Oxford Pro Bono Publico
http://www.law.ox.ac.uk/opbp

Submission to the Commission on a Bill of Rights

Reconciling domestic superior courts with the ECHR and the ECtHR: A Comparative Perspective

24 November 2011

Disclaimer and indemnity
Oxford Pro Bono Publico (OPBP) is a programme run by the Law Faculty of the University of Oxford (the University), an exempt charity (and a public authority for the purpose of the Freedom of Information Act). The opinions expressed in this report do not reflect those of the University or the Faculty of Law of the University. Neither the University nor the Faculty of Law accepts any responsibility or liability for the work carried out by OPBP and its members.

Contributors:

Faculty:

Dr. Liora Lazarus
Fellow of St Anne's College
OPBP Executive Committee
University of Oxford

Research coordinators:

Laura Hilly
Chair, OPBP
D.Phil Candidate, University of Oxford

Lawrence Hill-Cawthorne
Treasurer, OPBP
D.Phil Candidate, University of Oxford

Peter Morcos
BCL, University of Oxford

Jonathan Worboys
BCL, University of Oxford

Paolo Ronchi
D.Phil Candidate, University of Oxford

Researched and written by:

Eirik Bjorge
D.Phil Candidate, University of Oxford

Stephen Dimelow
D.Phil Candidate, University of Oxford

James Fraczyk
BCL, University of Oxford

Andrea Grgic
D.Phil Candidate, University of Zagreb
Visiting researcher, University of Oxford

Marija Jovanovic
M.Jur, University of Oxford

Antonios Kouroutakis
D.Phil Candidate, University of Oxford

Natalia Lojko
M.Jur, University of Oxford

Gerard Sadlier
BCL, University of Oxford

Päivi Neuvonen
D.Phil Candidate, University of Oxford

Ailbhe O'Loughlin
M.Sc in Criminology Candidate, University of Oxford

Adelaïde Remiche
PhD Candidate, Université de Bruxelles

Michail Risvas
M.Jur, University of Oxford

Readers:

Barbara Havelkova
D.Phil Candidate, University of Oxford

In addition to the above, the research co-ordinators would like to acknowledge the assistance of and thank the following individuals:

- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, for his support of the project;
- Executive Members of the Oxford Pro Bono Publico Committee, **Professor Sandra Fredman**, **Dr Liora Lazarus**, **Dr Jeff King**, **Ms Anne Carter**, **Ms Dhvani Mehta** and **Ms Nabiha Syed**, for their support and assistance with the project.

Indemnity

Oxford Pro Bono Publico is a programme run by the Law Faculty of the University of Oxford, an exempt charity (and a public authority for the purpose of the Freedom of Information Act). The programme does not itself provide legal advice, represent clients or litigate in courts or tribunals. The University accepts no responsibility or liability for the work which its members carry out in this context. The onus is on the programme's project partners in receipt of the programme's assistance or submissions to establish the accuracy and relevance of whatever they receive from the programme; and they will indemnify the University against all losses, costs, claims, demands and liabilities which may arise out of or in consequence of the work done by the University and its members.

Contents

I. Introduction…… 4

II. Executive Summary……6

1. Thematic Summary……6
2. Summary of State Reports……10

III. State Reports……15

1. Belgium……15
2. Croatia……21
3. Finland……27
4. France……33
5. Germany……38
6. Greece……46
7. Italy……49
8. Netherlands……52
9. Poland……57
10. Serbia……61
11. Spain……68
12. United Kingdom……73
13. European Union……79

I. INTRODUCTION

This report has been prepared by a group of postgraduate law students and Law Faculty members from the University of Oxford, under the auspices of Oxford Pro Bono Publico (OPBP).

The aim of this report is to assist the Commission on a Bill of Rights in fulfilling its terms of reference set out in the Ministerial Statement of Mr Mark Harper MP (Parliamentary Secretary, Cabinet Office) on 18 March 2011[1] and elaborated in the discussion paper *Do We Need a UK Bill of Rights?* issued September 2011. In particular, this report will provide a comparative analysis of how parties to the European Convention on Human Rights (ECHR) have implemented their obligations under the Convention. In turn, this should illuminate the options open to the United Kingdom as it seeks to enforce and implement these obligations in its national legal order.

The report provides an assessment of the various approaches of certain members of the Council of Europe to ensuring compliance with their obligations under the European Convention on Human Rights. Specifically, it examines the role of the ECHR within these domestic legal orders and considers how the domestic courts engage with the jurisprudence of the European Court of Human Rights (ECtHR). The States examined in this report are reflective of the expertise of the researchers involved in this project.

The Government set up the Commission on a Bill of Rights a month after a lengthy paper was published by a UK-based think tank, Policy Exchange, entitled 'Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK'.[2] This paper argued that the current system of human rights protection in the UK, the ECHR as incorporated into UK law by the Human Rights Act 1998 (HRA), suffers from serious shortcomings, and consequently made various recommendations for resolving these issues. In particular, the paper was critical of what it perceived to be the increasingly powerful status of British judges, as a result of the HRA and the obligation therein of judges to interpret domestic laws, as far as possible, in line with the ECHR. The paper argued that UK judges have gone too far in this interpretation, stretching and altering the meanings of domestic laws. Consequently, so the argument goes, Parliamentary sovereignty, and thus democratic accountability, is being eroded. Moreover, the paper criticised the ECtHR, claiming that it has expanded the scope of the rights enshrined in the ECHR beyond that originally intended by the drafters. It was also claimed that, in so doing, the ECtHR fails to take sufficient account of the differences between States party to the ECHR.

A more recent testimony by Lords Phillips, President of the Supreme court, and Lord Judge, the Lord Chief Justice, before the JCHR argued that the UK courts had been too strict in their application of the decisions of the European Court of Human Rights.[3] Their premise was that the UK courts were approaching Strasbourg judgments as if they were precedents in the common law sense. This they argued, *inter alia*, did not allow sufficient flexibility in the interpretation of ECHR principles in the domestic context.

---

[1] United Kingdom Ministry of Justice, 'Commission on a UK bill of rights launched' (18 March 2011), available at <http://www.justice.gov.uk/news/newsrelease180311a.htm> accessed 21 April 2011.

[2] Michael Pinto-Duschinsky, 'Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK' (2011) available at <http://www.policyexchange.org.uk/publications/publication.cgi?id=225> accessed 21 April 2011.

[3] Meeting of the Joint Committee of Human Rights on 15 November on 'Human Rights Judgments'. http://www.parliamentlive.tv/Main/Player.aspx?meetingId=9451 .

It is not the purpose of this report to engage with such criticisms, but rather to provide the comparative context of the UK's relationship with the ECHR and ECtHR, i.e. by examining the approach of other States in the Council of Europe to these issues. It is the view of OPBP that in discussing these issues, particularly within the framework of the UK's independent commission into a Bill of Rights, it is essential that all begin from an *unbiased* and *informed* starting point. Consequently, this report offers a comparative assessment of these issues across a number of different jurisdictions that currently operate within the ECHR system. By seeing how other States adhere to their obligations under the ECHR and the jurisprudence of the ECtHR, policy makers, legislators and commentators will be better prepared to consider any proposals for the UK's position in this area.

The following report is divided according to jurisdiction. Each section is subsequently divided into the following five parts, addressing different aspects of the particular jurisdiction:

A. PRELIMINARY POINTS – this part offers some brief introductory remarks on the specific jurisdiction, in particular, whether it has a codified constitution, and whether it adopts a 'monist' or 'dualist' interpretation of the relationship between international law and the domestic legal order. A monist interpretation would involve viewing international and domestic law as operating within a single legal order, such that an international legal norm automatically becomes part of the national legal order once it becomes binding under international law, i.e. there is no divergence between the international and domestic legal orders. A dualist interpretation, on the other hand, would involve viewing international and domestic law as existing within separate, parallel legal orders, such that an international legal norm must be incorporated into the domestic legal order via an internal instrument in order for that international legal norm to become operative within that domestic legal order.
B. IMPLEMENTATION – this part notes the method by which the ECHR has been incorporated into the domestic legal order.
C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR – this part discusses the particular approach taken by the State in question to the relative hierarchy of legal norms within its legal order and, in particular, where the ECHR falls within that hierarchy.
D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR – this part provides an assessment of the power of domestic courts to apply the ECHR and examine the compatibility of domestic laws in light thereof.
E. DOMESTIC COURTS AND EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE – the final part examines the approach taken by the domestic courts of the jurisdiction in question to engaging with the case-law of the ECtHR, i.e. how, if at all, the domestic courts use ECtHR jurisprudence.

In addition to the national jurisdictions examined, the report will conclude with a brief discussion of the European Union and the relevance of the ECHR and ECtHR jurisprudence in relation thereto.

The report begins with an executive summary offering a thematic comparison of the findings, as well as an abridged version of each State report. More detailed discussions of the points made therein can be found in the respective State section in the main body of the report.

II. EXECUTIVE SUMMARY

This executive summary provides an overview of the findings made in this report. For more detailed discussions of any points, reference should be made to the relevant State sections, which appear in alphabetical order following this summary.

The summary is divided into two parts. The first seeks to illustrate using tables, the thematic findings of the report. This allows direct comparisons to be drawn between the various States discussed with regard to some of the main themes explored in the report. It also assesses the options open to the United Kingdom in light of theses comparisons. The second part of the executive summary is organised according to the specific States, summarising the salient details of the full State reports.

1. THEMATIC SUMMARY

ECHR OBLIGATIONS IN THE NATIONAL LEGAL SYSTEM

TABLE 1

State	Codified Constitution?	Monist view?	Dualist view?	Specific domestic instrument implementing the ECHR?
Belgium	✓	✓		
Croatia	✓	✓		
Finland	✓		✓	✓
France	✓	✓		✓
Germany	✓		✓	✓
Greece	✓	✓		
Italy	✓		✓	✓
Netherlands	✓	✓		
Poland	✓	✓		✓
Serbia	✓	✓		
Spain	✓	✓		
United Kingdom			✓	✓

Table 1 above compares the introductory findings made in the State section of this report, illustrating whether each State has a codified Constitution, adopts a monist or dualist view of its relationship with international law (including the ECHR), and has a specific domestic legal instrument that implements the ECHR.

It is clear from the table that the majority of States examined in this report have a codified Constitution and adopt a monist construction of the relationship between domestic and international law. Regarding specific implementation of the ECHR, those States that adopt a dualist view of their relationship with international law require such specific implementing instruments, for the dualist approach excludes the possibility that merely ratifying a treaty (such as the ECHR) results in it having binding force within domestic law.

ANALYSIS – OPTIONS FOR THE UNITED KINGOM

All of the jurisdictions examined in this report either take a monist view of international law, or have domestic legislation that implements the ECHR. Monist systems allow international obligations – such as those found in the ECHR – to take effect in national legal systems. In effect therefore, obligations under the ECHR bind directly in all of the national legal systems examined in this report. Since the United Kingdom takes a dualist approach to international law, this task is performed by the Human Rights Act 1998. The absence of such implementing legislation would firmly place the United Kingdom as an outlier in this respect.

ECHR OBLIGATIONS WITHIN THE HIERARCHY OF NATIONAL LAW

TABLE 2

Position of the ECHR in domestic legal hierarchy	States with the relevant hierarchical structure
Higher than Constitution	Belgium Netherlands
Below the Constitution but above ordinary domestic laws	Croatia France Greece Italy Poland Serbia Spain
Level with ordinary domestic laws	Finland Germany United Kingdom

Table 2 above compares the positions occupied by the ECHR in the normative hierarchies of the domestic legal orders examined in this report. It is clear from the table that the majority of the States dealt with in this report sit between two extremes, in that the ECHR is normatively inferior to the Constitution whilst being normatively superior to ordinary (i.e. non-constitutional) domestic laws. The upper extreme is occupied by Belgium and, arguably, the Netherlands, which view the ECHR as normatively superior to the Constitution, while the lower extreme is occupied by Finland, Germany, Italy and the United Kingdom, all of which view the ECHR as normatively equal to ordinary domestic laws.

ANALYSIS – OPTIONS FOR THE UNITED KINGOM

In the United Kingdom, ECHR obligations are level with ordinary domestic laws. Many of the jurisdictions examined in this report position ECHR obligations at a higher level than domestic ordinary law.

POWER OF NATIONAL COURTS IN HUMAN RIGHTS REVIEW

TABLE 3

Power of domestic courts in human rights review	**States with relevant approach to domestic court review**
Can strike down domestic laws that are inconsistent with the ECHR (or relevant domestic implementing law)	Belgium[4] Croatia Italy Poland Serbia Spain
Can disapply domestic laws that are inconsistent with the ECHR (or relevant domestic implementing law)	France Greece Netherlands
Consistent interpretation and 'soft' review	United Kingdom
Consistent interpretation	Finland Germany

Table 3 above compares the role of the judiciary in reviewing domestic law in light of the ECHR (or the relevant domestic law implementing the ECHR). It is clear that within the large majority of jurisdictions explored in this report, domestic courts (or at least the highest constitutional court) can strike down domestic legislation that they deem to be incompatible with the ECHR.

France, Greece and the Netherlands can then arguably be seen as occupying the 'middle ground', in that their domestic courts cannot hold legislation that is inconsistent with the ECHR to be unconstitutional, but can opt not to apply it in the particular case. That said, the French Constitutional Council, the judicial status of which has been queried somewhat, can find legislation to be unconstitutional. As the rights protections contained in the French constitution are highly similar to those in the ECHR, however, constitutional review by the Constitutional Council may have the same broad result as review on ECHR grounds in many cases. Thus, France might also be seen as falling within the first category.

Finland, Germany and the United Kingdom then sit at the bottom of this spectrum, with domestic judges having no power to set aside domestic laws on the ground that those laws are found to be inconsistent with the ECHR. Instead, there is simply an obligation to interpret domestic law, so far as is possible, in line with the ECHR. It should be noted, however, that German judges tend to view the domestic rights regime as being more protective of rights than the ECHR. Indeed, the Federal Constitutional Court *does* have the power to strike down domestic legislation that is incompatible with the rights laid down in the German Basic Law and, given the view that the Basic Law offers greater protection of rights than the ECHR, the inability of domestic German courts to strike down legislation on the basis that it is incompatible with the ECHR *per se* may be of little consequence. As far as Finland is concerned, it must be pointed out how Finnish courts have also given importance to the ECHR itself, now incorporated in the domestic Bill of Rights of the Finnish Constitution. The domestic Finnish courts have also tended to heavily rely on the ECtHR case-law in order to solve issues involving conflicting rights. There is no equivalent domestic rights regime, independent of the ECHR and the Human Rights Act 1998 implementing it, in the United Kingdom. However, the United Kingdom has been

[4] Constitutional Court has the power to strike down domestic laws that are inconsistent the Constitution, however the Constitution is to be interpreted in light of the ECHR and ECtHR judgments.

separated from Germany and Finland on the basis that courts in the United Kingdom may issue a 'declaration of incompatibility' in ECHR cases. This does not invalidate the law in question.

ANALYSIS – OPTIONS FOR THE UNITED KINGDOM

Of the jurisdictions assessed, only courts in the United Kingdom and Finland do not have the power to disapply or invalidate laws in human rights review. The Federal Constitutional Court in Germany can only strike down legislation when conducting review in light of domestic human rights norms. Courts in all of the other jurisdictions can strike down or disapply legislation in light of ECHR obligations.

The existence of a declaration of incompatibility under section 4 of the Human Rights Act 1998 sets the United Kingdom apart from the other legal systems analysed in this report. This is a unique declaratory remedy which does not disapply or invalidate laws, but simply asserts their incompatibility with the United Kingdom's obligations under the ECHR.

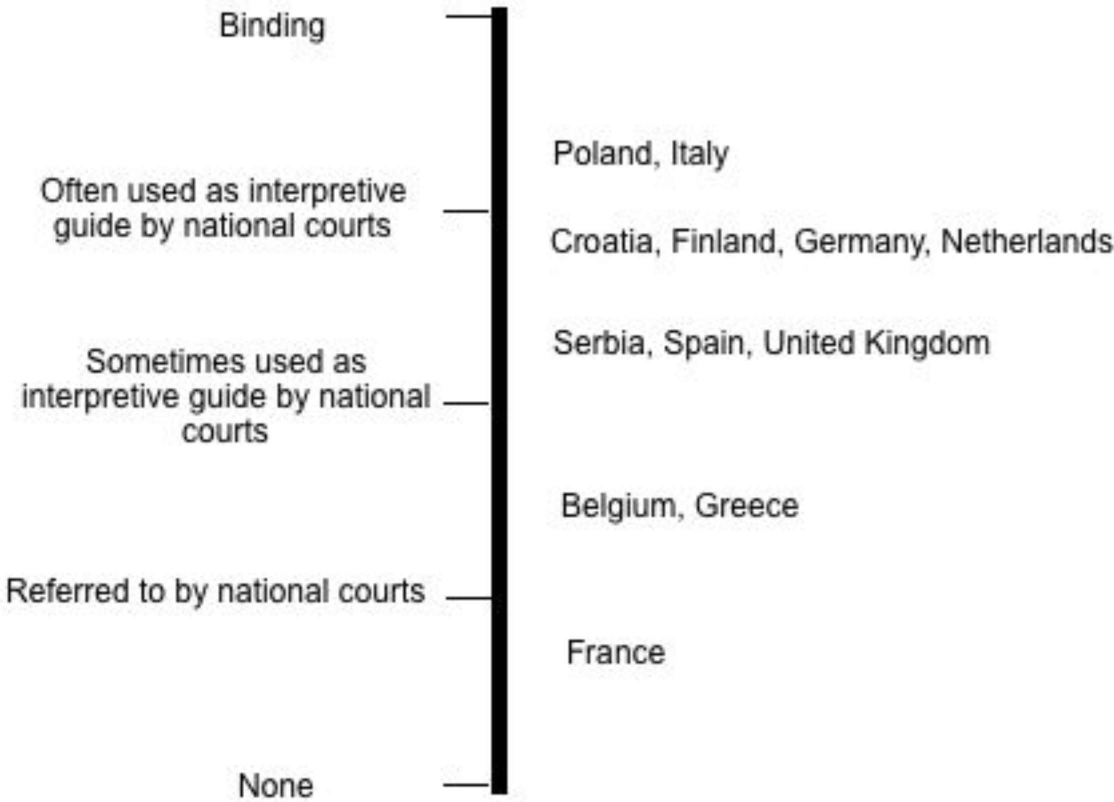
However, there is clearly a broad range of responses as to how review under the Convention should work. Whilst the United Kingdom offers weaker protection than many other parties to the Convention, it is not an outlier in this respect.

INFLUENCE OF ECTHR CASE ON NATIONAL COURT

By virtue of Art 46(1) ECHR judgments of the ECtHR are binding upon the parties to them. This arrangement is underpinned by the 'principle of subsidiarity,' which places the obligation upon State Parties to ensure Convention rights are secured at a national level. The United Kingdom, as a Contracting State, has undertaken to abide by the final judgment of the ECtHR in any case to which it is a party. Primary responsibility for giving direct effect to decisions of the ECtHR lies not with the national court, but with the national law making body, which is free to implement ECtHR judgments in accordance with the rules of its national legal system. Nevertheless, it can be argued that where a Court is faced with a decision against its own domestic jurisdiction, that decision will have more normative force than a decision against another member State of the ECHR.

The principle of subsidiarity does not extend to requiring that State parties implement judgments against other States. However, a Party State's obligation, in particular the obligation of national courts, to pay regard to the wider body of ECtHR jurisprudence, beyond cases to which they are a party, remains an important feature of ECHR compliance. Given that the approach in this regard differs between party states, it will be the focus of analysis for this report. Table 4 below shows the influence of broader ECtHR jurisprudence on the national courts in the legal systems considered in this report.

TABLE 4



The issues considered here are more subtle and complex than in the tables above, and therefore the States have not been perfectly aligned within each category. This is to reflect the broad spectrum of responses that the issue has raised. The Polish and Italian courts refer to ECtHR jurisprudence when considering Convention rights, and in principle consider those decisions to be an authoritative interpretation of such rights. It is worth noting, however, that no jurisdiction in this report treats all of the decisions of the European Court of Human Rights as binding in every situation.

Courts in Croatia, Finland, Germany and the Netherlands regularly consider ECtHR jurisprudence when deciding cases that concern Convention rights. This is also true in Serbia, although courts appear to prefer relying on domestic sources. Spanish courts have traditionally referred to ECtHR case law as well, although there appears some evidence of a further desire for independence. United Kingdom courts regularly consider ECtHR case law, although this jurisprudence will be discarded where decisions do not sufficiently take into account particular conditions in the United Kingdom.

Greek courts have referred to ECtHR jurisprudence, but have notably rejected its case law in public order cases. Belgian courts tend not to explicitly refer to ECtHR case law, but this case law still has influence in Belgium. French courts have traditionally resisted the application of the broader body of ECtHR case law in the domestic legal system.

ANALYSIS – OPTIONS FOR THE UNITED KINGDOM

The position of the United Kingdom courts in this area is influenced by section 2 of the Human Rights Act 1998. The comparative analysis shows that other jurisdictions vary in the way that

courts are influenced by ECtHR jurisprudence. Courts in some jurisdictions treat ECtHR case law as more authoritative, whilst others refer to its case law more sporadically, and rely on it less as an explicit interpretive tool. Hence, regarding Strasbourg jurisprudence there are a range of options remain open to the UK courts which are consistent with the UK's obligations under the Convention framework.

2. SUMMARY OF STATE REPORTS

BELGIUM

Belgium has a codified constitution and adopts a monist approach to the relationship between international law and Belgian legal order. There is as a consequence no domestic statute adopted specifically to incorporate the ECHR within the Belgian legal order. The ECHR appears to be viewed as occupying the highest point in the normative hierarchy of the Belgian legal system, sitting above even the Constitution.

The Belgian Constitutional Court has the power to review domestic laws in light of human rights law and to strike down domestic laws that are inconsistent with the ECHR. Indeed, the Court has even on occasion found the legislature liable for failing to adopt a law in conformity with its positive obligations under the ECHR. The Council of State also plays the role of reviewing administrative acts in light of their conformity with the ECHR. Belgian courts, on the whole, apply the ECHR as it has been interpreted by the ECtHR. However, Belgium's tradition of viewing judges as merely the 'mouth of the law' means that they do not often refer explicitly to ECtHR jurisprudence, but the latter's influence on domestic court rulings is clear.

CROATIA

Croatia has a codified constitution and adopts a monist approach to the relationship between international and domestic law. Hence, no statute explicitly seeking to implement the ECHR was introduced in Croatia. The ECHR is considered to fall below the Croatian Constitution in the normative hierarchy of the Croatian legal order, but above domestic statutes and by-laws.

Domestic courts must apply domestic laws in accordance with international treaties, including the ECHR, which has direct effect and thus can be applied directly to the facts of a case. Where a statute appears inconsistent with the ECHR, it is likely that a lower court would have to initiate an abstract review of the statute before the Croatian Constitutional Court. The Constitutional Court has the power to strike down domestic legislation that it deems contrary to human rights law, including rights protected under the ECHR. The Constitutional Court frequently refers to ECtHR jurisprudence, using it as a tool for interpreting the Constitution and as a basis for altering its own jurisprudence. It has also passed judgments in response to ECtHR rulings relating to other States in which the Constitutional Court provided protection for the human rights which went beyond the protection standard in the comparable ECtHR rulings.

FINLAND

Finland has a written constitution and adopts a dualist approach to the relationship between domestic and international law. Finland incorporated the ECHR into the domestic legal order by way of a domestic law, which came into force in May 1990. Within the normative hierarchy of the Finnish legal order, the ECHR, by virtue of the nature of the implementing instrument, sits at the same level as domestic statutory law, below the Constitution.

Finnish courts cannot strike down legislation that is deemed inconsistent with the ECHR. That said, after a constitutional reform, the courts were for the first time entitled to give primacy to the Constitution under Section 106 thereof if the application of an Act was in 'evident conflict with the Constitution' in a matter being tried by a court of law. The substance of the ECHR is now in the domestic Bill of Rights of the Finnish Constitution and, consequently, it is this which is generally relied on explicitly, rather than the ECHR directly. The domestic Finnish courts have tended to recognise the strong validity of ECtHR case-law. The Supreme Court has relied on ECtHR jurisprudence when considering how to balance conflicting rights, particularly regarding freedom of expression and the right to privacy. The Supreme Court has also annulled domestic court decisions in response to a finding by the ECtHR that they were incompatible with the ECHR. The Supreme Administrative Court has also sought guidance from ECtHR jurisprudence when interpreting certain rights.

FRANCE

France has a codified constitution and adopts a monist approach to the relationship between its domestic legal order and international law. Ratification of the ECHR was completed in accordance with Article 53 of the Constitution: a process requiring that Parliament pass a *loi* authorising Presidential ratification of the Treaty. Since ratification, the ECHR has been considered as falling below the French Constitution but above ordinary domestic law in the normative hierarchy of the French legal order.

Ordinary judges have the power to disapply domestic laws that do not comply with the ECHR. However, the question of the constitutionality of those laws remains within the sole jurisdiction of the French Constitutional Council. Traditionally French judges resisted the ECtHR broader body of jurisprudence, viewing the norms of the ECHR but not the judgments of the ECtHR against other Party States as binding. However, in practice the Constitutional Council has implicitly employed ECtHR case-law. Moreover, a new approach has emerged in French courts, whereby they appear to pre-empt ECtHR condemnation by adopting more progressive interpretations of human rights norms.

GERMANY

Germany has a codified constitution, known as the Basic Law, and embraces a dualist construction of the relationship between domestic German law and international law. The ECHR was implemented in the German legal order by a federal law of approval. Within the German legal order, the ECHR, as with other international treaties, occupies the same point in the normative hierarchy as domestic law, albeit below that occupied by the Basic Law.

The ECHR is directly applicable in German law and can be invoked before and enforced by ordinary German courts. A landmark 2004 ruling of the German Federal Constitutional Court held that the ECHR can be indirectly invoked before the Constitutional Court where the right in question corresponds to one protected in the Basic Law. Following this 2004 ruling of the Federal Constitutional Court, the Court has also been open to employing ECtHR jurisprudence as an interpretive aid of German law, looking to the considerations weighed by the ECtHR. This approach has been strengthened by a 2011 ruling by the Constitutional Court, which illustrates that the German courts will go very far, even in politically sensitive cases, to make sure that German law is not at variance with the ECHR.

GREECE

Greece has a codified constitution, which specifically provides for a monist approach to the relationship between the Greek legal order and international law. Greece has ratified the ECHR and, by virtue of Greece's monist approach to international law, it applies directly in the Greek legal order without the need for specific domestic implementation. The Greek Constitution operates at the peak of the normative hierarchy in the Greek legal order, with domestic laws sitting below. International law, including the ECHR, falls between these two extremes, superseding domestic law but operating below the Constitution.

The Greek courts are empowered by the Constitution to apply the ECHR directly and to review domestic legislation in light of the ECHR. The Greek courts' response to ECtHR jurisprudence has been mixed, referring to it at times, particularly to interpret the ECHR, but also rejecting its application at other times: see for instance the recent first instance judgment of *Alexandoupolis* where it was held that no domestic court is bound by decisions of the ECtHR.

ITALY

Italy has a codified constitution and subscribes to a dualist construction of the relationship between international and domestic law. The ECHR was implemented in Italy via a national law, placing it on the same footing as ordinary national laws, consequently below the Constitution. However, by virtue of the 2000 amendment to the Italian Constitution, the Italian Constitutional Court has held that the ECHR has a sub-constitutional status, still below the Constitution, but clearly above ordinary laws.

The Italian Constitutional Court is the only body competent to strike down domestic legislation where it conflicts with the ECHR. Lower courts follow a two-stage process. First, they must attempt to interpret the particular domestic law consistently with the ECHR. Second, where consistency is not possible, they must refer the decision to the Italian Constitutional Court. In its recent jurisprudence, the Italian Constitutional Court has held that the ECHR must be read in light of ECtHR jurisprudence, viewing the latter as binding on national courts, save for cases verifying the constitutionality of national laws. The Italian Constitutional Court maintains a residual power to review compliance of ECtHR rulings with the Italian Constitution.

NETHERLANDS

The Netherlands has a codified constitution and adopts a monist approach to the relationship between the domestic and international legal orders. The ECHR became binding within the domestic Dutch legal order at the point of ratification, which occurred in August 1954. In theory, the ECHR, together with other ratified international treaties, sits at the top of the normative hierarchy within the domestic Dutch legal order, such that domestic laws, the Constitution and the Charter must be in compliance therewith.

However, domestic courts cannot strike down domestic legislation on the basis of its incompatibility with ratified international treaties, including the ECHR, as judicial review of Acts of Parliament is prohibited. Instead, domestic courts may only disapply primary legislation inconsistent with ECHR obligations. In the last three decades, the domestic courts have been more willing to find violations of the ECHR and are consequently more willing to disapply domestic legislation. The Dutch courts seem also to have embraced the jurisprudence of the ECtHR, such that it now appears to be very influential within the Dutch legal order.

POLAND

Poland has a codified constitution and adopts a monist approach to international law. The ECHR became binding in the Polish legal order in January 1993. The ECHR sits between ordinary domestic statutes and the Constitution in the Polish normative hierarchy.

Three classes of cases can be extrapolated from the domestic jurisprudence of Poland regarding the approach taken by domestic courts to the ECHR. First, in some early cases the Polish Supreme Court emphasised the interpretive value of the ECHR. Second, there were those cases in which the Supreme Court noted the binding force of the ECHR and its direct applicability in domestic courts. Finally, there are those cases in which the Supreme Court has noted the supremacy of the ECHR over inconsistent domestic laws. Polish courts refer regularly to ECtHR jurisprudence, employing it especially for the purpose of interpreting the rights protected by the Polish Constitution. In compliance with Art 46 ECHR obligations, the courts view ECtHR judgments as binding on the respondent State. The Polish courts take the position that a country against whom a complaint has been filed is bound by an ECtHR ruling and that all other ECtHR jurisprudence is interpretative guidance for determining the scope of human rights in Poland.

SERBIA

Serbia has a written, codified constitution and adopts a monist approach to the relationship between international and domestic law. Serbia has ratified the ECHR and, consequently, it is directly applicable in the Serbian legal order and enforceable by domestic courts.

In Serbia, the Constitutional Court has extensive powers of review and may strike down a piece of domestic legislation if it finds it to be inconsistent with the Constitution or with applicable rules of international law, including the ECHR. Regarding ECtHR jurisprudence, although domestic courts often favour domestic sources of fundamental rights, the Constitutional Court has relied heavily on ECtHR reasoning in finding violations of various rights protected by the ECHR.

SPAIN

Spain has a written constitution with a codified system of laws. It takes a monist approach to the relationship between international law and the domestic legal order. The ECHR was incorporated into the Spanish legal order upon its publication in the State Official Bulletin in October 1979. Within the Spanish legal order the ECHR, along with other international treaties, sits below the Spanish Constitution but above ordinary domestic law in the hierarchy of norms.

The Spanish Constitutional Court has the power to strike down domestic laws that it finds to be inconsistent with the rights protected in the Constitution. The Spanish Constitutional Court has traditionally been seen as a faithful follower of ECtHR jurisprudence. However, this appears to have been somewhat undermined as the Spanish Constitutional Court has sought greater autonomy from the ECtHR. Indeed, it has recently diverged with the ECtHR on its view of the threshold of the right to respect for private and family life, taking a narrower approach to the point at which these rights are infringed than the ECtHR.

UNITED KINGDOM

The UK does not have a single, codified constitution. It adopts a dualist construction of the relationship between international law and the domestic UK legal order. The ECHR was implemented into UK domestic law by the Human Rights Act 1998 (HRA). As a result, within the domestic UK legal order, the rights in the ECHR occupy the same position in the normative hierarchy as ordinary domestic law. That said, s3 HRA does require that, so far as is possible, domestic legislation be interpreted so as to conform to the standards in the ECHR.

Where domestic law is found by a court to be inconsistent with the ECHR, via the HRA, the court must apply domestic law while at the same time issuing a 'Declaration of Incompatibility', leaving the legislature to amend the domestic legislation so as to bring it into compliance with the ECHR, if it so chooses. The House of Lords (now the Supreme Court) has, moreover, been eager to note that the interpretive obligation in s3 HRA must not be used to change the meaning of a domestic statute. According to s2(1)(a) HRA, courts have to 'take into account of' judgments of the ECtHR. This provision was inserted so as not to make ECtHR jurisprudence binding in the UK. However, for the most part the courts have followed ECtHR jurisprudence. Case-law from the UK Supreme Court appears to demonstrate that ECtHR jurisprudence may be discarded if it is felt that a particular domestic interest is insufficiently considered by the ECtHR (*Horncastle*). The essence of any rule or guidance as to when domestic courts apply ECtHR judgments does not therefore appear to centre upon whether the UK was a party to an ECtHR decision, but rather whether the judgment is suitable for the UK legal system.

This conclusion does however need to be reconciled with a later Supreme Court judgment where the court stated that it was bound by a decision of the ECtHR (*AF*). It is also unclear how recent judgments will be viewed by the Supreme Court. For example, the recent decision decide in July 2011 of *Al-Skeini*,[5] dealing with the extraterritorial application of the ECHR, reversing the decision of the Supreme Court, have further implications for other judgments, such as *Smith*, where the House of Lords held that a British soldier cannot rely on the ECHR unless he is on the premises of a British military base.[6] Moreover, the forthcoming ECtHR decision in *Al Khawaja* will also have implications for this question.

EUROPEAN UNION

The EU has a legal order independent of those of its constituent member states, and the Court of Justice of the European Union (CJEU) views the relationship between international law and the EU legal order as dualist in nature. While the ECHR forms a fundamental reference point for the CJEU's jurisprudence on fundamental rights within EU law, since the EU is presently not a party to the ECHR, the ECtHR is unable to hold the EU itself accountable for violations of the ECHR committed by the EU institutions.

This, however, is due to change very soon, given that the 2009 Treaty of Lisbon requires the EU to accede to the ECHR. It remains to be seen precisely how this accession will work; however, it is likely that the ECtHR (as opposed to the CJEU) will operate as the final arbiter on the ECHR *vis-à-vis* the EU institutions.

---

[5] *Al Skeini v UK* (Application No. 55721/07) 7 July 2011.

[6] R *(Smith) v Secretary of State for Defence* [2010] UKSC 29.

III. State Reports

1. Belgium

A. Preliminary Points

The Kingdom of Belgium has a codified Constitution, adopted on the 7 February 1831. The Constitution, under its Title II, contains a Bill of Rights. Amongst the human rights guaranteed, many of them, such as the right to freedom of expression, the right to freedom of assembly, the right to freedom of religion or the right to respect for private life, are also enshrined in the European Convention on Human Rights (ECHR).

Article 167 of the Constitution empowers the King to conclude treaties. However, the Constitution adds that treaties take effect only after having received approval by the Parliament. Belgium has ratified the ECHR, with it entering into force in the Belgian legal order on 14 June 1955.

The Belgian Constitution is silent with regards to the relationship between domestic and international law. Hence, the courts have answered this question. Since the *Le Ski* case (1971),[7] the monist approach has become the leading one in the Belgian legal order.[8] In this famous judgment, the Court of Cassation[9] stated that, 'when there is a conflict between domestic law and international law, which has direct effect in the domestic legal order, the rule established by the Treaty shall prevail; such a pre-eminence stems from the very nature of conventional international law'.[10] Two important elements regarding the relationship between domestic and international law are enunciated in this decision. First, the pre-eminence of international law stems from its very nature. This illustrates that the approach taken by the Court is *purely* monist, and not dualist in the sense of the Constitution itself recognising international law as prevailing over the national legal order.[11] Second, it emphasises the centrality of the notion of 'direct effect'. Having 'direct effect' can be defined as 'the characteristic of an international law provision providing to its addressee the right to invoke it in front of a court of law'[12]. Traditionally, a provision was deemed to have direct effect when the two following criteria were reunited: (i) the provision should be sufficiently clear and complete ('objective criterion') and (ii) the Contracting

---

[7] Cass., 27 May 1971, *Pas.* 1971, p. 886

[8] Cass., 26/09/1978; Cass., 3/05/1974; Cass., 14/01/1976; Cass., 4/04/1984; Cass., 20/01/1989; Cass., 10/05/1989; Cass. 14/05/1991; Cass., 1/04/1993; Cass., 9/03/1999; Cass., 16/03/199; Cass., 8/06/1999, www.cass.be.

[9] In Belgium, there are three different jurisdictional orders, each of them having its highest courts. The *Cour de Cassation* (Cassation Court – Art 147 of the Belgian Constitution) is the highest of the ordinary courts. It is constitutionally required to review points of law from decisions of lower courts (although it does not consider issues of fact). Second is the *Cour Constitutionnelle* (Constitutional Court – Art 142 of the Belgian Constitution), which is has exclusive competence to review the constitutionality of legislative acts. Finally, the *Conseil d'Etat* (Council of State – Art 160 of the Belgian Constitution) has competence to review the legality and constitutionality of administrative acts.

[10] Author's translation from: ' … lorsque le conflit existe entre une norme de droit interne et une norme de droit inetrantional 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 meme du droit international conventionnel … '.

[11] However, it should be noted that the two other supreme courts do not have such a 'pure' monist approach. (see E Slaustky, 'De la hiérarchie entre Constitution et droit international', (2009) 3 APT 227). Notwithstanding, it is widely accepted that the Belgian legal order endorses a monist understanding of the relationship between the national and international legal systems (see Slaustky *ibid.*)

[12] J Salmon (dir), *Dictionnaire de droit international public* (Bruylant: Bruxelles, 2001) 413 (translated from: 'l'effet direct est la caractéristique d'une disposition de droit international conférant à son destinataire le droit de s'en prévaloir en justice').

States should have had the intention to give such a direct effect to the provision ('subjective criterion'). It appears that the objective criterion (i.e. clarity and completeness of the provision) is the pre-eminent one.[13] This notion of direct effect is itself considered to be the criterion determining whether international law shall prevail over domestic law. According to the case law from the Court of Cassation,[14] only those international norms which are of direct application prevail over national law. The Council of State (*Conseil d'Etat*) adopts a similar point of view.[15] However, the Constitutional Court (*Cour Constitutionnelle*) has a more nuanced approach since it examines the conformity of national laws to constitutional provisions, read in combination with legally binding international provisions including international laws that do not have direct effect.[16] As the ECHR is recognised as having direct effect under Belgian law, this subtle difference between the approaches of the Court of Cassation and the Council of State, on the one hand, and the Constitutional Court, on the other, is less of a concern.[17]

B. IMPLEMENTATION

No statute implementing the ECHR has been adopted.[18] Belgium's monist approach and the judicial recognition that the ECHR has direct effect would render any implementing statute redundant.

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

The Constitution recognises no hierarchy between national and international law, and hence between the domestic legal order and the ECHR.

With regards to national laws, the Special Act on the Constitutional Court appears to be the only way through which the legislator has expressed its vision of the normative hierarchy between domestic and European human rights law. The Special Act on the Constitutional Court creates its own, very specific, normative hierarchy. Article 26 of the Special Act of 6 January 1989 on the Constitutional Court, as modified by the Special Act of the 9 March 2003,[19] implies that the ECHR is at the top of the normative hierarchy within the Belgian legal order. The Constitution then sits below the ECHR, and the treaties establishing the European Union. This is significant and elevates the ECHR to an exceptional level under Belgian law as the Constitution will prevail over all other international law instruments, including those deemed to have direct effect.

This supremacy of the ECHR over the Constitution is confirmed by Art 26 of the Special Act on the Constitutional Court. This permits a judge to refrain from referring a preliminary question to the Constitutional Court when there is a potential conflict between a legislative norm and a human right that is simultaneously enshrined in the ECHR and in the Constitution ***and*** there 'appears from a judgment delivered by the ECtHR [regardless of whether Belgium is a party to

---

13 See J Piret, 'L'influence du juge belge sur l'effectivité de la Convention: retour doctrinal et jurisprudential sur le concept d'effet direct' in V Chapaux et al (eds) *Entre Ombres et Lumières: 50 ans d'application de la Convention européenne des droits de l'Homme en Belgique* (Bruylant, 2008)

14 Cass., 27 May 1971, *Pas.* 1971, p 886.

15 CE, 17/02/1989, *J.T.*, 1989, p. 254.

16 e.g. CA, 22/07/2006, n° 106/2003.

17 This recognition has been gradual, and has been done on a case-by-case basis. See J Piret, (n 13) 93.

18 The approval given by the Parliament in order to allow the treaty to enter into force (see above) cannot be defined as an implementing law.

19 This article excludes the possibility of a preliminary issue about the constitutionality of the legislative act approving the ECHR being referred to the Constitutional Court.

that judgment] that the provision of European or international law has manifestly been infringed'.[20]

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

Three distinct jurisdictional orders operate in Belgium. Each jurisdictional order is frequently required to determine cases which review the conformity of national laws with international human rights law, specifically the ECHR. Although there are distinctions in the approaches of each of the courts, generally, the courts tend to either rule out norms that would be 'unconventional' or interpret national law in the light of international law. This is directly influenced by the requirement that domestic courts apply international human rights instruments that are directly effective. Hence, with regards to the traditional civil and political rights guaranteed by the ECHR, the courts do not hesitate to sanction the legislator when its acts infringe fundamental rights. For instance, the Court of Cassation in a 2006 decision stated that the legislator was liable because it did not adopt the appropriate measures imposed by Art 6(1) ECHR with regards to the right of an accused to be judged within a reasonable time.[21]

a. *The Court of Cassation*

Since the *Le Ski* case, the Court of Cassation, along with the lower ordinary courts, do not discuss what role they should play in reviewing domestic legislative or administrative acts in light of international human rights law having direct effect. As a matter of fact, the courts apply it and, if needed, outlaw any statute or administrative norm that would be contrary to it.[22]

In 2004, a new stage was reached: the Court of Cassation affirmed the primacy of the ECHR over the written Constitution, and not just domestic statutes and administrative acts.[23] The ordinary courts could therefore consider themselves competent to review whether a constitutional provision conforms with the ECHR.[24] More concretely, the recognition of the primacy of the ECHR over the Constitution has led the Court of Cassation to refuse to refer a preliminary issue to the Constitutional Court regarding the compliance of a legislative norm with a constitutional human rights provision,[25] as the specific human right was also enshrined in the ECHR. Hence, the Court of Cassation, through the prism of the primacy of the ECHR over the Constitution, considers itself competent to assess, albeit indirectly, the constitutionality of the legislative norm, notwithstanding that the Constitution gives Constitutional Court the sole jurisdiction to review the constitutionality of legislative acts.[26]

---

20 Art 26 of the Special Act on the Constitutional Court.

21 Cass 28/09/2006, <www.cass.be>

22 In a judgment handed down on the 26 September 1978, the Court of Cassation applied the *Le Ski* jurisprudence to the ECHR: 'when there is a conflict between domestic law and international law, which has direct effect in the domestic legal order, such as arts 5 and 8 of the ECHR, the rule established by the Treaty shall prevail'(translated from: 'Lorsqu'un conflit existe entre une norme de droit international conventionnel, ayant des effets directs dans l'ordre juridique interne - telle une norme se déduisant des articles 5 et 8 de la Convention européenne des droits de l'homme - et une norme de droit interne, la règle établie par le traité doit prévaloir').

23 Cass 9/11/2004 www.cass.be. Cass 16/11/2004 <www.cass.be> These two cases have led the legislator to react in order to affirm what was its vision of the relationship between the Constitution and international law having direct effect (see above).

24 It should be noted that thus far, there are no cases where this has not been done.

25 Whereas the *Cour Constitutionelle* is the only Court competent to review the constitutionality of a legislative act.

26 As will be seen, this has led the legislator to react.

Another very important evolution lies in the *Ferrara* judgment. In this case, the Court of Cassation confirmed, for the first time, the liability of the legislature for not having adopted the necessary legislative measures in order to fulfil its positive obligations stemming from Art 6(1) ECHR.[27] Through this case, the Court of Cassation has reviewed a legislative omission in light of the ECHR.

b. The Constitutional Court

The Constitutional Court is the court competent to review the constitutionality of legislative acts, and its competences are limited to the review of compliance of legislative norms with certain constitutional articles (in particular, the Belgian Bill of Rights) and the rules defining the competence of each legislature (in the context of a federal State). At first sight, the Court would therefore seem incompetent to review domestic law in light of international human rights law. Indeed, the Constitutional Court has confirmed that it has no competence directly to strike down legislation that is inconsistent with international legal instruments, including the ECHR.[28]

However, the Constitutional Court has, indirectly, included the ECHR in its 'yardstick norms', i.e. the norms that it ensures are respected by the legislature. It has done this in two different ways. First, the Constitutional Court can and has assessed the compatibility of a statute with the ECHR through the prism of the principle of equality and non-discrimination, as it is enshrined in the Belgian Constitution (Arts 10 and 11).[29] The Constitutional Court may declare a norm to be unconstitutional if it results in a given group of people effectively enjoying a human right recognised by the ECHR while depriving another of that same right.[30]

Second, since the decision n° 136/2004 in 2004,[31] the Constitutional Court interprets a constitutional provision, where it has a scope similar to one enshrined in the ECHR, in light of the latter, as interpreted by the ECtHR.[32]

c. The Council of State

The Council of State is competent to review the legality and constitutionality of administrative acts. According to Art 14 of the Coordinated Laws on the Council of State, this Council annuls administrative acts that are contrary to the norms above them in the normative hierarchy of the Belgian legal order. It is not contested that the ECHR is normatively higher than administrative acts. Therefore, the Council of State assesses whether they comply with the ECHR.[33]

Moreover, and following the Court of Cassation, the Council of State has established that international norms having direct effect, and the ECHR in particular, prevail over legislative norms. This has led the Council to refuse to apply a legal norm banning the publication of polls

---

27 Cass, 28/09/2006, <www.cass.be>.

28 e.g. CC, 7/05/2006, n° 91/2006, <www.arbitrage.be> ('§ B. 9: The Court has no competence to directly control legislative acts with regards to conventional law'; translated from: '§ B.9 La Cour n'est pas compétente pour contrôler directement des normes législatives au regard de dispositions conventionnelles').

29 CC, 13/10/1989, n° 18/90

30 M Uyttendaele, *Trente Leçons de droit constitutionnel* (Bruylant, 2011), 516

31 CC, 22/07/2004, n° 136/2004, § B. 5. 3 and B. 5. 4

32 e.g. CC, 20/10/2004, n° 158/2004; CC, 21/12/2004, n° 202/2004; CC, 7/05/2006, n° 91/2006; CC, 10/07/2008, n° 101/2008; <www.arbitrage.be>.

33 e.g. CE, 22/06/2010, n° 205638; CE, 11/05/2007, n° 171094; CE, 17/12/1997, n° 70395.

in the 30 days preceding an election because such a norm was contrary to Art 10 ECHR on the freedom of expression.[34]

In another case, the Council of State affirmed the primacy of a directly effective international legal norm over the written Constitution. The first time it affirmed such supremacy, the conflict existed not between the ECHR and the Constitution, but between the Constitution and European Community secondary law.[35] However, there is no reason why the Council of State would not adopt the same attitude with regards to the ECHR.

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

ECtHR jurisprudence has two different effects within the Belgian legal order. First, ECtHR judgements have a *res judicata* effect ('*autorité de la chose jugée*'). The idea is that regarding the concrete disputes resolved by the judgment, the ECtHR decision is binding. [36] The domestic courts are indeed obliged to consider it as establishing the legal truth. Second, ECtHR judgements also have an interpretative authority, or a *res interpretata* effect ('*autorité de la chose interprétée*').[37] By that, we mean that even though the interpretation of the ECHR right given by the ECtHR is not binding, the Belgian Courts will generally apply them as interpreted by the ECtHR.

However, according to the Belgian legal culture, which conceptualises judges as being only 'the mouth of the law', judges will rarely state that they are applying the ECHR as it has been interpreted by the ECtHR.[38] Indeed, they seldom refer expressly to ECtHR case-law, even though it is clear that their interpretation is influenced by the ECtHR jurisprudence. For instance, the ECtHR has recently ruled against Turkey because an individual interrogated by the police had been denied access to a lawyer. In Belgium, there is no law allowing suspects to be assisted by their lawyer at the initial stages of police interrogation. Nevertheless, the Court of Cassation subsequently applied the principle set down in the ECtHR decision of *Salduz v Turkey* that 'in order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6(1) [ECHR] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right'.[39] Indeed, the Belgian Supreme Court stated that the right to a fair trial recognised by Art 6 ECHR implies that the person suspected of

---

34 CE, 17/02/1989, *JT*, 1989, p 254.

35 CE, *Orfinger*, 5/11/1996, n° 62922; CE, *Goosse*, 5/11/1996, n°62921, <http://www.raadvst-consetat.be/> ('When there is a conflict between domestic law and international law, which has direct effect in the domestic legal order, the rule established by the Treaty shall prevail, even though the domestic provisions at stake are those of the Constitution'; translated from:'Considérant que lorsqu'un 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 (…) même si les dispositions de droit interne sont celles de la Constitution').

36 Art 46 ECHR.

37 J Velu, 'La garantie des droits de l'Homme et Strasbourg' [1982] JT 107; J Velu, R Ergec, *La Convention européenne des droits de l'Homme* (extrait du "repertoire pratique du droit belge", complement t. VII, 1990).

38 However, they do sometimes explicitly refer to a judgment handed down by the ECtHR and its *res interpretata* effect. For instance, in Cass. 10/06/20, the Court of Cassation stated that 'according to the res interpretata effect stemming from the judgment handed down by the ECtHR [i.e., the Taxquet case] and to the primacy of the ECHR over the national law, it had to refuse to apply articles 342 and 348 of the Criminal Procedure Law as they enshrine the rule, condemned by the ECtHR, according to which a jury shall not motivate its decision' (translated from: 'En raison de l'autorité de la chose interprétée qui s'attache actuellement à cet arrêt et de la primauté, sur le droit interne, de la règle de droit international issue d'un traité ratifié par la Belgique, la Cour est contrainte de rejeter l'application des articles 342 et 348 du Code d'instruction criminelle en tant qu'ils consacrent la règle, aujourd'hui condamnée par la Cour européenne, suivant laquelle la déclaration du jury n'est pas motivée', Cass. 10/06/2009, <www.cass.be>).

39 *Salduz v Turkey*, (2008) 49 *EHRR* 42, 55.

an infraction must have access to a lawyer within 24 hours of her arrest.[40] Although the Court did not explicitly cite the *Salduz* case, it was clear that it applied it.

It should be noted that, while the Court of Cassation and the Council of State rarely refer explicitly to ECtHR case-law, this is not the case with the Constitutional Court. The latter often mentions ECtHR jurisprudence in order to ground its interpretation of a given human right when that right is enshrined in both the ECHR and the Constitution.[41] For instance, the Constitutional Court, in a judgment handed down in December 2005, declared the electoral law suspending the right to vote of detainees to be unconstitutional. In so doing, the Court explicitly referred to the ECtHR case of *Hirst v United Kingdom*.[42]

---

[40] Cass., 15/12/2010 ('The right to a fair trial, as enshrined in Art 6(1) ECHR implies that the person who has been arrested has the right to be effectively assisted by a lawyer during the police interrogation, which is held in the 24 hours of his or her arrest, unless there are compelling reasons justifying to limit this right'; translated from: 'Le droit à un procès équitable, consacré par l'article 6.1 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, implique que la personne arrêtée ou mise à la disposition de la justice bénéficie de l'assistance effective d'un avocat au cours de l'audition de police effectuée dans les vingt-quatre heures de sa privation de liberté, sauf à démontrer, à la lumière des circonstances particulières de l'espèce, qu'il existe des raisons impérieuses de restreindre ce droit'): <www.cass.be>.

[41] e.g. CC, 4/07/1991, n° 18/91 (refers to *Marckx v. Belgium,* (1979) 2 EHRR 330.); CC, 7/05/2006, n° 91/2006 (refers to *Goodwin v United Kingdom* (1996) 22 EHRR 123 and to *Ernst v Belgium* (2004) 39 *EHRR* 724 ; CC, 10/07/2008, n° 101/2008 (refers to *McCann v. United Kingdom* (2008) 47 EHRR 40).

[42] *Hirst v United Kingdom* (n° 2) (2006) 42 EHRR 41.

2. Croatia

A. Preliminary Points

The Constitution of the Republic of Croatia (CRH) was adopted in 1990, and has since been amended four times.[43] The CRH is the basic legal act of the Republic and sets out the main principles and values upon which the legal system is grounded. It also introduces and defines the main institutions of state power as well as their mutual relations. Almost half of the CRH is devoted to the protection of human rights and fundamental freedoms. Besides civil and political rights, the CRH also includes a very extensive list of social, economic and cultural rights. According to the CRH, the main institutions are the Parliament, the President and the Government. Legislative powers have primarily been given to the Parliament, although some concessions have been given to the Government, as well as local and regional self-governmental bodies.

The judicial branch is organised as a three-tier system comprising municipal courts, county courts and the Supreme Court, as well as highly specialised courts which deal with administrative and commercial legal issues and misdemeanours. There is also a Constitutional Court (CC), which is not regarded as a body within the judicial system but as an independent state entity whose primary role is to ensure adherence to the CRH. According to the CRH, the CC has the competence to review the constitutionality of legal acts *in abstracto* and *in concreto*. An abstract review of constitutionality can be initiated by anyone who claims that a particular statute is not concordant with the CRH, or a particular by-law is not concordant with the CRH or a specific statute. The right to initiate proceedings does not require that there be an individual breach of a constitutional right. In the course of this proceeding, the CC can strike down any statute or by-law of the Parliament (or local government or an administrative body) with the effect *ex tunc* or *ex nunc*. In addition, the CC can initiate an abstract review of constitutionality on its own motion.

On the other hand, a concrete review of constitutionality can be initiated before the CC by an applicant who claims that a particular decision of a state authority breached one of her human rights or fundamental freedoms under the CRH. In such a case, the CC can strike down an individual decision of a state authority. In both cases of abstract and concrete review, the CC is willing to examine the case if a violation of an international agreement for the protection of human rights has allegedly occurred.[44] However, in the case of a concrete review of constitutionality, a human right guaranteed by an international agreement has to fall under the notion of a constitutional human right and fundamental freedom. With regards to the rights enshrined in the ECHR this will always be the case.

According to the prevailing opinion of Croatian constitutional law experts, the CRH adopts a monist approach to the relationship between domestic and international law.[45] This stance is reasoned with two arguments which stem from the prevailing interpretation of Art 141 CRH:

> (1) International agreements concluded and ratified in accordance with the Constitution and made public shall be part of the Republic's internal legal order and shall in terms of legal effect be above law.

---

43 The Constitution of the Republic of Croatia, Official Gazette, nos. 56/90, 135/97, 8/98-consolidated wording, 113/00, 124/00-consolidated wording, 28/01, 41/01-consolidated wording, 55/01-corr. of consolidated wording, 76/10 and 85/10-consolidated wording.

44 U-I-745/1999 (CC, 8 November 2000), U-III-3138/2002 (CC, 7 February 2000).

45 Duška Šarin, *Nastanak hrvatskoga Ustava* (Narodne novine 1997), 223.

(2) Their provisions may be changed or repealed only under conditions and in the way specified in them, or in accordance with the general rules of international law.

The first paragraph of this article has been interpreted as not requiring international agreements to be implemented via domestic statutes to be part of Croatian law..[46] Moreover, the CC has held that the second paragraph of this article means that it does not have the competence to review the constitutionality of international agreements.[47] Thus, following ratification, international agreements are immediately binding in Croatian law.

B. IMPLEMENTATION

In the opinion of the CC, the ECHR has been part of the Croatian legal order since 1991 by virtue of the Constitutional Law on Human Rights of Ethnic or National Communities or Minorities.[48] However, officially the ECHR has been in force in the Republic of Croatia since 5 November 1997, following ratification in the Parliament and publication in the Official Gazette.[49] Although there is no other law which was specifically targeted at implementing the ECHR, many laws have been amended as a consequence of established violations of the ECHR by the Republic of Croatia. The most significant examples include amendments to the Constitution, the Constitutional Act on Constitutional Court, the Courts' Act and the Civil Procedure Act following abundant ECtHR jurisprudence which found violations of Art 6 ECHR on the right to a fair trial within a reasonable time.[50] Other examples include amendments to the Criminal Act to include hate crime, following the case of *Šečić v Croatia*.[51] In response to *Kovač v Croatia*,[52] the Criminal Procedure Act was amended to enable renewal procedures once violations of the ECHR had been established by the ECtHR.[53] Following *Perić v Croatia*,[54] similar amendments were made to the Civil Procedure Act.[55]

Moreover, notwithstanding that Croatia is not a member of the EU, it is obliged to implement human rights *acquis communautaire* by virtue of the Stabilization and Association Agreement.[56] As a

---

[46] J Omejec, 'O potrebnim promjenama u strukturi hrvatskog ustavnog sudovanja' in J Barbić (ed), *Hrvatsko ustavno sudovanje: de lege late i de lege ferenda* (Hrvatska akademija znanosti i umjetnosti 2009) 129.

[47] U-I-672/2001 (CC, 25 February 2004); Smiljko Sokol and Branko Smerdel, *Ustavno pravo* (Manualia Facultatis iuridicae Zagrabiensis 2006) 185–186

[48] U-I-745/1999 (CC, November 2000).

[49] Act on Ratification of the ECHR, Official Gazette – International Agreements, no. 18/97.

[50] Ž Potočnjak, M Stresec, 'Europski sud za ljudska prava i Ustavni sud Republike Hrvatske u zaštiti ljudskih prava' in J Barbić (ed), *Hrvatsko ustavno sudovanje: de lege late i de lege ferenda* (Hrvatska akademija znanosti i umjetnosti 2009) 222.

[51] *Ibid.* 237. *Šečić v Croatia* (2009) 49 EHRR 19.

[52] *Kovač v Croatia,* App no 503/05 (ECHR, 12 July 2007).

[53] Ž Potočnjak, M Stresec, 'Europski sud za ljudska prava i Ustavni sud Republike Hrvatske u zaštiti ljudskih prava' in J Barbić (ed), *Hrvatsko ustavno sudovanje: de lege late i de lege ferenda* (Hrvatska akademija znanosti i umjetnosti 2009), 228.

[54] *Perić v Croatia,* App no 34499/08 (ECHR, 27 March 2008)

[55] Ž Potočnjak, M Stresec, 'Europski sud za ljudska prava i Ustavni sud Republike Hrvatske u zaštiti ljudskih prava' in J Barbić (ed), *Hrvatsko ustavno sudovanje: de lege late i de lege ferenda* (Hrvatska akademija znanosti i umjetnosti 2009), 229.

[56] Act on Ratification of Stabilization and Association Agreement, Official Gazette – International Agreements, no. 14/01.

result, many national laws have been enacted (i.e. the Anti-Discrimination Act and Gender Equality Act) or amended (i.e. the Labour Act).[57]

C. Hierarchy Between Domestic Law and the ECHR

According to Article 5 CRH, all statutes shall conform to the CRH and all other by-laws shall conform to the CRH and statutes. In the opinion of the CC all statutes and by-laws shall conform to the international agreements which have been concluded and ratified in accordance with the CRH and published in the Official Gazette. The hierarchy of legal norms in the Croatian legal system is perceived to be as follows: the CRH, international agreements, laws (statutes) and by-laws. Accordingly, the ECHR takes precedence over Croatian statutes and by-laws. Although formally the ECHR has a sub-constitutional status, the CC has granted it a quasi-constitutional status.[58]

D. The Approach of Domestic Courts in Reviewing Laws in Light of the ECHR

The Supreme Court is responsible for the uniform application of the law and there are no limitations to initiate revision proceedings before the Supreme Court if a particular legal matter is important from the perspective of the prohibition of discrimination[59] or protection of human rights in general.[60] However, in the case of a direct conflict between the CRH and a statute in the course of proceedings before the court, a court should stop the proceedings and initiate an abstract review of the constitutionality before the CC. On the other hand, if a by-law does not seem consistent with the statute or the CRH, the national court would have to apply the statute directly and initiate an abstract review of constitutionality before the CC. Although the CC has not deliberated on this issue to our knowledge, the same principle would apply if a statute or a by-law seems inconsistent with an international agreement.[61]

E. Domestic Courts and ECtHR Jurisprudence

The CC used the jurisprudence of the ECtHR as an interpretative tool of the CRH in a range of cases.[62] The CC has referred to the ECtHR jurisprudence in hundreds of its decisions and rulings.[63] Among the decisions and judgments of the ECtHR to which the CC has referred in its decisions, far more have involved judgments passed in relation to other contracting states to the

---

[57] Ž Potočnjak and A Grgić, 'Odnos Zakona o suzbijanju diskriminacije s Ustavom i drugim zakonima koji zabranjuju diskriminaciju', in T Šimonović Einwalter (ed), *Vodič uz Zakon o suzbijanju diskriminacije* (Ured za ljudska prava Vlade Republike Hrvatske 2009) 129.

[58] *Op. cit.* note 25.

[59] Anti-Discrimination Act, Official Gazette, no. 85/08, Art 23.

[60] Civil Procedure Act, Official Gazette, nos. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 02/07 and 123/08, Art 382.

[61] In the case U-I-745/1999 (CC, 8 November 2000) the CC reviewed the conformity of the Expropriation Act with the ECHR and not with the CRH.

[62] For example, in the case U-I-659/1994 (CC, 15 March 2000) the CC interpreted the Article 3 CRH (the Rule of Law) drawing on the ECtHR jurisprudence in the cases of *Sunday Times v UK* (1979) 2 EHRR 245, and *Malone v UK* (1984) 7 EHRR 14. For an extensive discussion how the CC used the ECtHR jurisprudence to interpret the CRH see Ž Potočnjak, M Stresec. (n 50).

[63] This conclusion was reached after searching the Internet database of the Constitutional Court of the Republic of Croatia <http://www.usud.hr/default.aspx?Show=c_praksa_ustavnog_suda&m1=2&m2=0&Lang=hr> accessed 14 April 2011.

ECHR rather than Croatia. The ECtHR case-law has also inspired the CC to initiate a change in its own jurisprudence.[64]

Moreover, the jurisprudence of the ECtHR has served as a tool for the CC to ensure the protection of human rights beyond the guarantees which were at that time established by the ECtHR. Namely, the CC struck down provisions of the Retirement Insurance Act,[65] which had established a different retirement age for men (65) and women (60) notwithstanding the ECtHR's ruling in *Stec v United Kingdom*,[66] in which it concluded that the difference in retirement age was reasonably and objectively justified in that it was intended to correct the disadvantaged economic position of women. Thus, by invoking the ECtHR jurisprudence the CC has used its competence to strike down non-ECHR-compliant laws (statutes and by-laws), guaranteeing protection of human rights which went beyond the protection that was at that time established under the ECHR.

---

64 For example, inspired by the ECtHR jurisprudence on Article 6 (1) ECHR (Right to a fair trial within reasonable time), in U-IIIA-4885/2005 (CC, 20 June 2007) the CC reversed its previous standing according to which the Court dismissed constitutional complaints in the part referring to the reasonable length of administrative proceedings preliminary to an administrative dispute and only examined the reasonable length of the action pending before the Administrative Court, without taking account of the length of the preliminary administrative proceedings. Following this decision, Article 29 (1) CRH right to a fair trial within reasonable time applies also to preliminary administrative proceedings.

65 *Op. cit.* note 35.

66 *Stec v UK* (2006) 43 EHRR 47.

3. FINLAND

A. Preliminary Points

The Republic of Finland has a written Constitution with a catalogue of fundamental constitutional rights. The current constitutional system has been shaped by two recent reforms: the reform of the Bill of Rights of the Constitution in 1995 and the new Constitution of 2000. The aim of the 1995 reform was to make domestic fundamental rights more compatible with the international human rights obligations following the ratification of the ECHR.[67] Traditionally, constitutional rights were regarded to bind the legislator, but a new provision of *ex post* constitutional review was included in the Constitution of 2000. These two reforms together have considerably strengthened the role of constitutional and human rights as individual rights by making it easier for private individuals to invoke their rights before the courts and other public authorities.[68]

In Finland, the constitutional system is based on a dualist approach to the relationship between domestic and international law. The ratification of international obligations and their coming into force in domestic law are two separate stages. According to Section 94 of the Constitution, Parliament's assent is required for international obligations that contain provisions of a legislative nature. Section 95 of the Constitution, for its part, provides that the provisions of treaties and other international obligations are brought into force by an Act if they are of a 'legislative nature'. Section 80 clarifies this requirement by stating that the 'principles governing the rights and obligations of private individuals' are of a legislative nature and shall be governed by Acts. Accordingly, the provisions of international human rights treaties, such as the ECHR, have been incorporated into domestic law by enacting a domestic Act of Parliament. Despite the dualist starting point, the Finnish system has been described as '*de facto* monism'.[69] The domestic implementation of international obligations is usually completed by passing a so-called 'blanket law' (an Act of Parliament *in blanco*) which incorporates the text of the treaty into Finnish law 'as it has been agreed.'[70] After the process of incorporation, the treaty is part of Finnish law and the courts must apply it just as any other domestic legal norm.

B. Implementation

Finland ratified the ECHR in May 1990. The ECHR was incorporated into domestic law by a blanket law which was completed by a separate decree.[71] Both the introductory act and decree came into force on the 23 May 1990. The legislative proposal could not be passed in the ordinary legislative procedure, as its acceptance required support from at least two thirds of the votes cast in Parliament. Section 95 of the Constitution requires that this procedure must be followed if the proposal to bring an international obligation into force 'concerns the Constitution', as it was determined to be the case in the ratification of the ECHR. Incorporation as the method of implementation means that a separate act gives the original text of the ECHR its domestic legal validity.[72] Accordingly, the ECHR is in force in its authentic languages.

---

67 PeVL 2/1990 vp and PeVM 25/1994 vp, p 5. The abbreviation 'PeVL' refers to 'Opinion of the Constitutional Law Committee' and the abbreviation 'vp' refers to the annual session of Parliament.

68 HE 309/1993 vp, p 15. The abbreviation 'HE' refers to 'government bill'.

69 M Scheinin, 'General Introduction' in Martin Scheinin (ed), *International Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff Publishers 1996) 15.

70 See e.g. M Pellonpää, *Euroopan ihmisoikeussopimus* (Talentum Media 2005) 54 – 55.

71 SpoS 18-19/1990 and 439/1990

72 Scheinin (n 69) 13.

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

The hierarchical status of an international treaty in Finnish law is determined by the hierarchical status of the incorporating act. In Finland, the domestic rank of the ECHR is that of statutory law.[73] The fact that the blanket law for the incorporation of the ECHR was accepted by the qualitative majority does not raise its status to the same level as the Constitution. In practice, this means that potential conflicts between the ECHR and domestic law cannot be solved by relying on the idea of hierarchical superiority.[74] The same hierarchical status between the ECHR and domestic statutes means that that the Finnish Courts can examine the compatibility of domestic laws with the provisions of the ECHR to the extent that the principles of statutory interpretation allow.[75] Incorporation as the method of implementation means that these norms are directly applicable by the courts and can prevail over domestic norms on the basis of the general rules of legal interpretation, such as *lex posterior* and *lex specialis*.[76] In practice, however, the Courts have been unwilling to rely on the formal rules of priority. It has been more common to harmonise the two legal systems by interpreting domestic legislation in compliance with the ECHR, but in this way tacitly elevating the ECHR.

The Constitutional Law Committee of Parliament has pointed out that the *lex posterior* rule applies in both directions and new pieces of legislation can, in theory, prevail over the provisions of human rights treaties as a matter of constitutional law. This amounts to the fact that Parliament 'retains its constitutional authority' to enact new legislation.[77] At the same time, however, the Committee has underlined that Finland is bound by its international obligations regardless of its internal legislation. The common presumption is that the domestic legislator does not intend to derogate from its international obligations unless Parliament has explicitly stated otherwise. This presumption is now confirmed by Section 22 of the Constitution which provides that public authorities, including both the legislator and the Courts, have a duty to 'guarantee the observance of basic rights and liberties and human rights'. Section 22 of the Constitution of 2000 lays down the normative basis for so-called 'human rights-friendly' interpretation. It is noteworthy that human rights are mentioned separately from basic rights. International human rights norms have arguably gained a 'semi-constitutional' status in the interpretation of domestic constitutional provisions.[78] It has been pointed out that international human rights treaties, above all the ECHR, do not just complement domestic laws but have also provided an 'inducement to their development'.[79]

---

[73] The Constitutional Law Committee of Parliament has stated that the Convention is internally in the same position as ordinary laws: Opinion of the Constitutional Law Committee on the ECHR, PeVL 2/1990 vp, p. 2.

[74] M Pellonpää (n 70) 59–60.

[75] See e.g. T Ojanen, 'From Constitutional Periphery Towards the Center – Transformations of Judicial Review in Finland' (2009) 27 *Nordic Journal of Human Rights* 194, 197.

[76] The Constitutional Law Committee has pointed out that these rules can help to solve the potential conflicts between domestic law and the ECHR. PeVL 2/1990 vp, p. 2 and PeVM 25/1994 vp, p. 4.

[77] See e.g. M Scheinin: 'Incorporation and Implementation of Human Rights in Finland' in Martin Scheinin (ed) *International Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff Publishers 1996) 259.

[78] *Ibid.* at 276.

[79] See e.g. K Tuori: 'Combining abstract ex ante and concrete ex post review: the Finnish model', Venice Commission, CDL-UD(2010)011, available at <http://www.venice.coe.int/docs/2010/CDL-UD(2010)011-e.asp> visited 30 April 2011, at 2.

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN THE LIGHT OF THE ECHR

The Finnish system of constitutional review can be described as one of the 'hybrid form' systems because the supervision of constitutionality has both *ex ante* and *ex post* dimensions.[80]

a. *Supervision of constitutionality (ex ante)*

Section 74 of the Constitution mandates the Constitutional Law Committee of Parliament[81] to issue statements on the constitutionality of legislative proposals which are sent to it for consideration by the plenary session of Parliament or by other parliamentary committees. The Committee also conducts an assessment of their bearing on international human rights instruments. Formally, the Committee ensures that the specific procedure for constitutional enactment ('statute of exception') is followed if the legislative proposal includes amendments or limited derogations of the Constitution. Section 22 of the Constitution has encouraged the Committee to adopt a more substantive approach. Today, it primarily solves the conflicts with fundamental and human rights by amending the legislative proposal, rather than by relying on the 'statute of exception' under Section 73 of the Constitution.[82]

b. *Supervision of legality (ex post)*

Before the constitutional reform, the only forms of constitutional review were the *ex ante* supervision of legislative proposals by the Constitutional Law Committee and the rights-friendly interpretation of domestic law by the courts. This was taken further by the exceptionally high status of *travaux préparatoires* which can even trump the precedents of the two supreme courts. After the constitutional reform, the courts were for the first time entitled to give primacy to the Constitution under Section 106 thereof if the application of an Act was in 'evident conflict with the Constitution' in a matter being tried by a court of law. The courts cannot review the general compatibility of legislation with the Constitution. They are merely entitled to set an Act of Parliament aside in a specific case tried before them. Moreover, the requirement of an 'evident conflict' means that the scope of *ex post* review is closely related to the application of *ex ante* review.[83] The conflict cannot be regarded as 'evident' if it could be avoided by consistent interpretation or if the Constitutional Law Committee has earlier found no conflict with the Constitution.[84] In those rare cases in which the two courts of final instance have relied on Section 106, they have emphasised the limits of their review.[85]

As stated above, the doctrine of 'human rights-friendly' interpretation has provided the primary means of judicial harmonisation in relation to the ECHR. The courts are willing to turn to a more direct application of the ECHR only if the consistent interpretation is not possible.[86] For

---

80 *ibid.* 4.
81 The Committee is a rather exceptional 'quasi-judicial' body. It is composed of Members of Parliament but, unlike other Parliamentary Committees, it has characteristically been apolitical and legal in its argumentation, which is illustrated by the fact that it is usually the Government who advises Parliament to ask the Committee to review a legislative proposal. See further e.g. in T Ojanen (n 75)196.
82 PeVM 10/1998 vp, pp. 22–23.
83 See e.g. K Tuori (n 79) 5.
84 The fact that the Committee conducts its own assessment at the abstract level is said to give the courts a certain degree of leeway in this respect. See PeVM 10/1998 vp, pp. 30–31.
85 KKO 2004:26 and KHO 2008:25.
86 L Lehtimaja, 'The View of the Finnish Supreme Court on the European Convention on Human Rights' (6 June 2008), available at <www.kko.fi/44943.htm> (visited 30 April 2011) at 1.

instance, in the case concerning the compensation of undue deprivation of freedom, the Supreme Court used the *Gebura v Poland* case[87] to support its conclusion that compensation could be provided on the basis that the plaintiff's right to liberty under Article 5 ECHR was violated. This was necessary because the existing legislation did not cover the case in which no express rule of domestic legislation had been violated although the plaintiff was by mistake detained for four days in excess.[88] As the substantive content of the ECHR rights is inherently dependent on the ECtHR, the Constitutional Law Committee has expanded its definition of 'human rights-friendly' interpretation to cover the case-law of the ECtHR.[89] It has also been pointed out that the Finnish courts must not 'passively' defer to the views of the Constitutional Law Committee, rather they must also 'actively' take into account the subsequent case-law of the ECtHR.[90]

E. Domestic Courts and ECtHR Jurisprudence

In Finland, there are two types of courts: general courts and administrative courts. The Finnish system does not recognize the principle of *stare decisis*. In practice, however, the lower courts show a strong respect for the decisions of the two courts of final instance. This section will therefore focus on the application of the ECtHR jurisprudence by the highest courts: the Supreme Court (*Korkein oikeus, KKO*) and the Supreme Administrative Court (*Korkein hallinto-oikeus, KHO*).

a. *The Supreme Court*

The Supreme Court gave its first reported reference to the ECHR (Art 3) in a case concerning the extradition of a plane hijacker.[91] The ECHR (Art 6) was, then, directly applied in a case concerning the right of the defendant to examine witnesses.[92] The Supreme Court has also refused to apply a domestic Act concerning paternity actions on the basis that it was in conflict with Arts 8 and 14 ECHR.[93] Similarly, the ECHR was given a preference over domestic legislation in two cases concerning the impartiality of lay judges.[94] Later, the Supreme Court has most frequently cited Art 6 ECHR. Art 6 is relevant both in civil and criminal cases, but most often it has been applied in cases regarding the minimum rights of the accused in criminal proceedings.[95] In many cases, the Supreme Court has clarified the content of Section 21 of the Constitution (the right to protection under the law) by relying on the interpretation of Art 6 ECHR by the ECtHR.[96]

The other central area of interest has been that of rights clashes. These clashes most often occur between the freedom of expression and the right to privacy. The Supreme Court has analysed ECtHR jurisprudence to determine how to balance the conflicting rights. In a case concerning the secrecy of correspondence between an advocate and his client in light of Art 8 ECHR and Section 10 of the Constitution, the Supreme Court stated that the accepted derogations from fundamental rights cannot go further than the accepted limitations in international human rights

---

[87] *Gebura v Poland*, App no 63131/00 (ECtHR, 6 March 2007).
[88] KKO 2008:10.
[89] Opinion of the Constitutional Law Committee on the ECHR, PeVL 2/1990 vp, p. 3.
[90] See e.g. Opinion on the Constitution of Finland adopted by the Venice Commission at its 74th Plenary Session (Venice, 14–15 March 2008), CDL-AD (2008)010, at 25.
[91] KKO 1990:93.
[92] KKO 1991:84.
[93] KKO 1993:58.
[94] KKO 1995:185 and KKO 1997:194.
[95] See e.g. KKO 1992:73, KKO 1992:81 and KKO 1994:26.
[96] See e.g. KKO 2005:73.

treaties binding Finland.[97] In the other case, the Supreme Court relied on the ECtHR case-law when deciding that the concept of private life must be interpreted broadly even in criminal cases.[98]

The Supreme Court has also considered whether and under what conditions the ECtHR case-law can be used to justify the nullification or re-opening of national judgments. In its *Z v Finland* judgment,[99] the ECtHR found a violation of Art 8 ECHR on the basis that a domestic secrecy order was issued for 10 years. For the application of the Parliamentary Ombudsman, the Supreme Court ended up reversing an earlier judgment given by the Court of Appeal and issued a new secrecy order for 40 years.[100] The Supreme Court has also nullified an earlier decision given by the Court of Appeal in a case in which the ECtHR found a violation of Art 6 when the applicant had been prevented to examine witnesses against him.[101] In this case, however, the nullification was primarily based on the Court's finding of an essential procedural error.[102] In the other case, the Supreme Court refused to annul the earlier decision despite the fact that the ECtHR had found a violation of Art 10 ECHR in a case in which a journalist had been convicted of violating the privacy of an MP.[103] This decision was based on the fact that the court's decision had not been 'manifestly erroneous' and 'just satisfaction' by the ECtHR was regarded as adequate compensation.[104] In the more recent case concerning the prohibition of self-incrimination, the Supreme Court has notably ended up reversing its own judgment on the basis that it did not comply with ECtHR jurisprudence.[105]

b. *The Supreme Administrative Court*

The case-law of the Supreme Administrative Court provides more diverse references to the substantive provisions of the ECHR and the case-law of the ECtHR. Art 8 ECHR is the treaty provision cited most frequently by the Supreme Administrative Court.[106] In two cases the Supreme Administrative Court sought guidance from the case-law of the ECtHR when deciding whether the non-disclosure of statements given by the security police was justified. First, in a case concerning residence permit and family reunification, the Supreme Administrative Court confirmed that the standards of Arts 8 and 13 ECHR reflect the requirements of the Constitution when the right to family life is balanced with the requirements of public interest.[107] Second, in a case concerning the conditions of citizenship, the Supreme Administrative Court interestingly stated that the case-law of the ECtHR can be used as a source of guidance even in those cases which go beyond the material scope of the ECHR. Although the conditions of citizenship did not fall into the material scope of Art 8 ECHR, the Supreme Administrative Court still relied on the case-law of the ECtHR when interpreting the right to protection under law under Section 21 of the Constitution.[108] This combination, i.e. the application of the highly developed ECtHR principles of due process together with the materially broader domestic fundamental rights, guarantees the highest possible protection of individual rights.[109]

---

[97] KKO 2003:119.
[98] KKO 2005:136.
[99] *Z v Finland*, App no 22009/93 (ECtHR, 25 February 1997).
[100] KKO 1998:33.
[101] *Mild and Virtanen v Finland*, App no 39481/98 and 40227/98 (ECtHR, 26 July 2005).
[102] KKO 2007:36.
[103] *Selistö v Finland*, App no 56767/00 (ECtHR, 16 November 2004).
[104] KKO 2008:24.
[105] KKO 2009:80.
[106] See e.g. KHO 2003:92, KHO 2003:28, KHO 2002:84.
[107] KHO 2007:47.
[108] KHO 2007:49.
[109] M Pellonpää 'Euroopan ihmisoikeustuomioistuimen ja EY:n tuomioistuimen vaikutuksista Suomen valtiosäännön

In a series of cases concerning the right to fair trial under Art 6 ECHR, the Supreme Administrative Court has considered the criteria under which the oral hearing is not necessary.[110] This assessment was based on a case in which the ECtHR had acknowledged that the lack of oral hearing does not always amount to a violation of Art 6 ECHR.[111] Similarly, the Supreme Administrative Court relied on the case-law of the ECtHR on Art 6 ECHR in its decision that Section 21 of the Constitution did not apply to a prohibition of appeal in a case concerning civil servants.[112] The Supreme Administrative Court has also examined expulsion orders in light of the ECtHR case-law on Art 3 ECHR.[113]

The Finnish courts do not always explicitly refer to the jurisprudence of the ECtHR in their reasoning even if its influence is 'clearly visible'.[114] It has been pointed out by commentators that the Supreme Court usually gives more specific references to ECtHR case-law, whereas the Supreme Administrative Court more often relies on unspecified references. This, however, does not mean that the Supreme Administrative Court could not engage in a full analysis of ECtHR jurisprudence as part of its deliberations.[115] It has also been pointed out that the Supreme Court is more inclined to refer to human rights, whereas the Supreme Administrative Court often limits its reference to the catalogue of domestic constitutional rights.[116] This, however, should not obscure the fact that the Finnish courts have generally recognised the strong validity of ECtHR jurisprudence.

Today the Finnish courts take ECtHR jurisprudence into account 'routinely', although mainly by using 'indirect' methods, for example, as an 'aid' or 'standard' of interpretation.[117] The substance of the provisions of the ECHR has been integrated into the Bill of Rights of the Finnish Constitution. This means that the need for a direct application of the ECHR has materialised less frequently and the ECHR and ECtHR jurisprudence are more often used as guidance for the interpretation of domestic legislation.[118] On the other hand, as demonstrated in this section, there are several cases in which the Finnish courts have been ready to give direct preference to the provisions of the ECHR over conflicting domestic legislation or even to nullify their previous judgments on the basis of the subsequent case-law of the ECtHR.

---

kannalta' in H Kanninen, H Koskinen, A Rosas, M Sakslin & K Tuori (eds) *Puhuri käy. Muuttuva suomalainen ja eurooppalainen valitosääntömme. Heikki Karapuu 31.12.1944 – 15.6.2006* (Edita 2009) 114.

[110] KHO 2007:67 and KHO 2007:68.

[111] *Jussila v Finland*, App no 73053/01 (ECtHR, 23 November 2006).

[112] *Eskelinen and others v Finland*, App no 63235/00 (ECtHR, 19 April 2007) and KHO 2011:39.

[113] KHO 2008:90 (the expulsion order was maintained) and KHO 2008:91 (the expusion order was reversed).

[114] M Scheinin (n 77) 270.

[115] T Ojanen 'Eurooppa-tuomioistuimet ja suomalaiset tuomioistuimet' (2005) *Lakimies* 7–8, 1210–1228, 1217. See e.g. KKO 2005:82 and KHO 2003:24.

[116] *Ibid.* at 1218. See e.g. KHO 2004:99.

[117] See e.g. T Ojanen (n 75) 198 and M Pellonpää (n 70) 123.

[118] L Lehtimaja (n 86).

4. FRANCE

A. PRELIMINARY POINTS

The current French Constitution was adopted on 4 October 1958, marking the beginning of the Fifth Republic under General Charles de Gaulle. The 1958 Constitution does not expressly enumerate a list of human rights but instead refers in its preamble to those protected by the 1789 Declaration of the Rights of Man and the Citizen and the preamble to the 1946 Constitution. France is a democratic republic with a directly elected president and a bicameral parliament consisting of the National Assembly (*Assemblée Nationale*) and Senate (*Sénat*). Its legal system is in the civil tradition with codified laws. France was one of the original signatories to the ECHR on 4 November 1950 but did not ratify it until 3 May 1974,[119] and it did not allow individual complaints to be brought before the ECtHR until 1981.[120] France has one of the highest rates of condemnation by the ECtHR in Europe, with a total of 604 unfavourable judgments by 2010.[121]

France's approach to the ratification of treaties is formally monist, but there is some debate on this issue regarding the ECHR, which will be discussed in more detail below.

B. IMPLEMENTATION

The ECHR was published by decree[122] in the French *Journal Officiel* (JO) on 4 May 1974 and on that date became part of French domestic law. France was slow to ratify the ECHR, with national officials routinely asserting that ratification would be superfluous as human rights were already sufficiently protected by domestic law.[123] France was also reluctant to implement Art 25 ECHR to allow the individual right of petition, which it first recognised in 1981 only for a renewable period of five years.[124] It has been argued that this reluctance was due in large part to general hostility to the supranationalism of the ECHR regime.[125]

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

Under Art 54 of the 1958 Constitution, if a treaty referred to the Constitutional Council (*Conseil Constitutionnel*) is found to be unconstitutional, the Constitution must be amended before ratification. According to Articles 54 and 61 of the Constitution, only the President of the Republic, the President of the National Assembly, the President of the Senate or 60 deputies or 60 senators can refer international treaties to the Constitutional Council. The ECHR itself was never referred to the Council to test its constitutionality, but Protocol 6 to the ECHR has been

---

119 AZ Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Clarendon Press 1983) 70.

120 N Krisch, 'The Open Architecture of European Human Rights Law' (LSE Law, Society, Economy Working Papers 11/2007), available at <http://eprints.lse.ac.uk/24621/1/WPS11-2007Krisch.pdf> accessed 24 April 2011, 10.

121 ECtHR, 'Violation by Article and by Country 1959–2010', available at <http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf> accessed 24 April 2011.

122 *Décret* n°74-360.

123 E Lambert Abdelgawad, A Weber, 'The Reception Process in France and Germany' in H Keller, A Stone Sweet (eds) *A Europe of Rights: The Impact of the European Court of Human Rights on National Legal Systems* (OUP 2008) 108.

124 *ibid.* 108–9.

125 *ibid.* 108.

declared constitutional.[126] Article 55 of the 1958 Constitution places international agreements above national laws, but they remain inferior to the Constitution.[127]

Following the *Interruption Voluntaire de Grossesse* (IVG) case (discussed in more detail below),[128] in which the Constitutional Council held that the ECHR does not have constitutional status within France and thus does not fall within its sole jurisdiction, lower courts can disapply laws which contravene the ECHR, but they do not have the power to strike them down. Only the legislature can repeal laws that have been democratically passed by Parliament. Lower courts have no power to enforce the human rights provisions contained in the 1789 Declaration nor the 1946 preamble, however, as only the Constitutional Council can decide matters of constitutionality. In 2008, an important constitutional amendment inserted Article 61(1), which establishes the right of an individual to challenge the constitutionality of a statute before the Constitutional Council. Where an individual raises a constitutional question in a lower court, the case must be referred to the Constitutional Council by either the Court of Cassation (*Cour de Cassation*) or the Council of State (*Conseil d'Etat*). The implementing legislation of the new Article 61(1) gives constitutional questions priority over those relating to international agreements.[129] Therefore, if an individual raises both a constitutional and an ECHR question before a lower court, the court must first decide whether to refer the constitutional question to the Constitutional Council before addressing the ECHR issue.

It has been argued that the motivation for the 2008 amendment and its implementing legislation was partly a desire to reaffirm the place of the French constitution at the apex of the French legal order and to put an end to the paradoxical situation created by the *IVG case* (see discussion below).[130] The result remains unorthodox, however, as international agreements rank lower than constitutional provisions in the French hierarchy of norms and should therefore be used to resolve the case before recourse to the Constitution.[131] In the French case, as soon as a constitutional question is raised it must be referred to the Constitutional Council, whether or not the case could be resolved on ECHR grounds in the lower court. The ECHR thus enjoys a status above ordinary law and is enforceable in the lower courts, but it remains inferior to the Constitution, which has been confirmed as existing at the summit of the hierarchy of norms.

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

The monist features of the French system have clashed with the separation of powers doctrine, particularly regarding the judicial review of statutory law.[132] There are three superior courts in France: the Court of Cassation (*Cour de Cassation*), at the summit of the civil and criminal jurisdictions; the Council of State (*Conseil d'Etat*), the ultimate administrative court; and the Constitutional Council (*Conseil Constitutionnel*), which monitors elections and, when called upon, ensures the compatibility of laws and treaties with the Constitution. Before 1971, this *contrôle de constitutionnalité* could only be exercised in the abstract and *before* the law under review came into

---

[126] M Fartunova, 'Report on France' in G Martinico and O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 210.
[127] Abdelgawad and Weber (n 123) 115.
[128] Conseil Constitutionnel Décision no. 74-54 DC du 15th janvier 1975.
[129] Loi organique no. Organic Law 2009-1523 du of 10 décembere 2009 relativef à l'application de l'article 61-1 relating to the application of Article 61-1 of the Constitution, J.O., 11 Dec., 2009, p. 21379.
[130] GL Neuman, 'Anti-Ashwander: Constitutional Litigation as a First Resort in France' [2010] 43 International Intl Law and Politics 15, 23.
[131] See comparison with American approach to judicial review in GL Neuman (n 130).
[132] *ibid.*

force. Review involved reference to the text of the 1958 Constitution only, which does not expressly enumerate human rights. These restrictions on constitutional review may be explained by the principle of the separation of powers in French law, which considers laws to be the democratic expression of the will of the people and thus should not unduly be interfered with by the judiciary. In 1971, however, the Constitutional Council held in a landmark decision that the 1789 Declaration and the 1946 preamble had constitutional value and therefore laws that infringed the rights protected therein could be declared unconstitutional.[133]

In the *IVG* case, the Constitutional Council refused to consider the ECHR as having constitutional force and thus excluded its provisions from forming the basis of pre-promulgation review. It held that the determination of questions of compatibility with international agreements such as the ECHR was the responsibility of ordinary judges.[134] The Court of Cassation in *Jacques Vabre* (1975),[135] as well as the Council of State in *Nicolo* (1989),[136] subsequently confirmed that ordinary courts could disapply laws that did not comply with international agreements, even if the former had been passed after ratification of the latter. The Constitutional Council retained its monopoly on constitutional review, however, thus creating a paradoxical situation whereby ordinary courts could ignore promulgated laws that conflicted with the ECHR but were powerless to exercise any control over their constitutionality. Given these two distinct rights protection regimes, therefore, it may be misleading to characterise the French system simply as monist.[137]

E. Domestic Courts and ECtHR Jurisprudence

The first ECtHR judgment against France was delivered on 18 December 1986 in *Bozano v France*. As noted, France has one of the highest condemnation rates in Europe, with 604 judgments finding at least one violation of an ECHR right in 815 cases referred to the ECtHR between 1959 and 2010. France ranks fourth highest for violations among the member states of the Council of Europe, behind Turkey (2245 cases), Italy (1617) and Russia (1019). This is significantly higher than the UK (271) and Germany (128), European countries with a similar (or higher) population and at a comparable level of development. Such a high rate may be attributed to the late introduction of the individual right of petition in 1981 and the absence of a right of individual applications for post-promulgation constitutional review before the law was changed in 2008. Significant legislative and jurisprudential developments have come about following France's condemnation by the ECtHR in order to prevent repetition of rights violations, but judgments against other countries are rarely acted on by the courts or legislature.[138]

For a long time French judges resisted ECtHR jurisprudence, regarding the provisions of the ECHR but not the ECtHR's interpretations thereof as binding law.[139] As noted, the Constitutional Council still refuses to consider ECHR provisions as coming under its remit as they do not have constitutional value. In practice, however, the Council implicitly takes the ECHR and ECtHR jurisprudence into account in elaborating constitutional principles that are not found in the 1789 Declaration or 1946 preamble, such as the right to respect for private life,

---

[133] Conseil Constitutionnel Décision 71-44 DC (*Liberté d'Association*), 16th juillet 1971.
[134] Déecision no. 74-54 DC 15 janvier 1975.
[135] Cour de Cassation Pourvoi no. 73-13556 24 mai 1975.
[136] Conseil d'Etat statuant au contentieux no. 108243 20 octobere 1989.
[137] Abdelgawad and Weber (n 123) 116.
[138] *ibid.* 126–7.
[139] *ibid.* 138.

freedom of marriage, the right to live a normal family life, the principle of human dignity, rights of criminal defence, and media pluralism as an aspect of freedom of expression.[140]

More recently French domestic courts have adopted a more systematic practice of referring to the provisions of the ECHR as a matter of course.[141] The higher courts have generally been slower to follow this trend than the courts of first and second instance.[142] In contrast, however, some cases decided by higher courts demonstrate a desire to pre-empt condemnation by the ECtHR by taking a more progressive approach to interpreting ECHR protections. For example, in the *Boussouar*[143] and *Planchenault*[144] cases the Council of State allowed judicial review of administrative decisions for alleged violations of prisoners' rights because 'to refuse to overturn the impugned decisions would be tantamount to accepting to close your eyes until Strasbourg [ECtHR] opens them for you.'[145] Following such an approach, domestic judges interpret the provisions of the ECHR independently, sometimes going beyond the requirements of the ECtHR, and in the absence of pre-existing jurisprudence, thus stimulating a dialogue with the ECtHR.[146] This tactic, along with the 2008 constitutional amendment, may go some way in reducing the rate of condemnation of France by the ECtHR.

The French courts have not expressly dealt with the issue of the reconciliation of the ECHR and ECtHR with legislative sovereignty, but there is evidence in the case-law and the 2008 amendment that the former are seen as a threat to the latter. The 1958 Constitution set up a strong separation of powers doctrine giving priority to the laws passed by the Parliament, seen as the expression of the will of the French people, who are the holders of national sovereignty.[147] The absence of post-promulgation judicial review of legislation and the limited powers of seizure of the Constitutional Council are evidence of a reluctance to allow judges to interfere with democratic expression. This situation was altered by the 2008 constitutional amendment allowing individual citizens to bring cases before the Constitutional Council, but it is telling that post-promulgation review may be based only on the Constitution, and the Council continues to resist the elevation of the ECHR to a constitutional level.

As noted, lower courts can refuse to apply domestic laws that conflict with the ECHR but they cannot strike them down. As the Constitutional Council refuses to declare laws that violate the ECHR as unconstitutional, the only power that can repeal such laws is the legislature. This, coupled with constitutional supremacy, favours national legislative sovereignty over the provisions of the ECHR. The reluctance of domestic courts to follow the jurisprudence of the ECtHR, unless France is directly implicated in a case, further demonstrates a will to assert national and legislative autonomy. French courts are now beginning to show signs of a more progressive approach to human rights, but this may simply be further evidence of an attempt to assert autonomy, and of the belief that the ECHR constitutes a minimum standard of rights which is surpassed by domestic provisions. We await future cases to see how the French courts

---

[140] GL Neuman (n 130) 33.
[141] Abdelgawad and Weber (n 123) 139–140.
[142] *ibid.*
[143] Conseil d'État, December 14, 2007, *Boussouar*.
[144] Conseil d'État, December 14, 2007, *Planchenault*.
[145] Translated from: 'Refuser de contrôler les décisions aujourd'hui attaquées reviendrait à accepter de fermer les yeux en attendant qu'on les ouvre pour vous à Strasbourg.' M Guyomar, Conclusions sur Conseil d'Etat, Assemblée, 14 décembre 2007, M Planchenault (1reespèce), et Garde des sceaux, ministre de la Justice c/ M. Boussouar (2e espèce) [Conclusions of the Conseil d'Etat, Assembly, December 14, 2007, *Planchenault* (First Case), and *Minister of Justice v Boussouar* (Second Case)], Revue Française de Droit Administrative 87 (2008) 100.
[146] E Abdelgawad and A Weber (n 123) 140.
[147] Article 3 of the 1958 Constitution.

will address this issue, and the impact of both the 2008 constitutional amendment and the emerging progressive approach of the upper courts on France's high level of condemnations for ECHR violations.

5. GERMANY

A. PRELIMINARY POINTS

The Federal Republic of Germany operates under the constitutional document known as the Basic Law for the Federal Republic of Germany, having been formally approved in 1949 and remaining in force after German reunification, albeit with some subsequent amendments.

Germany is considered to have adopted a dualist conception of the relations between domestic and international law.[148] According to the Federal Constitutional Court (FCC), '[T]he Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is [one] between two different legal spheres [whose nature] can only be determined from the viewpoint of domestic law (...) itself.'[149] Therefore, in order to produce legal effects and to be directly applicable in the German legal order a treaty must be incorporated into the German legal system in the proper form and in conformity with substantive constitutional law, i.e. by means of a federal law adopted by the Parliament.

The jurisdiction of the Federal Constitutional Court is threefold:[150] it controls the compatibility of domestic laws with the Basic Law ('norm control' proceedings); it is the arbiter of disputes between organs of the Basic Law, the Federation and the *Länder*;[151] and it receives individual complaints alleging the unconstitutionality of court decisions and domestic statutes. Under Article 93 of the Basic Law a complaint may be lodged with the Federal Constitutional Court by anyone claiming that public authorities have infringed his/her fundamental rights (Arts 1–19 of the Basic Law). The Federal Constitutional Court is the final authoritative interpreter of the Basic Law, and it is the only court authorized to invalidate unconstitutional norms at the federal level.[152]

B. IMPLEMENTATION

The ECHR was introduced into the German legal order by a federal law of approval (*Zustimmungsgesetz*), adopted by the German Parliament (*Bundestag*) on 7 August 1952.[153] Through this federal law of approval, the ECHR is directly applicable in cases in the lower courts of Germany.

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

---

148 The German version is a 'moderate dualism', according to the President of the German Federal Constitutional Court: H-J Papier, 'Execution and effects of the judgments of the European Court of Human Rights in the German judicial system' in Council of Europe, *Dialogue between judges* (Strasbourg 2006) 60.

149 BVerfGE 111, 307 [34] (This decision is known as the '*Görgülü* case').

150 E Abdelgawad, A Weber (n 123) 120.

151 Germany is made up of sixteen Länder which are partly sovereign constituent states of the Federal Republic of Germany.

152 E Abdelgawad, A Weber (n 123) 120.

153 Act on the Convention for the Protection of Human Rights and Fundamental Freedoms (*Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*), BGBl. 1952 II, 685.

Pursuant to Art 59(2) of the Basic Law,[154] treaty law and the ECHR have the status and rank of ordinary law within the German legal order.[155] Consequently, the ECHR does not enjoy the rank of constitutional law within Germany: '[T]he guarantees of the European Convention on Human Rights and its Protocols, by reason of this status in the hierarchy of norms, are not a direct constitutional standard of review in the German legal system.'[156] However, the position of the ECHR is strengthened by a presumption that other statutes are not intended to violate it. The FCC ruled that German laws 'are to be interpreted and applied in harmony with the Federal Republic of Germany's commitments under international law, even when such laws were enacted posterior to an applicable international treaty; it cannot be assumed that the legislature, insofar as it has not clearly declared otherwise, wishes to deviate from the Federal Republic of Germany's international treaty commitments or to facilitate violation of such commitments.'[157] As stated by the FCC in 1987 and again in its landmark decision in the *Görgülü* case: 'The guarantees of the Convention [ECHR] influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law.'[158]

Thus, the FCC has effectively elevated the ECHR and the ECtHR jurisprudence 'to the level of constitutional law', as 'interpretation aids' for the determination of the content and scope of the fundamental rights and rule-of-law guarantees of the Basic Law.[159] However, it has been noted that in practice, the ECHR has played a limited role in German jurisprudence, due in large part to the strength of domestic rights and the Constitutional Court's case-law on them.[160]

By virtue of its implementation, the ECHR may be applied by the lower courts of Germany. Although no special procedure for assessing the conformity of draft legislation with the ECHR is established within the German constitutional system, the ECHR is taken into account as an indirect standard of scrutiny through assessing the compliance of the draft law with the standards enshrined by the Basic Law. Moreover, before entering into force, the proposed statute needs to be examined in light of its compatibility with federal legislation, which, bearing in mind that the ECHR enjoys the rank of federal law, includes an examination of compatibility with ECHR standards.[161]

---

154 Art 59(2) of the Grundgesetz [GG] [Basic Law] reads: 'Treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the approval or participation of the appropriate legislative body in the form of a federal law.'

155 This was reiterated by the Federal Constitutional Court in 2004 (BVerfGE 111, 307).

156 BVerfGE 111, 307 [32].

157 BVerfGE 74, 358 (370).

158 BVerfGE 111, 307.

159 BVerfG, 2 BvR 2365/09 ('Preventive Detention') [82]; see also A Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' 6 (2010) European Constitutional Law Review 175, 187.

160 N Krisch, 'The Open Architecture of European Human Rights Law' (October 2007) LSE Legal Studies Working Paper No. 11/2007 <http://ssrn.com/abstract=1018991> accessed 25 April 2011.

161 E Abdelgawad, A Weber (n 123) 142.

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

Germany has a detailed catalogue of fundamental rights and a long tradition of their constitutional protection. Thus, few cases decided by national courts refer directly to the ECHR.[162] In most cases, in so far as the standards laid down in the ECHR are the same as those contained in the Basic Law, German courts have expressed a clear preference for domestic provisions and therefore referred to the Basic Law..[163]

However, there are some examples where the Constitutional Court assessed the domestic legislation in light of its compliance with the ECHR standards even as soon as the ECHR had entered into force. Thus, in its decision from 1957,[164] the Court examined whether the German legislation on homosexuality was contrary to Arts 2, 8, 13 and 14 ECHR. It referred later to various provisions of the ECHR and, occasionally, to judgments of the ECtHR.

This practice was confirmed by the decision of the Federal Constitutional Court in 1987, which emphasised that the ECHR serves as an interpretive aid in determining the content and scope of fundamental rights enshrined in the Basic Law.

In the course of criminal proceedings, the Federal Court of Justice (*Bundesgerichtshof*) most often refers to the procedural rights laid down in the ECHR, these being broader in scope than the equivalent provisions of the Basic Law. For instance, the Federal Constitutional Court often invoked Art 6(2) ECHR, which guarantees the presumption of innocence, not specifically addressed in the Basic Law.[165]

Until the 2004 *Görgülü* ruling by the FCC, violations of the ECHR by judges and other public authorities could not serve as a basis for an individual constitutional complaint before it. Individuals were restricted to pleading the fundamental rights enshrined in the Basic Law. However, in its *Görgülü* decision of 2004 the Federal Constitutional Court announced that it would accept complaints challenging, indirectly, a violation of the ECHR before it. Therefore, to instigate a constitutional complaint (*Verfassungsbeschwerde*) before the FCC, a complaint must formally rely on the infringement of the principle of the rule of law (Art 20, clause 3 of the German Constitution) and of those domestic fundamental rights which correspond to the ECHR guarantee at issue.[166] In view of that, the FCC emphasised that:

> [It] must in any case be possible, on the basis of the relevant fundamental right, to raise the objection in proceedings before the Federal Constitutional Court that state bodies disregarded or failed to take into account a decision of the European Court of Human Rights.' [167]

That is true also for the complaint that a State body has not respected a provision of the ECHR.[168]

---

162 *ibid.* 141.

163 G Martinico, O Pollicino, *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010).

164 BVerfGE 6, 389.

165 BVerfGE 74, 358; BVerfGE 82, 106.

166 BVerfGE 111, 307 (2004) [63].

167 *ibid.*

168 Decision of the Federal Constitutional Court of 13 December 2006, *BVerfG*, 1 BvR 2084/05 [37].

This new approach was explained by the FCC referring to its competence 'to prevent and remove, if possible, violations of public international law that arise from the incorrect application or non-observance by German courts of international law obligations'.[169] The FCC reiterated the position that it is 'indirectly in the service of enforcing international law, [in order to] reduce the risk of failing to comply with international law'.[170] Moreover, as noted above, even before the *Görgülü* ruling, in its 1987 judgment, the Constitutional Court took the view that German laws 'are to be interpreted and applied in harmony with the Federal Republic of Germany's commitments under international law'. [171]

According to some commentators, the FCC now expressly embraces the jurisprudence of the ECtHR.[172] It has been noted that the FCC rejects the traditional theory that judgments of that court were not binding on domestic courts, broadly interpreting the duty to abide by judgments under Article 46(1) ECHR as covering all state organs.[173]

Nowadays, the ECHR serves as an 'interpretative aid' of German constitutional norms insofar it offers the same level of the protection as the provisions of the Basic Law:

> 'The guarantees of the Convention [ECHR] influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law.'[174]

On the other hand, judicial control of the conformity of domestic acts with the ECHR primarily falls within the ambit of the ordinary German courts, given the ECHR's rank as an ordinary federal statute. The ECHR is directly applicable in German law and can be invoked before, and enforced by, ordinary German courts. As applicable federal statute law, the ECHR has binding effect on all executive bodies and on all courts, by virtue of Article 20(3) of the Basic Law. According to the FCC, all German authorities and courts are obliged, under certain conditions, to observe and apply the ECHR.[175]

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

In order to adjust the German legal order to the requirements of the ECtHR's jurisprudence, the FCC can strike down laws but only if they are found to be unconstitutional. Thus, even if the law violates some of the ECHR provisions, the Court will declare a law null and void on the sole basis that it violates fundamental rights laid down in the Basic Law.[176] For instance, after the judgment of the ECtHR in the case of *Karlheinz Schmidt*,[177] the FCC nullified the laws which were found to be contrary to Art 4 ECHR read in conjunction with Art 14 ECHR, but referred in its

---

169 BVerfGE 111, 307 [61].

170 *ibid.*

171 BVerfGE 74, 358 (370).

172 F Hoffmeister, 'Germany: Status of European Convention on Human Rights in Domestic Law' (2006) 4 Intl J of Constitutional Law 4 (2006) 722, 722.

173 *ibid.*

174 BVerfGE 111, 307.

175 BVerfGE 111, 307 [46].

176 BVerfGE 256/08 ("*Data Retention*").

177 *Karlheinz Schmidt v. Germany* (appl. no. 13580/88), Judgment (Chamber), 18 July 1994, Series A, Vol. 291–B.

decision to the existence of discrimination based on sex contrary to Art 3, paragraph 3, of the Basic Law. In the same manner, the Federal Constitutional Court can nullify a decision which violates fundamental rights and, in case of a final court judgment, may send the case back for a retrial.[178]

Although the FCC regularly cites the ECHR to support its own interpretation and to confirm its findings under the Basic Law, it has been claimed that the ECHR has, thus far, not been decisive in the conclusion reached by the FCC.[179] It has been pointed out that references to the ECHR and the ECtHR's case-law by the FCC are weak both in quality and quantity.[180]

However, following the *Görgülü* judgment, the Federal Constitutional Court seemed to be more willing to examine domestic law in light of ECtHR jurisprudence.[181] The other courts also rely in their reasoning on the ECtHR rulings. Thus, for example, in a decision of 18 November 1999, the Federal Court of Justice analysed in detail the ECtHR's judgment in the case of *Teixeira de Castro v Portugal*,[182] in order to determine how to deal with the admissibility of evidence resulting from undercover agents' activities. Similarly, it has been observed that the Federal Administrative Court (*Bundesverwaltungsgericht*) sometimes mentions Art 8 ECHR in decisions which deal with the status of aliens, and Art 3 ECHR when deciding whether a non-national should be deported.[183]

In the landmark *Görgülü* decision, the Federal Constitutional Court for the first time directly addressed the question of the effects of a judgment of the ECtHR in the German legal order and the relationship between the ECHR and domestic human rights law respectively.[184] Following the adverse judgment,[185] in which the ECtHR found a German court's position to be in violation of Art 8 ECHR, the Higher Regional Court in subsequent proceedings indicated that it did not consider itself bound by the judgment of the ECtHR, reasoning that only the German State, as a Party to the ECHR, can be bound. The applicant therefore filed a constitutional complaint before the FCC which quashed the decision of the Higher Regional Court on the grounds that it had not properly taken into account the judgment of the ECtHR in this matter. The Court held that 'the judgments of the Strasbourg Court [ECtHR] are binding on the parties to the proceedings and thus have limited substantive *res judicata*.'[186] The FCC's decision in *Görgülü* regarding *res judicata* was, however, overturned in the 2011 *Preventive Detention* ruling,[187] which concerned the question of preventive detention of sexual offenders. The FCC in *Görgülü* further held that, if

> [T]here are decisions of the European Court of Human Rights that are relevant to the assessment of a set of facts, then in principle the aspects taken into account by the European Court of Human Rights when it considered the case must also be taken into account when the matter is considered from the point of view of

---

[178] E Abdelgawad, A Weber (n 123) 149–150.
[179] *ibid*. 141.
[180] *ibid*.
[181] See, for example, the decision of the Federal Constitutional Court of 13 December 2006 (BVerfG, 1 BvR 2084/05, para 39), where the Federal Constitutional Court went in detail into the question of whether the administrative courts have respected the *Chassagnou* judgment of the ECtHR issued against France. *Chassagnou et autres v. France* (App. nos 25088/94, 28331/95 and 28443/95), Judgment (Grand Chamber) 29 April 1999, Reports 1999-III, 123.
[182] *Teixeira de Castro v. Portugal* (App. no. 25829/94), Judgment (Chamber), 9 June 1998, Reports 1998-IV, 145.
[183] Abdelgawad and Weber (n 123) 141.
[184] *ibid*. 131.
[185] *Görgülü v. Germany* (App. no. 74969/01), Judgment (Third Section), 26 February 2004 (not reported).
[186] 124 BVerfGE 111, 307 [38].
[187] BVerfG, 2 BvR 2365/09 ('Preventive Detention').

> constitutional law, in particular when proportionality is examined, and there must be a consideration of the findings made by the European Court of Human Rights after weighing the rights of the parties.[188]

In that context, the finding of a violation entails three main obligations for the State concerned.[189] The first is that the State Party may no longer hold the view that its acts were in compliance with the ECHR. Second, the State Party has the obligation to restore, if possible, the state of affairs with regard to the matter in dispute to what it was prior to the declared violation of the ECHR (*restitutio in integrum*). Finally, in case of an ongoing violation, the State Party is under an obligation to end this state of affairs.

As a consequence of the above, the FCC in *Görgülü* explicitly formulated the obligation of German courts 'to take into account' (*Berücksichtigungspflicht*) the guarantees of the ECHR and the case-law of the ECtHR when interpreting fundamental rights and constitutional guarantees.[190] Nevertheless, according to the German Constitutional Court, judgments of the ECtHR should not be enforced 'in an automatic way';[191] rather, the German state bodies enjoy 'latitude' in this regard. This obligation 'to take into account' an ECtHR ruling requires that courts must either comply with it or justify why they do not so comply. Thus, the German courts, or the authorities responsible, must 'discernibly consider the decision and, if necessary, justify in an understandable manner why they nevertheless do not follow the international-law interpretation of the law.'[192]

Nevertheless, there is a widespread belief among German judges that rights protection under the national system is better than that under the ECHR. It is based on the view that the substantive guarantees of the Basic Law are in general wider in scope and more effectively monitored than the rights enshrined in the ECHR.

In general, the position of the FCC regarding the ECHR and ECtHR jurisprudence has been described by many as ambivalent,[193] 'fluctuating between openness towards international law and emphasis on German constitutional sovereignty'.[194] Thus, for example, the FCC noted in its *Görgülü* ruling that the Basic Law 'does not waive the sovereignty contained in the last instance in the German constitution.'[195] Accordingly, the FCC further stated that the legislature may exceptionally deviate from the requirements of treaty law if it is the only way to avoid a violation of the fundamental principles contained in the Constitution.[196]

Nevertheless, it has been noted that 'notwithstanding these statements by the Federal Constitutional Court, the case law of the ECtHR has in general influenced the German legal order, particularly after a finding of a violation'.[197] Those commentators emphasise that the ECtHR's case-law triggered several amendments to the Code of Criminal Procedure (*Strafprozessordnung*), sometimes even before the ECtHR had rendered its judgment.[198] Thus, the

---

188 BVerfGE 111, 307 [46].
189 E Abdelgawad, A Weber (n 123) 133.
190 BVerfGE 111, 307 [46–48].
191 BVerfGE 111, 307 [47].
192 BVerfGE 111, 307 [50].
193 E Abdelgawad, A Weber (n 123) 133.
194 *ibid.*
195 BVerfGE 111, 307 (2004); *Görgülü,*[35].
196 'There is, therefore, no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which the violation of fundamental principles of the constitution can be averted' (BVerfGE 111, 307 [35]).
197 E Abdelgawad, A Weber (n 123) 133.
198 *ibid.*

ECtHR found that the procedure before the courts, which reviewed the lawfulness of the applicant's detention on remand, did not comply with the guarantees afforded by Art 5(4) ECHR and that this provision had therefore been violated.[199]

The Court had occasion in the *Preventive Detention* case to explicate and summarise the relationship between the ECHR and German law. The starting point is, as adumbrated above, that the ECHR is incorporated into German law by way of statute only. The ECHR does, however, serve as an 'interpretation aid' in the interpretation of German fundamental rights and rule-of-law principles of the Basic Law. The same is the case with ECtHR jurisprudence; it too will influence the interpretation of German law. The influence of the ECHR and ECtHR jurisprudence will, however, only go so far as it may be supported by legal method and the exigencies of the Basic Law. The constitutional importance of the ECHR and ECtHR jurisprudence is a function of the openness to international law of the Basic Law and of the prominent position which human rights have been accorded in the Basic Law.

The recourse to the ECHR and ECtHR jurisprudence as aids to interpretation does not, however, require there to be any kind of systematic synthesis between the requirements of the Basic Law and those of the ECHR.[200] Whilst the *Görgülü* ruling had said that 'the authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the ECtHR', and the court had been criticised for this choice of words,[201] the FCC in *Preventive Detention* ruled that the duty to apply the ECHR in national law was 'not … a duty only to take into account [*Berücksichtigungspflicht*], for the Basic Law aims … to avoid conflict between international obligations of the Federal Republic of Germany and national law'.[202] 'The openness of the Basic Law', continued the FCC in *Preventive Detention*, 'thus expresses an understanding of sovereignty which not only does not oppose international and supranational integration; it presupposes and expects it'.[203]

Moreover, following the ECtHR's judgment in the *Öztürk* case,[204] Parliament amended the Court Costs Act and the Code of Criminal Procedure with the Act of 15 June 1989. The German Civil Code (*Bürgerliches Gesetzbuch*) has also been modified. The statutory provisions governing custody of and access to children have been changed several times,[205] following adverse judgments of the ECtHR in, *inter alia*, the *Elsholz* case.[206]

---

[199] *Garcia Alva v Germany* (App. no. 23541/94), Judgment (First Section), 13 February 2001 (not reported); *Lietzow v Germany* (App. no. 24479/94), Judgment (First Section), 13 February 2001, Reports 2001-I, 353 et s eq.; *Schöps v Germany* (App. no. 25116/94), Judgment (First Section), 13 February 2001, Reports 2001-I, 391 et s eq., in which applicants complained under Art 5(4) ECHR that they had been denied access to the investigation file in connection with the judicial review of their detention on remand.

[200] BVerfG, 2 BvR 2365/09 ('Preventive Detention') [86].

[201] C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 513, 523, citing BVerfGE 111, 289 (315) (English translation [29]) .

[202] BVerfG, 2 BvR 2365/09 ('Preventive Detention') [89].

[203] *Ibid.*

[204] *Öztürk v Germany* (App. no. 8544/79), Judgment (Plenary), 21 February 1984, Series A, Vol. 73. In this case, the Court held that there had been a breach of Art 6(3e) ECHR because the applicant was ordered to bear the interpreter's fees.

[205] Reform zum Kindschaftsrecht of 16 December 1997; Reform zum Kinds chafts recht 1997, BGBl. 1997, 2942.

[206] *Elsholz v Germany* (App. no. 25735/94), Judgment (Grand Chamber), 13 July 2000, Reports 2000-VIII, 345 et s eq (the Court concluded that the German court decisions dismissing the applicant's request for access to his son, a child born out of wedlock, amounted to a breach of Art 8 ECHR).

Other domestic law changes intended to accelerate the court proceedings, particularly those before the FCC. In the *Pammel* and *Probstmeier* cases,[207] which concerned the length of the proceedings in the Federal Constitutional Court relating to an objective review of the constitutionality of legislation carried out in connection with an application for a preliminary ruling, the ECtHR held that the proceedings had exceeded the reasonable time referred to in Art 6(1) ECHR.[208] Subsequently, the number of legal staff assigned to the Federal Constitutional Court increased in order to solve the problem of the increased workload.

With respect to the judgments in cases brought against other States party to the ECHR, the FCC emphasised in the *Görgülü* case that 'the decision of the European Court in proceedings against other States parties merely give the States that are not involved an occasion to examine their domestic legal systems and, if [it] appears that an amendment may be necessary, to adapt themselves to the relevant case law of the European Court'.[209] Thus, for example, amendments aimed at giving the accused more rights to be heard (in 1964) or granting persons who had been kept in custody without later being sentenced the right to compensation (in 1971) were introduced in the German legislation in order to satisfy the requirements of the ECHR.[210] Accordingly, in the light of the ECtHR's judgment in *Kudla v Poland*,[211] the German Government indicated that the creation of a new remedy in respect of lengthy proceedings was necessary.[212]

---

207 *Pammel v Germany* (App. no. 17820/91), Judgment (Chamber), 1 July 1997, Reports 1997-IV, 1096 et s eq.; *Probstmeier v Germany* (App. no. 20950/92), Judgment (Chamber), 1 July 1997, Reports 1997-IV, 1123 et s eq.

208 E Abdelgawad, A Weber (n 123) 135–136.

209 *Görgülü* (n 163) [38]–[39].

210 E Abdelgawad, A Weber (n 123) 136.

211 *Kudla v Poland* (appl. no. 30210/96), Judgment (Grand Chamber), 26 October 2000, Reports 2000-XI, 197 et s eq.

212 E Abdelgawad, A Weber (n 123) 136.

6. Greece

A. Preliminary Points

The current Constitution of Greece was adopted in 1975 by a specially empowered parliamentary convention (the Fifth Revisionary Parliament) after a seven year military dictatorship. It has been amended three times, in 1986, 2001 and 2008. According to Article 1 the State is a parliamentary republic based on popular sovereignty,[213] and a plethora of Articles are dedicated to the protection of individual and social rights.[214] The independence of the judiciary is guaranteed,[215] and, *prima facie*, all courts have the duty not to apply a law which is contrary to the Constitution.[216] The power to invalidate a law, though, is reserved for the Supreme Special Court.[217] Furthermore, with the exception of the Supreme Special Court's precedent, judicial precedent does not bind courts.[218]

The Greek Constitution is described as 'particularly open towards international law'.[219] Article 2(1) provides that 'Greece, adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and States'.[220] In Article 28, the relationship between international law and domestic law is established. According to Article 28(1):

> The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.[221]

According to Article 28(1) both customary and conventional international law supersede domestic law. This was one of the main innovations of the 1975 Constitution in relation to the Constitution of 1952.[222] Greece may thus be labelled monist in its approach to the relationship between international and domestic law. Customary international law is automatically part of the law,[223] as is conventional international law after its ratification, with no further action being required before such conventions apply within the Greek legal order. However, international law does not prevail over the Constitution as the latter occupies the highest place in the hierarchical pyramid of the sources of law.[224]

---

[213] Art 1 Greek Constitution, official translation in English available <www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma/> visited 9 April 2011.
[214] Arts 2(1) and 4–25 Greek Constitution.
[215] Art 87(2) Greek Constitution.
[216] Art 93(4) Greek Constitution.
[217] Art 100 Greek Constitution.
[218] Law 345/1976 Art 51 Official Gazette /141/1976.
[219] A Grammaticaki-Alexiou, 'Sources and Materials' in K Kerameus, P Kozyris (eds) *Introduction to Greek Law* (Kluwer/Sakkoulas, Deventer 1988) 22.
[220] Art 2(1) Greek Constitution.
[221] Art 28(1) Greek Constitution.
[222] P Spyropoulos & T Fortsakis, *Constitutional Law in Greece* (Kluwer International/Ant. N. Sakkoulas) 55–56.
[223] This was recognised in 1896 by the Greek Supreme Court of Civil and Criminal Matters (Areios Pagos), though no special provisions existed at the time: Areios Pagos, Ruling 14/1896.
[224] Art 1(3) Greek Constitution.

B. IMPLEMENTATION

Greece re-ratified[225] the ECHR in 1974.[226] Greece has also signed and ratified Protocols 1,[227] 2,[228] 3,[229] 5,[230] 6,[231] 7,[232] 8,[233] 11,[234] 13[235] and 14.[236] The laws passed by the Parliament that ratify the ECHR and its Protocols do not contain specific provisions about the role of the courts regarding review of domestic law in light of the ECHR. However as the ECHR constitutes an integral part of the domestic law and prevails over any contrary statutory provision,[237] the courts proceed to normal judicial review in accordance with the hierarchy of the sources of law,[238] as provided for in Art 28 of the Constitution.

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

As noted, the Greek Constitution views itself as occupying the highest point of the normative hierarchy in the Greek legal order, with international law, including the ECHR, just below, and domestic law at the bottom. This hierarchy is generally followed by the courts. While the courts review domestic legislation in light of the ECHR, usually their analysis is accompanied by references to the corresponding rights guaranteed by the Greek Constitution. However, the courts are reluctant to review constitutional provisions in light of the ECHR. For example, both the Supreme Administrative Court ('*Symvouleio tis Epikrateias*', 'Council of State') and the Supreme Civil and Penal Court, interpreting Art 28 of the Greek Constitution, repeatedly held that the latter prevails over international law and the ECHR.[239]

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

The incorporation of the ECHR into the Greek legal order through Article 28(1) of the Constitution automatically empowers the domestic courts to apply it and thus review domestic law in light thereof.[240] Hence the role of the domestic courts is underlined by the direct application of the ECHR, and this has allowed them, for example, to develop the right to property,[241] to ban restrictions on the freedom of movement,[242] or even to defend the constitutionality of a law.[243]

---

225 Greece had ratified the ECHR in 1953 (Law No 2329/1953). However under the military junta regime (1967–1974), due to international pressure arising from human rights violations, it withdrew in 1970 from the Council of Europe and denounced the ECHR.
226 Law Decree 53/1974, Official Gazette /256/1974.
227 Law Decree 53/1974 Official Gazette /256/1974.
228 Law Decree 215/1974 Official Gazette /365/1974.
229 Law Decree 215/1974 Official Gazette /365/1974.
230 Law Decree 215/1974 Official Gazette /365/1974.
231 Law 2610/1998 Official Gazette /110/1998.
232 Law 1705/1987 Official Gazette /89/1987.
233 Law 1841/1989 Official Gazette /94/1989.
234 Law 2400/1996 Offiсlal Gazette /96/1996.
235 Law 3289/2004 Offical Gazette A/227/2004.
236 Law 3344/2005 Official Gazette A/133/2005
237 Art 28 Greek Constitution; P Dagtoglou, 'Constitutional and Administrative Law' in K Kerameus, P Kozyris (n 126) 47.
238 *Lex superior derogat inferiori.*
239 Supreme Civil and Criminal Court (Plenary) 40/1998; Supreme Administrative Court 1930/1998 [11] (ECtHR, *Former King of Greece and others v Greece*, 23 November 2000, 28 November 2002).
240 I Kastanas, 'The Conformity of Greece to the Decision of the European Court of Human Rights: general assessment' [2003] To Syntagma 2/2003
241 Supreme Court of Civil and Penal Law 40/1998.

In a series of cases, the domestic courts have, however, recognised a margin of appreciation left to the legislature. Among them, the most robust is the power of the legislature to form the social insurance policy, limiting the property rights of private social insurance funds that exercise public authority.[244] Moreover, limits to property rights are set when a law complies with the public interest and the principle of proportionality is not violated.[245] However, the margin of appreciation is not always coherently applied. For example, on the one hand, the courts rejected a claim that the power of the legislature to set procedural rules before the courts undermined the appellants' right to fair trial and natural justice,[246] whilst on the other hand the courts invalidated a law placing the obligation on the defendant to present his case before the court with a lawyer.[247]

E. DOMESTIC COURTS AND THE ECTHR JURISPRUDENCE

The domestic courts quite often refer to ECtHR jurisprudence and, in most cases, in order to interpret the ECHR according to the principle *autorité de la chose interprétée*.[248] However, concerning the *autorité de la chose jugée*, the jurisprudence of the Greek courts is not coherent. On the one hand, the domestic courts recognise the *stare decisis* of the ECtHR, especially in criminal cases,[249] but, on the other hand, notable cases related to the Greek public order deny its application.[250] For instance, in a recent case before the first instance court, it was declared that no domestic court is bound by decisions of the ECtHR.[251]

While the courts have not engaged with issues of legislative sovereignty, as the Parliament in Greece is not sovereign, the question of the relationship between the Constitution and the ECHR has been a thorny and legally complicated one. In theory the Constitution prevails over the ECHR,[252] however, the jurisprudence of the Greek Supreme Administrative Court is not settled. Contrary to the traditional view that international law, including the ECHR, does not prevail over the Constitution, according to some cases and dissenting opinions the ECHR, as a part of European Union Law and pursuant to the jurisprudence of the Court of Justice of the European Union, supersedes even the Constitution.[253]

---

242 Supreme Court of Civil and Penal Law 360/2010.
243 Supreme Court of Civil and Penal Law 3504/1994; Special Supreme Court 1/2010 which confirmed the Supreme Court of Civil and Penal Law 250/2008.
244 Supreme Administrative Court 2200/2010.
245 See Supreme Court of Civil and Penal Law 968/2010.
246 Supreme Court of Civil and Penal Law 766/2010; Supreme Administrative Court 993/1994; Supreme Court of Civil and Penal Law 359/1994 and Supreme Administrative Court 369/2010.
247 Supreme Court of Civil and Penal Law 1294/1991.
248 Supreme Court of Civil and Penal Law 562/2010.
249 Supreme Court of Civil and Penal Law 554/2010.
250 C Papastylianos, 'The interpretation of term "Public Order" as restriction of individual freedoms in the ECHR and the Constitution: The limits of jurisdictional judgment at the application of restrictions of individual freedoms' [2003] To Syntagma 3/2002 (In Greek).
251 First Instance Court Alexandoupolis 4005/2008.
252 C X Xrysogonos, 'The non-application of ECHR from the Greek Courts" [2002] To Syntagma 5/2002 (In Greek).
253 Supreme Administrative Court 4675/1998; Dissenting Opinion of Justice Sakelariou, Supreme Administrative Court 1930/1998 [11].

7. ITALY

A. PRELIMINARY POINTS

Italy has a codified Constitution, which was adopted in 1947. It was one of the original signatories to the ECHR in 1950. The ECHR was ratified by Italy in 1955, and the right to individual petition was granted in 1973.

Italy's legal system takes a dualist approach to international law. Consequently, international obligations, including those enshrined in the ECHR, do not become part of the domestic legal order until they are transposed by the Italian legislature. Depending on the legislative instrument used, these international obligations may take on a different standing within the hierarchy of norms in Italian law.

The Supreme Court of Cassation is the highest authority for the interpretation of Italian law and for the resolution of conflicts between various lower courts.[254] The Italian Constitutional Court (ItCC) is a separate body which determines the constitutional validity of primary legislation.[255] Access to the ItCC can be obtained in two ways: through an incidenter proceeding, should the question of unconstitutionality be raised in a regular court case; or through a principaliter proceeding, if the case is lodged independently from a court case. In the former case only judges, may apply for a ruling by the ItCC; in the latter, the Government or Regions can do so.[256]

B. IMPLEMENTATION

The ECHR was transposed into Italian domestic law by Law No. 848 of 4 August 1955.

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

By virtue of its transposition into domestic law via Law No. 848, the ECHR gained the rank of ordinary law. This meant that in the hierarchy of sources of law it fell beneath constitutional norms and alongside the majority of ordinary legislation.

There was, however, the issue of whether subsequent ordinary laws could validly be taken to derogate from the obligations contained in the ECHR, according to the rule that later laws derogate from inconsistent prior laws. On the face of it, it appeared that this was a possible interpretation of the legal status of the ECHR, although some commentators considered this an unsatisfactory position.[257] Some analysts have also noted that the approach of different courts may not have been consistent.[258]

However, recent case-law appears to indicate that this has been resolved. In 2001, the Italian Constitution was amended; Article 117, paragraph 1, of the Constitution now requires that the legislative bodies of the State and regions must exercise their legislative powers 'in compliance with the Constitution and with the constraints deriving from EU legislation and international

---

254 H Keller and A Stone Sweet, *A Europe of Rights* (OUP 2008) 397.

255 *ibid.*

256 J Frosini, 'Constitutional Review' in GF Ferrari (ed) *Introduction to Italian Public Law* (Giuffrè, Milano 2008), 183 ff.

257 For a survey of the Italian scholarly debate, see S Mirate, 'A New Status for the ECHR in Italy: The Italian Constitutional Court and the New 'Conventional Review' of National Laws' (2009) 15 Eur Public L 89, 92–93.

258 *ibid.* 95–97; H Keller and A Stone Sweet (n 254) 405.

obligations'. Two recent judgments of the ItCC[259] have held that, whilst the ECHR is formally only part of the ordinary law of Italy, its substance has constitutional status due to Article 117, giving it authority above that of ordinary laws.[260] As a result, the ItCC has held that ordinary laws enacted subsequent to the 1955 ratification cannot simply derogate from the ECHR.

Article 11 of the Italian Constitution declares that:

> Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.

The ItCC has, however, rejected the notion that the ECHR might qualify as a limitation of sovereignty under Article 11. It has held that:

> … the ECHR is "only" a multilateral international public law Treaty which does not entail and cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution.[261]

In this regard, the ECHR is incorporated into Italian law by a legislative provision, given constitutional status by Article 117, but does not accord sovereignty to an external organisation.

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

The ItCC is the only court which may declare a law to be in violation of the Constitution. The rulings of the ItCC cited above therefore only grant the ItCC itself the power to strike down legislation on the basis that it is in breach of the ECHR. Any other court must follow a two-step process. At the first stage, it must attempt to interpret the relevant provision of national law in accordance with the ECHR. If this fails, the second stage is to refer the case to the ItCC. The ItCC will then consider whether to strike down the provision by referring to the provisions of the ECHR and the Italian Constitution.

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

Even prior to the ItCC judgments of 2007 mentioned above, there was clear evidence of ECtHR jurisprudence being used by domestic courts to interpret the provisions of the ECHR. This was the case with regard to fair trial issues and the unreasonable length of criminal procedures.[262]

In its 2007 decisions, the ItCC recognised that the ECHR must be interpreted in the context of the judgments handed down by the ECtHR. It accepted that reference must be made to the autonomous meanings with which the ECtHR imbues certain concepts, and to the interpretations it gives the provisions of the ECHR. In this sense, 'the constitutional scrutiny is not based on the text of the ECHR provision, but rather on the interpretation of the provision

---

[259] Italian Constitutional Court, Decisions no. 348 and 349, Gazzetta Ufficiale, 24 October 2007.

[260] See Decision no. 348 (n 259) [4.3], in which the court recognises that this is a 'schizophrenic' approach.

[261] See Decision no. 348 (n 259) [6.1].

[262] See Court of Cassation, Judgment of 26 January 2004, no. 1340.

by the European Court of Strasbourg [ECtHR]'.[263]

Subsequent case-law has confirmed this trend. The ItCC's decision no. 38 of 2008 held that 'the contracting states are bound, except in the case of the ascertainment of the constitutional conformity of the ECHR provisions, to follow the interpretation that on those provisions is given by the European Court of Human rights'.[264]

Despite this background context, the ItCC has not considered itself bound by the ECtHR in all respects. It maintains a residual capacity to review the ECtHR's judgments for their compliance with the Italian Constitution. It retains the exclusive competence to determine whether a particular weighting of interests remains within the boundaries of the Italian Constitution. In its 2007 judgments, it held that: [265]

> … it must be emphasised that the judgments of the Strasbourg Court [ECtHR] are not unconditionally binding for the purposes of the verification of the constitutionality of national laws. Such controls must always aim to establish a reasonable balance between the duties flowing from international law obligations, as imposed by article 117(1) of the Constitution and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution.

In this regard, whilst the ItCC has been influenced by ECtHR case-law, the position in Italian law is that the ItCC's interpretation of the Italian Constitution is authoritative.

---

[263] See Decision no. 348 (n 259) [4.6].

[264] Italian Constituional Court, Judgment 38/2008, Gazzetta Ufficiale; Italian Constitutional Court, Judgment 311/2009, Gazzetta Ufficiale.

[265] See Decision no. 348 (n 259).

8. THE NETHERLANDS

A. PRELIMINARY POINTS

The Kingdom of the Netherlands (*Koninkrijk der Nederlanden*) was formally established by a written Constitution (*Grondwet voor het Koninkrijk der Nederlanden*) in 1814. The Constitution is, however, only the second highest form of law within the Netherlands, secondary to the Charter (*Statuut vor het Koninkrijk der Nederlanden*), a relatively recent document created in 1954.

The Charter is concerned with the relationships between the 'countries' of the Netherlands, Aruba, Curaçao and St Maarten. The latter two territories used to be part of the Netherlands Antilles, but this country ceased to exist as of 10 October 2010 after the Charter was amended. It can, therefore, primarily be seen as 'the constitution for the federation'[266] formed by the four countries. A clause is provided within the Charter that '[t]he Constitution shall have regard to the provisions of the Charter'[267] and, in that respect, it is superior to the Constitution. However, it should also be noted that, in the absence of any relevant provision within the Charter, various affairs including the monarchy and legislative power, are governed by the Constitution.[268] Consequently, parts of the Constitution (such as monarchical succession) apply to all four territories rather than just the Netherlands.

In terms of human rights, one of the most pertinent Charter provisions stipulates that:

> 1. Each of the Countries shall promote the realization of fundamental human rights and freedoms, legal certainty and good governance.
> 2. The safeguarding of such rights and freedoms, legal certainty and good governance shall be a Kingdom affair.[269]

The Charter also requires that any amendment, regarding human rights, to a Constitution of one of the countries, must be approved by the Kingdom government.[270]

Regarding the Constitution, despite many amendments, the main structure of the 1814 version has been retained.[271] The Dutch legislature, a bicameral Parliament, can amend the Constitution on condition that, amongst other things, two thirds of both Houses approve.[272]

The first chapter of the Constitution is directly concerned with fundamental rights. It contains 23 Articles that protect a range of rights similar to those within the ECHR. Additionally, provisions which can be classed as fundamental rights are found elsewhere within the Constitution, e.g. Art 114, prohibiting the death penalty.

---

266 Constantijn AJM Kortman and Paul BT Bovend'Ert, *Constitutional Law of the Netherlands* (Kluwer Law International 2007) 30.
267 The Charter for the Kingdom of the Netherlands (Official Translation, Ministry of Foreign Affairs 2002) (hereafter referred to as 'The Charter') Art 5, para 2.
268 *ibid*, para 1.
269 Art 43 The Charter.
270 Art 44(1)(a) The Charter.
271 Kortman and Bovend'Ert (n 266).
272 *ibid.*

In addition to the Parliament and the Monarch, the Constitution also established an important organ of government: the Council of State (*Raad van State*), which is tasked with providing non-binding advice to the legislature.[273]

The Dutch legal system was recognised as monist in nature by the Supreme Court in 1919.[274] The monist structure of the legal system, in relation to international treaties (although not international customary law),[275] is also enshrined in Art 93 of the Constitution:

> Provisions of treaties and of decisions by international organizations, which may be binding on all persons by virtue of their contents shall become binding after they have been published.[276]

B. IMPLEMENTATION

The ECHR and Protocol No 1 thereto were both ratified on 31 August 1954 and, six years later, the Netherlands recognised the right of individuals to lodge complaints under what is now Art 34 ECHR. All of the ECHR Protocols have now been ratified, with the sole exception of Protocol No 7, due to Dutch concerns that the court system might become overburdened.[277]

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

Acts of Parliament, the Constitution and even the Charter must comply with ratified international treaties,[278] including the ECHR. The judiciary may disapply primary legislation, but they are not empowered to strike it down as invalid.[279] This is because, under Art 120 of the Constitution, judicial review of Acts of Parliament is prohibited.[280]

It is the Dutch Parliament that is primarily tasked with ensuring the compliance of its Acts with the ECHR, amending legislation where appropriate in the event of non-compliance. In this regard, the Council of State assists by providing non-binding advice to the Parliament.[281]

Dutch academics have criticised this prohibition of judicial review of Acts of Parliament on the ground that it creates a 'sharp contrast'[282] with the monist provisions (Arts 93 and 94) discussed above, which have been utilised on a frequent basis to disapply Acts of Parliament held to be incompatible with international human rights obligations.[283]

A Royal Commission prepared a draft revision of the Constitution that would have amended Art 120 to exempt human rights from the prohibition on review.[284] However, a government

---

[273] Article 73 Dutch Constitution.
[274] Supreme Court, 3 March 1919, NJ 1919, 371.
[275] For a discussion on this point see EA Alkema, 'Constitutional Law' in JMJ Chorus et al (eds), *Dutch Law* (4th edn, Kluwer Law International 2006) 326.
[276] Article 93 Dutch Constitution.
[277] E de Wet, 'The Reception Process in the Netherlands and Belgium' in H Keller and A Stone Sweet, (eds) *A Europe of Rights: The Impact of the European Court of Human Rights on National Legal Systems* (OUP 2008).
[278] Alkema (n 275) 327.
[279] L F Zwaak 'The Netherlands' in R Blackburn, J. Polakiewicz (eds), *Fundamental Rights in Europe* (OUP 2001) 599.
[280] Article 120 Dutch Constitution.
[281] Article 73 Dutch Constitution.
[282] EA Alkema (n 275) 334.
[283] See J Polak and M Polak, 'Faux Pas ou Pas des Deux? Recent Developments in the Relationship between the Legislature and Judiciary in the Netherlands' (1986) 33 Netherlands International Law Review 371.
[284] EA Alkema (n 275) 334.

memorandum, that preceded an amendment to the Constitution in 1983, rejected the proposal, arguing that such an amendment would politicise the judiciary and reduce the legal certainty of Acts of Parliament.[285]

Under Dutch domestic case-law there are two essential requirements before the judiciary can disapply primary law in light of treaties:

1. The parties to the treaty must have intended to create enforceable rights for individuals.[286]
2. The treaty provision in question must be self-executing, i.e. be capable of judicial enforcement without any further measure.[287]

The first requirement is met in relation to the ECHR and its Protocols,[288] and the second requirement is not problematic in relation to substantive ECHR rights, as all such rights have now acquired self-executing status under Dutch law.[289] The last right to acquire this status was Art 13 (right to a remedy) which, for many years, the Supreme Court had refused to acknowledge as self-executing, ruling that it merely obliged the legislature to provide an effective remedy.[290] By 1994, however, this position was reversed by the Council of State.[291]

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

Until 1980 there was only one case in which the Supreme Court found that a provision of the ECHR was not fully respected.[292] The Court essentially ruled that criminal prosecutions must be suspended until the accused is informed of the nature and cause of the accusation against him, in compliance with Art 6(3)(a) ECHR.[293] Similarly, before 1980, there was only one instance of a District Court disapplying a provision of national legislation that was held to be incompatible with the ECHR.[294]

From the 1980s onwards, however, the Dutch courts have found a greater number of violations and have more frequently disapplied national legislation.[295] Indeed, on occasion the courts have even given precedence to a provision of the ECHR over national law in situations where the ECHR provision, as interpreted by the ECtHR, did not, at the time of the domestic case, require the finding of an infringement.[296] An example was a Supreme Court ruling in 1984, which disapplied a provision of the Dutch Civil Code that required that, in the case of children to a divorce, the Dutch courts should appoint a guardian and a supervising guardian.[297] The court

---

285 *ibid.*
286 For a recent outline of this rule see the Supreme Court, 29 November 2002, NJ 2003, 35.
287 Supreme Court, 30 May 1986, NJ 1986, 688; see also the Council of State, ABBRvS, 15 September 2004, LJN AR, 2181.
288 E de Wet (n 277) 235.
289 *ibid.* 236.
290 Supreme Court, 24 February 1960, NJ 1960, 483; Supreme Court, 18 February 1986, NJ 1987, 62.
291 Council of State AB 1995, 238 (16 June 1994).
292 Supreme Court, 23 April 1974, NJ 1974, 272.
293 *ibid.*
294 District Court of Maastricht, 14 November 1977, (1978) Netherlands Yearbook of International Law 293.
295 LF Zwaak (n 279) 602.
296 *ibid.*
297 Supreme Court, 4 May 1984, NJ 1985, 510.

ruled that this provision implied that parental authority ends upon divorce, which it found to be an infringement of Art 8 ECHR.[298]

The ECHR is viewed by the Dutch courts as 'normal' international law.[299] As such, it has been applied through the monist mechanism contained in Arts 93 and 94 of the Constitution. Consequently, one could argue that, in terms of the hierarchy of norms, the Dutch judiciary views the ECHR as a superior form of law to national law. Indeed, that domestic law has been disapplied on numerous occasions would suggest this to be the case. At the very least, therefore, 'the status of human rights treaties in the Dutch legal order is very high'.[300]

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

The case-law of the ECtHR has, over the past few decades, become substantially influential in the Dutch courts.[301]

In relation to the margin of appreciation, some early Dutch cases were held to be so disproportionate that they fell outside the margin. For example, on 9 May 1983 the Litigation Division (*Afdeling Rechtspraak*) of the Council of State rejected an appeal made against a deportation order that was issued after a divorce from the appellant's Dutch wife.[302] The ECtHR in *Berrehab v The Netherlands*[303] subsequently found a violation of Art 8 ECHR as the order did not pursue a legitimate aim. In particular, the ECtHR held that:

> ...it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.[304]

After *Berrehab*, however, the Dutch courts began to apply the ECtHR's margin of appreciation criteria in a more adept way. One of the most recent and important cases in this respect culminated is *Üner v The Netherlands*,[305] which concerned an exclusion order (for 10 years) that was issued against Mr Üner, a Turkish national. The Netherlands argued that the expulsion of long-term immigrants was not always disproportionate and discriminatory, and that if it were this would entirely eliminate the margin of appreciation enjoyed by the State when assessing individual immigration cases.[306]

Moreover, the Kingdom argued[307] that it had expelled Mr Üner in accordance with the ECtHR's criteria laid down in the earlier case of *Boultif v Switzerland*.[308] Such criteria require that the

---

298 *ibid.*
299 E Mak, 'Report on the Netherlands and Luxembourg' in G Martinico, O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 321.
300 LF Zwaak (n 279) 599.
301 For a discussion see E Mak (n 299) 317–318.
302 For a summary of the facts see *Berrehab v The Netherlands* (1988) 11 EHRR 322 [7]–[13].
303 *ibid.*
304 *ibid* at [29].
305 *Üner v The Netherlands* (2007) 45 EHRR 14.
306 *ibid* at [38].
307 *ibid* at [50].
308 *Boulif v Switzerland* (2001) 33 EHRR 50.

expulsion be in accordance with the law and necessary in a democratic society due to a pressing social need and, in particular, proportionate to the legitimate aim pursued.[309] The Grand Chamber (as well as the Chamber at first hearing) of the ECtHR ruled that the exclusion order did, indeed, come within the margin of appreciation and was not disproportionate.

An important recent example of the ECtHR's influence concerned the implementation of the *Salduz* judgment.[310] On 30 June 2009, the Supreme Court handed down three decisions pertaining to the compatibility of Art 6 ECHR with information obtained from police interrogations which was subsequently used as evidence.[311] In particular, the Supreme Court cited the most relevant considerations of the ECtHR judgment,[312] and stated that:

> The drafting of a general regulation on legal aid with regard to police interrogations – also considering the policy-related, organisational and financial aspects – exceeds the law forming task of the Supreme Court. Nevertheless, the judgement of the ECtHR raises questions which the criminal law judge will have to answer in individual cases.[313]

The Supreme Court went on to rule that, if no opportunity was given to a defendant to consult a lawyer prior to the first police interrogation, this will, in general, exclude from evidence the defendant's statements made before he or she was able to consult a lawyer.[314]

---

309 *ibid* at [42]–[56].
310 *Salduz v Turkey* (2009) 49 EHRR 19.
311 Supreme Court, 30 June 2009, LJN: BH3079, LJN: BH3081 and LJN: BH3084 [2.1].
312 *ibid* at [2.2] and [2.3].
313 *ibid* at [2.4] (translation by Mak (n 299) 318).
314 *ibid* at [2.7.1] and [2.7.2].

9. POLAND

A. PRELIMINARY POINTS

Poland is a democratic republic located in central Europe. Until 1989 Poland was a socialist country; its democratic history is therefore relatively short. Poland's political regime is based on a written Constitution from 1997. Poland is a unitary, as opposed to a federalist, state with a continental system of law (i.e. civil law).

The relationship between domestic and international law was not elaborated explicitly either in the Polish Constitution of 1952 or in the first Constitution enacted after Poland became democratic, the so-called 'Little' Constitution of 1992. However, the current Polish Constitution of 1997 does regulate the relationship between domestic and international law expressly. Art 91(1) reflects a monist approach to this relationship, such that a ratified international treaty becomes a part of the domestic law of Poland and is applicable directly after promulgation, unless its application depends on the enactment of a statute.[315] Further, Art 91(2) provides that an international agreement ratified upon prior consent granted by statute will have precedence over inconsistent domestic law statutes. International agreements concerning human rights fall within this category, made clear in Art 89(1) of the Constitution which enumerates the types of agreements that require prior consent, mentioning agreements that concern freedoms, rights and obligations of citizens. Pre-emption of the ECHR in relation to Polish statutes not reconcilable with the European standards is also stated in the case-law of the Supreme Court.[316]

In its approach to the ECHR, Poland typifies a post-communist, Central European country; its reception of the ECHR and the jurisprudence of the ECtHR is enthusiastic and unquestioned. Poland embraced the ECHR full-heartedly and has followed the ECtHR's case-law closely. Nevertheless, in spite of this very positive approach to the ECHR, Poland remains one of the countries most condemned by the ECtHR for ECHR infringements;[317] there being 87 in 2010.

B. IMPLEMENTATION

Poland signed the ECHR on 26 November 1991. The ECHR was ratified on 19 January 1993 and it entered into force within the Polish legal order on 19 January 1993.[318] The Polish Constitution of 1997 guarantees human rights standards similar to the ones provided under the ECHR; indeed, it is claimed that the standards included in the Polish Constitution are more elaborate. The ECHR rights and freedoms have been further elaborated in statutes, which determine, *inter alia*, the mode of their implementation and enforcement and the conditions for their limitation.

---

[315] The Constitution specifies in Art 89(1) that such a statute is necessary where the treaty concerns: peace, alliances, political or military treaties; freedoms, rights or obligations of citizens, as specified in the Constitution; membership of an international organisation; considerable financial implications imposed on the state; matters regulated by statute or those in respect of which the Constitution requires a statute.

[316] E Skrzyd o-Tefelska, 'Selected Jurisprudence of the Polish Supreme Court and Constitutional Court Involving Questions of Public and Private International Law' (1995/96) The Polish Yearbook of International Law 22, 206 ff.

[317] See Council of Europe, 'Annual Report 2010 of the European Court of Human Rights ' (2011), 150, and "Fundamental Rights: Challenges and Achievements in 2010", 168.

[318] Journal of Laws of 1993, No. 61 item 284.

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

The ECHR is a part of the Polish legal order. Its provisions are not only of guiding value but they are also a direct basis for decisions of the Polish courts[319]. The ECHR has priority over statutes where such statutes are not in accordance with the ECHR.[320] It is below the Constitution in the normative hierarchy but above the statutes of the Parliament. The Constitution is, however, deemed not only to incorporate the ECHR catalogue of rights but to provide a further reaching protection.

Polish courts, in particular the highest judicial authorities i.e. the Supreme Court, High Administrative Court and Constitutional Tribunal,[321] take the ECHR into account on a regular basis in their judicial activity. Polish courts recognise that they are bound by the ECHR and the decisions of ECtHR in a number of ways: they are obliged to take the ECHR into account in rendering their decisions; to interpret Polish law in compliance with the ECHR; and to take concrete steps where infringement has been ascertained.[322]

The ECHR is also taken into account by the legislature. Generally speaking, Polish authorities control conformity of legislation with international obligations, though no specific mechanism was set up for reviewing compliance with the ECHR. It should, however, be underlined that the argument that a draft statute is not in conformity with international human rights standards is a strong one; the Polish legislature has not consciously enacted any law not in conformity with the ECHR.[323]

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

Polish law belongs to the continental legal tradition, which means that there are, formally speaking, no binding judicial precedents.

There are a number of cases decided by the Polish courts in which the ECHR was relied on. Only rarely did the courts consciously analyse the nature of the obligations arising under the ECHR; in most cases the courts simply adopted the interpretation of the ECHR provided by the ECtHR without discussing the former's binding power.[324] There are, however, a number of cases

---

319 Decisions of the Supreme Court in cases nos. V CSK 271/08, III CZP 16/10, II KKN 295/98; see also Polish Constitutional Tribunal in case no. K 14/98.

320 Decisions of the Supreme Court in cases nos. V CSK 271/08, III CZP 16/10, III KKN 414/99, III KK 116/02.

321 In Poland, the administration of justice is implemented by the Supreme Court, common courts, administrative courts and military courts. Three judicial bodies in Poland are particularly important for the reception of the ECHR: the Supreme Court, the High Administrative Court and the Constitutional Tribunal. The Supreme Court supervises common and military courts regarding judgments. It is the highest court of appeal. The High Administrative Court and other administrative courts provide control over the performance of public administration. The Constitutional Tribunal is empowered to review compliance of statutes with constitutional standards and with international agreements (both through so-called abstract review procedure and through individual complaints). Where the Tribunal finds non-compliance, it may declare the non-complying law void.

322 Decisions of the Supreme Court in cases nos. V CSK 271/08, I PZ 5/07.

323 Keller, 'Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland' (2005) 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 283.

324 Decisions of the Supreme Court in cases nos. I PZP 9/92, V CKN 1095/00, II KK 146/03, V KK 140/02, II KKN 313/97, III KKN 143/01, WRN 91/93, IV KK 418/02, III KK 343/02, II KK 298/02, III KKN 361/00, III ARN 49/93, III ARN 23/94; see also decision of the High Administrative Court in case no. V SA 3675/00; see also

where the role of the ECHR in domestic courts was considered directly. Three classes of cases are particularly important here. First, in some early cases the Polish Supreme Court emphasised the interpretative value of the ECHR even before it became officially binding.[325] It also confirmed that the provisions of the ECHR should be interpreted in the light of the ECtHR's jurisprudence. Second, there were those cases in which the Polish Supreme Court emphasised the binding power of the ECHR and held the ECHR to be directly effective and directly applicable by common courts.[326] Finally, there were those cases in which the Polish Supreme Court concluded that the ECHR has priority over statutes of the Polish Parliament where the provisions of such statutes are not in accordance with the ECHR.[327]

An obligation to follow the ECHR is inferred by the courts from the Polish Constitution, in particular Art 9 thereof, which provides that Poland must comply with its international obligations, as well as Art 91, described above in connection with Art 6(1) ECHR.[328] Interestingly, though, in one of the judgments of the Polish Supreme Court, in underlining the binding force of the ECHR, the Court referred not only to the fact that Poland signed the ECHR, but it also argued that it is not in Poland's interest for the decisions of the Polish administration and judiciary to be condemned by the ECtHR and criticised in international legal writing.[329]

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

ECtHR jurisprudence is referred to as an interpretative guidance in determining the scope of human rights in Poland. As human rights enshrined in the ECHR are also provided for in the Polish Constitution, Polish courts most often refer to the Constitution, using the ECtHR's jurisprudence to interpret the human rights enshrined therein. This is so particularly with regards the case-law of the Constitutional Tribunal.[330]

The Polish courts take a position that a country against whom a complaint has been filed is bound by the ruling of the ECtHR and it may not question the finding of infringement.[331] Such binding force concerns not only the courts but also the executive and the judiciary.[332]

---

decisions of the Constitutional Tribunal in cases nos. P 4/01, K 1/98, K 28/97, K 14/96, K 7/01, P 6/01, K 14/98, K 11/98.

325 Decision of the Supreme Court in a case no. I PZP 9/92 (the Supreme Court held that a dismissal because of somebody's political or religious beliefs is an infringement of Arts 9 and 10 ECHR). Another important early decision was made in 1995, in which the Polish Supreme Court used the ECHR as the source for construing the legal norm disallowing extradition of the individual. One of the first cases in which the Supreme Court referred to ECHR standards was the case of Mr and Ms Mandugequi. They were arrested in Poland and China requested their extradition claiming that they committed economic crimes. The Supreme Court declared that they cannot be extradited because it may lead to their torture in China. Therefore, extradition was found impossible. See the decision of the Supreme Court of 29 July 1997, no. II KKN 313/97.

326 Decisions of the Supreme Court in cases nos. V CSK 271/08, III CZP 16/10, II KKN 295/98; see also Polish Constitutional Tribunal in case no. K 14/98.

327 Decision of the Supreme Court in cases nos. V CSK 271/08, III CZP 16/10, III KKN 414/99, III KK 116/02.

328 Decisions of the Supreme Court in cases nos. V CSK 271/08 and I PZ 5/07.

329 Decision of the Supreme Court is case no. III ARN 75/94.

330 The Tribunal prefers to ground a ruling on the Polish Constitution rather than on the ECHR and treats the ECHR as guiding the interpretation of the rights included in the Constitution. The Tribunal takes an attitude that the Polish Constitution reflects the provisions of the ECHR, though the ECHR and the Constitution should be read autonomously; see, e.g., case no. K 7/01.

331 Decision of the Supreme Court in case no. V CSK 271/08.

332 Decisions of the Supreme Court in cases nos. V CSK 271/08 and I PZ 5/07.

However, at times, Polish courts, rather than using the ECHR to interpret Polish law (especially the Constitution), act directly on the basis of the ECHR, determining the breach of the ECHR itself.333 This is possible because, as explained, the ECHR forms part of domestic Polish law, and is thus directly applicable by domestic courts and of higher legal power than the statutes.

Since Poland ratified the ECHR, Polish courts have embraced the jurisdiction of the ECtHR relatively enthusiastically. In dealing with human rights issues (especially in penal cases) Polish courts regularly refer to the case-law of the ECtHR. The case-law of the ECtHR is used to interpret basic rights included in the domestic constitutional catalogue, which reflects the ECHR. The ECHR is present especially in the rulings of the highest judicial instances, and the awareness as regards the ECHR and the case-law of the ECtHR is also increasing within lower courts.

Recently, one of the most important judgments of the Polish courts regarding the ECHR concerned a controversial issue of whether a decision of the ECtHR holding there to be a breach of the ECHR required re-opening of civil proceedings. While this issue has not been questioned in criminal and labour law cases (where the re-opening of proceedings is possible), it was subject to fierce debates and divergent court rulings in the Supreme Court regarding civil law cases.[334] Finally, to solve this matter, the Supreme Court issued a resolution affirming that determination of the breach of the ECHR by the ECtHR does not in itself require re-opening of civil proceedings.[335] It is questionable whether this decision allows the courts to provide adequate remedies to victims of ECHR violations.

---

333 See, e.g., decisions of the Constitutional Tribunal in cases nos. K 1/98 and K 7/01.

334 See, e.g., the divergent rulings of the Supreme Court in cases nos. V CO 16/05 and I P 5/07.

335 On 30 November 2010 the Supreme Court issued a resolution of 7 judges concerning the possibility of re-opening civil proceedings after the judgment of the ECHR; see case no. III CZP 16/10.

10. SERBIA

A. PRELIMINARY POINTS

Following the breakup of the Socialist Federal Republic of Yugoslavia and subsequently the State Union of Serbia and Montenegro, the Republic of Serbia adopted its Constitution in 2006, which has the status of supreme law.[336] Art 194 of the Constitution is generally perceived as adopting a monist approach to international law.

It should be noted that the legal system in Serbia, like in all other countries with the continental legal tradition, is based on statute law. Case-law of the courts of general and special jurisdiction is not formally considered to be a source of law. However, jurisprudence of the higher courts and especially the Supreme Court of Cassation has a significant influence on the uniform application of the law by the lower courts.

B. IMPLEMENTATION

The Parliament of the (former) State Union of Serbia and Montenegro signed and ratified the ECHR in 2003,[337] which entered into force in March 2004. The ECHR can be directly applied by Serbian courts.[338]

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

The Constitution occupies the highest point on the normative ladder, with domestic statutes, by-laws and other general acts operating below. Ratified international treaties, including the ECHR, and generally accepted rules of international law operate between these two rungs, above statutes but below the Constitution. Moreover, Art 18 of the Constitution explicitly stipulates that:

> [The] Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws ....'

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

The Serbian Constitutional Court is empowered to assess the compliance of laws and other general acts with the Constitution, generally accepted rules of international law and ratified international treaties, including the ECHR (abstract legal control).[339] Laws or other general acts which are found to be inconsistent with the Constitution or applicable international law cease to be effective.[340]

Not only is the Constitutional Court empowered to strike down a statute which is found to be incompatible with the Constitution and/or applicable international law but it also has the power to prevent a bill passed by the Parliament from entering into force after assessing its

---

336 Art 194 Serbian Constitution.
337 Official Gazette SCG – International treaties No 9/01 from 26.12.2003.
338 See for example Rev. 877/07 where the Supreme Court upheld a lower court's judgment finding a violation of Art 5(4) of the ECHR.
339 Art 167 Serbian Constitution.
340 Art 168 Serbian Constitution.

constitutionality at the request of one third of parliamentarians.[341] The Court may also act on its own initiative (*ex officio*) as well as on the initiative of the citizens and other legal persons (although in the latter case it has no obligation to initiate the proceedings). In courts of general or special jurisdiction, where the issue of compliance of domestic law with the Constitution or international law arises, they must adjourn the proceedings and initiate a procedure for assessing the constitutionality or legality of that act before the Constitutional Court.[342]

Individuals, they may only approach the Court by means of constitutional appeal if their fundamental rights and freedoms protected by the Constitution (but without mentioning the international legal instruments) are said to be violated by state authorities and if other legal remedies for their protection have already been applied or not specified.[343] The constitutional appeal is considered to be 'the most fortunate medium for the interaction between the national constitutional law and the law of the European Court of Human Rights.'[344]

Despite the undoubtedly dominant position of international law in the hierarchy of legal acts, some ambiguity is present in Art 194 which requires that ratified international treaties be in compliance with the Constitution, thus, as noted above, establishing a kind of supremacy of the national legal order. Nevertheless, the Constitutional Court has not yet found a ratified treaty to be inconsistent with the Constitution.

The Supreme Court of Cassation (SCC) has legislative power to issue general legal positions[345] - interpretative guidelines - on the preferable approach to interpretation and the application of the law without reference to any particular case. Although not formally binding on the lower courts (they are binding for the chambers of the SCC) these general legal positions have a strong impact on the uniform application of the law. The SCC has recently adopted an interesting general legal position[346] following the ECtHR's judgments in *Kacapor and others v Serbia*[347], *Vlahovic v Serbia*[348] and *Crnisanin and others v Serbia.*[349] In these judgments the ECtHR declared that the execution of court judgmentsa court must be regarded as an integral part of the 'trial' for the purposes of Art 6 ECHR and that the State's failure to enforce final judgments constituted an interference with Art 1 right to property. The SCC subsequently issued the general legal position in which it clearly stated that socio-economic problems or a lack of resources could not justify the State's failure to fulfil its obligations arising from the ECHR.

In addition, following the ECtHR's judgments in *Lepojic v Serbia*[350] and *Filipovic v Serbia*,[351] the SCC issued a general legal position,[352] urging the courts to show special consideration when adjudicating on the crimes of insult and defamation of public figures. The SCC noted that the

---

341 Art 167 Serbian Constitution.
342 The Law on the Constitutional Court, Official Gazette of RS No 109/07, Art 63.
343 Art 170 Serbian Constitution.
344 B Zupancic, 'Constitutional Law and Jurisprudence of the ECHR' (2001) 2 German Law Journal.
345 The Organization of the Courts Act, Official Gazette of the Republic of Serbia No. 116/08, Arts 44–45.
346 General Legal Position on the Enforcement Proceedings, The Supreme Court of Cassation, 25 March 2011 available at <http://www.vk.sud.rs/pravno-shvatanje-sprovodjenje-izvrsenja.html>, accessed on 25 April 2011.
347 Application nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06.
348 Application no. 4269/04.
349 Application nos. 35835/05, 43548/05, 43569/05 and 36986/06.
350 Application no. 13909/05.
351 Application no. 27935/05.
352 General Legal Position of the Criminal Chamber, the Supreme Court of Cassation, 18 December 2008 available at <http://www.bgcentar.org.rs/index.php?option=com_content&view=Article&id=512%3Apraksa-dravnihorgana&catid=83&Itemid=129>, accessed on 25 April 2011.

scope of an acceptable critique needs to be wider when public figures are concerned so as to protect citizens' rights to express their attitudes towards public authorities.

The above cases illustrate that, although general courts have no power to interfere with legislation adopted by the Parliament, they nevertheless seem to be willing to disregard the provisions of domestic law where the ECtHR has found them to be in contradiction to the jurisprudence of the ECtHR.

On the other hand, the Constitutional Court showed a notable enthusiasm and little self-restraint when both assessing the compliance of national legislation with human rights requirements and scrutinising the decisions of the judiciary and other public authorities. Given the fact that the Court is entitled to act *proprio motu,* the extent to which it is able to engage in the scrutiny of the other branches of government is not constrained by the wording of the Constitution but depends only upon its own perception of its proper role.

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

The existence of directly applicable and judicially enforceable domestic rights guarantees, with which judges are familiar, has meant that they primarily rely on these rights, using ECtHR jurisprudence to reinforce their positions.

However, the Constitutional Court has been often been strongly influenced by the ECtHR's jurisprudence, particularly in cases involving freedom of expression,[353] the right to a prompt assessment of complaints against detention decisions,[354] the presumption of innocence,[355] or of the right to trial within a reasonable time.[356]

The question of how to reconcile this reliance on ECtHR jurisprudence with national sovereignty has not raised particular concerns in Serbia as the Constitution clearly gives primacy to international treaties over the legislation. Moreover, the Constitution empowers the Constitutional Court to assess the constitutionality and compliance, not only of domestic statutes, but also any general and concrete legal act, with human rights standards.

---

[353] See Uz 290/2007, Official Gazette No. 15, 19 March 2010 where the Court relied on the ECtHR's judgments in *Lepojic* and *Filipovic* in overturning the conviction of appellants who had been found guilty of defaming civil servants.
[354] Uz 2129/2009 Official Gazette RS No 35, 26 May 2010; Uz 893/2008 Official Gazette No 69, 24 September 2010.
[355] Uz 1600/2009 Official Gazette RS No 69, 24 September 2010.
[356] Uz 135/2009 Official Gazette RS No 21, 29 March 201.

11. Spain

A. Preliminary Points

Spain is a relatively young democracy in Western Europe and one of the later countries in the region to join the Council of Europe and the European Union, in 1977 and 1986 respectively. The current Constitution was approved by the Spanish people by referendum and entered into force on 29 December 1978. This was an important step in the country's transition to liberal democracy following one of the longest fascist dictatorships in Europe, which lasted from the end of the Spanish Civil War in 1939 until the death of Franco in November 1975.

Spain is a constitutional monarchy under the head of State, King Juan Carlos I, with a bicameral Parliament consisting of the Congress of Deputies (*Congreso de los Diputados*) and the Senate (*Senado*). Its legal system is in the civil tradition with codified laws. Spain signed the ECHR upon joining the Council of Europe in 1977 and ratified it on 4 October 1979. It has also signed and ratified all optional protocols to the ECHR, with the exception of Protocols 9 and 10. Spain's rate of condemnation by the ECtHR is relatively low, at a total of 56 unfavourable judgments by 2010, ranking it behind Greece (541) and Portugal (138), who both ratified the ECHR at approximately the same time as Spain, in 1974 and 1978 respectively.

Spain takes a monist approach to the incorporation of international treaties, including the ECHR, into domestic law.

B. Implementation

The ECHR became part of Spanish law upon its publication in the State Official Bulletin on 4 October 1979. The ratification of treaties which are political in nature and affect fundamental rights and liberties, such as the ECHR, requires the agreement of both chambers of the Spanish Parliament sitting at the request of the Executive.[357]

C. Hierarchy Between Domestic Law and the ECHR

Notwithstanding the monist approach taken by Spain towards the relationship between international and domestic law, the Spanish Constitution remains the supreme norm in the Spanish legal order, and the Constitution must be amended before any treaty that conflicts with its provisions may be ratified.[358] Furthermore, the Constitutional Court retains the power to declare treaties, or part of them, unconstitutional, even following ratification.[359] However, treaties do seem to enjoy a superior position to *ordinary* Spanish law, as they have the power to abrogate, modify or suspend ordinary law, while the latter does not have such power over treaties. Marino-Blanco argues, however, that this apparent superiority of treaty law may not in fact derive from the hierarchy of norms but rather from the principle of *pacta sunt servanda*, which prevents the unilateral modification of the terms or obligations assumed under a treaty.[360]

---

[357] C Villiers, *The Spanish Legal Tradition* (Dartmouth 1999) 50.
[358] *ibid.*
[359] *ibid.*
[360] E Merino-Blanco, *Spanish Law and Legal System* (2nd edn, Sweet and Maxwell 2006) 36–37.

D. The Approach of Domestic Courts in Reviewing Laws in Light of the ECHR

As noted, the 1978 Constitution is at the summit of the Spanish hierarchy of norms. It is not only a source of production of law but also a direct source of law and rights.[361] Any laws that seem to conflict with it may be referred to the Spanish Constitutional Court (*Tribunal Constitucional*) and struck down if held to be unconstitutional, even following promulgation. The Constitution also presents a framework for the interpretation of laws which must be construed in accordance with its provisions.[362]

Laws judged to conflict with the ECHR are inapplicable in the lower courts, but are not invalid.[363] The Constitutional Court has repeatedly rejected human rights treaties as an autonomous parameter for assessing the validity of domestic legislation, but the Court agrees that, due to Art 10(2) of the Constitution, set out below, the ECHR has a special interpretive status in Spanish law.[364]

The Constitutional Court is the highest level interpreter of the Constitution and the guarantor of the fundamental rights and liberties contained within it.[365] These rights, set out in Arts 14–29, are protected by the highest legal guarantees and have a direct legal and binding effect, including on all public bodies.[366] Citizens are granted direct access to the Constitutional Court to enforce these rights in an action known as the *recurso de amparo*.[367] Constitutional rights, set out in Arts 30–38 of the Constitution, have a similar status to fundamental rights but cannot be the subject of *amparo*. Most commentators believe the rights protected in the 1978 Constitution to be broader than those afforded by the ECHR.[368] The relatively low number of cases brought against Spain at the ECtHR may be attributed to this high level of domestic protection and the *recurso de amparo*, which must generally be exhausted before a claimant can proceed to the ECtHR.[369] Most human rights violations are addressed at a domestic level without the need for recourse to the ECtHR.[370]

Moreover, it must be noted that the ECHR, together with other international human rights instruments, has a special status in Spanish law under Art 10(2) of the Constitution, which states:

> The norms relative to basic rights and liberties which are recognised by the constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.[371]

---

361 Villiers (n 357) 26.
362 *ibid.*
363 A Torres Pérez, 'Report on Spain' in G Martinico, O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 460.
364 *ibid.* 461.
365 *ibid.*
366 *ibid.*
367 *ibid.*
368 AZ Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Clarendon Press 1983) 161.
369 M Candela Soriano, 'The Reception Process in Spain and Italy' in H Keller and A Stone Sweet (eds) *A Europe of Rights: The Impact of the European Court of Human Rights on National Legal Systems* (Oxford University Press 2008) 486.
370 *ibid.*
371 Translation from Spanish cited in AZ Drzemczewski (n 368) 160.

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

The Spanish Constitutional Court is generally considered to be one of the most faithful followers of ECtHR jurisprudence,[372] which it considers to be 'not only an interpretive criterion for applying the constitutional provisions protecting fundamental rights' but also 'of direct application' in the Spanish legal system.[373] The Constitutional Court and legislature hasten to comply with ECtHR judgments, including those against other Council of Europe members.[374] Despite Spain's eagerness to please, however, there is potential for conflict as the Constitutional Court struggles for greater autonomy, demonstrated by the following brief study of the important case-law in the region.

In the case of *Barbéra, Messegué and Jabardo v Spain*[375] (*Barbéra I*), three men convicted of the assassination of Catalan businessman José María Bultó alleged that their criminal trial had violated their right to a fair and public hearing under Art 6(1) ECHR. Their *amparo* action had been rejected by the Spanish Constitutional Court as unfounded and they sought the vindication of their rights before the ECtHR. The ECtHR ruled in favour of the claimants, holding that there had been a violation of Art 6(1).

This judgment raised a problem for the Spanish legal order as it potentially invalidated the decisions passed by the initial criminal trial before the National Court, the decision of the Supreme Court on appeal and the Constitutional Court's rejection of the *amparo* action.[376] Under Spanish law, the judgments of the Constitutional Court were considered 'infallible' both judicially and legislatively, and no statutory provisions existed for their revision or annulment.[377] This presented a difficulty for the implementation of ECtHR jurisprudence at the domestic level as the Spanish system did not allow for a remedy in the form of an annulment of all decisions and a retrial on the facts.[378] This conundrum also exposed the potential for conflict between the supposed superiority of Spanish Constitutional Court decisions and obedience to the ECtHR's interpretation of the ECHR.

In a decision delivered on 16 December 1991, the Spanish Constitutional Court in plenary session held that the absence of legislation was not an excuse for allowing a breach of a fundamental right to persist, as Art 6(1) was practically identical to Art 24(2) of the Spanish Constitution.[379] The Constitutional Court invalidated the decisions passed by the Supreme Court and the National Court to allow for a full retrial. The accused were acquitted due to lack of evidence.[380] In *Barbéra II*,[381] however, the ECtHR held that quashing the criminal sentences was not enough to compensate for the violation of the claimants' rights and Spain would also have to pay just satisfaction and the costs of the procedure.[382]

---

[372] N Krisch, 'The Open Architecture of European Human Rights Law' (LSE Law, Society, Economy Working Papers 11/2007) 6, available at <http://eprints.lse.ac.uk/24621/1/WPS11-2007Krisch.pdf>.
[373] Spanish Constitutional Court in STC 303/1993, FJ8, quoted in A Torres Pérez (n 360) 461.
[374] *ibid.*
[375] 6 December 1988, Series A, vol. 146
[376] C Shutte, 'The Execution of European Court of Human Rights Judgments in Spain' in T Barkhuysen et al (eds), *The Execution Of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Martinus Nijhoff 1999) 150.
[377] *ibid.* 152.
[378] *ibid.*
[379] STC 245/1991.
[380] C Shutte (n 376) 156.
[381] Series A, vol. 285-C, 13th June 1994.
[382] C Shutte (n 376) 156.

A dissenting judge in the Constitutional Court's judgment of 16 December 1991 reproached the decision for transforming the ECtHR into a sort of 'constitutional supercassation' and the Constitutional Court into an 'executing organ' of the ECtHR.[383] The decision was also criticised by academic commentators for tying constitutional rights too closely to the interpretation of the ECtHR.[384] The Constitutional Court subsequently departed from this position,[385] in a decision made in response to the ECtHR's judgment in the 1992 *Ruiz-Mateos* case.[386] The Constitutional Court held that its judgments were constitutionally and statutorily irrevocable[387] and that it was in no way subordinate to the ECtHR as the two courts operated in distinct legal orders. Accordingly, the Constitutional Court was subject only to the Spanish Constitution and enjoyed a freedom of interpretation.[388] Thus, this case, and the subsequent decisions affirming it,[389] marked an important departure by Spain from its deference to the ECtHR and an attempt to reaffirm the supremacy of the Spanish Constitutional Court.[390]

The Spanish Constitutional Court's discretion was also expanded in a second series of cases concerning environmental pollution. In a decision[391] delivered following the ECtHR's judgment in the *López Ostra* case,[392] the Constitutional Court resisted the ECtHR's extension of the right to privacy and a home to include the right not to be disturbed by noise and air pollution. In *Moreno Gómez,*[393] the Constitutional Court affirmed that the right to privacy and a home in the Spanish Constitution could be affected by environmental factors, including high noise levels, but it did not fully subscribe to the ECtHR's approach.[394] Contrary to its previous decisions, it held that Art 10(2) of the Spanish Constitution did not demand a 'literal translation' of ECtHR decisions and pointed out 'normative differences' between the ECHR and the Spanish Constitution. It set a high threshold for the violation of the right to privacy and a home, holding that in this case the threshold had not been reached.[395] In contrast, when the case reached the ECtHR it was unanimously held that there had been a violation of the claimant's fundamental rights.[396] This decision marks a further departure from Spanish conformity with the decisions of the ECtHR towards greater autonomy for the domestic legal order.

As the above outline demonstrates, the ECHR enjoys a high position in the Spanish legal order, and the legislature and judiciary have been willing to implement ECtHR jurisprudence at the domestic level. However, the Spanish Constitution remains at the summit of the hierarchy of norms and the dominance of the Spanish Constitutional Court has been affirmed. The Constitutional Court's 1992 decision views the ECHR as part of domestic law but confers a margin of appreciation on Spanish courts in its application. Thus, ECtHR jurisprudence appears to be more of an aid to the interpretation of the fundamental rights protected by Spanish law, of which the ECHR is a part, than binding law. The ECHR does not form part of the Spanish Constitution, although according to Art 10(2) the provisions of the latter must be interpreted in

---

383 *ibid.* 158.
384 N Krisch (n 372) 8.
385 In *amparo* appeals 2291/1993 and 2292/1993.
386 21 February 1992.
387 C Shutte (n 376) 160.
388 N Krisch (n 372) 8.
389 ATC 96/2001 24 April 2001, STC 313/2005 of 12 December 2005, FJ 3, STC 197/2006 of 3 July 2006, cited in N Krisch (n 406) 8.
390 N Krisch (n 372) 8.
391 STC 199/1996 of 3 December 1996, FJ 2-3, 6.
392 *López Ostra v Spain* (ECtHR, 9 December 1994).
393 STC 119/2001 of 24 May 2005, FJ 5.
394 N Krisch (n 372) 8–9.
395 *ibid.* 9.
396 *Moreno Gómez v Spain* (ECtHR, 16 November 2004).

conformity with the former. Spain's initial enthusiasm for the jurisprudence of the ECtHR in the early years of its democratic development seems to have been tempered in more recent times by considerations of national autonomy. The irrevocability of the Constitutional Court's decisions is further evidence of the supremacy of domestic courts in the Spanish legal order, despite deference to the jurisprudence of the ECtHR.

Regarding the question of legislative sovereignty and its relationship with the ECHR system, there have been no cases directly addressing this, but the domestic courts' general approach to the ECHR and ECtHR jurisprudence discussed above may be instructive. Ordinary laws do not affect international agreements, but such agreements can modify ordinary laws, even those promulgated after ratification. As noted above, laws judged to be in conflict with the ECHR are inapplicable in the lower courts, but are not invalid.[397] The Constitutional Court rejects human rights treaties as an autonomous parameter for assessing the validity of domestic legislation, but the Court accepts that Art 10(2) of the Constitution gives the ECHR special interpretive status in Spanish law.[398] It may, therefore, be taken into account in judging the constitutionality of laws, even though their conventionality is not directly controllable. The judgments of the Constitutional Court in response to *Ruiz-Mateos* and *Lopez Ostra* demonstrate an attempt to claw back national autonomy, even if only in relation to the supremacy of the Constitutional Court. Art 10(2) and the closeness of constitutional provisions to the ECHR make direct conflict between the Constitution and the ECHR unlikely, as laws that violate the ECHR are apt to be unconstitutional. There is room for conflict with the jurisprudence of the ECtHR, however, if the Constitutional Court disagrees with the former's construction of the ECHR and upholds the constitutionality of a domestic law. Until now this conflict has been relatively low-key, and it remains to be seen what will happen if the Spanish courts and the ECtHR meet head-on in a more decisive case.

---

[397] A Torres Pérez (n 363) 460.
[398] *ibid.* 461.

12. UNITED KINGDOM

A. PRELIMINARY POINTS

As the UK has not suffered conquest, the loss of a major war, or revolution since written constitutions have become commonplace, it is one of only a handful of states which retain an uncodified constitution.[399] This is not to say that the UK Constitution is unwritten, as large parts of it can be found in statutes, but rather it reflects the fact that much of it is not contained within a single document that has been entrenched against easy amendment or repeal.

The UK's relationship with public international law is dualist, such that international law is only part of UK law once it is incorporated into national law. Unlike most other States, where because ratification is viewed as a legislative act a treaty becomes effective in municipal law and international law simultaneously, in the UK a treaty 'has no effect in municipal law until an Act of Parliament is passed to give effect to it'.[400]

B. IMPLEMENTATION

The ECHR was implemented domestically by the Human Rights Act 1998 (HRA). This legislation allows British litigants to rely on most of the rights and freedoms set out in the ECHR in domestic courts (provided that the other party to the case is a public authority[401]),[402] and therefore removed the need for litigants to apply at first instance to the ECtHR. As compared to other dualist systems, for instance Finland, national incorporation came quite late for the UK.

For present purposes, the key provisions of the HRA are ss2, 3, and 4:

- HRA, s2, requires municipal courts to take any relevant case-law of the European Commission on Human Rights (now defunct) and the ECtHR into account when making a decision.
- Under HRA, s3, the domestic courts have an obligation to read 'primary legislation and subordinate legislation ... in a way which is compatible with ... Convention [ECHR] rights' so far as it is possible to do so.
- Under HRA, s4, a domestic court may make a declaration of incompatibility whenever it is impossible to reconcile a provision with the ECHR.

C. HIERARCHY BETWEEN DOMESTIC LAW AND THE ECHR

The approach taken to the hierarchy in the UK between international law (i.e. the ECHR) and domestic law is best illustrated by reference to the power of the domestic courts to apply the ECHR via the HRA.

Although the HRA gave domestic courts the power to review domestic law in light of ECHR rights, it did not drastically alter the constitutional position of the courts. Strictly speaking, the courts remain subordinate to the legislature. While there may now be a strong presumption that

---

399 C R Munro, *Studies in Constitutional Law* (2nd edn, OUP 2005) 4.

400 P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn rev, Routledge 1997) 66.

401 S6 HRA.

402 S1 HRA sets out the rights and freedoms that have been incorporated. It lists a) Arts 2 to 12 and 14 ECHR; b) Arts 1 to 3 of the First Protocol; and c) Art 1 of the Thirteenth Protocol. All must be read with Arts 16 to 18 ECHR. For more information, see H Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge Cavendish 2007) 165–66.

the will of the legislature is for ECHR compliance as a result of s3 HRA, if a provision cannot be reconciled with the ECHR and ECtHR jurisprudence there is little that the courts can do. The courts have no power to disapply or strike down a national law which they believe contravenes the ECHR (unless the legislation has been enacted by a devolved body[403]), and a declaration of incompatibility under s4 HRA only serves to highlight that a court believes a provision cannot be reconciled with the ECHR, rather than to impede the provision's operation.[404] Consequently, notwithstanding the s3 HRA interpretive obligation, where domestic law conflicts with the ECHR the former prevails until the UK Parliament amends it. Indeed, Parliament retains a power to legislate contrary to the ECHR when it sees fit under s19(1)(b) HRA. S 4 declarations of incompatibility are unique to the United Kingdom and not employed in any other legal system analysed in this report. They arise because of the constitutional arrangement in the United Kingdom and are therefore an important tool for the judiciary within the UK's HRA legislative regime.

D. THE APPROACH OF DOMESTIC COURTS IN REVIEWING LAWS IN LIGHT OF THE ECHR

It was noted above that UK courts have no power to disapply or strike down domestic legislation that is inconsistent with the ECHR. However, the HRA does give the courts an important interpretive function. The precise role of domestic courts with respect to human rights protection in the UK can be summarised by reference to three cases: *Re S and Re W (Care Orders),*[405] *Ghaidan v Mendoza*,[406] and R *(On the application of Anderson) v Secretary of State for the Home Department.*[407]

In *Re S and Re W* Lord Nicholls noted that the enactment of the HRA brought with it a requirement to delineate between judicial interpretation and legislating:[408]

> In applying section 3 [of the HRA] courts must be ever mindful of ... [its] ... outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.[409]

The minutiae of this boundary are still being worked out, but a basic picture is beginning to become clear. Perhaps the biggest strides forward were made in *Ghaidan*, where the House of Lords expanded on the domestic courts' interpretative obligation under s3 HRA. It was stated that there is a bias in favour of interpreting a statute compatibly with the ECHR (as opposed to issuing a declaration of incompatibility), and so domestic courts should not feel limited by conventional methods of statutory interpretation:

---

403 S3(2)(c) HRA. For a case concerning subordinate legislation, see *Re P and others* [2008] UKHL 38, [2009] 1 AC 173.
404 S4(6) HRA.
405 [2002] UKHL 10, [2002] 2 AC 291.
406 [2004] UKHL 30, [2004] 3 WLR 113.
407 [2002] UKHL 46, [2003] 1 AC 837.
408 See also, *Poplar Housing and Regeneration Community Association Ltd and Secretary of State for the Environment v Donoghue* [2001] EWCA Civ 595, [2001] 3 WLR 183 [75]–[76] (Lord Woolf); *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545 [80] (Lord Hope).
409 *Re S and Re W* (n 436) [39] (Lord Nicholls).

> … the interpretative obligation decreed by s3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.[410]

However, that was not to say the power was completely unlimited:

> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of the legislation. That would be to cross the constitutional boundary s3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of s3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble friend Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that s3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention compliant, and the choice may involve issues calling for legislative deliberation.[411]

In *Anderson*, the very outermost boundary of interpretation was clarified. It was stated that where a pervasive feature of the legislation was incompatible with the ECHR, a declaration of incompatibility must be issued because the use of s3 HRA would alter the nature of the legislation and by doing that the judiciary would cross the constitutional divide between interpreting and legislating.

E. DOMESTIC COURTS AND ECTHR JURISPRUDENCE

While on the international law plane it may be possible to describe the relationship between States and the ECtHR as hierarchical, with the ECtHR at the top, it is clear that the domestic understanding of the relationship is quite different.[412] A legal hierarchy of this sort cannot be said to exist between the UK and the ECtHR for a number of reasons.

First, decisions of the ECtHR are not binding on domestic courts and do not automatically override domestic legislation or precedent.[413] S2 HRA makes it clear that domestic courts only

---

[410] *Ghaidan* (n 440) [30] (Lord Nicholls).
[411] *ibid.* [33] (Lord Nicholls).
[412] As recently as 15 December 2010 the Lord Chief Justice, Lord Judge, said that '[t]he way in which the Courts will decide they should take account of Strasbourg [ECtHR] jurisprudence seems to me to be an open question.' (House of Lords Constitution Committee, Interview with Igor Judge, Lord Chief Justice of England and Wales (15 December 2010), available at <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=7287> accessed 5 April 2011). The findings of Dr Baak Çali takes this further and suggests that very few courts see themselves as subordinate to the ECtHR: B Çali, *Perceptions of the Authority of the European Court of Human Rights amongst Apex Court Judges in the UK, Germany, Ireland, Turkey and Bulgaria* (2011) available at <http://ecthrproject.files.wordpress.com/2011/04/domestic-judges-ecthr-summary-findings.pdf> accessed 9 April 2011.
[413] See, e.g., *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [26] (Lord Slynn); *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [18] (Lord Bingham).

have to take ECtHR jurisprudence *into account* and, therefore, where it is felt that case-law should be ignored, the courts are free to do so.

Second, although primacy has been given to the ECHR through the interpretive obligation in s3 HRA, the absence of a power to strike down legislation where it cannot be reconciled with the ECHR demonstrates that the ECtHR has not been given a superior status to the UK Parliament. In fact, it suggests that if a hierarchy exists, the institution at the top is the UK Parliament because legislation remains active until Parliament decides otherwise.

Third, as noted previously, Parliament retains a power to legislate contrary to the ECHR when it sees fit under s19(1)(b) HRA.

Finally, domestic courts only apply the ECHR in domestic cases because they have been told to do so by Parliament, not because they are required to do so as a consequence of the UK's ratification of the ECHR. Indeed, this is a result of the UK's dualist, as opposed to monist approach to the relationship between domestic and international law.

It is important to understand the precise circumstances in which domestic courts will choose to ignore ECtHR jurisprudence. Having the power to disregard ECtHR case law does not mean decisions of the ECtHR are routinely discarded however. For the most part, domestic courts apply decisions of the ECtHR, even where it is felt that the ECtHR has made a mistake. This is clear from Lord Hoffmann's speech in *AF v Secretary of State for the Home Department and another*:[414]

> ... the judgment of the European Court of Human Rights ("ECtHR") in A v United Kingdom (2009) 49 EHRR 625 requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism.[415]

It is only when the domestic court feels there is a good reason to depart from a decision that it will do so, as the Supreme Court decisions in *Cadder v Her Majesty's Advocate*[416] and *R v Horncastle and others*[417] demonstrate.[418]

In *Cadder*, the Supreme Court was asked whether a person detained by the police in Scotland on suspicion of having committed an offence has the right of access to a solicitor prior to being interviewed. Despite the far reaching implications of its decision,[419] it was decided that the Scottish procedure amounted to a breach of the ECHR because: a) no attempt had been made to mitigate its severity in line with Art 6; and b) ECtHR jurisprudence clearly established that, unless there are compelling reasons which prevent it, a detainee must have access to a lawyer from the time of the first interview.[420]

---

414 [2009] UKHL 28, [2010] 2 AC 269.

415 *ibid* [70].

416 [2010] UKSC 43, [2010] WLR 268.

417 The research of Dr Basak Çali suggests that a good reason is most likely to be based on a misunderstanding of the domestic law or legal system, a misunderstanding of the facts of a cases by the ECtHR or the lack of good, clear reasoning by the ECtHR: B Çali (n 412).

418 For discussion, see E Bjorge, 'Parochialism and Internationalism in the Supreme Court: Horncastle and Cadder' [2011] PL 475.

419 An estimated 76,000 cases were being held in the system pending a decision in this appeal.

420 *Salduz v Turkey* (2008) 49 EHRR 421.

In *Horncastle*, however, when the Supreme Court was asked whether a conviction based solely or to a decisive extent on the statement of a witness whom the defendant had had no chance of cross-examining infringed Art 6 ECHR, the Court chose to ignore ECtHR jurisprudence. This was because domestic courts have long sought to ensure that any use of hearsay evidence is closely monitored and does not lead to an unfair trial.[421] Moreover, the reasoning of the ECtHR was considered by the Supreme Court to be much less clear and authoritative than it often is.[422]

It is difficult to say with certainty what these judgments tell us about the willingness of the UK domestic courts to apply judgments in which the UK is a party to litigation and judgments in which the UK is not a party. In *Horncastle,* the Supreme Court ignored the ECtHR case law because it was not sufficiently sensitive to the domestic legal system. It therefore appears that when assessing whether the domestic court should take into account an ECtHR judgment, the UK position is that the domestic court should not consider whether the UK was a party to the litigation, but instead consider whether the judgment is one which fits suitably within the domestic legal system. On the basis of *Horncastle* therefore, the essence of any guidance or rule as to when a domestic court should apply ECtHR judgments centres on a judgment's suitability for the UK domestic legal system.

The *AF* judgment does however need to be considered in view of the above conclusions. In *AF* Lord Hoffmann stated that the court was bound to apply the ECtHR decision of *A v UK*. The question which immediately arises therefore is why the court was bound to follow the *A* judgment. There is no clear answer to this question, however, it should be noted that when making this statement Lord Hoffmann refers to the UK's international obligations rather than its domestic obligations under s 2 HRA.

It is possible that the question about the relationship between the domestic courts and the ECtHR will be before the Supreme Court in the near future. It is further possible that light will be shed on the circumstances in which UK domestic courts will apply cases to which it was a party to and those to which it was not a party. The recent decision of *Al-Skeini* and *Al-Jedda*,[423] decided in July 2011, which reversed the decisions of the Supreme Court have implications for Supreme Court judgments such as *Smith*.[424] These are yet to be resolved. The decision of the Grand Chamber in *Al-Khawaja*[425] is due very soon and, should it reaffirm the decision of the Chamber (which overturned the decision of the Court of Appeal in *R v Al-Khawaja (Imad)*[426] on the matter subsequently accepted by the Supreme Court in *Horncastle*), it is highly probable that the case will return to the Supreme Court. In that instance, the key question will be whether the UK courts are bound by a decision of the UK Supreme Court (*Horncastle*) or of the Grand Chamber of the ECtHR (*Al-Khawaja*).

Despite the uncertainties outlined above, the overall approach taken by UK domestic courts with regard to ECtHR jurisprudence can be summarised with reference to three cases: R *(Ullah) v*

---

[421] *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128.
[422] *R v Horncastle and others* [2009] UKSC 14, [2010] 2 WLR 47 [120] (Lord Brown).
[423] *Al Skeini v UK* (Application No. 55721/07) 7 July 2011; *Al-Jedda v UK* (Application. No. 27021/08) 7 July 2011; see further P Ronchi, 'The Borders of Human Rights' [2012] 128 LQR (forthcoming).
[424] R *(Smith) v Secretary of State for Defence* [2010] UKSC 29. See further M Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' http://ssrn.com/abstract=1917395.
[425] On 16 April 2009 the UK requested that the decision of the Chamber in *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1 be referred to the Grand Chamber.
[426] [2005] EWCA Crim 2697, [2006] 1 WLR 1078.

Special Adjudicator,[427] *Re P (A Child) (Adoption; Unmarried Couple)*,[428] and the previously mentioned *Horncastle*.[429]

In *Ullah*,[430] Lord Bingham set out the domestic courts' maximum role with respect to the ECHR, specifically that, unless Parliament proclaims otherwise, the domestic courts are only responsible for ensuring that the UK keeps tow with ECtHR jurisprudence, not further developing it:[431]

> It is of course open to member states to provide for rights more generous than those guaranteed by the Convention [ECHR], 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 the courts is to keep pace with the Strasbourg [ECtHR] jurisprudence as it evolves over time: no more, but certainly no less.[432]

In *Re P*, a majority of the House of Lords distinguished *Ullah* and decided that where the ECtHR decides that an issue falls within the national margin of appreciation, the domestic courts are free to conclude that the ECHR has been violated, and thus expand the protection afforded to human rights in the UK:

> These remarks [of Lord Bingham in *Ullah*] were not, however, made in the context of a case in which the Strasbourg court [ECtHR] has declared a question to be within the national margin of appreciation. That means that the question is one for the national authorities to decide for themselves and it follows that different member states may well give different answers.[433]

Finally, in *Horncastle*, Lord Phillips expanded on Lord Bingham's comments in *Ullah* and clarified exactly when a domestic court was free to ignore the ECtHR in a case not governed by the margin of appreciation doctrine:

> The requirement [under s2 HRA] to "take into account" the Strasbourg [ECtHR] 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

---

[427] [2004] UKHL 26, [2004] 2 AC 323.

[428] [2008] UKHL 38, [2008] 3 WLR 76.

[429] [2009] UKSC 14, [2010] 2 WLR 47.

[430] This *dictum* has been quoted favourably in *R (Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 [27] (Lord Steyn); *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 [129] (Lord Mance); *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484 [49] (Lord Hope); *Kay v Lambeth London Borough Council; Leeds City Council v Price* [2006] UKHL 10, [2006] 2 AC 465 [87] (Lord Hope).

[431] For criticism of this view, see R Wintemute, 'The Human Rights Act's First Five Years: Too Strong, Too Weak or Just Right?' (2006) 17 KCLJ 209; J Lewis, 'The European ceiling on human rights' [2007] PL 720; 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 Human Rights Act* (CUP 2007); J Wright, 'Interpreting section 2 of the Human Rights Act 1998: Towards an indigenous jurisprudence of human rights' [2009] PL 595.

[432] *Ullah* (n 425) [20] (Lord Bingham).

[433] *Re P* (n 426) [31] (Lord Hoffmann).

> 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.[434]

A final word must be said about the UK's approach to reconciling national sovereignty with the ECHR and ECtHR. As a result of the UK's strong tradition of majoritarian democracy, the reconciliation of legislative sovereignty with the judicial protection of rights was a central issue in the various debates that surrounded the HRA, as the following quote from former Lord Chancellor Jack Straw demonstrates:

> The sovereignty of Parliament must be paramount. By that, I mean that Parliament must be competent to make any law on any matter of its choosing. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of [Parliament] possess such a mandate because they are elected, accountable and representative ... To allow the courts to set aside Acts of Parliament would confer on the judiciary a power that it does not possess, and which could draw it into serious conflict with Parliament. [435]

In legal terms, national parliamentary sovereignty has been maintained by the exclusion of a judicial override of legislation. That the judiciary cannot discard legislation which is deemed incompatible with the ECHR ensures that, at least formally, parliament can still legislate on any issue it chooses. In the words of Leigh and Masterman, the structure of the HRA leaves an 'escape-hatch' through which parliamentary sovereignty survives.[436] Although many feel that this is an overly superficial account of the modern British constitutional landscape,[437] it has so far been unquestioningly accepted by the judiciary.[438]

---

434 *Horncastle* (n 422) [11] (Lord Phillips).

435 HC Deb 16 February 1998, vol 306, col 772; see also, Home Department, *Rights Brought Home: the Human Rights Bill* (White Paper, CM 3782, 1997) [2.14]; CA Gearty, 'Parliamentary Democracy and Human Rights (2002) 118 LQR 248.

436 I Leigh, R Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart 2008) 19.

437 See, e.g., A Bradley, 'The Sovereignty of Parliament – Form or Substance?' in J Jowell and D Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007) 51–54; M Elliot, 'Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention' (2002) 22 LS 340, 346–52; A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009), ch 11 and p 411–15.

438 *R v A* (No 2) [2001] UKHL 25, [2002] 1 AC 45 [68] (Lord Hope) [106] (Lord Hutton); *R v Lambert* [2001] UKHL 37 [2002] 2 AC 545 [79] (Lord Hope); *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 [39] (Lord Nicholls); R *(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [129] (Lord Hoffmann); and *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816 [127] (Lord Hobhouse).

13. EUROPEAN UNION

A. PRELIMINARY POINTS

The ECHR is an instrument of the Council of Europe, which is institutionally independent of the European Union (EU). These two organisations also have their own courts that provide judicial oversight. In the case of the European Union, that court is the Court of Justice of the European Union based in Luxembourg (CJEU).[439] The main judicial body of the Council of Europe, and of the ECHR, on the other hand, is the ECtHR.[440]

It has long been apparent that the CJEU considers the EU to possess a legal system independent of that of its constituent member states.[441] With regards to the relationship between international and European Union law, the CJEU takes the view that this is of a dualist nature, with the two legal orders operating in parallel to, yet separate from, one another.[442] Within this legal system, the CJEU has extensive powers of judicial review. It may examine member state measures that fall within the scope of EU law (not simply those that implement EU law).[443] It is also the sole court which can invalidate EU secondary legislation.[444]

EU law very effectively permeates member states' domestic legal systems. Subject to certain requirements, provisions of EU law can be enforced directly in domestic courts via the doctrine of direct effect.[445] Where this is the case, EU law takes precedence over conflicting national law.[446]

B. THE STATUS OF THE ECHR IN EU LAW

The EU has not yet acceded to the ECHR. However, the Lisbon Treaty mandates that the EU 'shall accede to the European Convention on Human Rights'.[447] There is, therefore, a legal requirement that the EU ratify the ECHR, albeit without an explicit deadline, and indeed there

---

[439] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU), Art 19(1).

[440] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art 19.

[441] For a recent example, see Case C-402/05 *Kadi v Council & Commission (Common foreign & security policy)* [2009] AC 1225 at [282], which refers to the 'autonomy of the Community legal system'.

[442] Joined Cases C-402/05 and C-415/05 *Kadi, Al Barakaat v Council of the European Union and the Commission of the European Communities* [2008] ECR I-6351 [288].

[443] For example, Case R-36/75 *Roland Rutili v Ministre de l'interieur* [1975] ECR 1219 at [17], in which the ECJ held that courts' powers of review extended beyond an assessment of the member states' legislative provisions implementing EU law. They also applied to a review of the exercise of discretion by national authorities within the framework of this implementing legislation.

[444] Case R-314/85 *Foto-Frost v Hauptzollamt Luebeck-Ost* [1987] ECR 4199 [15].

[445] The doctrine of direct effect can first be found in Case R-26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1. This case has generally been read to make provisions of EU law directly effective where they are sufficiently precise and clear, they are unconditional, and they confer a specific right.

[446] Case C-6/64 *Costa v ENEL* [1964] ECR 585, in which the ECJ held that 'the member states have limited their sovereign rights … and have thus created a body of law which binds both their nationals and themselves'.

[447] Art 6(2) TEU.

remain various procedural hurdles that must first be overcome.[448] Negotiations for the EU's accession to the ECHR are already underway.[449] Indeed, in a speech given in July 2010, EU Vice-President and Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, stated that the process was going 'very quickly'.[450]

C. THE CJEU, THE ECHR AND THE ECTHR

The CJEU's (previously the European Court of Justice, or ECJ) case-law first mentioned fundamental rights in 1969.[451] By 1970 the Court had declared that these rights were 'inspired by the constitutional traditions common to the member states'.[452] Prominent voices, amongst them the German Constitutional Court,[453] had expressed concern about the lack of human rights protection under EU law. As a result, the CJEU in its early case-law has often been considered a protector of the interests of the EU, rather than a protector of human rights.

By 1991, the CJEU had come to recognise that ECHR rights had a 'special significance' in EU law.[454] This was because all EU Member States were signatories to the ECHR. The Court has since referred to ECtHR case-law in its interpretation of ECHR rights.[455]

There was no mention of fundamental rights in the original European Community Treaty. However, the Lisbon Treaty of 2009 gave legal force to the European Union Charter of Fundamental Rights (EUCFR) which had previously been proclaimed in 2000. Fundamental rights now feature in Art 6 of the Treaty on European Union (TEU):

> 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

---

448 Art 218(8) of the Treaty on the Functioning of the European Union (TFEU) requires the agreement on accession to be concluded unanimously by the Council. Under Art 218(6)(a)(ii) TFEU, the Council must obtain the consent of the European Parliament for concluding the agreement on the EU accession. Accession must also be approved by all 47 existing contracting parties to the ECHR.

449 'European Commission and Council of Europe kick off joint talks on EU's accession to the Convention on Human Rights' (7 July 2010) available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=PR545(2010)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE> accessed 27 March 2011.

450 Council of Europe TV report, (9 July 2010) available at <http://webtv.coe.int/index.php?VODID=100> accessed 27 March 2011.

451 Case R-29-69 *Erich Stauder v City of Ulm Sozialamt* [1969] ECR 419 [7].

452 Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr* [1972] CMLR 255 [4].

453 See the reservations expressed in its reference to the ECJ in *Internationale Handelsgesellschaft*, found at [7(c)] of BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*.

454 Case C-260/89 *ERT* [1991] ECR 2925 [41].

455 Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-03689 [26].

> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The CJEU's previous case-law, which elucidated fundamental rights as 'general principles of EU law' will continue to function alongside the EUCFR, as per Art 6(3) TEU.

In 1996 the CJEU was asked to assess the legality of accession to the ECHR. Its decision regarding the competence of the EU to accede to the ECHR is no longer relevant given the entry into force of the Lisbon Treaty.[456] However, its reservations as to how the jurisdiction of the CJEU would function with regards to the ECHR remain important.[457] The precise rules on jurisdiction post-accession have not yet been elucidated. Early press releases from the EU, however, indicate that the ECtHR 'will be the final and highest instance for ensuring fundamental rights protection'.[458]

Many parties to the ECHR are also member states of the EU. As a result, there has been litigation against some of these states in the ECtHR regarding domestic measures that originated with the EU. Perhaps the most important case for understanding how the ECtHR views its (current) relationship with the EU is that of *Bosphorus v Ireland*.[459] In this case the ECtHR held that it was not inconsistent with the ECHR for state parties to delegate powers to international organisations.[460] However, these organisations had to provide an 'equivalent protection' of human rights.[461] Once this equivalence had been established, as it was said to have had with the EU,[462] then a rebuttable presumption of ECHR compliance came into operation.[463] This rebuttable presumption, rebuttable if it could be shown that there had been a 'manifest deficiency' in the protection of fundamental rights, operates in the context of a specific case, and not with regard to the entire system of rules.[464]

There are reasons to believe that the ECtHR will not maintain this approach to the EU after the latter's accession. In *Bosphorus* the ECtHR addressed the issue of the acts of a supranational organisation that was not party to the ECHR. The approach taken was, on one view, both logical and advantageous to the ECtHR at the time. Indeed, it would have been difficult to assert jurisdiction over an organisation that was not a party to the ECHR. Furthermore, it has been argued that an alternative finding by the ECtHR in that case would have been a brusque stoke in a fragile European dialogue between the CJEU and the ECtHR.[465]

Once the EU accedes to the ECHR, however, these barriers will be removed. Moreover, such accession would provide positive reasons for the ECtHR to exercise a more pressing standard of

---

456 Given the legal mandate in Article 6(2) TEU.

457 Opinion 2/94 [1996] ECR I-01759 [20].

458 'European Commission proposes negotiation directives for Union's accession to the European Convention on Human Rights (ECHR) – frequently asked questions' (17 March 2010) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/84&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 27 March 2011.

459 *Bosphorus v Ireland* (2005) 42 EHRR 1.

460 *ibid.* [150].

461 *ibid.* [155].

462 *ibid.* [165].

463 *ibid.* [156].

464 *ibid.*

465 See, e.g., S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) 43 CML Rev 629, on the relationship between the two courts.

review. There are currently 47 parties to the ECHR, and each of these is reviewed under the same set of standards by the ECtHR. The maintenance of the *Bosphorus* precedent would leave the EU as the sole exception to this general policy. The EU's press releases seem to envisage no deferential treatment, with the CJEU's position considered 'comparable to that of national constitutional or supreme courts in relation to the European Court of Human Rights.'[466] Furthermore, during a joint press statement with the EU, the Secretary General of the Council of Europe, Thorbjørn Jagland, stated that accession would create 'one legal space for all European nations and [the] European Union.'[467] An application of different legal standards to the EU would appear to run contrary to these early remarks.

D. EU ACCESSION AND FUNDAMENTAL RIGHTS IN EU MEMBER STATES

It is not yet known what the precise settlement between the EU and the Council of Europe will be. However, early press releases appear to show that the CJEU will follow the ECtHR on human rights issues.[468]

As noted above, EU law is directly effective in member states, and member state courts are bound to accord EU law supremacy over national law. It is true that fundamental rights in the EU only come into play within the scope of EU law. There are also certain restrictions as to the doctrine of direct effect.[469] Insofar as the CJEU takes into account, or is bound to take into account, the ECtHR's judgments, these judgments will take on the constitutional effects of EU law.

It is also worth putting this into the context of the development of EU law. There are two key points in this regard. First, the EU Treaties provide for potentially a very broad legislative jurisdiction.[470] In practice, it has been well documented that the EU institutions have steadily increased their range of competences since the inception of the European Communities. In this sense ECHR rights will come to have direct effect in an increasing number of areas of national law.

Second, many commentators have noted that the EU has continued to erode distinctions in its case-law on direct effect that served to restrict the permeation of EU law into national legal systems.[471] The latest example of this is the case of *Kucukdeveci*,[472] which appears to undermine the orthodox position that directives which regulate relations between private parties will not have direct effect. This is because the directive in question concerned issues of non-discrimination, allowing the CJEU to circumvent previous restrictions.[473] It is unclear what general effect this ruling will have, but it symbolises an expanding trend towards direct effect.

---

466 *Accession negotiation* (n 456).
467 *Council of Europe Report* (n 448).
468 *Accession negotiation* (n 456).
469 See above n 443.
470 See, e.g., Art 352(1) TFEU, which allows the Commission, Council and Parliament acting in tandem to create new powers not set out by the Treaties.
471 See, e.g., P Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 EL Rev 349.
472 Case C-555/07 *Kucukdeveci* [2010] IRLR 346.
473 *ibid.* [50]. The ECJ held that the Directive in question (2000/78) 'merely gives expression to, but does not lay down, the principle of equal treatment'. As a result, whilst the Directive itself cannot be said to be directly effective in disputes between private parties, the underlying principle can be used by national courts to disapply national law (*ibid.* [51]).

Depending on the form that accession takes, it is possible that ECtHR case-law may gain direct effect via EU law. The scope of EU law is expanding and the instances of its direct effect are increasing. As a result, ECtHR case-law could continue to gain influence in EU member states' national legal systems.