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## The European Court of Human Rights and its impact on domestic legal systems

### *A Corte Europeia de Direitos Humanos e seu impacto em ordenamentos jurídicos internos*

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#### **Abstract**

*The European Court of Human Rights was created in order to supervise a rather classical legal instrument. But some peculiarities since its origins and several evolutions led to the establishment of a true “European public order” under its influence. This paper questions the possibility to consider the ECtHR as a “constitutional judge” and analyzes some of the most important changes it has produced in the domestic legal systems – above all in the public institutions – of the States parties to the European convention on human rights.*

**Keywords:** European Court of Human Rights; domestic legal systems; public law; constitution; balance of powers.

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## Resumo

O Tribunal Europeu de Direitos Humanos foi criado com o objetivo de supervisionar um instrumento jurídico bastante clássico. Mas algumas peculiaridades desde suas origens e várias evoluções levaram ao estabelecimento de uma verdadeira “ordem pública europeia” sob sua influência. Este artigo questiona a possibilidade de considerar o TEDH como um “juiz constitucional” e analisa algumas das mudanças mais importantes que ele produziu nos sistemas jurídicos internos - sobretudo nas instituições públicas - dos Estados signatários da Convenção Europeia sobre Direitos Humanos.

**Palavras-chave:** Tribunal Europeu de Direitos Humanos; sistemas jurídicos nacionais; Direito Público; Constituição; equilíbrio entre poderes.

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## 1. Introduction

In regard to their controversy on the judicial use of comparative constitutional law, justices Bryer and Scalia of the United States Supreme court used to refer, among several foreign “constitutional courts”, to the European Court of Human Rights (hereafter ECtHR) (MURKENS, 2008). At the time this was surprising from a European perspective: the drafters of the European convention for the protection of human rights and fundamental freedoms (hereafter ECHR), which was concluded in 1950 and entered into force in 1953, meant to create classical international mechanisms. First of all, the conventional obligations were binding on State organs and authorities: the main traditional fear concerned State violations of human rights. Secondly, at the beginning there was only an interstate judicial mechanism of enforcement comprising the European commission of human rights and the European court of human rights. The possibility to file individual complaints of violations of the ECHR was optional and depended on the choice of every State party. Only through Protocol 11 did this mechanism become mandatory for all parties in 1998. Thirdly, the jurisdiction of the

Court depends on the principle of subsidiarity: States have to implement the convention by using their own judicial mechanisms and only on last recourse is it possible to file a complaint before the Court. For this reason, the admissibility of the claims depends on the principle of exhaustion of domestic remedies<sup>1</sup>. Fourthly, according to article 46<sup>2</sup> of the ECHR, the judgments of the Court are binding – have force of *res judicata* – only for the parties to the case at hand and they are declaratory: the Court makes findings on the violation of the convention, indicates the result in order to make reparation for the victim of this violation, but the means are left to the choice of the State. According to the rules of international State responsibility, the reparation should take the form of *restitutio in integrum* which means the State has to erase as much as possible the consequences of the violation of the victim's rights and it has to follow the principle of non-repetition of the same wrongful act<sup>3</sup>.

This conventional mechanism did not seem at first revolutionary even if it was rather new in 1950, therefore many States parties thought that it would not change much about the protection of human rights which was believed by them to be already almost perfect. But if we take the example of France, it ratified the convention only in 1974 behind some false pretenses, the true reason being probably the fear of the dynamics of supranationality (PELLET, 1974).

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<sup>1</sup> "ARTICLE 35 - Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken (...)" (EUROPEAN COURT OF HUMAN RIGHTS, 1950).

<sup>2</sup> ARTICLE 46 "Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case" (EUROPEAN COURT OF HUMAN RIGHTS, 1950).

<sup>3</sup> See Part II, Chapter 2 of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission (UNITED NATIONS, 2001).

The ECHR has indeed been called by some a « shadow constitution »<sup>4</sup> for States who don't have a formal bill of rights, which is the case of France. The constitution of 1958 does not provide a list of fundamental rights but refers only to a few of them among which habeas corpus<sup>5</sup>. Thus between 1974<sup>6</sup> and 2010<sup>7</sup> in France the only way for plaintiffs to ask for a judicial review of statutes in order to protect their subjective fundamental rights was to invoke the ECHR before the French judge.

Given all of this, how is it possible to speak of “European constitutional law” about the ECHR or to analyze the impact of the ECtHR on domestic legal systems? In order to answer this question, we can start by looking at the activity of the Court nowadays: 47 States are parties to the ECHR, including many Eastern European States which have adhered to it during the 1990s, after their secession from the Soviet Union. In 2019, 44,500 applications were allocated to a judicial formation, 38,480 of these having been declared inadmissible. The stock of allocated applications pending before the Court was stable over the year amounting to 59,800. The applications decided by judgment or inadmissibility decision were 40,667. Judgments were delivered in respect of 2,187 applications (EUROPEAN COURT OF HUMAN RIGHTS, 2019). These statistics reveal the huge activity of the Court which has become a common mechanism of protection of human rights throughout Europe.

But some peculiarities of the ECtHR were already present at its origins since, according to article 32 of the ECHR, the ECtHR is a supranational court with authority to interpret the convention.<sup>8</sup> Because of this mission, over the years the Court found itself at the intersection of three different sets of norms on the protection of human rights in Europe: national constitutions, the ECHR and European Union law.

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<sup>4</sup> See for instance: GRÜN WALDOVÁ, 2017.

<sup>5</sup> “ARTICLE 66. No one shall be arbitrarily detained.

The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute” (EU CHARTER OF FUNDAMENTAL RIGHTS).

<sup>6</sup> When the French Constitutional council recognized the possibility to found a claim of judicial review of statutes on fundamental rights such as those of the Declaration of the rights of man and of citizens (CONSEIL CONSTITUTIONNEL, 1971).

<sup>7</sup> When the new procedure of “priority preliminary ruling on constitutionality” before the Constitutional council entered into force.

<sup>8</sup> “Article 33 Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide” (COUNCIL OF EUROPE, 1994).

### 1.1. National constitutions

Article 53 of the ECHR functions as a “maximization clause” according to the principle of subsidiarity: “Safeguard for existing human rights - Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”. This provision means that the convention sets minimum standards for human rights and therefore States parties are meant to provide a higher level of protection when possible. If they choose a different standard in this perspective they act according to the ECHR and thus the Court should not criticize them. In the case *Micallef v. Malta* (EUROPEAN COURT OF HUMAN RIGHTS, 2009a), the ECtHR stated that according to article 53, article 6 of the ECHR cannot be used in order to lessen the protection of human rights granted by the convention when domestic law is more protective. In the case at hand, the Maltese judge applied fair trial guarantees of article 6 to proceedings which were not covered by this provision according to the ECtHR. But this hypothesis bears an inherent paradox: can the Court admit that human rights are better protected by domestic systems than by the ECHR? This is probably the reason of the limited use of article 53 made by the ECtHR.

### 1.2. The ECHR

The ECtHR is the official interpreter of this treaty, but the focus must be placed on the question of the authority of its interpretation in the domestic legal orders of the different States parties, while keeping in mind that conventional rights are conceived as minimum standards and thus are rather indeterminate.

### 1.3. European Union law

Until 2000 there was no formal bill of rights of the EU, therefore the Court of justice of the European Union (hereafter CJEU) relied on the principles common to member States’ constitutional traditions and on the ECHR as interpreted by the ECtHR – all member States being also parties to

this treaty<sup>9</sup>. The Charter of fundamental rights of the European Union (hereafter CFREU) has been integrated among the EU treaties in 2009 and, according to article 6 of the Treaty on European Union, the EU shall accede to the ECHR in the future. In this case the ECtHR would be called to review the behavior of the European Union with respect to its human rights obligations besides the activity of its member States. The CJEU should already interpret human rights in EU law according to the case law of the ECtHR, when possible. According to article 52 of the CFREU, “Scope of guaranteed rights - (...) 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. Thus the ECtHR’s interpretation of rights has an impact also on EU law.

This brief landscape shows that the ECtHR finds itself at the intersection of all these different norms on the protection of fundamental rights – which are often very similar in content – and in the strategic position to regulate and harmonize their relationship. This situation explains in part why the ECtHR can have an impact on domestic legal systems.<sup>10</sup>

These effects depend of course also on a series of criteria linked to the status of the ECHR in the different States parties which is extremely variable. The first criterion concerns the validity of the ECHR in the domestic legal order: while in “monist” States it has immediate validity, in “dualist” ones it must be incorporated (CALIGIURI; NAPOLETANO, 2010). The second one is linked to the authority of the convention in the domestic system. The various parties can choose among many possibilities: they can give it constitutional authority, supra legislative authority, at least legislative authority,

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<sup>9</sup> Article 6 of the Treaty on the European Union: “1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law” (TREATY ON EUROPEAN UNION, 2008).

<sup>10</sup> Many concrete examples of this impact can be found here: COUNCIL OF EUROPE, 2020.

sometimes – as in Spain or in Portugal – specific authority granted to human rights treaties in general. In nearly all States parties, domestic judges managed to give the ECHR a special authority. Some eastern European States which ratified the convention recently introduced a reference to human rights treaties within their constitution<sup>11</sup> – usually under pressure from the EU’s conditionality mechanisms – but for the majority of States parties it depends on the domestic judge. The third criterion is the direct effect given by some domestic systems to conventional rights: even if in different ways and by different means, all States parties managed to give to plaintiffs the possibility to claim their conventional rights before the domestic judge. Fourthly, legal situations differ according to whether the State party has or not a formal constitutional bill of rights<sup>12</sup>: this criterion explains the different uses of the convention. Finally, the last determining factor is the presence of a civil law system or of a common law system.

Even if the combination of all these criteria entails some variations, we observe that the ECtHR has developed a constitutional language, referring to the “constitutional European order” (ARCARI; NINATTI, 2017) or to the “European public order” (EUROPEAN COURT OF HUMAN RIGHTS, 1996) created by the convention and that it has started to assume to a certain extent the function of a constitutional judge. This is the main reason of the impacts of its case law on domestic legal systems. I will concentrate here on its effects on public law and above all on constitutional law because this field enshrines the main rules on the functioning of the State. This paper does not aim to cover all the 47 parties, so while analyzing the practice of several States, I will take mainly examples of this impact on France because this State does not have a formal and developed constitutional bill of rights, it has a high record of violations of the convention and has implemented several reforms on the basis of the ECtHR’s case law.

## 2. The ECtHR as a « Constitutional Judge »

Despite the limited authority assigned to them by the ECHR, for many reasons the Courts’ findings are not limited to the specific case at issue and may in some regards appear as a “judicial review” (ARCARI; NINATTI, 2017).

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<sup>11</sup> See for instance the constitutions of the Czech Republic and of Romania.

<sup>12</sup> See for instance the difference between the French constitution (which does not contain a formal bill of rights) and the German Basic Law (which provides for a detailed bill of rights).

## 2.1. Extension of the scope of rights and the establishment of new ones

The ECtHR exercises a great judicial power by extending the scope of some traditional rights of the ECHR and by establishing new rights on the basis of its interpretive authority. These new rights must be introduced into domestic systems and often in a way or another integrated to constitutional rules or given priority over other rules. A first example concerns economic and social rights which are not covered by the ECHR. The Court has nonetheless recognized for instance the right to a healthy environment deriving it from the right to life and the right to respect of private and family life (EUROPEAN COURT OF HUMAN RIGHTS, 2009b). Moreover, while conventional rights were meant to cover only State action – the parties cannot interfere with these rights –, the Court has widely used its doctrine on “positive obligations” in order to force States parties to provide protection of these rights also against threats coming from private persons (ANDRIANTSIMBAZOVINA, 2005).

If we take the example of France, the Constitutional Council, for instance, has taken into account this case law in four different ways. Firstly, it has accepted to establish new constitutional rights such as the right to private life, the freedom of marriage or human dignity.<sup>13</sup> Secondly, it has enlarged the scope of several constitutional rights such as freedom of expression which has come to encompass the right to access different sources of information or habeas corpus which is now interpreted according to the requirements of article 5 of the ECHR.<sup>14</sup> Thirdly, it has decided that due process was applicable to all kinds of judicial procedures: it is the case for the right to an effective judicial remedy, for rights of defense guarantees in relation to all kinds of sanctions, for public hearings and for fairness and independence of courts and other bodies.<sup>15</sup> Fourthly, in several cases the Constitutional Council finally overturned its previous case law in order to take into account the ECtHR’s ruling. Two famous examples concern the question of invalidation of judicial precedents by statutes and the requirement of a lawyer during police custody.<sup>16</sup>

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<sup>13</sup> See for instance: CONSEIL CONSTITUTIONNEL, 1999a; CONSEIL CONSTITUTIONNEL, 2003a; CONSEIL CONSTITUTIONNEL, 1993; CONSEIL CONSTITUTIONNEL, 1994.

<sup>14</sup> CONSEIL CONSTITUTIONNEL, 1986; CONSEIL CONSTITUTIONNEL, 1990; CONSEIL CONSTITUTIONNEL, 2003b.

<sup>15</sup> CONSEIL CONSTITUTIONNEL, 1982; CONSEIL CONSTITUTIONNEL, 1987.

<sup>16</sup> CONSEIL CONSTITUTIONNEL, 1999b.

## 2.2. “Objectivization” of the Court’s decisions

While the ECtHR’s rulings have authority only *inter partes*, the Court managed to enable their application beyond the litigation at hand. It thus developed “pilot judgments”<sup>17</sup> in order to address structural problems or systemic failures in some States parties. When the ECtHR receives a large amount of applications stemming from the same situation, it can decide to “freeze” all pending cases while waiting for the State concerned to take general measures in order to comply with its decision. For this purpose, the Court indicates to the State which measures should be taken (withdrawal of a statute, adoption of a specific legislation, establishment of an institution...) and indicates a specific timeframe for the entry into force of the reform that has to be implemented.

As we have seen, the Court’s rulings should be declaratory and leave the choice of the means of redress to the State whose violation has been recognized. But the Court has taken the habit to set obligations of means for reparation by establishing both individual and general directives. In some cases, indeed, the only means of redress is to strike down a law or to create a specific procedure. A famous example is the *Assanidzé v. Georgia* case where the Court ordered the release of a detainee because of arbitrary detention.<sup>18</sup> By the same token, the Court asks for the reopening of domestic judicial procedures in case of the violation of due process rights but very often it is not possible according to the domestic law. Facing the inaction of Parliament, in some cases the domestic judge has himself ordered these means of redress; the ECtHR has decided for example that criminal proceedings should be reopened by Italy because of the violation of article 6 and finally the Italian Court of cassation took a decision on this point because the Italian parliament did not act (ITALY, 2006).

The *erga omnes* effect of the Courts’ interpretation of conventional rights has even been recognized by States at a high level conference on the future of the ECtHR which met in 2010 in Interlaken; among other things, States parties were called upon « to commit themselves to : (...) c) taking into

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<sup>17</sup> The case concerned the denial of the right to property for over 80,000 people (EUROPEAN COURT OF HUMAN RIGHTS, 2004b).

<sup>18</sup> The plaintiff had been pardoned by a presidential decree but was still detained (EUROPEAN COURT OF HUMAN RIGHTS, 2004a).

account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system » (EUROPEAN COURT OF HUMAN RIGHTS, 2010).

### **2.3. The supremacy of the ECHR over domestic constitutions**

In several cases the ECtHR has decided that domestic constitutional rules violated the ECHR. In 1998 for instance the Court, which was called to examine the dissolution of a political party by Turkey, declared that there is no constitutional exception to the ECHR (EUROPEAN COURT OF HUMAN RIGHTS, 1998). In other two remarkable cases, the Court declared constitutional rules unconventional: they involved the deprivation of the right to vote and to stand for elections for detainees (EUROPEAN COURT OF HUMAN RIGHTS, 2013) and the transitional provisions of the Fundamental law of Hungary adopted in 2012 which terminated the mandate of the president of the supreme court and thus violated article 6 on the independence of the judiciary (EUROPEAN COURT OF HUMAN RIGHTS, 2016).<sup>19</sup>

This judicial activism of the Court has led to a series of constitutional reforms in several States parties; we can cite States which introduced fair trial guarantees in their constitution (Italy, Portugal, Switzerland), the United Kingdom which suppressed the Lord chancellor whose function overlapped between parliamentary and judicial functions (EUROPEAN COURT OF HUMAN RIGHTS, 2000), many States parties which created procedures in order to make reparation for the excessive length of judicial processes.

As a result, not only did the ECtHR manage to give priority to the convention over domestic rules, but also to induce systemic changes of domestic legal regimes. In a way, it introduced a sort of "supranational judicial review" of national statutes by the Court i.e. court's decisions which review the compatibility of national law (including the Constitution) with the ECHR, that are binding within national law and have direct effect vis-à-vis all national institutions.

### **3. Shifts on the balance of powers**

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<sup>19</sup> See also: ARCARI; NINATTI, 2017.

All State authorities are bound by the ECHR's obligations. The ECtHR thus controls as well the executive – the *Wille v. Liechtenstein* case (EUROPEAN COURT OF HUMAN RIGHTS, 1999b), for example, concerned freedom of expression because the Prince of this small country had decided not to reappoint to a public office an administrative judge who had expressed some views on constitutional law during a conference –, the legislative – the law as a general rule has to abide by the ECHR (EUROPEAN COURT OF HUMAN RIGHTS, 1979) – and the judiciary – the excessive length of criminal proceedings being often pointed by the Court (EUROPEAN COURT OF HUMAN RIGHTS, 1999a). Moreover, the ECtHR's case law has led in several domestic legal regimes to a shift of the balance of powers involving mainly the legislative bodies – which lose power – and the judiciary – which is in the end the main winner.

### 3.1. The judiciary

According to the decisions of the Court, domestic judges have to use a strong power in order to review statutes and in order to exercise a full control over acts of the executive. Following this trend, the French Council of State recognized for instance that a violation of the ECHR can entail the State's domestic responsibility (FRANCE, 2007). Moreover, when States enjoy a "margin of appreciation" in the implementation of the ECHR, the proportionality test as established by the ECtHR has led to reinforce the judge's control in fields where it was previously limited. For example, in cases involving the private and family life of aliens facing an administrative decision of expulsion, the French Council of State introduced this proportionality test. It enhanced the judge's control over State acts and reinforced the protection of individual rights over the general interest. It is the case for publication bans for example (SAUVÉ, 2017).

### 3.2. The constitutional judge

Not only does the ECtHR submit to its control the decisions of domestic constitutional judges, but it also compels them to follow fair trial standards common to all other courts. In a famous case, for example, the ECtHR rejected the French Constitutional Council's jurisdiction over

“legislative validations” – a retroactive validation by the Parliament of an administrative act which could have been struck down by a judge: the Court stated that the law validated by the Council still breached the convention (EUROPEAN COURT OF HUMAN RIGHTS, 1999c). Following this position, the Constitutional Council established the « sufficient general interest » test – similar to the ECtHR’s « overriding general interest » test – in order to control proportionality in these cases. Likewise, the ECtHR declared a breach of articles 10 and 11 of the ECHR because the German Federal constitutional court had approved a decision dismissing a teacher as a civil servant because of her affiliation to the communist party (EUROPEAN COURT OF HUMAN RIGHTS, 1995). As a principle, the ECtHR decided that judicial review must respect fair trial guarantees of article 6 of the ECHR when subjective rights are at stake in the judicial process (EUROPEAN COURT OF HUMAN RIGHTS, 1993). Pursuant to this decision, on the 4th February 2010 the French Constitutional Council adopted new internal rules of procedure governing the “priority question of constitutionality” procedure. These included, among others, the adversarial principle, the removal of a judge (or the possibility to abstain) in case of conflict of interests and the requirement of a public hearing.

### **3.3. The legislative**

The legislative bodies tend to lose power by being submitted to several legal duties. A good example is the new function of Parliament consisting in voting reforms according to pilot judgements delivered by the ECtHR. The case of the United Kingdom is particularly interesting in this perspective because of the existence of parliamentary sovereignty. To a certain extent, the introduction of the ECHR – with the case law of the ECtHR – has led to changes in British constitution by limiting the supremacy of the Parliament. According to the 2000 Human rights act, litigants may plead conventional rights against public authorities and courts may enforce these rights unless there is a conflicting statute, but certain judges have also the possibility to declare these statutes unconventional – even if they can’t annul them.

## **4. Limits to the peculiarity of Public Law**

Several States parties have legal regimes based on civil law which are based on the distinction between private and public law. The latter being linked to the State, it usually derogates from “common legal regimes”, thus enjoying a privileged status. The ECtHR’s case law tends to erase or at least strongly limit this distinction by several means.

#### 4.1. Deterritorialization

Article 1 of the ECHR provides: “The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention”.<sup>20</sup> The Court has first interpreted this provision as entailing, in the classical sense, the respect of the rights on the territory of States parties. But in a decision of 2001, it opened the path to extraterritoriality: the Court declared the inadmissibility of the petition of Yugoslav victims of the bombing of the Serbian television building by NATO because it took place outside of the territory of the States parties involved. But at the meantime the Court stated that in exceptional cases, the State can act “under its jurisdiction” in the meaning of the ECHR even outside of its territory (EUROPEAN COURT OF HUMAN RIGHTS, 2001). Following this path, a few years later the Court judged a case involving violations of conventional rights which took place in Transnistria, a region of Moldova but under the effective control of the Russian army. The ECtHR recognized the responsibility of both States based on one side on territorial jurisdiction and on the other side on effective control over part of the territory (EUROPEAN COURT OF HUMAN RIGHTS, 2004c). In two seminal cases the Court clearly established the principle of the responsibility of States for acts occurred “under their effective control”. In the *Al Skeini and Al Jedda* judgments, it made findings of violations by the United Kingdom of conventional rights of detainees in an Iraqi prison under the effective control of the British army during military occupation (EUROPEAN COURT OF HUMAN RIGHTS, 2011). In the *Hirsi* judgment, the ECtHR considered that Italy had effective control in the high seas over migrants on a military vessel (EUROPEAN COURT OF HUMAN RIGHTS, 2012). The Court has also used this case-law in order to decide some cases where States had to protect human rights in the field of Internet activities.<sup>21</sup>

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<sup>20</sup> We underline.

<sup>21</sup> See: EUROPEAN COURT OF HUMAN RIGHTS, 2015.

## 4.2. Common standards for public and private procedures

Many civil law countries set specific legal regimes for public law and public acts (such as administrative acts) which include specific standards and rules for judicial review of these acts. The ECtHR on the contrary considers that the same standards – mainly fair trial rights derived from article 6 of the ECHR – should regulate all judicial proceedings. According to its interpretation of this provision, for example, the determination of “civil rights and obligations” depends on the criterion of the impact of a legal procedure on subjective patrimonial rights. This led to the extension of these standards to administrative decisions refusing the exercise of a profession, to the exercise of the right to property, to litigation between civil servants and the State as an employer, to proceedings before regulatory authorities... In order to abide by this case law, States parties often have to amend their laws and regulations. On the same token, the ECtHR considers that a “criminal charge” within the meaning of article 6 includes administrative and fiscal sanctions, the alternative criteria of this legal classification being the legal qualification of facts by national law, the nature of the facts and the severity of the sanction. This position led to a quarrel between the ECtHR and the French Council of State about the presence of the “*commissaire du gouvernement*” at the deliberation of administrative courts. The ECtHR considered that because this judge issued conclusions favoring one party to the dispute without the possibility to discuss them for the other party, his/her presence at the deliberation could influence the other judges and thus breach fair trial rules according to the ECHR. The Council of State tried to resist the reform implied by the Court’s position but at the end a decree of 2006 (FRANCE, 2006) excluded the *commissaire du gouvernement* from the deliberations except in the Council of State unless a party asks for his/her exclusion. The name of this member of administrative courts has also been changed to the more neutral “public reporter”. Among many other examples, we can cite the extension of the freedom of expression (article 10 of the ECHR) and of the freedom of association (article 11) to the benefit of civil servants.

In so doing, the ECtHR also tends to provoke evolutions of the theory of spheres as conceived by several States parties (SAINT-BONNET, 2015). This theory traditionally distinguishes a private sphere (where the State can’t intrude in the exercise of rights), a public sphere (including public buildings

and assets where some specific rules must be observed, notably by civil servants) and a public space where the State can only issue rules with the aim to articulate and harmonize the exercise of all human rights and to keep the public order safe for everyone. These spheres tend to get blurred nowadays by some activities like the Internet and by the ECtHR case-law on the exercise of the freedom of religion for example.

## 5. Conclusion

The case-law of the ECtHR has clearly achieved many evolutions since the adoption of the ECHR in 1950, thus showing its influence over the domestic legal systems of the States parties, including public and constitutional law. However, this impact should not be overestimated because of several challenges the Court is actually facing. First of all, even if many States parties have introduced important changes into their legal systems, in some cases they show great resistance to the ECtHR's positions; the example of the United Kingdom on the issue of the right to vote of detainees is topical.<sup>22</sup> Moreover, some countries still suffer mass and systemic failures which persist even after the decisions of the Court trying to put pressure on them.<sup>23</sup>

From a theoretical point of view, we could also question to a certain extent the legitimacy of the ECtHR acting as a "constitutional judge". Indeed, the ECHR did not establish a true "European constitutional order" regulating a political entity with general jurisdiction (if compared to the European Union for instance) which receives delegation of power from the European people (MATHIEU, 2011). The Court has an influence over the interpretation of domestic fundamental rights by creating a hierarchy between human rights, but conventional provisions set minimum standards, indeterminate, hence they need to be contextualized. As already seen, domestic judges can choose an interpretation giving more efficacy to the protection of human rights (NOLLAEMPER, 2009). The French Council of State, for instance, recognized to legal persons (local entities) the right to invoke the ECHR's rights against the State, while the ECtHR doesn't consider it as an obligation for States parties.

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<sup>22</sup> See Prisoners' right to vote (EUROPEAN COURT OF HUMAN RIGHTS, 2019b).

<sup>23</sup> See on this issue the annual reports of the Committee of ministers of the Council of Europe: COUNCIL OF EUROPE, 2019.

Due to the above, the impacts of the ECtHR should be regulated by a tight dialogue with domestic judges; hence several States parties created national bodies charged with monitoring the ECtHR case law in order to foresee some reforms of domestic law. These include specific parliamentary commissions; the Council of State in France which gives consultative opinions to the government on conventionality of bills it wants to submit to the Parliament; the French national consultative commission for human rights which can draw the attention of authorities on unconventional measures and is consulted on all governmental bills; the Human rights act in the United Kingdom which provides for a parliamentary joint committee which controls bills concerning the protection of human rights (CALIGIURI; NAPOLETANO, 2010).

In any case, the judge empowered with judicial review has to be accountable for it. Protocol 16 which entered into force on the 1<sup>st</sup> August 2018 and provides for new means of cooperation between the ECtHR and domestic judges may open the path to a new balance of powers.

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