Collection dirigée par SAMANTHA BESSON et NICOLAS LEVRAT

FONDEMENTS DU DROIT EUROPÉEN

Le juge en droit européen et international

The Judge in European and International Law

Ouvrage édité par Samantha Besson et Andreas R. Ziegler

Avec la collaboration de Fatimata Niang

LGDJ lextenso éditions

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Sommaire

SARAH LAMBRECHT*

The Attitude of four Supreme Courts towards the European Court of Human Rights: Strasbourg has spoken…

Introduction

> '*Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.*'[1]

> '*Argentoratum locutum, nunc est nobis loquendum – Strasbourg has spoken, now it is our time to speak.*'[2]

Both quotes, originating from supreme court judges, illustrate the difficulty courts have in determining their attitude towards the European Court of Human Rights (ECtHR; Strasbourg Court). Besides the Belgian Constitutional Court (BeCC), this contribution also focuses on the attitude of three neighbouring supreme courts. Firstly, the UK Supreme Court (UKSC), since this Court has addressed its interrelationship with the ECHR and the ECtHR case-law in depth. From the UK arises also its most severe criticism[3]. The German Federal Constitutional Court (BVerfG) has also explicitly defined its interrelationship, although in a different manner than the UK, which creates an interesting contrast. Lastly, the Dutch Supreme Court (HR)–the Netherlands is a unique country since the Dutch Constitution prohibits constitutional review of parliamentary acts. Due to the limited reach of this contribution, only the Constitutional Courts of Belgium and Germany are examined,

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* FWO fellow, Research Group Government and Law, University of Antwerp. I would like to thank Prof. Samantha BESSON and Prof. Patricia POPELIER for their helpful remarks.

1 Lord ROGER, *AF* [2009] UKHL 28 [98].

2 Brian KERR (UKSC), *The modest underworker of Strasbourg,* London, Clifford Chance Lecture, 25 January 2012.

3 Colm O'CINNEIDE, *Human Rights and the UK Constitution*, London, The British Academy, 2012, pp. 26-36.

since these courts play a prominent role in the application of fundamental rights[4] in national legal systems[5]. They are responsible for the interpretation of constitutional rights taking into account analogue ECHR rights as interpreted by the ECtHR. The Netherlands and the UK, however, lack a constitutional court. Here, the HR (in the area of civil, criminal and fiscal law) and the UKSC constitute the highest national courts. The first part of the contribution examines the impact of the ECHR and the ECtHR case-law on the case-law of the four supreme courts. The contribution describes not only the status of the ECHR and ECtHR judgments in domestic law and certain mechanisms of coordination used by courts[6], but also provides an empirical analysis[7] of the supreme courts' reference practice[8], namely the amount of judgments in which an ECHR provision or a specific ECtHR judgment is invoked or applied. This empirical analysis reveals to what extent an (explicit) Europeanisation[9] of the supreme courts' case-law is taking place. The second part assesses the limits set forward by the supreme courts and the legal framework in following the Strasbourg case-law.

4 Used as an umbrella term for rights guaranteed in international treaties and national constitutions.

5 Catherine VAN DE HEYNING, 'The natural 'home' of fundamental rights adjudication: constitutional challenges to the ECtHR', *Yearbook of European Law*, 2012, forthcoming.

6 On 'impact', Alec STONE SWEET, Helen KELLER, 'The reception of the ECHR in national legal orders', in Helen KELLER, Alec STONE SWEET, eds., *A Europe of Rights*, Oxford, Oxford University Press, 2008, pp. 11-36.

7 From 1996 until 2012, two years were analysed out of every five years to level out large fluctuations. Analysis of the UK was limited until 1997 (not all judgments were published prior on <www.bailii.org>); of Germany until 1998 (publication since then on <www.bundesverfassungsgericht.de/entscheidungen.html>); of the Netherlands until 1997 (although not all judgments of 1997 and 1998 are published on <www.rechtspraak.nl>); of Belgium until 1996 (<www.const-court.be>). For 2012, judgments were only taken into account through 15 November 2012.

8 The analysis is carried out through search engines on the official websites using the following codes. For references to the ECHR by the HR and the BeCC 'EVRM', 'E.V.R.M.', 'Verdrag tot bescherming' and 'Verdrag voor de rechten'; by the BVerfG 'EMRK', 'MRK', 'Menschenrechtskonvention' and 'der Menschenrechte und Grundfreiheiten'. For references to the ECtHR by the HR 'EHRM', 'E.H.R.M.', 'Europese Hof voor', 'ECRM', 'ECieRM' and 'Commissie voor de rechten'; by the BeCC 'EHRM', 'Europees Hof voor', 'ECRM' and 'Commissie voor de rechten'; by the BVerfG 'EGMR', 'EKMR' and 'für Menschenrechte'. Afterwords all the results were checked one by one to verify if there indeed was a reference to the ECHR or a specific ECtHR judgment. For the UKSC all judgments were analysed individually.

9 In this contribution, 'Europeanisation' aims solely at the influence of the ECHR, as interpreted by the ECtHR.

I. Impact of the ECtHR Case Law on the Case Law of four Domestic Courts

In all four countries, a strong connection exists between the domestic judge and the Conventional system, irrespective of their monistic or dualistic nature.[10] The difference between the above-mentioned countries, firstly, consists of the fact that Belgium as well as Germany have a codified constitution against which primary legislation can be reviewed. In the Netherlands[11] and the UK[12], the ECHR functions rather as a surrogate for a constitutional fundamental rights catalogue.[13] Furthermore, the nature of the court also determines to what extent the impact of the ECHR and the ECtHR case-law translates into explicit references. For example, the HR, a cassation court, pronounces more concise judgments than a constitutional court.

The ECtHR has over the years, as interpreter of the ECHR, established a very extensive case-law. It is on this case-law –not the ECHR rights in itself– that criticism has been voiced in all four countries.[14] Therefore, it is crucial to also analyse to what extent the ECtHR case-law[15] is cited and taken into account. According to the Convention, judgments are only binding for the parties involved.[16] Nevertheless,

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10 Similarly Helen KELLER, Alec STONE SWEET, 'Assessing the impact of the ECHR in national legal orders', in Helen KELLER, Alec STONE SWEET, eds., *A Europe of Rights*, Oxford, Oxford University Press, 2008, p. 683.

11 Monica CLAES, Janneke GERARDS, 'The Netherlands', in Julia LAFFRANQUE, ed., *The protection of fundamental rights post-Lisbon*, Tallinn, Tartu University Press, 2012, available on <www.nver.nl/-documents/FIDE_report_2012_topic_1.pdf>, p. 619.

12 Fransesca KLUG, 'A Bill of Rights: do we need one or do we already have one?', *LSE Legal Studies Working Papers* 2007, available on <ssrn.com/abstract=999952>.

13 KELLER, STONE SWEET, op.cit., note 10, p. 686.

14 E.g. Dominic GRIEVE, 'It's the interpretation of the HRA that's the problem - not the ECHR itself', in *Conservative Home Platform* 2009, available on <conservativehome.blogs.com/-platform/2009/04/dominic-grieve-.html> [consulted 5 February 2013].

15 When referring to the 'ECtHR case-law', this contribution refers to the *res interpretata*, namely the content of the judgment that can be generalized beyond the individual case, see Samantha BESSON, 'The *erga omnes* effect of judgments of the ECtHR', in Samantha BESSON, ed., *The ECtHR after Protocol 14*, Zürich, Schulthess, 2011, p. 132.

16 Art. 46 ECHR refers to decisional authority of ECtHR judgments only, the ECtHR however, does grant its judgments jurisprudential authority based on Art. 1 and Art. 19 *juncto* 32 ECHR, BESSON, op.cit., note 16, pp. 138-139, 173; COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, 'Strenghtening subsidiarity', Conference on the Principle of Subsidiarity 1-2 October 2010 in Skopje, available on <assembly.coe.int/CommitteeDocs/2010/20101125_-Skopje.pdf>, p. 3, 15-16; Janneke GERARDS, 'Samenloop van nationale en Europese gron-

in all four supreme courts ECtHR judgments have, to a great extent an *erga omnes* effect, based on domestic legal obligations or on domestic court's case-law or practice.[17] In the contribution, focus is put on the domestic dimension.

In addition, according a recent trend in the ECtHR case-law, judicial restraint should have the upper hand when supreme courts have already carried out a comprehensive analysis on the basis of the relevant Convention case-law.[18] The ECtHR applied this reasoning when determining the limits of freedom of speech with regard to someone's reputation,[19] the recognition of a right by domestic law[20] and the existence of an emergency situation (Art. 15 ECHR).[21] At the opening of the 2012 judicial year, Tulkens raised the question 'whether this approach can have wider application in different Convention contexts'.[22] She must have already known that a week later the grand chamber would pronounce two judgments that extended this reasoning to the balancing exercise between Art. 8 and 10 ECHR, whereby the ECtHR was able to meet the objections following the first *von Hannover* judgment:

> Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.[23]

This case-law encourages domestic supreme courts to take into account (to a greater extent) the ECtHR case-law. When doing so, the ECtHR will give them a broader margin of appreciation. Tulkens indicates that this is a 'judicial policy to encourage the national courts to implement in full the task conferred on them by

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drechtenbepalingen [Concurrence of national and European fundamental rights provisions]', *Tijdschrift voor Constitutioneel Recht*, 2010, p. 232.

17 For an extensive analysis on the legal status of the *erga omnes* effect of ECtHR judgments according to ECHR law and domestic law, see BESSON, op.cit., note 16, pp. 138-144.

18 Dean SPIELMANN, 'Allowing the right margin the ECtHR and the national margin of appreciation doctrine: waiver or subsidiarity of European review?', *CELS Working Paper Series* 2012, available on <cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%-20of%-20appreciation%20cover.pdf>, pp. 23-24.

19 ECtHR, 12 September 2011 (GC), *Palomo Sanchez a.o. v. Spain*, n°28955/06, 28957/06, 28964/06.

20 ECtHR, 18 January 2011, *MGN Limited v. UK*, n°39401/04, §150; ECtHR, 10 May 2001 (GC), *Z a.o. v. UK*, n°29392/95, §101; ECtHR, 19 October 2005 (GC), *Roche v. UK*, n°32555/96, §120.

21 ECtHR, 19 February 2009 (GC), *A a.o. v. UK*, n°3455/05, §174.

22 Françoise TULKENS, in ECtHR, ed., *Dialogue between judges*, Strasbourg, ECtHR, 2012, p. 9.

23 ECtHR, 7 February 2012 (GK), *Axel Springer AG v. Germany*, n°39954/08, §88; ECtHR, 7 February 2012, *von Hannover v. Germany (n°2)*, n°40660/08, 60641/08, §107.

the Convention'.[24] The ECtHR clearly opts for a cooperative approach. The more domestic supreme courts include ECtHR case-law in their motivation, the less risk they bear for a violation. This can perhaps lead to an increased amount of (explicit) references to the ECtHR case-law, for which, according to empirical analysis, there is evidently space. In the following sections, the contribution examines further the attitude and reference practice of each court towards the ECHR and the ECtHR case-law.

A. The Dutch Supreme Court between Monism and the Ban on Constitutional Review

Despite their greatly different legal system, fundamental rights protection in the Netherlands as well as the UK is primarily offered by the ECHR.[25] Such a strong connection with the European level of fundamental rights protection is perhaps most expected in the Netherlands. For the Netherlands is characterised by a strong monistic nature. International treaties with direct effect have precedence over conflicting national norms, including the Constitution.[26] Moreover, Art. 120 Constitution explicitly prohibits constitutional review of primary legislation, although the national judge *can* examine primary legislation for compatibility with fundamental rights protected in international treaties. Because of the combination of monism and a ban on constitutional review, the value of the Dutch constitution as a source of fundamental rights protection for judges is extremely limited. Rather, the ECHR is the primary source.[27]

Certain Dutch scholars argue that based on Art. 93-94 Constitution the ECtHR case-law is incorporated into the ECHR rights.[28] The Dutch Supreme Court (HR) has never explicitly endorsed the incorporation doctrine, albeit its case-law does point in that direction.[29] In its report 2009-10, the HR grounded the *erga omnes*

24 TULKENS, op.cit., note 22, p. 8.

25 Although in the UK indirectly, via reference to 'Convention rights' in the HRA.

26 Arts. 93-94 Constitution.

27 CLAES, GERARDS, op.cit., note 11, pp. 616-619.

28 GERARDS, op.cit., note 16, p. 232.

29 E.g. HR, 10 August 2001, *LJN* ZC3598; HR, 19 October 1991, *NJ* 1992, 129. Ellen HEY et al., 'De transnationale dialoog tussen rechters: verschillende interpretaties van Europese en nationale grondrechten [The transnational dialogue between judges: different interpretations of European and national fundamental rights]', *Nederlands Juristenblad* 2005, available on <www.njb.nl/NJB2006/mem/links/art20533_lang.pdf>, pp. 6-7; Aernout NIEUWENHUIS, Laurens DRAGSTRA, 'Van minimum, tekort en meerwaarde [About minimum, deficit and added value]', in VERENIGING VOOR DE VERGELIJKENDE STUDIE VAN HET RECHT VAN BELGIË EN NEDERLAND,

effect rather on the importance of loyalty.[30] A similar reasoning can be encountered in the case-law of the UKSC.[31] In a recent contribution, the HR's President stated that the domestic judge should loyally follow the ECtHR case-law, but not slavishly. The domestic judge should in principle apply and follow the ECtHR case-law. With the exception of two situations: if the case can be distinguished from the relevant ECtHR case-law or if the domestic judge is attempting to make the ECtHR change its case-law through a well-motivated judgment. However, if the latter proves unsuccessful, the domestic judge is obliged to follow the ECtHR, since the ECtHR has the last word concerning the interpretation of the Convention and because of the loyalty to the Convention.[32]

Tables and Graphs 1. Overview amount of references to the ECHR and the ECtHR case-law

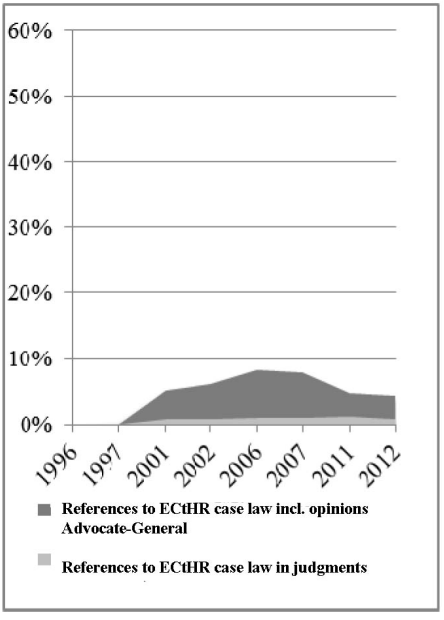
Year	*Total # of judgments*	*Judgments with reference to ECHR*	*Judgments and opinions A-G with reference to ECHR*	*Judgments with reference to ECtHR case law*	*Judgments and opinions A-G with reference to ECtHR case law*
1996	353	9 (2,6%)	11 (3,1%)	0 (0,0%)	0 (0,0%)
1997	365	10 (2,7%)	10 (2,7%)	1 (0,3%)	1 (0,3%)
2001	1073	117 (10,9%)	203 (18,9%)	9 (0,8%)	56 (5,2%)
2002	1155	121 (10,5%)	216 (18,7%)	10 (0,9%)	72 (6,2%)
2006	1238	131 (10,6%)	245 (19,8%)	12 (1,0%)	103 (8,3%)
2007	1269	134 (10,6%)	266 (21,0%)	14 (1,1%)	100 (7,9%)
2011	2338	226 (9,7%)	407 (17,4%)	29 (1,2%)	110 (4,7%)
2012	2221	208 (9,4%)	376 (16,9%)	18 (0,8%)	97 (4,4%)

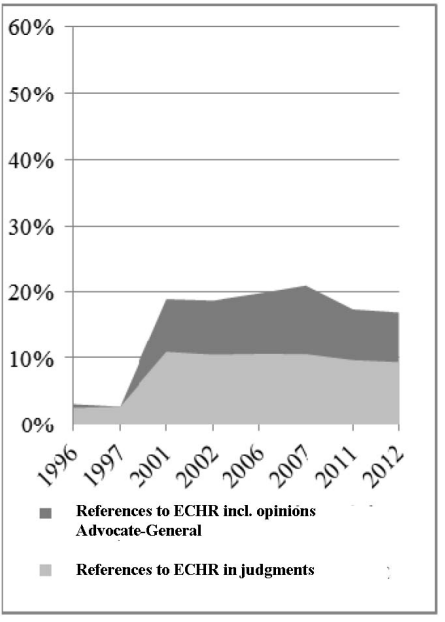
ed., *Preadviezen*, The Hague, Boom juridische uitgevers, 2008, pp. 49-52; *a contrario*: Elaine MAK, 'Report on the Netherlands and Luxembourg', in Guiseppe MARTINICO, Oreste POLLICINO, eds., *The national judicial treatment of the ECHR and EU laws*, Groningen, Europa Law Publishing, 2010, p. 285.

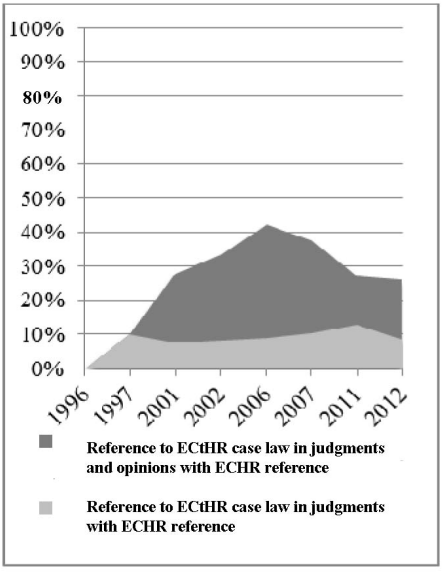
30 Geert CORSTENS, Jan Watse FOKKENS, 'Internationalisation of the law', in DUTCH SUPREME COURT, *Report for 2009-10*, available on <www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Pages/Internationalisationofthelaw.aspx> [consulted 5 February 2013].

31 *Infra*, note 49.

32 Geert CORSTENS, *De veranderende constitutionele rol van de rechter [The changing constitutional role of the judge]*, Staatsrechtconferentie 2012, Leiden University, <media.leidenuniv.nl/legacy/bijdrage-staatsrechtconferentie-2012---g-corstens.pdf>, p. 8.







Year	*Reference to ECtHR case law in judgments with ECHR reference*	*Reference to ECtHR case law in judgments and opinions with ECHR reference*
1996	0,0%	0,0%
1997	10,0%	10,0%
2001	7,7%	27,6%
2002	8,3%	33,3%
2006	9,2%	42,0%
2007	10,5%	37,6%
2011	12,8%	27,0%
2012	8,7%	25,8%

In the above-mentioned report, the HR emphasized that the 'ECHR also plays a major role in day-to-day légal

practice'[33] and that 'Supreme Court judgments make fairly regular direct references, especially if the decision of either European court leads to changes in Supreme Court case-law'.[34] However, no empirical analysis is included. Despite these claims, the above-mentioned numbers show that the HR rarely refers to the ECtHR case-law. In 2012, the HR referred mainly to the *Salduz* case-law.[35] The percentage of references in judgments to the ECHR and ECtHR does remain stable (with the exception of 1996-1997).[36] Advocate-Generals assist the HR through independent opinions that enter at length into the relevant case-law, doctrine and parliamentary proceedings and are therefore taken into account in the analysis. In less than 10% of judgments with reference to the ECHR does the Court also refer to the ECtHR. This low average is partly due to the high amount of references to Art. 6 ECHR when determining if the reasonable time requirement is violated.[37] Art. 6 ECHR is also the most invoked Article.[38] The HR predominantly refers to the ECtHR case-law implicitly through following the case-law or referring to or simply following the opinion of the Advocate-General that analysed the case-law.

B. The UK Supreme Court and the Mirror Principle

Before the coming into force of the Human Rights Act 1998 (HRA), the dualistic approach in the UK caused the ECHR to have no direct effect. Notwithstanding that the ECHR was considered to be relevant for UK judges, e.g. as an interpretation aid, their level of participation in the fundamental rights debate on the national and European level remained limited.[39] This is reflected in the number of references to the ECHR before and after the HRA. S.1 HRA duplicated[40] most ECHR rights on the national level by reference, thus creating a strong connection between both layers. Contrary to the three other countries, the HRA also pro-

33 CORSTENS, FOKKENS, op.cit., note 30.

34 Ibid.

35 E.g. HR, 2 October 2012, *LJN* BX5109.

36 Albeit no conclusions can be drawn from this, since not all judgments were published in the central database during those years.

37 2011: 63,7%(191); 2006: 49,6%(108); 2001: 37,2%(96).

38 77,7%.

39 Andrew CLAPHAM, 'The ECHR in the British courts', in Philip ALSTON, ed., *Promoting human rights through bill of rights*, Oxford, Oxford University Press, 1999, pp. 95-117.

40 This term being less misleading than 'incorporation', Lord HOFFMANN, *Lyons* [2002] UKHL 44 [27]; Jonathan LEWIS, 'The European ceiling on human rights', *Publ.L.*, 2007, pp. 724-725; Jane WRIGHT, 'Interpreting section 2 of the HRA 1998: Towards an indigenous jurisprudence of human rights', *Pub.L,* 2009, p. 599.

vides an explicit rule on how domestic courts should deal with the Strasbourg case-law. S. 2(1) HRA obliges domestic courts to take into account the Strasbourg case-law. This rule was adopted after much debate to offer courts « the flexibility and discretion that they require in developing human rights law »[41].

The UK Supreme Court (UKSC[42]) primarily applies the mirror principle, meaning that 'the ambit of application of the [HRA] should mirror that of the Convention'.[43] According to Lord Slynn in *Alconbury*, '[i]n the absence of some special circumstances […] the court should follow any clear and constant jurisprudence of the European Court of Human Rights'.[44] Lord Bingham stated famously in *Ullah* that s. 2(1) HRA '[implies] the duty of national courts to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, certainly no less'.[45] The arguments raised not to offer a broader protection than the ECtHR will be discussed further on.

In the case-law of the UKSC, four arguments are put forward as to why the court should not provide less protection than the ECtHR in the absence of special circumstances. Firstly, the Court avoids thus the finding of a violation by the ECtHR[46] seeing as one of the purposes of the HRA was precisely to avoid the long and costly road to Strasbourg.[47] Secondly, rejecting a judgment against the UK would put the UK in breach of its international obligation (Art. 46 ECHR), which it accepted when acceding to the Convention.[48] Thirdly, Lord Bingham noted in *Kay* that the effectiveness of the Convention is dependent upon the loyal acceptance by Member States of the principles the Strasbourg Court lays down, as highest judicial authority on the interpretation of the Convention rights.[49] Fourthly, Lord Bingham linked the statement that 'the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court' with the obligation in s.6 HRA, which makes it unlawful for a public authority, including a court, to act incompatible with a Convention right. He concluded with the argument that 'the meaning of

41 Lord IRVINE, Hansard HL vol 584 col 1271 (19 January 1998).

42 Before October 2009 the Appellate Committee of the House of Lords. 'UKSC' will be used as an umbrella term.

43 Lord PHILLIPS, *McCaughey* [2011] UKSC 20 [59].

44 [2001] UKHL 23 [26].

45 [2004] UKHL 26 [20].

46 Lord SLYNN, *Alconbury* [2001] UKHL 23 [26]; *R (Amin)* [2003] UKHL 51 [44].

47 HOME OFFICE, *Rights brought home: the Human Rights Bill*, Cm 3782, 1997, §1.14-1.19.

48 Lord HOFFMAN, *AF* [2009] UKHL 28 [70].

49 [2006] UKHL 10 [28].

the Convention should be uniform throughout the states party to it'.[50] However, certain criticisms can be voiced against this argument. Firstly, it is true that the Convention intends to ensure 'a uniform *minimum* standard of human rights protection across all of the state parties'.[51] This is supported not only by the text of the Convention, but also by the HRA. From the Convention perspective, Art. 1 *juncto* 32 ECHR has led certain scholars to conclude that *judgments* perhaps only bind the parties, but that *interpretations* given by Strasbourg are binding for all the Member States.[52] Domestically, the obligation in s.6 HRA precludes UK judges from interpreting the duplicated right less generously than its Convention counterpart.[53] This minimum of course does not stand in the way of a higher standard; be it by filling in the margin of appreciation or extending the rights protection.[54] Furthermore, domestic courts are not interpreting the Convention as such, but the domestic duplications[55] of the rights in the Convention. They could not be interpreting the Convention rights in a non-uniform way.[56] The meaning of Convention rights and the internal consistency of the Convention would thus not be affected by the interpretation of its HRA counterpart.[57] No argument is given why both the domestic level and the European level should uphold the same uniformity.[58]

50 Ibid. Affirmed by Lord STEYN, *LS* [2004] UKHL 39 [27]; Lord BINGHAM, Baroness HALE, *Animal Defenders* [2008] UKHL 15 [37] [53]; Lord HOFFMAN, *P & Ors, Re* [2008] UKHL 38 [36]; Lord *Brown, Rabone* [2012] UKSC 2 [113].

51 Jean-Paul COSTA, 'On the legitimacy of the European Court of Human Rights' judgments', *European Constitutional Law Review*, 2011, p. 177.

52 GERARDS, op.cit., note 16, p. 232.

53 Tom RAINSBURY, 'Their Lordships' timorous souls', *UCL Human Rights Review*, 2008, p. 34; Roger MASTERMAN, 'Aspiration or foundation? The status of the Strasbourg jurisprudence and the 'Convention rights' in domestic law', in Helen FENWICK et al., eds., *Judicial reasoning under the UK Human Rights Act*, Cambridge, Cambridge University Press, 2007, p. 66.

54 *Infra* II.A.; Brenda HALE, 'Argentoratum locutum: Is Strasbourg or the Supreme Court supreme?', *Human Rights Law Review*, 2012, p. 70.

55 Lord HOPE, *McCaughey* [2011] UKSC 20 [75].

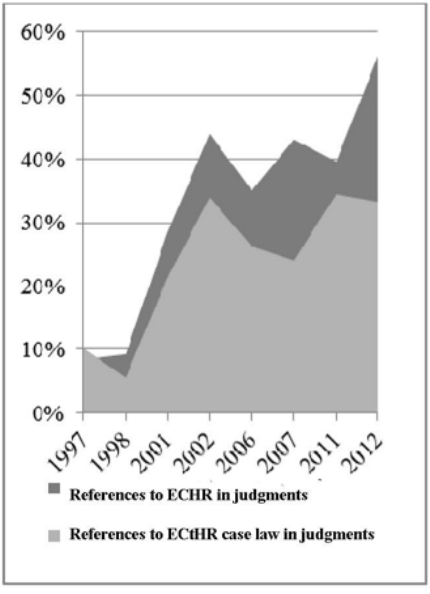
56 Similarly, LEWIS, op.cit., note 40, p. 736; Merris AMOS, 'The principle of comity and the relationship between british courts and the ECtHR', *Yearbook of European Law*, 2009, pp. 514-515; RAINSBURY, op.cit., note 54, p. 34; HALE, op.cit., note 54, p. 69; Alexander IRVINE, 'A British interpretation of Convention rights', *Publ.L.*, 2012, p. 251.

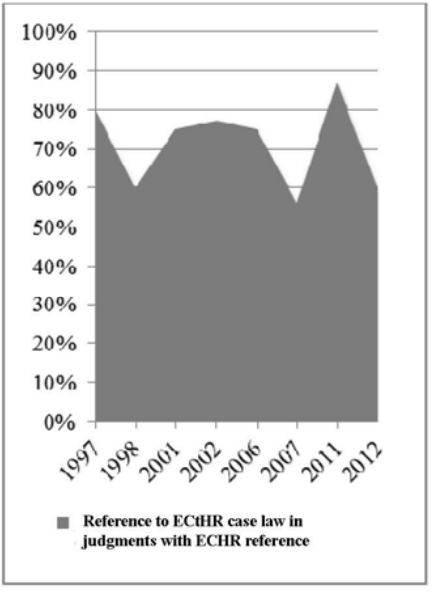
57 GERARDS, op.cit., note 16, p. 247.

58 RAINSBURY, op.cit., note 54, p. 37.

Tables and Graphs 2. Overview amount of references to the ECHR and the ECtHR case-law

Year	*Total # of judgments*	*Judgments with reference to ECHR*	*Judgments with reference to ECtHR case law*	*Reference to ECtHR case law in judgments with ECHR reference*
1997	59	5 (8,5%)	6 (10,2%)	80,0%
1998	54	5 (9,3%)	3 (5,6%)	60,0%
2001	70	20 (28,6%)	15 (21,4%)	75,0%
2002	50	22 (44,0%)	17 (34,0%)	77,3%
2006	57	20 (35,1%)	15 (26,3%)	75,0%
2007	58	25 (43,1%)	14 (24,1%)	56,0%
2011	58	23 (39,7%)	20 (34,5%)	87,0%
2012	48	27 (56,3%)	16 (33,3%)	59,3%





Currently, the UKSC refers in about half of the cases (indirectly) to the ECHR. The HRA entered into force on 2 October 2000 following an extensive judicial training programme. From then on, there is a clear increase in the number of references to the ECHR. By 2001, references tripled compared to 1998, even though the House of Lords still regularly ruled that the HRA was not yet applicable to the lower court. By 2002, references quintupled compared to 1998. Yearly fluctuations can be explained by the limited amount of judgments. The UKSC refers to an extensive amount of ECHR rights. The Articles most referred to are Art. 8

ECHR (2012: 33,3%; 2011: 30,4%) and Art. 6 ECHR (2012: 18,5%; 2011: 47,8%).

The tendency to follow the Strasbourg case-law very strictly seems to be connected to the combination of a legal obligation to take into account ECtHR case-law combined with the 'paradigm of system of binding precedent and a linear judicial hierarchy'.[59] This externalises in the amount of references to the ECtHR case-law. In about a third of all cases, the Court refers to the ECtHR case-law. The Court also has a habit of referring to the relevant ECtHR case-law when the ECHR is being applied.[60] Furthermore, the UKSC analyses the ECtHR case-law the most intensively of the four examined courts. Albeit, this is probably partly due to the limited amount of cases the Court handles yearly.

C. The Docility of the Belgian Constitutional Court

In principle, the Belgian Constitutional Court (BeCC) only has jurisdiction to review the compatibility of primary legislation to *constitutional* fundamental rights.[61] Nevertheless, the ECHR and the ECtHR case-law were used to circumvent the initial lack of mandate to review Statutes against fundamental rights, to increase its legitimacy as a young court founded by a lawmaker full of fear of a government of judges[62] and to modernise the constitutional fundamental rights catalogue.[63] For this purpose, the Court combines Art. 10-11 Constitution with rights guaranteed in international treaties[64] and interprets constitutional fundamental rights in accordance to analogue rights in international treaties.[65] In both cases, the ECHR and the ECtHR case-law dominate.

The BeCC has never given explicit insight into its precise relationship with the ECtHR, although several of its members have examined this subject thor-

59 IRVINE, op.cit., note 56, pp. 246-247.

60 When it does not refer to the ECtHR case-law, this usually implies that the ECHR Article was not of importance for the case, e.g. *R v. Varna* [2012] UKSC 42.

61 Art. 142 Constitution, Artt. 1 and 26 Special Act 6 January 1989 on the Constitutional Court.

62 Patricia POPELIER, 'Belgium', in Patricia POPELIER et al., eds., *Human rights protection in the European legal order,* Cambridge, Intersentia, 2011, p. 156.

63 Sarah LAMBRECHT, 'De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming [The added value of a constitutional catalogue of fundamental righs in a multilevel system of fundamental rights protection]', *Jura Falc.*, 2012, pp. 236-240.

64 BeCC, 23 May 1990, n°18/90, B.11.3.

65 BeCC, 22 July 2004, n°136/2004, B.5.3.

oughly.[66] The question therefore arises if *not* defining the relationship between both courts is not a deliberate choice. The docility of the BeCC, however, manifests itself in several ways. Firstly, the Court has weakened a constitutional right (the absolute confidentiality of mail in Art. 29 Constitution) to reconcile it with the positive obligations ensuing from the ECtHR case-law, although it did not refer to specific judgments.[67] Furthermore, the Court does not hesitate to change its case-law to correspond with the ECtHR case-law and has previously even reopened the proceedings[68] or postponed a judgment.[69]

Tables and Graphs 3. Overview amount of references to the ECHR and the ECtHR case-law[70]

Year	*Total # of judgments*	*Reference in 'B' section*	*Reference in 'subject' or 'A' section*	*Judgments with reference to ECHR*	*Judgments with reference to ECtHR case law in 'B' section*	*Reference to ECtHR case law in 'B' section of judgments with ECHR reference*
1996	82	8 (9,8%)	14 (17,1%)	14 (17,1%)	2 (2,4%)	25,0%
1997	84	13 (15,5%)	23 (27,4%)	23 (27,4%)	5 (6,0%)	38,5%
2001	163	36 (22,1%)	52 (31,9%)	52 (31,9%)	9 (5,5%)	25,0%
2002	191	31 (16,2%)	57 (29,8%)	57 (29,8%)	3 (1,6%)	9,7%
2006	200	43 (21,5%)	58 (29,0%)	59 (29,5%)	7 (3,5%)	16,3%
2007	163	39 (23,9%)	46 (28,2%)	46 (28,2%)	12 (7,4%)	30,8%
2011	201	60 (29,9%)	78 (38,8%)	79 (39,3%)	24 (11,9%)	40,0%
2012	143	36 (25,2%)	47 (32,9%)	49 (34,3%)	20 (14,0%)	55,6%

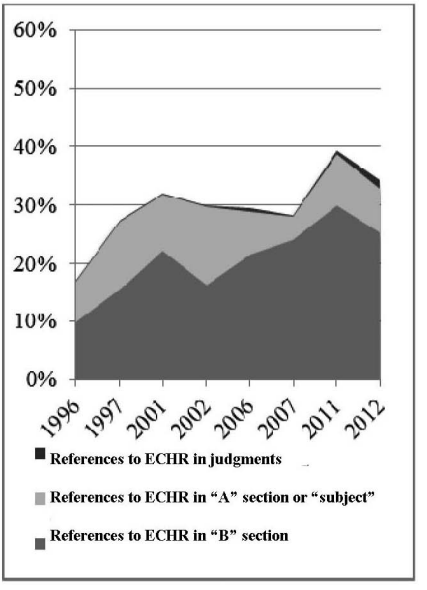
66 André ALEN et al., 'De verhouding tussen het Grondwettelijk Hof en het EHRM [The relationship between the Constitutional Court and the ECtHR]', in André ALEN, Jan THEUNIS, eds., *Leuvense staatsrechtelijke standpunten 3*, Bruges, die Keure, 2012, pp. 3-45; Paul MARTENS, 'L'influence de la jurisprudence de la Cour Européenne des Droits de l'Homme sur la Cour Constitutionnelle', *CDPK*, 2010, pp. 349-358; Jan THEUNIS, 'The influence of the ECHR on national constitutional jurisprudence: the example of the Belgian Constitutional Court', International conference on the influence of the ECtHR case law on national constitutional jurisprudence of 13-16 October 2005 in Kiev, available on <http://www.venice.coe.int/-webforms/-documents/CDL-JU%282005%29057prov-e.aspx>.

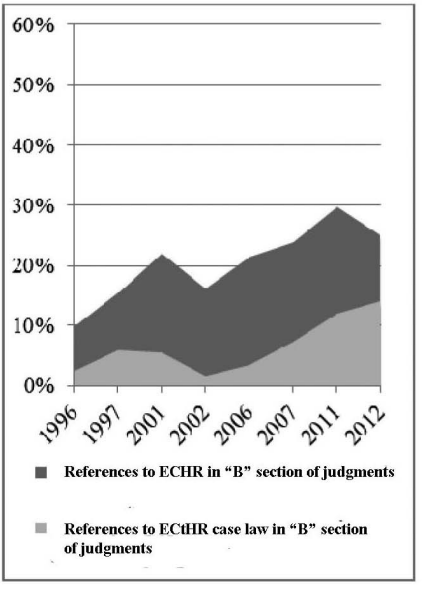
67 BeCC, 21 December 2004, n°202/2004.

68 Following ECtHR, 11 January 2007, *Mamidakis v. Greece*, n°35533/04; BeCC, 7 June 2007, n°81/2007.

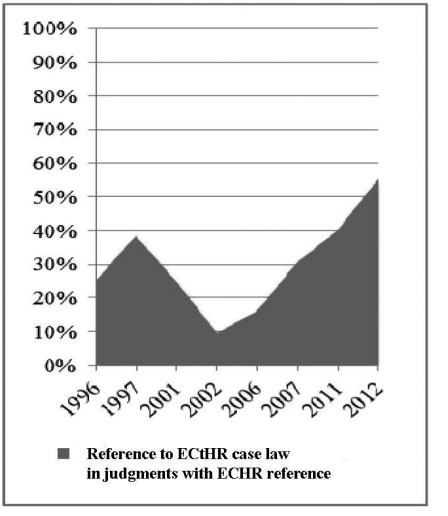
69 Waiting on *Hirst (n°2)*; BeCC, 14 December 2005, n°187/2005, B.5.5. MARTENS, op.cit., note 66, p. 352.

70 'B' section in which the Court states its reasoning. 'A' section -invoked by the parties- or the 'subject' -invoked by the referring judge.





The number of references to the ECHR and the ECtHR case-law has increased over the years. This is probably connected to an increased invocation of the Convention. The BeCC refers to a wider range of Articles than the HR. Nevertheless, Art. 6 ECHR is also most prominent.[71] References to Art. 8 ECHR[72] and Art. 1, 1st Protocol[73] are also common.



Moreover, general references to *the* ECtHR case-law[74] have been replaced by references to specific judgments. In certain judgments the Court even

71 2012: 39,5%(15); 2011: 49,2%(30).
72 2012: 26,3%(10); 2011: 21,3%(13).
73 2012: 23,7%(9); 2011: 24,6%(15).
74 E.g. BeCC, 20 February 2002, n°41/2002, B.13.

refers to the ECtHR case-law very extensively.[75] Regrettably, the Court still regularly neglects to mention the relevant ECtHR case-law when applying the ECHR and lapses into concise standard formulations stating that examining the ECHR will not lead to different results.[76] Such an approach creates issues not only of transparency and adequate reasoning, but also in view of the above-mentioned trend of providing a broader margin of appreciation for judgments in which the ECtHR case-law was comprehensively analysed.

D. The German Federal Constitutional Court split between Dualism and Openness[77]

In the German legal order, the ECHR merely has the status of a federal statute.[78] This was confirmed in *Görgülü*, which dealt with the relationship with the ECHR and ECtHR. The applicant claimed that the *Görgülü* judgment by the ECtHR was not implemented by the domestic court thus breaching international law. The German Federal Constitutional Court (BVerfG) agreed in essence and ruled that the *Naumburg Oberlandesgericht* had violated Art. 6 *Grundgesetz juncto* the rule of law principle (Art. 20(3)). In *Gorgülü* the BVerfG confirmed that international law (including the ECHR) and national law belong to two different legal spheres (dualism).[79] However, the Court mitigated the consequences of dualism through the principle of openness towards international law (*Völkerrechtsfreundlichkeit*; *Völkerrechtsoffenheit*)[80] and of the *lex posterior* principle through the presumption of conformity to international law by the lawmaker. Unless the legislator

75 BeCC, 12 July 2012, n°93/2012 (Artt. 8, 14 ECHR); BeCC, 3 May 2012, n°58/2012 (Art. 8 ECHR).

76 BeCC, 1 March 2012, n°26/2012, B.10.

77 Rainer ARNOLD, 'Germany', in Patricia POPELIER et al., eds., *Human rights protection in the European legal order*, Cambridge, Intersentia 2011, pp. 258-259; Elisabeth LAMBERT-ABDELGAWAD, Anne WEBER, 'The reception process in France and Germany', in Helen KELLER, Alec STONE SWEET, eds., *A Europe of Rights*, Oxford, Oxford University Press, 2008; Philipp CEDE, 'Report on Austria and Germany', in Guiseppe MARTINICO, Oreste POLLICINO, eds., *The national judicial treatment of the ECHR and EU laws*, Groningen, Europa Law Publishing, 2010, pp. 55-80.

78 Art. 59(2) *Grundgesetz*. Christoph GRABENWARTER, Katharina PABEL, *Europäische Menschenrechtskonvention*, Munich, Verlag CH. Beck, 2012, pp. 17-21.

79 BVerfG 2 BvR 1481/04 of 14 October 2004, §34.

80 Ibid. Hans-Jürgen PAPIER, 'Execution and effects of the judgments of the ECtHR in the German judicial system', in ECtHR, ed., *Dialogue Between Judges*, Strasbourg, ECtHR, 2006, p. 46.

explicitly states that legislation goes against the ECHR, the legislation will be interpreted in conformity with the treaty.[81]

The BVerfG has confirmed that the ECHR does not have a constitutional status and thus an appeal cannot be launched based solely on the ECHR.[82] Nevertheless, the ECHR should be consulted when interpreting the *Grundgesetz.*[83] According to Papier, this has led to an extensive harmonisation of both fundamental rights catalogues.[84] Furthermore, the 'German courts too are under a duty to take the decisions of the ECHR into account'.[85] This formulation is almost identical to s.2(1) HRA. Nonetheless, its legal foundation is fundamentally different. The BVerfG grounds this obligation not on a specific provision but rather on the rule of law principle. This obligation can have far-reaching consequences, since disregarding it could lead to an individual constitutional complaint.[86] Utilising the ECtHR case-law as a guideline when interpreting constitutional rights should not, however, lead to lessening the constitutional standard of fundamental rights protection[87] or to limiting constitutional rights when several rights are being balanced against each other (multipolar relations).[88]

Tables and Graphs 4. Overview amount of references to the ECHR and the ECtHR case-law

Year	*Total # of judgments*	*Judgments with reference to ECHR*	*Judgments with reference to ECtHR case law*	*Reference to ECtHR case law in judgments with ECHR reference*
1998	321	6 (1,9%)	0 (0,0%)	0,00%
2001	442	13 (2,9%)	4 (0,9%)	7,69%
2002	427	12 (2,8%)	3 (0,7%)	16,67%
2006	322	14 (4,4%)	12 (3,7%)	64,29%
2007	251	16 (6,4%)	12 (4,8%)	62,50%
2011	299	14 (4,7%)	12 (4,0%)	57,14%
2012	204	12 (5,9%)	9 (4,4%)	50,00%

81 Christian WALTER, 'Nationale Durchsetzung', in Rainer GROTE et al., eds., *EMRK/GG: Konkordanzkommentar*, Tübingen, Mohr Siebeck, 2006, p. 1664.

82 BVerfG 10, 271 (274); 64, 135 (157); 74,102 (128); 111, 307 (317).

83 BVerfG 35, 311 (320).

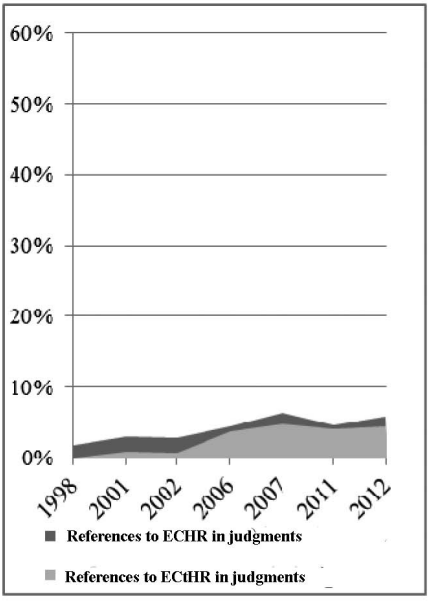
84 PAPIER, op.cit., note 80, p. 49.

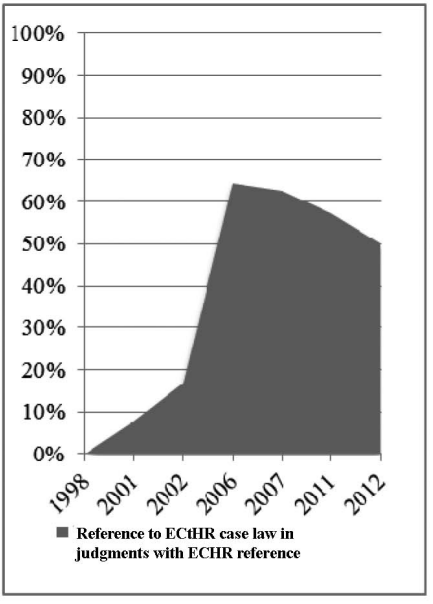
85 BVerfG 2 BVR 1481/04 of 14 October 2004, §46.

86 Matthias HARTWIG, 'Much ado about human rights: the Federal Constitutional Court confronts the ECtHR', *German Law Journal*, 2005, p. 894.

87 BVerfG 2 BvR 2307/06 of 4 February 2010, §21.

88 BVerfG 2 BvR 2365/09 of 4 May 2011, §93.





Although a clear increase is noticeable in the number of references to the ECHR and the ECtHR case-law following the *Görgülü* judgments, references remain rare. The Convention system plays a far less prominent role than in the three other examined courts. Two explanations are raised. Firstly, contrary to the BeCC, the BVerfG did not need the ECHR to obliquely review constitutional rights. Secondly, the BVerfG, which has in the course of sixty years developed a very extensive constitutional doctrine, considers reference to the Convention system often superfluous.[89]

This, however, does not imply that the BVerfG does not take into account the ECtHR case-law. Rather, this occurs behind the scenes during the preparation of judgments, so harmony is assured and the finding of a violation by the ECtHR is confined to a minimum.[90] When the BVerfG *does* refer to the ECHR, it does so quite varied.[91] Remarkably, the BVerfG sometimes refers to the ECtHR case-law

89 ARNOLD, op.cit., note 77, pp. 158-159.

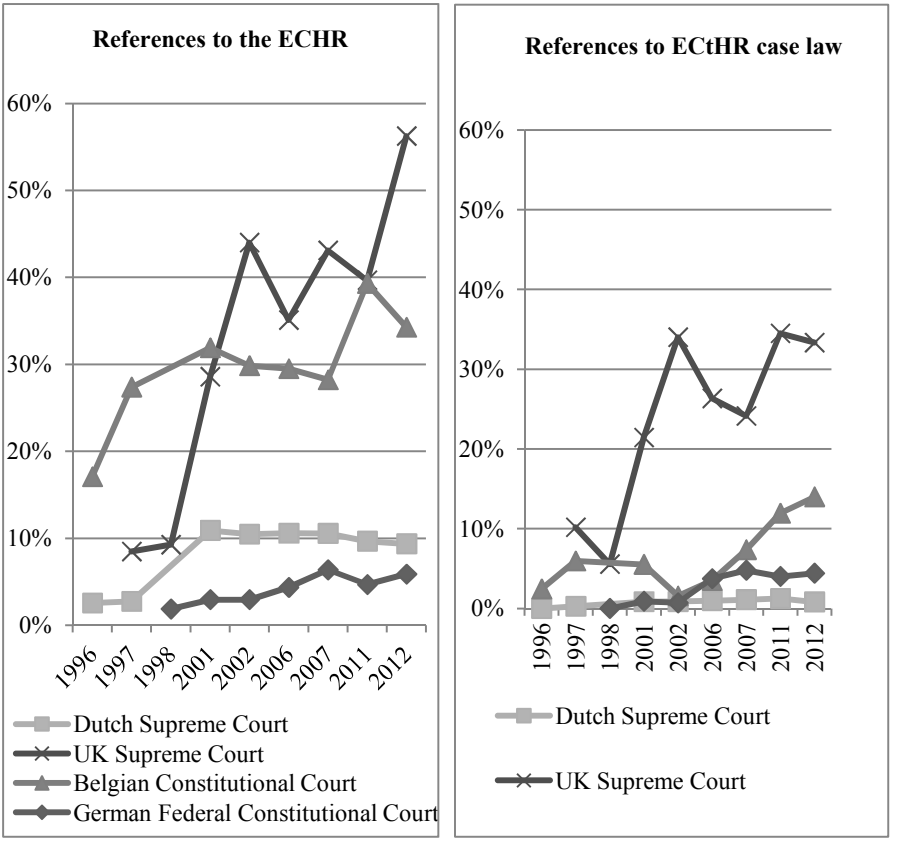
90 Ibid., p. 157; LAMBERT-ABDELGAWAD, WEBER, op.cit., note 77, p. 119.

91 2012: 1 to Art. 3; 2 to Art. 5; 4 to Art. 6; 1 to Art. 7; 2 to Art. 8; 1 to Art. 10; 1 to Art. 35; 1 to Art. 1P1.

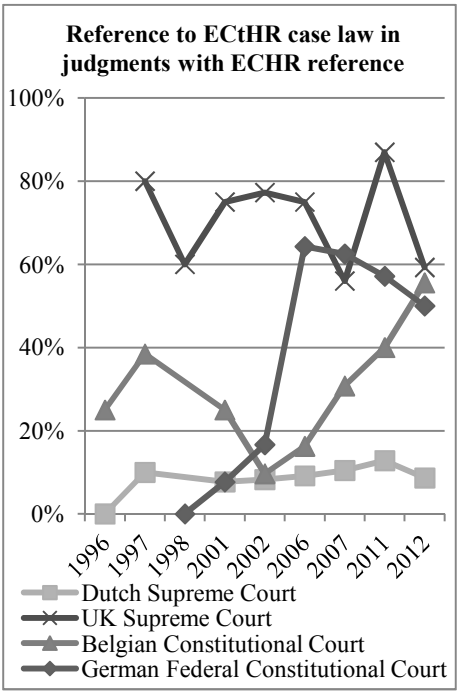
without referring to the relevant ECHR provision[92] Furthermore, the BVerfG will rarely refer to the ECHR without mentioning the relevant ECtHR case-law.

E. Comparative Overwiew

Graphs 5.



92 BVerfG 2 BvR 2378/10 of 29 February 2012; BVerfG 1 BvL 14/07 of 7 February 2012; BVerfG 2 BvR 1879/10 of 21 June 2012.



A clear rise of references is most noticeable in the UKSC's case-law: 5-10% in 1997-98 to around 35% in 2011-12. Also in the BeCC's case-law there is a significant increase: 2,4% in 1996 to 13,9% in 2012. Despite the clear differences in explicit references to the ECtHR case-law, all of the examined supreme courts developed techniques to avoid the finding of a violation by the ECtHR. Moreover, notwithstanding the increasing criticism, the ECtHR case-law remains a useful source of inspiration[93] and even legitimacy[94]. The next section demonstrates, however, that the amount of explicit ences is not *per se* proportional to the unchallenged application of the ECtHR case-law.

II. Limits to Impact of the ECtHR Case Law

Several situations are conceivable where it is difficult or even impossible to follow the Strasbourg case-law. For instance, the ECtHR allows room to domestic courts to offer a wider protection or to fill in the granted margin of appreciation. Sometimes the Strasbourg Court has not yet ruled on the matter or its case-law is unclear. In addition, a supreme court might be able, but not willing to follow the ECtHR case-law. The question then arises if the domestic supreme court should uphold: 'Strasbourg has spoken, the case is closed'.[95] Or that (sometimes) the court should opt for: 'Strasbourg has spoken, now it is our time to speak'.[96]

93 Referring to a 'strategic partnership', VAN DE HEYNING, op.cit., note 5.

94 Especially in Belgium (*supra* note 62), contrasting sharply with the UK, where a substantial part of the politicians is very hostile towards the ECtHR case-law.

95 Lord ROGER, *AF* [2009] UKHL 28 [98].

96 Brian KERR, op.cit., note 2.

A. Beyond the 'Minimum Standard' and the Margin of Appreciation

The ECHR, as interpreted by the ECtHR, offers a minimum standard of fundamental rights protection.[97] No ECHR provision therefore prevents broader protection on the national level. Moreover, Art. 53 ECHR explicitly authorises it. Yet, the HR is not inclined to offer a broader protection than the one offered by the ECtHR, since this would transgress its competence based on Art. 94 Constitution.[98] Consequently, the Court decided not to extend the reach of 'family life' to a lesbian relationship.[99] A similar reasoning can be found in the UKSC's case-law founded on the mirror principle. Lord Bingham emphasised in *Ullah* that it is not up to the domestic courts to offer more fundamental rights protection than the ECtHR case-law.[100] Lord Hoffman even stated that '[it] is for the Strasbourg court, not for us, to decide whether its case-law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention',[101] according to Masterman, to avoid accusations of excessive activism or acting without sufficient competence.[102]

According to Lord Bingham, only the ECtHR is competent to interpret the ECHR and its meaning should be uniform across Europe.[103] The Convention system, however, pursues solely a uniform *minimum* standard. This argument also reveals the confusion that the lack of difference in appellation (Convention rights) causes. The HRA guarantees *national* rights, but the connection with the ECHR is so strong that the distinction is often not made.[104] Lord Brown went even further in *Al-Skeini* stating that there is a greater danger in offering broader protection to an applicant, since only the applicant (not the State) can have the decision corrected in Strasbourg.[105] Despite this case-law, the UKSC has offered a few times broader

97 COSTA, op.cit., note 51, p. 177.
98 GERARDS, op.cit., note 16, p. 243.
99 HR, 10 August 2001, *LJN* ZC3598.
100 [2004] UKHL 26 [20]. Similarly, Lord HOPE, Lord BROWN, *Ambrose* [2011] UKSC 43 [16-20] [86].
101 Lord HOPE, *N v. SSHD* [2005] UKHL 31, [25].
102 Roger MASTERMAN, 'Aspiration or foundation? The status of the Strasbourg jurisprudence and the 'Convention rights' in domestic law', in Helen FENWICK et al., eds., *Judicial reasoning under the UK Human Rights Act*, Cambridge, Cambridge University Press, 2007, p. 77.
103 *Ullah* [2004] UKHL 26 [20].
104 Baroness HALE, *Animal Defenders International* [2008] UKHL 15 [53].
105 [2007] UKHL 26 [106]. See also, Lord BROWN, *Rabone* [2012] UKSC 2 [112-113].

protection than the ECtHR based on the ECHR.[106] Also, it has offered broader protection based on common law.[107] In Belgium and Germany, constitutional rights of course offer additional protection. In the case-law of the BVerfG, the constitutional fundamental rights protection is even central.

Recently, some Lordships stated that the mirror principle has no application when dealing with a case that falls within the margin of appreciation.[108] Contrary to the BeCC, the UKSC distinguishes between the margin of appreciation offered by the ECtHR and the discretionary space offered by the court to the legislator. According to Lord Hope: 'this technique is not available to the national courts when they are considering Convention issues arising within their own countries'.[109] The BeCC, however, has never recognised that this is a supranational concept connected to the subsidiary role of the ECtHR.[110] It merely expresses that there is a margin of appreciation for the legislator while referencing the relevant ECtHR case-law,[111] even though the ECtHR has clearly stated that: 'The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level'.[112]

B. Unclear or Inconsistent ECtHR Case-law

The UKSC explicitly ruled that the mirror principle is inapplicable when ECtHR case-law is unclear or inconsistent,[113] for instance, when recent judgments are inconsistent with previous ones[114] or when the ECtHR has not yet developed principles for general application.[115] The abstract review by the BeCC only enlarges the issue of transposibility from the ECtHR's concrete review.[116] When a

106 HALE, op.cit., note 54, pp. 71-72; *EM (Lebanon)* [2008] UKHL 64; *Adam, R* [2005] UKHL 66.
107 Roger MASTERMAN, 'Taking the Strasbourg jurisprudence into account: developing a 'municipal law of human rights' under the HRA', *International and Comparative Law Quarterly*, 2005, p. 911; Lord DYSON, *Al Rawi* [2011] UKSC 34 [68].
108 Lord HOFFMAN, Baroness HALE, Lord MANCE, *P & Ors, Re* [2008] UKHL 38 [31] [118] [126-129].
109 *Kebeline* [1999] UKHL 43.
110 Steven GREER, *The margin of appreciation*, Strasbourg, CoE Publishing, 2000, p. 32; George LETSAS, *A theory of interpretation of the ECHR*, Oxford, Oxford University Press, 2007, p. 90.
111 BeCC 12 July 2012, n°20/2011, B.13.
112 ECtHR, 19 February 2009 (GC), *A a.o. v. UK*, n°3455/05, §184.
113 Lord SLYNN, *Alconbury* [2001] UKHL 23 [26]; Lord BINGHAM, *Ullah* [2004] UKHL 26 [20].
114 Lord WILSON, *Quila* [2011] UKSC 45 [43].
115 Lord HOPE, *Doherty* [2008] UKHL 57 [20].
116 André ALEN et al., op.cit., note 66, p. 29.

domestic court is confronted with such issues, it should signal this. Such an approach would create the necessary transparency and justification, but also would contribute to the breach of a one-way flow from Strasbourg and to entering into a dialogue. Unfortunately, the BeCC does not do so openly.

Sometimes the ECtHR has not yet spoken on an ECHR related issue. According to Lord Hope, 'if Strasbourg has not yet spoken clearly enough on [the] issue, the wiser course must surely be to wait until it has done so'.[117] However, according to Lord Kerr, domestic courts should not wait: 'if the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments'.[118] The HR, according to an analysis of Gerards, usually passes its own judgment, which creates the possibility of an inter-court dialogue.[119]

C. Unwilling to Follow ECtHR Case-law

Contrary to the UKSC and the BVerfG, neither the HR nor the BeCC have put forward explicit limits to following the ECtHR case-law. Nonetheless, both courts sometimes show a certain restraint when applying the ECtHR case-law.[120] The UKSC, however, has ruled that a domestic court can deviate from the ECtHR case-law, because it misunderstood the domestic context. For example, in *Spear*[121] the House of Lords decided not to follow the *Morris*[122] judgment. In the grand chamber judgment *Cooper,*[123] the ECtHR adjusted its case-law and followed the House of Lords[124]. More recently, for similar reasons the UKSC disagreed in *Horncastle* with a ECtHR judgement on hearsay evidence and was constructively critical towards the ECtHR emphasising that '[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

117 *Ambrose* [2011] UKSC 43, [15].

118 Ibid., [128-130]. Lord Irvine, 'A British interpretation of Convention rights', *Publ.L.* 2012, pp. 249-250; Lord Brown, *Rabone* [2012] UKSC 2 [112].

119 Gerards, op.cit., note 16, pp. 241-242. HR, 30 June 2009, *LJN* BH3079.

120 E.g. following the *Salduz* judgment (HR, 30 June 2009, *LJN* BH3079) or the *Koua Poirrez* judgment (BeCC, 19 May 2004, n°92/2004, B.11.2).

121 *Boyd* [2002] UKHL 31.

122 ECtHR, 26 February 2002, *Morris v. UK*, n°38784/97.

123 ECtHR, 16 December 2003 (GC), *Cooper v. UK*, n°48843/99.

124 Nicolas Bratza, 'The relationship between the UK courts and Strasbourg', *European Human Rights Law Review*, 2011, p. 509.

court and the Strasbourg Court'.[125] This request for a valuable dialogue was carefully answered in the grand chamber judgment *Al-Khawaja and Tahery.*[126]

Such a proactive and argumentative attitude guarantees that neither becomes the 'modest underworker' of the other.[127] Also, an advantage of this approach is its visibility and transparency. The BeCC's case-law is less transparent. For instance, its president Bossuyt has been very critical on the ECtHR's case-law expansion to social security rights,[128] e.g. in *Koua Poirrez.*[129] Judgment 92/2004[130] dealt similarly with disability benefits for destitute foreigners but strangely distinguished the matter from the *Koua Poirrez* judgment and interpreted the judgment in a restraint manner.[131] Such a restraint interpretation can be well founded, however, regrettably -especially from the point of view of mutual influencing- no arguments were raised. Furthermore, the criticism was not based on hierarchical or sovereignty arguments, but rather on substantive arguments, which encourages the ECtHR to respond to concrete issues, causing neither actor to passively adopt or shield the case-law of the other.

Similarly, the BVerfG ruled in *Görgülü* that when 'taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law'.[132] Particularly when an equilibrium is being sought between differing fundamental rights. Referring to *von Hannover*, the Court emphasised the risk of 'individual application proceedings before the ECHR […] possibly not [giving] a complete picture of the legal positions and interests involved'.[133] Despite these statements, the BVerfG has never explicitly deviated from the ECtHR case-law.

In *Pinnock*, the UKSC unanimously ruled that it is not wrong not to follow ECtHR case-law which is inconsistent with some fundamental substantive or procedural aspect of domestic law.[134] A similar 'constitutional red line'[135] was drawn in *Gör-*

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125 Lord PHILIPS, [2009] UKSC 14 [11].
126 Nicolas BRATZA, ECtHR, 15 December 2011 (GC), *Al-Khawaja and Tahery v. UK*, n°26766/05, 22228/06, §2(concurring opinion).
127 KERR, op.cit., note 2, p. 25.
128 Marc BOSSUYT, 'Should the Strasbourg Court exercise more self-restraint?', *Human Rights Law Journal*, 2007, pp. 321-332.
129 ECtHR, 30 September 2003, *Koua Poirrez v. France*, n°40892/98.
130 BeCC, 19 May 2004, n°92/2004, B.11.2.
131 MARTENS, op.cit., note 66, pp. 355-356; ALEN et al., op.cit., note 66, p. 31.
132 BVerfG 2 BVR 1481/04 of 14 October 2004, §57.
133 Ibid., §58-59.
134 [2010] UKSC 45 [48].

gülü based on national sovereignty.[136] Neither Courts have, however, invoked such reasoning. It seems to be rather a 'warning shot' towards Strasbourg than a rule that encourages mutual influence.

Conclusion

On the national level of fundamental rights protection in Europe, two trends can be distinguished. The increasing Europeanisation of domestic fundamental rights protection, which externalises in the increasing amount of references to the ECHR and ECtHR case-law, and its counter reaction observed in many countries, focused on the protection of a constitutional identity and increasing the margin of appreciation. The increasing criticism on the ECtHR barely filters through the attitude of the domestic supreme courts, even when it is voiced by their judges.[137] All four courts approach the ECtHR cooperatively. Courts, such as the BeCC, who often rely on the ECtHR to increase the legitimacy of their judgments, have little to gain from weakening the ECtHR's authority by openly voicing harsh criticism.[138] Moreover, the domestic courts risk the finding of a violation by the ECtHR, when they would deviate from the ECtHR case-law.

Nevertheless, there are ways to influence the ECtHR case-law and to express domestic concerns. Firstly, the ECtHR pays a lot of attention to the relevant national case-law, particularly of supreme courts. The more these courts motivate and substantiate their case-law, also in the light of the ECHR and ECtHR case-law, the more the ECtHR can take it into account in a concrete case. Furthermore, a domestic supreme court can only benefit from clearly indicating concerns to the ECtHR. Not only for reasons of transparency, but also to allow the ECtHR to respond and establish mutual influencing. Such indication does not *per se* need to reveal itself in a judgment going counter to an ECtHR judgment, but can just as well be based on clarifying certain ambiguities or inconsistencies.

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135 Wim VOERMANS, 'Protection of European human rights by highest courts in Europe', in Patricia POPELIER et al., eds., *Human rights protection in the European legal order*, Cambridge, Intersentia, 2011, p. 377.

136 BVerfG 2 BVR 1481/04 of 14 October 2004, §36.

137 BeCC: BOSSUYT, op.cit., note 128, pp. 321-332; UKSC: Lord HOFFMANN, *The Universality of Human Rights*, London, Judicial Studies Board Annual Lecture, 19 March 2009; BVerfG: Reinhard MÜLLER, Rudolf GERHARDT, 'Straßburg ist kein oberstes Rechtsmittelgericht', in *Frankfurter Allgemeine Zeitung*, 9 December 2004.

138 Similarly Catherine VAN DE HEYNING, op.cit., note 5.

Applying such techniques could contribute to constructively channelling the increasing criticism on the ECtHR by the politicians, academia and media and to finding a balance between both trends. I can, thus, but only concur with the following statement by Bratza: 'it is right and healthy that national courts should continue to feel free to criticize Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices […] such dialogue can only serve to cement a relationship'.[139] Without this proactive attitude, the relationship between domestic courts and the ECtHR risks getting bogged down in a one-way flow.

[139] BRATZA, op.cit., note 124, p. 512.