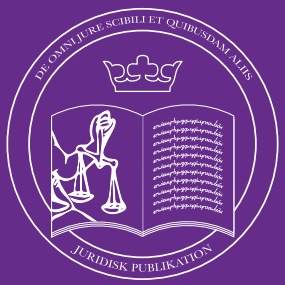

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Climate change litigation and the European Convention of Human Rights
– The interpretation of the European Convention of Human Rights by national courts

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CLIMATE CHANGE LITIGATION AND THE EUROPEAN CONVENTION OF HUMAN RIGHTS

– THE INTERPRETATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS BY NATIONAL COURTS

Av Jens Klinteskog[1]

1. CLIMATE CHANGE LITIGATION AND THE ECHR

Evolutive interpretation implies that a court has chosen a different interpretation as the wording and the consequences of the interpretation have changed over time. In a ruling which elicited worldwide news coverage, on the 9th of April 2024 the European Court of Human Rights (ECtHR) interpreted the European Convention of Human Rights (ECHR) evolutively to declare that a failure to combat climate change threatens human rights. The leadup to this decision, Verein KlimaSeniorinnen Schweiz v. Switzerland (KlimaSeniorinnen),[2] has consisted of the worldwide phenomenon of fiercely contested climate litigation. In a European context the ECHR has been one of the legal bases for litigations against states and companies. Absent any ruling from the ECtHR, domestic courts had been asked to interpret the Convention evolutively. The most renowned cases have come from the Netherlands. In State of the Netherlands v. Urgenda Foundation (Urgenda), from 2019, the State was successfully sued for having lowered its CO2 reduction target and thus for having violated two articles of the ECHR.[3] Also, in Milieudefensie et al. v. Royal Dutch Shell plc (Milieudefensie) a district court ordered the multinational corporation Shell to reduce its greenhouse emissions to align with the targets set by the Paris Climate Accords.[4] The Court argued that Shell's own commitments to reduce greenhouse gases were insufficiently concrete at the time – based on an interpretation of "duty of care" in light of international law – in particular Article 8 of the ECHR (right to respect for private life). In a Swedish context, the non-governmental organisation Aurora representing 600 youths, including Greta Thunberg, has sued the Swedish government for failing to live up to its climate change commitments.[5]

1 Universitetsadjunkt vid Uppsala Universitet.
2 Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC], 9.4.2024, 53600/20.
3 State of the Netherlands v. Urgenda Foundation NL: HR: 2019: 2007.
4 Milieudefensie et al. v. Royal Dutch Shell plc NL: RBDHA: 2021: 5337.
5 "Hon är juristen bakom klimataktivisternas stämning av svenska staten," Realtid, 25 nov 2022, https://www.realtid.se/hon-ar-juristen-bakom-klimataktivisternas-stamning-av-svenska-staten/, retrieved on 2024-04-30.

Aurora claims that the government's failure to combat climate change puts their life in danger, which constitutes a violation of the government's responsibility to protect against environmental hazards under the ECHR.[6]

Based largely on this development amongst domestic courts, the ECtHR decided to interpret the Convention evolutively on the 9th of April 2024 in KlimaSeniorinnen. In this paper, we will examine a selection of countries which have handled the issue of evolutive interpretation of the ECHR differently. The question posed in this paper is if domestic courts are able to interpret the ECHR in an evolutive manner, and if so, to what extent have courts actually engaged in this practice, and what are the potential implications of domestic courts engaging in evolutive interpretation? Climate change litigation is the illustrative issue in this text.

Having thus provided the background to the legal developments which gave rise to KlimaSeniorinnen, we will discuss the evolutive interpretation of the Court in the ruling. Although the ECtHR has now decided that states have a positive obligation to reduce their CO2 emissions this did not settle the issue of evolutive interpretation by domestic courts.

2. THE CONTESTED ISSUE OF CLIMATE LITIGATION

In May 2022, The Law Alumni Association of Uppsala University hosted a public debate on climate litigation, with individual presentations from the participants.[7] The panel consisted of legal scholars from across the country, with some participating over Zoom. Ebbesson, Professor of Environmental Law at Stockholm University, forcefully asserted that climate litigation was coming to Sweden; in a presentation so fiery that, had it not been present through videoconference, it would have set the woods of Uppland ablaze. As Ebbesson presented an outline for the advance of global climate litigation, he maintained that the Dutch ruling in Urgenda was the one with the most immediate potential implications for the Swedish legal system. Ebbesson then proceeded to talk about the aforementioned Milieudefensie in which the District Court of the Hague interpreting the Dutch civil law statue "duty of care" in light of international law (primarily Article 8 of the ECHR) obliged a private company (Shell) to reduce its emissions. Ebbesson used these comparative examples to bolster his case that climate litigation against the Swedish State, as well as against private enterprise, is viable and legitimate.

6 Ibid.

7 Alumnidagen, Uppsala University May the 10th 2022.

Darpö, Professor of Environmental Law at Uppsala University, was not entirely convinced. During the open debate, Darpö pointed to the glaring absence of a legal basis to process climate litigation. Furthermore, the Swedish Environmental Code, Miljöbalken (1998:808, MB), is structured around processing permissions for potentially environmentally harmful activity. Assessments prescribed therein measure the impact on the local environment, not global emissions. Besides, Darpö further pointed out, once a permit is assigned according to MB they are almost never re-assessed or retracted. At the same time, Darpö argued that it should be possible to hold states accountable for the international climate agreements to which they are signatories. He just could not imagine any plausible legal basis within the Swedish legal system for climate litigation.

Ebbesson retorted that Article 8 of the ECHR did provide a legal basis for such climate litigation. He further stated that Swedish statutes such as the general duty of care as stated in MB provide a basis for processes against both the State as well as private enterprises, both before and after issuing a permit.

Hellner, Associate Professor of Procedural Law at Stockholm University, partially agreeing with Ebbesson, argued that a Swedish court could claim a legal basis in the Instrument of Government, Regeringsformen (1974:152, RF) 1 kap. 2 § 3 st RF which commits public institutions to "Promote sustainable development leading to a good environment for current and future generations". She drew an analogy with the German Federal Constitutional Court (FCC) decision from April of 2021 which held the German Government to account for not reducing its CO2 emissions sufficiently, based partly on Article 20a of the Basic Law for the Federal Republic of Germany (GG). A provision similar to that of the Swedish RF.[8]

The disparate opinions and arguments of the debate panel were fairly representative of the various views held on the viability and legitimacy of climate change litigation. As argued by Ebbesson: in a European context the ECHR had come to assume a crucial legal basis for these processes in domestic courts. As of 2022, Strasbourg had yet to consider climate litigation. Arguably, what the Dutch courts had taken upon themselves was to interpret the ECHR in an evolutive manner. That is, they interpreted human rights enshrined in the ECHR more extensively than the minimum standard set by the Convention and which the rulings of the ECtHR call for.

8 The decision that Hellner referred to is BvR 2656/18.

3. CLIMATE CHANGE LITIGATION AND DOMESTIC COURTS

Whilst the Convention does not include an explicit right to a healthy environment, the instigators of climate change litigation typically claimed that dangerous climate change posed a threat to various rights under the Convention.[9] The Urgenda decision reverberated throughout Europe and led to a wave of climate litigation across the Continent.[10] The European Union had committed itself to greenhouse gas emissions reductions of 20% by 2020, relative to 1990.[11] The Netherlands had initially maintained a more ambitious goal but in 2011 the Dutch government lowered this target to align with the EU's 20% reduction. In response, the Urgenda Foundation sued the State. In the decision that followed, relying primarily upon IPCC reports, the Dutch Supreme Court deemed that anything less than a 25–40% reduction in Dutch greenhouse gas emissions by the end of 2020 would be insufficient to prevent dangerous climate change. The State was found to have violated two articles of the ECHR: the right to life in Article 2 and Article 8, which place a positive duty of care on governments to protect against environmental hazards that would adversely affect those rights. The Supreme Court held that the risks caused by climate change are sufficiently real and immediate to fall under the State's positive obligation to protect against environmental disaster and harm (an obligation established in cases such as Öneryildiz v. Turkey and Budayeva et al v. Russia).[12] Thus, climate change poses a known, real, and imminent threat of loss of life and disruption of family life to Dutch citizens. The following passage is worth quoting in full:

> As the State has asserted, the ECtHR has not yet issued any judgments regarding climate-change or decided any cases that bear the hallmarks that are particular to issues of climate change. […] The question is whether the global nature of the emissions and the consequences thereof entail that no protection can be derived from Articles 2 and 8 ECHR […] The Supreme Court considers the answer to this question to be sufficiently clear. It will therefore give the answer to this question itself and will not submit it to the ECtHR for an advisory opinion […][13]

9 See Setzer, Joana and Higham, Catherine, Global Trends in Climate Change Litigation: 2022 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

10 Berkell, Maxwell and Mead, Standards for Adjudicating the Next Generation of Urgenda-style Climate Cases, Journal of Human Rights and the Environment, November of 2021. p 2.

11 P 3.7 of the ruling: Urgenda. An English translation provided by the Court. Note that the only official version is in Dutch.

12 Öneryıldız v. Turkey [GC], 30.11.2004, 48939/99; Baysayeva v. Russia [GC], 05.04.2007, 74237/01.

13 Urgenda, 5.6.3–4.

An unambiguous and forthright statement that the ECtHR has yet to issue a ruling on climate change; an acknowledgement that the Dutch Supreme Court could have submitted the question to the ECtHR but chose not to. Instead, relying upon its own interpretation of the ECHR. An interpretation which considers new circumstances (climate change) and answers a question on a novel issue: whether states can be held accountable for failing in their commitments to protect human rights under these new circumstances. In the second case, Milieudefensie, the ruling has been appealed, but regardless of the outcome of that appeal, the principal issue of a court obliging a private company to reduce its carbon footprint based on the ECHR remains.

During the debate, Hellner argued that the decision from April 2021 by the German Constitutional Court (BvR 2656/18) may serve as an example for climate change litigation in a Swedish setting. In that ruling, the Court found that the provision on environmental protection in Article 20a of the German Basic Law (GG) imposes a constitutional duty on the State to achieve climate neutrality. However, the Court also stated that while according to the case-law of the ECtHR the Convention imposes positive obligations on the state (to protect life and health against risks posed by environmental pollution) "as far as it is apparent."[14] This does not imply protection of a scope greater than that provided by Article 2(2) first sentence of the GG. The Court thus concluded that since the German GG provides a protection that is more extensive than the ECHR, the Court applied the GG and not the ECHR. The German Court thus found that climate action against the State was viable but chose to interpret the GG instead of resorting to the ECHR. The Court suggests that as far as is apparent the case-law of the ECtHR does not establish a legal basis with which to pursue climate litigation, at least not to the extent which the GG allows for. The German Court comes off as more reluctant in comparison with the Dutch Court which considered "the answer to this question to be sufficiently clear"[15] with regards to whether the ECHR allowed for a right to hold the State accountable. The issue in these cases is if domestic courts are allowed to interpret the ECHR evolutively.

4. EVOLUTIVE INTERPRETATION OF THE CONVENTION BY THE ECTHR AND ITS RELATIONSHIP TO DOMESTIC COURTS

Fundamentally, interpretation implies attributing meaning to a text. Evolutive interpretation[16] implies that the Court has chosen a different interpreta-

14 BVerfG, Order of the First Senate – 1 BvR 2656/18 –, 1–270. p 147 (my translation).

15 Urgenda, 5.6.3.

16 Throughout this paper, evolutive interpretation will be used as synonymous with dynamic interpretation or the "living principle approach". Some argue for differentiating between changes in

tion as the wording and the consequences of the interpretation have changed over time.[17] From the outset, Lord McNair, the first President of the European Court in the 1960s, made the point that the type of general terms in which the European Convention is drafted is "not stereotyped as at the date of the treaty but must be understood in the light of the progress of events and changes in habits of life".[18] In Tyrer from 1978, the ECtHR held that the ECHR is "a living instrument which must be interpreted in the light of present-day conditions".[19] Following Article 1 of the Convention: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. Also, the signatories to the Convention all agree to adhere to the rulings and jurisprudence developed by Strasbourg per Article 46 of the Convention.

Sceptics of evolutive interpretation tend to employ three main arguments against it. Firstly, there is a concern that case-law based on evolutive interpretations may take on the role of legislator. Paul Mahoney, former judge of the ECtHR, writes that the Court makes new law when interpreting the Convention according to changing attitudes and circumstances. In the creation of new law, the judiciary may usurp the role of the elected legislator. Secondly, unexpected evolutive interpretations may potentially run counter to legal principles such as foreseeability and legal consistency. Thirdly, "usurping the elected legislator" may appear appealing whenever one agrees with the verdict, but less so when a conclusion is less satisfying to one's individual taste.[20]

Proponents of evolutive interpretations point out that the Convention is a treaty, as such, according to the Vienna Convention[21] Article 31, it should be interpreted according to the intention of the parties. Refusing to interpret a treaty evolutively may lead to a situation where a judge will be unable to interpret the treaty properly, resulting in a failure to fill a gap and thus in non-performance of a treaty obligation. From this follows that the ECtHR is compelled to interpret the Convention evolutively as doing otherwise would result in the non-perform-

interpretation of the text on the one hand and changes in the consequences of that interpretation on the other.

17 Torp Helmersen, Sondre, Evolutive Treaty Interpretation: Legality, Semantics and Distinctions, European Journal of Legal Studies, Volume 6, Issue 1 (Spring/Summer 2013), p 12.

18 Bjorge, Erijik, Domestic Application of the ECHR: Courts as Faithful Trustees, Oxford University Press, 2015. p 131.

19 Tyrer v. the United Kingdom [GC], 25.04.1978, No. 5856/72, p 31.

20 Mahoney, Paul, Marvellous Richness of Diversity or Invidious Cultural Relativism, 19 Human Rights Law Journal, 1998. p 2.

21 United Nations, Vienna Convention on the Law of Treaties, Treaty Series vol. 1155, 1969. p 331.

ance of a treaty obligation and an inability to give effect to the protection of human rights as enshrined in the treaty.

To balance the capacity for evolutive interpretation with domestic authority there is the European consensus and the margin of appreciation.[22] The European consensus acts as a benchmark to which an individual country's alleged human rights violation may be compared and measured: Whenever a considerable number of signatories have introduced a certain minimum level of protection, the ECtHR concludes that there is a consensus, or an emerging consensus amongst the member states. Critics of the concept (who tend to favour applications of evolutive interpretations) challenge this idea by suggesting that human rights protection should not be based on whatever a majority opines at any given moment.[23] The margin of appreciation acts as an interpretative law of subsidiarity; the substantive concept of margin of appreciation suggests that states are justified in taking measures to pursue public goals.[24] There is also a margin of appreciation which implies that despite there being an interference, such an interference did not amount to a violation of a right.[25] The ECtHR grants some leeway to domestic institutions to determine certain questions according to the circumstances of their domestic contexts.

Article 32 of the European Convention states that "The jurisdiction of the court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto", an indication that the ECtHR has the ultimate competence to deal with issues of interpretation and application of the Convention. However, the margin of appreciation and the European consensus are balancing acts between a supranational body and domestic courts. The idea is that the power of the ECtHR to review decisions should be more limited than those of domestic courts.[26]

This tension between evolutive interpretation on the one hand and the margin of appreciation and the European consensus on the other is ultimately a tension between supranational law in opposition to sovereignty.

Undeniably, there is some space for domestic courts to interpret the Convention. For example, in terms of procedure, Article 1 ECHR obliges member states to

22 Dzehtsiarou, Kanstantsin, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, German Law Journal, Vol. 12, p 1730-1745, 2011. p 1733.
23 Ibid, p 1734.
24 Letsas, George, A Theory of Interpretation of the European Convention on Human Rights, Oxford University Press, 2007. p 84.
25 Ibid, p 85.
26 Ibid, p 90.

secure the rights enshrined within Convention while Article 35 ECHR is a local remedies rule, making the Convention subsidiary to domestic proceedings.[27] But there is also a substantive room for interpretation by a domestic court since the Convention from its inception was envisioned as the lowest common human rights guarantee. Therefore, there is no explicit article and no case-law stopping domestic courts from guaranteeing more substantive rights based on the ECHR. The situation is more complex than it may appear. Since the fact that the ECHR presumes the domestic human rights protection to be more extensive may not imply that domestic courts are competent to raise the level of protection through evolutive interpretation.[28] However, defenders of evolutive interpretations by domestic courts would argue that such interpretations would only become problematic when the domestic courts' existing jurisprudence on the matter is overturned by a judgment by Strasbourg.[29] As we shall see, such arguments underestimate the implications of evolutive interpretations by domestic courts. When considering changing the interpretation of the ECHR it is possible to ask for an advisory opinion from the ECtHR, a possibility introduced in 2013 through Protocol 16. But at least within the margin of appreciation, there is nothing in the text itself that prevents member states from interpreting the Convention further.

In ECtHR case-law, domestic courts have been given some deference of judgment in the absence of consensus on what human rights as enshrined in the ECHR entail. The less consensus, the better placed domestic courts are to decide.[30] The margin of appreciation has mostly been used when assessing situations concerned with domestic morals.[31] Thus, little indicates an exclusive competence of Strasbourg to decide on the ECHR and the potential violations of human rights as enshrined therein. In the next few sections, we will look at how some member states have dealt with the issue of evolutive interpretations in practice – within and possibly beyond this basic framework.

5. IRELAND – RELUCTANT INTERPRETERS

Due to the dualism of its legal system the ECHR played a minor role in Ireland. Even on those rare occasions when judges did refer to the Convention, primacy was given to domestic constitutional sources.[32] In 2003 however, the Oireachtas

27 Djeffal, Christian, Dynamic and Evolutive Interpretation of the ECHR by Domestic Courts? An Inquiry into the Judicial Architecture of Europe, in The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence, Oxford University Press, 2016. p 189.
28 Ibid, p 189.
29 Ibid, p 189.
30 See for example Carson and Others v. The United Kingdom [GC], 16.03.2010, 42184/05.
31 Letsas, George, 2007. p 91.
32 O'Connell, Donncha, Ireland, in Fundamental Rights in Europe; The European Convention on

(the Parliament) introduced the Convention on Human Rights Act. In section 2 the Act states that Irish Law ought to be interpreted as far as possible in compliance with the ECHR. It also states that Irish courts are bound to take notice of the case-law of the ECtHR and interpret Irish Law as far as it is possible in compliance with the ECHR. Implying that the courts have to interpret the ECHR and seek harmonisation without being strictly bound by the case-law of Strasbourg. Formerly, the Irish Supreme Court has interpreted its own bill of rights evolutively.[33]

McD v. L & anor from 2009 turned out to be a milestone for the interpretation of the ECHR in Ireland. The circumstances revolved around whether the donor of a child had a right of contact with the child which was raised by a homosexual couple. To settle the issue, the High Court determined that the two women living in a relationsship and the child would fall under the term family per Article 8 ECHR. The High Court argued that even though such an arrangement was not yet recognized as a family according to the ECtHR, the judges pointed out that the case-law had gradually moved in that direction as to allow for such an arrangement to fall under Article 8. That is, an Irish court decided to interpret Article 8 in an evolutive manner. However, the ruling was appealed to the Supreme Court.[34]

The Supreme Court of Ireland decided that the High Court had erred in interpreting the ECHR evolutively. Judge Fennelly stated that:

> It is vital to point out that the European Court has the prime responsibility of interpreting the Convention. […] It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence. […] None of the foregoing means that the present legal situation will continue unaltered at either international or national level. National legislation may address these difficult problems. Changes in the Strasbourg jurisprudence are to be expected. The legal principle is important. […] The Act of 2003 does not provide an open-ended mechanism for our courts to outpace Strasbourg.[35]

Human Rights and its Member States 1950-2000, Blackburn and Polakiewicz (ed), Oxford University Press, 2001. p 429.

33 For example the landmark case of Ryan v. Attorney General, 1962. No. 913 P, in which the Supreme Court established that Article 40.2.2 of the Irish Constitution contained a right to bodily integrity, even though no such right was explicitly mentioned in the text.

34 The Supreme Court of Ireland, McD v. L and anor [2009] IESC 81.

35 The Supreme Court of Ireland, McD v. L and anor [2009] IESC 81. N 104–105.

Djeffal, Professor of Law, Science and Technology at the Technical University of Munich, points out that there is a noteworthy aspect of McD v. L & anor from the perspective of evolutionary interpretations of the ECHR.[36] First of all, the High Court based its evolutive interpretation on the case-law of the ECtHR and what it perceived to be its general direction. In the Supreme Court, Judge Fennelly stated that "courts […] should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence". Djeffal argues that this leaves open the possibility that courts could interpret questions not yet brought to the ECtHR by employing evolutive interpretation.[37] Considering the strictly dualist nature that Fennelly espouses and that in the preceding sentence he emphasises the importance of consistent interpretations amongst member states, this to me seems to indicate a reluctance by the Irish Supreme Court to diverge from Strasbourg case-law to any significant degree. In the ruling, the Court makes clear that an Irish Court should not go further and anticipate any development of the case-law from Strasbourg.

This line of reasoning is largely a result of the dualist legal system. In Carmody v. Minister for Justice the Supreme Court determined that constitutional arguments should precede ECHR ones.[38] The Court claimed that this followed from the title of the Act of 2003 – that the effect of the Act is subject to the Constitution. This statement has been confirmed in a number of subsequent cases. For example, the Supreme Court Judge Hogan has stated that "the Convention comes into play only where the Constitution does not provide an adequate remedy in its own right".[39] The High Court also had to interpret the Convention in Pullen & Ors v. Dublin City Council and concluded that national courts were not competent to decide that they had a margin of appreciation regarding some issues.[40] According to the Court, Strasbourg had long recognised that the Convention, as a living instrument, cannot be applied uniformly to all states and that its application may have to vary depending upon local needs and conditions. But the competence to change law through interpretation in relation to a particular country was considered within the domain of international law and not for a domestic court.[41] Irish courts are competent to interpret Irish Law while international courts are competent to interpret international law.

36 Djeffal, Christian, 2016. p 183.
37 Ibid, p 184.
38 Moriarty, Bríd, in Human Rights Law, Law Society of Ireland, Massa, Eva (ed), Oxford University Press, 2012, 4th edition. p 95.
39 Quote from Ibid. p 95.
40 High Court, Pullen and Others v. Dublin City Council and Human Rights Commission, [2008] IEHC 379.
41 Ibid, p 184.

6. BRITAIN – COMMON-LAW INTERPRETERS

Parliament passed the Human Rights Act in 1998, incorporating the ECHR into the British legal system, with an explicit reference that British courts may use Convention rights as a standard to review Acts of Parliament and to issue declarations of incompatibility. As such, the Act was a considerable change for the British legal system–renowned for parliamentary sovereignty.[42] For example, Section 4 of the Act stipulates that after a court finds a provision incompatible with a Convention right, it may proceed to make a declaration of incompatibility. The draft legislation stated that "The courts will be required to interpret the legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so."[43] A white paper issued as a guidance when the Act was adopted it states that "The Convention is often described as a 'living instrument' because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention."[44]

However, in Ullah, Lord Bingham took a different position:

> It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[45]

Lord Bingham thus argues that states can offer a higher level of protection than the minimum standards set by the Convention, but not by interpreting the articles of the Convention. The principle and its underlying assumptions are still contested by legal scholars and judges.[46] For example, Lord Hoffmann has

42 Ibid, p 185.

43 Cooper, Jonathan, Marshall-Williams, Adrain (ed), Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill, Hart Publishing. 2000. p 52.

44 Gledhill, Kris, Human Rights Acts: The Mechanisms Compared, Hart Publishing, 2015. p 167.

45 House of Lords, Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant), UKHL 26, [2004], p 20.

46 For an overview, see Andenas, Mads and Bjorge, Eirik, National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2011–15.

opined that by the Human Rights Act, Convention rights are British rights.[47] Since rights accorded through the Act would not change the Convention, an evolutive interpretation by a British court of the Act would be feasible. Some academics argue that the ECHR should constitute a minimum standard of human rights and that the Act may go on to provide a more extensive level of protection, based upon the case-law and the wording of the Convention as expressed in the Act.[48]

Another manifestation of this debate occurred in Ambrose, in which the Supreme Court had to confront whether or not to apply the principle laid down in Ullah.[49] The question was if the right of access to a lawyer prior to police questioning applied only to questioning once the person was actually in police custody. In the ruling, Lord Hope, speaking for the majority, concluded that there was no case-law from Strasbourg indicating that such a right existed, asserting that if Strasbourg has not yet spoken clearly on the issue the wiser course must surely be to wait, thereby affirming the Ullah principle.[50] Lord Dyson added to the judgment that although he agreed with the Ullah principle, since Strasbourg had yet to rule on the issue, a domestic court was free to judge however it chooses.[51] Lord Kerr dissented, however, and argued that the Ullah principle does not imply that the judiciary cannot give effect to the rights in the Convention, referring to this as "Ullah-style reticence".[52] According to Lord Kerr, merely because the ECtHR has yet to rule on a subject does not imply that a court may adopt an attitude of indifference to giving effect to such a right. He went on to argue that in another context, Lord Bingham had further elaborated upon the Ullah principle by stating that the task of the English courts is to give fair effect, on the facts of this case, to the principles which Strasbourg has laid down.[53] Lord Kerr also stated that it was hardly feasible for all issues to be settled by Strasbourg. Arguing further that the "dialogue" between national courts and Strasbourg implied that a domestic court should not refrain from saying what it believed ought to be correct.[54]

47 In his speech "On the Universality of Human Rights" given at the Judicial Studies Board Annual Lecture in 2009. p 44.

48 Draghici, Carmen, The Human Rights Act in the shadow of the European Convention: Are Copyist's Errors Allowed?, European Human Rights Law Review, 2014, p 154–169. p 34.

49 House of Lords, Ambrose v. Harris, UKSC 43, [2011].

50 Ibid, p 20.

51 Ibid, p 105.

52 Ibid, p 130.

53 Ibid, p 128.

54 Ibid, p 130.

The issue at stake in Ambrose was to differentiate between a situation which would fall under the case-law of the European Court, in which case the British Court should give fair effect to the facts of the case to the principles laid down by Strasbourg, and a situation not yet dealt with by the ECtHR. If the Court had interpreted the human rights provisions more extensively than the minimum already guaranteed by Strasbourg it would have engaged in evolutive interpretation, but it was unclear to the Court if it was walking ahead of Strasbourg or whether it had encountered a novel case to which the minimum guarantees applied. The majority in Ambrose assumed a cautious approach and decided to await Strasbourg. The reasoning in Ullah and Ambrose represent the informed and deliberate approach – a cautious but contested approach – British courts have assumed on the issue of evolutive interpretation by domestic courts of the ECHR.

7. GERMANY – DOMESTIC INTERPRETERS

For decades, evolutive interpretation of the Basic Law (GG) has been an established doctrine of the FCC. In 2004, after a lower court had disregarded a judgment of the ECtHR the FFC, through BVerfGE 111, 307, settled the relationship between German Law and the ECHR.[55] The FCC stated that the binding effect of statute and law includes a duty to take the guarantees of the Convention and the decisions of the ECtHR into consideration as part of a correct interpretation of the law. For a lower court to disobey or to fail to consider a judgment by the ECtHR would not only violate the ECHR, but also German constitutional rights. However, the FCC also pointed out that first and foremost it was the GG that formed the basis for human rights protection in Germany: "The Basic Law is obviously based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the point of view of domestic law only by domestic law itself."[56] The Court further stated that "the decisions of the ECtHR have special importance for Convention law as the law of international agreements, since they reflect the current state of development of the Convention and its protocols."[57]

The FCC is solely able to interpret the Basic Law, and so a claimant must appeal to a parallel provision in the ECHR. But the FCC has thus set a standard by which the Convention is placed in a separate sphere, and the interpretation thereof is primarily an issue for the ECtHR. However, with regards to lower

55 BVerfG, Order of the Second Senate – 2 BvR 1481/04 –, p. 1–72.

56 English translation provided by the Court. Note that only the German version is authoritative, ibid p. 34.

57 Ibid p. 38.

courts, the FCC maintains that it itself is competent to review whether or not those abide by international treaties, and it is thus also able to interpret the ECHR this way. According to the FCC, it has a particular responsibility to make sure that Germany abides by such treaties. The Court has further pointed out that this applies to duties under the Convention, which contributes to a joint European-wide human rights development. The FCC has thus emphasised that the ECHR is first and foremost an aid to the interpretation of the Basic Law.[58]

This is a principle that the Court also upheld in relation to the Charter of Fundamental Rights of the European Union (the Charter), and the Court's view of the relationship between the Charter and the Basic Law sheds light upon the relationship between the Convention and the GG. In two recent landmark decisions, the FCC declared that it is competent to hear constitutional complaints from German residents based on fundamental rights guaranteed under the Charter.[59] The Charter was applicable because the relevant provisions concerned the implementation of the GDPR. The Court had previously left the review of cases concerning EU Law to the European Court of Justice (CJEU). But from then on, the Court decided that it would make sure that harmonized EU Law in the light of the fundamental rights granted under the European Charter was correctly interpreted and implemented. It went on to state that it would supervise national courts in doing so. The Court also shed light upon the issue of harmonization of human rights in Europe and the relationship between case-law of domestic and supranational courts:

> The Federal Constitutional Court can draw on the presumption that constitutional review on the basis of German fundamental rights generally ensures the level of protection required under the Charter as interpreted in the case-law of the CJEU. This presumption arises from overarching ties between the Basic Law and the Charter shaped by a common European fundamental rights tradition, which is notably rooted in the European Convention on Human Rights. In keeping with this tradition, both the Charter and the fundamental rights of the Basic Law are interpreted in light of the Convention.[60]

Furthermore, the Court stated in the press release accompanying the decision that:

58 Djeffal, Christian, 2016. p 180.
59 BVerfG, Order of the First Senate – 1 BvR 276/17 –, 1–142.
60 Order of 6 November 2019 – 1 BvR 16/13 – Right to be forgotten I.

> This approach disregards neither the autonomy of the Basic Law's fundamental rights regime nor the fact that the interpretation of these fundamental rights is in part informed by Germany's historical experiences and must take into account the specific structures of the legal order and the social realities in the Federal Republic of Germany.[61]

In the ruling, the Court went on to argue that since the human rights involved only partially concerned rights as protected by the Charter, the Basic Law was also applicable. It went on to state that in principle, the fundamental rights of the Basic Law provide the sole standard of review in relation to domestic law, but when it concerns the implementation of EU legislation that leaves leeway to design. The Court then went on to apply the Basic Law; interpreting its own domestic constitutional framework in light of the Charter.[62]

The FCC has thus taken upon itself to interpret both the Charter and the Convention, but the first order is to consult the Basic Law. Then, if the rights in the GG are not applicable whatsoever or if those rights offer a level of protection below that of the Charter or the Convention, then that level of protection applies. Thus, whenever the FCC engages in evolutive interpretations of human rights, those rights will be derived from the Basic Law rather than from the Convention.

8. FRANCE – EXPLICIT EVOLUTIVE INTERPRETERS

Article 55 of the French Constitution states that treaties and agreements shall, when ratified and approved, have a standing superior to domestic legislation, provided that the other state adheres to the treaty or agreement in question. Although remaining below that of the Constitution, the ECHR has thus a status superior to that of domestic provisions. Importantly, international law also carries direct effect in France, which means that individuals may invoke the ECHR directly. While French judges were initially reluctant to accept this principle, there is now a strong inclination to consider and apply international law, including the ECHR, in the courts.[63] Furthermore, the provisions of the ECHR are applicable not only between the State and citizens but also between individuals.[64]

61 1 BvR 16/13 – (Right to be forgotten I, Press Release No. 83/2019 of 27 November 2019, 1, cc).

62 BVerfG, Order of the First Senate – 1 BvR 276/17 –, p. 1–142.

63 Lageot, Celine, in Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law, Gerards and Fleuren (ed), Intersentia Publishing, 2014. p 168.

64 Myriam Hunter–Henin, Horizontal Application of Human Rights in France: The Triumph of the European Convention on Human Rights, in D. Oliver and J. Fedtke (eds), Human Rights and the Private Sphere – A Comparative Study, Routledge-Cavendish, London and New York, 2007, p

The impact of the ECHR on French law has increased since the early 1990s.[65] It can even be argued that European human rights law is implicitly placed on the same level as constitutional rules.[66]

According to Lageot, Professor of Public Law at University of Poitiers, the ECHR is a "constant interpretative reference" for the Conseil Constitutionnel.[67] She argues that this can be explained by the fact that ECHR rights are more concrete and offer stronger protection for individual rights than does the French Constitution. Furthermore, she goes on to claim that the monist system with primacy of international law has "undoubtedly played a role in encouraging very extensive integration of the European Courts reasoning into French case-law."[68] Former President Jean-Paul Costa has stated that the Conseil d'État, the Cour de Cassation, and the Conseil Constitutionnel, explicitly on the basis of the ECHR, sometimes go further than the European Court has done in its jurisprudence.[69] This inclination to go further than the minimum standard set by Strasbourg has been demonstrated by the jurisprudence of the Cour de Cassation on fiscal sanctions and the fair trial standard in Article 6, right to a fair and public hearing, ECHR. For example, Article 6 was ruled to be applicable to fiscal disputes before civil courts in Kloeckner, a decision in which the Cour de Cassation came to that conclusion far in advance of Strasbourg.[70]

Another important example is the Conseil d'État's interpretation of Article 1 of the First Protocol (the right to property). Previously, there was no ECtHR ruling to the effect that crystallizations of retirement pensions were protected under the Convention. But the Assemblée of the Conseil d'État, relying upon Article 1 of the First Protocol, held in Diop that crystallizations of retirement pensions were protected under the ECHR.[71] It was subsequently confirmed by the Strasbourg Court some two years later. President Costa was later to state that the interpretation by the Conseil d'État in the ruling as well as the interpretative method of the ECHR by the Conseil that the Conseil "anticipated the jurisprudence of the European Court on Article 1 of the First Protocol. This new attitude is one of

98–124.

65 Dupre, Catherine, in Fundamental Rights in Europe; The European Convention on Human Rights and its Member States 1950–2000, Blackburn and Polakiewicz (ed), Oxford University Press, 2001. p 313.

66 Lageot, Celine, 2014. p 184.

67 Ibid, p 164.

68 Ibid, p 184.

69 Bjorge, Erijik, 2015. p 137.

70 Cour de Cassation, Assemblée plénière, 14.6.1996, 93–21.710.

71 Conseil d'État, Assemblée, 30.11.2001, 212179.

which I am glad."[72] However, it should be added that there were occasions when the French courts explicitly refused to adopt an evolutive interpretation of the ECHR, in deference to the legislator.[73]

However, the exemplar of evolutive interpretations of the Convention by the Conseil d'État concerns prisoners' rights. There have been several cases concerning for example the allocation of a detainee, prison employment relegation etc.[74] Such decisions had up to that point been regarded as measures of the interior and hence not subject to judicial review. But by applying the right to an effective remedy, Article 13 of the ECHR, and after an investigation by the Rapporteur Public, the Conseil d'État held that these situations could no longer be exempt from judicial review. The investigation by the Rapporteur included not only ECHR authorities but even a comparative study to gauge how Belgian and Italian jurisprudence dealt with the issue, and which way the case-law was developing.[75] Even though Strasbourg had yet to rule on the issue, the Court stated:

> Taking into account the European jurisprudence to a certain measure leads you to go beyond what the Court requires in the scope of its control *a posteriori* and *in concreto*. […] To refuse to overturn the decisions which are attacked today would be tantamount to accept to close one's eyes and wait for Strasbourg to open them for one. […] By enlarging the ambit of judicial review, moreover you would give full effect to the subsidiary character of the control of the European Court; taking charge of giving full effect before national authorities to Convention rights.[76]

French courts thus refuse to simply follow Strasbourg, but are instead evolutive interpreters themselves, and explicitly so.

9. THE NETHERLANDS – A MONIST SYSTEM

The Netherlands is a paragon monist system. Human rights treaties have considerable legal influence in the Netherlands as they carry direct and internal effects in addition to assuming precedence over Dutch Law – the Constitution included. This direct effect of a treaty implies that if a decision or a provision has a "self-executing" character, then no additional measures need to be taken

72 Quoted in Bjorge, Erijik, 2015, p. 138-139.
73 Lageot, Celine, 2014. p 175.
74 Andenas, Mads and Bjorge, Eirik, 2011–15. p 13.
75 Bjorge, Erijik, 2015. p 139.
76 From Andenas, Mads and Bjorge, Eirik, 2011–15. p 14.

before it can be invoked.[77] Furthermore, following Article 94 of the Dutch Constitution, regulations in the Netherlands shall not be applied unless in conformity with provisions of treaties or decisions of international organizations. Whenever there is a conflict between the Convention and domestic law, the Convention and other treaties assume precedence.

The Convention carries direct effect and is thus to be interpreted teleologically in accordance with the VCLT. As a result, in the case of a conflict between domestic law and the ECHR, the ECHR assumes supremacy. This supremacy principle is also afforded to the case-law and the interpretations given by the Strasbourg court.[78] Also, the interpretations by the ECtHR must be integrated into the ECHR provisions and the interpretations thereof. In effect, the ECHR has been incorporated as a bill of rights.[79]

Another feature of the Dutch Constitutional system is the inability of courts to review whether a provision is unconstitutional. Judicial review is somewhat peculiar since under Article 120 of the Dutch Constitution, the courts can perform the review of primary sources against international treaties having direct effect provisions and binding decisions of international organisations, but the courts cannot perform reviews of the Constitution. However, since Article 94 affirms the supremacy of international law it practically affords the courts the power of judicial review, certainly with regards to human rights documents. Parliamentary sovereignty still matters to the courts: They are reluctant to declare national law void because it may result in the nonexistence of legislation.[80] Instead, the courts attempt to avoid conflicts and absences of legislation by trying to, as far as possible, interpret domestic legislation in light of, and in conformity with, international law.[81]

With regards to the actual provisions, when comparing the rights afforded to Dutch citizens by the Dutch Constitution, it is obvious that the Constitution does not offer broader protection than international human rights treaties.[82]

77 Bertolini, Elisa and Romeo, Graziella, A Dutch Interpretation of Supranational law: The Application of the ECHR in the Netherlands in a Comparative Perspective, Bocconi Legal Studies Research Paper No. 2981699, 2017. p 4.

78 Gerard, Janneke, and Fleuren, Joseph, Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law, Gerard and Fleuren (ed), Intersentia Publishing, 2014. p 222.

79 Bertolini, Elisa and Romeo, Graziella, 2017. p 5.

80 Ibid, p 9.

81 Ibid, p 9.

82 Swart, Bert, The European Convention as an Invigorator of Domestic Law in the Netherlands, Journal of Law and Society, Published by Wiley on behalf of Cardiff University, Mar 1999, Vol 26, p 38–53. p 40.

In addition, the Bill of Rights has basically become redundant because of the prohibition of constitutional review. Thus, the standard of protection is set according to international treaties since international fundamental rights prevail over primary legislation as well as over the Constitution itself:

> The European Convention has become to the Dutch legal system what the national Constitution is to the legal systems of the United States of America or Germany. As a result, most provisions in the Dutch Constitution on basic individual rights tend to be neglected or overlooked.[83]

With regards to ECHR, if these rights are self-executing and contain enforceable rights for individuals, they carry horizontal effect.[84] Additionally, ECHR rights may impose obligations on private individuals. However, in practice, Dutch courts tend to favour indirect horizontal effect over direct effect, according to which the basic principles of civil law are interpreted in light of the ECHR.[85] The fact that there has been no conflict between the Constitution and the ECHR can, at least partly be attributed to the fact that the Constitution lacks a clause declaring Dutch sovereignty. A provision on sovereignty would almost certainly have sparked a conflict concerning a supposed displacement of sovereignty.[86] In 2001, the Dutch Supreme Court made explicit that Article 53 of the ECHR (stating that the interpretation of the ECHR should not lower the human rights protection afforded by other documents) allows domestic courts to provide a higher level of fundamental human rights protection by referencing the Convention.[87] The situation is excellently summarized as follows:

> The tremendously important role the ECHR plays in the Netherlands appears to be due to […] a prohibition of constitutional review, a lack of substantive constitutional standards for judicial review, a very short catalogue of fundamental rights and the priority of self-executing provisions of international law. Combined with the ready availability of concrete, practical standards developed by the European Court of Human Rights, these factors have resulted in the ECHR becoming almost a substitute bill of rights.[88]

83 Ibid, p 41.
84 Bertolini, Elisa and Romeo, Graziella, 2017. p 9.
85 Ibid, p 9.
86 Ibid, p 12.
87 Gerard, Janneke and Fleuren, Joseph, 2014. p 245.
88 Ibid, p 257.

The third-party applicability of the rights in the ECHR depends on whether the right in question is self-executing, as well as whether it is capable of imposing an obligation on private individuals. As a general rule, the courts avoid the direct applicability of such rights between third parties, instead, they prefer to apply a milder form of third-party appliance, by which common principles of civil law such as reasonableness, proportionality etc. are interpreted in the light of the Convention.[89] The reason for this is that this practice could otherwise lead to conflicts between such rights, and one suspects it could also potentially become burdensome and unpredictable to impose excessively extensive human rights obligations. This is the context in which the decisions which we surveyed above, Urgenda and Milieudefensie, have been made.

10. COMPARATIVE CLIMATE CHANGE LITIGATION

Through our brief survey of some of the signatories of the Convention, we have been able to answer the question: Is it possible for domestic courts to interpret the ECHR evolutively? The answer is yes. The Convention establishes a minimum standard for Human Rights protection and nothing prevents domestic courts from interpreting those rights more extensively. Domestic courts have indeed engaged in evolutive interpretations of the ECHR, more or less explicitly. By examining several countries, we have been able to establish that there are different positions on the issue of evolutive interpretations. In examining differing interpretations, we have primarily surveyed and compared the diverse contexts of the domestic courts and their rulings. However, one should bear in mind that these issues may not have been raised before the courts since most of the jurisdictions surveyed do not try law in the abstract. Also, it can be difficult to distinguish between a situation in which a court engages in evolutive interpretations from a situation in which a court merely confronts an issue not yet raised in Strasbourg: something the UK Supreme Court struggled with in Ambrose.

The Dutch Supreme Court in Urgenda arguably strays away from giving effect to a right which has not yet been pronounced upon by the ECtHR. Admittedly, the ECtHR has developed an extensive case-law on environmental damages which the State is dutybound to uphold.[90] The Court in Urgenda, however, arguably followed the case-law of Strasbourg on environmental damages, then interpreted those rights evolutively without even claiming to assume that they were anticipating developments by Strasbourg. Of the countries surveyed above, the Irish Supreme Court is the body that has come down most explicitly and

89 Bertolini, Elisa and Romeo, Graziella, 2017. p 10.

90 See for example Öneryıldız v. Turkey [GC], 30.11.2004, 48939/99; Baysayeva v. Russia [GC], 5.4.2007, 74237/01.

definitely against evolutive interpretations by domestic courts: stressing that it is a prerogative of Strabourg. Ambrose highlighted how cautiously – and consciously – British judges have interpreted their Human Rights Act, even though the white papers would – in theory – allow them to go further.

In Milieudefensie, the Dutch District Court chose to interpret domestic legislation in the light of the ECHR instead of applying the Convention directly.[91] The Court chose to interpret the Dutch civil law statute "duty of care" in light of international law – primarily Article 8 of the ECHR – to oblige a private company to reduce its carbon footprint. Considering the size of Shell, the Court did not deem the verdict excessively burdensome. As we have seen, this is a common feature of how Dutch courts prefer to apply a milder form of third-party applicability by interpreting civil law "in light of" the articles of the ECHR. Although the Court does not explicitly admit to it, it is quite safe to claim that it bases its interpretation of Dutch private law on an evolutive interpretation of the ECHR.

A comparison with Germany may be illuminating. Just like the Convention in the Netherlands, the GG carries horizontal effect. Although, it must be stated that this long-standing doctrine is not applied as broadly as in the Netherlands. The FCC has stated on several occasions that fundamental rights are primarily a protection for individuals against the State, and the Court likes to refer to an indirect horizontal effect.[92] That said, German courts are obliged to keep in mind constitutional principles and rights – including international law – when interpreting legal provisions, and the potential application is broad. Evolutive interpretations of constitutional principles and rights, however, are left to the FCC. Thus, it is difficult to imagine the FCC interpreting a civil code provision in light of a supra-national human rights document to oblige a company to reduce its carbon footprint. The FCC is less concerned about seeking to pre-empt the Strasbourg court on the European consensus and more interested in whatever way the case-law on the ECHR can aid in the interpretation of the Basic Law. The ruling of April of 2021 which held the German Government to account for not reducing its greenhouse gas emission sufficiently, based primarily on Article 20a of the German Basic Law, was a case in point.

The most explicit evolutive interpreter of the Convention surveyed in this work is France. In several instances, the French courts have been able to "shadow" further developments by Strasbourg by successfully anticipating future judgments. In doing so, they have resorted to comparative surveys of other European countries

91 Milieudefensie et al. v. Royal Dutch Shell plc, NL:RBDHA:2021:5337.

92 For example in BVerfG, Order of the First Senate – 1 BvR 3080/09 –, p. 1–58.

in order to detect any emerging European consensus on the issue, in accordance with the spirit of the ECtHR and its jurisprudence while stressing the importance of giving "full effect" to Convention rights.[93]

Such an approach was also evident in Notre Affaire à Tous and Others v. France from 2021 in which the French State was ordered by the Paris Administrative Court to reduce its CO2 emissions in line with the Paris Agreement.[94] Arguably, the judgment was heavily influenced by the landmark Urgenda decision. Concluding that climate change did constitute a real and present danger to the citizens based on the near unanimous scientific consensus on the topic, the Court stated that the State was obliged to do its part to tackle this threat since it had committed itself to do so through international treaties. Asserting that the CO2 limits set by the Paris Agreement were legally enforceable, the Court relied on several legal bases to establish a duty to uphold human rights standards, stressing the need for a domestic court to give effect to the rights outlined by the Convention:

> The European Convention on Human Rights lays down a requirement for the effective protection by States, in particular through preventive measures […] and the legal framework is ineffective when, in terms of risk mitigation measures, greenhouse gas reduction trajectories are constantly exceeded.[95]

The French Court comes off as rather unconcerned about whichever way Strasbourg may argue; what matters is to give effect to the rights enshrined in the Convention.

Ireland has not been unaffected by international climate change litigation, and the case Friends of the Irish Environment v. Ireland from 2020 is an illustrative example of how supra-national instruments like the ECHR, and international trends such as climate change litigation, operate in a national context. Friends of the Irish Environment (FIE), filed a suit in the High Court, arguing that the Irish government's approval of the National Mitigation Plan violated Ireland's Climate Action and Low Carbon Development Act. FIE alleged that the plan was insufficent and inconsistent in regards to Ireland's environmental commitments as well as its human rights commitments, including the ECHR and the Irish Human Rights Act. The circumstances were thus quite similar to those of

93 Andenas, Mads and Bjorge, Eirik, No. 2011–15. p 14.

94 La cour d'appel de Versailles, Notre Affaire à Tous and Others v. France, 3.2.2021, (No 1904967, 1904972, 1904976/4–1).

95 Ibid, p 8 (my translation).

Urgenda, something both parties in the proceedings recognised and attempted to turn to their respective advantages, the reasoning is worth quoting in full:

> In the context of the rights under the ECHR said to be engaged, there were significant references in the submissions of both parties to the decision […] in *Urgenda* […]. FIE placed significant reliance in its submissions on *Urgenda* and suggested that this Court should consider the reasoning of the Supreme Court of the Netherlands as being persuasive as to the proper application of the ECHR to climate change. It was argued by FIE that, if the relevant interpretation of the Convention as determined by the Dutch Supreme Court is correct, then it would follow, on the facts, that Ireland is also in breach of its obligations under the Convention.
>
> The Government argued that this Court should not consider the judgment of the Hoge Raad as being persuasive. […] First, it was said that, echoing a point already mentioned, national courts should exercise care in considering the decisions of other national courts under the Convention in circumstances where the ECtHR itself has not addressed the issue concerned. […] It was said that the precise status of the ECHR in Dutch Law has not been established and it was further suggested that the Netherlands operates a monist system whereby, unlike the position in Ireland, international treaties can affect domestic law without the necessity of legislation. […] There is, therefore, a significant issue between the parties as to the weight, if any, which this Court should attribute to the decision in *Urgenda*.[96]

Ultimately, the Irish Supreme Court concluded that FIE did not have standing as it was an organisation, not a person. Irish Law does not recognize actio popularis. The Irish Supreme Court thus, quite predictably, was unable to interpret the European Convention on Human Rights Act evolutively.

Differing positions with regards to evolutive interpretation of the ECHR is likely unavoidable, due to different legal contexts. Additionally, continuing divergence is probable, as there is nothing to prevent the courts of the signatories to interpret the articles more extensively than the minimum standard as set by the Court in Strasbourg. A Dutch court choosing to interpret the Convention evolutively is as legitimate in choosing to do so as an Irish court is in choosing not to. Following from this, regardless of whether courts sets out to engage in evolutive interpretation of the ECHR as dogma, the divergent ways in the

96 Supreme Court, Friends of the Irish Environment v. Ireland [2020], IESC 49, 5.12–5.15.

incorporation of the ECHR, the different Constitutional traditions, and other contextual factors – such as political circumstances – eventually results in divergences. Of course, there are mechanisms of control, for example, whenever a matter becomes too contentious or whenever a court resorts to Protocol 16, Strasbourg may try to settle the matter. In the next section, we will consider the implications of this diversity of evolutive interpretations.

11. THE IMPLICATIONS OF EVOLUTIVE INTERPRETATIONS BY DOMESTIC COURTS

We have concluded that not only is evolutive interpretation of the ECHR by domestic courts possible, but also that it will in all likelihood continue and diverge. What are the normative implications of this diversity of approaches? The answer has implications not only for the interpretation of the ECHR but also for international and supra-national law more broadly, since it concerns potential issues with how such norms are interpreted and applied in context.

There has been a widespread movement to interpret human rights provisions to include various climate change related protections and considerations.[97] From the 1960s onwards, the US Government was an instigator and leader in international environmental regulation, however, due to political gridlock at the federal level this changed in the 1990s.[98] In the absence of legislation, the following years saw legal remedies – such as litigation – radically change environmental regulation. Climate change litigation in the US context can be understood as a reaction to the lacuna left by the State.[99] This method of achieving results in response to Government absence was to spread across the world.

But whereas environmental litigation in the US took the form of civil lawsuits, universal human rights documents came to assume a crucial role in Europe. As we have seen in the case of the ECHR, the integration of the Convention into domestic legal contexts as well as increasing awareness and concern about human rights has heightened the prestige of human rights documents over the last decades. As part of this development, the case-law of the ECtHR had through evolutive interpretation established that the right to a healthy environment was a derivative right. As with the case of government absence in the US, the failure of national governments in Europe to adhere to their climate change

97 Pozzo, Barbara Climate Change Litigation in a Comparative Law Perspective, in Comparative Climate Change Litigation: Beyond the Usual Suspects, ed by Sindico, and Moïse Mbengue, Springer International Publishing AG, 2021. p 597.
98 Ibid, p 596.
99 Ibid, p 598.

obligations resulted in calls to interpret human rights provisions evolutively to include various climate-related protections and considerations.[100]

This leads us to consider the first implication of evolutive interpretations of human rights by domestic courts. And that is a conceptual problem, rather than a legal one. The ECtHR may be a regional human rights body, but as the full name of the ECHR, The European Convention on Human Rights and Fundamental Freedoms, suggests, the rights' claim is fundamental and universal – a claim to validity across time and space – in scope. When the Convention came into force in 1953, the idea was to give effect to certain rights stated in the Universal Declaration of Human Rights and to make them binding.[101] Since then, the concept of human rights has evolved, but not uniformly so.[102] This contested issue of what constitutes universal human rights may turn into a conceptual problem when some individuals are assigned particular rights in one country, while other individuals are deprived of such rights in another country – all under the rubric of "universal".

If courts in different countries of the world were to interpret universal human rights in radically different ways, what is ultimately to differentiate those rights from rights of citizens? In the case of neighbouring countries offering dramatically different and varying levels of human rights protection – while in unison claiming these to be "universal" – then they all collectively dilute the claim to universality. Relying too heavily on evolving and differing interpretations may be perilous as it risks weakening and fragmenting the concept of universal human rights. On the other hand, an expansive evolutive reading and application of human rights documents may serve great purposes by considering particular contexts and responding to local concerns, when governments, political processes and other actors fail to respond. Also, in order to give effect to such rights as the right to life and dignity, an evolutive reading may be required in order to maintain that right – a right which otherwise may turn out to be worthless.

The second implication of evolutive interpretation concerns questions of legitimacy and the boundary between politics and law. As argued above, detractors of evolutive interpretation by Strasbourg are concerned that the judiciary may take on the role of legislator without democratic legitimacy. This concern pertains equally to interpretations by domestic courts. Naturally, those

100 Ibid, p 605.

101 For a historical overview, see for example the excellent information on the website of the ECtHR: https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c. Retrieved on 2024-04-29.

102 One well-known conceptualisation of this process was formulated already in the 1970s by Vasak. For a critical and up-to-date take on the concept see Domaradzki, Khvostova & Pupovac in Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse, 2019.

claiming that evolutive interpretations by the ECtHR may run counter to legal principles such as foreseeability and legal consistency direct the same criticism at evolutive interpretations by domestic courts. However, defenders may claim that changing conditions compel interpretations and application in a manner which render those rights practical and effective, not theoretical and illusory. Specifically, in the case of evolutive interpretations by domestic courts, as a whole, for good and for ill, domestic courts tend to be closer to the popular mood and values of the country in which they find themselves, as opposed to supra-national courts.

Also, those defending evolutive interpretations of the ECHR by domestic courts may argue that, for example, in the case of commitments regarding climate change, these are already agreements in the form of treaties. Thus, climate litigation is no intrusion of politics upon law any more than what the State has already bound itself to. However, from this does not necessarily follow that states have an obligation under human rights documents to protect against environmental effects caused by climate change. After all, states sign countless treaties and international obligations without upholding them and are rarely called to court by their citizenry for failing to implement them. Then again, states have committed themselves to obligations in order to mitigate the effects of dangerous climate change on their citizenry. Since governments have stipulated their desires to be bound by these international agreements it is quite reasonable to argue that there should be mechanisms to hold them to account. Ergo, litigation by environmental organisations to uphold legal undertakings and international commitments may serve to bolster political legitimacy and accountability. As we have seen, evolutive interpretations of the ECHR (as well as other legal documents such as the GG) by domestic courts have arguably been quite successful for this purpose.

The third implication of evolutive interpretation concerns the risk of divergent interpretations. Whenever courts in different domestic jurisdictions choose to interpret the Convention evolutively, in due time the Convention will be interpreted differently. While domestic courts do need to interpret the Convention in order to apply it in the first place, if allowed to interpret evolutively the result may be cherry-picking whatever interpretation is deemed most desirable. There is also a risk of conflicting interpretations as various courts lay claim to divergent interpretations. In the end, the result may be muddled interpretations of the Convention all throughout Europe. For this reason, academics and judges have argued for restricting or setting boundaries for evolutive interpretations by domestic courts. One prominent voice belongs to Judge Tulkens of the ECtHR, who argues for restricting the competence of such interpretations

to the European Court.[103] In Dialogue Between Judges, Tulkens points out that the European Consensus has long played a crucial role in setting the standard for interpreting the Convention. In addition to the role of regulating the consensus, the Court has repeatedly stated that "[w]hile the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases."[104] Part of this ambition has been to not "change course" or depart from its case-law unless there are "good reasons" to do so, and in the words of Tulkens "explain any such departures clearly and to entrust the task to the Grand Chamber."[105]

Obviously, evolutive interpretations by domestic courts are problematic in terms of legal certainty and foreseeability. But it should be considered that "maintenance"[106] requires the Court to ensure that the rights and freedoms set out in the Convention continue to be effective even during changing circumstances. Arguably, it is reasonable for a domestic court to interpret the terms and application of the ECHR evolutively if required to give effect to human rights, especially if domestic human rights documents are insufficient. Such a functionalist argument for a teleological reading of the Convention text carries different implications for different Member States. In the end, some states such as Britain or Germany could then choose to not develop the case-law of the ECtHR, while other states would further the evolution of the Convention. Taken too far, however, a court in one domestic jurisdiction could end up choosing to develop environmental protection on the basis of Article 8, but the court in another member state may instead opt to interpret, for example, the protection against blasphemy afforded by Article 9.[107] It is by no means certain that decisions by courts in the various states would march at different paces in the same direction.

Which brings us to the fourth implication: the issue of conflicting rights – a concern related to the issue of divergent interpretations. Some of those who are sceptical of evolutive interpretations in principle tend to point out that human

103 Dialogue Between Judges, European Court of Human Rights, Council of Europe, 2011. p 9.
104 Christine Goodwin v. the United Kingdom [GC], 11.7.2002, 27238/95, p 74. See also for example Chapman v. the United Kingdom.
105 Dialogue between judges, 2011. p 9.
106 See the Preamble to the Convention.
107 See for example the discussion about restricting freedom of expression Restricting Freedom of Expression for Religious Peace: On the ECHR's Approach to Blasphemy by Hauksdóttir, 2021. She criticises the ECtHRs ruling in ES v. Austria (which established the concept of "justified indignation" and a respect for religious feeling) for its potential ramifications for freedom of speech (Article 9 ECHR).

rights as they were conceptualised in the aftermath of the Second World War, the "first generation" of human rights, were largely negative rights.[108] As rights have expanded to include positive rights the risk of collision has increased. Through legislative schemes, the legislature is arguably more competent and prepared to design, implement, and foresee potential conflicts compared with a court. Evolutive interpretations increase the risk of a conflict because by expanding the franchise further, and in potentially unpredictable ways, a court may be unequipped to consider all the possible implications of a ruling. A relevant example of this is posited by Krommendijk, Professor of Human Rights Law at the Radboud University, who argues that in a post-Urgenda Dutch context, environmental goals and various claims based on the ECHR may eventually collide.[109] By investigating judgments from 2016-2020, he empirically studied the extent to which the ECHR was appealed to in Dutch courts. He found that in litigation involving objections to the construction of wind parks the right to a healthy environment based on Article 8 was invoked on numerous occasions. Few of these claims have been successful thus far, but it serves as an example that as rights are increasingly appealed to, the courts are also called to engage in a balancing act of rights. Quite self-evidently, there is a risk of over-extension. An obvious conflict would occur if a court were to forbid the construction of several wind parks by referencing Article 8 while simultaneously compelling the Dutch State to adhere to its CO2 reducing measures, also based on Article 8.

Finally, evolutive interpretations of the ECHR by domestic courts already feature in several states, regardless of whether or not one believes that such a prerogative should belong to Strasbourg. I argue that the potential complications above may best be understood and mitigated with the concept of heterarchy. To employ the term to describe the relationship between the ECtHR and the member states of the Council of Europe is hardly novel, but evolutive interpretation by domestic courts is yet another enhancer of this process.[110] Hierarchical structures connote vertical power structures and absolute authority whereas heterarchical structures imply flexible functions and overlapping jurisdictions without predetermining any set authority between them.[111] In a hierarchic legal framework there is a set order of norms and corresponding institutions governing those in a vertical sense. Whereas heterarchical structures are flexible and un-hierarchised, horizontal, and able to respond to input, and to switch positions. Thus,

108 As first proposed by Vasak – his three-generations of human rights concept.

109 Krommendijk, Jasper. Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation, RECIEL, Issued April of 2022. p 67.

110 See for example Steven Greer and Luzius Wildhaber in Revisiting the Debate about 'constitutionalising' the European Court of Human Rights, 2012.

111 Huomo-Kettunen, Heterarchical Constitutional Structures in the European Legal Space, European Journal of Legal Studies, Volume 6, Issue 1 (Spring/Summer 2013), p 47–65. p 50.

heterarchical structures are communicative due to the acute need to exchange information in order to balance pluralism with order.

Over the last few decades, the ECHR changed from a minimum standard of human rights enforced by Strasbourg to increasingly resembling a Constitution for Europe. Most states have incorporated the ECHR into their legal systems, the appeals to the ECHR and the incorporated versions have steadily been on the rise. Additionally, as we have explored, one should not underestimate the diversity and pluralism of the domestic contexts either. Add EU Law, such as the Charter, on top of this process, and it is easy to visualise the richness (or bulkiness) of what has been referred to as "Constitutional Pluralism."[112] Obviously, per Article 32 the ECtHR retains the final say on the interpretation of the Convention and Protocol 16 provides the option of asking for advisory opinions from domestic courts. Thus, Strasbourg may rein in whatever it perceives as an excessive or undesirable interpretation by a domestic court outside the margin of appreciation. In the future, the Court will be pressed further to monitor how the Convention is interpreted and applied in Europe and to maintain a dialogue with domestic courts while responding to their interpretations of the Convention.

A consequence of increasing divergences of interpretation may be the corresponding increase in the relevance of comparative law. An even more interconnected European legal framework, hierarchically connected but also increasingly horizontally so, will necessitate increasing communication and knowledge of other legal systems, and of how the ECHR is interpreted and applied in other jurisdictions. That is, courts in Sweden will need to understand how the ECHR is interpreted not just by Strasbourg, but also how the Convention is interpreted elsewhere. Thus, evolutive interpretations of the ECHR contribute to an increasingly heterarchical legal structure in Europe, as opposed to a hierarchical one. The fact that rulings such as Urgenda and Milieudefensie attracted such widespread attention and sparked international debate, is further testimony of an increasingly inter-connected European legal domain, but not necessarily of a more homogenous domain. This heterarchical framework was on display in KlimaSeniorinnen.

12. EVOLUTIVE INTERPRETATION IN VEREIN KLIMASENIORINNEN SCHWEIZ V. SWITZERLAND AND DOMESTIC COURTS

In KlimaSeniorinnen from the 9th of April 2024 the ECtHR interpreted two articles of the Convention evolutively: Article 8 to infer that States have a pos-

112 See for example the book with the very name Constitutional Pluralism in the EU by Jaklic, 2013.

itive obligation to adopt measures to mitigate climate change and Article 6 to infer that associations can have standing. In the judgment, the Court allocated 75 pages out of a total of 230 to review relevant international materials and comparative law. This does not include the room allocated to the arguments by the high number of third-party interventions (37) as well as respondent states (33).

The Court confronted the argument that the issue of climate change should be handled by the political sphere and not by the courts.[113] Conceding that the courts cannot replace democratic processes, the Court argued that the task of the judiciary is to ensure the necessary compliance with legal requirements.[114] While the Court's mandate is to interpret the Convention and not to ensure compliance with international law treaties, the Court argued that it has always held that the Convention should as far as possible be interpreted in harmony with other rules of international law.[115] In its assessment, the Court stated that it cannot ignore the science and the growing international consensus regarding the critical effects of climate change on human rights. This consideration relates in particular to the consensus flowing from the international-law mechanisms to which the Member States have acceded, for instance, the Paris Agreement.[116] In the view of the Court, there was a new European consensus.

The issue of connectivity and burden sharing meant that previous case-law on emissions was not directly applicable to climate change and that a new approach was called for. As such, the Court conceded that the issue of climate change was unprecedented in its complexity, since there is no clear nexus between those causing the harm and those suffering from it, which is normally the case with emissions.[117] Instead, mitigation measures are matters of comprehensive regulatory policies.[118] Thus, the Court quickly concluded that one could not directly transfer existing case-law on emission to the context of climate change.[119] As in Urgenda and other successful climate-litigation cases, the Court concluded that the individual state cannot avoid its responsibility because climate change is a global phenomenon.

Assessing the scientific evidence, the Court concluded that the risks of climate change can be reduced if temperature rise is held below 1.5 degrees Celsius

113 KlimaSeniorinnen v. Switzerland p. 411.
114 Ibid, p 412.
115 Ibid, p 454–455.
116 Ibid, p 456.
117 Ibid, p 414–415.
118 Ibid, p 418.
119 Ibid, p 422.

compared to pre-industrial levels.[120] It noted that the Convention is a living instrument and should be interpreted in light of present-day conditions.[121] The Court ruled that Article 8 provides for a positive obligation for states to protect against climate change, and that states need to set concrete and measurable goals on how to reduce emissions, but are given a wide margin of appreciation on how to achieve these objectives. According to the Court, Switzerland had failed to set out a credible carbon-budget and the measures taken to combat climate change had been inadequate.

The Court also noted that Article 34, the status of victims, must be interpreted in an evolutive manner.[122] Relying on a comparative study, the Court stated that most Member States had gradually allowed for legal standing for environmental associations,[123] thus, there had been an "evolution"[124] in contemporary society with regard to the importance of associations to litigate issues of climate change. The Court proceeded to give standing to associations, under certain conditions, rather than to the purported victims, since it is difficult for individuals to prove vulnerability, future risk and harmful effects from climate change.

Judge Eicke partly dissented with the majority. He argued that "the majority in this case has gone well beyond what I consider to be, as a matter of international law, the permissible limits of evolutive interpretation",[125] claiming that the majority had created a new right. According to Eicke, the Court departed from its "normally careful, cautious and gradual approach to the evolutive interpretation of the Convention"[126] arguing that although the Court must interpret the document in light of present-day conditions it cannot derive from these instruments a right which was not originally there.[127] He further pointed out that the contracting parties to the Convention had explicitly rejected the adoption of a protocol which would provide for the right to a healthy environment.[128] Besides, the signatories to the Paris Agreement had agreed to voluntary rather than binding mechanisms.[129] Eicke's criticism was aimed not at the nature of evolutive interpretation but rather at the limits of it.

120 Ibid, p 436.
121 Ibid, p 434.
122 Ibid, p 461, 482.
123 Ibid, p 493.
124 Ibid p 497.
125 Separate Opinion, 3.
126 Ibid.
127 Ibid, 18.
128 Ibid, 19.
129 Ibid, 14.

For domestic courts, the ruling implies that, under certain conditions, associations may have standing and conduct climate change litigation against states. Also, signatories to the Convention are obliged to take positive concrete and measurable action to combat climate change to comply with the goals set by the Paris Climate Agreement of keeping temperatures below 1.5 degrees Celsius compared to pre-industrial levels. The Court interpreted the new European Consensus to entail a right to protection against the negative effects of climate change, but member states retain a broad margin of appreciation for how to reduce their emissions.

13. CONCLUSIONS

The Purpose of this text was to investigate whether domestic courts of the various parties to the ECHR are able to interpret the ECHR in an evolutive manner, with the issue of climate change litigation as a backdrop and example. Through a comparative survey, we have realised that domestic courts hold different positions on this topic, and it is quite safe to say that courts in certain countries have indeed interpreted the ECHR evolutively. Thus, this brings us back to Uppsala University and the debate. Darpö pointed out that in Sweden there was no statute at the time as a legal basis to process climate litigation. Ebbesson, on the other hand, made the argument that the ECHR provides a legal basis on its own for climate litigation. As we have seen, Ebbesson was correct in that the case-law of the ECtHR is a minimum standard. Would also, potentially, a Swedish court choose to interpret the ECHR evolutively? Or as suggested by Hellner, RF, with reference to the German example?

It is of course possible that Ebbesson desired to push a normative argument as opposed to a purely descriptive one. From a purely descriptive point of view, however, it should be evident even from our cursory survey that one should not underestimate the different legal contexts as well as the different functions the ECHR has come to assume. A Swedish court with no history of trying to anticipate the European consensus nor of employing the ECHR as a "bill of rights" is unlikely to interpret evolutively, and to rely solely on the ECHR as a legal basis in the fashion of the Dutch Supreme Court in Urgenda. Human rights concerns have certainly risen to prominence in Sweden as of late. After all, it was only in 2008 that RF was publicly declared to be "dead matter."[130] But thus far, those rulings have been based on RF, not the ECHR or the Swedish incorporation of the Convention. When a provision was added to RF to clarify the ECHR's status within the constitutional framework, the travaux préparatoires

130 "Stärk våra fri- och rättigheter", SvD, May the 5th 2008.

elaborated somewhat on the changing nature of the Convention and its implication for the Swedish legal system.[131]

First of all, it was pointed out that it was first and foremost the responsibility of the legislature to make sure that Swedish Law would continuously adhere to the changing requirements of the ECHR.[132] It has also been pointed out that the Convention should be comprehended from the case-law of the Commission and the European Court.[133] Thus, no mention or notion was made of Swedish courts contributing to the further development of Convention rights. Furthermore, the Swedish judiciary does not have the constitutional influence of, for example, the English judiciary, nor does it have a constitutional court such as Germany.[134] As stated above, the FCC itself has pointed to the importance of considering the particular context in which it interprets these universal human rights, something to consider before drawing functional analogies between e.g., the GG and RF.[135]

Since a Swedish court would have been unlikely to have interpreted the ECHR evolutively, KlimaSeniorinnen was decisive as it means that the Swedish Supreme Court may now consider Auroras admissibility claim, which it decided to do on the 25th of April 2024.[136] The particularities of various legal systems notwithstanding, Urgenda had a tremendous impact beyond Dutch jurisdiction. As is evident not only from the number of climate change processes undertaken since then, but, as we have seen, also evident from the reasoning and references made to Urgenda by the courts themselves. A process which culminated in KlimaSeniorinnen. During the debate, Darpö pointed out that it should be possible to hold states accountable for the international agreements to which they are signatories. Urgenda and KlimaSeniorinnen undoubtedly helped to address the gap between domestic action and international commitment. However, it is reasonable to disagree on how to best bridge such a gap. Allowing us to examine a wide variety of approaches from different legal systems, influenced by common concerns and grappling with the same issue, comparative law offers a rich source of potential solutions to legal problems.

131 Prop. 1993/94:117 p. 36.
132 Ibid.
133 Cameron, Iain, Sweden, in Fundamental Rights in Europe; The European Convention on Human Rights and its Member States 1950-2000, Blackburn and Polakiewicz (ed), Oxford University Press, 2001. p 840.
134 Ibid.
135 1 BvR 16/13 – Right to be forgotten I, Press Release No. 83/2019 of 27 November 2019, 1, cc).
136 Press release by the Swedish Supreme Court, T 8304-22; Ö 7177-23.