

PERCEPTIONS OF THE AUTHORITY OF THE EUROPEAN COURT OF HUMAN RIGHTS AMONGST APEX COURT JUDGES IN THE UK, GERMANY, IRELAND, TURKEY AND BULGARIA¹

SUMMARY OF FINDINGS

'One tries to find a common line that is acceptable to the European Court of Human Rights, but that still includes our position. And that continues, like a game of pool.' - (Interviewee)

WHAT IS THE RESEARCH ABOUT?

The European Court of Human Rights does not have a hierarchical relationship with domestic courts, and its judgments cannot automatically override domestic legislation or precedent. Yet as a matter of international legal obligation states, including their courts, are required to respect the judgments of the European Court of Human Rights. The relationship between the two courts can go both ways: it may be conflicting or consensual. In between those two options, there is a good deal of space for judicial discretion and deliberation.

Dr. Başak Çalı's research project into the 'Perceptions of the Authority of the European Court of Human Rights' sought to examine the structure of the arguments made by apex domestic court judges when they think about their relationship with the European Court of Human Rights. What argumentative strategies do they employ to make sense of this relationship? In what terms do they perceive the authority of the judgments of the European Court of Human Rights? What reasons do they give for following those judgments? What reasons are provided for not following the judgments? Are there variations in the reasoning and argumentative structure dependent on the environment within which the domestic judge performs his or her duties (monist or dualist states, civil or common law)?

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HOW DID WE CARRY OUT THE RESEARCH?

Apex court judges are in a unique position to develop the conceptual framework of this relationship and set an example to lower courts. We interviewed thirty active apex domestic court judges (members of Constitutional Courts, Supreme Courts of Cassation and Supreme Administrative Courts) from the UK, Ireland, Germany, Turkey, and Bulgaria. We asked them how they saw the relationship between their respective courts and the European Court of Human Rights and what kinds of factors mattered in setting out this relationship.² Interview method was appropriate for this research, as it enabled us to access judges' overall assessment of the relationship between Apex Courts and the European Court of Human Rights. Judges reflected both on the cumulative case law of their own courts and that of the European Court of Human Rights in their assessments. An analysis merely looking at the case law would not have captured this reflective and deliberative dimension.

In-depth questions focused on how the judges saw the basis of the legitimacy of the European Court of Human Rights judgments, the kind of authority the Strasbourg Court has and the kinds of argumentative strategies judges follow when they find themselves in disagreement with the European Court of Human Rights.

In what follows, we set out and analyse our research findings and open them to further debate with the European judicial community.

KEY FINDINGS

- A subtle doctrine regulating the relationship between the European Court of Human Rights and apex court judges is in the making in Europe. Apex court judges perceive the European Court of Human Rights primarily as a hybrid form of binding and persuasive authority, due to its knowledge and expertise in European human rights law and its embeddedness in domestic legal systems. This authority is conceived of as 'competing, but not final'. The interviewees did not view either their domestic legal frameworks (whether monist or dualist) or the international legal obligation as a sufficient basis for defining their relationship with the European Court of Human Rights. Rather, they employed a pluralist reasoning structure justifying the competing authority of the European Court of Human Rights, recognising persuasiveness and harmonization of human rights law across Europe as weighty reasons alongside legal pedigree.
- A significant majority (63%) of judges, spanning the different countries in our sample, operated a presumption in favour of respecting the authority of the European Court of Human Rights. They believed that not following the case-law of the European Court of Human Rights should be a conceptual 'exception'. We label this doctrinal attitude 'qualified internationalism'.
- The exceptional grounds for not following the European Court of Human Rights are defined primarily in structural terms, and not as a substantive disagreement about rights. Significantly, the apex court judges argue for a right to resist the European Court of Human Rights case-law when that court a) misunderstands domestic law b) misunderstands domestic facts c) has not established a clear principle itself.
- Apex judges coming from different countries assigned different weights to arguments for and against following the case-law of the European Court of Human Rights, highlighting peculiarities of legal culture in various contexts. However, we found striking overlaps, too, calling into question views about the primacy of national legal cultures in shaping unique attitudes towards the European Court of Human Rights. This opens up a space for 'doctrinal harmony' in setting out the relationship between highest courts in sovereign states and supranational courts.

²All interviewees were active judges at the time of the interview. All of the interviews have been anonymised.

DETAILED FINDINGS AND DISCUSSION

1. Domestic legal framework is necessary, but not sufficient; international legal framework is relevant, but not determinative.

From a domestic law perspective the relationship between the European Court of Human Rights and Apex Courts is regulated by constitutional or statute law. For example, German, Bulgarian and Turkish Constitutions have provisions that place the European Convention on Human Rights and Fundamental Freedoms as domestic law, but hierarchically lower than the respective Constitutions.³ The Human Rights Acts in the dualist United Kingdom and Ireland incorporate the provisions of the European Convention on Human Rights into domestic law.⁴ In civil law jurisdictions there is no statutory framework regulating the status of the judgments of the European Court of Human Rights. In the UK and Ireland, the Courts are asked to 'take into account' the case law of the European Court of Human Rights as a matter of statutory obligation.⁵

Neither domestic legal frameworks nor international law obligations are perceived to determine the status of the judgments of the European Court of Human Rights alone.

Whilst apex judges agree that the domestic legal frameworks embed the judgments of the European Court of Human Rights in the national legal systems, most reject the further idea that this creates an express duty to follow each and every judgment of the European Court of Human Rights. They support this using the argument that the European Court of Human Rights does not stand in a hierarchical relationship with apex courts, and does not have the power to override the domestic apex court judgments by the simple virtue of a claim of having authority over domestic courts.

None of the apex court judges in our sample regarded an international law obligation on the part of the state as the sole basis for following the judgments of the European Court of Human Rights.

An international legal obligation was often given as a supporting secondary reason for following the judgments of the European Court of Human Rights, together with a domestic legal obligation to follow (43% of the interviewees). This finding undermines views that see domestic judges as enforcers of international law. It suggests that judges at the apex of their system, regardless of whether they come from a monist or a dualist background, find their own domestic legal frameworks as the primary, although not exclusive, point of reference and loyalty.

Of the judges referring to a domestic legal obligation to follow the case of law of the European Court of Human Rights, 75% also stated that they regard the European Court of Human Rights as a persuasive authority.

The persuasive authority of the European Court of Human Rights was defined with reference to the Court's expertise in the interpretation and clarification of human rights principles. The legal pedigree of the Strasbourg Court, either in domestic or international law, therefore, was not a sufficient basis for Apex Courts to internalise the judgments of the European Court of Human Rights. Rather, they defined the European Court of Human Rights both as a function of its legal pedigree and as a function of its actual performance, expertise, and the values it advances. The European Court of Human Rights is, therefore, uniquely drawing from both sources of authority: persuasive and binding.

³Article 25 of the Basic Law for the Federal Republic of Germany, Article 90 of the Constitution of the Turkish Republic, Article 5(4) of the Constitution of the Bulgarian Republic.

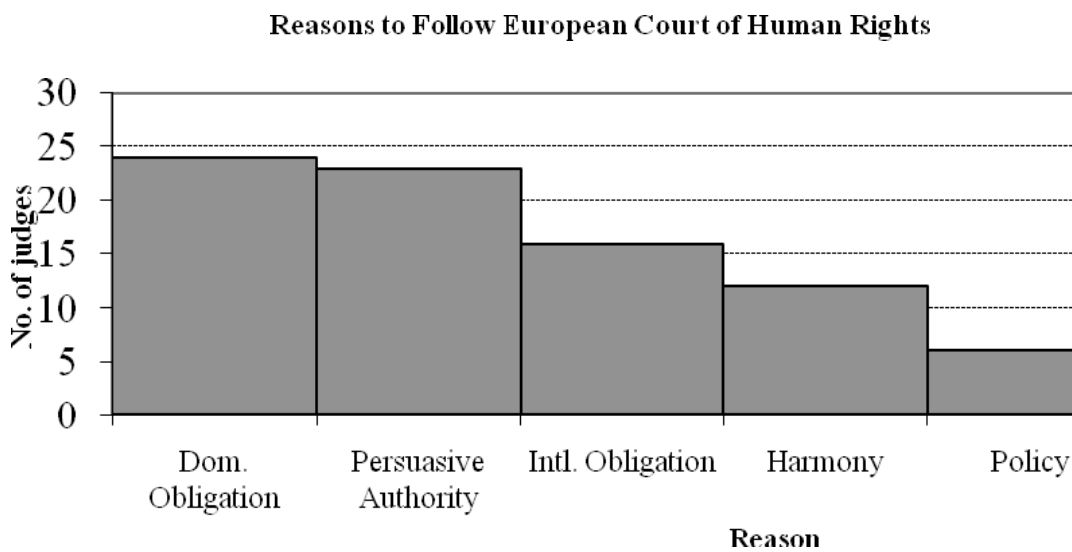
⁴Human Rights Act of 1998 in the United Kingdom and European Convention on Human Rights Act of 2003 in Ireland.

⁵Article 2 (1) of the Human Rights Act of 1998 states that courts 'must take into account' judgments of the European Convention on Human Rights. Article 4(c) of the European Convention on Human Rights Act of 2003 in Ireland states courts shall take 'due account' of the judgments, decisions of declarations of the European Court of Human Rights.

Significantly, in the United Kingdom and Germany, *all judges* who recognized that there was a domestic legal obligation to follow the case law of the European Court of Human Rights also identified this duty as a function of the persuasive authority of the European Court of Human Rights. The European Court of Human Rights, therefore, is predominantly conceptualized as a competing, but not a final authority.

Alongside domestic authority and persuasiveness, the most frequent reason given to follow Strasbourg case law by judges was the benefit of interpretative harmony of human rights law standards across Europe which results from following the European Court of Human Rights judgments.

Apex court judges in Germany, Turkey and Bulgaria identified additional policy reasons unconnected to human rights law as relevant reasons for following the European Court of Human Rights judgments. In Germany, judges believed in the value of advancing European integration by following the European Court of Human Rights judgments, towards furthering the goal of peace and unity in Europe. In Turkey and Bulgaria, judges identified the benefits of European Union membership as a weighty reason. Such reasons, however, were ‘add-ons’, rather than competing reasons.



2. Qualified Internationalism: A doctrine in the making?

“Although there may be circumstances where it would be possible to justify not following the judgment, these would be exceptional. The European Court of Human Rights has a high degree of persuasive authority but is not the final authority” - (German Interviewee)

A traditional framework, proposed to understand the relationship between domestic judges and international law, categorises judges’ doctrinal attitudes as ‘nationalist’ or ‘internationalist’. Although it is now widely recognized that this is a simplistic framework, the alternative options are not well understood.

Our research confirms that the nationalist and internationalist judges are out there, but hard to find in reality within European apex courts. Judges are rarely driven either solely by domestic law and precedent, or the judgments of the European Court of Human Rights: only one out of 30 judges held that national law and courts should always have primacy over the European Court of Human Rights. Only five out of 30 judges held that the judgments of the European Court of Human Rights should be followed at all costs, and three of those five came from Bulgaria – a legal system that has undergone a complete transformation since 1989 with the domestic law being heavily revised to adhere to European Court of Human Rights standards.

Our interviewees tended to adopt more nuanced interpretive doctrines in their view of the authority of the European Court of Human Rights. These views are coherent with holding the European Court of Human Rights as a hybrid authority, having qualities of both a binding authority and a persuasive authority. We call these categories ‘**qualified nationalism**’ and ‘**qualified internationalism**’.

Qualified nationalism starts from a rebuttable presumption of deference to domestic law. The rebuttal can be based on either the absence of any guiding domestic law, or the presence of very strong and clear jurisprudence at the European Court of Human Rights level leaving no margin of appreciation for member states. This doctrine tilts towards viewing the European Court of Human Rights as a limited binding and persuasive authority, and places great emphasis on domestic sources of human rights law interpretation. We find five instances of qualified nationalism in the dataset: three of those are from Ireland. Ireland was also the only country where judges advance an argument about the immunity of certain issues (namely abortion, and the definition of family) from legal deliberation outside the national context.

Qualified internationalism starts from a rebuttable presumption of deference to the European Court of Human Rights, based on the persuasiveness of the European Court of Human Rights’ expertise in human rights law and the quality of its judgments. A rebuttal could be based only on strong reasons not to follow it. For example, if the European Court Human Rights misunderstands domestic law or domestic facts, or its jurisprudence is unclear or conflicting. This approach instructs judges to see the European Court of Human Rights as a binding authority most of the time, without taking away the discretion of the judge to choose to apply its persuasive authority.

A significant majority of our interviewees (19 out of 30) approach the relationship between the European Court of Human Rights and apex courts from a ‘qualified internationalist’ perspective. Furthermore, this perspective is advanced in each jurisdiction. Significantly, nine out of the ten UK and German judges interviewed were qualified internationalists.

This finding shows that the preferred doctrinal attitude towards the European Court of Human Rights within the dataset is one of ‘qualified internationalism’.

Distribution of Doctrinal Attitudes Across the Dataset

	Internationalist	Qualified Internationalist	Qualified Nationalist	Nationalist
Bulgaria	3	4	2	0
UK	1	4	0	0
Germany	0	5	0	0
Ireland	0	1	3	1
Turkey	1	5	1	0
Total	5	19	5	1

3. Compelling reasons for not following the European Court of Human Rights

The judges organised their reasons for not following the case-law of the European Court of Human Rights under two different logics. These are: a) objections based on institutional priority, b) persuasiveness of individual judgments.

Objections based on institutional priority cover judges' concerns about deference to their own Constitution, deference to Parliament and deference to institutions at the national level.

Objections based on the persuasiveness of individual judgments cover misunderstandings of the facts of a specific case, objections to the application of the living instrument doctrine, unclear case-law on a specific point, misunderstandings of domestic law, political bias, and practical difficulties in understanding the case-law (such as language and knowledge of the court).

Ranking of reasons cited for not following the European Court of Human Rights

Reason	No. of Judges
Deference to Constitution	9
ECtHR has misunderstood the relevant domestic factual situation	7
ECtHR has misunderstood the domestic law	5
Practical difficulties (case-load or linguistic)	5
Deference to Parliament	4
A rejection of the ECtHR's application of the living instrument doctrine	4
Unclear case-law on a particular principle or point	4
General deference logic	3
A specific issue should be decided locally rather than by a European court.	2
The ECtHR is politically biased.	1

The objections that judges make within the confines of institutional logic should be interpreted within the context of the doctrinal approach they adopt.

A judge adopting an overall qualified internationalist outlook, but also identifying deference to the Constitution as a reason not to follow aptly demonstrates this point:

“So, from the point of view of our Constitution theoretically there may be cases where obeying –theoretically I am saying- where obeying the judgment of the European Court of Human Rights would mean violating the Constitution and in that case the Constitution would have priority.” - (Interviewee, Germany)

A qualified nationalist judge, on the other hand, relies on institutional objections as a real and live issue:

“It also has to be borne in mind that the Constitution takes precedence over the Convention. So, no interpretation of the Convention can be applied or any decision of the Court can be applied, if it is not, if it is not compatible with the Constitution.” - (Interviewee, Ireland)

Among qualified internationalists (the majority of judges in our dataset), we find that reasons not to follow the European Court of Human Rights are predominantly clustered around a) factual misunderstandings, b) misunderstanding of domestic law, c) practical difficulties in accessing the judgment and d) unclear case law in a specific issue, whilst deference to Constitutions or Parliament is referred to as a formal or exceptional category.

Conclusion: Conflict or Consensus?

“... The difference is of course that the Court in Strasbourg is interpreting the Convention for 47 countries and each individual supreme court is interpreting the law just for their own country and that involves a built-in inevitable tension that will always be there.” - (Interviewee)

Our research shows that conflict and consensus are both part of the everyday interaction between the European Court of Human Rights and apex domestic courts. In fact, the relationship between these two courts as competing authorities thrives on consensus as well as conflict.

We find, however, that what matters is not whether the apex domestic courts and the European Court of Human Rights are in conflict, but how that conflict is ultimately perceived.

The qualified nationalists see conflict as a reason to close off the domestic legal system to outside influences. Nationalists and internationalists *a priori* reject conflict.

The qualified internationalists (the majority of judges in our dataset) see conflict as **an opportunity to harmonise the interpretation of human rights law and its proper application to facts**. Conflict, therefore, is not an end in itself, but a means to advance human rights law interpretation. Deference and non-deference to supranational human rights orders is only meaningful in the context of this larger purpose that judges assign to their work.

We identified the attributes of a doctrine in the making. This opens up an important avenue for further research: How widespread is qualified internationalism across Europe, or indeed other parts of the world, and what conditions must obtain for it to flourish?