NATIONAL JUDGES AND EUROPEAN LAWS:
A COMPARATIVE CONSTITUTIONAL PERSPECTIVE

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1. GOALS OF THIS CONTRIBUTION

Is EU law still as special as the inventors of supranationalism have traditionally argued over the years? This contribution tries to provide this question with an answer by focusing on the – still limited – extension of the structural EU law principles (primacy and direct effect) to the European Convention on Human Rights. Here I am going to argue that we are already (without taking into account the future accession of the EU to the ECHR) dealing with a partial convergence in the application of EU law and of the ECHR’s provisions. In order to set out this argument, I will move to analyse the relevant case law of the domestic judges on three factors of potential convergence; consistent interpretation, disapplication of national law conflicting with European provisions, and emergence of a counter-limits doctrine.

As for the focus of this contribution, the investigation will concern some selected constitutional experiences. It will be ascertained whether national judges treat ECHR and EU law similarly, and to what extent they facilitate their convergence. In this respect, my purpose is to study the judicial application of the ECHR and EU law to analyse the vertical relationship between national judges (constitutional and ordinary alike) and these external legal sources. As such, I am not interested in the horizontal convergence between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

2. GOING BEYOND THE CONSTITUTIONAL WORDING

Recent literature1 underscored the variety of national constitutional provisions regarding the ECHR. Indeed, looking at these provisions (and those applicable to EU law) one easily appreciates the diversity of national approaches with respect to the domestic authority of European laws.2

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2 Ibid.
Despite these differences, it has been noted\(^3\) that European jurisdictions are progressively nearing on the “position” of the ECHR in the hierarchy of sources. This convergence is the final outcome of different national pathways; sometimes national legislators must be credited, in other circumstances it is rather Constitutional or Supreme Courts, or even common judges. This is irrespective of the formal position set out in the constitution, or of the dualism or monism classification.\(^4\)

The ECHR is generally acknowledged supra-legislative force, but its relationship with constitutional supremacy is more controversial, as discussed below. A similar variety can also be found in the domestic treatment of EU law. One can identify several “strategies” used to ensure EU law’s primacy.\(^5\) However (again), despite this variety and although there are sporadic cases of judicial resistance,\(^6\) as it was noted,\(^7\) EU law is applied in all jurisdictions uniformly, as primacy and direct effect are accepted by all national courts.\(^8\)

As Keller and Stone Sweet argued,\(^9\) the situation is not much different for the ECHR from what just explained regarding EU law. This finding has been somehow confirmed by recent comparative investigations.\(^10\)

To support this claim it is necessary to go beyond the wording of formal provisions and observe how national judges treat these European laws. The first common element of these two European regimes is the crucial role of national judges, who are the real “natural judges” of both, for different reasons. They are the first guardians of the Simmenthal doctrine for EU law\(^11\) and, at the same time, the first adjudicators of the ECHR in national systems, due to the principle of subsidiarity. This is a crucial point of this research, dealing with both ECHR and EU law. To provide a comparative overview, I will treat in turn the following judicial practices:

- consistent interpretation (a consequence of the “indirect effect” of supra-national laws);
- disapplication of domestic law (the consequence of supra-national laws’ direct effect/primacy);
- counter-limits doctrine (setting a limit to supra-national law’s supremacy).

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\(^3\) H. Keller and A. Stone Sweet (eds), *A Europe*, supra note 1, pp. 677–711, at p. 683 ff.
\(^4\) This conclusion is also supported by Keller-Stone Sweet, ‘Assessing’, supra, pp. 685–686.
\(^6\) See the reaction to the Mangold case, for instance: R. Herzog, L. Gerken, ‘[Comment] Stop the European Court of Justice’, www.euobserver.com/9/26714.
\(^7\) M. Claes, *The National Courts’ Mandate supra* note 5.
\(^8\) G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment supra* note 1.