Unpacking the partnership: typology of constitutional courts' roles in implementation of the European Court of Human Rights' case law

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Implementation of the European Court of Human Rights' case law – Compliance with the European Convention – Role of constitutional courts in implementing the European Court's case law – Constitutional courts and convergence, engagement and resistance to the European Court's case law – Constitutional courts self-correcting their practices to implement the European Court's case law – Changing constitutional courts' procedures and design to implement the European Court's case law – Constitutional courts conducting implementation of the European Court's case law – Constitutional courts evaluating implementation of the European Court's case law – Varying partnership capacity of constitutional courts vis-à-vis the European Court – Factors of partnership capacity: a favourable institutional setting, a favourable political setting and a favourable attitude of a constitutional court towards the European Court's judgment – Seeking implementation partners beyond constitutional courts

Introduction

The European Convention on Human Rights (hereinafter 'ECHR' or 'the Convention') – as interpreted by the European Court of Human Rights (hereinafter 'the European Court' or 'the Strasbourg Court') – regularly requires changes in the domestic legislation, case law and administrative practices of State parties. However, as

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an international court, the Strasbourg Court has very limited formal competences for ensuring compliance with its own judgments. Accordingly, recent debate on the effectiveness of the ECHR system has concentrated on securing the domestic implementation of ECHR rights.[1] The role of the domestic authorities in the ECHR system has been depicted as crucial because they 'do the "heavy lifting" required to comply'.[2] More specifically, domestic authorities play two essential roles within the processes of implementation[3] of the European Court's judgments. First, they diffuse the European Court's conclusions as they transform them into general, domestically applicable rules. Second, they subsequently apply such rules and perform the role of filters vis-à-vis the European Court by preventing or remedying human rights violations at the national level.[4]

At the domestic level of the ECHR system, one actor has traditionally been portrayed as an important ally of the European Court – the constitutional court.[5] Constitutional courts are usually singled out from the rest of the domestic judiciary as institutions particularly well placed to contribute to the implementation of the Strasbourg Court's case law and enhance the legitimacy of the ECHR system.[6] They have been depicted as the European Court's partners,[7] having a crucial impact on how far Strasbourg Court's case law permeates the domestic legal order.[8]

[1] *See* e.g. High-level Conference on the Implementation of the European Convention on Human Rights, our shared responsibility – Brussels Declaration (2015). *See also* L. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *EJIL* (2008) p. 125.

[2] C. Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and domestic policy change', 20 *EJIR* (2014) p. 1100 at p. 1117.

[3] In this article, the term 'implementation' refers to the domestic *process* centred around the reaction to the European Court's judgment. Such a broad understanding allows both the positive steps leading to compliance and the rather negative steps leading to partial compliance or non-compliance to be taken into account. For details on implementation of the European Court's case law, *see* e.g. E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (CoE Publishing 2008).

[4] D. Kosař and J. Petrov, 'The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular', 77 *Heidelberg J Int'l L* (2017) p. 585.

[5] I have chosen to concentrate on Kelsenian constitutional courts – specialised courts entitled to strike down legislation as unconstitutional. V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) p. xiii-xiv.

[6] D. Paris, 'Allies and Counterbalances. Constitutional Courts and the European Court of Human Rights: A Comparative Perspective', 77 *Heidelberg J Int'l L* (2017) p. 623.

[7] W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', 9 *HRL Rev.* (2009) p. 397 at p. 402.

[8] C. van de Heyning, 'The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights', 31 *Yearbook of European Law* (2012) p. 128 at p. 131.

This article acknowledges constitutional courts' importance in the implementation of ECHR rights. However, it also argues that the domestic implementation environment is more complex and asks for a more nuanced approach in assessing the role of constitutional courts in implementing the European Court's case law. The aim of this article is twofold. First, it aims to specify what forms the partnership of the European Court and constitutional courts takes in the context of implementing the European Court's judgments and what benefits it brings to the ECHR system. Second, it examines under what conditions the partnership can actually work and deliver such benefits. Accordingly, in order to map the forms of the partnership, this article first offers a typology of the roles played by constitutional courts in mechanisms of implementation of the European Court's case law. Subsequently, it examines the conditions under which constitutional courts have the capacity to perform the roles listed in the typology and secure compliance with the European Court's judgments (partnership capacity).

Looking at the partnership between the constitutional courts and the European Court, many constitutional courts have indeed embraced Strasbourg case law as a common feature of constitutional adjudication. The ECHR has gained prominent status[9] in the legal orders of many State parties, and the European Court's rulings are regularly taken into account by constitutional courts.[10] This can be seen as a mutually beneficial practice. The Strasbourg Court's rulings serve as guidance for constitutional courts; they provide a means of bolstering a constitutional court's persuasiveness or can even serve as a shield against opposing domestic actors.[11] From the Strasbourg Court's point of view, by relying on the European Court's case law, constitutional courts increase the effectiveness of the ECHR system. They can act as particularly effective diffusers and filters of the European Court's case law. They regularly reinterpret domestic laws in a manner consistent with European Court's case law, and several constitutional courts use the ECHR – as interpreted by the European Court – as a reference point for the review of legislation or at least as guidance for the interpretation of constitutional rights.[12]

[9] *See* H. Keller and A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2012).

[10] *See* J. Gerards and J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (Intersentia 2014).

[11] *See* L. Garlicki and I. Kondak, 'Poland: Human rights between international and constitutional law', in I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge University Press 2016) p. 326 at p. 329; Sadurski, *supra* n. 7, p. 438.

[12] For example, the Italian (post-2007) and Czech constitutional courts view the ECHR as a yardstick for the review of legislation. The Spanish and German constitutional courts use the ECHR for the interpretation of domestic constitutional rights. See numerous other examples in Paris, *supra* n. 6, and C. van de Heyning, 'Constitutional courts as guardians of fundamental rights:

A closer look, however, shows that there are at least two important features which require clarification of the constitutional courts' position within the implementation mechanisms: the interaction of constitutional courts with other actors; and the constitutional courts' discretion in dealing with the European Court's case law. First, although constitutional courts belong among the 'central actors' implementing the European Court's case law,[13] they are not the sole actors involved in the implementation mechanisms, nor are they omnipotent. Often, constitutional courts have to interact with other actors, mainly with law-making or law-applying bodies. In the end, the outcomes of the implementation processes depend upon mutual interaction between these actors, their powers, and their willingness to employ them.[14]

The second important feature is the factual discretion constitutional courts have when dealing with the European Court's case law.[15] Constitutional courts tend to accept the European Court's conclusions; their decision-making then leads to *convergence* with ECHR standards. Certain frictions between constitutional courts and the European Court can emerge, though,[16] as a constitutional court's complete embrace of ECHR standards can also threaten its autonomy.[17] Constitutional courts thus also *engage* more actively with the European Court's jurisprudence, and may even *resist* it.[18] Accordingly, constitutional courts sometimes resort to a narrow reading of the Strasbourg Court's rulings in order to limit their impact, or they might initiate a judicial dialogue to persuade the European Court to reassess its view. More rarely, constitutional courts silently or

The constitutionalization of the Convention through domestic constitutional adjudication', in P. Popelier et al. (eds.), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) p. 21.

[13] D. Anagnostou, 'Politics, courts and society in the national implementation and practice of European Court of Human Rights case law', in D. Anagnostou (ed.), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press 2013) p. 211.

[14] C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014) p. 25.

[15] *See* N. Krisch, 'The Open Architecture of European Human Rights Law', 71 *MLR* (2008) p. 185 at p. 215.

[16] G. Martinico, 'National Courts and Judicial Disobedience to the ECHR: A Comparative Overview', in O.M. Arnardóttir and A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection* (Routledge 2016) p. 59; V. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010) p. 92 and p. 94.

[17] D. Anagnostou, 'Untangling the domestic implementation of the European Court of Human Rights' judgments', in Anagnostou (ed.), *supra* n. 13, p. 1 at p. 13; A. Stone Sweet and H. Keller, 'Introduction: The Reception of the ECHR in National Legal Orders', in Keller and Stone Sweet, *supra* n. 9, at p. 20.

[18] I have borrowed the concepts of convergence, engagement and resistance from Jackson, *supra* n. 16.

even explicitly reject the Strasbourg Court's conclusions. At a more general level, several constitutional courts have also devised doctrines that limit the European Court's impact on national law.[19] As a result, it cannot be taken for granted that constitutional courts will completely embrace the whole body of Strasbourg case law.

Acknowledging these developments, the contribution of this article is twofold. First, it shows and systematises the various ways constitutional courts contribute to the effective functioning of the ECHR system. Constitutional courts correct their own practices, conduct ordinary courts and law-making bodies in their implementation efforts and evaluate their previous implementation steps. Second, the article also shows that some constitutional courts are in fact better placed than others to play these roles and partner with the European Court (furthermore in some cases more than in others) and explains why this is so. More specifically, it argues that the constitutional courts' partnership capacity[20] is subject to three sets of conditions: a favourable institutional setting; a favourable political setting; and a favourable attitude of the constitutional court towards the European Court's judgment. Only constitutional courts that are likely to be involved in implementation mechanisms and are able and willing to secure compliance with the Strasbourg judgments have a high partnership capacity. Such constitutional courts can be relied on as the European Court's major domestic compliance partners – at least from a short-term perspective – as they can successfully fulfil most of the roles listed in the typology. However, in the case of constitutional courts with lower partnership capacities, the European Court and pro-compliance actors must build partnerships with other actors, too. Partnering with actors other than constitutional courts is also important from a long-term perspective because estimations of a constitutional court's partnership capacity will always include an element of uncertainty. Moreover, a constitutional court's partnership capacity can change over time and across issues.

The article proceeds in seven parts. After this introduction, the second part briefly presents the typology of the roles played by constitutional courts in the mechanisms of implementation of the European Court's case law. The following three parts introduce the individual categories of the typology and refer to concrete examples from the ECHR system. The sixth part examines the conditions under which constitutional courts are likely to play the roles presented by the typology and bring about the desired benefits for the ECHR system. It probes the elements

[19] B. Peters, 'The Rule of Law Dimensions of Dialogues between National Courts and Strasbourg', in M. Kanetake and A. Nollkaemper (eds.), *The Rule of Law at the National and International Levels* (Hart 2016) p. 201 at p. 210-215, and references cited therein.

[20] Partnership capacity denotes the likeliness of a constitutional court's involvement in implementation, plus its ability and willingness to secure compliance with the European Court's judgments. See 'Varying partnership capacity of constitutional courts' below.

of the partnership capacity of constitutional courts and explains the consequences it has for the politics of implementing the European Court's case law. Finally, there is a concluding part.

The typology

The central part of this article is a typology of the roles played by constitutional courts in the mechanisms of implementation of the European Court's case law.[21] It is informed by the domestic politics theories of compliance with the judgments of international courts. These theories emphasise that international courts influence state behaviour through the medium of domestic politics. Implementation of international case law thus depends on the interaction between the domestic actors involved in the compliance mechanisms and on the international court's ability to build domestic pro-compliance coalitions.[22]

The typology was developed in an inductive way through several cycles of gradual generalisations from the existing cases of implementation of the European Court's judgments.[23] Three main sources of information about these cases were used. The main sources were the resolutions of the Committee of Ministers regarding supervision of the execution of the Strasbourg Court's judgments.[24] These usually contain an appendix providing information submitted by the respective government about the measures adopted to implement the judgment. Yet, the resolutions usually restrict themselves to positive developments. Therefore, the inquiry was supplemented with other sources in order to grasp cases of resistance, too. The major recent comparative volumes on the impact of the ECHR on national legal orders[25] and cases reported in the International Law in Domestic Courts database were consulted. The typology also takes into account

[21] I concentrate on general measures and I acknowledge both the *inter partes* binding effect of the European Court's rulings (Art. 46 ECHR) and the *res interpretata* effect of Strasbourg judgments. As a result, I have taken into account both the judgments addressed to the given country and to other countries. *See* A. Bodnar, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings', in Y. Haeck and E. Brems (eds.), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014) p. 223.

[22] *See supra* n. 14, and K. Alter, 'Tipping the Balance: International Courts and the Construction of International and Domestic Politics', 13 *CYELS* (2011) p. 1.

[23] *See* A.L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) p. 240.

[24] I have made use of nearly 300 resolutions in English containing the terms 'constitutional court', 'constitutional tribunal' or 'constitutional council' and nearly 240 resolutions in French containing the terms 'cour constitutionnelle', 'tribunal constitutionnel' or 'conseil constitutionnel'.

[25] Keller and Stone Sweet, *supra* n. 9; Anagnostou (ed.), *supra* n. 13; Gerards and Fleuren, *supra* n. 10; A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press 2016); I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic*

Table 1. Role of constitutional courts in the mechanisms of implementation of the Strasbourg Court's case law

		Stage of constitutional court's (CC's) involvement	
		Initial stage of implementation	**CC's later involvement**
Source of ECHR violation	**CC's procedural and administrative practices**	*CC as a self-corrector*	*CC as an object of changes*
	Decisions of domestic law-applying bodies	*CC as a conductor of jurisprudential implementation*	*CC as an evaluator of jurisprudential implementation*
	Domestic legislation	*CC as a conductor of legislative implementation*	*CC as an evaluator of legislative implementation*

cases from both the 'old' and 'new' Council of Europe members to illustrate the breadth of potential issues.

The typology, summarised in Table 1, is constructed along two dimensions. This acknowledges that implementation of the Strasbourg judgments is 'a multi-faceted and inherently political process',[26] usually involving different domestic actors in different positions. The implementation of the Strasbourg case law is a process of changing the status quo; the vertical dimension therefore reflects what the source of ECHR violation was and what the object of change is – domestic legislation, decisions of law-applying bodies (domestic jurisprudence) or even the constitutional court's own procedural and administrative practices.

The horizontal dimension takes into account that constitutional courts can become involved in an implementation mechanism at different stages. They might already be involved at an early phase of an implementation process – act as (one of) the first actors domestically – and be able to set the agenda. In such cases, constitutional courts act as initiators of implementation. However, other actors can also take steps towards implementation, even before a constitutional court is involved. In such cases, constitutional courts do not set the agenda but rather react to steps already taken by other actors, for instance by supporting or altering them. The distinction between a constitutional court's involvement at an initial stage of implementation and in a later phase is not strictly set in terms of time units. What matters is whether any other actors have adopted implementation measures prior to the constitutional court's involvement.

Change in Central and Eastern Europe (Cambridge University Press 2016); and *The Impact of the European Convention on Human Rights in States Parties – Selected Examples* (CoE Publishing 2016).

[26] D. Anagnostou and A. Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25 *EJIL* (2014) p. 205 at p. 207.

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Combining the two dimensions, the typology works with six main categories of constitutional court roles in implementation mechanisms.[27] Moreover, with respect to diverging constitutional courts' preferences towards the Strasbourg judgments at stake, constitutional courts can employ various techniques within a given role. These techniques, which can lead to convergence, engagement or even resistance to the European Court's case law, are addressed below.

The following three parts analyse the categories laid down in the typology and refer to specific examples involving various Council of Europe member states. Although the context in which constitutional courts operate varies from state to state and may affect the course of implementation mechanisms, for the purposes of construing the typology this article treats the constitutional courts equally. The common denominator is that the 47 member states of the Council of Europe have all incorporated the Convention, making it binding on state authorities and enforceable by domestic courts,[28] and that they have some *de facto* discretion when dealing with the ECHR and with Strasbourg case law.[29] Nevertheless, the section 'Varying partnership capacity of constitutional courts', below, revisits the significance of differences in the constitutional courts' institutional designs and the political environments in which they operate.

Changing a constitutional court's procedural and administrative practices and design

Although constitutional courts regularly function as domestic guardians of fundamental rights, sometimes their own decisions and practices lead to violations of the Convention. As the exhaustion of all (effective) domestic remedies is an admissibility criterion enshrined in Article 35(1) ECHR, it is a commonplace that the European Court de facto reviews the conduct of constitutional courts. The Strasbourg Court not only deals with the substantive interpretation of law by the constitutional courts but also examines their own procedural performance.[30] Issues like the length of proceedings, compliance with the equality of arms principle in the proceedings before the constitutional court, and too restrictive an assessment of the admissibility of constitutional complaints by the constitutional courts have all been subject to criticism from the Strasbourg Court.[31]

[27] The six roles are mutually exclusive at any one point in time. However, the constitutional courts can play multiple roles across different phases of the implementation of one judgment.

[28] A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', 1 *GlobCon* (2012) p. 53 at p. 63.

[29] Stone Sweet and Keller, *supra* n. 17, at p. 14.

[30] *See* e.g. ECtHR [plenary] 23 June 1993, Case No. 12952/87, *Ruiz-Mateos* v *Spain*, paras. 55-60.

[31] *See infra* notes 33, 35, 40, 43, 46 and 48.

For the sake of the comprehensiveness of our understanding of the various roles of constitutional courts, this article devotes a special category to the cases in which their administrative and procedural practices[32] alone form a source of ECHR violation. I distinguish those from situations in which a constitutional court overturns its own *substantive* case law in response to the Strasbourg judgments; this is addressed below. In the first scenario, the constitutional court is a central actor capable of resolving the problem by changing its own practices. In many cases, self-correction by the constitutional court alone serves as a sufficient measure of non-repetition of the respective human rights violation. Therefore, constitutional courts can secure compliance with the Strasbourg standards on their own. Yet, in the latter cases concerning changes to *substantive* case law, the constitutional courts correct themselves but, in addition, aim to orchestrate implementation in order to safeguard compliance, also by other actors. In other words, the self-correcting role is inward-looking, whereas the roles involving changes to substantive case law contain important outward-looking elements, too.

This part of the article addresses the various roles the constitutional courts play in inward-looking cases. They can act as self-correctors, but can also play a more passive role and be subjected to changes in the design of the proceedings or of the constitutional court itself.

Constitutional courts as self-correctors

To give a few specific examples of the active self-correcting role, the Czech Constitutional Court has repeatedly been criticised by the Strasbourg Court for performing a too restrictive and formalistic assessment of the admissibility of constitutional complaints.[33] In response to this criticism, Czech constitutional judges discussed the issue at a plenary meeting and concluded that it was necessary to avoid an excessively formalistic approach.[34] In another set of cases, the European Court found a violation of Article 6 ECHR since the Czech Constitutional Court had not informed a complainant about submissions made by other parties to the proceedings.[35] Pursuant to these judgments, a plenary

[32] This section deals *exclusively* with cases in which the violation of the ECHR was caused by the *practices* of the constitutional court, not by the underlying legislation regulating the proceedings before the constitutional court as such. This is so because the latter cases fall into a different category (discussed below) as the source of violation was the legislation itself.

[33] ECtHR 20 April 2004, Case No. 57567/00, *Bulena* v *the Czech Republic*; ECtHR 28 June 2005, Case No. 74328/01, *Zedník* v *the Czech Republic*; ECtHR 13 December 2005, Case No. 6019/03, *Zemanová* v *the Czech Republic*.

[34] Resolution CM/ResDH(2009)122, 3 December 2009.

[35] Instead of many *see* ECtHR 21 June 2005, Case No. 61811/00, *Milatová and others* v *the Czech Republic*.

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meeting of the Czech Constitutional Court adopted a recommendation inviting judge-rapporteurs to communicate the parties' submissions to the applicants for possible commentary whenever they contained new facts, allegations or arguments.[36]

ECHR-related problems can also emerge as regards access to constitutional courts' files. In *Társaság a Szabadságjogokért* the Strasbourg Court declared a violation of Article 10 ECHR because the Constitutional Court of Hungary had refused a non-governmental organisation access to a pending motion for abstract review of constitutionality initiated by members of Parliament.[37] In response to the judgment, the Hungarian Constitutional Court granted the organisation unlimited access to the given complaint.[38]

Sometimes the solution is not so straightforward, though, and the*Běleš* constitutional court's self-correction does not work. Another Czech case is a good example of a complex implementation mechanism in which the constitutional court plays multiple roles. The Czech legal order provides for extraordinary appeal (*dovolání*),[39] which can be filed in the Supreme Court. The unclear relationship between extraordinary appeal and constitutional complaint proceedings has caused many problems and several judgments in which the European Court has declared that the practice of the Czech Constitutional Court violated the applicant's right of access to a court.[40] In reaction to the Strasbourg judgments, the Czech Constitutional Court first adopted a communication clarifying the interpretation of the admissibility rules.[41] Subsequently, the Czech Parliament amended the Constitutional Court Act,[42] but 'convicting' judgments from the European Court followed even after the amendment.[43] In 2012, the Czech

[36] Resolution ResDH(2006)71, 20 December 2006; *see also* Resolution CM/ResDH(2012)20, 8 March 2012.

[37] ECtHR 14 April 2009, Case No. 37374/05, *Társaság a Szabadságjogokért* v *Hungary*.

[38] Resolution CM/ResDH(2012)191, 6 December 2012.

[39] For explanation of the extraordinary appeal in the Czech legal order *see* M. Bobek, 'An Introduction to the Czech Legal System and Legal Resources Online', *GlobalLex*, 2006 (updated in 2014 by Olga Pouperová), <www.nyulawglobal.org/globalex/Czech_Republic.html>, visited 8 July 2018.

[40] *See* e.g. ECtHR 12 November 2002, Case No. 46129/99, *Zvolský a Zvolská* v *the Czech Republic*; ECtHR 12 November 2002, Case No. 47273/99, *Běleš* v *the Czech Republic*. In the most problematic cases the party lodged an extraordinary appeal and a constitutional complaint at the same time. In this first phase, the constitutional complaint was dismissed as premature. Nevertheless, the Supreme Court dismissed the extraordinary appeal as inadmissible, and the Constitutional Court found the subsequent constitutional complaint to be belated. *See* ECtHR 24 February 2004, Case No. 73577/01, *Vodárenská akciová společnost* v *the Czech Republic*.

[41] Commission of the Constitutional Court No. 32/2003 Coll.

[42] Act No. 83/2004 Coll.

[43] E.g. ECtHR 12 October 2010, Case No. 35836/05, *Adamíček* v *the Czech Republic*; ECtHR 13 October 2011, Case No. 26908/09 and 30809/10, *Tieze a Semeráková* v *the Czech Republic*.

Constitutional Court quashed the relevant part of the Code of Civil Procedure because it found the regulation of extraordinary appeal to be unforeseeable.[44] The Parliament then adopted a new law which aimed to finally resolve the problem.[45] Looking at the implementation roles of the Czech Constitutional Court, it initially strove for self-correction, however unsuccessfully. In the latter phases, the procedures before the Constitutional Court were subject to change (see below). Subsequently, the Constitutional Court undertook outward-looking measures and stepped more forcefully into the role of conductor of legislative implementation (discussed in more detail below) and provoked far-reaching change as it derogated the regulation of extraordinary appeal and gave the legislature several hints on how to design the new legislation.

Constitutional courts' design as object of change

The last example illustrates that sometimes a constitutional court's self-correction may be difficult to achieve and larger changes in the domestic legal order may be necessary even in cases which touch upon the procedure before the constitutional court. Indeed, on several occasions State parties have even resorted to changing the design of the proceedings before the constitutional court – or of the constitutional court itself – in reaction to the European Court's case law. Constitutional courts tend to be rather passive in such cases.

Specific features of the proceedings before the constitutional court were fine-tuned in response to the Strasbourg judgments. In reaction to the *Olujić* judgment,[46] a constitutional amendment was adopted introducing time limits on the decision-making of the Croatian Constitutional Court in cases concerning the disciplinary responsibility of judges.[47] Organisational changes with respect to constitutional courts were also taken in order to implement the European Court's rulings. For example in *Peša* the Strasbourg Court ruled that Croatia had violated, inter alia, Article 5(3) ECHR because the Croatian Constitutional Court had not decided on the constitutionality of the applicant's detention in a timely manner.[48] In response, a new section of the Croatian Constitutional Court was established. This section was charged with deciding on those constitutional complaints which required particular promptness, such as detention cases.[49] In Germany, as part of the struggle to comply with the Strasbourg case law on excessively lengthy

[44] Judgment of the Czech Constitutional Court, 21 February 2012, Pl. ÚS 29/11.

[45] Law No. 404/2012 Coll.; *see also* Resolution CM/ResDH(2013)58, 30 April 2013. It remains questionable, though, whether the amendment has resolved the whole issue.

[46] ECtHR 2 February 2009, Case No. 22330/05, *Olujić* v *Croatia*.

[47] Resolution CM/ResDH(2011)194, 2 December 2011.

[48] ECtHR 8 April 2010, Case No. 40523/08, *Peša* v *Croatia*.

[49] Resolution CM/ResDH(2011)195, 2 December 2011.

proceedings, an additional registry of the Federal Constitutional Court was set up and additional legal staff members were employed in the Court's research department.[50]

Constitutional courts and jurisprudential implementation of the European Court's judgments

More often, the sources of ECHR violation lie in the substantive opinions of domestic courts and administrative bodies. Changes in domestic case law – including the constitutional courts' jurisprudence – are thus often necessary in order to comply with the European Court's judgments. Scholars have come up with two different narratives in this context. On the one hand, it can be assumed that constitutional courts as courts with human rights expertise will be prone to apply ECHR standards. With respect to their specific position within the judiciary, some constitutional courts are well situated to orchestrate domestic jurisprudential responses to Strasbourg case law. Moreover, most constitutional courts are entitled to review and quash the decisions of the ordinary judiciary and administrative bodies if they contravene the constitution. The fact that the rulings of many constitutional courts have gained *de facto* precedential value[51] implies that constitutional courts are particularly well-designed for the diffusing of ECHR standards to the rest of the judiciary. On the other hand, constitutional courts can also act in a contrary manner. They might prefer to guard their own constitutional autonomy or might simply prefer developing domestic constitutional rights case law without engaging with the ECHR.[52]

The following sections show that when constitutional courts are involved in the initial phases of implementation, they can act as conductors orchestrating jurisprudential implementation. When involved in subsequent phases, they evaluate other actors' implementation measures.

Constitutional courts as conductors of jurisprudential implementation

On many occasions, constitutional courts have served as the domestic introducers of the interpretations, concepts and standards of review employed by the European Court. Constitutional courts sometimes even overrule their own case law in order to comply with the Strasbourg Court's approach. Even then

[50] Resolution CM/ResDH(2013)244, 5 December 2013. *See also* E. Lambert Abdelgawad and A. Weber, 'The Reception Process in France and Germany', in Keller and Stone Sweet, *supra* n. 9, p. 107 at p. 135-136.

[51] E.g. W. Sadurski, *Rights Before Courts* (Springer 2014) p. 67.

[52] Stone Sweet and Keller, *supra* n. 17, p. 20. See also 'Favourable attitude of the constitutional court', below.

constitutional courts act as conductors of jurisprudential implementation because they must ensure this change is reflected by ordinary courts and executive bodies.

In that way, constitutional courts have introduced Strasbourg standards into various areas of law. The Czech Constitutional Court has, for instance, overruled its own case law[53] and altered its approach to the right to effective investigation under Articles 2 and 3 ECHR. At the same time, it has imposed the standards flowing from Articles 2 and 3 ECHR on police authorities.[54] The European Court's case law concerning the right to effective investigation has also influenced other constitutional courts. The Spanish Constitutional Court issued six rulings in 2008 addressing the right to effective investigation[55] and held that it requires 'adequate and effective investigation of the elements reported', which implies 'special instructions to ensure that all reasonable lines of investigation are pursued in ascertaining the fact'.[56]

In another set of cases, the Croatian Constitutional Court changed its case law on procedural rights in eviction proceedings in response to the European Court's judgments in *Ćosić*[57] and *Paulić*.[58] It also stressed the duty of the judiciary to align its practices to the obligations stemming from the Convention. As a result, application of the proportionality analysis – even by ordinary courts – is improving.[59]

Besides such instances of a constitutional court's contribution to jurisprudential implementation, constitutional courts have also shown the limits of transmitting Strasbourg standards. Such limits can take the form of ongoing dialogues with the Strasbourg Court, of narrow readings of Strasbourg rulings, or even of disregard and rejection of the European Court's case law.

First, constitutional courts sometimes engage quite creatively with Strasbourg case law and initiate judicial dialogue with the European Court. Such dialogue has two important aspects for the purposes of this article. First, constitutional courts sometimes try to reshape Strasbourg case law in order to secure smoother compliance with domestic constitutional standards while at the same time trying to persuade the European Court to reflect their reshaping efforts and revisit its own case law accordingly.

[53] Judgment of the Czech Constitutional Court, 12 August 2014, I. ÚS 3196/12, para 15.
[54] Judgment of the Czech Constitutional Court, 2 March 2015, I. ÚS 1565/14.
[55] Resolution CM/ResDH(2011)266, 2 December 2011.
[56] *Id.*, referring to the judgment of the Spanish Constitutional Court, no. 34/2008.
[57] ECtHR 15 January 2009, Case No. 28261/06, *Ćosić* v *Croatia*.
[58] ECtHR 22 October 2009, Case No. 3572/06, *Paulić* v *Croatia.*
[59] Resolution CM/ResDH(2011)48, 8 June 2011; K. Turković and J. Omejec, 'Commitment to reform: Assessing the impact of the ECtHR's case law on reinforcing democratization efforts in Croatian legal order', in Motoc and Ziemele, *supra* n. 25, p. 119-120.

The German *Bundesverfassungsgericht* is well-known for its dialogues with the European Court.[60] A primary example of such a dialogical jurisprudential implementation is the *von Hannover* saga concerning publication of photographs of Princess Caroline von Hannover. Both the German Constitutional Court and the European Court had been balancing Caroline von Hannover's right to privacy with the freedom of expression of the press. Unlike the *Bundesverfassungsgericht*, the European Court struck the balance in favour of von Hannover's privacy. Yet in a subsequent case, the German Constitutional Court again ruled in favour of the newspapers and rejected von Hannover's complaint. Nevertheless, it acknowledged the European Court's judgment and employed the proportionality analysis – adjusted to Strasbourg standards.[61] This time the European Court found no violation of the ECHR, although the facts of the case did not differ substantially from the previous one, and deferred to the German Constitutional Court.[62] This case shows that some constitutional courts do not automatically mirror what the Strasbourg Court has said but instead 'translate'[63] its rulings and adapt them to the domestic constitutional landscape.

Going beyond engagement and reshaping the Strasbourg jurisprudence, constitutional courts can also resist the European Court and reject its conclusions. The Austrian Constitutional Court's 1987 *Miltner* judgment illustrates this. The main question was whether the neighbours' objection to a construction project fell within the term 'determination of civil rights' in which case, according to Article 6 ECHR, it would need to be decided upon by an independent and impartial tribunal. Although the Strasbourg case law suggested as much, the Austrian Constitutional Court refused to do so. It held that the case at hand affected civil rights, but not at their core. Hence, the case could be decided by an administrative agency, not necessarily by a tribunal in the sense of Article 6 ECHR. According to the Austrian Constitutional Court, the European Court's overbroad interpretation of the term 'civil rights' was contrary to the constitutionally entrenched Austrian administrative system. Therefore, the Austrian Constitutional Court decided to depart from the Strasbourg Court's interpretations.[64]

[60] E. Bjørge, 'National supreme courts and the development of ECHR rights', 9 *ICON* (2011) p. 5 at p. 26.

[61] J. Rackow, 'From Conflict to Cooperation: The Relationship between Karlsruhe and Strasbourg', in K. Ziegler et al. (eds.), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) p. 379 at p. 382.

[62] *Id.*

[63] A. Paulus, 'From Implementation to Translation: Applying the ECtHR Judgments in the Domestic Legal Order', in A. Seibert-Fohr and M.E. Villiger (eds.), *Judgments of the European Court of Human Rights – Effects and Implementation* (Nomos 2014) p. 273 at p. 278.

[64] Verfassungsgerichthof, 14 October 1987, *Miltner*, VfSlg 11500/1987; D. Thurnerr, 'The Reception Process in Austria and Switzerland', in Keller and Stone Sweet, *supra* n. 9, p. 361; N. Krisch, *Beyond Constitutionalism* (Oxford University Press 2010) p. 113.

Constitutional courts as evaluators of jurisprudential implementation

Ordinary courts (and administrative bodies) can act as autonomous implementation actors without being nudged to do so by a constitutional court. As the ECHR mandate of ordinary judges *de facto* introduced elements of decentralised control of Conventionality in some countries,[65] the ordinary courts could implement Strasbourg case law on their own, even before the constitutional court came into play. That brings us to the category in which constitutional courts react to law-applying bodies' efforts to implement the European Court's judgments. Constitutional courts then act as evaluators of jurisprudential implementation.

If the constitutional court is only involved in the implementation process at a later stage, it usually either acknowledges and bolsters the conclusions of the ordinary courts or fine-tunes certain aspects of their rulings. The Czech Supreme Administrative Court has, for example, domestically introduced the Strasbourg standards concerning the dissolution of political parties.[66] The Czech Constitutional Court subsequently confirmed the ruling and acknowledged those standards.[67] One does rather exceptionally encounter cases in which an ordinary court aligns its case law with the European Court's conclusions and the constitutional court subsequently takes a less Strasbourg-friendly approach and overturns the decision. The interplay between the Romanian High Court of Cassation and Justice and the Constitutional Court (addressed below) comes close to this.

Constitutional courts and legislative implementation of the European Court's judgments

Violations of the Convention are frequently caused by domestic legislation. The Strasbourg Court is not, however, entitled to strike down domestic laws.[68] Nevertheless, since European constitutional courts have become important actors in the processes of domestic law-making,[69] they often partner with the European Court and function as its lever in striking down legislation incompatible with the ECHR. Intertwining of the supervision of constitutionality

[65] Ferreres Comella, *supra* n. 5, p. 140-142; L. Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All', 9 *Utrecht Law Review* (2013) p. 19 at p. 25.

[66] Judgment of the Supreme Administrative Court of the Czech Republic, 17 Feb 2010, Pst 1/2009-348.

[67] Decision of the Czech Constitutional Court, 27 May 2010, Pl. ÚS 13/10.

[68] Sadurksi, *supra* n. 7, p. 441.

[69] A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000); A.R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators* (Cambridge University Press 2013) p. 153-164.

and Conventionality with use of the ECHR as a benchmark for constitutional review (which is the case with some European constitutional courts)[70] plays a crucial role. Employing various techniques, constitutional courts can significantly contribute to the legislative implementation of Strasbourg judgments. When involved in the initial phases of implementation, constitutional courts can act as conductors of legislative implementation. Yet they also react to the implementation efforts of the legislature and fulfil the role of evaluators of legislative implementation.

Constitutional courts as conductors of legislative implementation

Constitutional courts can use their powers to remove legislative obstacles to compliance with the ECHR. They can do so either through ECHR-compatible interpretation of domestic laws or by quashing ECHR-incompatible legislation. As to the reinterpretation of domestic laws, in *Frankowicz*[71] Poland had breached Article 10 ECHR when Mr. Frankowicz was convicted in disciplinary proceedings for criticising the medical practices of a fellow doctor. In reaction to the European Court's ruling, the Polish Constitutional Tribunal did not quash the provision of the Code of Medical Ethics but instead held that it could not be interpreted as prohibiting truthful public assessment of the activities of a doctor by a colleague in the public interest. Thus, the Constitutional Tribunal indicated that only ECHR-compatible interpretations of the law were constitutionally acceptable.[72]

A typical example of ensuring legislative compliance by abolishing problematic pieces of legislation is the derogation of legislation excluding certain matters from judicial review. In response to *Lauko*[73] and *Kadubec*,[74] the Slovakian Constitutional Court quashed a provision preventing the courts from reviewing minor offences for which a fine lower than 2000 SKK had been imposed.[75] Relying on *Lauko* and *Kadubec*, the Czech Constitutional Court abolished similar provisions in Czech law.[76]

In some cases, however, negative legislating was insufficient. Although a constitutional court could quash problematic legislation, it would then be up to the legislature to act. In *Chruściński*,[77] the Strasbourg Court had found a violation of Article 5(4) ECHR when neither the detainee nor his lawyer had been allowed

[70] *See supra* n. 12.
[71] ECtHR 16 December 2008, Case No. 53025/99, *Frankowicz* v *Poland*.
[72] Resolution CM/ResDH(2012)200, 6 December, 2012.
[73] ECtHR 2 September 1998, Case No. 26138/95, *Lauko* v *Slovakia*.
[74] ECtHR 2 September 1998, Case No. 27061/95, *Kadubec* v *Slovakia*.
[75] Resolution DH (99) 554, 8 October 1999. *See also* M. Kryzyanowska-Mieryewska, 'The Reception Process in Poland and Slovakia', in Keller and Stone Sweet, *supra* n. 9, p. 579-580.
[76] Judgment of the Czech Constitutional Court, 17 January 2001, Pl. ÚS 9/2000.
[77] ECtHR 6 November 2007, Case No. 22755/04, *Chruściński* v *Poland*.

to consult the case file in the detention proceedings. The Polish Constitutional Tribunal subsequently declared the relevant statutory provision unconstitutional and invited Parliament to adopt new legislation respecting its conclusions. As a provisional measure, the Constitutional Tribunal gave the law-applying bodies instructions on how to interpret the law before Parliament acted. Following the Constitutional Tribunal's judgment, the Polish Parliament amended the wording of the provision at stake, which now regulated the detainee's access to evidence in the detention proceedings.[78] Apart from derogating the problematic legislation, some constitutional courts are also active in giving the legislature guidelines on how to remedy the situation and how the new legislation should be phrased.[79]

Prompt adoption of fully compliant legislation by the legislature after a constitutional court's intervention cannot be taken for granted, though. For instance, the Czech Constitutional Court, taking into account the European Court's case law involving other countries, abolished a provision of the Code of Criminal Procedure that prevented detainees from attending court hearings for the review of the lawfulness of their detention.[80] However, the law-making authorities only amended the law[81] in 2011 after a series of 'convicting' judgments from the Strasbourg Court[82] stating, inter alia, that the intervention of the constitutional court alone had not rectified the problem as more detailed legislative regulation was necessary.[83] A similar pattern of synergy involving the Strasbourg Court and a domestic constitutional court can be found in the Polish case concerning judicial assessors. First, the Constitutional Tribunal – relying on the European Court's Article 6(1) ECHR jurisprudence – ruled that the regulation of the assessors' status violated the principle of judicial independence. Subsequently, the Strasbourg Court confirmed this position in *Urban*,[84] which ultimately led to the legislative abolition of the institution of judicial assessors in 2009.[85]

Moving on to other techniques commonly employed by constitutional courts, there are a number of cases in which a constitutional court goes beyond the automatic reception of the European Court's conclusions. These cases range from domestic adaptation of the Strasbourg case law, its narrow reading to rejection of

[78] Resolution CM/ResDH (2011) 142, 14 September 2011. *See also* Garlicki and Kondak, *supra* n. 11, p. 314.

[79] Brewer-Carías, *supra* n. 69, p. 153-164.

[80] Judgment of the Czech Constitutional Court, 22 March 2005, Pl. ÚS 45/04.

[81] Act No. 459/2011 Coll.

[82] ECtHR 4 December 2008, Case No. 19970/04; *Husák* v *the Czech Republic*; ECtHR 26 March 2009, Case No. 39298/04 and 8723/05, *Krejčíř* v *the Czech Republic*; ECtHR 28 October 2010, Case No. 20157/05 *Knebl* v *the Czech Republic*.

[83] *Knebl*, *supra* n. 82, para. 87.

[84] ECtHR 30 November 2010, Case No. 23614/08, *Henryk Urban and Ryszard Urban* v *Poland*.

[85] Garlicki and Kondak, *supra* n. 11, p. 317-318.

the Strasbourg judgments. Also in the legislative implementation of Strasbourg case law, one can witness the constitutional courts' efforts to reshape the European Court's case law and square its requirements with domestic constitutional traditions through a dialogue with the Strasbourg Court. An example of such domestic reshaping, or translation,[86] of the Strasbourg case law is the German preventive detention saga. The European Court had declared that the German system of preventive detention amounted to a penalty in the sense of Article 7(1) ECHR. Therefore, it was not possible to retroactively prolong the detention.[87] The German Constitutional Court took into account the European Court's conclusions, but insisted that preventive detention should not be qualified as a penalty.[88] The German Constitutional Court 'translated' the European Court's demands into the language of proportionality and legitimate expectations.[89] Subsequently, the German Parliament adopted legislation phrased along the lines of the German Constitutional Court's directives.[90]

Recent examples show that constitutional courts can also try to restrict the effect of Strasbourg case law in the domestic realm. I will illustrate this with two examples concerning the Italian Constitutional Court.[91] First, constitutional courts can limit the impact of a single Strasbourg ruling. In its decision no. 236/2011, which concerned the principle of *lex mitior*, the Italian Constitutional Court reviewed the relevant Strasbourg case law but held: 'In the light of the considerations set out above, it is not arbitrary to conclude that the recognition by the European Court of the principle of retroactivity in mitius […] did not preclude the ability to introduce exceptions or restrictions on its applicability when supported by a valid justification'.[92] Commentators claim that in this ruling the Italian Constitutional Court, by emphasising the differences in context between the cases, had in effect limited the reach of the European Court's ruling.[93]

[86] Paulus, *supra* n. 63, p. 273.

[87] ECtHR 17 December 2009, Case No. 19359/04 *M* v *Germany*.

[88] E. Klein, 'Germany', in Gerards and Fleuren, *supra* n. 10, p 207.

[89] 2 BvR 2365/09, 4 May 2011, 128 BVerfGE, 326. A press release in English is available at <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2011/bvg11-031.html>, visited 8 July 2018.

[90] Donald and Leach, *supra* n. 25, p. 288-289. *See also* the Communication from Germany concerning the case of M. and others against Germany (Application No. 19359/04), DH-DD (2014)1463, 1 December 2014, available at the HUDOC EXEC database (hudoc.exec.coe.int/).

[91] This is not to say that the Italian Constitutional Court is the only one using such techniques. I have chosen the Italian examples because they have been well documented by Giuseppe Martinico (*supra* n. 16).

[92] Italian Constitutional Court, judgment no. 236/2011. English translation available at: <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2011236_Quaranta_Lattanzi_en.pdf>, visited 8 July 2018.

[93] Martinico, *supra* n. 16, p. 74.

More recently, the Italian Constitutional Court has tried to restrict the reach of Strasbourg case law on a more general level. As the Italian system of constitutional review is based on the incidental review of legislation initiated by ordinary courts,[94] the European Court's case law often serves as a basis for questioning the constitutionality of Italian legislation, and in doing so bringing it to the Constitutional Court's attention.[95] In its judgment no. 49/2015, however, the Italian Constitutional Court 'indirectly tried to put the brakes on the European Court's evolutionary jurisprudence itself'.[96] The *Corte Constituzionale* held that Italian judges should rely only on well-established case law of the European Court and laid down several conditions that should discourage ordinary judges from blindly following the European Court.[97] The Italian Constitutional Court thus sent a signal to the ordinary courts: they should think twice before referring a case to the Constitutional Court due to the Strasbourg case law.[98]

Furthermore, recent developments in Russia should be mentioned. In 2015, a group of Russian deputies asked the Russian Constitutional Court to review the constitutionality of the Law on Ratification of the ECHR and other norms. Their argument was that these provisions directed Russian authorities to implement the European Court's judgments even if they violated the Russian Constitution. The Russian Constitutional Court did not abolish those norms. However, it declared that neither the Convention nor its interpretation by the Strasbourg Court took precedence over the Russian Constitution.[99] The Russian Parliament then followed the Constitutional Court's suggestion and adopted a

[94] *See* V. Barsotti et al., *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) p. 54; J. Ferejohn and P. Pasquino, 'Constitutional Adjudication, Italian Style', in T. Ginsburg (ed.), Comparative Constitutional Design (Cambridge University Press 2014) p. 294.

[95] A. Pin, 'A Jurisprudence to Handle with Care: The European Court of Human Rights' Unsettled Case Law, its Authority, and its Future, According to the Italian Constitutional Court', *Int'l J. Const. L. Blog*, 1 May 2015, <www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015>, visited 8 July 2018.

[96] *Id.*

[97] Such as excessive creativity, inconsistency with other judgments of the European Court, existence of strong dissenting opinions, the fact that the decision originates from an ordinary division and has not been endorsed by the Grand Chamber, or the fact that the European Court has failed to assess the particular characteristics of the national legal system. Italian Constitutional Court judgment no. 49/2015. English translation available at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf>, visited 8 July 2018.

[98] Pin, *supra* n. 95.

[99] Russian Constitutional Court, 14 July 2015, No. 21-П/2015. English summary is available at <www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-П.pdf>, visited 8 July 2018. *See also* L. Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015', 12 *EuConst* (2016) p. 377.

statute introducing the Constitutional Court's competence to declare the execution of an international obligation impossible if it contradicted the Constitution. In 2016, the Russian Constitutional Court used this competence for the first time when it declared the European Court's *Anchugov and Gladkov* ruling, which addressed prisoner voting rights, to be non-executable.[100] This judgment held that the European Court's conclusions were incompatible with the Constitution, which seems to add up to blocking the legislative implementation of *Anchugov and Gladkov*. Nevertheless, the Russian Constitutional Court also included a somewhat compromising passage in which it tried to square the view of the European Court with Russian law by referring to the possibility of other State authorities optimising the system of criminal penalties, which could have implications for the voting rights of convicted persons.[101] Whether such changes will take place and with what effect is a question for the future.[102]

Constitutional courts as evaluators of legislative implementation

Parliaments and the executive bodies adopting secondary legislation also act on their own and adopt legislative responses to Strasbourg case law, even without prior encouragement from a constitutional court. Nonetheless, constitutional courts can react later and evaluate such legislation adopted in reaction to the European Court's rulings.

Besides acknowledging and supporting the legislative steps towards implementation, constitutional courts act as fine-tuners of such legislation. By doing so they acknowledge the implementation efforts of the legislature but press it for greater compliance. In Austria, the Parliament took steps to liberalise the legal regime of broadcasting services in response to the European

[100] Russian Constitutional Court, 19 April 2016, No. 12-П/2016. English translation available at <www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf>, visited 8 July 2018. For the second time, the Russian Constitutional Court used this power in the *Yukos* case, which, however, concerned only individual measures of execution. *See* Russian Constitutional Court, 19 January 2017, No.1-П/2017, English translation available at <www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf>, visited 8 July 2018.

[101] *See* M. Aksenova, 'Anchugov and Gladkov is not Enforceable: the Russian Constitutional Court Opines in its First ECtHR Implementation Case', *Opinio Juris*, 25 April 2016, <www.opiniojuris.org/2016/04/25/anchugov-and-gladkov-is-not-enforceable-the-russian-constitutional-court-opines-in-its-first-ecthr-implementation-case/>, visited 8 July 2018.

[102] *See* European Commission for Democracy through Law (Venice Commission), Russian Federation: Final opinion on the amendments to the federal constitutional law on the Constitutional Court (2016) 10, <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e>, visited 8 July 2018.

Court's judgment in *Informationsverein Lentia*.[103] The Austrian Constitutional Court, however, subsequently abolished certain parts of those laws as they violated the principle of legality and still failed to meet certain requirements of the Convention. The legislature then clarified and refined the respective laws.[104]

Constitutional courts sometimes also contribute to the emergence of implementation difficulties and substantive delays, as a Romanian example shows. The criminalisation of defamation in Romania had been a problematic issue for many years. With its 1999 ruling in *Dălban*,[105] the European Court entered into the debate when it held that the conviction of a journalist in the given case had violated Article 10 ECHR. A complicated battle ensued over the decriminalisation of defamation. In 2006, full decriminalisation was achieved by means of legislative amendment. However, the very next year, the Romanian Constitutional Court abolished the new legislation decriminalising defamation as unconstitutional: 'By the repealing of the mentioned legal provisions was created an inadmissible legislative lacuna, contrary to the constitutional provision that guarantees human dignity as a supreme value'.[106] In 2010, however, the Romanian High Court of Cassation and Justice ruled that the legal provisions criminalising insult and libel were not in force as they had not been recriminalised by the legislature.[107] The Constitutional Court answered in 2013. It referred to the European Court's case law and took it into account. However, the Constitutional Court bolstered its 2007 decision and made clear that the rules criminalising insult and libel were applicable.[108] Later that year, the lower chamber of the Romanian Parliament even voted to recriminalise defamation explicitly. However, the Senate rejected the measure. In the end, the new Criminal Code adopted in 2014 did not include the criminalisation of insult and libel.[109]

[103] ECtHR 24 November 1993, Case No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, *Informationsverein Lentia and Others* v *Austria*.

[104] Resolution DH (98) 142, 11 June 1998.

[105] ECtHR 28 September 1999, Case No. 28114/95, *Dalban* v *Romania*.

[106] Romanian Constitutional Court, Decision No. 62 of 18 January 2007. English translation available at <www.ccr.ro/files/products/D0062_07.pdf>, visited 8 July 2018.

[107] High Court of Cassation and Justice (Romania), Decision No. 8 of 18 October 2010, as referred to in Resolution CM/ResDH(2011)73, 8 June 2011, and in the decision of the Romanian Constitutional Court, *infra* n. 108.

[108] Romanian Constitutional Court, Decision No. 206 of 29 April 2013. English translation available at <www.ccr.ro/files/products/Decizie_206_2013en.pdf>, visited 8 July 2018.

[109] Donald and Leach, *supra* n. 25, at p. 221.

Varying partnership capacity of constitutional courts

The typology shows the forms the partnership between the European Court and constitutional courts takes. At the same time, cases cited in the previous parts demonstrate the benefits of the partnership for the ECHR system. First of all, constitutional courts can significantly contribute to the *enforcement* of Strasbourg case law when accepting the European Court's conclusions. When their role is to engage in self-correction, when they orchestrate legislative or jurisprudential implementation and even when they evaluate other actors' implementation efforts, they diffuse the European Court's conclusions domestically. Also, they facilitate preventing human rights violations or at least remedying them at the national level.[110] Thereby, constitutional courts can raise the domestic legitimacy of a Strasbourg ruling and of the Strasbourg Court itself. A constitutional court's involvement in the domestic enforcement of Strasbourg judgments can be interpreted as an approval of the European Court's conclusions by the main guardian of constitutional rights and, accordingly, as an additional legitimacy input.[111]

Another positive consequence of the partnership for the ECHR system is that constitutional courts fulfil the function of *overseeing* implementation. When they act as evaluators of legislative and jurisprudential implementation, they react to other actors' implementation efforts, which has important implications for the effectiveness and legitimacy of the system. Supporting and bolstering the implementation efforts helps to disseminate the European Court's conclusions domestically. And, again, it serves as a legitimacy input when the guardian of domestic constitutional rights approves (or refines) measures inspired by Strasbourg case law. Fine-tuning implementation measures, in addition, pushes other actors towards greater compliance with the European Court's judgment, which helps to reduce and remedy potential ECHR violations at the national level.

However, the cited cases also show that the fruits of the constitutional courts' partnership cannot be taken for granted. The situation is complicated by each constitutional court's interaction with other domestic actors and by a growing number of instances of more creative engagement with, and even resistance to, the European Court's case law.[112] Hence, some constitutional courts are better placed than others for partnering with the European Court and contributing to the

[110] Kosař and Petrov, *supra* n. 4; Helfer, *supra* n. 1.

[111] *See* similarly Paris, *supra* n. 6.

[112] If creative engagement is carried out in good faith, the ECHR system can profit from that. *See* 'Favourable attitude of the constitutional court' below, which argues that such engagement can amount to constitutional courts functioning as mediators between the national and the international within the ECHR system. Such a mediating function can be seen as another benefit of the partnership with constitutional courts.

ECHR system; furthermore in some cases more than in others. A constitutional court's partnership capacity, i.e. the ability to play the roles listed in the typology and to secure successful implementation of (and compliance with) the European Court's case law, varies from country to country and from case to case.

In the following sections, this article argues that the effective partnership capacity of a constitutional court is subject to three sets of conditions – a favourable institutional setting, a favourable political setting and favourable attitude of the constitutional court towards the Strasbourg judgment.[113] All these conditions affect a constitutional court's partnership capacity, namely whether the constitutional court can be involved in the roles listed in the typology, whether it is *able* to ensure compliance domestically and whether it is *willing* to ensure compliance.

Favourable institutional setting

Constitutional courts are not self-activating institutions and their involvement in European Court's case law implementation mechanisms depends on other actors. Access to a constitutional court – the question of who can bring a claim and activate a constitutional court – is a crucial 'ingredient' of a constitutional court's institutional design.[114] In the European Court's case law implementation context, the number of access channels influences the likelihood that the constitutional court will be 'activated' and affects which of the typology roles it will be able to play.

Typical modes of activating a constitutional court are by official, legislative or judicial reference, or with an individual petition (constitutional complaint).[115] The legislative referral is important for the constitutional courts' roles as conductors and evaluators of legislative implementation. A parliamentary minority can make a reference requesting that the constitutional court deals with the legislative obstacle of complying with the ECHR even if the majority does not address the issue on its own. However, such an action by MPs cannot be taken for granted. There are issues that might never be referred to the constitutional

[113] All three groups of conditions matter for the constitutional courts' capacity to play the roles of conductor or evaluator of jurisprudential and legislative implementation. A constitutional court's self-correction capacity mostly depends on the attitude of the constitutional court. When a constitutional court's design is subject to change (see above), the constitutional court's role is rather passive. Consequently, I have left this aside when discussing partnership capacity.

[114] T. Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press 2003) p. 37; P. Pasquino, 'Constitutional Adjudication and Democracy', 11 *Ratio Juris* (1998) p. 98 at p. 116.

[115] A. Harding et al., 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective', 3 *JCL* (2008) p. 1 at p. 7. Official reference denotes cases referred by a named official (president, ombudsman) or agency.

court – issues of low political salience, not interesting for the opposition, or, on the contrary, all too salient issues that the opposition does not dare risk opening because they are too politically divisive, e.g. the rights of unpopular minorities. Also, the majority and the opposition do regularly agree on certain topics.

Since legislative referrals and the logic of political competition do not automatically secure the activation of a constitutional court, judicial reference and constitutional complaint gain importance. Ordinary courts or individual citizens – actors not subject to partisan considerations – can refer issues to the constitutional court. The activation of the constitutional court by means of a judicial reference depends on the *de facto* discretion of an ordinary court. The precondition is that the ordinary courts recognise the constitutional and ECHR dimensions of the case and decide to activate the constitutional court. If an ordinary court ignores those dimensions or decides to resolve the issue on its own, the only remaining possibility for activating the constitutional court is with a constitutional complaint, if available.

The availability of a constitutional complaint mechanism is crucial for a constitutional court's capacity in the role of conductor and evaluator of the jurisprudential implementation. If an ordinary court fails to recognise and address the constitutional and/or ECHR dimensions of a case and no constitutional complaint mechanism is available, a constitutional court is prevented from fulfilling the role of conductor of jurisprudential implementation. If an ordinary court recognises the constitutional and/or ECHR dimensions and decides to resolve the issue on its own, a constitutional court cannot act as an evaluator of jurisprudential implementation if the legal order does not provide for a constitutional complaint mechanism.

Yet another important feature of the institutional setting of a constitutional court is the capacity to strike down the judgments of ordinary courts. It is a defining feature of Kelsenian constitutional courts that they are empowered to invalidate legislation. Yet, not all constitutional courts possess the competence to strike down judicial decisions. This competence affects a constitutional court's ability to fulfil the roles of conductor and evaluator of jurisprudential implementation. If a constitutional court does not possess this competence, then an ordinary court has final say in interpreting the constitutional court's judgment. In such cases, a constitutional court does not have many instruments at its disposal to enforce its opinions within the ordinary judiciary. Probably the only option in such cases is to set aside the relevant statute because the ordinary courts were not able to construe it in a way compatible with the constitution/ECHR.[116]

Besides the access channels and competences, another institutional feature seemingly crucially affecting a constitutional court's partnership capacity is the

[116] L. Garlicki, 'Constitutional courts versus supreme courts', 5 *ICON* (2007) p. 44 at p. 67.

status of the ECHR. If the Convention possesses subconstitutional status and the source of violation lies with the Constitution itself, the constitutional court may have to rely on other actors' steps leading to constitutional amendment if it is impossible to interpret the Constitution in harmony with the ECHR as interpreted by the European Court.[117] More generally, however, the significance of this feature needs some qualification. In practice, constitutional courts have quite a wide range of discretion as regards using the Convention as a standard of review.[118] Accordingly, what matters is the *de facto ex post* significance that constitutional courts ascribe to the ECHR, rather than its *ex ante de iure* status.[119]

I will mention but a few examples to demonstrate how the listed institutional features – especially access and competences – vary in European constitutional courts and how this affects a constitutional court's capacity to fulfil the roles listed in the typology. For instance, the German, Spanish, Slovenian, Czech and Slovak constitutional courts can be activated by all four types of referral – official, legislative, judicial, and individual. They have powers allowing both the abstract and concrete review of legislation, and can decide on constitutional complaints and eventually quash the decisions of ordinary courts.[120] Hence, they can interact directly with law-making and judicial actors. Within the field of legislative implementation, those constitutional courts can be called upon to rectify ECHR-problematic legislation by all four groups of actors. Thereby, the institutional setting of those constitutional courts facilitates acting as conductors or evaluators of legislative implementation. In addition, those constitutional courts all have the competence to review judicial decisions upon constitutional complaints and ultimately, to abolish the decisions of ordinary courts.[121] That enables those constitutional courts to play the roles of conductor and evaluator of jurisprudential implementation, too. Individuals affected by the non-compliance of a lower court with a constitutional court's rulings can bring the case back to the constitutional court by filing a constitutional complaint. Quashing a non-compliant decision of an ordinary court then gives the constitutional court the capacity to impose its will

[117] *See* e.g. the Lithuanian Constitutional Court's reaction to ECtHR [GC] 6 January 2011, Case No. 34932/04, *Paksas* v *Lithuania*. A. Padskocimaite, 'Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania', 77 *Heidelberg J Int'l L* (2017) p. 651.

[118] Paris, *supra* n. 6.

[119] Keller and Stone Sweet, *supra* n. 9, p. 683.

[120] D. Kommers and R. Miller, 'Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court', 3 *JCL* (2008) p. 194 at p. 202-203. I leave aside other powers such as deciding conflicts between state organs or conflicts between the central and local institutions, which are usually not crucial in the context of ECHR implementation.

[121] *See* M. de Visser, *Constitutional Review in Europe* (Hart 2014) p. 171-175.

on the lower courts.[122] Altogether, with respect to their institutional setting, those constitutional courts are well-equipped to act as self-correctors, conductors of legislative and jurisprudential implementation, and as evaluators of legislative and jurisprudential implementation.

There is some variation in the design of constitutional complaints, though. The Polish Constitutional Tribunal is accessible, inter alia, by individual reference. But unlike in the German system, the Polish constitutional complaint cannot directly challenge the decision of an ordinary court. It can only challenge the constitutionality of the statute upon which the judicial decision was based.[123] This means that the Polish Constitutional Tribunal can only target the legislation in question. It cannot quash the decision of an ordinary court. Therefore, its ability to conduct and evaluate jurisprudential implementation is reduced and its partnership capacity is largely limited to self-correction and conducting and evaluating the legislative implementation of the European Court's judgments.

For the Italian Constitutional Court, review of legislation initiated by means of judicial reference is a central feature.[124] The institutional setting surrounding the Italian Constitutional Court is distinctive because of its two main limitations: the 'screening function' of ordinary judges in activating the constitutional court; and the fact that only laws can be the object of constitutional review.[125] Ordinary judges act as the 'gatekeepers' of constitutional review who decide on the activation of the constitutional court.[126] This has repercussions for the Italian Constitutional Courts' partnership capacity. If an ordinary court fails to activate the Constitutional Court, the latter's capacity to conduct legislative and jurisprudential implementation, and correct it or refine it within the evaluating role, is highly restricted. Even if an ordinary court does refer the case to the Constitutional Court and the Constitutional Court decides, its ability to influence the outcome is limited as there is no constitutional complaint mechanism.[127] It is, however, true that the Italian Constitutional Court has introduced elaborate techniques of communication with the ordinary courts – different modes for construing the constitutionally compatible interpretation of statutes

[122] Garlicki, *supra* n. 116, p. 67.

[123] Art. 79 of the Polish Constitution.

[124] *Supra* n. 94.

[125] T. Groppi, 'The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review', 3 *JCL* (2008) p. 100 at p. 102-103.

[126] T. Groppi and I. Spigno, 'The Constitutional Court of Italy', in A. Jakab et al., *Comparative Constitutional Reasoning* (Cambridge University Press 2017) p. 519 at p. 519. Italian judges have been quite active in this regard. The question is how this practice changes after the Italian Constitutional Court's judgment no. 49/2015 (*see supra* n. 97).

[127] Garlicki, *supra* n. 116, p. 67.

(*sentenze interpretative*).[128] Still, this does not completely compensate for the Constitutional Court's lack of control over the ultimate outcome.

Favourable political setting

In addition to the institutional setting, a constitutional court's partnership capacity is co-determined by less formal political factors. Even if the constitutional court has been activated and has the competence to decide on the issue, its ability to push through change motivated by Strasbourg jurisprudence will be limited by the constitutional court's position in the given political system and the local political/legal culture. For example, in cases of politically sensitive issues when the questions of separation of powers and democratic legitimacy likely come into the foreground, some constitutional courts resort to deference vis-à-vis the legislature and leave the introduction of certain ECHR standards up to parliament.[129] However, even if the constitutional court does intervene, parliament can resort to statutory override or even to amending the constitution. A Hungarian case concerning the legal definition of the term 'family' exemplifies this. Partly relying on the European Court's jurisprudence, the Hungarian Constitutional Court acted as the conductor of legislative implementation of the European Court's case law and abolished a provision defining the term 'family' too narrowly. In reaction to the Constitutional Court's ruling, however, the definition was not widened. The parliament defied the Constitutional Court's efforts to conduct legislative implementation and moved the narrow definition of 'family' into the constitution.[130]

That brings us to another factor – the constitutional court's stature, i.e. its 'gravitas', the reputation and weight other actors ascribe to it. Gravitas of a particular constitutional court is crucial for its ability to manoeuvre other domestic actors into taking a pro-compliance stance and, thereby, pushing through the desired changes. The German Constitutional Court for instance has been labelled one of the most powerful courts in the world, the 'epicentre' of German constitutionalism.[131] Such stature for a constitutional court increases its partnership capacity because it promises the efficacy of the constitutional court's implementation role.

However, the stature of a constitutional court can change over time. Although the eastern-central European constitutional courts have been described as success stories,[132] recent populist attacks on the Hungarian and Polish constitutional

[128] Ferejohn and Pasquino, *supra* n. 94, p. 306.

[129] Anagnostou, *supra* n. 13, p. 218.

[130] K. Bárd, 'The legal order of Hungary and the European Convention on Human Rights', in Motoc and Ziemele, *supra* n. 25, p. 183-184.

[131] Kommers and Miller, *supra* n. 120, p. 55.

[132] H. Schwartz, 'Eastern Europe's Constitutional Courts', 9 *Journal of Democracy* (1998) p. 100 at p. 100.

courts disrupt that narrative.[133] Populist court-curbing techniques tend to decrease the stature of constitutional courts. Indeed, their goal is to prevent the constitutional court from deciding at all (jurisdiction stripping, restricting access channels) or at least keep it from blocking populist reforms. As to the latter, they aim to 'tame' constitutional courts through court-packing or judicial replacements with loyal appointees and, thereby, preventing constitutional courts from blocking the populist agenda. As a result, the capacity of a constitutional court to decide autonomously and give effect to the European Court's case law can be greatly diminished. Hence, the *de facto* judicial independence of the constitutional court and the culture of political non-interference with the judiciary is another extremely important factor in the constitutional court's partnership capacity.

Favourable attitude of the constitutional court

Factors determining a constitutional court's partnership capacity, however, do not lie exclusively within the external political environment. Even if the constitutional court has been activated, can play the relevant role and is able to secure compliance with the European Court's case law, it may not be *willing* to do so. Several cases cited above demonstrate that constitutional courts are far from being mere transmission belts of the Strasbourg Court. In some cases, constitutional courts engage quite actively with Strasbourg jurisprudence.

When entering into a dialogue with the European Court, constitutional courts can be seen as the Strasbourg Court's major partners in (re)shaping ECHR rights. In the end, 'delineating the scope of human rights is a deliberative enterprise based on competing ideals'.[134] Constitutional courts have to square individual rights requirements with the public good and the broader domestic constitutional landscape.[135] With respect to such expertise, constitutional courts are well-designed to bring yet another benefit to the ECHR system. Besides enforcement of Strasbourg judgments and supervision of other actors during their implementation efforts, constitutional courts function as 'mediators' between the national and the international within the ECHR system.[136]

[133] B. Bugarič and T. Ginsburg, 'The Assault on Postcommunist Courts', 27 *Democratization* (2016) p. 69.

[134] E. Benvenisti and A. Harel, 'Embracing the tension between national and international human rights law: The case for discordant parity', 15 *ICON* (2017) p. 36 at p. 57.

[135] *See* J. Komárek, 'National constitutional courts in the European constitutional democracy', 12 *ICON* (2014) p. 525.

[136] G. Ulfstein, 'The European Court of Human Rights and national courts: a constitutional relationship?' in O.M. Arnardóttir and A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection* (Routledge 2016) p. 46 at p. 57.

Thus, even discontent with the European Court can be beneficial and legitimacy-enhancing for the ECHR system, if expressed in a constructive manner. In such cases, initiation of judicial dialogue should increase deliberation on the issue at stake, and constitutional courts can take advantage of their institutional positions and verbalise the interlocutors' views and values.[137] Moreover, constitutional courts can also convey other domestic actors' views and values to the deliberative dialogue. Such deliberation can lead to further development of ECHR norms and to improved mutual understanding between the European Court and constitutional courts.[138] As Amos put it, 'evidence of having listened is an important legitimating force'.[139] Even the Strasbourg Court's legitimacy can profit from the dialogues – if the European Court listens and engages with a constitutional courts' views, it 'cannot be accused of usurping a role well beyond the scope of the functions devolved to it by Contracting States'.[140]

However, more problematic cases of rejection of the European Court's conclusions, and efforts to restrict the effects of Strasbourg case law, also occur.[141] Those cases are rather heterogeneous and difficult to grasp. They range from limited pushbacks that seek to influence the European Court's case law in a given area, to backlash seeking a reshuffling of authority within the ECHR system.[142] Sometimes, resistance is issue-specific and driven by a constitutional court's differing interpretation of a constitutional feature.[143] Sometimes, it is a result of judicial politics within a constitutional court. Kosař and Petrov have argued that resistance can be a result of the preferences of the various actors within the constitutional court.[144] For instance, if the constitutional court's individual judges view the European Court as an obstacle to their judicial autonomy, they may try to suppress the domestic effects of Strasbourg case law.[145] Other cases of constitutional courts' resistance, however, reveal deeper gaps between the constitutional court and the European Court. Resistance can be a result of differing political-legal conceptions of rights and constitutionalism as advocated

[137] L.B. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', 3 *ICON* (2005) p. 617 at p. 632.

[138] *See generally* V. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', 119 *Harv. L. Rev.* (2005) p. 109 at p. 116.

[139] M. Amos, 'The dialogue between United Kingdom courts and the European Court of Human Rights', 61 *ICLQ* (2012) p. 557 at p. 575.

[140] Sadurski, *supra* n. 7, p. 442.

[141] *See supra* nn. 64, 99 and 108.

[142] *See generally* M.R. Madsen et al., 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) p. 197 at p. 200.

[143] E.g. the Austrian Constitutional Court in the *Miltner* case, *supra* n. 64.

[144] Kosař and Petrov, *supra* n. 4.

[145] *Id.*

by the European Court on the one hand and the constitutional court on the other. Pluralist rights-based constitutionalism open to international law can be rather easily squared with international human rights constraints. However, more sovereignty-based visions of constitutionalism may be harder to reconcile with an international court's pronouncements.[146] The clash between the Russian Constitutional Court and the European Court, where the Russian Constitutional Court's vision of sovereignty within the ECHR system has played a significant role, comes close to this.[147]

As a result, the cases of resistance might amount to a hard-to-predict mixture of a constitutional courts' defence of its own supremacy, differing constitutional ideas, judicial egos,[148] and national sovereignty. Yet, such cases may eventually widen the gap between the ECHR and domestic legal orders without offering any prospect of reconciling the issue at stake. Thus, even though the emergence of certain 'inter-layer irritations'[149] in the ECHR system is probably inevitable, I believe it is normatively desirable – from the point of view of both ECHR rights and domestic constitutional rights – that such discontent be channelled into a constructive dialogue, leaving space for mutual reflection and accommodation of the diverging perspectives.

Consequences for politics of implementing the European Court's case law

The findings presented in this paper have further repercussions for the politics of implementation of the European Court's case law. From a short-term perspective (the implementation of a concrete Strasbourg judgment), constitutional courts with high partnership capacity can be relied upon. If a constitutional court operates within a favourable institutional and political setting and has a favourable attitude towards the Strasbourg judgment at stake, it is likely to be involved, and should be able and willing to secure compliance with the European Court's judgment (by correcting its practices, conducting implementation or evaluating it). Therefore, the pro-compliance actors can largely rely on the constitutional court. However, if the constitutional court is difficult to activate in a given case, faces difficulties enforcing its own views domestically (e.g. due to low 'gravitas' or a lack of competence to quash ordinary court decisions), or is opposed to the European Court's ruling, its partnership capacity is lower. In such cases,

[146] *See* A. Hunneeus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority', 79 *Law and Contemporary Problems* (2016) p. 179 at p. 180.

[147] Aksenova, *supra* n. 101; Mälksoo, *supra* n. 99, p. 388 (both criticising the Russian Constitutional Court's sovereignty-centred approach).

[148] *See*, *mutatis mutandis*, J. Weiler, 'Editorial: Judicial Ego', 9 *ICON* (2011) p. 1.

[149] C. O'Cinneide, 'Human Rights within Multi-Layered Systems of Constitutional Governance: Rights Cosmopolitanism and Domestic Particularism in Tension', 19 Irish Yrbk. Intl. L. (2010) p. 19.

the Strasbourg Court and the compliance-seeking actors should pay attention to the particular limits of the constitutional court's partnership capacity and, possibly, partner with other actors capable of implementing the judgment. For instance, when it comes to jurisprudential implementation in the Italian system, pro-compliance actors should not forget to focus on ordinary judges who hold the key to activating constitutional adjudication and also have the final say over implementation of the constitutional court's and the European Court's views in judicial practice.

Anticipating the partnership capacity can be a complicated task, though. The favourable institutional setting factor should be rather easy to evaluate. Constitutional courts' competences and access channels are clearly set out in constitutions and statute books and should be cognisable. Assessment of the political setting can be trickier. It is largely a set of informal factors embedded in the domestic legal and political culture. Still, at least the basic contours of the political setting can usually be estimated. The third group of factors affecting the partnership capacity is however the most challenging – the attitude of the constitutional court. The reaction of a constitutional court can sometimes be difficult to anticipate. As the examples cited above show, resistance can come both from generally well-complying countries and poor compliers, from democracies and hybrid regimes, from younger constitutional courts and more established ones. Resistance can come in the form of discontent with a particular ruling, but also as an exemplification of a deeper ideological mismatch between the European Court and a given constitutional court. Hence, at best the European Court and the pro-compliance actors can merely second-guess the attitude of a constitutional court. Although constitutional courts often adopt a positive attitude, this cannot be taken for granted. Thus, the attitude of a constitutional court to the European Court's case law sometimes turns into a hard-to-predict mixture of competing constitutional ideas, judicial politics, judicial egos and ideas about rights and constitutionalism as such.

From a long-term perspective, corresponding to the Strasbourg Court's 'embeddedness effectiveness',[150] even high partnership capacity constitutional courts cannot always be relied on as exclusive partners. This article has explained that the constitutional courts' involvement in implementation mechanisms is not automatic but depends on the cases brought before them. Furthermore, the previous discussion shows that a particular constitutional court's partnership capacity can change over time (especially due to changing political settings)[151] and across issues (especially due to the attitude of the constitutional court to the issue at stake).

[150] Helfer, *supra* n. 1.
[151] *See supra* n. 133.

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From this it follows that although the European Court's partnership with constitutional courts can be extremely fruitful, there are also significant limits and conditions qualifying such benefits, both short-term and long-term. Accordingly, the European Court and other actors preferring compliance with its judgments should take account of those limiting conditions and develop partnerships with other domestic actors, too. For the Strasbourg Court, there are two main ways of developing such partnerships: by jurisprudential means; and through socialisation. Indeed, the European Court has made efforts in both regards. As to the jurisprudential way, the Strasbourg Court's recent practice of procedural review has aimed to motivate both ordinary courts and parliaments to engage with the European Court's case law in a more thorough and transparent manner.[152] As for socialisation, the European Court has organised, for example, a series of seminars entitled 'Dialogue between Judges',[153] and in 2015 established the Superior Courts Network to ensure an effective exchange of information with national apex courts.[154] Still, some countries remain absent from those events and networks, and some are represented only by constitutional court officials.

It should be stated that the purpose of this debate was not to insist that one model of constitutional adjudication was better or worse than the others. Each model has its own legal, political and cultural logic and history. Accordingly, very different patterns of implementation mechanisms can occur across those various models and, in abstract terms, it would be impossible to conclude which one was better or worse. Still, such differences should inform the European Court and other actors interested in successful implementation of Strasbourg case law.

Conclusion

The necessity of a deeper embeddedness of the ECHR in domestic systems is a topic that has prevailed in the debates on the future of the ECHR system.[155] Therefore, we need a more exact understanding of the domestic level of the Convention system. In this vein, this article has examined the role of constitutional courts in the implementation of the Strasbourg Court's judgments. The article has tried to explain the various forms the European

[152] M Saul, 'How and When Can the International Human Rights Judiciary Promote the Human Rights Role of National Parliaments?', in M. Saul et al. (eds.), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (Cambridge University Press 2017); B. Cali, 'From Flexible to Variable Standards of Judicial Review: The Responsible Courts Doctrine at The European Court Of Human Rights', in Arnardóttir and Buyse, *supra* n. 136, p. 144.

[153] Regarding socialisation *see* M. Claes and M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', 8 *Utrecht Law Review* (2012) p. 100 at p. 105.

[154] 'Superior Courts Network', *ECtHR*, <www.echr.coe.int/Pages/home.aspx?p=court/network&c>.

[155] *See supra* n. 1.

Court's implementation partnership with constitutional courts has taken, what its benefits are, and under what conditions it works successfully in practice.

As to the forms of partnership, the article has put forth a typology of the constitutional courts' roles in the mechanisms of implementation of the European Court's rulings. The typology shows the multiplicity of roles that constitutional courts can play vis-à-vis other actors when implementing European Court rulings, and systematises those roles. The constitutional courts' involvement in the listed roles usually has positive consequences for the implementation of the European Court's rulings. Constitutional courts contribute to their enforcement and, when acting as evaluators of legislative or jurisprudential implementation, supervise the implementation efforts of other actors. Besides that, constitutional courts can also mediate between the national constitutional landscape and the international human rights requirements as phrased by the European Court.

Nevertheless, constitutional courts' capacity to deliver those goods cannot be taken for granted. Constitutional courts vary in their institutional design and the political setting in which they operate. Moreover, in some cases constitutional courts do not merely accept the European Court's conclusions; they might engage quite creatively with Strasbourg case law, or even resist it. As a result, the constitutional court's partnership capacity, i.e. the ability to play the roles listed in the typology and secure compliance with the European Court's case law, varies across countries and across particular cases. The partnership capacity is subject to three kinds of conditions: a favourable institutional setting (access rules, competences, *de facto* domestic status of the Convention); a favourable political setting (stature of the constitutional court, *de facto* judicial independence); and a favourable attitude of the constitutional court towards the European Court's judgment. This has further repercussions for the politics of implementation of the European Court's case law. The findings of this article suggest that although constitutional courts are important partners, they are not omnipotent or absolutely reliable. Accordingly, partnering with actors other than the constitutional court is crucial in the case of low partnership capacity constitutional courts. Furthermore, partnering with other actors is generally important from the long-term perspective too, since estimations of a constitutional court's partnership capacity will always include an element of uncertainty and, moreover, a constitutional court's partnership capacity can change over time and across issues.

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