Convention Constitutionalism

Maastricht Law Series

33

Roland Pierik

Convention Constitutionalism

On the Necessity of Judicial Review by the European Court for European Democratic Governance

eleven

Maastricht Law Series

The European Court of Human Rights has been criticized for unduly interfering in democratic decision processes. Some argue that the unelected Strasbourg activists in robes should not interfere with democratic policy decisions that were made nationally. This inaugural lecture analyses this practice of rights-based judicial review by the Strasbourg Court.

The first part presents a general legal-philosophical background. It explains that republicans, who emphasize the importance of the democratic way of self-governance, are in favour of weak forms of judicial review. Liberals, who prioritise the constitutionally protected fundamental rights, are in favour of strong judicial review.

The second part employs this conceptual toolbox to describe and analyse judicial review as exercised by the Strasbourg Court since its inception in 1959. Should we understand it as strong, weak, or as something in between? I conclude that it is best understood as a weakened form of strong judicial review.

The third part provides a normative discussion of the Strasbourg Court in the context of the emerging European constitutional landscape. It starts from the observation that the European Convention on Human Rights is first and foremost a collaboration of Party States that pursue congruent constitutional-democratic projects. This third part investigates the role of judicial review by the European Court in the ongoing dialogue with Party States in cementing a convention constitutionalism through the further strengthening of a European consensus on the content and impact of Convention rights.

About the Maastricht Law Series: Created in 2018 by Boom juridisch and Eleven International Publishing in association with the Maastricht University Faculty of Law, the Maastricht Law Series publishes books on comparative, European and International law. The series builds upon the tradition of excellence in research at the Maastricht Faculty of Law, its research centers and the *Ius Commune* Research School. The Maastricht Law Series is a peer reviewed book series that allows researchers an excellent opportunity to showcase their work.

ISBN 978-90-4730-229-2

Maastricht University

Convention Constitutionalism

Convention Constitutionalism

On the Necessity of Judicial Review by the European Court for European Democratic Governance

Inaugural lecture
by Prof. Dr. Roland Pierik
appointed as professor of Philosophy of Law
in the Faculty of Law of Maastricht University
1 December 2023

eleven

Published, sold and distributed by Eleven
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
Independent Publishers Group
814 N. Franklin Street
Chicago, IL 60610, USA
Order Placement: +1 800 888 4741
Fax: +1 312 337 5985
orders@ipgbook.com
www.ipgbook.com

Eleven is an imprint of Boom (Den Haag).

ISBN 978-90-4730-229-2
ISBN 978-94-0011-447-0 (E-book)

Table of Contents

1 Introduction **7**

2 Legal-Philosophical Background **9**
2.1 The Republican Position 9
2.2 The Liberal Position 10
2.3 Republicans and Liberals: A Conclusion 12

3 Between State Power and Competence Creep **13**
3.1 The First Phase (1960-1975): the Sleeping Beauty Period 14
3.2 The Second Phase (1975-1995): the Court Finds Its Distinctive Voice 15
3.3 The Third Phase (1995-2011): the State Parties Start Grumbling 17

4 The way Forward. Should the European Court Exercise Weak or Strong Judicial Review? **19**

5 Convention Constitutionalism **22**

6 Conclusion **24**

7 Embedment in the Law Faculty **25**

8 Some Words of Thanks **26**

Bibliography **27**

1 Introduction*

Dear Pro-Rector,

Dear colleagues, friends, and family,

Constitutional courts have been criticized for unduly interfering in the outcomes of democratic processes.[1] Such criticism made the headlines in December 2022, when the Netanyahu administration in Israel introduced a sweeping package of judicial overhaul. The aim was to curb the influence of the Supreme Court.[2] The proposals included a bill that would allow a simple majority in parliament to overturn Supreme Court decisions. The bill also included a proposal to limit the way the Court could employ the constitution to review executive measures.[3] This move by the Netanyahu administration led to an unprecedented protest from Supreme Court judges, who usually keep a very low profile. Moreover, for ten months in a row, hundreds of thousands of Israelis, week after week, took to the streets to demonstrate against these proposals.

Similar attempts to overhaul the judicial system have been made by the administrations of Poland and Hungary. These attempts to limit the power of the Supreme Court met with similarly fierce protests, both in the legal community and on the streets.

Finally, the European Court of Human Rights has been criticized for unduly interfering in the outcomes of democratic decision-making processes. Some argue that the 'unelected activists in robes' in Strasbourg should not interfere with democratically supported decisions that were made by national governments.

In my lecture today, I want to focus on rights-based judicial review. In such cases, the highest court in the judicial system determines whether a specific legislative or executive measure is in violation of a fundamental right that is protected by the constitution. For example, does such a measure threaten the freedom of religion or the freedom of expression?

Basically, judicial review comes in two forms. In the strong version, constitutional courts have the authority to decline to apply a state act in a particular situation because it is incompatible with the constitution. This kind of decision implies that the measure is invalidated or annulled. In the weak version of judicial review, constitutional courts can only declare that a legislative or executive measure is incompatible with the constitution.

---

* I want to thank to Leonard Besselink, Ingrid Robeyns and Rob Schwitters for their very helpful suggestions on an earlier version of this text.

1 My discussion of constitutional courts also includes supreme courts that exercise constitutional functions, particularly for those countries that do not have a separate constitutional court.

2 For discussions of these issues by (mainly Israeli) law professors, see: https://www.lawprofsforum.org/en.

3 The Israeli Constitution is called 'basic law'.

The court cannot invalidate or annul the state act, this declaration is merely an advice. It is up to the administration to decide whether the measure is implemented or not.

Let me apply this distinction to the Israeli example mentioned earlier. The Netanyahu administration criticized the current practice of strong judicial review by the Supreme Court. It sought to transform the law to make it into a practice of weak judicial review. The protesters in the street, on the other hand, were strongly in favour of holding on to the strong version of judicial review. They wanted to leave the final decision-making power on constitutional issues in the hands of the Supreme Court as a counterweight to the power of the administration.

We can observe two simultaneous developments. First, various state administrations seek to limit the power of supreme courts. Second, the state administrations of Israel, Hungary, and Poland have themselves been accused of having authoritarian traits. Recently, a number of books have been published with telling titles like *How Democracies Die* and *Strongmen*.[4] These books emphasize how administrations, once elected in office, seek to increase their power by gradually eroding the system from within, by undermining the rule of law and the protection of fundamental rights. In these examples we see a tug of war between the executive and the judicial branch of government. They fight about who should have the final say in important decisions about the enforcement of fundamental rights.

In my lecture today, I will use these actual political examples to refer to long-running legal-philosophical discussions about judicial review. But I will move away from domestic cases. My main interest today is in how we can understand judicial review within the context of the newly emerging European constitutional sphere. I will therefore focus primarily on judicial review by the European Court of Human Rights.

My argument today consists of three steps. In the first part of this lecture, I will present the general legal-philosophical background of the discussion on judicial review. In the second part, I will employ this legal-philosophical background to analyse judicial review as exercised by the European Court of Human Rights. My main question there is: how can we understand judicial review as exercised by the Strasbourg Court? As strong? As weak? Or as something in between? The third part of the lecture will provide a normative evaluation of the role the European Court of Human Rights should play in the emerging European constitutional landscape. I will argue that the Strasbourg Court should pursue a path towards stronger judicial review.

4 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018); Ruth Ben-Ghiat, *Strongmen. Mussolini to the Present* (New York: Norton, 2020); Yascha Mounk, *The People vs. Democracy Why Our Freedom Is in Danger and How to Save It* (Harvard: Harvard University Press, 2018).

2 Legal-Philosophical Background

For legal philosophers, these debates on judicial review are very relevant because they are intimately linked to the constitutional-democratic character of our societies. To understand the core of these discussions, it is important to realize that the term 'constitutional democracy' does not refer to one single tradition. It is a composite term that refers to two distinct and sometimes conflicting strands of thought: constitutionalism and democracy. 'Democracy' is linked to the republican tradition, which is historically associated with the work of Jean-Jacques Rousseau. 'Constitutionalism' refers to the liberal tradition, which has its historical roots in the work of John Locke. Constitutional democracy is a permanent balancing exercise between its two foundational ideals: on the one hand, a democratic method of self-governance, and on the other hand, the protection of fundamental rights through a constitution. And this dichotomy dovetails very nicely with the two main views on judicial review.

2.1 The Republican Position

Let us first look at the republican tradition. Republicans are fervent critics of strong judicial review. Jeremy Waldron, for example, argues that strong judicial review is politically *illegitimate* and a violation of democratic values. This is because it leaves important decisions in society to a small number of unelected and unaccountable judges. Waldron argues that this undermines cherished principles of democratic-representation and political equality.[5]

Another critic is Richard Bellamy, who contends that a political community should be governed by 'democratic mechanisms through which the people authorize their political and legal representatives and hold them to account'. He prioritizes 'a parliamentary model of rights review and a "weak" form of rights-based judicial review, in which a declaration of incompatibility by the appropriate court is either advisory or can be overridden or put to one side by the legislature'.[6] In short, these republicans lean heavily towards democratically-regulated politics. They emphasize political equality and argue that the majority rule in democracy should always prevail. In the republican tradition, the role of the constitution and the constitutional protection of fundamental rights has faded into the background.

5 Jeremy Waldron, 'The Core of the Case Against Judicial Review', (2006) 115 *The Yale Law Journal* at 1353.

6 Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights', (2014) 25 *The European Journal of International Law* at 1021.

2.2 The Liberal Position

This brings us to those who lean more towards the constitutional side. Liberals seek to balance the 'democratic' and the 'constitutional'. They move away from the view that political governance only revolves around democratic decision-making and emphasize the principle of legality. This implies that the exercise of democratic political authority should always remain within the boundaries of the constitution. As such the constitution provides a stable anchor for constitutional democracies over time.[7] The constitution determines the rules of the game of legitimate democratic decision-making. Thus, the *executive* branch only has those powers that are expressly conferred on it by the constitution. And it is the task of the *judicial* branch, through the process of judicial review, to evaluate democratic outcomes against constitutional norms.

Philip Pettit proposes to supplement the electoral system with a system of individualized contestation that parallels the collective challenge that elections make possible:

> There ought to be openings for particular individuals and subgroups to test the laws or proposals for how far the process in which they are generated respects the value of equal access to influence and, more generally, the value of equal status. And those openings ought to hold out the prospect of an impartial judgement on the question and, if the judgement goes in favour of the challenges, the prospect of an adjustment that satisfies them.[8]

This protection-mechanism presupposes constitutional courts and judicial review to determine how, sometimes quite abstractly formulated constitutional values must be interpreted in specific cases: fundamental freedoms, individual dignity, or rule of law.[9]

One does not have to be convinced that democratic majorities are unduly partisan to acknowledge that the majoritarian democratic process is sometimes less attentive to minorities and their fundamental rights. The law-making process is under constant time pressure because there are always too many complex pieces of legislation to deal with. This will sometimes preclude legislators from making a thorough analysis of potential negative fundamental rights implications, especially when they need to legislate hastily in response to a crisis. And even if legislators gave these fundamental rights their full attention, they would only have limited foresight about the full range of circumstances in which a law will have an impact on the enjoyment of individual rights in the future.

---

7 Alexander Somek, 'Cosmopolitan constitutionalism: The case of the European Convention', (2020) 9 *Global Constitutionalism* at 469; Nicholas Bamforth, 'Social Sensitivity, Consensus and the Margin of Appreciation', in *Human Rights between Law and Politics. The Margin of Appreciation in Post-National Contexts*, ed. Petr Ahgha (Oxford and Portland: Hart, 2017), 130. Massimo Fichera, *The EU and Constitutional Time* (Cheltenham: Edward Elgar, 2023).

8 Philip Pettit, *On the People's Terms* (Cambridge: Cambridge University Press, 2012), 213-214.

9 Indeed, anti-judicial review republicans argue that courts and judges are not legitimized to make court decisions on the basis of such open sources. See: Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford: Oxford University Press, 2023), 5.

This means that Parliament can make laws which impose limitations on rights that they neither intended nor anticipated.[10]

In other cases, however, the human rights of minorities are explicitly disregarded. A telling example is the Orban administration in Hungary, which for years has knowingly violated the fundamental rights of the LGTBQ community.

Sometimes minority rights are curbed unintentionally. Sometimes they are violated deliberately. But Aileen Kavanagh is right when she writes that 'Elected politicians typically view rights as "side constraints" on their policy goals, rather than as "navigational lights" for the entire policy endeavour'.[11]

Rights-based judicial review can repair such legislative blind spots. We can think of the constitutional-democratic system as a two-step strategy that can remedy democratic deficiencies. The main bulk of law-making and implementation of law is done democratically. The recursive second step of judicial review is the smoking out and removal of those decisions that, in hindsight, violate fundamental rights.

Of course, judicial review does not allow a claimant to restart the full discussion from the very beginning. That would be an offence to the democratic process, and an offence to the entitlement to equal respect and concern of the decisional majority.[12] But the institutionally acknowledged access to judicial review if a citizen suspects that a certain policy decision violated a constitutionally protected fundamental right is an important feature of a constitutional democracy. It acknowledges the equal status of citizens as worthy of being given reasons and as capable of making relevant arguments and, as such, the claimant's entitlement to equal respect and concern.[13]

Moreover, it is also important to note that those in favour of strong judicial review do not dispute the central role of representative democracy. But they believe that the democratic decision-making process alone does not represent a complete picture of what democratic governance implies. Strong and independent constitutional review has a supplementary but indispensable role. It provides an additional layer of governmental accountability in the process of checks and balances. As Tom Hickey says: a defence of judicial review 'would not rest on the capacity of the institution to bring about right answers to rights questions but rather on its capacity to counteract particularly bad answers'.[14] Taking out evidently bad decisions or decisions with an unfortunate bad impact not only repairs unfortunate rights violations, but also provides an important signal of what the constitutional-democratic system stands for. After all, the worst decisions might have a disproportionate negative effect on the legitimacy of the system as a whole.

10 Rosalind Dixon, 'The Core Case for Weak Form Judicial Review', (2017) 38 *Cardozo Law Review* at 2209.

11 Aileen Kavanagh, *The Collaborative Constitution* (Cambridge: Cambridge University Press, 2023), 143.

12 Pettit, *On the People's Terms*, 217.

13 Alon Harel and Adam Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review', (2012) 10 *International Journal of Constitutional Law* at 952.

14 Tom Hickey, 'The Republican Core of the Case for Judicial Review', (2019) 17 *International Journal of Constitutional Law* at 305.

In this way, we can link the discussion on judicial review back to the balancing act between the constitutional and the democratic elements in constitutional-democratic systems. We can see a clear difference between the two traditions and two different views on judicial review. On the one hand, republicans are confident that the democratic process provides sufficient protection for fundamental rights. They do not want unaccountable judges to interfere with the outcomes of democratic decision-making processes. They are therefore in favour of weak judicial review.

I find myself in agreement with liberals who are in favour of strong judicial review. They see it as an additional layer of governmental accountability. Strong judicial review provides an impartial check to make sure that executive measures do not violate fundamental rights.[15] For liberals, this recursive two-step strategy embodies the essence of checks and balances and the system of the separation of powers to prevent a state administration from abusing its power.

2.3 Republicans and Liberals: A Conclusion

Let me conclude this first part of the lecture by emphasizing two things. First, the distinction between strong and weak judicial review is not like an on-off light switch. It is more like a dimmer: judicial review can be strong, weak, or something in between. Second, it should also be clear that the form of judicial review in a particular system is not set in stone. It can, and actually does, change over time. Think back to the example of judicial overhaul in Israel. If the Netanyahu administration is successful that will generate a significant change from strong to weak judicial review. On the other hand, as we will see in the next section, we can also observe the process of competence creep in which courts, verdict by verdict, seek to strengthen their power as judicial reviewers.

This brings me to the second part of my lecture: how can we characterize judicial review in the Netherlands and in Europe?

15 Pettit, *On the People's Terms*, 208; Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge UP, 2015), 171.

3 Between State Power and Competence Creep

Does the Netherlands have a system of strong judicial review? The short answer to this question is no. Article 120 of the Constitution prevents the Supreme Court from reviewing state acts against the *Grondwet*. At the same time, this answer is too short because it presupposes that only the national constitution is relevant here.

But, as Leonard Besselink has argued, 'The study of constitutional review in the Netherlands makes it clear that the concept of 'constitution' stands in need of reconsideration'.[16] Indeed, in the current era of Europeanization, we should focus on the wider concept of 'constitutionality'. This also includes other norms and institutions with constitutional relevance.[17] One example is, of course, the European Union. More relevant for our discussion are the Council of Europe and the European Court of Human Rights.[18]

The Council of Europe was founded in 1949 in response to the horrors of the Second World War. The aim of the Council was to achieve greater unity between 'like-minded European countries' and their 'common heritage of political traditions, ideals, freedom and the rule of law'.[19] The main tools to this aim were the establishment of the European Convention on Human Rights, that entered into force in September 1953, and the accompanying European Court of Human Rights that started in February 1959. The emergence of the European Court has changed the terms of the discussion on judicial review. What is new is that it now concerns interactions between national authorities and a supranational court.

The question in this second part of the lecture is: how should we characterize rights-based judicial review by the European Court of Human Rights? As weak? As strong? Or as something in between?[20]

16 Leonard Besselink, 'Constitutional Adjudication in the Netherlands', in *The Max Planck Handbooks in European Public Law. Part 3: Constitutional Adjudication: Institutions*, ed. Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (Oxford: Oxford University Press, 2017), 566.

17 Besselink, 'Constitutional Adjudication in the Netherlands', 615.

18 Not only for the Netherlands, but for all 46 member states of the Council of Europe.

19 Statute of the Council of Europe, opened for signature on 5 May 1949, 87 UNTS 103, Art. 1 (entered into force 3 August 1949).

20 This description is strongly based on Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010). And Armin von Bogdandy and Christoph Krenn, 'ECJ and ECtHR: Two Senates of Europe's Constitutional Jurisdiction', in *The Max Planck Handbooks in European Public Law IV*, ed. Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (Oxford: Oxford University Press, 2023).

3.1 The First Phase (1960-1975): the Sleeping Beauty Period

Article 1 of the European Convention determines that national authorities have the primary responsibility for ensuring effective protection of fundamental rights.[21] The European Court of Human Rights only has a subsidiary task. It mainly involves checking *ex post* whether national authorities have indeed complied with their obligations under the Convention.[22] The idea of subsidiarity also implies that the Court gives national authorities some leeway regarding how they fulfil their Convention-related obligations. This means that states can implement their obligations in ways that best suit their national identity and constitutional tradition. This leeway is called the *margin of appreciation*.

At the same time, by signing and ratifying the Statute of the Council of Europe, the state parties have opted to transfer their sovereignty in the field of the observance and enforcement of human rights to the European Court. Article 32 of the European Convention states that 'in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide'.[23] Article 46 determines that the states 'undertake to abide by the final decision of the Court in any case in which they are parties'.

A strict legal reading of these two articles would lead to the preliminary conclusion that from the very start, the European Court had the competence to exercise strong judicial review. However, in the first phase of the Convention system, say between 1960 and 1975, the European Court acted very carefully and with much self-restraint. It invoked human rights diplomacy, rather than challenging national sovereignty.[24] First and foremost, the Court sought to gain legitimacy in the new European constitutional landscape.

Moreover, in the first decades of its existence, the Court faced an important limitation. Complaints did not arrive at its desk directly, but first had to pass the *European Commission of Human Rights*, that used to be quite restrictive in passing on complaints to the Court. Only with Protocol No. 11 in 1994 was this detour fully abolished, and the unconditional and individual right to petition, the 'crown jewel of the Convention', was established.[25]

---

21 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019), 5.

22 For a reassessment of the shifting roles of the European Court and the Convention states in guaranteeing the protections of the European Convention, see Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law', (2018) 18 *Human Rights Law Review*.

23 The European Court of Human Rights thus has the *Kompetenz-Kompetenz*.

24 Von Bogdandy and Krenn, 'ECJ and ECtHR: Two Senates of Europe's Constitutional Jurisdiction', 403. Jonas Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?', in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford UP), 182.

25 Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?', 182.

Finally, in the first years of its existence, The Court's determination of a violation of the Convention was purely declaratory. The Court could merely award a 'just compensation' but did not determine a way in which the rights' violation could be rectified.[26]

From this I draw the conclusion that in this first phase the judicial review exercised by the European Court was very weak. It is not a coincidence that this period is characterized as the 'Sleeping Beauty years' of the European Convention.[27]

3.2 The Second Phase (1975-1995): the Court Finds Its Distinctive Voice

Around the mid-1970s, Sleeping Beauty slowly woke up.[28] Judgment by judgment, the Court carved out for itself the authority to develop its jurisprudence. It became increasingly independent, departing from the original intent of the states that had signed the Convention.

In *Golder v. The United Kingdom* in 1975, the Court determined that the Convention must be interpreted in light of its object and purpose, rather than narrowly as a treaty between sovereign states.[29] In this way, the Court carved out the power to develop its jurisprudence independently for itself, and more and more at a distance of the convention states. For those more familiar with EU-jurisprudence, this *Golder* decision is the *Van Gend en Loos* moment for the European Court of Human Rights. Even though it generated quite some critique from the Convention states, in the end they accepted the judgment and its implications.

In *Tyrer v. United Kingdom* in 1978 the Court held that the Convention must be considered as a 'living instrument' of development and improvement, that needs to be read in light of changing circumstances. It should not be seen as an 'end game' treaty that froze the state of affairs as the Convention States determined it 25 years ago.[30]

Finally, in *Airey v. Ireland* in 1979 the Court declared that Convention rights must be interpreted to be 'practical and effective rather than theoretical and illusory'.[31] Moreover, the Court increasingly moved beyond the modus of merely interpreting the Convention

26 Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, 127. 'A strict reading of the Convention text suggested that all the violating State would need to do would be to pay a detained individual any 'just satisfaction' awarded by the Court.'

27 Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, 277-318.

28 Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, 120.

29 ECtHR, *Golder v. United Kingdom* (1975) Series A no 18 (ECLI:CE:ECHR:1975:0221JUD000445170).

30 ECtHR, *Tyrer v. United Kingdom* (1978) Series A no 26 (ECLI:CE:ECHR:1978:0425JUD000585672), para. 31.

31 ECtHR, *Airey v. Ireland* (1979) Series A no 32 (ECLI:CE:ECHR:1979:1009JUD000628973), para. 24.

on a case-by-case approach. Instead, it sought 'to elucidate, safeguard and develop the rules instituted by the Convention'.[32]

Taken together, the various judgments show the process of 'competence creep' by the Strasbourg Court which strengthened its position as an independent interpreter of the European Convention. Over time, the Court refined and reinforced its interpretive approach. It increasingly decoupled the interpretation of the Convention from the will of the contracting states. Armin von Bogdandy and Christoph Krenn conclude that the Court increasingly interpreted Convention rights 'as autonomous, dynamic, and destined to effectively limit the discretion of national authorities'.[33]

Earlier, I concluded that in the first phase, the Court exercised a weak form of judicial review. In this second phase, roughly between 1975 and 1995, the Court found its voice in entrenching the European Convention in the European legal space. My conclusion regarding this second phase is that the Court exercised a much stronger form of judicial review.

However, within the newly developed European constitutional space, the European Court must share the legal competence to exercise judicial review with the national constitutional courts. The European Court *cannot* give a verdict on whether a legislative or executive measure by a Convention state is legally valid. This assessment can only be done within domestic judicial review that is based on domestic constitutional law. Thus, the European Court of Human Rights cannot invalidate or annul a state act.[34]

Moreover, its subsidiary character implies that the European Court can only step in if a state party failed to guarantee an adequate protection of the threshold level of fundamental rights as described in the Convention. Finally, the European Convention is not a comprehensive constitutional document, but it has a much more limited pretention. As Monica Claes and Bruno de Witte explain, the Convention only provides a 'floor of rights'.[35]

On the other hand, the European Court does have the legal competence to make binding judgments on citizens' complaints alleging that a state party has violated a Convention right. Thus, the European Court can only exercise judicial review within the

32 ECtHR, *Ireland v. United Kingdom* (1978) Series A no 25 (ECLI:CE:ECHR:1978:0118JUD000531071), para. 154.

33 Von Bogdandy and Krenn, 'ECJ and ECtHR: Two Senates of Europe's Constitutional Jurisdiction', 405.

34 A recent development is the pilot judgments procedure against systemic deficiencies. The European Court can initiate such a pilot-judgment procedure if it is clear that systemic or structural problems in the respective contracting state underlie the violation of a Convention right. Characteristic of a pilot judgment procedure is that 'the Court explicitly identifies the systemic problem, names the necessary – usually legislative – remedial steps in its judgment, sets a deadline, and suspends proceedings on applications that stem from the same structural problem until this date'. Von Bogdandy and Krenn, 'ECJ and ECtHR: Two Senates of Europe's Constitutional Jurisdiction', 410. I will not discuss this pilot judgments procedure here.

35 Monica Claes and Bruno de Witte, 'The Roles of Constitutional Courts in the European Legal Space', in *The Max Planck Handbooks in European Public Law IV*, ed. Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (Oxford: Oxford University Press, 2023), 499-500.

limited legal domain as demarcated by the rights in the European Convention.[36] Within that domain, however, the European Court does exercise strong judicial review. A judgment of the European Court that a state has violated a Convention right is binding. It is a strong form of judicial review because such a verdict cannot be reversed by a decision of a national government. As a result, Convention states have a binding legal obligation to implement judgments of the European Court of Human Rights.[37]

3.3 The Third Phase (1995-2011): the State Parties Start Grumbling

The European Court entered a third phase around 1995. Convention states started to counteract and grumbled that they had ended up in a situation they had not signed up for some forty years ago. They argued that the Court had gone too far and too fast in its extensive interpretation of the scope of Convention rights. However, since the verdicts of the European Court are legally binding, state parties had to find another way of showing their discontent.

A telling example is the infamous *Lautsi* case of 2011.[38] The case against the Italian state was brought to the European Court by Ms. Soile Lautsi, an atheist and mother of two young children. She objected to the crucifixes that were mandatory and very prominently placed in the classrooms of the public school her children attended. In the first instance, the European Court agreed with Ms. Lautsi that the mandatory presence of crucifixes in public schools was a violation of the freedom of thought, conscience, and religion, as protected by Article 9 of the Convention. The Italian government objected to this decision by the European Court and appealed immediately. Silvio Berlusconi, the Italian prime minister at the time, did not mince his words: 'This decision is not acceptable for us Italians. It is one of those decisions that make us doubt Europe's common sense.'[39]

Italy's undisguised threat was that if the judgment was upheld, it would openly and explicitly ignore its implications. And more importantly, Italy did not stand alone: ten other convention states vowed to support Italy. This massive and manifest rebellion generated a real dilemma for the European Court. It realized that its legitimacy would be damaged beyond repair if it maintained the *Lautsi* verdict. Thus, on appeal, the Court made a U-turn, and the doctrine of the margin of appreciation came to the rescue. The

36 Von Bogdandy and Krenn, 'ECJ and ECtHR: Two Senates of Europe's Constitutional Jurisdiction', 402.

37 The extent to which some of the state parties comply, or do not comply, with this obligation is a discussion for another day.

38 *Lautsi v. Italy*, App. no. 30814/06 (ECtHR, Second Section, 27 July 2009 and Grand Chamber, 18 March 2011).

39 As quoted in Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', (2010) 6 *European Constitutional Law Review* at 6-7.

Grand Chamber of the European Court concluded that it was up to the Italian administration to make its own decisions on this matter.[40]

The *Lautsi* case makes it clear that there is an inherent tension within the Convention structure. On the one hand, the participating states established the European Court as an external and independent supranational arbiter on the concrete content of Convention rights in specific situations. On the other hand, as a supranational court it is critically dependent on the continuing support of the states. The Court can only maintain its legitimacy if the states more or less consistently comply with its judgments. It seems very plausible that the European Court backed down after the explicit threat that ten Convention states would openly defy such a high-profile judgment.

I can now answer the main question stated in this second section of the lecture. From a narrow legal perspective, it seems that the European Court of Human Rights, within the domain demarcated by the European Convention, can exercise strong judicial review. It has the power to make the final judgment or to declare that the margin of appreciation is applicable. From a legal perspective, applying the margin of appreciation does not undermine strong judicial review by the European Court. After all, it is ultimately the Court that decides whether the margin of appreciation should be considered applicable, and not the convention state.

At the same time, given the political context in which the Court unavoidably operates, it remains critically dependent on the continuing support of state parties. The permanent background threat of revolting convention states inherently limits the room for manoeuvre of the European Court. This leads to my conclusion that the European Court of Human Rights exercises a weakened version of strong judicial review. After all, the Court always has the Convention states in its rear-view mirror. And as the *Lautsi* case made clear, *sometimes the objects in the mirror are closer than they appear.*

40 In this way the margin of appreciation sometimes functions as a refuge for the Court to stay out of trouble with these Convention states.

4 The way Forward. Should the European Court Exercise Weak or Strong Judicial Review?

This brings me to the third and final part of my lecture. Should the European Court of Human Rights, in the near future, pursue a path of weaker or stronger judicial review? In the *Lautsi* case, one thing became very clear. The European Court can only effectively fulfil its role as the European guardian of human rights if it can maintain the long-term loyalty of state parties. This implies that the Court's decisions cannot deviate too much from the 'European consensus' between the states on the content of human rights.

On the other hand, being too deferential to state parties also severely endangers the Court's legitimacy, but now in the eyes of citizens who rely on the Court to protect their fundamental rights against state actions. Being too lenient on the state parties undermines the Court's key task of protecting human rights.

In this sense, the Court finds itself between a rock and a hard place. And this tension can be illuminated by returning to the legal-philosophical discussion that republicans and liberals engage in, as discussed in section 2.

In this debate on the correct form of judicial review by the European Court, weak or strong, republicans emphasize the importance of a persistent and explicit democratic oversight of the European Court by state parties. Richard Bellamy believes that the European Court should maintain a low profile and adhere to the principle of due deference. He still conceives the European Convention narrowly as a voluntary treaty between sovereign states. He thus concludes that the European Court should only exercise weak judicial review, keeping the convention states firmly at the steering wheel.[41]

On the other hand, liberals like Alexander Somek and George Letsas advocate a much stronger role for the European Court.[42] They argue that the preamble of the Convention has clearly determined the path the Court should follow. The primary goal of the evolutive interpretation of Convention rights must be the achievement of greater unity between the state parties. This should be accomplished through the maintenance and further realization of human rights and fundamental freedoms. Letsas goes as far as to argue that 'the purpose of human rights treaties, unlike that of many other international treaties, is to protect the autonomy of individuals against the majoritarian will

41 Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights', 1034.

42 Somek, 'Cosmopolitan constitutionalism: The case of the European Convention'; George Letsas, 'The Margin of Appreciation Revisited. A Response to Follesdal', in *Human Rights: Moral or Political?*, ed. Adam Etinson (Oxford: Oxford University Press, 2018); 'The ECHR as a living instrument: its meaning and legitimacy', in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, ed. Andreas Føllesdal, Birgit Peters and Geir Ulfstein (Cambridge: Cambridge University Press, 2013).

of their state, rather than give effect to that will'.[43] This leads to the conclusion that the European Court of Human Rights should take the lead in the protection of human rights by exercising strong judicial review.

I find myself somewhere in the middle of this debate, but I lean towards the liberal side. I disagree with Bellamy's proposal, because it would simply undermine the purpose of the European Convention on Human Rights. It was set up to develop a shared European human rights standard. That goal would be derailed completely if the Court is required to defer important decisions to 47 different democratic legislatures. It would make it simply impossible for the Court to develop consistent lines of jurisprudence on Convention rights.[44]

Two important developments over the last five decades indicate the emergence of something like 'Convention constitutionalism'. Firstly, in spite of Bellamy's reluctance to acknowledge it, the Convention system has moved beyond the point where the European Convention is merely a voluntary agreement between state parties. Over time it has obtained a constitutional, or at least semi-constitutional status. Secondly, a robust European consensus has gradually emerged that 'strengthens a common understanding of human rights into the fabric of the Convention'.[45] On the basis of this emerging consensus, the Court has created an impressive body of jurisprudence in which the rights contained in the Convention are interpreted and applied in an authoritative manner.[46]

This progressive interpretation of the European Convention into a growing European consensus is the result of a permanent conversation between the European Court and the party states. This incremental interpretation of the Convention is a delicate balancing act. In specific decisions, it might be hard for the Court to determine whether it can presume that there is already an established European consensus in favour of a further step being taken in human rights strengthening jurisprudence. Moreover, it is a gradual process of two steps forward and sometimes one step back. This implies that the Court must sometimes accept that it has to retreat when a specific verdict generates too much opposition. The risk of non-compliance by convention states was loud and clear in reaction to the first *Lautsi* verdict. In other cases, the resentment may be more ambiguous, harder to detect, or may only build up over time. At the same time, a bold verdict like *Lautsi I* can also provoke discussions *within* a convention state where the population at large might be more convinced by a decision of the Court than the political establishment. In this sense, the European Court is not only a dialogical partner with the political representatives of the parties to the Convention but also with its populace.

43 George Letsas, *A theory of interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 79.

44 Cf. Letsas, 'The Margin of Appreciation Revisited. A Response to Follesdal', 304.

45 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, 122.

46 Janneke Gerards, 'Judicial Deliberations in the ECtHR', in *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond*, ed. Nick Huls, Maurice Adams and Jacco Bomhoff (MC Asser Press, 2009).

An emerging consensus on the content of human rights has three major implications. First, it increases the scope of specific Convention rights. Second, it allows the European Court to narrow the margin of appreciation allotted to national governments in an incremental fashion. Third, those contracting parties that are lagging in the protection of the right in question may over time fall outside the newly emerged consensus, with the ultimate consequence that they are now presumed to be in violation of the Convention, unless the state has a reasonable justification why a law or policy falls outside of the consensus.[47]

On the other hand, in those cases in which there is no European consensus on how a specific convention right should be understood, the issue remains in the area of the margin of appreciation. Being aware of such a lack of European consensus helps the European Court to minimize legitimacy challenges. Indeed, if judges would base their verdicts solely on abstract moral values, disconnected from any European consensus, they are vulnerable to being accused of making arbitrary or political judgments. In this way, they fall prey to the critique by Waldron and Bellamy as discussed earlier.

47 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, 138.

5 Convention Constitutionalism

Constitutionality and the constitutional protection of fundamental rights are not self-obvious and pre-political Cartesian benchmarks. Fundamental rights can only be articulated and realized through a political authority. At the same time, fundamental rights and their articulation are not national idiosyncrasies either. Even though, historically seen, each European constitutional democracy has invented the wheel of constitutional essentials for itself, there is a striking similarity between the set of rights and the content of these rights in different states, a similarity that is mutually recognized. For example, when other European states criticized the Hungarian administration for violating the fundamental rights of members of the LGTBQ-community, they did not criticize the Orban administration for violating *Hungarian* fundamental rights. Instead, such an appeal can only be successful when it refers to a conception of fundamental rights that is shared by states, including Hungary, but is in this case violated by Hungary.

If this is correct, it has an important implication. The legitimacy of constitutional essentials and fundamental freedoms within a state is, unlike democratic policies, not primarily based on their national democratic authorship. The legitimacy lies in the way they are formulated in a way that is recognizable and acceptable in a wider constitutional discourse. This indicates that, even though fundamental rights are not universal, inherent, and self-evident, as they were for Locke, there seems to be an underlying common core of the concept of fundamental rights that transcends the distinct formulations as arrived at in separate constitutional democratic states.

The reason why the Convention system is set up is precisely an attempt of Party States to interact with peers engaged in a similar constitutional-democratic enterprise. This horizontalization of constitutional authority is the move from 'constitution' to 'constitutionality.' It broadens the authority of constitutional values because it does not merely 'depend on endorsement by an independent people but also on recognition by other peoples who pursue the same type of political project'.[48] In this sense we can acknowledge the emergence of *convention constitutionalism* among the state parties of the European Convention.[49] The European Court of Human Rights has an important role to play in the ongoing dialogue with domestic constitutional courts and parliaments in strengthening this convention constitutionalism by further cementing a European convergence on the content and impact of Convention rights.

This has an important implication that might be hard to swallow for a republican like Bellamy. The emergence of *convention constitutionalism* implies that Convention

48 Somek, 'Cosmopolitan constitutionalism: The case of the European Convention', 475.

49 It should be clear that this concept of *convention constitutionalism* piggybacks on Alexander Somek's concept of 'cosmopolitan constitutionalism'. Somek, 'Cosmopolitan constitutionalism: The case of the European Convention'; Somek, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014).

states are no longer the 'exclusive masters of their constitutional law'.[50] Via the case law of the European Court, national constitutional systems are affected by one another. By accepting the judgments of the European Court and the application of its case law, the Convention states develop a shared voice on their constitutional development. But this is the unavoidable implication of the *democratic* decisions around the 1950s by the party states to sign and ratify the Statute of the Council of Europe – as described in section 3.2. They explicitly opted to transfer their sovereignty in the field of the observance and enforcement of human rights to the European Court on the shared path of 'achievement of greater unity'.

50 Somek, 'Cosmopolitan constitutionalism: The case of the European Convention', 467-468.

6 Conclusion

Let me summarize the argument. Democratic governance not only implies democratic decision-making procedures, but also the protection of constitutional essentials: the rule of law and fundamental rights. Indeed, strong judicial review provides an essential additional layer of governmental accountability and checks and balances in the process of democratic governance. In the last three decades, the European Court of Human Rights has carved out for itself a central position in the European constitutional landscape. It has become the key actor in the process of the observance and enforcement of human rights. Strong judicial review by the European Court of Human Rights is necessary for democratic governance.

7 Embedment in the Law Faculty

The hardest part of preparing this inaugural lecture was not the writing of the text. The hardest part was to stop writing. There are so many themes that I could have included. Arguments that I should not ignore. Academic puzzles that should have been tackled. In this sense, this inaugural lecture is not a finalized text. It is merely a work in progress and a starting point for various research strands I would like to develop in the coming years.

I am interested in how the idea of constitutionality will develop in the emerging European constitutional space: in the triangle of national constitutional courts, the Court of Justice of the European Union, and the European Court of Human Rights. I am interested in how the power struggle between the European Court and national administrations will develop and how the concept of convention constitutionalism will develop overtime.

The law faculty of Maastricht University, being a truly European faculty, is an excellent place to further explore my chosen research themes in what is sometimes called the field of 'normative constitutionalism'. I am looking forward to collaborating with colleagues in constitutional and European law on these themes.

But first and foremost, I am looking forward to the ongoing collaboration within our department of Foundations of law. I arrived in what I only fully realized much later is a very well-functioning organization. We were able to further strengthen the department by hiring several new scholars. The last year, we set all kinds of new activities in motion. We renamed the department. We started the *Maastricht Foundations of Law Colloquia*. We developed three brand-new masters' courses. Other initiatives that started long before I arrived are also thriving, think of the *Roundtable on Law and Popular Culture*. And on 1 March 2024, we will kickstart our new research centre, *The Maastricht Centre for Law & Jurisprudence*. Dear colleagues: it is a genuine privilege and a joy to collaborate with you all in our Foundations department. I am very much looking forward to all our future endeavours.

8 Some Words of Thanks

I thank the Board of Maastricht University for the confidence placed in me, and for having appointed me as the Chair of Philosophy of Law in the Faculty of Law. I also want to thank our dean, Jan Smits. He enabled me to make a soft landing and a running start simultaneously. Those who know a thing or two about aviation techniques might insist that this is impossible: you cannot both have a soft landing *and* a running start, but our dean can make things possible. I thank my predecessor, Jaap Hage, who was proactive from the very start to help me easily settle into the department.

Dear colleagues, friends, and family, here in the aula and online. Thank you all very much for joining me here today. I see delegates from all the universities where I have worked during my academic journey: Twente University, Tilburg University, Radboud University Nijmegen, the University of Amsterdam, and, of course, now Maastricht University. I genuinely hope you did not come to Maastricht only for this lecture, because I would like you to join me as well at the afterparty in a few minutes. It means a lot to me to see so many new, old, and very old friends have gathered here today.

As the saying goes, it takes a village to raise a child. Well, it takes a global academic village to train an academic. I want to thank my PhD supervisors, Huib de Jong here in the cortège and Will Kymlicka in Canada. Also, Wibren van der Burg, who welcomed me as a post-doc in his Pioneer-project and helped me to kick-start my academic career. I want to thank many collaborators and co-authors. To name a few: Ingrid Robeyns, Wouter Werner, Mijke Houwezijl, Stefan Rummens, Marc de Wilde, and Marcel Verweij. They helped me to develop my ideas and they have made academic life so much more fun.

Dear former and current PhD students: Geoff, Hadassa, Tamar, Lars, Steven, Eline, and Adelheid. It was and is a pleasure to work with you. Supervising PhD students is the icing on the cake of academic work.

A special word of thanks to my Dutch and Flemish family who are here in large numbers today. A very special word of thanks for my little sister Charlot Pierik, without whose help the Robeyns-Pierik household would too often come to a grinding halt.

My last words this afternoon are for the three most important people in my life. Dear Erin and Ischa: you have developed in very different but both very special ways over the past few years. It is very special to be able to experience that process so closely. I am very proud of you and am delighted that the two of you are here today.

Dear Ingrid: The cliché is correct. Without you I would not be standing here today. My job in Maastricht has made your life more complex, and yet you supported me wholeheartedly in this decision from the very beginning. We are both academics, and this academic character has very much shaped the way we organized our lives together. But besides the academic there is so much more and that makes my life with you very special. Thank you for that.

Ik heb gezegd.

Bibliography

Bamforth, Nicholas. 'Social Sensitivity, Consensus and the Margin of Appreciation'. In *Human Rights between Law and Politics. The Margin of Appreciation in Post-National Contexts*, edited by Petr Ahgha, 129-144. Oxford and Portland: Hart, 2017.

Bates, Ed. *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*. Oxford: Oxford University Press, 2010.

Bellamy, Richard. 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights'. *The European Journal of International Law* 25, no. 4 (2014): 1019-1042.

Ben-Ghiat, Ruth. *Strongmen. Mussolini to the Present*. New York: Norton, 2020.

Besselink, Leonard. 'Constitutional Adjudication in the Netherlands'. In *The Max Planck Handbooks in European Public Law. Part 3: Constitutional Adjudication: Institutions*, edited by Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter, 565-618. Oxford: Oxford University Press, 2017.

Christoffersen, Jonas. 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?'. In *The European Court of Human Rights between Law and Politics*, edited by Jonas Christoffersen and Mikael Rask Madsen, 181-203. Oxford: Oxford UP, 2011.

Claes, Monica, and Bruno de Witte. 'The Roles of Constitutional Courts in the European Legal Space'. In *The Max Planck Handbooks in European Public Law IV*, edited by Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter, 495-526. Oxford: Oxford University Press, 2023.

Dixon, Rosalind. 'The Core Case for Weak Form Judicial Review'. *Cardozo Law Review* 38 (2017): 2193-2232.

———. *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age*. Oxford: Oxford University Press, 2023.

Dzehtsiarou, Kanstantsin. *European Consensus and the Legitimacy of the European Court of Human Rights*. Cambridge: Cambridge UP, 2015.

Gerards, Janneke. *General Principles of the European Convention on Human Rights*. Cambridge: Cambridge University Press, 2019.

———. 'Judicial Deliberations in the ECtHR'. In *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond*, edited by Nick Huls, Maurice Adams and Jacco Bomhoff, 407-436: MC Asser Press, 2009.

Harel, Alon, and Adam Shinar. 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review'. *International Journal of Constitutional Law* 10, no. 4 (2012): 950-975.

Hickey, Tom. 'The Republican Core of the Case for Judicial Review'. *International Journal of Constitutional Law* 17, no. 1 (2019): 288-316.

Kavanagh, Aileen. *The Collaborative Constitution*. Cambridge: Cambridge University Press, 2023.

Letsas, George. 'The ECHR as a living instrument: its meaning and legitimacy'. In *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, edited by Andreas Føllesdal, Birgit Peters and Geir Ulfstein, 106-141. Cambridge: Cambridge University Press, 2013.

———. 'The Margin of Appreciation Revisited. A Response to Follesdal'. In *Human Rights: Moral or Political?*, edited by Adam Etinson, 295-310. Oxford: Oxford University Press, 2018.

———. *A theory of interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press, 2007.

Levitsky, Steven, and Daniel Ziblatt. *How Democracies Die*. New York: Crown, 2018.

Mancini, Susanna. 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty'. *European Constitutional Law Review* 6 (2010): 6-27.

Mounk, Yascha. *The People vs. Democracy Why Our Freedom Is in Danger and How to Save It*. Harvard: Harvard University Press, 2018.

Pettit, Philip. *On the People's Terms*. Cambridge: Cambridge University Press, 2012.

Somek, Alexander. *The Cosmopolitan Constitution*. Oxford: Oxford University Press, 2014.

———. 'Cosmopolitan constitutionalism: The case of the European Convention'. *Global Constitutionalism* 9, no. 3 (2020): 467-489.

Spano, Robert. 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law'. *Human Rights Law Review* 18 (2018): 473-494.

Von Bogdandy, Armin, and Christoph Krenn. 'ECJ and ECtHR: Two Senates of Europe's Constitutional Jurisdiction'. In *The Max Planck Handbooks in European Public Law IV*, edited by Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter, 383-418. Oxford: Oxford University Press, 2023.

Waldron, Jeremy. 'The Core of the Case Against Judicial Review'. *The Yale Law Journal* 115, no. 6 (2006): 1346-1406.

Maastricht Law Series

The Maastricht Law Series is created in 2018 by Boom juridisch and Eleven International Publishing in association with the Maastricht University Faculty of Law. The Maastricht Law Series publishes books on comparative, European and International law. The series builds upon the tradition of excellence in research at the Maastricht Faculty of Law, its research centers and the Ius Commune Research School. The Maastricht Law Series is a peer reviewed book series that allows researchers an excellent opportunity to showcase their work.

Series editors

Prof dr. Bram Akkermans (editor-in-chief)
Prof. dr. Monica Claes
Prof. dr. Fons Coomans
Prof. dr. Mariolina Eliantonio
Prof. dr. Michael Faure
Prof. dr. Bram van Hofstraeten
Prof. dr. Saskia Klosse
Dr. Denise Prevost
Prof. dr. David Roef
Dr. Marcel Schaper
Prof. dr. Jan M. Smits

Published in this series:

Volume 1: Reinhard Zimmermann, Does the Law of Succession Reflect Cultural Differences?, ISBN 978-94-6236-856-9
Volume 2: Anna Berlee, Access to personal data in public land registers, ISBN 978-94-6236-841-5
Volume 3: Marcus Meyer, The Position of Dutch Works Councils in Multinational Corporations, ISBN 978-94-6236-848-4
Volume 4: Jaap Hage, Foundations and Building Blocks of Law, ISBN 978-94-6236-860-6
Volume 5: Bastiaan van Zelst, The End of Justice(s)?, ISBN 978-94-6236-881-1
Volume 6: Agustín Parise & Lars van Vliet (eds.), Re- De- Co-dification? New Insights on the Codification of Private Law, ISBN 978-94-6236-900-9
Volume 7: Caroline Rupp, Rafael Ibarra Garza & Bram Akkermans, Property Law Perspectives VI, ISBN 978-94-6236-904-7
Volume 8: Aalt Willem Heringa, Europees Nederlands Staatsrecht, ISBN 978-94-6290-604-4
Volume 9: Symeon C. Symeonides, The "Private" in Private International Law, ISBN 978-94-6236-949-8
Volume 10: Jaap Hage, European Integration: A Theme, ISBN 978-94-6236-981-8
Volume 11: Jan M. Smits, Five Uneasy Pieces. Essays on Law and Evolution, ISBN 978-94-6236-982-5

Volume 12: Hannah Brodersen, Vincent Glerum, & André Klip, The European Arrest Warrant and In Absentia Judgements, ISBN 978-94-6236-985-6
Volume 13: Bram Akkermans & Gijs van Dijck, Sustainability and Private Law, ISBN 978-94-6236-986-3
Volume 14: Antonia Waltermann, David Roef, Jaap Hage & Marko Jelicic, Law, Science, Rationality, ISBN 978-94-6236-989-4
Volume 15: Frans L. Leeuw, Van Legal Realism naar Legal Big Data, ISBN 978-94-6290-781-2
Volume 16: Josua Sitompul, Cross-border Access to Electronic Evidence, ISBN 978-94-6236-133-1
Volume 17: Bram Akkermans & Jill Robbie, Property Law Perspectives VII, ISBN 978-946236-181-2
Volume 18: Bram Akkermans & Anna Berlee, 'Sjef-Sache', ISBN 978-94-6236-197-3
Volume 19: Froukje van den Borne, Luca Cox, Youri Cremers, Daan Groenewoud, Sven Schaghen & Tom Stijns, Het stopzetten van KEI-civiel nader bezien, ISBN 978-94-6290-955-7
Volume 20: Nicholas Mouttotos, The Impact of Europeanization in Cyprus Contract Law and the Spill-Over to Matters of Civil Procedure, ISBN 978-94-6236-206-2
Volume 21: Katja Zimmermann, Facilitating Cross-Border Real Estate Transactions in Europe, ISBN 978-94-6236-220-8
Volume 22: Alexis E. Antoniades, Remedies for human rights violations by the European Union, ISBN 978-94-6236-275-8
Volume 23: André Klip, European Arrest Warrant, ISBN 978-94-6236-284-0
Volume 24: Bram Akkermans, Sustainable Property Law, ISBN 978-94-6236-289-5
Volume 25: Sarah Schoenmaekers & Pauline Melin, The Art of Moving Borders, ISBN 978-94-6236-296-3
Volume 26: Agustín Parise & Olivier Moréteau, Comparative Perspectives on Law and Language, ISBN 978-94-6236-328-1
Volume 27: Renata Barbosa, Vincent Glerum, Hans Kijlstra, André Klip & Christina Peristeridou, Improving the European Arrest Warrant, ISBN 978-94-6236-327-4
Volume 28: Cedric Vanleenhove & Lotte Meurkens, The Recognition and Enforcement of Punitive Damages Judgments Across the Globe, ISBN 978-90-4730-162-2
Volume 29: Jill Robbie, Flore Vavourakis, Víðir Smári, Ivan Allegranti & Aleksa Radonjić, Property Law Perspectives VIII, ISBN 978-90-4730-171-4
Volume 30: Alice Giannini, Criminal Behavior and Accountability of Artificial Intelligence Systems, ISBN 978-90-4730-172-1
Volume 31: Sander Kramer, Effective Cross-Border Pension Information in the Face of Multi-Level Legal Systems, ISBN 978-90-4730-187-5
Volume 32: Katharina Boele-Woelki, Teaching Comparative Law: Experiences and Reflections, ISBN 978-90-4730-194-3
Volume 33: Roland Pierik, Convention Constitutionalism, ISBN 978-90-4730-229-2