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# Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts

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## Abstract

*The aim of this article is to answer the question, ‘are national judges extending the structural EU law principles (primacy and direct effect) to the European Convention on Human Rights?’ This article does not intend to examine the broader issue of the rapprochement between the legal systems of the EU and the European Convention on Human Rights (ECHR) but it concentrates on how national judges treat the norms of the ECHR compared with their treatment of EU law. I have structured this article in three parts. The first part offers a first look at the ‘constitutional variety’ existing in terms of constitutional provisions devoted to the impact of the ECHR and EU laws on the national systems. In the second part I will move to analyse the relevant case law of the domestic judges on three factors of potential convergence: consistent interpretation, disapplication of national law conflicting with European provisions, and emergence of a counter-limits doctrine. Finally, in the third part I will offer some concluding remarks on the convergence issue.*

## 1 Goals and Structure of the Research

This article tries to answer the question, ‘are national judges extending the structural EU law principles (primacy and direct effect) to the European Convention on Human Rights?’ I do not intend to examine the broader issue of the *rapprochement* between the legal systems of the EU and the European Convention on Human Rights

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(ECHR), but to concentrate on how national judges treat the ECHR compared with how they treat EU norms. While there is a massive literature analysing either the issue of the national application of EU law or that of ECHR norms, a specific comparative analysis which takes into account the national judicial treatment of both laws is still lacking.

This investigation will concern some selected constitutional experiences. It will be ascertained whether national judges treat ECHR and EU law similarly, and to what extent they facilitate their convergence. In this respect, my purpose is to study the judicial application of the ECHR and EU law to analyse the vertical relationship between national judges (constitutional and ordinary alike) and these external legal sources. As such, I am not interested in the horizontal convergence between the European Court of Human Rights (ECtHR) and the CJEU. Obviously, these two dynamics are strongly related, and both European Courts have undergone deep transformations, especially after the enlargements of the EU and the Council of Europe.

This article builds on a well known premise: according to many scholars, a huge distinction exists between the ECHR and EU laws, as Lord Hoffmann recently pointed out:<sup>1</sup>

The fact that the 10 original Member States of the Council of Europe subscribed to a statement of human rights in the same terms did not mean that they had agreed to uniformity of the application of those abstract rights in each of their countries, still less in the 47 states which now belong. The situation is quite different from that of the European Economic Community, in which the Member States agreed that it was in their economic interest to have uniform laws on particular matters which were specified as being within European competence. On such matters, the European institutions, including the Court of Justice in Luxembourg, were given a mandate to unify the laws of Europe. The Strasbourg court, on the other hand, has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights . . . The proposition that the Convention is a 'living instrument' is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by European public order.

Nevertheless, after a detailed analysis of the national case law, I argue that we are already dealing (regardless of the EU's possible accession to the ECHR) with a partial convergence in the application of EU and ECHR's norms.

This article is comprised of three parts. The first offers an overview of the 'constitutional variety' of constitutional provisions governing ECHR and EU norms' impact on national systems. The second part will examine the relevant national case law under three aspects of potential convergence: consistent interpretation, disapplication of national norms/provisions conflicting with European provisions (a symptom of ECHR provisions' direct effect), and the emergence of counter-limits doctrines. Finally, in the third part I will provide some concluding remarks on the convergence hypothesis.

<sup>1</sup> Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, London, 19 Mar. 2009.

Looking at the constitutional provisions governing the effects of the ECHR norms on domestic orders, one can appreciate the variety of ways in which to conceive the relationship between the national and European constitutional levels.

A gap exists between the formal *status* of ECHR norms and their real value and nature. I would describe this gap as distinguishing between a 'static approach' (what national constitutions say) and a 'dynamic approach' (concerned with the actual force of these laws, as emerges in the case law).<sup>2</sup> Another *caveat* should be made at this point: I focus on the activity of those national courts that have vehemently contributed to making the CJEU change or to readjust its doctrines. However, it would be possible to find other similar cases in other legal contexts.<sup>3</sup>

## 2 Constitutional Variety: the Formal Provisions

### A A First Look at the Relationship between the ECHR and National Laws

In a recent book, Keller and Stone Sweet<sup>4</sup> underscored the variety of national constitutional provisions regarding the ECHR. Indeed, looking at these provisions (and those applicable to EU law) one easily appreciates the diversity of national approaches with respect to the domestic authority of European laws:

1. First, some constitutions reserve a particular status to EU law, distinguishing it from 'normal' public international law. An example is Italy, where Article 117 of the Constitution states: '[I]n legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations'. Accordingly, many commentators<sup>5</sup> have stressed the distinction between the effects of EU obligations and international ones.
2. Secondly, some constitutions acknowledge the special *status* of international human rights treaties (or some of them). In Spain and Portugal (see, respectively, Article 10 of the Spanish Constitution<sup>6</sup> and Article 16 of the Portuguese Constitution) such declarations provide an interpretative support for constitutional human rights provisions.
3. Thirdly, some constitutions seem not to distinguish between international and EU law.

<sup>2</sup> For the same approach, see the books devoted to the ECHR: L. Montanari, *I diritti dell'uomo nell'area europea fra fonti internazionali e fonti interne* (2002) and O. Pollicino, *L'allargamento ad est dell'Europa e rapporti tra Corti costituzionali e Corti europee. Verso una teoria generale dell'impatto interordinamentale del diritto sovranazionale?* (2010).

<sup>3</sup> See the cases reported in G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (2010).

<sup>4</sup> H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2009).

<sup>5</sup> For instance, see Pinelli, 'I limiti generali alla potestà legislativa statale e regionale e i rapporti con l'ordinamento comunitario', *V Foro italiano* (2001) 194.

<sup>6</sup> On this provision see A. Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española* (1999).

According to another classification,<sup>7</sup> the ECHR's status in the domestic order may be summarized as follows:

- a) Some constitutions attribute constitutional rank to the ECHR, as in Austria<sup>8</sup> and the Netherlands ('the world's most monist State'<sup>9</sup>).
- b) In some states, instead, the ECHR has a super-legislative ranking (e.g., in France, Belgium, Spain, and Portugal).
- c) In other states (the UK), finally, the ECHR has a legislative ranking. Countries like Italy and Germany seemingly belong in the third group (if one reads their constitutions) but local Constitutional Courts clarified that the ECHR has a special force that exceeds the normal constitutional discipline of international norms.

Despite all these differences, recent scholarship has pointed to the progressive *rapprochement* between the European domestic orders with regard to the 'position' of the ECHR in the national hierarchy of sources. This convergence is the final outcome of different national pathways; sometimes national legislators must be credited, in other circumstances it is rather Constitutional or Supreme Courts, or even ordinary judges. This is irrespective of the formal position set out in the constitution, or of the dualism or monism classification.<sup>10</sup>

The ECHR is generally acknowledged to have supra-legislative force, but its relationship with constitutional supremacy is more controversial, as discussed below.

## B A First Look at the Relationship between EU and National Laws

A similar variety can also be found in the domestic treatment of EU law. One can identify several 'strategies' used to ensure EU law's primacy:

- (a) Some states embrace a monist vision of the relationship between orders, implying the unconditional acceptance of EU law (the Netherlands, Belgium, Luxembourg). In the Netherlands, for example, Article 94 of the Basic Law – according to a generally accepted interpretation<sup>11</sup> – provides that international law is not only part of, but is also superior to, any domestic law. The same applies to EU law.
- (b) Other states expressly constitutionalize a set of limits to European integration (Germany,<sup>12</sup> Sweden<sup>13</sup>). The German text is particularly meaningful, because

<sup>7</sup> E.g., Montanari, *supra* note 2.

<sup>8</sup> As Cede pointed out, 'The ECHR has a double status in Austria. In addition to its character as an international treaty, it has been transformed, on the domestic level, into a law with the rank of a constitutional act. This has a twofold implication. First, the ECHR grants individual rights that are directly actionable before all courts and authorities. Given their status as constitutional law, these rights may be relied upon before the CC': Cede, 'Report on Austria and Germany', in Martinico and Pollicino (eds), *supra* note 3, at 55, 63.

<sup>9</sup> Keller and Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems', in Keller and Stone Sweet (eds), *supra* note 4, at 677, 684.

<sup>10</sup> This conclusion is also supported by *ibid.*, at 685–686.

<sup>11</sup> See, e.g., C.F. Doebble, *International Human Rights Law* (2004), i, at 9; Claes and de Witte, 'Report on the Netherlands', in A. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context* (1997), at 171–194.

<sup>12</sup> Art. 23(1).

<sup>13</sup> Art. 5, Chapter X, par. 1 of the Instrument of Government.

it seemingly codifies the German Constitutional Court's doctrine of the *Solange* saga.<sup>14</sup>

- (c) The constitutions of other states, be they monist or dualist – for different reasons – do not include any express 'European clause' (Italy, until the constitutional reform of 2001,<sup>15</sup> the UK, if only for 'structural reasons'). For instance, since its decision No. 183/1973<sup>16</sup> and until 2001, the Italian Constitutional Court referred only to Article 11: 'Italy . . . agrees to limitations of sovereignty where they are necessary to allow a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed.' This provision was originally conceived to justify Italy's membership of the United Nations. EU membership, in fact, imposes limitations of sovereignty for goals that clearly go beyond 'peace and justice between nations'. Thus, the Court was forced to 'manipulate' the original meaning of Article 11 in order to allow for further sovereignty limitations. Before 1992, something similar had happened in Germany, where the Constitutional Court interpreted Article 24 of the *Grundgesetz* (on participation in international organizations) to explain the penetration of EU law.

This is what still happens in Spain, where Article 93 of the Constitution does not mention the European Union.

- (z) A group of '*souverainist*'<sup>17</sup> states proudly reaffirms the sovereignty of the constitution (Hungary,<sup>18</sup> Poland,<sup>19</sup> and the Baltic States<sup>20</sup>) with regard to international

<sup>14</sup> BVerfGE 37, S. 271 2 BvL, 52/71, 29 May 1974; *Solange II*, BVerfGE 73, 339 2 BvR 197/83, 22 Oct. 1986; *Maastricht-Urteil*, BVerfGE 89, 155, 12 Oct. 1993; *Banana*, BVerfGE, 2 BvL 1/97, 7 June 2000; *European Arrest Warrant*, BVerfGE, 2 BvR 2236/04, 18 July 2005; *Lissabon-Urteil*, 2 BvE 2/2008, 30 June 2009, up to the recent *Honeywell* decision of 6 July 2010 (BVerfGE, 2 BvR 2661/06).

<sup>15</sup> Amending Art. 117.

<sup>16</sup> Italian Constitutional Court judgment no. 183/1973, available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

<sup>17</sup> Albi, 'Estonia's Constitution and the EU: How and to What Extent to Amend It?', *Juridica International* (2002) 39.

<sup>18</sup> The Hungarian legal system seems to be characterized by a strong dualist tradition, although the Constitutional Court Act empowers the Constitutional Court to review the validity of a national act with the possibility of taking into account international treaties promulgated into the domestic order: Constitutional Court Act, ss. 1(c), 45(1). At the same time, international treaties have to be consistent with the Constitution (defined at Art. 77 as the basic law of the Republic): '(1) The Constitution is the basic law of the Republic of Hungary', available at: [www.mkab.hu/index.php?id=constitution](http://www.mkab.hu/index.php?id=constitution). Other translations of this Art. emphasize the supreme character of the Constitution: see, for instance, the translation available at: [www.servat.unibe.ch/icl/hu00000\\_.html](http://www.servat.unibe.ch/icl/hu00000_.html). I must thank the anonymous reviewers for having pointed out this aspect.

Another crucial Art. in the relationship between international and domestic law is Art. 7(1): '[t]he legal system of the Republic of Hungary shall accept the generally recognized rules of international law and shall further ensure the harmony between domestic law, and the obligations assumed under international law'. The Hungarian legal order expressly distinguishes between EU law and international law in Art. 2A of the Constitution:

'(1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union.

and supranational integration.<sup>21</sup> Some of them qualify as ‘*souverainist*’ only at first glance, since constitutional provisions declaring the constitution’s supremacy are sometime balanced by the pledge of compliance with international obligations (e.g., see Articles 9<sup>22</sup> and 8 of the Polish Constitution). In these cases, however, national constitutional courts emphasized the ‘*souveranism*’ of the constitution to confirm its full primacy.<sup>23</sup>

This is just a possible categorization of the constitutional frameworks in Member States. Despite this variety and although there are sporadic cases of judicial resistance,<sup>24</sup> as was noted,<sup>25</sup> EU law is applied in all jurisdictions uniformly, as primacy and direct effect are accepted by all national courts.<sup>26</sup>

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(2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament, which was introduced after the constitutional reform of 2002 together with other provisions, including Article 6. Article 2/A makes EU membership contingent upon the protection of fundamental rights and the respect of national competences.’

Art. 6, p. 4 of the Hungarian Constitution states, ‘The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe’. As Sonnevend put it, ‘As regards the protection of fundamental rights, Art. 2/A of the Constitution stipulates that only “competencies resulting from the Constitution” may be exercised together with the other Member States, or by the Community institutions. Undoubtedly, this is a *nemo plus iuris* rule: it provides that the exercise of powers by the Union is subject to the same constitutional barriers as are applicable to the Republic of Hungary and its organs. Since the organs of the Republic lack the power to violate fundamental rights of the individuals, no such power can be transferred to the EU. As regards the scope of competences transferred to the EU, Art. 2/A(1) of the Constitution provides that only those powers may be exercised by the EU that are necessary to exercise the rights and fulfil the obligations resulting from the founding treaties. This language makes it clear that Art. 2/A does not legitimize those sovereign acts of the EU that are not founded on a competence resulting from the treaties. *Ultra vires* acts are therefore not covered by the integration clause’: Sonnevend, ‘Report on Hungary’, in Martinico and Pollicino (eds), *supra* note 3, at 251, 256.

<sup>19</sup> Art. 8 (Poland): ‘(1) The Constitution shall be the supreme law of the Republic of Poland.’

(2) The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.’

<sup>20</sup> See Jarukaitis, ‘Report on Estonia, Latvia and Lithuania’, in Martinico and Pollicino (eds), *supra* note 3, at 167.

<sup>21</sup> For a different reading of these clauses see Palermo, ‘Nuove occasioni (mancate) per una clausola europea nella Costituzione italiana. Alcune osservazioni critiche’, 3 *Diritto pubblico comparato ed europeo* (2003) 1539; Claes, ‘Le “clausole europee” nelle costituzioni nazionali’, 2 *Quaderni Costituzionali* (2005) 283.

<sup>22</sup> Art. 9: ‘The Republic of Poland shall respect international law binding upon it.’

<sup>23</sup> See the judgment of the Polish Constitutional Tribunal on the Lisbon Treaty (No. K 32/09, available at: [www.trybunal.gov.pl/eng/summaries/documents/K\\_32\\_09\\_EN.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_32_09_EN.pdf)). On Poland see Kowalik-Bańczyk, ‘Report on Poland’, in Martinico and Pollicino (eds), *supra* note 3, at 327, 330.

<sup>24</sup> See the reaction to the *Mangold* case, for instance: Herzog-Gerken, ‘[Comment] Stop the European Court of Justice’, available at: <http://euobserver.com/9/26714>. This piece is the translation of an article originally published in German on 8 Sept. 2008 in the *Frankfurter Allgemeine Zeitung* (‘Stoppt den Europäischen Gerichtshof’).

<sup>25</sup> M. Claes, *The National Courts’ Mandate in the European Constitution* (2006).

<sup>26</sup> Martinico and Pollicino (eds), *supra* note 3.

### 3 Dealing with Law in Action

As Keller and Stone Sweet argued,<sup>27</sup> the situation is not much different for the ECHR from what I have just explained regarding EU law. To support this claim it is necessary to go beyond the wording of formal provisions and observe how national judges treat these European laws.

The first common element of these two European regimes is the crucial role of national judges, who are the real 'natural judges' of both, for different reasons. They are the first guardians of the *Simmenthal* doctrine for EU law<sup>28</sup> and, at the same time, the first adjudicators of the ECHR in national systems, due to the principle of subsidiarity.

This is a crucial point of this research, dealing with both ECHR and EU law. To provide a comparative overview, I will treat the following judicial practices in turn:

- (a) consistent interpretation (a consequence of the 'indirect effect' of supra-national laws);
- (b) disapplication of domestic law (the consequence of supra-national laws' direct effect/primacy);
- (c) counter-limits doctrine (setting a limit to supra-national law's supremacy).

#### A Consistent Interpretation

A first analogy in the national judicial treatment of these two European laws may be found in the interpretive superiority accorded to the EU/ECHR by national judges independently of what national constitutions provide about their status in the domestic legal order. There are at least three different orders of reasons for this:

1. constitutional provisions (Spain, Romania);
2. legislative provisions (UK);
3. constitutional courts' case law (Italy and Germany).

This is a reflection of the constitutional variety described above. Sometimes the language of domestic constitutions conveys a message of reaction to totalitarian experiences, e.g., in the form of an increased openness to international law and the acknowledgment of peace as a fundamental constitutional principle, not simply as a strategic foreign policy option. In Spain<sup>29</sup> and Portugal<sup>30</sup> constitutional courts run a preventive check on the constitutionality of international treaties. In Spain, when a conflict arises the Constitution must be amended before the stipulation of the treaty. In Portugal, instead, in order to be ratified the treaty must be approved by the Assembly of the Republic with a special majority.<sup>31</sup> Treaties may be subject to constitutional review even after ratification. According to the literature, the particular

<sup>27</sup> Keller and Stone Sweet, *supra* note 9, at 685–686.

<sup>28</sup> Claes, *supra* note 26.

<sup>29</sup> Art. 95(2) Constitution.

<sup>30</sup> Art. 278 Constitution.

<sup>31</sup> Art. 279(4) Constitution.



domestic force of treaties in the domestic legal order can be inferred by Article 8 of the Portuguese Constitution and Article 96 of the Spanish one, although these two provisions seemingly regulate treaties' validity rather than their efficacy.<sup>32</sup>

Nevertheless, the most important confirmation of human rights treaties' special ranking in Spain is Article 10.2,<sup>33</sup> acknowledging that they provide interpretive guidance in the application of human rights-related constitutional clauses (even if the Constitutional Court specified that this does not imply that human rights treaties have constitutional *status*<sup>34</sup>). As for Portugal, the fundamental provision is Article 16 of the Constitution,<sup>35</sup> which recognizes that international human rights treaties have a role which is complementary to the Constitution. This provision accords an interpretative role to the Universal Declaration of Human Rights, seemingly excluding other conventions like the ECHR. In 1982, an attempt to insert a reference to the ECHR into the Constitution failed, but the Portuguese Constitutional Court often used the ECHR as an important auxiliary hermeneutic tool for interpreting the Constitution, leaving the matter unresolved.<sup>36</sup> A similar provision is Article 20(1) of the Romanian Constitution: '[c]onstitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to'.

Article 5 of the Bulgarian Constitution<sup>37</sup> recognizes a general precedence of international law (including the ECHR and EU law) over national law, and also covers the duty to interpret national law in a manner which is consistent with these regimes (and the case law of their respective courts). In 1998, the Bulgarian Constitutional Court ruled that:

The Convention constitutes a set of European common values which is of a significant importance for the legal systems of the Member States and consequently the interpretation of the constitutional provisions relating to the protection of human rights has to be made to the extent possible in accordance with the corresponding clauses of the Convention.<sup>38</sup>

<sup>32</sup> Montanari, *supra* note 2, at 108.

<sup>33</sup> Art. 10 Constitution: '(2) The norms relative to basic rights and liberties which are recognized 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.'

<sup>34</sup> Tribunal Constitucional, Judgment 30/1991, available at: <http://www.tribunalconstitucional.es>.

<sup>35</sup> Art. 16 Constitution: '1. The fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law. 2. The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights.'

<sup>36</sup> Portuguese Constitutional Court, decision 345/99, available at: [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt). The episode is mentioned by Coutinho, 'Report on Portugal', in Martinico and Pollicino (eds), *supra* note 3, at 351, 360. On Portugal see Montanari, *supra* note 2, at 112.

<sup>37</sup> Art. 5(4) Constitution: 'Any international instruments which have been ratified by the constitutionally established procedure, promulgated, and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.'

<sup>38</sup> See Constitutional Court Decision no. 2, of 18 Feb. 1998: Official journal no. 22, 24 Feb. 1998. The cases reported are quoted by Fartunova, 'Report on Bulgaria', in Martinico and Pollicino (eds), *supra* note 3, at 101.



As we can see, according to all these provisions, national law is to be interpreted in light of the ECHR (and other human rights treaties).

Consistent interpretation is a very well known doctrine in EU law (see *Von Colson*<sup>39</sup> and *Marleasing*<sup>40</sup>). More generally, consistent interpretation is a typical doctrine of multilevel systems,<sup>41</sup> since it guarantees some flexibility in the relationship between laws of different orders and entrusts judges with the role of gatekeepers (see *Hermès*<sup>42</sup> and *Dior*,<sup>43</sup> on the relationship between EU and WTO laws). Traditionally, the literature conceives consistent interpretation as an indirect effect since it confirms the primacy of EU law, giving a sort of interpretive priority to EU law norms, especially when the conflicts between norms cannot be resolved by using the *Simmenthal* doctrine because of the absence of direct effect for the EU provisions.

It is a well-known story which does not need repeating. The only thing I would like to point out is the increasing importance of consistent interpretation in EU law, as recently stressed by Rodin:<sup>44</sup> the *Simmenthal* doctrine is a rigid one which requires a unilateral conclusion in case of constitutional conflict (i.e., conflict between constitutional supremacy and the primacy of European law), while the consistent interpretation makes it possible to neutralize or soften constitutional conflicts, where this is possible, of course.

The duty to interpret national law consistently with the ECHR provisions is sometimes based on legislative provisions, as in the UK, under the Human Rights Act (HRA) 1998. In 1998, the ECHR was incorporated into the HRA, containing a selective incorporation of the ECHR's rights (the so-called 'Convention Rights'). Section 3<sup>45</sup> sets out the necessity to interpret domestic law 'so far as is possible' in conformity with the Convention.

The proposed schematization – i.e., the statutory source of the consistent interpretation obligation – may be contested, however, since there are some recent English cases where the HRA was treated as a part of the 'constitutional core'. This is precisely what happened in *Thoburn*.<sup>46</sup> In this judgment, Laws LJ recognized the existence of a constitutional group of statutes and Acts which included the European Communities Act 1972:

<sup>39</sup> Case 14/83, *Von Colson* [1985] ECR 1891.

<sup>40</sup> Case 106/89, *Marleasing* [1990] ECR I-4345.

<sup>41</sup> Even in the US: *Charming Betsy 'canon'*, 6 US (2 Cranch) 64 (1804).

<sup>42</sup> Case C-53/96, *Hermès International (a partnership limited by shares) v. FHT Marketing Choice BV* [1998] ECR I-3603.

<sup>43</sup> Case C-300/98 and C-302/98, *Dior and others* [2000] ECR I-1307.

<sup>44</sup> Rodin, 'Back to Square One. The Past, the Present and the Future of the *Simmenthal* Mandate', paper presented at the 8th European Constitutional Law Network, Madrid, 6–8 Oct. 2010.

<sup>45</sup> S. 3: '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.'

<sup>46</sup> *Thoburn v. Sunderland City Council* [2002] 1 CMLR 50.

In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental . . . We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b).

The Magna Charta, the Bill of Rights of 1689, the Act of Union of 1707, the Reform Acts, the HRA 1998, the Scotland Act 1998, the Government of Wales Act 1998, and the European Communities Act 1972 all belong to the category of 'constitutional' statutes. Looking at the judges' reasoning, it is possible to appreciate a further effort to reconcile the primacy of EU law (now vested with constitutional status) with parliamentary sovereignty. According to this judgment, in fact, EU law's primacy is based on Parliament's self-limitation; in other words, the legal basis of the UK's relationship with the EU rests on national provisions, not on EU law:

There is nothing in the [European Communities Act] which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it.

Finally, in the absence of express written provisions (either constitutional or statutory) the duty to interpret national law in light of the ECHR can sometimes derive from the Constitutional Court's case law, as in Germany and Italy. In Germany, the Second Senate of the Bundesverfassungsgericht (BvG) in 2004<sup>47</sup> clarified the relationship between the BvG and the ECtHR, and somehow followed up the Strasbourg Court's decision *Görgülü v. Germany*.<sup>48</sup> As explained in the literature,<sup>49</sup> this judgment must be connected to another instance of judicial conflict between the two courts, the *Hannover v. Germany* case.<sup>50</sup> On that occasion, the two courts had interpreted the right to privacy differently. The BvG thus in 2004 seized the opportunity to bring some clarity: the ECHR and the ECtHR's case law bind the Federal Republic only as a public international law subject. The ECHR was ratified as ordinary law and, therefore, it can be derogated from by any subsequent ordinary statute and cannot serve as a standard of constitutional review (i.e., one cannot claim the violation of conventional rights before the BvG).

However, the case law of the Strasbourg Court may be referred to when interpreting the constitution, if this does not entail a limitation of another constitutional right. Moreover, the BvG recalled the open nature of the German Constitution (Articles 23

<sup>47</sup> See order 2 BvR no. 1481/04.

<sup>48</sup> See Di Martino, 'Il Tribunale costituzionale tedesco delimita gli effetti nel diritto interno delle sentenze della Corte Europea dei diritti dell'uomo' (2004), available at: <http://archivio.rivistaaic.it/>; App. No. 74969/01, *Görgülü v. Germany*, available at: [www.echr.coe.int/echr/](http://www.echr.coe.int/echr/).

<sup>49</sup> Palermo, 'Il Bundesverfassungsgericht e la teoria selettiva dei controlimiti', 1 *Quaderni Costituzionali* (2005) 181.

<sup>50</sup> App. No. 59320/00, *Hannover v. Germany*, available at: [www.echr.coe.int/echr/](http://www.echr.coe.int/echr/).

and 24), obliging national judges to take into account the law and case law of the Convention and to interpret domestic norms in the light thereof, but only if this is possible (and providing reasons when failing to do so).

Recently, in May 2011,<sup>51</sup> the BvG held preventive detention to be unconstitutional, basing its expansive interpretation of the *Grundgesetz* on the case law of the Strasbourg judges.<sup>52</sup>

In Italy, in two fundamental decisions of 2007 the Constitutional Court<sup>53</sup> clarified the position of the ECHR in the domestic legal system. Without going into details,<sup>54</sup> the nucleus of these decisions can be summarized as follows:

1. The Convention has a super-primary value (i.e., its normative ranking is half-way between statutes and constitutional norms);
2. In some cases, the ECHR can serve as 'interposed parameter' for the constitutional review of primary laws, since the conflict between them and the ECHR can entail an indirect violation of the Constitution;
3. This (no. 2) does not imply that the ECHR has a constitutional value; on the contrary, the ECHR has to respect the Constitution;
4. The ECHR cannot be treated domestically like EU law, as explained below;
5. The constitutional favour accorded to the ECHR implies the obligation to interpret national law in light of ECHR's norms.

In conclusion, it emerges that the technique of consistent interpretation is being extended from EU law to the ECHR, following different paths (constitutional, legislative, and judicial). This does not mean that the convergence is perfect: for instance, it is not always clear whether the duty to interpret national law in light of the ECHR includes the need to take into account the case law of the ECtHR. In this respect, there are different answers. Formally, the abovementioned Constitutions are silent on this, while the UK's HRA expressly provides (section 2) that: '[a] court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights'. In Italy and Germany, as seen above, it is the Constitutional Court that gave instructions to this effect.

A last word on these cases: the constitutional provisions providing for the duty of consistent interpretation do not distinguish between the ECHR and other international

<sup>51</sup> No. 2 BvR 2365/09, German Federal Constitutional Court, 4 May 2011, available at: [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de). On this case see Bjorge and Andenas, 'German Federal Constitutional Court – Preventive Detention – Relationship between International and National Law – European Convention on Human Rights', 105 *AJIL* (2011) 768.

<sup>52</sup> For instance App. No. 19359/04, *M v. Germany*, 17 Dec. 2009, available at: [www.echr.coe.int/echr/](http://www.echr.coe.int/echr/).

<sup>53</sup> Corte Costituzionale, judgments nos. 348 and 349/2007, available at <http://www.cortecostituzionale.it>.

<sup>54</sup> For a detailed analysis of the judgments see Biondi, Dal Monte, and Fontanelli, 'The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System', 7 *German LJ* (2008) 889; Pollicino, 'The Italian Constitutional Court at the Crossroads between Constitutional Parochialism and Co-operative Constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007', 4 *European Constitutional L Rev* (2008) 363.

treaties on human rights, whereas when this doctrine is based on legislation and judicial decisions the ECHR enjoys *ad hoc* treatment.

I turn now to other jurisdictions. In the Baltic countries, the ECHR is deemed a source of inspiration for the construction<sup>55</sup> of national (including constitutional) law, and was cited by the constitutional courts of these countries even before their accession to the ECHR.<sup>56</sup> This is the case in Lithuania as well as Latvia, where the Court expressly agreed to be bound by the ECtHR's case law<sup>57</sup> even when it interprets its own Constitution.<sup>58</sup> Likewise, the Estonian Supreme Court expressly acknowledged the ECHR's priority over national law,<sup>59</sup> and its own duty to bear in mind the ECtHR's case law.<sup>60</sup>

The Belgian Cour Constitutionnelle uses the technique of consistent interpretation, taking into account the case law of both European Courts and showing its readiness even to revise its previous case law, if need be.<sup>61</sup>

Finally, the Supreme Courts of the Nordic countries have acknowledged EU and ECHR law's special role.<sup>62</sup> They have accorded to these regimes a sort of interpretative priority, and used consistent interpretation and indirect effects doctrines to avoid constitutional conflicts between national and supranational laws.

### **B Judicial Disapplication of Domestic Law: *Simmenthal* Reloaded?**

As already noted, the national judge has been considered the first guarantor of EU law's primacy, since the *Simmenthal* judgment of the ECJ:

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.<sup>63</sup>

<sup>55</sup> Constitutional Court of Lithuania, Ruling of 8 May 2000. All these cases are reported by I. Jarukaitis, 'Report on Estonia, Latvia and Lithuania', in Martinico and Pollicino (eds), *supra* note 3, at 167.

<sup>56</sup> For the Lithuanian context see, for instance, the Rulings of 28 May 2008, 7 Jan. 2008, 29 Dec. 2004; Constitutional Court of Latvia Judgments of 29 Oct. 2009, 5 Nov. 2008, 11 Apr. 2006 in case no. 2005-24-01; Constitutional Review Chamber of the Supreme Court of Estonia, No. 3-4-1-2-01 of 3 May 2001. All these cases and those in the footnotes immediately below are reported more fully than on the courts' websites in Jarukaitis, *supra* note 56.

<sup>57</sup> Constitutional Court of Latvia, Judgment No. 2000-03-01 of 30 Aug. 2000.

<sup>58</sup> Constitutional Court of Latvia, Judgment No. 2006-03-0106 of 23 Nov. 2006.

<sup>59</sup> Supreme Court of Estonia, Judgment of 6 Jan. 2004 in case No. 3-1-3-13-03.

<sup>60</sup> Judgment of the Constitutional Review Chamber of the Supreme Court of Estonia, 30 Dec. 2008 in case No. 3-4-1-12-08.

<sup>61</sup> For instance, Constitutional Court No. 81/2007, 7 June 2007.

<sup>62</sup> For Denmark see decisions U.1979.117/2H. U.1988.454H. For Sweden see the decision NJA 1996 s. 668. Many of these cases are reported by Lebeck, 'Report on Scandinavian Countries', in Martinico and Pollicino (eds), *supra* note 3, at 389.

<sup>63</sup> Case 106/77, *Simmenthal* [1978] ECR 629. On the recent developments of the *Simmenthal* doctrine see Rodin, *supra* note 45.

From these lines one can infer: (a) the connection between EC (now EU) law's primacy/precedence and the duty to disapply conflicting national law; (b) the crucial role of domestic judges in ensuring primacy.

In this section, I will show a second similarity in the national use of European laws, reflected in the judicial treatment of conflicts between domestic norms and EU/ECHR norms according to the *Simmenthal* doctrine, applied to ECHR law by analogy. Here again, we can find different reasons for this phenomenon (and the variety of constitutional provisions analysed above proves critical):

In some cases, the extension of the disapplication practice can be explained on constitutional bases (France, the Netherlands),

In other cases, instead, such extension has been devised by the *genius* of domestic (common) judges (e.g. in Italy).

In some countries there are constitutional provisions empowering national judges to disapply national law that conflicts with international treaties. In France (where the Constitution stipulates the superiority of treaties), there are no specific provisions concerning human rights treaties, and all the provisions in the Constitution's Title VI – regarding the entry into force of international treaties – are applicable to the ECHR. The domestic super-legislative ranking of international treaties is inferable from Article 55,<sup>64</sup> which provides that ratified treaties are superior to domestic legislation. The review of the conformity of national law with international treaties (control of '*conventionnalité*') is entrusted to national judges.

Unlike France, many Eastern European Countries have entrusted this control to constitutional courts, causing a certain degree of convergence between the control of constitutionality and that of '*conventionnalité*'.<sup>65</sup> A similar mechanism – with the important difference of the absence of judicial review of legislation – is the Dutch model,<sup>66</sup> based on Articles 91 and 93 of the *Grondwet* (the Basic Law).<sup>67</sup> The clearest

<sup>64</sup> Art. 55 Constitution: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'

<sup>65</sup> About the jurisdiction of the national constitutional courts in this field see Bulgaria Art. 149(4); Poland Art. 188; Czech Republic Art. 87; Slovenia Art. 160. See Montanari, *supra* note 2, at 99.

<sup>66</sup> On this see de Wet, 'The Reception Process in the Netherlands and Belgium' in Keller and Stone Sweet, *supra* note 4, at 229, 260; Van Dijk, 'Dutch Experience with European Convention in Domestic Law', in L.A. Rehof and C. Gulmann (eds), *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (1989), at 137; Montanari, *supra* note 2, at 65; Zvaak, 'The Netherlands', in R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe: the European Convention on Human Rights and its Member States, 1950–2000* (1989), at 595.

<sup>67</sup> Art. 91 Basic Law: 'The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the Parliament. The cases in which approval is not required shall be specified by Act of Parliament. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the Parliament only if at least two-thirds of the votes cast are in favour.'

Article 93: 'Provisions of treaties and of *resolutions* by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.'

signal of the Dutch order's incredible openness to international law is Article 90: 'the Government shall promote the development of the international rule of law'. Grewe<sup>68</sup> argued that the Dutch system, recognizing the prevalence of the international regime over the national one, is the only truly monist system in Europe. Another confirmation comes from *Grondwet's* Article 94: '[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions'. According to some authors,<sup>69</sup> this Article also refers to constitutional provisions.<sup>70</sup> In any case, Article 94 entitles national judges to review the conventionality of national law, even though they are not allowed to review the constitutionality of the statutory norms under Article 120 of the *Grondwet*.<sup>71</sup>

In essence, in both France and the Netherlands the convergence between EU and ECHR law is due to a set of constitutional instructions which seem not to distinguish between public international law and EU law.<sup>72</sup>

The second case of extension of the *Simmenthal* doctrine to the ECHR – the Italian case – is completely different, in terms of scope and reasons. As widely noted,<sup>73</sup> Italian common (*comuni*) judges started disapplying domestic norms conflicting with the ECHR.<sup>74</sup> In 2007, the Corte Costituzionale resolved to stop this trend, which constituted an undue 'constitutional exception' to constitutional supremacy, and derogated from centralized constitutional review. The Constitutional Court, to hinder this practice and ensure at the same time the ECHR's supra-statutory status, agreed for the first time to assess the validity of national provisions using the ECHR standard. The Corte, therefore, extended the doctrine of the 'interposed norm' (*'norma interposta'*).<sup>75</sup> In essence, it sent this message to common judges: 'instead of disapplying, refer a

<sup>68</sup> Grewe, 'La question de l'effet direct de la Convention et les résistances nationales', in P. Tavernier, *Quelle Europe pour les droits de l'homme?* (1996), at 157.

<sup>69</sup> Van Dijk, *supra* note 67, at 137; Montanari, *supra* note 2, at 65.

<sup>70</sup> Van Dijk, *supra* note 67, at 137; Montanari, *supra* note 2, at 65.

<sup>71</sup> Art. 120: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'

<sup>72</sup> Betlem and Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation', 3 *EJIL*(2003) 569: 'there is no fundamental divide between the application of public international law and EC law'.

<sup>73</sup> Biondi, Dal Monte, and Fontanelli, *supra* note 55; Pollicino, *supra* note 55.

<sup>74</sup> See: Court of Pistoia 23 Mar. 2007; Court of Genoa, 23 Nov., 2000; Court of Appeal of Florence decisions Nos 570 of 2005 and 1403 of 2006, and the State Council (*Consiglio di Stato*), I Section, decision No. 1926 of 2002: '[s]ome judges had already started applying this method, which comes from the judicial practice of disapplying the internal statutory norm conflicting with Community law. In some recent occasions, even the Supreme Court of Cassation (*Corte di Cassazione*) and the Supreme Administrative Court (*Consiglio di Stato*) had endorsed the use of disapplication in cases of conflict with ECvHR law': Biondi, Dal Monte, and Fontanelli, *supra* note 55, at 891.

<sup>75</sup> 'Scholars have minted the wording "interposed provision" to individualize the cases in which a constitutional standard can be invoked only indirectly in a constitutional judicial proceeding, because different primary provisions are inserted between the constitutional standard and the reported provisions (suspected of being unconstitutional)': *ibid.*, at 897. See also C. Lavagna, *Problemi di giustizia costituzionale sotto il profilo della 'manifesta infondatezza*, (1957), at 28; M. Siclari, *Le norme interposte nel giudizio di costituzionalità* (1992).



preliminary question of constitutionality to the Constitutional Court!'. The Court's argument hinged upon the distinction between ECHR and EU law:

according to the constitutional judges, the ECHR legal system has distinct structural and functional legal features as compared to the European legal order. . . . [in their view,] the ECHR is 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.<sup>76</sup>

This explains the different treatment reserved to the ECHR, as regards the practice of disapplication and the necessity that the Convention be consistent with the whole Constitution, not just with the counter-limits (i.e., those fundamental principles forming an untouchable constitutional core).

Quite surprisingly, after the intervention of the Constitutional Court, some ordinary judges kept disapplying national provisions conflicting with the ECHR<sup>77</sup> for various reasons:

1. Sometimes the judges seemed not to understand the Constitutional Court's *Diktat*, or not to know the difference between the ECHR and EU law;<sup>78</sup>
2. In other cases, the judges duly recalled the Corte Costituzionale's instructions, yet misunderstood the meaning of the new (post-Lisbon) Article 6 TEU, which paves the way for the EU's accession to the ECHR. In other words, they thought that the ECHR has (already) become part of EU law *ipso iure*, after the coming into force of the Lisbon Treaty and, therefore, now had direct effect and primacy. This is perhaps the case in a judgment of the Consiglio di Stato (Supreme Court of Administrative Law) of March 2010;<sup>79</sup>
3. Finally, there are cases of open civil disobedience by common judges who demonstrate that they are aware of, but will not follow, the instructions of the Constitutional Court.<sup>80</sup>

It is possible to see the Italian case as a demonstration that a problem of application of 'external' law in a multilevel legal system might result in an 'internal' judicial conflict (Constitutional Court versus ordinary judges).<sup>81</sup>

There are other interesting (yet less clear-cut) cases: in Bulgaria, for instance. National judges are considered the first defenders of the ECHR's precedence over national law under Article 5.4 of the Constitution. Both common judges and the

<sup>76</sup> Pollicino, *supra* note 55.

<sup>77</sup> Carlotto, 'I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un'analisi sul seguito giurisprudenziale', available at: [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it); E. Lamarque, 'Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune', available at: <http://www.associazionedeicostituzionalisti.it>.

<sup>78</sup> Tribunale di Livorno, Sez. Lav., Order of 28 Oct. 2008. See Carlotto, *supra* note 78.

<sup>79</sup> Consiglio di Stato, judgment of 2 Mar. 2010, n. 1220. On this decision see Colavitti and Pagotto, 'Il Consiglio di Stato applica direttamente le norme CEDU grazie al Trattato di Lisbona: l'inizio di un nuovo percorso?', available at: [www.associazionedeicostituzionalisti.it/rivista/2010/00/Colavitti-Pagotto01.pdf](http://www.associazionedeicostituzionalisti.it/rivista/2010/00/Colavitti-Pagotto01.pdf) (2010).

<sup>80</sup> Tribunale di Ravenna, 16 Jan. 2008. On this see Carlotto, *supra* note 78.

<sup>81</sup> For a wider analysis coming to this conclusion see *ibid.*: Lamarque, *supra* note 78.



Constitutional Court are seemingly entitled to carry out the *contrôle de conventionnalité*,<sup>82</sup> but scholars have noticed<sup>83</sup> a certain reluctance on the part of ordinary judges:

The national courts prefer to decide that the case pending before them doesn't fall into a field of these two international instruments. Nevertheless, two comments should be made. First, this position does reveal a certain difficulty to solve potential conflicts between the domestic law and European instruments. Second, the national courts do still prefer to apply the relevant domestic law instead of the relevant international clauses. One of the reasons is that the judges' knowledge of these instruments is still insufficient.<sup>84</sup>

The Bulgarian Constitutional Court has recognized the priority of the Constitution over EU and ECHR law, but also admitted that the Constitution is to be interpreted as far as possible in light of ECHR law. This solution has been described as the paradoxical consequence<sup>85</sup> of the wording of Article 149 of the Constitution (namely, of the combination of paragraphs (2) and (4)), which governs both the control of constitutionality (paragraph 2) and of conventionnalité (paragraph 4). These kinds of review, indeed, were deemed to differ in terms of purpose and scope.<sup>86</sup>

In Portugal, theoretically, it can be argued that Articles 204<sup>87</sup> and 8<sup>88</sup> of the Constitution, combined, entitle national judges to disapply national law conflicting with constitutional and international law, but scholars describe this possibility as a sort of 'sleeping giant' that has never woken up.<sup>89</sup>

<sup>82</sup> See Art. 149(2) and (4) of the Constitution (Bulgaria): '(1) The Constitutional Court shall: 1. provide binding interpretations of the Constitution; . . . 4. rule on the compatibility between the Constitution and the international treaties concluded by the Republic of Bulgaria prior to their ratification, and on the compatibility of domestic laws with the universally recognized norms of international law and the international treaties to which Bulgaria is a party.'

<sup>83</sup> Fartunova, *supra* note 39, at 109.

<sup>84</sup> *Ibid.*, at 108–109.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Art. 204 Constitution: 'In matters that are brought to trial, the courts shall not apply rules that contravene the provisions of this Constitution or the principles enshrined therein.'

<sup>88</sup> Art. 8 Constitution:

'1. The rules and principles of general or common international law shall form an integral part of Portuguese law.

2. The rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese state.

3. Rules issued by the competent bodies of international organisations to which Portugal belongs shall come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.

4. The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.'

<sup>89</sup> 'Although authorized by the Portuguese Constitution, I could not find cases where Portuguese judges had directly invoked the ECHR to put aside conflicting national law': Coutinho, *supra* note 37, at 364. See Report of the Portuguese Constitutional Court to the XII Congress of the European Constitutional Courts, 14–16 May 2002, at 53, cited by Coutinho, *supra*.

On the domestic effects of the ECHR another interesting provision is Article 96 of the Spanish Constitution, the meaning of which is a matter of debate: does it empower judges to disapply national legislation in conflict with ECHR provisions? Granted, according to the Constitutional Tribunal, Spanish judges may disapply national laws conflicting with international treaties,<sup>90</sup> although the possible disapplication of national law for conflict with human rights treaties like the ECHR appears to be more problematic, and the Constitutional Tribunal has never pronounced on this issue. Since the Constitutional Tribunal has demonstrated its willingness to take the ECHR into account – via Article 10.2 of the Constitution – scholars suggested that ordinary judges should refer a question to the Constitutional Tribunal when conflict arose, rather than disapply national law.<sup>91</sup> This view also hinges upon the distinction between normal international treaties (Article 96) and human rights treaties (Article 10).

Finally, there are states where disapplication is forbidden: in the UK, for instance, in case of conflict between primary legislation and the Convention, judges can only adopt a 'declaration of incompatibility',<sup>92</sup> which does not influence the validity and the efficacy of the domestic norm. After such a declaration, 'if a Minister of the Crown considers that there are compelling reasons for proceeding . . . he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility' (HRA, section 10).<sup>93</sup>

Regardless of whether disapplication is allowed or practised to ensure the implementation of ECHR norms, in all jurisdictions the Convention is apparently provided, at least, with a sort of 'direct effect' (i.e., the other structural principle of EU law, together with primacy). In this respect, the Austrian case is significant, as Keller and Stone Sweet pointed out: '[i]n 1964, the political parties revised the Constitution, to confer upon the Convention constitutional status and direct effect. Today, conflicts between the Austrian Constitution and the ECHR are governed by the *lex posteriori derogat legi priori* rule, an apparently unique situation.'<sup>94</sup> Interestingly, even before the 1964 amendment<sup>95</sup> a *de facto* constitutional character had been acknowledged to the

<sup>90</sup> Tribunal Constitucional, 49/1988, FJ 14; Tribunal Constitucional 180/1993.

<sup>91</sup> Ferreres Comella, 'El juez nacional ante los derechos fundamentales europeos. Algunas reflexiones en torno a la idea de diálogo', in A. Saiz Arnaiz and M. Zelaia Garagarza (eds), *Integración Europea y Poder Judicial* (2006), at 231.

<sup>92</sup> On this declaration see Ewing and Tham, 'The Continuing Futility of the Human Rights Act', *Public Law* (2008) 668.

<sup>93</sup> A. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (2007), at 436.

<sup>94</sup> Keller and Stone Sweet, *supra* note 9, at 684.

<sup>95</sup> As seen above, Austria is a case of constitutional incorporation of the ECHR, as the Convention there has 'the status of a provision of the national Constitution': M. Janis, R. Kay, and A. Bradley (eds), *European Human Rights Law* (1996), at 448. Art. 50(3) Austrian Constitution distinguishes between international treaties having a constitutional relevance and those presenting a legislative relevance. Should these treaties modify or complement the Constitution they may only be concluded following the procedure laid down in Art. 50(3). Moreover 'in a vote of sanction adopted pursuant to Paragraph (1)', such treaties or such provisions as are contained in treaties shall be explicitly specified as 'constitutionally modifying'; this way this system creates a connection between the content of the Treaty and the form chosen to give it effect. The ECHR was concluded by the procedure established under Art. 50 but without such a declaration: as a consequence, the Austrian Constitutional Court originally argued that the ECHR did not

ECHR, which confirms the necessity to go beyond the wording of the constitutional texts in the present investigation.

It appears that the situation has not changed much since the 1980s, when Neville Brown and McBride argued that the attribution of the direct effect to the provisions of the ECHR is a matter for the national constitutions to decide on.<sup>96</sup> At the same time, as we saw, there are cases in which, notwithstanding the ambiguity of the national constitutions, direct effect is recognized to the ECHR provisions: the Belgian case is emblematic, as shown in *Franco Suisse Le Ski*.<sup>97</sup> That is why, today, despite the literal wording of the Constitution, some scholars consider both the European laws (i.e., the ECHR and EU law) to be ‘supranational’.<sup>98</sup> Even in Luxembourg, over the years, courts have confirmed the ‘the directly self-executing character of many of the Convention’s provisions’.<sup>99</sup> Hence, the ECHR and its Protocols are considered to be directly applicable in the Luxembourg legal order’.<sup>100</sup>

However, the most evident case of this trend is the situation of Scandinavian countries, where ‘[t]he EC/EU/EEA law in Scandinavian law and the ECtHR are regarded as *lex superior*, despite [the fact] that the explicit formal basis for that remains limited. The special character of European law within domestic law in Scandinavia (except for the ECHR in Norway and Sweden) tends to be expressed through judicial practice rather than through acknowledgment of their constitutional role’.<sup>101</sup>

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have constitutional status. Soon afterwards, a constitutional Act was passed modifying the Constitution and acknowledging the constitutional value of the ECHR (Art. II BvG (BGBl 1964/59). Later, the Constitutional Court acknowledged the interpretative value of such clause, giving it a retroactive effect (‘[t]he ECHR has a double status in Austria. In addition to its character as an international treaty, it has been transformed, on the domestic level, into a law with the rank of a constitutional act. This has a two-fold implication. First, the ECHR grants individual rights that are directly actionable before all courts and authorities. Given their status as constitutional law, these rights may be relied upon before the CC’: Cede, *supra* note 8, at 63). As a consequence, today it is possible to say that the ECHR ‘has the rank of directly applicable federal constitutional law’. Confirmation of the constitutional status of the ECHR is derived from the complementary nature of this document (with regard to the constitutional text). This is the real criterion for evaluating its ranking in the legal sources of the national system despite the procedure followed to incorporate them, and that explains why the ECHR had, *de facto*, constitutional rank even before 1964.

<sup>96</sup> ‘An individual could not however rely upon any provisions of the ECHR in a national court unless it was “capable of conferring rights on citizens of the Community which they can invoke before the courts”. This requirement raises the question whether the ECHR’s provisions are of direct effect. The only guide to this is to be found in the decisions of the courts of countries whose constitutions accord the ECHR legal effect’: Neville Brown and McBride, ‘Observations On the Proposed Accession by the European Community to the European Convention on Human Rights’, 4 *Am J Comp L* (1981) 691, at 695. See also Drzemczewski, ‘The Domestic Status of the European Convention on Human Rights: New Dimensions’, 1 *LIEI* (1977) 1.

<sup>97</sup> Cass. 27 May 1971, [1971] *I Pas.* 886.

<sup>98</sup> For instance, see Popelier, ‘Report on Belgium’, in Martinico and Pollicino (eds), *supra* note 3, at 83, 84.

<sup>99</sup> For instance: Cour supérieure de justice (chambre des mises en accusation), 2 Apr. 1980, and Cour de cassation, 17 Jan. 1985, No. 2/85. These cases are reported by Mak, ‘Report on the Netherlands and Luxembourg’, in Martinico and Pollicino (eds), *supra* note 3, at 303.

<sup>100</sup> *Ibid.*, at 314.

<sup>101</sup> Lebeck, *supra* note 63, at 407.

### C The Limits to Primacy: the Counter-limits Doctrine

As Maduro pointed out, 'The acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional, if not even, at times, resisted by national constitutional courts. This confers to EU law a kind of contested or negotiated normative authority',<sup>102</sup> and reveals the existence of a never-ending process of judicial bargaining between domestic courts (especially constitutional and supreme courts) and the CJEU. The conditions posed by the constitutional courts and mentioned by Maduro are represented by doctrines such as the 'counter-limits' and the *Solange* ones.

By 'counter-limits' (*controlimiti*)<sup>103</sup> I mean those national fundamental principles raised by constitutional courts – like impenetrable barriers – against the infiltration of EU law. The counter-limits are conceived as a form of '*contrepois au pouvoir communautaire*',<sup>104</sup> an ultimate wall in the way of the full application of EU law, an intangible core of national constitutional sovereignty.<sup>105</sup> The counter-limits doctrine was *de facto* conceived by the German BvG in *Solange I*,<sup>106</sup> and by the Italian Constitutional Court in case no. 183/73. However, many constitutional courts endorsed it later on: the French<sup>107</sup> and the Spanish ones in 2004,<sup>108</sup> but even earlier the English High Court had made the primacy of EU law contingent on the preservation of certain untouchable principles.<sup>109</sup> More recently, the decisions of the Polish<sup>110</sup> and German Constitutional Courts<sup>111</sup> (but see also the decisions of Cypriot<sup>112</sup> and Czech<sup>113</sup> judges)

<sup>102</sup> Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', 2 *European J Legal Stud* (2007), available at: <http://ejls.eu/index.php?mode=htmlarticle&filename=./issues/2007-12/MaduroUK.htm>.

<sup>103</sup> This formula has been introduced into Italian scholarly debate by Paolo Barile: Barile, 'Ancora su diritto comunitario e diritto interno', VI *Studi per il XX anniversario dell'Assemblea costituente* (1969) 49.

<sup>104</sup> About the notion of *contrepois au pouvoir* see Manin, 'Frontières, freins et contrepois – La séparation des pouvoirs dans le débat constitutionnel américain de 1787', 2 *Revue française de sciences politiques* (1994) 257; Georgopoulos, 'The Checks and Balances Doctrine in Member States as a Rule of EC Law: the Cases of France and Germany', 9 *ELJ* (2003) 530.

<sup>105</sup> It is very interesting to note that the notion of counter-limits implies a sort of constitutional and moral superiority of the national legal orders with regard to the supranational level. This form of constitutional superiority is usually justified by the existence of the democratic deficit that characterizes the EU: see, e.g., *Solange I* (BVerfGE 37, at 271 ff.): 'the Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level'.

<sup>106</sup> *Ibid.*, available at: [www.bundesverfassungsgericht.de/en/index.html](http://www.bundesverfassungsgericht.de/en/index.html).

<sup>107</sup> But see also Conseil d'Etat, decision *Sarran*, 30 Oct. 1998; Cour de Cassation, decision *Fraisse*, 2 June 2000; Conseil d'Etat, decision *SNIP*, 3 Dec. 2001. In addition see Conseil Constitutionnel 2004-496-497-498-499 DC 2004-505 DC.

<sup>108</sup> Tribunal Constitucional, *declaracion* 1/2004.

<sup>109</sup> *McWhirter and Gouriet v. Secretary of State for Foreign Affairs* [2003] EWCA Civ 384. On this point see Biondi, 'Principio di supremazia e "Costituzione" inglese. I due casi "Martiri del sistema metrico" e "Mc Whirter and Gouriet"', 4 *Quaderni Costituzionali* (2003) 847.

<sup>110</sup> Trybunał konstytucyjny, P 1/05, available at: [www.trybunal.gov.pl/eng/index.htm](http://www.trybunal.gov.pl/eng/index.htm).

<sup>111</sup> BVerfG, 2 BvR 2236/04, available at: [www.bundesverfassungsgericht.de/en/index.html](http://www.bundesverfassungsgericht.de/en/index.html).

<sup>112</sup> Ανώτατο Δικαστήριο, 294/2005, available at: <http://www.cylaw>.

<sup>113</sup> Ústavní Soud, Pl. ÚS 66/04, available at: [http://test.concourt.cz/angl\\_verze/cases.html](http://test.concourt.cz/angl_verze/cases.html).

have recalled the question of the ultimate barriers in the field of the European arrest warrant.<sup>114</sup>

According to Panunzio,<sup>115</sup> the counter-limits (even in the *Solange* rendering) represent an instrument to force the courts to communicate; they are like a ‘gun on the table’ which induces the jurisdictional actors to confront each other. What was the essence of the BvG’s *Diktat in Solange* – a judgment delivered a few years after the ambivalent *Internationale Handelsgesellschaft* decision?<sup>116</sup> The BvG said that ‘as long as [German: *Solange*] the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the *Bundesverfassungsgericht* in judicial review proceedings . . . is admissible and necessary’.<sup>117</sup> In other words, the German court asked for a Bill of Rights and a strong Parliament in a context of separation of powers, the two main ingredients of the archetypical definition of Constitution in Article 16 of the Declaration of the Rights of Man and of the Citizen (1789).<sup>118</sup> This was deemed to be the right mix to overcome the democratic deficit afflicting the European Communities.

A similar doctrine has emerged in respect of the ECHR’s penetration into the domestic legal order. The most telling example is the BvG’s order no. 1481/04,<sup>119</sup> mentioned above, where the Karlsruhe judges ruled that, in the case of unresolvable conflicts between ECHR and domestic law, the latter should prevail. For the first time in its history, the BvG specified which matters are off limits for the primacy of the ECHR: family law, immigration law, and the law on protection of personality.<sup>120</sup> The BvG stressed the particularities of the proceedings before the ECtHR, which might lead to a different outcome in the balancing between values.

The most interesting element of this decision is that the BvG made use of the selective approach also used in the *Lisbon* judgment<sup>121</sup> with respect to EU law.<sup>122</sup> In the *Lisbon* judgment the BvG ruled as follows:

<sup>114</sup> Komarek, ‘European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapunctual Principles’, Jean Monnet Working Paper (2005), available at: [www.jeanmonnetprogram.org/papers/05/051001.html](http://www.jeanmonnetprogram.org/papers/05/051001.html).

<sup>115</sup> Panunzio, ‘I diritti fondamentali e le Corti in Europa’, in S. Panunzio (ed.), *I diritti fondamentali e le Corti in Europa* (2005), at 3, 17 ff.

<sup>116</sup> Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125: ‘[t]he validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure’.

<sup>117</sup> BVerfGE 37, 271 2 BvL 52/71 *Solange I*.

<sup>118</sup> ‘A society in which the guarantee of the rights is not secured, or the separation of powers not determined, has no constitution at all.’

<sup>119</sup> 2 BvR 1481/04.

<sup>120</sup> On this see Hoffmeister, ‘Germany: Status of European Convention on Human Rights in Domestic Law’, 14 *Int’l J Constitutional L* (2006) 722.

<sup>121</sup> BVerfG, cases 2 BvE 2/08 and others, 30 June 2009, available at: [www.BVerfG.de/entscheidungen/es20090630\\_2bve000208.html](http://www.BVerfG.de/entscheidungen/es20090630_2bve000208.html).

<sup>122</sup> On this see Lanza, ‘Core of State Sovereignty and Boundaries of European Union’s Identity in the *Lissabon-Urteil*’, 11 *German LJ* (2010) 399.

European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.<sup>123</sup>

The BvG thus contributed significantly to defining the meaning of Article 4 TEU,<sup>124</sup> namely elucidating the concept of 'national identity' (already used in Article 6(3) TEU, previous version).

Even in legal orders lacking a fully fledged constitutional text, like the UK,<sup>125</sup> judges limited the openness granted to the ECHR. Emblematically, in *Horncastle*, the Supreme Court<sup>126</sup> said:

The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.<sup>127</sup>

Even more clearly – and using a rhetoric that recalls that of continental constitutional courts – the same court said, elsewhere:

This Court is not bound to follow every decision of the [ECtHR]. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court

<sup>123</sup> BVerfG, case 2 BvE 2/08 *supra* note 122, at para. 249.

<sup>124</sup> Art. 4 TEU: '2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

<sup>125</sup> See Murphy, 'Human Rights Law and the Perils of Explicit Judicial Dialogue', working paper, 2011; Bratza, 'The Relationship between the UK Courts and Strasbourg', *European Human Rts L Rev* (2011) 505.

<sup>126</sup> On the impact of the ECHR on the activity of some national supreme courts see Bjorge, 'National Supreme Courts and the Development of ECHR Rights', 9 *Int'l J Constitutional L* (2011) 5.

<sup>127</sup> *R v. Horncastle and Others* [2009] UKSC 14, at para. 11.



to engage in the constructive dialogue . . . which is of value to the development of Convention law. Of course, we should usually follow a clear and constant line of decisions . . . But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber . . . Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with *some fundamental substantive or procedural aspect of our law*, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.<sup>128</sup>

In Austria, where the ECHR enjoys constitutional status, this Convention-friendliness cannot justify a violation of the Constitution.<sup>129</sup> In this sense, some authors<sup>130</sup> have compared the *Görgülü* judgment to the *Miltner* case,<sup>131</sup> where the Austrian Constitutional Court stressed the possibility of departing from the ECtHR's case law if adherence thereto would entail a violation of the Constitution.

The Italian Constitutional Court came to a similar conclusion in 2007 (decisions 348 and 349), where it clarified that the ECHR has a privileged position, but enjoys no 'constitutional immunity'; on the contrary, it must abide by all constitutional norms. The Italian judges equated the ECHR with any source of international law and found, accordingly, that the 'constitutional tolerance' of the Italian system towards the ECHR is lower than that towards EU law. This difference in degree is clearly visible: whereas the 'counter-limits' against the penetration of EU law are a subset of constitutional rights (which means that EU law prevails over non-core constitutional values), the Italian court is stricter with the Convention, requiring its conformity with every constitutional norm: 'the need for a constitutionality test on the Convention norm excludes the possibility of having a limited set of fundamental rights that could serve as a counter-limit; indeed, every norm of the Constitution shall be respected by the international norm challenged'.<sup>132</sup>

## 4 Final Remarks

This article provides a first comparison of the national judicial treatment of EU law and the ECHR. In order to see whether national judges are treating the ECHR and EU law similarly I focused on three judicial practices: the consistent interpretation, disapplication of national norms, and counter-limits doctrines. A first analogy is interpretive favour accorded to these laws by national judges independently of what the constitutions provide about their *status* in the hierarchy of domestic legal sources (among others, see 2 BvR 1481/04; Corte Costituzionale, Nos. 348 and 349/2007). For instance, in France, the Netherlands, the Nordic countries, and in other European states, the practice of consistent interpretation is widely used for both these laws, to solve the antinomies existing between national and ECHR and EU law alike.

<sup>128</sup> *Manchester City Council v. Pinnock* [2010] UKSC 45, at para. 48 (emphasis added).

<sup>129</sup> 'In this case, even though the Convention has constitutional rank, the contrary rule of constitutional law would have to prevail by virtue of its *lex specialis* character': Cede, *supra* note 8, at 70.

<sup>130</sup> As Krisch says in 'The Open Architecture of European Human Rights Law', 2 *MLR* (2003) 183.

<sup>131</sup> Austrian Constitutional Court, *Miltner*, VfSlg 11500/1987, available at: [www.ris.bka.gv.at/vfgh/](http://www.ris.bka.gv.at/vfgh/).

<sup>132</sup> Biondi, Dal Monte, and Fontanelli, *supra* note 55, at 915.



A second (potential) similarity rests in the resolution of conflicts between domestic and EC/ECHR norms. In this respect, the Italian case is symptomatic, in which ordinary judges autonomously treat the Convention as if it is EU law. This use of disapplication seems to imply the acknowledgment of a certain degree of *precedence* and *direct applicability* to ECHR norms.<sup>133</sup>

Of the three aspects of potential convergence examined, this is the most controversial. Disapplication is allowed in other jurisdictions as well (Romania, Portugal, Spain), but national judges, for different reasons, have so far refrained from this practice. In any case, even in these states, it is fair to underscore that the ECHR, apparently, has at least direct effect and precedence.

Nevertheless, the ECHR's primacy is not unlimited, as the recent BvG decisions indicate: a particular counter-limits doctrine is emerging also with regard to the ECHR<sup>134</sup> and this is the third observable symptom of the converging trend.

In conclusion, despite the variety of national constitutional provisions on the status of EU and ECHR norms, some national judges began extending the structural principles of EU law (primacy and direct effect) to the ECHR. At the same time, the interpretative superiority accorded to ECHR law is limited by constitutional principles which can be called 'counter-limits' in Italian parlance (see cases 183/73 and 170/84), which constitute the intangible nucleus of constitutional sovereignty.

In terms of method, I have attempted to go beyond the formalistic data, trying to expound the law in action. However, constitutional provisions play a major role: although sometimes one can see evident symptoms of approximation in the treatment of EU and ECHR laws, quite often the constitutional discipline results in an important, if not decisive, obstacle to complete convergence.

The starting assumption is that there are more similarities than differences in the national treatment of European laws. In some cases, this similarity was convincingly proved, although often the convergence is based on different grounds (constitutional openness towards human rights law treaties; existence of specific legislative provisions on the ECHR; the activity of constitutional courts).

In other cases, finally, a trend of approximation is discernible (see the section on the extension of disapplication to the Convention, suggesting its *de facto* primacy), but it is not uniform across the Member States, and may also be the cause of internal conflicts (see the Italian tension between ordinary judges and the Corte Costituzionale).

Finally, the emergence of some constitutional barriers is common to both European laws (but mind the difference between Italy and Germany). This may be seen either as an evident *rapprochement* between EU and ECHR law (i.e., a confirmation of the supranational character of the ECHR) or, alternatively, as the normal reaction of national courts faced with the progressive abandonment of the margin of appreciation doctrine by the Strasbourg Court.<sup>135</sup> In any case, convergence does not mean

<sup>133</sup> E.g., TAR Trentino-Alto Adige, Trento, judgment of 17 July 2008, n. 171.

<sup>134</sup> See 2 BvR 1481/04, *supra* note 48.

<sup>135</sup> Sadursky, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', 3 *Human Rts L Rev* (2009) 397.

perfect coincidence, but it describes a process of mutual rapprochement between legal entities, it is an ongoing process.

As a consequence, it is (still) difficult to answer conclusively the central question of this article. However, comparing the current scenario with that studied by Neville, McBride, and Drzemczewski in the 1970s–1980s, it is immediately clear that, today, the issue of the ECHR's primacy and direct effect does not depend just on what is written in the constitutions, it is something that seems to go beyond the full control of national constitutions. In this scenario, EU law has also provided national judges (the Italian case is very clear on this) with arguments for reconsidering the ECHR's force, as Keller and Stone Sweet, for instance, noted.<sup>136</sup>

Arguably, the EU's accession to the ECHR will render this question moot, by fostering absolute convergence in the judicial treatment of EU and ECHR laws. I am not sure about that. On the contrary, the CJEU's case law on international treaties concluded by the European Communities drew a distinction between 'EC law proper' and 'Community Agreements'.<sup>137</sup> Moreover, recently, the ECJ extended the 'WTO exception' (WTO law's lack of direct effect) to other international law treaties.<sup>138</sup>

Cases like *Mox Plant*,<sup>139</sup> then, reveal how the ECJ (now CJEU) still holds the reasons connected to its interpretive monopoly dear, and betray its lack of tolerance for interpretive competitors. This is a reminder of how there cannot be obvious conclusions in this area, as is often the case in the fascinating 'journey to an unknown destination'<sup>140</sup> of European integration.

<sup>136</sup> 'European integration – the evolution of the EU's legal system, in particular – has shaped reception in a number of crucial ways. First, the ECJ's commitment to the doctrines of the supremacy and direct effect of Community law provoked processes that, ultimately, transformed national law and practice. Supremacy required national courts to review the legality of statutes with respect to EC law, and to give primacy to EC norms in any conflict with national norms. For judges in many EU States, the reception of supremacy meant overcoming a host of constitutional orthodoxies, including the prohibition of judicial review of statute, the *lex posteriori derogat legi priori*, and separation of powers notions. These same structural issues arose anew under the Convention': Keller and Stone Sweet, *supra* note 9, at 681.

<sup>137</sup> Bourgeois, 'The Effects of International Agreements in European Community Law: Are the Dice Cast?', 82 *Michigan L Rev* (1984) 1250.

<sup>138</sup> See Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond', 4 *J Int'l Econ L* (2004) 885.

<sup>139</sup> Case C-459/03, *European Commission v. Ireland* [2006] ECR I-4635.

<sup>140</sup> Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' 4 *J Common Market Stud* (1993) 417.