

# The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular

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## Abstract

The impact of the European Court of Human Rights (hereinafter also the "ECtHR" or the "Strasbourg Court") on national law is considered the key cause of the effectiveness of the Strasbourg human rights regime. However, recent examples of backlash against the ECtHR show that compliance with its judgments is not automatic and that domestic institutions are not mere "transmission belts" of the Strasbourg jurisprudence. Even constitutional courts, until recently considered the major allies of the Strasbourg Court,

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have started to resist and sometimes even block full implementation of the ECtHR's judgments. The aim of this paper is to specify the significance of the domestic actors in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also "ECHR" or "Convention") system's architecture and to provide a framework of factors affecting the particular actors' treatment of ECHR rights. It does so in four steps. First, it explains that the Strasbourg system depends on domestic actors in two ways: (1) domestic institutions act as the "diffusers" of the Strasbourg case law by establishing a general domestic rule respecting the demands of the ECtHR; and (2) they further shape this rule by its enforcement in day-to-day practice and by doing so they fulfil the "filtering" role vis-à-vis the ECtHR. But this is an ideal scenario. The second part of this paper shows that in real life implementation of the ECtHR's case law is a multi-faceted process in which various actors with various interests engage with the Strasbourg jurisprudence. Third, this paper explains the role of the domestic judiciary in implementing the Strasbourg case law and places constitutional courts within the broader judicial context. Finally, it zeroes in on constitutional courts and their complicated relationship with the Strasbourg Court. More specifically, it argues that a constitutional court must be understood as one of the many domestic "meso-level" actors that interact with each other within the State ("macro-level"), but it also consists of several "micro-level" actors within the constitutional court itself. Only if we grasp all of these three levels can we see the full picture of how constitutional courts influence the dynamics of the implementation process.

## I. Introduction

The authority of the European Court of Human Rights has changed profoundly since its establishment. At the beginning of its functioning, the Strasbourg Court faced the problem of limited caseload and the reluctance of certain signatory parties to accept its jurisdiction. By the 1980s, all signatory parties had recognised the competence of the ECtHR to receive petitions from individuals, the number of applications rose exponentially and the authority of the ECtHR increased significantly.<sup>1</sup> Towards the end of the

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<sup>1</sup> See *E. Bates*, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, 2010; *M. R. Madsen*, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, in: *Law & Contemp. Probs* 79 (2016), 141 et seq.; *M. R. Madsen*, *The Protracted Institutionalization of the Strasbourg Court: From*

millennium, the Strasbourg Court turned into a permanent international court with a caseload comprising tens of thousands of applications every year, a court representing “*the most effective human rights regime in the world*”.<sup>2</sup>

Nowadays, the ECtHR delivers rulings which deal with crucial legal, political and societal issues of our day and influences domestic legal orders of the Council of Europe (hereinafter also “CoE”) member states on a regular basis. In reaction to the judgments of the ECtHR, the CoE member states often amend legislation, change domestic case law, alter their public policies and even revisit the fundamental features of their constitutional and political systems.<sup>3</sup> This development allowed the former President of the Strasbourg Court *Rolv Ryssdal* to claim that the judgments of the Strasbourg Court had “*not only generally but always been complied with by the Contracting States concerned*”.<sup>4</sup>

However, a more detailed analysis of the situation shows that since the second half of the 1990s, the overall rate of compliance with the ECtHR’s judgments has decreased<sup>5</sup> and the Strasbourg human rights regime has witnessed more instances of lengthy compliance processes that divided domestic actors. Some of those processes resulted in partial or minimalist compliance and even in overt non-compliance with the ECtHR’s case law.<sup>6</sup>

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Legal Diplomacy to Integrationist Jurisprudence, in: J. Christofersen/M. R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, 2013, 43 et seq.

<sup>2</sup> A. Stone Sweet/H. Keller, *The Reception of the ECHR in National Legal Orders*, in: A. Stone Sweet/H. Keller (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, 3.

<sup>3</sup> See e.g. T. Barkhuysen/M. L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, in: T. Christou/J. P. Raymond (eds.), *European Court of Human Rights: Remedies and Execution of Judgments*, 2005, 1 et seq.; E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, 2008; L. Helfer/E. Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, in: IO 68 (2014), 77 et seq.; D. Kosar, *Policing Separation of Powers: A New Role for the European Court of Human Rights?*, in: *Eu Const. L. Rev.* 8 (2012), 33 et seq.; and D. Kosar/L. Lixinski, *Domestic Judicial Design by International Human Rights Courts*, in: *AJIL* 105 (2015), 713 et seq.

<sup>4</sup> D. Harris/M. O’Boyle/E. Bates/C. Buckley, *Law of the European Convention on Human Rights*, 2014, 30.

<sup>5</sup> For the discussion of decreasing rates of compliance with the ECtHR’s judgment see Y. Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, in: *AJIL* 106 (2012), 225 et seq., 262 et seq.

<sup>6</sup> Various reasons that may explain this resistance have been put forward: see e.g. D. Anagnostou/A. Mungiu-Pipidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter*, in: *EJIL* 25 (2014), 205 et seq.; C. Hillebrecht, *Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights*, in: *Human Rights Review* 13 (2012), 279 et seq.

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This combination of floods of new cases and the growing resistance to the Strasbourg case law pushed the ECtHR between a proverbial “rock and a hard place”. On the one hand, signatory parties identified failures and delays in the execution and full implementation of the ECtHR’s judgments, resulting in a high number of repetitive cases and the overload of the Strasbourg Court, as the major challenges for the practical functioning of the system of the Convention.<sup>7</sup> This voice calls for a more proactive implementation of Strasbourg jurisprudence and more profound changes to domestic legal systems. On the other hand, the increasing impact of the Strasbourg Court on national legal systems led to the domestic criticism of the ECtHR, which is no longer limited to discontent with particular decisions only, but opens up the debates questioning the legitimacy of the Strasbourg Court as such.<sup>8</sup> This voice calls for less intervention by the ECtHR into domestic law.

These two demands show that implementation of the ECtHR’s case law is crucial both for the Strasbourg Court’s legitimacy and the practical functioning of the entire Convention system. The impact of the ECtHR on national legal systems and its ability to induce systemic change of domestic policies is thus a critical point of the architecture of the system established by the Convention. However, the ECtHR, despite being labelled as the most effective international human rights court in the world, is still only an international court with no influence over “either the sword or the purse”.<sup>9</sup> International courts are empowered to interpret the law in their rulings, but they have no power to execute their decisions and have only few formal instruments to force governments to comply with their rulings.<sup>10</sup>

This paper argues that the effectiveness of the ECtHR and of the entire regime established by the Convention to a large extent depends on the co-

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<sup>7</sup> See the respective declarations adopted at the High level conferences on the Future of the European Court of Human Rights in Interlaken (2010), Izmir (2011), Brighton (2012) and Brussels (2015). See also the annual reports on the supervision of the execution of the ECtHR’s judgments by the Committee of Ministers, available at: <<http://www.coe.int>>.

<sup>8</sup> *S. Flogatis/T. Zwart/J. Fraser* (eds.), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength*, 2013; *B. M. Oomen*, *A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands*, in: *The International Journal of Human Rights* 20 (2016), 407 et seq.; *P. Popelier/S. Lambrecht/K. Lemmens* (eds.) *Criticism of the European Court of Human Rights*, 2016; *E. Bates*, *Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg*, in: *HRLR* 14 (2014), 503 et seq.

<sup>9</sup> *A. Hamilton*, *Federalist No. 78*, 2003, 464.

<sup>10</sup> *H. H. Koh*, *How Is International Human Rights Law Enforced?*, in: *Ind. L. J.* 74 (1999); *O. Hathaway/S. Scott*, *Outcasting: Enforcement in Domestic and International Law*, in: *Yale L.J.* 121 (2011), 252 et seq.

operation of domestic authorities and their willingness to give effect to the judgments of the Strasbourg Court. In other words, the key to the current problems of the Strasbourg human rights regime must be found at the domestic level. This claim has already been made by others.<sup>11</sup> The novelty of this paper is that it offers a more nuanced explanation of how the domestic level matters for the implementation of the ECtHR's judgments and for the Convention system as such. The aim of this paper is to specify the significance of the domestic actors in the ECHR system's architecture and to provide a framework of factors affecting the particular actors' treatment of ECHR rights.

More specifically, this paper shows that regarding the implementation of the ECtHR's case law, the domestic authorities play two crucial roles. First, they act as "diffusers" when they adopt general rules reflecting the Strasbourg Court's case law and thus diffuse the conclusions of the ECtHR towards all the rights holders at the national level. Second, when these general ECtHR-inspired rules are invoked, the domestic authorities apply and enforce them and, thereby, act as "filters" vis-à-vis the Strasbourg Court. However, this is just the model. We problematise this model and show that these two roles of the domestic authorities cannot be taken for granted as they ultimately depend on the involvement of various domestic actors in the implementation processes, attitudes of these domestic actors towards the ECtHR's judgments, their mutual relations, their power within the domestic system and their ability and readiness to act. Building on these insights we make the case for studying the roles and significance of *particular* actors within the processes of the implementation of the ECtHR's case law.

Subsequently, we single out constitutional courts, because they have a great potential to contribute to the embeddedness of the Strasbourg Court's case law at the national level and at the same time their role within the Convention regime has been under-theorised. We show that the forming of the constitutional courts' relationships with the Strasbourg Court is a complex process affected by factors located at different levels. The constitutional courts are constrained by the fundamental features of the polity (macro-level factors). Within this structure they interact with other actors involved in the processes of implementation of the ECtHR's case law (meso-level factors), and these interactions essentially influence the outcomes of implementation processes. Nevertheless, the very position of the constitutional

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<sup>11</sup> See e.g. C. Hillebrecht (note 6), 279 et seq.; C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, 2014, in particular at 25; and D. Anagnostou/A. Mungiu-Pippidi (note 6), 205 et seq., in particular at 221.

courts in these interactions is created by players acting within the constitutional courts themselves (micro-level factors).

This paper proceeds in seven parts. After this introduction (Part I), Part II briefly sketches the basic features of the domestic effects of the Strasbourg judgments, namely the *inter partes* effect and the so-called *res interpretata* effect. Part III presents the typical roles domestic authorities may play in the processes of the ECtHR's case law implementation and shows their "diffusing" and "filtering" function vis-à-vis the Strasbourg Court. Part IV problematises the model of diffusers and filters, and provides for a more nuanced account of the domestic actors' significance in the Convention system. Part V identifies the various actors within the domestic judiciaries who may influence the implementation processes. Part VI zeroes in on the role of constitutional courts in implementing the Strasbourg case law. Part VII concludes.

## II. The Domestic Effects of the Strasbourg Case Law

The Strasbourg Court's case law has had a major influence on the domestic law of most of the CoE member states in various areas.<sup>12</sup> The ECtHR's judgments regularly not only influence the legal order of a respondent state, the direct addressee of the ECtHR's ruling, but also provokes reforms in states which were not party to the proceedings.

This Part briefly explains the legal grounding of the ECtHR's domestic impact. First, it discusses the *inter partes* binding force of the ECtHR's judgments and the recent shift from the ECtHR's classical remedial strategy to a more proactive specification of individual and general measures required from the "convicted" signatory parties. Subsequently, it deals with the doctrine of *res interpretata* effect which explains what normative implications the Strasbourg jurisprudence has for the States which were not party to the original dispute.

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<sup>12</sup> See e.g. *M. Grigolo*, Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject, in: EJIL 14 (2003), 1023 et seq.; *B. Algan*, The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey, in: GLJ 9 (2008), 2237 et seq.; *N. Krisch*, The Open Architecture of European Human Rights Law, in: M.L.R. 71 (2008), 183 et seq.; *P. Johnson*, An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights, in: HRLR 10 (2010), 67 et seq.; *C. Hillebrecht*, Domestic Politics (note 11); *L. Helfer/E. Voeten* (note 3), 77 et seq.; and *D. Kosař*, Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design, in: Utrecht Law Review 13 (2017), 112 et seq. See also supra note 3.

## 1. *Inter partes* Binding Force of the ECtHR's Judgments

The Convention contains several provisions regulating the execution of the ECtHR's judgments. Art. 41 ECHR grants the Strasbourg Court the power, if necessary, to award the just satisfaction. Moreover, Art. 46(1) ECHR requires the signatory parties to abide by the final judgment of the ECtHR in any case to which they are party. The effect of this provision reaches beyond the situation of a particular applicant who was successful at the Strasbourg Court. The Convention's purpose was not only to redress concrete wrongs committed by the States, but also to secure certain minimal standards of human rights protection within the territory of the parties to the Convention.<sup>13</sup>

As a result, Art. 46(1) ECHR urges the states to respond to the judgment of the ECtHR in the case of the individual applicant, and on the general level, if necessary, in order to prevent future human rights violations of the same kind. Accordingly, the Strasbourg Court held that

“As regards the requirements of Article 46, it should first be noted that a respondent State found to have breached the Convention or its Protocols is under an obligation to abide by the Court's decisions in any case to which it is a party. In other words, a total or partial failure to execute a judgment of the Court can engage the State Party's international responsibility. The State Party in question will be under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded.”<sup>14</sup>

This means that the responding State faces three levels of obligations resulting from the “conviction” of the State by the Strasbourg Court: (1) the duty to pay just satisfaction to the injured party, if awarded by the ECtHR (Art. 41 ECHR); (2) the duty to adopt individual measures, and (3) the duty

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<sup>13</sup> J. Gerards, *The European Court of Human Rights and National Courts: Giving Shape to the Notion of “Shared Responsibility”*, in: J. Gerards/J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law*, 2014, 19.

<sup>14</sup> ECtHR [GC], *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, judgment of 30.7.2009, Application No. 32772/02, § 85. See also e. g. ECtHR, *Castillo Algar v. Spain*, judgment of 28.10.1998, Application No. 28194/95, § 60; ECtHR [GC], *Assanidze v. Georgia*, judgment of 8.4.2004, Application No. 71503/01, § 198; and ECtHR [GC], *Maestri v. Italy*, judgment of 17.2.2004, Application No. 39748/98, § 47.

to adopt general measures to avoid repetition of the rights violation. As the duty to pay just satisfaction does not require changes in the domestic law, we leave it to one side. The necessity to adopt individual measures may in some instances be important for changes in the domestic legal order as compliance with certain individual measures might require systemic changes in the domestic law.<sup>15</sup> However, it is the duty to adopt general measures that is essential for the purposes of this paper, as it regularly implies amending domestic legislation, revisiting the domestic case law and changing administrative practice. The ECtHR made it clear – the member states have committed themselves to adjust their legal orders so that they comply with the Convention.<sup>16</sup>

The ECtHR often declares that it cannot engage in the abstract or concrete review of legislation and that it does not have the power to quash the piece of legislation in question.<sup>17</sup> The Strasbourg Court therefore limits its review on the result of the law's application and on declaring whether there was a violation of the Convention or not.<sup>18</sup> This self-perception led to the ECtHR's restrained approach towards remedies in which the Strasbourg Court has concentrated solely on finding the violation of the Convention and left the rest to the States. Under this traditional model of remedies, the ECtHR would not specify what measures should be taken to comply with its judgment as the States would be seen as better placed to decide what the appropriate way to prevent repetition of the human rights violation is.<sup>19</sup>

This practice has changed though. In recent years, the Strasbourg Court has stepped beyond its classical remedial strategy and started indicating

<sup>15</sup> For further details see *J. Jahn*, Ruling (In)directly Through Individual Measures? Effect and Legitimacy of the ECtHR's New Remedial Power, in: HJIL 74 (2014), 26 et seq.

<sup>16</sup> See e.g. *Maestri v. Italy* (note 14); ECtHR [GC], *Apicella v. Italy*, judgment of 29.3.2006, Application No. 64890/01, § 123; ECtHR, *Yordanova and others v. Bulgaria*, judgment of 24.4.2012, Application No. 25446/06, § 163; ECtHR [GC], *Paksas v. Lithuania*, judgment of 6.1.2011, Application No. 34932/04, § 119.

<sup>17</sup> See Art. 34 ECHR; and e. g. ECtHR [GC], *F. v. Switzerland*, judgment of 18.12.1987, Application No. 11329/85, § 43; ECtHR [GC], *Marckx v. Belgium*, judgment of 13.6.1979, Application No. 6833/74, § 58.

<sup>18</sup> See note 17 above.

<sup>19</sup> *D. Hawkins/W. Jacoby*, Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights, in: Journal of International Law and International Relations 6 (2010), 40 et seq.; *C. Hillebrecht* (note 6), 281 et seq. In the case-law of the Strasbourg Court see e. g. ECtHR [Plenary], *Marckx v. Belgium* (note 17); ECtHR [Plenary], *Belilos v. Switzerland*, judgment of 29.4.1988, Application No. 10328/83, § 78; ECtHR [Plenary], *Scozzari and Giunta v. Italy*, judgment of 13.7.2000, Application Nos. 39221/98 and 41963/98, § 249.

more specific individual and also general measures,<sup>20</sup> which can have further implications for implementation processes. Furthermore, specification of general measures by the ECtHR and subsequent compliance with them is the essential element of the pilot judgment procedure.<sup>21</sup> In fact, the pilot judgment procedure aims at disposing of a large number of similar cases in order to reduce the ECtHR's backlog, which inevitably requires general measures on the State level.

However, the pilot procedure focuses only on cases emanating from the same signatory party. It is an important tool for increasing the effectiveness of the Strasbourg system, but it would hardly be sufficient to reduce the backlog of the ECtHR's cases in itself. In order to ensure the effectiveness of the Strasbourg system, the ECtHR's case law needs to be taken into account also by the signatory parties that were not a party to the case adjudicated by the ECtHR. This brings us to the doctrine of *res interpretata* effect.

## 2. *Res interpretata* Effect

The case law of the ECtHR is binding for the parties to a particular dispute. Regarding these parties, the judgment of the ECtHR gains the status of *res iudicata*. The impact of the Strasbourg Court, however, is broader as it reaches beyond the States which were parties to the proceedings. In fact, the ECtHR judgments often influence legal orders of the states which were not the direct addressees of the judgments, and thus *de facto* gain *erga omnes* effect. For instance, Ireland, Latvia and Cyprus changed their regulation of prisoners' voting rights in response to the *Hirst (no. 2)* judgment.<sup>22</sup> The

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<sup>20</sup> See *J. Jabn* (note 15); *H. Keller/C. Marti*, Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Jurisprudence, in: *EJIL* 26 (2015); *P. Leach*, No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies, in: A. Føllesdal/B. Peters/G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, 2013.

<sup>21</sup> For the description of pilot judgments procedure see e.g. *A. Buysse*, The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges, in: *The Greek Law Journal* 57 (2009), 1890 et seq.; *M. Fyrmys*, Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights, in: *GLJ* 12 (2011), 1231 et seq.

<sup>22</sup> ECtHR [GC], *Hirst v. UK (no. 2)*, judgment of 6.10.2005, Application No. 74025/01. It is interesting that the *Hirst (no. 2)* judgment acquired the *erga omnes* effect without gaining the *inter partes* effect.

Grand Chamber judgment in *Salduz v. Turkey*<sup>23</sup> had already led to reforms of custodial legal assistance in France, Belgium, Ireland, Scotland and the Netherlands.<sup>24</sup> In response the pilot judgment in *Hutten-Czapska v. Poland*,<sup>25</sup> the Czech Republic adopted a new Act on unilateral rent increases.<sup>26</sup> These are just a few examples. Other states also regularly monitor the developments in the Strasbourg case law beyond the cases against their own governments and adjust their legal orders accordingly.<sup>27</sup>

These examples are instances of the Strasbourg Court's general interpretative authority over the Convention (Art. 32 ECHR) and its implications for the States which were not the direct addressees of a Strasbourg judgment. The case law of the ECtHR thus acquires the so-called "*res interpretata* effect".<sup>28</sup> According to *res interpretata* effect, via its rulings the ECtHR provides for abstract interpretation of the Convention rights, which shall be taken into account by all the signatory parties if relevant for their domestic legal orders. *Res interpretata* effect is not explicitly stated in the text of the Convention. It has been inferred from the very construction of the European system of human rights protection<sup>29</sup> and mentioned in the case law of the ECtHR<sup>30</sup> as well as in political declarations<sup>31</sup> and various CoE documents.<sup>32</sup>

In sum, the effects of a single judgment of the Strasbourg Court go far beyond the situation of a concrete successful applicant. The ECtHR's

<sup>23</sup> ECtHR [GC], *Salduz v. Turkey*, judgment of 27.11.2008, Application No. 36391/02.

<sup>24</sup> See *D. Giannouloupolos*, Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries, in: HRLR 16 (2016), 129 et seq.

<sup>25</sup> ECtHR [GC], *Hutten-Czapska v. Poland*, judgment of 19.6.2006, Application No. 35014/97.

<sup>26</sup> Act No. 107/2006 Coll. It shall be added that another impulse for adopting this new statute was the case-law of the Czech Constitutional Court. See *J. Wintr*, Vliv Evropské úmluvy na český ústavní pořádek [Impact of the European Convention on the Czech Constitutional Order], in: *Jurisprudence* 21 (2012), 7.

<sup>27</sup> For other examples see the texts referred to in note 32.

<sup>28</sup> See the texts referred to in note 32.

<sup>29</sup> *Res interpretata* effect is inferred from the joint reading of Arts. 1 and 19 ECHR. See *A. Z. Drzemczewski*, Quelques réflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg, in: *J. Barthelemy et al.*, La conscience des droits: mélanges en l'honneur de Jean-Paul Costa, 2011.

<sup>30</sup> See e.g. ECtHR, *Opuz v. Turkey*, judgment of 9.6.2009, Application No. 33401/02, § 163; ECtHR, *Rantsev v. Cyprus*, judgment of 7.1.2010, Application No. 25965/04, § 197 and the case law cited therein.

<sup>31</sup> See above note 7.

<sup>32</sup> For further details on *res interpretata* effect see *A. Bodnar*, Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings, in: *Y. Haec/E. Brems* (eds.), *Human Rights & Civil Liberties in the 21st Century*, 2014, 223 et seq.; *A. Z. Drzemczewski* (note 29), 243 et seq.; *J. Gerards* (note 13), 21 et seq.

judgment is supposed to be projected into the national legal system of a violating State through adoption of general measures of non-repetition, eventually along the lines proposed by the Strasbourg Court, if it resorted to indicating what measures would remedy the situation. Furthermore, other signatory parties are likewise supposed to react to the ECtHR's judgment if it provides for an interpretation of the Convention related to a situation which is relevant for them. Having sketched the legal basis for the effects of the Strasbourg case law in the CoE member states, both in parties to the dispute and third States, it is now possible to unpack the member state into multiple domestic actors and show how these actors influence the implementation process.

### III. Domestic Level Matters: “Diffusing” and “Filtering” Role of the Domestic Authorities

Part II of this paper showed that the impact of the Strasbourg case law on national legal systems has been grounded mainly in the obligation to execute the ECtHR's judgments under Art. 46(1) ECHR and in the doctrine of *res interpretata* effect. However, the ECtHR is empowered only to interpret the Convention in its rulings, but on its own has little formal power to change domestic laws and case-law in order to put national legal orders into compliance with its rulings. In this regard, the ECtHR, to a large extent, has to rely on national legal and political authorities who may serve as levers of the Strasbourg Court. As *Courtney Hillebrecht* put it, “domestic political institutions, particularly domestic democratic institutions, play an important role in facilitating compliance with international human rights law”.<sup>33</sup>

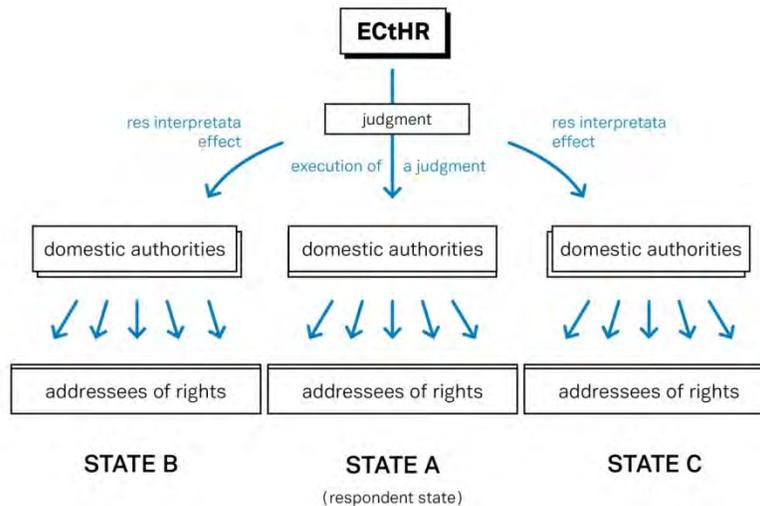
Part III of this paper thus aims to offer a more detailed explanation of how the domestic level matters for the implementation of the ECtHR's judgments and for the Convention system as such. Regarding the *inter partes* binding effect and the *res interpretata* effect of the Strasbourg case law, the domestic institutions fulfil two main roles in the Convention system – the role of “diffusers” of the Strasbourg case law and the role of “filters” of the Strasbourg Court.

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<sup>33</sup> C. Hillebrecht (note 6), 279 et seq., 284. See also C. Hillebrecht, The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System, in: HRQ 34 (2012), 959 et seq., 964 et seq. and 984 et seq. (regarding the IACtHR).

Scheme No. 1 illustrates the first phase,<sup>34</sup> in which the national authorities act as the “diffusers” of the ECtHR’s conclusions. Within this function, the domestic authorities are expected to reflect the Strasbourg Court’s rulings and adopt domestic rules – via a statutory amendment or a change of domestic practice, especially through the case law of the apex courts with (quasi-)precedential effects – which respect the conclusions of the ECtHR. These domestic rules are general and apply to all rights holders at the national level. In other words, the domestic authorities act as the “diffusers” as they spread the effects of an ECtHR ruling. The domestic authorities thereby transform the ECtHR’s conclusions from a case of one particular applicant to a general domestic rule applicable to all similar situations. The model case depicted in Scheme No. 1 expects the respondent State A to adopt general measures fully respecting the Strasbourg case-law. Other States (B and C in Scheme No. 1) are presupposed, first, to respect the *res interpretata* effect and, second, to comply fully with the judgments of the ECtHR.

Scheme No. 1: Domestic authorities as “diffusers” in the Convention system

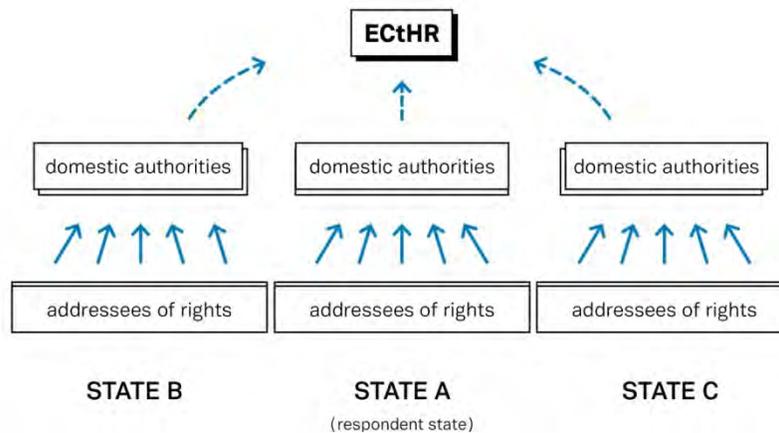


In the second phase, the domestic authorities – especially the administrative bodies and the national courts – fulfil the role of “filters” within the processes of the application of law. They are supposed to respect the general rules adopted in the first phase in order to comply with the Strasbourg

<sup>34</sup> In some cases, the two phases might merge into one.

judgments (during the “diffusing” phase) and apply these general rules to concrete cases. In doing so, the national authorities should prevent violations of the Convention rights, or at least remedy them, already at the national level. As a result, the national authorities may act as “filters” vis-à-vis the Strasbourg Court and *de facto* become, to some extent, the ECtHR’s substitutes.<sup>35</sup> The Convention then becomes embedded<sup>36</sup> at the national level, which implies granting protection of the Convention rights – as interpreted by the ECtHR – already at the national level and preventing applications from being filed at the Strasbourg Court, or at least significantly lowering their total number. The filtering role of the national authorities is depicted in Scheme No. 2.

Scheme No. 2: Domestic authorities as “filters” in the Convention system



Among other implications, the described model shows that not only the establishment of a domestic general rule complying with the EC(t)HR, but also the subsequent practice of the law enforcement authorities when applying the rule is crucial from the point of view of the overall effectiveness of the Convention system. This brings us to the importance of various actors involved in the domestic implementation process – which includes both the

<sup>35</sup> On the substituting role of national courts in relation to international courts, see A. Nollkaemper, *The Role of National Courts in Inducing Compliance with International and European Law – A Comparison*, in: M. Cremona (ed.), *Compliance and the Enforcement of EU Law*, 2012.

<sup>36</sup> L. R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, in: *EJIL* 19 (2008), 125 et seq.

diffusing and the filtering phase – that will be addressed in the Part that follows.

#### IV. Implementation Processes of the Strasbourg Case Law: Particular Actors *within* the Domestic Arena Matter

The model developed in Part III structures the basic features of the ECtHR's judgments implementation and illustrates the ties between the Strasbourg level and the domestic level of the Convention system. Yet, it is notable that these links between the ECtHR and domestic layers of the Strasbourg human rights regime are, in fact, more diverse and heterogeneous. In practice, the system is not so strictly built along hierarchical lines<sup>37</sup> and, especially at the domestic level, implementation is more open-ended as to the processes and their final outcomes.

As regards the processes of implementation, the domestic layer of the Convention system is far from being monolithic. On the contrary, domestic implementation processes are distinctive by (1) plurality of actors, (2) who may have different attitudes towards the Strasbourg judgments, (3) are entangled in the web of mutual relations and interactions among each other, and (4) may have different powers and willingness to employ them. As the recent instances of backlash against the ECtHR demonstrated, implementation of the Strasbourg case-law may become a “hot” political issue. Ultimately, domestic responses depend primarily on the ability and willingness of domestic actors to push through such a change. Therefore, in order to understand the implementation properly, we need to open “the black box” of the domestic authorities element in the model scheme of the ECtHR's case-law implementation processes.

First, regarding the plurality of actors, both national and international actors can possibly take part in the implementation processes. At the international level they include, among other actors, third States, governmental and non-governmental international organisations criticising non-compliance by the respondent State.<sup>38</sup> International actors can also play the expertise-

<sup>37</sup> See *N. Krisch* (note 12), 183 et seq.; and *C. O'Conneide*, Human Rights within Multi-Layered Systems of Constitutional Governance: Rights Cosmopolitanism and Domestic Particularism in Tension, in: *Irish Yearbook of International Law* 5 (2010), 19 et seq.

<sup>38</sup> See e.g. ECtHR [GC], *D. H. and others v. the Czech Republic*, judgment of 13.11.2007, Application No. 57325/00; and *H. Smekal/K. Šipulová, DH v Czech Republic Six Years Later: On the Power of an International Human Rights Court to Push through Systemic Change*, in: *NQHR* 32 (2014), 288 et seq. (who discuss the subsequent implementation process in the Czech Republic).

providing role. The Venice Commission is a particularly illustrative case. It provides States with opinions on their (draft) legislation or with reports on topical issues.<sup>39</sup> At the same time, some constitutional courts have required *amicus curiae* opinions from the Venice Commission on comparative and international legal aspects of the cases they were dealing with. Such *amicus curiae* briefs regularly contain passages on the ECtHR's case law,<sup>40</sup> which enhances the constitutional courts' knowledge of the Strasbourg Court's jurisprudence and may contribute to its smoother implementation.

At the domestic level, the implementation process may involve several actors, including the executive, the legislature, domestic courts, the Ombudsman and the government agent before the ECtHR. Also civil society actors, especially the domestic Non-Governmental Organisations (NGOs), importantly influence implementation processes. Even though they do not possess sufficient formal powers to change the status quo, they can mobilise around an ECtHR judgment, provide expertise and generate pressure on the states authorities to act.<sup>41</sup>

Usually, at least in the high-profile cases, a plurality of actors is engaged – as *Courtney Hillebrecht* states, “[n]o single domestic actor, not even the strongest executive, can satisfy all of the tribunals’ mandates, legally or logistically”.<sup>42</sup> Different authors then emphasise roles of different institutions, some rely on the power of the civil society and NGOs,<sup>43</sup> or pressure groups,<sup>44</sup> while others focus on the power of the judiciary,<sup>45</sup> legislature<sup>46</sup> or

<sup>39</sup> See e.g. *M. de Visser*, A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform, in: *Am J. Comp. L.* 63 (2015), 701 et seq.; and *V. Volpe*, Drafting Counter-Majoritarian Democracy the Venice Commission's Constitutional Assistance, in: *HJIL* 76 (2016), 811 et seq.

<sup>40</sup> E.g. Amicus curiae brief for the Constitutional Court of Georgia on individual application by public broadcasters, adopted by the Venice Commission at its 98<sup>th</sup> Plenary Session (Venice, 21.-22.3.2014), paras. 49-60; Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12.7.2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova adopted by the Venice Commission at its 94<sup>th</sup> Plenary Session (Venice, 8.-9.3.2013); Amicus Curiae Brief on the Compatibility with Human Rights Standards of certain articles of the Law on Primary Education of the Sarajevo Canton of the Federation of Bosnia and Herzegovina adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session (Venice, 15.-16.6.2012), paras. 23-29.

<sup>41</sup> For the role of civil society in implementation of the ECtHR's case law see *L. Miara/V. Prais*, The Role of Civil Society in the Execution of Judgments of the European Court of Human Rights, in: *EHRLR* (2012), 528 et seq.

<sup>42</sup> *C. Hillebrecht*, Domestic Politics (note 11), 25.

<sup>43</sup> See above note 41.

<sup>44</sup> See *J. P. Trachtman*, International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law, in: *Chi. J. Int'l L.* 11 (2010), 127 et seq.

the executive<sup>47</sup> to push through the policy change. Therefore, the domestic implementation process is a complex endeavour that typically involves a number of actors. In fact, it is a complicated system consisting of an ever-changing set of actors whose steps might be important for the implementation of a Strasbourg Court's judgment.<sup>48</sup>

Second, these actors who engage in the implementation processes may have different interests, preferences and attitudes towards human rights as such and towards the issue at stake in particular. Not all of these actors are necessarily in favour of the ECtHR's rulings in all of the cases. It is rather clear that domestic responses to the ECtHR's judgments do not take place automatically. In the cases of diverging preferences of domestic actors, implementation of the ECtHR's rulings thus can be described as a political battle,<sup>49</sup> or more generally, as a competition between the pro-compliance forces and the compliance-opposing camp. In practice, however, the positions of particular actors will hardly be "black or white", which makes the trajectory of the implementation process even more complicated and unpredictable.

Furthermore, one must take into account the fact that the Convention system consists of 47 members and includes, broadly speaking, three types of states (according to their human rights situation): established democracies, (post-)transition democracies, and hybrid regimes in which the basic norms of democratic governance and the rule of law have not been fully accepted.<sup>50</sup> The smooth functioning of the model presented in Part III of this paper in practical terms also presupposes a high level of expertise in human rights law, including knowledge of the Strasbourg case law concerning other countries so that the *res interpretata* effect is effectively guaranteed, and the respective language skills<sup>51</sup> of domestic officials. These assumptions still

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<sup>45</sup> See A. Nollkaemper (note 35); J. Gerards/J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law*, 2014.

<sup>46</sup> See A. Donald/P. Leach, *Parliaments and the European Court of Human Rights*, 2016, 99 et seq.

<sup>47</sup> See H. H. Koh, *Why Do Nations Obey International Law?*, in: *Yale L.J.* 106 (1997), 2599 et seq., 2656 et seq.

<sup>48</sup> See also K. Alter, *New Terrain of International Law*, 2014, 19.

<sup>49</sup> M. Marmo, *The Execution of Judgments of the European Court of Human Rights – A Political Battle*, in: *Maastricht J. Eur. & Comp. L.* 15 (2008).

<sup>50</sup> R. Harmsen, *The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights*. In: J. Christoffersen/ M. R. Madsen (note 1), 141 et seq.

<sup>51</sup> Even though the ECtHR has recently significantly improved access to its case law in other than the two original languages and started to publish translations of its judgments into various languages on its website – the so-called "HUDOC" (see <<http://hudoc.echr.coe.int>>).

cannot be taken for granted, at least not in all of the 47 signatory parties to the Convention. As a result, especially in (post-)transition democracies and hybrid regimes, the obstacles of effective implementation may result not only from the political battles and the respective (in)action of anti-compliance forces, but also from ignorance of the ECtHR's rulings, insufficient engagement with the issues addressed by the Strasbourg Court or from lack of enforcement capacity or will in the "filtering" phase.

Third, there are mutual relations and interactions between domestic actors. The proverbial "implementation ball" may move from one domestic institution to another as a result of their actions. For instance, if the constitutional court strikes down a statute for violating the Convention, the ball moves to the parliament which can no longer be inactive as it must fill the gap in the law. This may nudge or force the parliament to leave the compliance-opposing camp and implement the relevant Strasbourg judgment. However, the parliament may also opt for minimalist compliance with the constitutional court's judgment and the ball then moves to the courts again. Due to the divergent preferences and priorities of domestic institutions regarding human rights, the ECtHR's judgments may also "ignite domestic battles over human rights, state sovereignty and the role of international law in domestic politics".<sup>52</sup> Such Strasbourg judgments may sometimes even result in reshuffling the power of domestic actors, for instance by introducing judicial review in a certain area,<sup>53</sup> by reducing the autonomy of one branch of Government,<sup>54</sup> by changing the composition of a constitutional organ<sup>55</sup> or by introducing a new independent body to review police misconduct.<sup>56</sup> Such transfers of powers require lengthy discussion, careful de-

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As of 11.7.2016, the number of translated judgments varied from 14 (Dutch) to 2,622 (Turkish).

<sup>52</sup> C. Hillebrecht (note 6), 279 et seq., 293.

<sup>53</sup> The ECtHR has, among other things, required the Netherlands to allow full judicial review of the Crown's administrative decisions (ECtHR [GC], *Bentham v. Netherlands*, judgment of 23.10.1985, Application No. 8848/80, §§ 32-44; see also *P. van Dijk*, *The Bentham Case and Its Aftermath in the Netherlands*, in: NILR 34 (1987)).

<sup>54</sup> For instance, the ECtHR has significantly narrowed the scope of parliamentary immunity (see ECtHR [GC], *Karácsony and Others v. Hungary*, judgment of 17.5.2016, Application Nos. 42461/13 and 44357/13; and earlier case law discussed in *D. Kosář* [note 3], 46 et seq.).

<sup>55</sup> For instance, the ECtHR has *de facto* forced Ukraine to change the composition of the Ukrainian High Council of Justice (see ECtHR, *Volkov v. Ukraine*, judgment of 9.1.2013, Application No. 21722/11, §§ 91, 109-117 and 200; for further details see *D. Kosář/L. Lixinski* [note 3], 713 et seq., 737 et seq. and 756).

<sup>56</sup> See e.g. ECtHR, *Güleç v. Turkey*, judgment of 27.7.1998, Application No. 21593/93, §§ 76 and 80; ECtHR, *Hugh Jordan v. the United Kingdom*, judgment of 4.5.2001, Applica-

liberation and sometimes even *quid pro quo* solutions among the domestic actors involved.

Finally, the capacities and powers of the actors involved matter. As *Sonia Cardenas* put it, the domestic battle over compliance may be affected more by the distribution of institutional power than by the greatest commitment to international human rights law.<sup>57</sup> In the same vein, *Courtney Hillebrecht* concurs and argues,

“[i]nternational law, and particularly the tribunals’ rulings, can provide an impetus for action for individual actors or coalitions of actors, but their ability to act on that impetus will be limited – or enhanced – by their domestic political power.”<sup>58</sup>

For instance, when domestic constraints on the executive, such as independent judiciaries, political competition, free media and civil society, are weak as in Russia, a single actor – the executive – can dominate the implementation process.<sup>59</sup> In contrast, when several strong institutions take part in the implementation process, as in the United Kingdom, the eventual result of this process very much depends on the ability to reach consensus.<sup>60</sup> Similarly, implementation of the *D.H. v. Czech Republic* judgment concerning the segregation of Roma children in primary education shows how much the relative power of each domestic actor involved matters.<sup>61</sup> For several years, the implementation process reached an impasse as equally powerful pro-compliance and anti-compliance coalitions, both ready to act, blocked any significant action.<sup>62</sup> It was only when the new Minister of Education went over to the pro-compliance camp that the balance tilted towards the pro-compliance position and implementation moved forward.<sup>63</sup>

In sum, it is possible to conclude that the implementation process and its outcome depend (1) on the number of (domestic) actors taking part in the

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tion No. 24746/94, § 120; and ECtHR, *Eremiášová and Pechová v. the Czech Republic*, judgment of 16.2.2012, Application No. 23944/04, §§ 137 and 151-160.

<sup>57</sup> *S. Cardenas*, Conflict and Compliance: State Responses to International Human Rights Pressure, 2007, 13.

<sup>58</sup> *C. Hillebrecht*, Domestic Politics (note 11), 25.

<sup>59</sup> *C. Hillebrecht* (note 6), 279 et seq., 288 et seq.

<sup>60</sup> *C. Hillebrecht* (note 6), 279 et seq., 293 et seq.

<sup>61</sup> *H. Smekal/K. Šípulová* (note 38), 288 et seq.

<sup>62</sup> *H. Smekal/K. Šípulová* (note 38), 288 et seq.

<sup>63</sup> More specifically, the Ministry of Education pushed the new concept of inclusive education through the Czech Parliament (see Arts. 16-16b of the 2004 School Act, as amended) in March 2015 and the new Minister of Education *Kateřina Valachová* (appointed on 17.6.2015), despite heavy criticism from the anti-compliance camp, adopted the necessary secondary legislation and defended the inclusive education against potential setbacks.

implementation process, (2) on their stances towards the ECtHR's judgment to be implemented, (3) on mutual relations and interactions among these actors, and (4) on their respective power within the system and their ability and readiness to act.

Therefore, the actors involved may play different roles in the implementation processes. We acknowledge that every actor possesses a certain spectrum of *de facto* possible options regarding how to react to the Strasbourg judgment.<sup>64</sup> According to its preferences, powers and possible interactions with other actors, a particular actor may essentially influence the dynamics of the implementation process and, therefore, affect its outcome – the level of compliance with the ECtHR's ruling.

However, all those actors operate within a broader ecosystem – the State – that is shaped by macro-level factors. Fundamental state-level features of the polity and their implications for the implementation of international commitments have been widely studied.<sup>65</sup> Socio-political macro-level factors such as regime type,<sup>66</sup> length of democracy,<sup>67</sup> legal infrastructure and domestic institutional capacity,<sup>68</sup> states' reputational concerns,<sup>69</sup> or generally spread human rights expertise and awareness<sup>70</sup> have been reported to influence compliance with international human rights law. At the same time, legal macro-level factors like the status of international law in domestic law, and particularly the *de facto* domestic status of the ECHR and the ECtHR's case law,<sup>71</sup> separation of powers doctrine and configuration of constitutional review,<sup>72</sup> or prevailing perceptions of legal and political culture and the con-

<sup>64</sup> A. Stone Sweet/H. Keller (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, 14.

<sup>65</sup> The following list of macro-level factors does not aspire to completeness. We rather mention the factors most relevant for the focus of our article.

<sup>66</sup> A.-M. Slaughter, *International Law in a World of Liberal States*, in: *EJIL* 6 (1995), 503 et seq.

<sup>67</sup> See the discussion in S. Grewal/E. Voeten, *Are New Democracies Better Human Rights Compliers?*, in: *International Organization* 69 (2015), 497 et seq.

<sup>68</sup> D. Anagnostou/A. Mungiu-Pipidi (note 6), 205 et seq.; C. Hillebrecht, *The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change*, in: *EJIL* 20 (2014), 1117 et seq.

<sup>69</sup> A. T. Guzman, *A Compliance-Based Theory of International Law*, *Cal. L. Rev.* 90 (2002), 1823 et seq.

<sup>70</sup> D. Anagnostou/A. Mungiu-Pipidi (note 6), 205 et seq., 221; C. Hillebrecht (note 6), 279 et seq.

<sup>71</sup> H. Keller/A. Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in: A. Stone Sweet/H. Keller, *A Europe of ...* (note 2), 683; in detail see *Davide Paris'* contribution in this issue.

<sup>72</sup> J. Gerards/J. Fleuren (note 45), 363.

cept of democracy among judges in a given country<sup>73</sup> should be taken into account. That is to say that the macro-level factors can contribute to explanations of variations in the implementation of international human rights law over time and across countries,<sup>74</sup> and that they also shape the starting position of particular actors in the individual implementation processes at the meso-level (domestic politics).

Having provided this general framework, we now turn to analysing the role of an allegedly natural ally of the ECtHR – the domestic judiciary – in implementing the Strasbourg case law. We first analyse the role of the judiciary as a whole (Part V). Subsequently, we zero in on constitutional courts (Part VI).

## V. Domestic Judiciaries: The Driving Force of Implementation?

The previous part showed that several domestic actors are usually involved in the process of implementation of the ECtHR's case law, and that their attitudes towards the Strasbourg judgments, their mutual relationship and their relative powers to a large extent determine the direction and speed of the implementation processes. Among those actors, domestic courts are the most natural allies of the Strasbourg Court who may help the ECtHR to secure compliance with its judgments and to enhance its legitimacy.<sup>75</sup> Domestic courts, in general, and the constitutional courts in particular, can help to monitor the enforcement of Strasbourg judgments in their own states and, by issuing similar decisions, even increase the support within their own states for those judgments.<sup>76</sup> That also explains why the ECtHR

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<sup>73</sup> See, mutatis mutandis, *M. Wind*, The Nordics, the EU and the Reluctance Towards Supranational Judicial Review, in: JCMS 48 (2010), 1039 et seq. or *J. A. Mayoral/U. Jaremba*, Perspectives on Europeanization of National Judiciaries: Old and New Questions, in: iCourts Working Paper Series 59 (2016), 10 et seq.

<sup>74</sup> *C. Hillebrecht*, The Domestic Mechanisms (note 33), 959 et seq., 963.

<sup>75</sup> See *W. Sadurski*, Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments, in: HRLR 9 (2009), 397 et seq., 414 et seq. (who describes the cooperation between the ECtHR and the Polish Constitutional Court that led to *Hutten-Czapska v. Poland* (note 25); *S. Dothan*, Reputation and Judicial Tactics: A Theory of National and International Courts, (2014), (showing other examples).

<sup>76</sup> *S. Dothan* (note 75), 111.

forged a compliance partnership with domestic judges<sup>77</sup> and empowered them vis-à-vis other branches of the Government.<sup>78</sup>

However, the domestic judiciary is not a monolithic block either.<sup>79</sup> Hence, it is necessary to unpack it and to understand the compliance pushes and pulls *within* the judiciary. There are at least five actors within the domestic judiciaries. These actors are the constitutional court – as a specific institution detached from ordinary courts<sup>80</sup> (if it exists in a given country) – top ordinary courts (the Supreme Court, the Supreme Administrative Court, the Council of State and other courts of the same stature), lower courts, court presidents and judicial associations. These actors, each in its own way, play the role of “judicial gatekeepers” in implementing the Strasbourg jurisprudence into the domestic case law. They may, like domestic actors within the other two branches of the Government, have different interests, preferences and attitudes towards the Strasbourg case law in general as well as towards particular judgments. The position of each of these actors depends, among other things, on their openness to supranational sources, values and beliefs that may or may not place a special premium, on legal certainty and the stability of the legal system, knowledge of foreign languages, promotion incentives, expectations of its key audience, and on power considerations. Moreover, the position of each actor within the judiciary may change over time.

The significance of the role of constitutional courts and top ordinary courts is clear. Constitutional courts can reinterpret statutes through the Convention-conforming interpretation or strike down laws that fail to meet the domestic fundamental rights standards, which are often heavily influenced by Strasbourg case law. Some constitutional courts went even further. They *de facto* constitutionalised the Convention<sup>81</sup> and started to use it as a

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<sup>77</sup> See *L. R. Helfer* (note 36), 125 et seq., 158. On the importance of national courts in ensuring compliance with international human rights rulings more generally see *A. Nollkaemper* (note 35); *H. H. Koh* (note 10), 1401 et seq., 1413; and *J. Hathaway*, *Between Power and Principle: An Integrated Theory of International Law*, *U. Chi. L. Rev.* 71 (2005), 469 et seq., 506, 520 et seq.

<sup>78</sup> More specifically, the ECHR is empowering the judiciary vis-à-vis the political branches and further shifting the separation of powers by judicialisation of new areas of law and by elevating judicial decisions to the status of the source of law on a par with statutory law (which indirectly challenges the primacy of the legislature in lawmaking). See *D. Kosář/L. Lixinski* (note 3), 713 et seq., at 747 et seq.

<sup>79</sup> *D. Kosář/L. Lixinski* (note 3), 713 et seq., 759.

<sup>80</sup> See the contribution of *Davide Paris* in this issue.

<sup>81</sup> See e.g. *A. Stone Sweet/H. Keller*, *The Reception of the ECHR in National Legal Orders*, in: *A. Stone Sweet/H. Keller*, *A Europe* (note 2), 686; and *G. Martinico*, *National Judges and Supranational Laws: Goals and Structure of the Research*, in: *G. Martinico/O. Pollicino*

benchmark, separately from the domestic constitutional norms, for judging domestic laws.<sup>82</sup> Top ordinary courts are also powerful players as they may employ Convention-conforming interpretations and prioritise positions that engage more with the Strasbourg case law.<sup>83</sup> By doing so, they are also *de facto* imposing their Strasbourg-friendly positions on the lower courts. Hence, constitutional courts and top ordinary courts may operate as great “diffusers” and “filters” in the Convention system.<sup>84</sup> On the other hand, they also wield a significant “negative power” that can be unleashed. They can impose a narrow reading of the Strasbourg case law on the lower courts that may lead to minimalist compliance.<sup>85</sup> In some countries, they may even block the compliance processes by finding the Strasbourg position incompatible with the domestic constitution,<sup>86</sup> as in such scenarios other political actors will very probably not openly defy the position of their own apex court.<sup>87</sup>

The role of lower courts, court presidents and judicial associations is less visible and often underestimated. Lower courts do not necessarily have to share the top courts’ views of the Strasbourg Court.<sup>88</sup> For instance, in Po-

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(eds.), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*, 2010, 7 et seq. and 12 et seq.

<sup>82</sup> See e.g. *C. van de Heyning*, *Constitutional Courts as Guardians of Fundamental Rights: The Constitutionalization of the Convention Through Domestic Constitutional Adjudication*, in: P. Popelier/A. Mazmanyán/W. Vandenbruwaene (eds.), *The Role of Constitutional Courts in Multilevel Governance*, 2013, 21 et seq.; and *Davide Paris’* contribution in this issue.

<sup>83</sup> See e.g. *J. Gerards/J. Fleuren* (note 45).

<sup>84</sup> See Part III and especially Schemes No. 1 and 2.

<sup>85</sup> For instance, see the unwillingness of the UK and Swiss courts to accept the ECtHR’s rulings on the issue of confrontation (see *J. Jackson/S. Summers*, *Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence*, *Criminal Law Review* 2 (2013), 114 et seq.), narrow reading of the ECtHR’s case law on the role of advocates general by French Conseil d’État (see *N. Krisch* [note 12], 183 et seq., 194 et seq.; and *J. Bell*, “Interpretative Resistance” Faced with the Case-law of the Strasbourg Court, *European Public Law* 14 (2008), 134 et seq.; the “post-D. H. case-law” of the Czech Supreme Court that limited the reach of the ECtHR’s Grand Chamber judgment in *D. H. v. Czech Republic* (see Judgment of the Czech Supreme Court of 13.12.2012 No. 30 Cdo 4277/2010-180).

<sup>86</sup> See *A. Padsokocimaite’s* contribution in this issue; *P. Leach/A. Donald*, *Russia Defies Strasbourg: Is Contagion Spreading?* *EJIL: Talk!* [online] 2015; *M. Smirnova*, *Russian Constitutional Court Affirms Russian Constitution’s Supremacy over ECtHR Decisions*, *EJIL: Talk!* [online] 2015; and the discussion on the implementation of the 2013 *Anchugov & Gladkov v. Russia* judgment in note 144 below.

<sup>87</sup> For a rare exception see ECtHR [GC], *A. and others v. United Kingdom*, judgment of 19.2.2009, Application No. 3455/05, § 157.

<sup>88</sup> *R. Mańko*, “War of Courts” as a Clash of Legal Cultures: Rethinking the Conflict between the Polish Constitutional Tribunal and the Supreme Court Over “Interpretive Judg-

land they seem to be more resistant to the Strasbourg influence than the Polish Constitutional Tribunal and the Supreme Court.<sup>89</sup> In the Czech Republic, one might witness an even more complex situation – the so-called “sandwich scenario”: judges appointed after the fall of communism, often fluent in English and French and more keen on implementing the Strasbourg case law, sit in the lowest courts and in the constitutional court, whereas judges who were appointed in the communist era, not well versed in foreign languages and often sceptical about the purposive and value-oriented ECtHR’s reasoning, occupy the seats at appellate courts and at the Supreme Court.<sup>90</sup> In other words, the Strasbourg sceptics on the bench are “sandwiched” by the pro-Strasbourg judges.<sup>91</sup>

Court presidents are even less visible yet important actors. They are the key players within the Central and Eastern European judiciaries,<sup>92</sup> who influence judicial appointments and decide on promotion, case assignment and other perks,<sup>93</sup> and hence their stance towards the Strasbourg Court also matters. For instance, a court president who is sceptical about international human rights courts might prioritise the appointment of less Strasbourg-enthusiastic judges to his court or informally tone down current judges’ engagement with the Strasbourg case law. Finally, judicial associations, although rarely built on the pro-Strasbourg and anti-Strasbourg axis, may

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ments”, in: M. Hein/A. Geisler/S. Hummel (eds.), *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory*, 2014, 79 et seq.

<sup>89</sup> See e.g. *T. T. Konciewicz*, *Emergency Constitutional Review: Thinking the Unthinkable? A Letter from America*, *VerfBlog* 29 (2016), <<http://verfassungsblog.de>>, DOI: <<https://dx.doi.org/10.17176/20160330-093907>>; and *T. T. Konciewicz*, *Polish Judiciary and Constitutional Fidelity: Beyond the Institutional “Great Yes”?*, *VerfBlog* 12 (2016), <<http://verfassungsblog.de>>.

<sup>90</sup> See *D. Kosář*, *Perils of Judicial Self-Government*, 2016, 107 et seq. Note that the composition of the Czech Supreme Administrative Court differs from the Czech Supreme Court, as the former was established only in 2003 and lured several young judges who studied abroad.

<sup>91</sup> *D. Kosář* (note 90).

<sup>92</sup> While court presidents in West Europe have undergone a profound transformation since World War II (see e.g. *P. H. Solomon*, *The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability*, in: A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, 2012, 909 et seq., 918 et seq.) and exercise less influence than their counterparts in the post-communist Europe, they still have they say in some established democracies (see e.g. *P. H. Solomon* [note 92], and *A. Garapon/H. Epineuse*, *Judicial Independence in France*, in A. Seibert-Fohr [note 92], 285 et seq.).

<sup>93</sup> See *D. Piana*, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*, 2010, 43 et seq; *P. H. Solomon*, *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China*, in: *Communist and Post-Communist Studies* 43 (2010), 351 et seq., 354; *L. F. Müller*, *Judicial Administration in Transitional Eastern Countries*, in: A. Seibert-Fohr (note 92), 937 et seq., at 965; and *D. Kosář* (note 90), 390 et seq.

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also induce judges to exercise restraint or openness towards the ECtHR, as they influence promotion in several countries such as France<sup>94</sup> and Italy.<sup>95</sup>

## VI. Constitutional Courts and the Strasbourg Court: A Far More Complicated Relationship than It Seems

Out of the five actors identified in Part V we zero in on the constitutional courts. They have a special place in the legal and political systems of the CoE member states as well as within the Council of Europe.<sup>96</sup> They have been the key guardians of the fundamental rights and the rule of law in the continental systems since World War II and they have formed “an important part of the communicative arrangement of constitutional democracies”.<sup>97</sup> As a result, they have a great potential to contribute to the embeddedness of the Strasbourg Court’s case law at the national level. Indeed, constitutional courts have played a crucial role in domestic adoption of the ECHR standards. They regularly reinterpret domestic laws in line with the ECtHR case law, introduce the ECtHR-made standards domestically, quash ECHR-dubious legislation and push the legislature and ordinary courts for greater compliance with the ECtHR judgments.<sup>98</sup> For that reason, constitutional courts are often referred to as the most important domestic allies of the ECtHR<sup>99</sup> or “faithful trustees”<sup>100</sup> of the Convention. However, there are certain limits to the constitutional courts’ allegiance to the Strasbourg Court<sup>101</sup> and a growing number of instances of judicial disobedience vis-à-

<sup>94</sup> In France professional organizations control the *commissions d’avancement* (promotion commissions). For further details regarding the *commissions d’avancement*, see A. Garapon/H. Epineuse (note 92), 285 et seq.

<sup>95</sup> See C. Guarnieri/P. Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy, 2002, 54; or C. Guarnieri, Judicial Independence in Europe: Threat or Resource for Democracy?, in: Representation 49 (2013), 347 et seq., 348.

<sup>96</sup> See, mutatis mutandis, J. Komárek, National Constitutional Courts and the European Constitutional Democracy, I.CON 12 (2014), 525 et seq., 532 et seq.

<sup>97</sup> See Komárek (note 96), 532.

<sup>98</sup> See the contribution of Davide Paris in this issue or I. Motoc/I. Ziemele (eds.), The Impact of the ECHR on Democratic Change in Central and Eastern Europe, 2016; J. Gerards/J. Fleuren (note 45).

<sup>99</sup> See note 75 above.

<sup>100</sup> We borrow this term from E. Bjorge, Domestic Application of the ECHR: Courts as Faithful Trustees, 2015.

<sup>101</sup> See the contribution of Davide Paris in this issue.

vis the ECtHR.<sup>102</sup> Accordingly, we acknowledge the constitutional courts' major contribution to the implementation of ECHR rights, but at the same time concentrate on the mentioned limits of the constitutional courts' implementation potential. Are they always the main driving force in implementing the Strasbourg judgments? And is their support unequivocal?

The answer to these questions is not straightforward. Domestic constitutional courts are far from being mere "transmission belts" of the Strasbourg Court. There are at least two broader narratives regarding their position towards the ECtHR. The first narrative portrays constitutional courts as "downstream consolidators of democracy"<sup>103</sup> who use the Convention as a "shield" against their governments or as a "shadow constitution".<sup>104</sup> Some constitutional courts in the region even constitutionalised the Convention formally,<sup>105</sup> and started to use the Convention – as interpreted by the Strasbourg Court – as a yardstick for constitutional review of legislation and for the review of decisions made by the ordinary judiciary.<sup>106</sup> Under this narrative, constitutional courts are staunch allies of the ECtHR that provide the Strasbourg case law with the radiating effect in domestic systems. However, there is also a competing narrative. Constitutional courts may perceive the ECtHR as a competitor and, therefore, prefer not to engage much with the Convention in order to guard their own playing field.<sup>107</sup> The ECtHR might even become a subversive force that challenges the prominent position of constitutional courts within the domestic constitutional order, disrupts the status quo or undermines the national sovereignty.<sup>108</sup> Under this narrative, constitutional courts embrace the Strasbourg case law only if it suits their own goals.

But even constitutional courts are not necessarily monolithic blocs. While some European constitutional courts decide cases only in full

<sup>102</sup> G. Martinico, National Courts and Judicial Disobedience to the ECHR: A Comparative Overview, in: O. M. Arnardóttir/A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection*, 2016, 74.

<sup>103</sup> We borrow this term from Tom Ginsburg who used it in a different context (see T. Ginsburg, *Courts and New Democracies: Recent Works*, in: *Law & Social Inquiry* 37 (2012), 729 et seq.).

<sup>104</sup> A. Stone Sweet/H. Keller (note 64), 686.

<sup>105</sup> See e.g. Judgment of the Czech Constitutional Court of 25.6.2002, No. Pl. US 36/01 (discussed in more detail in M. Bobek/D. Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, in: G. Martinico/O. Pollicino [note 81], 159 et seq., 175 et seq.).

<sup>106</sup> For further details and practical examples see C. van de Heyning (note 82), 21 et seq.

<sup>107</sup> See A. Stone Sweet/H. Keller (note 64), 20.

<sup>108</sup> For a similar argument in the context of EU law see J. Komárek (note 96), 525 et seq., 532 et seq.

bench,<sup>109</sup> many constitutional courts sit not only as a full court, but also in smaller panels.<sup>110</sup> The German *Bundesverfassungsgericht* is a typical example. It is *de facto* not one, but two courts,<sup>111</sup> because its 16 judges virtually never sit together to decide cases on the merits. Novel cases are decided in two separate eight-member senates,<sup>112</sup> whereas repetitive and less important cases are adjudicated by three-member panels.<sup>113</sup> Czech, Romanian, Slovak and many other constitutional courts decide cases either in plenary sessions or in smaller (usually three-member) panels.<sup>114</sup> It is thus quite possible that the smaller decision-making units *within* a given constitutional court may diverge regarding their openness towards the Strasbourg case law.

However, these tensions among the panels of the same court should not be exaggerated and most constitutional courts have developed mechanisms for unifying the divergent case law anyway.<sup>115</sup> Therefore, it is important to look beyond the dynamics between the plenary and the panels and among the panels. Depending on legal culture, the perception of the role of a constitutional court and its justices, the maturity of constitutional adjudication and institutional design in a given country, there are at least five more players *within* the constitutional court whose role might be critical to the embeddedness of the Strasbourg case law: the court president, the Secretariat, a separate analytical department specialising in international and comparative law, individual justices, and law clerks.

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<sup>109</sup> Note that such institutional rule is manageable only if the constitutional court has a limited docket, which in the Continental context means that the individual constitutional complaint is not available. The Italian *Corte Costituzionale*, the French *Conseil Constitutionnel* and constitutional courts in the Baltic States are typical examples of this model.

<sup>110</sup> In fact, constitutional courts that decide cases only in plenary sessions (see the preceding footnote) are becoming rare in Europe.

<sup>111</sup> See more generally *J. R. Leiss*, One Court, Two Voices, in: GLJ 16 (2015), 901 et seq.

<sup>112</sup> See *D. P. Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany, 2012, 18 et seq.

<sup>113</sup> *D. P. Kommers* (note 112), 20 et seq.

<sup>114</sup> *D. P. Kommers* (note 112), 20 et seq.

<sup>115</sup> See e.g. *R. Procházka*, Mission Accomplished: On Founding Constitutional Adjudication in Central Europe, 2002, 33 et seq.; *D. Kosař*, Conflicts between Fundamental Rights in the Jurisprudence of the Czech Constitutional Court, in: E. Brems (ed.), Conflicts Between Fundamental Rights, 2008, 347 et seq., at 348–351; and *W. Sadurski*, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, 2014, 22.

<sup>115</sup> This has become a necessity given the number of judgments they issue. For broader implications of this problem see, *mutatis mutandis*, *M. Bobek*, Quantity or Quality? Re-Assessing the Role of Supreme Jurisdictions in Central Europe, in: *Am. J. Comp. L.* 57 (2009), 33 et seq. (who deals primarily with supreme courts, but his arguments are applicable to constitutional courts as well).

The role of a president of a constitutional court varies from one country to another and often reflects the role of court presidents of ordinary courts.<sup>116</sup> In some countries, constitutional court presidents decide unilaterally on case assignment,<sup>117</sup> have a major say in the composition of panels,<sup>118</sup> set the agendas of plenary meetings,<sup>119</sup> and may even informally influence the selection of new constitutional justices.<sup>120</sup> None of this entails a direct take on the Strasbourg case law, but it is clear that constitutional court presidents are powerful figures in many countries and their view on the Strasbourg Court may heavily influence the position of individual justices towards the ECtHR.<sup>121</sup>

The role of the Secretariat or the Registry of a constitutional court in implementing the Strasbourg judgments is rarely studied, but it might matter too. The Registry may play the “sifting” role in processing the individual constitutional complaints<sup>122</sup> and provide research support for the justices regarding Strasbourg case law.<sup>123</sup> Some constitutional courts even decided to create a specialised analytical department that focuses primarily on the analysis of international law, European Union law and foreign law. Such department was created for instance in the Czech Republic. The Analytical Department (*analytický odbor*) of the Czech Constitutional Court employs several analysts,<sup>124</sup> who are purposefully selected from different backgrounds<sup>125</sup> to ensure language diversity.<sup>126</sup> It is formally subordinated to the General Secretary of the Czech Constitutional Court, but its role in “trans-

<sup>116</sup> See notes 92-93 above.

<sup>117</sup> This is the case, for instance, in Italy. For further details see *V. Barsotti/P. G. Carozza/M. Cartabia/A. Simoncini*, Italian Constitutional Justice in Global Context, 2016, 47.

<sup>118</sup> For instance, the President of the Czech Constitutional Court has such power.

<sup>119</sup> Virtually any President of the Constitutional Court is able to exploit his agenda-setting role.

<sup>120</sup> For instance, the President of the Czech Constitutional Court has heavily influenced the composition of the so-called “third” Czech Constitutional Court (2013-now). For further details see *V. Šimíček*, Výběr kandidátů na soudce Ústavního soudu a jejich schvalování Senátem, in: J. Kysela (ed.), Dvacet let Senátu Parlamentu České republiky v souvislostech, 2016; *D. Kosař/ L. Vyhnaněk*, Senát a výběr soudců Ústavního soudu, in: J. Kysela (note 120).

<sup>121</sup> See notes 92-93 above.

<sup>122</sup> This role of the General Registry of *Bundesverfassungsgericht* is well-known. For further details see *D. P. Kommers* (note 112), 18 et seq.

<sup>123</sup> See the four notes that follow.

<sup>124</sup> The Analytical Department consists of the head of the department, six analysts, three librarians and two people working on the official Collection of Judgments and Decisions.

<sup>125</sup> The members of the Analytical Department include academics, former members of the ECtHR’s Registry, former law clerks to justices of the Czech Constitutional Court, former law clerks at top ordinary courts, as well as lawyers who practised law in the Czech Republic.

<sup>126</sup> This means that English, French, German and Spanish must be covered all the time. However, members of the Analytical Department often speak several other languages.

lating” the Strasbourg case law into the Czech constitutional context is so important that it must be treated separately from the rest of the Secretariat. More specifically, the Analytical Department alerts the justices when a new Strasbourg judgment against the Czech Republic is issued, provides the justices with monthly summaries of the new Strasbourg judgments against other countries, and, at the request of an individual justice, conducts individualised research on the Strasbourg jurisprudence tailored to a particular case.<sup>127</sup>

It is thus clear that a well-staffed Secretariat or a specialised analytical department can significantly improve the use of the Strasbourg case law and be of help in overcoming eventual non-compliance with the ECtHR case law caused by the lack of awareness. This is particularly true in Central and Eastern Europe, where many top jurists in their fifties and sixties, including constitutional court justices, do not speak foreign languages fluently.<sup>128</sup> As a result, they become dependent on reliable “translators” of the ECtHR’s case law. Such justices, not confident in their own foreign language skills, are of course more willing to consult “in-house” specialists rather than members of academia and other “outsiders”.<sup>129</sup>

Individual justices’ attitudes, expertise in and openness towards ECHR law may also affect the constitutional court’s treatment of the ECtHR’s case-law.<sup>130</sup> A constitutional court justice who is knowledgeable about the ECtHR’s case law and engages with it thoroughly may serve as a “hub” or an “entry point” for the Strasbourg jurisprudence. The former career of constitutional courts’ justices is particularly important here – these “entry point” justices often come from academia and top ordinary courts, but some countries even intentionally<sup>131</sup> facilitated such “hubs” by appointing

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<sup>127</sup> Apart from its major analytical task, the Analytical Department also runs the library of the Czech Constitutional Court and is responsible for publishing the official Collection of Judgments and Decisions of the Czech Constitutional Court.

<sup>128</sup> See *J. Malenovsky*, *L’indépendance des juges internationaux*, in: RdC, 2011, 187 et seq; and *D. Kosař*, *Selecting Strasbourg Judges: A Critique*, in: M. Bobek (ed.), *Selecting Europe’s Judges A Critical Review of the Appointment Procedures to the European Courts*, 2015, 120 et seq., 143 et seq.

<sup>129</sup> But, as we mentioned above, constitutional courts in some countries have requested the Venice Commission for *amicus curiae* briefs on comparative and international human rights issues. See above note 40.

<sup>130</sup> See *Ladislav Vyhnánek’s* contribution in this issue.

<sup>131</sup> However, it is not entirely clear whether these governments appointed the ex-Strasbourg justices primarily in order to strengthen the influence of the Strasbourg case law or rather because they thought that the ex-Strasbourg justices were the best available candidates (and the increasing awareness of the Strasbourg case law was merely a “side effect”) or both.

ex-Strasbourg judges<sup>132</sup> to the constitutional court.<sup>133</sup> From these “entry points”, the Strasbourg case law travels into the subsequent judgments of the given constitutional court and radiates to the ordinary courts. Even if these Strasbourg-friendly justices are in the minority at the moment, they bring new arguments into the deliberation and, if separate opinions are allowed, may castigate the majority in their dissenting opinions. Such dissenting opinion also has an important signalling function: it signals to the party that lost before the constitutional court that it makes sense to lodge the application to the ECtHR. In addition, it sends a signal to the ECtHR itself, which will surely subject such judgment of the constitutional court to serious scrutiny. This dual signalling function constrains the majority, as most constitutional courts will think twice before challenging the ECtHR openly.<sup>134</sup>

Finally, mainly in the post-communist countries that have (re-)established constitutional review only recently and often show lower human rights awareness, even law clerks can make the difference, especially if they are fluent in English and French. As explained above, the language skills of constitutional justices in many Central and Eastern European countries are insufficient for them to engage fully with the Strasbourg jurisprudence.<sup>135</sup> Having a law clerk who is able to do so can overcome this deficiency.<sup>136</sup> Some justices go even further and intentionally hire former members of the ECtHR’s Registry,<sup>137</sup> which gives them a clear competitive edge regarding the knowledge of the Strasbourg case law.

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<sup>132</sup> This is even encouraged by the CoE organs that have argued that the fact that judges return from the ECtHR to their home state has several positive effects, since “former [Strasbourg] judges are likely to enrich the legal profession’s knowledge of Strasbourg case law with their uniquely acquired European experience” (Committee on Legal Affairs and Human Rights, Nomination of candidates and election of judges in the European Court of Human Rights, 1.12.2008, Doc. 11767, Part B (Explanatory memorandum), § 38).

<sup>133</sup> Note that several ECtHR judges from Central and Eastern Europe were in their 30s and early 40s when they joined the Strasbourg Court (for the explanation of this phenomenon see note 128). That means that once their Strasbourg term had expired, they were still in their 40s or 50s and thus looking for another job. The Baltic States in particular tend to appoint their former ECtHR judges to their constitutional courts. For instance, *Danutė Jočienė* became a justice of the Constitutional Court of Lithuania in 2014 and *Ineta Ziemele* joined the Constitutional Court of Latvia in 2015.

<sup>134</sup> This does not mean that the constitutional courts will necessarily decide to opt for a Strasbourg-friendly position; see notes 138-142 below.

<sup>135</sup> See note 128.

<sup>136</sup> See *Ladislav Vyhnánek’s* contribution in this issue.

<sup>137</sup> For instance, a Justice of the Czech Constitutional Court *Kateřina Šimáčková* has had at least one law clerk who previously worked at the ECtHR’s Registry in her team since her appointment in 2013.

The abovementioned taxonomy of various actors operating *within* the constitutional courts shows that the process of the implementation of Strasbourg judgments by domestic constitutional courts is far more complex than usually thought. Most scholarship on the role of the Convention in domestic constitutional adjudication lacks the necessary depth and breadth to understand this dynamic, as it focuses primarily on the relevant judgments of constitutional courts and not the actors behind them. Hence, we need more nuanced studies to advance our understanding of the institutional factors that affect the treatment of Strasbourg case law in domestic constitutional adjudication.

But that would not be enough. The position of the constitutional courts towards the Strasbourg Court may change over time. Moreover, we should not forget that not every member state of the CoE established a constitutional court. In fact, some established democracies in Western Europe do not have one. Finally, constitutional courts do not operate in a vacuum and it is thus also necessary to understand their relationship with other domestic actors. We will now turn briefly to these three factors.

First, the position of the Convention and the role of Strasbourg case law in domestic constitutional adjudication are not static. Initially, constitutional courts in West Europe were protecting their turf and only slowly started embracing the Strasbourg case law. However, more recently, we could witness a reverse move from deference towards defiance to the ECtHR's case law in several countries. These signs of resistance come from both established and new democracies. For instance, the Italian Constitutional Court held in 2015 that only the "settled case law" of the ECtHR is binding upon Italian ordinary courts.<sup>138</sup> Even the German Constitutional Court has shown considerable reservations about fully embracing the Strasbourg case law in the so-called preventive detention saga,<sup>139</sup> the *Görgülü* case<sup>140</sup> and the

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<sup>138</sup> See Judgment of Italian Constitutional Court No. 49/2015 of 26.3.2015; and *A. Pin*, *A Jurisprudence to Handle with Care: The European Court of Human Rights' Unsettled Case Law, Its Authority, and Its Future, According to the Italian Constitutional Court*, in: *Int'l J. Const. L. Blog* [online] 2015; see also contributions by *Diletta Tega* and *Davide Paris* in this issue.

<sup>139</sup> See e.g. *G. Merkel*, *Incompatible Contrasts? Preventive Detention in Germany and the European Convention on Human Rights*, in: *GLJ* 11 (2010), 1046 et seq.; *M. Andenas/E. Borge*, *Preventive Detention*, No. 2 BvR 2365/09, in: *AJIL* 105 (2011), 768 et seq.; *A. L. Paulus*, *From Implementation to Translation: Applying the ECtHR Judgments in the Domestic Legal Orders*, in: *A. Seibert-Fohr/M. E. Villiger* (eds.), *Judgments of the European Court of Human Rights – Effects and Implementation*, 2014, 274 et seq.; *T. Giegerich*, *The Struggle by the German Courts and Legislature to Transpose the Strasbourg Case Law on Preventive Detention into German Law*, in: *T. Giegerich* (note 139), 225; and *E. Klein*, *Germany*, in: *J. Gerards/J. Fleuren* (note 45), 207.

von *Hannover* case.<sup>141</sup> What is worse for the ECtHR, this contagion seems to be spreading to top ordinary courts as well.<sup>142</sup> The recent socio-legal study on the legitimacy of the ECtHR in the eyes of domestic judges yielded similar results and confirmed the rise of opposition to the Strasbourg Court within the judiciary.<sup>143</sup> The Russian Constitutional Court went much further, and in the series of judgments from 2015 and 2016 stressed the supremacy of the Russian Constitution over the Convention, in the latter ruling, it declared the ECtHR's 2013 *Anchugov and Gladkov v. Russia* judgment dealing with the voting rights of prisoners as non-executable given the supremacy of the Constitution in Russia's legal system.<sup>144</sup> At the same time, however, the Russian Constitutional Court added that the ECtHR's judgment could be executable by other State authorities through optimising the

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<sup>140</sup> See e.g. C. Tomuschat, Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court, GLJ 11 (2010), 513 et seq., 520 et seq.; and M. Hartwig, Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights, in: R. Miller /P. Zumbansen (eds.), Comparative Law as Transnational Law, 2012, 145 et seq.

<sup>141</sup> See note 140 above; C. Coors, Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights, GLJ 11 (2010), 527 et seq., 533 et seq.; W. Hoffmann-Riem, Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen, in: EuGRZ 33 (2006), 492 et seq., 497 et seq.; and H.-J. Papier, Umsetzung und Wirkung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte aus der Perspektive der nationalen deutschen Gerichte, in: EuGRZ 33 (2006), 1 et seq., 3.

<sup>142</sup> See *Moreira Ferreira v. Portugal* (no 2), in which the Portuguese Supreme Court rejected a request for revision following a judgment delivered by the ECtHR (the case is currently pending before the Grand Chamber). See also *J. Jackson/S. Summers* (note 85), 114 et seq., (discussing the unwillingness of the UK and Swiss courts to accept the ECtHR's rulings on the issue of confrontation); and *G. Martinico* (note 102), 101 et seq. (for further examples).

<sup>143</sup> See *B. Çali/A. Koch/N. Bruch*, The Legitimacy of the European Court of Human Rights: The View from the Ground, 2011, in particular at 18 et seq.; and *B. Çali/A. Koch/N. Bruch*, The Social Legitimacy of Human Rights Courts: A Grounded Interpretivist Theory of the Elite Accounts of the Legitimacy of the European Court of Human Rights, in: HRQ 35 (2013), 955 et seq., 972. For a more doctrinal take on this issue see *P. Popelier/S. Lambrecht/K. Lemmens* (note 8).

<sup>144</sup> See Decision of the Russian Constitutional Court of 19.4.2016, in which the Russian Constitutional Court ruled that enforcement of the 2013 *Anchugov & Gladkov v. Russia* judgment is "impossible", because it is contrary to the Russian Constitution. For further implications of this decision see *N. Chaeva*, The Russian Constitutional Court and Its Actual Control Over the ECtHR Judgement in *Anchugov and Gladkov*, in: EJIL Talk!, 26.4.2016; *I. Nuzov*, Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce, in: I CONnect, 13.5.2016, at: <<http://www.iconnectblog.com>>. See also the earlier Decision of the Russian Constitutional Court of 14.7.2015 No. 21-П/2015; *L. Mälksoo*, Russia's Constitutional Court Defies the European Court of Human Rights, in: Eu Const. L. Rev. 12 (2016), 377 et seq.; and the literature in note 86 above.

system of criminal penalties, which can be viewed as somewhat of a compromising passage.<sup>145</sup>

A less visible shift took place in Central and Eastern Europe, whose constitutional courts were adamant supporters of the Strasbourg Court in their early years. That was understandable, as for them the ECtHR's case law was, in the absence of the developed case law, based on the domestic catalogues of fundamental rights, an important inspiration,<sup>146</sup> or even operated as a "shield"<sup>147</sup> against the post-communist semi-authoritarian regimes.<sup>148</sup> But times have changed. Some constitutional courts in the region, such as the Hungarian Constitutional Court and the Polish Constitutional Tribunal, came under pressure from the ruling parties that see the Strasbourg Court and the Council of Europe more broadly as the supporters of their opposition.<sup>149</sup> Other constitutional courts have built a considerable amount of their own case law within the last 20 years and, at least in certain areas of law, do not need to look to Strasbourg for guidance any more. The Czech Constitutional Court in particular has become more assertive and increasingly aware of and willing openly to advance the distinctive Czech constitutional identity.<sup>150</sup> Neither the pressure and court-packing in Hungary and Poland nor the new self-esteem in Czechia have so far materialised in an open challenge to the Strasbourg Court. However, it is significantly more

<sup>145</sup> See *Ausra Pads kocimaite's* contribution in this issue; *M. Aksenova*, Anchugov and Gladkov is not Enforceable: the Russian Constitutional Court Opines in Its First ECtHR Implementation Case, in: *Opinio Iuris*, 25.4.2016, at <<http://opiniojuris.org>>.

<sup>146</sup> *I. Motoc/I. Ziemele* (note 98). See also, mutatis mutandis, *M. Bobek*, Comparative Reasoning in European Supreme Courts, 2013, 255 et seq.

<sup>147</sup> Or a proverbial "straw" the drowning constitutional courts attempted to clutch at.

<sup>148</sup> See e.g. *R. Procházka*, *Európský dohovor o ľudských právach v slovenskom ústavnom poriadku* (The ECHR in the Slovak Constitutional Order), in: *Časopis pro právní vědu a praxi* (2002), 215 et seq., 218; and *M. Bobek/D. Kosař* (note 105), 171 et seq. (on Slovakia); *W. Sadurski* (note 75), 439.

<sup>149</sup> See e.g. *B. Bugarič/T. Ginsburg*, The Assault on Postcommunist Courts, in: *Journal of Democracy* 27 (2016), 69 et seq.

<sup>150</sup> For instance, the Czech Constitutional Court has recently found the judgment of the European Court of Justice "ultra vires" (see *R. Zbíral*, A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed ultra vires [Czech Constitutional Court, judgment of 31.1.2012, Pl. ÚS 5/12], in: *CMLR* 49 (2012), 1475 et seq.; and *M. Bobek*, Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure, *Eu. Const. L. Rev.* 10 (2014), 54 et seq.) and openly departed from the position taken by German *Bundesverfassungsgericht* on the same issue (see e.g. *J. Komárek and editors*, The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009, *Eu. Const. L. Rev.* 5 (2009), 345 et seq.; and *H. Smekal/L. Vyhnánek*, Equal Voting Power Under Scrutiny: Czech Constitutional Court on the 5 % Threshold in the 2014 European Parliament Elections, in: *Eu. Const. L. Rev.* 12 (2016), 148 et seq.) which was unheard of just few years ago.

likely that this may happen in future, especially if the ECtHR increases the number of highly divisive judgments against these countries that would resonate with the ruling political forces and the public at large.<sup>151</sup>

Second, one must not forget that several CoE member states did not create constitutional courts. For instance, the Dutch Constitution explicitly prohibits judicial review of legislation.<sup>152</sup> The common law member states, the United Kingdom<sup>153</sup> and Ireland,<sup>154</sup> have supreme courts that can be perceived as constitutional courts in the broader sense,<sup>155</sup> but their role is different from the specialised *Kelsenian* constitutional courts on the Continent.<sup>156</sup> Nordic countries do have some form of constitutional review, but despite recent developments it has been used sparingly and reluctantly.<sup>157</sup> In

<sup>151</sup> This is already happening against Hungary (see e.g. *Karácsony and Others v. Hungary* [note 54]; and ECtHR [GC] *Baka v. Hungary*, 23.6.2016, No. 20261/12). In the Czech Republic, the only Strasbourg judgment that has resonated significantly within the domestic political sphere (and partly also among the people) is the Grand Chamber judgment in *D. H. v. the Czech Republic* (see *L. Majerčík*, Czech Republic: Strasbourg Court Undisputed, in: P. Popelier/S. Lambrecht/ K. Lemmens [note 8], 131 et seq.). Regarding Poland see *K. Kowalik-Bańczyk*, Poland: The Taming of the Shrew in: P. Popelier/S. Lambrecht/ K. Lemmens (note 8).

<sup>152</sup> See e.g. *G. van der Schyff*, Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?, in: GLJ 11 (2010), 275 et seq.; and *E. Mak*, Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalised Legal Order, in: M. Jovanovic (ed.), Constitutional Review and Democracy, 2015, 185 et seq.

<sup>153</sup> The Supreme Court of the United Kingdom may not only engage in Convention-conforming interpretation, but also issue the so-called “declaration of incompatibility” (see e.g. *E. F. Delaney*, Judiciary Rising: Constitutional Change in the United Kingdom, Nw. U. L. Rev. 108 (2014), 543 et seq., 556 et seq.). This broader understanding of constitutional adjudication is also closely connected to the debates on the “new commonwealth constitutionalism” (see e.g. *S. Gardbaum*, Reassessing the New Commonwealth Model of Constitutionalism, in: I.CON 8 (2010), 1 et seq.) and the “weak judicial review” (see e.g. *R. Dixon*, Weak-Form Review & American Exceptionalism, in: Oxford Journal of Legal Studies 32 (2012), 587 et seq.).

<sup>154</sup> The Irish Supreme Court can even conduct judicial review in abstract review procedure (see e.g. *N. Howlin*, Shortcomings and Anomalies: Aspects of Article 26, in: Irish Student Law Review 13 (2005), 26 et seq.; *S. Ó Tuama*, Judicial Review Under the Irish Constitution: More American than Commonwealth. Electronic Journal of Comparative Law 12 (2008), <<http://www.ejcl.org>>; and *E. Carolan*, Evaluating the Judicial Role in Developing the Irish Constitution, in: G. F. Ferrari/J. O’Dowd (eds.), 75 Years of the Constitution of Ireland: An Irish-Italian Dialogue, 2014, 63 et seq.

<sup>155</sup> See *P. Häberle*, Role and Impact of Constitutional Courts in a Comparative Perspective, in: I. Pernice/J. Kokott/C. Saunders (eds.), The Future of the European Judicial System in a Comparative Perspective, 2006, 65 et seq., 67.

<sup>156</sup> See *V. F. Comella*, Constitutional Courts and Democratic Values: A European Perspective, 2009; *L. Garlicki*, Constitutional versus Supreme Courts, in: I.CON 5 (2007), 44 et seq.; and literature in note 96.

<sup>157</sup> See *J. Husa*, Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?, in: Scandinavian Studies in Law 55 (2010), 101 et seq.; the special issue on Nordic

the absence of the specialised constitutional court, other bodies have to play its role. In the Netherlands and common law jurisdictions, the supreme courts are most likely to fill this vacuum and act as “constitutional courts light”,<sup>158</sup> whereas in Nordic countries it is the parliament that tends to play the key role in implementing the Strasbourg case law. This insight could actually lead to the new avenue of research that would attempt to define the circumstances under which top ordinary courts turn into “constitutional courts light”, to compare these “constitutional courts light” with the fully-fledged specialised constitutional courts and to analyse their distinct roles in implementing the Strasbourg case law.

Finally, it is important to see the role of constitutional courts in implementing the ECtHR’s case law in the broader political context. This brings us back to the complexities of the domestic implementation process that depends on the plurality of actors with different interests, various degrees of Strasbourg enthusiasm, complicated mutual relationships and divergent powers.<sup>159</sup> For instance, if a Strasbourg friendly constitutional court has the support of a pro-Strasbourg coalition of other domestic actors,<sup>160</sup> it can diffuse the Strasbourg standards smoothly. But if such court faces an anti-Strasbourg coalition, its impact on the implementation process is diminished.<sup>161</sup> In the worst case scenario, the ruling anti-Strasbourg coalition may exercise pressure on the pro-Strasbourg constitutional justices or even try to paralyse the entire constitutional court.<sup>162</sup> The opposite scenario, the pro-

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constitutionalism in *Nordisk Tidsskrift For Menneskerettigheter* (Vol. 27, No. 2, 131 et seq.) and the Symposium on Nordic Juristocracy in: *I.CON 9* (2011), 449 et seq).

<sup>158</sup> But the absence of a constitutional court seems to increase the role of national parliaments too. See the reform proposal of MP *Taverne* in the Netherlands (see *S. Lambrecht*, *HRA Watch: Reform, Repeal, Replace? Criticism of the European Court of Human Rights: A UK Phenomenon?*, in: *UK Const. L. Blog* [27.7.2015], available at <<https://ukconstitutionallaw.org>>) and the discussions on the repeal (and possible replacement) of the Human Rights Act in the United Kingdom; *T. Lock/K. Dzehtsiarou*, *The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights*, in: *OHRH Blog* [15.5.2015], available at <<http://humanrights.dev3.oneltd.eu>>; and *R. Masterman*, *The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights*, in: *P. Popelier/S. Lambrecht/K. Lemmens* (note 8), 449 et seq.).

<sup>159</sup> See Part IV of this paper.

<sup>160</sup> This has been a standard scenario in most established democracies in West Europe. See the chapters on Austria, Belgium, Germany, Italy and Sweden in *P. Popelier/S. Lambrecht/K. Lemmens* (note 8).

<sup>161</sup> This has happened, to a certain extent, for instance in *Mečiar’s* Slovakia in the 1990s (see e.g. *R. Procházka* [note 148], 218) and in post-Orbán Hungary (see *E. Polgári*, *Hungary: Gains and Losses. Changing the Relationship with the European Court of Human Rights*, in: *Popelier/S. Lambrecht/K. Lemmens* [note 8]).

<sup>162</sup> The former was employed in Poland by the *Kaczyński brothers* in 2005–2007 and the latter by *Jaroslav Kaczyński* after his “Law and Justice” party won the elections in 2015.

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Strasbourg coalition facing the anti-Strasbourg constitutional court, is unlikely, but it cannot be excluded.<sup>163</sup> Finally, if the constitutional court joins the anti-Strasbourg domestic alliance, it may effectively block the implementation process altogether.<sup>164</sup>

It is thus clear that, however important and powerful a given constitutional court is, it is just one of the many actors within the domestic politics. In fact, a constitutional court must be understood as one of the many domestic “meso-level” actors that interact with each other<sup>165</sup> within the State (“macro-level”), but it also consists of several “micro-level” actors<sup>166</sup> within the constitutional court itself. These three levels at which the constitutional courts operate are closely interrelated. For instance, the attitude of other domestic political actors can influence the internal politics of the constitutional courts by buttressing the bargaining power of pro-Strasbourg or anti-Strasbourg judges. At the same time, the internal politics of constitutional courts can significantly affect the way in which the courts interact with other actors within the implementation processes.<sup>167</sup> Hence, we can see the full picture of how the constitutional courts influence the dynamics of the implementation process only if we take into account all of these three levels. Various factors at all the three levels affect whether and to what extent the constitutional courts act as effective “diffusers” and “filters” of the Strasbourg Court.

This is not to say that every study of the role of the constitutional courts in the implementation process of the Convention must cover all three levels. This would be a daunting task that could hardly be accomplished by a single researcher. We rather suggest that any researcher should be aware of each layer, even if she eventually focuses on only one or two of them. In fact, we should encourage more studies focusing on a particular layer as

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<sup>163</sup> For instance, if authoritarian leaders manage to pack the constitutional court, which will then defy the newly elected pro-Strasbourg political coalition. In any case, the ECtHR has already held that there is not any prohibition on a Government to challenge the decisions of its own highest courts before the ECtHR (see ECtHR, *A. and others v. United Kingdom* [note 87], § 157) and thus, if the anti-Strasbourg judgment of the domestic constitutional court is challenged before the ECtHR, the Government may decide not to defend the judgment of its constitutional court and even ask the ECtHR to find a violation of the Convention.

<sup>164</sup> See the Russian scenario described in notes 86 and 144 above.

<sup>165</sup> See above.

<sup>166</sup> See notes in 110-137 above.

<sup>167</sup> See *G. Vanberg*, *Constitutional Courts in Comparative Perspectives: A Theoretical Assessment*, in: *Annual Review of Political Science* 18 (2015), 167 et seq., 182.

well as methodological plurality<sup>168</sup> to tackle the different problems on each level. Both macro-level quantitative studies of state compliance with the Strasbourg case law or of the normative position of the Convention within the domestic constitutional systems, meso-level studies of the legislative responses to the Strasbourg jurisprudence or of conflicts between the constitutional court and ordinary courts, and in-depth micro-level socio-legal studies of the interactions between justices and law clerks or a comparative study on the role of constitutional courts' analytical departments are equally valuable. They all contribute, each in its own way, to the bigger picture and our understanding of the Convention system of human rights.

## VII. Conclusion

In this paper we have provided a general framework of the role of domestic actors in the implementation of Strasbourg judgments. We argue that the implementation of the ECtHR case law is a multi-faceted process in which various actors with different interests are engaged. In order to understand this complex process we unpacked the abovementioned domestic dynamics and put forward the argument that the following factors are crucial for the course and the outcome of compliance processes: the number of actors involved in the implementation process, the attitude of the actors involved in the ECtHR judgment, their mutual relations, the relative strength of the domestic forces engaged in the compliance mechanisms and their readiness to act.

Subsequently, we zeroed in on the role of domestic judiciaries in the compliance process, and on the role of constitutional courts in particular. We argue that in implementing the Strasbourg case law, the constitutional courts are constrained by the fundamental features of the given polity (macro-level factors). Within these boundaries they interact with other actors involved in the processes of the ECtHR's case law implementation (meso-level factors), and these interactions essentially influence the outcomes of implementation processes. Nevertheless, the very position of the constitu-

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<sup>168</sup> We should thus go beyond the doctrinal and normative understanding of the Convention and Strasbourg case law that operates primarily on the macro-level. Interactions among meso-level actors call for insights from political science and micro-level functioning of the constitutional courts is a fertile soil for socio-legal studies (for an example of a wonderful socio-legal study of a top domestic court see *B. Latour, The Making of Law: An Ethnography of the Conseil d'État*, 2010).

tional courts in these interactions is created by players acting within the constitutional courts themselves (micro-level factors).

By doing so, we showed that constitutional courts are neither all-powerful nor paper tigers and that it is important to assess their capabilities within the Convention system realistically. Future research thus should develop an understanding of the circumstances under which constitutional courts will be in a stronger position vis-à-vis the legislative majorities and the executive (meso-level actors) and the circumstances under which they will be constrained. Another potential fertile ground for future research is to explore how the constitutional court's inner structure affects the way the constitutional court as a whole as well as its individual justices (micro-level actors) communicate with the ECtHR and other domestic actors.<sup>169</sup> Only then can we move beyond individual cases and come up with robust theories about the role of the constitutional courts in the Strasbourg human rights architecture.

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<sup>169</sup> Contributions of *Ausra Padskocimaite*, *Ladislav Vyhnánek* and *Diletta Tega* in this issue show that this is indeed possible.

