



Authority of the ECHR in Hungary, the Netherlands and the EU  
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## 1. Abstract

This thesis compares three approaches towards the European Convention on Human Rights system. Being a monist state, the Netherlands is welcoming towards the ECHR and the practice of the European Court of Human Rights. Given the lack of domestic judicial constitutional review, the Dutch courts apply the ECHR directly in the domestic setup. Hungary is presently best described as hesitant towards the ECHR system: several judgements of the Constitutional Court point towards a greater acceptance of the practice of the ECtHR as binding, but the practice is not yet conclusive. The Court of Justice of the European Union, nevertheless that the EU is not a member to the ECHR, refers to the ECHR quite often, however since the adoption of the Charter of Fundamental Rights, the number of references is decreasing. Since 2010 the constitutional review rights of the Hungarian Constitutional Court are restricted in economic legislation, but review against international norms is still possible in this area. I assess the possibility of the Hungarian Constitutional Court to follow the Dutch path and use the ECHR system more effectively to protect human rights in this restricted area.

## 2. Introduction

The European Convention of Human Rights is possibly the most important human rights document in Europe. It has been signed by 47 states and more importantly, has a decision making body, the Court, the decisions of which are binding upon states. This makes it unique worldwide. Article 46(1) of the Convention declares the judgments of the Court binding to the states in the cases where they are parties. The interpretation of this proclamation differs widely among member states – depending on the internal setup of the European states. In this work, I will show three approaches: that of the Netherlands, a highly friendly attitude towards the European Convention on Human Rights (the ECHR, or the Convention);<sup>1</sup> that of Hungary, which is changing possibly towards a pro-ECHR approach;<sup>2</sup> and the attitude of the EU, which is not at all party to the ECHR, but the Convention and the practice of the Court plays an important role.<sup>3</sup>

The Netherlands is welcoming towards the Convention-system, Hungary is hesitant on whether to accept or reject it, while the European Union – in the wake of its own Charter of Fundamental Rights – is about to say goodbye to the ECHR. In the Netherlands, the ECHR is often invoked by the national judiciary to protect human rights and to exercise judicial review, because the Dutch Constitution prohibits courts from exercising judicial review of statutes against the Constitution, but allows it against international conventions, such as the ECHR. The

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<sup>1</sup> The most important works are: H. F. van Panhuys and Evert Alkema, eds., “Fundamental Human Rights and the Legal Order of the Netherlands,” in *International Law in the Netherlands. 3: [...] (Alphen aan den Rijn: Sijthoff & Noordhoff [u.a.], 1980), 109–48; Evert Alkema, “The Netherlands,” in International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, ed. Dinah Shelton (Oxford; New York: Oxford University Press, 2011).

<sup>2</sup> The most important works are: Nóra Chronowski, “Az Alaptörvény a többszintű európai alkotmányosság hálójában [The Hungarian Fundamental Law in the Multi-Level Network of European Constitutionalism],” in *Alkotmányozás és Alkotmányjogi változások Európában és Magyarországon*, ed. Fruzsina Gárdos-Orosz and Zoltán Sente (Budapest: Nemzeti Közszerológati Egyetem Közigazgatás-tudományi Kar, 2014), 113–34.

<sup>3</sup> The most important works are: Takis Tridimas, *The General Principles of EU Law*, 2nd ed, Oxford EC Law Library (Oxford; New York: Oxford University Press, 2006); Xavier Groussot, *General Principles of Community Law*, The Hogendorp Papers 6 (Groningen: Europa Law Pub, 2006).

Hungarian Constitutional Court (HCC) does not often refer directly to the ECHR to establish rights or to exercise judicial review, but uses some decisions of the European Court of Human Rights (ECtHR) to provide their decisions with further legitimacy and in some exceptional cases, to reopen an already decided case. I will argue that there might be a shift in the practice of the HCC towards a greater acceptance of the ECtHR, but this shift is not yet conclusive. Shortly after 2010, when the new government gained the supermajority, the Parliament restricted the HCC's judicial review rights in the economic legislation sphere, in which the HCC may only review legislation against the most important rights (e.g. human dignity), and against international treaties. I will elaborate on how this restriction changed the practice of the HCC and the chances for the HCC to use the Dutch practice to circumvent its restrictions (i.e. by relying on the ECHR instead of the national constitution as a basis of judicial review). The supremacy of international law is quite well established in the practice of the Hungarian Constitutional Court, but the HCC is generally reluctant to directly refer to the ECHR – instead, it often finds a comparable Hungarian legal doctrine and conducts judicial review on this basis. Both in the Netherlands and in Hungary the ECHR is the most often referred international law instrument, as we will see it later. These two countries are jurisdictions where international law can intervene into domestic law. Before the adoption of the Charter, the number of references by the CJEU to the ECHR and/or to the practice of the ECtHR was rising. The Charter, however, changed this picture and it seems today that the CJEU prefers its “own” Bill of Rights document over an external one. There is a treaty obligation for the EU to access the ECHR, but attempts to make this accession were prevented by the CJEU. In my thesis I will describe how the adoption of the Charter changed the practice of the CJEU in relation to the ECHR and how Charter rights substitute references to the ECHR.

The most important works are, for the Netherlands, that of *Alkema, Panhuys, Schyff* and *Van Dijk*, for Hungary *Chronowski, Tilk, Blutman* and *Csatlós* are the most important authors. For

the EU, *Tridimas*, *De Búrca* and *Groussot* are the most significant. In my thesis I will describe the three different approaches of the Netherlands, Hungary and the EU towards the most important European human rights system. My claim is that the ECHR and the ECtHR are important under different circumstances, and influence all three jurisdictions regardless of their different domestic setup and attitude towards international law.

### 3. Methodology

In this work ‘constitutional review’ will refer to judicial review done against a Constitution, while ‘conventionality review’ will refer to judicial review done against an international legal source (in this work, it will mean the ECHR) and “judicial review” as the source of them. I use these two terms to distinguish the two types of judicial review based on their origin.

I refer to judicial review (constitutional and conventionality review included) as both the strong and the weak judicial review. Strong judicial review means the power of the Judiciary to annul laws, while weak judicial review refers to the power of the courts to refuse to apply any given law in an individual case. As we will see in the case of the Netherlands, the weak judicial review in practice can have similar effects to that of the strong.

I will refer to both the *Commission* and the *Court* established under the ECHR as the European Court of Human Rights or as ECtHR. Similarly, I will refer to the Court of Justice of the European Union and to all of its previous names as CJEU. There are debates on the possible revision of the current Dutch Constitution and to introduce the possibility of judicial review,<sup>4</sup> this thesis will not cover these recent developments. Because of the vast amount of cases, it is

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<sup>4</sup> Elaine Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” in *Constitutional Review and Democracy*, ed. Miodrag A. Jovanović, Democracy and the Rule of Law 5 (The Hague, the Netherlands: Eleven International Publishing, 2015), 194–199; Monica Claes and Gerhard Van der Schyff, “Towards Judicial Constitutional Review in the Netherlands?,” in *Constitutionalism in the Netherlands and South Africa: A Comparative Study*, ed. Gerhard van der Schyff (Nijmegen: Wolf Legal Publishers, 2008), 131–141.

impossible to cover all relevant decisions in my thesis, therefore I primarily rely on secondary literature. When making this work, because of the vast number of decisions, I relied primarily on secondary literature, but read the most important decisions.

## 4. The Netherlands

The Netherlands is the most international law-friendly jurisdiction among the three and particularly the Dutch courts use the ECHR system very widely. In the Netherlands, international human rights law intrudes into the domestic legal system very deeply. The supremacy of international law over the full scale of domestic legislation is well established. The Dutch Constitution prohibits judicial review over acts of the Legislator and over international treaties.<sup>5</sup> The Netherlands is a monist state in the sense that international law does not need to be incorporated into the Dutch system and is binding upon ratification.<sup>6</sup>

In this part I will first outline the relevant attributes of the Dutch legal system and the history of the lack of constitutional review. After this introduction, I will elaborate on the gradual acceptance of the ECHR as a basis for judicial review. This part will cover from the beginning of conventionality review until today. The third and fourth subsection deals with two specific aspect of the Dutch system: the interestingly cautious application of conventionality review and the third party applicability of the Convention. The last part is the summary for the Netherlands.

### a. The Dutch legal system and the history of the lack of constitutional review

There are two conditions for international law to be applicable by Dutch courts *vis-à-vis* statutes: first, they have to have created enforceable rights for individuals, second, they have to be self-executing.<sup>7</sup> These conditions originate in Article 93 and 94 of the Constitution. The first condition is met by human rights treaties (such as the ECHR) easily: their aim is to create rights

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<sup>5</sup> *Constitution of the Kingdom of Netherlands*, 2008, 120.

<sup>6</sup> Claes and Van der Schyff, "Towards Judicial Constitutional Review in the Netherlands?," 235.

<sup>7</sup> Erika de Wet, "The Reception Process in the Netherlands and Belgium," in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, ed. Helen Keller and Alec Stone Sweet (Oxford ; New York: Oxford University Press, 2008), 235.



against the government. This condition excludes, for example, the UN Charter's<sup>8</sup> prohibition of the use of force (it was invoked before a Dutch Court against the bombardment of Serbia), because it is not aimed at individuals, but at states.<sup>9</sup> The first condition is easy to decide, while the second one is more troublesome. Self-executive nature means that the provision can be enforced by courts without any further implementation.<sup>10</sup>

In judicial review cases the ECHR is the most often cited international instrument by courts of the Netherlands,<sup>11</sup> however the International Covenant on Civil and Political Rights, for example, is also frequently used.<sup>12</sup> According to the Dutch practice, EU law, for example, does not fulfill this condition of the Constitution, regardless that it has direct effect in the domestic legal orders of the Union. The courts accepted, however, the CJEU's case law that they have to refuse to apply domestic law if it contravenes EU law.<sup>13</sup> EU law therefore has a similar position in the Dutch legal order as international human rights treaties, but not on Constitutional basis, but on EU law basis (and the practice of the CJEU).

There is no single supreme Court of all areas of law in the Netherlands, but there are different Court of last instance for specific areas. The Supreme Court (*Hoge Raad*) has last instance jurisdiction in civil, criminal and tax matters, the Administrative Law Section of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*) has last instance jurisdiction in administrative matters, the Central Appellate Council (*Centrale Raad voor Beroep*) has last instance jurisdiction in social security and civil service matters and the Appellate Chamber for

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<sup>8</sup> *Charter of the United Nations*, 1945, <http://www.un.org/en/charter-united-nations/>.

<sup>9</sup> de Wet, "The Reception Process in the Netherlands and Belgium," 235.

<sup>10</sup> *Ibid.*

<sup>11</sup> Jerfi Uzman, Tom Barkhuysen, and Michiel L. Van Emmerik, "The Dutch Supreme Court: A Reluctant Positive Legislator?," in *Netherlands Report to the Eighteenth International Congress of Comparative Law*, 2010, 1–2, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1895432](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895432).

<sup>12</sup> Gerhard Van der Schyff, "Judicial Review of Legislation: Constitutionalism Personified in the United Kingdom, the Netherlands and South Africa" (Antwerp University, 2010), 121.

<sup>13</sup> Mak, "Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order," 190–191.

Economic Affairs (*College van Beroep voor het Bedrijfsleven*) has last instance jurisdiction in commercial matters.<sup>14</sup> The review of treaties is decentralized in the Netherlands, i.e. all courts have the right to interpret treaties and give effect to Article 94 of the Constitution.<sup>15</sup>

The courts of the Netherlands may refuse to apply legislation which is not in line with an international treaty obligation, but may not strike down statutes.<sup>16</sup> It means that Article 94 of the Constitution is applied only in individual cases and not in the general judicial review sense, i.e. the laws violating a higher law (the Constitution) are not annulled, such as in Germany and many other states of the World. In a formal sense, this judicial review power is even more reduced taking into account the lack of binding precedents in the Netherlands. In practice, however, Court rulings refusing application to laws are generally followed by other courts what leads to a *de facto* precedent system.<sup>17</sup> A study found that it is almost impossible to find a case where lower courts did not follow the decisions of higher courts and the Supreme Court stated in a ruling that lower courts must, in principle, follow its decisions.<sup>18</sup> With these limitations in mind, in this thesis I refer to the powers of the Dutch courts under Article 94 of the Constitution as judicial review.

The prohibition of constitutional review dates back to 1848, when the Article 115 (2) was inserted, stipulating that “the laws are unassailable”, as a codification of the constitutional

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<sup>14</sup> Van der Schyff, “Judicial Review of Legislation : Constitutionalism Personified in the United Kingdom, the Netherlands and South Africa,” 69.

<sup>15</sup> Leonard FM Besselink, “The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All,” *Utrecht Law Review* 9, no. 2 (2013): 23; Van der Schyff, “Judicial Review of Legislation : Constitutionalism Personified in the United Kingdom, the Netherlands and South Africa,” 70.

<sup>16</sup> The courts are allowed the review secondary legislation, such as municipal regulations against the Constitution. de Wet, “The Reception Process in the Netherlands and Belgium,” 240.

<sup>17</sup> Van der Schyff, “Judicial Review of Legislation : Constitutionalism Personified in the United Kingdom, the Netherlands and South Africa,” 148.

<sup>18</sup> *Ibid.*

practice developed since establishment of the Kingdom of Netherlands in 1813.<sup>19</sup> There were attempts in the Netherlands to amend the Constitution in order to allow courts to exercise constitutionality review. It was proposed, for example, in 1966 and 1969.<sup>20</sup> In 2012, to the opposite, the abolition of the conventionality control was proposed.<sup>21</sup> All these attempts failed. In 2010, some of the overseas territories of the Netherlands, however, established constitutional review procedure for parliamentary acts but it is not applicable in the mainland.<sup>22</sup>

Originally the courts did not exercised conventionality review. The interaction of the national and international level of laws intensified as the Netherlands was a founder of the Council of Europe in 1949 and the predecessor of the EU in 1952.<sup>23</sup> At the time of the signature and ratification of the ECHR in 1950 and 1954,<sup>24</sup> the Dutch Legislature deemed the effects of the accession insignificant, “as domestic law already complied fully with it”.<sup>25</sup> As now apparent, this was a mistaken attitude.

The lack of judicial review reflects the Dutch understanding of separation of powers, according to which making general laws is the task of the Legislator while the courts are to

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<sup>19</sup> Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” 187.

<sup>20</sup> Claes and Van der Schyff, “Towards Judicial Constitutional Review in the Netherlands?,” 128–129; Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” 188.

<sup>21</sup> Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” 196.

<sup>22</sup> *Ibid.*, 189.

<sup>23</sup> *Ibid.*, 190.

<sup>24</sup> “Chart of Signatures and Ratifications of Treaty 005 (Convention for the Protection of Human Rights and Fundamental Freedoms),” *Treaty Office of the Council of Europe*, March 10, 2016, <http://www.coe.int/web/conventions/full-list>.

<sup>25</sup> Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe: The European Convention on Human Rights and Its Member States, 1950-2000* (Oxford University Press, 2001), 595; Evert Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” in *The Dynamics of the Protection of Human Rights in Europe*, ed. Rick Lawson, Matthijs de Blois, and Henry G. Schermers, Essays in Honour of Henry G. Schermers, v. 3 (Dordrecht ; Boston : Norwell, MA, U.S.A.: M. Nijhoff ; Sold and distributed in the U.S.A. and Canada by Kluwer Academic Publishers, 1994), 3.

apply it in individual cases.<sup>26</sup> As *Mak* explains, in the Dutch system the Legislator is not sovereign (as in the United Kingdom, for example), because it has to obey the Constitution. The lack of constitutionality review arranges competences so as the Legislator has the power to interpret the Constitution, not the Judiciary. An additional argument to support the lack of constitutional review is that in this way the independence of judges is better protected because there is less chance of the politicization of judicial appointments.<sup>27</sup>

#### **b. Gradual acceptance of conventionality review**

The wide-range use and direct application of the ECHR for judicial review makes the Netherlands a unique legal system. The courts were reluctant to directly apply the ECHR for nearly thirty years after accession, but now “the ECHR has taken over the role as the most important civil rights charter for the Netherlands.”<sup>28</sup> During this thirty years, the courts of the Netherlands avoided the application of the ECHR through various means such as denying the self-executing nature of the Convention,<sup>29</sup> or tried to find a comparable right in Dutch law.<sup>30</sup> *Alkema* wrote in 1980 that the courts considered the ECHR only as a subsidiary source of law. “Where a comparable constitutional provision is available, an interpretation, sometimes a wide interpretation, of the latter is preferred to an (express) application of the ECHR.”<sup>31</sup> The example given is a case concerning freedom of expression in the form of neon-signs: Article 7 of the Constitution provides that “no one shall require prior permission to publish thoughts or opinions through the press”. It was interpreted by the courts to cover the neon-letters as well, however they were not at all printed in press. *Alkema* claims that it is a wide interpretation of the

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<sup>26</sup> Van der Schyff, “Judicial Review of Legislation : Constitutionalism Personified in the United Kingdom, the Netherlands and South Africa,” 148.

<sup>27</sup> Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” 186.

<sup>28</sup> Uzman, Barkhuysen, and Van Emmerik, “The Dutch Supreme Court,” 5.

<sup>29</sup> *Ibid.*, 8–11.

<sup>30</sup> Panhuys and Alkema, “Fundamental Human Rights and the Legal Order of the Netherlands,” 136.

<sup>31</sup> *Ibid.*

Constitutional text, and shows the reluctance of the courts to use the ECHR, as the Solicitor-General suggested.<sup>32</sup>

#### i. First just interpretation

The Netherlands' courts were not always as open towards the ECHR as they are today, what is described by *Alkema* as “the interpretation and application of international human rights have become a matter of daily routine in the courtrooms.”<sup>33</sup> *Alkema* says that the period before the 1980s “can roughly characterized by judicial reticence, whereas the second period starting in 1980 shows features, judicial activism as well as some judicial restraint”, while the constitutional setting remained the same.<sup>34</sup> In the early years after the accession to the ECHR, the courts in some cases reviewed legislation against the Convention, but always found it to be in line with it, with hardly a few exceptions. The courts generally found that and limitation was “prescribed by law”, “necessary in a democratic society” and justifiable because it was necessary “for the prevention of disorder and crime.”<sup>35</sup> *Van Dijk* listed the several “techniques” how the courts reached the non-violation result, which are similar to the today-practice of the HCC:

- applying a comparable provision from Dutch law,<sup>36</sup>
- denying the self-executive nature of the treaty provision,<sup>37</sup>
- giving a very restrictive scope to the provisions of the ECHR,<sup>38</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> Alkema, “The Netherlands,” 424.

<sup>34</sup> Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 3; Van Dijk agrees that 1980 is the dividing line: Pieter Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” in *Fortschritt im Bewusstsein der Grund- und Menschenrechte: Festschrift für Felix Ermacora = Progress in the spirit of human rights*, ed. Felix Ermacora et al. (Kehl; Arlington: N.P. Engel, 1988), 639–640.

<sup>35</sup> Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 3–4.

<sup>36</sup> Judgment, NJ 1967 270 (Supreme Court of the Netherlands 1967).

<sup>37</sup> Judgment, NJ 1964 388 (Rotterdam District Court 1963).

<sup>38</sup> Judgment (Supreme Court of the Netherlands 1973). “Article 6 does not apply to extradition proceedings.” Summary from: Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” 640.

- giving broad scope to the restrictions of the Convention,<sup>39</sup>
- interpreting the Convention to be in line with domestic law.<sup>40</sup>

There were a few exceptions to the reluctance to hardly apply the ECHR before 1980. The Supreme Court decided in 1974 that the ECHR was not respected by the prosecutors and “the prosecution must be suspended as long as the suspect has not been informed of the nature and cause of the accusation against him [or her] in conformity with Article 6(3)(a).”<sup>41</sup> The other exception is from 1977, when the Maastricht District Court ruled that “the obligation under ... the Road Traffic Act of the owner of a car with which a traffic offence has been committed to reveal the identity of the driver is an interference with private life incompatible with Article 8 of the Convention and, therefore, cannot be applied.”<sup>42</sup>

It is important to note that until 1976 and 1979 there were no lost cases for the Netherlands before the ECtHR.<sup>43</sup> The first case was *Engel and Others*,<sup>44</sup> the second is *Winterwerp*.<sup>45</sup> After these preludes, in 1980 the Supreme Court overruled previous practice by explicitly referring to the *Marckx* decision of the ECtHR,<sup>46</sup> however the Court did not render the Dutch statutory provision inapplicable yet, just gave it an interpretation being in line with the ECtHR.<sup>47</sup> The

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<sup>39</sup> Judgment, NJ 1962 107 (Supreme Court of the Netherlands 1962). “A regulation restricting Roman Catholic processions to a few places may be considered necessary in a democratic society for the protection of public order.” Summary from Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” 641.

<sup>40</sup> Judgment, NJ 1977 557 (Supreme Court of the Netherlands 1977). “The compulsory blood test is not contrary to Article 6(2).” Summary from Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” 641.

<sup>41</sup> Judgment, NJ 1974 272 (Supreme Court of the Netherlands 1974). Summary from Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” 641.

<sup>42</sup> Judgment (Maastricht District Court 1977); Summary from: Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” 641.

<sup>43</sup> Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 4.

<sup>44</sup> *Engel and Others v. the Netherlands*, nos. 5100/71 and 5101/71 (European Court of Human Rights 1976).

<sup>45</sup> *Winterwerp v. the Netherlands*, no. 6301/73 (European Court of Human Rights 1979).

<sup>46</sup> *Marckx v. Belgium*, no. 6833/74 (European Court of Human Rights 1979).

<sup>47</sup> Judgment, NJ 1980 463 (Supreme Court of the Netherlands 1980); Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 5.

same happened in 1982 when the Dutch Supreme Court interpreted the law giving veto rights to the parents on the marriage of their minor children as not being absolute, but subject to a test of reasonableness, because only this is compatible with Article 12 of the ECHR (Right to marry).<sup>48</sup>

This practice is comparable to the Hungarian Constitutional Court's practice, when the HCC decided on the fate of a legislation for the first time based on an ECtHR decision. The legislation was already set aside by the Legislator, so the HCC only prohibited its application in running cases, which is a relatively small step. Both the Dutch and the Hungarian courts were initially cautious and moved only step by step. (More on the Hungarian decision below.)

Figure 1 shows the gradual increase in the number of cases where the Dutch courts applied the ECHR against Dutch law. It demonstrates from a quantitative perspective the change of the courts' approach.

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<sup>48</sup> Judgment, NJ 1983 32 (Supreme Court of the Netherlands 1982); Summary from: Alkema, "The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order," 5; Van Dijk, "Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case," 644.

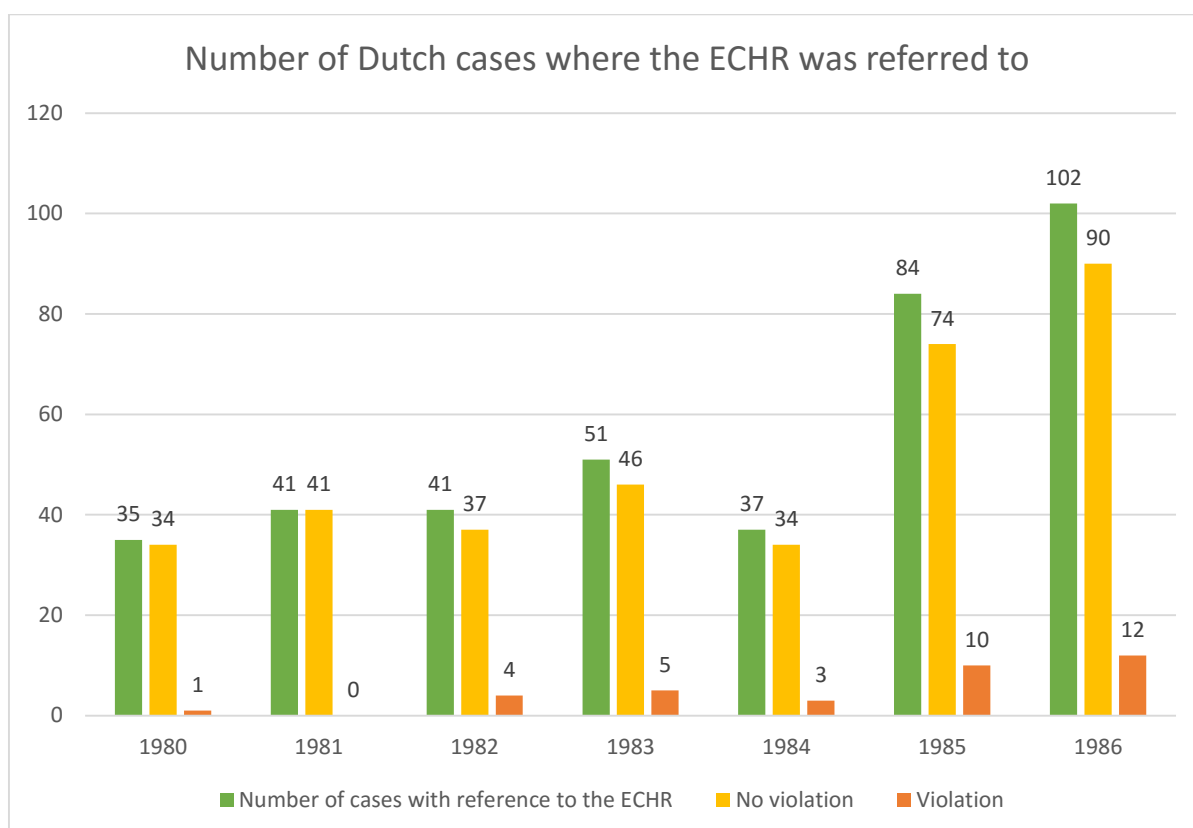


Figure 1: Number of Dutch cases where the ECHR was referred to<sup>49</sup>

The numbers illustrates how the use of the ECHR gradually increased in the practice of the courts. Both the number of cases where the ECHR was invoked and the cases where a violation of the convention was found increased. I was unable to find statistical data for later years,<sup>50</sup> but if we take into account that before the 1980s there was hardly any case with ECHR violation, and now the ECHR is practically the “Bill of Rights” of the Netherlands, we can imagine the picture.

<sup>49</sup> Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” 642. The data was collected by the Netherlands Institute for Human Rights (SIM), by Herman von Hebel and Koen Peters and cited in Van Dijk’s work.

<sup>50</sup> The Netherlands Institute for Human Rights (SIM) stated in an email on 14 March 2016 that they no longer collect this data.



## ii. The “incorporation theory”

The family life jurisprudence culminated in the Supreme Court’s 1989 decision, where it proclaimed that the interpretation of the ECHR by the ECtHR is incorporated into the treaty and is authoritative.<sup>51</sup> This important principle is called the “incorporation theory”, and means that the provisions of the Convention should be interpreted in light of the practice of the ECtHR when they are applied to the national legal order.<sup>52</sup> This theory is now reinforced by widespread practice.<sup>53</sup> Consequently Dutch courts are bound by the practice of the ECtHR even if the judgment was not made in connection of the Netherlands<sup>54</sup> as we have seen an early predecessor to it in the *Marckx* judgment.

The incorporation theory is not self-evident. According to Article 93 of the Constitution, “resolutions by international institutions ... shall become binding.” The courts should have deemed ECtHR judgments as falling under this provision, but that would have led to finding that ECtHR practice binds only the state itself (and not provides rights to individuals), and that cases not concerning the Netherlands are not binding at all for the state.<sup>55</sup> Instead of this route, the Dutch courts went on the incorporation theory. *Mak* conducted an experiment<sup>56</sup> and found that searching a landmark ECtHR case decided against the Netherlands in the database of domestic judgments returned 127 results. The similar search for one single case against Turkey

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<sup>51</sup> HR, NJ 1990 628 (Supreme Court of the Netherlands 1989); Cited in: Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” 193; Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 6.

<sup>52</sup> de Wet, “The Reception Process in the Netherlands and Belgium,” 237.

<sup>53</sup> Judgment, HR NJCM-Bulletin 21 (Supreme Court of the Netherlands 1996); Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 6.

<sup>54</sup> de Wet, “The Reception Process in the Netherlands and Belgium,” 237.

<sup>55</sup> Alkema, “The Netherlands,” 415.

<sup>56</sup> Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” 193.

returned 26 results. This shows that the courts in the Netherlands are quite open to use the case law of the ECtHR in their judgments.

As we will see after reviewing the Hungarian system that while the HCC is far away from saying anything like the incorporation theory, the HCC cites ECtHR cases quite often and not only analyses the text of the Convention what can be deemed as a predecessor for it. Moreover, the HCC decided that the interpretation of the Convention should be founded on the practice of the ECtHR, and when a fundamental right is framed similarly in Hungarian law and the ECHR, the HCC should avoid interpreting it in a manner which should lead to violation-findings. These decisions does not mean the waking of the incorporation theory, but may be seen as predecessors to it. (For the Hungarian practice, see below.)

### iii. Divergence in Articles

It was already mentioned that there are two conditions for treaties, to be fit for judicial review. One is that they have to establish individual rights, the second is that they have to be self-executive. While the first condition is clear, the second is troublesome. Not all the provisions of the ECHR were always accepted as self-executive. Article 13 of the Convention (Right to an effective remedy) is accepted as such only since 1994.<sup>57</sup> Previously the courts regarded this provision – and comparable provisions of 6 (Right to a fair trial) – as only binding the Legislature to adopt laws with adequate guarantees.<sup>58</sup> A detailed examination on the divergent practice of different Articles is done by *Alkema*.<sup>59</sup>

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<sup>57</sup> Judgment, AB 1995 238 (Dutch Council of State 1994); de Wet, “The Reception Process in the Netherlands and Belgium,” 236.

<sup>58</sup> Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 4.

<sup>59</sup> Panhuys and Alkema, “Fundamental Human Rights and the Legal Order of the Netherlands,” 137–141.

### c. Cautious conventionality review

Regardless that conventionality review is well-established in the Dutch legal system, courts are cautious when deciding a statute inapplicable for its contradiction with international norms. The text of the Convention or the practice of the ECtHR has to clearly suggest the contradiction with domestic law.<sup>60</sup> If the practice of the ECtHR is not conclusive and the domestic statute is not in clear violation of this practice, the Dutch courts tend to interpret the Convention to be in line with the domestic norms. Sometimes the ECHR provisions are interpreted restrictively or inapplicable in a given situation.<sup>61</sup> *Van Dijk* provided several examples where the Dutch courts gave to the Dutch law “an interpretation or scope different from its original meaning and from the legal practice until then, or by inserting a new principle into Dutch law derived from the treaty provision.”<sup>62</sup>

Even when the contradiction is clear, the courts not always render non-applicable the domestic statute because there might be a range of solutions for the problem. *De Wet* mentions a case where the Supreme Court did not rendered the law on a discriminatory tax non-applicable, but did something similar to the conditional annulment of legislation exercised widely by constitutional courts, such as the Hungarian Constitutional Court. When doing so, a constitutional Court calls the Legislator to amend the unconstitutional provision within a timeframe. If the lawmaker fails to do so, the problematic provision might be annulled. The Dutch Supreme Court found that the law contradicted Article 14 of the ECHR and Article 1 of Protocol No. 1, but left the solution to the Legislature, because of the wide range of possible

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<sup>60</sup> de Wet, “The Reception Process in the Netherlands and Belgium,” 241.

<sup>61</sup> Ibid.

<sup>62</sup> Van Dijk, “Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary - The Dutch Case,” 643.

remedies. The Court nonetheless urged the Legislature to act within a reasonable time, because after the lapse of it the Court might change its mind.<sup>63</sup>

#### d. Third party applicability

The third party applicability of the ECHR in the domestic level in the Netherlands is interesting, because it gives wider applicability to the ECHR in the domestic level, as it has in its original – international – level. As *Alkema* summarizes,<sup>64</sup> in the Convention procedure, the respondent can only be a state, not individuals. Therefore, there is this procedural obstacle to the third party applicability of the ECHR. Third party applicability is possible only indirectly in the Convention procedure, i.e. when the Court holds states liable for not protecting individuals against the acts of other individuals.

The ECHR in the Netherlands has third party applicability (*Drittwirkung*) under an additional condition, namely that the treaty provision must be capable of imposing obligations on private parties beside public authorities.<sup>65</sup> This criteria is additional to the two existing criteria (contains enforceable rights for individuals and is self-executing) established for treaty law to be fit for judicial review purposes.<sup>66</sup>

Third party applicability of the ECHR in the Dutch domestic level got some recognition as early as the 1950s and 1960s as *Drzemczewski* found it. The courts strike down contracts for lease or sale of real property which discriminated against race, religion or nationality based on the ECHR.<sup>67</sup> In another case a weekly magazine argued that the Dutch Broadcasting

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<sup>63</sup> de Wet, “The Reception Process in the Netherlands and Belgium,” 241.

<sup>64</sup> Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 10–13.

<sup>65</sup> Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 10.

<sup>66</sup> See above.

<sup>67</sup> Judgment, NJ 1959 473 (Hof Arnhem 1959); Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford : New York: Clarendon Press ; Oxford University Press, 1983), 213.

Association discriminated against them and it was in violation of Article 10 (Freedom of expression) and 14 (Prohibition of discrimination) of the ECHR. None of the three courts which dealt with the case found that these provision regulate the relationship of private parties and public authorities and therefore they may not be applied in the case concerning the dispute of two private parties. Instead, they found other grounds to dismiss the application.<sup>68</sup>

The third party applicability of the ECHR remained declared by courts, however, seldom for several decades. *Alkema* stated in his 1994 study that “over the last decade, the phenomenon became more frequent both with respect to domestic and international fundamental rights.”<sup>69</sup> He refers, for example, to the importance of Article 8 (Right to respect for private and family life) in harassment cases against former partners or spouses, or in data protection cases when the petitioner was a patient of a private institution of hospital and wanted to prevent the institution to disclose his or her medical data.<sup>70</sup>

#### e. Conclusion for the Netherlands

When the Netherlands joined the ECHR, the legislators deemed it a symbolic step, since they were sure the Dutch legal system complies with human rights anyway. This opinion, as we have seen, was right for several decades. After the first ECtHR decisions against the Netherlands and the gradual acceptance of the ECHR as the “Bill of Rights”, however, the picture changed. In a country without constitutional review, the courts were pushed to look beyond their regular comfort zone. The Netherlands is a monist country and the legal system was always very welcoming towards international law. The Dutch courts established conventionality review to substitute constitutionality review. The good functioning of the

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<sup>68</sup> Judgment, NJ 1966 115 (Supreme Court of the Netherlands 1965); Drzemczewski, *European Human Rights Convention in Domestic Law*, 213.

<sup>69</sup> Alkema, “The Effects of the European Convention on Human Rights and Other International Human Rights Instruments on the Netherlands Legal Order,” 11.

<sup>70</sup> Drzemczewski, *European Human Rights Convention in Domestic Law*, 11–12.

conventionality system is maybe shown by the fact that all of the attempts to include constitutional review powers into the Constitution failed. Possibly the single most important reason for the Netherlands that it did not have a constitutionality review procedure is that the conventionality review procedure fulfills, at the end of the day, the same aim.<sup>71</sup>

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<sup>71</sup> Mak, “Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order,” 189.

## 5. Hungary

Hungary's approach towards the ECHR system is best described as hesitant: there are statements pointing towards the acceptance of the supremacy of the ECHR and the ECtHR and phrases limiting the scope or applicability of these statements. In the Hungary part of my thesis I will first draw the history of the use of the ECHR and the practice of the ECtHR in the decisions of the Hungarian Constitutional Court (HCC). The second subsection deals with the current situation, where a number of decisions point towards a greater acceptance of the Convention and the Court's practice. The third subsection shortly summarizes the so called "reverse Solange doctrine", while the fourth focuses on the possibility of the Dutch way for the HCC to circumvent its restriction in economic legislation. At the same time, this last subsection draws conclusions.

Hungary is a dualist state regarding international law, which means that international law must be incorporated into the domestic legal system and does not apply right away after ratification, as it does in the Netherlands. The Hungarian system is quite welcoming towards international law: the supremacy of international law over sources other than the Fundamental Law (e.g. statutes, government and municipal decrees) is accepted since a very early decision of the HCC in 1993.<sup>72</sup> *Blutman* says that the supremacy of international *ius cogens* over the Constitution (now Fundamental Law) was possible to read out of that decision and is still the practice of the HCC, however it never enforced this provision, i.e. it never invalidated a provision of the Constitution for violating *ius cogens*. A 2011 decision extended the number of

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<sup>72</sup> Hungarian Constitutional Court, Case No. 53/1993. (X. 13.) (1993); László Blutman, "A nemzetközi jog érvényesülése a magyar belső jogban: két előkérdés [The enforcement of international law in the domestic legal system of Hungary: two preliminary questions]," in *A nemzetközi jog hatása a magyar joggyakorlatra*, ed. László Blutman, Erzsébet Csatlós, and Imola Schiffner, 2014, 112–113.

international sources of law which are, in theory, superior even to the Fundamental Law.<sup>73</sup> Even though these widely welcoming statements by the HCC exist, direct judicial review based on international law is extremely rare.<sup>74</sup> According to *Csatlós*, there were only two cases between 1990 and 2011 when the HCC exercised judicial review of a statute against the ECHR and only one of these two cases resulted in annulling the statute.<sup>75</sup> The HCC found a constitutional omission partially based on the ECHR (i.e. when the Legislator should have acted but failed to do so) in one additional case.<sup>76</sup>

The ECHR is part of the Hungarian legal system by its incorporation with XXXI. Law of 1993. It is possible therefore to invoke the ECHR before any domestic tribunal in any procedure.<sup>77</sup> As *Polgári* notes, the same is not automatically true however for the practice of the ECtHR.

#### a. The history of the use of the ECHR

At the dawn of the HCC in the 1990s, the ECHR and the ECtHR were mostly used as “supplementary arguments”.<sup>78</sup> There were signs at this early time that the HCC will use the ECHR as a special source, as *Polgári* noted. In a case concerning the publicity of Court

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<sup>73</sup> Hungarian Constitutional Court, Case No. 61/2011. (VII. 13.) (2011); Blutman, “A nemzetközi jog érvényesülése a magyar belső jogban: két előkérdés [The enforcement of international law in the domestic legal system of Hungary: two preliminary questions],” 112–113.

<sup>74</sup> The exception is Hungarian Constitutional Court, Case No. 6/2014. (II. 26.) (2014). where the HCC decided that the statutory provision on the 98 % tax violates the ECHR, *because* the ECtHR so decided. Chronowski, “Az Alaptörvény a többszintű európai alkotmányosság hálójában [The Hungarian Fundamental Law in the Multi-Level Network of European Constitutionalism],” 124–125.

<sup>75</sup> Erzsébet Csatlós, “Alkotmánybírói határozatok: ahol a nemzetközi jog mérce vagy felülvizsgált norma [Decisions of the Constitutional Court: where international law is the standard or the reviewed norm],” in *A nemzetközi jog hatása a magyar joggyakorlatra*, ed. László Blutman, Erzsébet Csatlós, and Imola Schiffner, 2014, 348–349.

<sup>76</sup> *Ibid.*, 381.

<sup>77</sup> Manuscript to be published in *Fundamentum*: Eszter Polgári, “Az Alkotmánybíróság esete az Európai Emberi Jogi Egyezményrel- Az elvárások és a gyakorlat [The case of the Constitutional Court with the European Convention on Human Rights - The expectations and the practice]” 2016, 8.

<sup>78</sup> László Sólyom, *Az Alkotmánybíráskodás Kezdetei Magyarországon*, Osiris Tankönyvek (Budapest: Osiris, 2001), 205.



proceedings, the HCC argued that it is a “constitutional requirement” to decide the question by taking into account the Convention.<sup>79</sup>

Csatlós analyzed the use of the HCC regarding international law (i.e. not only the ECHR).<sup>80</sup> The work supports the above claims, since the numbers show that the HCC mostly use international law and decisions of international bodies as supplementary. The classification is of course subjective to a certain extent, and the analysis is not focused on the ECHR or the ECtHR, but generally at international legal sources, however the far most used international source in the HCC’s practice is the ECHR and ECtHR judgments.<sup>81</sup>

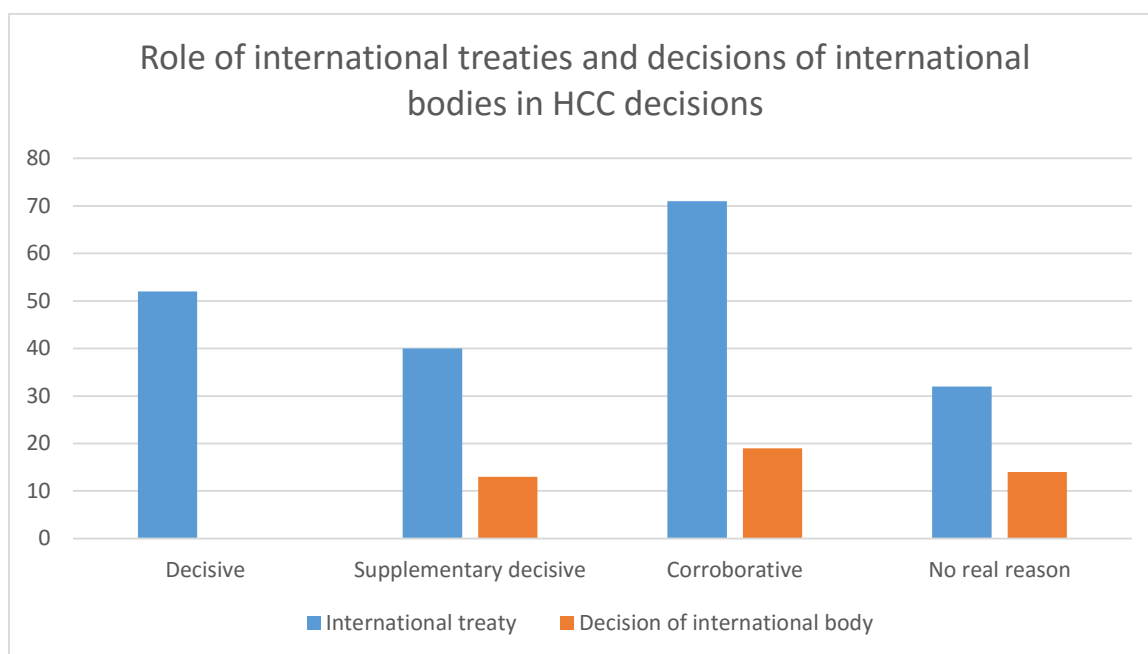


Figure 2: Role of international treaties and decisions of international bodies in HCC decisions<sup>82</sup>

<sup>79</sup> Hungarian Constitutional Court, Case No. 58/1995. (IX. 15.) (1995).

<sup>80</sup> The data is from Erzsébet Csatlós, “Alkotmánybírósági határozatok: a nemzetközi jog mint értelmezési támpont [Decisions of the Constitutional Court: international law as interpretative benchmark],” in *A nemzetközi jog hatása a magyar joggyakorlatra*, ed. László Blutman, Erzsébet Csatlós, and Imola Schiffner, 2014, 437.

<sup>81</sup> Zoltán Sente, “A nemzetközi és külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában 1999–2008 között [The Use of International and Foreign Precedents in The Practice of The Hungarian Constitutional Court between 1999-2008],” *Jog, állam, politika* 2, no. 2 (2010): 58. See the numbers at: Csatlós, “Alkotmánybírósági határozatok: a nemzetközi jog mint értelmezési támpont [Decisions of the Constitutional Court: international law as interpretative benchmark],” 409.

<sup>82</sup> The data is from Csatlós, “Alkotmánybírósági határozatok: a nemzetközi jog mint értelmezési támpont [Decisions of the Constitutional Court: international law as interpretative benchmark],” 437.

It is apparent from Figure 2 that before 2012 the HCC did not regard decisive a decision of any international body (including the ECtHR). It is also apparent, that until 2011, the HCC mainly used international law and decisions of international bodies as corroborative aides in the reasoning. The references to the ECHR or to the practice of the ECtHR were generally illustrative in nature or only provide additional legitimacy to the decision.<sup>83</sup>

The above findings are supported by the Judges of the HCC. In a 2008 interview several HCC judges said that ECtHR judgments are highly persuasive, but not authoritative.<sup>84</sup> The HCC generally used ECtHR decisions only as illustrations or to provide additional legitimacy for its decisions.<sup>85</sup> According to *Sonnevend*, in a book section published in 2010: “Whenever the effect of the Convention upon the domestic legal system is addressed, the central question is whether or not the Convention shall be considered as a binding standard of interpretation of constitutional rights. This question is answered almost unanimously in the negative”<sup>86</sup> He cites a 2000 interview with the first President of the HCC, László Sólyom, who argued that reference to the ECtHR is “merely of auxiliary nature besides the reasoning of the Constitutional Court, and that it might emphasize the importance of a specific rule of the Constitution.”<sup>87</sup>

#### **b. More authoritative use after the 2000s**

There are inconsistent statements from the HCC: there are examples that the Court says something favorable for the ECHR or the ECtHR, but then instantly feels obliged to emphasize its independence. When reading these sentences, we can understand that it is a transitory period.

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<sup>83</sup> Between 1999 and 2008, the HCC invoked the practice of the ECtHR almost in every tenth decision, Szente, “A nemzetközi és külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában 1999–2008 között [The Use of International and Foreign Precedents in The Practice of The Hungarian Constitutional Court between 1999-2008],” 55, 65.

<sup>84</sup> *Ibid.*, 64.

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

<sup>86</sup> Pál Sonnevend, “Report on Hungary,” in *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*, ed. Giuseppe Martinico (Groningen: Europa Law Publ, 2010), 262.

<sup>87</sup> *Ibid.*

From the 2000s the HCC gradually aligned with the ECtHR and in some cases the ECtHR was cited in a quasi-authoritative manner.<sup>88</sup> In the following, I will give the most important examples of this transition with marking the years when the certain events happened, to show the relative quick shift in the practice.

In a 2004 decision the HCC ruled that the interpretation of the ECHR by the ECtHR “forms and binds” the Hungarian jurisprudence.<sup>89</sup> *Blutman* says that this statement concerns the general practice or the ECtHR, not individual judgments against Hungary, since those are binding as per Article 46 of the Convention.<sup>90</sup> To support this argument, *Blutman* cites several decisions from the 1990s, where the HCC followed and cited the jurisprudence of the ECtHR in freedom of expression cases.<sup>91</sup>

*Kovács* and *Chronowski* argue that the illustrative use of ECtHR decisions in HCC judgments started to move to the acceptance of the ECtHR’s supremacy.<sup>92</sup> In 2011 the HCC ruled that “Concerning some fundamental rights, the Constitution formulates the essential substance of the fundamental right as laid down in certain international treaties (for example the Civil and Political Rights Covenant or the European Convention on Human Rights). ... Deriving from the principle of *pacta sunt servanda* ... the Constitutional Court must follow the

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<sup>88</sup> Szente, “A nemzetközi és külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában 1999–2008 között [The Use of International and Foreign Precedents in The Practice of The Hungarian Constitutional Court between 1999-2008],” 70; Sonnevend, “Report on Hungary,” 262.

<sup>89</sup> In Hungarian: “*alakítja és kötelezi*”, translation by the author. Hungarian Constitutional Court, Case No. 18/2004. (V. 25.) (2004).

<sup>90</sup> László Blutman, “A nemzetközi jog érvényesülése a magyar belső jogban: joghatások [The enforcement of international law in the domestic legal system of Hungary: legal effects],” in *A nemzetközi jog hatása a magyar joggyakorlatra*, ed. László Blutman, Erzsébet Csatlós, and Imola Schiffner, 2014, 135.

<sup>91</sup> *Ibid.*, 136.

<sup>92</sup> Péter Kovács, “International Law in the Jurisprudence of the Hungarian Constitutional Court: Opening of a New Tendency?,” in *Judgments of the European Court of Human Rights: Effects and Implementation*, ed. Anja Seibert-Fohr and Mark Eugen Villiger, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, volume 2 (Baden-Baden, Germany: Nomos ; Ashgate, 2014), 261; Chronowski, “Az Alaptörvény a többszintű európai alkotmányosság hálójában [The Hungarian Fundamental Law in the Multi-Level Network of European Constitutionalism],” 123–125.

Strasbourg practice and the level of protection of fundamental rights specified therein, even in cases where the same does not flow compellingly from the Court's »precedents«.”<sup>93</sup> This fragment shows that the HCC deems the ECHR and the ECtHR a unique source of interpretation of fundamental rights.

In 2012, the HCC went further and ruled that the interpretation of the ECHR, should be “founded on” the interpretation of the ECtHR, since the High Contracting Parties assigned the ECtHR with this task.<sup>94</sup> *Chronowski* emphasizes that this “founding” does not mean the acknowledgement of the binding nature of the judgments.<sup>95</sup> The ruling of the HCC is still important, since it can be read as a move towards the incorporation theory in the Netherlands: the HCC decided, that upon interpreting the ECHR, the practice of the ECtHR is of special importance. It is of course not identical of the incorporation theory, which says that the practice of the ECtHR is “incorporated” into the provisions of the Convention.

In 2013, the HCC ruled that based on an ECtHR decision, the HCC *may* defer from its previous case-law, but the HCC emphasized that the decisions of foreign courts do not override the practice of the HCC.<sup>96</sup> The Court established that the decision of the ECtHR is sufficient reason to overwrite *res iudicata* and the HCC may re-open cases based on an ECtHR decision.<sup>97</sup> The HCC felt necessary to instantly reiterate that this does not mean that an ECtHR judgment may automatically overwrite their practice.<sup>98</sup> This shows that the HCC moved forward: it

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<sup>93</sup> Hungarian Constitutional Court, Case No. 61/2011. (VII. 13.) (2011). Translated by the author.

<sup>94</sup> Hungarian Constitutional Court, Case No. 43/2012. (XII. 20.) (2012).

<sup>95</sup> Chronowski, “Az Alaptörvény a többszintű európai alkotmányosság hálójában [The Hungarian Fundamental Law in the Multi-Level Network of European Constitutionalism],” 123.

<sup>96</sup> Hungarian Constitutional Court, Case No. 4/2013. (II. 21.), 20, 25 (2013).

<sup>97</sup> Chronowski, “Az Alaptörvény a többszintű európai alkotmányosság hálójában [The Hungarian Fundamental Law in the Multi-Level Network of European Constitutionalism],” 124.

<sup>98</sup> *Ibid.*

established that an ECtHR decision is enough reason to overwrite *res iudicata*, but emphasizes that it is not yet superiority.

At the end of 2013 the HCC decided it “must refrain from” such an interpretation of a fundamental right enshrined in both the Fundamental Law and the Convention which would cause violation-finding decisions by the ECtHR.<sup>99</sup> The Court also reinforced, that Hungary cannot escape its international obligations even if it would flow from the Fundamental Law.<sup>100</sup> This decision can be read as a negative formulation of some kind of control of the ECtHR: the HCC did not said that the practice of the ECtHR binds it, but warned itself not to run into violations if it can be avoided.

The finding that the state cannot escape its international obligations even by relying on its constitution was not without antecedents. The ECtHR ruled in 2010 that Hungary is in violation of Article 3 of Protocol 1 of the ECHR (Right to free elections) by automatically disenfranchising the mentally disabled<sup>101</sup> and this rule was based on the Constitution in force at that time. Hungary obeyed the ruling. The new government, elected in 2010, wanted to enact a new constitution anyway, and the disenfranchisement provision was omitted from the new law. It means, that Hungary obeyed a ruling by amending the Constitution.

In 2014 the HCC ruled that in case of a contradiction between the decisions of the HCC and the ECtHR on the same issue, the decision of the ECtHR prevails.<sup>102</sup> In this case the HCC held, that the statutory provision on the 98 % tax violates the ECHR and is therefore annulled, *because* the ECtHR so decided. As *Chronowski* notes, however, the stakes were not high, since

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<sup>99</sup> Hungarian Constitutional Court, Case No. 36/2013. (XII. 5.), 28 (2013).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Alajos Kiss v. Hungary*, no. 38832/06 (European Court of Human Rights 2010).

<sup>102</sup> *Chronowski*, “Az Alaptörvény a többszintű európai alkotmányosság hálójában [The Hungarian Fundamental Law in the Multi-Level Network of European Constitutionalism],” 125; Hungarian Constitutional Court, Case No. 6/2014. (II. 26.), 22, 24 (2014).

the underlying statutory provision was already amended (the tax rate was decreased to 75 % from the previous 98 %), the HCC therefore only ordered the inapplicability of the previous provision for those (older) cases where it should have been applied. This shows the step-by-step approach of the HCC, i.e. that the Court moves cautiously and moved forward when the risk of resistance was low.

The debate on the role of the ECHR and the ECtHR in the Hungarian domestic system is lively and important, this is shown by the fact that the Minister of Justice asked for an abstract interpretation on the matter from the HCC.<sup>103</sup> The Minister of Justice asked the HCC for an abstract interpretation regarding whether Hungarian courts (i.e. courts other than the HCC) may or may not directly interpret and apply the ECHR and/or the decisions of the ECtHR. The question is whether ordinary courts must refer these questions to the HCC every time, or are obliged to follow ECtHR practice in their everyday work. The problem arose from a decision of the Hungarian Curia, where the Court sentenced someone for life sentence and ordered the review to be the earliest after 40 years, instead of a life sentence without parole, *because* of the decision of the ECtHR. The Curia went into interpreting the decision and derived the 40 years from the practice of the ECtHR.<sup>104</sup> The file for the abstract interpretation of the Fundamental Law was signed by the Minister and sent to the HCC less than a month after the Curia ruling. The decision of the HCC is awaited the earliest in the spring of 2016.<sup>105</sup>

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<sup>103</sup> László Trócsányi (Minister of Justice of Hungary), “Alaptörvény 24. cikk (2) bekezdés b) pontjának értelmezésére irányuló indítvány [Referral to interpret Article 24(2) Paragraph b) of the Fundamental Law], No. XX-AJFO/139/2/2015,” July 6, 2015.

<sup>104</sup> Curia (Hungary) Case No. Bfv.II.1812/2014 (2015).

<sup>105</sup> The source of the information on the timing is an informal correspondence with a clerk of a HCC Judge.

From these examples we can see the gradual approach of the HCC towards the acceptance of the supremacy of the ECHR and the ECtHR. It is interesting to note that the HCC moves towards this new doctrine in small steps, from time to time reinforcing its own prerogatives, but still gives more and more power to the ECtHR.

Figure 3 below shows the number of cases per year with reference to the ECHR and/or to the ECtHR since the ratification of the ECHR in 1993. The rise of the number of cases is apparent, especially after the entering into force of the Fundamental Law in 2012. While until the end of 2011, under nineteen years there were 191 cases with reference, in 2012-2015, under only four years there were 119 cases. This shows that the HCC become recently more willing to use and refer to the ECHR and to the ECtHR.

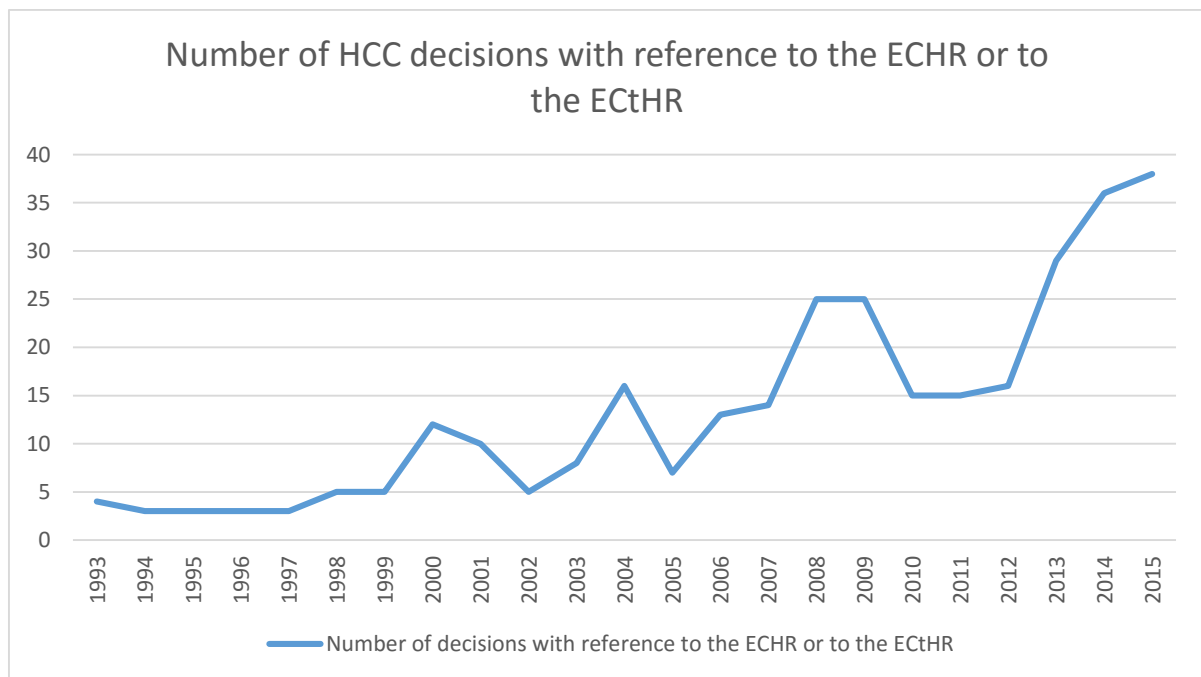


Figure 3: Number of HCC decisions with reference to the ECHR or to the ECtHR<sup>106</sup>

<sup>106</sup> The data was collected and the chart was made by the Author. The data was collected from the search engine of the webpage of the HCC (mkab.hu) on 16 March 2016. The search phrases were “emberi jogok és az alapvető szabadságok védelméről szóló” [on the protection of Human Rights and Fundamental Freedoms], “Emberi Jogok

The above numbers and the analysis of the HCC's practice might suggest that the Court is ready to accept the supremacy of the ECtHR but the picture is more complex. Several members of the HCC debates the acceptance of the ECHR or the ECtHR as sources for judicial review.<sup>107</sup> *Polgári* cites statements against the increased influence of the ECHR or the ECtHR from separate opinions of five judges of the HCC (there are fifteen judges according to the Fundamental Law).<sup>108</sup> Judge Bragyova, for example, stated that "the Convention does not bind the Constitutional Court" and the "case law of the [ECtHR] is ... an important source of inspiration when interpreting the Constitution, but the practice of the Court does not bind the Constitutional Court".<sup>109</sup> Judge Balsai argued that the practice of the ECtHR "cannot be identified with the Convention".<sup>110</sup> Judge Bragyova also argued that whenever possible, the HCC should first look at the Fundamental Law, and establish its decision on it, not at the ECHR.<sup>111</sup> This idea is similar to the early practice of the Dutch courts, when they looked for a comparable right in Dutch law, instead of using the ECHR. The arguments of the judges cited above show that the HCC is not unanimous when delivering more and more ECHR-friendly rulings: the dissents are evidences to possibly heated debates inside the HCC and future nomination to the Court can significantly alter the majority opinion.

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Európai Egyezménye" [European Convention on Human Rights] and "Emberi Jogok Európai Bírósága" [European Court of Human Rights]. The search is not case sensitive, and the result was checked for duplicate data. The results for 2016 were omitted, to provide comparable data for each year.

<sup>107</sup> Polgári, "Az Alkotmánybíróság esete az Európai Emberi Jogi Egyezményrel- Az elvárások és a gyakorlat [The case of the Constitutional Court with the European Convention on Human Rights - The expectations and the practice]," 18–20.

<sup>108</sup> Ibid., 20–22.

<sup>109</sup> Hungarian Constitutional Court, Case No. 166/2011. (XII. 20.) (2011) Separate opinion of Judge Bragyova.

<sup>110</sup> Hungarian Constitutional Court, Case No. 32/2014. (XI. 3.) (2014) Separate opinion of Judge Balsai.

<sup>111</sup> Hungarian Constitutional Court, Case No. 166/2011. (XII. 20.) (2011) Separate opinion of Judge Bragyova.



### c. The reverse Solange doctrine

*Von Bogdandy* and his co-authors argue, that because of the recent fall of respect for human rights in Hungary, international human rights treaties should be more intensively invoked by citizens to protect their rights. This proposal argues for the substitution of national procedures with international ones. They named the proposal as the “reverse Solange doctrine” which refers to the famous decision<sup>112</sup> of the German Federal Constitutional Court (FCC) in which the FCC established that *as long as* (in German: *solange*) EU law meets the fundamental rights protection standards of Germany, the FCC will not review EU law. The reverse doctrine, on the contrary, argues that *as long as* domestic constitutional provisions provide an acceptable level of human rights protection, the international instruments and mechanisms are not necessary to be used. If the domestic system fails to protect fundamental rights, the international level should be used.<sup>113</sup>

The reverse Solange doctrine might work as a theoretical underlying or a hidden rational for the HCC to follow the Dutch incorporation theory and to accept the full supremacy of the ECtHR. If the HCC understands its role as the protector of human rights, it might use this doctrine (explicit or implicit) to use the ECHR system more effectively for example in the economic legislation area, where its review rights – and therefore the level of protection for human rights offered by the Hungarian legal system – is formally restricted. Figure 3 above illustrated the increase of references to the ECHR and to the ECtHR after the entering into force of the Fundamental Law. One possible explanation is that the HCC noticed the lack of sufficient

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<sup>112</sup> Judgment of May. 29, 37 BVerfGE 271 (Solange I) (Federal Constitutional Court of Germany 1974).

<sup>113</sup> Armin von Bogdandy et al., “A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine,” in *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, ed. Armin von Bogdandy and Pál Sonnevend (Oxford: Hart [u.a.], 2015), 237.

domestic protection of human rights, but whether it is true or not, a detailed analysis of all 310 decisions would be necessary, what exceeds the possibilities of this thesis.

#### d. The ECHR: A way to circumvent the reduced review rights

Since 2010 the review rights of the HCC in economic legislation are restricted. After a unwelcomed decision of the HCC,<sup>114</sup> the newly elected Parliament amended the previous Constitution to bar the HCC from examining economic legislation. The case concerned a retroactive 98 % tax on high severance payments of previous government officials. The restriction was upheld in the new Fundamental Law as well which provides as follows in Article 37(4):

As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its powers set out in Article 24(2)b) to e), review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law *exclusively* in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. The Constitutional Court shall have the unrestricted right to annul also Acts having the above subject matters, if the procedural requirements laid down in the Fundamental Law for the making and promulgation of those Acts have not been met.<sup>115</sup>

It is apparent that under this provision the HCC cannot review economic legislation except against four areas of fundamental rights (dignity, protection of personal data, freedom of thought, rights related to Hungarian citizenship) as far as the debt exceeds 50 % of the GDP. This ratio is now around 80 % and it is unlikely to go below 50 % in the near future.<sup>116</sup> The

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<sup>114</sup> Hungarian Constitutional Court, Case No. 184/2010. (X. 28.) (2010) See summary at [http://codices.coe.int/NXT/gateway.dll/codices/precis/eng/eur/hun/hun-2010-3-009?fn=document-frameset.htm\\$f=templates\\$3.0](http://codices.coe.int/NXT/gateway.dll/codices/precis/eng/eur/hun/hun-2010-3-009?fn=document-frameset.htm$f=templates$3.0).

<sup>115</sup> Emphasis added.

<sup>116</sup> Johanna Fröhlich, "Constitutional Review and the Parliamentary Supermajority: The Hungarian Example," in *Constitutional Review and Democracy*, ed. Miodrag A. Jovanović, Democracy and the Rule of Law 5 (The Hague, the Netherlands: Eleven International Publishing, 2015), 274.

respect of the procedural requirements to adopt a law can be overseen by the HCC under the restrictions as well.

The original prohibition enacted in 2010 barred the HCC to review statutes even against international law, because it was phrased differently:

The Constitutional Court shall review the constitutionality of statutes on the [economic spheres] *only if* the petition refers *exclusively* to the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to the Hungarian citizenship under Article 69 of the Constitution.<sup>117</sup>

The HCC did interpret this provision as barring the HCC from reviewing statutes if the application argued under international law.<sup>118</sup> The new provision in the Fundamental Law, however, does not prohibit the review of statutes *vis-à-vis* international law. The provision, as cited above, limits the prohibition only to the powers of the HCC listed in Article 24(2)b) to e), and reviewing statutes against international law is listed in the f) paragraph (“The Constitutional Court ... f) shall examine any legal regulation for conflict with any international treaties;”).

The HCC generally interprets the limitations restrictively.<sup>119</sup> Right after the HCC annulled the retroactive 98 percent tax, the government not only amended the Constitution (as analyzed above), but adopted a new law with the same purpose and same ratio on the extremely high tax. The HCC interpreted the limitation of its powers restrictively: it annulled the new law on the 98 % retroactive tax as it violated human dignity. The HCC ruled that human dignity was

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<sup>117</sup> Act XX of 1949 on the Constitution of the Republic of Hungary (as of 2 January 2011), 1949, 32/A, [http://hunmedialaw.org/dokumentum/150/Act\\_XX\\_of\\_1949\\_not\\_in\\_force.pdf](http://hunmedialaw.org/dokumentum/150/Act_XX_of_1949_not_in_force.pdf). Emphasis added.

<sup>118</sup> Hungarian Constitutional Court, Case No. 219/B/2008. (2011).

<sup>119</sup> Péter Tilk, “Az Alkotmánybíróság és a pénzügyi tárgyú törvények vizsgálati lehetősége [The Hungarian Constitutional Court and the Possibility of Judicial Review in Economic Legislation],” *Fundamentum*, no. 1–2 (2014): 97–98; Fröhlich, “Constitutional Review and the Parliamentary Supermajority: The Hungarian Example,” 274–275.

violated because the tax authority wanted to collect tax on income on which tax has already been paid. The Court also ruled that human dignity inherently contains equality.<sup>120</sup>

The HCC does enforce the provision on its limited powers in many cases,<sup>121</sup> but generally interprets its powers widely. It ruled, for example, that “not all statutory provision concerning duties, or payments similar to duties, are exempted from constitutionality review, but only the law on duties.”<sup>122</sup> The HCC consequently found its power to review a provision on duties partially because that provision was not in the Law on Duties (other reason was that the nature of the payment was not entirely duty-like).<sup>123</sup> The HCC similarly ruled that “not all statutory provision concerning taxes are exempted from constitutionality review, but only central taxes”.<sup>124</sup> The reason of the limitation is, according to the HCC, to protect the income side of the central budget, and the provision at stake did not frustrated that.<sup>125</sup>

The above examples were to show the limited understanding of the restriction of the review rights of the HCC. The Court does maintain the limitation of its rights in a number cases: economic freedoms, right to liberty and security, rights of local governments, freedom of expression, right to education were no basis to review legislation under the restricted review scope.<sup>126</sup>

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<sup>120</sup> Hungarian Constitutional Court, Case No. 37/2011. (V. 10.) (2011) See summary at [http://codices.coe.int/NXT/gateway.dll/codices/precis/eng/eur/hun/hun-2011-2-005?fn=document-frameset.htm\\$f=templates\\$3.0](http://codices.coe.int/NXT/gateway.dll/codices/precis/eng/eur/hun/hun-2011-2-005?fn=document-frameset.htm$f=templates$3.0).

<sup>121</sup> Tilk, “Az Alkotmánybíróság és a pénzügyi tárgyú törvények vizsgálati lehetősége [The Hungarian Constitutional Court and the Possibility of Judicial Review in Economic Legislation],” 97.

<sup>122</sup> Hungarian Constitutional Court, Case No. 1252/B/2010. (2011). Translation by the author.

<sup>123</sup> Tilk, “Az Alkotmánybíróság és a pénzügyi tárgyú törvények vizsgálati lehetősége [The Hungarian Constitutional Court and the Possibility of Judicial Review in Economic Legislation],” 97.

<sup>124</sup> Hungarian Constitutional Court, Case No. 347/B/2009. (2011). Translation by the author.

<sup>125</sup> Tilk, “Az Alkotmánybíróság és a pénzügyi tárgyú törvények vizsgálati lehetősége [The Hungarian Constitutional Court and the Possibility of Judicial Review in Economic Legislation],” 97.

<sup>126</sup> Ibid., 99.

Given that the review rights of the HCC are restricted, but not regarding international law, and the increased acceptance of the supremacy of the ECHR and the practice of the ECtHR as analyzed above, a logical consequence could be for the HCC to use international human rights as a basis of review. It would be quite similar to the Dutch system: the Constitution (or the Fundamental Law) bars the courts from constitutional review totally in the Netherlands, and partially in Hungary. The Constitution, however, does not bar the courts from conventionality review.

The HCC reassured that its powers regarding review against international law is not restricted. It ruled in 2014 that “according to [Paragraph f) of Article 24 (2) of the Fundamental Law], the Constitutional Court »shall examine any legal regulation for conflict with any international treaties«. ... The provision limiting the review rights under Article 37 (4) ... does not have any effect to the review of statutes against international treaties.”<sup>127</sup> The case concerned the 98 percent tax-saga, and the HCC did annul the law because it violated the ECHR and the decision of the ECtHR. After reviewing the practice of the HCC on the interpretation of its limited powers, I was able to find only one more decision, in which the issue of review against international law was raised. This decision is from 2012, where the HCC noted in a side mark (literally: in brackets) the same, that the restriction does not affect the HCC’s review rights against international law.<sup>128</sup>

### **e. Conclusion for Hungary**

As before 1980 the Netherlands’ courts, the HCC is somewhat reluctant to directly apply the Convention or the practice of the ECtHR. Courts of both countries follow similar practices, for example finding a comparable provision in domestic law to avoid the necessity of using the

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<sup>127</sup> Hungarian Constitutional Court, Case No. 6/2014. (II. 26.), 20–21 (2014). Translation by the author.

<sup>128</sup> Hungarian Constitutional Court, Case No. 3353/2012. (XII. 5.), 58 (2012).

Convention. Both the courts of the Netherlands before 1980 and the HCC recently regarded the ECHR and the practice of the ECtHR a supplementary source of interpretation, or as a source of inspiration. From the small steps of the HCC taken towards the acceptance of the ECHR, we can see the same cautious approach what the Dutch courts followed: first they referred to the Convention, but found no violation of it, but later these references become harsher and ultimately the Dutch courts established a conventionality review system. Another example for the gradual approach is what I described under the “Cautious constitutionality review” in the Netherlands part. The Dutch courts did not render inapplicable a law in a case, only called the Legislator, to amend it, otherwise the Court may change its mind. Similarly, the HCC built its decision on an ECtHR ruling where the Hungarian statute was already amended, and the HCC only ordered its inapplicability for pending cases. These two examples also show the small step approach.

The HCC have not established the incorporation theory, but some decisions of the HCC points to this direction. It is, however, absolutely not sure, whether the HCC will take this step at all. I mentioned above that several Judges of the HCC are hostile towards the Convention and the ECtHR. It is not sure therefore, whether the ECHR will become a ‘Bill of Rights’ for the economic legislation in Hungary. *Von Bogdandy et al* argued that if the domestic remedies fail to protect human rights, recourse to international documents has to be made. This reverse Solange doctrine might be a theoretical framework or a supporting argument for the HCC to go down the Dutch path.

## 6. European Union

In the EU part I will first summarize the history of the use of the ECHR and ECtHR by the CJEU. Second, I will focus on the relationship of EU law and the Convention, since it is not as simple as regarding Member States. The third part deals with the consequences of the adoption of the EU Charter, and the fourth part mentions some examples for the confusion rising out of the dual system of human rights documents. The fifth subsection is the conclusion for the EU part.

### a. The history of the use of the ECHR

The EU and the ECHR has a long history. The joining of the EU to the Convention was raised as early as 1979, but did not happened ever since. All 28 Member States of the EU are members to the ECHR, what makes the connection very close. In this part I will discover the history of the use of the ECHR and the practice of the ECtHR by the CJEU. At the beginning, the provisions of the Convention were introduced to the EU legal order as general principles of law.

Prior to the Charter, the practice of the ECtHR and the ECHR itself was as well invoked in several cases by the CJEU. The Convention and the practice built on it was brought in the EU sphere through general principles. In the 1973 *Nold* case, the Court ruled in the famous Paragraph 13 as follows:

As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.<sup>129</sup>

The text refers to the ECHR when mentions “international treaties”, and the “collaborated” condition was involved because France did not yet ratified the ECHR at the time of the wording of the judgment.<sup>130</sup> The common constitutional tradition of the member states was already an established source of general principles of community law, and the CJEU in *Nold* completed it with international treaties.<sup>131</sup> As *Groussot* notes, the text of the above paragraph might suggest that international law is only a secondary source of the general principles, after constitutional traditions.

After this general acceptance of the ECHR, the first case where a provision of the ECHR was actually invoked was the *Rutili* decision of 1975.<sup>132</sup> In this case the Court used the ECHR as guidelines and inspiration, not as binding law. The Convention, however, might create binding obligations for the Member States through inspiring general principles.<sup>133</sup> After this decision both the applicants and the Advocate General referred to the ECHR more vividly, and the CJEU also opened.<sup>134</sup> Subsequently the CJEU established its standard practice that the ECHR supports the existence of a general principle together with the constitutional tradition of the Member States.<sup>135</sup>

In the following years the ECHR was not invoked alone, only as an additional source among the common constitutional tradition of the Member States. In the 1979 *Hauer* decision, for example, the CJEU explicitly cited Paragraph 13 from *Nold*,<sup>136</sup> and thus reinforced that the

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<sup>129</sup> Case C – 4/73, *Nold v Commission*, 13 (Court of Justice of the European Union 1973).

<sup>130</sup> *Groussot, General Principles of Community Law*, 62.

<sup>131</sup> *Ibid.*

<sup>132</sup> Case C – 36/75, *Rutili v Ministre de l’intérieur* (Court of Justice of the European Union 1975).

<sup>133</sup> *Groussot, General Principles of Community Law*, 63.

<sup>134</sup> *Ibid.*, 64.

<sup>135</sup> *Ibid.*, 65–66.

<sup>136</sup> Case C – 44/79 P, *Hauer v Land Rheinland – Pfalz*, 3 (Court of Justice of the European Union 1979).



ECHR is part of the general principles of EU law. The CJEU also explicitly referred to the relevant Article of the Convention,<sup>137</sup> but the ECHR alone was not yet enough ground for a judgment. The Court found that the relevant provision of the Convention “does not enable a sufficiently precise answer to be given to the question”, thus engaged in the analysis of the practice of the member states.<sup>138</sup> The CJEU therefore invoked the relevant provision of the ECHR only as additional, non-binding source of general principles.<sup>139</sup>

In 1986 the CJEU used stronger words. In the *Johnston* case, the CJEU ruled:<sup>140</sup>

That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 (Official Journal C 103, p. 1) and as the Court has recognized in its decisions, the principles on which that Convention is based *must* be taken into consideration in Community law.

*Groussot* summarizes that even after this decision the ECHR is not a direct source of EU law, however the CJEU generally follows its practice. The ECHR is a source for the CJEU to find the general principles of EU law, but once a provision of the ECHR is channeled into EU law as general principle, it is practically binding.<sup>141</sup>

The 1990s brought two changes: the first was that the Maastricht treaty in 1992 made the ECHR justiciable part of EU law, and the second that the CJEU barred the Union’s accession to the Convention for the first time in 1994. The text of the Maastricht treaty – now article 6(3) of the TEU – provided (and still provides) as:

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

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Groussot, *General Principles of Community Law*, 69–70.

<sup>140</sup> Case C – 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, 18 (Court of Justice of the European Union 1986). Emphasis added.

<sup>141</sup> Groussot, *General Principles of Community Law*, 71.

This provision is a codification of the CJEU's case-law. The Court deemed the ECHR as part of the general principles since *Nold*. In Opinion 2/94 the CJEU ruled that the EU cannot accede to the ECHR because the EU lacks competence to do so.<sup>142</sup> It meant that a Treaty amendment was required for the accession, and without that the relationship of the ECHR and EU law remained the same.<sup>143</sup> Following Opinion 2/94, there was an increased use of the ECHR and – what is a novelty – the ECtHR practice in CJEU jurisprudence.<sup>144</sup> In the *Grant* judgment, for example, the CJEU referred to the ECtHR practice on Article 6 (Right to a fair trial) regarding marriage and the status of homosexuals.<sup>145</sup> In *Montecatini*, the CJEU referred to ECHR jurisprudence on the presumption of innocence.<sup>146</sup> In *Connolly*, the CJEU reviewed the ECHR jurisprudence on Article 10.<sup>147</sup> According to *Groussot*, this more frequent use of ECHR jurisprudence increased even more between 2002 and 2006.<sup>148</sup> *Groussot* notes *Rechnungshof* and *Rundfunk* as an example, where the CJEU cited five ECtHR cases regarding Article 8 (Right to respect for private and family life).<sup>149</sup>

For 2010 the ECHR become “indisputably a central reference text for the protection of fundamental rights in the European Union.”<sup>150</sup> As *Uerpmann-Wittzack* notes, the formal status of the Convention has not changed, however the CJEU seems to enforce the fundamental rights guaranteed in the Convention more enthusiastically and the CJEU relies on the case law of the

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<sup>142</sup> Opinion 2/94, 36 (Court of Justice of the European Union 1996).

<sup>143</sup> Groussot, *General Principles of Community Law*, 72.

<sup>144</sup> *Ibid.*, 77.

<sup>145</sup> Case C – 249/96 P, *Grant v South – West Trains*, 33–34 (Court of Justice of the European Union 1998).

<sup>146</sup> Case C – 235/92, *Montecatini v Commission*, 176 (Court of Justice of the European Union 1999).

<sup>147</sup> Case C – 274/99, *Connolly v Commission*, 35 (Court of Justice of the European Union 2001). All examples from Groussot.

<sup>148</sup> Groussot, *General Principles of Community Law*, 79.

<sup>149</sup> Joined Cases C – 465/00, C – 138/01 and C – 139/01, *Rechnungshof and Rundfunk* (Court of Justice of the European Union 2003).

<sup>150</sup> Armin von Bogdandy, Jürgen Bast, and Robert Uerpmann-Wittzack, eds., “The Constitutional Role of International Law,” in *Principles of European Constitutional Law*, 2nd rev. ed (Oxford ; Portland, OR : München, Germany: Hart ; CH Beck, 2010), 147.

ECHR as it relies on its own.<sup>151</sup> It is significant, since the CJEU only cites cases from its own practice and now from the ECtHR.

As *Chalmers et al* argue the EU courts treat the judgments of the ECtHR as highly persuasive, but they may defer from it if it serves better the individual freedom or the collective interest in question.<sup>152</sup> The CJEU allows the departure from the ECtHR's case-law if necessary, but said that it should follow it when the Charter right corresponds to the ECHR right.<sup>153</sup>

### **b. Relationship of ECtHR and EU law**

While the binding nature of ECtHR judgments over Contracting Parties is not a question,<sup>154</sup> the same problem is of high importance regarding the EU, which is not a party to the ECHR. The EU did not join the Convention, however, it is a topic in the EU for almost 40 years.<sup>155</sup> After exhausting negotiations, the ECHR has been amended to make EU-accession possible.<sup>156</sup> The obstacle is, therefore, not on the side of the Council of Europe or the ECHR, but on the EU. In *Opinion 2/94*, the CJEU argued that the accession is impossible, because the EU lacks competences to do so. After the Treaty of Lisbon entered into force, the Treaty on the European Union provides that “the Union shall accede to the [ECHR]”. When everything looked fine, the accession was again barred by the CJEU as in 1994. In *Opinion 2/13* the CJEU raised objections against the accession and the whole process halted. It is not possible here to recite the objections of the CJEU, but the consequence of the *Opinion* is that the EU is still not a member to the ECHR. Article 6(3) of the Treaty on the European Union still provides, however, that the EU

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<sup>151</sup> *Ibid.*, 161.

<sup>152</sup> Anthony Arnall and Damian Chalmers, eds., *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), 262.

<sup>153</sup> Case C – 400/10 P, *McB v LE* (Court of Justice of the European Union 2010); Arnall and Chalmers, *The Oxford Handbook of European Union Law*, 262–264.

<sup>154</sup> *European Convention on Human Rights*, 1950, 46(1).

<sup>155</sup> Louise Halleskov Storgaard, “EU Law Autonomy versus European Fundamental Rights Protection—On *Opinion 2/13* on EU Accession to the ECHR,” *Human Rights Law Review* 15, no. 3 (September 2015): 487, doi:10.1093/hrlr/ngv012.

<sup>156</sup> *ECHR*, 59(2).

should accede to the ECHR. The relationship of the ECHR and EU law is, therefore, interesting from the side of the ECtHR as well, i.e. what the ECtHR says on EU law?

The following cases show examples for the most important questions of the relationship of the ECtHR and EU law. The *Matthews* case shows that the EU Member States are responsible for violations originating from the EU Treaties. The *Bosphorus* case shows that there is a presumption of compliance of EU law to the ECHR standard, and *M.S.S.* shows when such a presumption is rebutted. Because the EU is not a party to the ECHR therefore the measures of the Union may not be challenged before the ECtHR. EU law, however, when executed by the Member States, is indeed challengeable before the ECtHR. It accounts to most of the cases, since the EU lacks direct enforcing powers, and almost all of its policies are implemented by the Member States. The following three ECtHR cases will shed light on this relationship.

In the *Matthews* case,<sup>157</sup> the question was whether the lack of voting right of a Gibraltar resident on the European Parliamentary elections is consistent with the ECHR or not. The lack of voting right originated in the Act on Direct Elections of 1976, which excluded residents of Gibraltar from the EP elections. The ECHR ruled that such an exclusion is contrary to Article 3 of Protocol 1 of the Convention (Right to free elections). The Court argued that States are free to join any international organization but they are responsible for the violations of the ECHR in case the treaty establishing such an organization violate human rights.<sup>158</sup> As *Tridimas* notes this rationale is convincing: “If the Convention is to guarantee rights which are not theoretical or illusory, the Contracting Parties should undertake responsibility for any obligations which they voluntarily enter into just as they are for the exercise of their sovereign

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<sup>157</sup> *Matthews v the United Kingdom*, no. 24833/94 (European Court of Human Rights 1999).

<sup>158</sup> *Tridimas, The General Principles of EU Law*, 349.

powers within the domestic legal order”.<sup>159</sup> The Court therefore established that states are responsible for the EU Treaties’ compliance with the ECHR.

In the *Bosphorus* case<sup>160</sup> the ECtHR established the presumption of compliance of EU law with the ECHR. The case originated from a seizure of an aircraft leased by a Turkish airline from the Yugoslav national airline. The seizure was carried out by the Irish authorities under a sanctions regime against Yugoslavia. The Court found no violation, because the seizure was for a legitimate interest. The Court laid down general principles according to which a general presumption of compliance is established concerning EU law with the ECHR. This presumption exists only if the EU provides comparable protection of human rights as the ECHR and the ECtHR does, and is rebuttable. The presumption is limited, because it only exists if the state does not have any discretion. Should the state has discretion, all responsibility is on it. The Court thus ruled that EU law generally complies with the ECHR standards. The presumption is, however, rebuttable.

*M.S.S.*<sup>161</sup> is an example where this presumption is rebutted. The applicant was an Afghan refugee who was first registered in the EU in Greece, but subsequently he went to Belgium. Under the Dublin II regulation,<sup>162</sup> Belgium had to send him back to Greece, because he was registered there first. He contested the decision because of the bad conditions in Greece. The ECtHR held liable *both* Greece *and* Belgium. The significance of the judgment is that it means that EU law does not always provide sufficient protection of human rights. The Dublin II regulation provided that the transfer of the refugee is automatic. Under *M.S.S.*, states have to

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<sup>159</sup> Ibid.

<sup>160</sup> *Bosphorus Hava Yollari v Ireland*, no. 45036/98 (European Court of Human Rights 2005).

<sup>161</sup> *M.S.S. v. Belgium and Greece*, no. 30696/09 (European Court of Human Rights 2011).

<sup>162</sup> *Council Regulation (EC) No. 343 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (Dublin II)*, 2003.

assess whether the other state provides sufficient conditions for the refugees. The ECtHR therefore showed an example where the presumption of compliance was rebutted.<sup>163</sup> The CJEU in *N.S.* recognized as well that human rights (fundamental rights) may override the mutual trust between Member States in certain cases. The CJEU based its ruling on the Charter, however cited the *M.S.S.* case as well.<sup>164</sup>

### c. Consequences of the Charter

The existence of the Charter did not decreased the number of references to the ECHR or to the ECtHR case-law, but changed the type and manner of these references. After the entering into force of the Charter, the number of references to it drastically increased. Figure 4 below shows that the number of CJEU cases with reference to the ECHR or the ECtHR is increasing even though the Charter entered into force at the end of 2009. The peak year, with the highest number of references to the Convention or to the ECtHR was 2013 with 41 judgments. It is visible from Figure 4 that the number of ECHR references started to rise at the dawn of the 2000s. This growth was noticed by *Tridimas* as well.<sup>165</sup> According to *Tridimas*, not only quantitative but substantial changes also occurred after 2000. The CJEU's fundamental rights jurisprudence "broadened and deepened", and the Court allowed to be led by the ECtHR.<sup>166</sup> After 2013 there is a decrease, but it is not yet significant, and the trend is clearly the increased use of the ECHR by the CJEU. The Charter did no harm the number of references to the ECHR – but did harm the substantial power of the ECHR, as it will be seen below.

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<sup>163</sup> Storgaard, "EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR," 508.

<sup>164</sup> Joined Cases C – 411/10 and C – 493/10 *N.S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 111–113 (Court of Justice of the European Union 2011).

<sup>165</sup> Tridimas, *The General Principles of EU Law*, 342.

<sup>166</sup> *Ibid.*, 343.

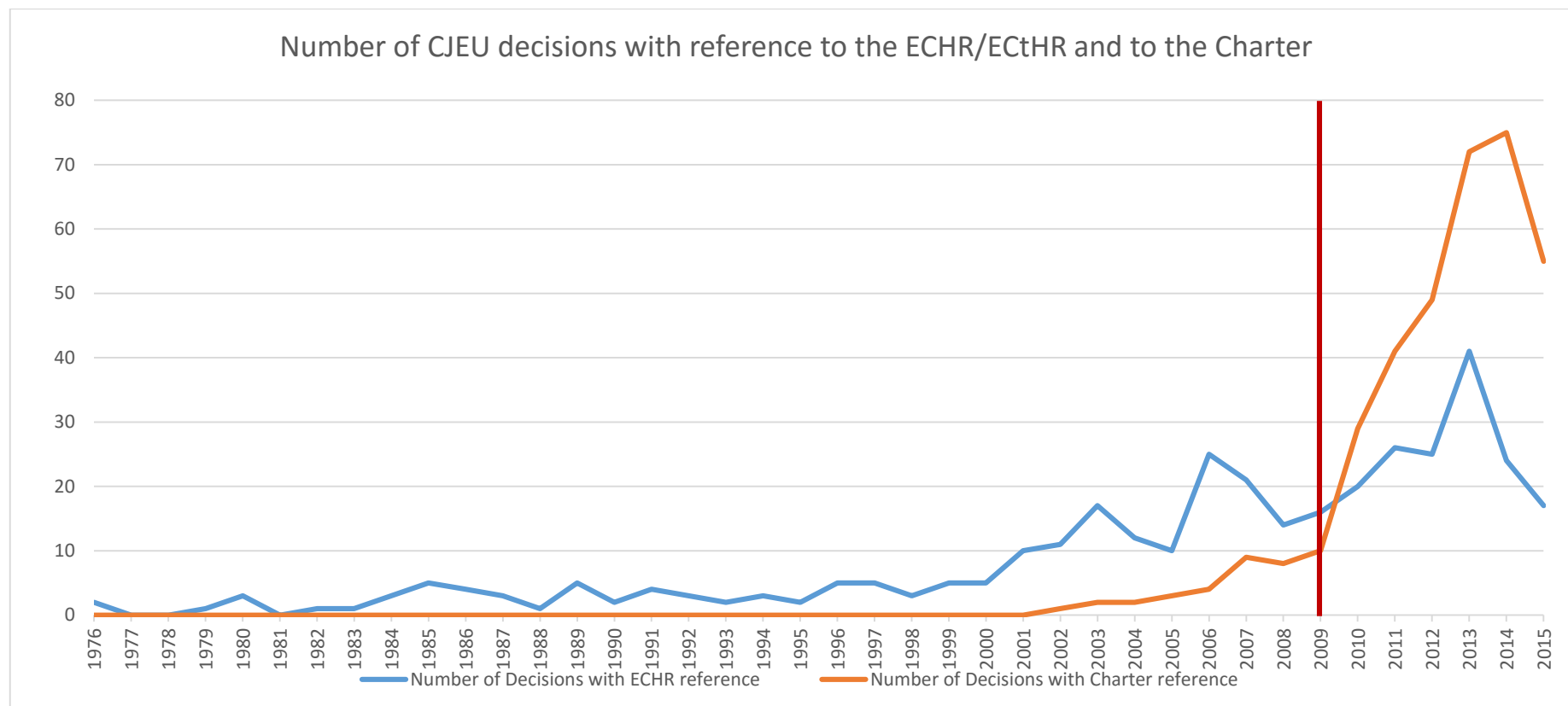


Figure 4: Number of CJEU decisions with reference to the ECHR/ECtHR and to the Charter<sup>167</sup>

<sup>167</sup> The data was collected and the chart was made by the Author. The data was exported from the Eur-Lex search engine on the judgments only of the Court of Justice (and the Court of Justice of the European Union) on 13 March 2016. The search phrases were “ECHR” or “ECtHR” or “European Convention on Human Rights” or “European Court of Human Rights” or “European Convention for the Protection of Human Rights” and “Charter of Fundamental Rights of the European Union”. The search is not case sensitive, and the result was checked for duplicate data. The results for 2016 were omitted, to provide comparable data for each year. Note that cases with reference to *both* the ECHR *and* the Charter are counted in both lines.

The increase in the mentioning of the Charter is shocking. After the “solemn proclamation” in 2000 of the Charter, for until its gaining binding force, there was a total of 39 mention of the Charter – far fewer, than of the ECHR (204). After 2009, however, the Charter was referred to 321 times, the ECHR only 153 times. It shows that – on a quantitative basis – the Charter is extremely more intensively used by the CJEU than the ECHR.

Figure 5 below shows the number of cases with reference *only* to the ECHR and *only* to the Charter and the number of cases with reference to both the ECHR *and* the Charter. It is apparent that the number of cases with reference solely to the ECHR was rising until the Charter’s enter into force in 2009 and declining sharply since then. As expected, the number of cases with reference only to the Charter rises. What is more interesting, that the use of the ECHR will not disappear, since the number of cases with reference to both texts also rises. It suggests that the CJEU prefers to use the documents together and refer to both when dealing with human rights. A reason for this might be that the ECHR is still a binding source of EU law through Article 6(3) of the TEU.



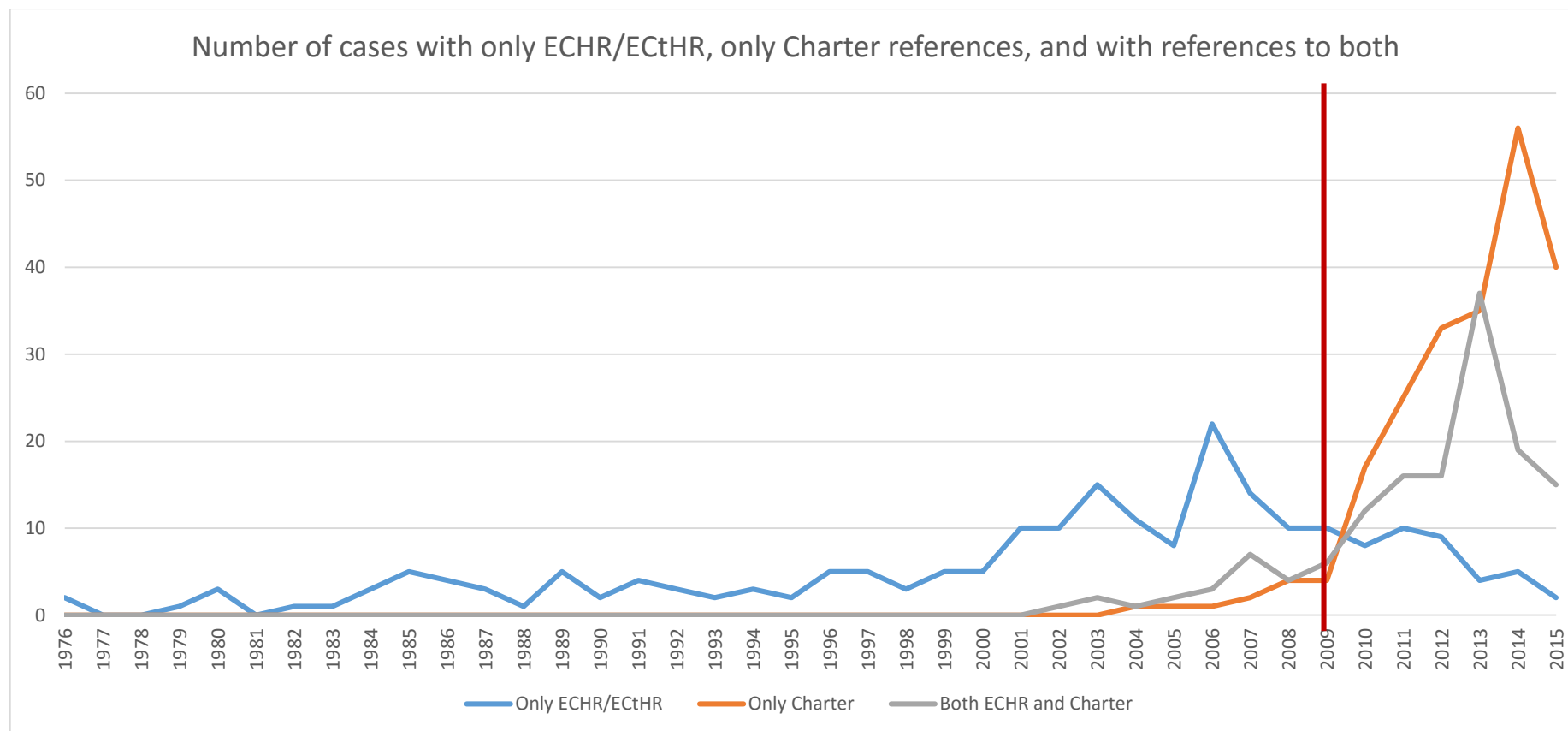


Figure 5: Number of cases with only ECHR/ECtHR, only Charter references, and with references to both<sup>168</sup>

<sup>168</sup> The same data were used as above. The EU legal order is unique, since it has a separate document for human (fundamental) rights. This is the reason why the figures above are possible to make in the EU legal order, and not possible regarding the Netherlands or Hungary. In these countries the search for the term “Constitution” and “ECHR” in Court decisions would not provide comparable data, since the Constitution in both countries contains far more provisions than only human rights.

*De Búrca* analyzed the cases where the CJEU *substantially* used the Charter between 2009 and 2012 and found a decline in the *substantial* use of the ECHR.<sup>169</sup> It is important to note, that he did a substantial analysis (i.e. analyzing all decisions whether the mentioning of the Charter was part of a substantial argument or not), while Figure 5 above shows any references to the ECHR (whether substantial or tangential). He found that the CJEU engaged in substantial analysis of the Charter in 27 cases and among these decisions, the CJEU referred to the ECtHR case-law in 10 cases and approved this case-law in all of them. *De Búrca* notes that “whereas the Court used to cite the ECHR significantly more often than the Charter in cases involving human rights claims, the reverse is now the case.”<sup>170</sup> He also noted that “the Court does not cite or draw in any significant way on the relevant human rights jurisprudence of ... the European Court of Human Rights ... when interpreting provisions of the Charter. ... [The CJEU] has interpreted the provisions of the Charter usually in isolation from the jurisprudence emerging from other human rights instruments with similar provisions.”<sup>171</sup>

Figures 4 and 5 above and the explanation illustrated a change in the CJEU’s practice: previously it used the ECHR (and the ECtHR’s practice) more often, but since the Charter entered into force, the CJEU uses primarily the human rights instrument of the EU. It is understandable that a Court refers to its “own” human rights document more enthusiastically than to a document to which it is not even a party. The CJEU always emphasized the autonomy

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<sup>169</sup> Grainne De Búrca, “After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?,” *Forthcoming, Maastricht Journal of European and Comparative Law* 20 (2013): 134–135.

<sup>170</sup> *Ibid.*, 175.

<sup>171</sup> *Ibid.*, 176. *De Búrca* lists a number of possible reasons why the CJEU might be reluctant to cite the practice of other courts (176-178).

and unique nature of EU law – here it just does the same by referring to the EU human rights instrument, instead of a “foreign” one.

#### d. Divergent interpretations of the same provision

It is indeed problematic if there is more than one interpretations of a single rule and thus legal certainty does not prevail. It happened in the CJEU’s *Hoechst* case,<sup>172</sup> on the one hand, and the *Chappell*<sup>173</sup> and *Niemietz*<sup>174</sup> cases of the ECtHR, on the other. Both courts interpreted Article 8 (Right to respect for private and family life) of the ECHR. While the CJEU ruled that it does not cover legal persons in 1989, a few years later the ECtHR ruled that it does.<sup>175</sup> In *Niemietz*, the ECtHR explicitly cited the *Hoechst* case and the CJEU’s restrictive interpretation of Article 8.<sup>176</sup> In a 1999 case the Court of First Instance explicitly refused to follow the ECtHR practice (*LVM* case):<sup>177</sup>

In so far as the pleas and arguments put forward today by LVM and DSM are identical or similar to those put forward at that time by *Hoechst*, the Court sees no reason to depart from the case-law of the Court of Justice. That case-law is, moreover, based on the existence of a general principle of Community law, as referred to above, which applies to legal persons. The fact that the case-law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR to legal persons has evolved since the judgments in *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica* therefore has no direct impact on the merits of the solutions adopted in those cases.

Three years after, however, the CJEU aligned with the ECtHR. In the *Roquette Frères* case the Court reiterated the ECtHR practice, according to which the home in some cases may be

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<sup>172</sup> Joined Cases C – 46/87 and C – 227/88, *Hoechst v Commission* (Court of Justice of the European Union 1989).

<sup>173</sup> *Chappell v the United Kingdom*, no. 10461/83 (European Court of Human Rights 1989).

<sup>174</sup> *Niemietz v Germany*, no. 13710/88 (European Court of Human Rights 1992).

<sup>175</sup> Groussot, *General Principles of Community Law*, 83; Tridimas, *The General Principles of EU Law*, 342.

<sup>176</sup> *Niemietz v Germany*, no. 13710/88, 80 (European Court of Human Rights 1992).

<sup>177</sup> Case T – 305/94, *LVM v Commission*, 419–420 (Court of First Instance 1999). This part of the judgment was not appealed, therefore the CJEU did not take a stance on it. Case C – 238/99, *LVM v Commission*, 251 (Court of Justice of the European Union 2002).

also a business premise as well (especially regarding self-employed persons), and that Article 8 does not protect business spaces as it protects private areas.<sup>178</sup>

Another divergence occurred regarding self-incrimination.<sup>179</sup> In 1989 the CJEU ruled in *Orkem* that it is against Article 6 (Right to a fair trial) to order someone to provide evidence against himself or herself.<sup>180</sup> Four years later, in 1993 the ECtHR concluded to the contrary: Article 6, in the ECtHR's interpretation, comprises the right to remain silent and not to help the investigation.<sup>181</sup>

#### e. Conclusion for the EU

If the EU were a party to the Convention, the situation would be simple: the EU must obey the ECHR and the decisions of the ECtHR. This is, however, not the case. All difficulty arises from the lack of accession, recently barred partly by the CJEU. The Convention and the practice of the Court is still channeled into the EU legal order. It happened first through general principles, later a formal legal basis was established for this end. Prior to the binding force of the Charter, the most important and most invoked human rights document in the CJEU's practice was the Convention. It changed, however, drastically after 2009, when the Charter gained legal force – as shown by Figures 4 and 5 above. The parallel existence of the ECHR and the Charter, and the divergent formulation of some same rights cause problems in legal certainty, where the CJEU interprets a right different from the interpretation of the ECtHR.

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<sup>178</sup> Case C – 94/00, *Roquette Frères v Commission* (Court of Justice of the European Union 2002); Tridimas, *The General Principles of EU Law*, 343.

<sup>179</sup> Tridimas, *The General Principles of EU Law*, 344.

<sup>180</sup> Case C – 374/87, *Orkem v Commission* (Court of Justice of the European Union 1989).

<sup>181</sup> *Funke v France*, no. 10828/84 (European Court of Human Rights 1989).

## 7. Conclusion

In this work I explained three approaches towards the ECHR and the ECtHR: one extremely welcoming, one hesitant and a third saying goodbye. Dutch courts use the ECHR and deem the decisions of the ECtHR as being part of the Convention (the incorporation doctrine). The Dutch courts exercise judicial review based on the ECHR. Hungary is best described as hesitant: decisions from the last years point towards the greater acceptance of the supremacy of Strasbourg over the Hungarian constitutional Court, but a significant minority of judges disagree and the practice is not yet conclusive. I argued that the HCC may circumvent its reduced review rights through the Convention (conventionality review), following the Dutch example. The EU says goodbye to the Convention: the Court of Justice of the European Union used the Convention and the practice of the ECtHR extensively, but since the EU Charter gained legal force, the CJEU refers to it more often and abandons the ECHR and the ECtHR.

The overview of the Netherlands, Hungary and the EU approach also highlights the importance of domestic factors. The approach of the CJEU is interesting because the references to the practice of the ECtHR started even before the EU had any formal legal relationship with the Convention or the ECtHR. The CJEU channeled it into EU law through general principles of law, which suggests the high importance of the ECHR in Europe. In the Netherlands, there is no possibility of constitutional review, therefore the courts established their conventionality review system. In Hungary, the Legislator restricted the review rights of the Constitutional Court, and at the same time this body is more and more open towards the ECHR – the result might be the establishment of a Dutch-like conventionality review system in the restricted area. The practice of the HCC, however, is not yet conclusive, and there are more than one judges who oppose the acceptance of the supremacy of the ECtHR.

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