

# Allies and Counterbalances

## Constitutional Courts and the European Court of Human Rights: A Comparative Perspective

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### Abstract

This paper investigates and advocates for the potentials of a direct engagement with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) by constitutional courts through a comparative analysis encompassing six Western European countries. It first shows that, although it does not generally enjoy constitutional rank, the Convention serves as a standard for constitutional review, as constitutional courts have incorporated it into their constitutional yardsticks through various techniques. It then stresses that this has not molded constitutional courts into mere agents of the Strasbourg court, because they have also developed a series of limitations to avoid a mechanical transposition of Strasbourg case-law into the domestic legal order. Finally, it highlights the benefits of the Convention's integration into the constitutional yardstick by arguing that this enhances domestic compliance with the Convention, strengthens the legitimacy of the Convention system, and fosters judicial dialogue. Overall, by directly engaging with the ECHR and with Stras-

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bourg case-law, constitutional courts can play a pivotal role in keeping the balance between the supranational protection of human rights and the national margin of appreciation.

## I. Introduction

Constitutional courts are generally considered to be the guardians of the constitution, as they are entrusted with the task of upholding the legal order's highest norms against potential threat from the domestic authorities, notably Parliament. This paper aims to investigate whether, how, and to what extent they can serve as guardians of the ECHR too. It first examines how the constitutional courts of six Western European countries – Austria, Belgium, France, Germany, Italy, and Spain – engage with the ECHR and with the European Court of Human Rights' (ECtHR's) jurisprudence. It then argues that, thanks to their distinctive role in the domestic legal order, constitutional courts are in a position to contribute to the domestic enforcement of the ECHR in a way that other domestic authorities are precluded from doing. However, their engagement with the ECHR, and notably with the ECtHR's jurisprudence, not only benefits domestic compliance, but is also crucial to keep the balance between supranational human rights protection, on the one hand, and the national margin of appreciation, on the other – that is, between rights and democracy – thereby contributing to the overall legitimacy of the Convention system.

This article proceeds in two sections. Section II focuses on the ECHR's role in constitutional adjudication. First, it sheds light on the contribution of constitutional courts to the ECHR's domestic implementation, a contribution that is frequently underestimated to the benefit of rather less frequent cases of disobedience against Strasbourg. It shows that, although the ECHR normally lacks constitutional rank, constitutional courts resort to various techniques to incorporate it in their constitutional yardsticks, thus enabling themselves to review the compliance of domestic acts with the ECHR. These incorporation techniques are briefly addressed, while the ECHR-blind approach of the French *Conseil constitutionnel* is singled out as the exception to the rule (II. 1.). The second part of section II stresses that using the ECHR as a yardstick for constitutional review does not turn constitutional courts into bodies subordinated to the ECtHR. While reviewing domestic acts' compliance with the ECHR, constitutional courts have also developed some important exceptions to the duty to comply with Strasbourg judgments. This enables them to avoid a mechanical transposi-

tion of the ECtHR's case-law into the domestic order. These exceptions are concisely listed and discussed (II. 2.).

While section II is essentially descriptive, section III follows a normative approach. It makes a case for constitutional courts' acceptance of the ECHR, as interpreted by the ECtHR, as part of their constitutional yardstick, and stresses the benefits of this option. In particular, it highlights that, by doing so, constitutional courts are in a position to enhance domestic compliance with the ECHR, to strengthen the legitimacy and acceptance of the Convention system, and to better enter into dialogue with the Strasbourg court.

The conclusion, besides recapping the paper's main findings, further claims that, under certain conditions, even an open act of resistance to the ECtHR by constitutional courts can be understood as a contribution to the overall legitimacy and efficacy of the Convention system, rather than a simple threat to it. It then sets out the conditions constitutional courts should respect when voicing their dissent to Strasbourg, in order to turn a potential challenge to the European system of human rights' protection into a contribution to its sound development.

## II. The Role of the European Convention on Human Rights in Constitutional Review

### 1. The Convention's Incorporation into the Constitutional Yardstick ...

The ECHR does not generally enjoy constitutional rank in the legal orders of Contracting States; most frequently it has been incorporated into the domestic legal orders by means of an ordinary statute and does not formally enjoy a status higher than that.<sup>1</sup> The Austrian legal order provides for an interesting exception. Here, after some uncertainties following the Convention's ratification in 1958, a constitutional amendment passed in 1964 retrospectively made clear the ECHR's constitutional status.<sup>2</sup> Since then, the

<sup>1</sup> Germany provides a clear example of this approach, as the Bundesverfassungsgericht explained in *Görgülü*: BVerfG, Order of the Second Senate of 14.10.2004, 2 BvR 1481/04 (BVerfGE 111, 307), para. 31.

<sup>2</sup> BGBl. 59/1964; A. Gamper, Austria: Endorsing the Convention System, Endorsing the Constitution, in: P. Popelier/S. Lambrecht/K. Lemmens (eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, 2016, 75 et seq.

ECHR is plainly part of the constitutional yardstick and it is for the Austrian constitutional court, within the limits of its jurisdiction, to ensure domestic acts' compliance with the ECHR in the same way as it ensures compliance with the Constitution.<sup>3</sup> The *Verfassungsgerichtshof* maintains that, in interpreting the ECHR, it has “to consider particularly the case-law of the ECtHR which is the body that first and foremost interprets the ECHR”.<sup>4</sup> It quotes the Strasbourg court's case-law more than other constitutional courts and follows the ECtHR in most cases.<sup>5</sup>

In various countries, however, despite the lack of such constitutional rank, constitutional courts have developed various doctrines that make possible the Convention's *de facto* incorporation into the constitutional yardstick. Interpreting constitutional rights in the light of the Convention is the first and most well-known of these doctrines.<sup>6</sup> When it comes to defining the content and scope of a constitutional right that is also protected by the Convention, the constitutional court interprets the constitutional right in the light of, and in accordance with, the corresponding Convention right. Thus, given that the rights enshrined in the Convention are normally protected in domestic constitutions too, Convention rights shape the content of constitutional rights.

This technique has been extensively applied by the constitutional court of Spain, on the basis of Art. 10.2 of the constitution, which expressly requires it to interpret

“the principles relating to the fundamental rights and liberties recognised by the Constitution [...] in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain”.

In its case-law, the *Tribunal Constitucional* has emphasized that Art. 10.2 leads to a *de facto* coincidence between the rights enshrined in the Constitution and those enshrined in international treaties. In the *Tribunal Constitucional's* words, Art. 10.2

<sup>3</sup> C. Grabenwarter, Zur Bedeutung der Entscheidungen des EGMR in der Praxis des VfGH, in: ÖRZ 85 (2007), 154.

<sup>4</sup> VfSlg 11.500/1987 (*Miltner* case), para. II, 4, g), translation by A. Gamper (note 2), 77.

<sup>5</sup> C. Grabenwarter, European Fundamental Human Rights in the Case Law of the Austrian Constitutional Court, in: L. Weitzel (ed.), *L'Europe des droits fondamentaux. Mélanges en hommage à Albert Weitzel*, 2013, 60. For some examples, C. Grabenwarter (note 3).

<sup>6</sup> See C. van de Heyning, Constitutional Courts as Guardians of Fundamental Rights. The Constitutionalisation of the Convention Through Domestic Constitutional Adjudication, in: P. Popelier/A. Mazmanyán/W. Vandenbruwaene (eds.), *The Role of Constitutional Courts in Multilevel Governance*, 2013, 28.

“requires that corresponding [constitutional] precepts be interpreted in accordance with the content of said treaties and conventions *so that in practice this content becomes to a certain extent the constitutionally declared content of the rights and freedoms which the second chapter of title I of our Constitution describes*”.<sup>7</sup>

The ECHR has been by far the international treaty to which this mechanism has been applied most frequently.<sup>8</sup> This has moved the Convention’s lack of constitutional status to the background. Admittedly the *Tribunal Constitucional* has always maintained that Art. 10.2 does not confer constitutional rank upon international treaties, so that they cannot serve as an autonomous yardstick for constitutional review.<sup>9</sup> In practice, however, the ECHR does serve as a constitutional yardstick to measure the validity of statutes and acts of public authorities.<sup>10</sup>

Interestingly, the *Tribunal Constitucional* has always smoothly agreed to take into account the ECtHR’s jurisprudence when interpreting constitutional rights in light of the ECHR. Without ever extensively giving reasons for its choice,<sup>11</sup> it simply stated that Art. 10.2 “enables and even recommends” to make reference to Strasbourg jurisprudence.<sup>12</sup> If the ECtHR declares that Spain violated a Convention right that is also enshrined in the Spanish Constitution, it is the duty of the *Tribunal Constitucional* to declare and redress this violation.<sup>13</sup>

In its famous *Görgülü* judgment, the *Bundesverfassungsgericht* reached a similar conclusion, despite the absence in the German Basic Law of a corresponding constitutional mandate as precise as the one in the Spanish Constitution. While expressly excluding that the Convention could serve as an autonomous and direct standard of review,<sup>14</sup> the *Bundesverfassungsgericht* refers to the Convention and the Strasbourg court’s case-law as “guides to interpretation”. In the German Constitutional Court’s words, however, the obligation to read constitutional rights in accordance with the Convention sounds softer and less compelling than in the words of its Spanish analogue:

<sup>7</sup> STC 36/1991, FJ 5, emphasis added.

<sup>8</sup> A. Saiz Arnaiz, Artículo 10.2: La interpretación de los derechos fundamentales y los tratados internacionales sobre derechos humanos, in: M. E. Casas Baamonde/M. Rodríguez-Piñero y Bravo-Ferrer (eds.), *Comentarios a la Constitución Española*, 2008, 198.

<sup>9</sup> See, for example, STC 36/1991, FJ 5 and STC 120/1990, FJ 2.

<sup>10</sup> A. Saiz Arnaiz (note 8), 207.

<sup>11</sup> A. Saiz Arnaiz (note 8), 199.

<sup>12</sup> STC 36/1984, FJ 3, translation by the author.

<sup>13</sup> STC 245/1991, FJ 2.

<sup>14</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 32: “The guarantees of the European Convention on Human Rights and its protocols, by reason of their status in the hierarchy of norms, are not a direct constitutional standard of review in the German legal system.”

“The guarantees of the Convention 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.”<sup>15</sup>

A similar technique – not significantly different in its essence, although labelled under a different name: the “reconciliation method” – has been developed by the Belgian Constitutional court.<sup>16</sup> Here too, the *Cour constitutionnelle* holds that international treaties are not as such an autonomous standard for constitutional review.<sup>17</sup> However, when the scope of a binding treaty provision is analogous to that of one or several constitutional provisions, the *Cour constitutionnelle* considers that the treaty and the constitutional provisions form “an inseparable whole” (“*un ensemble indissociable*”). When interpreting these constitutional provisions, it then takes into account the corresponding provisions of international law.<sup>18</sup> Although referring to all international treaties, this doctrine has been applied mainly to the ECHR.<sup>19</sup>

Another technique the Belgian constitutional court resorts to in order to protect Convention rights is the so called “combination method”.<sup>20</sup> This consists of applying the guarantees of equality and non-discrimination to rights that are not enshrined in the Constitution but in an international treaty. Put differently, the *Cour constitutionnelle* considers that Arts. 10 and 11 of the Belgian constitution prohibit discrimination in the enjoyment of all rights, whatever their source may be: The principle of equality and non-discrimination applies to all rights, including those derived from international treaties.<sup>21</sup> This enables the *Cour constitutionnelle* to hold unconstitutional a statute that creates a discrimination in the enjoyment of a certain right guaranteed by an international treaty. Also in this case, the ECHR has

<sup>15</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 32. The duty to take the Strasbourg case-law into account when interpreting constitutional provisions was first affirmed in BVerfGE 74, 358 (370).

<sup>16</sup> *M. Verdussen*, Justice constitutionnelle, 2012, 132 et seq.

<sup>17</sup> Judgment 29/1995.

<sup>18</sup> Judgment 136/2004.

<sup>19</sup> *M. Verdussen* (note 16), 133.

<sup>20</sup> *M. Verdussen* (note 16), 126 et seq.

<sup>21</sup> Judgments 18/1990, limiting the application of the combination method to international treaties’ provisions having direct effect in the domestic legal order, and 106/2003, extending it to all provisions of international and EU law.

been the international treaty to which this doctrine has been most frequently applied.<sup>22</sup>

The Italian *Corte costituzionale* too has accepted to review domestic legislation's compliance with the ECHR. This is the outcome of two landmark judgments of 2007.<sup>23</sup> The cornerstone of the Italian constitutional court's reasoning was Art. 117.1 of the Constitution, which requires the State and the Regions to exercise their legislative powers "in compliance with the constraints deriving from [...] international obligations". Unlike other constitutional courts, the *Corte costituzionale* maintains that a statute violating the Convention indirectly violates the Constitution too, as it conflicts with the constitutional mandate of Art. 117.1 to respect international treaties. The Convention and, most notably, the Strasbourg court's jurisprudence serve then as an indirect yardstick for constitutional review that place themselves between the Constitution and the statutes, the so called "interposed yardstick" ("*parametro interposto*").

The Convention's incorporation into the constitutional yardstick being the common rule among the constitutional courts considered here, the French *Conseil constitutionnel* represents a remarkable exception. In its landmark decision on abortion in 1975, it held for the first time that "a statute that is inconsistent with a treaty is not *ipso facto* unconstitutional" and therefore it is not for the *Conseil constitutionnel* "to consider the consistency of a statute with the provisions of a treaty or an international agreement".<sup>24</sup> Since then, this doctrine has never been overruled<sup>25</sup> and the *Conseil constitutionnel* has consistently denied its jurisdiction to review the

<sup>22</sup> *M. Verdussen* (note 16), 129, stressing that the results of the application of the combination method are nearly tantamount to the use of the Convention as a direct yardstick for constitutional review. See further *A. Alen/E. Peremans/J. Spreutels/W. Verrijdt*, Rapport de la Cour constitutionnelle de Belgique présenté au XVI<sup>e</sup> Congrès de la Conférence des Cours constitutionnelles européennes, Vienne 12.-14.5.2014, La coopération entre les cours constitutionnelles en Europe – situation actuelle et perspectives, <<http://www.confueconstco.org>>, 8. At p. 11 et seq., interesting data and examples of quotations of the ECtHR's case-law are provided.

<sup>23</sup> Judgments 348 and 349/2007.

<sup>24</sup> Conseil constitutionnel, decision of 15.1.1975, 74-53 DC, *IVG*. Exceptionally, the Conseil constitutionnel agrees to review the conventionality of statutes when it rules on applications relating to elections: see, e.g., decision of 21.10.1998, 88-1082/1117 AN, *Val-d'Oise* (*5<sup>ème</sup> circ.*).

<sup>25</sup> In French legal scholarship, however, exists a long and lively discussion on whether it would be convenient for the Conseil constitutionnel to overcome its *IVG* doctrine and agree to review the conventionality of statutes. See, *ex multis*, *J. Roux*, L'abandon de la jurisprudence *IVG*: une question d'opportunité ou de logique?, in: R.D.P. 125 (2009), 645 et seq. Recently, the *IVG* doctrine has been strongly defended by *D. de Béchillon*, Synthèse, in: X. Magnon/P. Esplugas-Labatut/W. Mastor/S. Mouton (eds.), *L'office du juge constitutionnel face aux exigences supranationales*, 2015, 319 et seq.

compliance of legislative acts with international treaties, the Convention in particular.<sup>26</sup> No mention of the Strasbourg court's jurisprudence is found in the *Conseil constitutionnel's* case-law.<sup>27</sup> Although Art. 55 of the French Constitution clearly secures the prevalence of international treaties over domestic statutes,<sup>28</sup> it seems that the clear wording of the constitutional text has not been convincing enough to make the *Conseil constitutionnel* accept the ECHR as a yardstick.<sup>29</sup> This notwithstanding, the ECtHR's jurisprudence strongly influences the *Conseil constitutionnel*. Without explicitly saying it, the *Conseil constitutionnel* regularly draws inspiration from Strasbourg case-law and tends to follow it.<sup>30</sup> The relationship between the two courts has therefore properly been termed as "a dialogue without words" ("*un dialogue sans paroles*").<sup>31</sup>

## 2. ... and Its Limits

Accepting Strasbourg jurisprudence as part of the yardstick for constitutional review potentially exposes constitutional courts to the risk of losing their autonomy and becoming mere agents of the ECtHR. After all, if they have to repeat at the domestic level the words of the Strasbourg court, they might be afraid of turning into ancillary courts, called up to apply and give

<sup>26</sup> This jurisprudence paved the way for a diffuse review of legislation in the light of international treaties, the so-called *contrôle de conventionnalité*: see *O. Dutheillet de Lamothe*, *Contrôle de constitutionnalité et contrôle de conventionnalité*, in: *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle*, 2007, 315 et seq.

<sup>27</sup> The quotation of the ECtHR's judgment *Leyla Şahin v. Turkey* of 29.6.2004 in the *Conseil constitutionnel's* decision of 19.11.2004, 2004-505 DC on the Treaty establishing a Constitution for Europe represents the only exception.

<sup>28</sup> Art. 55 of the French Constitution reads: "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>29</sup> The attitude of the *Conseil constitutionnel* toward the ECHR seems to be explained as a "judicial policy" to protect itself from the concurrence of the ECtHR: *D. Szymczak*, *Question prioritaire de constitutionnalité et Convention européenne des droits de l'homme: L'euphémisation "heurtée" du Conseil constitutionnel français*, in: *Jus Politicum*, 2012, n. 7, <<http://juspoliticum.com>>, 13.

<sup>30</sup> *O. Dutheillet de Lamothe*, *Conseil constitutionnel et Cour européenne des droits de l'homme: un dialogue sans paroles*, in: *Le dialogue des juges. Mélanges en l'honneur du président Bruno Genevois*, 2009, 408 et seq. More recent examples of this attitude of the *Conseil constitutionnel* are mentioned in *J. Andriantsimbazovina*, *Unité et divergences de jurisprudences constitutionnelles et supranationales: Respect du droit, irrégularité, dialogue – L'exemple des rapports du Conseil constitutionnel et de la Cour européenne de droits de l'homme*, in: *X. Magnon/P. Esplugas-Labatut/W. Mastor/S. Mouton* (note 25), 74 et seq.

<sup>31</sup> *O. Dutheillet de Lamothe* (note 30).



effect to the judgments of another “higher” court. They might be perceived as speaking on behalf of the ECtHR, as if the European multilevel system of rights protection had its brain in Strasbourg and its arms in domestic constitutional courts.

A comparative analysis, however, shows that constitutional courts had been extremely careful in avoiding an absolute and mechanical prevalence of the Strasbourg judgments over constitutional rights. They have established an array of limits to compliance with the ECtHR’s jurisprudence that ensure national authorities, and notably constitutional courts themselves, a certain leeway to refuse compliance with Strasbourg decisions. In the case-law of the constitutional courts considered here, three arguments in particular have been resorted to in order to set limits to compliance with the ECtHR’s judgments.

First, constitutional courts have stressed *the Convention’s subordination to the constitution*, which remains the first and ultimate binding norm. Despite the ECHR’s integration into the constitutional yardstick, in case of an irremediable conflict between the Convention and the constitution, national authorities must abide by the latter.

Even in Austria, where the Convention formally enjoys the same rank as the Constitution in the hierarchy of legal norms, the *Verfassungsgerichtshof* holds that there is a limit to the Convention’s prevalence over the Constitution: the respect for “the constitutional principles determining the organization of the State”. In a famous decision of 1987 – the most important case of “rebellion” by the Austrian Constitutional Court against the ECtHR<sup>32</sup> – the *Verfassungsgerichtshof* stated that, in case of a conflict between the ECHR, as interpreted by the ECtHR, and Austrian constitutional law, that cannot be solved by way of interpretation, the *Verfassungsgerichtshof*

“will be bound to the constitutional principles determining the organisation of the state even if this implies a contradiction to the ECHR. If these principles are incompatible with a certain interpretation of the ECHR, it will be impossible for the Court to base its own decision on this interpretation”.<sup>33</sup>

In Italy, in the same judgments in which it accepted the Convention as a yardstick for the review of legislation, the *Corte costituzionale* went on to

<sup>32</sup> A. Gamper (note 2), 78 et seq.

<sup>33</sup> VfSlg 11.500/1987 (note 4). Compliance with the ECtHR’s jurisprudence being the rule, in recent years there have been some cases in which the *Verfassungsgerichtshof* did not follow the Strasbourg court: see C. Grabenwarter, *Der österreichische Verfassungsgerichtshof*, in: A. von Bogdandy/C. Grabenwarter/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum*. Bd. VI. Verfassungsgerichtsbarkeit in Europa: Institutionen, 2016, 465; A. Gamper (note 2), 95 et seq.

stress that the Convention remains a sub-constitutional norm and must therefore comply with all constitutional provisions.<sup>34</sup> The Convention and Strasbourg case-law can serve as a yardstick for the review of legislation only if they first comply with the Constitution. In Italy, the Convention is then at the same time a yardstick for constitutional review, with regard to ordinary legislation, and an object of constitutional review, with regard to the Constitution. More recently, in its judgment 49/2015, the *Corte costituzionale* stressed, with no ambiguity, the “axiological prevalence of the constitution over the Convention” and spelled out that, in the “highly unlikely event” of an irreconcilable conflict between the two, “it is beyond doubt that the courts will be required to abide first and foremost by the Constitution”.<sup>35</sup>

The *Bundesverfassungsgericht* too does not leave any room for doubt regarding the Constitution’s prevalence over the Convention. In its own words:

“The Basic Law aims to integrate Germany into the legal community of peaceful and free States, but *does not waive the sovereignty contained in the last instance in the German constitution*. 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 a violation of fundamental principles of the constitution can be averted. [...] The law of international agreements applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and *in conformity with substantive constitutional law*”.<sup>36</sup>

A second argument constitutional courts often mention to soften the binding nature of ECtHR decisions refers to the need to take into consideration *the differences between the two systems of rights’ protection*. This means that Strasbourg judgments cannot be schematically inserted into the domestic legal order but need to be somehow adjusted to it.

In its judgment 119/2001, the *Tribunal Constitucional* held that, while Art. 10.2 of the Spanish Constitution requires the interpretation of constitutional rights in light of the ECtHR’s jurisprudence, this does not entail the obligation to translate in a “mimetic way” the Strasbourg judgments into

<sup>34</sup> See judgments 348/2007, para. 4.7, and 349/2007, para. 6.2. In particular, the *Corte costituzionale* emphasized that, unlike EU law, the “examination of constitutionality [of ECHR provisions, as interpreted by the ECtHR] cannot be limited to the possible violation of fundamental principles and rights in particular or supreme principles but must extend to any contrast between [the ECHR] and the Constitution” (judgment 348/2007, para. 4.7).

<sup>35</sup> Judgment 49/2015, para. 4.

<sup>36</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 35, emphasis added.

the domestic legal order, disregarding the differences between the Convention and the Constitution.<sup>37</sup>

Similarly, the *Bundesverfassungsgericht* holds that it is not only the failure to consider the ECHR and the ECtHR's decisions that may amount to a fundamental right's violation; also "the 'enforcement' of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law".<sup>38</sup> In particular, the *Bundesverfassungsgericht* strives to stress the limits of the ECtHR's approach to human rights based on the individual nature of the application under Art. 34 ECHR. Since the Strasbourg court decides "specific individual cases in the two-party relationship between the complainant and the State",<sup>39</sup> its judgments can be biased by the lack of due consideration to the fair balance of all the interests involved, including those of the persons who did not take part in the proceeding before the ECtHR.<sup>40</sup> A schematic application of a Strasbourg judgment to a "multipolar fundamental rights situation" can be problematic and courts shall therefore enjoy a certain leeway in adjusting the ECtHR's case-law to the domestic legal order.<sup>41</sup>

The same argument has been thoroughly set out by the Italian Constitutional Court in its judgment 264/2012, in which it refused to declare unconstitutional a statute whose application had led the ECtHR to find Italy in breach of Art. 6 of the Convention.<sup>42</sup> The *Corte costituzionale* stressed that the Convention, as interpreted by the ECtHR, is just *one* of the standards that must be considered when ruling on the constitutionality of a statute. This means that a ECtHR's judgment declaring Italy in violation of the Convention does not automatically entail the unconstitutionality of the statute that caused the breach of the Convention. That Strasbourg judgment

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<sup>37</sup> In this decision the Spanish Constitutional Tribunal did not follow the ECtHR's judgment *López Ostra v. Spain*, 9.12.1994 (n. 16798/90); see A. Queralt-Jiménez, La Interpretación de los Derechos: del Tribunal de Estrasburgo al Tribunal Constitucional, 2009, 301 et seq. More generally, A. Saiz Arnaiz (note 8) stresses that the Tribunal Constitucional refuses the role of a mere executor of Strasbourg judgments (199) and interprets Art. 10.2 of the constitution in a way that allows the same Tribunal Constitucional a certain leeway in the alignment of constitutional rights to the corresponding Convention rights (202).

<sup>38</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 47.

<sup>39</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 58.

<sup>40</sup> Strong criticism in H.-J. Cremer, Zur Bindungswirkung von EGMR-Urteilen, in: EuGRZ 31 (2004), 695 et seq. Cremer interestingly notices that the jurisprudence of the Bundesverfassungsgericht too has developed in the context of individual recourses without this preventing it from properly considering the multipolar nature of fundamental rights' relationships.

<sup>41</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 50.

<sup>42</sup> ECtHR, *Maggio and others v. Italy*, 31.5.2011 (n. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08).

must be balanced with other constitutional principles, and this balance's outcome can also be the statute's vindication, not necessarily its unconstitutionality. This is due to the different review the two courts perform:

“in contrast to the European Court, this Court [the *Corte costituzionale*] carries out a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time, and is therefore required to carry out that balancing operation, which falls to this Court alone”.

Thus, even after a ECtHR judgment that found Italy in breach of the Convention, the *Corte costituzionale* enjoys a certain margin of appreciation when deciding on the constitutionality of the concerned legislative provision. Exceptionally, a statute can thus be considered to be contrary to the Convention by the ECtHR, but not unconstitutional by the *Corte costituzionale*, as judgment 264/2012 shows.

A third argument refers to Art. 53 of the Convention, which safeguards existing human rights by excluding that a Convention provision might be construed as “limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party”. In some constitutional courts' view, this requires a comparison between the levels of protection under the constitution and the Convention, making it possible to refuse to enforce an ECtHR judgment if it decreases rather than improves the level of rights' protection. This has been referred to in particular by the German and the Italian constitutional courts.

In *Görgülü*, through an express reference to Art. 53 ECHR, the *Bundesverfassungsgericht* made the duty to interpret constitutional rights in the light of the Convention conditional upon the requirement that

“this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law [which] the Convention itself does not desire”.<sup>43</sup>

Similarly, the Italian Constitutional Court, also with reference to Art. 53, stated that

“where a fundamental right is at issue, the need to comply with international law obligations can never constitute grounds for a reduction in protection compared to that available under internal law, whilst it can and must vice versa constitute an effective instrument for the broadening of that protection. [...] The comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion

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<sup>43</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 32.

of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same rights.”<sup>44</sup>

Interestingly, the reference to Art. 53 ECHR shifts the relationship between constitutional law and the ECHR from a question of hierarchy of norms to a question of substantial rights’ protection.<sup>45</sup> The enforcement of the ECtHR’s case-law does not depend on the rank of the Convention, but rather on it being able to provide greater protection than the domestic constitutional law. Given the open-ended nature of the question of which level provides for greater rights’ protection, constitutional courts are granted a broad discretion to choose whether the ECtHR’s jurisprudence has to be complied with or not.

Against this background of constitutional courts’ limitations to the ECHR, the doctrine that the Italian constitutional court elaborated in its judgment 49/2015 stands out as a remarkable, disturbing exception.<sup>46</sup> In this judgment the *Corte costituzionale* qualified the courts’ duty to comply with the ECtHR judgments, only when “a certain interpretation of the provisions of the ECHR has become sufficiently consolidated at Strasbourg”.<sup>47</sup> To decide whether a certain ECtHR interpretation must be considered as binding “consolidated law”,<sup>48</sup> the *Corte costituzionale* provided the following criteria:

<sup>44</sup> Judgment 317/2009, para. 7; but see already judgment 349/2007, para. 6.2.

<sup>45</sup> In Italian legal scholarship, this point has been stressed in particular by *A. Ruggeri*, for example in: *La CEDU alla ricerca di una nuova identità, tra prospettiva formale-astratta e prospettiva assiologico-sostanziale d’inquadramento sistematico* (a prima lettura di Corte cost. nn. 348 e 349 del 2007), in: *Forum di Quaderni costituzionali*, <<http://www.forumcostituzionale.it>>, 2007.

<sup>46</sup> On judgment 49/2015 see, in German, *D. Paris/K. Oellers-Frahm*, *Zwei weitere völkerrechts“unfreundliche” Entscheidungen des italienischen Verfassungsgerichtshof aus dem Jahr 2015* (Nr. 49 und 50)/*Zur Frage der Maßgeblichkeit der Rechtsprechung des EGMR*, in: *EuGRZ* 44 (2016), 245 et seq., with further reference to the numerous commentaries in Italian.

<sup>47</sup> And, in the *Corte costituzionale*’s view, when the ECtHR’s judgment is a “pilot judgment”: see judgment 49/2015, para. 7, where the following quotation is also taken from. Furthermore, in the same judgment, the *Corte costituzionale* stresses that “There is no doubt that the ordinary courts cannot refuse to act on a decision by the Strasbourg Court concerning proceedings of which that court is subsequently apprised, where necessary, provided that they put an end, as is their duty, to the harmful effects of the violation found to have occurred.” (para. 7).

<sup>48</sup> Notice that the translation of judgment 49/2015 available on the *Corte costituzionale*’s website translates the Italian wording “*diritto consolidato*” as “consolidated law”; in ECtHR, Grand Chamber, *Parrillo v. Italy*, 27.8.2015 (n. 46470/11), the ECtHR refers, perhaps more properly, to “well-established case-law”.

“the creativity of the principle asserted compared to the traditional approach of European case-law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member States which, in terms of those characteristics, by contrast prove to be little suited to Italy”.

The other limitations to the ECHR examined so far deny enforcement to the ECtHR’s judgments because of their interaction with the national legal order, be it their conflict with the constitution, their problematic integration into the domestic legal order, or the decrease in rights’ protection they would imply. By contrast, judgment 49/2015 of the Italian Constitutional Court denies binding force to ECtHR judgments in light of criteria that do not refer to the national legal order but merely to the ECtHR’s judgment itself: whether it is in line with previous case-law, the presence or absence of dissenting opinions, endorsement by the Grand Chamber, and so on. Unlike the aforementioned exceptions, this doctrine does not exclude compliance for specific reasons peculiar to the concerned State, but rather denies in principle the binding force of the ECtHR’s judgment.

The brief comparative analysis carried out in this section shows that, even if they accept integration of the ECHR and the ECtHR’s case-law into the constitutional yardstick, constitutional courts still preserve a high degree of autonomy from the Strasbourg court. Far from being mere officials of the ECtHR, constitutional courts enjoy a sufficiently broad margin of appreciation to decide whether and to what extent a judgment from Strasbourg must be complied with. Put differently, being at the service of the ECHR does not necessarily mean becoming a servant of the ECtHR.

Among the constitutional courts considered here, it is only in regards to Belgium that it has been argued that the constitutional court’s autonomy is as limited as to define the *Cour constitutionnelle* as “a body subordinated to the ECtHR”<sup>49</sup> or, more bluntly, “a satellite” of it.<sup>50</sup> There are, however, good reasons to single out the position of the Belgian Constitutional Court

<sup>49</sup> M. Verdussen, The Belgian Experience of Rights-Based Review: Has the Constitutional Court Become a Body Subordinated to the European Court of Human Rights?, in: J. Bell/M.-L. Paris (eds.), Rights-Based Constitutional Review. Constitutional Courts in a Changing Landscape, 2016, 346 and esp. 371 et seq.

<sup>50</sup> L. Lavrysen/J. Theunis, The Belgian Constitutional Court: A Satellite of the ECtHR?, in: A. Alen/V. Joosten/R. Leysen/W. Verrijdt (eds.), *Liberæ Cogitationes. Liber amicorum Marc Bossuyt*, 2013, 354.

from that of other constitutional courts.<sup>51</sup> Compared to its brethren in Europe, the *Cour constitutionnelle* only recently and progressively gained a proper fundamental rights' jurisdiction, not least by referring to human rights' international treaties, and notably to the ECHR. The fundamental rights' catalogue of the Belgian Constitution dates back to 1831, and for most rights it has not been amended since then. It is then very unlikely that it can guarantee a broader protection than the ECHR. Furthermore, the *Cour constitutionnelle* does not enjoy exclusive jurisdiction over the review of legislation in light of the Convention, as since 1971 the Court of Cassation has maintained that international treaties enjoy precedence over domestic legislation, which paves the way for a concurring diffuse review on the conventionality of domestic legislation.<sup>52</sup> All this contributes to make the Belgian constitutional court particularly Strasbourg-prone.

### III. The Benefits of Upholding the Convention: Compliance, Legitimacy, and Dialogue

The previous section has shown that, despite the ECHR's general lack of constitutional status, constitutional courts have accepted a role in the enforcement of the Convention by integrating it into their own constitutional yardsticks without losing their autonomy from the ECtHR. In this section it will be argued that there are good reasons to do so.

A first argument in support of constitutional courts' engagement with the ECHR is the added value constitutional courts can bring to *domestic compliance with the ECHR*. Constitutional courts enjoy jurisdiction and power other courts do not have. By putting them at the service of the ECHR, constitutional courts can help with the ECHR's enforcement – both in the prevention of ECHR violations and in the redress of violations already ascertained by the ECtHR<sup>53</sup> – in a way that is unavailable to other courts. Constitutional complaints and the concrete review of legislation are particularly effective in this sense.

<sup>51</sup> For a comprehensive discussion of the reasons for the Strasbourg-friendly stance of the *Cour constitutionnelle* see P. Popelier, Belgium: Faithful, Obedient, and Just a Little Irritated, in: P. Popelier/S. Lambrecht/K. Lemmens (note 2), 119 et seq.

<sup>52</sup> Court of Cassation, 27.5.1971, *Franco-Suisse La Ski*. On the interaction between the conventionality review by ordinary courts and by the constitutional court see A. Alen/E. Peremans/J. Spreutels/W. Verrijdt (note 22), 29 et seq.

<sup>53</sup> D. Kosar/J. Petrov, The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular, in this issue, 595.

Constitutional complaints empower the individual to file an application to the constitutional court to redress the violation of certain constitutional rights by national authorities – be they legislative,<sup>54</sup> administrative, or judicial authorities – provided that all other available remedies have been exhausted. Those constitutional courts that have jurisdiction over constitutional complaints, like the *Bundesverfassungsgericht* and the *Tribunal Constitucional*, enjoy the privilege of the last word in respect of fundamental rights at the domestic level. If, by reviewing domestic compliance with constitutional rights, a constitutional court agrees to take into account the ECtHR’s jurisprudence, nearly all potential cases individuals might bring to Strasbourg must be dealt with by the constitutional court first.<sup>55</sup> The same ECHR requires it, since the previous exhaustion of all domestic remedies, including lodging a constitutional complaint in legal orders in which it exists, is a precondition for filing an application to the Strasbourg court under Art. 35.1 of the Convention.<sup>56</sup>

The constitutional court, then, becomes a kind of filter<sup>57</sup> for potential applications to the ECtHR and a guarantor of the State’s international obliga-

<sup>54</sup> Notice, however, that in Spain an *amparo* against an act of a legislative authority can only challenge “decisions or enactments *without the force of law* taken by the Spanish Parliament or any of its organs or by the legislative Assemblies of the Autonomous Communities or their organs” (so Art. 42 of the Organic Law on the Constitutional Tribunal, emphasis added).

<sup>55</sup> The same does not apply to the Austrian *Verfassungsgerichtshof* as it has no jurisdiction to hear constitutional complaints against judgments of the ordinary courts but only against those of the administrative courts, with the exception of the Supreme Administrative Court. Hence, as stressed by *A. Gamper* (note 2), 92, the constitutional court “cannot prevent other courts from applying the Convention wrongly or from basing their decisions on laws that violate the ECHR without referring them to the constitutional court’s review”. Notice that in Spain, the 2007 reform of the *amparo*, which introduced the requirement of “special constitutional relevance” for the admissibility of constitutional complaints, strongly affects the role of the Tribunal Constitucional as a connection between the domestic and the Convention systems of fundamental rights’ protection: see *S. Ripol Carulla*, *Un nuevo marco de relación entre el Tribunal Constitucional y el Tribunal Europeo de Derechos Humanos*, in: R.E.D.I. 66 (2014), 11 et seq., claiming that the applications against Spain and the ECtHR’s judgments of violation have increased following the 2007 reform of the constitutional complaint.

<sup>56</sup> The *Verfassungsbeschwerde* and the *recurso de amparo* are included in the domestic remedies to exhaust in the light of Art. 35, para. 1 ECHR since the Commission’s decisions *W. v. Germany*, 18.7.1986 (n. 10785/84) and *Union Alimentaria Sanders SA v. Spain*, 11.12.1987 (n. 11681/85). As for the question of whether the *recurso de amparo* is still to consider a domestic remedy to exhaust following the 2007 reform see ECtHR, *Arribas Antón v. Spain*, 20.1.2015, indirectly touching upon this point; in legal scholarship see *A. González Alonso/F. M. Ruiz-Risueño Montoya*, *El nuevo recurso de amparo constitucional a la luz del Convenio Europeo de Derechos Humanos*, in: *Revista española de derecho europeo* 54 (2015), 167 et seq.

<sup>57</sup> *D. Kosář/J. Petrov* (note 53), 595.



tions. The *Bundesverfassungsgericht* expressly acknowledged this in *Görgülü*. Stressing its own power to redress, in the context of a constitutional complaint proceeding, a court's violation of the duty to take into account the Strasbourg jurisprudence, it stated:

“as part of its competence the Federal Constitutional Court is also competent to prevent and remove, if possible, violations of public international law that consist in the incorrect application or non-observance by German courts of international-law obligations and may give rise to an international-law responsibility on the part of Germany [...]. In this, *the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law.*”<sup>58</sup>

On the one hand, the previous involvement of the constitutional court can certainly contribute to a decrease in the number of applications to Strasbourg.<sup>59</sup> On the other hand, it makes the ECtHR's work easier, as its judgments turn essentially into a review of the constitutional court's decisions.<sup>60</sup> Admittedly, this can lead to an open conflict between the ECtHR and the constitutional court. The constitutional court's involvement being necessary, a judgment of a violation by the ECtHR cannot but turn into a reproach to the constitutional court.<sup>61</sup> However, as will be explained later, constitutional courts are in a better position than ordinary courts to deal with these kinds of conflicts.

Concrete review of legislation – i.e. the interlocutory procedure for the review of the constitutionality of statutes triggered by ordinary courts – can also bring a significant contribution to the enforcement of the ECtHR's

<sup>58</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 61, emphasis added. Even those who strongly criticized *Görgülü* for the *Bundesverfassungsgericht*'s weak commitment to the ECHR praised this part of the decision: see *H.-J. Cremer* (note 40), 698 and *C. Tomuschat*, The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court, in: GLJ 11 (2010), 526.

<sup>59</sup> *S. Ripol Carulla* (note 55), 14; *W. Verrijdt*, The Belgian Constitutional Court as a Domestic Remedy for ECHR Violations, in: A. Alen/V. Joosten/R. Leysen/W. Verrijdt (note 50), 900.

<sup>60</sup> *W. Verrijdt* (note 59), 902; *C. Tomuschat* (note 58), 516, stresses that, in respect to the *Bundesverfassungsgericht*, judges in Strasbourg serve “as appeals judges scrutinizing the correctness of the decisions taken by the constitutional judges in Karlsruhe”.

<sup>61</sup> *A. Saiz Arnaiz* (note 8), 199, and *H.-J. Cremer* (note 40), 697. In the latter's view, this explains why the *Bundesverfassungsgericht* refused to strictly oblige ordinary courts to comply with a ECtHR decision finding a violation of the Convention against Germany. Since a similar judgment by the ECtHR necessarily entails a rebuttal of a *Bundesverfassungsgericht*'s decision, its plain application would run counter Art. 31.1 of the Law on the Federal Constitutional Court (BVerfGG), which states that “the decisions of the Federal Constitutional Court shall be binding upon federal and Land constitutional organs as well as on all courts and administrative authorities”.

judgments.<sup>62</sup> Unlike other courts, constitutional courts enjoy the power to nullify a statute enacted by Parliament. This is generally considered *the* characteristic power of a constitutional court, as the centralization of the power to nullify statutes in one specific court – what German scholars call the *Verwerfungsmopol* – is the core element of the European, or “*Kelsenian*”, model of judicial review of legislation. This means that, when a violation of the ECHR directly results from a legislative provision and cannot be avoided through an interpretation of the latter that accords with the Convention, the constitutional court is in a position to guarantee compliance with the ECtHR’s decisions while other courts are not.

Integrating the ECHR and the ECtHR’s jurisprudence into the constitutional yardstick first has the effect of making the legislature aware that failure to comply with the ECHR is likely to lead to a declaration of unconstitutionality, thereby increasing consideration of the ECHR in the law-making process.<sup>63</sup> But it can also be an effective remedy both in preventing a statute from conflicting with the ECHR, leading to the finding of a violation by the ECtHR, and in redressing violations of the Convention, as ascertained by the ECtHR, caused by such a law.

Admittedly, it is first for the legislature to put legislation in line with the ECtHR jurisprudence, to comply with its decisions and to prevent further violations. But if, for whatever reason, the legislature passes a statute conflicting with the ECHR or remains inactive when an amendment to the leg-

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<sup>62</sup> However, unlike the constitutional complaint, the interlocutory procedure is generally not considered by the ECtHR as a domestic remedy to exhaust before filing an application to Strasbourg. The ECtHR has developed its jurisprudence in particular on the Italian concrete review of legislation, consistently refusing to consider it a domestic remedy to exhaust, as the individual is not entitled to apply directly to the constitutional court: firstly, ECtHR, *Brozicek v. Italy*, 19.12.1989 (n. 10964/84), para. 34. See, however, *Parrillo v. Italy* (note 48) and, in particular, the joint partly concurring opinion of judges *Casadevall, Raimondi, Berro, Nicolaou* and *Dedov*. The opinion points out that the only reason for not considering the application to the constitutional court as a domestic remedy to exhaust relies in the Corte costituzionale’s judgment 49/2015, which attenuated the binding force of the ECtHR’s decisions. The opinion seems then to suggest to the Corte costituzionale that the ECtHR might be ready to “promote” the application to the Italian constitutional court among the remedies to exhaust, if the Corte costituzionale went back to its judgment 49/2015: see *B. Randazzo, Susidiarietà della tutela convenzionale e nuove prove di dialogo tra le Corti. Parrillo c. Italia: novità in tema di accessibilità del giudizio costituzionale dopo le “sentenze gemelle”* (e la sentenza n. 49 del 2015), in: *Diritti umani e Diritto internazionale* 9 (2015), 622. As for France and Belgium, on the *question prioritaire de constitutionnalité* and the *question préjudicielle* the ECtHR hasn’t expressed its view yet: for a discussion see *M. Guillame, Question prioritaire de constitutionnalité et Convention européenne des droits de l’homme*, in: *Nouveaux Cahiers du Conseil constitutionnel* 32 (2011), n. 32, 83 et seq.; and *W. Verrijdt* (note 59), 893 et seq., respectively.

<sup>63</sup> *A. Gamper* (note 2), 88.

islation is needed to avoid further violations, ordinary courts can make things right as far as they can interpret the existing legislation in a way that conforms to the ECHR. But when the letter of the legislation does not allow any interpretation in conformity with the ECHR the ordinary courts face the following dilemma: While applying the law would contravene the ECHR, disapplying it would violate the Constitution, since courts cannot deny application to statutes. The intervention of the constitutional court offers an exit from this dead end. Ordinary courts can instigate an interlocutory procedure for review of the constitutionality of the concerned statute by employing the Convention, as interpreted by the Strasbourg court, as a standard of review. This enables the constitutional court to repeal *erga omnes* a provision that infringes the ECHR. In doing so, the constitutional court, acting on the initiative of the ordinary courts, stands in for the legislature and secures compliance with the ECHR. A country like Italy, in which the legislature has often turned a blind eye to the ECtHR's judgments, provides significant evidence of the possibility for constitutional courts to ensure compliance with the ECHR, even in cases in which such a compliance is unavailable to ordinary courts because it is a legislative act that is responsible for the violation.<sup>64</sup>

But the importance of constitutional courts' contribution to domestic compliance with the ECHR is not confined to cases in which ordinary courts cannot secure compliance by their own means. Even if legislation can be interpreted in line with the ECHR, still the constitutional court's intervention ensures an added value in terms of legal certainty. The constitutional courts' judgments having general effects, striking down a piece of legislation conflicting with Strasbourg jurisprudence secures that no other judge can apply that law in a way that is contrary to the ECHR. By contrast, when the constitutional court confines itself to assessing a statute's compatibility with the Constitution, without taking into account its conformity with the ECHR, it might well happen that the same statute withstands the scrutiny of the constitutional court while its application may still lead to a

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<sup>64</sup> See the examples quoted by *D. Tega*, *The Italian Way: A Blend of Cooperation and Hubris*, in this issue, 701. For an application of the same mechanism in the German legal order see *M. Payandeh*, *Konventionswidrige Gesetze vor deutschen Gerichten*, in: *DÖV* 64 (2011), 382 et seq. As for Belgium, see *L. Lavrysen/J. Theunis* (note 50), 354: "[The Belgian constitutional court] contributes in an important way to the effective implementation of the Convention, as interpreted by the European Court, in annulling or declaring unconstitutional – and thus setting aside – acts of parliament that violate the Convention." Also in France, notwithstanding the ECHR-blind approach of the *Conseil constitutionnel*, the *question prioritaire de constitutionnalité* is considered to be an effective tool to prevent and redress ECHR's violations: *M. Guillame* (note 62), 91 and 95.

breach of the Convention. Ordinary courts thus have to deal with an unconventional but not unconstitutional statute.<sup>65</sup>

Upholding the Convention by constitutional courts is beneficial not only in terms of compliance, but also in terms of *legitimacy of the Convention system*. The current growing intolerance of the Convention system that has led some countries to envisage abandoning it is partly, if not mainly, a crisis of legitimacy. The Strasbourg court is perceived as an alien body that takes intrusive judgments strongly affecting the States' freedom without being aware of the States' social, cultural, and legal distinctiveness. Contracting parties are often skeptical about the growing gap between the text of the Convention and the Strasbourg jurisprudence since they consider themselves bound to obligations to which they have never subscribed. The doctrine of the margin of appreciation is not deemed to adequately counterbalance the Strasbourg court's evolutionary interpretation of the Convention.

Constitutional courts' use of the Convention as a yardstick could partly contribute to redressing at the domestic level this lack of legitimacy of the Convention system. When a constitutional court accepts a Strasbourg decision as part of the constitutional yardstick, this decision receives the legitimacy of the highest and most authoritative court of the country.<sup>66</sup> The State is not anymore required to comply with the verdict of an external body whose composition in almost its entirety was determined by other States. It has rather to comply with the judgment of its own constitutional court, whose judges have been chosen by the same State's authorities. The appropriation of the Convention by constitutional courts turns an international obligation into a domestic obligation with constitutional rank, which certainly increases the legitimacy of the request to comply.<sup>67</sup>

Admittedly, a constitutional court cannot give a blank check to the Strasbourg Court. Constitutional courts are not ready to give their endorsement to a line of jurisprudence they consider in conflict with the constitution or not sufficiently respectful of the domestic margin of appreciation. This leads

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<sup>65</sup> This can happen in particular in France, where the two reviews – conformity with the Constitution and conformity with the ECHR – are kept strictly separated. *D. de Béchillon* (note 25), 320, considers rare but perfectly acceptable that an ordinary court would declare contrary to the ECHR a statute that was held in conformity with the Constitution by the Conseil constitutionnel.

<sup>66</sup> *A. von Bogdandy/C. Grabenwarter/P. M. Huber*, Verfassungsgerichtsbarkeit im europäischen Rechtsraum, in: *A. von Bogdandy/C. Grabenwarter/P. M. Huber* (note 33), 9.

<sup>67</sup> In this regard see *W. Verrijdt* (note 59), 901, who stresses that through its authority the constitutional court contributes to the “conventionalization of domestic law”. I prefer speaking of “constitutionalisation of convention law”.

to a third argument in support of constitutional courts' acceptance of the Convention as a standard of review, namely *making judicial dialogue easier*.

With the Convention system encompassing 47 States, divergences with Strasbourg are to a certain extent unavoidable. Despite the mechanisms the ECtHR has developed to avoid open conflicts with contracting States – from the margin of appreciation to a strategic use of the referral to the Grand Chamber – it is certainly not rare that some ECtHR judgments are not accepted by the concerned State. This is not necessarily a sign of the States' unwillingness to respect human rights or of their denial of the Convention's values.<sup>68</sup> A State's dissent can also be grounded on the same values on which the ECtHR based its judgment, but on a different reading of them. A state can legitimately disagree with the balance of rights made by the Strasbourg court, for example because it thinks that the ECtHR gave too much importance to a certain right to the detriment of another, or because it considers that, despite paying lip service to subsidiarity, the Strasbourg court did not adequately take into consideration national particularities. These kind of conflicts being unavoidable, there are good reasons to think that they are better managed if it is only the constitutional court that in principle has to deal with them, and not all domestic courts.

To the extent to which these cases can find a solution through the dialogue between domestic courts and the Strasbourg court, it is wise to make this dialogue easier by providing the Strasbourg court with a reliable point of contact at the domestic level. Dialogue can better work if the ECtHR has a partner court in every contracting state that expresses at the highest level the voice and concerns of that country. By contrast, it is much more difficult for the ECtHR to engage in dialogue with a plurality of national courts expressing different and potentially conflicting views.

If this is so, then constitutional courts are, among domestic judicial authorities, the best equipped courts to dialogue with Strasbourg. On the one hand, constitutional courts enjoy a composition and purpose that make them well-suited to voice domestic difficulties in compliance with Strasbourg judgments. Their dissent is grounded on a contracting State's constitutional values and expressed by the court that is institutionally required to

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<sup>68</sup> See A. Føllesdal, *Much Ado About Nothing? International Judicial Review of Human Rights in Well-Functioning Democracies*, in: A. Føllesdal/J. K. Schaffer/G. Ulfstein (eds.), *The Legitimacy of International Human Rights Regimes*, 2014, 273, pointing out that strong criticism of the legitimacy of the Convention system exists also in countries like the UK and the Nordic countries, that ensure a comparatively high protection of human rights and are rarely found in breach of the Convention.

secure them: they are the courts most likely to be heard in Strasbourg.<sup>69</sup> On the other hand, constitutional courts are a reliable partner for the ECtHR. Thanks to their peculiar jurisdictions and to their authority, they enjoy an apex position among domestic courts and are able to guide the jurisprudence of the other courts and make them prone to accept the Strasbourg jurisprudence.<sup>70</sup> This can be decisive when a contentious line of case-law from the ECtHR has to find acceptance among a State's courts.

In this perspective, while isolated episodes of conflict between constitutional courts and the ECtHR are not necessarily to be considered as such a pathology of the Convention system – as will be further argued *infra* –,<sup>71</sup> those judgments in which constitutional courts decline their monopoly on conflicts with the ECtHR and enable all courts to refuse enforcement to the ECtHR's judgments are open to strong criticism.

This is what, to a certain extent, the *Bundesverfassungsgericht* did in *Görgülü*, when it stated that:

“If, in concrete application proceedings in which the Federal Republic of Germany is involved, the ECHR establishes that there has been a violation of the Convention, and if this is a continuing violation, the decision of the ECHR must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, *justify understandably why they nevertheless do not follow the international-law interpretation of the law.*”<sup>72</sup>

Not only the constitutional court but all courts are then allowed to refuse compliance with the Strasbourg court's judgments, under the sole requirement to “understandably justify” their choice.<sup>73</sup>

<sup>69</sup> *S. Ripol Carulla* (note 55), 16; *W. Verrijdt* (note 59), 902: “If the constitutional court does not find a violation, this conclusion is presumably based on strong arguments, which might convince the ECtHR to take a more deferential approach”.

<sup>70</sup> *A. Alen/E. Peremans/J. Spreutels/W. Verrijdt* (note 22), 48.

<sup>71</sup> See section IV.

<sup>72</sup> BVerfG, 2 BvR 1481/04 (note 1), para. 50, emphasis added. Strong criticism in *C. Tomuschat* (note 58), 523 and in *H.-J. Cremer* (note 40), 694, who rightly stresses that the *Bundesverfassungsgericht* made it too easy for ordinary courts to refuse compliance with ECtHR decisions. Notice that, indeed in the very case *Görgülü*, the ECtHR's judgment was not implemented by the court to which the case was referred after the *Bundesverfassungsgericht*'s decision. This led Mr. *Görgülü* to file two new constitutional complaints, claiming, among other things, that the ECtHR's judgment had not been implemented. See the *Bundesverfassungsgericht*'s final decision, Order of the First Chamber of the First Senate of 10.6.2005 – 1 BvR 2790/04. Paras. 1-14 of the Order provides for an account of this complex case.

<sup>73</sup> Furthermore, as noted by *M. Payandeh* (note 64), 385, the *Görgülü* judgment is anything but clear on the conditions under which ordinary courts are allowed to not follow a Strasbourg decision.

In the same line, it is to regret that in its judgment 49/2015, the Italian Constitutional Court relieved ordinary courts from the obligation to comply with Strasbourg judgments, when they consider these judgments are not “consolidated law”. By so doing, instead of securing its monopoly on the conflicts with Strasbourg, it rather created the preconditions to diffuse and multiply them among ordinary courts. Furthermore, unlike the *Bundesverfassungsgericht*, the Italian Constitutional Court does not have jurisdiction over constitutional complaints. Therefore, once a violation of the Convention occurs through a court decision, in particular because the court does not consider itself bound by the ECtHR judgment on the ground that this is not yet “consolidated law”, the *Corte costituzionale*, unlike the *Bundesverfassungsgericht*,<sup>74</sup> does not have the opportunity to redress it anymore.

It seems therefore desirable for the sake of judicial dialogue that, as far as possible, divergences with Strasbourg are voiced by one single court – the constitutional court – and spelled out clearly. This is impossible unless the constitutional court engages directly with the ECHR and with the ECtHR’s case-law. From this perspective, the “*dialogue sans parole*” of the *Conseil constitutionnel* is open to criticism. While in terms of compliance with the ECHR the *Conseil constitutionnel* can properly give its contribution by taking into account the ECtHR jurisprudence without explicitly mentioning it, this approach certainly does not facilitate dialogue with the Strasbourg court.<sup>75</sup> If the constitutional court does not engage with the ECtHR’s case-law, the Strasbourg court is prevented from fully understanding the precise reasons for the conflict, whether it consists of an open refusal of Strasbourg case-law or rather a misunderstanding of it.

#### IV. Allies and Counterbalances of the Strasbourg Court

This paper has focused on the specific contribution constitutional courts can make to the domestic implementation of the ECHR and notably of Strasbourg case-law. In particular, it has shown that the lack of constitutional status of the ECHR has not prevented the constitutional courts considered here from integrating it into the constitutional yardstick and using it, along with the ECtHR’s case-law, as a standard of review. By doing so, constitutional courts have accepted their role as guardians of the ECHR, playing a pivotal role in ensuring its respect within the domestic legal order.

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<sup>74</sup> See note 72.

<sup>75</sup> *D. Szymczak* (note 29), 14 et seq. and 22 et seq.; *J. Andriantsimbazovina* (note 30), 78.

It has stressed, in particular, that thanks to their peculiar jurisdiction and position in the legal order constitutional courts can contribute to the enforcement of the ECHR in a way that is unavailable to other courts. From this perspective, constitutional courts must be understood as precious allies of the ECtHR in the common task to ensure real protection for the rights enshrined in the Convention.

Yet constitutional courts are also responsible for the development of exceptions and limits to the duty of State authorities to comply with the Strasbourg judgments. In this paper it has been suggested that these exceptions are not necessarily a threat to the Convention system: under certain conditions, they can also support its overall legitimacy and functioning. This contention deserves deeper development, to which these concluding lines are devoted.

A certain tension between rights and democracy is intrinsic in every form of judicial review, be it exercised by all domestic courts, by the constitutional court only, or by a supranational or international court. However, it has been rightly noted that, in light of the counter-majoritarian difficulty, the legitimacy of international courts is much weaker than that of domestic constitutional courts.<sup>76</sup> At the domestic level, specific constitutional arrangements are provided to strike a fair balance between the effectiveness of the judicial review performed by the constitutional court and the respect for the will of the democratically legitimated parliament. These include, in particular, the involvement of the parliament in the composition of the constitutional court and the possibility for the parliament to amend, following special proceedings, the constitution, that provides the standard for the constitutional court's decisions.<sup>77</sup> These counterbalances are certainly weaker at the supranational level, where no State alone can significantly influence the ECtHR's composition, nor amend the ECHR and its Protocols.

In the Convention system, the respect for States' autonomy depends thus essentially on the doctrine of the margin of appreciation, i.e. on the ECtHR's own will not to intrude in matters that it thinks the States can legitimately regulate differently without violating their international obligation to abide by the ECHR. But it is the ECtHR itself that decides which margin of appreciation to leave a certain State in relation to a certain matter: there is little that States can do when they consider this margin has not been

<sup>76</sup> See *A. Føllesdal* (note 68), 276 et seq.

<sup>77</sup> In his powerful response to *Bickel's* countermajoritarian difficulty, *V. Ferreres Comella* stresses the importance of these two elements – involvement of the democratic branches in the selection of the constitutional court's judges and constitutional amendment – in order to guarantee the democratic checks on constitutional courts: see *Constitutional Courts and Democratic Values. A European Perspective*, 2009, 98 et seq.



respected. Against this backdrop, constitutional courts can serve as a convenient counterbalance, when the ECtHR fails to respect the States' margin of appreciation. A cautious and careful use by constitutional courts of the aforementioned resistance to the ECtHR's judgments can contribute to a better balance between rights and democracy and avoid an unconditional prevalence of the former over the latter. Within certain limits, constitutional courts' dissent can therefore be understood not as a threat to the effectiveness of the Convention system, but rather as a contribution to its balance.<sup>78</sup>

Drawing a clear-cut line between legitimate dissent and erosion of the effectiveness of the Convention system is certainly not easy. Five conditions, however, can be formulated to delimit the field of a legitimate dissent by constitutional courts against the ECtHR.

First, judicial dissent should be channeled to a single court. As above-mentioned, if a specific court is entrusted with the task of voicing the dissent of the whole legal order to Strasbourg, then this dissent is more likely to be understood as part of a judicial dialogue aimed at enhancing and refining the protection of human rights. By contrast, if all courts are allowed to disregard the ECtHR's judgments it becomes more difficult to manage this conflict, and the dissent is likely to turn into a challenge to the system. For this reason, those constitutional courts' decisions that enable all courts to refuse compliance with the Strasbourg court's case-law instead of concentrating this power in their own hands alone have been strongly criticized above.

Second, constitutional resistance to the ECtHR has to be handled with care. For judicial dissent to be a positive contribution to a better fundamental rights' protection, constitutional courts should not oppose a ECtHR judgment save for very exceptional cases. The ECtHR's judgments should be endowed with a presumption of compliance that a constitutional court can rebut only under exceptional circumstances.<sup>79</sup> Constitutional courts

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<sup>78</sup> See, similarly, *G. Martinico*, Corti costituzionali (o supreme) e "disobbedienza funzionale", in: *Diritto Penale Contemporaneo* 4 (2015), issue 2, 305. The author labels a constitutional court's decision not to follow the ECtHR in order to make it change its mind "functional disobedience" because the constitutional court seeks to redress an ECtHR decision it considers not respectful of the margin of appreciation or based on an erroneous reconstruction of the European consensus. See also *G. Martinico*, National Courts and Judicial Disobedience to the ECHR: A Comparative Overview, in: O. M. Arnadóttir/A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection*, 2016, 59.

<sup>79</sup> My perspective is similar to that of *B. Çali*, The Legitimacy of International Interpretative Authorities for Human Rights Treaties: An Indirect-Instrumentalist Defence, in: A. Føllesdal/J. K. Schaffer/G. Ulfstein (note 68), 141 et seq., who argues for a presumption of deference by domestic authorities to the international interpretative bodies, but also admits that this presumption can be rebutted in cases of "bad interpretations". *Çali* stresses, in par-

must be aware that frequently opposing the ECtHR jeopardizes the effectiveness of the ECtHR's judgments in its own legal order and in other legal orders, and should thus exercise this power extremely cautiously. Put differently, resistance should be understood as the *extrema ratio*.

Third, as far as possible, constitutional courts should try to avoid openly denying the implementation of a ECtHR judgment to which their States are parties, i.e., a judgment whose binding force is spelled out by Art. 46, para. 1 of the Convention. They should rather exercise their resistance in a more nuanced way by opposing a certain line of case-law of the ECtHR in order to influence its development and prevent its establishment and application to their legal orders. In a nutshell, constitutional courts' opposition should possibly target the *res interpretata* while showing respect for the *res iudicata*.

Fourth, when voicing their disagreement, constitutional courts should at the same time uphold the State's commitment both to its general obligation to respect the ECHR and to the Convention's values. Constitutional courts must make clear that their opposition does not question the broader obligation of the State to abide by the ECtHR case-law but is confined only to a specific interpretation given by the ECtHR.<sup>80</sup> Furthermore, they must stress that they are not opposing the Convention's fundamental values but rather a certain interpretation of them in a specific situation. This is essential to contain the disagreement to a single episode that does not affect the continuing commitment to the Convention system and to show that this exceptional opposition is meant to support the system in the long run, not to jeopardize it.

Fifth, when opposing the ECtHR, constitutional courts shall clearly express the reasons for their disagreement. They must enable the ECtHR to understand that their disagreement does not entail a denial of the Convention's fundamental values but is rather grounded on a different balance between those values. If the disagreement stems from the belief that the ECtHR did not properly perceive the peculiarities of the domestic context and the impact that its judgment would have on it, then all means must be given to the ECtHR to fully evaluate these elements.

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ticular, that both deference and rebuttal foster a constructive dialogue about the best interpretation of human rights treaties and that, when airing disagreement, states should express it "in the spirit of improving global interpretation of human rights law" (162).

<sup>80</sup> From this perspective, the comparison between the attitude of the constitutional courts of Russia and Lithuania in case of disagreement with the ECtHR is very interesting: see, in this issue, A. Padskocimaite, Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania, 651.

If constitutional courts abide by these conditions, even their disagreement can benefit the Convention system in the long term. If States perceive that no dialogue is possible with the ECtHR and that they do not possess any means to react to judgments they consider unduly limiting their margin of appreciation, this may lead them in the long term to consider the possibility of leaving the ECHR, as no other option is available. By contrast, if a channel of dialogue is left open, the overall system is more likely to be accepted. For this task of judicial mediation between the national and the supranational sphere, constitutional courts seem to be the best equipped courts, thanks to their peculiar composition and jurisdiction. Besides contributing to the effectiveness and legitimacy of the Convention system as allies of the ECtHR, constitutional courts can also pursue the same goals, from a different perspective, by acting as counterbalances to the Strasbourg court.

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