A THEORY OF NATIONAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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(circa 94,000 words)

Abstract

This study seeks to flesh out a theory of national application of the European Convention on Human Rights (ECHR). It does so by seeking to provide an answer to the research question, 'what is the proper role of the domestic courts in the application of the European Convention?' By relying upon the examples of French, German, and UK law, the study argues that it is not true in descriptive terms, nor desirable in normative terms, that the domestic courts take an approach to the ECHR based upon friction and assertion of sovereignty. This study argues instead that domestic application of the ECHR is built on the attainment of certain aims. These aims are inferred, in the main, from the domestic courts' jurisprudence, such as it relates to four central ECHR doctrines, and they are: the doctrines of evolutionary interpretation; proportionality; the margin of appreciation; and autonomous concepts. On the basis of an analysis of this jurisprudence, the four aims are identified as being, first, honouring the principle of *pacta sunt servanda*; secondly, the safeguarding of human rights based upon the insight that human rights are a paramount good to be pursued; thirdly, the aim of positive, as opposed to negative, rights diversity; and, fourthly, the aim that conclusions reached on the domestic level of one state must be capable of being universalized. The approach of the domestic courts to the application of the ECHR can be explained on the basis of the domestic courts' wish to attain these four aims. The proper role played by the domestic courts, the study argues, is one in which they are willing to give a lead to Strasbourg as well as to be led, in both, to use the wording of the Preamble of the ECHR, 'the maintenance' and in the 'further realisation' of the Convention rights.

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Citation convention

This thesis relies on OSCOLA (4th edn, 2012). For the French and German cases, it uses, as far as practicable, French and German conventions. Thus 'BVerfGE 111, 307 (308)' is a pinpoint to page 308 in the 'Entscheidungen des Bundesverfassungsgerichts'; where I want to pinpoint a specific paragraph in a decision of the German Federal Constitutional Court, I use brackets, in conformity with OSCOLA (eg 'BVerfGE 111, 307 [38]').

Table of Abbreviations

AJDA—Actualité juridique droit administratif

AJIL—American Journal of International Law

BIICL—British Institute for International & Comparative Law

BVerfG—Bundesverfassungsgericht (German Federal Constitutional Court)

BVerfGE—Entscheidungen des Bundesverfassungsgerichts

BvR—Verfassungsbeschwerden (appeal in a constitutional case, before the Federal Constitutional Court)

CECE—Comité d'études pour la constitution européenne

CLJ—Cambridge Law Journal

CLP—Current Legal Problems

CTS—Consolidated Treaties Series

DR—Decisions and Reports

ECHR—European Court of Human Rights

ECJ—European Court of Justice

EComHR—European Commission of Human Rights

ECR—European Court Reports

EHRLR—European Human Rights Law Review

EHRR—European Human Rights Reports

EJIL—European Journal of International Law

EU—European Union

GC—Grand Chamber

HMSO—Her Majesty's Stationery Office

HRA—Human Rights Act 1998

ICJ—International Court of Justice

ICLQ—International & Comparative Law Quarterly

I-CON—International Journal of Constitutional Law

ILC Ybk—Yearbook of the International Law Commission

ILR—International Law Reports

LGDJ—Librairie générale de droit et de jurisprudence

LQR—Law Quarterly Review

LSE—London School of Economics and Political Science

MLR—Modern Law Review

NI—Northern Ireland

NZLR—New Zealand Law Reports

OJEU—Official Journal of the European Union

OJLS—Oxford Journal of Legal Studies

PC—Privy Council

PCIJ—Permanent Court of International Justice

PL—Public Law

RFDA—Revue française de droit administratif

RGDIP—Revue générale de droit international public

RIAA—Reports of International Arbitral Awards

StR—Strafsenat (Criminal Division in the Bundesgerichtshof, ie Federal Court of Justice)

UNTS—United Nations Treaty Series

VCLT—Vienna Convention on the Law of Treaties

Ws—Beschwerde (in a Oberlandesgericht, ie Higher Regional Court)

Table of Cases

European Court of Human Rights, and the European Commission of Human Rights

Court of Justice of the European Union

1952 p 176	
Territorial Dispute (Libya/Chad), Judgment ICJ Rep 1994 p 21	19

Permanent Court of International Justice

Certain German Interests in Polish Upper Silesia, Merits (1926) PCIJ No 7 Series A p 4	50
Factory at Chorzow, Merits, Judgment No 13 PCIJ (1928) No 17 Series A p 30	50
Free Zones of Upper Savoy and the District of Gex, Order of 6 December (1930) PCIJ Series A No 24 p 12 and (1932) PCIJ Series A/B No 46 p 167	50
Lighthouses Case between France and Greece, Judgment (1934) PCIJ Series A/B No 62 p 27	19
The Case of the SS 'Lotus', Judgment (1927) PCIJ Series A No 10 p 19	202–03
The Oscar Chinn case PCIJ No 75, Series C	54

Arbitral Tribunals

Affaire de la dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie) (1925) 1 RIAA 529	202

Federal Administrative Court and lower administrative courts

Federal Court of Justice and lower civil courts

French Courts

Conseil d'État and lower administrative courts

Conseil constitutionnel

Cour de cassation

UK Courts

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1 Introduction

1.1 Research Question

What is the proper role of the domestic courts in the application of the European Convention on Human Rights (ECHR)? [1] This research question bears on how domestic courts define their role both in relation to other national authorities and to the European Court of Human Rights at Strasbourg. In order to answer this question the present study analyses domestic jurisprudence from France, Germany, and the United Kingdom. The analysis focuses upon how domestic courts in these three systems have applied the chief doctrines of the ECHR, such as they are explicated by the European Court in its jurisprudence, and how, in doing so, the domestic courts fashion their role vis-à-vis the European Court.

These chief ECHR doctrines are: the 'living instrument' doctrine of interpretation, the ECHR principle of proportionality, the doctrine of the national margin of appreciation, and the doctrine of autonomous concepts. By way of introduction, the study also looks at how France, Germany, and the United Kingdom have incorporated the ECHR into domestic law, and moreover at cases in which, under the banner of 'dialogue', the domestic courts have opted, at least on the face of it, to go against the grain of the European jurisprudence.

The study makes both descriptive and normative claims. Whilst no attempt will be made to bridge the philosophical gap between 'ought' and 'is', this study will

[1] 4 November 1950, 213 UNTS 222.

tease out the normative reasons for why the domestic courts follow the course which they have chosen. It will moreover use those normative reasons as a basis on which to assess the role played by the domestic courts vis-à-vis the European Court and national authorities in the domestic courts' application of the ECHR.

This study argues that the domestic courts in France, Germany, and the United Kingdom, go far in avoiding friction with the European Court. I argue that their national application of the ECHR seeks to attain four aims. First the domestic courts are motivated by the injunction of *pacta sunt servanda* (that is, the principle that agreements are binding and are to be implemented in perfect good faith). Secondly the domestic courts are motivated by the view that human rights are a paramount good to be pursued by the legal order. The domestic courts are, thirdly, motivated by what will be referred to as positive, as opposed to negative, rights diversity. Fourthly the domestic courts are motivated by the insight that the conclusions they reach must be capable of being universalized and to some extent applied also by the courts of other ECHR states parties. It is the argument of this study that these four elements are capable of explaining the way in which the French, German, and UK courts apply the ECHR and the jurisprudence in which the Convention has been interpreted by the European Court.

1.2 A Focus upon Jurisprudence

In terms of European comparative law in the most general sense, the Europeanization of domestic law does not happen so much by way of legislation as by way of

adjudication.[2] More specifically in the context of the application by national authorities of the ECHR, it is the *courts* which have taken the lead in incorporating the Convention in the member states.[3] In keeping with these insights the present study focuses upon the jurisprudence of domestic courts.

The main focus of the analysis in this study will be upon the 'ständige Rechtsprechung' of the Federal Constitutional Court, and the 'jurisprudence constante' of the Conseil d'État,[4] and upon the leading cases of the UK Supreme Court. Nonetheless this study will also to some extent turn to the extrajudicial interventions in which judges explicate the way in which they apply the ECHR. In fact many of the articles to which this study refers are written by judges. This is a reflection of the changing role—and the opening up—of the judiciaries in France, Germany, and the United Kingdom; it seems right not to exclude that material from the analysis.

Von Ranke, the founder of modern source-based history, said about the academic discipline of history that its main office ought to be 'to show what actually happened (*wie es eigentlich gewesen*)'.[5] To some extent the present study too aspires

[2] K Zweigert & H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, Oxford University Press 1998) 28–29.

[3] A Stone Sweet & H Keller, 'Introduction: The Reception of the ECHR in National Legal Order' in A Stone Sweet & H Keller, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 687.

[4] 'Ständige Rechtsprechung' and 'jurisprudence constante' both contain the idea that while a single decision may not have a lot of force, a group of decisions in the same direction may have a gravitational effect on the courts: J Bell, 'The Relevance of Foreign Examples to Legal Development' (2011) 21 Duke Journal of Comparative & International Law 431, 450; J Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006) 76; J Bell, S Boyron, and S Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 27–28; F Terré, *Introduction générale au droit* (9th edn, Dalloz 2012) 283–300; F Bydlinski, 'Richterrecht über Richterrecht' in *50 Jahre Bundesgerichtshof I* (Beck 2000); K Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 429.

[5] L von Ranke, 'The Ideal of Universal History' in F Stern (ed), *The Varieties of History* (2nd edn, Macmillan 1970) 57.

to show what is *actually* happening when the domestic courts apply the European Convention. It will at times turn to a broader range of material than court rulings only. With any luck a fuller, or thicker, picture may emerge than the one which would have emerged if the analysis had been based upon the jurisprudence of the courts and academic commentary only. For the same reason cases from the lower courts will also be relied upon, albeit to a limited extent. It is believed that by venturing under the surface of the jurisprudence in this way, to the coalface so to speak, one can get a firmer grip of what is actually happening. In doing so this study follows Sir Frederick Pollock's exhortation to comparative lawyers that they must 'work cautiously as miners who have to work underground'.[6]

1.3 Methodological Issues

A basic methodological principle in comparative law is that of *functionality*. In law the only things which are comparable are those that fulfill the same function.[7] It thus becomes important not to focus upon the labels used by the three legal systems studied here, but instead to focus upon the function performed by particular legal concepts or doctrines in play. The point about functionality has a bearing too upon this study's selection of which courts' jurisprudence to analyse.

[6] F Pollock, 'The History of Comparative Jurisprudence' in *Essays in the Law* (Macmillan 1922) 10.

[7] K Zweigert & H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, Oxford University Press 1998) 34.

Within domestic law ECHR questions typically arise in the field of public law.[8] In terms of French law, this study looks mainly at the jurisprudence of the Conseil d'État, which sits atop the French hierarchy of administrative law courts. In France, administrative law is the branch which is concerned with the powers and organisation of governmental bodies, most prominently the state.[9] Questions bearing upon the ECHR certainly come to a head in the jurisprudence of the Cour de cassation[10] and in the Conseil constitutionnel.[11] It is, however, in the jurisprudence of the Conseil d'État that questions bearing upon the Convention are the most at the fore. It seems reasonable therefore to concentrate the French analysis on the jurisprudence of the Conseil d'État.[12]

The necessity of a functional approach becomes even more apparent if one pans eastward. In Germany where—in common with what is the case in France—the judiciary is split, it is *not* the Federal Administrative Court (Bundesverwaltungsgericht), but the Federal Constitutional Court (Bundesverfassungsgericht) which has drawn up the most important lines in respect of

[8] See, however, B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 85–88; E Bjorge, '*Drittwirkung* of International Human Rights Treaties' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law vol V* (Oxford University Press 2013) 1.

[9] M Guyomar & B Seiller, *Contentieux administratif* (Dalloz 2010) 12–13; J Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006) 47–48; See J Bell, S Boyron, and S Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 38–42.

[10] JP Marguenaud, *La Cour européenne des droits de l'homme* (5th edn, Dalloz 2010).

[11] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 124–25.

[12] This is also the approach taken in F Sudre, *Droit européen et international des droits de l'homme* (11th edn, Presses universitaires de France 2012); P Wachsmann, *Les droits de l'homme* (5th edn, Dalloz 2008); L Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (LGDJ 2012); B Stirn, D Fairgrieve, and M Guyomar, *Droits et libertés en France et au Royaume-Uni* (Odile Jacob 2006).

the ECHR.[13] Thus it is the jurisprudence of the Federal Constitutional Court which is of the greatest interest for the purposes of this study. It will, however, be necessary to look to some extent upon the case law of the Federal Administrative Court too; the same goes for the case law of the Federal Court of Justice (Bundesgerichtshof).

In the United Kingdom cases bearing upon the ECHR will typically come to a head in the Queen's Bench Division of the High Court, then in the Civil Division of the Court of Appeal, and then in the Supreme Court of the United Kingdom as the final court of appeal. The analysis will, in common with what is ordinarily the case in English law,[14] focus on cases from the Supreme Court (and its predecessor the Judicial Committee of the House of Lords) but it will also, where appropriate, turn to cases from the Court of Appeal and the High Court.

1.4 Selection of Jurisdictions

This study analyses the jurisprudence of three legal systems: French, German, and UK law. There are two main reasons why these three have been chosen. First they represent three of the arguably most important member states of the Council of Europe. Secondly, choosing France, Germany, and the United Kingdom gives one a selection where three of the traditional 'groups' of European administrative law

[13] T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) Ch 2. Also: J von Bernstorff, *Kerngehalte im Grund- und Menschenrechtsschutz* (Duncker & Humblot 2013); C Grabenwarter, 'Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten' [2012] Europäische Grundrechte-Zeitschrift 507; M Payandeh, 'Konventionswidrige Gesetze vor deutschen Gerichten' [2011] Die öffentiche Verwaltung 382.

[14] See *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) 1054–55 (Lord Hailsham LC). Also: Lord Carnwath, 'Judicial Precedent—Taming the Common Law' (2013) 12 Oxford University Commonwealth Law Journal 261, 261–62; R Cross & JW Harris, *Precedent in English Law* (4th edn, Oxford University Press 1991) 3–10.

traditions are represented. France represents the 'French' group of administrative law traditions (which also encompasses the Netherlands, Belgium, Italy, and Greece). Germany represents the 'German' group (which also encompasses Austria, Switzerland, and Poland). The United Kingdom represents the 'British' group (which also encompasses Ireland, Denmark, and Norway).[15]

It has convincingly been argued that traditionally comparative law has tended to be static, in the sense that it has traditionally compared 'national' legal concepts from one or more legal systems.[16] Yet, as Muir Watt has stated, the questions raised by Europeanization are essentially dynamic, and concern the impact of these changes on the configuration of legal traditions.[17] The present study follows the approach recommended by Muir Watt. By basing itself on a comparison of how French, German, and UK law have reacted to the precepts of the ECHR, this study endeavours to take seriously this type of dynamic perspective on comparative law.

There may be an additional reason to conduct the kind of comparison of which this study is one. The ECHR establishes, as Mahoney has pointed out, a two-way bridge between international law and domestic law. In one direction flows the international obligation for the contracting states to make their national legal orders compatible with specified common standards; in the other direction flow the

[15] M Fromont, *Droit administratif des États européens* (Presses universitaires de France 2006) 72.

[16] W Heydebrand, 'From Globalization of Law to Law under Globalization' in D Nelken & J Feest (eds), *Adapting Legal Cultures* (Hart 2001) 117.

[17] H Muir Watt, 'Globalization and Comparative Law' in M Reimann & R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (paperback edn, Oxford University Press 2008) 589. Also: M Reimann, 'Comparative Law and Neighbouring Disciplines' in M Bussani & U Mattei, *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 20–21; F Bignami, 'Comparative Administrative Law' in M Bussani & U Mattei, *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 169.

inspiration and continuing source of those standards which on the whole derive from principles already recognised under the domestic law of the members states.[18]

Two points which make up the backdrop for the comparison with French and German law should be made already at the outset. One point with respect to German law has been pointed out by Giegerich. It is that, given the fleshing out of the idea of the *Rechtsstaat* and the development of protection of fundamental rights in German law in the post-war period, German judges have perhaps been particularly unhappy to take lessons from the European Court. They have, in Giegerich's words, conceived of the good of fundamental rights as being for export only, not for import.[19] This has meant that there have been many cases coming before the German courts in which the German rights protection was so strong as to render the European standards entirely superfluous. The German courts, which take a practical not an academic approach to adjudication, in such cases see no reason to engage in lengthy (and redundant) discussion of ECHR law. To understand the way in which the German courts apply the ECHR one has to be aware of this to a large extent well-founded self-image of German judges. (As will be shown, however, this has also meant that the German courts, in cases where the national level of rights protection has been lower than that of the ECHR, have had to learn the hard way that not all the beams were in the eyes of others.)[20]

[18] P Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference back to National Law' in M Andenas, G Canivet, and D Fairgrieve, *Comparative Law before the Courts* (BIICL 2004) 135–36. See 2.4 below for a discussion of this point.

[19] T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 95–96. Also: M Fromont, 'Le pouvoir discrétionnaire et le juge administratif français' in *Festschrift für Hermann Jahrreiß* (C Heymanns Verlag 1974) 67.

[20] See Chs 7–8.

A point that needs to be made with respect to French law is that the style of judgment of the Conseil d'État is quite a lot pithier than that of the German or UK courts.[21] This point is sometimes exaggerated,[22] and the Conseil d'État seems to be changing its style of judgment incrementally.[23] It is certainly true that unless one also takes into account the *conclusions* of the *rapporteur public* which precede Conseil d'État rulings,[24] and often also the academic (or judicial) commentary which follows in their wake, then it can be difficult to make sense of the ruling for someone who is not indoctrinated in the register of the Conseil d'État.[25] This study endeavours to analyse the French jurisprudence taking these insights on board. It bears mention at this stage that the role of the *commissaire du gouvernement* provided a flashpoint in the relationship between the Conseil d'État and the European Court, when the latter in the Chamber case *Kress v France*[26] and the subsequent Grand Chamber case *Martinie*

[21] J Bell, 'English Law and French Law—Not so Different?' [1995] CLP 63, 86–90. A sociological account of how to understand the rulings of the Conseil d'État and the work that goes into them is given by B Latour, *La fabrique du droit: une ethnographie du Conseil d'État* (La Découverte 2002).

[22] D Fairgrieve, 'The Form of Judgments in France and the Role of the *Rapporteur Public*' in M Andenas & S Vogenauer (eds), *Style and Form of Judgments* (forthcoming).

[23] See for example Conseil d'État, *Association pour la promotion de l'image et autres*, 26 October 2011, No 317827 and others. Additionally a working group, headed by President Martin, the Conseil d'État has recently handed down its final report on whether to change its traditional style of judgment: Conseil d'État, *Groupe de travail sur la rédaction des décisions de la juridiction administrative*: <http://www.conseil-etat.fr/media/document/rapport_redaction_decisions_juradm_2012.pdf> in which it proposes substantial changes to the for of judgment of the Conseil d'État.

[24] As Fairgrieve explains, 'each case before the Conseil d'État is attributed a *rapporteur public* who will follow the procedure from the outset, initially passively, but ultimately playing a crucial role by delivering his or her oral *conclusions* on the case in open court, including a recommendation as to the decisions': D Fairgrieve, 'The Form of Judgments in France and the Role of the *Rapporteur Public*' in M Andenas & S Vogenauer (eds), *Style and Form of Judgments* (forthcoming). The *rapporteur public* was previously called *commissaire du gouvernement*: L Neville Brown & J Bell, *French Administrative Law* (5th edn, Oxford University Press 1998) 69–71. M Guyomar & B Seiller, *Contentieux administratif* (Dalloz 2010) 309 say about the title of 'rapporteur public' that it 'constitue sans doute la pire appellation à l'exclusion de toutes les autres'.

[25] M Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press 2009) 35–36.

[26] *Kress v France* App No 39594/98 judgment 7 June 2001.

v France,[27] held that for the *commissaire* to participate in the *délibéré*—or the deliberation meeting—in the Conseil d'État (as well as other administrative courts) was contrary to art 6. The *commissaire du gouvernement*'s assisting at the deliberation meeting was seen by the European Court to breach the principle—inherent in the Court's understanding of the right to a fair trail—according to which 'justice should not only be done, but should be seen to be done'.[28] It is undoubtedly true, as Bell and Lasser have pointed out, that the *Kress* and *Martinie* line of cases was initially met with hostility in the Conseil d'État.[29] The minimalist reading which the Conseil d'État gave to *Martinie* in *Courty* goes far in bearing such a characterization out.[30] As such this line of cases presents a possible counter example to the argument propounded in this study. But the considerable lengths to which the French authorities would later go—confirmed by the European Court in *Etienne v France*[31] and *Escoffier v France*[32] to be in conformity with the demands of the Convention—are equally of importance.[33]

[27] *Martinie v France* App No 58675/00 judgment [GC] 12 April 2006.

[28] See J Bell, '"Interpretative Resistance" Faced with the Case-Law of the Strasbourg Court' (2008) 14 European Public Law 137, 138. This dictum originated, interestingly, in the common law conception of a fair trial: 'a long line of cases shows that it is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done': *R v Sussex Justices, ex p McCarthy* [1924] KB 256, 259 (Lord Hewart CJ).

[29] See J Bell, '"Interpretative Resistance" Faced with the Case-Law of the Strasbourg Court' (2008) 14 European Public Law 137, 140; M Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press 2009) 90–115. See for the backstory: J Bell, 'The Role of the Commissaire du Gouvernement and the European Convention on Human Rights' (2003) 9 European Public Law 309; J Bell, 'French Administrative Law and the Supremacy of European Laws' (2005) 11 European Public Law 487.

[30] Conseil d'État, *Courty*, 25 May 2007.

[31] *Etienne v France* App No 11396 admissibility decision 15 December 2009.

[32] *Escoffier v France* App No 8615/08 admissibility decision 8 March 2011.

[33] See JM Sauvé, 'Le Conseil d'État et l'application de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales', speech given on 9 April 2010; B Stirn, *Vers un droit public européen* (Montchrestien 2012) Ch 4.

The owl of Minerva, Hegel reminds us, takes wing only with the onset of dusk;[34] this has been taken to mean that only when an epoch is closed can it be properly understood. In light of later developments, therefore, the reaction of the Conseil d'État in *Courty* many seem, more than anything else, like the exception that proves the rule.

The selection of illustrations of case studies is based on the following principles: the cases chosen are those that, in each of the three legal systems, are representative of the trend of the jurisprudence in the legal system, according to the legal method in that system. As will be seen, the reasons underlying these choices tie in with what was mentioned under 1.2 above. This means that in the context of UK law it becomes important to include what at common law is called leading cases; in French and German law it becomes important to include analysis of the cases which are representative of what in German law is called *ständige Rechtssprechung* and in French, *la jurisprudence constante*.[35] But how does this study go about finding out what those cases are? To do so the study aims at approaching the German material according to the German legal method, the French according to the French legal method, the UK material according to the common law method.

[34] See GWF Hegel, *Elements of the Philosophy of Right* (HB Nisbet tr, 1991 Cambridge University Press) 23.

[35] F Bydlinski, 'Richterrecht über Richterrecht' in *50 Jahre Bundesgerichtshof I* (CH Beck 2000); J Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006) 76. See also the text in connection with footnotes 427–28 below.

2 The Thesis of the Study

2.1 Introduction: A Theory of National Application of the ECHR

It could perhaps be thought that this thesis makes broad claims for itself insofar as it is entitled a *theory* of national application of the European Convention on Human Rights. Yet this is not a study in normative theory or jurisprudence. It is rather one which analyses how the French, German, and UK courts apply the ECHR. As stated in Chapter 1, the research question of this study is: what is the proper role of the domestic courts in the application of the ECHR?

Courts are practical. They do not as a rule engage in philosophizing, or approach questions posed to them on the basis of high theory. The domestic courts prefer instead to assess the merits of ECHR claims before them in the context of competing claims based on the interests of society, the rights of others, and the role of judges under the rule of law.[36] As stated in Chapter 1, no attempt will be made here to bridge the gap between 'ought' and 'is'. Nonetheless it would be wrong to conceive of as entirely disconnected that which the courts do in fact and the normative reasons for which they do so. While this study deals with what could be called descriptive material—primarily the jurisprudence of the domestic courts—it should be kept in mind that that descriptive material embodies values and is underlain by normative choices. Only to the extent that this study tries to aggregate and analyse those normative choices is this study a normative one.

This study therefore shows how the domestic courts—in France, Germany,

[36] B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 49–50.

and the United Kingdom—go about applying the ECHR; in order to do so the study draws out normative assumptions upon which the national courts have based their approach. These normative assumptions are teased out from the jurisprudence analysed in Chapters 3–8. As adumbrated in Chapter 1, these normative assumptions are: *pacta sunt servanda*, rights diversity, human rights as an important good to be pursued, and what will here be called the Kantian element. All four will be explicated below, and so will the way in which the national courts rely upon them. Thereafter the study will move on to an assessment of these assumptions, so that it may be ascertained whether they ought to be approved of or whether they leave, in normative terms and by extension also practically in terms of how the national courts apply the Convention, something to be desired. This Chapter will in other words draw out these value assumptions, and then test whether they are correct in normative terms. This is done in order to fashion the thesis of the study, which is then presented in 2.5 below.

2.2 What the Courts Do in Fact

2.2.1 Introduction

The starting point for the national courts has been that they see the Convention rights, as explicated in the case law of the European Court, as a 'floor'. They take the view that the Convention rights are a minimum below which they ought in principle not to fall.[37] It is worth mentioning in that regard that this is something in which the national

[37] BVerfGE 74, 358 (370); Conseil d'État, 20 October 1989 *Nicolo*; *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham). Also: T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 82–96; M Guyomar & B Seiller, *Contentieux administratif* (Dalloz 2010) 408–09; B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 39.

courts of France, Germany, and the United Kingdom have been and continue to be very successful indeed. One could, in numerical terms, hardly have hoped for a better track record when it comes to the national courts performing their task of first line appliers of the Convention rights. As much as 96 per cent of the cases which, in the period 1959–2010, went through the French courts and were then taken to Strasbourg were either declared inadmissible or struck out; only 4 per cent resulted in a judgment, many of which ended in findings of no violation, that is to say, a confirmation of the determination of the national courts. In respect of the United Kingdom 97 per cent of the cases going to Strasbourg are declared inadmissible or struck out; only 3 per cent result in a judgment of the Court. The German numbers are even more overwhelming: 99 per cent of the German cases which go to Strasbourg are declared inadmissible or struck out.[38] These numbers are an important backdrop to the analysis which this study sets out to undertake.

It could be thought that applying the ECHR as a floor was straightforward. When considered closely, however, the jurisprudence of the domestic courts shows that that is not always the case. In the following it will be seen that not falling behind the standards of the Convention is in fact a function of a complicated set of factors. These include the doctrine of autonomous concepts, evolutionary interpretation, the margin of appreciation, the strictures of proportionality, and also that which could usefully be summed up by the words 'dialogue between the European Court and a domestic court' in a given line of cases. These elements have a bearing on another element, namely that one cannot always know what the demands of the Convention rights as expounded by Strasbourg jurisprudence are. In a case where that question

[38] *Statistics on Judgments by State 1959–2010* (Council of Europe 2011).

makes itself felt the national courts will have to decide whether to give effect, on the facts of the case in issue, to the principles laid down by the European Court or, as Lord Wilson put it in *Sugar*, to do little more 'than to shadow the European Court'[39] by seeking to align the case in issue with the least dissimilar of the reported cases.

2.2.2 Autonomous Concepts

The question is raised in some cases of how to interpret aspects of the ECHR that have differing definitions in national law. If, for example, a state member of the Council of Europe defines 'penalty' differently from how it is defined in the second sentence of art 7(1) of the Convention, is it then possible that that measure, because of how it is defined in national law, may be held to fall outside of the scope of the ECHR right, so that in fact 'a heavier penalty' may 'be imposed than the one that was applicable at the time the criminal offence was committed' in spite of the prohibition contained in art 7(1)?[40]

The European Court has (in common with international law more generally) adopted a set of rules for determining the meaning of such terms, and this doctrine has come to be known, most usually, as the autonomous meaning of Convention concepts.[41] This question is dealt with comprehensively in Chapter 7. Two types of

[39] *British Broadcasting Corporation & Another v Sugar* [2012] UKSC 4, [2012] 1 WLR 439, 457 (Lord Wilson), 471 (Lord Mance).

[40] *Welch v United Kingdom* App No 17440/90 judgment 9 February 1995 [27]–[28]; *Jamil v France* App No 11/1994/458/539 judgment 8 June 1995 [30]; *M v Germany* App No 19359/04 Judgment 17 December 2009 [75].

[41] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 42; G Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279; A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 110–13; R White & C Ovey, *Jacobs,*

view have been put forward in the literature: one accords a measure of deference to national courts on this score; the other conceives of the matter in less deferential terms and underlines instead what could usefully be termed the need for good faith application by the national courts of the autonomously defined Convention concepts.

The first view could be cast in the following terms. While it is admitted by Legg, one adherent to this view, that there is in principle little reason why the European Court ought to be deferential in this regard (seeing as when it comes to concepts developed by the European Court it is the European Court, and not the national courts, that has the expertise) this does not mean that there are never grounds for deference on autonomous concepts to the national courts. While, according to Legg, it is for the European Court to assess whether the standards of the ECHR apply to a case before the Court, this is not the end of the matter.[42] On Legg's view the European Court will consider arguments about deference to the extent that the approach of the Court in this type of case shows the limits of that which has become known as autonomous concepts. The European Court thus does not, again on Legg's view, simply select the appropriate human rights standards uninfluenced by state views. Rather it ensures that the state does not merely circumvent treaty protections by making an arbitrary reclassification, but when it determines the substance of the treaty obligations the Court will accord deference to the state when it finds that it has cause to do so.[43] Legg sees deference as the nourishing taproot of all the branches of

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White & Ovey: The European Convention on Human Rights (5th edn, Oxford University Press 2010) 69.

[42] *Chassagnou & Others v France* app nos 25088/94, 28331/95, and 28443/95 judgment [GC] 29 April 1999.

[43] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 111–12.

ECHR law. Deference therefore in his account plays an important role also with respect to the Court's fashioning of autonomous concepts. To conceptualize the issues of autonomous concepts and deference in this way may be to confound two elements of the Strasbourg decision-making process which ought to remain disaggregated but that will be dealt with in more detail in Chapter 7.

The examples given above of the concepts of 'penalty' in art 7(1) of the Convention could usefully be relied on here too. The German Federal Constitutional Court in its ruling in the *Preventive Detention II* case noted that the European Court had relied on autonomous concepts when it handed down an adverse judgment against Germany in *M*. The German Court stated that it must, in expounding the German Basic Law in light of the European Convention and the jurisprudence of the European Court, fit the solutions of the ECHR system into the 'existing, dogmatically differentiated national legal system'. In this regard, said the Court, 'an imprudent adaptation of international legal concepts will not do'.[44] For an autonomous concept such as the ECHR notion of 'penalty' to fit into the scheme of German constitutional law, a transplantation would in other words not be acceptable. There was, the German Court held, no reason to adapt the constitutional concept of penalty contained in the Basic Law to the concept of penalty in art 7(1) of the European Convention. The court stated that the European Court had set out in this respect that the concept of 'penalty' in art 7 ECHR is to be interpreted autonomously, and that the European Court is not bound by the qualification of the measure under national law:

> This way of constructing concepts by the European Court is legitimate for the purposes of the European Convention. The independent construction of the concepts by the European Court,

[44] BVerfGE 128, 326 [94].

> and the flexibility and vagueness necessarily attendant, take into account the legal, linguistic, and cultural diversity of the member states of the Council of Europe. For a mature constitutional order such as the Basic Law there is, however, no reason to let go of the concept of penalty in art 103 of the Basic Law.[45]

Interestingly, however, the German Court went far in making sure that this did in the event not matter. It held that the autonomously developed ECHR concept must be given full import through the proportionality test that must be performed. The Court said that in the interpretation of the guarantees of the Basic Law, especially when an autonomous concept developed in the jurisprudence of the European Court differed from the corresponding concept of the Basic Law, then the principle of proportionality, which it pointed out was immanent to the Basic Law, comes into consideration in the taking into account of the rulings of the European Court.[46]

In a similar line of cases the French Conseil d'État was faced with the same problem: what effects ought it to have in national law that the European Court develops Convention concepts that are autonomous as compared to those of national law? They adopted much the same approach as the German courts: while in principle they would not adopt one-to-one the ECHR concept into national law, but instead retain a national concept, in practice the influence of the ECHR concept upon the national concept meant that the national law was brought in line with the ECHR on this point.[47]

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[45] BVerfGE 128, 326 [142].

[46] BVerfGE 128, 326 [94].

[47] Conseil d'État, 12 December 2007 *Section Française de l'Observatoire International des Prisons* (*conclusions*: Guyomar); Decision number 2008–562 *Conseil constitutionnel*, Journal officiel of 26 February 2008, 3272

The UK courts have in a number of cases gone even further and effectively incorporated into UK law the autonomous concepts developed by the European Court. This approach is illustrated by that which Lord Phillips, with whom the rest of the House of Lords agreed, said in *Uttley*: 'I accept that, for the purposes of article 7(1), a penalty is an autonomous concept'.[48] Lord Phillips did *not* then go on to point out that while in principle the House of Lords agreed that this was so with respect to the article of the Convention it was not necessarily so in respect of UK law. He simply applied the autonomous ECHR concept in the context of UK law. It should be pointed out, however, that with respect to the autonomously defined concept of 'home' under art 8, the UK courts were, while in principle accepting the Strasbourg doctrine, in fact for a period reluctant really to accept the consequences which by necessity ensued from such an acceptance in principle. The UK courts have been reticent to do so in a way that corresponds not just formally but also in terms of substance to the autonomous concepts of the European Court. Demoted tenancies are an example of the UK courts having been reticent in this regard.[49] This the UK courts have done without making any bones about it.

What we see here is that the national courts do not in formal terms see themselves bound to develop national legal concepts that correspond entirely with the autonomously defined concepts of the ECHR. Rather they, at least the German and

[48] *R (Uttley) v Home Secretary* [2004] UKHL 38, [2004] 1 WLR 2278 [23] (Lord Phillips); se also [46] (Baroness Hale), [64] (Lord Carswell).

[49] *McCann v United Kingdom* App No 19009/04 judgment 13 May 2008 [46]; *Buckley v the United Kingdom* App No 20348/92 judgment of 29 September 1996 [54]; *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57, [2009] 1 AC 367; *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983; *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465; *Manchester City Council v Pinnock (Nos 1 and 2)* [2010] UKSC 45, [2011] 2 AC 104.

French courts, apply their own concepts but they plainly apply these concepts so that the standards of rights protection which follow from the ECHR concepts are respected.

2.2.3 Evolutionary Interpretation

It is a well-known systemic aspect of the ECHR rights that the rights of the Convention must 'be analysed in the light of the principle, firmly rooted in the Court's case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions'.[50] 'The meaning and content of the provisions of the Convention will be understood', as Sir Humphrey Waldock, President of the European Court 1971–74, once put it, 'as intended to evolve in response to changes in legal or social concepts'.[51]

As will be seen in Chapter 4, such an approach is not without a certain mooring in the intentions of the parties to the ECHR. The Strasbourg institutions understood early on the necessity of seeking 'the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.[52] The approach taken by the European Court is one which takes seriously the

[50] *Hirsi Jamaa & Others v Italy* judgment [GC] 23 February 2012 [175]; *Tyrer v United-Kingdom* (1978) 58 ILR 339, 353.

[51] H Waldock, 'The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights' in *Mélanges Reuter* (Pedone 1981) 547. Also: M Sørensen, 'Do the Rights Set forth in the European Convention on Human Rights in 1950 have the Same Significance in 1975? Report presented by Max Sørensen to the Fourth International Colloquy about the European Convention on Human Rights, Rome 5–8 November 1975': reprinted in *Max Sørensen: A Bibliography* (Aarhus University Press 1988) 23, 54–55; HJ Cremer, 'Regeln der Konventionsinterpretation' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 174–229.

[52] *Wemhoff v Germany* 27 June 1968 [8].

intention on the part of the states members, as set out in the Preamble to the Convention, that not only the 'maintenance' but also the 'further realisation' of human rights and fundamental freedoms is incumbent upon the states members. It is against this backdrop that the European Court has put such a premium upon the object and purpose of the Convention, that is, on safeguarding 'not rights that are theoretical or illusory but rights that are practical and effective'.[53] The nexus between the intentions of the parties and the object and purpose of the Convention was given an accurate description by Judge Sir Gerald Fitzmaurice when he pointed out in *Belgian Police* that: 'the object and purpose of a treaty are not something that exist *in abstracto*: they follow from and are closely bound up with the intentions of the parties'.[54]

It may be worth remembering that this approach is shared by the law of treaties more generally; it is, as Higgins has pointed out, the 'wider principle—intention of the parties, reflected by reference to the objects and purpose—that guides the law of treaties'.[55] This was why the arbitral tribunal in *Iron Rhine*, in reaching an evolutionary interpretation of the treaty terms of the boundary treaty at issue, held that

[53] *Airey v United Kingdom* App No 6289/73 judgment 9 October 1979 [24]; *Nada v Switzerland* App No 10593/08 judgment [GC] 12 September 2012 [182], [195].

[54] Separate Opinion of Judge Sir Gerald Fitzmaurice, *National Union of Belgian Police* (1980) 57 ILR 262, 293.

[55] R Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski* (Kluwer 1996) 181; E Bjorge, *Evolutionary Interpretation of Treaties* (forthcoming). Also: *Territorial Dispute (Libya/Chad), Judgment* ICJ Rep 1994 p 21, 23. Also: *Lighthouses Case between France and Greece, Judgment* (1934) PCIJ Series A/B No 62 p 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ICJ Rep 1971 p 35 [66]; *Aegean Sea Continental Shelf* ICJ Rep 1978 p 22 [52]; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment ICJ Rep 2009 p 213, 242; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977) 11 RIAA 53, 231; *Young Loan Arbitration* (1980) 59 ILR 494, 531; *Dispute concerning Filleting within the Gulf of St Lawrence ('La Bretagne') (Canada/France)* (1986) 82 ILR 591, 619; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 110.

'an evolutive interpretation, which would ensure an application of the treaty that would be *effective* in terms of its object and purpose, will be preferred'.[56]

Incidentally this type of approach to interpretation is one which has a long pedigree also in French, German, and UK law. The UK courts interpret statutes taking a contemporaneous and purposive approach as opposed to a historical and textual one.[57] Lord Bingham in *Quintaville* set out the common law's view of the relation between the intention of Parliament and evolutions subsequent to the passing of the law. To his mind there was no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is 'always speaking'. (The words 'always speaking' go back to the Victorian draftsman, Lord Thring, who exhorted draftsmen to draft legislation so that 'an Act of Parliament should be deemed to be always speaking'.)[58] Lord Bingham said:

> If Parliament, however, long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of 'cruel and unusual punishments' has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so.[59]

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[56] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 RIAA 35, 73.

[57] J Bell, 'Interpreting Statutes over Time' in F Ost & M van Hoecke (eds), *Temps et droit: le droit a-t-il pour vocation de durer?* (Bruylant 1998) 31–34.

[58] H Thring, *Practical Legislation* (John Murray 1902) 83. Also: R Cross J Bell, and G Engle, *Cross: Statutory Interpretation* (3rd edn, Butterworth's 1995) 51.

[59] *R v Secretary of State for Health ex p Quintaville* [2003] UKHL 13, [2003] 2 AC 687 [9] (Lord Bingham), [21]–[23] (Lord Steyn). Also: *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763; *Grant v Southwestern and County Properties Ltd* [1975] Ch 185; *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL); *R v Ireland* [1998] AC 147 (HL); *Goodes v East Sussex County Council* [2000] UKHL 34, [2000] 1 WLR 1356; *Birmingham City Council v Oakley* [2000] UKHL 59, [2000] 3 WLR 1936; *R v Bristol City Council, ex p Everett* [1999] EWCA Civ 869, [1999] 1 WLR 1170 (CA); *Royal College of Nursing of the United Kingdom v Department for Health and Social Security* [1981] AC 800 (HL); *McCarten Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2

A classic case in this regard is *Edwards v Attorney-General of Canada*,[60] where the Judicial Committee of the Privy Council had to decide whether or not, for the purpose of s 24 of the British North America Act 1867 (the act containing at the time the Canadian constitution) women were 'persons', and whether by extension they could be members of the Canadian Senate. As late as 1909, in *Nairn v University of St Andrews*, the House of Lords had held that women graduates from Scottish universities were not 'persons' who were able to vote in the election of members of Parliament for the Scottish universities.[61] It was plain enough that when the act was adopted the term had referred to men only. Nonetheless the Board of the Privy Council in *Edwards* found that women too were 'persons'. By way of Lord Sankey LC's arresting horticultural metaphor their Lordships made it clear that they did 'not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation'; 'the British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits'.[62]

Another, more recent, striking example of the approach of the common law in this regard is *New Zealand Maori Council v Attorney-General*.[63] In this case, from the New Zealand Court of Appeal, the court took the same approach to the Treaty of Waitangi, a convention signed in 1840 between the Maori and Great Britain. President

AC 277 (HL); *R v Brittain* [1972] 1 QB 357 (QB); *R v R (Rape: Marital Exemption)* [1992] 1 AC 599 (HL); *Yemshaw (Appellant) v London Borough of Hounslow (Respondent)* [2011] UKSC 3, [2011] 1 WLR 433 [56]. Cf, however, *The Longford* (1889) 14 PD 34, 36 (Lord Esher MR).

[60] *Edwards v Attorney-General of Canada* [1930] AC 124 (PC).

[61] *Nairn v University of St Andrews* [1909] 1 AC 1 (HL).

[62] *Edwards v Attorney-General of Canada* [1930] AC 124 (PC) 136. Also: B Hale, 'Common Law and the Convention: The Limits to Interpretation' [2011] EHRLR 534, 534–35.

[63] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

Sir Robin Cooke, who later sat in the House of Lords as Lord Cooke, stated that 'the treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas'; the correct approach would be to interpret the treaty 'widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms'.[64]

The same approach was taken by the Cour de cassation when, in a famous line of cases,[65] it gave an evolutionary interpretation to art 2279 of the Civil Code. Article 2279 provides that: 'En fait de meubles, la possession vaut titre' ('In matters of movables, possession is equivalent to a title'). When, in 1804, the article was drafted one could not have thought of non-corporeal property, as that did not at the time exist in the way in which it would come into existence in the nineteenth century. The question therefore arose as to whether such movables were to be seen as being covered by the terms of the article. The Cour de cassation, by way of evolutionary interpretation of the terms used by the legislator, held that these later phenomena were in fact covered, as the term 'meubles' was of itself capable of generalization and thus applicable to all types of movables.[66] Equally in *Jand'heur* the Cour de cassation interpreted art 1384(1) of the Civil Code in the light of is broader object and in accordance with latter-day developments.[67] What *avocat général* Matter said in his conclusions applies to the jurisprudence of the Conseil d'État as much as to the Cour de cassation:

[64] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 655–56, 663.

[65] See for example Cour de cassation (1re chambre civile) 20 October 1982.

[66] F Terré, *Introduction générale au droit* (9th edn, Dalloz 2012) 472; J Bell, 'Interpreting Statutes over Time' in F Ost & M van Hoecke (eds), *Temps et droit: le droit a-t-il pour vocation de durer?* (Bruylant 1998) 34–35.

[67] Cass ch reuniés, 13 February 1930 *Jand'heur c Les Galeries belfortaises* (*conclusions*: Matter).

> la jurisprudence opère une œuvre créatrice : qu'en présence de tous les changements opérés dans les idées, dans les mœurs, dans les institutions, dans l'état économique de la France, on doit adapter libéralement, humainement, le texte aux réalités et aux exigences de la vie moderne.

The Conseil d'État takes a similarly evolutionary and teleologic approach to interpretation.[68] This is true not least where the human element invoked by Matter is in play. Thus *commissaire du gouvernement* Abraham in his *conclusions* in *GISTI*, adopted by the Conseil d'État,[69] argued that the term 'minor' in a 1985 French–Algerian extradition treaty ought not to be constructed according to a 'strictly literal interpretation' as this would be 'contrary to the objectives sought by the negotiators of the 1985 convention'.[70]

The same is the case in German law, where for example the Federal Constitutional Court in a line of authorities beginning in the early 1950s developed German constitutional law by reliance upon a doctrine of 'Verfassungswandel',[71] according to which terms in the Basic Law were interpreted evolutionarily.

> A constitutional provision can undergo a change of meaning, if in its scope of application new facts appear or known facts by way of development appear in new constellations or takes on a new meaning.[72]

[68] Y Gaudemet, *Les methods du juge administratif* (LGDJ 1972) 66–70, 136–43.

[69] Conseil d'État, 29 June 1990 *GISTI*.

[70] Conclusions of *commissaire du gouvernement* Abraham in *GISTI* (1990) 94 RGDIP 882, 906–07.

[71] A Voßkuhle, 'Gibt es und wozu nutzt eine Lehre vom Verfassungswandel?' (2004) 43 Der Staat 450; K Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 328–39.

[72] BVerfGE 2, 280 (401) ('eine Verfassungsbestimmung [kann] einen Bedeutungswandel erfahren, wenn in ihrem Bereich neue, nicht vorausgesehene Tatbestände auftauchen oder bekannte Tatbestände durch ihre Einordnung in den Gesamtablauf einer Entwicklung in neuer Beziehung oder Bedeutung erscheinen'). Also: BVerfGE 3, 407 (422).

Nonetheless the fact that the European Court has taken this approach might suggest that the national courts would have trouble keeping up, insofar as they are bound to apply a set of rights which are, on the European Court's admission, 'dynamic and evolutive'.[73] This seems, however, not to be the case in any of the three national legal systems here analysed, and it is probably not going too far in terms of conjecture to say that that is in some measure thanks to the fact that the national courts are familiar with this type of approach from their own jurisprudence.

The famous dictum set out by Lord Bingham in *Ullah*, that the national courts must 'keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less',[74] has set the tone for how the UK courts have dealt with the matter. The approach has been called the mirror principle.[75] This was well summarised by Baroness Hale in *McCaughey*.[76] Her Ladyship stated that it could not have been Parliament's intention that the Convention rights enshrined in the HRA were to remain set in stone as they were when the act was passed or when it came into force. It must have been intended, she continued,

> that the national courts would, at the very least, 'keep pace with the Strasbourg jurisprudence as it evolves over time'. If the evolutive interpretation of the Convention rights means that they now mean something different from what they meant when the 1998 Act was passed, then it is our duty to give effect to their current meaning, rather than to the one they had before.[77]

[73] *Goodwin v United Kingdom* App No 28957/95 judgment [GC] 11 July 2002 [74]; *Stafford v United Kingdom* App No 46295/99 judgment [GC] 28 May 2002 [68].

[74] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham).

[75] J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720, 726–38; A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 153–64.

[76] *McCaughey & Another* [2011] UKSC 20, [2012] 1 AC 725.

[77] *McCaughey & Another* [2011] UKSC 20, [2012] 1 AC 725, 757 (Baroness Hale). Also: 769 (Lord Dyson).

As will become plain in Chapter 4, the question has not really come to a head in the same way before the German courts. This is due to the high (and in no way static) standards of the protection which follow from the Basic Law.[78] *Boussouar* and *Planchenault* are examples of the approach taken by the French courts in this regard.[79] In his *conclusions*, adopted by the Conseil in its judgment, *commissaire du gouvernement* Guyomar held that taking into account the European jurisprudence to a certain measure would mean going beyond what the Court requires in the scope of its control *a posteriori* and *in concreto*: 'To refuse to overturn the decisions which are attacked today would be tantamount to accept to close one's eyes and wait for Strasbourg to open them for one.'[80] Thus the Conseil d'État, in the context of art 13 and the right of prisoners to an effective remedy in contesting administrative decisions against them, developed its understanding of the Convention rights beyond what (at that time) the European Court had done.[81]

The domestic courts have lost little time in throwing their lot in with the European Court when it comes to seeing the Convention rights as a function of a

[78] B Peters, 'Germany's Dialogue with Strasbourg: Extrapolating the *Bundesverfassungsgericht*'s Relationship with the European Court of Human Rights in the Preventive Detention Decision' (2012) 13 German Law Journal 757, 769.

[79] Conseil d'État, 14 December 2007 *Boussouar*; Conseil d'État, 14 December 2007 *Planchenault*.

[80] M Guyomar, 'Conclusions sur Conseil d'État, Assemblée, 14 décembre 2007, M. Planchenault et Garde des sceaux, ministre de la Justice c/ M. Boussouar' [2008] Revue française de droit administratif 87, 100.

[81] M Andenas & E Bjorge, 'L'application de la Convention européenne des droits de l'homme: quel rôle pour le judge interne' [2012] Revue internationale de droit comparé 384, 405–06; M Guyomar, 'Le dialogue des jurisprudences entre le Conseil d'État et la Cour de Strasbourg: appropriation, anticipation, émancipation' in *La conscience des droits: Mélanges en l'honneur de Jean-Paul Costa* (Dalloz 2011) 317–18.

'living instrument'.[82] As is clear not least from the *conclusions* in *Planchenault* and *Boussouar*, they seem to have done so on the assumption that *not* to do so would have meant not taking the system of the Convention seriously.

The question of evolutionary interpretation shares a border with another important question, one which has come to the fore especially in French and UK law. This type of interpretation may at times segue into what could be called 'taking the underlying principles of the ECHR seriously'. It is clear enough that to shelter behind the fact that, on a particular Convention issue, the European Court has not so far spoken would not be a very good approach to the ECHR, as this would mean potentially tempering the impact of ECHR law in all those cases which had not, on identical or similar facts to those of which a domestic court is seized, come up before the European Court. By applying a principled approach the courts avoid using any dearth of Strasbourg authority on an issue as a pretext for refusing to give effect to a right which otherwise seems undeniable.[83]

As has been foreshadowed above, and as will be dealt with in further depth in the following Chapters, the national courts in France, Germany, and the United Kingdom take a principled view of the ECHR as a minimum standard to be applied in good faith. Even if the content of an ECHR right must, in terms of its international meaning, be determined by the European Court, that does not mean that there can be no variation in the manner in which it finds expression, in terms of how the national courts see the Convention right, in the jurisprudence of national courts. While it is true that the national courts are at pains to keep pace with Strasbourg, it is not so that

[82] *Tyrer v United-Kingdom* (1978) 58 ILR 339, 353.

[83] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 586–87; E Bjorge, 'The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence' [2013] CLJ (forthcoming).

the national courts in France, Germany, and the United Kingdom choose to remain stationary in situations where the European Court has not taken a pace which would allow national courts to fall into step beside them.[84] In part this is because the national courts take seriously the responsibility resting upon them, according to the principle of subsidiarity, to be the first line defenders of the Convention rights, or as *commissaire du gouvernement* Mattias Guyomar put it in *Boussouar & Planchenault*, it simply means that the courts aim to 'give full effect to the subsidiary character of the control of the European Court, taking charge of giving full effect before national authorities to Convention rights'.[85]

In *Association pour la promotion de l'image* the Conseil d'État was asked whether a decree regulating the use of and storage of data from biometric passports was lawful.[86] One of the provisions of the decree was that eight fingerprints were stored by the authorities, while only two were in fact needed for the passport. The Conseil d'État, clearly basing itself on Convention principle as well as legal precepts flowing from national law and other international treaties, held parts of the decree to be unlawful.[87] The Conseil d'État sought to give full and fair effect, on the facts of the case before them, to the principles which the European Court had laid down; it did not approach the issues by way of seeking to align the case with the least dissimilar of the

[84] B Kerr, 'The UK Supreme Court: The Modest Underworker of Strasbourg?' 25 January 2012.

[85] M Guyomar, 'Conclusions sur Conseil d'État, Assemblée, 14 décembre 2007, M. Planchenault et Garde des sceaux, ministre de la Justice c/ M. Boussouar' [2008] Revue française de droit administratif 87, 100. Also: Conseil d'État, 17 February 1995, *Marie* & *Hardouin* (especially in the *conclusions* of *commissaire du gouvernement* Frydman); B Stirn, D Fairgrieve, and M Guyomar, *Droits et libertés en France et au Royaume-Uni* (Odile Jacob 2006) 251.

[86] Conseil d'État, 26 October 2011 *Association pour la promotion de l'image et autres*.

[87] Conseil d'État, 19 February 1909 *Abbé Olivier*; Conseil d'État, 17 August 1917 *Baldy*; Conseil d'État, 19 May 1933 *Benjamin*.

reported cases from the Strasbourg jurisprudence.[88]

Rapporteur public Boucher, in his *conclusions*, made clear that according to the jurisprudence of the European Court the collection and retention of the personal data in issue could in principle fall within the ambit of art 8.[89] On the basis of the jurisprudence of the European Court the *rapporteur public* set out the principles by which the protection afforded by art 8, as interpreted by Strasbourg, is underlain. These were, first, that it was not necessary that the data had been used, or that they were sensitive, for there to a breach of the right;[90] and, secondly, data concerning public information may be deemed to be private when it is systematised and archived, and particularly when it concerns a person's distant past.[91]

On the basis of the principles drawn up by the *rapporteur public* the *Assemblée* of the Conseil d'État conducted a three step proportionality inquiry, in which it concluded that it was disproportionate to the aim to collect and store eight fingerprints when in fact only two were needed.

Lord Kerr has said about the UK courts that 'even if a case can be made that in the past we were excessively deferential to Strasbourg, there are recently clear and vigorous signals that we are no longer'.[92] The approach taken by the UK Supreme

[88] X Domino & M Guyomar, 'Le passeport biométrique au contrôle: empreintes et clichés' [2012] AJDA 35.

[89] *Leander v Sweden* App No 9248/81 judgment 26 March 1987; *S & Marper v United Kingdom* App Nos 30562/04 & 30566/04 judgment [GC] 4 December 2008.

[90] *Amann v Switzerland* App No 27798/95 judgment 16 February 2000.

[91] *Rotaru v Romania* App No 28341/95 judgment [GC] 4 May 2000.

[92] B Kerr, 'The UK Supreme Court: The Modest Underworker of Strasbourg?' 25 January 2012 at 1.

Court seems to bear out this proposition out.[93] Lord Bingham in *JJ* held that the task of the national courts in applying the ECHR is 'to give fair effect, on the facts of this case, to the principles which the Strasbourg court has laid down'.[94] To the extent that these words are in need of any gloss, that too was provided by Lord Bingham when he, in his last article, said of *JJ* specifically, and the way in which the UK courts will rely on the ECHR as set out in the Strasbourg jurisprudence generally, that what the courts will do is 'to ascertain the true governing principle and apply it'. It is important to note that Lord Bingham did not in any way see *JJ* as falling foul of his own *Ullah* principle; nor did he see the case as an outlier. He in fact said that 'this is not an example cherry-picked to make this point: it is an example repeated over and over.'[95] It is even arguable that already in *Ullah* the House of Lords followed just this approach.[96]

If once they did so in the past the national courts do not anymore hesitate to resolve the question of whether a claim to a Convention right is viable where there is no clear current view from Strasbourg to be seen. They choose the interpretation that most closely accords with their reasoned view of the content of the Convention right; the national courts do not see themselves as relieved of their duty to confront the question of the content of a claimed right. It seems that one can conclude from the

[93] *Limbuela* [2005] UKHL 66, [2006] 1 AC 396; *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385 [19]; *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173; *EM (Lebanon)* [2008] UKHL 64, [2009] 1 AC 1198; *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621; *Rabone & Another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.

[94] *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385 [19] (Lord Bingham).

[95] T Bingham, 'The Human Rights Act: A View from the Bench' [2010] EHRLR 568, 573; *Lives of the Law: Selected Essays and Speeches 2000–2010* (Oxford University Press 2011) 183–84.

[96] E Bjorge, 'The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence' [2013] CLJ (forthcoming); M Andenas & E Bjorge, '*Ambrose*: Is the *Ullah* Principle Wrong?' (2012) 128 LQR 319, 322–23. Cf P Sales, 'Strasbourg Jurisprudence and the Human Rights Act' [2012] PL 253.

jurisprudence of the national courts that the absence of clear jurisprudence from the European Court on an issue will not alone supply the answer to whether a claimed Convention right has the content contended for.[97] By taking such a principled approach to the ECHR as a floor the national courts in reality also provide an answer to the questions which have been posed as to whether the ECHR rights ought to be seen as a ceiling too.[98]

A word should be said here about the approach in this regard of the German courts, and how it stands apart from that of the French and the UK courts. *Data Retention* furnishes a pertinent example in this regard.[99] The Federal Constitutional Court in this case struck down as unconstitutional the German law implementing the EU Data Retention Directive.[100] At issue in the case was whether the law contravened art 10 of the German Basic Law, on the privacy of correspondence, posts, and telecommunications. Though the incompatibility of the law with arts 8 and 10 of the ECHR was raised by the claimants, the German Court, on the face of its decision, approached the question squarely as one of domestic constitutional law. The judgment effectively nullified the German law implementing the Directive. The Court found that the regime set up by the law in question amounted to 'a particularly grave infringement, with a scope hitherto not known by our legal system',[101] underscoring

[97] See for example *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435; B Kerr, 'The UK Supreme Court: The Modest Underworker of Strasbourg?' 25 January 2012 at 17.

[98] Cf P Sales, 'Strasbourg Jurisprudence and the Human Rights Act' [2012] PL 253. Sales's defence of his reading of the mirror principle from *Ullah* will be dealt with in 4.3.

[99] BVerfGE 125, 260.

[100] Directive 2006/24/EC of the European Parliament and of the Council of March 15, 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[101] BVerfGE 125, 260 [210].

that the system allowed 'the production of expressive personality and mobility profiles for effectively every person'.[102] The Court held that the law constituted a disproportionate infringement of fundamental rights and must be struck down. *Data Retention* is exemplary of the German approach in this type of case: the ECHR issues do not come to a head in the way they might have done in French an UK law as the protection afforded by the Basic Law is so strong. But it is equally plain that the German Court in no way will use a lack of Strasbourg authority on an issue as a reason not to develop standards of rights protection. Though, as adumbrated above, counsel for the claimants argued on the basis of the Convention rights the Court did not in its judgment advert to ECHR law.

It is obvious from what has just been said that there are times when the national courts will conclude in ways which are more generous than what the European Court has done, whilst the courts on other occasions are likely to be more circumscribed. The courts are in the latter type of situation careful to limit the number of instances as much as possible. It is only really where they in good faith feel that the European Court has got an issue wrong, and that it would be right for this to be pointed out and explicated fully, that the courts take this step. As will become clearer in Chapter 8, this is what happened in *Horncastle*,[103] *Dubus*,[104] and the first *Von Hannover* case in the German courts.[105]

[102] BVerfGE 125, 260 [211].

[103] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47 [11].

[104] Conseil d'État, 30 July 2003 *Dubus* (*conclusions*: Guyomar).

[105] BVerfGE 101, 361.

2.2.4 Margin of Appreciation

The doctrine of the margin of appreciation significantly influences the European Court's approach to adjudicating the Convention questions which come before it.[106] The European Court's doctrine of margin of appreciation has been referred to as a form of legal discretion which recognizes that the respondent state can be presumed to be best qualified to appreciate the necessities of a particular situation affecting its jurisdiction.[107]

Though it may be that it is relied upon less and less by the European Court,[108] the concept of the margin of appreciation is firmly embedded in the jurisprudence of the Court, featuring in numerous of judgments. The question arises as to whether an equivalent to the margin of appreciation ought to be applied by the domestic courts in their determination of questions arising in national law in connection with Convention rights.

Perhaps the most straightforward approach would be to say, as Sales J did in *S*

[106] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 1.

[107] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 666. Also: RSJ Macdonald, 'The Margin of Appreciation' in RSJ Macdonald, F Matscher, and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993); JG Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993) 174–75; A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012); G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 80–98; A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009) 29–31; L Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (LGDJ 2012) 10–12.

[108] G Letsas, 'Preface' in *A Theory of Interpretation of the European Convention on Human Rights* (paperback edn, Oxford University Press 2010); S Sedley, 'How to Comply with Strasbourg' [2013] London Review of Books 22.

& KF,[109] that the national courts should, in certain types of case, accord a margin of appreciation to the impugned authority in the same way as the European Court accords one to the national authorities which are challenged before it. It will, however, be seen that this is *not* what has become the orthodox approach in any of the three systems studied here. It is not the case in the United Kingdom, and even more emphatically not the case in France and Germany. The UK position has been summarized by Lord Hope in *Kebilene* and later in *AXA*:

> the doctrine by which a margin of appreciation is accorded to the national authorities is an essential part of the supervisory jurisdiction which is exercised over state conduct by the international court. It is not available to the national courts when they are considering Convention issues arising within their own countries.[110]

The courts in the United Kingdom have nonetheless adopted a domestic concept of deference or respect.[111] As Lord Neuberger put it in *RJM*, there may be areas where, as a matter not so much of Convention as of national law, the court 'should be very slow to substitute its view for that of the executive', as the fact that there may be grounds for criticising or disagreeing with such views 'does not mean that they must be rejected'.[112] It goes without saying, however, that if this is taken too far then the risk of the European Court finding against one will become real. Lord Neuberger

[109] *S & KF v Secretary of State for Justice* [2012] EWHC 1810 (Admin) (Sales J) [55]–[56]. Cf P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 618.

[110] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL) 381 (Lord Hope); *AXA General Insurance Ltd* [2011] UKSC 46, [2012] 1 AC 868 [32] (Lord Hope).

[111] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 618–19; T Hickman, *Public Law After the Human Rights Act* (Hart 2010) 124–25; A Le Sueur, M Sunkin, and JE Khushal Murkens, *Public Law* (2nd edn, Oxford University Press 2013) 769–73.

[112] *RJM v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 [56]–[57] (Lord Neuberger). Also: *Swift v Secretary of State for Justice* [2013] EWCA Civ 193 (CA) [24] (Lord Dyson MR).

added therefore that 'there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that even with the broad margin accorded to the state, the court will conclude that the policy is unjustifiable'.[113]

When, in *Countryside Alliance*,[114] the House of Lords afforded a margin of discretionary judgment to Parliament in relation to whether the Hunting Act 2004 was in breach of art 1 Of the First Protocol of the ECHR, the European Court agreed when the case subsequently made its way to Strasbourg.[115] The European Court concluded that the UK courts had 'given the greatest possible scrutiny to the applicants' complaints under the Convention and especially those complaints brought under Article 1 of Protocol No. 1'.[116]

The German courts have been fastidious with regard to whether they ought to adopt in national law a margin of appreciation. The margin of appreciation finds no parallel at the national level.[117] The German courts, because of the high level of rights protection afforded by the Basic Law, sometimes go further than the level of protection afforded by the ECHR.[118] There are times when, as will be seen in Chapter 6, in the context of the proportionality inquiry the German courts will accord a

[113] *RJM v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 [57] (Lord Neuberger).

[114] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

[115] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 619.

[116] *Friend v United Kingdom*; *Countryside Alliance v United Kingdom* 50 EHRR SE6 [58].

[117] B Peters, 'Germany's Dialogue with Strasbourg: Extrapolating the *Bundesverfassungsgericht*'s Relationship with the European Court of Human Rights in the Preventive Detention Decision' (2012) 13 German Law Journal 757, 769.

[118] BVerfGE 125, 260.

measure of deference to the legislator when it comes to the appropriateness of legislative measures,[119] and the same may be the case with regard to the necessity of a measure.[120] It is nonetheless no exaggeration to say that judicial review, both of statutes but all the more so of administrative action, is very rigorous indeed in Germany. Nolte has gone so far as stating 'that nowhere in Europe is judicial review as rigorous' as in the German courts.[121] The German Federal Constitutional Court, too, has taken this approach. In cases bearing on economic policy it has, within its proportionality inquiry, been willing to accord to the legislator a generous measure of deference:

> In looking at the proportionality of qualification of a fundamental right regulating professional conduct, a freedom of discretion must be accorded to the legislator…. The Basic Law allows in the regulation of economic goals and attendant measures for a margin of appreciation and a margin of manoeuvre.[122]

One finds in the jurisprudence of the Conseil d'État some very rare examples of the Conseil adopting the European Court's approach to the doctrine of the margin of appreciation in a case bearing upon Convention rights.[123] There is normally precious

[119] BVerfGE 103, 293 (307).

[120] BVerfGE 53, 135 (145).

[121] G Nolte, 'General Principles of German and European Administrative Law—A Comparison in Historical Perspective' (1994) 57 MLR 191, 197.

[122] BVerfGE 53, 135 (145); original: 'Bei der Prüfung der Frage, ob die in einer Berufsausübungsregelung enthaltenen Einschränkungen verhältnismäßig sind, ist der Gestaltungsfreiheit Rechnung zu tragen, die dem Gesetzgeber…. In der Bestimmung wirtschaftspolitischer Ziele und der zu ihrer Verfolgung geeigneten Maßnahmen läßt das Grundgesetz einen Beurteilungsspielraum und Handlungsspielraum'. Also: BVerfGE 115, 276 (308); original: 'Ein Mittel ist bereits dann im verfassungsrechtlichen Sinne geeignet, wenn mit seiner Hilfe der gewünschte Erfolg gefördert werden kann, wobei die Möglichkeit der Zweckerreichung genügt. Dem Gesetzgeber kommt dabei ein Einschätzungs- und Prognosevorrang zu. Es ist vornehmlich seine Sache, unter Beachtung der Sachgesetzlichkeiten des betreffenden Sachgebiets zu entscheiden, welche Maßnahmen er im Interesse des Gemeinwohls ergreifen will.'

[123] Conseil d'État, 22 November 2000 *Mutuelle inter-jeunes*; Conseil d'État, 2 June 1999 *X*; Conseil d'État, 7 October 1977 *Sieur Gaillard Yves.*

little discussion of the matter in *conclusions* by *rapporteurs publics*. The emphasis is rather on finding the principles upon which the Strasbourg jurisprudence is based and loyally to follow them. Surely this ought to some degree to be seen in relation to the strong tradition in French law of very high levels of scrutiny of administrative action.[124]

As will be seen the picture which emerges is one in which the national courts have been reticent in adopting wholesale the European concept of the margin of appreciation. Though it might have been conceivable that they would do, none of the systems here studied have adopted into its national application of the ECHR the margin of appreciation as applied by the European Court. In other words the French, German, and UK courts have not taken the view that seeing as the European Court is likely, in some types of case, to accord to national authorities a margin of appreciation, the national courts ought by the same token to do the same. The domestic courts do not rely on a transplanted ECHR margin of appreciation in order to restrict the Convention rights in their national application.

They have, however, as will be shown in Chapter 6 taken inspiration from the idea of the margin of appreciation in order to expand the scope of their rights review under the Convention.[125] It is possible therefore to explicate the approach taken by the

[124] Conseil d'État, 19 February 1909 *Abbé Olivier*; Conseil d'État, 17 August 1917 *Baldy*; Conseil d'État, 19 May 1933 *Benjamin*; Conseil d'État, 28 May 1954 *Barel*; Conseil d'État, 19 October 1962 *Canal*. Also: CJ Hamson, *Executive Discretion and Judicial Control* (Stevens & Sons 1954) 212; S Cassese, *La construction du droit administratif: France et Royaume-Uni* (J Morvillez-Maigret tr, Montchrestien 2000) 109; B Stirn, *Vers un droit public européen* (Montchrestien 2012) 95–99.

[125] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173. Also: A Kavanagh, 'Strasbourg, the House of Lords or Elected Politicians: Who decides after Re P?' (2009) 72 MLR 815, 831–34; T Hickman, *Public Law After the Human Rights Act* (Hart 2010) 44–45; JM Sauvé, 'Le juge administratif et la protection des libertés et des droits fondamentaux' in *Mélanges en l'honneur de Serge Guinchard* (Dalloz 2010) 555; BVerfGE 125, 260. See Ch 6.

domestic courts as 'margins of initiative'; instead of relying upon a margin of appreciation in order to curtail the scope of Convention rights the domestic courts have used similar approaches to go further in guaranteeing ECHR than that which, at a given point in time, follows from the Strasbourg jurisprudence.

2.2.5 Proportionality

Proportionality involves the balance which is to be struck between interests and objectives; it embodies some sense of an appropriate relationship between means and ends. The test exists in various guises. One common formulation is a three-part inquiry which asks, first, whether the measure was suitable to achieve the desired objective; secondly, whether the measure was necessary for the achievement of the desired objective; and, thirdly, whether in nonetheless imposed excessive burdens on the individual.[126] All of these parts of the inquiry feature in the test applied by the European Court. Only rarely will a measure be faulted as being unsuitable, and as the Court takes a practical, and not a theoretical, approach to adjudication it rarely discusses this stage in any detail. The test, at least such as it will play out with regard to art 8–11, was thus well summed up in *Dudgeon*:

> The notion of 'necessity' is linked to that of a 'democratic society'. According to the Court's case-law, a restriction on a Convention right cannot be regarded as 'necessary in a democratic society'—two hallmarks of which are tolerance and broadmindedness—unless, amongst other things, it is proportionate to the legitimate aim pursued.[127]

[126] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 657.

[127] *Dudgeon v United Kingdom* (1981) 67 ILR 395 [53]. Also: *Sunday Times v United Kingdom* App No 6538/74 judgment [Plenary Court] 26 April 1979; *Lithgow (Shipbuilding Nationalization)* (1986)

President of the European Court 1985–98 Rolv Ryssdal said that 'the theme that runs through the Convention and its case law is the need to strike a balance between the general interest of the community and the protection of the individual's fundamental rights'.[128] The principle of proportionality could be said to follow logically from the structure of the ECHR rights, or even from the fact that they are fundamental rights in the first place. It is thus a logical test.[129] As was just seen it certainly follows generally from the jurisprudence of the European Court that national courts must conduct a proportionality inquiry when they analyse whether an interference with a right was justifiable.

German law has been at the forefront in this regard.[130] In fact it has been argued that it was and is more fastidious than the European Court itself.[131] While it was not so until relatively recently, it is now the case that French, German, and UK law have accepted and apply fully the proportionality test required by the jurisprudence of the European Court.

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75 ILR 438, 527–28; *Gillow* (1986) 75 ILR 561, 580–81; *Redfearn v United Kingdom* App No 47335/06 judgment 6 November 2012 [47]–[57].

[128] R Ryssdal, 'The Coming of Age of the European Convention on Human Rights' (1996) 1 EHRLR 18, 26.

[129] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 665.

[130] J Schwarze, *Eurpäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (2nd edn, Nomos 2005) 669.

[131] B Goold, L Lazarus, and G Swiney, *Public Protection, Proportionality, and the Search for Balance* (Ministry of Justice 2007) 48.

In French law the position presently taken by the Conseil d'État is clear from the line of cases culminating in *Association pour la promotion de l'image*.[132] While the Conseil d'État has for many years now accepted that it is bound in effect to comply with the Strasbourg proportionality test, *Association pour la promotion de l'image* was the first ruling in which the Conseil d'État (sitting in its highest formation, the *Assemblée générale*) spelled this out clearly by going through the whole test in one judgment.[133] The Conseil d'État in this case adopted the explicit approach that had already been a feature of the jurisprudence of the Conseil constitutionnel for some time. The Conseil d'État in *Association pour la promotion de l'image* conducted a fully-fledged three-step proportionality analysis of a decree setting out the rules on retention of fingerprints which individuals had to give in order to be eligible to receive biometric passports.

The test applied by the UK courts was set out in *Quila*.[134] Lord Wilson cast the appropriate test in the following terms: first, is the legislative objective sufficiently important to justify limiting a fundamental right? secondly, are the measures which have been designed to meet it rationally connected to it? thirdly, are they no more than are necessary to accomplish it? and, fourthly, do they strike a fair balance between the rights of the individual and the interests of the community?[135] It would certainly be fair to say that the UK courts have learned their lessons from adverse

[132] Conseil d'État, 26 October 2011 *Association pour la promotion de l'image* (*conclusions*: Boucher).

[133] See X Domino & M Guyomar, 'Le passeport biométrique au contrôle: empreintes et clichés' [2012] AJDA 35.

[134] *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621.

[135] *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621, 643 (Lord Wilson). Also: *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, 187 (Lord Bingham); *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69 (PC) 80. See P Sales, 'Rationality, Proportionality and the Development of the Law' [2013] PL 223, 226–27.

Strasbourg rulings such as *Smith & Grady*.[136] Lord Bingham in *Denbigh* said about the nature of the inquiry which a UK court will perform that:

> it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting… There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test.[137]

2.2.6 Dialogue

What in Bruno Genevois's coinage has been called 'le dialogue des juges'[138] is at times taken to mean that national courts reassert their autonomy vis-à-vis the European Court.[139] This was not necessarily what Genevois meant by the phrase. Another perspective is to see the dialogic exchanges more as an effort of cooperation.[140] Three recent examples of the types of dialogue which may play out

[136] See P Craig, 'The Nature of Rationality Review' [2012] CLP (forthcoming).

[137] *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, 116 (Lord Bingham).

[138] B Genevois, 'Conclusions' Conseil d'État, 6 December 1978 *Cohn-Bendit*.

[139] HJ Papier, 'Das Bundesverfassungsgericht im Kräftefeld zwischen Karlsruhe, Luxemburg und Straßburg' in HP Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity* (Brill 2012) 2045; M Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 ICLQ 557; N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law* (Oxford University Press 2010).

[140] A Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 European Constitutional Law Review 175; A Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 Global Constitutionalism 53; A Stone Sweet, 'The Structure of Constitutional Pluralism' (forthcoming); M Andenas & E Bjorge, 'National Implementation of ECHR Rights' in A Follesdal, B Peters, and G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 424.

between the domestic courts and the European court are the lines of cases in *Von Hannover (No 2)*[141] and *Horncastle–Al-Khawaja*,[142] and *Animal Defenders*.[143]

After the European Court had handed down its judgment against Germany over the protection of privacy in *Von Hannover v Germany*,[144] the German Federal Constitutional Court made great concessions in respect of how it balanced the protection of privacy (of celebrities) with the freedom of expression (of newspapers). It put more of an accent upon protection of privacy than it had done hitherto; equally it conceded that different types of speech may call for different levels of protection. With respect to the latter point the German Court thus conceded that:

> In balancing the conflicting legal values, taking into account the presumption, emanating from art 5(1) of the Basic Law … that reporting by the press aiming at a contribution to the formation of a public opinion is allowed, freedom of expression guaranteed by art 10(1) ECHR is to be accorded special weight where reporting by the press contributes to matters of general interest.[145]

This goes some way to prove the wish of the German Court to harmonise the standards of the rights of the Basic Law and the Convention rights; the German Court in this case, perhaps more than ever before in its rights jurisprudence, takes seriously

[141] BVerfGE 120, 180; *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012.

[142] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47; *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011.

[143] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312; *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013.

[144] *Von Hannover v Germany* App No 59320/00 judgment 24 June 2004.

[145] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [203].

the influence both of the Convention rights and of the European Court's interpretations of it.[146]

The idea that, in constitutional terms, a national court has the last word, Andreas Voßkuhle, President of the German Constitutional Court, has said, does not contradict the idea of multilevel dialogue between European courts, 'so long as he who has the last word is willing to learn at the same time as he is speaking'.[147] Given the importance accorded by the German courts to the *Von Hannover* line of cases, and to the issue of balancing between privacy and freedom of speech, much seemed to ride on how the Grand Chamber would settle *Von Hannover v Germany (No 2)*. The Grand Chamber of the European Court in its ruling brought out that the German Constitutional Court had, in accordance with the Strasbourg case-law, carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private lives. In doing so, said the European Court, the German courts had attached fundamental importance to the question of whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest.

Seeing as the traditional German conception of freedom of speech has been that all types of speech are potentially of equal importance,[148] the European Court

[146] HJ Cremer, *Human Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Routledge–Cavendish 2011) 92.

[147] A Voßkuhle, 'Menschenrechte im Europäischen Verfassungsgerichtsverbund' speech at the Berlin–Brandenburgische Akademie der Wissenschaften 22 October 2011: 'muss einem Dialog im Europäischen Verfassungsgerichtsverbund nicht entgegenstehen, solange derjenige, der das letzte Wort spricht, beim sprechen lernt'.

[148] See the Federal Constitutional Court's *Von Hannover* ruling from 1999: BVerfGE 101, 361. Also: SC Lenski, 'Human Rights Protection in Multipolar Legal Relationships' in KS Ziegler & PM Huber (eds), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Hart 2013) 143; S Deakin, A Johnston, and B Markesinis, *Tort Law* (7th edn, Oxford University Press 2013) 734–38.

rightly saw this as an instance of the German Court adopting Strasbourg's approach. It noted that the Federal Court of Justice had changed its approach in the wake of *Von Hannover v Germany*, and that the Federal Constitutional Court, for its part, had 'not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law'.[149] The Grand Chamber of the European Court concluded that:

> In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.[150]

The same conclusions can be inferred from *Horncastle*[151] and the ruling by the Grand Chamber of the European Court in *Al-Khawaja*.[152] The question with which the Supreme Court was faced in *Horncastle* was whether a conviction based 'solely or to a decisive extent' on the statement of a witness whom the defendant has had no chance of cross-examining necessarily infringes on the defendant's right to a fair trial under articles 6(1) and 6(3)(d) of the European Convention. The most recent Strasbourg authority on the issue was *Al-Khawaja*.[153] In the two applications jointly

[149] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [125].

[150] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [126].

[151] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47.

[152] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011.

[153] *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

adjudged in this Chamber decision against the United Kingdom statements had been admitted in evidence at a criminal trial of a witness who was not called to give evidence. The Strasbourg Court had held that, in both cases, the statement was the 'sole or, at least, the decisive basis' for the applicant's conviction.

The Supreme Court did not accept in *Horncastle* that the Strasbourg Court's decision in *Al-Khawaja* should be determinative of the results of the appeals in the case before them. It held that while it would normally apply the principles which had been clearly established by the European Court there would, however, be rare occasions where it would have concerns as to whether a decision of the European Court 'sufficiently appreciates or accommodates particular aspects of our domestic process'; 'in such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course'.[154] This, the argument went, would then give the European Court the opportunity to reconsider the particular aspect of the decision that in issue, and what might prove to be a valuable dialogue between the Supreme Court and the European Court could take place. The Supreme Court in other words felt that the European Court had misunderstood the common law, and it set out in detail why this was so. The strategy worked, insofar as the Grand Chamber in its ruling ceded some ground to the Supreme Court, admitting that: 'where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1'.[155]

It must be true, however, as Bruno Genevois has pointed out, that the national courts are best placed to gauge the impact of particular aspects of the Strasbourg case

[154] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47 [11].

[155] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011 [147] (internal references omitted).

law, and that it is therefore important that the possibility of dialogue should exist.[156] This is summed up by the 'vital forces' doctrine of the European Court, according to which: 'by reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State'.[157]

An aspect of this doctrine was brought out, by way of dialogic exchange between the domestic and the European level, in the line of cases in *Animal Defenders*.[158] The particularities of the House of Lords and Grand Chamber cases are expounded in detail in Chapter 8.[159] Suffice it to say here that the House of Lords was asked in *Animal Defenders* to review the proportionality, and compatibility with art 10, of a statutory rule which prohibited all political advertising on television. The European Court had held, in *Verein gegen Tierfabriken*,[160] that it 'cannot exclude that a prohibition of "political advertising" may be compatible with the requirements of article 10 of the Convention in certain situations', where those reasons were '"relevant" and "sufficient" in respect of the particular interference with the rights'.[161] This, and the fact that the House of Lords felt that the European Court had in its leading case on

[156] B Genevois, 'Cour européenne des droits de l'homme et juge national : dialogue et dernier mot' in *Mélanges en l'honneur de Jean-Paul Costa* (Dalloz 2011) 281, 291.

[157] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [111].

[158] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312; *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013.

[159] See under 8.2.3.

[160] *Verein gegen Tierfabriken* (2001) 34 EHRR 159.

[161] *Verein gegen Tierfabriken* (2001) 34 EHRR 159 [75].

the issue not been wholly seized of all the pertinent arguments, meant that the House of Lords seems to have concluded in perfect good faith that in upholding the prohibition it was giving effect to the trend of the Strasbourg jurisprudence. In common with what the Supreme Court did in *Horncastle*, the House of Lords did not in *Animal Defenders* invite a battle royal with the European Court; it sought, rather, to apply the Strasbourg jurisprudence loyally and to put forth with confidence its own view, within the bounds drawn up by the Strasbourg jurisprudence.[162]

Given the searching proportionality inquiry undertaken by the national authorities—both Parliament and the reviewing courts, from the High Court to the House of Lords—the Grand Chamber of the European Court, in its turn, felt equally confident in taking a deferential approach to the conclusions of the House of Lords.[163] The House of Lords in *Animal Defenders*, had made a good faith attempt to apply the Strasbourg jurisprudence to a particular set of facts, conducting a searching proportionality inquiry in which it deferred in the final analysis to the reasoned conclusions of Parliament. The Grand Chamber gave its imprimatur to the balance struck by the House of Lords, underlining that it was not the Court's task to take the place of the national authorities, but that it must nonetheless review those authorities' decisions taken pursuant to their margin of appreciation, in the light of the case as a whole.[164] In this connection the Grand Chamber pointed out that the quality of the

[162] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [37] (Lord Bingham), [43] (Lord Scott), [53] (Baroness Hale).

[163] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013.

[164] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [105].

parliamentary and judicial review of the necessity of the measure was of particular importance, including to the operation of the margin of appreciation.[165]

2.3 Normative Assumptions Relied upon by the National Courts

2.3.1 Introduction

It could be tempting to try to tease out one unifying normative underpinning which would explicate all the choices on which the domestic courts rely in their application of the Convention rights. The search for such a panacea-like answer would, however, be ill advised, if for no other reason than the insight which Tony Judt has proffered in relation to historical analysis, that an accurate mess is often far truer to life than elegant untruths.[166]

In the event the mess is not all that messy. It is not surprising that the values and normative choices on which the national courts base their approach to the ECHR are, to some extent, of a feather. Four values may be identified in this regard. The first, and perhaps the chief one, is summed up by the brocard *pacta sunt servanda*, which clearly the national courts see as demanding not only that obligations are to be executed but that they are to be executed in perfect good faith.

Secondly, and following from the first, the national courts see their role in the system of the forty-seven member strong Council of Europe as one where they are entitled to a measure of deference when it comes to the application of Convention

[165] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [108].

[166] T Judt, *Thinking the Twentieth Century* (William Heinemann 2012) 270.

rights to facts of which they may be better seized than the European Court. This embodies as a normative value the notion that a measure of rights diversity is legitimate; furthermore the national courts in France, Germany, and the United Kingdom plainly see themselves as entitled, in some types of case, to see the traditions of their legal system as valuable contributions to the European concert of rights that is the ECHR. In the end, however, this is circumscribed by the principle of good faith.

The third normative value could be termed the Kantian element. It refers to that which Kant called 'universalizability'. The national courts are plainly mindful that if they in a given case (in which a breach might of itself not have any type of grave consequences) were to choose not to apply the standards of the Convention, then other courts in other countries might take a leaf out of their book and do the same (in cases where a breach might potentially have very grave consequences indeed).

Fourthly comes a normative value that is no less important for being self-evident: it is that human rights are in the view of the national courts, simply put, a paramount good to be pursued.

These are the four normative choices by which the approach of the French, German, and UK courts to the ECHR is underlain. Together they explain what the courts do and their normative reasons for so doing. In the following each of these four will be spelled out, and in 2.4 below they will be subject to assessment as to whether they ought to be approbated or not. It should be noted, however, that inevitably the spelling out of these normative choices and their assessment will, though they are in principle discreet exercises, to some extent be elided. This is not unnatural as the dividing line between spelling out the content of normative reasoning and assessing

the same normative reasoning may be a porous one.

2.3.2 *Pacta Sunt Servanda*: Treaties Must be Executed in Good Faith

It could reasonably be concluded from what was said under part 2.2.2 above on autonomous concepts, that the main motivation of the national courts when it comes to the doctrine of autonomous concepts is to avoid breaching the standards of rights protection developed by the European Court. The German Federal Constitutional Court for example took care to preserve, in principle, the concept of 'penalty' which is found in the Basic Law; it did not simply substitute the ECHR concept for the Basic Law one. Instead what it did was to retain, in principle, the national concept but to apply, in practice, the ECHR concept insofar as it injected the latter into the proportionality inquiry which it conducted. A similar approach was taken by the French courts: retention in principle of a national concept but application in practice of the ECHR one. Thus the French and German courts made sure in effect to comply with the ECHR.

This approach seems to be undergirded by the normative assumption that *pacta sunt servanda*, and the attendant precept of good faith. The principle that agreements are binding, and that for this to mean anything the agreements are to be implemented in good faith, is a well-known quantity.[167] While it does not need a lengthy introduction here a few words should nonetheless be said about the principle.

The rule of *pacta sunt servanda*, according to which states must comply with

[167] A Denning, *The Changing Law* (Stevens & Sons 1953) 104.

their obligations in good faith, is one of the central canons of the customary law of treaties.[168] The link between the precept of good faith and treaty obligations is not least important when it comes to execution of those obligations. It is, as the arbitral tribunal held in the *North Atlantic Fisheries* case, a principle of international law 'that treaty obligations are to be executed in perfect good faith'.[169]

This is no less so when it comes to the *performance* of treaty obligations. The International Court of Justice held in *Nuclear Tests* that one of the basic principles governing the performance of legal obligations, whatever their source, is the principle of good faith.[170] Leading publicists, too, have taken this view.[171] Thus Lord McNair, the first president of the European Court, stated that 'the performance of treaties is

[168] VCLT, 23 May 1969, 1155 UNTS 331, art 26. Also: J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012); A Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 197–81.

[169] *North Atlantic Fisheries (Great Britain v United States)* (1910) 11 RIAA 167, 188. Also: *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections,* Judgment ICJ Rep 1998 p 275, 296; *Factory at Chorzow, Merits, Judgment No 13* PCIJ (1928) No 17 Series A p 30; *Certain German Interests in Polish Upper Silesia, Merits* (1926) PCIJ No 7 Series A p 4, 30; *Free Zones of Upper Savoy and the District of Gex, Order of 6 December* (1930) PCIJ Series A No 24 p 12 and (1932) PCIJ Series A/B No 46 p 167; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion* ICJ Rep 1948 p 57, 63; *Rights of Nationals of the United States of America in Morocco, Judgment* ICJ Rep 1952 p 212; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Jurisdiction of the Court, Judgment* ICJ Rep 1973 p 18. See also *Re Italian Special Capital Levy Duties* (1949) 18 ILR 406, 407; *Lighthouses Arbitration (Claim No 26)* (1956) 23 ILR 342, 345; *Alsing Trading Co v The Greek State* (1954) 23 ILR 633, 635; *Interpretation of Article 78(7) of the Peace Treaty with Italy 1947 (Franco–Ethiopian Railway Co claim)* (1956) 24 ILR 602, 626; *Pertusola* claim (1951) 18 ILR 414, 419.

[170] *Nuclear Tests (Australia v France) (New Zealand v France)* ICJ Rep 1974 253, 267.

[171] RY Jennings, 'Treaties' in M Bedjaoudi (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff 1991) 146; H Lauterpacht, 'De l'interprétation des traités' (1950) 43 Annuaire de l'Institut du Droit international 366, 369; G Schwarzerberger, 'The Fundamental Principles of International Law' (1955) 87 Recueil des Cours de l'Academie de Droit International de la Haye 195, 301–04; R Bernhardt, *Die Auslegung völkerrechtlicher Verträge—insbesondere in der Rechtsprechung internationaler Gerichte* (Heymann 1963) 24–25; E Zoller, *La bonne foi en droit international public* (Pedone 1977); W Karl, *Vertrag und spätere Praxis im Völkerecht* (Springer 1983) 271–73; R Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000); PM Dupuy & Y Kerbat, *Droit international public* (10th edn, Dalloz 2010) 329; ME Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 108–09.

subject to an overriding obligation of mutual good faith'.[172] Cassin, Lord McNair's successor as President of the European Court, sitting as sole arbitrator in the 1955 arbitral award *Diverted Cargoes*, referred to the principle of good faith as 'the fundamental principle which governs both the interpretation and the execution of treaties'.[173]

It is no novelty that national courts, in their approach to international agreements, rely on this principle, and the concomitant precept of good faith which flows from it. Thus for example the Conseil d'État in its decision on the Treaty of Maastricht,[174] in referring to the rules of public international law, accepted and applied 'the rule *pacta sunt servanda* which implies that all treaties that are in force bind the parties and must be executed by them in good faith'.[175] With respect to the ECHR the UK courts see themselves as being, as Lord Bingham put it in *Greenfield*, 'bound in international law to perform their duties under the Convention in good faith'.[176] In fact one of Lord Bingham's main tenets of the rule of law was, more broadly, that 'public officers at all levels must exercise the powers conferred on them in good faith'.[177]

As foreshadowed above, we find the traces of this normative assumption in relation to the jurisprudence of the national courts on the doctrine of autonomous

[172] AD McNair, The Law of Treaties (2nd edn, Oxford University Press 1961) 465.

[173] *Diverted Cargoes Case (Greece v United Kingdom)* (1955) 12 RIAA 53, 70 (translated here).

[174] Treaty on European Union, 7 February 1992, OJEU C 191/1.

[175] Conseil d'État, 9 April 1992 *Treaty on European Union*; 93 ILR 337.

[176] *Secretary of State for the Home Department, Ex p Greenfield* [2005] UKHL 14, [2005] 1 WLR 673 [19].

[177] T Bingham, *The Rule of Law* (Allen Lane 2010) 60.

concepts. It would hardly be in conformity with the principle of *pacta sunt servanda* if in their execution and performance of the Convention the national authorities were not to accept that they had to respect the fact that the European Court, by fashioning autonomous convention concepts, has defined some minimum standards of the ECHR. Only in a very minimalist and bad faith sense would one conform to the principle that agreements must be observed if one were to take the most formal approach to the observation of the agreement. The tribunal in the 1926 *Cayuga Indians* case between Great Britain and the United States gave this a vivid form when it referred to good faith as 'the elementary principle of justice that requires us to look at the substance and not stick in the bark of legal form'.[178] The same is clear also from the jurisprudence of the European Court of Human Rights. The European Court in *Sporrong & Lönnroth v Sweden* held that it will 'look behind the appearances and investigate the realities of the situation complained of".[179]

The example, referred to above, of 'penalty' is apposite here too. If, in the jurisprudence of the national courts, certain measures which could well be seen as being penalties were systematically to be classified in national law not as penalties but as strictly preventive measures then the impact of the provision would be a function of national legal definition. In this way the precepts of the Convention would be reduced to vanishing point. This would be absurd. It would be in breach of good faith and

[178] *Cayuga Indians (Great Britain) v United States* (1926) 6 RIAA 173, 179.

[179] *Sporrong and Lönnroth v Sweden* Series A No 52 [63]; *Lindheim and others v Norway* app nos 13221/08 and 2139/10 judgment 12 June 2012 [69]. The European Court has also linked the principle of good faith to the doctrine of the margin of appreciation. As was said in the dissenting opinion by Judges Wiarda, Cremona, Vilhjalmsson, Ryssdal, Ganshof van der Meersch, Sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch, and Matscher in *Sunday Times* the doctrine of the domestic margin of appreciation 'is concerned, in the first place, with determining whether the national authorities have acted in good faith, with due care and in a reasonable manner' when evaluating those facts and circumstances that might lead to an interference with a right being justified. Joint Dissenting Opinion Judges Wiarda, Cremona, Vilhjalmsson, Ryssdal, Ganshof van der Meersch, Sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch, and Matscher *Sunday Times Case* (1980) 58 ILR 491, 543–44.

therefore also *pacta sunt servanda*. Letsas takes a very generous approach when he conceptualizes failures by national courts to respect the autonomously defined concepts of the ECHR as 'good-faith violations of the ECHR'. In his view what the European Court does when it applies its doctrine of autonomous concepts is 'indirectly to review national legislation with a view to spot good-faith errors regarding the way in which the Convention rights are affected by national legislation'.[180] This seems too generous in the sense that it gets the point about good faith the wrong way around. It is not clear that the German courts were acting in good faith when, in the period before *Preventive Detention II*, they refused to take into account the autonomous ECHR concept of 'penalty'. Rather the problem was their lack of good faith in the application of the Convention, as they applied it only in the most formal sense, in a way which rendered the rights protection ineffective rather than effective, putting a premium on form rather than on substance.

The traces of this normative assumption may be found, too, in the jurisprudence of the national courts on what was called above the principled approach, the fact that the national courts take an approach based upon principle rather than to shadow the European Court in the explication of Convention rights. In *Greenfield* Lord Bingham said that 'article 26 of the Vienna Convention on the Law of Treaties, expressing customary international law, requires state parties to a treaty to perform it in good faith'; the focus of the Convention is 'on securing observance by member states of minimum standards in the protection of the human rights specified in the

[180] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 43–45.

Convention'.[181] Seeing those two propositions together may bring out the importance of good faith in relation to the principled approach. To focus too closely upon what the European Court has said in the least dissimilar case to the one of which a national court is seised would be contrary to good faith application with the Convention. What matters are substance and underlying principle, not first and foremost the terms or form in which those might have been cast. A similar principle was effectively brought out by the British argument before the Permanent Court in *Oscar Chinn:* 'International Law has regard to substance rather than form, and will not countenance the evasion of an international obligation by the adoption of indirect means to effect an unlawful purpose'.[182]

The same is the case with the jurisprudence bearing upon dialogue between the national courts and Strasbourg. When the Supreme Court in *Horncastle*[183] held that it could not follow the Chamber decision in *Al-Khawaja*,[184] it did so explicitly stating that it felt that the European Court had misunderstood the common law on the question at issue. The response from the Grand Chamber of the European Court which ensued could hardly be interpreted as anything but a recognition that we must assume, at least in retrospect,[185] that *Horncastle* was a good-faith, and very successful, attempt at dialogue with the European Court. Thus p*acta sunt servanda*, and the attendant

[181] *Secretary of State for the Home Department, Ex p Greenfield* [2005] UKHL 14, [2005] 1 WLR 673 [4].

[182] *The Oscar Chinn case* PCIJ No 75, Series C 39–40. Also: R Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000) 268–69.

[183] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47.

[184] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment 20 January 2009.

[185] Cf E Bjorge, 'Exceptionalism and Internationalism in the Supreme Court: *Horncastle* and *Cadder*' [2011] PL 475.

standard of good faith, explains the approach taken by the national courts to autonomous concepts but also to dialogue, as well as the broader point of a principled approach. As will be seen it is arguably relevant to the notion of national application of the margin of appreciation too.

The principle of good faith is important, moreover, in respect of evolutionary interpretation.[186] Good faith is at the origins of the diverse means of treaty interpretation on which both international and national courts rely, and it is as a function of the fundamental rule of good faith that the choice of how to weigh the interpretive factors must be made.[187] Sir Humphrey Waldock, President of the European Court 1971–74, said of the evolution of treaty concepts, and the limits within which terms may properly be implied in a treaty as necessarily inherent in it, that both these points are to be considered as covered by the requirement of interpretation in good faith.[188] It would for example go against the grain of good faith, and thus also *pacta sunt servanda*, to say that only such practices as were seen to be covered by the terms 'slavery or servitude' would today be covered by the provisions of art 4(1) of the Convention. It was clearly, as was seen above, on the basis of such a normative assumption that the Court of Appeal in *R v SK* reached the evolutionary interpretation it did.[189]

[186] E Bjorge, *Evolutionary Interpretation of Treaties* (forthcoming).

[187] P Daillier, M Forteau, and A Pellet, *Droit international public* (8th edn, LGDJ 2009) 283.

[188] H Waldock, 'The Effectiveness of the System Set up by the European Convention on Human Rights' (1980) 1 Human Rights Law Journal 1, 3–4. Also: J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 54.

[189] *R v SK* [2011] EWCA Crim (CA) 1691.

2.3.3 Rights Diversity

The domestic courts in France, Germany, and the United Kingdom are also motivated by the fact that, while it is the case 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',[190] and that it cannot have the same application to the relations between the organs of state at the domestic level,[191] the European Court will in the end (perhaps) accord to the national court a margin of appreciation. Therefore, as a matter less of principle than of practicality, the French courts will operate in some cases with a certain margin of appreciation and the UK courts will too, albeit this margin is referred to as a 'discretionary area of judgment'.[192]

What is the normative underpinning when the national courts proceed in this way? It may indeed be that they wish to mirror (to the extent that that is possible, given the different roles played by the different institutions) that which the European Court is doing. To that extent it is tied up with the precept of good faith. This seems to have been the French approach: in French law the courts seem, admittedly only in a limited number of cases, to have adopted the doctrine one-to-one from the jurisprudence of the European Court and into their own.[193] The United Kingdom is perhaps in a middle position in the sense that the UK courts have taken the line that,

[190] *A v United Kingdom*, App No 3455/05, judgment [GC] 19 February 2009 [184].

[191] *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 (HL) 381 (Lord Hope); *AXA General Insurance Ltd* [2011] UKSC 46, [2012] 1 AC 868 [32] (Lord Hope). Also: P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 618.

[192] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL) 381; *AXA General Insurance Ltd* [2011] UKSC 46, [2012] 1 AC 868 [32] (Lord Hope), [131] (Lord Reed).

[193] Conseil d'État, 22 November 2000 *Mutuelle inter-jeunes*; Conseil d'État, 2 June 1999 *X*; Conseil d'État, 7 October 1977 *Sieur Gaillard Yves*.

as Lord Hope put it in *Kebilene*, the doctrine of margin of appreciation 'is not available to the national courts when they are considering Convention issues arising within their own countries'[194] but have nonetheless adopted a domestic concept of deference or respect.[195] Thus in *Swift* Lord Dyson MR explicitly made the point that the observations by the European Court on a margin of appreciation in its jurisprudence 'were made in relation to the margin of appreciation accorded by the Strasbourg court to Member States', and would thus not necessarily have the same application before domestic courts.[196]

The German courts have not seen the matter in the same way, as they have neither taken the Strasbourg doctrine on board in the direct way (preferred by the French courts) nor in the indirect way (preferred by the UK courts). That is not to say, however, that no measure of deference will be accorded by the German courts to parliament or to the executive in particular types of case; it is just that this follows from German doctrines of administrative and constitutional law rather than from the precepts of the ECHR.

Though the three courses adopted are discrete they have more in common than what sets them apart from each other. In this regard the courts rely on values and make normative choices. What are the normative reasons on which we can assume that the national courts are relying?

It seems that the national courts in their application of the ECHR rely on

[194] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL) 381 (Lord Hope); *AXA General Insurance Ltd* [2011] UKSC 46, [2012] 1 AC 868 [32] (Lord Hope).

[195] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 618–19.

[196] *Swift v Secretary of State for Justice* [2013] EWCA Civ 193 (CA) [24] (Lord Dyson MR).

concepts of deference, whether that is a wholly European concept of deference or a municipal one, because they feel that with respect to some questions under the ECHR there ought to be a presence or tolerance of a diversity of views among the states members. This is not surprising. It seems to flow from the fact that, as Lord Bingham once put it, the national courts are 'called upon to administer an international code of human rights largely laid down by the European Court in Strasbourg'.[197] As the administrators of first resort of the Convention they are indeed exposed to the needs and pressures felt in European societies in a way which one can at times only with difficulty recreated in a supranational body such as the European Court.

2.3.4 The Kantian Element

The two normative assumptions hitherto analysed both bear on the relationship between a national court and the European Court or between one national court and the European Convention. To some extent the perspective has been a bilateral one. A third normative assumption which underlies the choices which the national courts make in their jurisprudence bearing upon the ECHR, however, is that which could be called the Kantian element. Kant's categorical imperative was cast in the following terms: 'act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction'.[198] Von Bogdandy has introduced this precept into European law, and sees the extent to which judicial decisions can be universalized as an apposite criterion for the assessment of whether a

[197] T Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press 2010) 71.

[198] I Kant, *Grounding for the Metaphysics of Morals* (JW Ellingdon trans, Hacker 1993).

judicial development is to be commended or not.[199] This means that national judges, when adjudicating in ECHR cases, must see themselves in relation not only to Strasbourg but also to others, and bear in mind the extent to which the maxim on which they base their ruling may be universalized and used by other courts.

There is ample evidence that this is a normative assumption which the French, German, and UK courts follow in their approach to the ECHR. The Supreme Court in *Cadder* for example seems to have relied to a very large extent upon this Kantian imperative. Lord Hope held that the particularity of Scots criminal law which was in issue could not be saved by any guarantees otherwise in place there:

> Distinctions of that kind would be entirely out of keeping with the Strasbourg court's approach to problems posed by the Convention, which is to provide principled solutions that are universally applicable in all the contracting states. It aims to achieve a harmonious application of standards of protection throughout the Council of Europe area, not one dictated by national choices and preferences. There is no room in its jurisprudence for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its Western fringes such as Scotland on the other.[200]

Equally, when the German Constitutional Court was faced with the questions presented before it in *Preventive Detention II*, the challenge for the German court was to find a solution which was satisfactory both in terms of national constitutional law and in terms of the European Court's ruling in *M*, clearly complying with the latter.

[199] A von Bogdandy, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum: Überlegungen zum Lissabon-Urteil des BVerfGE' (2010) 63 Neue juristische Wochenzeitung 1, 1–2. Also: G de Búrca, 'The ECJ and the International Legal Order: A Re-Evaluation', in G de Burca & JHH Weiler, *The Worlds of European Constitutionalism* (Oxford University Press 2012); M Andenas & E Bjorge, 'The External Effects of National ECHR Judgments' NYU Jean Monnet Working Paper 07/12: <http://centers.law.nyu.edu/jeanmonnet/papers/12/documents/JMWP07AndenasandBjorge.pdf>.

[200] *Cadder v Her Majesty's Advocate* [2010] UKSC 43, [2010] WLR 268 [40] (Lord Hope).

This is, as was seen above, exactly what the German Court did in its ruling; it reached the only solution capable of being universalized. It stands to reason that if the German court had decided not to follow Strasbourg, then other European courts, with less happy histories of rights protection than the German Court, could have interpreted this as a license not to follow the decisions of Strasbourg. If this was not said in terms in the ruling of the German Court, it was clear enough in the subsequent judgment from the European Court, where the Strasbourg judges expressed some relief that the German Court had conceived of the matter not in a self-contained but rather in a manner capable of universalization. The European Court greeted

> the reversal of the Federal Constitutional Court's case-law concerning preventive detention in its leading judgment of 4 May 2011. It welcomes the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level.[201]

Lord Neuberger MR made much the same point when he said in relation to *Hirst* and prisoners voting that:

> We may think that it is inappropriate that Strasbourg pokes its nose into the votes for prisoners issues on the basis that it should be left to our Parliament to decide. However, if Strasbourg said votes for criminals was a matter for national legislatures, it may be that a dictator might see this as a green light to depriving his enemies of the vote by trumping up charges to bring against them. It may be thought to be a small price to pay for a civilised Europe that we sometimes have to adapt our laws a little.[202]

[201] *Schmitz v Germany* No 30493/04 judgment 9 June 2011 [41] (citation omitted).

[202] Lord Neuberger MR, 'Who are the Masters now? Second Lord Alexander of Weedon Lecture' <http://www.judiciary.gov.uk/Resources/ICO/Documents/Speeches/mr-speeches-weedon-lecture-110406.pdf>.

It bears mention that other UK judges have taken a less Kantian approach to the matter. Lord Hoffmann, perhaps the most prominent member (or former member) of the UK judiciary to have expressed such views, has thus put the matter in rather different terms from those chosen by Lord Neuberger:

> the Strasbourg Court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe (or at any rate those which pay attention to its decisions) culminating, for the moment, in its decision that the UK is not entitled to have a law that convicted prisoners lose, among other freedoms, the right to vote.[203]

Lord Hoffmann's criticism is important. His extra-judicial scepticism is, however, not echoed in his judicial statements, which do not seem averse to according comity to the European Court.[204] At all events, Lord Neuberger's point stands and it is the point in principled terms that interests us here.

If, the argument could conceivably have gone, the UK courts ignore what the European Court has said about the rights of prisoners to vote, then other Council of Europe countries with less happy histories of democracy might perhaps find in the approach of the United Kingdom support and succour for even worse policies. Similarly if German courts could—as in the end they did not—turn a blind eye to what the European Court had said about M's detention in *M v Germany*, then surely the Russian courts must be able to do the same with regard to the Russian

[203] Lord Hoffmann, 'Foreword' in M Pinto-Duchinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (Policy Exchange 2011) 7. Also: Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416.

[204] See for example *AF v Secretary of State for the Home Department & Another* [2009] UKHL 28, [2010] 2 AC [70]; *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [30]; *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [30]–[56].

businessman Mikhail Khodorkovsky's detention in *Yukos*?[205] The national courts clearly take this on board and have made of this Kantian precept an important normative assumption which underpins their approach to the ECHR.

2.3.5 Human Rights as a Paramount Good to be Pursued

One need not search for long in the jurisprudence of the French, German, and UK courts in order to find examples which show that human rights are seen as a paramount good to be pursued. The jurisprudence of the German Federal Constitutional Court could, with its emphasis upon fundamental rights in all fields of the law, be seen as one continuous testimony to this normative value.[206] In the view of one leading twentieth-century common lawyer, Lord Kilmuir, himself one of the architects of the ECHR, there was no aim was 'more noble' for a lawyer than to endeavour to secure 'the absence of arbitrary imprisonment, torture and official murder, the presence of freedom of thought, of religion, of marriage, and political association'.[207] Lord Bingham saw the upholding of human rights as so fundamental a good that no state could deserve the badge of honour 'rule of law' without also affording protection to 'what are there regarded as the basic entitlements of a human being'.[208] René Cassin, the first Vice President of the reconstructed post–World War II Conseil d'État and President of the European Court of Human Rights 1965–68,

[205] *OAO Neftyanaya Kompaniya Yukos v Russia* App No 14902/04 judgment 20 September 2011.

[206] HC Nipperdey, 'Die Würde des Menschen' in Nipperdey and others (eds), *Die Grundrechte II* (Duncker & Humblot 1954) 1.

[207] DP Maxwell-Fyfe, *Political Adventure: The Memoirs of the Earl of Kilmuir* (Weidenfeld & Nicholson 1964) 184.

[208] T Bingham, *The Rule of Law* (Allen Lane 2010) 84.

gave expression to the same sentiment when he stated, in 1955, that 'a democracy is only worthy of the name if it accords to human rights, their content having been delimited by the exigencies of societal life, protection that is effectively upheld by the courts'.[209] The current Vice President of the Conseil d'État Jean-Marc Sauvé, too, gave expression to similar sentiments, and with particular reference to the ECHR, when in 2012 he defended the ECHR against its critics saying that: 'the European system for the protection of human rights is our common good'.[210]

While this normative value might be thought not to be clearly defined that makes it no less important. The lengths to which the national courts have been willing to go in some cases bear this out. In the United Kingdom the *Belmarsh* case exemplifies this.[211] The House of Lords in that case, dubbed by one commentator 'the high water mark of effective judicial protection in human rights law in the United Kingdom in the war on terror',[212] went to considerable lengths to uphold the protection of human rights, in the face of considerable pressure from the government. In German law the *Preventive Detention II* case is a good example. The German Federal Constitutional Court in this case was at pains to make sure that German law respected the strictures of human rights law in a judgment which effectively overturned more than fifty years of conventional wisdom in Germany.[213]

[209] R Cassin, 'Préface' in M Letourneur & J Méric, *Conseil d'État et juridictions administratives* (Armand Colin 1955) 4; A Prost & J Winter, *René Cassin et les droits de l'homme* (Fayard 2011).

[210] JM Sauvé, 'Le système européen des droits est notre bien commun' Le Monde 27 February 2012.

[211] *A v Secretary of State* [2004] UKHL 56, [2005] 2 AC 68.

[212] P Birkinshaw, 'Terrorism, Secrecy and Human Rights' in KS Ziegler & PM Huber (eds), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Hart 2013) 240.

[213] BVerfGE 128, 326.

2.3.6 Assessment

The domestic courts must surely be right in conceiving of the European Convention as a framework to be followed in line with the command that *pacta sunt servanda*, and also in taking the position that for this really to mean anything this performance must be carried out in perfect good faith. An approach to the Convention that did not take seriously *pacta sunt servanda*, or a similar rule, is almost impossible to imagine. Such an approach would hardly be a legal one.

It is difficult, too, to argue with the next normative choice which seems to underpin what the national courts do as they apply the Convention rights in the context of domestic law: that human rights are seen by the courts as an important good to be pursued. Any legal system worthy of the name provides jealous protection for fundamental rights and liberties. It has famously been argued that the rule of law is 'the name commonly given to the state of affairs in which a legal system is legally in good shape'.[214] It seems hard to escape the conclusion that this state of being in good shape ought also to encompass the safeguarding of fundamental rights, as it is difficult to see what, in the final analysis, the legal system should protect if not the individuals who make up the society which it regulates.

Similarly the Kantian perspective, which seems also to underpin the approach taken by the national courts to the ECHR, ought to be approbated, as it is built upon solidarity and an ability to see oneself not as being in a bilateral relationship with Strasbourg but rather as being one of several interlocutors. The nature and content of the obligations flowing from the ECHR give the obligations an objective character, and the national courts must be correct in basing their approach to the Convention

[214] J Finnis, *Natural Law & Natural Rights* (2nd edn, Oxford University Press 2011) 270.

upon this understanding. It seems obvious that the 'civilised Europe', which according to Lord Neuberger may be built here only at the expense incurred by each national system's adapting its laws a little,[215] is not one born of contractual obligations only.

Rather, the system of the ECHR should be seen as being something more than just a web of bilateral relations between a variegated set of national authorities vis-à-vis the ECHR authorities. With respect to international treaties of the kind of which the European Convention is one, that is, conventions 'adopted for a purely humanitarian and civilizing purpose', as the International Court of Justice put it in *Genocide*, 'one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties'.[216] Unlike bilateral treaties of what could be termed the classical kind, the ECHR, in the words of the European Court, 'comprises more than mere reciprocal engagements between contracting States'; the European Convention must be understood as having engendered 'objective obligations'.[217] It becomes clear, on this background, that the approach of the domestic courts goes with the grain of the underlying logics of the system of the ECHR.

To some extent these three normative underpinnings of the approach taken by the national courts to the ECHR are all of a feather. The fourth one, rights diversity, is however of a slightly different kind. Rights diversity by definition has in it the potential for friction and difference of approach. This has led some authors to go far

[215] Lord Neuberger MR, 'Who are the Masters now? Second Lord Alexander of Weedon Lecture' <http://www.judiciary.gov.uk/Resources/ICO/Documents/Speeches/mr-speeches-weedon-lecture-110406.pdf>.

[216] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion ICJ Rep 1951 p 15, 23.

[217] *Ireland v United Kingdom* 25 ECHR Ser A 1978 [239].

in arguing that the ECHR is a code more honoured in the breach than in the observance.

Thus Krisch, in an important contribution in which he bases his analysis upon the example of French, German, UK, and Spanish law, has argued that the legal order of the ECHR is so marked by rights diversity that, on his view, friction is the norm rather than the exception.[218] He for example states about the French courts' approach to the ECHR that they stage resistance against the European Court whenever they think its interference in French law and institutions has gone too far. Krisch sees the challenges to a more harmonic, or 'constitutionalist', understanding of the ECHR legal order as being based on factual grounds (insofar as, on his reading, domestic courts not only fail to follow Strasbourg judgments but also evade them and misinterpret them). Importantly he also sees the state of affairs which he describes as being desirable in normative terms. On Kirsch's view pluralism is in fact, and ought also in principle to be, the defining precept of the ECHR system. He does, however, temper the factual side of his account by the proviso that reality has proved to be rather harmonious, insofar as the day-to-day operation of the relationship with the European Court has lately been highly cooperative, and friction has been rare.

That proviso seems to get closer to the truth than the overall picture which Krisch paints. In fairness to his account it should be added, however, that much of the jurisprudence on which he based his analysis (particularly with respect to French and

[218] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law* (Oxford University Press 2010) Ch 4. Also: N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 EJIL 247; N Krisch, 'The Case for Pluralism in Postnational Law', LSE, Law, Society & Economy Working Papers 12/2009.

German law)[219] was already at the time he was writing no longer really representative of the approach of the domestic courts which he was analysing.[220] The developing trends which were lacking in Krisch's analysis have since become even clearer. Friction is very much the exception and not the rule. It is no exaggeration to state that the domestic courts as a rule follow the jurisprudence of the European Court.

Perhaps the most important judgment that has come since Krisch wrote his analysis would be *Horncastle*.[221] *Horncastle* has certainly been seen as perhaps the clearest example of a national court going against the jurisprudence of the European Court.[222] As was seen in relation especially to *Horncastle* and *Al-Khawaja* it is, however, first and foremost when the courts believe the European Court to have misunderstood an aspect of their law that they go so far as going against the Strasbourg jurisprudence. This is in fact entirely clear from *Horncastle* itself. Lord Phillips, who delivered the Supreme Court's judgment in *Horncastle*, has pointed out that it was not just a matter of the Supreme Court preferring the UK approach as it thought that to be superior to that of the European Court. Rather the Supreme Court felt that its position had not been fully appreciated by the European judges. The UK

[219] Most of the French cases on which Krisch relies are from the period 1970–2000. Cases such as Conseil d'État, 14 December 2007 *Boussouar* and Conseil d'État, 14 December 2007 *Planchenault* are not included in the analysis. Nor does he, in the parts of his analysis which bears on the jurisprudence of the Cour de cassation, give the ruling of the Assemblée plénière of the Cour de cassation of 15 April 2002 its proper due: 'Attendu que les États adherents à la Convention … sont tenus de respecter les décisions de la Court européenne des droits de l'homme, sans attendre d'être attaqués devant elle ni d'avoir modifié leur législation'.

[220] A Stone Sweet, 'The Structure of Constitutional Pluralism' (forthcoming).

[221] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47.

[222] P Craig, 'Political Constitutionalism and the Judicial Role' (2011) 9 I-CON 112, 120; N Bamforth & LC Hoyano, *Human Rights Law and Principles in the United Kingdom* (Oxford University Press 2013 forthcoming) Ch 9; E Bjorge, 'Exceptionalism and Internationalism in the Supreme Court: *Horncastle* and *Cadder*' [2011] PL 475.

Supreme Court was, in Lord Phillips's words, saying to Strasbourg: 'We do not think that you have quite appreciated why we do things in this way, please think again'.[223]

What could be seen as the best support of a pluralist thesis in fact undermines any and all arguments about pluralism and friction. For as will have been seen, not least from the reaction the Grand Chamber gave to it in *Al-Khawaja, Horncastle* was nothing if not a good faith contribution to the development of ECHR law. This is an important aspect of the relationship between the domestic courts and Strasbourg. Had, furthermore, Krisch's account of the relationship between the domestic courts and the European Court been true, then surely the German Federal Constitutional Court would have gone against Strasbourg in *Preventive Detention II*? [224] The German Constitutional Court's statement in *Preventive Detention II* to the effect that all organs of the state are under a duty 'not only to take into account' the European Convention but also 'to avoid conflict' between it and national law seems to go against the grain of Krisch's account of the approach taken in German law.[225] So does the exhortation, in the same ruling, that the openness of the Basic Law expresses an understanding of sovereignty which does not only not oppose international and supranational integration but presupposes and expects it.[226]

Krisch sees the ECHR system as one in which pluralism has catered to national courts' desire for maintaining their autonomy, and which has allowed them to

[223] HC 873–ii Q78.

[224]See the point about how difficult *Preventive Detention* was in political terms: C Grabenwarter, 'Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten' [2012] Europäische Grundrechte-Zeitschrift 507, 507.

[225] BVerfGE 128, 326 [89].

[226] BVerfGE 128, 326 [89].

insist on their superior status in principle.[227] As will have become apparent, instead of this account I would suggest that the domestic courts are so loyal to the logics of the ECHR system that they only very rarely go against the European Court unless they, in good faith, believe that Strasbourg has genuinely misunderstood an aspect of their domestic law. Good faith application is not the exception; it is the rule. The rights diversity to which the national courts feel entitled, and by which their normative choices are underpinned, is one of good faith. In this type of framework it is not difficult to explain why there is so *little* friction between the domestic courts and Strasbourg.

As has been foreshadowed, and as will be seen in more detail, the real rights diversity that can be observed is in fact that which takes places when the domestic courts go further in their rights protection than the standards laid down by the European Court, or find that Convention rights are breached in a type of case where the European Court had not hitherto done so. If one takes seriously the logics of the ECHR then this, too, seems unobjectionable.

While misgivings might be voiced that may be legitimate because of concerns of national law (such as some types of decision belonging constitutionally not with the courts but with other branches of government)[228] they do not take on such an air if seen from within the system of the ECHR. One reason for this is that the courts of one state member will not, by contributing to the heightening of rights standards, in principle bind other than their *own* national authorities. This is obvious but nonetheless worth pointing out. The Conseil d'État did not bind any other than their

[227] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law* (Oxford University Press 2010) Ch 4.

[228] L Hoffmann, 'The Separation of Powers: Shadow and Substance' (forthcoming).

own national authorities when in *Planchenault* and *Boussouar* it arguably went further than the European Court had done, at that juncture, when it came to art 13 guarantees and prisoners' rights. The German Federal Constitutional Court in *Data Retention* equally bound only German authorities when it struck down the national laws implementing the EC data retention directive. And this type of rights diversity in no way runs the risk of incurring criticism from Strasbourg. In fact the then President of the Court, Sir Nicolas Bratza stated that it would be right and positive for the protection of human rights that the national courts should sometimes consciously leap ahead of Strasbourg.[229] We can sum up by saying that the rights diversity element is allayed by the first normative underpinning brought out above, that is, *pacta sunt servanda* with its attendant good faith requirement. This is why the national courts hesitate to water down the standards of the Convention but are less hesitant to heighten them. Explaining why this is the case is not very difficult. Three reasons stand out in this regard.

The first reason is the following. In the context of public international law the question has been posed: 'Why do people comply with international law?' In answering this question international lawyers rely upon the fact that international law is not imposed upon states by an external legislature. A powerful reason why states comply, and always have complied, with international law is that they make the rules to suit themselves.[230] This is very much the case too with the European Convention on Human Rights. It has become commonplace in the United Kingdom to mention that it was to a large extent Sir Maxwell-Fyfe, later Lord Kilmuir, who wrote the

[229] N Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] EHRLR 505, 512.

[230] V Lowe, *International Law* (Oxford University Press 2007) 19. Also: T Bingham, *The Rule of Law* (Allen Lane 2010) 113–14.

Convention. [231] Together with Pierre-Henri Teitgen, a French professor of international law and Minister of Justice in de Gaulle's post-war cabinet,[232] he made sure that common law concepts of liberties and civil law perceptions of rights were woven together in what would become the text of the Convention.

In addition to this first reason comes a second. Among the international lawyers who were put on the Court in its formative first decades (such as the important internationalists drawn from the common law such as Lord McNair and Sir Humphrey Waldock, and Continental internationalists such as Verdross and Ross) there were judges drawn from the top courts in the leading member states. Perhaps the foremost example in this regard was René Cassin, who was Vice President of the French Conseil d'État at the same time as he was Vice President, and later President, of the European Court. From the point of view of the incorporation of the ECHR and Strasbourg jurisprudence into national law it is perhaps difficult to imagine more propitious beginnings at least in institutional terms.

The third element is that the European Court never, or at least extremely rarely, develops the standards of the ECHR without making sure that such a development would have firm support in the practice of the authorities of the states members. This may sound exaggerated but is in fact the best description of the incremental approach adopted by the European Court to development of the ECHR. The Court thus practically never arrives at an evolutionary interpretation without basing such an interpretation also upon a 'consensus' among the member states. This

[231] DP Maxwell-Fyfe, *Political Adventure: The Memoirs of the Earl of Kilmuir* (Weidenfeld & Nicholson 1964) 174–89; AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 738.

[232] See L Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (LGDJ 2012) 18.

approach goes back to *Tyrer*[233] and was succinctly summed up by the Grand Chamber in *A, B & C v Ireland*:

> The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with *Tyrer v the United Kingdom*, the Convention being considered a 'living instrument' to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.[234]

The International Law Commission's Special Rapporteur on the importance of state parties' subsequent practice in treaty interpretation, Georg Nolte, has also pointed out this aspect of the jurisprudence of the European Court. In fact Nolte has gone so far as to state that whenever the Court has recognised that it is engaging in evolutionary interpretation 'it has *invariably* referred to state, social or international legal practice'.[235] While this is a perspective that seems at times to be lost on some of those who analyse the dynamics of intention and consent in relation to the European Convention,[236] it is nonetheless an important one.

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[233] *Tyrer v United-Kingdom* (1978) 58 ILR 339.

[234] *A, B & C v Ireland* App No 25579/05 judgment [GC] 16 December 2010 [234].

[235] G Nolte, 'Second Report of the Study Group on Treaties over Time' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press forthcoming) (emphasis added).

[236] G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509; M Fitzmaurice, 'The Practical Working of the Law of Treaties' in MD Evans, *International Law* (3rd edn, Oxford University Press 2010) 188; M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human Rights' in A Orakhelashvili & S Williams (eds), *40 Years of the Vienna Convention on Treaties* (British Institute of International and Comparative Law 2010) 92; R Bernhardt, 'Thoughts on the Interpretation of Human-Rights Treaties' in F Matscher & H Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymanns Verlag 1988) 65–71; WJ Ganshof van der Meersch, 'Quelques aperçus de la méthode d'interprétation de la Convention de Rome du 4 novembre 1950 par la Cour européenne des droits de l'homme' in *Mélanges offerts à Robert Legros* (Éditions de l'Université de Bruxelles 1985) 209–10. Cf H Waldock, 'The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights' in *Mélanges offerts à Paul Reuter—Le droit international: unité et diversité* (Pedone 1981) 535.

These three factors seem to go a long way in explicating the picture which was drawn up above. It makes it even less surprising that the national courts follow the jurisprudence of the European Court.

What, then, are we to make of the fact that the national courts go so far in upholding, in good faith, the principles of the Convention rights as set out by Strasbourg? Already posing the question is to provide an answer to it. This follows already from the underlying and general principle adopted by the courts in France, Germany, and the United Kingdom alike: the courts will, wherever possible, interpret domestic law so as to conform with international law. 'That', as Lowe has put it, with the simplicity that the matter requires, 'is fitting'. It is indeed fitting for, as Lowe continues, if the courts were to decide cases in a manner that violated the state's international obligations, the state in issue would incur international responsibility.[237] The approach taken is in other words entirely to be approbated.

This leads naturally to an assessment of the next normative choice by which the approach of the national courts is underlain: human rights as a good to be pursued. For I would argue that it is the case that to the extent that the type of approach described by Lowe above should know exceptions, such as those imposed by the constitutional arrangements of the state in issue (which in principle of course could be highly legitimate),[238] then they ought to be overridden in the case of human rights.[239]

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[237] V Lowe, *International Law* (Oxford University Press 2007) 125.

[238] See, for example: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry ('International Tin Council')* [1990] 2 AC 418 (HL) 499–500 (Lord Oliver); *Thomas v Baptiste* [2000] 2 AC 1 (PC) 23 (Lord Millet); *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, 995 (Lord Hoffmann). Generally: L Hoffmann, 'The Separation of Powers: Shadow and Substance' (forthcoming).

[239] *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [49]–[50] (Lord Steyn). Also: M Hunt, *Using Human Rights Law in English Courts* (Hart 1998) 26–28; L Collins, 'Foreign Relations and the Judiciary' (2002) 51 ICLQ 485, 496. Cf P Sales & J Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 LQR 388, 398–400.

The UK courts put such accent upon this point that even before the ECHR had been incorporated into domestic law they did in effect rely upon it. As Lord Bingham put it in *R v Lyons*: 'although international law and national law differ in their content and their fields of application they should be seen as complementary and not alien or antagonistic systems'. Thus even before the HRA 'the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law'.[240] The national courts are entirely right in basing their approach to the domestic application of the ECHR on the importance of human rights. They are also right to emphasise the complementarity of international and national law in this regard.

The reason for this was perhaps best summed up by Lauterpacht, whose work in the later 1940s on the then fledgling subject of international (and European) human rights would go on to form the foundation of the European Convention,[241] when he stated that the individual is the ultimate subject of both international and domestic law, representing both the justification and moral limit of the legal order.[242] Most answers to this type of fundamental question will be bound to lead to problems of *petitio principii*. Perhaps the closest thing to an answer as to why the courts are correct in setting such store by human rights as a good to be pursued is that 'there is

[240] *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 987.

[241] JH Barrington—representative, together with D Maxwell Fyfe, of the United Kingdom in the drafting of the European Convention—expressed what he called the British draftsmen's great debt to Lauterpacht, from whom they 'shamelessly borrow[ed] many ideas': JH Barrington, 'The Proposed European Court of Human Right' (1949) 35 Transactions of the Grotius Society 41, 41. Also: H Lauterpacht, 'The Proposed European Court of Human Right' (1949) 35 Transactions of the Grotius Society 25, 33–34.

[242] H Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 69–70.

probably nothing which matters more to any of us during our lives on earth than that we should be properly and fairly treated as human beings'.[243]

The domestic courts in France, Germany, and the United Kingdom are, on the view taken in this study, entirely right also to see their obligations under the ECHR in objective, Kantian terms. Human rights obligations are—by dint of their sheer importance but also the non-synallagmatic way in which they are drawn up—not entirely like other obligations. The domestic courts must be correct to have taken so seriously the consequences which follow from this.

And on this basis we can also form a conclusion in relation to the approach the courts have taken to rights diversity. They now take a fastidious approach according to which they do not go against Strasbourg unless they feel, in good faith, that Strasbourg has misconstrued aspects of their domestic law. As was seen above, this is subject only to the caveat that the domestic courts have, in certain types of case, been minded to go further than Strasbourg. This approach is entirely to be approved of for the following two reasons. Going against Strasbourg could amount to making a negative contribution to the system of objective obligations that makes up the ECHR; it would have the potential of encouraging the courts of other states to do the same, the result of which would be systematic breaches of the Convention.[244] As shown above, however, the domestic courts at times go further than what follows clearly from the jurisprudence of the European Court. This too is to be approved of as this will not bind other state authorities than those of the state whose courts take this step. If the courts, or other national authorities, of other states members were to take

[243] T Bingham, *The Business of Judging: Selected Essays and Speeches 1985–1999* (2nd edn, Oxford University Press 2011) 129.

[244] Cf L Hoffmann, 'The Separation of Powers: Shadow and Substance' (forthcoming).

inspiration from such an approach then that would only lead to better compliance with the ECHR rights. This approach, too, therefore merits our support in normative terms and is to be approved of.

2.4 Thesis of the Study

From these preliminary conclusions it is possible to flesh out the thesis of this study. It is not true in descriptive terms, nor is it desirable in normative terms, that the domestic courts take an approach to the ECHR which is based most prominently upon friction and assertion of sovereignty and diversity of approach. The opposite is true, and in normative terms it has been argued here that this is as it ought to be.

The domestic courts, as exemplified by those of France, Germany, and the United Kingdom, go far in avoiding friction with the European Court. Their national application of the ECHR seeks to attain four aims. This approach is based upon the importance, in the view of the domestic courts, first of *pacta sunt servanda*, and that principle's attendant good faith obligation; secondly upon a concept of human rights as a paramount good to be pursued by the legal order; upon a measure, thirdly, of positive, as opposed to negative, rights diversity; and, fourthly, upon the insight that the conclusions they reach must be capable of being universalized and to some extent applied also by the courts of other ECHR states parties. This study argues that these four elements are capable of explaining the way in which the French, German, and UK courts apply the ECHR and the jurisprudence in which the Convention has been interpreted by the European Court.

3 Incorporation: Conceptual Relationship between ECHR and National Law

3.1 Introduction

The starting point for domestic courts when they adjudicate on cases in which the relationship between domestic law and the Convention arises is the conceptual relationship between the domestic law and the Convention. Although arguably supererogatory, this statement necessary to highlight that the way in which the Convention rights are incorporated into municipal law will perforce structure (and perhaps limit) the options which are open to the domestic court seized of a case in which municipal law seems to say one thing and the ECHR another. By distilling the conceptual relationship between domestic law and the ECHR in German, French and English law, this Chapter sets the scene for the analysis in the following Chapters.

3.2 German Law

Although art 1(1)–(2) of the Basic Law (*Grundgesetz*) provides that 'human dignity is inviolable' and that 'the German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world', the rights of the ECHR do not enjoy constitutional authority in Germany.[245] The ECHR is incorporated in German law by way of statute, in the same

[245] See BVerfGE 74, 358 (370); 82, 106 (114). Also: J von Bernstorff, *Kerngehalte im Grund- und Menschenrechtsschutz* (Duncker & Humblot 2013); C Grabenwarter, 'Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten' [2012] Europäische Grundrechte-Zeitschrift 507; HJ Papier, 'Das Bundesverfassungsgericht im Kräftefeld zwischen Karlsruhe, Luxemburg und Straßburg' in HP Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity vol II* (Brill 2012) 2047–48; T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 82. See generally B Peters, 'Germany's Dialogue with Strasbourg: Extrapolating the *Bundesverfassungsgericht's* Relationship with the European Court of Human Rights in the Preventive

way as other international treaties. Formally speaking, by reason of art 59(2)(1) of the Basic Law the ECHR possesses the status of an ordinary law.[246]

Nonetheless, the German Federal Constitutional Court in 1987 held that German law—*including* the Basic Law—must be interpreted in conformity with the ECHR, in that the Convention is to be used as an 'aid to interpretation' *vis-à-vis* the norms of domestic law. This is *prima facie* incongruent with the place given by German law to the ECHR. Moreover conflicts between statutory law and the ECHR have, in a way which seems to contradict the principle of *lex posterior derogat legi priori*, generally been solved in favour of the Convention. The principle of *lex posterior* is thus modified by the constitutional principle of 'openness to international law' (*Völkerrechtsfreundlichkeit*). On this basis the Federal Constitutional Court in *Görgülü*[247] held that both the Convention rights and the jurisprudence of the European Court must be taken into account when interpreting German law.

Detention Decision' (2012) 13 German Law Journal 756; W Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011) 191–229; S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen I* (Mohr Siebeck 2001) 36–37, 134, 211–12; C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 513; C Grabenwarter, 'Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte—am Beispiel des Falls M. gegen Deutschland' (2010) 65 Juristenzeitung 857; A Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 European Constitutional Law Review 175; A Zimmermann, 'The Effect of the ECHR on the Legal and Political Systems of Member States' in R Blackburn & J Polakiewicz (ed), *Fundamental Rights in Europe: The European Convention and its Member States, 1950–2000* (Oxford University Press 2001); J Limbach, 'The Protection of Human Rights in Germany' in BS Markesinis (ed), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Hart 2000) 153; M Payandeh, 'Konventionswidrige Gesetze vor deutschen Gerichten' [2011] Die öffentiche Verwaltung 382, 386–87; L Viellechner, 'Berücksichtigungspflicht als Kollisionsregel' in N Matz-Lück & M Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem: Konkurrenzen und Interferenzen* (Springer 2012) 109.

[246] T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 82.

[247] BVerfGE 111, 307.

The limit and the content of the duty identified in *Görgülü* remain unclear, however. The duty does not meet the threshold of binding norm (ie as to what material result must be reached), but at the same time exceeds a content-neutral exhortation to look at the ECHR and its associated jurisprudence. This much is clear from the fact that reasons must be given as to why a court that decides not to follow these sources chooses to do so.

The Constitutional Court in *Preventive Detention II* did go some way in further explaining what is entailed by this duty. The Court said in *Preventive Detention II* that the duties flowing from the ECHR must be 'translated'.[248] It seems that by underlining this the Court has given itself some leeway in future cases where the exact adoption of a Convention solution appears impossible. One thing is certain, however, and that is that the professed fear on the part of German courts, such as the Constitutional Court in *Görgülü*, that the reception of ECHR law into German law might lead to a watering down of German fundamental rights has been laid to rest.[249]

The ECHR was introduced into German law via an item of federal legislation in 1952.[250] This means that the Convention rights have precedence over any *Land* law, in line with Article 31 of the Basic Law. It also means, according to the *lex superior* principle, that they take precedence over any secondary federal legislation and, according to the *lex posterior* principle, that they take precedence over any anterior primary federal legislation. The obverse of this is that the Convention rights,

[248] BVerfGE 128, 326 [92].

[249] M Payandeh & H Sauer, 'Konvergenzen von Grundgesetz und EMRK im Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung' [2012] Jura 289, 295–96.

[250] Act on the Convention for the Protection of Human Rights and Fundamental Freedoms (*Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*) of 7 August 1952, Federal Law Gazette (Bundesgesetzblatt—BGBl) 1952 II 685.

according to the *lex posterior* principle, take second place to later primary federal legislation and, according to the *lex superior* principle, take second place to all constitutional norms.[251]

It bears mention here that Germany has never had great difficulties complying with its obligations under the ECHR. The number of violations against Germany in 2009 was 18, compared to 61 against Italy—an apt comparator on the basis of size and history. During the period 1959–2009 the Strasbourg system faulted Germany in a mere 99 judgments, as compared to the 1556 adverse determinations it reached against Italy.[252] This may contribute to the view—traditionally common amongst German judges—that the high standards of protection afforded by the Basic Law render the Convention superfluous.

The provisions concerning rights in ch 1 of the Basic Law have much the same structure as the rights set out in the ECHR. This is not surprising in light of the fact that their drafting was largely contemporaneous and based on many of the same principles, most notably the recognition of the individual being possessed of a bundle of fundamental rights *vis-à-vis* the state, interference with which is acceptable only if proportionate to the social outcome sought.

This necessitates a brief historical excursus. Of the core states involved in the drafting of the ECHR—a process starting in early 1948 leading up to its signing at Rome on 4 November 1950—Germany was conspicuous in its absence, presumably

[251] T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 82–83.

[252] C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 513, 514–15.

for reasons connected to the preceding war.[253] The same reasons which seemed to militate against German jurists playing any meaningful role in the drafting of the Convention may also go some way to explaining why rights protection was to attain basal significance—indeed becoming part of the 'constitutional identity'[254]—in the Federal German Republic.

In the 1952–53 *Comité d'études pour la constitution européenne* (CECE), set up by members of the *Mouvement européen* with a view to contributing to the drafting of a constitution for a European political community, German representatives played an important role. Its 26-member Constitutional Committee was chaired by the German lawyer and Parliamentarian Heinrich von Brentano, and also included German Parliamentarian Max Becker. Much energy was expended on the question of how best to protect fundamental rights in Europe. The response of the German delegation to the proposal, mooted by the Italian delegation, that the committee ought to give more attention in its drafting work to '*les droits de l'homme et des libertés fondamentales*', was perhaps indicative of why Germany in later decades would see so few adverse judgments against it in what was to become the European Court of Human Rights. The protection of fundamental rights, thought the German delegation, was better left to the nation states.[255] In any event the structure of the first chapter of the Basic Law which deals with fundamental rights (arts 1–19) bear close, even filial resemblance to the rights established in the ECHR. It has been pointed out that—

[253] See generally AWB Simpson, *Human Rights and the End of Empire: Briatin and the Genesis of the European Convention* (Oxford University Press 2001) chs 12–14.

[254] See for a recent example BVerfGE 123, 267 (340).

[255] G De Búrca, 'The Evolution of EU Human Rights Law' in P Craig & G De Búrca (ed), *The Evolution of EU Law* (Oxford University Press 2011) Ch 11.

obvious differences in the chosen drafting language aside—even the register in which the rights of the Basic Law and the ECHR are couched evinces striking similarities.[256]

Giegerich has pointed out that the 'hierarchical infirmity' (*rangmäßige Schwäche*) of the chosen method of incorporation of the Convention rights in German law risks incurring the danger that Germany, through its internal law, should be in breach of its international obligations. In most cases, however, this situation is avoided, as the courts opt for an interpretation conforming with the ECHR of both posterior primary federal legislation and constitutional norms.[257] The hierarchical infirmity of incorporation is ameliorated further by the principle of 'openness of the Basic Law towards international law' (*Völkerrechtsfreundlichkeit des Grundgesetzes*), according to which it cannot be assumed that the statutory or constitutional legislator wanted to create a breach of international obligations.[258]

The Federal Constitutional Court in *Presumption of Innocence*[259] said that the eponymous right is an aspect of the rule of law (*Rechtsstaatsprinzip*)[260] and as such enjoys constitutional status. It is also incorporated in German law through art 6(2) of

[256] C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 513, 515.

[257] T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 84.

[258] BVerfGE 74, 358 (370); BVerfGE 111, 307 (317).

[259] BVerfGE 74, 358.

[260] Though the *Rechtsstaatsprinzip* and the common law notion of the rule of law (as well as the French 'la primauté du droit' or 'l'État de droit') could be seen as being equivalent to each other they also differ from each other in significant respects: J Bell, 'Comparative Administrative Law' in M Reimann & R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (paperback edn, Oxford University Press 2008) 1271; L Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany* (Oxford University Press 2004) 34–36; F Bignami, 'Comparative Administrative Law' in M Bussani & U Mattei, *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 156–57; DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press 1997) 36–37.

the ECHR as federal law.[261] The Court said that when it had previously had recourse to the wording of art 6(2) in order to expound the constitutional guarantee of the presumption of innocence,[262] that was because of the legal effect which the Convention has on the relationship between the fundamental rights of the Basic Law and the related ECHR rights. When a court interprets the Basic Law, the Court continued, it must take account of (*in Betracht ... ziehen*) the development of the Convention rights, so long as this does not represent an infringement on the protection guaranteed by the Basic Law. The jurisprudence of the European Court therefore serves as an 'aid to interpretation' for expounding the content and reach of fundamental rights and the rule of law in the Basic Law.[263] The Constitutional Court further held that the same applies to statutes, even when they have been enacted after the international legal obligation in issue. The reason for this is, as described above, that one cannot assume 'that the legislator, unless express provisions have been made, wanted to deviate or allow infringements on such obligations'.[264]

This approach is in line with the obligation incumbent upon German courts to interpret statutes in conformity with international law in the broader sense. Both treaty and customary norms will form a basis to which statute interpretation must conform.[265] The courts must operate on the assumption that the legislator, unless he or

[261] BVerfGE 19, 342 (347); BVerfGE 22, 254 (265); BVerfGE 25, 327 (331); BVerfGE 35, 311 (320).

[262] See BVerfGE 35, 311 (320).

[263] BVerfGE 74, 358 (370). Also: A Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 European Constitutional Law Review 175, 187; C Grabenwarter, 'Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten' [2012] Europäische Grundrechte-Zeitschrift 507, 509–10.

[264] BVerfGE 74, 358 (370).

[265] S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen I* (Mohr Siebeck 2001) 36–37,

she has made any declarations to the contrary, intends the laws of Germany to respect international law.[266]

However, statutory interpretation that conforms with the ECHR (*konventionskonforme Auslegung*) can only go so far. It is not possible to read down a statute where it is clear that deviation from the Convention was desired.[267] Nonetheless, at the time of writing the Federal Constitutional Court has never relied on the *lex posterior* principle to circumvent the ECHR in an interpretive sense.[268]

The leading case in this regard is *Görgülü*,[269] which has been seen as an instance of the Federal Constitutional Court taking the occasion to elucidate its understanding of the relationship between the ECHR and German law. It has been further suggested that the judgment in *Görgülü* a demonstration of strength *vis-à-vis* the Strasbourg Court,[270] with the Constitutional Court stating that it was incumbent upon the authorities and courts of the Federal Republic of Germany, under certain conditions, 'to take account of the European Convention on Human Rights as

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134, 211–12; J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 89–90.

[266] S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen I* (Mohr Siebeck 2001) 211–12.

[267] BVerfGE 74, 358 (370); BVerfGE 111, 307 (317–28).

[268] T Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 84; C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 513, 519; C Grabenwarter, 'Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten' [2012] Europäische Grundrechte-Zeitschrift 507, 509.

[269] BVerfGE 74, 358. See particularly C Grabenwarter, 'Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte—am Beispiel des Falls M. gegen Deutschland' (2010) 65 Juristenzeitung 857.

[270] C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 513, 522.

interpreted by the Strasbourg Court in making their decisions'.[271] It has been pointed out that its chosen wording ('take account') is weaker than what had earlier been used (such as 'comply by' and 'abide by).[272] The Constitutional Court went on to say that if

> the Strasbourg Court establishes that there has been a violation of the Convention, and if this is a continuing violation, the decision of the Strasbourg Court 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 comprehensibly why they nevertheless do not follow the international interpretation.[273]

Against this background the Constitutional Court held that the lower courts had not been bound 'regarding the actual outcome' (*im konkreten Erbegnis*).[274] The Constitutional Court reinforced its conclusion by pointing out that the application of ECHR rights may at times be compounded by the existence of 'multipolar fundamental rights situations',[275] ie situations in which the state action under review is intended to protect the rights of third parties, being rights-holders other than the claimant. In view of this the Court noted that there may 'be constitutional problems if one of the subjects of fundamental right in conflict with one another obtains a judgment from the Strasbourg Court in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private law relationship'.[276] This led the lower courts again to find against Mr Görgülü, before the

[271] BVerfGE 111, 307 (315).

[272] C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 513, 523.

[273] BVerfGE 111, 307 (324).

[274] BVerfGE 111, 307 (332).

[275] BVerfGE 111, 307 (324).

[276] BVerfGE 111, 307 (324).

Constitutional Court issued an injunction against the Court of Appeal and handed down a judgment setting the matter straight, in favour of the claimant and in keeping with the adverse judgment by the European Court against Germany.[277] The balance which *Görgülü* tried to strike in this respect is encapsulated in the following dictum by Constitutional Court: 'The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty encapsulated in the last instance in the German constitution'.[278]

To sum up, *Görgülü* reflects the following about the relationship between German law and the Convention rights: (1) the ECHR is incorporated in German law by way not of constitutional law but of statute, and this is to be taken seriously; (2) if the European Court determined a breach of the Convention rights on the part of Germany, and the breach of the Convention is a continuing one, then the German courts must take into account (*berücksichtigen*) the relevant judgment; (3) 'taking into account', however, means only that comprehensive reasons must be given if the national courts find that they are unable to follow the Strasbourg decision at issue; (4) if the European Court has held that a German statute is in breach of the Convention rights then this may either be interpreted in conformity with the relevant provision of the ECHR, or the legislator may change the legislation; (5) the legislation at issue may be interpreted in conformity with Convention rights only to the extent that the interpretation follows the exigencies of rational statute interpretation (*im Rahmen methodisch vertretbarer Gesetzesauslegung*), and the language may not be strained beyond comprehension. German courts are furthermore obliged to interpret the

[277] See BVerfGE 1 BvR 2790/04.

[278] BVerfGE 111, 307 (319). Also: BVerfGE 123, 267 (340).

legislation in conformity with the Convention as far as possible.[279] It bears mention that the statutory provisions in issue in *Görgülü* were amenable to a congruent interpretation—thus matters did not come to a head in the way in which they might have done had the statute not been so susceptible.

The Federal Constitutional Court in *Preventive Detention II* again had cause to illuminate the conceptual relationship between German law and the ECHR. The European Court in *M v Germany*[280] had held that the continued (preventive) detention beyond the 10-year period which had been the statutory maximum at the time of the applicant's offence and conviction was in breach of art 5(1) of the Convention, and that the retrospective extension of the preventive detention to an effectively unlimited period of time was in breach of art 7(1).

The textual clash between the ECHR on the one hand, and the German statutory provisions on the other was dramatic. Article 67(d) of the Criminal Code provided:

> (2) If there is no provision for a maximum duration or if the time-limit has not yet expired, the court shall suspend on probation further execution of the detention order as soon as it is to be expected that the person concerned will not commit any further unlawful acts on his or her release. Suspension shall automatically entail supervision of the conduct of the offender.
>
> (3) If a person has spent ten years in preventive detention, the court shall declare the measure terminated if there is no danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims. Termination shall automatically entail supervision of the conduct of the offender.

[279] BVerfGE 111, 307 (323–24). Also: C Grabenwarter, 'Wirkungen eines Urteils des Europäischen Gerichtshof für Menschenrechte—am Beispiel des Falls M. gegen Deutschland' (2010) 65 Juristenzeitung 857, 862.

[280] *M v Germany* App No 19359/04 judgment of 17 December 2009.

This was plainly given retroactive effect by s 1(a)(3) of the Introductory Act to the Criminal Code:

> Article 67d of the Criminal Code, as amended by the Combating of Sexual Offences and Other Dangerous Offences Act of 26 January 1998 (Federal Gazette I, p. 160), shall apply without restriction.

The Federal Constitutional Court summarized its approach as follows:

> The starting point is that the ECHR is incorporated into German law by way of statute only. The ECHR does, however, serve as 'interpretation aids' (*Auslegungshilfe*) in the interpretation of German fundamental rights and rule of law principles of the Basic Law. The same is the case with the Strasbourg jurisprudence; it too will influence the interpretation of the German constitutional precepts. The influence of the ECHR and of the Strasbourg jurisprudence will, however, only go so far as it is methodologically reasonable and in conformity with the exigencies of the Basic Law. The constitutional importance of the ECHR and the Strasbourg jurisprudence is a function of the openness to international law of the Basic Law, and of the prominent position which human rights have been accorded in the Basic Law. The recourse to the ECHR and the Strasbourg jurisprudence as interpretation aids does, however, not require there to be any kind of schematic parallelisation between the requirements of the Basic Law and those of the ECHR.[281]

The Court further underscored the importance of the role played by human rights in the Basic Law:

> The prominent position which human rights enjoy in the Basic Law is given expression particularly in the attachment of the German people to inviolable and inalienable in human rights in art 1(1)(2) of the Basic Law.

The Federal Constitutional Court had in *Görgülü* referred to the position of human

[281] BVerfGE 128, 326 [86].

rights in the Basic Law. It had, however, never previously referenced art 1(1)(2) in such an explicit fashion. In this, *Preventive Detention II* is emblematic of a new approach wherein the Court rendered art 1(1)(2) 'a maxim for the interpretation of the Basic Law'.[282] It seems that the court here gave its imprimatur to the approach advocated for some years in legal doctrine, that one has to take seriously the constitutional fact that the Basic Law itself refers to the importance of international human rights.[283]

Another point is partly to do with the terminology in which *Preventive Detention II* is drafted. Whilst the *Görgülü* ruling had said that 'the authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the European Court', the Federal Constitutional Court in *Preventive Detention II* ruled that the duty to apply the ECHR in national law exceeded this position. What was required was more than a duty only to 'take into account', as the Basic Law aims to avoid conflict between international obligations of the Federal Republic of Germany and national law.[284] As the court said in *Preventive Detention II*, '[t]he openness of the Basic Law thus expresses an understanding of sovereignty which not only does not oppose international and supranational integration; it presupposes and expects it'.[285]

[282] BVerfGE 128, 326 [90].

[283] See, generally, J von Bernstorff, 'Pflichtenkollision und Menschenwürdegarantie: Zum Vorrang staatlicher Achtungspflichten im Normbereich von Art. 1 GG' (2008) 47 Der Staat 21; *Kerngehalte im Grund- und Menschenrechtsschutz* (Duncker & Humblot 2013).

[284] BVerfGE 128, 326 [89].

[285] BVerfGE 128, 326 [89].

While *Preventive Detention II*, when compared to *Görgülü*, does not represent a fundamental shift in German jurisprudence one should not underestimate that the Federal Constitutional Court in *Preventive Detention II* went to great lengths to avoid a clash with the ECHR and with the European Court.[286] The textual disjunction between the statutory scheme and the Convention was plainly more dramatic in *Preventive Detention II* than it had been in *Görgülü*. It therefore demonstrates that the rule based on the principle of *lex posterior* is no more than a nominal starting point in an interpretive process within which the German courts will go very far in interpreting the standards of the Basic Law in light of the Convention, such that it is effectively the principle of *lex superior* which dictates the reading or striking down of the statute concerned.

It has been affirmed that the Federal Constitutional Court in *Preventive Detention II* adopted a solution which builds upon a cooperative and dialogue-based relationship with the ECHR; it promoted an integrative solution and sought, so far as possible, to combine the reasoning and jurisprudence of the European Court with a municipal constitutional interpretation.[287] The Court in *Preventive Detention II* therefore did not shy away from engagement with the issue, but instead explored the frontiers of constitutional interpretation, actively and constructively taking on board in its interpretation and application of constitutional rights the jurisprudence of the European Court without losing sight of the characteristics of German law.[288] President

[286] C Grabenwarter, 'Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten' [2012] Europäische Grundrechte-Zeitschrift 507, 512–14.

[287] B Peters, 'Germany's Dialogue with Strasbourg: Extrapolating the *Bundesverfassungsgericht's* Relationship with the European Court of Human Rights in the Preventive Detention Decision' (2012) 13 German Law Journal 756, 771.

[288] M Payandeh & H Sauer, 'Konvergenzen von Grundgesetz und EMRK im Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung' [2012] Jura 289, 298.

Voßkuhle made the point, already before *Preventive Detention II* was handed down, that 'those keen to see duels should go to the flicks':[289] as such it seems clear that on the rare occasions on which German law and the law of the ECHR collide then German courts are willing to go to great lengths to make sure that domestic law is in conformity with the demands of the Convention rights.

3.3 UK Law

The Convention was incorporated into UK law through the Human Rights Act 1998 (UK) (HRA), s 1 of which enlists the 'Convention rights' which can be the subject of litigation before the courts. These are arts 2–12 and 14 ECHR, arts 1–3 of the First Protocol, as well as arts 1–2 of the Sixth Protocol as read with arts 16–18 of the Convention. Thus art 13, on the right to an effective remedy, is excluded from the domestic law of the United Kingdom. Section 11 of the Act provides that a person's reliance upon a Convention right does not restrict their rights or freedoms conferred 'by or under any law having effect in any part of the United Kingdom'.

The Convention rights within the meaning of the HRA are thus domestic and not international rights, although the domestic rights so created are expressed in the same terms as those contained in the Convention. Put another way, their formal source is the HRA itself, not the Convention. This is clear from Lord Bingham's judgment in *Al-Skeini* where he stated that the object of the HRA could have been achieved by a simple incorporation of the Convention (or some or all of its articles) into domestic law but this was not done. An approach was chosen according to which 'there is a

[289] A Voßkuhle, 'Wer Duelle liebt, soll ins Kino gehen' *Süddeutsche Zeitung* 13 October 2010 at 5.

distinction between rights arising under the Convention and rights created by the 1998 Act by reference to the Convention'.[290] Lord Hoffmann expanded on this in *Re P*:

> 'Convention rights' within the meaning of the 1998 Act are domestic and not international rights. They are applicable in the domestic law of the United Kingdom and it is the duty of the courts to interpret them like any other statute. When section 6(1) says that it is unlawful for a public authority to act incompatibly with Convention rights, that means the domestic rights set out in the Schedule to the Act and reproducing the language of the international Convention.[291]

The view has been expressed that the HRA (together with a few other statutes which condition in some principled manner the legal relationship between citizen and state) falls within a special category of statute that is entitled to a certain level of immunity from additional legislative interference.[292] This view holds that, while ordinary statutes were subject to the doctrine of implied repeal, the common law has modified the traditional concept of sovereignty, by creating exceptions to the doctrine of implied repeal. Those norms referred to as 'constitutional statutes', of which the HRA

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[290] *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [10] (Lord Bingham).

[291] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [33] (Lord Hoffmann). Also: *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 [27] (Lord Hoffmann); *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [25] (Lord Birkenhead), [62]–[65] (Lord Hoffmann); *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 [32]–[34] (Lord Nicholls). Cf A Le Sueur, M Sunkin, and JE Khushal Murkens, *Public Law* (2nd edn, Oxford University Press 2013) 749 who may take a different perspective when they state that 'the HRA gives domestic effect to rights and freedoms that are established by the ECHR, which have been interpreted and explained by the Strasbourg institutions; the HRA did not establish new free-standing rights'.

[292] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151. See the debate in A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 301–02; P Craig, 'Britain in the European Union' in D Oliver & J Jowell (eds), *The Changing Constitution* (Oxford University Press 2011) Ch 4; T Khaitan, 'The "Constitution" as a Statutory Term: Another Step towards a Legal Constitution' (forthcoming). Cf D Campbell & J Younger, 'The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws' [2002] PL 399; NW Barber & AL Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] 112; AL Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) 31–63; A Tomkins, *Public Law* (Oxford University Press 2003) 123.

is seen to be one, are not subject to the doctrine of implied repeal.[293] The repeal or disapplication of such a statute may occur only in the case where one finds 'express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible'.[294]

This view is not, however, unequivocally confirmed by the Supreme Court or the House of Lords.[295] In *Watkins* Lord Rodger stated that efforts to stand on its feet a catalogue of rights under 'constitutional statutes' was unnecessary: 'the Convention rights form part of our law and provide a rough equivalent of a written code of constitutional rights, albeit not one tailor-made for this country'.[296] The position of the top court seems to support Dickson's proposition that United Kingdom has 'internationalized rather than constitutionalized its system for protecting fundamental rights'.[297]

Thus, whilst perhaps stopping short of drawing up a catalogue of constitutional rights, the UK courts have gone far in incorporating the Convention rights into the waft and weave of the common law. Judges within the UK judiciary have been at pains to defend both the place of the HRA and the Convention rights it creates within UK law. Their view taken by the UK judiciary of the ECHR and of the

[293] Other examples are said to include Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Scotland Act 1998, and the Government of Wales Act 1998: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [62] (Laws LJ).

[294] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [63].

[295] B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 20–30.

[296] *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395 [62]–[64] (Lord Rodger).

[297] B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 31.

HRA is attested to by the numerous interventions made by senior judges in the last few years. In the face of criticism of the ECHR, Lord Bingham once said that whilst it may be that there are rights which could valuably be added to the Convention, there were none that could safely be discarded.[298] Lord Neuberger, President of the Supreme Court, in 2013 defended both the European Court as well as its jurisprudence from criticism in the United Kingdom, criticism which to his mind was 'exaggerated' and 'slanted',[299] whilst Baroness Hale said of the prospect that the HRA should be repealed that: 'I am quite sure that most of us—probably all of us—would regret it, because the opportunity for us, ourselves, to work out what is, and what is not, compatible with the European convention has brought great benefits to the law and to a great many people'.[300]

Section 2(1) of the HRA contains a requirement for the courts to 'take into account' Convention case law,[301] prompting doctrinal debate as to the implications of the term.[302] For the present purposes it is not necessary to enter into this debate: suffice to say that his provision does not operate in isolation. Section 6(1) too is of importance in this regard. As Baroness Hale said in *McCaughey* HRA s 6(1) makes it

[298] T Bingham, *The Rule of Law* (Allen Lane 2010) 84.

[299] O Bowcott, 'Senior Judge Warns over Deportation of Terror Suspects to Torture States' *The Guardian*, 5 March 2013.

[300] J Rozenberg, 'Judges Would Regret Human Rights Act Repeal, warns Lady Hale' *The Guardian*, 14 March 2013.

[301] See A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) Ch 6; A Le Sueur, M Sunkin, and JE Khushal Murkens, *Public Law* (2nd edn, Oxford University Press 2013) 749–50; J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720.

[302] D Irvine, 'A British Interpretation of Convention Rights' [2012] PL 237; P Sales, 'Strasbourg Jurisprudence and the Human Rights Act' [2012] PL 253; F Klug & H Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' [2010] EHRLR 621; J Wright, 'Interpreting Section 2 of the Human Rights Act: Towards an Indigenous Jurisprudence of Human Rights [2009] PL 595; N Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] EHRLR 505; R Clayton, 'Smoke and Mirrors: The Human Rights Act and the Impact of the Strasbourg Case Law' [2012] PL 639.

'unlawful for a public authority to act in a way which is incompatible with a convention right'.[303] What is 'incompatible with a convention right' will, however, often be the very thing to be proven.

Thus Lord Hoffmann in *AF* considered that, although it was true that s 2(1)(a) required the courts only to 'take into account' Strasbourg decisions, 'the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the [European Court] on its interpretation'.[304] The orthodox approach of the UK courts to the jurisprudence of the European Court is now set out by Lord Neuberger in *Pinnock.* His remarks bear quoting at length:

> This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law …. Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. … Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.[305]

[303] *Brigid McCaughey & Another* [2011] UKSC 20, [2012] 1 AC 725 [26] (Baroness Hale).

[304] *AF v Secretary of State for the Home Department & Another* [2009] UKHL 28, [2010] 2 AC [70] (Lord Hoffmann). Also: [98] (Lord Rodger).

[305] *Manchester City Council v Pinnock (Nos 1 and 2)* [2010] UKSC 45, [2011] 2 AC 104 [48] (Lord Neuberger MR).

One further point must be highlighted. While the so-called 'mirror principle' from *Ullah* has been the rule and contrary occurrences have been exceptional,[306] it is not always clear what follows from the Strasbourg jurisprudence. This much seems clear from cases such as *Ambrose*, where Lord Kerr held that the mirror principle was ripe for revision, as it had lead to his mind to what he termed '*Ullah*-type reticence' towards the European Convention:

> On the basis of this, it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but there is also the view that we should not go where Strasbourg has not yet gone.[307]

In the same vein as Lord Kerr in *Ambrose*, Lord Wilson said in *Sugar* that he would welcome an appeal 'in which it was appropriate for this court to consider whether, of course without acting extravagantly, it might now be useful to do more than to shadow the [European Court] in the manner hitherto suggested'.[308] The approach suggested by these recent dicta seems to have received support in doctrine. Craig, for example, argues for an approach to the jurisprudence which is based on ECHR principles rather than strict adherence to *Ullah*.[309] Though such a change in approach would not alter in structural terms the position which the European Convention enjoys in UK law, it would nonetheless have a significant practical impact on the adjudication of cases under the

[306] See 2.2.3 above.

[307] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [126] (Lord Kerr).

[308] *British Broadcasting Corporation & Another v Sugar* [2012] UKSC 4, [2012] 1 WLR 439 [59] (Lord Wilson), [113] (Lord Mance).

[309] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 586–87; A Le Sueur, M Sunkin, and JE Khushal Murkens, *Public Law* (2nd edn, Oxford University Press 2013) 750–51; R Clayton, 'Smoke and Mirrors: The Human Rights Act and the Impact of the Strasbourg Case Law' [2012] PL 639, 652–53; N Bamforth & LC Hoyano, *Human Rights Law and Principles in the United Kingdom* (Oxford University Press 2013) Ch 9.

HRA. In a number of cases the Supreme Court has held that it could not rely on a Convention right on the facts of the case in issue, as a case on similar facts had not been adjudicated on by the European Court, and might have decided differently had it not been for the mirror principle.[310] This will be dealt with in further detail in Chapter 4.

Section 3 HRA provides that if legislation is challenged 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Section 3 does not affect the validity, continuing operation, or enforcement of any incompatible primary legislation;[311] nor does it affect the validity of incompatible secondary legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of incompatibility.[312] *Ghaidan v Godin-Mendoza*[313] is the leading case on the interpretation of statutes under s 3(1).[314] It is clear from *Ghaidan* that the application of s 3 does not depend upon ambiguity in the legislation that is interpreted.[315] While the natural starting point is the wording used by Parliament, this is not determinative.[316] It is open to the courts to read in words which alter the meaning of the enacted legislation, so as to make it Convention-complaint; s 3 enables language to be interpreted restrictively or expansively in order to

[310] See for example *McGowan (Procurator Fiscal, Edinburgh) v B (Scotland)* [2011] UKSC 54, [2011] 1 WLR 3121; *Jude, Hodgson, and Birnie v Her Majesty's Advocate* [2011] UKSC 55, [2012] SLT 75; *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435; *British Broadcasting Corporation & Another v Sugar* [2012] UKSC 4, [2012] 1 WLR 439; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

[311] HRA s 3(2)(b).

[312] HRA s 3(2)(c).

[313] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

[314] See A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 88–90; B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 66–68; P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 592–94.

[315] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [29] (Lord Nicholls).

[316] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [31] (Lord Nicholls).

achieve Convention-compliance.[317] There are, however, limits to the use of s 3(1). The courts may not adopt a 'meaning inconsistent with a fundamental feature of legislation'; more generally the courts should not rely upon s 3 in order to adopt an interpretation of legislation for which they are ill-equipped, such as where the interpretation would bring about far-reaching change of a kind best dealt with by Parliament.[318] This robust approach was well summarized by Lord Phillips in *Ahmed* as extending the reach of s 3 'beyond that of the principle of legality',[319] that is, beyond the principle that legislation can only abrogate certain common law rights expressly or by necessary implication.[320]

3.4 French Law

The impact of the ECHR on French law is the result of several factors. First, and perhaps most importantly, France is a monist state.[321] An international treaty, signed and ratified, is part of internal French law from its publication, with superiority over ordinary legislation. This follows directly from art 55 of the French Constitution of 1958:

> Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.[322]

[317] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [32] (Lord Nicholls).

[318] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [33] (Lord Nicholls).

[319] *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 [112] (Lord Phillips).

[320] See *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 AC 115 (HL) 131 (Lord Hoffmann).

[321] See, for example, Conseil d'État, 11 April 2012 *GISTI*.

[322] Article 55 of the French Constitution: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.' C Rousseau, 'La constitution de 1958 et les traités internationaux' in *Hommage d'une génération de jurists au président Basdevant* (Pedone 1960) 463; B Stirn, D

It also follows from the principle of monism that the ECHR is directly applicable before French courts.

When the administrative courts recognize the incompatibility of a statute with a treaty norm, such as the Convention, they do so by way of failing to apply the statute in issue. The courts do not strike down the statute, as they do not possess the power to do so. Thus, outside of the conflict considered by the court, the statute will continue to produce effects in the national legal order. It will be up to the Parliament to modify the statute in question with a view to making it compatible with the Convention.

Article 54 of the French constitution provides that in the case of a conflict between a treaty and the Constitution, the treaty in issue may not be ratified until after a constitutional amendment.[323] If any remains, the Conseil constitutionnel may rule on the conformity of the signed but as yet un-ratified treaty with the Constitution. It is obvious from this procedure that treaties are considered in French law to be subservient to the Constitution. This has been confirmed in the jurisprudence of the Conseil d'État.[324] Though the framework was on its face one according to which the Convention should, *prima facie*, have been given full recognition from day one this

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Fairgrieve & M Guyomar, *Droits et libertés en France et au Royaume-Uni* (Odile Jacob 2006) 240–41; S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen I* (Mohr Siebeck 2001) 328; B Stirn, *Vers un droit public européen* (Montchrestien 2012) 78–79; JB Auby, *La globalisation, le droit et l'État* (2nd edn, LGDJ 2010) 85–89 & 240–46.

[323] See J Bell, S Boyron, and S Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 18–19.

[324] Conseil d'État, 3 July 1996 *M Koné*; Conseil d'État, 30 October 1998 *M Sarran, Levancher et autres*; Conseil d'État, 3 December 2001 *Syndicat national des industries pharmaceutiques*.

was not the case; instead what took place, beginning in the 1970s, was the gradual integration of the Convention into the fabric of French law.

France ratified the ECHR in 1974. Although French citizens could not bring cases to the European Court before 1981, the ECHR could be directly evoked before domestic courts. In many European legal systems, not least in Western Europe, a certain idea existed that the system of the European Convention could add only very little to the rights protection afforded by the national system. This was not the case when in 1981 France's Minister of Justice and later President of the Conseil constitutionnel, Robert Badinter, established an avenue for French applicants to take their case to the European Court, later affirming the value of external judicial examination of the activities of the French state vis-à-vis its citizens:

> la meilleure défense des nos libertés résidait dans le contrôle de conformité des lois et jugements à la Convention européenne des droits de l'homme par la Cour de Strasbourg.[325]

Prior to Badinter's actions, the ECHR was invoked before the French courts only rarely, which no doubt in part informed Badinter's view of the necessity of allowing French citizens to take their cases to the European Court. The Cour de cassation already in 1975, in its decision *Société des cafés Jacques Vabre*, held that EC law takes precedence over statutes even where the latter was later in time,[326] and this

[325] R Badinter, *Les Épines et les Roses* (Fayard 2011) 241. Also: M Andenas & E Bjorge, 'L'application de la Convention européenne des droits de l'homme: quel rôle pour le juge interne?' [2012] Revue international de droit comparé 383, 415.

[326] Cour de cassation, 24 May 1975 *Société des Cafés Jacques Vabre*.

solution, *mutatis mutandis*, also applies with respect to ECHR law.[327] The *Jacques Vabre* decision is seen as the moment at which French law acknowledged that it is bound by superior European law. It was also the moment at which the French judiciary accepted for the first time to exercise judicial review of French law, after which point individuals could come before the ordinary courts to block the operation of municipal law on the basis of rights derived from EC and ECHR law. The Conseil constitutionnel held in 1975 that it was outside its ambit, in its capacity of adjudicator of the conformity of statutes to the constitution, to adjudicate on whether laws were in conformity with the European Convention, making this the task of ordinary judges. This has later consistently been upheld, such as in the 2010 ruling *Jeux en ligne*, where the Conseil constitutionnel expressly distinguished between

> le contrôle de conformité des lois à la constitution, qui incombe au Conseil constitutionnel, et le contrôle de leur compatibilité avec les engagements internationaux ou européens de la France, qui incombe aux juridictions administratives et judiciaires.[328]

The Conseil d'État concluded that it could exercise this type of judicial review on the basis of European law in the case of *Nicolo,*[329] where it held that a subsequent national statute could not infringe on the application of the rule flowing from an earlier international convention.[330]

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[327] See F Sudre, 'La dimension internationale et européenne des libertés et droits fondamentaux' in R Cabriallac, MA Frison-Rooche & T Revet (eds), *Libertés et droit fondamentaux* (15th edn, Dalloz 2009) 39.

[328] Conseil constitutionnel decision 2010–605, 12 May 2010, Journal officiel of 13 May 2010 p 8897 [11].

[329] Conseil d'État, 20 October 1989 *Nicolo*.

[330] See the account in M Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press 2009).

Jurisprudence such as the above has led to the suggestion that the Conseil d'État was reluctant—if not outright recalcitrant—in taking on board the demands of the ECHR. In his 1993 book *Le Conseil d'État dans la société contemporaine*[331] Jean-Paul Costa did not mention with one word the ECHR or its Court, of which he would only five years later become a member and subsequently president.[332] His book *La cour européenne des droits de l'homme: des juges pour la liberté*, published 20 years after the first one, makes of the ECHR its keystone.[333] The approach of the Conseil d'État in the late 1990s was summed up by *commissaire du gouvernement* Abraham in *Bitouzet*:

> le juge national doit accorder la plus grande importance à la manière dont une disposition de la Convention est interprétée et appliquée par la Cour et ne s'en écarter que pour des motifs tout à fait exceptionnels, et à condition que la jurisprudence européenne ne soit pas elle-même fixée de manière suffisamment stable.[334]

Today French law is among the legal systems in Europe that have gone the furthest in opening up to the demands of the European Convention.[335] This is not least the case under the current Vice President of the Conseil d'État, Jean-Marc Sauvé.[336] Sauvé has summarized the importance to the jurisprudence of the Conseil d'État of the ECHR,

[331] JP Costa, *Le Conseil d'État dans la société contemporaine* (Economica 1993).

[332] See on this B Latour, *La fabrique du droit: une ethnographie du Conseil d'État* (La Découverte 2002) 17, 74.

[333] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013).

[334] Conclusions of R Abraham *Bitouzet* [1998] RFDA 1234.

[335] JB Auby, 'Le droit français vu du droit comparé' [2013] AJDA 407; M Fromont, *Droit administratif des États européens* (Presses universitaires de France 2006) 359.

[336] It should be noted parenthetically that while it is true in formal terms that the Conseil d'État is headed by the head of the government, the prime minister, it is for all intents and purposes the Vice President who is the head of the Conseil d'État; in this sense he or she is, in addition also to being the French Republic's most senior civil servant, not vice and in terms of the Conseil d'État second to none. See B Stirn, *Le Conseil d'État: son rôle, sa jurisprudence* (Hachette 1994).

as interpreted by the European Court, as much more than mimicry and reproduction of the solutions adopted by the European Court. While in his view the administrative courts rarely go further than the European Court they in no way restrain themselves of the option of anticipating this jurisprudence or giving, according to the circumstances, a broader scope to the Convention rights than Strasbourg has done.[337] On the whole, Sauvé has made it very clear that the system set up by the ECHR enjoys a very important place in the view of the Conseil d'État and has defended the European Court as having 'made an exceptional contribution to the protection of fundamental rights and freedoms' and stated that in Europe 'the European system for the protection of human rights is our common good'.[338]

The right of individuals to take their case to the European Court has led the latter to verify the compatibility of French law with the standards flowing from the ECHR and at a number of occasions to find that French law falls foul of the Convention. The jurisprudential armoury of administrative judges has, as described above, grown considerably after *Nicolo*, recast in the framework of *contrôle de conventionnalité* which is exercised increasingly often.

Where French law is concerned the Convention is seen as setting a threshold of protection which the state must meet and, if national law so orders, may go beyond. The ECHR in other words does not impose on the State the introduction into

[337] JM Sauvé, 'Le judge administrative et la protection des libertés et des droits fondamentaux' in *Justices et droit du procès: du légalisme procedural à l'humanisme processuel. Mélanges en l'honneur de Serge Guinchard* (Dalloz 2010) 561.

[338] See JM Sauvé, 'Le système européen des droits est notre bien commun' *Le Monde* 27 February 2012; E Bjorge, '*Kandyrine de Brito Paiva*' (2012) 106 AJIL 353, 356.

municipal law of rules identical to those of the Convention; it delineates a standard of minimum protection, defined uniformly in the jurisprudence of the Court.[339]

Even more revealing is the manner in which the French courts mediate conflict between the Convention, as developed in the jurisprudence of the European Court, and domestic law. Sauvé has said extra-judicially that the history of the relationship between the French legal order and the Convention has been one of 'progressive acculturation'.[340] Since the beginning of the 1990s and with invigorated force—particularly after the 1996 ruling *Maubleu*[341]—the process of acculturation entered an important stage. Traditionally, many areas of French administrative law had been viewed, because of their alleged *sui generis* nature, as falling outside the scope of art 6(1) of the Convention. The Conseil d'État in *Maubleu*, however, read down the legislative provision in issue so that it was in conformity with art 6(1); as a result, suspended doctors were given, for the first time, the right to contest on the basis of art 6 findings against them in disciplinary matters. *Mableau* thus abandoned a long line of French administrative authority.[342]

This development, by which the jurisprudence of the European Court and the exigencies of the ECHR are interlaced by degrees into national law, is to an extent new, but often that which is done has long roots in the traditions of the domestic legal system. Thus it may be that there is more continuity than change in the particular case. Abraham,

[339] F Sudre, 'La dimension internationale et européenne des libertés et droits fondamentaux' in R Cabriallac, MA Frison-Roche & T Revet (eds), *Libertés et droit fondamentaux* (15th ed, Dalloz 2009) 41.

[340] JM Sauvé, 'Le Conseil d'État et l'application de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales' <http://www.conseil-etat.fr/cde/fr/discours-et-interventions/le-conseil-d-etat-et-l-application-de-la-convention-europeenne-de.html>.

[341] Conseil d'État, 14 February 1996 *Maubleu*.

[342] Conseil d'État, 11 July 1984 *Subrini* (*conclusions*: Genevois).

at the time a *commissaire du gouvernement* at the Conseil d'État, was surely right when, in 1990, he said about French administrative law that while a large place would in future be given to the ECHR, the Convention would in no way disrupt the familiar traits of French law, as both French administrative law and that of the ECHR were founded on the same idea:

> C'est la recherche de la meilleure conciliation possible entre la protection des intérêts particuliers et les impératifs de l'intérêt public, c'est l'idée que la liberté est la règle et que toute mesure qui en restreint l'exercice doit être proportionnée à l'objectif poursuivi.[343]

Abraham's point about the similarity of the two systems with respect to particularly to proportionality seems to be borne out by that which Cassin, both Vice President of the Conseil d'État and President of the European Court of Human Rights, said in a summary of the former body in 1955: 'une démocratie ne mérite ce nom que si les droits de l'homme bénéficient, une fois leur contenu délimité par les exigences de la vie en société, d'une protection effectivement sanctionnée, grâce au contrôle d'une juridiction'.[344]

[343] R Abraham, 'Les incidences de la Convention européenne des droits de l'homme sur le contentieux administratif français' (1990) 6 RFDA 1053, 1064.

[344] R Cassin, 'Préface' to M Letourneur & J Méric, *Conseil d'État et juridictions administratives* (Librairie Armand Colin 1955) 4.

4 Evolutionary Interpretation: 'The Convention is a Living Instrument'

4.1 Introduction

One of the hallmarks of the system set up by the European Convention is the so-called 'dynamic', 'evolutive', or 'evolutionary' interpretation of the Convention by the European Court. The ECHR is interpreted as 'a living instrument' in order for it to be kept abreast of 'present-day conditions' is t which must be interpreted in the light of present-day conditions'.[345] Lord McNair, the first President of the European Court, 1959–65, made the point that the type of general terms in which the European Convention is drafted is 'not stereotyped as at the date of the treaty but must be understood in the light of the progress of events and changes in habits of life'.[346] Judge Sir Gerald Fitzmaurice cast the same insight in the following terms: the ECHR should be given 'a reasonably liberal construction that would also take into consideration manifest changes or developments in the climate of opinion which have occurred since the Convention was concluded'.[347]

This approach is not without a certain mooring in the intentions of the parties to the ECHR, as expressed in the Preamble to the Convention. The Preamble states that 'the aim of the Council of Europe is the achievement of greater unity between its Members'; 'one of the methods by which the aim is to be pursued is the maintenance

[345] *Hirsi Jamaa & Others v Italy* judgment [GC] 23 February 2012 [175]; *Tyrer v United-Kingdom* (1978) 58 ILR 339, 353.

[346] A McNair, The Law of Treaties (2nd edn, Oxford University Press 1961) 467–68. Also: E Bjorge, *Evolutionary Interpretation of Treaties* (forthcoming); H Waldock, 'The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights' in *Mélanges Reuter* (Pedone 1981) 547. Also: M Sørensen, 'Do the Rights Set forth in the European Convention on Human Rights in 1950 have the Same Significance in 1975? Report presented by Max Sørensen to the Fourth International Colloquy about the European Convention on Human Rights, Rome 5–8 November 1975': reprinted in *Max Sørensen: A Bibliography* (Aarhus University Press 1988) 23, 54–55.

[347] Judge Sir Gerald Fitzmaurice, *Belgian Police* (1980) 57 ILR 262, 295.

and further realisation of Human Rights and Fundamental Freedoms'. Jean-Paul Costa, President of the Court 2007–11, said of this preambular injunction that: 'Cela implique une conception évolutive et progressive du contenu des droits reconnus, et la Cour manquerait à une partie de ses devoirs si elle ne veillait qu'à la sauvegarde des droits en négligeant l'impératif de leur développement.'[348]

During the preparatory work of the ECHR it was specifically expressed that the Court must rely in its interpretation of the Convention on general principles not such as they were when the Convention was concluded but as they should come to stand 'at any given moment':

> We state that organised international protection shall have as its aim, among other things, to ensure, that internal laws on guaranteed freedoms are in conformity with the fundamental principles of law recognised by civilised nations. What are these principles? They are laid down in much doctrinal work and by a jurisprudence which is their authority. These are the principles and legal rules which, since they are formulated and sanctioned by the internal law of all civilised nations *at any given moment*, can therefore be regarded as constituting a principle of general common law, applicable throughout the whole international society.[349]

[348] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 43.

[349] *References to the Notion of the 'General Principles of Law Recognized by Civilised Nations' Contained in the Travaux Préparatoires of the Convention* 4 (italics added); JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 43; J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 54–55. It is clear that the test which was envisaged was not an exacting one: 'From the moment when judicial law, English law, Swedish law, French law, Norwegian law, American law, lay down a sanction, or an identical or similar rule, it is possible to say that it forms part of the common heritage of civilised nations, and to deduce that, in each internal law, it is expression of a principle valid for the whole of international society.' See H Lauterpacht, *Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration* (Longmans 1927) 91–151.

In line with this the Strasbourg institutions early on understood the necessity of seeking 'the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.[350] It may be worth remembering that this approach is shared by the law of treaties more generally; it is the 'wider principle—intention of the parties, reflected by reference to the objects and purpose—that guides the law of treaties'.[351]

Equally exemplary of the ECHR system, however, is the duty of member states to make sure their internal law does not fall foul of the evolving standards of the ECHR. This follows already from art 1 which is in the following terms: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

The fact that the European Court has taken the 'living instrument' approach might suggest that the national courts could have trouble keeping up, insofar as they

[350] *Wemhoff v Germany* App No 2122/64 27 June 1968 [8].

[351] R Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski* (Kluwer 1996) 181; E Bjorge, *Evolutionary Interpretation of Treaties* (forthcoming). Also: *Young Loan Arbitration* (1980) 59 ILR 494, 531; *Dispute concerning Filleting within the Gulf of St Lawrence ('La Bretagne') (Canada/France)* (1986) 82 ILR 591, 619; *Iron Rhine* (2005) 27 RIAA 35, 65; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment ICJ Rep 2009 p 213, 242. Cf, however, G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, 512–41; R Bernhardt, 'Thoughts on the Interpretation of Human-Rights Treaties' in F Matscher & H Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymanns Verlag 1988) 65–71; J Velu & R Ergec, *La Convention européenne des droits de l'homme* (Bruylant 1990) 51; MA Eissen, 'La Cour européenne des droits de l'homme' (1986) 102 Revue du droit public 1539, 1586–87; G Cohen-Jonathan & JP Jacqué, 'Activité de la Commission européenne des droits de l'homme' (1982) 28 Annuaire français de droit international 513, 527; WJ Ganshof van der Meersch, 'Quelques aperçus de la méthode d'interprétation de la Convention de Rome du 4 novembre 1950 par la Cour européenne des droits de l'homme' in *Mélanges offerts à Robert Legros* (Éditions de l'Université de Bruxelles 1985) 209–10; WJ Ganshof van der Meersch, 'Le caractère "autonome" des termes et "la marge d'appréciation" des gouvernements dans l'interprétation de la Convention européenne des droits de l'homme' in F Matscher & H Petzold (eds), *Protecting Human Rights: The European Dimension Studies in Honour of Gérard J Wiarda* (Carl Heymanns Verlag 1988) 202.

are bound to apply a set of rights which are, on the European Court's admission, 'dynamic and evolutive'.[352] This seems, however, not to be the case in any of the three national legal systems here analysed, and it is probably not going too far to say that that is in some measure thanks to the fact that the national courts are familiar with this type of approach from their own jurisprudence.[353]

4.2 The Approach of the Domestic Courts to the Living Instrument Doctrine

4.2.1 UK Courts and the Development of the Convention Rights

As was seen in Chapter 2, the famous dictum set out by Lord Bingham in *Ullah*, that the national courts must 'keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less',[354] has to a large extent set the tone for how the UK courts have dealt with issues relating to evolutionary interpretation of the Convention. Baroness Hale in *McCaughey*[355] summarised the approach of the UK courts well when she said that it could not have been Parliament's intention that the rights incorporated through the HRA were to become ossified as the were when the act was passed or when it came into force. Rather it must have been intended, she continued,

> that the national courts would, at the very least, 'keep pace with the Strasbourg jurisprudence as it evolves over time'. If the evolutive interpretation of the Convention rights means that they

[352] *Goodwin v United Kingdom* App No 28957/95 judgment [GC] 11 July 2002 [74]; *Stafford v United Kingdom* App No 46295/99 judgment [GC] 28 May 2002 [68].

[353] See 2.2.3 above.

[354] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham).

[355] *McCaughey & Another* [2011] UKSC 20, [2012] 1 AC 725.

> now mean something different from what they meant when the 1998 Act was passed, then it is our duty to give effect to their current meaning, rather than to the one they had before.[356]

Arden LJ made the same point in *Faizovas*, where she said 'the Convention is interpreted as a living instrument and it would thus not be surprising if the standards set in earlier cases had been increased in a later decision'.[357]

Perhaps the leading case in this regard is *Re P*.[358] The claimants in this case, an unmarried heterosexual couple, lived in Northern Ireland, where statutory regulation of adoption, enacted as secondary legislation,[359] prevented courts making an adoption order in favour of an unmarried couple. They argued that this violated their right to be free of discrimination taken together with their right to respect for family life under arts 8 and 14. Though the European Court had not decided whether denying an unmarried heterosexual couple the opportunity to adopt violated art 14, the Grand Chamber in *EB v France* had held that preventing adoption by a lesbian, whose partner was loath to take on any responsibility for the child, lay outside the state's margin of appreciation in the case at issue.[360]

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[356] *McCaughey & Another* [2011] UKSC 20, [2012] 1 AC 725, 757 (Baroness Hale), 769 (Lord Dyson).

[357] *R (on the Application of Faizovas) v Secretary of State for Justice* [2009] EWCA Civ 373 (CA) [4]. Also: *R v SK* [2011] EWCA Crim (CA)1691.

[358] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173. See A Kavanagh, 'Strasbourg, the House of Lords or Elected Politicians: Who decides after *Re P*?' (2009) 72 MLR 815; T Hickman, *Public Law After the Human Rights Act* (Hart 2010) 44–45; J Lewis, '*Re P* and Others: An Exception to the 'No More, Certainly No Less' Rule [2009] PL 43; M Arden, 'Peaceful or Problematic? The Relationship Between National Supreme Courts and Supranational Courts in Europe' [2011] Yearbook of European Law 2010 3.

[359] Adoption (Northern Ireland) Order 1987 (SI 1987/2203 (NI 22)) art 14.

[360] *EB v France* App No 43546/02 judgment [GC] 22 January 2008.

Taking as its starting point that s 6 HRA, which provides that a public authority must not act in a way which is incompatible with a Convention right, applies for the courts, the House of Lords found that it was required under s 6(1) to apply the secondary legislation in a way which was compatible with Convention rights. If the secondary legislation could not be interpreted in a way compatible with the ECHR, national courts were not to apply it.

The next issue was to determine whether the Order did in fact breach Convention rights. The majority all agreed that it did, though for various reasons. Disagreement arose over whether preventing unmarried couples from adopting amounted to unjustifiable discrimination against them for the purposes of art 14. There was no definitive Strasbourg ruling on the issue. Lord Hoffmann, Lord Mance, and Lord Hope held that Strasbourg jurisprudence indicated that the ECHR prohibited such discrimination. On this point Baroness Hale disagreed, believing that it was unclear how the issue would be decided—though thinking it quite possible that the issue would be deemed to be one within the state's margin of appreciation. On Baroness Hale's account, the Strasbourg Court would therefore not find the provision unjustifiably discriminatory. Though she thought the matter would have been found to be within the margin of appreciation, this in her view did not bar a UK court from interpreting the Convention for itself. She therefore held that for the purposes of UK law the Order was discriminatory on the grounds of marital status. Lord Hoffmann, Lord Mance, and Lord Hope took the view that if Baroness Hale's view of how the Strasbourg Court would deal with the question was correct, they would follow her approach and hold that the UK should find the law in breach of the Convention rights of the applicant.

On the final issue, whether the discrimination was justified or not, the majority were unanimous in finding it was not. It was the bright-line character of the rule, devoid of any recourse to notions of proportionality, which made the rule unjustifiable. Lord Hoffmann said:

> Even if the court considers that an applicant couple pass all these tests—that adoption by them is plainly in the best interests of the child, that the child wishes to be adopted, that their relationship is loving, stable and harmonious …. The court is bound to refuse the order and take a course which, ex hypotesi, is not in the best interests of the child on the sole ground that the applicants are not married.[361]

Addressing the possibility of the House of Lords going further than the European Court, Lord Hoffmann said that it was true that Lord Bingham in *Ullah* said that the 'duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less,'[362] but then went on to say that Lord Bingham's

> remarks were not, however, made in the context of a case in which the Strasbourg court has declared a question to be within the national margin of appreciation. That means that the question is one for the national authorities to decide for themselves and it follows that different Member States may well give different answers.[363]

Where the European Court has declared something to be within the margin of appreciation, therefore, it would be

[361] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [11].

[362] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [30].

[363] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [31].

> for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom … It follows, my Lords, that the House is free to give, in the interpretation of the 1998 Act, what it considers to be a principled and rational interpretation to the concept of discrimination on grounds of marital status.[364]

The majority concluded that the Order could not be applied; unmarried couples in Northern Ireland could be considered as potential adopters.

To reach this result the House of Lords engaged with the issue of how UK courts should go about to apply the HRA in cases involving a claim which the European Court has held—or is likely to hold—falls within a state's margin of appreciation. One possible way of seeing this would be to say that because no claim could win the day before the European Court, UK courts should similarly find that for the purposes of the HRA no ECHR claim exists. Such an approach would, however, probably not pass muster with regard to the traditional stance in UK courts on the margin of appreciation. Lord Hope in *Kebilene*[365] said that the margin of appreciation afforded by Strasbourg to the Member States was not available to UK courts under the HRA, but that UK courts should nonetheless recognise the difficult choices which had to be made between the rights of the individual and the needs of society.[366]

As seen above, Lord Hoffmann disagreed with the proposition that because no claim could succeed before the European Court, UK courts should similarly find that

[364] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [37]–[38].

[365] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL).

[366] P Craig, 'Fundamental Principles of Administrative Law in Relation to Basic Principles of Constitutional Law' in D Feldman (ed), *English Public Law* (Oxford University Press 2009) 610.

no ECHR claim exists for the purposes of the HRA. *Re P* sets out a viable margin of appreciation exception to Lord Bingham's (increasingly undermined)[367] rule. Where a case would fall under the margin of appreciation if Strasbourg were to adjudicate on it, the UK must decide how the ECHR applies for its own citizens. There are rights under the ECHR which UK applicants may be able to claim against the government, but which an applicant in another country might not. And it seems also to mean that there are rights which UK citizens may be granted by UK courts which they might not, because of the margin of appreciation, be granted in Strasbourg. The HRA does more than just give citizens rights which are established in the ECHR by the Strasbourg court. It also enables UK courts to find rights deemed to follow from the Convention which would not have been found by the Strasbourg court. What the House held in *re P* seems therefore to dovetail neatly with what Lord Hope held in *Kebilene*.

Dickson sees *Re P* as an example of the House of Lords expanding UK human rights law through the common law.[368] Such a reading sits comfortably with the view, explicitly referred to by Lord Hoffmann in *Re P*, that Convention rights within the meaning of the HRA are domestic and not international rights.[369] It also serves to highlight how porous the dividing line has become that sets the boundaries between developing domestic rights through domestic law and developing domestic rights by way of international influences. The fact that the question can even be asked—was this a development based upon domestic or international sources?—in itself testifies to how far the UK courts have developed their position when it comes to the

[367] See 4.3 below.

[368] B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 40.

[369] *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [33] (Lord Hoffmann). See 3.3 above.

development of ECHR rights.

4.2.2 French Courts and the Development of Convention Rights

French courts as a matter of course make use of the European Court's 'living instrument' method when interpreting the ECHR; the Convention thus becomes a living instrument for effective rights protection through the contribution of French courts.[370] This is demonstrated by the jurisprudence of the Cour de cassation on fiscal sanctions and the 'fair trial' standard in art 6.[371] This occurred for example in *Kloeckner*,[372] in which the Cour de cassation ruled, well in advance of the European Court, that art 6(1) was applicable to fiscal disputes before civil courts.

Another important example is the Conseil d'État's jurisprudence on art 1 of the First Protocol. Whilst there was no Strasbourg jurisprudence to the effect that crystallisations of retirement pensions were protected under this provision, the *Assemblée* of the Conseil d'État, relying upon art 1 of the First Protocol, held in *Diop* that crystallisations of retirement pensions *were* protected under the ECHR provision.[373] *Commissaire du gouvernement* Courtial said in his *conclusions* that while the conclusion which the Conseil would end up adopting was not clear from the letter of art 1 of the First Protocol, 'la notion des "biens" dans la jurisprudence de la

[370] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 124; L Heuschling, 'Comparative Law in French Human Rights Cases' in E Örücü (ed), *Judicial Comparativism in Human Rights Cases* (BIICL 2004).

[371] J Andriantsimbazovina & L Sermet, 'Jurisprudence administrative et Convention européenne des droits de l'homme' [2009] RFDA 715, 726.

[372] Cour de cassation, 14 June 1996 *Kloeckner*.

[373] Conseil d'État, 30 November 2001 *Diop* (*conclusions*: Courtial).

Cour de Strasbourg a connu une extension remarquable en évoluant vers la notion d'intérêts partrimonaux'. If the logics of this development were to be taken seriously, Courtial held, only one conclusion was possible.

Two years later the evolutionary interpretation recommended by the *commissaire du gouvernement* and adopted by the Conseil d'État was subsequently confirmed by the European Court two years later in *Koua Poirrez v France*.[374] President Costa later said about the interpretation given by the Conseil d'État in *Diop*, and more generally the approach of the Conseil to the interpretation of the Convention, that the Conseil in *Diop* 'anticipated the jurisprudence of the European Court on art 1 of the First Protocol. This new attitude is one of which I am glad. This change of perspective doubtlessly corresponds to a change in mentality towards the Convention'.[375]

The best example of an area where the Conseil d'État has been faced with how to deal with the fact that the Convention is a living instrument, however, has been the field of prisoners' rights.[376] It has even been argued that the Convention is the most important source in French law on this score.[377] On the whole, French administrative courts have lost no time in joining the Strasbourg Court in evolving rights in this area. Important here are two cases decided on the same day, on the basis of the same

[374] *Koua Poirrez v France* App No 40892/98 judgment 30 September 2003.

[375] B Lapoudille, 'Questions à Jean-Paul Costa, président de la Cour européenne des droits de l'homme' Dalloz Actualité 5 February 2007. Also: JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 124.

[376] B Belda, 'L'innovante protection des droits des détenus élaborée par la Court européenne des droits de l'homme [2009] AJDA 406; M Guyomar & B Seiller, *Contentieux administratif* (Dalloz 2010) 235–36.

[377] C Vigouroux, 'La valeur de la justice en détention' [2009] AJDA 403.

conclusions by *rapporteur public* Guyomar.[378] The first of the cases concerned a decision about a change of the allocation of a detainee, the other prison employment relegation.

Traditionally, such measures have been deemed to be *mesures d'ordre intérieur*, which were not subject to judicial review. In respect of prisons, this practice is very much a vestige of old penitentiary administration traditions. French administrative law has drawn a distinction between them and *actes administratives*. *Mesures d'ordre intérieur administratives* in later years have become eroded by rights-based jurisprudence,[379] so that fewer and fewer *mesures* are exempt from judicial review. Barring any breach of legal requirement, however, the ordinary operational decisions in the exercise of a discretion which the administration enjoys—the decision for example to alter the frequency of services—was regarded until very recently to lie squarely outside the ambit of judicial review.[380]

In *Boussouar*,[381] which was about the right to an effective remedy in art 13, the *Assemblée du contentieux*, the highest body of the Conseil d'État, held that the decision to change the allocation of a detainee from a high-security prison (*maison centrale*) to a detention centre where detainees are being held pending their trial or sentencing (*maison d'arrêt*) was in fact an administrative act, lending itself to judicial

[378] M Guyomar, 'Conclusions sur Conseil d'État, Assemblée, 14 décembre 2007, M. Planchenault et Garde des sceaux, ministre de la Justice c/ M. Boussouar' [2008] RFDA 87.

[379] See eg Conseil d'État, 10 October 1990 *Hyver*.

[380] J Bell, S Boyron & S Whittaker, *Principles of French Law* (2nd edn, Oxford University Press 2008) 181.

[381] Conseil d'État, 14 December 2007 *Boussouar*.

review.[382] The second decision in which the Conseil applied these criteria was *Planchenault*.[383] At issue was the decision by a penitentiary administration body to deny a prisoner the opportunity to work in the prison kitchen on grounds of his attitude being uncooperative. The effects of this measure on his situation proved to be important to his chances of proving that he was capable of reinsertion into society and benefitting from a reduction of his sentence diminished. The Conseil clarified the degree of control afforded in these instances to the judge.

The *jurisprudence constante* on the issue, as exemplified by the cases *Marie* and *Remli*, did not warrant this move. The *rapporteur public* made clear in his *conclusions* that in his view only an evolutionary approach to the Convention rights, going further than Strasbourg all the while taking inspiration from the ECHR rights, would allow this.

Following the extensive conclusions of the *rapporteur public*, which cited ECHR authorities but also comparative analysis by way of showing the direction in which was heading Belgian, Italian, and UK jurisprudence on the issue, the *Assemblée du contentieux* held that the situations in *Boussouar* and *Planchnault* could no longer be exempt from judicial review by dint of being *mesure d'ordre intérieur*. This effectively meant that the two situations in *Boussouar* and *Planchenault* were held to constitute 'administrative acts susceptible of *recours pour excès de pouvoir*'. As the principle of legality in French administrative law prescribes a line of conduct for administration from which the administration cannot depart without committing an *excès de pouvoir*, any violation of the principle can be a ground for review, potentially

[382] M Guyomar, 'Conclusions sur Conseil d'État, Assemblée, 14 décembre 2007, M. Planchenault et Garde des sceaux, ministre de la Justice c/ M. Boussouar' [2008] RFDA 87, 92.

[383] Conseil d'État, 14 December 2007 *Planchenault*.

making the administrative act void. This traditionally is based on four grounds, *viz*. *incompetence, vice de forme, violation de la loi,* and *détournement de pouvoir*.[384] The *conclusions,* adopted by the Conseil in the two judgments, are worth quoting at some length:

> En premier lieu, l'évolution jurisprudentielle que nous vous proposons qui prolonge les acquis de vos décisions *Marie–Remli* nous paraît de nature à prémunir la France contre toute condamnation de la Cour de Strasbourg. Les deux logiques de contrôle—la vôtre et celle de la Cour européenne—ne coïncident pas exactement. La prise en compte de la jurisprudence européenne vous conduit, dans une certaine mesure, à aller au-delà de ce que la Cour exige dans le cadre de son contrôle *a posteriori* et *in concreto*. … Refuser de contrôler les décisions aujourd'hui attaquées reviendrait à accepter de fermer les yeux en attendant qu'on les ouvre pour vous à Strasbourg. Telle n'est pas la conception que nous avons de votre office. … En outre, en élargissant l'accès à votre prétoire, vous conférez sa pleine portée au caractère subsidiaire du contrôle de la cour européenne, prenant en charge dès les instances nationales la vérification du respect des droits conventionnellement garantis.[385]

[384] L Neville Brown & J Bell, *French Administrative Law* (5th edn, Oxford University Press 1998) 239.

[385] M Guyomar, 'Conclusions sur Conseil d'État, Assemblée, 14 décembre 2007, M. Planchenault et Garde des sceaux, ministre de la Justice c/ M. Boussouar' [2008] Revue française de droit administratif 87: 'First of all, the jurisprudential evolution which we suggest you take, extending the *acquis* of your decisions *Marie* and *Remli*, seems to us to avert that the Strasbourg Court find any breach on the part of France. The two different systems of control—yours and that of the European Court—do not correspond completely. Taking into account the European jurisprudence to a certain measure leads you to go beyond what the Court requires in the scope of its control *a posteriori* and *in concreto*. … To refuse to overturn the decisions which are attacked today would be tantamount to accept to close one's eyes and wait for Strasbourg to open them for one. This is not the conception we have of your office. … By enlarging the ambit of judicial review [en élargissant l'accès à votre prétoire], moreover, you would give full effect to the subsidiary character of the control of the European Court, taking charge of giving full effect before national authorities to Convention rights.' (My translation.)

4.2.3 German Courts and the Development of Convention Rights

As has been seen in Chapter 3, the Federal Constitutional Court in *Görgülü*[386] and *Preventive Detention II*[387] outlined the most important principles of the relationship between German law and the ECHR. *Görgülü* was the first judgment in which the German high court held that breaches of the ECHR could be invoked in individual complaints before it. The Court furthermore emphasized the paramountcy of Strasbourg judgments; they mirror the level of development of the Convention standards, the Federal Constitutional Court said.[388] But the judges also underlined that the judgments of the Strasbourg Court are *res judicata*; conversely, for other states than the parties at bar, they only have limited force of law. German courts by extension need only take into consideration the judgments of the Strasbourg Court.[389] On the one hand, then, *Görgülü* outlines an internationalist approach to international law, on the other a principle of German constitutional sovereignty. This two-sided argumentation of 'openness' to international and European law and entrenchment of sovereignty is developed further in relation especially to EU law in the *Lisbon* case.[390]

The Federal Constitutional Court in the *Data retention case* of March 2010 announced its decision on the constitutionality of the German law implementing the EU Data Retention Directive.[391] It was only the compatibility of the law implementing

[386] BVerfGE 111, 307.

[387] BVerfGE 128, 326.

[388] BVerfGE 111, 307 [38].

[389] BVerfGE 111, 307 [50].

[390] BVerfGE 123, 267.

[391] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available

the Directive with the German Basic Law which was contested by the claimants, not the constitutionality the Directive itself.[392] At issue in the case was whether the law contravened art 10 of the German Basic Law, on the privacy of correspondence, posts, and telecommunications. Though the incompatibility of the law with arts 8 and 10 ECHR was raised by the claimants, the Court, on the face of their decision, approached the question squarely as one of domestic constitutional law. Dubbed by the then President of the Federal Constitutional Court, Hans-Jürgen Papier, 'one of the most important rulings of my tenure,' [393] the judgment effectively nullified the German law implementing the Directive. The Court in its surprisingly scathing judgment found that the regime set up by the law in question amounted to 'a particularly grave infringement, with a scope hitherto not known by our legal system,' [394] underscoring that the system allowed 'the production of expressive personality and mobility profiles for effectively every person'.[395] Finding the system wanting in a number of ways—including on data security, delimitation of data application, and legal protection—the Court held that the law was disproportional and therefore did not pass constitutional muster.

Looming in the background was the relationship between national and international law. The Federal Constitutional Court famously in *Solange II*[396] had reaffirmed that it accepted the basic rights protection of the ECJ as consistent with its

electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[392] BVerfGE 125, 260 [1]–[3].

[393] HJ Papier, 'Gegen die Totalkontrolle', *Süddeutsche Zeitung* 3 March 2010.

[394] BVerfGE 125, 260 [210].

[395] BVerfGE 125, 260 [211].

[396] BVerfGE 73, 339 [4].

own standards; as a rule the Court would stop short of testing EU law for basic rights compliance, thus narrowing the scope for constitutional complaints against EU law in Germany.[397] A hands-off approach to the law at issue in *Data Retention* could have been justified under the *Solange II* doctrine, though not without running the risk of making EU law a back-door conduit for the passing of legislation which the Federal Constitutional Court would otherwise have struck down. The Court chose instead to leave unchallenged the Directive-mandated portion of the law all the while striking down the German implementation legislation which exceeded the terms of the Directive. This way the *Solange II* doctrine was honoured, the layered integrity of European legal development maintained.[398] Studiously sidestepping any comment on the validity of the EU Directive itself, the Court forcefully underscored that the principle 'that the observation of the freedom of citizens may not be recorded and retained in an all-encompassing way belongs to the German federal constitutional identity … which Germany must seek to preserve nationally and internationally'.[399]

But *Data Retention* merits interest as much for what it does *not* say about ECHR law as for what it actually says. Though, as adumbrated above, counsel for the claimants fielded arguments based on Convention rights—and it has been argued with force in legal literature that the Directive as such is at variance with both art.8 and 10 ECHR as 'its harmful effects on citizens by far outweigh its benefits'[400]—the Court did not once in its judgment advert to ECHR law. This was not sheer happenstance,

[397] BVerfGE 125, 260 [181].

[398] C DeSimone, 'Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive' (2010) 11 German Law Journal 291, 316.

[399] BVerfGE 125, 260 [218].

[400] P Breyer, 'Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR' (2005) 11 European Law Journal 365, 375.

and for the following reason. As was seen in Chapter 3, German courts must give precedence to interpretation in accordance with Convention rights, subject to the caveat that applicable methodological standards leave scope for interpretation and weighing of interests. Another caveat which follows from *Görgülü* is the following one, concerning whether the Strasbourg Court has adjudicated on the issue or not: 'the Convention does not automatically have priority over other federal law, in particular if in this connection it has not already been the object of a decision of the ECHR'.[401] *Data Retention* toes this line. But this does not mean that the Federal Constitutional Court will shrink from its responsibilities of safeguarding fundamental rights in cases where the Strasbourg Court has not adjudicated on a case with facts closely analogous with the one at issue. With the strong national catalogue of fundamental rights of the Basic Law, there was no need for the Federal Constitutional Court in *Data Retention* to seek refuge in the jurisprudence of the Strasbourg, which had not been seized of the issue in this direct way. With a long-standing tradition for very rigorous rights protection, the Federal Constitutional Court in *Data Retention* did not need explicitly to advert to the ECHR—even to shore up their argument—in order to strike down the law in issue.

4.3 Evolution and Ordinary Application of ECHR Principle

The question of how far the domestic courts ought to go in interpreting the ECHR evolutionarily shares a border with another pressing question. That question is: how ought the courts to approach a question under the ECHR which has not been settled by the European Court? It is not necessarily so that to find in favour of a claimant who

[401] BVerfGE 111, 307 [62].

argues a point that has yet to be resolved by the European Court will necessarily be to engage in evolutionary interpretation. Given the attention this question has been accorded by the UK courts, UK law will here be taken as an example.

The approach to the jurisprudence of the European Court set out by Lord Bingham in *Ullah* has become the orthodoxy of the UK courts in their application of the Convention rights.[402] The duty of the national courts is, on the *Ullah* approach, 'to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[403] While much attention has been accorded to the words 'no more, but certainly no less',[404] considerably less attention has been given to that which Lord Bingham, and the rest of the unanimous House of Lords, actually did in *Ullah*.[405] This seems to be an aspect of *Ullah* deserving of more attention; thus far it has been all but out shadowed by the words 'no more but certainly no less'. In fact the way in which the House of Lords decided *Ullah* seems to go against that which is understood today to be the import of the *Ullah* principle. In addition comes the fact that while Lord Bingham set out in his *Ullah*

[402] See *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham); *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [106] (Lord Brown), [90] (Baroness Hale); *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 AC 1 [60] (Lord Philips), [93] (Lord Hope), [147] (Lord Brown); *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 [27] (Lord Steyn); *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 [34] (Lord Nicholls); *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [37] (Lord Bingham), [53] (Baroness Hale).

[403] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham). Generally: T Bingham, *Lives of the Law: Selected Essays and Speeches 2000–2010* (Oxford University Press 2011) 184; B Stirn, *Vers un droit public européen* (Montchrestien 2012) 64.

[404] B Dickson, *Human Rights Law and the United Kingdom Supreme Court* (Oxford University Press 2013) 39–43; R Clayton, 'Smoke and Mirrors' [2012] PL 639; B Hale, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?' [2012] HRLR 65; P Sales & R Ekins, 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 LQR 217, 224; N Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] EHRLR 505, 511–12; A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 144–64.

[405] See E Bjorge, 'The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence' [2013] CLJ (forthcoming).

dictum what has become the orthodox approach of the UK courts to the Strasbourg jurisprudence, he on later occasions made both judicial and extra-judicial statements which seem to indicate another approach and ought also to give some pause to those who defend a strict application of 'no more, but certainly no less'.[406]

For Lord Bingham revisited the theme and provided some clarifications, setting out what on his view was the correct approach to the jurisprudence of the European Court.[407] As an example he gave *JJ*.[408] In this ruling it was Lord Bingham himself who delivered the leading judgment, with which Baroness Hale and Lord Brown agreed. Lord Hoffmann and Lord Carswell, though they shared the approach suggested by the majority to be the correct one to take to the Convention, disagreed with respect to the result.

JJ bore on deprivation of liberty under art 5. Close attention was paid in the House of Lords to *Guzzardi v Italy*, found to be the most pertinent discussion of what in terms of the Convention was meant by deprivation of liberty.[409] The facts in *Guzzardi*, in which the applicant's confinement on a Mediterranean island bore little resemblance to the situation of JJ, could not readily be transposed to the case before the House of Lords.[410] Lord Bingham in his judgment in *JJ* made clear how the courts must approach a

[406] Cf *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198; *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396; *Re P (Adoption: Unmarried Couple*) [2008] UKHL 38, [2009] 1 AC 173; *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385 [19]; *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621; *Rabone & Another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.

[407] T Bingham, 'The Human Rights Act: A View from the Bench' (2010) 6 EHRLR 658; T Bingham, *Lives of the Law: Selected Essays and Speeches 2000–2010* (Oxford University Press 2011) 177–85.

[408] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385. Also: R Clayton & H Tomlinson, 'Lord Bingham and the Human Rights Act 1998' in M Andenas & D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press 2009) 69.

[409] *Guzzardi v Italy* (1980) 3 EHRR 333.

[410] T Bingham, *Lives of the Law: Selected Essays and Speeches 2000–2010* (Oxford University Press 2011) 183.

problem of this kind, in a case where the European Court has not had occasion to rule on any case at all closely comparable to the present one. In this type of case, said Lord Bingham,

> it is inappropriate to seek to align this case with the least dissimilar of the reported cases. The task of the English courts is to seek to give fair effect, on the facts of this case, to the principles which the Strasbourg court has laid down.[411]

All their Lordships, including Lord Hoffmann and Lord Carswell, seemed to agree on the approach to be taken to the Strasbourg jurisprudence: the courts must focus on the principles laid down by the European Court; the point is explicitly *not* to align the present case with the least dissimilar European authorities. On Lord Hoffmann's view the rationale behind going through the Strasbourg authorities was to find not an identical case but 'illustrations of the principle' to be applied;[412] Lord Carswell said that the focus must be 'on the principles to be followed'.[413]

While Lord Bingham in *JJ* did not himself cite, and thus explicitly disavow, his own *Ullah* dictum, the contrast is a significant one between, on the one hand, his insistence on finding the broader Strasbourg principles and, on the other hand, the way in which the *Ullah* rule has been relied upon in later cases. The problem with which the House was faced in *JJ*, one of the very last in which Lord Bingham sat, he explicated, in the very last article he had occasion to write, was nothing else than 'to ascertain the true

[411] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [19] (Lord Bingham).

[412] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [44]–[45] (Lord Bingham).

[413] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [84] (Lord Bingham).

governing principle and apply it'.[414] The present article argues that this principled approach, which is arguably what follows from *Ullah*, rather than the way in which *Ullah* has been understood is the correct way of approaching the Strasbourg jurisprudence.

The Supreme Court in *Ambrose* had occasion to apply this principled approach, but decided not to.[415] The issue in *Ambrose* was whether the right to a fair trail was breached if the suspect had been questioned by police before being taken into custody. Lord Hope said, on behalf of the majority, that a ruling by the Supreme Court to the effect that there was such a rule would have far-reaching consequences; therefore 'if Strasbourg has not yet spoken clearly enough on this issue, the wiser course must surely be to wait until it has done so'.[416] Basing himself on Lord Bingham's *Ullah* dictum, he concluded that the task of the Supreme Court was to 'identify as best it can where the jurisprudence of the Strasbourg court clearly shows that it stands on this issue'.[417] The same was the case in *Jude*[418] and *McGowan*.[419]

Goodhart, in commenting upon the traditional English doctrine of precedent, once remarked that it was hardly surprising that the complaint was traditionally frequently heard that 'the dead hand of the past lies heavy on English law'.[420] This is one possible outcome of a strict doctrine of precedence. Much in this way Lord Bingham's approach

[414] T Bingham, *Lives of the Law: Selected Essays and Speeches 2000–2010* (Oxford University Press 2011) 184–85.

[415] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435.

[416] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [15].

[417] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [20].

[418] *Her Majesty's Advocate v Jude* [2011] UKSC 55, [2012] SLT 75.

[419] *McGowan (Procurator Fiscal, Edinburgh) v B (Scotland)* [2011] UKSC 54, [2011] 1 WLR 3121.

[420] AL Goodhart, 'Precedent in English and Continental Law' (1934) 50 LQR 40, 49.

has now become mortmain; it presently acts as an inhibitor on the courts of this country giving full effect to Convention rights.

Lord Kerr in his dissenting judgment, however, proffered a better solution. Some judges in the United Kingdom, he stated, have evinced what he termed '*Ullah*-type reticence': 'On the basis of this, it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but there is also the view that we should not go where Strasbourg has not yet gone'.[421] He went on to highlight Lord Bingham's fear that a refusal to follow the jurisprudence of the European Court would 'dilute or weaken the effect of the Strasbourg case law',[422] and then set out what was perhaps the crux of his argument with regard to the *Ullah* rule:

> I greatly doubt that Lord Bingham contemplated—much less intended—that his discussion of this issue should have the effect of acting as an inhibitor on courts of this country giving full effect to Convention rights unless they have been pronounced upon by Strasbourg.[423]

If seen on the background of what Lord Bingham said subsequent to *Ullah*, Lord Kerr's words here seem very apposite indeed. In the absence of a ruling by the European Court as to the validity of a claim to a Convention right, continued Lord Kerr, it ought not to be 'open to courts of this country to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken'.[424] His main point in this regard was that not all debates about the ambit of Convention rights would be

[421] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [126].

[422] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [127].

[423] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [128].

[424] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [128].

resolved by the European Court; many claims to Convention rights will inevitably fall to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from the European Court.[425]

Lord Kerr, on the back of the reasons cited above, concluded that it would be particularly unsatisfactory if because of what he had termed *Ullah*-type reticence the Supreme Court should feel constrained not to reach a decision on the arguments advanced by the respondents just because those arguments were likely to be presented in a case presently before the European Court and one could not at the time say how the Court would react to them.[426] If, he concluded,

> 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. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable. I consider that not only is it open to this court to address and deal with those arguments on their merits, it is our duty to do so.[427]

Lord Kerr's judgment in *Ambrose* is of a feather with Lord Bingham's enjoinment to the courts to give fair effect to the principles which the Strasbourg Court has laid down.[428] Lord Hope's judgment, and those of the other Justices in the majority, save for Lord Dyson,[429] conversely, are ones which seem to 'seek to align this case with the least

[425] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [129]. Lord Kerr amplified his views in the 2012 Clifford Chance Lecture: 'The UK Supreme Court: The Modest Underworker of Strasbourg?' 25 January 2012.

[426] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [130].

[427] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [130]. Also: [101]–[102] (Lord Dyson).

[428] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [19].

[429] *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43, [2011] 1 WLR 2435 [102]–[105].

dissimilar of the reported cases'.[430] There exist cogent reasons as to why the courts ought to adopt Lord Kerr's approach. The reasons he gives for his approach have received support in the literature, for example from Craig, who sees Lord Kerr's approach to the Strasbourg jurisprudence as preferable to strict adherence to the 'no more, no less' principle.[431] In addition to the reasons which Lord Kerr set out himself comes the following one: the fact that the principled approach which he recommends seems to be more in line with an important tenet of the approach of the common law to judicial authority.

While the notion of binding precedent may be the distinctive feature of the common law system, it is also a well-known rule in the common law that judicial authority belongs to the principle on which rulings are based: 'the only part of a previous case which is binding is the *ratio decidendi*'.[432] To some extent this latter point counteracts the tendency of the UK courts to get fixated on single authoritative decisions, and it is all the more important for it. This received its perhaps classical formulation by Sir Frederick Pollock who said that in the common law:

> Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.[433]

[430] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [19].

[431] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 586–87. Also: B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 42–43; A Le Sueur, M Sunkin, and JE Khushal Murkens, *Public Law* (2nd edn, Oxford University Press 2013) 751.

[432] R Cross & JW Harris, *Precedent in English Law* (4th edn, Oxford University Press 1991) 39.

[433] F Pollock, 'Introduction' in J. Drake and others (eds), *The Progress of Continental Law in the Nineteenth Century* (New York 1918) xliii–xliv. Also: W Holdsworth, *Essays in Law and History* (Oxford University Press 1946) 158–59.

Efforts to bind in fetters of verbal definition the common law have, he continued, been 'constantly and for the most part happily frustrated by the reconsideration and restatement of guiding principles in the judgment of the highest courts'.[434] In *State of Norway's Application* the House of Lords brought out this tenet of the approach of the common law to judicial authority: 'The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent'.[435] The tradition in English law is thus that principles are derived from observing the development of a line of particular authorities on a particular topic; the courts draw upon the underlying principles animating those earlier authorities.[436] It may be that the UK courts ought to go further in applying this also when it comes to Strasbourg jurisprudence.

It is interesting to compare this situation with the approach taken by the Continental courts. While in German law there is not in strict terms a doctrine of *stare decisis*, precedents carry substantial weight.[437] German courts will follow series of decisions which are substantially to the same effect (*ständige Rechtssprechung*).[438] The same is the case in French law, where the acceptability of decisions is not to be assessed in relation to individual decisions but to *la jurisprudence constante*.[439] French judges,

[434] F Pollock, 'Introduction' in J Drake and others (eds), *The Progress of Continental Law in the Nineteenth Century* (New York 1918) xliv. Also: *Close v Steel Company of Wales Ltd* [1962] AC 367 (HL) 388–89; *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29, [2011] 1 AC 1 [135] (Baroness Hale).

[435] *In re State of Norway's Application* [1990] 1 AC 723 (HL) 737–38.

[436] *Dunlop v Higgins* (1848) 1 HLC 381, 9 ER 805; *Household Fire Insurance Co v Grant* (1879) 4 Ex D 216, 218–19. Also: J Holland & J Webb, *Learning Legal Rules* (7th edn, Oxford University Press 2010) 153.

[437] K Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 429; J Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006) 141.

[438] F Bydlinski, 'Richterrecht über Richterrecht' in *50 Jahre Bundesgerichtshof I* (CH Beck 2000).

[439] J Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006) 76.

both in the Conseil d'État and in the Cour de Cassation, are fully aware that they are laying down generally applicable rulings.[440] When French courts decide ordinary cases they simply apply established principles to the large body of relatively unproblematic, routine appeals of which French courts receive an abundance. In deciding such cases, *arrêts d'espèce*, the courts rely upon *la jurisprudence constante*. It is, as Bell and Boyron have put it, through the application of that *jurisprudence constante* that the full force of judicial law-making in the French courts is seen,[441] and it does not seem unreasonable to say that the same is the case in German law. 'As was true of Roman law', in Goodhart's words, 'so in modern Continental law the emphasis is not on the individual case in particular, but rather on a series or group of cases creating a practice'.[442]

One German commentator said of the English theory of precedent, in 1931, that through it 'wird der Konservatismus des Rechts künstlich gesteigert und seine Evolutionsfähigkeit gelähmt'.[443] If it is true that aspects of the traditional English theory of precedent in this way, to some extent at any rate, artificially increases the conservatism of the law, and stymies its ability to evolve, then it might certainly be asked whether that is what has given us the unfortunate situation where the UK courts get fixated on single authoritative Strasbourg decisions instead of looking for the underlying principles. For the fact of the matter is that the Continental courts have not been hampered in their approach to the Strasbourg jurisprudence by '*Ullah*-style reticence' such as we find it in *Ambrose*.

[440] Generally: F Terré, *Introduction générale au droit* (9th edn, Dalloz 2012) 283–300.

[441] J Bell, S Boyron & S Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 27–28.

[442] AL Goodhart, 'Precedent in English and Continental Law' (1934) 50 LQR 40, 42.

[443] AB Schwarz, 'Das englische Recht und seine Quellen' in K Heinsheimer, *Die Zivilgesetze der Gegenwart II* (Dt Druck- und Verlasghaus 1931) 25.

Sales has been prominent in arguing that the mirror principle ought to be upheld, specifically taking issue with Lord Kerr's approach in *Ambrose*.[444] His defence of the mirror principle is not one which could be taken lightly. He must be right when he says that domestic courts should not as a rule interpret the Convention rights more restrictively than the European Court, as the consequences will be that individuals aggrieved at decisions of the domestic courts will exercise their right of petition to the European Court to vindicate their rights. The proper protection of their Convention rights is, as he states, at domestic level and that will in such a scenario have been found to have been inadequate. This is because, as he puts it, a primary objective of the HRA (to spare individuals having to embark down the long and hard road to Strasbourg in order to vindicate their rights) will have been defeated.

Of course, this point does not apply in the scenario where a domestic court goes beyond, that is to say possibly grants a *higher* level of protection, than what the European Court has laid down in a particular case. But Sales sounds the note of caution that in this type of scenario it is, given the architecture of the ECHR system, only the individual that is able to take bring the case to Strasbourg. This point was made by Lord Brown in *Al-Skeini*:

> There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual *can* have the decision corrected in Strasbourg.[445]

[444] P Sales, 'Strasbourg Jurisprudence and the Human Rights Act' [2012] PL 253.

[445] *R (on the Application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC [106].

Referring to this statement by Lord Brown, Sales criticizes the approach which Lord Kerr suggested in *Ambrose*. If this approach had been adopted in *Ambrose*, he says, it would not have been possible to test its accuracy by argument in Strasbourg, because the public authority would have lost and neither it nor the Government would have been able to take the case to Strasbourg. Sales thus makes an eloquent case for erring on the side of caution or what he himself refers to as 'a relatively conservative approach to trying to develop the interpretation of the Convention rights' on the part of a domestic court.[446] This is convincingly put. There are, however, two reasons why it is not in the end convincing.

The first reason this approach does not in the end seem convincing is the point Sales himself makes, that is, the importance at national level of obviating the need for the individual to go to Strasbourg. As Lord Kerr brings out in his judgment in *Ambrose*:

> It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from the European court. Moreover, as a matter of elementary principle, it is the court's duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available.[447]

The second reason, related to the first, is that when the system of the ECHR is set up in such a way as to grant the right to petition only to individuals that is because it is a

[446] P Sales, 'Strasbourg Jurisprudence and the Human Rights Act' [2012] PL 253, 263.

[447] *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435 [129].

system for, as the Convention's title states, 'the Protection of Human Rights and Fundamental Freedoms'. When it was put in place, and subsequently given effect nationally, this was because it was felt that individuals ought to be given a stronger protection of their rights. To steal a line from Karl Kraus, Sales here uses the ECHR for the very aims of which Convention professes to be the cure. It seems paradoxical to use this, the very logics of the system, as a basis on which to argue for a restrictive interpretation. Taking a different point of view, Costa has underlined how, generally, the judges of the European Court 'will, when they are in doubt, err on the side of liberty, certainly not against liberty.[448] That seems a more apt approach.

It may moreover wrong to make denial of justice the touchstone of judicial dialogue, if for no other reason than because dialogue between a domestic court and the European Court does not only take place within a line of cases, that is, within the same factual complex which first comes before the domestic courts and then before the European Court. As will be seen in Chapter 8, dialogue can also happen *between* case complexes; *Horncastle*[449] and *Al-Khawaja*[450] for example were not the same case yet an important example of dialogue between the UK Supreme Court and Strasbourg. It is apposite to point out that the same was also the case in *Ambrose* itself. In fact Lord Hope pointed out that a case on similar facts, *Abdurahman v United Kingdom*,[451] was at the time when *Ambrose* came before the Supreme Court, 'still awaiting a

[448] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 41 ('optent, dans le doute, pour la liberté, certainement pas contre la liberté').

[449] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47.

[450] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011.

[451] *Abdurahman v United Kingdom* App No 40351/09 (still pending).

hearing in Strasbourg'.[452] In Lord Hope's view the fact that this application was still pending suggested that if there was any doubt as to where the jurisprudence of the European Court stood, it would have been wise to wait for its ruling in *Abduraham* before holding that the protection which the claimant in *Ambrose* averred followed from art 6 actually did so.

Not least since a victory for the claimant in *Ambrose* would *not* have foreclosed the question reaching Strasbourg, Lord Kerr must have been entirely right when he said in his judgment in *Ambrose* that:

> In this context, it would be particularly unsatisfactory, I believe, if, because of an *Ullah*-type reticence, we should feel constrained not to reach a decision on the arguments advanced by the accused just because those very arguments are likely to be ventilated on behalf of the applicant in the European Court in *Abdurahman v United Kingdom* and we cannot say how Strasbourg will react to them. 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.[453]

Guyomar and Seiller have stated, with respect the Conseil d'État's application of the ECHR jurisprudence, that although it may be difficult at times to arrive at a 'claire identification d'une solution de principe', domestic courts in France nonetheless of course may not ignore the jurisprudence of the European Court. Instead what the must do and do in fact is to take into account 'à titre préventif, des grandes lignes dégagées, pour l'interprétation de la Convention européenne, par la Cour de Strasbourg'.[454] Relying upon the 'grande lignes' which emerge from the European Court's jurisprudence, as Guyomar

[452] *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435 [47]–[49] (Lord Hope), [130] (Lord Kerr).

[453] *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435 [130] (Lord Kerr)

[454] M Guyomar & B Seiller, *Contentieux administratif* (Dalloz 2010) 408.

and Sellier put it, even prophylactically, seems to come very close indeed to reliance upon the underlying principles of the Strasbourg jurisprudence. Sudre, too, sees this approach as the best way for the French courts to approach to Strasbourg jurisprudence, referring to it as 'une attitude décomplexée'.[455]

Thus the Conseil d'État, showing that its approach to the Strasbourg jurisprudence is shorn of complexes, was able in *Remli*[456] to anticipate what the Grand Chamber of the European Court would later hold, in relation to the interpretation of art 14 of the Convention, in *Ramirez Sanchez v France*[457] by building upon the underlying principles upon which the Strasbourg jurisprudence seems to be founded. Likewise the Conseil in *Didier*[458] anticipated that which the European Court would later do in *Didier v France*,[459] in relation to the guarantees of impartiality which follow from art 6(1). As will be seen in Chapter 8, however, the result which the Conseil d'État reached *Dubus*,[460] by trying to rely upon the principles which it thought itself able to glean from the jurisprudence of the European Court, were later held by the European Court to be wrong in *Dubus v France*.[461] In *Boussouar* and *Planchenault* the Conseil d'État followed *commissaire du gouvernement* Mattias Guyomar, who in relation especially to art. 13 of the Convention had urged the Conseil to build upon the principles on which the jurisprudence of the

[455] F Sudre, 'Du "dialogue des juges" à l'euro-compatibilité' in *Le dialogue des juges: mélanges en l'honneur du président Bruno Genevois* (Dalloz 2009) 1028.

[456] Conseil d'État, 30 July 2003 *Remli*.

[457] *Ramirez Sanchez v France* App No 59450/00 judgment [GC] 4 July 2006.

[458] Conseil d'État, 3 December 1999 *Didier*.

[459] *Didier v France* App No 58188/00 27 August 2002.

[460] Conseil d'État, 30 July 2003 *Dubus* (*conclusions*: Guyomar).

[461] *Dubus v France* App No 5242/04 judgment 11 June 2009.

European Court was founded, thus 'giving full effect before national authorities to Convention rights'.[462]

The Conseil d'État's decision in *Association pour la promotion de l'image* is a good example of the principled approach.[463] The Conseil in this case was asked whether a decree regulating the use of and storage of data from biometric passports was lawful. One of the stipulations of the decree was that eight fingerprints were stored by the authorities, while only two were needed for the passport. The Conseil d'État, basing itself on Convention principle as well as legal precepts flowing from national law, held parts of the decree to be unlawful.[464] Whether the storage or personal information retained by the authorities would constitute a breach of art. 8 would depend upon the context in which the information at issue has been recorded and retained, the nature of the records, the way in which they are used and processed, as well as the results which may be obtained.[465] It is plain from the *conclusions* of *rapporteur public* Julien Boucher that there was no single authoritative decision from the European Court which directly settled the matter. This, however, did not deter him, and the Conseil d'État which adopted his *conclusions*, from simply applying the principles animating art 8 and art 2 Protocol 4. Such examples

[462] Conseil d'État, 14 December 2007 *Boussouar* & *Planchenault* (*conclusions*: Guyomar).

[463] Conseil d'État, 26 October 2011 *Association pour la promotion de l'image et autres* (*conclusions*: Boucher).

[464] The decision also develops the, in origin national, proportionality test relied upon in, Conseil d'État, 19 February 1909 *Abbé Olivier* (*conclusions*: Chardenet); Conseil d'État, 17 August 1917 *Baldy* (*conclusions*: Corneille); Conseil d'État, 19 May 1933 *Benjamin* (*conclusions*: Michel). See B Stirn, *Vers un droit public européen* (Montchrestien 2012) 95–99; X Domino & M Guyomar, 'Le passeport biométrique au contrôle: empreintes et clichés' [2012] AJDA 35.

[465] *Friedl v Austria*, judgment 31 January 1995, Series A no 305–B [49]–[51]; *Peck v United Kingdom*, App No 44647/98 ECHR 2203–I [59]; *S & Marper v United Kingdom* App Nos 30562/04 & 30566/04 judgment [GC] 4 December 2008 [67].

abound in the jurisprudence of the Conseil d'État. Perhaps the field where this has been the most striking is that of prisoners' rights.[466]

Though the majority approach in *Ambrose* is dressed up as the logical continuation of what Lord Bingham ruled in *Ullah*, it is not clear that the approach actually merits such association. A close reading of *Ullah* in fact, and ironically, suggests that *Ullah* itself would not have passed the '*Ullah* test'.[467]

The principled approach suggested by Lord Kerr in *Ambrose* is in tune with what Lord Bingham and a unanimous House of Lords held in *Ullah*. It is more in line moreover with the general approach of the common law to legal precedent, which for more than a hundred years has been that the courts in reaching their decision in each case draw upon the *principles* established in earlier authorities.

It bears mention at this point that it is plain enough that there may be times when finding out what is the underlying ECHR principle, and what is the conclusion to be extracted from it in the case before the court, will prove be very difficult indeed. This point does, however, apply with equal force with respect also to the practice of finding out what is the principle on which a common law judgment is based. This is in other words both a problem intrinsic to the business of judging generally and it is, moreover, a problem the grappling with which common law judges are no less qualified than judges of other jurisdictions.

[466] M Guyomar & B Seiller, *Contentieux administratif* (Dalloz 2010) 235–36; B Stirn, *Vers un droit public européen* (Montchrestien 2012) 120. Cf *S & KF v Secretary of State for Justice* [2012] EWHC 1810 (Admin) [58]–[59] (Sales J).

[467] M Andenas & E Bjorge, '*Ambrose*: Is the *Ullah* Principle Wrong?' (2012) 128 LQR 319, 322–23.

The Supreme Court in *Rabone*,[468] which bore on the operational obligation under art 2 of the Convention in cases of voluntarily institutionalised mentally ill patients who commit suicide, seems to have applied something closely akin to a principled approach.[469] Interestingly Lord Brown pointed out that it may be said that in finding in *Rabone* a violation of the art. 2 duty on a state in certain circumstances to take "preventative operational measures" the Supreme Court was 'going further than the evolving jurisprudence of the [European Court] has yet clearly established to be required'.[470] For it was, he continued, plain that no Strasbourg decision had, at that time, equated the position of voluntary patients with that of detained patients with regard to the art. 2 duty. Even if that were the case he would not see the Supreme Court's ruling in *Rabone* to be offending against the familiar principle first set out by Lord Bingham in *Ullah*. Lord Brown concluded on this point by saying that if a domestic court is

> content (perhaps even ready and willing) to decide a Convention challenge against a public authority and believes such a conclusion to flow naturally from existing Strasbourg case law (albeit that it could be regarded as carrying the case law a step further), then in my judgment it should take that further step.[471]

The Supreme Court could take heart from the fact that, as Andenas has pointed out,[472] the European Court, subsequent to *Rabone*'s having been handed down, came to the same conclusion, expressly referring to and relying upon the approach taken in *Rabone*.[473]

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[468] *Rabone & Another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.

[469] M Andenas, 'Leading from the Front: Human Rights and Tort Law in *Rabone* and *Reynolds*' (2012) 128 LQR 323.

[470] *Rabone & Another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72 [111].

[471] *Rabone & Another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72 [112].

[472] M Andenas, 'Leading from the Front: Human Rights and Tort Law in *Rabone* and *Reynolds*' (2012) 128 LQR 323, 325.

The approach of the Supreme Court is, in other words, to some extent evolving, and this incremental development is to be welcomed. In *Sugar v BBC* Lord Wilson, in a discussion of the *Ullah* principle, made clear that he would welcome an appeal 'in which it was appropriate for this court to consider whether, of course without acting extravagantly, it might now be useful to do more than to shadow the ECtHR in the manner hitherto suggested'.[474] The dogmatic formula that now, most prominently in *Ambrose*, parades as the *Ullah* principle is not in line with the approach Lord Bingham actually had in mind, according to which the task of the national court is to give fair effect, on the facts of the case of which it is seized, 'to the principles which the Strasbourg court has laid down'.[475] The principled approach is preferable to strict adherence to the mortmain into which the *Ullah* principle has been turned; it also coheres with common law tradition.[476] Judicial authority under the ECHR, as well as at common law, belongs to principles. National courts, in applying the ECHR as expounded by the European Court, must stand back from the at times overwhelming case law of the European Court, or else they may end up not seeing the principles for the case law. This is now the approach the courts in France, Germany, and the United Kingdom adopt.

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[473] *Reynolds v United Kingdom* App No 2694/08 judgment 13 March 2012 [63].

[474] *British Broadcasting Corporation & Another v Sugar* [2012] UKSC 4, [2012] 1 WLR 439 [59] (Lord Wilson).

[475] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [19].

[476] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 586–87.

4.4 Conclusion

The domestic courts have taken seriously the notion that if the evolutionary, or 'living-instrument', interpretation of the Convention rights as laid down by the European Court means that the rights now mean something different form that which they meant earlier, then it is their duty to give effect to that current meaning. As was foreshadowed in Chapter 2, the inference can reasonably be drawn that the domestic courts have been aided in this regard by their *own* traditions of approaches similar to the technique used by the European Court, such as 'always speaking' statute interpretation,[477] 'living tree' interpretation,[478] the Federal Constitutional Court's doctrine of 'Verfassungswandel',[479] and the Conseil d'État's evolutionary and teleologic approach to interpretation.[480] More specifically, their approach to the evolutionary approach of the European Court, and the evolutionary character of the jurisprudence of the Court, has been one which not only endeavours to keep pace with the Strasbourg jurisprudence but also, at times, anticipates its development. As was seen above, there may be a fine line between the types of case in which plainly a domestic court would be going beyond that which follows from the Strasbourg *acquis* and the types of case in which it would simply resolve a Convention issue which has not yet been specifically resolved by the Strasbourg jurisprudence. It would, as Lord Brown put it in *Rabone*, be 'absurd' if the domestic courts saw themselves as being

[477] *R v Secretary of State for Health ex p Quintaville* [2003] UKHL 13, [2003] 2 AC 687 [9] (Lord Bingham).

[478] *Edwards v Attorney-General of Canada* [1930] AC 124 (PC).

[479] BVerfGE 2, 280 (401); BVerfGE 3, 407 (422).

[480] Conseil d'État, 29 June 1990 *GISTI* (*conclusions*: Abraham); *conclusions* reported in (1990) 94 RGDIP 882, 906–07.

bound to wait for guidance from Strasbourg in the latter type of case.[481] But the national courts have taken this realization to its logical conclusion and will not be deterred in the first type of case either. As former President Jean-Paul Costa has said about the Conseil d'État, the Cour de cassation, and the Conseil constitutionnel, it does happen that domestic courts, explicitly on the basis of the ECHR, go further than the European Court has done in its jurisprudence.[482] This shows just how far the French, German, and UK courts have gone in taking on board the notion that 'the Convention is a living instrument'.[483]

[481] *Rabone & Another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72 [112] (Lord Brown).

[482] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 124–25. Also: B Stirn, *Vers un droit public européen* (Montchrestien 2012) 64–65.

[483] *Tyrer v United-Kingdom* (1978) 58 ILR 339, 353.

5 Proportionality

5.1 Introduction

The centrality in the law of the ECHR of proportionality balancing has long been recognised. This is not surprising as proportionality is an analytical framework which is particularly well suited to managing the litigation of qualified rights.[484] The vocation of the ECHR proportionality test is to strike a balance between the general interests of the community and the protection of the individual's fundamental rights. The European Court pointed this out in *Cossey*, where it held that 'regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention'.[485]

The ECHR proportionality test encompasses first legality ('Is the interference prescribed by a clear and accessible law?') and secondly legitimacy and the giving of reasons. The analysis here focuses upon legitimacy and the giving of reasons. This part of the test may then be disaggregated into four elements: First whether there was a legitimate aim to the interference; this will not normally be the object of a very searching scrutiny. Secondly the Court will turn to whether the measure was suitable or appropriate to achieve the desired end. The attention then, thirdly, shifts to whether the interference was proportionate to the identified legitimate aim and necessary in a democratic society. The fourth hurdle is sometimes referred to as whether the

[484] A Stone Sweet & H Keller, 'Introduction: The Reception of the ECHR in National Legal Order' in A Stone Sweet & H Keller, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 10–11. Also: A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 178–81.

[485] *Cossey v United Kingdom* App No 10843/84 judgment 27 September 1990 [37]. Also: R Ryssdal, 'The Coming of Age of the European Convention on Human Rights' (1996) 1 EHRLR 18, 26.

interference was proportionate *strico sensu*; the question that the European Court will ask at this point is whether a 'fair balance' had been struck between on the one hand the interests of the applicant and the general interests of the community on the other.[486]

It is particularly with arts 8–11 of the Convention that the structured proportionality test has been applied. But the European Court will conduct a proportionality inquiry with respect to other Convention rights too. The same is the case also with art 14, which as the European Court held in *Belgian Linguistics* 'is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized'.[487] In *O'Halloran* the Court, following the approach of the Privy Council in *Brown v Stott,*[488] accepted that in some cases art 6 rights can be interfered with if that interference is proportionate.[489] Furthermore it is clear from cases such as *A v United Kingdom* that a test similar to the proportionality inquiry will be applied also in respect of derogations under art 15, in the determination of whether a state member

[486] See the debate on this type of balancing in J Finnis, *Natural Law & Natural Rights* (2nd edn, Oxford University Press 2011) 117; P Craig, 'The Nature of Rationality Review' [2012] CLP (forthcoming); T Endicott, 'Proportionality and Incommensurability' Oxford University Legal Research Paper Series, No 40/2012.

[487] *Belgian Linguistics Case* App No 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 judgment [Plenary Court] 23 July 1968 [10]. See for a more recent example: *Serife Yigit v Turkey* App No 39876/05 judgment [GC] 2 November 2010 [67].

[488] *Brown v Stott* [2003] 1 AC 681 (PC) (Lord Bingham).

[489] *O'Halloran & Francis v United Kingdom* App Nos 15809/02 & 25624/02 judgment [GC] 29 June 2007 [53]. Also: *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011. See the criticism in N Bamforth & LC Hoyano, *Human Rights Law and Principles in the United Kingdom* (Oxford University Press 2013) Ch 9; A Ashworth, 'Security, Terrorism and the Value of Human Rights' in BJ Boold & L Lazarus, *Security and Human Rights* (Hart 2007) 215–16; A Ashworth, 'Eroding the Structure of the Convention? The Public Interest in Prosecutions for Serious Crime' in KS Ziegler & PM Huber (eds), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Hart 2013) 36–37.

has gone beyond what is 'strictly required by the exigencies of the situation'.[490] The 'fair balance' test, or a test similar to it, also applies in respect of for example art 1 of the First Protocol. This is clear from cases such as *Pressos Compania Naviera SA*:

> An interference with the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[491]

The Court in *Pressos Compania Naviera SA* continued to say that it was particularly important in this regard that there had been 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions'.[492]

Nada v Switzerland, which concerned art 8, is exemplary of the structured inquiry which the European Court will conduct in respect of arts 8–11. The Grand Chamber in *Nada* began by ascertaining that there had in fact been a *prima facie* interference with the applicant's right to respect for his private and family life, and that this interference would amount to a breach of the article unless the requirements of 8(2) were satisfied. In that regard that Grand Chamber state that: 'It thus remains to be determined whether it was "in accordance with the law", pursued one or more of the legitimate aims enumerated in that paragraph and was "necessary in a democratic

[490] *A v United Kingdom*, App No 3455/05, judgment [GC] 19 February 2009 [182]–[190]. Cf A Ashworth, 'Security, Terrorism and the Value of Human Rights' in BJ Goold & L Lazarus, *Security and Human Rights* (Hart 2007) 215.

[491] *Pressos Compania Naviera SA & Others v Belgium* App No 17849/91 judgment 20 November 1995 [38].

[492] *Pressos Compania Naviera SA & Others v Belgium* App No 17849/91 judgment 20 November 1995 [38]. Also: *Lindheim & Others v Norway* App Nos 13221/08 & 2139/10 judgment 12 June 2012.

society" to achieve such aims.'[493] The Grand Chamber underlined that, as a part of the last limb of the proportionality inquiry, the Court will apply a least restrictive means test:

> The Court has previously found that, for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out.[494]

This should be seen as a natural aspect of the proportionality inquiry; it is really no more than a different way of phrasing that which above was referred to as the third limb of the ECHR proportionality inquiry: whether the interference was proportionate to the identified legitimate aim and necessary in a democratic society.

Under the schema of the ECHR the national courts must, as they apply the Convention in the context of domestic law, apply the same proportionality test as the European Court. If they do not then the result may be that the European Court hands down an adverse ruling against the state in issue.[495]

The change which this has prompted in French, German, and UK law depends in part on what the picture was like before the ECHR law made its mark on domestic law. The proportionality test is a structured form of inquiryThe national courts must conduct a proportionality analysis which adheres to the structure of the ECHR test.

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[493] *Nada v Switzerland* App No 10593/08 judgment [GC] 12 September 2012 [167].

[494] *Nada v Switzerland* App No 10593/08 judgment [GC] 12 September 2012 [183]. Also: *Glor v Switzerland* App No 13444/04 ECHR 2009 [94].

[495] *Smith & Grady v Untied Kingdom* (1999) 29 EHRR 493; *Vogt v Germany* (1996) 21 EHRR 205 [52]. Also: P Sales, 'Rationality, Proportionality and the Development of the Law' [2013] PL 223, 226.

5.2 Proportionality Review in Domestic Law

5.2.1 Proportionality Review in French Law

French judges settle rights cases by way of full-fledged three-pronged proportionality analysis. This they have done with increasing rigour and frequency since at least the 1980s.[496] The beginnings of the French approach to proportionality inquiries in the jurisprudence of the Conseil d'État is well known and well documented.[497] The classic case in this regard is *Benjamin*.[498] *Benjamin* concerned the right of right-wing intellectual René Benjamin, representing the semi-fascist group *Action française*, to organise a meeting—ostensibly about the 'auteurs comiques' Courteline and Sacha Guitry—which the mayor of Nevers suspected would end with riots. Basing itself on the right to freedom of association set out in two laws dating back to 1881 and 1907, the Conseil d'État ruled that the mayor could not lawfully stop the meeting. There was indeed a threat of riots, but through careful proportionality analysis the Conseil d'État found that the right to freedom of association must in the event prevail. In this respect *Benjamin* followed in the same vein as the earlier ruling in *Baldy*, in which the *commissaire du gouvernement* had forcefully affirmed, in what would become a

[496] See, eg, Decision number 85–192 *Conseil constitutionnel*, Journal officiel of 26 July 1985 p 8510; Decision number 88–244 *Conseil constitutionnel*, Journal officiel of 10 January 1988 p 482; Decision number 90–280 *Conseil constitutionnel*, Journal officiel of 8 December 1990 p 15086; Decision number 92–316 *Conseil constitutionnel*, Journal officiel of 22 January 1993 p 1118; Decision number 93–335 *Conseil constitutionnel*, Journal officiel of 26 January 1994 p 1382.

[497] J Bell, 'The Expansion of Judicial Review over Discretionary Powers in France' [1986] PL 99, 113–19; L Neville Brown & J Bell, *French Administrative Law* (5th edn, Oxford University Press 1998) 253–67; S Boyron, 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) 12 OJLS 237.

[498] Conseil d'État, 19 May 1933 *Benjamin* (*conclusions* : Michel). Also Conseil d'État, 8 December 1972 *Ville de Dieppe*; Conseil d'État, 28 May 1971 *'Ville Nouvelle-Est'* (*conclusions*: Braibant); Conseil d'État, 9 May 1990 *de Benouville*.

commonplace in French public law, that 'la liberté est la règle, la restriction de police l'exception'—'liberty is the rule, security restrictions the exception'.[499]

Former President Jean-Paul Costa has been prominent in arguing that the ECHR proportionality test builds upon the approach taken in the early Conseil d'État jurisprudence. If the European Court had existed in 1933, he conjectures, and had been seised of a case similar to *Benjamin*:

> je n'ai guère des doutes sur le raisonnement qu'elle aurait tenu et sur le résultat : l'interdiction était prévue par la loi, le maintien de l'ordre public constituait un but légitime, mais l'interdiction était disproportionné, compte tenu des autres mesures à la disposition du maire.[500]

Perhaps the best example of the approach taken by the Conseil d'État today is *Association pour la promotion de l'image*.[501] As was said in Chapters 2 and 4, the Conseil d'État was asked in this case whether a decree regulating the use and storage of data from biometric passports was lawful, and held parts of the decree to be unlawful as they were disproportionate. The Conseil in this regard relied upon art 8,[502] as well as art 2 Protocol 4 (on the right to free movement). In spite of its traditionally pithy style of judgment the Conseil explicitly made clear that it followed from these ECHR provisions, as well as from domestic ones, that:

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[499] Conseil d'État, 17 August 1917 *Baldy*.

[500] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 91. Also: B Stirn, *Vers un droit public européen* (Montchrestien 2012) 95–99.

[501] Conseil d'État, 26 October 2011 *Association pour la promotion de l'image et autres*. Also: X Domino & M Guyomar, 'Le passeport biométrique au contrôle: empreintes et clichés' [2012] AJDA 35.

[502] *Rapporteur public* Boucher relied in his *conclusions* upon the art 8 cases Leander *v Sweden* App No 9248/81 judgment 26 March 1987; *S & Marper v United Kingdom* App Nos 30562/04 & 30566/04 judgment [GC] 4 December 2008. See Ch 2.

> l'ingérence dans l'exercice du droit de toute personne au respect de sa vie privée que constituent la collecte, la conservation et le traitement, par une autorité publique, d'informations personnelles nominatives, ne peut être légalement autorisée que si elle répond à des finalités légitimes et que le choix, la collecte et le traitement des données sont effectués de manière adéquate et proportionnée au regard de ces finalités.

On this background the Conseil went into a detailed and searching analysis of each of these three steps. It is also clear from the judgment that the Conseil d'État saw itself bound by a least restrictive means test, as it went into detail as to why the retention of two fingerprints would be proportionate whereas the retention of eight, as the decree provided, was disproportionate. *Association pour la promotion de l'image* should be seen as crowning glory of a long jurisprudence, spanning, as was adumbrated above, the early cases of *Baldy* and *Benjamin* but also later ones such as *Ville Nouvelle-Est*[503] and *St Marie de l'Assomption*.[504] The approach which the Conseil d'État explicitly adopted in *Association pour la promotion de l'image* had, however, already been clear from the jurisprudence of the Conseil constitutionnel.[505]

How searching the test is will differ with the right in question. Traditionally there has been in the jurisprudence of the Conseil constitutionnel a dichotomy between cases engaging rights of the first order and cases engaging rights of the

[503] Conseil d'État, 28 May 1971 *'Ville Nouvelle-Est'* (*conclusions*: Braibant).

[504] Conseil d'État, 20 October 1972 *St Marie de l'Assomption*. Also: Conseil d'État, 19 April 1991 *Babas* & *Belgacem*. See G Braibant & B Stirn, *Le droit administratif français* (6th edn, Dalloz 2002) 283–85; B Stirn, D Fairgrieve & M Guyomar, *Droits et libertés en France et au Royaume-Uni* (Odile Jacob 2006) 250.

[505] O Dutheillet de Lamothe, 'Constitutional Court Judges' Roundtable' (2005) 4 I-CON 550; V Goesel Le Bihan, 'Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel: figures récentes' [2007] Revue française de droit constitutionnel 269, 284–85.

second order.[506] The former type of case covers, in broad terms, freedom of speech and individual liberty. The latter type of case covers, in broad terms, the right to property, the principle of equality, personal freedom, the right to freedom of enterprise, the right to freedom to marry, and equality with respect to public expenditure. In principle the test has the same structure whether the right in issue is a first- or second-order right. The difference is one of intensity.

The proportionality test applied by the Conseil constitutionnel in first-order rights cases is one of higher intensity than the one applied in cases of rights of the second order. Because of the format of Conseil judgments, one is at times hard pressed to find out 'what the judges do rather than what they say they do'. The terse style of the judgments of the Conseil seems to have made looking for particular legal shibboleths an important part of analysing the type of proportionality test to which the Conseil advert. The marker 'manifest' is the most important such marker.[507] With rights which are accorded second-order status, the Conseil will go no further than ascertaining that the limitation of a right not be 'manifest'. In the formulaic register of the Conseil this always means that the word manifest will feature in the test in this type of case. With rights which are accorded first-order status, the Conseil will subject the statute to a more searching proportionality analysis, with no reference to the disproportion between end and means having to be manifest.

[506] V Goesel Le Bihan, 'Réflexion iconoclaste sur le contrôle de proportionallité exercé par le Conseil constitutionnel' [1997] Revue française de droit constitutionnel 227; 'Le contrôle exercé par le Conseil constitutionnel: défense et illustration d'une théorie générale' [2001] Revue française de droit constitutionnel 67.

[507] See V Goesel Le Bihan, 'Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel: figures récentes' [2007] Revue française de droit constitutionnel 269, 270.

A measure of uncertainty has lingered as to whether it is still tenable to uphold this dichotomy between first-order rights, the abridgement of which require a searching proportionality analysis, and second-order rights, the abridgement of which require only manifest disproportionality. If, however, the two types of right, with their attendant proportionality tests, are seen as constituting the two extremes of a continuum the dichotomy is a tenable illustration of the use of proportionality by French constitutional judges. It is not necessary, at all events, to deal further with this debate here, though we shall see later that it has real effects; what is apposite here is to ascertain the extent to which French law has its proportionality analysis in rights cases.

A recent and illustrative example of the manifest proportionality test is found in *Prohibition des machines à sous*.[508] In this case the Conseil was asked, under the new procedure according to which private persons may dispute the constitutionality of a statute before the Conseil, to adjudicate on a law relative to the import and use of fruit machines. The contested statute did not breach the freedom of enterprise as it did not 'infringe on the principle of necessity and of proportionality'.[509] In other decisions, however, the Conseil has gone much further and developed a fully-fledged proportionality analysis.

The Conseil constitutionnel's decision in a case bearing on preventive detention furnishes a good example of this. Act of 25 February 2008 on post-sentence preventive detention and diminished criminal responsibility due to mental deficiency introduced into French law the concept of 'preventive detention'. Under Article 706–

[508] Decision number 2010–55 *Conseil constitutionnel*; Journal officiel of 19 October 2010, at 18695.

[509] Decision number 2010–55 *Conseil constitutionnel*; Journal officiel of 19 October 2010, at 18695 [6].

53–13 of the French Code of Criminal Procedure, this measure could be ordered against particularly dangerous offenders posing a high risk of recidivism because they suffer from a serious personality disorder. In view of the custodial nature of the measure, the time it may last, the fact that it is indefinitely renewable, and the fact that it is ordered after conviction by a court, the Conseil considered that post-sentence preventive detention could not be ordered retrospectively against persons convicted of offences committed prior to the publication of the act. The decision on *Loi relative à la retention de sûreté et à la declaration d'irresponsabilité pour cause de trouble mental*, [510] which engaged first-order rights and therefore the more searching proportionality test, is the judgment in which the willingness of the Conseil to accept the ECHR-style test is the clearest. This was the first instance at which the Conseil scrutinised all three stages of the test—suitability, necessity, and proportionality *stricto sensu*—in the same decision. The legislation which was under review in this case allowed for individuals who had completed their prison sentence following conviction for certain crimes subsequently to be held in preventive detention—'*rétention de sûreté*'—for indefinitely renewable periods of one year, if they were considered to be dangerous and to present a high risk of recidivism. The decision has many interesting features but apposite for our purposes here is the analysis which the Conseil conducted on the basis of art 9 of the Declaration of the Rights of Man and of the Citizen of 1789, which provides that: 'Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement

[510] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, at 3272.

réprimée par la loi.'[511] The Conseil also founded its analysis in art 66 of the Constitution, which provides that: 'Nul ne peut être arbitrairement détenu. L'autorité judiciaire, gardienne de la liberté individuelle, assure le respect de ce principe dans les conditions prévues par la loi.'[512]

It should be added that the Conseil held that preventive detention was not a 'repressive measure'; the scheme was not deemed to represent punishment to those affected.[513] The presumption of innocence therefore could not apply.[514] On the one hand the Conseil had found that the preventive detention scheme had to respect the principles which flow from art 9 of the Declaration of 1789 and art 66 of the Constitution, according to which individual liberty may be restricted only to the extent that it is 'necessary'. In addition to this came the right to individual liberty, including the right to privacy, guaranteed by arts 2 and 4 of the Declaration of 1789.

On the other hand it was incumbent on the legislator to take into account exigencies of public order. As it was found that the restrictions of these rights had to be 'suitable, necessary and proportionate with respect to the prevention sought attained' the Conseil embarked on an elaborate three-pronged proportionality analysis.[515] Not only is this, as adumbrated above, the first time the Conseil has

[511] English translation: 'As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.'

[512] English translation: 'No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute.'

[513] See Ch 7.

[514] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, at 3272 [12].

[515] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, at 3272 [12].

adverted in the same decision to all three stages of the proportionality test; it is also the first time the Conseil has split the analysis into suitability, necessity, and proportionality this clearly, treating under separate headings all three elements.

Looking first at the suitability—'*l'adéquation*'—of the measures at issue, the Conseil noted that the measures concerned only a class of particularly dangerous person, characterized by a very high probability of recidivism due to serious personality disturbances. The Conseil furthermore considered that, according to section 706–53–13 of the proposed code of criminal procedure, the statute in issue, the preventive detention would concern only persons found guilty of very serious crimes, and that the area of application of the preventive detention scheme was suitable to its aim.[516] In addition to this came section 706–53–14 of the proposed code of criminal procedure, which added a further guarantee, as the provision said that a committee was to examine the situation of the persons at issue, in order to ascertain whether detention was still necessary. This, said the Conseil, would ensure that the measures included only those suffering from serious personality disturbances.

Where necessity was concerned the Conseil said that considering the gravity of the restriction which the scheme would mean to individual liberty, the preventive detention could only be necessary if no other less restrictive measure could achieve the same aim while infringing less on the personal integrity of the persons concerned. The Conseil considered at this juncture the safety mechanisms which the legislator had been at pains to include in the scheme, such as, *inter alia*, the underscoring in the statute of the exceptional nature of the scheme, the several evaluations to which the

[516] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, at 3272 [15].

continued detention would be subject, and the fact that courts could only order the measure on cases of 'strict necessity'.[517] The scheme, subject to these restrictions, was necessary with respect to the aim sought to be achieved.

With respect to proportionality *stricto sensu*, the third step of the test, the Conseil brought out, *inter alia*, that the preventive detention scheme could be ordered only if approved by a multidisciplinary preventive detention committee, and then the three-judge panel of a court of appeal, following a hearing in court in the presence of both parties, which, if the person at issue so wished, could be public. It also underlined that after the passing of three months the person under preventive detention may ask that the detention be ended, and that the courts could, of their own volition or on the request of the detainee, end the detention at any time if legal or factual circumstances so required. The Conseil further pointed out that the legislator had tried to harmonise the preventive detention scheme with, on the one hand, the right to individual liberty guaranteed by art 66 of the Constitution and, on the other hand, the stated aim of preventing recidivism. Finally the Conseil said that the necessary character of the measure was ensured by the fact that the legislator had made sure that the evolution of the detainee be kept under regular review. In view of these measures the Conseil found that the scheme, to the extent that it did not apply retroactively,[518] was proportionate and therefore not in breach of the Constitution.

[517] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, at 3272 [18]–[20].

[518] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, at 3272 [8]–[10].

5.2.2 Proportionality Review in German Law

As was said in Chapter 2, German law has been at the forefront in developing proportionality as a standard both in public law generally and with respect to rights protection more specifically.[519] In fact it could, as was also stated in ch 2, legitimately be averred that German law has been more fastidious in this respect than the law of the ECHR itself.[520]

The use by the Federal Constitutional Court of proportionality inquiries in rights cases goes back to the 1950s,[521] while in German administrative law the life of the proportionality test, including proportionality *stricto sensu*, goes all the way back to the 1880s if not even earlier.[522]

In the 1958 judgment *Lüth*,[523] the first and arguably most important post–World War Two freedom of expression case, the Federal Constitutional Court held that the right to freedom of expression of the Leader of the Hamburg Senate Erich

[519] J Schwarze, *Eurpäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (2nd edn, Nomos 2005) 669.

[520] B Goold, L Lazarus, and G Swiney, *Public Protection, Proportionality, and the Search for Balance* (Ministry of Justice 2007) 48. Also: L Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany* (Oxford University Press 2004) 46–47 & 194–97.

[521] See eg HJ Cremer, *Human Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Routledge–Cavendish 2011); C Grabenwarter & T Marauhn, 'Grundrechtseingriff und -schranken' in T Marauhn & R Grote, *EMRK/GG Konkordanzkommentar zum europäischen Grundrechtsschutz* (Mohr Siebeck 2006); A Voßkuhle, 'Grundrissen—Öffentliches Recht: Der Grundrechtseingriff' [2009] Juristische Schulung 313; A Voßkuhle, 'Grundrissen—Öffentliches Recht: Der Grundsatz der Verhältnismäßigheit' [2007] Juristische Schulung 429.

[522] See, eg, F Wieacker, 'Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung' in M Lutter, W Stimpel, and H Wiedemann (eds), *Festschrift für Robert Fischer* (de Gruyter 1979) 867. Also: A Stone Sweet & J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia J Transnational L 73, 98–111; M Cohen-Eliya & I Porat, 'American Balancing and German Proportionality: The Historical Origins' 8 (2010) I-CON 263, 271–72.

[523] BVerfGE 7, 198.

Lüth had been breached.[524] Lüth had in his private capacity encouraged people to boycott the screening of the filmmaker Veit Harlan's film *Unsterbliche Geliebte*, as in the view of Lüth Harlan had made anti-Semitic films on the payroll of the Third Reich during World War Two. Though there was nothing controversial about Harlan's film as such, Lüth felt that the screening of Harlan's film would upset precarious balances in post-war German society. The court of first instance handed down an injunction prohibiting Lüth to encourage German cinemagoers not to go see the film. This Lüth felt abridged his right to freedom of expression in art 5(1)(1) of the Basic Law. Article 5(1)(1) of the Basic Law provides that:

> Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich allgemein zugänglichen Quellen ungehindert zu unterrichten.[525]

The Federal Constitutional Court held that, in view of the importance of free speech, the injunction prohibiting Lüth expressing what he had said was disproportionate to its aim. The Court conducted no fully-fledged proportionality analysis, but instead an 'unstructured' one stressing that there should be proportionality between the aim sought and the means applied. In present-day terminology the Regional Court's judgment was found not to be a proportionate ('verhältnismäßig') limitation ('Einschränkung') of Mr Lüth's right.[526]

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[524] B Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' 115 (1999) LQR 47, 50–54.

[525] 'Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.'

[526] HJ Cremer, *Human Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Routledge–Cavendish 2011) 175.

The Federal Constitutional Court in *Apothekenurteil*[527] gave another early example of what it would later develop into its structured inquiry. *Apothekenurteil* bore upon freedom to engage in business and to choose a profession. The government of Upper Bavaria had promulgated a law on pharmacies, which regulated the setting up of pharmacies in a way which the Federal Constitutional Court held to be in breach of the Basic Law. The Court, in setting out the standard for what would be acceptable regulation of the freedom to engage in business and to choose a profession, averted to proportionality analysis. Though not as explicitly as the Court's jurisprudence would go on to do later, *Apothekenurteil* evinces the use of the three categories suitability, necessity, and proportionality *stricto sensu*. Then in *Wenker*,[528] from 1965, it was clear that proportionality analysis in rights cases had taken a very prominent place in the jurisprudence of the Federal Constitutional Court:

> The principle of proportionality is a constitutional principle. It follows from the principle of rule of law. At bottom it follows already from the nature of fundamental rights themselves, which, as the expression of the general right to freedom of the citizen vis-à-vis the state, may be curtailed by public power only to the extent that it is unavoidable in the protection of public interests.[529]

The current position of German law is that a statute which qualifies a fundamental right has to pass a four-pronged proportionality test.[530] The principle from which this

[527] BVerfGE 7, 377.

[528] BVerfGE 19, 342.

[529] BVerfGE 19, 342 (348): 'Der Grundsatz der Verhältnismäßigkeit [hat] verfassungsrechtlichen Rang. Er ergibt sich aus dem Rechtsstaatsprinzip, im Grunde bereits aus dem Wesen der Grundrechte selbst, die als Ausdruck des allgemeinen Freiheitsanspruchs des Bürgers gegenüber dem Staat von der öffentlichen Gewalt jeweils nur so weit beschränkt werden dürfen, als es zum Schutz öffentlicher Interessen unerläßlich ist.'

[530] See, eg, H Maurer, *Allgemeines Verwaltungsrecht* (18th edn, CH Beck 2011) 736–38; J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (2nd edn, Nomos 2005) 670–71; G Manssen, *Staatsrecht II: Grundrechte* (7th edn, Beck 2010) 54–58.

test flows is referred to in the German literature as the 'Verhältnismäßigkeitsgrundsatz im weiteren Sinne', proportionality in the wide sense. The first step of the test is that the restriction in issue need have a legitimate aim—'legitime Zwecksetzung'. Though as a rule the legislature is free to choose the aims of the statutes which it promulgates into law, illegitimate aims are not acceptable, and a statute which is found to have one will be struck down. A statute is found to contravene the Basic Law only when there is no legitimate aim to be found.

It is a contentious issue in German law whether, in the judicial review of a statute, all possible aims are to be taken into account or only those which the legislator pursued. It would scarcely be sensible that a statute is struck down if the legislator could pass the same statute again claiming that it pursued different aims from the initial one. Because of this the Federal Constitutional Court will at times try to 'save' statutes which could have been struck down on the grounds of the unacceptability of aims which the legislator had not considered.[531] The second step of the German proportionality test is one of appropriateness, what in the jurisprudence of the Federal Constitutional Court is called 'Geeignetheit'. The restriction must be appropriate. A restriction will meet this demand when it promotes the aim sought: 'The measure is appropriate when it helps reach the aim sought to be attained'.[532] As will be plain from this quotation the measure does not have to be the best way of promoting the aim of the statute; it is enough that the measure contributes to what is sought attained. In other words no least restrictive means test follows from the practice of the Federal Court. The court does not demand that the possibility of

[531] BVerfGE, NJW 1998, 1776.

[532] BVerfGE 30, 292 (316). Also: BVerfGE 19, 330 (337); BVerfGE 25, 1 (17–18); BVerfGE 63, 88 (115); BVerfGE 67, 157 (175); BVerfGE 96, 10 (23); BVerfGE 103, 293 (307).

recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out.[533] Thus the legislator is in this regard accorded a measure of deference:

> A measure is appropriate in terms of the Basic Law when it *helps* reach the aim sought attained; in this regard it is enough that there is a possibility of the aim being reached. The assessment and prediction necessarily fall within the ambit of the legislator. It is principally for the legislator, in view of the exigencies of legality of the field at issue, to decide what measures to take to pursue the public interest.[534]

This is, however, to some extent modified in the third step of the German test, which concerns the necessity of the measure. A measure qualifying a fundamental right is valid under the Basic Law only if it respects the principle of necessity. The principle of necessity requires that of two broadly equally suitable means, the one interfering less intensively ought to be chosen: 'The means is necessary only if the legislator could not have chosen another mean which would have been equally effective but less detrimental to fundamental rights'.[535] Faced with several measures which are equally effective, the legislator must choose the one which either does not infringe or

[533] BVerfGE 96, 10 (23). Also: C Grabenwarter & T Marauhn, 'Grundrechtseingriff und -schranken' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 364–65. Cf *Nada v Switzerland* App No 10593/08 judgment [GC] 12 September 2012 [183]; *Glor v Switzerland* App No 13444/04 ECHR 2009 [94]

[534] BVerfGE 115, 276 (308): 'Ein Mittel ist bereits dann im verfassungsrechtlichen Sinne geeignet, wenn mit seiner Hilfe der gewünschte Erfolg gefördert werden kann, wobei die Möglichkeit der Zweckerreichung genügt. Dem Gesetzgeber kommt dabei ein Einschätzungs- und Prognosevorrang zu. Es ist vornehmlich seine Sache, unter Beachtung der Sachgesetzlichkeiten des betreffenden Sachgebiets zu entscheiden, welche Maßnahmen er im Interesse des Gemeinwohls ergreifen will.'

[535] BVerfGE 67, 157 (176); BVerfGE 30, 292 (316). Also: C Grabenwarter & T Marauhn, 'Grundrechtseingriff und -schranken' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 366.

infringes the least on fundamental rights.[536] At this stage of the test, too, the Federal Constitutional Court has accorded a measure of deference to the legislator:

> In looking at the proportionality of qualification of a fundamental right regulating professional conduct, a freedom of discretion must be accorded to the legislator…. The Basic Law allows in the regulation of economic goals and attendant measures for a margin of appreciation and a margin of manoeuvre.[537]

The last stage of the German proportionality test is proportionality in the narrow sense. The principle of proportionality in the narrow sense as the third sub-principle of proportionality expresses the meaning of optimization relative to competing principles.[538] This stage of the German test is, in Alexy's words, underlain by the proposition that 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[539] On this reading the last stage of the three-stage test may be broken down into three stages. The first of these three involves establishing the degree of non-satisfaction of, or detriment to, the first of the competing principles. Then comes a second stage in which the importance of satisfying the competing principle is established. The third stage finally establishes whether the importance of satisfying the competing principle justifies the non-satisfaction, or detriment of, the first. Alexy gives he Federal Constitutional Court's decision in *Titanic* as an example. A widely published satirical magazine had

[536] BVerfGE 53, 135 (145).

[537] BVerfGE 53, 135 (145): 'Bei der Prüfung der Frage, ob die in einer Berufsausübungsregelung enthaltenen Einschränkungen verhältnismäßig sind, ist der Gestaltungsfreiheit Rechnung zu tragen, die dem Gesetzgeber…. In der Bestimmung wirtschaftspolitischer Ziele und der zu ihrer Verfolgung geeigneten Maßnahmen läßt das Grundgesetz einen Beurteilungsspielraum und Handlungsspielraum'.

[538] See R Alexy, 'Postcript' in R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 399–401.

[539] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 102.

referred to a paraplegic reserve officer fist as ‘né Murderer’ and then as a ‘cripple’. The magazine was in the Court of Appeal ordered to pay damages. A constitutional complaint was brought. The Federal Constitutional Court undertook ‘case-specific balancing’ between on the one hand the freedom of expression of those who published the article in the magazine, protected in art 5(1)(1) of the Basic Law, and the officer’s general personality right, protected in art 2(1) read in conjunction with art 1(1) of the Basic Law. The judgment in damages was held to be tantamount to a serious interference with the right to freedom of expression. This was so even though the damages had been awarded in a civil and not a criminal judgment—the damages could reduce the future willingness of those affected to produce their magazine as they had hitherto been doing.[540] The description, ‘né Murderer’, was then contextualised in the particular facetious register of the magazine, in which several persons had been given humorous surnames at birth. In this context one could not see the description as an ‘unlawful, serious, illegal breach’ the personality right of the reserve officer.[541] The interference with the personality right, then, was treated as having no more than moderate intensity. Having reached this conclusion, the Federal Constitutional Court made clear that for an award in damages—a serious interference with the constitutional right to freedom of expression—to be justified the interference with the right to personality would have to be at least as serious. This, however, the Federal Constitutional Court did not find to be the case. The interference with freedom of expression was therefore disproportionate. Matters did, however, stand differently with regard to giving the officer the epithet ‘cripple’. This description the Federal Constitutional Court found was a ‘serious breach of the paraplegic’s personality

[540] BVerfGE 86, 1 (10).

[541] BVerfGE 86, 1 (11).

right'.[542] Imposing damages to protect the officer was therefore important. To describe a severely disabled person as a 'cripple' is taken generally to be humiliating and disrespectful. The serious interference with freedom of expression was therefore countered by the protection of personality. This being the case the Federal Constitutional Court concluded that there was 'no flaw in the balancing to the detriment of freedom of expression'.[543] The constitutional complaint of Titanic was justified only so far as it related to damages for the epithet 'né Murderer'; it was unjustified with respect to 'cripple'.[544] This brings out the three stages into which the proportionality *stricto sensu* has been broken down in German law.

It is clear that the German Federal Constitutional Court makes full use, and has done so for many decades, of three-stage proportionality analysis. It is, however, equally clear that this is not something German judges have begun doing because of the influences of the Strasbourg jurisprudence. The German test is plainly a searching one.[545] Though it is difficult to prove this, it seems reasonable to conclude that this is a main reason why Germany is faulted so rarely by the European Court on issues relating to proportionality. It could be asked, however, whether there are any substantial differences between the German and the European test. Grabenwarter and Marauhn have argued that the differences are few and that if one looks closely at what is actually going on in the two tests the similarities outweigh the differences:

> The need for the relation between the objective and the measures taken to be an adequate one—proportionality *strico sensu*—is the

[542] BVerfGE 86, 1 (13).

[543] BVerfGE 86, 1 (13).

[544] BVerfGE 86, 1 (14).

[545] B Goold, L Lazarus, and G Swiney, *Public Protection, Proportionality, and the Search for Balance* (Ministry of Justice 2007) 48.

> most important element of the proportionality inquiry, and of the justification of a measure altogether, in the jurisprudence both of the Federal Constitutional Court and of the European Court.[546]

5.2.3 Proportionality Review in UK Law

The test applied by the UK courts was set out in *Quila*.[547] Lord Wilson cast the appropriate test in the following terms: first, is the legislative objective sufficiently important to justify limiting a fundamental right? secondly, are the measures which have been designed to meet it rationally connected to it? thirdly, are they no more than are necessary to accomplish it? and, fourthly, do they strike a fair balance between the rights of the individual and the interests of the community?[548] It would certainly be fair to say that the UK courts have learned its lessons from adverse Strasbourg rulings such as *Smith & Grady*.[549] Lord Bingham in *Denbigh* said about the nature of the inquiry which a UK court will perform that:

> it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting… There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test.[550]

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[546] C Grabenwarter & T Marauhn, 'Grundrechtseingriff und -schranken' in R Grote & T Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 367.

[547] *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621.

[548] *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621, 643 (Lord Wilson); *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, 187 (Lord Bingham).

[549] See P Craig, 'The Nature of Rationality Review' [2012] CLP (forthcoming).

[550] *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, 116 (Lord Bingham).

It is clear, and has so been for a long while, that the UK courts apply proportionality analysis in cases bearing on human rights.[551] As was adumbrated in ch 2, he test applied by the UK courts was set out in Lord Wilson's judgment in *Quila,*[552] where the inquiry was cast in the following terms: first, is the legislative objective sufficiently important to justify limiting a fundamental right? secondly, are the measures which have been designed to meet it rationally connected to it? thirdly, are they no more than are necessary to accomplish it? and, fourthly, do they strike a fair balance between the rights of the individual and the interests of the community?[553]

One question long lingered in UK law with regard to the proportionality inquiry as applied in rights cases: was the 'proportionality *stricto sensu*' element of the classic German formulation of the proportionality test part of the test applied in UK law?[554]

In the early 1990s the courts recognised that *Wednesbury*[555] rationality review was itself a concept which could vary in intensity: this was brought out in *Brind,*[556]

[551] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532. Also: M Elliot, 'Proportionality and Deference: The Importance of a Structured Approach' in M Elliott and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press 2010) 264; P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) Ch 21; J Rivers, 'Proportionality and the Variable Intensity of Review' [2006] CLJ 174; M Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] New Zealand Law Review 423; P Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265; J King, 'Proportionality: A Halfway House' [2010] New Zealand Law Review 327.

[552] *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621.

[553] *Quila & Another* [2011] UKSC 45, [2012] 1 AC 621, 643 (Lord Wilson). Also: *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, 187 (Lord Bingham).

[554] See *Bank Mellat v HM Treasury* [2011] EWCA Civ 1, [2012] QB 101 (QB). Interestingly the Court of Appeal in *Bank Mellat* seems to suggest, at [21], that the UK courts have gone further than the European Court and the ECJ, as in the view of the Court of Appeal the two European courts 'strip out' the third stage of the proportionality test.

[555] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[556] *R v Secretary of State for the Home Department Ex p Brind* [1991] 1 AC 696 (HL).

where the House of Lords, before the HRA, made clear that in cases regarding fundamental rights a more searching version of *Wednesbury* review than the one set out by Lord Greene and overlaid by Lord Diplock, in *Wednesbury* and *GCHQ*[557] respectively, would be used. The result was the recognition that some rights contained in the ECHR had always been part of the common law; in effect where the interest affected was a fundamental right, the review would be more intense. This was little short of being an altogether different test from *Wednesbury*.

In parallel with this development the courts began to reconfigure *Wednesbury*, without really acknowledging that they were modifying the test. In many areas they would strike down decisions which were by no stretch of imagination 'manifestly absurd' or in breach of all logics, an example of which is found in *Balchin*,[558] where Sedley J said that a decision would be *Wednesbury* unreasonable if it disclosed an error of reasoning which robbed the decision of its logical integrity. The courts thus started opening up the argumentation, no longer demanding that the decision be logically absurd, but they did so without saying that the test was changed. As a result there was more and more daylight between *Wednesbury* and the actual tests applied.

When Strasbourg was not swayed by the United Kingdom's arguments that rationality review must do in *Smith & Grady*,[559] the Strasbourg view was duly accepted by the House of Lords in *Daly*.[560] UK judges as a matter of course hold that interferences with Convention rights must accord with a proportionality test in order

[557] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

[558] *R v Parliamentry Commissioner for Adminstration Ex p Balchin* [1997] COD 146 (QB).

[559] *Smith & Grady v Untied Kingdom* (1999) 29 EHRR 493.

[560] *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [27].

to pass muster. The same is the case with cases with a Community law component. The application by UK judges of proportionality analysis does not, however, stop there. Also in cases in which the claimant takes care not to frame their case in terms of Convention rights have the Supreme Court Justices adverted to tests of proportionality in order to settle the case in issue. This was for example the case with *JFS,*[561] which was couched not in terms of Convention rights but the Race Relations Act 1975. This case repays study not only with regard to the fields in which UK judges advert to proportionality analysis; it is also revealing with regard to whether the UK test is a full-fledged three-step test, with proportionality *stricto sensu* as the final step.

JFS involved a challenge by a claimant, in the form of judicial review of administrative action, of the decision of a London school—JFS, formerly the Jews' Free School—to refuse to admit his son to the school. The school is constantly oversubscribed. As its oversubscription policy the school adopted the practice of giving precedence in admission to those children recognised as Jewish by the Office of the Chief Rabbi (OCR). On the Orthodox interpretation of Jewish law only those descended in the matrilineal line from a woman whom the OCR would recognise as Jewish or those who have undertaken a course of conversion recognised by Orthodox authorities are recognised as Jewish.

The claimant's son was on this interpretation not Jewish. The admissions policy in issue was held by the Supreme Court to constitute unlawful discrimination against the claimant's son on grounds of ethnic origin. This issue did not arise as a

[561] *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15, [2010] 2 AC 728.

rights case under the HRA. The claimant did not couch his claim directly in terms of freedom of religion, which would have been a fully viable argumentative trajectory. Had he done so he would have been met with a set of decisions from the UK courts and the European Court which were considerably less favourable to a claimant than would be a claim under the Race Relations Act. The issue would particularly have arisen as to whether there was an 'interference' with his freedom of religion, which would in part involve the courts considering whether there was an alternative available to the claimant which allowed him to manifest his religion. In this regard the UK courts have taken a fairly rights-restrictive approach.[562] The Race Relations Act 1976 creates two different statutory torts—direct and indirect discrimination. As Baroness Hale set out in her judgment 'the main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim'.[563] The basic structure of the indirect discrimination claim involves several steps: the first step is whether the policy has a greater adverse effect on particular ethnic groups than others; the second step is whether, despite the greater adverse effect, the policy was legitimate. The second step opened for the school the possibility of arguing, as it did, that the freedom of religion of the school ought to be weighed in the balance.

Two Justices clearly regarded the use of the contested admissions criteria as justified on a proportionality analysis. Lords Rodger and Brown in their judgments held that the objective pursued by the schools admissions policy was incompatible

[562] See *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [23]; *R (on the application of X) v Headteachers & Governors of Y School* [2007] EWHC 298 (Admin), [2007] HRLR 20 [40]; *Eweida v British Airways Plc* [2010] EWCA Civ 80, [2010] ICR 890; *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, [2010] 1 WLR 955.

[563] *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15, [2010] 2 AC 728 [57] (Baroness Hale).

with any approach that would give precedence to children whom the OCR did not recognise as Jewish. The aim of the school, to instil Jewish values into children who are Jewish in the eyes of Orthodoxy, was legitimate, said Lord Rodger; instilling Jewish values into children whom Orthodoxy does not regard as Jewish, at the expense of children whom Ortodoxy does regard as Jewish, he continued, would make no sense.[564] He 'could not see how a court could hold that this policy is a disproportionate means of achieving the School's legitimate aim'.[565]

There has, as adumbrated above, been uncertainty as to whether the UK test embodies the third element of the classic German formulation of the proportionality test—proportionality *stricto sensu*. In this regard, too, *JFS* provides guidance. Before we come to what the Supreme Court in *JFS* said on this issue, however, it is necessary to look at the cases preceding *JFS*. Traditionally the leading, most structured formulation by UK judges has been the one set out in the Privy Council's judgment in *de Freitas v Permanent Secretary of Ministry of Agriculture.*[566] The test applied in *de Freitas* was later referred to by Lord Steyn in *Daly*[567] and also received the imprimatur of the House of Lords in *Huang*.[568] Lord Hope in *Shayler*[569] and Lord Bingham in *A v Secretary of State for the Home Department*,[570] too, have given it

[564] *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15, [2010] 2 AC 728 [233].

[565] *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15, [2010] 2 AC 728 [233] (Lord Rodger), [256] (Lord Brown).

[566] *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69 (PC).

[567] *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [27].

[568] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [19].

[569] *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 [61].

[570] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [30].

their support. This test did not in unambiguous terms include the last stage. Some UK cases have, however, acknowledged that the proportionality test demands 'the striking of a fair balance between the rights of the individual and the interests of the community'.[571]

Razgar concerned the rights of asylum seekers who resisted removal in reliance on art 8. In such cases, said Lord Bingham, the questions to be answered were likely to include whether the interference with art 8 rights was necessary, and is so whether such interference was proportionate to the legitimate public end sought to be achieved. In setting out the last of those steps, Lord Bingham said that 'the answering of [that question], where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage'.[572]

Lord Mance in *JFS* held that, *ex hypothesi*, if the case was not one of direct discrimination then the policy was indirect discrimination. Sedley LJ in the Court of Appeal had held that the school's admissions criteria were 'explicitly related to ethnicity', and that 'an aim of which the purpose or inevitable effect is to make and enforce distinctions based on race or ethnicity cannot be legitimate'.[573] On Lord Mance's view, however, it was possible to identify a legitimate aim, one founded in the school's Orthodox Jewish character. The question then was whether the JFS as the

[571] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 [20]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167.

[572] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 [20].

[573] *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15, [2010] 2 AC 728 [45]–[47].

alleged discriminator could show the differential treatment 'to be a proportionate means of achieving a legitimate aim': s 1(1A)(c). The proportionality test applied ran the full gamut of suitability, necessity, and proportionality *stricto sensu*. Quoting Mummery LJ in *R (Elias) v Secretary of State for Defence* and Lord Bingham in *Huang* as to the proper proportionality test,[574] Lord Mance said that:

> It is for the school to show, in the circumstances, that its aim or objective corresponds to a real need and that the means used are appropriate and necessary to achieving that aim, and any decision on these points must 'weigh the need against the seriousness of the detriment to the disadvantaged group'.[575]

Lord Mance held that the policy pursued a legitimate aim, ie that of effectuating the obligation imposed by Jewish religious law to educate those regarded by the OCR as Jewish. Then, however, he conducted a thorough analysis in which he balanced the need of the school against the detriment which the admissions policy had created for the claimant, in which he found in the end that the measure did not pass muster as on the evidence before the court the school had not demonstrated that the adopted measure was proportionate in the strict sense. Albeit following a slightly different argumentative route, Justices Lord Hope and Lord Walker agreed with Lord Mance's approach.[576] From all the Justices who looked at indirect discrimination, and thus had to engage in proportionality analysis, the message on proportionality is clear: the test involves a third, proportionality *stricto sensu* stage. Elliott has pointed out that 'although some English cases have acknowledged that the proportionality test requires "the striking of a fair balance between the rights of the individual and the interests of

[574] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 [151]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [19].

[575] *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15, [2010] 2 AC 728 [97] (Lord Mance).

[576] *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15, [2010] 2 AC 728 [205]–[215] (Lord Hope), [235]–[237] (Lord Walker).

the community', this notion is deeply ambiguous'.[577] The picture which is emerging in the wake of *JFS*, however, is not ambiguous and may be summarized as follows. In most cases the judicial formulation of proportionality will be cast in terms of the suitability and necessity of the measure. The Supreme Court will not always address the *stricto sensu* proportionality inquiry, as many cases will begin and end with consideration only of the two first stages of the test. As is borne out, however, by the approach of all the Justices in *JFS* for whom the issue of indirect discrimination arose, *ex hypothesi* or otherwise, the UK test plainly embodies the third stage of the ECHR-style test too.

5.3 Discussion

The German and French route to a full-fledged proportionality test has been different from the UK one in at least one different aspect: particularly German courts, already from the 1880s, and also French courts, from the 1930s, had developed doctrines according to which in rights cases the 'police' measures applied had to be proportionate to the aim sought. In German law this was already from the late nineteenth century a three-step analysis, whereas in French law it focused solely on the weighing, without the benefit of the structured three-step analysis. It is, against this background, clear that the angle from which the UK courts came to near themselves the proportionality test was plainly another one than the German and French courts.

The traditional perspective of the common law has been a different one. UK public law has traditionally been not about rights but about the identification of wrongs

[577] M Elliot, 'Proportionality and Deference: The Importance of a Structured Approach' in M Elliott and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press 2010) 266.

which deserved to be remedied.[578] It seems apposite in this regard to contrast the traditional *Wednesbury* approach of the UK courts with the French and German approaches described above. The *Wednesbury* test did not include the same kind of weighing of interest but rather said that a decision may be attacked if it is so unreasonable that no reasonable decision maker could have made it. The traditional form of rationality review was limited: the reviewing court had to be satisfied that the challenged decision was so unreasonable that it would not have been made by any reasonable public authority. It was clear from Lord Greene MR's judgment in *Wednesbury* that he conceived of rationality review showing its bite only in the extreme instance of 'dismissal for red hair' type of case.[579] A few decades later is was equally clear from Lord Diplock's judgment in *GCHQ* that this type of irrationality would only apply to an administrative 'decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it'.[580]

As Sedley has pointed out, however, the constitutional environment of UK public law has in recent years included a developing culture of human rights, and public law, without becoming a different creature, has begun to take some of its colour from this culture. Obviously the HRA has been instrumental in this regard. The growing recognition of the importance of rights was in UK public law accommodated by modification of the substantive meaning of irrationality. Though he was speaking

[578] *AXA General Insurance Ltd* [2011] UKSC 46, [2012] 1 AC 868 [170] (Lord Reed); *(Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 (CA) [145] (Lord Phillips MR); *R v Somerset CC, ex p Dixon* [1998] Env LR 111 (QB) 121 (Sedley J). Also: S Sedley, *The Lion behind the Throne* (forthcoming) Ch 8; B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 18.

[579] *Short v Poole Corp* [1926] ch 66 at 91; *Associated Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) 233–34.

[580] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410.

pre-HRA, it was under the influence of the European Convention that Lord Bridge in *Brind* stated that, in relation to freedom of speech, while at the time UK judges were not bound by a code comparable to that of the ECHR:

> this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.[581]

Thus, incrementally, UK public law had begun to adapt itself to the Convention concept of proportionality before the Convention itself had become part of UK law.[582] This development would then be crowned, with respect to rights cases, in *Daly*.[583] Although it was handed down on the eve of the ECHR's entry into domestic force this case, on infringement with prisoners' rights to maintain the confidentiality of their privileged legal correspondence, is to this day a leading authority on how rights restrictions are to be assessed under the HRA. *Daly* ushered in what has been referred to as the unequivocal embrace of proportionality under the HRA, and conversely the abandonment of the deferential *Wednesbury* standard in cases bearing upon Convention rights.[584] Lord Bingham stated that 'the infringement of prisoners' rights to maintain the confidentiality of their privileged legal correspondence is greater than

[581] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL) 748–49 (Lord Bridge). Also: *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554–56 (Sir Thomas Bingham MR)

[582] S Sedley, *The Lion behind the Throne* (forthcoming) Ch 8.

[583] *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532.

[584] L Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany* (Oxford University Press 2004) 243; M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth & P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 341.

is shown to be necessary to serve the legitimate public objectives'.[585] Lord Steyn in his speech, which was explicitly endorsed by Lord Bingham, developed Lord Bingham's departure from orthodoxy, stating that there was a material difference between the *Wednesbury* grounds of review and the approach of proportionality applicable in respect of review where Convention rights were at stake. On this background he spelled out, not from the the jurisprudence of the European Court but of the Privy Council, a structured proportionality inquiry which in practice was indistinguishable from the one employed by the European Court.[586] Sedley in his analysis of *Daly* has stated that given that by the time Daly's appeal was argued and decided, the HRA 1998 had been brought into force but the searches of his cell and the policy under which the were conducted preceded the Act, his claim must be a claim at common law only:

> It would not have been difficult for the courts to say (as the Court of Appeal had done in relation to discrimination against gay service personnel) that that was then, and that what happened now must await more recent event to which the Human Rights Act could be applied. But the Law Lords had a different goal in view: to make it clear that, irrespective of the introduction of a statutory system of human rights adjudication now directly accessible to British citizens, the common law itself recognised that fundamental rights were entitled to legal protection unless they were defeated by some sufficiently powerful public interest. This was not, the Law Lords made clear, a manipulation or even an expansion of the concept tof irrationality: it was a clean break with it in favour of proportionality.[587]

[585] *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 [19] (Lord Bingham).

[586] *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 [24]–[28] (Lord Steyn).

[587] S Sedley, *The Lion behind the Throne* (forthcoming) Ch 8.

Thus it was the influence of the ECHR—even before the HRA had been allowed to take full effect—that would bring UK public law in line with the approaches that had made up the base lines in French and German law already for decades.

Though, however, the proportionality test of the Strasbourg jurisprudence is of German provenance it is clear that the German courts, too, have faced some serious difficulties in respect of the ECHR proportionality inquiry. As became clear in the discussion of the *Titanic* case, the third stage of the test as applied to rights-collisions is in one sense akin to the old, 'unstructured' tests applied for example in the French courts going back to the 1930s. On this score the German Federal Constitutional Court has been faulted by the European Court for getting the end result wrong.

Particularly difficult this has been when it comes to the art 8 right to privacy of celebrities, vis-à-vis paparazzo-style journalists, who in their turn enjoy the art 10 right to freedom of expression. The Federal Constitutional Court in the *von Hannover* case,[588] put the accent on freedom of speech, even though the speech at issue was celebrity photographs. The European Court, in its response,[589] emphasised privacy. The bone of contention was really what role one ought to accord to paparazzo-style photographs published in German newspapers: did they enjoy the same protection as more serious or political expressions? The German legal order, with its historical experiences of censorship, refrains from making substantial assessments of the value and content of expressions, affording as a rule the same protection to all forms of expression. Some have seen the Strasbourg judgment in *von Hannover* as a decision

[588] BVerfGE 101, 361.

[589] *Von Hannover v Germany* 2004 VI ECHR 294. See S Deakin, A Johnston, and B Markesinis, *Tort Law* (7th edn, Oxford University Press 2013) 736–37; JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 94.

which 'gives rise to serious concerns about state control of the press, threatening a cornerstone of democratic society'.[590] It is also interesting that in terms of this type of rights-collision proportionality *stricto sensu* balancing the UK courts had, ahead of time, struck exactly the balance which Strasbourg was to strike in *von Hannover*. The Federal Constitutional Court brought this problem out in a general fashion recently, when it said that balancing exercises were particularly difficult in 'multipolar fundamental rights situations … in which a claim to "more" freedom for one bearer of rights is counterpoised by "less" for another'.[591] The House of Lords in *Campbell* held that the publication of photographs taken in public of a celebrity leaving a self-help group impinged on her right to privacy as set out in art 8, and that in the balancing vis-à-vis the rights of newspapers to publish these photos privacy weighed heavier.[592] The European Court's ruling in *von Hannover* was regarded as a watershed decision when it was rendered,[593] as it insisted that the national courts proceed with a thumb on the scale in favour of privacy—which result had, in respect of the UK, already been reached by the UK courts.[594]

Whilst it may once have been true, as van Gerven put it in the late 1990s,[595] that a comparison between German and French law showed that the acceptance of the

[590] K Ziegler, 'Privacy after *Caroline von Hannover v Germany*' in K Ziegler (ed), *Human Rights as Private Law Privacy as Autonomy* (Hart 2007) 207.

[591] BVerfGE 128, 326 [93]: 'mehrpoligen Grundrechtsverhältnissen … in denen das "Mehr" an Freiheit für den einen Grundrechtsträger zugleich ein "Weniger" für einen anderen bedeutet'.

[592] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[593] *Von Hannover v Germany* 2004 VI ECHR 294.

[594] See S Sedley 'Sex, Libels and Video-Surveillance' in *Ashes and Sparks* (Cambridge University Press 2011); J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720, 741–43.

[595] W van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 51.

test is far from the same under both legal systems, this seems no longer to be the case with respect to the ECHR proportionality inquiry. The lack of definition of the principle of proportionality in French law to which van Gerven pointed, seems now to have given way to a very clearly defined test which both the Conseil constitutionnel and the Conseil d'État have been minded to apply rigorously in rights cases. It mat even be the van Gerven's broader point—that the differences between the approach taken in German and French law 'flow from deeper differences in mentality and constitutional structures: in mentality, in that German legal reasoning is, on the whole, more principled (and categorical) while French legal reasoning is more pragmatic (and factual)'[596]—is less pertinent now than it was at the time he made it.

As was clear from the analysis of *Lüth*[597] above, German law too, in the 1950s, started out with a less structured proportionality inquiry than would later become the hallmark German test. The Court conducted no fully-fledged proportionality analysis, but instead an unstructured one, stressing that there should be proportionality between the aim sought and the means applied. Whilst we may find the beginnings of a structured proportionality inquiry in rights cases in the twentieth-century jurisprudence of all the three systems here analysed, it seems a fair conclusion to say that the influence of ECHR law, together no doubt with EC law, has helped the domestic courts in finessing their approach to proportionality. At present French, German, and UK law alike—in spite of originally coming to the phenomenon from different angles—explicitly take the same approach.

[596] W van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 52

[597] BVerfGE 7, 198.

5.4 Conclusion

With the jurisprudential developments in French and UK law in the last two decades, it is clear that in the round the domestic courts in France, Germany, and the United Kingdom have adopted the ECHR proportionality test in rights case. In French law this was made explicit, with the use of the German terminology, in the jurisprudence of the Conseil constitutionnel during the 1980s and -90s. The Conseil d'État then in *Association pour la promotion de l'image et autres* adopted the same open way of showing in its rulings that it was following the test as laid down by the European Court.[598] In doing so, however, it was building upon its own age-old approaches to measures which restrict fundamental rights. Likewise there is no doubt presently as to whether the UK courts conduct the proportionality *stricto sensu* test, in cases where that is necessary. As this Chapter has shown, the only real possible difference between any of the domestic approaches to proportionality in rights cases is that between German law and the ECHR. The German courts have been prominent in traditionally adopting a very strict and equally structured approach to proportionality, and it seems that the European Court has learned more from the German courts than vice versa. As will be shown in Chapter 8, however, with respect to the balancing between rights *tout court* (as opposed to the balancing of the rights of the individual and the interests of society) the Federal Constitutional Court has had to learn the hard way that not all the beams were in the eyes of others.

[598] Conseil d'État, 26 October 2011 *Association pour la promotion de l'image et autres*.

6 Margin of Appreciation

6.1 Introduction

The doctrine of the margin of appreciation significantly influences the European Court's approach to adjudicating the Convention questions which come before it.[599] The doctrine of the margin of appreciation has been referred to as a form of legal discretion which recognizes that the respondent state can be presumed to be best qualified to appreciate the necessities of a particular situation affecting its jurisdiction.[600]

Though it might have been conceivable that they would do, none of the systems here studied have adopted into its domestic application of the ECHR the margin of appreciation as applied by the European Court. This has cogent reasons, which bear on the fact that the margin is 'a tool to define relations between the domestic authorities and the Court' which 'cannot have the same application to the relations between the organs of State at the domestic level',[601] but also, as will be seen, on the international law ancestry of the doctrine.

The cases in which the European Court will accord to the state authorities a

[599] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 1.

[600] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 666. Also: RSJ Macdonald, 'The Margin of Appreciation' in RSJ Macdonald, F Matscher, and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993); JG Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993) 174–75; A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012); G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 80–98; A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009) 29–31; L Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (LGDJ 2012) 10–12.

[601] *A v United Kingdom*, App No 3455/05, judgment [GC] 19 February 2009 [184].

margin of appreciation, and even at times a particularly broad one, are in particular those bearing on morals[602] and on various types of positive obligation.[603] The types of case which perhaps stand the most out in this regard, however, have been those dealing with general measures of economic or social strategy; the European Court has in this type of case been willing to accord to the state authorities 'a wide margin'.[604]

It could, however, be said that, in general terms, this last type of case is one in which any court, whether national or international, often will feel the least comfortable overriding democratic or expert body decisions. It is not, generally, for the courts to form a view on what is appropriate policy in such types of case. As Lord Neuberger put it in *RJM* this is an area where the courts 'should be very slow to substitute its view for that of the executive'; the fact that there may be grounds for criticising or disagreeing with such views 'does not mean that they must be rejected'. He added, however, that 'there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that even with the broad margin accorded to the state, the court will conclude that the policy is unjustifiable'.[605] This approach was followed in *Knowles* where in a case about indirect discrimination and art 1 of the First Protocol the High Court stated that in principle there was 'nothing in this case to suggest that the margin of appreciation

[602] *Schalk & Kopf v Austria* App No 20141/04 judgment 24 June 2010 [96]–[98]; *A, B, and C v Ireland* App No 25579/05 judgment [GC] 16 December 2010 [229]–[233]; *Lautsi & Others v Italy* App No 30814/06 judgment [GC] 18 March 2011 [68].

[603] *Hatton & Others v United Kingdom* App No 36022/97 judgment [GC] 8 July 2003 [98]. Also: R White & C Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 361–62.

[604] *Stec & Others v United Kingdom* App No 65731/01 judgment [GC] 6 July 2005 [52].

[605] *RJM v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 [56]–[57] (Lord Neuberger).

should be other than relatively wide'.[606]

In recent times, in the context of constitutional law, the German Federal Constitutional Court, too, has taken a similar approach. It has been willing, in cases bearing on economic policy, to accord to the legislator a generous measure of deference within its proportionality inquiry. This excerpt is from a leading case from the 1980s:

> In looking at the proportionality of qualification of a fundamental right regulating professional conduct, a freedom of discretion must be accorded to the legislator…. The Basic Law allows in the regulation of economic goals and attendant measures for a margin of appreciation and a margin of manoeuvre.[607]

One way of conceptualizing the margin of appreciation is to see it as a way in which to resolve doubts, and whether in principle they are to be resolved in favour of states or individuals. It is true that the Commission in its *Golder* case,[608] with the approval of the Court in the same case,[609] distanced itself from possible theories according to which doubts ought in principle to be resolved in favour of the states:

> The over-riding function of this Convention is to protect the rights of the individual and not to lay down as between States mutual

[606] *Knowles v Secretary of State for Work and Pensions* [2013] EWHC 19 (Admin) [95] (Hickinbottom J). Also: *S & KF v Secretary of State for Justice* [2012] EWHC 1810 (Admin) [92] (Sales J).

[607] BVerfGE 53, 135 (145); original: 'Bei der Prüfung der Frage, ob die in einer Berufsausübungsregelung enthaltenen Einschränkungen verhältnismäßig sind, ist der Gestaltungsfreiheit Rechnung zu tragen, die dem Gesetzgeber…. In der Bestimmung wirtschaftspolitischer Ziele und der zu ihrer Verfolgung geeigneten Maßnahmen läßt das Grundgesetz einen Beurteilungsspielraum und Handlungsspielraum'. Also: BVerfGE 115, 276 (308); original: 'Ein Mittel ist bereits dann im verfassungsrechtlichen Sinne geeignet, wenn mit seiner Hilfe der gewünschte Erfolg gefördert werden kann, wobei die Möglichkeit der Zweckerreichung genügt. Dem Gesetzgeber kommt dabei ein Einschätzungs- und Prognosevorrang zu. Es ist vornehmlich seine Sache, unter Beachtung der Sachgesetzlichkeiten des betreffenden Sachgebiets zu entscheiden, welche Maßnahmen er im Interesse des Gemeinwohls ergreifen will.'

[608] *Golder v United Kingdom*, Report of 1 June 1973, Series B, No 16.

[609] *Golder v United Kingdom* Series A No 18.

> obligations which are to be restrictively interpreted having regard to the sovereignty of these States. On the contrary, the role of the Convention and the function of its interpretation is to make the protection of the individual effective.[610]

Yet the European Court has in its jurisprudence come to rely heavily upon the margin of appreciation, which in effect is a way of interpreting the Convention guarantees restrictively, in favour of state sovereignty.[611] It is, however, more than only that.

Letsas has proposed to see the doctrine of the margin of appreciation as embodying two different strands. On his view the Court uses the same term both for saying that the applicant did not have the right he or she claimed, and for saying that it will not substantively review the decision of national authorities as to whether there has been a violation. This, he avers, is why the doctrine has been capable of being described both as the other side of the principle of proportionality, and as enabling the Court to balance the sovereignty of the contracting parties with their obligations under the Convention.[612] It may be that the distinction is less clear than Letsas argues, as it seems that the one strand will be influenced by the other to the extent that they even sometimes merge entirely. (How to settle the tension between individual freedoms and collective goals is not necessarily always disaggregated from the idea that national authorities are better placed to decide certain human rights cases.) Nonetheless it is possible to trace this distinction in the jurisprudence of the Court.[613]

Legg, in a spirited defence of the doctrine of the margin of appreciation, has

[610] *Golder v United Kingdom*, Report of 1 June 1973, Series B, No 16, 40.

[611] L Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681, 695–98.

[612] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 80–81.

[613] See eg *Mosley v United Kingdom* App No 48009/08 10 May 2011 [108]–[111].

isolated three considerations upon which in his view the European Court's doctrine of margin of appreciation is based.[614] First he sees the doctrine as being based on the idea that the national authorities will have more expertise as to the resolution of a national question than the European Court. This is referred in the jurisprudence of the Court as the 'vital forces' doctrine: 'by reason of their direct and continuous contact with the vital forces of their countries, the national authorities (including national courts) are in principle better placed than an international court to evaluate local needs and conditions'.[615] Secondly Legg sees as a factor the extent to which the practice of European states differ. The greater the variation, the broader will the margin of appreciation be in principle. 'When there is a diverse constitutional practice among the Convention States', Weiler has stated, 'the Court needs to listen, not only preach, and to be seen to be listening'.[616] By the same token the Court has been unwilling to accord a margin of appreciation when a diverse practice gives way to a uniform practice on the part of the states members. The cases before the European Court on the rights of transsexuals, which culminated in *Goodwin*,[617] bring out this aspect of the doctrine of the margin of appreciation. For years, in *Rees*,[618] *Cossey*,[619] and

[614] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012).

[615] *Buckley v United Kingdom* (1996) 23 EHRR 101 [75]; *A, B & C v Ireland* App No 25579/05 judgment [GC] 16 December 2010 [232]; *MGN Limited v United Kingdom* App No 39401/04 judgment 18 January 2011 [142]; *Mosley v United Kingdom* App No 48009/08 10 May 2011 [108]. Also: J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720, 737–38.

[616] JHH Weiler, 'Editorial' (2010) 21 EJIL 1, 1.

[617] *Goodwin v United Kingdom* App No 28957/95 judgment [GC] 11 July 2002.

[618] *Rees v United Kingdom* App No 9532/81 judgment [Plenary Court] 17 October 1986.

[619] *Cossey v United Kingdom* App No 10843/84 judgment [Plenary Court] 27 September 1990.

Sheffield & Horsham,[620] the Court held back from recognizing the right to receive a birth certificate in accordance with one's new sex after sex change. In issue in these cases were art 8 and whether the interference by the United Kingdom with the prima facie privacy right to have one's own perceived gender recognised was proportionate. During the 1980s and 90s the Court made clear that the margin of appreciation accorded to national authorities as a function of differing views in the states members was contracting, as more and more states adopted the same solution to the issue. In the end the margin had been reduced to vanishing point, and the Grand Chamber in *Goodwin* held that the practice of non-recognition could no longer be tolerated on the basis of it.

The third reason isolated by Legg is democratic legitimacy. Sales has gone so far as claiming that one may conclude from the jurisprudence of the European Court that this is the most important reason why the Court accords to national authorities a margin of appreciation.[621] This point remains, however, disputed. While there may certainly be good reasons for an international tribunal not to take lightly the considered opinion of national assemblies it remains the case that the European Court at times finds it necessary to go against the opinion of a national assembly, especially where that national assembly did not, in legislating in relation to issues bearing upon Convention rights, properly take into account the exigencies of the ECHR. The Court for example went completely against the opinion of the national assembly in *Lindheim*, partly because it was clear that the parliamentarian treatment of the art 1 of the First

[620] *Sheffield & Horsham v United Kingdom* App No 22985/93 & 23390/94 judgment [GC] 30 July 1998.

[621] P Sales, 'The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights' in M Andenas & D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (Oxford University Press 2009) 163–82.

Protocol issues involved in no way had taken on board the rights issues, and attendant questions of proportionality, involved.[622] In this type of case there is little that suggests that the European Court will be deferential in principle; on the contrary the Court has shown itself willing to take a strong line in cases where the democratic process has resulted in what it sees as prima facie breaches of the Convention, especially where there is little evidence that little attention has been accorded to the rights issues at stake.[623] Below it will be considered whether it is true that the European Court has moved, by degrees, from reliance upon the margin of appreciation to relying instead upon the more principled notion of subsidiarity, and this point about respect for parliamentary debates potentially ties in with this point.

6.2 National Traditions of Deference in Administrative Law

6.2.1 Introduction

The way in which the national courts have approached the doctrine of the margin of appreciation has, it is argued here, been informed by the national traditions of judicial deference. It is in this regard interesting to note that it is often claimed that the Strasbourg doctrine of the margin of appreciation was, when it was first suggested inserted into the Convention itself,[624] and when, later, it appeared in the jurisprudence

[622] *Lindheim & Others v Norway* App Nos 13221/08 & 2139/10 judgment 12 June 2012.

[623] *A v United Kingdom*, App No 3455/05, judgment [GC] 19 February 2009; *M v Germany* App No 19359/04 Judgment 17 December 2009; *Chassagnou and others v France* app nos 25088/94, 28331/95, and 28443/95 judgment [GC] 29 April 1999. See also *Friend v United Kingdom*; *Countryside Alliance v United Kingdom* 50 EHRR SE6 [58] where the Court accorded deference to Parliament because of the serious treatment it had given to the ECHR issues.

[624] Travaux préparatoires to the ECHR I 276–77.

of the Commission,[625] a concept taken from national law. Many authors have held that the doctrine of the margin of appreciation originated from French and German administrative law. The European Court's doctrine of the margin of appreciation has been seen—to appropriate the old adage according to which international law is 'but private law writ large'[626]—as nothing but national doctrines of deference writ large.[627] Had this been the correct view one would have imagined the German and French administrative courts taking to the ECHR concept of the margin of appreciation like fish to water. This, however, they have not.

It will be argued here that this is not so clear as has been assumed; it seems more likely that the adoption by the Strasbourg institutions of this doctrine was instead taken from general international law. This is not wholly insignificant as, first, general international law has, since the time when the ECHR institutions adopted the doctrine, abandoned its doctrine of what in older international jurisprudence was termed *liberté d'appréciation*. This may, secondly, be the reason why the European Court, too, by parts is now moving away from the doctrine, replacing it instead with heavier reliance upon the principle of subsidiarity.

It is possible in principle to imagine in principle four different ways for a national court to relate to the European Court's concept of the margin of appreciation. One way is for a national court to take the view that seeing as the European Court

[625] *Cyprus case* App No 176/56, Yearbook of the European Convention on Human Rights vol 2 174–76.

[626] TE Holland, *Studies in International Law and Diplomacy* (Clarendon Press 1898) 152.

[627] A Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press 2012) 3; Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001) 2–3; AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 1001–05.

will, in specific types of case, accord to national authorities a margin of appreciation, the national courts ought by the same token to do the same, so as to make sure that a situation does not arise in which the national court may end up having applied stricter ECHR scrutiny than the European Court. A second way is for a national court to take the view that the margin of appreciation is a tool developed in international law, due in the first place to the fact that international organs are removed from national circumstance, and that because of this the reasons why in some cases Strasbourg should accord a margin of appreciation to national authorities do not apply nationally for the simple reason that the national courts are national. A third way would be not to adopt the doctrine of the margin of appreciation such as that is practiced by Strasbourg but, for similar structural reasons of deference, adopt, of one's own volition rather than a the behest of the ECHR system, a similar concept of deference in similar types of case as those in which Strasbourg would apply the margin of appreciation. A fourth way is to use the margin of appreciation, in a case which one imagines that the European Court would accord the state such a margin had the case come before that court, seemingly to go further than the European Court has done in similar cases.

6.2.2 The Positions Taken in the National Courts

It is only really in UK law where the issue of national appreciation has engendered a big debate. It seems that this is partly due to the national tradition of deference in administrative law in the United Kingdom. One example may go some way in illustrating these differences in terms of tradition.

In *Canal* the Conseil d'État in 1962 declared that a special military tribunal set up by emergency presidential decree, just after the war in Algeria, was contrary to law, as it was found to violate the criminal law principle that the liberty of the citizen required the decision of the court to be subject to review by the Cour de Cassation.[628] The decision led to great tension between General de Gaulle and the Conseil d'État, the autonomy—if not existence—of which for a short while seemed seriously threatened. Brown and Bell have contrasted the attitude of the Conseil d'État in *Canal* with that of the House of Lords in *Liversidge v Anderson*,[629] where the House of Lords found that the act of the Home Secretary was in effect unexaminable by the courts as it dealt with national security.[630] Hamson in 1954 compared the approach taken by the courts in the United Kingdom, especially the High Court, with the one taken to similar types of case by the Conseil d'État and found that it was most doubtful that the UK courts would exercise over the executive the supervision which the Conseil d'État has become accustomed to exercise over the French executive.[631] Cassese has concluded, in a comparison between French and English administrative law, that the review exercised by the French administrative courts is very big, and much more intense than what one finds in English law.[632]

In the jurisprudence of the Conseil d'État one finds some very rare examples

[628] Conseil d'État, 19 October 1962 *Canal*.

[629] *Liversidge v Anderson* [1942] AC 206 (HL).

[630] See generally AWB Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford University Press 1992).

[631] CJ Hamson, *Executive Discretion and Judicial Control* (Stevens & Sons 1954) 212. More generally: G Hewart, *The New Despotism* (Ernest Benn 1929).

[632] S Cassese, *La construction du droit administratif: France et Royaume-Uni* (J Morvillez-Maigret tr, Montchrestien 2000) 109.

of the Conseil adopting, in a case bearing upon Convention rights, the European Court's approach to the doctrine of the margin of appreciation.[633] There is very little discussion of the matter in *conclusions* by *rapporteurs publics*; rather the emphasis is, in Convention cases, to find the principles upon which the Strasbourg jurisprudence is based and loyally to follow them.[634] As will be shown, this may to some extent be explained by the background made up of traditional French administrative law approaches to deference.

It is worthwhile pointing out, however, that this does not necessarily mean that it is impossible to find cognate concepts to the margin of appreciation at play in the French courts' application of the ECHR.

The position of the United Kingdom courts has, as Lord Hope put it in *Kebilene*, been that the doctrine of margin of appreciation 'is not available to the national courts when they are considering Convention issues arising within their own countries'.[635] This rhymes well with that which the Grand Chamber held in *A v United Kingdom*: 'the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court'.[636] The courts in the United Kingdom have nonetheless adopted a domestic concept of deference or respect.[637]

[633] Conseil d'État, 22 November 2000 *Mutuelle inter-jeunes*; Conseil d'État, 2 June 1999 *X*; Conseil d'État, 7 October 1977 *Sieur Gaillard Yves*.

[634] See D Fairgrieve, M Guyomar, and B Stirn, *Droits et libertés en France et au Royaume-Uni* (Odile Jacob 2006) Ch 10. See T Hickman, *Public Law After the Human Rights Act* (Hart 2010) 99 for a similar point made about UK law post-*Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, 187 (Lord Bingham).

[635] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL) 381 (Lord Hope); *AXA General Insurance Ltd* [2011] UKSC 46, [2012] 1 AC 868 [32] (Lord Hope). Also: P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 618.

[636] *A v United Kingdom*, App No 3455/05, judgment [GC] 19 February 2009 [184].

[637] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 618–19.

This double approach is apparent for example in *Swift*,[638] where the Court of Appeal showed the UK courts' approach to the margin of appreciation is really about the entertainment of two thoughts at the same time. Lord Dyson MR stated that on the one hand the margin of appreciation to which the European Court refers in its jurisprudence is a 'margin of appreciation accorded by the ECtHR to the national court of a Member State'. It therefore did not follow that this margin of appreciation would be the same in a similar case where domestic courts review action by other national authorities. Nonetheless, it may be that the same reasons which had led the European Court to accord a margin of appreciation to the domestic court could lead the domestic court to accord a margin of discretion to the authority at issue.[639] The important point is that the margin of discretion accorded by the domestic court to a national authority is not a function of the margin accorded by the European Court to the domestic courts but may of course be based upon the same factors so that in a given case the two margins may seem identical.

The House of Lords in *Countryside Alliance* touched upon the issue of deference to Parliament.[640] In this case, in which it had been alleged that the Hunting Act 2004, according to which the hunting of wild mammals with dogs was prohibited, breached art 1 of the First Protocol. While concluding that art 1 was engaged, the House of Lords held that the restriction was proportionate. In so doing the House of Lords afforded to the legislature a wide margin of discretionary judgment on a

[638] *Swift v Secretary of State for Justice* [2013] EWCA Civ 193 (CA).

[639] *Swift v Secretary of State for Justice* [2013] EWCA Civ 193 (CA) [24]–[28] (Lord Dyson MR).

[640] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

controversial matter of social policy.[641] Lord Bingham in that regard highlighted the dangers of upsetting the democratic process if 'on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament'.[642] It may, of course, be added that very few cases before the courts where it is claimed that legislation is in breach of the ECHR will be immune to the criticism raised by Lord Bingham here. Indeed it is difficult to see why the fact that a group skilfully pushed the levers of parliamentary democracy ought to disadvantage their HRA bid before the courts subsequently; this may have the effect that if the group had not mobilised in respect of the issue during the legislative process then they would later have a greater chance of winning before the courts, which again would potentially discourage democratic participation.

This does not mean, however, that the result reached in the event by the House of Lords was wrong. In fact the claimants took their cause to Strasbourg, where the European Court agreed with the House of Lords in respect of the point made by the Law Lords on how broad a margin of discretion to accord to Parliament. The European Court concluded that 'the domestic courts have given the greatest possible scrutiny to the applicants' complaints under the Convention and especially those complaints brought under Article 1 of Protocol No. 1'. This went for all the national courts that had been seized of the case. Serious reasons would therefore be required for the Court to depart from the clear findings of those courts.[643]

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[641] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 619.

[642] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719 [45].

[643] *Friend v United Kingdom*; *Countryside Alliance v United Kingdom* 50 EHRR SE6 [58]. Also: *R (Sinclair Collins Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394 (CA) [175] (Arden LJ).

In Germany the courts have not adopted the margin of appreciation at a national level. 'The margin of appreciation doctrine', Peters has stated in an analysis of German law, 'finds no parallel at the national level'.[644] As we have seen the German courts, because of the high level of rights protection afforded by the Basic Law, sometimes go further than the level of protection afforded by the ECHR, as was arguably the case in *Data Retention*.[645] There are times when, as was seen in Chapter 5, in the context of the proportionality inquiry the German courts will accord a measure of deference to the legislator when it comes to the appropriateness of legislative measures,[646] and the same may be the case with regard to the necessity of a measure.[647] It is nonetheless no exaggeration to say that judicial review, both of statutes but all the more so of administrative action, is very rigorous indeed in Germany. Nolte has gone so far as stating 'that nowhere in Europe is judicial review as rigorous' as in the German courts.[648]

As will be seen that picture which emerges is one in which the national courts have been reticent in adopting wholesale the European concept of the margin of appreciation.

It is certainly true, as Lord Bingham once put it, that the national courts are

[644] B Peters, 'Germany's Dialogue with Strasbourg: Extrapolating the *Bundesverfassungsgericht*'s Relationship with the European Court of Human Rights in the Preventive Detention Decision' (2012) 13 German Law Journal 757, 769.

[645] BVerfGE 125, 260.

[646] BVerfGE 103, 293 (307).

[647] BVerfGE 53, 135 (145).

[648] G Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' (1994) 57 MLR 191, 197. Also: J Schwarze, *Eurpäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (2nd edn, Nomos 2005) 668.

'called upon to administer an international code of human rights largely laid down by the European Court in Strasbourg'.[649] Whether one puts the accent on the first or the second element here brought out by Lord Bingham may to some extent decide how one concludes with respect to what position the national courts ought to take to the doctrine of the margin of appreciation. Focusing upon the first element, that after all the national courts are the *first instance* appliers of the Convention rights to national circumstances, could lead to the conclusion that the national courts ought to go far in adopting the European doctrine. If the focus is on the latter element, however, that the code which is being administered by the national courts is an *international* code, largely laid down by the European Court, then one could be led to conclude that it would be wrong for the national courts to adopt such an approach.

This point has been made by former president of the European Court Jean-Paul Costa, who extra-judicially pointed out the importance of the margin of appreciation in ECHR adjudication, but at the same time warned against national courts adopting it at national level in a way that could lead to municipal authorities following double or triple standards. While to his mind it was right and proper that the European Court should accord to the national authorities a certain margin of appreciation, 'en même temps il faut éviter à tout prix les doubles ou triples standards selon les pays et en ce qui concerne les mêmes problèmes'.[650] This view has also been echoed by the European Court's current President, Dean Spielmann.[651] It seems that,

[649] T Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press 2010) 71.

[650] JP Costa, 'Interview exclusive de Jean-Paul Costa, président de la Cour européenne des droits de l'homme' (2007) 5 Droits de l'homme—jurisprudence de la cour européenne des droits de l'homme 77, 77–78.

[651] D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine' (forthcoming) 24–25.

in effect, this is largely the view taken also by the French, German, and UK courts.

6.2.3 The Margin of Appreciation and Its Alleged Administrative Law Ancestry

During the drafting of what would become the European Convention, the Maxwell-Fyfe and Teitgen Committee, chaired by Sir Maxwell-Fyfe, later Lord Kilmuir,[652] and Pierre-Henri Teitgen, a French professor of international law and Minister of Justice,[653] mooted the idea that the problem of agreeing detailed definitions was to devolve responsibility to member states, under the principle of subsidiarity. Rapporteur Teitgen thus suggested that an international convention was to establish and give general definitions of a list of guaranteed freedoms, and that:

> Each country shall, through its own legislation, determine the conditions in which these guaranteed liberties shall be exercised within its territory, and, in defining the practical conditions for the operation of these guaranteed liberties, each country shall have a very wide freedom of action.

The French original had 'une très large liberté d'appréciation'. While in the end this type of wording did not make its way into the text of the Convention, the expression *liberté d'appréciation* 'has echoes in the developed European law of human rights, which has adopted, for better or for worse, the doctrine of the margin of appreciation'.[654]

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[652] See DP Maxwell-Fyfe, *Political Adventure: The Memoirs of the Earl of Kilmuir* (Weidenfeld & Nicholson 1964) 174–89.

[653] See L Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (LGDJ 2012) 18.

[654] AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 676.

The Commission would adopt the doctrine of the margin of appreciation for the first time in the *Cyprus Case*. It has been claimed that it was the German lawyer in the Commission, Adolf Süsterhehn, a constitutionalist, who seemed to have been the moving spirit.[655] This does not, however, inexorably lead us to the conclusion that it is a hallmark of German administrative and constitutional law that the courts are deferential to administrative agencies and accord to them margins of appreciation.

It is true that doctrine similar to that of the margin of appreciation has been known in German constitutional and administrative law under the head *Beurteilungsspielraum*. With respect to so-called indefinite legal concepts (*unbestimmte Rechtsbegriffe*), such as 'serious reason', 'artistic value', 'suitability of a building as a monument', it was argued in German law that judicial review was very restricted.[656] The proponents of this very restricted judicial review of certain types of legal concept did, however, not find much favour with the administrative courts in Germany, which in an unbroken chain of decisions treated indefinite legal concepts fully as a matter of law and exercised full judicial review in respect of them.[657] The Federal Administrative Court made clear that the legal concepts at issue were fully reviewable in cases bearing upon concepts such as 'serious reason' in respect of change of name,[658] 'artistic value of a film' in respect of censorship,[659] 'suitability of

[655] AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 1003.

[656] O Bachof, 'Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht' [1955] JuristenZeitung 97.

[657] MP Singh, *German Administrative Law in Common Law Perspective* (2nd edn, Springer 2002) 177–78.

[658] 15 BVerwGE 207, 208.

[659] 23 BVerwGE 194, 200–01.

a building as a monument' in respect of protection of certain types of building,[660] 'service requirement' in respect of transfer of civil servants,[661] 'fitness of a person' in respect of military service, and 'inequitable' in respect of tax law.[662] While exceptions to this line of cases may be found,[663] it is plain from the jurisprudence of German administrative courts that while in principle the notion of a margin of appreciation was known in German administrative law in the middle of the twentieth century, and that is continues to be so, this doctrine entails no more than a slight margin of discretion subject to rigorous judicial control.[664] As was seen above, it has been stated by leading commentators that it seems that nowhere in Europe is judicial review as rigorous as in the German courts.[665]

Some authors have claimed that the Conseil d'État had used in its jurisprudence the phrase *marge d'appréciation*,[666] and that this jurisprudence was the inspiration for the ECHR institutions' taking up this doctrine. This is in fact not the case. The term appeared in the jurisprudence of the Conseil d'État for the first time in

[660] 24 BVerwGE 65.

[661] 31 BVerwGE 149, 152.

[662] 35 BVerwGE 67, 72–73.

[663] 39 BverwGE 197; 39 BverwGE 355.

[664] 23 BVerwGE 112; 45 BVerwGE 162; 45 BVerwGE 331; 49 BVerwGE 79; 50 BVerwGE 161, 164–65; 55 BVerwGE 250, 253–54; 65 BVerwGE 73, 75.

[665] G Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' (1994) 57 MLR 191, 197; J Schwarze, *Eurpäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (2nd edn, Nomos 2005) 668.

[666] A Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press 2012) 3; Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001) 2–3.

1977, after the ECHR had begun to make its presence felt.[667]

It has also been suggested that the conception of a margin of appreciation and use of a cognate expression (*droit d'appréciation*) was to be found in French administrative law. One author to make this point is Simpson.[668] As evidence he states that reliance upon the expression *droit d'appréciation* may be found in French administrative law as early as 1912. This is probably true, though it is not clear that the 1912 case in question is the best of examples, as this is the only occasion on which the Conseil d'État has used this particular phrase.

At all events the impression given is that the doctrine had a firm basis too in French administrative law. It is true that a 1912 Conseil d'État decision, *Abbé Bouteyre*, did mention and rely upon a *droit d'appréciation*.[669] The case concerned a priest who complained that he had not been admitted to the *concours de l'agrégation de philosophie* (a civil service competitive examination for a particular type of position in the public education system), where an 1885 regulation, and an 1852 decree, explicitly gave to the minister of education the power to decide what groups of citizen could apply to sit the examination with a view to becoming teachers in the public education system. It is perhaps not surprising that an element of discretion is involved when it comes to choosing candidates who will be allowed to sit a competitive examination. In fact this type of ministerial power has been seen as the exemplar of discretionary power: 'le pouvoir ministériel d'admettre des candidats à

[667] Conseil d'État, 7 October 1977 *Sieur Gaillard Yves*.

[668] AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) 1003.

[669] Conseil d'État, 10 May 1912 *Abbé Bouteyre*.

concourir est un type classique et incontestable du pouvoir discrétionnaire'.[670]

It would give a wrong impression, however, to leave it at that as the Conseil d'État has exercised a very strict control indeed with the administration in cases where the English courts, for example, traditionally took a more deferential approach. Hamson brought this out with clarity in an examination of *Barel*,[671] a case which could serve as a postwar pendant to the 1912 *Abbé Bouteyre* ruling. The case concerned five young Communists who, in the 1950s at time when virtually all Western countries discriminated against those thought to have Communist sympathies, had been denied permission to sit the examination for entry to the École nationale d'administration. The Conseil d'État, adopting the conclusions of *Commissaire du gouvernement* Letourneur, quashed the minister's decision as a misake of law (*erreur du droit*), as he had violated the constitutional principles of freedom of opinion and equal access to civil service. Moro Giaferri, a Parliamentarian and leading criminal counsel, said in relation to *Barel* that 'discretionary power is to be used with discretion'. As Braibant and Stirn have stated this is, of course, a political formula, and not in strict terms a legal one. In legal terms, however, a number of limitations make the discretion of administrative agencies subject a limited one and one which is dependent upon being legal in order to be acceptable.[672] The type of deference shown by the Conseil d'État in *Abbé Bouteyre* is clearly one which is contracting. Some commentators have in fact gone so far as concluding without more that 'there is no

[670] A de Laubadère, *Traité elémentaire de droit administratif* (LGDJ 1953) 227.

[671] Conseil d'État, 28 May 1954 *Barel*.

[672] G Braibant & B Stirn, *Le droit administratif français* (6th edn, Dalloz 2002) 280.

concept of deference in French administrative law'.[673] On this background the conclusion seems less than irresistible that the ECHR institutions received the doctrine of the margin of appreciation from German and French administrative law. A number of factors seem instead to point towards a different genealogy.

6.3 The Margin of Appreciation in Traditional International Legal Doctrine

It may be that the concept of a margin of appreciation lay not so much in national law as in international law. This may be borne out already by the way in which Rapporteur Teitgen explained the thinking by which the envisioned margin of appreciation was underlain:

> elle consacre le principe traditionnel, et même fondamental en droit international public, selon lequel chaque pays a compétence pour organiser sur son territoire les modalités d'exercice et les et les conditions quotidiennes de fonctionnement des droits et des libertés garantis.[674]

The doctrine of *liberté d'appréciation* in international law surfaced in the famous *Spanish Zone of Morocco Claims*,[675] where the sole arbitrator, Judge Huber, said about the appraisal of the necessity of certain military actions lay, to a large extent, not with the tribunal but with national authorities. The tribunal both explicitly used the terminology *liberté d'appréciation* and in actual fact deferred to national authorities in its necessity inquiry. It held that: 'L'appréciation de ces nécessités doit

[673] B Goold, L Lazarus, and G Swiney, *Public Protection, Proportionality and the Search for Balance* (HMSO 2007) 14.

[674] Travaux préparatoires to the ECHR I 276–77.

[675] *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 615; (1923–24) 2 Annual Digest and Reports of Public International Law Cases 19.

être laissée dans une large mesure aux personnes mêmes qui sont appelées à agir dans des situations difficiles, ainsi qu'à leurs chefs militaires'. A civilian court, and especially an international one, could not, the tribunal continued, intervene in this domain except in cases of manifest abuse of this *liberté d'appréciation*.[676]

The Permanent Court of International Justice, it too presided over by Huber, would later, in *Lotus*, hold in more general terms that international law leaves states 'a wide measure of discretion which is only limited in certain cases by prohibitive rules'.[677] The International Court of Justice in *Admissions* stated that, while art 4 of the Charter of the United Nations exhaustively prescribes the conditions for the admissions of new members, that provision did not 'forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with [those] conditions'; art 4 thus allowed for 'a wide liberty of appreciation' ('une large liberté d'appréciation').[678] This line of cases shows too, however, that the margin of appreciation in issue was never meant to be without bounds. As the International Court said, in respect of the deference owed to national customs authorities, in *US Nationals in Morocco*: 'the power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith'.[679] The underscoring here of the importance of reasonableness and good faith is

[676] *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 615, 645. Also: *Affaire de la dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)* (1925) 1 RIAA 529, 566–68; *Différend SAIMI (Società per Azioni Industriale Marmi d'Italia)—decisions no 4, 11, 19, 38 et 70* (1948–50) 13 RIAA 43, 45; *Georges Pinson (France/United Mexican States)* (1928) 5 RIAA 327, 412.

[677] *The Case of the SS 'Lotus', Judgment* (1927) PCIJ Series A No 10 p 19.

[678] *Conditions for Admission of a State Membership in the United Nations (Article 4 of the Charter)* ICJ Rep 1948 p 62, 64. Also: Declaration of Judge Sir Kenneth Keith, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment* ICJ Rep 2008 177, 279.

[679] *Rights of Nationals of the United States of America in Morocco, Judgment* ICJ Rep 1952 p 176, 212.

interesting, not least in view of what would later happen to this doctrine in the jurisprudence of the International Court.

From the 1950s and onward public international law would undergo change in respect of issues of sovereignty and the view of how acceptable doctrines of margins of appreciation really were in the intercourse of states. Huber who had presided over the *Spanish Zone of Morocco Claims* and *Lotus* tribunals, and in 1928 had given the famous definition of sovereignty in *Island of Palmas*, where he stated that 'sovereignty in the relations between States signifies independence',[680] would later hold that notions of sovereignty would in the end have to give way if international law was to develop. The former President of the Permanent Court of International Justice underlined in 1958 how in the chancelleries of the world exaggerated ideas of sovereignty have outlived themselves, at the expense of international cooperation:

> Nobody will venture to assert that the international law of today, in spite of new directions in 1920 and 1946, is able to cope with the present world situation. The responsibility of all concerned with international law in the widest sense of the term, whether as politicians or scientists, is all the heavier. There is only one way to a new solution: coexistence.[681]

He concluded that 'the idea of sovereignty, which flattered and served the sense of power in big states and the desire for independence in small ones, must make way for an efficient and active community of nations'.[682] The growing sense of the

[680] *Island of Palmas (Netherlands v United States of America)* (1928) 2 RIAA 829, 838.

[681] M Huber, 'On the Place of the Law of Nations in the History of Mankind' in *Symbolae Verzijl: Présentées au Professeur JHW Verzijl à l'occasion de son LXX-ième anniversaire* (Martinus Nijhoff 1958) 194–95.

[682] M Huber, 'On the Place of the Law of Nations in the History of Mankind' in *Symbolae Verzijl: Présentées au Professeur JHW Verzijl à l'occasion de son LXX-ième anniversaire* (Martinus Nijhoff 1958) 195.

unacceptability in international law of the principle of doctrines of restrictive interpretation of the kind of which the doctrine of the margin of appreciation is an example, referred to in public international law as *in dubio mitius*, was brought out by Franck when he said that: 'Sovereignty has historically been a factor greatly overrated in international relations. Among the overraters have been prominent practitioners of international law, dazzled by their status as, or aspiring to be, high officials of their national foreign offices.'[683] Thus no rule akin to the doctrine of the margin of appreciation, or one expressing that treaty obligations should in some circumstances be interpreted restrictively, was included in the Vienna Convention on the Law of Treaties of 1969.[684]

Later on the International Court of Justice would disavow its deferential approach from earlier decades, preferring instead one which involves a higher level of scrutiny. Thus, in an assessment of military necessity, as had been the case in *British Claims in the Spanish Zone of Morocco*, the International Court in its 2003 decision *Oil Platforms* did not accept the suggestion by the United States that the Court should take a deferential approach, as, on the US view, 'a measure of discretion ('une certaine liberté d'appréciation') should be afforded to a party's good faith application of measures to protect its essential security interests'. The Court, in response to this, simply stated that, 'the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion" ("une certaine liberté

[683] T Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998) 3.

[684] Vienna Convention on the Law of Treaties 22 May 1969, 1155 UNTS 331. See the debates in the International Law Commission on this: ILC Ybk 1964/II, 5; ILC Ybk 1966/II, 51. Also: L Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681, 687–88.

d'appréciation")'.[685]

If one looks at the language adopted, and the tradition in the international law of the first half of the twentieth century of deference vis-à-vis states, it seems more likely, then, that the Strasbourg institutions took the inspiration for the margin of appreciation not from national law but from international law.

From this two conclusions may be drawn. One is that we ought not to be surprised that the national courts have in fact not adopted the Strasbourg doctrine of the margin of appreciation, as certainly in French and in German law the doctrine is much less of a known quantity than what many authors have, more or less automatically, assumed. A second conclusion is that to some extent the ground has been pulled away from under the doctrine of the margin of appreciation. As will have been seen the doctrine, originating in the public international law of the period 1900–1950, has been reduced in general international law to vanishing point, with the International Court of Justice stating with clarity in its *Oil Platforms* judgment that it simply does not exist.

We ought not to be surprised, too, that not only have the national courts been reluctant to rely upon the doctrine but the same is increasingly the case with the European Court. For like other international courts and tribunals, but with some hesitation as compared to the International Court of Justice, the European Court, especially in the last five to ten years, has by degrees discarded the doctrine, favouring in its stead the more principled doctrine of subsidiarity.

[685] *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment* ICJ Rep 2003 p 161, 196. Also: Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907, 937; L Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681; JP Cot, 'Margin of Appreciation' in R Wolfrum (ed), *The Max Planck Encyclopedia of International Law* (Oxford University Press 2013).

The European Court will, as was adumbrated by then President Sir Nicholas Brazta in 2011, be willing to accept the approach of the national courts to ECHR rights when it is clear that the national courts have attempted in good faith to uphold Convention rights or to strike a fair balance between what is necessary in a democratic society and the right of the individual in issue.[686] This can be seen also from the examples discussed above bearing upon the Court's review of parliamentary debates. The Court felt confident in handing down an adverse judgment in *Lindheim*, where the national parliament in issue had taken an almost cavalier attitude to questions falling under art 1 of the First Protocol.[687] In the same vein the Court in *Lindheim* also took the occasion to make the point that from *Hirst v United Kingdom* 'it could be deduced that the margin of appreciation would be narrower when Parliament had not analysed and carefully weighed the competing interests or assessed the proportionality of blanket rules'.[688]

Conversely the Court felt confident in *not* finding a breach of art 1 of the First Protocol in *Friend* (the Strasbourg continuation of *Countryside Alliance*).[689] This was due to the fact that all the national courts which had been seized of the case in the United Kingdom had 'given the greatest possible scrutiny to the applicants' complaints under the Convention and especially those complaints brought under Article 1 of Protocol No. 1'.[690] In the view of Sir Stephen Sedley, both a former Lord Justice of Appeal and an erstwhile *ad hoc* Judge in the European Court, the Court has

[686] N Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] EHRLR 505.

[687] *Lindheim & Others v Norway* App Nos 13221/08 & 2139/10 judgment 12 June 2012.

[688] *Lindheim & Others v Norway* App Nos 13221/08 & 2139/10 judgment 12 June 2012 [85].

[689] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719.

[690] *Friend v United Kingdom*; *Countryside Alliance v United Kingdom* 50 EHRR SE6 [58].

in the last few years moved 'beyond the basic concept of the margin of appreciation towards the more profound and principled concept of subsidiarity'.[691] This is confirmed by President of the European Court, Dean Spielmann, who has maintained that:

> Pursuant to a recent trend in the jurisprudence of the European Court of Human Rights judicial self-restraint should prevail in the event that superior national courts have analysed in a comprehensive manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom.[692]

Whilst this is a powerful analysis it should be added to it that perhaps it gives us too schematic a view of the developments of the jurisprudence of the European Court. In the case that has been relied on the most by those who have put forward this view, *von Hannover v Germany (No 2)*, the Grand Chamber of the European Court made it clear that the subsidiarity here at play is one which has more than just a casual affinity to the doctrine of the margin of appreciation. In finding that, given the good faith attempts by the German Federal Constitutional Court to strike Convention-compliant balance between privacy and the freedom of speech, German law was not in breach of the Convention, the Grand Chamber held:

> In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of

[691] S Sedley, Speech given at Lincoln's Inn 13 November 2012. Also: S Sedley, 'How to Comply with Strasbourg' [2013] London Review of Books 22.

[692] D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine' (forthcoming) 23.

> the Convention. Accordingly, there has not been a violation of that provision.[693]

In structural terms this development may be reminiscent of one which, according to Hickman, one may detect in UK law when it comes to UK doctrines of deference of margins of discretion, that is, a move away from a reliance upon such concepts, doctrines, and terminology.[694] In *Huang* the House of Lords made reference to the considerable amount of argument that it had heard and the cases it had had referred to it bearing upon 'due deference, discretionary areas of judgment, the margin of appreciation' as well as other cognate doctrines.[695] The House of Lords continued by stating that 'the has been a tendency, both in the arguments addressed to the courts and in the judgments of the courts, to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice to perform'.[696] The House of Lords, and later the Supreme Court, has to a large degree eschewed such concepts, doctrines, and terminology.[697] As was the case above with respect to changes in the approach of the European Court, however, so it may be in respect also of UK law. Whilst Hickman may be right in pointing out that there has been a change in terminology, the change may be just that, leaving underlying mechanisms to work in much the same ways as they have done up until *Huang*. Lord Bingham's leading judgment in *Animal Defenders*,[698] handed down post *Huang*, exemplifies this.

[693] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [126].

[694] T Hickman, *Public Law After the Human Rights Act* (Hart 2010) 98–99.

[695] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [14].

[696] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [14].

[697] T Hickman, *Public Law After the Human Rights Act* (Hart 2010) 99.

Although in *Animal Defenders* the register of 'deference' or 'discretionary areas of judgment' was not deployed what was actually going on was much the same as would have happened under the guise of such doctrines.

There is, of course, a certain interdependence between the fact that the national courts have not adopted the margin of appreciation in national law and the fact that the European Court has made this move. It does not seem unreasonable to imagine that the European Court would not have done this if it had not been for the knowledge that, in fact, the national courts, such as the French, German, and UK courts but also the courts of other member states,[699] have now adopted an approach to Convention review which goes far in taking seriously the exigencies of the ECHR. Conversely, the national courts would not have gone so far in their review if they had not known that their good faith attempts at Convention review would carry clout with the European Court in the sense that, under a doctrine of subsidiarity, the European Court will not try to do the work already carried out by the national courts.

Importantly, however, this is different from the European Court relying on a, more or less generous, doctrine of margin of appreciation. It is certainly different from there being a double set of margins: one at the national level and one at the European level.

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[698] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [33].

[699] See H Keller & A Stone Sweet, 'The ECHR and National Legal Orders' in H Keller & A Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008).

6.4 Conclusion

The national courts in France, Germany, and the United Kingdom have not taken the view that seeing as the European Court is likely, in some types of case, to accord to national authorities a margin of appreciation, the national courts ought by the same token to do the same. The approach taken by the national courts is an admixture of the three last alternatives adumbrated under 6.2.1 above.

The national courts seem, in the first place, to have taken the view that the margin of appreciation is a mechanism developed in international law, 'a tool to define relations between the domestic authorities and the Court' which 'cannot have the same application to the relations between the organs of State at the domestic level,[700] due in the first place to the fact that international organs are removed from national circumstance. Thus the reasons why in some cases Strasbourg should accord a margin of appreciation to national authorities do not apply nationally for the simple reason that the national courts are national.[701] Secondly, and this is particularly the case in UK law, the approach has been adopted that it is not for the national courts to replicate the ECHR margin of appreciation, but that national systems may still rely upon national doctrines of deference, such as the UK courts have made clear that they at times will do.[702] A third way would be not to adopt the doctrine of the margin of appreciation such as that is practiced by Strasbourg but, for similar structural reasons of deference, adopt, of one's own volition rather than a the behest of the ECHR

[700] *A v United Kingdom*, App No 3455/05, judgment [GC] 19 February 2009 [184].

[701] P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 618.

[702] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL); *AXA General Insurance Ltd* [2011] UKSC 46, [2012] 1 AC 868; *R (Sinclair Collins Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394 (CA); *S & KF v Secretary of State for Justice* [2012] EWHC 1810 (Admin) (Sales J).

system, a similar concept of deference in similar types of case as those in which Strasbourg would apply the margin of appreciation. Thirdly the national courts have, and this applies to all three systems equally, taken inspiration from the idea of the margin of appreciation not in order to limit but to expand the scope of their rights review under the Convention. Thus in *Re P* the House of Lords found that seeing as the issue before it had not been pronounced upon by the European Court the margin of appreciation which, presumably, the state authorities would have been given should the case reach that court, gave the UK courts licence not only to be reticent but also to find a breach. This was due to the cast the Convention rights under the HRA are domestic and not international rights; the House of Lords therefore had a free hand to deciding on whether or not there had been a breach of the Convention rights in issue.[703] Similarly the head of the Conseil d'État, Jean-Marc Sauvé, has explicated the jurisprudence of the Conseil d'État in terms not of margins of appreciation but of 'margins of initiative',[704] as the Conseil not infrequently, too, adopts the same type of approach as the House of Lords adopted in *Re P*. Similarly the high levels of rights protection afforded by the Basic Law has given the German courts a secure basis upon which to reach the same result,[705] although the issue is not conceived of as margins of appreciation or initiative in German law.

[703] *Re P (Adoption: Unmarried Couple) Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173.

[704] JM Sauvé, 'Le juge administratif et la protection des libertés et des droits fondamentaux' in *Mélanges en l'honneur de Serge Guinchard* (Dalloz 2010) 555.

[705] BVerfGE 125, 260.

7 Autonomous Concepts

7.1 Introduction

The Convention concepts are to be defined autonomously, independent of the content of equivalent concepts in national law. The European Court has adopted its own rules for determining the meaning of such concepts; this has come to be known as independent classification of terms or, more usually, as the autonomous meaning of Convention concepts.[706] The fact that the concepts of the Convention are autonomous (or in French that the Convention concepts have 'une portée autonome') means that they enjoy a status of semantic independence; their meaning cannot be equated with the meaning that these very same concepts possess in domestic law.[707] One example of an autonomous concept is 'penalty' in the second sentence of art 7(1) of the Convention. Article 7(1) is in these terms:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

It may seem trite but it is worth clearing the ground by making clear that which the European Court pointed out in *M v Germany*: 'the same type of measure may be qualified as an additional penalty in on State and as a preventive measure in

[706] R White & C Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 69.

[707] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 42; G Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279; G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, 523–27; B Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in H Keller & G Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012) 288–89.

another'.[708] Thus the supervision of a person's conduct after release is an additional penalty under art 131–36–1 of the French Criminal Code, while it is a preventive measure, and thus not a penalty, under arts 215 and 228 of the Italian Criminal Code.

If certain measures which could well be seen as being penalties, or something very akin thereto, were to be classified in national law not as penalties but as strictly preventive measures, and the European Court were to accept this, then the impact of the provision would be a function of national legal definition. The effect of the Convention in national law could potentially be reduced to vanishing point. This would be absurd, and it is hardly surprising that the jurisprudence of the European Court recognised this early on.

In the literature the view has been propounded that this proposition is tempered by the way in which the European Court fashions its own autonomous concepts.[709] The Commission already in 1968 made clear, in *Twenty-One Detained Persons v Germany*, that while on the one hand the terms 'criminal charge' and 'civil rights and obligations' of the Convention 'cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but relate to an autonomous concept which must be interpreted independently', it was also the case, on the other hand, that 'the general principles of the High Contracting Parties must necessarily be taken into consideration in any such interpretation'.[710] It is not surprising that the

[708] *M v Germany* App No 19359/04 Judgment 17 December 2009 [74].

[709] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 111–12.

[710] *Twenty-One Detained Persons v Germany*, EComHR, Decision of 6 April 1968, Collection 27 [4].

autonomous concepts of the Convention have not been fashioned from nothing: international law has always drawn on concepts from national law.[711]

But as Crawford has said with respect to general international law, while international tribunals choose, edit, and adapt elements from national legal systems, the result is still a body of international law the content of which, while it has been influenced by domestic law, is still its own creation.[712] The same is the case with the autonomously defined concepts of the European Convention. While it may be that the Court at times draws inspiration from national law when fashioning its own concepts, that does not mean that the concepts of the Convention do not make up a creation of their own. Even when the Court decides to adapt elements from national legal systems into the ECHR concepts, that is a choice the Court makes of its own judgment; in this case, too, the autonomy is not open to question and while such a concept would have been influenced by domestic law it would remain its own creation.

The Grand Chamber of the European Court in *Chassagnou v France* had occasion to spell out what autonomous concepts mean in ECHR law.[713] At issue was the meaning of 'association' in art 11 of the Convention. Article 11(1) provides in pertinent part that 'everyone has the right to freedom of peaceful assembly and to freedom of association with others'. The case concerned the compulsory membership of French farmers of the so-called Approved Municipal Hunters' Association (*Associations communales de chasse agrées*—ACCAs), which the farmers claimed

[711] See, classically, H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927).

[712] J Crawford, *Brownlie's Principles of International Law* (Oxford University Press 2012) 35.

[713] *Chassagnou and others v France* App Nos 25088/94, 28331/95, and 28443/95 judgment [GC] 29 April 1999.

was a violation of their negative freedom of association. France advanced the argument that art 11 could not have been violated as in French law these organizations were not 'associations' but in point of fact 'para-administrative institutions'. The Grand Chamber did not accept the French argument. It ruled that:

> the question is not so much whether in French law ACCAs are private associations, public or para-public associations, or mixed associations, but whether they are associations for the purposes of Article 11 of the Convention. If Contracting States were able, at their discretion, by classifying an association as 'public' or 'para-administrative', to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Convention.[714]

It has been argued that this is not the end of the matter, however, as there is also a second type of argument advanced by the state in *Chassagnou*: the protection of art 11 only applied both if membership was compulsory and also there were negative consequences to such membership. Legg has stated that the Court in *Chassagnou*

> clearly considered arguments about deference. This shows the limits of what have become known as 'autonomous concepts'. This case is a strong example that autonomous concepts do not, as some commentators have argued, show that the Court's role is simply to select the appropriate human rights standards uninfluenced by state views.[715]

The European Court, in Legg's analysis, not only ensures that the state does not circumvent the substance of the Convention by making an arbitrary reclassification, but when it determines the in principle autonomous substance of the Convention

[714] *Chassagnou and others v France* app nos 25088/94, 28331/95, and 28443/95 judgment [GC] 29 April 1999 [100].

[715] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 111.

obligations the Court will give some measure of deference to the state when it has cause to do so. Perhaps an even stronger way of putting the same view is the proposition by former President of the European Court Rudolf Bernhardt that

> the notions contained in human-rights conventions have an autonomous international meaning; however, such meaning must be determined by a comparative analysis of the legal situation in the participating States. To the extent that this analysis shows considerable differences and disparities among the States, a national 'margin of appreciation' is and must be recognized.[716]

To put it in this way—both the way in which Legg and even more so the way in which Bernhardt puts it—is to confound two elements of the Strasbourg decision-making process which ought to remain disaggregated.

For it is one thing whether or not the Court in fashioning a Convention concept, such as 'association', adapts elements from national legal systems; it is another thing altogether whether, in its application of such a concept (and it is accepted here that the fashioning and the application are not two discrete processes but that they will rather bleed into one another), the European Court elects to show some deference to the national system in issue by according to its national authorities a margin of appreciation. Lord Hope made this point when he said in *Qazi* that:

> Although [ECHR] provisions do not all have to be applied uniformly as a margin of appreciation is given to the Contracting States in some contexts, the meaning which they take from the words used in each article of the Convention has to be the same.[717]

[716] R Bernhardt, 'Thoughts on the Interpretation of Human-Rights Treaties' in F Matscher & H Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymanns Verlag 1988) 71.

[717] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [61].

The UK Supreme Court has taken this concept to apply also with respect to other treaties that the ECHR. This is for example the case with EU law. In this vein Lord Mance in *The Office of Fair Trading v Abbey National plc* said about the Community concepts 'price and remuneration' that the Supreme Court must inquire:

> whether the answer we consider correct would be equally obvious to the courts of other Member States and to the Court of Justice itself; and in this regard we have to bear in mind the fact that Community legislation is drafted in different languages which may convey different meanings to different readers, that the Community concepts it uses (here 'price and remuneration') are autonomous concepts and that every provision of Community law must be placed in the context of Community law as a whole.[718]

This is in perfect harmony with the approach taken by the ECJ on the construction of EU concepts. As Federico Mancini, both a former Advocate General and a Judge of the Court, has said the ECJ has accorded itself what Mancini terms a 'hermeneutic monopoly' to avoid possible unilateral restrictions of the application of the rules on freedom of movement by the different Member States.[719] In the construction of its legal concepts the ECJ claims ultimate authority to define its meaning and scope; the definition of the EU concepts is a matter for EU law, not national law.[720] In WTO law

[718] *The Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696 [115].

[719] G Mancini, 'The Free Movement of Workers in the Case-Law of the European Court of Justice' in D Curtin & D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworth's 1992) 67.

[720] See P Craig & G de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011) 719. There is a large ECJ jurisprudence on this question; see for authority on the ECJ's ultimate authority to define the concept of 'worker' for example C–75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor detailhandel en Ambachten* [1964] ECR 177; C–53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035; C–196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159; C–350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I–2521; C–337/97 *CPM Meeusen v Hoofdirectie van de Informatie Beheer Groep* [1999] ECR I–3289; C–456/02 *Trojani v CPAS* [2004] ECR I–7573; C–208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I–181.

too the international treaty bodies have taken this approach, and this has been dubbed in the WTO literature 'extra/intra-regime characterization'.[721]

National courts, and particularly those in the United Kingdom, have recognized these aspects of conceptual autonomy or hermeneutic monopoly in other types of treaty too. Some treaty regimes do not, unlike the ECHR and the EU, have a treaty body or court that may authoritatively interpret the international instrument at issue.[722] This does not of necessity mean that there is not in the treaty system a measure of conceptual autonomy, however.

Lord Steyn in *Bristow Helicopters*, on the interpretation of the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, held that an autonomous interpretation must be adopted of the convention's terms, in the event the term 'bodily injury'. It followed, he said, from the scheme of the convention, and indeed from its very nature as an international trade law compact, that the basic concepts it employs to achieve it purpose are autonomous concepts. It was therefore irrelevant what the term 'bodily injury' meant in other contexts in national legal systems. The correct inquiry must be 'to determine the autonomous or independent meaning of "bodily injury" in the Convention'.[723]

The same approach has been taken by the House of Lords and the Supreme Court to the 1950 Refugee Convention. In respect of art 32(1) and the meaning of the

[721] See S Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (Cambridge University Press 2007) 131–40.

[722] See, on the difference between treaty regimes which have treaty bodies and treaty regimes which do not, G Ulfstein, 'Treaty Bodies and Regimes' in D Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012).

[723] *King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 AC [16] (Lord Steyn), [148] (Lord Hobhouse).

Refugee Convention concept 'lawfully in their territory' Lord Dyson in *R (on the application of ST) v SSHD* held that: 'Some provisions of the Convention have an autonomous single meaning'.[724] This was very much in the same vein as the traditional jurisprudence of the House of Lords in cases bearing on interpretation of the Refugee Convention. The House of Lords in *R v Secretary of State for the Home Department, ex p Adan*[725] for example held that there was a single autonomous meaning to be accorded to the term 'refugee' in article 1A(2) of the Refugee Convention. About this interpretation in *Adan* Lord Dyson in *R (on the application of ST) v SSHD* said the following: 'The meaning of this term cannot vary according to the differing interpretations of the Contracting States. It is not to be ascertained by reference to their domestic law'.[726] Lord Slynn in *Adan* saw the search for autonomous interpretation of treaty concepts under the Refugee Convention as 'part of the very alphabet of customary international law'.[727] Thus, he said, 'the European Court of Justice has explained how concepts in the Brussels Convention must be given an autonomous or independent meaning in accordance with the objectives and system of the convention'.[728] Thus Lord Slynn, himself a former Advocate General in the ECJ and very familiar with the law of the ECHR, arguably showed that if national judges in the United Kingdom have applied the notion of autonomous concepts to

[724] *R (on the application of ST) v SSHD* [2012] UKSC 12, [2012] 2 AC 135 [55] (Lord Dyson).

[725] *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477 (HL).

[726] *R (on the application of ST) v SSHD* [2012] UKSC 12, [2012] 2 AC 135 [55] (Lord Dyson).

[727] *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477 (HL) 515.

[728] As evidence for this proposition he cited *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging,* C–34/82 [1983] ECR 987, 1002 [9]–[10]; *SPRL Arcado v SA Haviland,* C–9/87, Opinion of Advocate General Slynn [1988] ECR 1539, 1549; *Athanasios Kalfelis v Banklaus Schröder Münchmeyer, Hengst and Co and others*, C–189/87, [1988] ECR 5565, 5585 [16]; *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS),* C–26/91 [1992] ECR 1–3967, 3993 [10].

other treaty regimes than ECHR and EU law, then surely they have been doing so while drawing inspiration from EU and ECHR law.

The German Federal Constitutional Court has discussed the issue only in relation to the ECHR; it has held that the problems of giving effect in national law to international treaty concepts are especially acute when what is at issue is 'an autonomous concept developed in the jurisprudence of the European Court'.[729] Though in French law the notion of 'portée autonome' may be found outside ECHR law, one would be very hard pressed to find examples of French courts relying, in relation to other treaty regimes than the ECHR, or at any rate European law, on something akin to the notion.[730] It is thus very much a tenable proposition to say that the theory of autonomous concepts is viewed by many if not most national judges as an important hallmark of the European Convention.

Though the UK courts have taken a broad view of the doctrine, applying it as we have seen to treaties in general, they have nonetheless been willing to view the doctrine as one of the hallmarks of the ECHR system. Baroness Hale thus explained in an article on the similarities and differences between the common law and the Convention that the notion of autonomous concepts

> goes back to the early days, to *Engel v Netherlands* (1976), where it was held that states could define conduct *into* the concept of a criminal charge for the purpose of the right to a fair trial, but not *out of it*. It stands to reason that, once a state has committed itself

[729] BVerfGE 128, 326 [94].

[730] One finds examples of the notion that concepts contained in provisions in national law have 'une portée autonome' (see Conseil d'État, 28 March 2011 *Groupement de Usagers de l'Aérodrome de Saint-Cyr-l'École* (*conclusions*: Roger-Lacan); Conseil d'État, 6 October 2010 *Mireille Degand* (*conclusions*: Boucher); Conseil d'État, 30 December 2010 *Marcel Cadenel* (*conclusions*: Guyomar); Conseil d'État, 11 July 2011 *Geneviève Montant* (*conclusions*: Guyomar) but not to concepts contained in other international treaty regimes than ECHR law.

> to certain minimum standards, it cannot contract out of those by defining the terms used in its own way. Certain key terms must have a common meaning across the *espace juridique*.[731]

She saw this notion very much as a hallmark of ECHR law, and also listed the development of the doctrine as one of the singularities of the Convention system in *McCaughey*.[732]

7.2 Germany and France: Domestic Concepts Trump ECHR in Principle

7.2.1 German Law

Here the dialogic exchange between the German courts and the European Court in *M v Germany*[733] and *Preventive Detention II*,[734] which was touched upon in Chapter 2 and will be dealt with further in Chapter 8, is pertinent.[735] Apposite here is that the European Court of Human Rights in *M* held that the retrospective extension of the preventive detention to an effectively unlimited period of time was in breach of article 7(1). The Court held that preventive detention as practiced in Germany was to be qualified as a 'penalty' and not merely a measure of correction and prevention. As the scheme had not been considered to be a penalty in German law, principles such as the prohibition of retroactive sentences and the *ne bis in idem* rule were not considered by

[731] B Hale, 'Common Law and Convention Law: The Limits to Interpretation' [2011] EHRLR 534, 538.

[732] *Brigid McCaughey & Another* [2011] UKSC 20, [2012] 1 AC 725 [90].

[733] *M v Germany* App No 19359/04 Judgment 17 December 2009.

[734] BVerfGE 128, 326.

[735] See G Nolte, 'Art. 103 Abs. 2' in C Starck (ed), *Kommentar zum Grundgesetz Band 3: Artikel 83 bis 146* (Franz Vahlen 2010) 1004–07.

the German judges adjudicating in the case to apply. The European Court, 'looking behind appearances and making its own assessment', concluded that preventive detention under the German criminal code must be qualified as a 'penalty' for the purposes of article 7(1).[736]

As the European Court relied in *M* on the doctrine of autonomous concepts the German Federal Constitutional Court had cause in *Preventive Detention II* to state how it viewed the relation between the German concept of penalty and the autonomously developed European concept:

> The courts must, when they interpret the Basic Law in light of the European Convention—as well as the jurisprudence of the European Court—find a way of carefully fitting the European jurisprudence into the existing, dogmatically differentiated national legal system; for this reason an imprudent adaptation of international legal concepts will not do.[737]

For an autonomous concept such as the ECHR notion of 'penalty' to fit into the scheme of German constitutional law, transplantation would in other words not be acceptable. The German court continued:

> There is no cause to adapt the constitutional concept of penalty in art 103(2) of the Basic Law—and therewith also that of art 103(3)—to the concept of penalty of art 7(1) of the ECHR. The European Court of Human Rights in this respect has set out that the concept of 'penalty' in art 7 ECHR is to be interpreted 'autonomously'; the European Court is not, according to itself, bound by the description of the measure under domestic law. This way of constructing concepts by the European Court is legitimate for the purposes of the European Convention. The independent construction of the concepts by the European Court, and the flexibility and vagueness necessarily attendant, take into account the legal, linguistic, and cultural diversity of the member states of

[736] BVerfGE 128, 326 [133].

[737] BVerfGE 128, 326 [94].

> the Council of Europe. For a mature constitutional order such as the Basic Law there is, however, no reason to let go of the concept of penalty in art 103 of the Basic Law, as this was brought out in the decision of 5 February 2004.[738]

This explicit discussion of the theory of autonomous concepts provides a rare look into how a national courts views the development of ECHR concepts in relation to the concepts of the national legal system of which it is itself a part. While the German Court understands the necessity of autonomously developed ECHR concepts, for the purpose of the jurisprudence of the European Court, it underscores the point that the law of the states members must necessarily be taken into consideration in the construction of autonomous ECHR concepts. Nevertheless it may be that, even taking into account the deference which on occasion the Court has accorded to the states in constructing the autonomous concepts of the Convention,[739] the 'flexibility and vagueness necessarily attendant' and 'the legal, linguistic, and cultural diversity' which the German Court brings out as the hallmarks of the theory of autonomous concepts may be to confuse the descriptive with the normative. In point of fact the European Court had chosen *not* to take into account the German colouring of the concept of 'penalty'—nor had it, as we shall see below, taken into account the French concept, which corresponded to that of the German legal order. It was this—the rather considerable difference between the German and the ECHR concepts of 'penalty'—that led the German Court to hold that is saw 'no reason to let go of the concept of penalty in art 103 of the Basic Law'.[740]

[738] BVerfGE 128, 326 [142] (referring to BVerfGE 109, 133).

[739] See *Chassagnou and others v France* app nos 25088/94, 28331/95, and 28443/95 judgment [GC] 29 April 1999 [100]; A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 111–12.

[740] BVerfGE 128, 326 [142].

Though the German Court made very clear that as far as German constitutional law was concerned the importance of the German concept of 'penalty' was in principle undiminished, it went very far in making sure that this did in the final analysis not matter, as it held that the full import of the autonomously developed ECHR concept was given pride of place in the proportionality test to be performed:

> With respect to the Basic Law—especially when an autonomous concept developed in the jurisprudence of the European Court has a different import from the corresponding concept of the Basic Law—the principle of proportionality, immanent to the Basic Law, comes into consideration, in the taking into account of the judgments of the European Court.[741]

Thus the German Court found that the autonomous ECHR concept must be given full impact in German law after all.

7.2.2 French Law

In the 2010 case *René Abolivier*, on the right to property protected in art 1 of the First Protocol, *rapporteur public* Claire Legras set out in her *conclusions* the issues as they bore on autonomous concepts:

> Les notions de propriété en droit interne et de bien au sens de l'article 1er du Premier protocole additionnel à la CEDH ne coïncident pas nécessairement. La Cour de Strasbourg rappelle ainsi avec constance que la notion de biens au sens de stipulations de cet article à une portée autonome. Constitue un bien au sens de la convention tout élément possédant une valeur patrimoniale tels que des biens incorporels ou une "espérance légitime". Certains

[741] BVerfGE 128, 326 [94].

> droits et intérêts constituants des actifs peuvent très bien passer pour des biens au sens de l'article 1er. Et la cour se réfère encore à la notion d''intérêt substantiel' pour apprécier si un requérant est ou non titulaire d'un bien au sens de l'article 1er. Cette conception extensive de la notion de biens va donc de pair avec une acceptation également large de celle de dépossession.[742]

The French courts have taken to heart what the European Court ruled in *Chassagnou*.[743] *Rapporteur public* Legras in *René Abolivier* relied on the case as an example of how the European Court, in its analysis as what is covered by art 11 of the Convention, looked beyond appearances and focus instead upon what it views as the underlying realities of the national legal concepts.[744]

The same is the case in the lower courts. Thus for example the Tribunal administratif of Dijon, in a case from 17 November 2009, relied on the approach taken by the European Court in *Chassagnou*. In its ruling the Tribunal administratif held, after having cited art 11 of the Convention, that:

> la liberté d'association reconnue par ces stipulations, telles qu'interprétées par la Cour européenne des droits de l'homme, doit garantir la possibilité pour les individus de partager leurs convictions ou leurs idées collectivement, en particulier dans le cadre d'associations d'individus ayant les mêmes convictions, idées ou intérêts ; que la portée de la liberté d'association devant être appréciée au regard de la liberté de pensée et d'opinion ainsi que de la liberté d'expression, respectivement garanties par les articles 9 et 10 de la convention, la notion d'association, au sens des stipulations de l'article 11 de la convention, possède une

[742] Conseil d'État, 2 June 2010 *René Abolivier* (*conclusions*: Legras) 12. The *rapporteur public* cited in favour of this proposition the following Strasbourg authorities: *Van Marle* App Nos 8543/79; 8674/79; 8675/79; 8685/79 judgment [Plenary Court] 26 June 1986; *Tre Traktörer Aktiebolag v Sweden* App No 10873/84 judgment 7 July 1989; *Pine Valley v Ireland* App No 12742/87 judgment 29 November 1991; *Wiesinger v Austria* App No 11796/85 judgment 30 October 1991; *Öneryildiz v Turkey* App No 48939/99 judgment [GC] 30 November 2004; *Anheuser-Busch v Portugal* App No 73049/01 judgment 11 January 2007; *Gauchin v France* App No 7801/03 judgment 19 June 2008.

[743] See 7.1 above.

[744] Conseil d'État, 2 June 2010 *René Abolivier* (*conclusions*: Legras) 10.

> portée autonome, indépendante de la qualification d'association en droit national.[745]

The Conseil d'État in *Section Française de l'Observatoire International des Prisons* was seised of a case which brought to the fore the different concepts of penalty in French law and in the Convention.[746] To avoid recidivism in sexual offenders a law of 12 December 2005 had introduced a regime whereby certain offenders who had been found to be particularly dangerous would be put under mobile electronic surveillance ('placement sous surveillance électronique mobile'—PSEM). This had not in French law been found to be a penalty. The Conseil constitutionnel had held that the measure could not in French law be qualified as a penalty: 'en premier lieu, que la surveillance judiciaire est limitée à la durée des réductions de peine dont bénéficie le condamné et qu'elle constitue ainsi une modalité d'exécution de la peine qui a été prononcée par la juridiction de jugement' and 'en second lieu, que la surveillance judiciaire, y compris lorsqu'elle comprend un placement sous surveillance électronique, est ordonnée par la juridiction de l'application des peines ; qu'elle repose non sur la culpabilité du condamné, mais sur la dangerosité ; qu'elle a pour seul but de prévenir la récidive et qu'ainsi, la surveillance judiciaire ne constitue ni une peine ni une sanction'. The Conseil constitutionnel thus held that 'le législateur a pu, sans méconnaitre l'article 8 de la Déclaration de 1789, prévoir son application à des personnes condamnés pour des faits commis antérieurement à l'entrée en vigueur de la loi'.

Commissaire du gouvernement Guyomar in *Section Française de l'Observatoire International des Prisons* said that the Conseil d'État was free to

[745] Tribunal administratif de Dijon 17 November 2009 *Anonymous* (No 0800899) 2–3.

[746] Conseil d'État, 12 December 2007 *Section Française de l'Observatoire International des Prisons* (*conclusions*: Guyomar).

ignore the solution reached by the Conseil constitutionnel; it was not, he said, binding for them. This would be not least because the Conseil constitutionnel is bound formally only by the constitution whereas the same question would before the Conseil d'État take on very strong ECHR element. He made it clear, however, that the decision ought to inspire the analysis of the Conseil d'État.[747] As the *commissaire* said, the question was whether the PSEM ought to be classified as a 'penalty' in terms of art 7 or the PSEM ought not to be classified as a 'penalty' and the Conseil d'État would have to dismiss the appeal.[748]

Guyomar began his analysis by stating that the Conseil d'État was bound neither by the qualification made by the Conseil constitutionnel nor by that made by the law itself, which saw the measures as 'security measures', and not penalties, only.[749] The *commissaire du gouvernement* continued: 'La Cour de Strasbourg ne s'estime en effet pas liée par les qualifications de droit interne et reconnaît à la notion de "peine" une "portée autonome"'.[750] He then set out the criteria on which the European Court will base its decision as to whether a measure is to be regarded, for the purposes of the Convention, as a penalty or not. These criteria were the connection between the measure at issue with an earlier condemnation for a criminal infraction; the nature and object of the measure; the procedures associated with its adoption and its executions; and, finally, its gravity. Before going on to applying these criteria to

[747] Conseil d'État, 12 December 2007 *Section Française de l'Observatoire International des Prisons* (*conclusions*: Guyomar) 2–3.

[748] As the *commissaire du gouvernement* also points out, no issue could arise with respect to art 4 Seventh Protocol, which prohibits 'double jeopardy', as France had not signed this protocol.

[749] Conseil d'État, 12 December 2007 *Section Française de l'Observatoire International des Prisons* (*conclusions*: Guyomar) 5.

[750] The *commissaire du gouvernement* cited in favour of this proposition *Welch v United Kingdom* App No 17440/90 judgment 9 February 1995 [27].

the measure in issue, the *commissaire* reminded the Conseil d'État of the legislative history and legal framework of the legal regime instituting the PSEM measures. These elements could not, he said, be the end-all of the analysis but would still constitute an indication.[751] This is in agreement with the approach of the jurisprudence of the European Court and the Commission; while on the one hand the concepts of the Convention 'cannot be construed as a mere reference to the domestic law' but relate instead to an autonomous concept which must be interpreted independently, it is also the case that 'the general principles of the High Contracting Parties must necessarily be taken into consideration in any such interpretation'.[752]

After a scrupulous analysis, in light of the criteria set out by the European Court, of the measure at issue, the *commissaire du gouvernement* in *Section Française de l'Observatoire International des Prisons* concluded that the regime of mobile electronic surveillance instituted by the law of 12 December 2005 could not be considered to be a 'penalty' under the Convention.[753]

The Conseil constitutionnel in 2008 had come to very much the same conclusion. Act of 25 February 2008 on post-sentence preventive detention and diminished criminal responsibility due to mental deficiency had introduced preventive detention into French law.[754] This measure may under art 706–53–13 of the French Code of Criminal Procedure be ordered against particularly dangerous offenders who

[751] Conseil d'État, 12 December 2007 *Section Française de l'Observatoire International des Prisons* (*conclusions*: Guyomar) 6.

[752] *Twenty-One Detained Persons v Germany*, EComHR, Decision of 6 April 1968, Collection 27 [4].

[753] Conseil d'État, 12 December 2007 *Section Française de l'Observatoire International des Prisons* (*conclusions*: Guyomar) 6.

[754] *Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental*, 25 February 2008.

were deemed to pose a high risk of recidivism because they suffer from a serious personality disorder. The Conseil constitutionnel in *Loi relative à la retention de sûreté et à la declaration d'irresponsabilité pour cause de trouble mental* ruled that such preventive detention, not based on the guilt of the person convicted but designed instead to prevent recidivism, could not be considered to be a penalty: 'la rétention de sûreté n'est ni une peine, ni une sanction ayant le caractère d'une punition'.[755] As pointed out in *M v Germany*, the Conseil constitutionnel took the same approach as the German Courts had taken until 2009, and also the same approach as the German Federal Constitutional Court would take in 2011 in *Preventive Detention II*.[756] The Conseil constitutionnel found that:

> In view of its custodial nature, the time it may last, the fact that it is indefinitely renewable and ordered after conviction by a court of law, post- sentence preventive detention cannot be ordered in the cases of persons convicted prior to the publication of the statute or convicted after this date of offences committed prior to such date.[757]

The provisions of the statutory regime that made such provisions were thus held to be unconstitutional. One might say that this means that the distinction between the French constitutional concept of penalty and the ECHR concepts is a distinction without a difference.

It was known well before *M v Germany*, of course, that the European Court applied an autonomous approach to what it views as 'penalty' under art 7(1). This the

[755] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, 3272 [9].

[756] *M v Germany* App No 19359/04 judgment 17 December 2009 [75].

[757] Decision number 2008–562 *Conseil constitutionnel*; Journal officiel of 26 February 2008, 3272 [10].

Court had made clear in for example *Welch v United Kingdom*[758] and *Jamil v France*.[759] The Court had brought out in *Welch* that the 'factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity'.[760] As we saw in Chapter 2, the Conseil constitutionnel held in 1975 that it was outside its ambit, in its capacity of adjudicator of the conformity of statutes to the constitution, to adjudicate on the conventionality of laws, making this the task of ordinary judges.[761] Still it takes into account the jurisprudence of the European Court.[762] It is highly unlikely therefore that the Conseil constitutionnel, by going so far in effectively applying not the French but the ECHR concept of 'penalty', had an eye to the consequences which could entail should it allow the retrospective application of the measures at issue.

The third arm of the French judiciary—the *juridiction judiciaire*—too has had to navigate the shoals of autonomously constructed Convention concepts. The criminal chamber of the Cour de cassation in its ruling of 19 October 2010 ruled that several of the rules of the criminal procedural code relative to pre-trial detention were contrary to art 6 of the Convention.[763] A new law was adopted, on 14 April 2011, which substantially reformed the French regime of pre-trial detention.[764] With this

[758] *Welch v United Kingdom* App No 17440/90 judgment 9 February 1995 [27]–[28].

[759] *Jamil v France* App No 11/1994/458/539 judgment 8 June 1995 [30].

[760] *Welch v United Kingdom* App No 17440/90 judgment 9 February 1995 [28].

[761] See Ch 2.

[762] O Dutheillet de Lamothe, 'Constitutional Court Judges' Roundtable' (2005) 4 I-CON 550.

[763] Cour de cassation crim, 19 October 2010 5699 (10–82.902); 5700 (10–82.306); 5701 (10–82.051).

[764] *Loi numéro 2011–392 du 14 avril 2011 relative à la garde à vue*.

reform the right to see a lawyer during pre-trial detention was substantially improved.[765] On the day of the publication of the new law in the *Journal official*, 15 April 2011, the Cour de cassation sitting in its highest formation, Assemblée plénière, handed down four judgments which would, through their reliance on the notion of autonomous concepts in ECHR law, put a spanner in the legislative works of the government.[766] *Première advocate générale* Petit reminded the Cour de cassation that the concepts of art 6 were to be constructed autonomously, detached in principle from their national legal context:

> En effet, le droit au procès équitable ne concerne pas tous les litiges mais uniquement les 'contestations sur les droits et obligations de caractère civil' et le 'bien-fondé d'une accusation en matière pénale', notions d'interprétation 'autonome' selon le juge européen, détachées de leur contexte juridique national et dotées d'une signification propre.[767]

She went on to explicate why this was, all the while underscoring the importance in ECHR law of such an approach:

> Ce recours à la technique de 'notions autonomes' tend à éviter 'toute fraude à la Convention', en empêchant les Etats de se soustraire à leurs obligations grâce aux définitions propres de leurs droits internes. Il s'agit de donner une définition commune de la norme européenne protectrice des droits de l'homme. Ces notions sont donc les clés d'accès aux garanties du procès équitable.[768]

[765] MA Beernaert, C Charrière-Bournazel, and Y Jeanneret, 'Les suites de l'arrêt *Salduz* en droit belge, français et suisse' 23 (2012) Revue trimestrielle des droits de l'homme 241, 257–58.

[766] Cour de cassation, 15 April 2011 589 (10–17.049); 590 (10–30.242); 591 (10–30.313); 592 (10–30.316) (*avis*: Petit).

[767] Cour de cassation, 15 April 2011 589 (10–17.049); 590 (10–30.242); 591 (10–30.313); 592 (10–30.316) (*avis*: Petit).

[768] Cour de cassation, 15 April 2011 589 (10–17.049); 590 (10–30.242); 591 (10–30.313); 592 (10–30.316) (*avis*: Petit).

The Assemblée plénière, agreeing with the *avis* of the *première advocate générale*, concluded that the rules contained in s 63–4 of the new criminal procedural code were not in conformity with art 6 autonomously interpreted. The Cour de cassation ruled that:

> pour que le droit à un procès équitable consacré par [cet article] soit effectif et concret, il faut, en règle générale, que la personne placée en garde à vue puisse bénéficier de l'assistance d'un avocat dès le début de la mesure et pendant ses interrogatoires.

It concluded that once a person in pre-trial detention who asks to see a lawyer is refused to see one, the procedure is in breach of art 6 of the Convention.

Both the German and the French courts have taken an approach to autonomous concepts according to which they in principle follow and rely on their national concepts rather than the autonomously developed ECHR ones. This is, however, rendered almost illusionary by the fact that both the Federal Constitutional Court and the Conseil constitutionnel have in reality applied the ECHR concepts.

7.3 United Kingdom: Full Approval of ECHR Concepts in Principle

In UK law the question has not arisen in the same way as in French and German law. It has not happened that the UK courts have said as explicitly as the French and German courts that there is a national legal principle that, for the purposes of national law, must in principle take precedence over ECHR concepts. As we shall see, however, this position is substantially undermined by the fact that the UK courts have, with regard to the autonomous art 8 concept 'home' in reality resisted giving effect in

national law to the autonomously constructed ECHR principle. In *Uttley* the House of Lords was seized of a case bearing on the imposition of retroactive penalties. The respondent had submitted that 'for the purposes of article 7(1) a "penalty" was an autonomous concept'.[769] To this Lord Phillips, with whom the rest of the House agreed, said: 'I accept that, for the purposes of article 7(1), a penalty is an autonomous concept'.[770]

At the time when the case reached the House of Lords a similar question had recently been considered by the Judicial Committee of the Privy Council in *Flynn v HM Advocate*.[771] The issue in *Flynn* had been whether changes made by Scottish legislation to the release regime applicable in the case of mandatory life sentences infringed art 7(1). At issue were complaints from prisoners sentenced to imprisonment for life in Scotland prior to the passing of the Convention Rights (Compliance) (Scotland) Act 2001 that under the regime brought into operation by that act—their complaint being directed specifically to paragraph 13 of the schedule of the act, which dealt with transitional provisions—they would serve a longer period in prison than they would have expected to serve under the arrangements in force at the time when they were originally sentenced. The Judicial Committee gave an interpretation of para 13 whereby the reviewing court would be entitled to avoid the necessity to impose a higher 'sentence'. Thus no breach of art 7(1) was found. The appellants had argued that the 'applicable' sentence in art 7(1) of the ECHR is that which would have been imposed by a court if it had passed sentence under the law in force at the time of the

[769] *R (Uttley) v Home Secretary* [2004] UKHL 38, [2004] 1 WLR 2278 [22] (Lord Phillips).

[770] *R (Uttley) v Home Secretary* [2004] UKHL 38, [2004] 1 WLR 2278 [23] (Lord Phillips); also [46] (Baroness Hale), [64] (Lord Carswell).

[771] *Flynn v HM Advocate* 2004 SCR 281.

commission of the offence. From this reasoning it followed that if the length of the punishment part of the life sentence exceeded that which they could realistically have expected under the previous arrangements for fixing that part then art 7(1) could be engaged. The Privy Council specifically rejected this construction of art 7(1). Lord Rodger held that under para 13 'the appellants are liable to be required to serve a longer period than would have been likely, but no longer period than would have been competent, before the first review under the previous system. That is not incompatible with article 7(1).'[772] In *Uttley* the respondent supported the construction of art 7(1) which had been advanced on behalf of the appellants in *Flynn*. He argued that the licensing provisions introduced a new component into the system, which did not exist at the time when the respondent committed the offences. This, it was argued, amounted to a lengthening of the sentence which could have been imposed before 1992 and accordingly violated art 7(1).

The Court of Appeal held that there had indeed been a breach of art 7(1), and the court made a declaration that the relevant sections of the 1991 act were incompatible with the Mr Uttley's art 7 rights. Pill LJ in his carefully reasoned judgment held that

> a sentence which includes a period of licence inevitably extending beyond two thirds of the term imposed is, in my judgment, a heavier penalty than a sentence without that requirement. The fiction that the penalty is one of 12 years in custody in each case must not be allowed to obscure the reality of the effects of the licence. While licence conditions vary, and in some cases will be more onerous than others, it is not and cannot be disputed that conditions will inevitably be imposed which are impediments on the offender's freedom of action. Moreover, the conditions create a potential liability to serve a further substantial period in custody, as to the provisions dealing

[772] *Flynn v HM Advocate* 2004 SCR 281.

> with the effects of reconviction. Arguments that the purpose of the licence conditions is rehabilitative and preventative, as they undoubtedly are, do not detract from their onerous nature when viewed as part of the sentence. Whatever the purpose, the effect is onerous.[773]

Longmore LJ added that 'any prisoner would regard the penalty of 12 years as harsher after 1992 than before. So, in my view, would the ordinary informed observer'.[774]

The House of Lords in *Uttley* did not agree with this. It held that the term 'applicable' in art 7(1) referred to the sentence that would have been actually applied at the time, or the maximum sentence that was available in law; they concluded that art 7 only prohibited a retrospective increase in the maximum penalty that was available following conviction and not a particular penalty that might be awarded within that maximum. If, said Lord Carswell, the interpretation suggested by the Court of Appeal had been adopted then 'it would frequently be necessary to attempt to divine what sentence a court would have passed if sentencing at the time of commission of the offence, a quest fraught with obvious difficulties'.[775]

Mr Uttley took his case to the European Court, where he argued that there had been a breach of art 7 resulting from his release at the two-thirds point of his sentence on licence.[776] He underscored that the Court of Appeal had found that a sentence incorporating a condition that release will be on licence is a harsher sentence than one

[773] *Uttley* [2003] EWCA Civ 1130, [2003] 1 WLR 2590 (CA) [15].

[774] *Uttley* [2003] EWCA Civ 1130, [2003] 1 WLR 2590 (CA) [36].

[775] *R (Uttley) v Home Secretary* [2004] UKHL 38, [2004] 1 WLR 2278 [64].

[776] *Uttley v United Kingdom* App No 36946/03 admissibility decision 29 November 2005.

which provides for unconditional release.[777] The European Court in its admissibility decision brought out that the term 'penalty' is autonomous in scope and that for the protection afforded by art 7 to be effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of art 7.[778] The essence of the applicant's complaint was that the change in the regime for early release, brought about by the 1991 act, was a further, or additional, 'penalty' within the meaning of art 7, over and above the 'penalty' which was applicable at the time the applicant committed the offences in or before 1983.

Referring to *Hogben v United Kingdom*[779]—a 1986 decision in which the Commission had, in a case similar to the one now before the Court, arrived at the same conclusion as the House of Lords in *Uttley*—the European Court found that:

> the application to the applicant of the post-1991 Act regime for early release was not part of the 'penalty' imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no 'heavier' penalty was applied than the one applicable when the offences were committed.[780]

The House of Lords in *Uttley* reached exactly the same position as the one which would be taken by the European Court. In fact the European Court found no fault with the approach of the House of Lords to the autonomous concepts in art 7(1). It would

[777] *Uttley v United Kingdom* App No 36946/03 admissibility decision 29 November 2005 at 6.

[778] *Uttley v United Kingdom* App No 36946/03 admissibility decision 29 November 2005 at 7.

[779] *Hogben v United Kingdom* App No 11653/85 decision 3 March 1986 (DR) 46 at 231; this holding was, as the European Court said, confirmed in *Grava v Italy* App No 43522/98 10 July 2003 [51].

[780] *Uttley v United Kingdom* App No 36946/03 admissibility decision 29 November 2005 at 8.

be wrong, however, to conclude that this means that the UK courts have taken a more deferential approach than the German and French courts to the Convention and the ECHR notion of autonomous concepts. Judicial disagreement does not always operate in the register of full disclosure—it instead partakes of distinction and the application of stricter forms of review where that would otherwise not have been called for.

A good example in this regard is the saga in the UK courts about what is a 'home' under art 8 and evictions by a person whose right to occupy property in domestic law has ceased.[781] The European Court had held in *Connors v United Kingdom* that where the applicant and their family had lived on a local authority gipsy site for most of the sixteen years preceding the termination of their licence, art 8 was applicable.[782]

The European Court in *McCann v United Kingdom* then held that this applied generally; it was not 'confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case'. The Court ruled that:

> The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.[783]

[781] See the discussion in T Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press 2010) 78–80.

[782] *Connors v United Kingdom* App No 66746/01 judgment 27 May 2004.

[783] *McCann v United Kingdom* App No 19009/04 judgment 13 May 2008 [50].

The Court also underscored, as it had done on earlier occasions too, that 'whether a property is to be classified as a "home" is a question of fact and does not depend on the lawfulness of the occupation under domestic law'.[784] This was criticized and discounted by the House of Lords first in *Doherty*,[785] and then in *London Borough of Harrow v Qazi*[786] and *Kay v Lambeth*.[787] Lord Hope set out his misgivings in *Doherty*:

> I am not convinced that the Strasbourg court—which did not hear oral argument in *McCann*—has fully appreciated the very real problems that are likely to be caused if we were to depart from the majority view in *Kay* in favour of that of the minority.[788]

It was therefore not possible to follow the European Court on this score; until the Court had developed principles on which the House of Lords could rely for general application the only safe course was 'to take the decision in each case as it arises'.[789]

Lord Millet held in *Qazi* that art 8 was not ordinarily infringed by enforcing the terms on which the applicant occupies premises as his home; art 8(1), he said, 'does not give a right to a home, but only to "respect" for the home'.[790] Lord Hope too was careful in his approach but also showed that on the majority approach the misgivings one had with respect to giving full effect in UK law to the autonomous

[784] *McCann v United Kingdom* App No 19009/04 judgment 13 May 2008 [46]; see for example *Buckley v the United Kingdom* App No 20348/92 judgment of 29 September 1996 [54].

[785] *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57, [2009] 1 AC 367.

[786] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983.

[787] *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465.

[788] *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57, [2009] 1 AC 367 [20].

[789] *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57, [2009] 1 AC 367 [20].

[790] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [100].

concept of 'home', as constructed by the European Court, resulted not in a outright rejection but rather in the application of a very strict test:

> I do not say that the right to respect for the home is irrelevant. But I consider that such interference with it as flows from the application of the law which enables the public authority landlord to exercise its unqualified right to recover possession, following service of a notice to quit which has terminated the tenancy, with a view to making the premises available for letting to others on its housing list does not violate the essence of the right to respect for the home under article 8(1). That is a conclusion which can be applied now to all cases of this type generally.[791]

Lord Scott went further, perhaps giving the game away by making explicit what the other Law Lords in the *Qazi* majority seemed to take care not to betray. He first brought out that international humans rights, having been 'the product of the horrors of fascism which led to World War II and the Holocaust', were not intended 'to engage in social engineering in the housing field'.[792] He continued:

> I would, for my part, have said that article 8 was not, in these circumstances, applicable. But it could also be said that a possession order was 'in accordance with the law' and was necessary in order to protect and give effect to the council's right to possession. … But it comes to the same thing. Article 8 cannot be raised to defeat contractual and proprietary rights to possession.[793]

Here we see a reticence toward accepting the autonomously developed ECHR concept of 'home' to tenancy cases. Lord Steyn in *Qazi* explicitly viewed the majority approach as one which did not accept the ECHR notion of autonomous concepts:

[791] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [83].

[792] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [123].

[793] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [149].

> It would be surprising if the views of the majority on the interpretation and application of article 8 of the European Convention of Human Rights, as incorporated into our legal system by the Human Rights Act 1998, withstood European scrutiny. It is contrary to a purposive interpretation of article 8 read against the structure of the Convention. It is inconsistent with the general thrust of the decisions of the European Court of Human Rights, and of the Commission. It is contrary to the position adopted by the United Kingdom Government on more than one occasion before the European Court of Human Rights. It does not accord to individuals 'the full measure of the [protection] referred to': *Minister of Home Affairs v Fisher* [1980] AC 319, 328. On the contrary, it empties article 8(1) of any or virtually any meaningful content. The basic fallacy in the approach is that it allows domestic notions of title, legal and equitable rights, and interests, to colour the interpretation of article 8(1).[794]

In *Kay v Lambeth* Lord Hope, Lord Scott, Lord Brown and Baroness Hale held, in the vein of *Qazi,* that a defence in possession proceedings which did not challenge the law under which the possession order was sought but was based only on the occupier's personal circumstances ought to be struck out.[795] Lord Bingham, Lord Nicholls and Lord Walker held that occupiers should be able to plead art 8 as a defence in possession proceedings but that it was only 'in rare and exceptional cases [that] it will not be futile'.[796] The European Court in *Kay v United Kingdom* agreed with the minority.[797] It was becoming clear that the resistance to giving full impact to the autonomous ECHR concept of 'home' in art 8 was becoming more and more untenable. Then the Supreme Court, sitting in a nine-judge formation and delivering a unanimous ruling, written by Lord Neuberger, changed tune in *Pinnock.* The Supreme Court said about the *Qazi*, *Kay*, *Doherty* case line that:

[794] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [27].

[795] *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465.

[796] *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 [25].

[797] *Kay v United Kingdom* App No 37341/06 judgment 21 September 2010.

> even before the decision in *Kay v United Kingdom*, we would, in any event, have been of the opinion that this court should now accept and apply the minority view of the House of Lords in those cases. In the light of *Kay v United Kingdom* that is clearly the right conclusion. Therefore, if our law is to be compatible with article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact.[798]

Thus, after a period during which the House of Lords had gone very far in allowing 'domestic notions of title, legal and equitable rights, and interests, to colour the interpretation of article 8(1)',[799] thus effectively resisting the autonomous construction given by the European Court to the concept 'home', the Supreme Court in *Pinnock* accepted the full impact of the doctrine of autonomous concepts also in regard to art 8.

D. Contracting out of Autonomous ECHR Concepts by Way of other Treaties

Another aspect of state compliance with the autonomously interpreted concepts of the European Convention should be considered here too: namely that of whether a state member to the ECHR may, after having signed the Convention, enter into other treaties which, because they are with respect to that state posterior to the European Convention, may seem to suggest that the state ought to renege on its ECHR commitments. In French law this issue came up in *Kandyrine de Brito Paiva*.[800] The Conseil d'État in this case evaded the autonomously developed concepts of art 1 of

[798] *Manchester City Council v Pinnock (Nos 1 and 2)* [2010] UKSC 45, [2011] 2 AC 104 (references omitted) [49].

[799] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [27].

[800] Conseil d'État, 23 December 2011 *Kandyrine de Brito Paiva* (*conclusions*: Boucher).

the First Protocol taken together with art 14.[801] The Conseil d'État, which in this case went against the main thrust of the *conclusions* of *rapporteur public* Julien Boucher,[802] found that while in principle the possession in issue, claim against the Russian government owned by the Portuguese national Mr Kandyrine de Brito Paiva which he had inherited from his French grandfather, must be seen as being a 'possession' in terms of art 1 of the First Protocol but because of a bilateral treaty between France and Russia, from 1997, in which France, acting 'in its own name or in that of French natural and legal persons', renounced the claims relative to all loans and obligations on which Mr Kandyrine de Brito Paiva had based his claim.[803] It seems to be a questionable approach for a national court to make its Convention obligations wait upon bilateral treaties in the way that the Conseil d'État did in *Kandyrine de Brito Paiva*.[804] The Grand Chamber of the European Court has, in general terms, made this point on several occasions. In *Hirsi Jamaa v Italy* the Grand Chamber said that a state which is a member of the Council of Europe 'cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements'.[805] While, as it has been pointed out in the literature, a state obviously is

[801] See E Bjorge, 'Kandyrine de Brito Paiva' (2012) 106 AJIL 353.

[802] See J Boucher, 'Conclusions—Conseil d'État, assemblée, 23 décembre 2011, *M. Eduardo José Kandyrine de Brito Paiva*, no 303678' (2012) 28 RFDA 1.

[803] Accord sur le règlement définitif des créances réciproques financières et réelles apparues antérieurement au 9 mai 1945, France–Russia 27 May 1997 no 19970089, published under decree no 98–366 6 May 1998, Journal officiel 15 May 1998 7378.

[804] See X Domino & A Bretonneau, 'Le juge administratif, arbitre international?' (2012) 68 AJDA 201; D Alland, 'Note—Conseil d'État, assemblée, 23 décembre 2011, *M. Eduardo José Kandyrine de Brito Paiva*, no 303678' (2012) 28 RFDA 26; G Guillaume, 'Avis d'*amicus curiae*—Conseil d'État, assemblée, 23 décembre 2011, *M. Eduardo José Kandyrine de Brito Paiva*, no 303678' (2012) 28 RFDA 1; E Bjorge, 'Kandyrine de Brito Paiva' (2012) 106 AJIL 353, 358–59.

[805] *Hirsi Jamaa v Italy* judgment [GC] 23 February 2012 [129]. Also: *Slivenko v Latvia* App No 48321/99 judgment 9 October 2004; A Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 60.

free to define certain facts *into* a Convention concept (if by this we mean that the state broadens the impact of the ECHR concept and thus gives a higher level of protection than what *prima facie* follows from the Convention), it cannot, whether by legislation or treaty making, define facts *out of it*.[806]

7.4 Conclusion

The national courts in the United Kingdom, France, and Germany may go in principle—and have gone in fact—very far in taking on board the autonomous scope of the Convention concepts. They have thus moved in the direction of not trying to shirk away from their Convention obligations by defining certain areas of the law as being outside the ambit of the Convention rights. In this sense the notion of autonomous concepts goes far in putting the national courts to the test; it makes it more difficult for the national courts to say for example that 'in principle we accept the rule of *ne bis idem* found in art 7 of the Convention, but in the event there is not a problem with respect to the Convention as the measure in issue, due to its definition in national law, seems to fall outside the reach of the Convention rights'. Appearances may, as will have been seen in this Chapter in relation to autonomous ECHR concepts in national courts, be deceiving. Though the German and French courts have, in particular with respect to preventive detention measures and art 7(1), made explicit that, to the detriment of the autonomously constructed ECHR concept, they give preference to national concepts of 'penalty', it is clear that they have made sure that their law has in the final analysis been in conformity with the ECHR concept. Thus

[806] B Hale, 'Common Law and Convention Law: The Limits to Interpretation' [2011] EHRLR 534, 538.

they in fact give effect to the autonomous ECHR concepts in national law. The position in UK law has in one sense been the obverse. Though the UK courts have gone very far in effectively applying the ECHR concepts—partly perhaps because there have not been all that clearly defined national concepts such as the ones to which the written German and French constitutions have in the course of the decades given rise—this apparent openness has been tempered by a measure of obduracy with respect to one particular autonomous concept. The UK jurisprudence on demoted tenancies shows that at times when a national court states that it recognises that an ECHR term is autonomous and that it is to be applied as such, this is little more than lip service. In the face both of internal opposition and adverse judgments from the European Court the UK courts, after a long period of in the words of Lord Steyn going too far in allowing domestic notions to colour the interpretation of the concept at issue,[807] accepted the full impact of the autonomous interpretation of what is under art 8 a 'home'.

The solution chosen by the French and German courts is, however, open to criticism as in the final analysis it may give a narrower scope to rights than that which would have been the case had the courts instead adopted also in terms of their national law the autonomous concept. This seems to have been the case in the preventive detention cases in Germany for example. The claimant in issue in *Preventive Detention II* was not, though he won the case, released but would have had to have been if the German court had recognized the autonomous concept of penalty not only for the purposes of its application in national law of the ECHR but also in its application of the national law concept of penalty.

[807] *London Borough of Harrow v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [27].

Furthermore the approach taken by the Conseil d'État in *Kandyrine de Brito Paiva* to the autonomously construed Convention concepts seems open to question. In the preparatory work of the European Convention it was underlined that the Convention system would brook 'no limitations of freedom for reasons of State' but only such carefully circumscribed limitations as conformed with the autonomously fashioned Convention rights.[808] It may seem that just that type of reason—*raison d'État*—that led the Conseil d'État to evade the concept in question by in effect giving pre-eminence to the bilateral Franco–Russian treaty.

This goes to show that while national courts in principle—and in cases where perhaps the costs are relatively small—blithely conform to the notion of autonomous concepts, and explicitly discuss and follow this doctrine, in cases where the costs are high and where the matter is presented only interstitially as one bearing on autonomous concepts then the national courts have in effect diluted the Convention concepts in way which runs athwart the idea of full and good-faith national implementation of the Convention rights.

[808] *Collected Edition of the 'Travaux Préparatoires' vol I* (Council of Europe 1949) 130–31.

8 Dialogue

8.1 Introduction

This Chapter turns to cases in which the national courts have entered into what could be called a dialogue with the European Court. To some extent all cases which are adjudicated at the domestic level and then in Strasbourg make up a dialogue between the domestic courts and the European Court. This Chapter focuses on cases where the domestic courts have had occasion to take a different view from the one expressed in the Strasbourg jurisprudence.

8.2 Dialogue between the Domestic Courts and the European Court

8.2.1 French Courts and Dialogue with Strasbourg

In the French legal order the case *Dubus* furnishes a good example.[809] The Conseil d'État 'makes every effort to acquire an accurate understanding of the European case-law so as to be able to apply it correctly, to take reasonable steps to anticipate it or even, if it considers it necessary, to depart from it with full knowledge of what it is doing'.[810] A cited as an example of the Conseil d'État departing in full knowledge from the jurisprudence of the European Court is *Dubus*. The Conseil d'État in this

[809] Conseil d'État, 30 July 2003 *Dubus* (*conclusions*: Guyomar). See A Laget-Annamayer, 'Les pouvoirs de sanction de la Commission bancaire' [2004] AJDA 26. See also the discussion of the *Kress* and *Martinie* cases, in the text connected with n 21–34 in Ch 1 above.

[810] M Guyomar, 'Le dialogue des jurisprudences entre le Conseil d'État et la Cour de Strasbourg: appropriation, anticipation, émancipation' in *Mélanges en l'honneur de Jean-Paul Costa* (Dalloz 2011) : 's'attache à connaître précisément la jurisprudence européenne afin de l'appliquer correctement, de raisonnablement l'anticiper ou même, [s'il] estime cela nécessaire, de s'en écarter en toute connaissance de cause'.

case chose to go against the grain of the jurisprudence of the European Court on the issue of art 6 rights and the impartiality of tribunals.

According to the Conseil d'État sanctions pronounced by the French Banking Commission are 'jurisdictional' in nature; the Commission must therefore, when it imposes sanctions, follow art 6 of the Convention. This had in the jurisprudence of the Conseil d'État meant that the Banking Commission must conduct public hearings ('*audiences*'), which must then be made public.[811] One of the questions that came before the Conseil d'État in *Dubus*, however, was whether it was in conformity with art 6 that the Banking Commission could, without there being any clear organisational division of labour within the body, act both by initiating proceedings against someone and then impose penalties in the same case.

Article L.613 of the Monetary and Financial Code provided that: 'The Banking Commission shall be responsible for overseeing compliance by credit institutions with the legislative and regulatory provisions applicable to them and for punishing any breaches ascertained.'

The *commissaire du gouvernement*, as he was then called, argued in his *conclusions* that the Conseil by not finding for the claimant would run the risk of France being condemned by the European Court. He said that the way in which the Commission was organised did not inspire the confidence necessary: 'One

[811] Conseil d'État, 29 November *Société Rivoli Exchange*. Also: Conseil d'État, 20 October 2000 *Société Habib Bank limited*; Conseil d'État, 3 December 2003 *Banque de l'Ile-de-France*; Conseil d'État, 30 July 2003 *Banque d'escompte et Wormser frères réunis*.

understands that such an organisation may be perceived, from the outside, as being based on a certain confusion of roles.'[812] 'We estimate', he continued,

> that it would not be at the cost of too strenuous an effort that the separation of the two instances (the secretariat on the one hand and the body of members on the other) in the commission is assured in such a way that successive intervention does not breach the exigencies of impartiality. This reasoning, however, resting as it does on the division of functions, has unstoppable consequences: once the proceedings have been initiated, the Secretary General, who must behave as a party to the case though he is not one, may not intervene in any other way than in the hearing.[813]

The conclusions were not followed by the Conseil on this point, and the case went to the European Court.[814] Following the line of argument adopted by the Conseil d'État, the government claimed before the European Court that the internal organization ('séparation organique') of the body was such that there was no breach of art 6. The government thus claimed that the test set out in *Piersack v Belgium* did not pose a problem in the case:

> In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's

[812] Conseil d'État, 30 July 2003 *Dubus* (*conclusions*: Guyomar) 6: 'On peut comprendre qu'une telle organisation puisse être perçue, de l'extérieur, comme reposant sur une certaine confusions des rôles.'

[813] Conseil d'État, 30 July 2003 *Dubus* (*conclusions*: Guyomar) 6: 'Nous estimons, au prix d'un effort qui ne nous semble pas insurmontable au regard de la pratique, que la séparation des instances (secrétariat général, d'une part, et collège des membres, d'autre part) au sein de la commission est assurée de telle manière que leur intervention successive ne contrevient pas à l'exigence d'impartialité. Mais les conséquences de ce raisonnement qui repose sur le dédoublement fonctionnel de la commission bancaire sont imparables : dès le procédure disciplinaire engagée, le secrétariat général, qui doit se comporter comme une partie même s'il n'en a pas la qualité, ne peut plus intervenir autrement que dans le cadre du débat contradictoire.'

[814] *Dubus v France* App No 5242/04 judgment 11 June 2009. See JF Flauss, 'Actualité de la Convention européenne des droit de l'homme' [2009] AJDA 1936, 1938.

> department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.[815]

The European Court, in common with the *commissaire du gouvernement* in the case before the national court, found that the internal organization of the body was in fact such as not to inspire the confidence needed according to art 6: 'the applicant company may reasonably have had the impression that it was the same persons that had initiated proceedings and judged it'.[816] The Court went on to say that the applicant could have had doubts as to the independence of the Banking Commission throughout the whole process. The European Court agreed with the analysis of the Conseil d'État, that had not questioned that fact that the Commission could initiate proceedings of its own volition, but the Court found that a more precise setting out of the power of the Commission to initiate proceedings was necessary in order to avoid the impression that the culpability of the applicant was established already at the opening of the proceedings.[817] The Court concluded that the applicant could reasonably have doubted the independence and the impartiality of the Commission due to the absence of clear distinctions between its different functions.[818]

[815] See *Piersack v Belgium* Series A No 53 judgment 1 October 1982 [30].

[816] *Dubus v France* App No 5242/04 judgment 11 June 2009 [60]: 'la société requérante pouvait raisonnablement avoir l'impression que ce sont les mêmes personnes qui l'ont poursuivie et jugée'

[817] *Dubus v France* App No 5242/04 judgment 11 June 2009 [60].

[818] *Dubus v France* App No 5242/04 judgment 11 June 2009 [61].

Guyomar's analysis of the *Dubus* case in the Conseil d'État and in the European Court highlights an interesting point. He says about the conclusion by the European Court in *Dubus* that:

> The solution chosen is not a surprise. It ought not to be interpreted as a rejection of the reasoning of the decision of 30 July 2003. Judicial dialogue will lead from time to time to the national courts initiating jurisprudential evolutions. The European Court may then take the opportunity to give its imprimatur to this evolution, but it may as easily refuse to accept the solutions developed by the national courts. Each actor plays a different role; while a convergence of national and European jurisprudence may be wished for, it will not always be consistent.[819]

It is pertinent to note at this point that after both the Conseil d'État and the European Court had delivered their judgment in the case, the Conseil constitutionnel too was seized of the same question. The Conseil constitutionnel, according its own jurisprudence, may not adjudicate on the compatibility of statutes with the Convention, only with the constitution.[820] It had held in 1989, in a case similar to *Dubus*, that the accumulation of the functions of the power to initiate proceedings and the power to impose penalties was not contrary to the principle of the separation of powers contained in art 16 of the 1789 Declaration of the Rights of Man and of the Citizen.[821] Then, however, in 2011 the Conseil constitutionnel, clearly adopting the argument of

[819] M Guyomar, 'Le dialogue des jurisprudences entre le Conseil d'État et la Cour de Strasbourg: appropriation, anticipation, émancipation' in *Mélanges en l'honneur de Jean-Paul Costa* (Dalloz 2011) 320: 'La solution retenue n'est pas une surprise. Elle no doit pas être interprétée comme un désaveu du raisonnement développé dans la décision du 30 juillet 2003. Le dialogue des juges conduit parfois le juge national à prendre l'initiative d'une évolution de jurisprudence. La Cour européenne peut saisir l'occasion qui lui est offerte, comme elle peut refuser de consacrer les solutions élaborées par le juge national. Chacun est dans son rôle : si la convergence des jurisprudences est souhaitable, elle ne saurait en effet être systématique.'

[820] Conseil constitutionnel 15 January 1975, *IVG*. See B Stirn, 'Les sources constitutionnels du droit administratif' (7th edn, LGDJ 2011) 36–37

[821] Conseil constitutionnel 17 January 1989, *Conseil supérieur de l'audiovisuel*.

the conclusions of the *commissaire du gouvernement* and the European Court in *Dubus*, held that parts of art L.613 were unconstitutional. On the basis of 'the principles of the independence and impartiality of adjudicatory bodies resulting from Article 16 of the 1789 Declaration' the Conseil constitutionnel ruled that:

> By organising the Banking Commission without providing for any separation within it first between the initiation of proceedings for any breaches by credit institutions of the legislative and regulatory provisions which are applicable to them, and secondly the function of ruling on these breaches, which may result in disciplinary penalties, the contested provisions violate the principle of the impartiality of adjudicatory bodies and, accordingly, must be ruled unconstitutional.[822]

What had changed since last time the Conseil constitutionnel had ruled on the question was the fact the European Court had handed down an adverse ruling against France on the question. It is possible to say then that what had started out as a riling question in which the Conseil d'État, contrary to the conclusions of the *commissaire du gouvernenment*, had been loath to take on board the exigencies of the Convention, ended with the Conseil constitutionnel declaring unconstitutional the same measures as had been before the Conseil d'État.

Some of the same mechanisms on display in *Dubus* were also at play in the saga of the reception in German law of the European Court's adverse ruling in *M v Germany*.[823] Though the principles at stake were perhaps even more important to the identity of German law than had been the case for French law in *Dubus*, the German

[822] Conseil constitutionnel 2 December 2011, *Banque Populaire Côte d'Azur* [8].

[823] *M v Germany* App No 19359/04 judgment 17 December 2009.

Federal Constitutional Court in this line of cases adopted the Strasbourg solution before it really had the chance to set Strasbourg jurisprudence aside.

8.2.2 German Courts and Dialogue with Strasbourg

The European Court in *M* had held that the continued preventive detention beyond the ten-year period which had been the maximum for such detention under the legal provisions applicable at the time of the applicant's offence and conviction was in breach of art 5(1) of the Convention, and that the retrospective extension of the preventive detention to an effectively unlimited period of time was in breach of art 7(1). As was seen in Chapter 7, the Court held that preventive detention as practiced in Germany was to be qualified, for the purposes of the ECHR, as a 'penalty' and not merely a measure of correction and prevention. As the scheme had not been considered to be a penalty in German law, principles such as the prohibition of retroactive sentences and the *ne bis in idem* rule were not considered by the German judges adjudicating in the case to apply. The German courts, in the application of s 2(6) of the German criminal code, explicitly allowed the retroactive application of a statue intensifying the 'measures of correction and prevention', including preventive detention. After this scheme was introduced in German law in 1998 the courts extended the confinement of inmates in preventive detention beyond the ten-year restriction, even if the inmates in issue had been put under the prevention detention scheme before the promulgation of the restriction in 1998.[824]

[824] C Grabenwarter, 'Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten' [2012] Europäische Grundrechte-Zeitschrift 507; M Payandeh & H Sauer, 'Konvergenzen von Grundgesetz und EMRK im Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung' [2012] Jura 289; G Merkel, 'Incompatible Contrasts? Preventive Detention in

When M was sentenced in 1986 he could, according to s 67(d)(1) of the criminal code, be kept in preventive detention for no more than ten years. This rule was then amended in 1998, with effect also for the preventive detention orders which had been made prior to the entry into force of the amended provision. Without that change in the law, the courts responsible for the execution of sentences would not have had jurisdiction to extend the duration of the applicant's preventive detention. The European Court held that there was not a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continued deprivation of liberty beyond the period of ten years in preventive detention, which was made possible only by the subsequent change in the law in 1998.[825]

The German courts had not examined whether the applicant's preventive detention beyond the ten-year point was justified under any of the sub-paragraphs of art 5(1), as they had not been required to do so under the provisions of the German Basic Law. Under art 5(1)(c), the apposite sub-paragraph, the detention of a person may be justified 'when it is reasonably considered necessary to prevent his committing an offence'. The applicant's continued detention had been justified by the courts responsible for the execution of sentences with reference to the risk that the applicant could commit further serious offence—similar to those of which he had previously been convicted—if released. The European Court held, however, that these

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Germany and the European Convention on Human Rights' (2010) 11 German Law Journal 1046, 1051; J Kinzig, 'Die Neuordnung des Rechts der Sicherheitsverwahrung' (2011) 64 Neue Juristische Wochenschrift 177; C Grabenwarter, 'Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte—am Beispiel des Falls M. gegen Deutschland' (2010) 65 Juristenzeitung 857; A Greger, 'Herausforderung Sicherheitsverwahrung—Wie die Praxis mit der Entscheidung der EGMR (M. gegen Deutschland) umgehen kann' [2010] Neue Zeitschrift für Strafrecht 676; M Andenas & E Bjorge, 'Preventive Detention' (2011) 105 American Journal of International Law; C Michaelsen, 'From Strasbourg, with Love—Preventive Detention Before the German Federal Constitutional Court and the European Court of Human Rights' (2012) 12 HRLR 148.

[825] *M v Germany* App No 19359/04 judgment 17 December 2009 [100].

potential further offences were not sufficiently concrete and specific as regards, in particular, the place and time of their commission and their victims, and did not fall within the ambit of art 5(1)(c). This finding, the European Court said, was confirmed by an interpretation of art 5(1)(c) in the light of art 5 as a whole.[826]

The Court also found that there had been a breach of the applicant's right not to have a heavier penalty imposed upon him than the one applicable at the time of his offence. When the applicant committed the attempted murder in 1985, a preventive detention order made by a sentencing court for the first time, read in conjunction with s 67(d)(1) of the criminal code, meant that the applicant could be kept in preventive detention for ten years at the most. Based on the subsequent amendment in 1998 of s 67(d) of the Criminal Code, read in conjunction with s 1(a)(3) of the introductory act to the criminal code, which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in 2001, the applicant's continued preventive detention beyond the ten-year point. Thus the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence—and at a time when he had already served more than six years in preventive detention. The European Court noted at the outset that, in common with prison sentence, preventive detention entails a deprivation of liberty. The Court, 'looking behind appearances and making its own assessment', concluded that preventive detention under the German criminal code must be considered to be a 'penalty' for the purposes of art 7(1).[827] The Court therefore found that there had been a breach of art 7. The finding of these two

[826] *M v Germany* App No 19359/04 judgment 17 December 2009 [102].

[827] *M v Germany* App No 19359/04 judgment 17 December 2009 [133].

breaches effectively cast a veil of doubt over the whole German system of preventive detention.

The response of the German courts to the adverse judgment in *M* was at first a variegated one: on the one hand decisions holding that the German courts were bound to German law, and on the other hand decisions which held that the apposite German statutes were capable of being interpreted in conformity with the European Court's decision in *M*.[828]

After the European Court's decision had been handed down M filed a constitutional complaint to the German Constitutional Court, arguing that he should be discharged from detention by way of a temporary injunction, as the European Court had said his continued detention was in breach of Convention rights. The Constitutional Court may exercise its authority to issue a temporary injunction in proceedings through provisional measures (*einstweilige Anordnungen*): s 32 of the Federal German Constitutional Court Act provides 'In a dispute the Federal Constitutional Court may deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment, ward off imminent force or for any other important reason for the common good.'[829] The Constitutional Court ruled that M must remain in detention.[830]

[828] See C Grabenwarter, 'Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte—am Beispiel des Falls M. gegen Deutschland' (2010) 65 Juristenzeitung 857.

[829] See generally A Maurer, 'The Federal Constitutional Court's Emergency Power to Intervene: Provisional Measures Pursuant to Article 32 of the Federal Constitutional Court Act' (2001) German Law Journal available at http://www.germanlawjournal.com/index.php?pageID=11&artID=70.

[830] 2 BvR 2365/09.

The Federal Constitutional Court's ruling was a terse one. It pointed out the dangers of keeping in detention an individual whom a later constitutional complaint could show ought not to have been kept in detention. The continued deprivation of his liberty, were it in a later constitutional judgment to be found unwarranted, would be a grave injustice, said the court.[831] In its conclusion, however, the court found that the detrimental effects of letting loose an individual whom the lower German courts had shown, by way of comprehensible reasoning, to be dangerous would outweigh the dangers of keeping the claimant in preventive detention.[832]

The tenor of the Federal Constitutional Court's decision seems to have served as an exemplar for the German courts in the many cases like *M* working its way up the German curial hierarchy.[833] The result of this line of authority were three adverse judgments handed down by the European Court in January 2011. The European Court in *Schummer*,[834] *Mautes*,[835] *Kallweit*,[836] and *Jendrowiak*[837] could do little else than reaffirm its decision in *M* and point out that German law was still in breach of arts 5 and 7. Initially the German courts responded by digging in, refusing to give effect in German law to the European Court's holding in *M*. Then, however, the German courts

[831] 2 BvR 2365/09 [3].

[832] 2 BvR 2365/09 [4].

[833] See, for example, Celle Court of Appeal, decision of 25 May 2010, file no 2 Ws 169–70/10; Stuttgart Court of Appeal, decision of 1 June 2010, file no 1 Ws 57/10; Koblenz Court of Appeal, decision of 7 June 2010, file no 1 Ws 108/10; Nuremberg Court of Appeal, decision of 24 June 2010, file no 1 Ws 315/10; Cologne Court of Appeal, decision of 14 July 2010, file no 2 Ws 428/10.

[834] *Schummer v Germany* App Nos 27360/04 & 42225/07 judgment 13 January 2011.

[835] *Mautes v Germany* App No 20008/07 judgment 13 January 2011.

[836] *Kallweit v Germany* App No 17792/07 judgment 13 January 2011.

[837] *Jendrowiak v Germany* App No 30060/04 judgment 14 April 2011.

seem to shift tack, proving more amenable to the European Court's decision in *M*.[838] Particularly the judgment of the Federal Court of Justice in 5 StR 60/10 furnishes an apposite example of this development.

The Federal Court of Justice in its judgment 5 StR 60/10[839] ruled that it was not bound, due to the authority of ECHR law, to follow the European Court's holding in *M*. In the event, however, the Federal Court of Justice's end result was in line with *M*. The claimant had been sentenced to preventive detention under s 66(b)(a)(2) of the German criminal code in a case parallel to that of *M*. In 1997 he had been sentenced to twelve years of imprisonment for several serious sexual offences. He served his sentence to term, and was then, in 2008, sentenced to preventive detention.

The Federal Court of Justice cited *Görgülü* to the effect that the Convention is incorporated into German law through statute, and therefore has the same status as other statutory legislation, and that the Convention rights 'is to be taken into account and used by national judges in the interpretation of national law, within the bounds of methodically defensible interpretation'. In that regard the German courts must advert to the decisions of the European Court, as they mirror the current development of the Convention rights.[840]

The court said about the European Court's ruling in *M* that in formal terms the Strasbourg judgment concerned only s 67(d) of the criminal code. The court did, however, make it clear that the same had to apply with respect to s 66(b)(1)(2), the

[838] See A Greger, 'Herausforderung Sicherheitsverwahrung—Wie die Praxis mit der Entscheidung der EGMR (M. gegen Deutschland) umgehen kann' [2010] Neue Zeitschrift für Strafrecht 676, 676–77.

[839] 5 StR 60/10 (5 StR 21/09) judgment 21 July 2010.

[840] 5 StR 60/10 [10], citing BVerfGE 111, 307 (317).

provision in issue, as the European Court would indubitably have found that provision to be in breach of the Convention too.[841] Faced with such a structural breach of the Convention, said the Federal Court of Justice, it was incumbent on it to give national law an interpretation which conformed to the Convention. The fact that the Convention enjoys that status of statutory norms only, and not of constitutional norms,[842] means that the Convention rights, as applied in German law, must be applied within the bounds of a 'methodologically defensible interpretation' (*im Rahmen methodisch vertretbarer Auslegung zu beachten und anzuwenden*).[843] This means that the extent to which German law may be interpreted in conformity with Convention rights ends where 'the contrary will of national lawmakers is sufficiently recognisable'; 'Convention friendly' interpretation of national law may not run headlong into the meaning intended by the legislator. From these principles it was clear that s 66(1)(2) of the criminal code could not be interpreted in light of art 7(1) of the Convention, as this would lead to the complete emasculation of the national law provision. The clear wording, eloquent of an equally clear will of the legislator, could not admit of such an interpretation; there was effectively no room for the use of art 7(1) of the Convention, as s 66(b)(1)(2) of the criminal code explicitly was meant to have retroactive effect.

The Federal Court of Justice said, however, that the decision must also pass a discretionary test, in which, on the one hand, the interests of the convicted and, on the other hand, the right to protection of the public would have to be balanced. In this

[841] 5 StR 60/10 [11]–[12].

[842] See 3.2 above.

[843] 5 StR 60/10 [13].

balancing exercise, said the Court, the constitutional principle of proportionality plays a central role:

> The criminal courts must, in the application of s 66(b)(1)(2), bear in mind that the constitutional principle of proportionality may, when in an individual case the right to liberty outweighs the general interest, offer the option of disallowing the effects of the rules of the preventive detention scheme.[844]

In doing so, the court said, domestic judges must take into account the ECHR, as interpreted by the European Court; the balancing must be directed by the Convention rights.[845] Thus the exigencies of the Convention rights are, through the constitutional principle of proportionality, brought to bear on the national law after all. The Court held that the same must apply with respect to art 5(1)(2) of the Convention. Taking a leaf out of the European Court's book, the Federal Court of Justice held that the there was not sufficient causal connection between the claimant's continued detention and his conviction.[846]

In *Preventive Detention II*,[847] the response of the German Federal Constitutional Court to this line of cases, the constitutional judges ruled on the compatibility with the ECHR of the German legislation on preventive detention, though for systemic reasons the question was formulated as one of constitutional compatibility rather than compatibility with the convention.[848] The court reviewed the

[844] 5 StR 60/10 [17].

[845] 5 StR 60/10 [18].

[846] 5 StR 60/10 [19].

[847] BVerfGE 128, 326.

[848] See 3.2 and 7.2 above.

provisions of the Criminal Code (*Strafgesetzbuch*) and the Juvenile Court Act (*Jugendgerichtsgesetz*) on the imposition and duration of preventive detention and found them incompatible with the fundamental right to liberty under art 2(2), sentence 2,[849] in conjunction with art 104(1)[850] of the Basic Law. The court ordered that the unconstitutional provisions continue to be applicable until the entry into force of new legislation.

As the statutory provisions at issue failed to satisfy the constitutional requirement of establishing a 'distance' between preventive detention and prison sentences (*Abstandsgebot*), those provisions fell afoul of the fundamental right to liberty. The court also ruled that the legislation failed to comply with the constitutional protection of legitimate expectations guaranteed in a state governed by the rule of law, as read together with the constitutional right to liberty. The protection of legitimate expectations under art 2(2), in conjunction with art 20(3), of the Basic Law[851] was seen as an expression of the rule-of-law precept.

When M—the claimant both in *M* in 2009 and in *Preventive Detention II* in 2011—was sentenced in 1986, he could be kept in preventive detention for no more than ten years, in accordance with s 67d(1) of the Criminal Code. This rule was amended in 1998 and made applicable in its new form to the preventive detention orders that had been issued prior to the amendment's entry into force. Without that

[849] Article 2(2) of the Basic Law provides: 'Everyone has the right to life and to physical integrity. The freedom of the person is inviolable. Intrusion on these rights may be made only pursuant to a statute.'

[850] Article 104(1) of the Basic Law provides: 'The liberty of the individual may be restricted only by virtue of a formal statute and only in compliance with the forms prescribed therein. Detained persons may not be subjected to mental or to physical ill treatment.'

[851] Art 20(3) of the Basic Law provides: 'The legislature is bound by the constitutional order; the executive and the judiciary are bound by law and justice'.

change in the law, the courts responsible for the execution of sentences would not have had the authority to extend the duration of the claimant's preventive detention.

After the European Court's decision was handed down, M filed a constitutional complaint before the German Constitutional Court, arguing that he ought to be discharged from detention by way of a temporary injunction since the European Court had said his continued detention was in breach of his rights under the Convention. The Constitutional Court, in the face of the European Court's decision, by a temporary injunction of 22 December 2009, ordered that M remain in detention.[852]

In the temporary injunction, the Constitutional Court tersely pointed out the dangers of holding an individual in detention who, it might later be shown, ought not to have been so held; the continued deprivation of his liberty, were it to be found unwarranted in a subsequent constitutional judgment, would be a grave injustice.[853] In its conclusion, however, the Court determined that the detrimental effects of freeing an individual whom the German lower courts had demonstrated by plausible reasoning to be dangerous would outweigh the hazards of keeping the claimant in preventive detention.[854]

The Constitutional Court then in its 2011 ruling, *Preventive Detention II*,[855] held the statutes in issue to be unconstitutional. The main issue was that the preventive detention scheme was in breach of the German Basic Law—even though

[852] No 2 BvR 2365/09.

[853] No 2 BvR 2365/09 [3].

[854] No 2 BvR 2365/09 [4].

[855] BVerfGE 128, 326.

in 2004 the Constitutional Court had held in *Preventive Detention I* that the self same scheme was constitutional, and even though what was really in issue were the exigencies of the European Convention.[856] What had changed in seven years? The Constitutional Court that rulings by the European Court containing new considerations for the interpretation of the Basic Law are equivalent to legally relevant changes (*rechtserhebliche Änderungen*), which may lead to the supersession of the final and binding effect of a Federal Constitutional Court decision.[857] In *Preventive Detention I*[858] the Court had declared constitutional the elimination of the ten-year maximum period for preventive detention that had applied previously and the application of the new legislation to the so-called old cases. But the Court had also ruled in that earlier decision that preventive detention did not fall afoul of any of the human rights guarantees in the Basic Law but, without going into detail, that there must be some 'distance' between preventive detention and prison sentences. The final and binding effect of the Constitutional Court's 2004 decision therefore did not constitute a procedural bar to the admissibility of the present constitutional complaints.

What *Preventive Detention II* says about prisoners' rights and the German legislation on preventive detention is important for several reasons. The issue before the Federal Constitutional Court stirred no small controversy in Germany at the time. Ministers and police, at both the state and the federal levels, warned of the potential consequences of following *M v Germany*, and in the days before *Preventive Detention II* was handed down officials made public how in Freiburg—a neighbouring city to Karlsruhe where the Constitutional Court is based—the allocation of twenty-five

[856] BVerfGE 109, 133.

[857] BVerfGE 128, 326 [82].

[858] BVerfGE 109, 133.

police officers to survey each one of the prisoners released from preventive detention heavily drained police resources.[859]

The approach of the Constitutional Court in *Preventive Detention II* duly received the imprimatur of the European Court, which in *Schmitz v Germany* took note of

> the reversal of the Federal Constitutional Court's case-law concerning preventive detention in its leading judgment of 4 May 2011. It welcomes the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level.[860]

Since the Constitutional Court ordered that the unconstitutional provisions would continue to apply until they were cured by the entry into force of appropriate new legislation, the affected prisoners would effectively be kept under lock and key pending those legislative changes. Consequently, more cases will surely reach the European Court, and the dialogue on preventive detention will just as surely continue as the modalities of the 'new' scheme preventive detention are being ironed out.

Another equally important dialogue that has played itself out between the German court on the one hand and the European Court on the other has been on the issue of balancing between privacy rights and freedom of expression.[861] The German jurisprudence on this issue had been found to give too much weight to freedom of

[859] See, eg, 'Ex-Sicherungsverwahrte unter Dauerbewachung', *Rhein-Zeitung* 4 May 2011 <http://www.rhein-zeitung.de/>.

[860] *Schmitz v Germany* App No 30493/04 judgment 9 June 2011 [41] (citation omitted).

[861] See A Clapham, *Human Rights* (Oxford University Press 2007) 108–18.

expression—specifically expression of all types—to the detriment of the privacy rights of famous persons.[862] *Von Hannover v Germany*,[863] in which the European Court found against Germany, had become in the German judiciary a focal point for consternation with the European Court, to the extent that one commentator even suggested that the German Court could be seen to be smarting from *Von Hannover* in later, unrelated cases, such as *Görgülü*:

> It appears from comments [on *Von Hannover*] published by members of the Constitutional Court that the Court had serious reservations with regard to that judgment. They emphasize that the drawing of demarcation lines between protected rights, on the one hand, and public interests which also involved private interests of third parties on the other hand, should be handled by the Strasbourg Court with great care and circumspection, leaving wide room to national perceptions. The Constitutional Court therefore seized the opportunity provided by the *Görgülü* case to manifest its understanding of the mutual relationship between the two systems of protection and their main guarantors.[864]

Tensions remained, in relative terms, tense between the two courts, and a climax was reached when the German Constitutional Court's President, 2002–10, Hans-Jürgen Papier, issued a press release effectively warning the national courts against following the European jurisprudence. Then, however, the German court in the next chapter of this line of cases would give a concession in its ruling in *Von Hannover (No 2)*,[865] where in a discussion about the balancing between privacy and freedom of expression rights the German court conceded that:

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[862] BVerfGE 101, 361.

[863] *Von Hannover v Germany* App No 59320/00 judgment 24 June 2004.

[864] C Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German Law Journal 514, 522.

[865] BVerfGE 120, 180.

> In balancing the conflicting legal values, taking into account the presumption, emanating from art 5(1) of the Basic Law … that reporting by the press aiming at a contribution to the formation of a public opinion is allowed, freedom of expression guaranteed by art 10(1) ECHR is to be accorded special weight where reporting by the press contributes to matters of general interest.[866]

This goes some way to prove the wish of the German court to harmonize the standards of the rights of the Basic Law and the Convention rights. The German Court in this case, perhaps more than ever before in its rights jurisprudence, took seriously the influence both of the Convention rights and of the European Court's interpretations of it.[867] The idea that a national court has the last word, Andreas Voßkuhle, Papier's successor as President of the German Constitutional Court, has said, 'does not contradict the idea of multilevel dialogue between European courts, so long as he who has the last word is willing to learn at the same time as speaking'.[868] This is exemplified by *Von Hannover v Germany (No 2)*.[869]

In the case that was to become *Von Hannover (No 2)* the Federal Constitutional Court took a deferential stance towards what the European Court had held in *Von Hannover v Germany*.[870] It said that art 8(1) of the Convention guarantees, in the context of art 5(2) of the Basic Law, to an individual the right to be protected by the state's courts against the publication of images taken from the individual's

[866] BVerfGE 120, 180.

[867] HJ Cremer, *Human Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Routledge–Cavendish 2011) 92

[868] A Voßkuhle, 'Menschenrechte im Europäischen Verfassungsgerichtsverbund' speech at the Berlin–Brandenburgische Akademie der Wissenschaften 22 October 2011: 'muss einem Dialog im Europäischen Verfassungsgerichtsverbund nicht entgegenstehen, solange derjenige, der das letzte Wort spricht, beim sprechen lernt'

[869] *Von Hannover v Germany (No 2)* App Nos 40660/08 & 60641/08 judgment [GC] 7 February 2012.

[870] BVerfGE 120, 180.

everyday life.[871] Article 8(1) thus influenced the constitutionally protected right to freedom of speech. This the German Court did by saying that the constitutional guarantee of the right to develop one's personality and the protection of privacy guaranteed by art 8 ECHR were in harmony, as the former makes reference to the 'sum of the personal, social and economic relations which are constitutive of the private life of every human being'.[872] Cremer has interpreted this as the German Court 'bringing constitutional and Convention requirements in line', not least because of the European jurisprudence on balancing between privacy and freedom of speech relied on by German Court.[873] Given the importance accorded by the German courts to the *Von Hannover* line of cases, and to the issue of balancing between privacy and freedom of speech, much seemed to ride on the how the Grand Chamber would settle *Von Hannover v Germany (No 2)*.

The Grand Chamber in its ruling brought out that the German Constitutional Court had, in accordance with the Strasbourg case-law, carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, said the European Court, the German courts had attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest.

[871] See HJ Cremer, *Human Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Routledge–Cavendish 2011) 90–92.

[872] [201]. See HJ Cremer, *Human Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Routledge–Cavendish 2011) 90–92.

[873] *Minelli v Switzerland* App No 14991/02 jugdment 14 June 2005; *Gurgenidze v Georgia* App No 71678/01 judgment 17 October 2006.

Seeing as the traditional German conception of freedom of speech, as opposed to that of the European Court, has been that all types of speech are potentially of equal importance,[874] the European Court rightly saw this as an instance of the German Court adopting Strasbourg's approach. It noted that the Federal Court of Justice had changed its approach in the wake of *Von Hannover v Germany*, and that the Federal Constitutional Court, for its part, had 'not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law'.[875] The Grand Chamber of the European Court concluded that:

> In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.[876]

It is apposite to note here that the European Court was convinced that since the German Courts had in effect modified approach, in accordance with *Von Hannover v Germany*, and given a detailed analysis of the Strasbourg jurisprudence, this was bluntly put good enough. What we see here is both the national judges recalibrating their position, and the judges of the European Court, in response, recalibrating theirs. It could be argued that the particular nature of the balancing between two rights—privacy and freedom of speech—makes for particular fertile ground for judicial

[874] See the Federal Constitutional Court's first Von Hannover ruling: BVerfG, 1 BvR 653/96.

[875] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [125].

[876] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [126].

dialogue between the national and the European level, as it is hard to say that the one position ifs more protective of fundamental rights than the other, so the European Court does not here run the risk of being seen as watering down standards.

8.2.3 UK Courts and Dialogue with Strasbourg

Some of the same mechanisms are in play in *Horncastle*[877] and the ruling by the Grand Chamber in *Al-Khawaja*.[878] The question with which the Supreme Court was faced in *Horncastle* was whether a conviction based 'solely or to a decisive extent' on the statement of a witness whom the defendant has had no chance of cross-examining necessarily infringes on the defendant's right to a fair trial under arts 6(1) and 6(3)(d) of the European Convention on Human Rights (ECHR). The most recent Strasbourg authority on the issue was the Chamber ruling in *Al-Khawaja & Tahery*.[879] In the two applications jointly adjudged in *Al-Khawaja & Tahery* decision statements had been admitted in evidence at a criminal trial of a witness who was not called to give evidence. The European Court had held that, in both cases, the statement was the 'sole or, at least, the decisive basis' for the applicant's conviction.

Neither the Court of Appeal nor the Supreme Court accepted in *Horncastle* that the European Court's decision in *Al-Khawaja* could be determinative of the results of the appeals in the case before them. Both courts held that, in the

[877] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47.

[878] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011.

[879] *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

circumstances of each of the appeals, the claimants had received a fair trial.[880] As on 16 April 2009 the United Kingdom had requested, under art 43(1) of the Convention, that the Chamber decision in *Al-Khawaja* be referred to the Grand Chamber, and the Supreme Court at that time was about to begin to hear *Horncastle*, a Panel of the Grand Chamber on 5 June 2009 adjourned consideration of the request pending the Supreme Court's judgment in *Horncastle*. This gave the Supreme Court a chance to have its say on the issue. The Supreme Court said about the requirement to 'take into account' the Strasbourg jurisprudence that it

> will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.[881]

The idea of a dialogue between judges was in other words readily accepted by the Supreme Court in *Horncastle*. Lord Phillips, with whose judgment all members of the Court agreed, concluded that it would not be right for the Supreme Court to hold that the sole or decisive test should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning. In his view those provisions struck the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not

[880] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47; [2009] EWCA Crim 964, [2009] WLR 173 (CA).

[881] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47 [11].

be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason. Lord Phillips specifically pointed out that in so concluding he had taken careful account of the Strasbourg jurisprudence. He toped 'that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case'.[882]

The President of the European Court in an article published on the eve of the Grand Chamber's decision in *Al-Khawaja* said that given the fact that the Supreme Court had gone to such lengths in giving reasons as to why it believed the European Court had got the issue wrong then:

> what takes place may indeed, as Lord Phillips put it, 'prove to be a valuable dialogue between this court and the Strasbourg Court.' I firmly believe that such dialogue can only serve to cement a relationship between the two courts which, whatever criticisms may be levelled against the Strasbourg Court, is a sound and solid one.[883]

The Grand Chamber in its ruling ceded some ground to the Supreme Court, admitting that

> where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, to use the words of Lord Mance in *R. v. Davis*, and one which would require sufficient counterbalancing factors, including the existence of

[882] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47 [108].

[883] N Bratza, 'The relationship between the UK courts and Strasbourg' [2011] EHRLR 505, 512.

> strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.[884]

To some extent the Grand Chamber was able to soften the blow to the judges of the Chamber by upholding their conclusion with respect to one of the two applicants. Nonetheless the Grand Chamber accepted the Supreme Court's basic point: the 'sole and decisive' rule cannot be applied in a way which ignores other safeguards against unfairness which are embedded in the domestic legal system in issue.[885] In Baroness Hale's view 'a head on collision was thus skilfully avoided'.[886] It seems clear that the European Court was convinced partly by the fact that the Supreme Court had gone to such lengths to show, in a clear and exhaustive way, why it was that it thought the Chamber decision had been wrong. The Supreme Court justified its position in an over 28,000 words long unanimous judgment handed down by the Supreme Court's President, Lord Phillips, complete with a lengthy annex, compiled by Lord Judge CJ, who also sat in the case, in which the Chief Lord Justice analysed the decisions by the European Court which bore upon the question.[887]

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[884] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011 [147] (internal references omitted).

[885] B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 59.

[886] B Hale, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?' [2012] HRLR 65, 76.

[887] See B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 57.

The same may be inferred from *Animal Defenders* in the House of Lords,[888] and subsequently in the Grand Chamber of the European Court.[889] The question facing the House of Lords in *Animal Defenders* was whether s 321(2) of the Communications Act 2003 was incompatible with art 10 of the ECHR. The claimant had launched a campaign, which included television advertising, entitled 'My Mate's a Primate' with the object of directing public attention towards the use of primates by humans and the threat presented by such use to the survival of primates. The Broadcast Advertising Clearance Centre had declined to clear the advert on the ground that its transmission would breach the prohibition on political advertising in ss 319 and 321(2) of the 2003 act. The House of Lords held the prohibition on political advertising to be compatible with art 10 of the ECHR. In *Verein gegen Tierfabriken*, which was central to the argument in the House of Lords, the European Court had held a similar Swiss prohibition to be incompatible with art 10. But the European Court had also stated that it 'cannot exclude that a prohibition of "political advertising" may be compatible with the requirements of article 10 of the Convention in certain situations', where the reasons could be deemed to be '"relevant" and "sufficient" in respect of the particular interference with the rights under article 10'.[890] In common with *Verein gegen Tierfabriken*, *Animal Defenders* turned, said Lord Bingham, on whether the ban at issue was necessary in a democratic society. In assessing the necessity Lord Bingham went into a detailed examination of the proportionality of the

[888] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.

[889] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013.

[890] *Verein gegen Tierfabriken* (2001) 34 EHRR 159 [75].

impugned measure, which included a 'less restrictive means test'.[891] He also brought out the considerable lengths to which Parliament had gone in endeavouring to strike a good balance between the claimant's freedom of speech and the rights of others.

In particular Lord Bingham underscored the point that: 'the rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising'.[892] He did not feel that the European Court had been sufficiently seised of the strength of this argument in *Verein gegen Tierfabriken*, where it was scarcely mentioned. This puts *Animal Defenders* on a par with *Horncastle* in the sense that the House of Lords in *Animal Defenders* seems to have felt, in good faith, that the European Court, in the judgment which the domestic court was potentially breaching, had not been able to take all the pertinent issues into account in ruling on the Convention point at issue. Like with the Supreme Court in *Horncastle*, this seems to have made the House of Lords in *Animal Defenders* confident in entering into dialogue with the European Court. But this was not the whole picture, however, as the House of Lords in *Animal Defenders*, with the possible exception of Lord Scott,[893] did not think that it was going against the grain of the Strasbourg jurisprudence. Lord Bingham concluded that, given that legislation cannot be framed so as to address particular cases but must lay down general rules:

> A general rule means that a line must be drawn, and it is for

[891] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [31].

[892] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [28].

[893] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [38]–[46].

> Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.[894]

It should be stressed that the House of Lords did not in *Animal Defenders* so much invite a battle royal as loyally invite the European Court to hold that general rules (or bright line rules) are possible in connection with political advertising if the rule at issue is the outcome of careful proportionality balancing. This is clear from Lord Bingham's reliance upon the Strasbourg jurisprudence, but also upon what he said in relation to the *Ullah* principle in the case; he saw 'little scope for competition between conflicting interpretations'.[895] Even Lord Scott, who seemed open to the possibility of going against the Strasbourg jurisprudence, was not prepared to assume from *Verein gegen Tierfabriken* that the European Court would disagree with the conclusion of the House of Lords in *Animal Defenders* that the statutory ban on the broadcasting of the claimant's advertisement did not infringe art 10 of the Convention.[896] The House of Lords in *Animal Defenders*, made a good faith attempt to apply the Strasbourg jurisprudence to a particular set of fact, conducting a searching proportionality inquiry in which it deferred in the final analysis to the reasoned conclusions of Parliament.

The Grand Chamber of the European Court in *Animal Defenders* held that the House of Lords had struck the right balance. In assessing whether the ban was proportionate, the Grand Chamber underlined that: 'it is not the Court's task to take the place of the national authorities but it must review, in the light of the case as a

[894] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [33].

[895] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [37].

[896] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [43].

whole, those authorities' decisions taken pursuant to their margin of appreciation'.[897] In this connection the Grand Chamber pointed out that the quality of the parliamentary and judicial review of the necessity of the measure was of particular importance in this respect, including to the operation of the margin of appreciation.[898] Judge Sir Nicolas Bratza referred, in his concurring opinion, to what he termed 'the exceptionally detailed examination given to the controls on the broadcasting of political advertisements' by the national authorities.[899] Given that both Parliament and the reviewing domestic courts had undertaken such a searching review of the proportionality of the measure, and the fact that there was no European consensus among the contracting states, the Grand Chamber prepared to accord a margin of appreciation to the national authorities and thus to hold the measures compatible with art 10. The approach opted for by the Grand Chamber in *Animal Defenders*, which rhymes well with *Al-Khawaja* and *Von Hannover (No 2)*, was explicated by Judge Sir Nicolas Bratza. He made the point that: 'The role of the Strasbourg Court in a case of this kind if not to carry out its own balancing test or to substitute its own view for that of the national legislature, based upon independent scrutiny, as to whether a fair and workable compromise solution could be found'. Rather, the role of the European Court is: 'to review the decision taken by the national authorities in order to determine whether in adopting the measures in question and in striking the balance in the way

[897] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [105].

[898] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [108].

[899] Concurring opinion of Judge Sir Nicolas Bratza, *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [12].

they did, those authorities exceeded the margin of appreciation afforded to them'.[900]

8.3 Discussion

The concept of good faith seems to play an important role in respect of whether the European Court ends up agreeing with the domestic court in issue. In *Dudgeon* the European Court stated that the United Kingdom authorities had 'acted carefully and in good faith'; in reaching their conclusion 'they made every effort to arrive at a balanced judgment between the differing viewpoint'. This could nevertheless not of itself be decisive as to the necessity for the interference with the right in issue, the Court held. Notwithstanding the margin of appreciation left to the national authorities it was for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, 'in particular whether the interference complained of was proportionate to the social need claimed for it'.[901]

It is clear that very weighty reasons would have to be put forward before the European Court for it to be willing to regard a treatment based exclusively on the ground of sex or sexuality as compatible with the Convention.[902] Furthermore it is clear that there are good reasons why the Court would be more reticent in its proportionality inquiry in cases where more than one Convention right is in play than when the balancing concerns a Convention right on the one side and the interests of

[900] Concurring opinion of Judge Sir Nicolas Bratza, *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [17].

[901] *Dudgeon v United Kingdom* (1981) 67 ILR 395 [59].

[902] *Karner v Austria* (2004) 38 EHRR 24 [37]; *Smith & Grady v Untied Kingdom* (1999) 29 EHRR 493 [90]; *SL v Austria* App No 45330/99 ECHR 2003-I [37].

society on the other. Nonetheless it is pertinent to see what the Grand Chamber held in *Von Hannover (No 2)* and in *Al-Khawaja* as an important development of the approach which the European Court takes to the proportionality inquiry conducted by the domestic courts.

The attempt on the part of the Conseil d'État in *Dubus* to have the European Court change its jurisprudence was not accompanied by a sufficiently convincing set of arguments.[903] As was seen above, the European Court could refuse to give its imprimatur to the jurisprudential evolution initiated by the Conseil d'État, by relying upon the *conclusions* of the *commissaire du gouvernement* in the case. It was clear that the solution suggested by the Conseil d'État, contrary to the *conclusions*, would go against the grain of the Strasbourg jurisprudence, and it had not really been explained why the European Court ought to approve of the evolution suggested.

The Grand Chamber of the European Court concluded in *Von Hannover (No 2)* that given that the Federal Constitutional Court had tried in good faith to make sure that their law complied with the Strasbourg jurisprudence, and having regard to the margin of appreciation enjoyed by the national courts in the balancing competing interests, the German court had not failed to comply with their positive obligations under art 8.[904]

Much the same could be said of *Horncastle*[905] and the ruling by the Grand Chamber of the European Court in *Al-Khawaja*.[906] In that line of cases the Supreme

[903] Conseil d'État, 30 July 2003 *Dubus*; *Dubus v France* App No 5242/04 judgment 11 June 2009.

[904] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [126].

[905] *R v Horncastle & Others* [2009] UKSC 14, [2010] 2 WLR 47.

Court clearly believed, in good faith, that the European Court had failed to appreciate important aspects of the common law. Given that the Supreme Court went to such lengths in making this clear how it believed that the European Court had erred, it showed that that was not just a case of a domestic court resisting the force of the Strasbourg jurisprudence. The approach of the Supreme Court worked, insofar as the Grand Chamber in its ruling ceded some ground to the Supreme Court, admitting that: 'where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1'.[907] In *Animal Defenders*,[908] too, a similar approach by the House of Lords prompted Strasbourg to react as it has done in *Al-Khawaja*. A searching proportionality inquiry and good faith reliance upon the Strasbourg case law at the domestic level made the Grand Chamber in *Animal Defenders* prepared to defer to the conclusions of the legislative and judicial authorities.[909]

8.4 Conclusion

The idea that a national court has the last word, Andreas Voßkuhle, President of the German Constitutional Court, has said, 'does not contradict the idea of multilevel dialogue between European courts, so long as he who has the last word is willing to

[906] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011.

[907] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011 [147] (internal references omitted).

[908] *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [33].

[909] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013.

learn at the same time as speaking'.[910] President Voßkuhle's words bring out the importance of process, of how the domestic courts deal with the cases before them. It is clear from the jurisprudence of the European Court that it will, to some extent, take into account more than just the result reached by the domestic courts. Thus the European Court in *Chapman v United Kingdom* held that:

> In particular, [the Court] must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.[911]

Perhaps what the Grand Chamber of the European Court held in *Von Hannover (No 2)* ought to be seen as the European Court, at least in questions relating to the balancing of rights, in effect adopting just such an approach, focusing on the decision-making process of the national court. Seeing as the German Court had 'carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life', while 'attaching fundamental importance' to the parameters highlighted in the European jurisprudence, as well as 'explicitly [taken] account of the Court's relevant case law',[912] the Grand Chamber found that, 'having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests', the German Court was not at fault.[913] Thus the

[910] A Voßkuhle, 'Menschenrechte im Europäischen Verfassungsgerichtsverbund' speech at the Berlin–Brandenburgische Akademie der Wissenschaften 22 October 2011: 'muss einem Dialog im Europäischen Verfassungsgerichtsverbund nicht entgegenstehen, solange derjenige, der das letzte Wort spricht, beim sprechen lernt'

[911] *Chapman v United Kingdom* (2001) 33 EHRR 399 [92].

[912] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [124].

[913] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012 [125].

European Court changed no less than its understanding of what is free speech, moving from its initial position, set out in the first *Von Hannover* case, according to which the freedom to publish celebrity news would by definition be the handmaid of celebrities' privacy interests, to a recalibrated position which took some inspiration from the initial German position according to which one cannot distinguish between important and non-important speech. If the Grand Chamber deemed this change of position to be right, then than must surely have been because the German Court had shown willingness to change its position and because of the salutary judicial dialogue which had given way to it.

One could argue that in the instance of a particular case, in the short term, it does not benefit the protection of fundamental rights that a national court should resist to adopt the position taken by the European Court. It may, however, be that in the longer run the acceptance, sometimes with alacrity, by the European Court of such rulings from the national courts is just what is needed to create a sense of solidarity between the European and the national courts. The fruits of such exchanges is, as Guyomar has argued, the constitution of a common law based on the circulation of models and mutual jurisprudential enrichment; judicial dialogue thus gives way to a living and dynamic body of law, contributing in its turn to heightened standards of human rights protection.[914]

[914] M Guyomar, 'Le dialogue des jurisprudences entre le Conseil d'État et la Cour de Strasbourg: appropriation, anticipation, émancipation' in *Mélanges en l'honneur de Jean-Paul Costa* (Dalloz 2011) 320: 'Le fruit de ces échanges est la constitution d'un droit commun obtenu par la circulation des modèles et l'enrichissement mutuel des jurisprudences. Le dialogue des juges débouche ainsi sur un droit vivant et dynamique, au service d'une protection de plus élevée des droits de l'homme.'

9 Conclusion

This study has sought to answer the question, 'what is the proper role of the domestic courts in the application of the European Convention?' It has been argued that it is not true in descriptive terms, nor desirable in normative terms, that the domestic courts take an approach to the ECHR based most prominently upon friction and assertion of sovereignty and diversity of approach. Rather, the opposite is true. Domestic courts in France, Germany, and the United Kingdom are at considerable pains to avoid friction with the European Court. It has been argued that in normative terms this is a desirable state of affairs.

The domestic jurisprudence from which these conclusions can be gleaned seeks to attain four aims. These four aims were identified as being, first, honouring the principle of *pacta sunt servanda*; secondly, the safeguarding of human rights based upon the insight that human rights are a paramount good to be pursued by the legal order; thirdly, the aim of positive, as opposed to negative, rights diversity; and, fourthly, the aim that conclusions reached on the domestic level of one state must be universalizable. It has been argued that the approach of the domestic courts to the application of the ECHR can be explained on the basis of the domestic courts' wish to attain these four aims.

It has further been argued that the role the domestic courts play is presently one in which they are willing to give a lead to Strasbourg as well as to be led, in both 'the maintenance and further realisation' of the Convention rights.[915] It is, as this study has argued, right and proper that the domestic courts should play this role. As

[915] Preamble, ECHR, 4 November 1950, 213 UNTS 222.

seen above, former President of the European Court Jean-Paul Costa made the point that the Court would have shirked its duties if it had failed to take the further realization of human rights and fundamental freedoms as seriously as the maintenance of the rights.[916] This study has argued that the same is the case with the domestic courts.

The role which the domestic courts have fashioned for themselves in their application of the ECHR is one which dovetails neatly with the role the European Court has fashioned for itself. The interplay between domestic courts and the European Court is not necessarily a zero sum game. It does, however, follow from that which the Court in an early case termed the 'subsidiary nature of the international machinery of collective enforcement established by the Convention'[917] that the further the domestic courts go far in taking seriously the demands of the Convention the less, in principle, will it be necessary for the European Court to do. As this study has shown, the domestic courts have gone to great lengths to incorporate into their work the methods of the European Court. The domestic courts in France, Germany, and the UK have gone far in making sure that their application of the Convention rights is, in the cases that come before them, equal to the demands which follow from the ECHR doctrines of evolutionary interpretation, proportionality, the margin of appreciation, and autonomous concepts. They have, in other words, taken on board the demands of subsidiarity, as set out by the Grand Chamber in *Z*:

[916] JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz 2013) 43. See 4.1 above.

[917] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* App Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 [Plenary Court] judgment 23 July 1968 [10].

> the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity.[918]

Importantly, these demands on the role played by the domestic courts are matched by the position taken by the European Court, especially in several recent Grand Chamber judgments. The European Court presently goes far in taking to its logical conclusion the recognition that the primary obligation for compliance with the Convention rests on the member state. The Grand Chamber stated in *Animal Defenders* that, in order to determine the proportionality of a measure, the Court will look at the reasoning given by the national authorities: 'The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation'.[919] If the quality of the parliamentary and judicial review is a high one, as was the case in *Animal Defenders,* then the European Court will be reticent in reviewing the conclusions reached at domestic level.

It is important to point out that it would scarcely have been possible for the European Court to take this approach had it not been for the fact that the domestic courts—as exemplified in the case of France, Germany, and the UK by cases such as *Al-Khawaja,*[920] *Von Hannover (No 2),*[921] and *Animal Defenders*[922]—now take the

[918] *Z v United Kingdom* App No 29392/95 judgment [GC] 10 May 2011 [103].

[919] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013 [108].

[920] *Al-Khawaja & Tahery v United Kingdom* App Nos 26766/05 and 22228/06 judgment [GC] 15 December 2011.

demands of the Convention so seriously. The one would not make much sense without the other.

It can be concluded, then, that the role of the domestic courts has now become that which it ought to have been all along. The role which the French, German, and UK courts have fashioned for themselves is one in which they are prime movers both in the application and development of the ECHR.

The application and the development of the Convention rights are, crucially, two sides of the same coin. Not falling behind the standards of the Convention is, as this study has shown, a function of a complicated set of factors, which include the doctrine of autonomous concepts, evolutionary interpretation, the margin of appreciation, the strictures of proportionality, and also that which could usefully be summed up by the words 'dialogue between the European Court and a domestic court'. As has also been shown, these elements have a bearing on the fact that one cannot always know what the demands of the Convention rights as expounded by Strasbourg jurisprudence are. It has been argued that the domestic courts in such cases do more than to 'shadow the European Court'.[923] They go further than seeking only to align the case before them with the least dissimilar of the reported cases. The trend in the jurisprudence is towards the approach set out by Lord Bingham in *JJ*, according to which it is the task of the domestic courts 'to seek to give fair effect, on the facts of

[921] *Von Hannover v Germany (No 2)* App Nos 40660/08 and 60641/08 judgment [GC] 7 February 2012.

[922] *Animal Defenders International v United Kingdom* App No 48876/08 judgment [GC] 22 April 2013.

[923] *British Broadcasting Corporation & Another v Sugar* [2012] UKSC 4, [2012] 1 WLR 439, 457 (Lord Wilson).

[the case before them], to the principles which the Strasbourg court has laid down'.[924] This study has argued that *Ullah*[925] can be read as giving effect to this approach. As *commissaire du gouvernement* Guyomar held in *Boussouar & Planchenault*, such an approach would amount to giving full effect to the subsidiary character of the control of the European Court, and to the domestic courts' taking charge of giving full effect before national authorities to the Convention rights.[926] If once they did so in the past the national courts do not anymore hesitate to resolve the question of whether a claim to a Convention right is viable where there is no clear current view from Strasbourg to be seen.

By playing this role the domestic courts make it possible for the European Court to play *its* proper role, that is, as the Court's First President Lord McNair said in 1961, to crown the edifice of the system set up by the Convention.[927] The domestic authorities are supposed to be the prime movers, willing to take a lead both in the development and the further realization of the Convention rights; only then can the role of the Court properly be called subsidiary.

[924] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] AC 385 [19] (Lord Bingham).

[925] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

[926] M Guyomar, 'Conclusions sur Conseil d'État, Assemblée, 14 décembre 2007, M. Planchenault et Garde des sceaux, ministre de la Justice c/ M. Boussouar' [2008] Revue française de droit administratif 87, 100.

[927] A McNair, 'Preface by Lord McNair, President of the European Court of Human Rights' in *The Rights of the European Citizen* (Council of Europe 1961) 9.

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