions on which the ECHR jurisprudence is now dismissed by judges as unhelpful, or otherwise not seriously engaged with, are infrequent.[133]

---

128 In a notorious example one senior judge was found to have given rise to a reasonable apprehension of bias after suggesting the HRA would amount to a 'field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers' in *Scotland on Sunday* (6 February 2000). The judge in question was removed from the bench on which he had recently sat – in a case concerning Article 8 ECHR (*Hoekstra, Van Rijs et al* v. *HM Advocate (No. 2)* 2000 *SLT* 602) – with the case subsequently being reheard by a differently constituted panel of judges (*Hoekstra, Van Rijs et al* v. *HM Advocate (No. 3)* 2000 *SLT* 605).

129 K. Starmer, 'Two years of the Human Rights Act', *European Human Rights Law Review* (2003) p. 14 at p. 15.

130 Ibidem.

131 Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006) p. 11.

132 e.g. *Attorney-General* v. *Guardian Newspapers (No. 2)* [1990] 1 *AC* 109, 283–284 (Lord Goff); *Derbyshire CC* v. *Times Newspapers Ltd* [1993] *AC* 534, 550–551 (Lord Keith).

133 e.g. *A. and Others* v. *Secretary of State for the Home Department* [2004] *UKHL* 56 at [92] (Lord Hoffmann).

Domestic courts therefore generally comply with – and give effect to – the requirements of the Convention; they are obligated to do so as a result of section 6 HRA (and are required to take into account relevant Strasbourg jurisprudence whenever decided).[134] While it is the executive that is primarily responsible for the execution of decisions of the European Court of Human Rights in which the United Kingdom has been found to be in breach of the Convention, the judicial branch may play a complementary – though subsidiary – role.[135]

Increasingly, the HRA has prompted domestic courts to respond to decisions against the United Kingdom by modifying their previous approach to the relevant domestic law.[136] Though it is open to the courts to adapt their approach to national law in the light of a finding against the United Kingdom, the influence of the Convention rights has however not displaced the common law doctrine of precedent; even if an otherwise applicable domestic precedent appears to have been rendered inconsistent with the Convention rights by a more recent line of authority from the Strasbourg court, the domestic courts will remain bound to apply the domestic precedent unless and until the law is changed by a superior domestic court.[137] Otherwise however, there is no distinction between those European Court of Human Rights Cases involving the United Kingdom and those to which the United Kingdom is not a party in the provisions of the HRA; the relevant provision – section 2(1) – simply states that Strasbourg case-law should be 'taken into account' to the extent that it is relevant.

Giving effect to the requirements of the Convention in national law, invariably involves a degree of translation or adaptation (largely for the reason – as outlined above – that the Convention rights have not been fully incorporated into domestic law). At common law – especially in the development of the breach of confidence doctrine – the Convention rights have been used to guide

134 It is possible to speculate, however, that the views of certain judges on the European Court of Human Rights helped to shape their interpretation of the HRA and the domesticated Convention rights. Lord Hoffmann's argument that human rights be understood as being universal in spirit, but domestic in their application (Lord Hoffmann, 'The universality of human rights', 125 *Law Quarterly Review* (2009) p. 416), finds a parallel in his speech in the House of Lords decision in *Re McKerr* ([2004] *UKHL* 12 at [65] (Lord Hoffmann): '[a]lthough people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention … their meaning and application is a matter for domestic courts, not the court in Strasbourg'), for instance, where he argued that the Convention rights under the HRA were domestic (not European) rights to he interpreted and applied by domestic courts.

135 An appeal against conviction, for instance, may occur in the light of a finding of the European Court of Human Rights that Article 6 has been breached (*Rowe and Davis* v. *United Kingdom*, 16 February 2000, appl. no. 28901/95) (though a finding of a breach of Article 6 prior to conviction will, however, not necessarily result in the relevant conviction being set aside (*R* v. *Lyons* [2002] *UKHL* 44; [2003] 1 *AC* 976)).

136 See *Manchester CC* v. *Pinnock* [2010] *UKSC* 45.

137 *Kay* v. *Lambeth LBC* [2006] *UKHL* 10; [2006] 2 *AC* 465.

development of the law rather than to replace or override existing doctrines; the breach of confidence doctrine has been modified in order to accommodate Articles 8 and 10. Similarly, in the interpretation of statute, the ability of the court to modify the meaning of legislation in order to achieve Convention compatibility is conditioned by the requirements of the HRA itself (i.e., the suggested interpretation must be 'possible') as well as by domestic constitutional conditions (section 3(1) does not entitle courts to take decisions 'for which they are not equipped').[138]

It follows from this that the ability of domestic courts to effectively execute decisions of the European Court of Human Rights against the United Kingdom is constrained by two key factors. First, the courts' ability to respond to European Court of Human Rights decisions against the United Kingdom is constrained by internal constitutional limitations – especially if the required change to the law cannot be achieved by way of interpretation or through incremental development of the common law.[139] Furthermore, in the event of the failure of the elected branches of government to address the inconsistency between national law and the Convention highlighted by a declaration of incompatibility, domestic courts cannot compel legislative change (even in the face of a European Court of Human Rights decision finding the United Kingdom to be in breach of the Convention).[140] Nor are damages available as a result of the failure of the legislature to amend or replace legislation declared incompatible with the Convention rights under section 4 HRA.[141]

Second, the ability of domestic courts to implement judgments against the United Kingdom has, in the opinion of the Parliamentary Joint Committee on Human Rights, been further curtailed by the – more procedural – preservation of the domestic doctrine of precedent. The finding of the House of Lords that domestic precedents remain binding – even in the face of more recent contradictory authority from the European Court of Human Rights – 'effectively excludes the judicial branch from having a significant role in the implementation of Strasbourg *judgments* against the UK'[142] (by prohibiting lower courts from departing from the existing domestic precedent and by effectively requiring an applicant to appeal to the apex court).

---

138 *Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30; [2004] 2 *AC* 557 at [33] (Lord Nicholls).

139 *R (on the application of Chester)* v. *Secretary of State for Justice* [2009] *EWHC* 2923. See G. Phillipson and A. Williams, 'Horizontal effect and the constitutional constraint', 74 *Modern Law Review* (2011) p. 878.

140 *R (on the application of Chester)* v. *Secretary of State for Justice* [2010] *EWCA* Civ 1439; [2011] 1 *WLR* 143.

141 Section 6(6) HRA.

142 Joint Committee on Human Rights, *Monitoring the Government's response to Court Judgments finding breaches of human rights* (2006–2007), HL128/HC728 at [13] (emphasis added).

5.2. THE 'MIRROR' PRINCIPLE

An approach which seeks to 'mirror'[143] the requirements of the Convention in their application pursuant to the HRA has developed to be the dominant trend and is best illustrated in the House of Lords decision in *Ullah*. In that case, Lord Bingham, then Senior Law Lord, said the following:

> 'a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention Right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[144]

This influential passage cemented a strong judicial presumption in favour of applying (mirroring) the requirements of relevant and applicable Strasbourg case-law in HRA adjudication. A particularly strong presumption appears to operate in respect of relevant decisions of the Grand Chamber of the European Court of Human Rights which have been straightforwardly applied, even in the face of apparent judicial disquiet.[145]

This presumption in favour of the application of relevant Strasbourg authority might be displaced in a number of (specific) circumstances, a number of which will, in practice, only arise in the course of judicial consideration of European Court of Human Rights decisions to which the United Kingdom was a party. For instance, one senior judge in the House of Lords suggested that:

> 'The House [of Lords] is not bound by decisions of the European Court and, if I thought that ... they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed.'[146]

---

143 The phrase 'mirror principle' is Jonathan Lewis': J. LEWIS, 'The European Ceiling on Rights', *Public Law* (2007) p. 720. See also R. MASTERMAN, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention Rights" in Domestic Law', in H. FENWICK, G. PHILLIPSON and R. MASTERMAN, eds., *Judicial Reasoning under the UK Human Rights Act* (Cambridge, Cambridge University Press 2007); J. BEATSON, S. GROSZ, T. HICKMAN, R. SINGH and S. PALMER, *Human Rights: Judicial Protection in the United Kingdom* (London, Sweet and Maxwell 2008) pp. 40–45.

144 *R (on the application of Ullah)* v. *Special Adjudicator; Do* v. *Immigration Appeal Tribunal* [2004] *UKHL* 26; [2004] 2 *AC* 323 [20] (Lord Bingham).

145 See *Secretary of State for the Home Department* v. *AF (No. 3)* [2010] 2 *AC* 269.

146 *R (on the application of Alconbury Developments Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] *UKHL* 23 at [76].

More specifically, the same judge – Lord Hoffmann – suggested, in *R* v. *Lyons (No. 3)* that a domestic court might not apply Convention case law if 'for example, an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law.'[147] In practice, this exception to the 'mirror principle' has been utilised by domestic courts in order to request the European Court of Human Rights to revisit a particular decision – or decisions – in order to clarify the precise requirements of the Convention in relation to specific aspects of English law. Exchanges between the House of Lords/UK Supreme Court and the European Court of Human Rights have taken place in a series of cases concerning the impact of Article 8 on possession proceedings[148] and in the context of adjudication relating to the compatibility of hearsay evidence with the requirements of Article 6(1) ECHR.[149] In the latter instance, the decision of the Supreme Court in *R* v. *Horncastle* provides perhaps the most compelling authority to date for the suggestion that domestic courts will not unquestioningly apply even relevant and clear Strasbourg case-law as a matter of course.[150] The European Court of Human Rights' response to this particular decision – in *Al-Khawaja* v. *United Kingdom*[151] – demonstrates the willingness of the Strasbourg court to respond constructively to concerns raised at the national level regarding the local execution of its judgments. The cumulative effect of this 'dialogue'[152] suggests that the 'mirror principle' does not present an unavoidable obstacle to the UK Supreme Court engaging critically with – and in turn contributing to the development of the jurisprudence of – the European Court concerning the meaning of the Convention rights.[153]

147 *R* v. *Lyons (No. 3)* [2003] 1 *AC* 976 at [46].

148 The relevant domestic authorities are: *Harrow LBC* v. *Qazi* [2003] *UKHL* 43; [2004] 1 *AC* 983; *Kay* v. *Lambeth LBC* [2006] *UKHL* 10; [2006] 2 *AC* 465; *Doherty* v. *Birmingham CC* [2008] *UKHL* 57; [2009] 1 *AC* 367; *Manchester CC* v. *Pinnock* [2010] *UKSC* 45. The relevant European Court of Human Rights decisions are: *Connors* v. *United Kingdom*, ECtHR 27 May 2004, appl. no. 66746/01; *McCann* v. *United Kingdom*, ECtHR 13 May 2008, 19009/04; *Kay* v. *United Kingdom*, ECtHR 21 September 2010, appl. no. 37341/06. For discussion see: I. Loveland, 'The shifting sands of Article 8 jurisprudence in English housing law', *European Human Rights Law Review* (2011) p. 151.

149 See: *R* v. *Horncastle* [2009] *UKSC* 14; [2010] 2 *AC* 373 and *Al-Khawaja and Tahery* v. *United Kingdom*, 15 December 2011, appl. nos. 26766/05 and 22228/06.

150 *R* v. *Horncastle* [2009] *UKSC* 14; [2010] 2 *AC* 373.

151 *Al-Khawaja and Tahery* v. *United Kingdom*, 15 December 2011, appl. nos. 26766/05 and 22228/06.

152 On which see: M. Amos, 'From Monologue to Dialogue', in R. Masterman and I. Leigh, eds., *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives (183 Proceedings of the British Academy)* (Oxford, Oxford University Press 2013).

153 R. Masterman, 'Deconstructing the Mirror Principle', in R. Masterman and I. Leigh, eds., *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives (183 Proceedings of the British Academy)* (Oxford, Oxford University Press 2013).

5.3. THE MARGIN OF APPRECIATION AND DEFERENCE

In applying the Convention jurisprudence, domestic courts recognise that specific interpretative principles are applied by the European Court of Human Rights in giving effect to the Convention. It is acknowledged, for instance, that the Convention is a 'living instrument'[154] the meaning of which might change over time in accordance with a consensus amongst the State Parties,[155] that the Convention rights should be applied to present day conditions,[156] and that the protections afforded by the Convention should be 'practical and effective' rather than being 'theoretical and illusory.'[157]

Formally, the margin of appreciation employed by the European Court of Human Rights is however *not* applicable by domestic courts in adjudication under the HRA; as outlined in the House of Lords in *ex parte Kebeline*:

> 'By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries.'[158]

In practice however, disentangling those elements of European Court of Human Rights decisions conditioned by the margin of appreciation from those that might be utilised or otherwise relied upon in domestic courts has proven difficult.[159] A number of commentators have criticised the attempts of domestic courts to disentangle the margin of appreciation from those aspects of the Strasbourg case-law which are applicable at the domestic level:

> '[i]n numerous appellate decisions under the HRA, the courts have paid lip service to the notion that the margin of appreciation has no role to play in domestic decision-making. In nearly every case ... the courts have then gone on to apply Strasbourg case-law heavily determined by that doctrine, thus precisely applying the margin of appreciation.'[160]

---

154 *In Re McCaughey* [2011] *UKSC* 20; [2012] 1 *AC* 725 at [2], [90] and [136].

155 In *R (Pretty)* v. *Director of Public Prosecutions* [2001] *UKHL* 61; [2002] 1 *AC* 800; *Evans* v. *Amicus Healthcare Ltd* [2003] *EWHC* 2161 (Fam); [2005] *Fam* 1; *R (on the application of Animal Defenders International)* v. *Secretary of State for Culture, Media and Sport* [2008] *UKHL* 15; [2008] 1 *AC* 1312.

156 Implicit in the UK Supreme Court decision in *R (Quila)* v. *Secretary of State for the Home Department* [2011] *UKSC* 45; [2012] 1 *AC* 621.

157 *AXA General Insurance Ltd* v. *HM Advocate* [2011] *UKSC* 46; [2012] 1 *AC* 868 at [111].

158 *R* v. *Director of Public Prosecutions, ex parte Kebeline* [2000] 2 *AC* 326, 380.

159 See for instance: *R (on the application of Animal Defenders International)* v. *Secretary of State for Culture, Media and Sport* [2008] *UKHL* 15.

160 H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford, Oxford University Press 2006) p. 146.

While the margin of appreciation is not explicitly applied under the HRA, a domestic variant – referred to as deference – is underpinned by similar concerns relating to the authority of primary decision-makers.

Domestic courts have recognised that public bodies should be afforded a 'discretionary area of judgment' within which 'the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.'[161] The degree to which the courts will defer to the judgments of the elected branches of government is however one of the most contested elements of adjudication under the HRA.[162]

At the structural level, a degree of deference to the *legislature* is inherent in the HRA scheme; statutes may not be struck down by the courts[163] and the ability of Parliament to legislate in apparent, or open, defiance of the requirements of the Convention is preserved.[164]

As a result, the highest courts have acknowledged that – when being asked to declare primary legislation incompatible with the Convention rights – 'great weight' should attach to the legislative determinations of Parliament (and to those legislative decisions determining how rights and competing societal interests should be balanced).[165] That said, respect for the legislative decisions of Parliament has not prevented the courts engaging in review, and interpretation, of legislation concerning topics which would, prior to the implementation of the HRA, have been seen to lie on the fringes of justiciability.[166]

Stricter scrutiny of executive action (and inaction) appears to be mandated by the terms of section 6(1) HRA: '[i]t is *unlawful* for a public authority to act in a way which is incompatible with a Convention right.' While it remains constitutionally permissible for Parliament to legislate incompatibly with the protections provided by the Convention rights, executive decisions are not so protected unless the public body concerned was compelled to so act as a result of primary legislation, or as a result of legislation which cannot be interpreted consistently with the Convention rights.[167]

---

161 *R* v. *Director of Public Prosecutions, ex parte Kebeline* [2000] 2 *AC* 326, 381.

162 For a sample of the voluminous literature see: F. KLUG, 'Judicial Deference under the Human Rights Act', *European Human Rights Law Review* (2003) p. 125; M. HUNT, 'Sovereignty's Blight: Why contemporary public law needs a concept of "due deference"', in N. BAMFORTH and P. LEYLAND, *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing 2003); J. JOWELL, 'Judicial Deference: servility, civility or institutional capacity?', *Public Law* (2004) p. 592; ALLAN 2006, *supra* n. 43, p. 671; KAVANAGH 2008, *supra* n. 106; A.L. YOUNG, 'In Defence of Due Deference', 72 *Modern Law Review* (2009) p. 554.

163 Section 4 HRA.

164 Section 19(1)(b) HRA.

165 *R (on the application of Animal Defenders International)* v. *Secretary of State for Culture, Media and Sport* [2008] *UKHL* 15 at [33].

166 Social policy (*Ghaidan* v. *Godin-Mendoza* [2004] *UKHL* 30) and national security (*A* v. *Secretary of State for the Home Department* [2004] *UKHL* 56) among them.

167 Section 6(2) HRA.

In their review of primary legislation the courts have been willing to defer to the judgment of Parliament (in the senses that the courts have acknowledged that certain questions might fall to be properly resolved by the legislature[168] or that weight should attach to the 'considered view' of the legislature as to the balance to be struck between competing rights and/or interests as expressed in statute).[169] In doing so, the courts acknowledge – in accordance with the structural design of the HRA – the legitimate (legislative) authority of Parliament to determine questions of rights.

Such deference is less evident in so far as decisions of the executive are concerned; the courts have shown themselves unwilling to cede determinative authority over Convention issues to delegated decision makers and have been less ready to acknowledge the existence of a 'dialogue' on the meaning and application of the Convention rights.[170] Having said this, *Wednesbury* reasonableness review still exerts a residual influence – even though proportionality is recognised as the appropriate test in rights adjudication – and on occasion domestic courts' approaches to policing the proportionality of restrictions placed on the Convention rights has been found to fall below the standard required by the European Court of Human Rights.[171]

In practice, and in the context of *both* legislative and executive decisions, courts have been sensitive to the need to preserve the careful balance apparent on the face of the HRA, and to thereby prevent the multi-institutional system of checks and balances it creates from collapsing into a de facto system of 'strong form judicial review.'[172] While the judgment of Laws LJ in *International Transport Roth GmbH* v. *Secretary of State for the Home Department* has been criticised for advocating a rigid, or doctrinal, approach to deference,[173] it nonetheless highlights a number of relevant considerations for courts approaching the contextual analysis of rights adjudication under the HRA. Laws LJ outlined the following four principles:

(i) '... greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure ... where the decision-maker is not Parliament, but a Minister or other public or governmental authority exercising power conferred by Parliament, a degree of deference will be due on democratic grounds.'

168 e.g. *Bellinger* v. *Bellinger* [2003] *UKHL* 21; [2003] 2 *AC* 467.

169 e.g. *R (on the application of Animal Defenders International)* v. *Secretary of State for Culture, Media and Sport* [2008] *UKHL* 15; [2008] 1 *AC* 1312; *R (on the application of ProLife Alliance)* v. *Secretary of State for Culture, Media and Sport* [2003] *UKHL* 23; [2004] 1 *AC* 185.

170 See *R (on the application of Begum)* v. *Denbigh High School Governors* [2006] *UKHL* 15; [2007] 1 *AC* 100; *Belfast City Council* v. *Miss Behavin'* [2007] *UKHL* 19; [2007] 1 *WLR* 1420.

171 See, e.g., *Gillan and Quinton* v. *United Kingdom* (2010) 50 *EHRR* 45.

172 M. Tushnet, 'New forms of judicial review and the persistence of rights- and democracy-based worries' 38 *Wake Forest Law Review* (2003) p. 813.

173 T. Hickman, *Public Law after the Human Rights Act* (Oxford, Hart Publishing 2010) ch. 5.

(ii) '... there is much more scope for deference "where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified.'

(iii) 'The third principle is that greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts. The first duty of the government is the defence of the realm. It is well-settled that executive decisions dealing directly with matters of defence, while not immune from judicial review (that would be repugnant to the rule of law) cannot sensibly be scrutinised by the courts on grounds relating to their factual merits ... The first duty of the courts is the maintenance of the rule of law. That is exemplified in many ways, not least by the extremely restrictive construction always placed on no-certiorari clauses.'

(iv) '... greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts. Thus, quite aside from defence, government decisions in the area of macro-economic policy will be relatively remote from judicial control ...'

Attempts to generate a freestanding doctrine of due deference have, however, been resisted by the judiciary, with the House of Lords in *Huang* seeming to rule-out the development of a doctrinal approach to the consideration of relative institutional competence, specific expertise and so on:

> 'The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judiciary task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.'[174]

6. LEGITIMACY DEBATES: THE EUROPEAN COURT OF HUMAN RIGHTS AND NATIONAL AUTHORITIES

Political and popular criticism of the European Court of Human Rights is widespread in the United Kingdom. While criticism from within the judiciary is less vehement than has become commonplace in other quarters, it is nonetheless occasionally visible and levelled towards the perceived expansionist tendencies of the European Court – referred to by one former Law Lord as the 'occasional

174 *Huang* v. *Secretary of State for the Home Department* [2007] *UKHL* 11; [2007] 2 *AC* 167 at [16].

extravagances of the Strasbourg Court'[175] – at its relative remoteness from national concerns and lack of direct accountability.[176]

Political and popular criticism of the European Court, and of the application of the Convention jurisprudence in the national system, has tended to take one of two forms. At the general level, there is a sense that decisions of the European Court of Human Rights are increasingly impinging on national sovereignty in the sense that initiatives that have been 'democratically endorsed' at the national level are subsequently challenged on human rights grounds by the European Court. This particular perspective can be argued to be most visible in the current impasse between the United Kingdom executive/legislature and European Court of Human Rights over prisoner voting rights.

Controversy has also arisen in respect of a number of specific decisions (or lines of decisions) taken by the European Court. The development of domestic protections against interferences with personal privacy carried out by the press (informed by the Convention jurisprudence on Article 8 and Article 10 ECHR) has been the subject of considerable controversy; so too have prohibitions against the deportation of individuals to countries where their rights under the Convention might be placed at risk (based on the decision of the European Court in *Soering* v. *United Kingdom*).[177] The inability of successive governments to deport individuals suspected of involvement in terrorist activities has been a persistent cause of frustration.[178]

Slightly more abstract concerns over the legal protection of human rights are also evident in the debates over the role and position of the European Court of Human Rights and domestic implementation of its decisions under the HRA. It is commonplace, for instance, to read that human rights are only available to terrorist suspects, paedophiles and sex offenders or that the rights of such individuals are routinely prioritised over those of others and the broader interests of society. Politicians will frequently criticise decisions taken on human rights grounds as spurious and having been taken in defiance of 'common sense'.[179] Human Rights are claimed to have given rise to a 'culture of compensation'[180] and – even more bizarrely – were claimed to be responsible for riots which took place in London and elsewhere in the United Kingdom during 2011.

Although enacted (1998) and fully implemented (2000) under a Labour government, the HRA soon became seen as a thorn in the side of subsequent

175 HL Debs, Vol. 721, Col. 709 (18 October 2010) (Lord Scott of Foscote).

176 Lord Hoffmann, *supra* n. 134, p. 416.

177 ECtHR 7 July 1989, appl. no. 14038/88.

178 See now *Othman (Abu Qatada)* v. *United Kingdom*, ECtHR 17 January 2012, appl. no. 8139/09.

179 'Afghans who fled Taliban by hijacking airliner given permission to remain in Britain', *The Guardian*, 11 May 2006.

180 Michael Howard MP, 'Time to liberate the country from Human Rights laws', 18 March 2005.

Labour administrations,[181] and has been mooted as a target for repeal by an incoming Conservative administration since at least 2005. The turning point was most probably the declaration of incompatibility issued in respect of the detention without trial provisions of the Anti-Terrorism, Crime and Security Act 2001, the centrepiece of the Labour Government's response to 9/11. Since then, numerous Labour and Conservative Ministers alike have portrayed the HRA – and the Convention rights to which it gives further effect – as unnecessary obstacles to effective crime control and the success of the so-called 'War on Terror.'

The leader of the Conservative party – David Cameron – fought the 2010 general election on a promise to reform or repeal the HRA. The subsequently-elected Conservative/Liberal Democrat Coalition Government has found itself hamstrung by the contrary positions of the (broadly) pro-HRA Liberal Democrats and the anti-HRA Conservatives but committed to examining the case for a British Bill of Rights which 'incorporates and builds on' the Convention obligations but which also 'protects and extends *British* liberties.'[182] The Coalition – dominated by a party seen to be increasingly mistrustful of the influence of the European Court of Human Rights – also sought to promote 'a better understanding of the *true scope* of these obligations and liberties.'[183]

Against this backdrop of political uncertainty regarding the future of the HRA and the role of the European Court of Human Rights in shaping, or influencing, national law, a Commission on a United Kingdom Bill of Rights was appointed in March 2011.[184] Given that its membership appeared to be split along pro- and anti-HRA lines, the failure of the Commission to make unanimous recommendations was widely predicted. Following consultation, and the resignation of one of its most hostile critics of the European Court, the Commission published its report in December 2012.[185] Though all members of the Commission agreed that the idea of a UK Bill of Rights deserved 'further exploration'[186] only a majority of the Commission found that a 'strong argument

---

181 Though, by the time of the 2010 General Election, and since, the Labour Party has been committed to the retention of the HRA.

182 The Coalition, *Our Programme for Government* (2010) p. 11.

183 Ibidem (emphasis added).

184 The Commission's Terms of Reference were as follows: 'The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties. It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties. It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe. It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012.'

185 Commission on a Bill of Rights, *A UK Bill of Rights? – The Choice Before Us* (December 2012), available at: <www.justice.gov.uk/about/cbr>, visited March 2013.

186 Idem at [67].

in favour of a UK Bill of Rights' had in fact been demonstrated.[187] A minority of the Commission forcefully argued that the failure of the majority to 'identify or declare any shortcomings in the HRA or in its application by the courts' undermined this finding.[188] Subsequent press coverage of the report and findings of the Commission has suggested that a number of members of the majority of the Commission who argued in favour of the adoption of a UK Bill of Rights did so (in apparent defiance of the terms of reference of the Commission) in order to dilute the protections offered by the Convention under the HRA.[189]

While the divided report of the Commission on a Bill of Rights appears increasingly unlikely to be capable of providing a roadmap towards reform,[190] the 2013 party conference season indicated that the future of the HRA – and the relationship between the United Kingdom and the European Court of Human Rights – is likely to provide one of the battlegrounds of the 2015 general election. While the Labour party and the Liberal Democrats remain committed to maintaining the protections afforded by the HRA, the Conservatives appear to be pursuing a highly aggressive anti-HRA and anti-Strasbourg agenda.[191]

7. CONCLUSIONS

Although the courts' development of fundamental common law rights had reached a relatively advanced stage prior to the HRA, the development of this nascent jurisdiction has been effectively stifled following the implementation of the HRA. It is unsurprising perhaps that since its implementation, the HRA has provided the primary mechanism through which human rights disputes make their way before the courts. The Convention rights are currently utilised much more frequently as tools of adjudication, and play a far more important role in the protection of individual freedoms, than those constitutional rights existent at common law. While some judges have hinted that further expansion of the fundamental common law rights jurisprudence might be a possibility[192] – especially in the event that any future Bill of Rights might dilute the protections currently afforded under the HRA and by the Convention rights[193] – the view

187 Idem at [78]-[80].

188 Idem at [88(ii)].

189 P. Sands and H. Kennedy, 'In defence of rights' 35(1) *London Review of Books* (2013) p. 19 (3 January 2013).

190 M. Elliott, 'A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights', *European Human Rights Law Review* (2013) p. 137.

191 Of the high-profile Conservative Ministers in the current administration, the Attorney-General – Dominic Grieve MP – seems a more moderate voice.

192 *International Transport Roth GmbH* v. *Secretary of State for the Home Department* [2003] *QB* 728, [71].

193 Sir Jack Beatson, 'Human Rights and Judicial Technique' in R. Masterman and I. Leigh, eds., *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (183 *Proceedings of the British Academy*) (Oxford, Oxford University Press 2013).

from the apex court would suggest that constitutional common law rights currently remain tools of statutory interpretation and little more.[194]

Notwithstanding the inability of UK courts to invalidate primary legislation on human rights grounds, the HRA – and the Convention rights to which it gives effect – can certainly be argued to operate as a functional Bill of Rights for the United Kingdom. The apparent ease with which the relevant rights have been assimilated into the legal system is testament to the fluidity of the United Kingdom's model of dualism. It also speaks to the relative familiarity of the courts with the Convention rights themselves, the techniques employed by the European Court of Human Rights and the body of the Strasbourg case-law, as well as to a desire on the part of at least some judges to be able to employ more robust or enquiring analyses – such as the proportionality test – in the course of judicial review proceedings. (The perceived failings of the so-called 'political constitution' and its inability to respond to increased threats to individual liberties prompted a number of senior judges – prior to the adoption of the HRA – to call for increased protection for individual rights in specified areas[195] or for the incorporation of the European Convention.)[196]

It is equally reasonable to suggest that the main characteristics of the UK constitutional system – namely, the central place of parliamentary sovereignty and the traditionally subordinate role afforded to the judiciary – can be seen to underpin continued political resistance to the notion of judicially-enforced rights. The traditional faith displayed by the United Kingdom constitution in mechanisms of political accountability (essentially, the accountability of Ministers and Government to *Parliament*) continues to resonate and can be seen in the perennial debates over the legitimacy of (even weak form) *judicial* review in the United Kingdom. But it is the clear divisions between national and international actors (and the superiority asserted by the former over the latter) that have prompted the most clear political resistance to the decisions of a *supra*-national court exerting influence at the national level. The re-emergence of an idea(l) of national legal sovereignty – a sovereignty entirely disassociated from the realities of multi-layered governance[197] – will arguably play the definitive role in the on-going debates over the continued influence of the European Convention on Human Rights in the United Kingdom.

---

194 *Watkins* v. *Secretary of State for the Home Department* [2006] *UKHL* 17; [2006] 2 *AC* 395 at [62].

195 See, e.g., *Kaye* v. *Robertson* [1990] *FSR* 62.

196 T. BINGHAM, 'The European Convention on Human Rights: Time to Incorporate', 109 *Law Quarterly Review* (1993) p. 390.

197 On which see generally: N. BAMFORTH and P. LEYLAND, eds., *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing 2003).

CHAPTER 9
COMPARATIVE ANALYSIS

Janneke GERARDS and Joseph FLEUREN

1. INTRODUCTION

The European Convention on Human Rights and the case-law of the European Court of Human Rights have tremendous impact on national law, especially on national case law. In several states this has led to criticism of the ECtHR, as this Court is considered to interfere too much with national sovereign policy choices and hamper democratically legitimised decision making. In the introduction to this book (chapter 1) we explained that the criticism of the Court often seems to be based on two important yet implicit and untested assumptions. First, it is often assumed that the European Court of Human Rights exercises such great influence that national courts have to act as marionettes – they must follow the Court's movements, even if they may want to act differently. And second, it is thought that this marionette behaviour and its constitutionally questionable consequences are unduly facilitated and accommodated by the legal and constitutional mechanisms determining the national courts' competences as regards the implementation of international law. In fact, the legal and constitutional system is thus often 'blamed' for the impact of ECtHR case-law on national law.

Given the importance of such unproven assumptions underlying the political and legal debates on the role of the Convention, we stated the objective of the current study to be to provide greater insight into the mechanisms determining the implementation and application of the Court's case-law by national courts. In particular we hoped to offer such insight by disentangling and illuminating the different elements underlying the interrelationship between the Court and national case-law. In particular, our project centred around answering the following four central research questions:

(1) What requirements have been formulated by the ECtHR in relation to the implementation of the ECHR in national law and the application of ECtHR case-law by national courts? To what extent and how does the ECtHR allow

for national peculiarities and deviations? How does the Court interact with national authorities, in particular national courts?

(2) What powers and techniques do national courts use to encourage or ensure that the State complies with its obligations under international law more generally, and the Convention in particular? How are these powers and techniques embedded in the constitutional law of the state at hand? How do the national courts' interpretation and application of the Convention relate to the role of national fundamental rights (e.g. constitutional rights)?

(3) How do national courts deal with the case-law of the Court? What is the influence of specific Convention doctrines (e.g. evolutive interpretation and the margin of appreciation doctrine) on national case-law? Do national courts act as 'marionettes' of the Court, and how do they use the leeway left by the ECtHR? To what extent and how do national courts employ judicial and constitutional techniques to avoid transgression of their constitutional powers, while trying to comply with the Convention's demands?

(4) To what extent does the effect of the Court's interpretation on national case-law cause debate about the role of national courts, and about the role of the Court? To what extent does such debate exist independently from the Convention, e.g. because of classic separation of powers doctrines? What is the impact of these debates on national constitutional law? Do they impact the way in which the national courts decide their cases? Do they result in proposals made for constitutional change?

Chapters 2–8 of this book presented the outcomes of the research we conducted as informed by these four questions. We looked into the requirements actually set by the ECtHR and we examined the way in which the national courts of six different Western European states respond to them using the competences they have within their respective constitutional systems. In this chapter, we aim to bring together the findings of the previous chapters, searching for interrelationships and connections and looking for answers to the main questions of this project. To do so, we first compare the constitutional mechanisms for the implementation of the ECHR (and international law more generally), paying attention to the status of the ECHR in the national hierarchy of norms as well as the ways in which the ECHR can have effect in national case-law (section 2). Subsequently, we focus on the implementation of the judgments and decisions of the ECtHR, addressing the requirements imposed by the ECtHR as well as their implementation in the legal orders of the six states of comparison (section 3). We further discuss the impact of debates and controversies regarding the judgments of the ECtHR and their implementation by national courts (section 4). We conclude this final chapter with a section answering the central questions of this study (section 5).

2. THE STATUS OF INTERNATIONAL LAW, IN PARTICULAR THE ECHR, IN THE DOMESTIC LEGAL ORDERS

2.1. MONIST AND DUALIST TRADITIONS

Every state has to comply with its obligations under international law. Regardless of whether such obligations originate from treaties, binding decisions of international organisations or customary international law, a state cannot invoke its domestic law to justify its failure to comply with them.[1] Consequently the states must ascertain that their legal systems, including their constitutions, enable them to observe international law.

As regards the question of how international obligations which affect domestic law are implemented by the various states throughout the world, two traditions may be distinguished. According to the monist tradition, international and national law are fully complementary. In states which belong to this tradition, both written and unwritten international law is considered to be part of the law of the land. Consequently national authorities (including national courts) and citizens are bound by domestic law as well as treaty law[2] and customary international law. Together they constitute the body of law which has to be respected by both public authorities and individuals.[3] The monist tradition has a long history. Its roots can easily be traced back to classical antiquity.[4]

The dualist tradition, on the other hand, is much younger. Historically the development of this tradition is closely connected to the primary role that gradually came to be granted to national parliaments in the modern era. It stems from the view that treaties concluded by the government should not be allowed to set aside or 'overrule' Acts of Parliament. Constitutional systems in which

---

1 Articles 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT). See also Articles 3 and 32 of the Articles on responsibility of States for internationally wrongful acts, annexed to UN General Assembly Resolution 56/83 (adopted on 12 December 2001) and the commentaries on these articles adopted by the International Law Commission (*Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 25 at pp. 36–38 and 94). Cf. J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge, Cambridge University Press 2002). Article 27 in conjunction with Article 46 VCLT provides for an exception to the rule that a state may not invoke its national law in order to justify a failure to perform a treaty, but as this exception is hardly relevant for the topic of this volume it will not be discussed further.

2 In this chapter 'treaty law' is used as an umbrella term for both treaties and binding resolutions of international organisations (which are adopted in pursuance of a treaty).

3 International law is of course only relevant for individuals and private legal persons insofar as international norms are of direct concern to them.

4 J.W.A. Fleuren, 'De historische ontwikkeling van de verhouding tussen internationaal en nationaal recht' [Historical development of the relationship between international and national law], 61 *Ars Aequi* (2012) pp. 611–620.

(written) international law is not as such – i.e. as international law – part of the law of the land are often termed 'dualist systems'. The reason for this is that they are based on the idea that international law and national law are two separate legal orders.[5] In this line of reasoning international law is binding upon the State, but public authorities, courts and citizens are only bound by law of domestic origin. Therefore states with dualist systems for the implementation of international law need to adopt legislation or other acts of law in order to transpose or transform the contents of international law into national law.

So whether the constitutional law of a state fits into the monist or dualist tradition, is in the end determined by (constitutional) history. Of the countries under review, three are labelled as 'monist' and three as 'dualist'. Belgium, France and the Netherlands have always nurtured a tradition in which international and national law are regarded as complementary. By contrast, in the United Kingdom, the Glorious Revolution of 1688 effectively ended the Crown's prerogative to exercise legislative powers by means of treaty-making and the power to thereby effectively set aside Acts of Parliament without Parliament's consent.[6] Until the present day, the notion of sovereignty of Parliament forms both the basis and the justification of the dualist system of the United Kingdom. In Sweden, dualism can be understood against the background of the constitutional separation of powers between, on the one hand, Parliament and the Government, and, on the other hand, the judiciary. Another explanation for the Swedish branch of dualism is the importance attached there to notions of legal certainty and coherence of the law, as was explained in chapter 7 (section 2). Present-day German dualism is the heritage of a theory developed in the late 19th century by a few German scholars.[7] This theory stated that international law and national law should be regarded as separate legal orders which cannot govern the same legal relations. According to this theory international law could only regulate relations between states, while national law was limited to governing relations between individuals and between individuals and the State. Consequently it was simply considered to be impossible that international and domestic law were complementary. Although this theory in its original form

5 The terms 'monism' and 'dualism' for the respective theories on the question of whether international law and national law belong to one and the same legal order, or constitute two separate legal orders, have their origin in A. VERDOSS, 'Zur Konstruktion des Völkerrechts' [On the construction of international law], published in 1914 and reprinted in H.R. KLECATSKY, R. MARCIC and H. SCHAMBECK, eds., *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross* [The Vienna School of Legal Theory. Essays by Hans Kelsen, Adolf Merkl and Alfred Verdross], Vol. II (Vienna, Europa Verlag 1968), pp. 1635–1657. The suggestion to make these terms operational by applying them to constitutional systems with regard to the implementation of international law was made by H.F. VAN PANHUYS, 'Relations and Interactions between International and National Scenes of Law', 112 *Recueil des cours de l'Académie de droit international de La Haye* (1964-II) p. 14.

6 See W. HOLDSWORTH, *A History of English Law*, Vol. XIV, edited by A.L. Goodhart and H.G. Hanbury (London, Sweet & Maxwell 1982) pp. 67 ff.

7 Notably H. TRIEPEL, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld 1899).

now has hardly any adherents, it has clearly left its mark on German constitutional doctrine.[8]

In practice the differences between constitutional systems that are labelled as 'monist' or 'dualist' are more subtle than is often suggested in textbooks. The theoretical notions of monism and dualism say very little about the kind of methods and instruments a certain state will have at its disposal to give effect to international norms in its national legal system.[9] The concepts of monism and dualism should therefore rather be regarded as 'schemes', which can assist in ordering the different constitutional systems and mechanisms states employ to implement international law in their domestic legal orders. In order to determine how states actually ascertain compliance with their international obligations, it is necessary to examine the constitutional practice of each individual state. Only then can similarities and differences really be mapped.

2.2. A NOTE ON THE LAW OF THE EUROPEAN UNION

Before we consider the implementation of international law, especially the status of the ECHR, in the countries under review, a preliminary note on the law of the European Union might be appropriate. From a constitutional law perspective, the implementation of EU law is of a very different nature than the implementation of ('ordinary') international law is. According to the settled case-law of the Court of Justice of the EU, the EU Member States have (unlike what is common practice in the field of international law) actually limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves.[10] As the Court of Justice held in its famous *Costa/ENEL* case, '[t]he integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity'.[11] As a consequence of this case-law the legal effect and supremacy of EU law is identical for all Member States, regardless of whether they have monist or dualist systems for the implementation of international law. In all Member States, national law and EU law are complementary and national law will not be applied if and insofar it is incompatible with EU law. States can decide to remove any doubts and hesitations about the legal effect of EU law by expressly codifying and endorsing this case-law in their constitutional law – as happened in the United Kingdom by

8 Cf. chapter 5, section 2.

9 See, for instance, the remarks on 'sector monism' in the chapter on Sweden (chapter 7, section 2).

10 See classically *Van Gend & Loos*, Case 26/62 [1963] *ECR* 3.

11 Case 6/64 [1964] *ECR* 1141.

means of the European Communities Act 1972 – but it is quite generally accepted that the effect of EU law in the national legal order does not depend on national legislation or the national constitution. This is different only in the situation where EU law itself requires active involvement by national legislators in order to be given effect.[12]

Some constitutional courts have found it difficult to acknowledge the consequences of this case-law of the Court of Justice.[13] In practice the direct effect and supremacy of EU law are almost always accepted, however, except for the extraordinary situation in which the EU institutions clearly appear to have acted *ultra vires*. For this reason we have not separately examined the implementation of EU law in Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom. This study is restricted to the ways in which 'normal' international law, which does not form part of primary or secondary EU law, is given shape in these six states.

2.3. THE STATUS OF INTERNATIONAL LAW, IN PARTICULAR THE ECHR, IN THE STATES UNDER REVIEW

2.3.1. Questions to be addressed

The study into the position of international law, in particular the ECHR, in the six states under review (Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom) has centred around three core questions:

(1) How does national constitutional law ascertain that international legal norms which are relevant to domestic law are adopted by, or implemented in the national legal order?
(2) What rank does international law or international law transposed into domestic law have in the national hierarchy of norms?
(3) To what extent are the national courts competent to apply international law and to review national law for its compatibility with international law?

These three questions, further specified in the form of a questionnaire, were submitted to the national experts who have written chapters 3–8 of this book.[14] In this section we aim to bring together the most important findings of the six national reports pertaining to these central questions.[15] We first address the

12 See e.g. Article 288(2) TFEU.
13 See in particular the analysis by M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart 2006).
14 For the questionnaire, see the Appendix to this book.
15 Further detail can be found in chapters 3–8 of the book.

different ways in which international legal norms can become part of national law, paying special attention to notions of monism and dualism and their impact on the status of the ECHR in the domestic legal orders (section 2.3.2). Section 2.3.3 is devoted to the issue of direct effect of provisions of international law. In this section we also discuss the interrelationship between the self-executing character of the substantive provisions of the ECHR and competences of the courts to give effect to such provisions. In section 2.3.4 we deal with the rank of international law, in particular the ECHR, in the national hierarchy of norms, as well as the concomitant competences of the courts. Finally we pay attention to the method of harmonious interpretation and the way in which especially the Belgian, German and French constitutional courts employ this method when exercising their powers of constitutional review (section 2.3.5).

2.3.2. *Implementation of (the content of) international legal norms in the national legal order*

2.3.2.1. Customary international law

In five of the six states studied, customary international law is clearly regarded as part of the law of the land. As for the United Kingdom, however, it should be noted that recent case-law clarifies that obligations resulting from customary international law can only be regarded as law of the land if they are clearly established and sufficiently lend themselves to being applied by the courts.[16] In Germany the status of customary international law is expressly codified in the constitution. It follows from Article 25 of the German Basic Law that the general norms of international law are part of federal law. They also have precedence over federal legislation and legislation of the *Länder* and they may directly create rights and obligations for individuals. Apparently, thus, even in countries where dualist ideas have taken root, the old tradition according to which international law and domestic law are fully complementary is still being continued in regard to customary international law.[17] From the countries under review Sweden is the only state where there is a real debate as to whether customary international law forms part of the law of the land. Even there, however, there are a few recent cases where the Swedish courts have taken account of developments in customary international law, indicating that custom *may* form part of the law of the land.[18]

---

16 Chapter 8, section 2.

17 Cf. M.P. Van Alstine, 'The Role of Domestic Courts in Treaty Enforcement. Summary and Conclusions' in D. Sloss, ed., *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study* (Cambridge, Cambridge University Press 2009) pp. 555–613 at pp. 581–582. For an overview of the status of treaty law and customary international law in 27 countries throughout the world see D. Shelton, ed., *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion* (Oxford, Oxford University Press 2011).

18 See chapter 7, section 2.

2.3.2.2. Treaties

As regards the question of whether treaties form part of the law of the land, the various states can be divided into two groups. Belgium, France, Germany and the Netherlands belong to those states where treaties which are binding upon the state are regarded as part of the law of the land as soon as certain basic conditions have been met. These conditions may vary per country and may imply that the treaty at hand has been approved by the national parliament in conformity with the national constitution and has been duly published. The main consequence of complying with these conditions is that the treaty can be applied by the national courts as source of international law (on direct effect, see section 2.3.3).

Sweden and the United Kingdom belong to the second group of states, where the courts are not competent to apply treaties which are binding on the state. In these two states it is always necessary to either incorporate the contents of a treaty in a national legal norm or expressly stipulate in legislation which treaty norms must be considered to have force of law.

It may come as a surprise to some that we have grouped together Germany with Belgium, France and the Netherlands. Usually, after all, the German system of giving effect to international law in the national legal order is considered to be dualist in nature. Admittedly, according to German legal doctrine a legal act (in case of treaties requiring approval by the federal Parliament: a federal Act of Parliament) is necessary to empower the courts to apply norms of international treaties.[19] In the past it was reasoned that this would have the effect that, next to the international legal norm that would bind the federal state of Germany in its relations with other states, the act of approval would constitute a parallel, though substantively identical legal act that would have legal force in the internal legal order. This classic transformation doctrine (*Transformationslehre*) has now been replaced, however, by the doctrine that the act of approval is not needed to bring about transformation into national, German law, but instead must be regarded as an instruction to the German courts to apply the international treaty *as such*, i.e. as a norm of international law. This so-called *Vollzugslehre* or *Theorie des Anwendungsbefehls* is now generally accepted and has been embraced by the German Federal Constitutional Court. Because this theory departs from a certain notion of separation of the national and the international legal order (given the necessary element of 'instruction'), the German constitutional system can still be regarded as formally dualist in nature, but it is clear that the dualist elements have been mitigated to an important extent.[20]

The differences between the constitutional systems in the two groups of states have important consequences for the position of the ECHR in the national legal orders. For Sweden and the United Kingdom, their strongly dualist tradition has

19 See Article 59(2) of the German Basic Law.

20 Chapter 5, section 2.

meant that even though they belonged to the first states to ratify the Convention, it took a very long time before individuals could actually invoke the ECHR rights and freedoms before the national courts. Only in 1 January 1995 did Sweden declare with an Act of Parliament that the ECHR and its Protocols must be regarded as part of national law. And only in 2000 did the Human Rights Act 1998 create the competence for British courts and other public authorities to apply the ECHR in conformity with the case-law of the ECtHR. Before that time, the national courts in these two states could only indirectly take the Convention into account by interpreting and applying national law in harmony with the case-law of the ECtHR. They did not have any competence to directly review the compatibility of national administrative acts and legislation with the substantive rights and freedoms laid down in the ECHR. For the states belonging to the first group – Belgium, France, Germany and the Netherlands – the situation is a very different one. In these states, the ECHR and the protocols to which the states are parties, can undoubtedly be regarded to form part of the law of the land. As a consequence, from the moment the ECHR entered into force for their state, individuals could invoke provisions of the ECHR before the national courts.

2.3.2.3. Decisions of international organisations

In Germany, binding decisions taken by international organisations do not form part of the law of the land, except where a legal act by the State expressly makes clear that they do.[21] This is different in Belgium, France and the Netherlands, where the monist character of the system implies that binding decisions of international organisations automatically form part of the law of the land, although it might be required that the decisions are duly published.[22] Non-binding decisions, such as recommendations or advisory opinions, *a fortiori* do not have binding legal status in the various states, even if it is clear that they may sometimes play a role as sources of inspiration for the national courts in interpreting and applying national law.[23]

2.3.3. *Direct effect*

2.3.3.1. The notion of direct effect or self-executing provisions of international law

Insofar as customary international law, treaties and decisions of international organisations form part of the law of the land, international norms are binding

21 Chapter 5, section 2.4.

22 Chapter 3, section 2.1; chapter 4, section 3.1; chapter 6, section 2.1.

23 On the domestic status of decisions of international organizations see also N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States* (Groningen, Europa Law Publishing 2004).

on all public authorities as well as individuals. The acceptance of the binding character of international norms is an efficient means to bolster the implementation of and compliance with international law in the national legal order, especially to the extent that international law has precedence over national law. Nevertheless, it may well be that full compliance with international obligations requires legislative intervention. The case may be that a treaty presupposes the presence of certain legislative provisions which do not yet exist in a certain state, or that a treaty or a decision of an international organisation contains norms prescribing a certain provision which only the national legislature can bring into being. In those cases, the binding effect of international norms as such does not immediately and automatically guarantee compliance with international obligations.

This brings us to the distinction between international provisions with direct effect (or 'self-executing' provisions of international law) and provisions without such effect. This distinction relates to the difference between treaty provisions which contain fully fledged legal norms which can be directly executed by administrative bodies or national courts (at least in those states where treaties form part of the law of the land) and treaty provisions which can only be effectively implemented in the national legal order by means of adopting national legislation.

In all four states where treaties form part of the law of the land, i.e. in Belgium, France, Germany and the Netherlands, the distinction between provisions with and without direct effect is of importance, although it is not always used and applied in exactly the same way. The Netherlands, for example, is the only state where the notion of direct effect is expressly codified in the Constitution. Further, a distinction can be made between states where courts answer the question as to the self-executing character of a provision exclusively by looking at the provision itself, and states where the courts also look at the context in which the provision is invoked. In the Dutch case-law, for example, the first was the prevailing approach and it is still often applied. Currently, however, under the influence of the case-law of the Court of Justice of the EU on the direct effect of provisions of EU law, the second approach is gaining support.[24] This so-called 'relative approach' makes it possible that a treaty provision which expressly and in unambiguous wording obliges the national authorities to adopt legislative measures, and for that reason cannot be regarded as self-executing from the perspective of an 'either/or' approach, may still be granted direct effect in a particular case to the extent that the court can assess whether the national legislature in the exercise of his powers has remained within the margin of discretion allowed by the treaty provision.[25] In Belgian

24 Chapter 6, section 2.2.

25 A relative approach has been defended on principle by Y. Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', 26 *Virginia Journal of International Law* (1986), pp. 627–692.

case-law such a relative approach has been adopted by the Court of Cassation.[26] Finally, in Germany, yet another approach is taken, as there the doctrine is defended that only self-executive (i.e. directly applicable) provisions of ratified treaties form part of the law of the land.[27] It should be stressed, though, that this doctrine is not free from controversy.

2.3.3.2. Direct effect of the ECHR

It is clear from the *travaux préparatoires* to the ECHR that the drafters intended the provisions of the Convention in which substantive rights and freedoms are laid down to have direct effect in the states where the ECHR would form part of the law of the land.[28] Indeed, in Belgium, France, Germany and the Netherlands, with their predominantly monist systems, the courts are used to accepting the direct effect of all substantive provisions of the ECHR and the Protocols to which the state is a party. In the Netherlands, the Supreme Court in the past has not accepted the self-executing character of the right to an effective remedy of Article 13 ECHR, but this case-law is outdated and the direct effect of this provision is now commonly accepted. In Sweden, the ECHR and the relevant Protocols were declared to form part of national law in 1995 and, for that reason, the issue of direct effect is not of any relevance within the Swedish legal system. Something similar holds true for the United Kingdom, where the Human Rights Act 1998 lists the various substantive EHCR provisions the national courts and other public authorities have to comply with.[29]

The direct effect of the substantive provisions of the ECHR and the relevant protocols in Belgium, France, Germany and the Netherlands, as well as the effect of the incorporation of the various Convention provisions in Sweden and the United Kingdom, means that these provisions create subjective rights for individuals which they can enforce vis-à-vis the state. Nevertheless, limitations to judicial competences may restrict the courts' power and inclination to apply the Convention provisions to their fullest extent. The British courts are not empowered, for example, to declare provisions of Acts of Parliament that conflict with incorporated ECHR rights null and void, nor can they disapply them. These limitations are addressed in more detail in section 3, but some notable characteristics can be mentioned here.

Firstly, it is interesting to note that in Belgium a special stand is taken towards the issue of direct effect of the ECHR. To understand this it must be

26 Chapter 3, section 2.1.

27 Chapter 5, section 2.2.

28 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, 8 vols. (The Hague, Nijhoff 1975–1985) Vol. V at pp. 26–27, 34–35, 66–67, 74–75.

29 However, Article 13 ECHR is excluded from these provisions. See further chapter 8, section 4.2.

recalled that the substantive ECHR provisions do not only oblige the states to refrain from unjustified interferences with the protected rights and freedoms, but they may sometimes also have a positive obligation to actively protect them in an effective manner. Insofar as these positive obligations have not yet been complied with in national law, they may require state activity by means of adopting legislation. In Belgium this has led the Court of Cassation to accept the direct effect of the substantive provisions of the Convention only to the extent that they imply negative obligations for the state. It withholds such direct effect where the Convention provisions oblige the state to introduce legislation which requires political choices to be made.

Further, it is remarkable that in the Netherlands the substantive provisions of the ECHR may have direct effect, yet the courts are sometimes restricted in exercising their constitutional power to apply them. If a discrepancy between Dutch law and the ECHR can be solved in different ways, while none of these fits in the structure and history of the legislative system, it is settled case-law that it is – at least *pro tempore* – up to the legislature, rather than the courts, to make the necessary political and policy choices. Reluctance to intervene in legislative processes may even prompt Dutch courts to continue to apply primary legislation which they have found to be incompatible with a self-executing provision of international law. In France, Germany, Sweden and the United Kingdom, such situations hardly ever appear to occur.

For the United Kingdom, finally, it should be noted that higher courts can only declare Acts of Parliament to be in conflict with the ECHR provisions listed in the Human Rights Act 1998, but they cannot give any effect to such 'declarations of incompatibility'. Instead, it is up to the legislature or executive bodies to decide how and to what extent existing legislation needs to be amended. If any policy choices need to be made to remove incompatibilities with Convention rights, they are thereby automatically made by political bodies.

2.3.3.3. Orders to legislate

If courts find that discrepancies between national law and the Convention can only be removed by amending legislation, the question may arise as to whether they can order the legislature or the state to make the necessary changes. In France, the Netherlands, Sweden and the United Kingdom, such a judicial competence to give orders to the legislature does not exist. In Belgium and Germany the same is true for the ordinary courts. The German Federal Constitutional Court is competent, however, to oblige the federal Parliament to introduce legislation to remedy an unconstitutional situation. In Belgium the finding of the Constitutional Court that there is a legislative gap which is contrary to the Belgian Constitution creates a legal obligation for the legislature to fill such a gap. Since both constitutional courts apply the constitutional rights

and freedoms in line with the Convention, the order to legislate in fact can be indirectly based on the ECHR.

2.3.3.4. Self-executing provisions and horizontal effect

Depending on their contents, self-executing provisions of treaty law can be relied on in legal relationships between citizens and the authorities or the State, or in legal relationships between private parties. Since human rights treaties entail an obligation for the States Parties to respect and protect the freedoms and rights of citizens, they can be invoked by individuals and legal persons in cases against the state insofar as these concern self-executing provisions. In practice, however, the national courts also appear to employ arguments derived from international human rights treaties such as the ECHR in cases between individuals or between individuals and legal persons. Indeed this is common practice for the ECHR in all states under review, although it happens less frequently in Sweden. At first glance this practice is at odds with the generally accepted view that the ECHR creates obligations for the State, rather than for individuals. In fact, Article 34 ECHR stipulates that individual applications can only be accepted by the Strasbourg Court if they relate to acts (or omissions) by public authorities. Nevertheless, it is equally clear that international human rights treaties contain provisions which impose certain positive obligations on the States Parties so as to ensure that individuals can also effectively enjoy their rights and freedoms in relation to others. An obvious example of this is the right to strike in Article 6(4) of the Revised European Social Charter (ESC), which workers' organisations and trade unions should be allowed to exercise vis-à-vis employers. In a similar vein, the ECtHR has accepted that the ECHR entails obligations for the States Parties to prevent the enjoyment of fundamental rights by individuals from being hindered or nullified by (groups of) other individuals or legal persons.

Two different techniques or strategies in the national case-law can be distinguished to give horizontal effect to the ECHR. If a provision of a human rights treaty is formulated or construed in such a way as to entail an obligation for the States Parties to recognise or ensure in their domestic legal order rights which individuals should be able to exercise towards other persons, then qualifying this provision as self-executing might have the effect that the domestic courts would be willing to apply this provision not only vis-à-vis the State and its authorities, but also in disputes between private parties. An example is provided by the Dutch case-law according to which Article 6(4) ESC is directly applicable in conflicts between trade unions and employers or employers' organisations. In these cases, there is *direct horizontal effect* for the human rights provision.[30] However, this method is not free of controversy and problems. After all, human rights treaties, including the ECHR, tend to be drafted with an eye to protection

30 See chapter 6, section 2.5.

from the State and obligations to be imposed on the State. It is usually up to political and legislative bodies to decide if and how they want to use the limitation clauses in the human rights treaties. These limitation clauses are usually drafted in such a way as to make clear that they are directed towards public authorities and they often do not really lend themselves to application in horizontal relationships. For that reason, it is often said that it is difficult for the national courts to apply such international treaty provisions directly in cases between private parties.

By contrast, the method of *indirect horizontal effect* is of undisputed legal validity in all six states under review. Indirect horizontal effect is given if the court takes the ECHR or another human rights treaty into account in taking its decision in cases between private parties, for example by construing and applying national legislation, open-ended provisions of private law and discretionary powers in harmony with the treaty's requirements.

It must be stressed, however, that the distinction between direct and indirect horizontal effect is not a very sharp one. Moreover, both techniques can only be successful if the structure of the national law is such as to allow the national court to give effect to an international treaty provision in a private law relationship. In practice the courts often do not really appear to be concerned about the exact technique they are using, as long as the intended horizontal effect is provided.

2.3.4. *Hierarchy and competence to review national legislation for compatibility with international law*

The differences between the constitutional powers to implement international law in the six states under review are most striking if we look at the third question to be addressed in this section, which relates to the place of international law in the national hierarchy of norms and the competences of the national courts to review the compatibility of national norms with international law. It turns out that there are exceptions to the general rule that in dualist systems the international norms which have been incorporated into the national legal order obtain the same rank as the act which has incorporated them. Indeed, in Germany, treaties which have been approved by the federal Parliament officially obtain the same rank as federal legislation, which means that, in the event of conflict, a treaty which has been adopted at a later date prevails over a federal Act of Parliament, and vice versa. This is also true for the ECHR. But general norms of public international law and customary international law find themselves somewhere in between the Basic Law and federal legislation, even if the basis for their incorporation is given in the Basic Law itself.[31] In Sweden, the ECHR is declared to have the status of primary legislation by an Act of

31 Chapter 5, section 2.5.

Parliament, yet the Swedish Constitution has declared the courts competent to disapply national legislation which is incompatible with the Convention. This means that in fact the ECHR in Sweden has quasi-constitutional status.[32] In the United Kingdom, too, the Human Rights Act 1998 is regarded as part of the 'constitutional statutes', but there the courts are not competent to disapply Acts of Parliament or declare them null and void. Higher courts can only make a declaration of incompatibility to inform the legislative authorities about the conflict with fundamental rights and freedoms.[33]

Important differences are also apparent in the states with predominantly monist systems. In the Netherlands all international law which forms part of the law of the land is regarded to be of higher rank than primary legislation and even the constitution. Nevertheless, the competence and duty of the Dutch courts to disapply provisions of the constitution or legislation is limited to those situations where there is an incompatibility with self-executing provisions of international law.[34] In Belgium, international law (and therefore also the ECHR) also ranks above the national law in the hierarchy of norms. Legislative provisions, including primary legislation and the Constitution, will not be applied if the courts find they conflict with self-executive provisions of international law.[35] In France, however, international law is positioned in between the Constitution and Acts of Parliament. According to Article 55 of the Constitution the French courts are competent to disapply both posterior and anterior legislation if there is an incompatibility with self-executing provisions of international law. Lower legislation will even be declared null and void. Consequently, French courts are competent to review the compatibility with international law of Acts of Parliaments, but not of the Constitution itself. If it turns out that a treaty has been ratified which is in conflict with the Constitution, this means that French courts will give priority to the Constitution.[36]

2.3.5. Harmonious interpretation and constitutional review

The national reports presented in chapters 3–8 of this book clearly demonstrate that courts only on rare occasions use their competences to disapply primary legislation because of a conflict with international law (or, in the UK, make a declaration of incompatibility). In the large majority of cases the courts use the technique of harmonious interpretation of national law, which is also known as interpretation in line with international law or the principle of 'treaty conform' construction. This technique is based on the presumption that the state does not intend to act in violation of international law, but rather wants to comply with its

32 Chapter 7, sections 3–4.
33 Chapter 8, sections 3.4.2 and 4.3.
34 Chapter 6, sections 2.1 and 3.
35 Chapter 3, section 2.2.
36 Chapter 4, sections 3.2 and 4.1.

obligations. This presumption implies that an interpretation and application of national law which is compatible with international obligations is preferred, except where national law expressly or reasonably resists such an interpretation.[37] In Belgium, the Court of Cassation even seems to have been inspired by this presumption when it developed its case-law on the supremacy of treaty provisions which have direct effect over domestic law.[38]

Of the six states under review, the United Kingdom is the only one to have expressly codified the notion of harmonious interpretation of national law in relation to the ECHR. Article 3(1) of the Human Rights Act 1998 expressly stipulates that primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. This provision is all the more important in light of the fact that the Human Rights Act also obliges the UK courts to take into account the case-law of the ECtHR in interpreting the provisions of the Human Rights Act. The practical effects of this are further discussed in section 3.

Finally, a special form of harmonious interpretation can be found in the case-law of the constitutional courts of Belgium, France and Germany. Each of these courts has the exclusive competence to decide upon the compatibility of primary legislation with the constitution, whether or not through a preliminary reference procedure. All three courts appear to interpret the constitutional rights and freedoms in the light of the ECHR and the ECtHR's case-law. As a consequence, constitutional review importantly, though indirectly, contributes to compliance with the ECHR.

2.4. CONCLUSION

The overview of the implementation and effect of international law in the constitutional systems of the six states under review provided in this section discloses a great diversity of techniques and methods. Even within the systems which belong to either the monist or dualist tradition, many differences can be perceived. Such differences have important consequences for the status of international law, in particular the ECHR, in the national legal order. Where ECHR rights and freedoms in Sweden and the United Kingdom can only be invoked by individuals before the national courts by virtue of the transformation of the ECHR in national law, individuals in Belgium, France, Germany and the Netherlands can directly invoke the ECHR provisions as such. The rank of treaty provisions such as those of the ECHR in the national hierarchy of norms is also different for the different states, just like the competences of national courts to

37 On the method of harmonious interpretation see, e.g., A. NOLLKAEMPER, *National Courts and the International Rule of Law* (Oxford, Oxford University Press 2011), ch. 7.

38 See chapter 3, section 2.1.

review the compatibility of national legislation with international law. In the Netherlands and Belgium, even the Constitution can be left aside in order to allow compliance with self-executing international obligations, while this is very different in the other states, where international law usually has a status somewhere in between that of the constitution and primary legislation. As a result the courts can usually review Acts of Parliament for compatibility with international law, but the status of the constitution is inviolable.

Besides these general differences, there are many more intricacies and nuances inherent in national constitutional law which may sometimes make it difficult for outsiders to know what competences the national courts really have. It is very clear from chapters 3–8, however, that all national courts are competent (and sometimes even obliged) to use the technique of harmonious interpretation. As will be readily apparent from the next section, this technique has proven to be of major importance for the application of the ECHR by national courts.

3. DEALING WITH THE JUDGMENTS AND DECISIONS OF THE COURT

3.1. INTRODUCTION

The preceding sections have illuminated the constitutional instruments available to national courts to implement the ECHR and international law more generally. Through these instruments the Convention and the interpretations given to it by the Court play an important role. In the current section we aim to analyse how and to what extent the influence of the Court's judgments makes itself felt when national courts make use of their constitutional competences. In particular, this section serves to test the assumption that the Court's case-law is of such a nature that national courts are compelled to follow it very closely, thereby easily transgressing the limits of their judicial competences. The second objective of this section is to answer the question of whether the constitutional construction of judicial competences really makes a difference to the application of the Convention by national courts and to its impact on national case-law.

In the introduction to this book (chapter 1), we indicated that there is a close relationship between the demands the Convention places on the national courts, the constitutional competences of national courts, and the way in which the national courts actually apply the Convention. One of the objectives of the current project was to disentangle the different elements determining the national courts' application of Convention rights and to assess and evaluate them on their own. For that reason, we discuss the various elements relating to the influence of the Convention on national law separately. Section 3.2 briefly reiterates the findings of chapter 2 regarding the requirements and obligations

imposed by the Court. Subsequently, in section 3.3 we address the way in which national courts actually deal with these requirements. In this context, we discuss the national courts' use of their constitutional competences as well as the extent to which and the manner in which they endeavour to respect their limits. We thereby synthesise the findings of the different national reports (chapters 3–8) and we arrive at a number of conclusions based on this synthesis.

3.2. THE COURT'S REQUIREMENTS

3.2.1. Res interpretata*: the interpretative force of the Court's precedents*

As follows from Article 46 ECHR, the judgments of the ECtHR are only binding for the parties to the case. This means that only the respondent state is bound to execute the judgment, i.e. to give some effect to the Court's declaratory finding that one or more Convention provisions have been breached. The state is relatively free to determine how such effect should be given to the Court's judgment, albeit that *restitutio in integrum* should be striven for. Redress should be provided either in kind (e.g. by restitution of unlawfully expropriated property, or by reopening criminal proceedings), or by means of financial compensation.[39] The other States Parties to the Convention are not legally obliged to give such concrete effects to the judgment, even if similar legal or factual situations may exist that could give rise to a comparable finding of a violation in a later case brought to the Strasbourg court. In short, Article 46 implies that the judgments of the Court do not have *erga omnes* effect.[40]

Nevertheless, the study presented in chapter 2 demonstrated that there is much more to be said about the effects of the Court's judgments. Article 32 ECHR stipulates that the jurisdiction of the Court 'extends to all matters concerning the interpretation and application of the Convention'.[41] Based on this provision it is generally accepted that the Court's judgments are intended to develop, refine and explain the meaning of the various Convention provisions. If the Court has explained the meaning of one of the provisions, it is held that the interpretation obtains *res interpretata* or force of interpretation.[42] This implies that the Court's interpretations establish the meaning of the Convention rights. Consequently, states cannot deviate from the ECHR provisions as construed by the Court without violating their obligations under the Convention.

---

39 See the classic judgment in *Papamichalopoulos* v. *Greece*, ECtHR 24 June 1993, appl. no. 14556/98.

40 See for more detail and sources chapter 2, section 3.2.

41 In particular, important interpretative questions should be answered by the Grand Chamber, see Article 43 ECHR.

42 See in particular chapter 2, section 3.2.

3.2.2. The obligations imposed on the states by the Convention and the Court

The Convention obligations as defined by the Court can be met on the domestic level in a variety of ways. In particular there is no obligation on the national courts to give direct effect and priority to the Convention provisions. The Convention and the Court generally respect the different constitutional mechanisms guaranteeing the states' compliance with their obligations under international law and the Court does not set any concrete requirements as regards the national court's powers of review. Yet the Court will hold a state responsible for a violation of the Convention if a national judgment results in a breach of a Convention right, even if the judgment is the direct result of the state's constitutional structure. This may occur, for instance, if a court is not allowed to disapply a statutory provision to avoid a violation of the Convention. Surely, however, this does not compel the states to introduce a system in which all courts should be allowed to give direct effect and priority to the Convention. The states may also choose to create other techniques and instruments for correction, such as a system whereby legislation is amended by the legislature as soon as a breach is found by the judiciary, or by providing for judicial remedies to obtain financial compensation. Hence the Court does not in any way dictate or prescribe how the states should prevent or repair any violations of this kind. In this respect there is no direct interference by the Court with the basic constitutional structure of the states.

Essentially, therefore, and in accordance with the fundamental principles of 'primarity' and 'subsidiarity' underlying the Convention, the Convention states are free to decide how to guarantee the Convention rights and freedoms to the people living on their territories.[43] As was set out in chapter 2, the Court normally does not interfere with such freedom and it will not impose any obligations as regards the internal organisation of the states – it will only assess whether the state has complied with its Convention obligations as it is required to do by Article 1 ECHR.

Nevertheless, chapter 2 demonstrated that the Court often sets strict and detailed requirements to be met by the national authorities.[44] Although this may seem to be surprising in the light of the primarity principle and the notion of national sovereignty, the states themselves have actually asked the Court to do so, in particular at the high level conferences on the future of the Court in Interlaken (2010) and Brighton (2012). It is mainly in response to these requests that the Court has concretised the states' task to secure the fundamental rights and freedoms protected in the Convention. Examples were given in chapter 2 of

43 For the notion of primarity, see further chapter 2, section 2.3 and see more elaborately J. CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston, Martinus Nijhoff Publishers 2009).

44 See in particular chapter 2, section 3.3.

cases where the Court invited the states to introduce the possibility of judicial review of Acts of Parliament, which would enable the national courts to set aside statutory provisions that are in breach of the Convention. In addition the Court has obliged the national courts to construe national legal provisions in conformity with the Convention as interpreted by the Court. This obligation even extends to relations between private parties: the national courts must take account of the Court's case-law in explaining contractual clauses and in balancing interests in employment disputes.

The national courts thus appear to have their own responsibility under the Convention to guarantee the conformity of their national law with the Convention provisions. Given the *res interpretata* of the Court's case-law they thereby have to take the Court's precedents into account and they must align their own judgments with those of the Court. If there are any constitutional limitations on their ability to do so, this may result in the state being held responsible for a violation of the Convention in Strasbourg. Accordingly, there is a strong incentive for the states to remove any constitutional obstacles to judicial application of the Convention. Indeed, given the support expressed in the Interlaken and Brighton declarations, it seems that the states have generally accepted this and that they are indeed willing to do so.

3.2.3. Consequences for the national courts

As a result of the obligations imposed on the States Parties to the Convention and the potential consequences thereof for their constitutional systems, it is not surprising that the Convention has had much impact on the work of national courts. The impact is even more significant because of the nature of the Court's interpretations of the Convention provisions. By using principles and methods such as evolutive and meta-teleological interpretation (i.e. interpretation based on the underlying principles and objectives of the Convention, such as respect for human dignity), and guidance on the need to protect fundamental rights in an effective and practical manner, the Court has read a great many rights and obligations into the Convention which the national courts have to take into account.

Yet this does not mean that the Court shuts its eyes to the constitutional competences and position of the national courts, nor to the far-reaching consequences its case-law may have. Although the Court sets high standards to be met by national case-law and imposes its own Convention interpretations on the national courts, chapter 2 has demonstrated that the Court is keenly aware of its subsidiary position as an international court. The Court does not like to see itself as being at the top of a pyramid of European protection of fundamental rights, from where it hands down judgments which all national courts must obey. Instead, it regards its relationship with the national courts as one of

partnership and 'shared responsibility' in a common project aiming at effective protection of fundamental rights. These notions of shared responsibility and partnership are expressed in different ways.

First, it is clear that the Court consciously does not always rely on evolutive and meta-teleological interpretation, even though these interpretative principles are usually of central importance to its case-law. Chapter 2 has indicated many examples of cases where the Court did not provide a far-reaching, general interpretation of the Convention, but restricted its judgment to the facts and circumstances of the case.[45] It was submitted in chapter 2 that this approach of 'judicial minimalism' creates a wide latitude for the national courts. National courts may reason, for example, that a certain judgment of the Court was closely geared to the factual circumstances of a case, which may justify the conclusion that there is no reason to amend an established national line of case-law. Another approach the Court clearly uses to give leeway to national law is its 'in for a penny, in for a pound' approach.[46] If the Court adopts this approach it will not give any sweeping interpretations of Convention provisions, e.g. stating that all social benefits of a certain type must be regarded as 'possessions' for the purposes of the right to property, or that single-parent adoption is protected by the right to respect for one's family life in Article 8 ECHR. Instead, the Court will examine whether national law recognises any such right or claim and whether the relevant topic comes within the general ambit of the Convention. If so, it will conclude that the state has voluntarily decided to provide for a right falling within the general scope of the Convention and that, for that reason, minimum fundamental rights safeguards should be provided, such as procedural safeguards meeting the demands of Article 6 of the Convention and the right to non-discrimination. This approach allows the states much discretion, as they can still decide not to provide for a certain right if they want to avoid the applicability of the Convention. Moreover, in cases where this so-called 'in for a penny, in for a pound' approach is followed, the applicability of the Convention appears to be restricted to Articles 6 and 14, i.e. procedural safeguards and the prohibition of discrimination.

Second, as is well known, the Court often leaves a certain margin of appreciation to the states.[47] Especially where a wide margin is accorded to the states, the Court will exercise judicial restraint in its assessment of the reasonableness of a state's interference with Convention rights. The Court has accepted that national courts are generally better placed to establish the facts or provide for a balance of interests and it will often rely on the balance of interests struck by them, especially in cases of conflicting fundamental rights.

45 See in particular chapter 2, section 5.2.
46 See chapter 2, section 4.5.3.
47 Chapter 2, section 3.4.

Third, the idea of a partnership or shared responsibility between the Court and the national courts is expressed in the Court's reliance on the quality of national judicial procedures and national case-law. On the one hand, the Court has imposed many procedural obligations on the states, encouraging them to guarantee a high level of legal protection and to provide for accessible and fair judicial remedies. On the other hand, if the Court is confident that such procedural obligations seem to have been complied with, it appears to be very willing to trust their outcomes.[48] In many cases it will then only superficially assess the substantive reasonableness of a justification or balancing exercise, thus showing a highly deferential attitude towards the national courts.

Finally, the notion of shared responsibility is apparent from the way the Court engages in dialogues with national courts.[49] Sometimes the Court accepts the invitation by a national court to assess its interpretation of one of the Court's judgments. In other cases, national courts may expressly indicate in their judgments that, in their view, a Court precedent conflicts with deeply entrenched legal or constitutional principles and that, for that reason, they are unwilling to implement the precedent through their case-law. The Court will respond to such a judgment by diligently considering whether its precedent should be modified because of the national court's objections. Although this will not always result in a change of interpretation, it may lead to refinement and slight adaptation, or at the least to deeper argumentation in favour of a certain interpretative choice.

For the national courts as well as the ECtHR, these forms of 'dialogue' by means of judgments can contribute to mutual respect for one another's work and one another's views as to the appropriate way to interpret the Convention. To guarantee a successful dialogue, however, it is important that the national courts sufficiently clearly express their criticism and objections in a legal manner.[50] If they do not do so, it will be difficult for the Court to know of the existence of friction between its own interpretations and national law.

In the future, the dialogue between the Court and the national courts may be bolstered even further by the entry into force of Protocol No. 16, which provides for a formal procedure for national highest courts to ask the Court's advice about issues concerning the interpretation of the Convention.[51] Although some criticism of this procedure has been expressed, especially as to its possible politicising effects, it may certainly add to the image of partnership and mutuality between the Court and the national courts.

48 Chapter 2, section 5.2.
49 Chapter 2, section 6.2.
50 Chapter 2, section 6.2.4.
51 Chapter 2, section 6.3.2.

3.2.4. Conclusion

The Convention's impact on national case-law is evidently at least partly due to the various obligations, doctrines and principles the Court has developed over the years. This section has shown that the Court's judgments have *res interpretata*, which means they express binding interpretations of the Convention text. The Convention States, including their national courts, must heed these interpretations in order to comply with their obligations under the Convention. The national courts accordingly must ensure their national laws are construed and applied in accordance with the Convention provisions as interpreted by the Court. Especially since the Court often uses its interpretation methods and principles to provide for extensive interpretations of the Convention, the national courts' obligations under the Convention are very far-reaching indeed.

At the same time it must be stressed that the Court leaves much latitude to the national authorities, in particular the courts, in finding appropriate ways to respect their obligations under the Convention. It does not only do so through its famous margin of appreciation doctrine, but it also has developed and employed various methods of interpretation to reduce the impact of the Convention. Examples mentioned in the above are its application of procedural review, the 'in for a penny, in for a pound' approach and the use of judicial minimalism. By using such approaches and doctrines the Court consciously strives for cooperation with the national courts as coequal partners, rather than for top-down imposition of its own views. Indeed, the Court's overall objective seems to be to arrive at a high level of protection of Convention rights which is well-supported by its national judicial 'partners'.

3.3. SYNTHESIS OF THE FINDINGS OF THE NATIONAL REPORTS

3.3.1. Introduction

In the previous section we explained that the Court encourages the national courts to adopt interpretations and standards that are in conformity with its case-law by means of judicial dialogue and through various argumentative techniques and doctrines. An important question raised by this is how the national courts respond to the Court's approach. Do they actually comply with the Court's requirements and obligations? What role do the national courts' constitutional competences play in this respect? Chapters 3–8 have answered such questions for the six states under review. In the current section we aim to summarise and synthesise the findings of these chapters before turning to answering the overall question of the extent to which ECHR law and national

constitutional law influence the national courts' implementation of the Convention.

3.3.2. *Formal powers to execute judgments against the State*

As was mentioned before, Article 46 ECHR entails an obligation for the states to execute a Court judgment in which it has found a violation of the Convention. The national courts can play different roles in complying with this obligation.

First of all, the states studied, with the exception of the United Kingdom, provide for the possibility of reopening of judicial proceedings if the violation of the Convention has been caused by a procedural defect. The national court is then obliged to take account of the Court's judgment in reassessing the facts and legal issues of the case. The Court does not require the introduction of this possibility of reopening, but it has frequently stressed its value and importance.

In Sweden, a finding of a violation by the Court could give rise to reopening, but only if the violation is a manifest one. In particular, the case-law on reopening criminal cases is restrictive. Reopening of criminal proceedings in France is possible if the violation has actually resulted in negative effects for the individual applicant which cannot be repaired by means of financial compensation (just satisfaction awarded under Article 41 ECHR). In response to the Court's invitation, Belgium, Germany and the Netherlands have provided for more generous possibilities for reopening of criminal proceedings. Procedures for reopening in all states are restricted to the individual case which has led up to the Court's judgment. There is no right to have their proceedings reopened for other individuals, even if they find themselves victims of a similar violation of the Convention.

In France, the Netherlands and the United Kingdom there is no possibility for reopening of civil and administrative procedures, although administrative law usually allows for a new administrative decision to be taken. In Germany a possibility for reopening of civil proceedings exists and Sweden provides for a procedure for reopening of administrative proceedings.

Clearly, therefore, national criminal courts in the six states generally have more ability to execute Court judgments than national administrative and civil courts have, but in the majority of states the possibility of reopening of procedures allows national courts to become engaged in implementing the Convention.

In addition, there is sometimes a possibility to bring liability proceedings against the state if the ECHR violation has resulted from a judicial decision. In the Netherlands the possibilities to do so are limited and they will usually only be successful if the courts have acted in manifest violation of the Convention. Somewhat similarly, procedures against the State to obtain redress can be brought in France and Sweden, although they will only be successful for the

applicant in a small number of cases. In the United Kingdom it is possible to ask the courts to end an ongoing violation of the Convention, e.g. a detention which is alleged to be contrary to Article 5, but this possibility is rarely used.

Finally, some of the states (notably the Netherlands and Sweden) allow the national courts to award financial compensation or compensation in kind (e.g. early release from prison) if judicial proceedings have taken an unreasonably long time.

3.3.3. *Frequency of references to Strasbourg case-law; acceptance of* res interpretata

In all states under review, courts regularly refer to the Court's judgments. If a Convention right is invoked in judicial proceedings in the Netherlands, for example, the national courts generally take account of the interpretation given by the ECtHR and apply the standards and conditions developed in the Court's case-law. It does not make any difference for this if the Netherlands actually was the respondent party in a case before the Court; the Dutch courts obviously (though implicitly) all accept the interpretative force of the Court's precedents. In Belgium, France and Germany, the courts likewise make frequent references to the Court's jurisprudence and respect the *res interpretata* of its judgments. In the United Kingdom the courts also systematically refer to Strasbourg case-law. Interestingly, the Human Rights Act even expressly obliges them to take the Court's interpretations into account. The situation in the Swedish courts is a bit different, as it was 1995 before they obtained competence to apply directly the Convention provisions. It is not surprising, then, that references to Strasbourg case-law have been less visible in their case-law. The Swedish courts are prepared to interpret their national legislation in the light of the ECHR *acquis*, even though generally they appear to favour statutory interpretation based on historical, teleological or grammatical interpretation. Nevertheless, it was noted in chapter 7 that there is continuous (and not always linear) development in the case-law of the Swedish courts and some courts have been willing to not only follow but also expand the substance of the Convention as interpreted by the ECtHR.[52]

From the study of the case-law of the ECtHR (chapter 2) it appeared that the Court imposes positive obligations on the national courts to take account of the Court's judgments in cases between private parties, e.g. by explaining contractual clauses in conformity with the Convention. Chapters 3–8 disclose that these obligations are met in all the states and that national courts regularly apply the Convention in horizontal relationships. Different modalities are used to give such effect. The Belgian Constitutional Court and the French courts, for instance, tend to apply the Convention provisions directly, while the courts in

52 Chapter 7, section 5.2.

other states and the Belgian Court of Cassation usually opt for indirect application, e.g. by interpreting open-ended clauses of private law in line with the Convention. Swedish courts are more cautious of embracing the horizontal effect of the Convention provisions, although Swedish labour courts sometimes apply Convention provisions (in their form as provisions of national law) in employment cases.

3.3.4. Adjusting national case-law because of ECtHR precedents

Judgments of the Court regularly cause adaptations to be made to national case-law in all six states. Since *res interpretata* is regarded as a leading principle it thereby turns out to hardly be relevant if the judgments are directed against another state. Swedish courts are less used to 'translating' Strasbourg case-law to the national context and more used to applying legislation in line with their original and textual meaning. However, even in Sweden there is an increasing tendency to respond to the Court's judgments.

Although all national courts thus regularly follow-up on judgments of the Court, the analysis of their case-law demonstrates that they do not show any 'marionette behaviour'. Especially in Belgium, Germany, the Netherlands and France, the courts are inclined to transform the Court's interpretations and judgments into more easily manageable standards which fit in better with the national legal system. Sometimes the courts thereby show quite some creativity, opting for a very narrow reading of Strasbourg precedents or even for deviations of the Court's approach; examples of this have been shown in particular for Belgium and the Netherlands. In Germany, 'transformation' of Convention standards into national standards is also accepted, but it is generally held that this should not lead to real deviations from the Court's case-law.

In the United Kingdom, too, courts generally diligently follow the Court's interpretation, although they also often slightly adapt the standards and doctrines adopted by the Court. It is important to note, however, that the legal character of a Court precedent in the United Kingdom is not equal to that of a precedent of the national highest courts. This means that lower courts have to continue applying the national case-law, even if this seems to be in violation of the Convention, until a higher court has decided to bring the case-law in line with the Convention.

It only very rarely occurs that judgments of the Court are actually set aside because they are considered to be at odds with national constitutional principles or national law. For the Netherlands, for example, only one example has been given of this, and even this judgment was not very fundamentally reasoned as being an intentional deviation from the Court's approach. Fundamental underpinning of deviating judgments is stronger in other states. The British Supreme Court has indicated, for example, that it does not consider itself to be

bound by ECtHR judgments which clearly show that the Strasbourg Court has misunderstood national law or which are considered to be plainly incorrect. This robust stance, however, hardly ever has the result that a judgment of the Strasbourg court is actually set aside and replaced by a national interpretation. The Court's judgments in practice almost always appear to lead the national interpretation of the Convention.

Similarly, it is well known that the German Federal Constitutional Court has always stressed its competence to set aside Strasbourg judgments if they are incompatible with fundamental constitutional values. Here, too, however, this theoretical competence has not yet been used in practice and, again, the general rule appears to be that the Court's interpretations are accepted. Lower courts which refuse to apply an interpretation given by the Strasbourg Court because of constitutional objections are even corrected by higher courts.

The Belgian courts also do not seem to be inclined to disregard the Court's interpretations, but on rare occasions this happens. On these occasions, the reasons for doing so are explained in a detailed and extensive judgment.

It is evident, therefore, that many national courts can dispose of implicit or explicit constitutional safety valves to ensure that the interpretations of the Court which are in clear conflict with national (constitutional) law do not need to be applied. It is equally obvious, however, that there is hardly ever any need to rely on such mechanisms, probably mainly because straightforward conflicts are almost always avoided by techniques of creative adaptation and transformation of the Court's standards.

On the rare occasion that a national court refuses to apply a Strasbourg precedent, this may give rise to a case before the Court. We already mentioned in section 3.2.3 that such a case leads the Court to careful examination of the national reasoning and to reassessment of its own standards. This may result in a sort of dialogue between the national court and the ECtHR, although this is usually only a brief conversation. In Germany, for example, the Federal Constitutional Court changed its case-law after the Strasbourg Court had found violations in cases about respect for private life and about *habeas corpus* rights.[53] This led to new cases before the Court, in which the Court examined whether the new interpretations sufficiently corresponded with its precedents. Since it held this to be the case, no further adaptations were necessary and the dialogue was closed.

In other cases the conversation appears to have been a more extended one. For Belgium, for example, chapter 3 mentioned an older case in which the Court of Cassation refused to follow-up on a judgment of the Strasbourg Court. When a new case on the matter was brought before the Court, it found that there was still a violation of the Convention because of the flawed follow-up of the first judgment. Only afterwards did the Court of Cassation change its approach. The

[53] Chapter 5, section 5.4.

most lengthy and elaborate dialogue thus far is visible between the Court and the United Kingdom, where the courts are presently involved in a dispute with the Court about the use of hearsay evidence, i.e. the use as evidence in criminal proceedings of declarations of witnesses which cannot be questioned by the defence.[54] The Court had developed a rather elaborate case-law on the topic, which proved to be unacceptable for the courts in the United Kingdom. Indeed, the Supreme Court expressly refused to adopt the standards and criteria of the Strasbourg Court as they would be irreconcilable with the main principles of criminal procedure in the United Kingdom. In a new case against the United Kingdom on the matter, the Grand Chamber slightly changed its standards, yet it also rejected some of the objections and arguments made by the national courts. This dialogue is still to be continued, as it is now up to the British courts to respond to the Grand Chamber's findings. If they do not accept these, it is likely that the dispute is again presented to the Court.

3.3.5. 'Positive deviations' and the application of the 'mirror principle'

All national courts in the states under review endeavour to interpret national law in harmony with the Convention so as not to fall below the minimum level of protection provided by the Convention and the case-law of the Court. The question may arise, however, of whether they are willing to go any further and deviate from the Convention standards in a 'positive' manner, i.e. by providing more protection to fundamental rights than is strictly required by the Court. Although Article 53 allows the courts to set national protection of Convention rights on a higher level than that offered by the Court, none of the courts seem much inclined to make use of this possibility of positive deviation. They prefer to use, either implicitly or explicitly, a 'mirror principle' approach. The mirror principle derives its name from an opinion of the United Kingdom Law Lord Bingham, in which he considered that it would be the task of the national courts to 'mirror' the standard of protection required by Strasbourg case-law.[55] This means that it is first and foremost the task of the national courts to ensure that the national standard of protection does not fall below that required by the Strasbourg Court ('negative deviation'). In Lord Bingham's view, however, 'mirroring' also means that positive deviations are not acceptable, in the sense that national courts should not add to the Strasbourg level of protection. He gave several reasons to adopt such a mirror principle in the United Kingdom, most of which in some way relate to the constitutional position of the courts. Offering more protection than strictly required would result in highly creative judicial law-making, which would be at odds with the separation of powers and the sovereignty of Parliament. Similar arguments have been presented by the Dutch

54 See chapter 2, section 6.2 and chapter 8, section 5.2.

55 In more detail, see chapter 8, section 5.2.

Supreme Court, which also expressly held that it is not up to the Dutch courts to offer a higher level of protection than strictly required by the Convention, and the same appears to be true for France. Other national courts have less explicitly denounced the possibility of offering additional protection. In chapter 3 it was indicated, for example, that the Belgian courts have never expressed a view on this. Nevertheless, the analysis of Belgian case-law shows that no such additional protection is provided in practice.

If there is a desire to provide more protection of fundamental rights than is guaranteed by the case-law of the Strasbourg court, there appear to be different avenues more suited to doing so than by direct application of the Convention. In particular in Germany the fundamental rights standards provided by the Basic Law prevail, which may easily be higher than the standards required by the Court. Here (as in Belgium and France), it is possible to rely on national constitutional provisions rather than on the Convention if one prefers a special standard of protection. Application of a mirror principle-like approach thus can be avoided. In states where constitutional review is non-existent, such as the United Kingdom and the Netherlands, this is clearly not an option.

3.3.6. Adopting typical Convention doctrines

The frequent references made by national courts to the Convention and the Court's judgments witness the impact of the Strasbourg case-law on national case-law. National courts tend to apply the standards and criteria developed by the Court and they only deviate from these if there is good reason to do so. It is also relatively easy for national courts to apply the Court's standards, which are often usefully concrete and detailed; one only needs to think of the refined sets of standards to decide on defamation cases or the lists of balancing factors in cases concerning the expulsion of minors.

Another still related question is whether the national courts do not only apply such standards, but have actually started to think and reason in a way similar to that of the Court. If they do, this should be apparent from cases where questions of interpretation arise that have not yet been answered by the Court. Surely such questions can usually be answered by relying on classical national methods of interpretation, such as textual or historical interpretation. The deep influence of the Court's case-law could be apparent here, however, from the national courts' use of typical ECHR interpretation methods, such as meta-teleological interpretation, evolutive interpretation or consensus interpretation. Similarly, deep influence of the ECHR could be discerned if the courts start to apply typical ECHR notions such as that of 'necessity in a democratic society' or the margin of appreciation doctrine even in cases where this is not required by Strasbourg case-law and even outside the context for which these notions and doctrines were originally developed.

Examples of such 'autonomous' application of Convention methods are extremely rare where interpretation and delineation of the scope of Convention rights are concerned. No examples were given for Belgium, Germany and Sweden. In chapter 6 on the Netherlands, one example was given of the use of meta-teleological interpretation by the Central Appeals Tribunal, by means of which it applied Article 8 of the Convention in a new context. The Central Appeals Tribunal thereby referred to the central ECHR notion of human dignity to reason that in extraordinary cases the State has the obligation to provide for a minimum level of subsistence for illegal immigrants. In most other cases, however, the Dutch courts tend to refer to concrete judgments of the Court without making express mention of the interpretative principles used in these judgments and without applying these principles independently.

By contrast, the Court's interpretative principles are relatively often mentioned in the United Kingdom, but it seems that the British courts pay mere lip service to the Court's approach: they do not actually apply and use such principles to underpin a new line of reasoning independently of the Court's concrete precedents. This is only different for the method of consensus interpretation, of which a few examples of application have actually been given for the United Kingdom. In these cases the courts mainly used this method as an argument for not having to give any new interpretation to the Convention because of the lack of European consensus.

The margin of appreciation doctrine proves to be a much more attractive instrument for national courts. Especially in the Netherlands this doctrine is frequently invoked. If the Court leaves a wide margin of appreciation to the state (as regularly occurs in cases on social security law, for example), Dutch courts often deduce from this that this margin of appreciation is particularly relevant for the legislature. For that reason the courts almost always exercise restraint in cases where the Court has left a wide margin to the states. It is thereby scarcely acknowledged that the doctrine was not developed to be used by the national courts and that it is really a tool for the European Court of Human Rights to help it position itself vis-à-vis *all* national authorities. The same is true for Belgium, although the use of the doctrine is less standard than in the Netherlands and it is not used by all courts. In the United Kingdom, by contrast, it is expressly recognised that the doctrine is not applicable on the national level. Instead, other forms of deferential review are usually applied. Similarly, no examples of direct and independent application of the margin of appreciation doctrine were found in Germany and Sweden.

This brief overview demonstrates that the national courts are not so deeply influenced by the typical ECHR approach as to lead them to adopt the Court's approaches and methods as part of their own national set of judicial argumentative techniques. They only refer to the standards of the Court if their applicability directly follows from one of the Court's precedents. This seems to

be different only for the margin of appreciation doctrine, which is enthusiastically referred to in the Netherlands and, to a lesser extent, in Belgium. It can be remarked, however, that the application of this doctrine does not lead to any deep penetration of Convention standards and notions into national law. On the contrary, it often serves to fend off appeals to Convention rights and it results in highly deferential review against standards of arbitrariness or manifest unreasonableness.

3.3.7. Taking constitutional competences seriously: judicial restraint

One of the questions raised in the six comparative chapters was whether and to what extent the national courts take account of their constitutional systems and judicial competences when deciding on Convention cases. It might be assumed that, because of the supposed impact of the obligations imposed by the Court, the national courts are easily inclined to transgress the limits of their judicial task or at the least exercise more strict and critical review than they would normally do. Chapters 3–8 show, however, that there is no particularly strict review by national courts in any of the states if Convention rights are invoked. This is particularly true for Sweden, where for a long time, the Swedish Constitution expressly limited the powers of the courts to review statutes and Government decrees for conflict with the Convention to situations of manifest violations of the Convention. This limitation was removed from the Swedish Constitution in 2011, but for the time being this has not resulted in any less judicial restraint by the Swedish courts. The Swedish legislative process generally takes account of human rights concerns, which partly explains the reluctance which continues to exist regarding reviewing legislation for its compatibility with Convention provisions.

Such a formal limitation of judicial powers never existed in the other five states, but even there, the application of Convention rights does not appear to result in special judicial activism. In Germany and France, judicial review in fundamental rights cases tends to be relatively strict, but this does not appear to be related to a particular Convention influence. In Belgium and the Netherlands, the national courts tend to exercise judicial restraint if they are confronted with cases about the Convention compatibility of Acts of Parliament or even administrative decisions. Intensive review of the justification of an interference with Convention rights is exercised only rarely. Usually it is limited to the situation where a *prima facie* case was made of a serious breach of fundamental rights. More often the courts pay deference to the legislative or administrative authorities, invoking the margin of appreciation doctrine (in the Netherlands) or referring to the discretionary powers and the democratic legitimacy of the bodies responsible for a certain act or measure. Furthermore, in the Netherlands the Supreme Court may even consider it prudent to refrain from applying the

Convention when an inconsistency between domestic law and a Convention provision can only be removed by making choices that should be left to the legislature. In Belgium, the Court of Cassation might rule in a similar situation that the such a situation might cause the Court of Cassation to hold that the Convention provision lacks direct effect in the case under consideration. In the United Kingdom, the judicial duty of respect for the competences of the other powers of government is readily apparent from the prohibition in the Human Rights Act to set aside or disapply statutory acts. The British courts have derived from this that it would not be appropriate to intervene too easily in the exercise of discretionary powers by the legislature. In practice, however, the level of restraint to be exercised varies and the courts pay increasing attention to a variety of factors that could help to determine the appropriate intensity of review. In particular, less discretion appears to be allowed to administrative bodies.

3.3.8. Conclusion

Based on the findings in chapters 3–8 of this book, we can conclude that the national courts in all the legal systems investigated attach great value to the judgments of the Court. Until recently the Swedish courts had only a few powers to review compatibility of national legislation with the Constitution or the Convention, so it is logical they have not developed any practice or tradition of striking down legislation by applying or taking into account the Court's precedents. Moreover, it is clear that there is limited experience with 'translation' of Strasbourg case-law, since more classical methods such as historical and textual interpretation are usually relied on. It is nevertheless important to note that the Swedish courts increasingly aim to explain national legislation in conformity with the Convention, even in private law relationships, and they strive to implement judgments rendered against Sweden in an appropriate manner. In these endeavours the Court's interpretations appear to play an important role.

Generally, we can also conclude that the national courts are strongly inclined to follow the Court's interpretations, yet at the same time they tend to fit in the Court's standards with their own legal systems as much as possible. By doing so they often bend and twist the Court's interpretations a little, transforming them into standards that they can easily apply. This does not mean to say the national courts often really deviate from the Court's precedent. It is very rare for the national courts to set aside a precedent decided by the Court because it would conflict with national (constitutional) principles. In these rare cases, moreover, this often leads to a dialogue with the Court, which eventually may result in adaptation of either the Court's standards or those of the national courts.

As a result of the national application of the Court's standards, these standards clearly have significant impact on national law. Nevertheless, the influence appears to run no deeper than to mean that national courts actually apply the Convention standards to those cases for which they have expressly been developed. The Court's interpretative principles and doctrines are rarely used independently and autonomously to justify, for example, the national courts' own definition of Convention terms. Hence, the national courts' argumentative toolbox has not been supplemented by tools such as evolutive or meta-teleological interpretation. This is only different for the margin of appreciation doctrine, which is often invoked in the Netherlands to justify the exercise of judicial restraint.

Finally, we can conclude from this study that the national courts hardly ever use their constitutional powers in an activist manner. Most national courts implicitly or explicitly rely on a mirror principle, which means that they will not deviate from the standards of the Convention, neither in a negative sense (falling below the minimum level of protection required by the Court), nor in a positive sense (providing for additional protection). The main reason for embracing a mirror principle is found in the need to respect the separation of powers and the limited law making competences of the courts. It is also noticeable that the courts generally exercise judicial restraint in their relation with the legislature and the administrative bodies, even in cases where Convention rights are at stake.

This short résumé of the findings of the comparative study illustrates that it can hardly be said that the national courts behave as marionettes of the Court and that the obligations imposed on them by the Court result in judicial activism or in application of Convention standards that is difficult to reconcile with the constitutional position of the courts. The opposite appears to be true: the national courts carefully assess the obligations imposed on them to see how they can be adapted and applied in their own systems, without transgressing their constitutional powers. Judgments of the Court which are considered to be really incompatible with national constitutional law may be interpreted in conformity with national law or even be set aside. At least some of the courts seem to be inclined to actively engage in a dialogue with the Court about the best interpretation to be given to Convention terms.

Interestingly, moreover, the design of the constitutional system for implementation of international law does not seem to matter very much for the way in which the national courts behave. Sweden, however, has a strongly dualist tradition and a strong view on the limited role of courts in reviewing legislation. It is clear that the Convention and the Court's interpretations necessarily play a limited role in this particular state when it comes to striking down legislation. In addition, some slight differences can be noted between states where the courts have a power of constitutional review and states where such power is lacking, in particular where there is the possibility to offer additional protection to fundamental rights. Generally, however, we may conclude the constitutional

system for the implementation of international law makes little difference for the frequency of references to case-law of the Court or the way in which the Court's standards and principles are applied.

4. DEBATE ABOUT THE COURT AND ITS CASE-LAW

4.1. INTRODUCTION

In the introduction to this book we explained that, over the past few years, there has been a surge of fundamental criticism of the Court and its judgments in the United Kingdom and, though with a different intensity, the Netherlands. In the critics' view the Court is too activist and it interferes too easily and too often with the discretion of the domestic authorities. As a result the Court is said to endanger and harm national sovereignty as well as democracy. This is considered all the more problematic as the Court compels the national courts to apply its standards and act in accordance with all its judgments. This may have the result, so it is thought, that the national courts are also increasingly activist in protecting fundamental rights. This risk of national judicial activism and transgression of competences is assumed to be particularly strong in states with a monist tradition (the Netherlands) and states that have created special competences for judicial review in cases concerning Convention rights (the United Kingdom).

One of the objectives of this book was to analyse the criticism of the Court to assess its impact on broader debates about constitutional powers of national courts. We also noted it would be interesting to examine whether the existence of criticism resulted in a different attitude at the Court, which perhaps would be more careful in imposing obligations on the national courts or would generally leave the states more discretion. In this section we present a short overview of the main findings in this regard. As in the previous section, we first summarise the response by the Court (section 4.2). Subsequently we briefly discuss the existence, nature and impact of the debate in the six states under review (section 4.3). We conclude the section with a short résumé of the most important findings (section 4.4).

4.2. DEALING WITH NATIONAL CRITICISM AND NATIONAL DEBATES BY THE COURT

Debates and controversies about the case-law of the Court have always existed. They can even be considered to be inevitable if it is understood that the Court is inherently engaged in deciding on highly divisive issues concerning national

sensitivities and priorities.[56] The interviews at the Court made clear that the Court considers criticism to be of great value and it continually strives to adequately respond to it. The Court wants to find out where criticism comes from, it will assess if it is reasonable and justified and it will internally discuss whether it should lead to adaptation of its case-law. Nevertheless, the interviewees stressed that criticism should never be blown out of all proportion and it should not lightly be considered to form cause for major change.

The Court's reading of the criticism in the United Kingdom and the Netherlands is nuanced. To the extent the criticism relates to concrete judgments, they can respond to it by using its dialogical approach. For another part, however, the criticism is regarded as running much deeper, affecting the very heart of the system of supervision existing under the Convention. Explanations are sought for this in a variety of factors, including a generally felt need to reaffirm the value of national sovereignty and nationalism, as well as of parliamentary sovereignty and the majority rule. The respondents indicated that it is difficult for the Court to respond to this kind of fundamental criticism, in particular because it appears to be strongly related to specific national discussions about competences and does not surface to the same degree and in a similar form in other states of the Council of Europe. It would be undesirable and imbalanced to make significant changes in approach and judicial policy in response to the debate in only two states. Engaging in informal dialogue and explaining the Court's case-law appears to be regarded as the best way to deal with this type of criticism.

According to the respondents at the Court, the debates in the United Kingdom and the Netherlands have not resulted in measurable changes in the Court's case-law. Indeed, the analysis of the Court's case-law in chapter 2 confirmed that the developments in the Court's approach and standards are mainly determined by the type of cases presented and the legal questions raised. Nevertheless, some of these developments appeared to be related to conscious choices of judicial policy. As we mentioned before, the Court increasingly regards national courts as partners in a common project to protect the Convention rights on an adequate level. This attitude and the connected embracement of the notion of 'shared responsibility' seem to provide important explanations for the rise of procedural review and dialogue by means of judgments. Indeed, the respondents indicated that criticism expressed in national judgments is a most useful type of criticism for the Court, as it is phrased in concrete and legal terms and is therefore relatively easy and appropriate to respond to by means of the Court's own judgments. The respondents at the Court acknowledged that some of the Court's judges are sensitive to the accusation of activism, but they stressed this accusation is far from new. It is endeavoured for many a decade to find a proper balance between

[56] See in particular chapter 2, sections 6.1 and 6.3.1.

the need for effective protection of fundamental rights and respect for national legal and constitutional traditions. This was also confirmed by the analysis made of the Court's case-law in chapter 2, which disclosed that techniques to achieve such a balance were developed and refined long before the criticism in the United Kingdom and the Netherlands emerged. Within the Court, it is admitted that it will always remain a struggle to find the right balance. It is hoped, however, that the quality of its judgments and the existing argumentative techniques and possibilities for dialogue will enable it to respond to national criticism in an appropriate manner.

4.3. CRITICISM IN THE STATES

We have already briefly discussed the debates in the Netherlands and the United Kingdom in the above, as well as in the introduction to this book (chapter 1). As was further explained in chapter 6, the debate in the Netherlands emerged in the political arena and in opinions written by scholars in newspapers, but it appears not to have affected national case-law in the sense that Convention rights cases are now approached differently than before. Instead, highest court judges have stressed the importance of the Convention and its application by the national courts. The most important result of the criticism of the Court seems to be that it has been translated into a more general political debate about the position of national courts and their competence to review the compatibility of Acts of Parliament with international law.

For the United Kingdom it is well known that there is severe criticism of the Court, especially on the conservative side of the present coalition cabinet, led by Prime Minister David Cameron. The debate in the United Kingdom is heavily fuelled by the media, parts of which constantly report very negatively on the Court and its judgments. A few (former) Supreme Court judges have also shown themselves to be critical of the Court's role. The resulting debate is multifaceted. Part of the criticism is directed at concrete judgments of the Court which are considered to be highly objectionable and in violation of important constitutional principles. Here one can think of the debate about voting rights for prisoners or the release of terrorist suspects who cannot be expelled to states where they run the risk of a flagrantly unfair trial. Another part of the criticism, mainly expressed in the media and lacking real foundation, concerns the impartiality and independence of the Court's judges. In addition, there are concerns about the Court's presumed activism, the expansion of the scope of the Convention, the danger of the Court for national sovereignty and the undemocratic character of the Court. In the United Kingdom, these debates seem to have greater consequences than in the Netherlands. Many critics of the Court have stressed that the Human Rights Act is to be blamed for requiring the national courts to follow the Court's case-law very closely, even if this is in clear

violation of the preferences of a parliamentary majority or the Court's approach is activist or undesirable for other reasons. Mainly for that reason they favour the adoption of real 'British' bill of rights, which is hoped to have particular impact on the behaviour of the national courts. Nevertheless, the proposal for such a bill of rights is extremely controversial.

In the other states under review, any existing debate about the Court is much more modest in nature. In Belgium, France, Germany and Sweden, the overall legitimacy of the Court and its judgments is hardly subject to debate. In Belgium the extreme right-wing party Vlaams Belang has tried to start a debate on the impact of the ECHR, but it has not really succeeded in doing so. Sharp criticism has also been given by two Belgian scholars, one of whom happens to be the President of the Constitutional Court, who have argued that the Court has taken Convention protection too far in the fields of immigration law and social security. This criticism has not been picked up by the media and has hardly been expressed in politics. Moreover, in Belgium there is no such thing as a general debate about the competences of national courts in reviewing the compatibility of legislation for conformity with the Convention.

In Sweden and France, discontent is sometimes expressed as regards concrete judgments of the Court, but this has not resulted in any wider debates about the position of the Court or, more generally, the competences and position of national courts. The same is true for Germany, where controversy in the media and politics mainly related to a few contentious judgments, especially those concerning the release of detainees who have been convicted for rape or murder. Again, however, this has not given rise to any concrete proposals to limit the effect of the Convention in national law. Quite to the contrary, the Federal Constitutional Court has accepted the controversial case-law of the Court and the general public seems to have resigned themselves to this. Besides this, a few leading German scholars (mostly former highest court judges) have made proposals to limit the impact of the Convention. Although these proposals are considered very interesting from an academic perspective, chapter 5 made clear that politicians have not actually taken up any of them. Indeed, no indication was found that one of these proposals could result in actual legal or constitutional change.

4.4. CONCLUSION

Serious debate on the impact of the Court's case-law is apparent in the United Kingdom and, albeit in a different tone and intensity, in the Netherlands. Both states have in common that the criticism has found a political and potentially legal and constitutional translation, although there are again important differences between the states. In the other states under review, the criticism is much more limited and has hardly surfaced in the media and politics.

Controversies and discontent usually relate to individual judgments which evoke the question of how they should be responded to in national law and policy. Although certain scholars and judges in Belgium and Germany have aimed to start a broader discussion about the Court's impact, these efforts have not found fertile ground.

The ECtHR appears to be competent to deal with the concrete type of criticism that is visible in Germany, Belgium and France, especially if such criticism finds its way into concrete judgments in which it is clearly stated and explained why a certain precedent of the Court must be considered wrong or undesirable. Diffuse and relatively vague debates about activism or national sovereignty are much more difficult to respond to through the judgments of the Court, as it is very difficult to make a legal and judicial translation of political and ideological debates. Generally, however, the Court deals with this kind of criticism by striving to find a proper balance between the need to respect national sovereignty and national diversity on the one hand, and the need to protect fundamental rights on the other hand. It is very difficult to say if it has actually succeeded in finding this balance, as this will depend on the expectations one has of the Court's work. Some may find that the Court does not yet make sufficient use of its powers and should protect fundamental rights more vigorously, while others may say that the Court should have more respect for national values and traditions and should be much more restrained in its approach. In fact, it hardly appears to be possible to have a purely objective and legal debate on this in which political, ideological and normative opinions do not play any role.

5. CONCLUSIONS

In the introduction to this book and of this final chapter, we stressed the deep impact of the ECHR on domestic law (in particular national case-law), as well the fundamental criticism to which this has given rise in the United Kingdom and the Netherlands. The aim of our study was to identify the different causes of this and to find out about the validity of two important assumptions. As a reminder, it is often thought that the great impact of the Convention immediately follows from the work of the Court, which has extensively interpreted the Convention by using its evolutive and autonomous interpretation methods and which has imposed many obligations on the national courts. In fact, it is sometimes assumed that only little freedom remains for the national courts, which have to copy the Court's approach and thereby necessarily easily transgress the limits of their own judicial competences. Alongside this, it often seems to be thought that there is a direct causal relationship between the extent of the courts' powers to implement international law (the Convention in particular) and the impact of the Convention on national law.

In the light of the findings of this study, we can conclude that both these assumptions have proven to be incorrect, or at the least over-broad and insufficiently nuanced. First and foremost, it has turned out that the character of the constitutional system for the implementation of international law through case-law is much less relevant than it is often thought to be. We found the impact of the ECHR on national case-law to be significant in all six states under review, regardless of their constitutional systems and the competences of the national courts. Whether the system is prevailingly monist, as in the Netherlands, France, Belgium or (increasingly) Germany, or prevailingly dualist, as in the United Kingdom and Sweden, national courts are ever more often confronted with cases in which the Convention is invoked and they cannot avoid applying its provisions as construed by the Court. In both the United Kingdom and Sweden judicial review of legislation is traditionally kept to a minimum and the inviolability of Acts of Parliament is a deeply rooted part of constitutional culture. Since 2011 it has been easier for the Swedish courts to exercise judicial review of legislative acts that conflict with the Constitution and the Convention and there are some examples of constitutional review based on the Convention, resulting in legislation not being applied.

Interestingly, moreover, chapters 3–8 of this book disclosed a number of tendencies quite the reverse to what is often assumed. Presumably national courts in monist systems can use the Convention provisions as standards of review much more easily than national courts in dualist systems. It has appeared, however, from our study that in states with a more dualist tradition, where national constitutional values are traditionally considered to be of primary importance, the national courts equally loyally apply the Convention and rely on the Court's interpretations. Of course it is true that in a state like the United Kingdom, the national courts' competences are limited, with the effect that a national court cannot set aside or disapply Acts of Parliament to avoid a conflict with the Convention. Moreover, we found the national courts to be much more inclined to exercise judicial restraint by application of, for example, the 'mirror principle'. This means they will not easily provide protection to fundamental rights over and above the minimum strictly required by the Strasbourg Court. The courts in the United Kingdom also tend to assess the Court's interpretations rather critically. If they really do not agree with a precedent, for example because it does not fit in with well-established legal and constitutional principles, they may even disregard certain interpretations and follow their own approaches. The Federal Constitutional Court of Germany has likewise stressed that the national constitutional clauses and principles will prevail in the event of a conflict. Nevertheless, these theoretical and doctrinal starting points should not obscure the fact that, in practice, the case-law in both Germany and the United Kingdom is strongly oriented towards the Strasbourg jurisprudence. National statutory acts are usually interpreted in line with the Court's judgments and the Court's

approaches have strongly influenced national legal doctrines. It may be concluded that both systems are strongly characterised by *'Europarechtsfreundlichkeit'*, or an openness to European judgments. The Court's jurisprudence will be carefully followed and applied, except for the extremely rare situation of a problematic conflict with core principles of national (constitutional) law.

By contrast, in more traditionally monist systems, the national courts appear to use many subtle instruments to mitigate the effects of direct applicability and priority of the Convention. Most of these instruments are directly related to the courts' general constitutional competences and their place in the national constitutional order. In the Netherlands, for example, there is the practice of 'abstaining': even if an Act of Parliament is at odds with one of the Convention provisions, the national courts may leave it to the legislature to decide how such a conflict should be solved. In practice, the typically 'monist' competence to set aside national legislation is hardly ever used. Just as in the United Kingdom and Germany, Dutch courts (as well as courts in Belgium and France) prefer to avoid having to find a violation of the Convention by construing the text of the statutory provision in harmony with the requirements of the Convention. Moreover, the courts in the Netherlands, Belgium and France tend to give relatively creative and flexible interpretations to the Court's requirements. They do not always apply the Court's precedents very precisely, but often transform the Court's standards and criteria into national standards, often adapting and bending them a little in the process. Finally, we noted several examples of courts in monist states refusing to strictly follow up on an interpretation given by the Court.

Clearly, courts in prevailingly monist states use many of the mechanisms and instruments which traditionally exist in dualist states. Chapters 3–8 of this book hence disclose a strong convergence as regards the application of the Convention by national courts, with the possible exception of Sweden. Perhaps this may explain why the impact of the Convention is so strong in all the states under review, regardless of the variation in their constitutional systems of implementation of international law.

The second assumption studied in this book is that the strong impact of the Convention on national law is related to the intrusive and expanding case-law of the Court. This study has shown that, to a certain extent, this assumption is correct. The Court has imposed ever more obligations on the national courts, such as the obligation to interpret national law and even private law contracts in line with the Convention. In addition to this, the scope of Convention rights has been extended as a result of the Court's evolutive and autonomous interpretation, thus bringing ever more claims within the reach of the Convention.

Simultaneously, the study of the Court's approach has shown that this assumption is over-broad. The widening and deepening of the obligations on the national courts have been accompanied by a parallel strengthening of the notion of dialogue between national courts and the European Court of Human Rights.

The Court actually invites the national courts to give their own interpretations to the Convention, even if they deviate from the Court's own case-law, because it regards this as a good way to ensure development of Convention law and, in the end, a more appropriate and suitable level of protection of Convention rights. The Court has also developed a range of mechanisms to help it protect fundamental rights while respecting the integrity of national constitutional and legal systems. Many of the Court's obligations relate to the quality and accessibility of national (judicial) procedures, and if such procedures appear to meet the Court's standards, the Court usually respects their outcomes without imposing its own value choices. The Court thus certainly requires its doctrines and criteria to be applied by national courts, but at the same time, it leaves national courts a wide latitude. For the Court, what counts is that the minimum level of protection of fundamental rights is safeguarded – the methods, constitutional competences and principles used by national courts to achieve that level are hardly considered to be relevant.

In the light of these findings, the recent debates and controversies on the Convention in the United Kingdom and the Netherlands are all the more striking. This is even more so since similarly deep and fundamental criticism of the Court's work is barely present in Belgium, France, Germany and Sweden. Of course, in these countries, too, individual judgments of the Court are criticised, just like interpretations which are considered too extensive, yet such criticism has not been translated into political debates with any actual force.

For Sweden, the reluctance towards constitutional review based on Court judgments can be partly explained by its constitutional system and traditions, particularly as regards building in consideration of human rights (including Court judgments) into the legislative process. The impact of the Convention on Belgian, French and German case-law is deeper, but even there hardly any controversy about the Court has surfaced. This makes it rather improbable that the existence of debate about the Court's position is directly related to the lack of constitutional competences to keep the Court's judgments at a distance or to the intrusive character of the Court's obligations. The explanation for the rise of controversies in the Netherlands and the United Kingdom is more likely to be found elsewhere. Perhaps, for example, explanations can be found in the political climate or in a general anti-Europeanist or anti-judicial attitude. This study, however, has not aimed at finding such non-legal and non-constitutional explanations – sociological or political science research is needed to discover these.

Nevertheless, we submit as a hypothesis for further research that a possible explanation is to be found in a striking constitutional similarity between the two critical states, which sets them apart from the other states investigated: the lack of constitutional review. The courts in Belgium, France, Germany and Sweden *do* have such a competence of constitutional review and especially in Belgium,

France and Germany it is used as a vehicle to implement the Convention. The Convention and the Court's case-law are read into constitutional fundamental rights provisions, and constitutional norms are used in that form to review the Convention compatibility of statutory provisions. Surely the availability of constitutional review does not make any legal difference as to the outcome in concrete cases, since it does not really matter, from the perspective of protecting Convention rights, if the Convention is applied directly (as is possible in the Netherlands), through legislation (as in the United Kingdom) or indirectly, via national constitutional norms. It is not inconceivable, however, that it makes an intuitive difference if Convention rights find their way into national law directly or indirectly, via the national constitution. In the United Kingdom and the Netherlands, the Convention is clearly a substitute constitution or bill of rights, but with the strange characteristic of being interpreted in the last resort by an external, supranational body. This supranational body thereby has direct responsibility for interpreting the most fundamental rights of the individuals living in the states; the national courts should merely apply its judgments. In states where constitutional review is allowed, to all appearances it is the national constitutional court that is the final arbiter in fundamental rights cases, rather than the Strasbourg Court. The national constitutional court thereby can act as intermediary between the national legal order and the Convention system, which may reduce the perception of the Strasbourg Court as directly interfering with national (constitutional) principles and values.

As mentioned, we do not know if this difference may really explain the criticism. Yet if it were indeed to appear to form part of the explanation, an interesting, though perhaps rather paradoxical, option to bolster the acceptability of the Court would be to introduce a system of constitutional review by a constitutional court. For the national courts, this would create a possibility to internalise Convention standards more visibly and to make use of the buffer function of a constitutional text.

All in all, we must conclude that the criticism of the Court remains an enigma. Most relevant here is that, in the end, the constitutional system for the implementation of international law hardly matters where the national courts' application of the Convention is concerned. The interaction between the Court and the national courts is a very special one, which sets the Convention system apart from other international law and which has a dynamic of its own. Indeed, there is much truth in the Court's own perception that there is a shared responsibility for protecting the rights of the Convention.

APPENDIX: QUESTIONNAIRE FOR NATIONAL REPORTS

INTRODUCTION: CONSTITUTIONAL BACKGROUND/SYSTEM

1. Can you briefly characterise your national constitutional system? Please pay attention to matters such as:

- Character of the state (monarchy, republic, ...)
- System of government (parliamentary, presidential, ...)
- Character of the constitution (written, unwritten)
- System for and extent of separation of powers (both horizontal (trias politica), and vertical (federation vs. unitary state, decentralisation or devolution))
- Judicial organisation

STATUS OF INTERNATIONAL LAW IN DOMESTIC LAW

2. a. Can you briefly characterise the status of international law (treaties, decisions/resolutions by international organisations, customary international law) in the constitutional order? Do treaties, decisions/resolutions by international organisations and/or customary international law form part of the law of the land?

In answering this question, a distinction should be made between:

- *provisions of international treaties*
- *customary international law*
- *binding norms created by international organisations (e.g. resolutions)*
- *non-binding norms created by international organisations (e.g. general comments)*
- *binding decisions/judgments in individual cases by international organisations (e.g. judgments of the ECtHR)*
- *non-binding decisions/judgments in individual cases by international organisations (e.g. views of the Human Rights Committee that monitors the implementation of the ICCPR)*

It should be noted that this question pertains to international law generally, so it is not necessary to deal at length with the specific situation of EU law.

b. If they form part of the law of the land, what rank do treaties, decisions/resolutions adopted by international organisations and/or customary international law have in the national hierarchy of norms? Is there some kind of hierarchy?

c. If international law is *not* part of the law of the land, by what methods is it guaranteed that the state complies with its international obligations under treaties, decisions/resolutions by international organisations, or customary international law?

d. Do the competent courts apply treaties, decisions/resolutions adopted by international organisations and/or customary international law as such (i.e. as sources of international law) or are they transformed into sources of national law in the process of incorporation? Are there any differences* in practical consequences between the different approaches? Or is this a mere academic question without practical consequences?

* *One may think of differences in interpretation (application of the Vienna Convention on the Law of Treaties (VCLT) in case of application of the treaty (etc.) as such; application of national interpretation criteria in case of transformation) or differences in status after abolishment of the international treaty (in case of transformation, the continued existence of the national law provisions is secured, whilst this is not the case if the treaty (etc.) is applied as such).*

JUDICIAL REVIEW

3. To what extent are the national courts (and/or non-judicial bodies, such as Councils of State) empowered to review the compatibility of Acts of Parliament and other legislation *with the constitution*?

NB: the main intention for this question is to help explain if there are differences visible between (the system for) constitutional review and review for compatibility with international treaties. Moreover, we would like to clarify whether constitutional review could be used (and perhaps is used) to avoid violations of the ECtHR.

b. If they are competent to do so, what system of constitutional review is used, i.e.:

- a system of concentrated review (with a constitutional court having the final say on the interpretation of the constitution)
- a decentralised system (where all courts have the power to decide on the constitutionality of Acts of Parliament)
- anything in between?

c. If there is a system of constitutional review, is there:

- a system of *a priori* review, i.e. review of compatibility before an act is adopted by Parliament (e.g. advice by the Council of State)
- a system of *ex post* review
- a combination of *a priori* and *ex post* review?

d. If there is a system of constitutional review, what kind of procedures are in place:

- abstract and/or concrete control of norms by direct appeal?
- abstract and/or concrete control of norms by means of preliminary questions?

4. To what extent and how are the national courts empowered to review the compatibility of the constitution, Acts of Parliament, lower legislation, and other decisions taken by public authorities with *treaties, decisions/resolutions adopted by international organisations and/or customary international law*?

If they are competent to do so:

a. Do all courts have this competence (i.e. a decentralised system of judicial review) or is the competence limited to designated judicial bodies (e.g. a constitutional court or the highest courts)?

b. Are the courts competent to give priority to international law if national law conflicts with treaties, decisions/resolutions adopted by international organisations and/or customary international law? If so:

    - Is this competence based on national (constitutional) law? Or is it inferred from the nature of international law (e.g. the nature of self-executing treaties or the principle of *pacta sunt servanda*)?
    - Which formal competences do the courts have to give such priority (e.g. disapplying national law in the case at hand, declaring national law null and void)?
    - Is there a difference between priority over legislation/acts of parliament and priority over the constitution?

- Does declaring an act null and void have *ex tunc* effect or *ex nunc* effect, or is it possible for the court to set a time limit for the legislature to make amendments before the act looses its legal effect?

IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY NATIONAL COURTS

5. a. Do all the substantive provisions of the ECHR (including the various substantive protocols) have direct effect, i.e. are they self-executing/directly applicable?

NB: This question does not refer to whether the ECHR and its Protocols are part of the law of the land, but to an issue which may arise after the latter question is answered in the affirmative, namely whether the national courts consider the substantive provisions of the ECHR and its Protocols of such a nature that they may avoid a conflict with those provisions by applying them directly. Or are some of the (substantive) provisions of the ECHR and its protocols considered to be of such a nature that they can only be implemented by means of legislative measures?
Of course, it is possible that the answer to this question cannot be given in general, since a relative approach is taken towards accepting direct effect (a relative approach is taken when the answer to the question of whether a treaty provision at issue is self-executing/directly applicable/has direct effect does not allow for a simple 'yes' or 'no', but may vary according to the context in which the provision is invoked). If this is the case, this should be mentioned in the chapter, preferably with a bit of explanation. In addition, sub-question (c) then becomes highly relevant, so it would be important to answer this question.

b. To the extent that the substantive provisions of the ECHR and its Protocols are considered to be self-executing/to be directly applicable/to have direct effect, does this *ipso facto* mean that these provisions result in subjective rights enforceable before the national courts? Or are there any substantive provisions which are considered to be self-executing, but may not result in subjective rights? If so, please give examples.

c. If some of the substantive provisions of the ECHR and its Protocols are considered to be of such a nature that they can only be implemented by means of legislative measures, or if this is accepted for a certain situation, are the national courts nevertheless competent to apply those provisions to establish state responsibility in cases where those provisions have been violated? If so, what remedies are possible? E.g.:

1) Are the national courts competent to order the state or its bodies to compensate for the damage caused by violations of non-self-executing provisions of the ECHR and its Protocols?
2) Are the national courts competent to order the State to adopt (legislative) measures which are necessary to implement non-self-executing provisions of the ECHR and its protocols?

NB: Please note that sub-question (c) might be relevant in three different situations:

- *It is possible that according to national constitutional law or case-law the fact that a treaty provision is not self-executing/is not directly applicable/ has no direct effect does not exclude the provision from being used by the courts to establish state responsibility for non-compliance with this provision.*
- *It is possible that according to national constitutional law or case-law the fact that a treaty provision is not self-executing/is not directly applicable/ has no direct effect in certain contexts (= relative approach) – for example because the provision obliges the state parties to adopt a national statutory act of which the contents are only outlined in the provision. In this situation, it is not excluded that the provision has direct effect in other context, for instance when it is invoked in order to establish state responsibility for not adopting the statutory act in question.*
- *It is possible that according to national constitutional law or case-law the fact that a treaty provision is considered to be self-executing/to be directly applicable/to have direct effect does not exclude that the courts in some cases rule that the removal of inconsistencies between the national law and the treaty provisions involves political choices that should – in view of the separation of powers doctrine – be left to the legislature. (This has happened frequently in the Netherlands, where the courts tend to take an 'absolute approach' towards the issue of direct effect.) In these cases the question may arise as to whether the treaty provision may nevertheless be successfully invoked to establish state responsibility.*

6. Are there examples of cases in which national legislation or national decisions have been set aside/declared null and void/disapplied because of a conflict with the ECHR?*

a. Can you estimate if this occurs frequently/sometimes/rarely?
b. If constitutional review is possible: can you estimate if the constitution is used more often/just as often/less often than the ECHR as a basis for holding that legislation or decisions do not comply with fundamental rights norms?
c. Are there any examples where the court has declined to use the competence to set aside national legislation/decisions in order to respect separation of

powers (between the courts and the legislature or between courts and administrative bodies) or the sovereignty of Parliament?

** The case may be that national constitutional rights, rather than ECHR provisions, are used as a basis to strike down legislation or that a combination is used of constitutional or ECHR provisions. If this is likely to occur, please mention this in the reply: it is very interesting to know if and in what cases such combinations are used and if and in what cases the constitution rather than the ECHR is used as a basis for review.*

7. Are the national courts competent to order* the national legislature to bring national law in conformity with the ECHR by means of amending or introducing legislation?

Cf. question 4.c. Question 4.c relates to state responsibility for violating non-self-executing provisions of the ECHR, while this question is phrased more generally.

** A court may be competent to decide that an Act of Parliament violates the ECHR, but it may lack the competence or be reluctant to set aside the act, declare it null and void or replace the relevant provisions. In the Netherlands, the court may then sometimes conclude in its judgment that it is up to the legislature to adapt the relevant legislation to the findings of the court within its own area of discretion. This is a different situation, however, from that in which the court can actually order the legislature to change the relevant legislation, i.e. impose a legally binding obligation on the legislature to make changes – in the Netherlands, that would be impermissible because of the separation of powers between courts and the legislature. What we would like to know is if such a judicial competence to impose binding obligations to change Acts of Parliament exists in the various countries under study.*

8. Do national courts strive to interpret national law (including the national constitution) in harmony with the ECHR?

9. Do national courts try to avoid conflicts with the ECHR by means of constitutional review or by means of construing national law in conformity with the constitution (*Verfassungskonforme Auslegung*)?

10. Do national courts use EU law as a vehicle* to review the compatibility of national law with the ECHR?

** Some courts may be inclined to apply the EU Charter of Fundamental Rights or the general principles of EU law as recognised in the case-law of the CJEU,*

rather than the ECHR provisions, because of the stronger impact of EU law (resulting from the doctrines of direct effect and priority of EU law).

THE IMPACT OF THE JUDGMENTS OF THE ECtHR ON NATIONAL JUDICIAL DECISION-MAKING

11. Do the national courts, when interpreting and applying ECHR provisions, refer to judgments/decisions of the ECtHR?

a. If so, do they do this standardly/frequently/sometimes/rarely?
b. Does it make a difference if your state was not a respondent party to the case at hand? I.e., do the courts generally refer to the case-law of the Court as a whole (*res interpretata effect*), or is there special importance for the judgments/decisions to which the state has been a party?

12. How do courts respond to judgments of the ECtHR in cases to which the state has been a party?

a. What general ways are there for the national courts to respond to such judgments (e.g. reconsidering a case after reopening; changing interpretation of national law in similar cases)?
b. Do national courts generally comply with the ECtHR's judgments in cases to which the state has been a party?

13. How do courts respond to judgments/decisions of the ECtHR more generally, i.e. also in cases to which the state has not been a party?

a. Do national courts try to adapt or limit the effect of the Court's judgments, e.g. by adapting the Court's interpretation to fit in as much as possible with the national legal system and the national legal traditions?
b. Do the national courts apply a strict 'mirror principle' approach, i.e. do they apply the Court's interpretations as carefully and strictly as possible without offering more or less protection to fundamental rights?
c. Do the national courts (sometimes) provide more protection to fundamental rights, e.g. by consciously applying national constitutional provisions or interpreting the ECHR provisions in a more protective manner?

14. The case-law of the ECtHR includes (positive) obligations for national courts to apply the Convention in relations between private parties (i.e. in horizontal relationships). Courts have to refrain from interpreting contractual obligations in violation of the ECHR (*Khurshid Mustafa & Tarzibachi, Pla &*

Puncernau). When deciding on horizontal conflicts between rights (e.g. the right to freedom of expression and the right to respect for one's reputation) they have to take account of the ECHR, and sometimes they are required to interpret national law in a specific manner (e.g. family law cases should always be decided in concreto, taking into account the best interests of the child). Do the national courts indeed apply the relevant ECHR provisions (or the corresponding provisions of the incorporating act) to cases between private parties, in compliance with the case-law of the ECtHR?

15. How do courts deal with the ECtHR's margin of appreciation doctrine?*

a. Do they apply the margin of appreciation doctrine in the same way as it is done by the ECtHR?
b. If so, do the courts make careful use of the doctrine, or do they sometimes opt for an overly narrow or overly wide margin of appreciation?

* *This question specifically relates to the application of the margin of appreciation doctrine by the national courts. In the Netherlands, courts often make mention of this doctrine. They often state, for example, that because the ECtHR has left a wide margin of appreciation to the states, their own review of the reasonableness or justifiability of an interference with a fundamental right should be restrained as well. Strictly speaking it is incorrect if national courts use and apply this doctrine, because it has been developed by the ECtHR as a device to deal with its subsidiary position in relation to the states. The national institutions should offer primary protection and should not automatically apply the doctrine. References to the doctrine may only be relevant if the ECtHR leaves a very limited margin in certain types of cases (e.g. cases concerning press freedom) and the courts want to explain why their own review of the justification for a certain interference is a strict one. In all other cases, the margin of appreciation as such is irrelevant. Of course, however, there may be a need for judicial restraint, deference or 'marginal' review; this is dealt with in the next question. For this question, it is only relevant to know if the doctrine is applied in national case-law as such and, if so, if this is done in a correct and careful manner.*

16. Do the courts, either when applying the ECHR or when applying national fundamental rights, apply standards that are developed by the ECtHR? E.g. review of legality (forseeability, accessibility) or necessity ('pressing social need'); application of the 'positive obligations doctrine'; use of specific standards developed for specific topics (e.g. in cases concerning property rights or fair trial)? If they do so, do they do this standardly/frequently/sometimes/rarely?

17. Do the courts make use of special interpretative techniques used by the ECtHR, such as evolutive interpretation* (interpretation 'in the light of present day conditions') or consensus interpretation?** If so, can you estimate if they do so standardly/frequently/sometimes/rarely?***

** Usually, national courts may not expressly mention the use of methods such as evolutive interpretation. They may simply adopt a novel interpretation or recognise a new element of a right by referring to classic methods of interpretation, such as teleological interpretation. In the answers to the question, this may be further explained. It is particularly interesting, however, if courts do refer to 'changing conditions', 'developments in society' or 'present day conditions'; to 'evolutive' interpretation; or to judgments of the ECtHR in which evolutive interpretation played a particularly important role.*

*** The method of consensus interpretation is very particular to supranational courts such as the ECtHR, which often only adopt a new interpretation if this finds sufficient support in the various member states of the Council of Europe. For that reason it is unlikely that national courts often use consensus interpretation. If they ever do so, however, this would be very interesting to know. What kind of consensus are they then referring to (e.g. 'general agreement in Europe' that a certain interpretation is reasonable) and how do they determine if there is such a consensus?*
Please note that this question does not relate to techniques of 'judicial borrowing' or the use of foreign judgments or comparative materials as a basis (or a source of inspiration) for judicial decision-making!

**** It may be the case that courts do not expressly use evolutive or consensus interpretation, but that such methods are used or mentioned in earlier stages of the procedure (e.g. in advisory opinions of an Advocate General). If such a difference in the use of the methods exists, you could mention this in your answer.*

LEGITIMACY DEBATES: THE ECtHR AND THE NATIONAL COURTS

18. Is the role and position of the ECtHR debated in your country? If so:

a. Where is the criticism mainly visible (media, politics, scholarship, court room)?
b. What kind of criticism is usually raised (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc.)?*

c. If there is any criticism, is this a new development? When did the criticism first become visible? Can you explain what brought up the criticism?
d. Does the criticism affect the status of the ECHR and the ECtHR's judgments/decisions in judicial decision-making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions, disapplying the ECHR in favour of national (constitutional) law)?

** In particular, it is interesting to know if the criticism is fuelled by the judgments of the ECtHR, or if it is directed at the way in which the national courts deal with the Convention. Is the criticism related to a few contentious cases decided by the ECtHR (perhaps not even relevant for your own legal system)? Is it directed at fundamental rights more generally, or international law more generally, or the judiciary more generally?*

19. Is the role and position of the courts/the judiciary more generally debated in your country? If so:

a. Is there a connection with cases about fundamental rights, the implementation of international law, or, more specifically, the implementation of ECHR law?
b. Where is the criticism mainly visible (media, politics, scholarship, court room)?
c. What kind of criticism is usually raised (complaints about expansion of scope; quality of judgments; independence and impartiality of judges; disrespect for national sovereignty; insufficient knowledge of national law; etc.)?*
d. If there is any criticism, is this a new development? When did the criticism first become visible? Can you explain what brought up the criticism?

20. Does the criticism affect judicial decision-making? If so, what concrete effects does this have (e.g. more frequent references to the margin of appreciation doctrine or doctrines of deference, more references to national constitutional law, restrictive interpretation of ECtHR judgments/decisions)?

21. Are there any intentions on the political level to amend the constitution or legislation in order to change the courts' competences in relation to the interpretation and application of the ECHR?*

** Here you may think of ways to reduce the influence of the Convention, e.g. by pulling out of the Convention altogether or by limiting the powers of the courts to review the compatibility of legislation with the Convention. It would be*

interesting to note, however, if there are also movements in the opposite direction. In Belgium and France, for example, the (different versions of the) question prioritaire de constitutionnalité *(QPC) system may have the effect that lower courts want to avoid the complex consequences of answering a constitutional question by applying the Convention. Perhaps the intention of the introduction of the QPC may not have been to strengthen the importance of the Convention, but this may be a practical side-effect.*

CONCLUSIONS

22. To what extent do you think that there is a connection between, on the one hand, the main features and characteristics of your constitutional system and the status of international law in the national legal system and, on the other hand, the impact of the ECHR and the judgments of the ECtHR on national case-law?

For example, in the Netherlands the important role and the enormous impact of the ECHR are at least partly due to Dutch constitutional particularities, such as the prohibition of constitutional review, the lack of substantive criteria for the limitation of constitutional rights, the short catalogue of fundamental rights, and the direct effect and priority of all self-executing provisions of international law). The result of this combination has been that the ECHR functions as a substitute bill of rights and that it is applied in the same way as the constitution is applied in other states, whilst the constitution does not have a great role to play in Dutch case-law. This question thus mainly invites you to try to explain if a certain impact of the ECHR on national case-law can be explained from (an amalgam of) specific constitutional rules.

23. How does the application of the ECHR in the case-law of the states relate to the role of national fundamental rights (e.g. constitutional rights)? For example, do national courts refer to the ECHR more often than to their own precedents and explanations? Is the ECHR as important, less important, more important than national constitutional rights? Does the application of the ECHR have displacement effect for constitutional rights?

24. To what extent do you think that debates on the role of the ECtHR and its judgments have impact on national case-law? And debates on the role of the judiciary?

25. Do you think that there is any relation between the debate on the ECHR and the national constitutional system for implementation of international law and if so, to what extent?