TOWARDS THE CONTROL OF PRIVATE ACTS BY THE EUROPEAN COURT OF HUMAN RIGHTS?

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ABSTRACT

This contribution critically analyzes the current approach by the European Court of Human Rights to the applicability of fundamental rights enshrined in the European Convention on Human Rights to private acts. It explores the recent case law of the Court primarily through the case of Appleby and Others v. The United Kingdom *(*Appleby*)*[1] *and the case of* Pla and Puncernau v. Andorra *(*Pla*)*[2]*, looking at its implications for the relationships between private parties under the private law of the States parties to the Convention and, in particular, the role of the doctrine of 'margin of appreciation' in limiting the control of private acts by the Court as to their compatibility with fundamental rights.*

Keywords: European Court of Human Rights, Horizontal effect, *Appleby*, *Pla*

§1. INTRODUCTION

Originally, as an aspect of public law, fundamental rights were applicable only in vertical relationships between individuals and the state. Being conceived as individuals' defences against the vigilant eye of the state, in principle, fundamental rights did not have any effect on horizontal relationships between private parties governed by private law. However, with the passing of time, it has become more and more difficult to draw a strict line between the world of fundamental rights and that of private law, in the same way as it has become increasingly difficult to draw such a line between public and private law in

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1 Appleby and Others v. The United Kingdom (2003), Reports of Judgments and Decisions 2003-VI.

2 Pla and Puncernau v. Andorra, Application no. 69498/01, Judgement of 13 July 2004.

general. Gradually, horizontal relationships between private parties have begun losing their immunity from the effect of fundamental rights. No longer viewed as a completely closed autonomous system for governing relationships between private parties, private law has been opened up to the far-reaching impact of fundamental rights or, in other words, to its constitutionalization.

Until recently, the tendency towards the constitutionalization of private law has primarily manifested itself in the national law of many countries as a result of the readiness of their domestic courts to grant effect to fundamental rights embodied in national constitutions and international human rights instruments in purely private law disputes.[3] Thus, for example, under the guidance of the Federal Constitutional Court, in Germany fundamental rights enshrined in the national constitution have had a profound impact on purely private law relationships for more than half a century.[4] Yet, an interesting perspective on the issue is also provided by international human rights law, in particular, the European Convention on Human Rights (ECHR), which may impose its own standards with regard to the way in which private law and fundamental rights are to

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3 Many authors have remarked upon the events that are taking place in this field and have speculated on future developments. For the Netherlands, see, for instance, E.A. Alkema, *De reikwijdte van fundamentele rechten: de nationale en internationale dimensies: preadvies voor de Nederlandse Juristenvereiniging*, 1995-I, 22 ff.; J.H. Nieuwenhuis, 'De Constitutie van het burgerlijk recht', 6 *Rechtsgeleerd magazijn Themis* 203 (2000); F.W. Grosheide, 'Constitutionalisering van het burgerlijk recht?', 3 *Contracteren* 48 (2001); C. Mak, 'Personality Rights in the Dutch and German Law of Obligations', in M.W. Hesselink, C.E. du Perrson, and A.F. Salomons (eds.), *Privaatrecht tussen autonomie en solidariteit*, (Den Haag: Boom Juridische uitgevers, 2003), 169; J. Smits, *Constitutionalisering van het vermogensrecht: preadvies uitgebracht voor de Nederlandse Vereiniging voor Rechtsverhelijking*', (Deventer: Kluwer, 2003); O. Cherednychenko, 'The Constitutionalization of Contract Law: Something New under the Sun?', 8:1 *Electronic Journal of Comparative Law* (2004), http://www.ejcl.org/81/art81-3.html; T. Barkhuysen, M.L. van Emmerik, and H.D. Ploeger, *De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht: Preadviezen voor de Vereiniging voor Burgerlijk Recht*, (Deventer: Kluwer, 2005); S.D. Lindenbergh, 'Constitutionalisering van contractenrecht. Over de werking van fundamentele rechten in contractuele verhoudingen', 6602 *Weekblad voor Privaatrecht, Notariaat en Registratie* 977 (2004); B.J. de Vos, 'Constitutionalisering: een overschat vraagstuk?', in E.M. Hoogervorst *et al* (eds.), *Rechtseenheid en vermogensrecht*, (Deventer: Kluwer, 2005), 287. For Germany, see, for example, C. Starck, 'Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court' and A. Heldrich and G.M. Rehm, 'Importing Constitutional Values through Blanket Clauses', in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law*, (Hart Publishing, 2001), 97, 113, with further references. For the UK, see, for example, H. Beale and N. Pittam, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law' and R. Ellger, 'The European Convention of Human Rights and Fundamental Freedoms and German Private Law', in Friedmann and Barak-Erez, 131, 161, with further references.

4 Since the famous pronouncement by the Constitutional Court in the *Lüth* case (BVerfG 15 January 1958, *BVerfGE* 7, 198, at 205), in which constitutional rights were held to constitute an objective system of values, no rule of German private law may be in conflict with constitutional values, and all such rules must be construed in a way that gives effect to these values. See also the famous pronouncements by the Constitutional Court in the *Handelsvertreter* case (BVerfG 7 February 1990, *BVerfGE* 81, 242), and the *Bürgschaft* case (BVerfG 19 October 1993, *BVerfGE* 89, 214).

relate to each other in national legal systems.[5] These standards must be complied with by all Contracting Parties, and therefore an approach to the protection of fundamental rights in a certain legal system can be tested as to its compatibility with the requirements set by the Convention. As the Convention itself is silent upon the issue of horizontal effect – which is not surprising, however, for an instrument which has its origins in a reaction to the horrors of Nazi Germany and the need to prevent the emergence of dictatorial and oppressive governments – the major role in determining the manner in which the Convention rights are to be projected in a horizontal dimension and the extent to which this is to be done belongs to the European Court of Human Rights in Strasbourg (ECtHR).[6]

Against this background, the aim of this paper is to discuss the current approach to the applicability of fundamental rights enshrined in the ECHR to the relationships between private parties (the 'horizontal effect' of Convention rights) taken by the ECtHR. For this purpose I will explore the recent case law of the Court primarily through the case of *Appleby and Others* v *The United Kingdom* (*Appleby*) and the case of *Pla and Puncernau v Andorra* (*Pla*), looking at the implications of this case law for the relationships between private parties under the private law of the States parties to the Convention and, in particular, the role of the doctrine of 'margin of appreciation' in limiting the control of private acts by the European Court of Human Rights as to their compatibility with the ECHR. From the outset, it should be noted that, at present, the Court avails itself of broad possibilities to exert an impact on the relationships between private parties. In addition to the most frequent situation in which the position of private parties may be indirectly affected as a result of the ECtHR establishing interference with the Convention by national legislation in the field of private law,[7] the Court has also recognized two other ways in which Convention rights may exert a much more profound impact on the

5 Another interesting perspective on the issue of the horizontal effect of fundamental rights can also be found in EU law. On this see, O. Cherednychenko, 'EU fundamental rights, EC Freedoms and Private Law', 1 *European Review of Private Law* 23 (2006).

6 In the literature, one can find arguments in favour of the applicability of Convention rights in relations between individuals which are based on the rules of international law and/or the intention expressed in the Preamble and/or the text of the Convention. See, for example, D. Spielmann, L'effet potentiel de la Convention européenne des droit de l'homme entre personnes privées, (Brussels, 1995), 26; M. Forde, 'Non-Governmental Interferences with Human Rights', 55 *British Yearbook of International Law* 265 (1985); M.A. Issn, 'La Convention et des devoirs de l'individu', in *La protection internationale des droit de l'homme dans le cadre européen: travaux du colloque organisé par la Faculté de droit et des sciences politiques et économiques de Strasbourg en liaison avec la Direction des droits de l'homme du Conseil de l'Europe, 14-15 novembre 1960*, (Paris: Dallas, 1961), 190 ff.

7 Among the most recent cases of this kind in the field of private law, see, for example, *Sidabras and Dziautas v. Lithuania*, Applications No.s 55480/00 and 59330/00, Judgement of 27 July 2004 (annotated in 6 *E.H.R.L.R.* 687 (2004)); *Schirmer v. Poland*, Application no. 68880/01, Judgement of 21 September 2004 (annotated in 11 *E.H.R.C.* 1050 (2004)); *J.A.P. Pye (Oxford) Ltd v. The United Kingdom*, Application no. 44302/02, Judgement of 25 November 2005.

relationships between private parties under private law.[8] Firstly, the Court may give effect to the Convention rights between private parties through the imposition of positive obligations on the Contracting State to take the necessary measures in order to guarantee that Convention rights are enjoyed in the private sphere. Secondly, the relationship between private parties may be influenced by the Convention rights as a result of the Court's review of the national court's decision delivered in a dispute between private parties governed by private law. These two possibilities for the expansion of the ECHR into the sphere of the relations between private parties will be the focus of attention here, since the ECtHR's position regarding each of them is particularly important for understanding its approach to the issue of the horizontal effect of Convention rights in general.

In the light of this, the structure of the present article is as follows. Firstly, by using the examples of the *Appleby* and *Pla* cases, I will discuss in more detail how the horizontal effect of the fundamental rights embodied in the ECHR can be advanced through the doctrine of positive obligations (section 2) and the review of national court decisions in private law disputes (section 3). Subsequently, I will focus on the role of the doctrine of 'margin of appreciation' in cases (potentially) involving the horizontal effect of Convention rights. For this purpose, I will first discuss the Court's view on the scope of the margin of appreciation in disputes between private parties in theory and the importance of this view for the issue of whether the acts of private parties, in particular, private transactions, can be subjected to the Court's control as to their compatibility with the ECHR (section 4). I will then turn to the ECtHR's approach to the margin of appreciation in cases between private parties in practice as demonstrated in *Appleby* and *Pla* and discuss the possible implications of the current position taken by the ECtHR on this issue for the relationships between private parties under private law (section 5). Finally, the main conclusions resulting from this analysis will be presented (section 6).

§2. HORIZONTAL EFFECT OF THE ECHR THROUGH THE 'POSITIVE OBLIGATIONS' OF THE STATES

The case law of the ECtHR contains evidence that, in the view of the Court, there are articles in the Convention that, apart from protecting the individual against state action, oblige the state to secure respect for fundamental rights even in the sphere of relations between individuals.[9] The starting point for the idea of state responsibility for the

[8] See also A. Clapham, *Human Rights in the Private Sphere*, (OUP, 1993), 345.

[9] See, for example, *Marckx v. Belgium* (1979), Series A, vol. 31, para. 31 (Article 8); *Airey v. Ireland* (1979), Series A, vol. 32, paras. 25-26, 33 (Articles 6 and 8); *Young, James and Webster v. The United Kingdom* (1981), Series A, vol. 44, para. 49 (Article 11); *Abdulaziz, Cabales & Balkandali v. The United Kingdom* (1985), *Series A,* vol. 94, para. 67 (Article 8); *Rees v. The United Kingdom* (1986), Series A, vol. 160, para. 37 (Article 8); *X and Y v. The Netherlands* (1985), Series A, vol. 91, para. 23 (Article 8); *Platform Ärzte für*

infringement of Convention rights by private actors lies in the *Marckx* case (1979), in which the ECtHR made clear that a state's Article 8 duty not to interfere with the exercise of the right to private and family life may encompass positive obligations – for example, to legislate in a way which is compatible with that right.[10] The protective function of fundamental rights, which imposes on the contracting states the duty to protect those rights, or, in other words, *positive* obligations, differs from the classical function of fundamental rights as defensive rights against the state, which prohibits any intrusions on the part of the contracting states into fundamental rights and thus imposes *negative* obligations upon them. While the latter presupposes the duty of states to *refrain* from action, the former, by contrast, imposes on the states the duty to *act* in order to ensure possibilities for the effective exercise of the Convention rights.[11]

The fulfilment of the positive obligations by the state may require an amendment of the existing or the adoption of new legislation,[12] changes in administrative practice[13] or even constant financial efforts[14] aimed at enabling individuals to enjoy their fundamental rights in practice. It may also require measures to be taken when the Convention rights of one individual are violated by another individual (and thus not by the state itself). In such

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das Leben v. Austria (1988), Series A, vol. 139, para. 34 (Article 11); *Hokkanen v. Finland* (1994), Series A, vol. 299-A, para. 55 (Article 8); *Ignaccolo-Zenide v. Romania* (2000), Reports of Judgments and Decisions 2000-I, para. 94 (Article 8); *Appleby and Others v. The United Kingdom* (2003), Reports of Judgments and Decisions 2003-VI, para. 39 (Article 10).

10 *Marckx v Belgium* (1979, para. 31.

11 In fact, this approach is similar to the one taken by the German theory of 'state duties to protect basic rights' ('*grundrechtliche Schutzpflichten*') adopted by the Federal Constitutional Court, which also makes the state responsible, though on the national level, due to its failure to legislate or take other protective actions to guarantee basic rights standards in relationships between private parties. Compare C. Starck, 'State Duties of Protection and Fundamental Rights', http://www.puk.ac.za/lawper/2000-1/starck.html, section 2.2; I. Isensee, 'Das Abwehrrecht und Staatliche Schutzpflicht', in J. Isensee/P. Kirchof (eds.), *Handbuch des Staatsrechts*, Part V, (Müller, 1992), 143, 143 ff., 181 ff.; E. Klein, 'Grundrechtliche Schutzpflicht des Staates', 42 *Neue juristische Wochenschrift* 1633 (1989), 1633 ff. Contrast the approach to the functions of fundamental rights with Judge Posner's dictum that the Constitution of the United States is 'a charter of negative rather than positive duties' in *Jackson v. City of Joliet* 715 F.2d 200, 203 (7th Circ. 1983). This view was affirmed by the US Supreme Court in *DeSchaner v. Winnebago County Department of Social services*, 489 U.S. 189 (1989), in which the Court noted: '[N]othing in the language [or history] of the Due Process Clause ... requires the State to protect the life, liberty, and property of the citizens against invasion by private actors ... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.' Compare, however, I.M. Heyman, 'The First Duty of Government: Protection, Liberty and the Fourteenth Amendment', 41 *Duke Law Journal* 507 (1991).

12 See, for example, *X and Y v. The Netherlands* (1985), Series A, vol. 91, in which the absence of criminal remedies for sexual abuse under the Dutch law in force was found to be in violation of Article 8.

13 See, for example, *Gaskin v. The United Kingdom* (1989), Series A, vol. 160, in which the violation of Article 8 was found to exist as a result of the absence of an independent authority which would decide upon the access to records relating to the individual's personal and family life in cases where a contributor to the records is either not available or refuses consent without justification.

14 See, for example, *Airey v. Ireland* (1979), Series A, vol. 32, in which the ECtHR held that the right to due process guaranteed in Article 6 may under certain circumstances imply the right to free legal assistance in civil cases.

a situation, the state may be held to be under an obligation to amend the legislation which makes it possible for one individual to infringe the rights of another individual[15] and, what interests us most here, even to grant horizontal effect to the Convention rights. The latter can occur where, for example, a certain association asks the state to protect it from infringements of its right to peaceful assembly by individuals[16] or where a father asks the state to protect him from the infringement of his right to family life by his parents-in-law.[17] Accordingly, the issue which lies at the heart of the duty of states to protect fundamental rights is not whether public authorities have actively encroached upon the fundamental rights of these individuals, but whether, by failing to act, they have prevented the individuals from effectively exercising their rights, in particular as a result of encroachments upon these rights by other *private individuals*. The existence of such a duty therefore opens up possibilities for the protection of individuals from each other by holding the state responsible in the international arena for a failure to legislate or grant a horizontal effect to fundamental rights in order to guarantee fundamental rights standards in relationships between private parties.

The legal basis for the positive obligations under the European Convention is, however, uncertain. According to one view, it follows from the obligation of the contracting states under Article 1 of the Convention to 'secure to everyone within their jurisdiction' their Convention rights and freedoms; where the victim's rights are violated – even by private actors – the state has breached this duty by failing to 'secure' them.[18] It has also been argued that the liability of the state for the violation of Convention rights by other individuals may rest on Article 17 of the Convention which prohibits any abuse of Convention rights by 'any State, group or person', and Article 13 which guarantees an 'effective remedy before a national authority' for everyone whose Convention rights are violated.[19] An alternative view is that whether or not a certain Convention right is capable of having a third party effect is determined by the nature and drafting of each separate right. According to this view, a Convention article stating that 'everyone has the right to

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15 See, for example, *Young, James and Webster v. The United Kingdom* (1981), Series A, vol. 44, in which the legislation which made it lawful for the British Railways Board to dismiss employees for refusing to join its favoured trade union was found to be in violation of Article 11.

16 *Platform Ärzte für das Leben v. Austria* (1988), Series A, vol. 139.

17 *Hokkanen v. Finland* (1994), Series A, vol. 299-A.

18 See, for example, D.J. Harris, M. O'Boyle and C. Warbick, *Law of the European Convention on Human Rights*, (Butterworths, 1995), 19-22; A. Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties', 2 *Netherlands International Law Review* 163 (1979), 176-177; A. Dremczewski, *European Human Rights Convention in Domestic Law*, (Clarendon, 1997), 221. An example of such an approach in the case law of the ECrtHR is *Young, James and Webster v. The United Kingdom* (1981), Series A, vol. 44, para. 49.

19 See, for example, A. Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties', 2 *Netherlands International Law Review* 163 (1979), 176. See also, H.L. MacQueen and D. Brodie, 'Private Rights, Private Law and the Private Domain', in A. Boyle et al. (eds.), *Human Rights and Scots Law*, (Hart Publishing, 2002), 141, 151, who argue that Article 17 is the basis of states' positive obligations.

...' may well be susceptible to a third party effect, whereas one which maintains that 'the state is under an obligation not to' violate the right concerned may not.[20]

A close connection between the positive obligations of the state under the ECHR and the horizontal effect of fundamental rights embodied in the Convention, as well as perplexities surrounding the application of positive obligations in private law disputes, can be demonstrated by the *Appleby* case. The case was brought by three UK citizens and an environmental group. They alleged that they had been prevented from meeting in the town centre, a privately-owned shopping mall, to impart information and ideas about proposed local development plans in violation of Articles 10 and 11 of the Convention. In particular, they argued that the State owed a positive obligation to secure the exercise of their rights within the shopping mall. In their view, as the information and the ideas they wished to communicate were of a political nature, their expression was entitled to the highest level of protection. Access to the town centre was essential for the exercise of those rights as it was the most effective way of communicating their ideas to the population. According to the applicants, the State is under an obligation 'to put in place a legal framework which [would provide] effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner, as already existed in a number of areas'.[21] They submitted that such legislation could be built around notions of 'quasi-public' land, and, in support of this conclusion, they referred to cases from other jurisdictions, mainly the US, where it was possible for individuals to exercise speech rights on the property of privately-owned shopping centres to which the public was invited.

Following its previous case law,[22] the Court agreed with the applicants in that the effective exercise of freedom of expression, which is of key importance as one of the preconditions for a functioning democracy, not only requires that the State does not interfere with it, but also imposes on the State a duty to take positive measures of protection even in the sphere of relations between individuals. In practical terms, this amounted to the recognition of the right to freedom of expression on the part of the environmental activists *as against another private party* – the owner of the shopping mall. The difficulty, however, lay in the fact that under the Convention, this other private party was also protected by the fundamental right; in this case, the right to property guaranteed by Article 1 of Protocol No. 1. In these circumstances, in order to strike a balance between the two competing

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20 See, for example, P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer Law International, 1998), 19-22; T. Raphael, 'The Problem of Horizontal Effect', 5 *European Human Rights Law Review* 493 (2002), 508. The treatment of Article 2 of the Convention in *Osman v. The United Kingdom* 29 EHRR 245 (2000), would appear to provide an example of such an approach.

21 *Appleby and Others v The United Kingdom* (2003), para. 34.

22 See, for example, *Özgür Gündem v. Turkey* (2000), Reports of Judgments and Decisions 2000-III, paras. 42-46, in which the Turkish State was found to be under a positive obligation to take investigative and protective measures where a newspaper and its journalists and staff had been the victims of a campaign of violence and intimidation.

fundamental rights, and in this way to establish whether or not the UK had violated its positive obligations with regard to the right to freedom of expression of its citizens, the ECtHR resorted to a comprehensive balancing of interests. In its analysis, the Court considered the following factors to be relevant: the physical layout and policies of shopping malls; changes in the 'demographic, social, economic and technical' means of social interaction; and the availability of various alternative ways of communicating the applicants' views to the public (such as acting with the permission of individual stores in the mall, using the town centre, door-to-door canvassing, seeking media exposure). Weighing all these factors, the Court concluded that in this case the interests of the property owner prevailed and the UK had not failed in any positive obligation to protect the applicants' freedom of expression in failing to secure the applicants' access to the town centre.

What is most interesting in the present context, however, is not the outcome of the case, but the reasoning which led to it, as, in essence, by recognizing the existence of the positive obligations of the state the ECtHR grants horizontal effect to the Convention rights of the two private parties. Moreover, via the doctrine of positive obligations, the Court becomes involved in balancing the *private* interests of the parties, which is essentially different from its original task, i.e. striking a balance between the general interest of the community and the interests of the individual. In doing so, the Court does not explicitly recognize the private law nature of the interests involved and the factors which from a private law perspective can be of importance in determining the outcome of a particular case. Among such factors, the extent to which private property lies in the private sphere is one.[23] Taking this factor into account in *Appleby* would involve considering whether the private property in question was open or closed to the public. Instead, the Court's judgment in *Appleby* was based almost entirely on an analysis of whether or not the applicants' right to freedom of expression had been unduly restricted and the conclusion was that this was not the case. This reasoning by the majority was strongly criticized in the partly dissenting opinion of Judge Maruste, who argued that the Court had unnecessarily given priority to property rights over the applicants' freedom of expression and assembly. In the view of Maruste, the privatized shopping centre in its functional nature and essence was a *forum publicum* or 'quasi-public' space, and therefore the situation in the case at hand was different from the 'my home is my castle' type of situation. In addition, the shopping centre in question was intended to be used by the applicants as a forum to discuss publicly a topic of public interest, and not one of a private nature. In these circumstances, according to Maruste, public authorities continue to bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals' rights other than property rights are respected. However, in the present case, '[t]he public authorities did not carry out a balancing

[23] On the importance of drawing a distinction between the public and private sphere in the context of the extension of the applicability of the equal treatment principle to the relationships between private parties, see, for example, J. Smits, *Constitutionalisering van het vermogensrecht*, 75 ff.

exercise and did not regulate how the privately owned *forum publicum* was to be used in the public interest'[24] and, therefore, in the opinion of Maruste, they failed to discharge their positive obligations. This dissenting voice within the Court shows how controversial the cases involving a balancing of parties' countervailing private interests can be.

§3. HORIZONTAL EFFECT THROUGH A FUNDAMENTAL RIGHTS REVIEW OF NATIONAL COURT DECISIONS IN PRIVATE LITIGATION?

In addition to the imposition of positive obligations on the state, the second important way to extend the influence of Convention rights within the realm of private law is to hold the state liable for the shortcomings in the decisions of its courts. Since the courts are organs of the state for which the state itself is responsible on the international level, the state can, in principle, be held responsible under the Convention for the acts of its courts when they interfere with a Convention right, even if the interference arises as a result of the judgement in a dispute between private parties under private law.[25] As a consequence, the ECtHR can review national court decisions, in particular those which involve an interpretation of national private law or private instruments, such as testamentary dispositions or contracts, as to their compatibility with fundamental rights standards; this can be compared to the constitutional review exercised by the German Constitutional Court with regard to the decisions of the national private law courts. Despite the fact that, as we shall see below, those cases that involve an interpretation of private instruments by the domestic courts can come very close to those where positive obligations are at stake, at least in theory, it appears helpful to distinguish between the two. The reason for this is that in the former category of cases, at least formally, the question before the ECtHR is whether or not the national court's interpretation of a private instrument is compatible with the Convention, and thus not whether the state has taken measures to protect one private party from another by intervening in a private legal relationship.

Although the case law of the ECtHR is rather undeveloped in the field of reviewing national court decisions in purely private law disputes,[26] the recent judgement of the Court in *Pla and Puncernau v Andorra* (the *Pla* case) provides the best example available so far of how closely the review of the national court decisions in private law cases may be connected with the horizontal effect of the Convention rights.[27] The *Pla* case arose out of

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24 *Appleby* (2003), Partly Dissenting opinion of Judge Maruste.

25 See, for example, *Hoffmann v. Austria* (1993), Series A, vol. 255 C, para. 29.

26 Cf. Clapham, *Human Rights in the Private Sphere*, 241.

27 For other cases of this kind dealt with by the European Court of Human Rights, see, for example, *Sunday Times v. The United Kingdom* (1979), Series A, vol. 30; *Markt Intern Verlag GMBH and Klaus Beermann v. Germany* (1989), Series A, vol. 165, para. 27. For these cases, cf. Clapham, *Human Rights in the Private Sphere*, 240-244. See also *Hoffmann v. Austria*, (1993), Series A 255 C, para. 29.; *Bruncrona v. Finland*, Application no. 41673/98, Judgement of 16 November 2004.

the interpretation given by the Andorran High Court of Justice to a clause in a will made before a notary in 1939 by Mrs Carolina Pujol Oller – the mother of one son and two daughters. Under this clause, her son, who was the beneficiary and life tenant under the will, was to transfer the estate to a *son or grandson of a lawful and canonical marriage*. Should those conditions not be met, the testatrix had stipulated that the children and grandchildren of the remaindermen under the settlement would be entitled to her estate. In 1995, the son of the testatrix who had inherited the estate made his own will. In a codicil of 3 July 1995, he left the estate he had inherited under his mother's will to his wife for life and to his *adopted* son, Antoni Pla, as remainderman. After his death in 1996, the codicil was opened. In 1997, however, two sisters, Carolina and Immaculada Serra Areny, who were the great-grandchildren of the testatrix, brought proceedings to have the codicil of 3 July 1995 declared null and void, to return to them all the assets of their great-grandmother's estate and to pay them damages for unlawful possession of the assets. The plaintiffs argued that by inserting in her will a clause under which the future heir had to leave the estate to *a son or grandson of a lawful and canonical marriage*, their great-grandmother did not intend the *adopted* children or grandchildren to inherit her estate. Accordingly, in the view of the plaintiffs, in the absence of any children or grandchildren born in a lawful and canonical marriage of their great-grandmother's son, they were the only legitimate heirs to the estate. The High Court of Justice of Andorra upheld the claims of the two sisters. In its view, the question to be answered in this case was whether a child who had been adopted in accordance with the procedure for full adoption can be regarded as a child of a lawful and canonical marriage, as required by the testatrix in her will of 1939. After analyzing the testatrix's intention in the light of the legal position of adopted children in the social and family conditions existing in 1939 when the will was made and in 1949 when she died, the Court came to the conclusion that the testatrix did not intend to allow the adopted child of her son, i.e. Antoni Pla, to inherit her estate.

This interpretation of the will by the High Court of Justice of Andorra was challenged by Antoni Pla and his mother before the ECtHR. They claimed that the judgement of the High Court of Justice amounted to an unlawful interference with their private and family life as guaranteed by Article 8 of the Convention, which was clearly discriminatory as regards Antoni under Article 14 of the Convention. Considering the case, the ECtHR noted that the present case was essentially different from all other cases in which it had had an occasion to examine allegations of differences of treatment for succession purposes under Article 14 taken together with article 8. Whereas the factor common to the previous cases was the difference of treatment which resulted directly from the domestic legislation, in the case at hand the question at issue was not the compatibility of the domestic legislation with the Convention, but that of the domestic court's interpretation of a private deed. As to this kind of case, the Court formulated the following rule:

> '[T]he Court is not in theory required to settle disputes of a purely private nature. That being said, in exercizing the European supervision incumbent on it, it cannot

> remain passive where a *national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice* appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14, and more broadly with the principles underlying the Convention'.[28]

Since the testamentary disposition, as worded by the testatrix, made no distinction between biological and adopted children, in the view of the Strasbourg Court it was not necessary for the domestic court to make such a discriminatory distinction while interpreting the will. According to the Court, the national court's interpretation cannot be justified on any of the justification grounds provided by Article 14. In the light of this, the Court concluded that there had been a violation of Article 14 read in conjunction with Article 8.

Thus, the question formally raised by the Strasbourg Court was not whether private parties could discriminate in their wills and whether by upholding such wills the domestic courts had acted incompatibly with the ECHR, but whether the manner in which the domestic courts interpreted the will of the testatrix was compatible with the Convention. In this way, the ECtHR approached the whole case not from the perspective of the *horizontal effect* of Article 14 in conjunction with Article 8, but purely from the perspective of testing the *interpretation* of a testamentary disposition as to its compatibility with the Convention.

It should be noted that drawing a distinction between the two perspectives is of crucial importance because in the case of the horizontal effect of the Convention, the question is whether or not the testator or the testatrix is allowed to discriminate in his or her testamentary disposition and thus what the limits are to his or her private autonomy. By contrast, in the case of testing the compatibility of the national courts' interpretation of a testamentary disposition this question simply does not arise because at stake is a purely state action, which appears to suggest that in this case private parties are allowed to discriminate in their testamentary dispositions and the private law courts are allowed to uphold such dispositions as long as the discrimination was the true intention of the testator.

In the light of this, the fact that the ECtHR in *Pla* ruled that 'no question relating to the testatrix's free will is in issue in the present case'[29] and that it is the national court's interpretation which is at stake seems to suggest that the testatrix clearly did not intend to discriminate against adopted children in her testamentary disposition and it was the High Court of Andorra which misinterpreted her free will. A closer look at the proceedings in *Pla*, however, shows that the matter is much more complicated than it may appear at first sight. It is worth noting that before the case came to Strasbourg, the contested decision of the testamentary disposition by the High Court of Justice of Andorra had been upheld by

[28] *Pla and Puncernau v Andorra*, para. 59 (emphasis added).

[29] *Pla and Puncernau v Andorra*, para. 57.

the Constitutional Court of Andorra to which the applicants lodged a constitutional complaint arguing *inter alia* that the decision of the High Court of Justice had violated the principle of children's equality before the law regardless of filiation guaranteed by Article 13 (3) of the Andorran Constitution. The Constitutional Court drew a clear distinction between the discrimination of successors by the public authorities and by private parties and also emphasized the discretion of the private law courts in establishing the true will of the testatrix. According to the Constitutional Court:

> '... It seems clear that the judgment of the High Court of Justice is limited to clarifying and determining, that is, interpreting, a specific point concerning the testatrix's intention, as expressed in her will in the form of a family settlement in favour of a child or grandson of a lawful and canonical marriage. The High Court of Justice does not at any point suggest that there is general discrimination against or inequality between children according to whether they are biological or adopted. Such an assertion would evidently amount to a flagrant breach of Article 13 (3) of the Constitution and would also be contrary to the prevailing legal opinion according to which legal systems must always be interpreted, which is that all children are equal, irrespective of their origin. However, as submitted in substance by State Counsel, "discrimination against adopted children as compared to biological children does not in the instant case derive from an act of the public authorities, that is, from the judgment of the Civil Division of the High Court of Justice, but from the intention of the testatrix or settlor regarding who should inherit under the will" in accordance with the principle of freedom to make testamentary dispositions, which is a concrete manifestation of the general principle of civil liberty. In its judgment the High Court of Justice confined itself to interpreting a testamentary disposition. It did so from the legal standpoint that it considered adequate and in accordance with its unfettered discretion, seeing that the interpretation of legal instruments is a question of fact which, as such, is reserved to the jurisdiction of the ordinary courts. ...'.[30]

Furthermore, the majority of the judges in *Pla* failed to convince Judge Garlicki in that it was indeed the discriminatory interpretation of the testamentary disposition which was at stake in this case and not the discriminatory testamentary disposition itself. In his dissenting opinion, Judge Garlicki argued that in *Pla* the Strasbourg Court was confronted with the issue of to what extent the Convention enjoyed 'horizontal effect' and, consequently, to what extent the State was under an obligation either to prohibit or to refuse to give effect to private action which interfered with the Convention rights of other private parties. Such a finding, however, puts the whole issue within the ambit of the positive obligations of the state and thus not the infringements of the Convention through the interpretation of a private instrument by the national private law court.

[30] *Pla and Puncernau v Andorra*, para. 20.

If, following the ruling of the Constitutional Court of Andorra and the dissenting opinion of Judge Garlicki, one assumes that it is indeed the problem of the horizontal effect of the Convention rights which was at stake in *Pla* and that the ECtHR avoided this problem under the cover of testing the *interpretation* of the testamentary disposition, the *Pla* case is of a totally different character from the well-established case law of the Court relating to discriminatory treatment in the field of succession and inheritance. In each of the earlier cases, it was the State action, in particular the domestic legislation, which gave rise to the difference in treatment, distinguishing as it did between the rights of succession of legitimate and illegitimate children[31] or between children born from an adulterous relationship and other children, whether legitimate or not.[32] In all of these cases, the Court established a violation of the Convention by the State. In none of these cases, however, did the question arise as to the compatibility of a discriminatory treatment by a private individual with the Convention. Accordingly, if the domestic court in *Pla* was in reality held responsible on the international level for enforcing the will which contained a clause discriminating against adopted children vis-à-vis biological children, the novelty of this case lies in the extension of the prohibition of discriminatory treatment to the *private* conduct of individuals in the field of succession and inheritance and far beyond this. By explicitly saying that it 'cannot remain passive' when a national court's interpretation of a 'private contract' is in violation of a Convention right, the Court clearly demonstrated its readiness to extend its control not only to the law of succession, but also to the field of general contract law. *All* private transactions may therefore become subject to control as to their compatibility with the ECHR as exercised by the ECtHR. One can only imagine the disastrous consequences of such an approach for the private autonomy and freedom of contract guaranteed to private parties under the private law of the States parties to the European Convention. As Richard S. Kay remarks, speculating on the possible implications of the decision of the ECrtHR in *Pla*:

> 'Every disappointed litigant could raise a European human rights claim by asserting that the domestic courts committed error by slighting the ubiquitous Convention rights. In theory, every perceived personal wrong could, in the end, find its way to Strasbourg. We would thus arrive, by a different route, at the robust version of the state's positive obligation to prevent private interferences with protected rights. The unsettling effect on private transactions is not hard to imagine.'[33]

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31 See *Marckx v. Belgium* (1979), para. 54; *Vermeire v. Belgium* (1991), Series A, vol. 214-C, para. 28; *Inze v. Austria* (1987), Series A, vol. 126, para. 40.

32 See *Mazurek v. France* (2000), Reports of Judgements and Decisions 2000-II, para. 43.

33 R.S. Kay, 'The European Convention on Human Rights and the Control of Private Law', 5 *European Human Rights Law Review* 466 (2005), 479.

Although, as Kay acknowledges, 'these are mere possibilities',[34] the uncertainties surrounding the *Pla* case raise an important issue of how far the horizontal effect of fundamental rights through the doctrine of the positive obligations of the state can extend. Can the state be held to be in violation of its positive obligations under the Convention for giving effect to a discriminatory testamentary disposition? In the view of the dissenting Judge Garlicki, supported by Judge Bratza, this certainly should not be the case. According to Judge Garlicki:

> '... [I]t seems equally obvious that the level of protection against a private action cannot be the same as the level of protection against state action. The very fact that, under the Convention, the State may be prohibited from taking certain action ... does not mean that private parties are similarly precluded from taking such action. In other words, what is prohibited for the State need not necessarily also be prohibited for individuals. Of course, in many areas such prohibition may appear necessary and well-founded. However, it should not be forgotten that every prohibition of private action (or any refusal to judicially enforce such action), while protecting the rights of some persons, unavoidably restricts the rights of other persons. This is particularly visible in regard to "purely" private-law relations, such as inheritance. The whole idea of a will is to depart from the general system of inheritance, i.e. to discriminate between potential heirs. ... [T]he testator must retain a degree of freedom to dispose of his/her property and this freedom is protected by both Article 8 and Article 1 of Protocol No. 1 to the Convention. Thus, ... the rule should be that the State must give effect to private testamentary dispositions, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the Convention or to aim at the destruction of the rights and freedoms set forth therein. As in respect of all exceptional circumstances, however, their presence must be clearly demonstrated and cannot be assumed.'[35]

The fact that the freedom of testamentary disposition is protected by the Convention implies that in the case of the horizontal effect of Convention rights through the doctrine of the positive obligations of the state the interests of *both* the testatrix and the adopted son are protected under the Convention. While the interests of the former come within the ambit of the right to private and family life under Article 8 and the right to property under Article 1 of Protocol No. 1 to the Convention, the interests of the latter are supported by the prohibition of discrimination under Article 14. This means that in the case of granting horizontal effect to the Convention rights through the doctrine of the positive obligations *both* of these interests must be taken into account when deciding

[34] Kay, 'The European Convention on Human Rights and the Control of Private Law', 479.

[35] *Pla and Puncernau v. Andorra*, Dissenting Opinion of Judge Garlicki. See also *Pla and Puncernau v Andorra*, Partly Dissenting Opinion of Judge Bratza.

whether the testatrix was allowed to discriminate in the circumstances of her case. This may lead, however, to the problems connected with striking an appropriate balance between the competing interests protected under the Convention discussed in the previous section by using the example of the *Appleby* case. At the same time, when horizontal effect is granted under the cover of testing the interpretation of the private instrument as to its compatibility with the Convention, the consequences for certain private law interests also protected by the Convention can be even more disturbing because there is a danger of these interests being *totally* ignored. The existence of such a danger is illustrated in the decision of the Court in *Pla*, which makes it clear that testing the interpretation by the private law courts does not involve a balancing of private law interests. Such an approach leads to a complete disregard of the fundamental rights of the testatrix if, in reality, the interpretation given by the High Court of Andorra is correct and it was indeed not the intention of the testatrix to allow adopted children to inherit her estate.

This discussion shows how subtle the distinction between testing the interpretation of private instruments by the national courts and the horizontal effect of fundamental rights can be in practice and, at the same time, how important it is to make such a distinction from the point of view of ensuring respect for private autonomy. At present, however, it is not entirely clear whether the ECtHR's majority intends to make this distinction and, in particular, intends to take into account that the level of protection against a private action cannot be the same as the level of protection against state action. Testing the interpretation of private instruments may therefore potentially lead to the horizontal effect of the Convention rights. The major lesson to be learned from the decision of the Court in *Pla* is thus how controversial the cases which formally involve the interpretation of private instruments can be in practice.

§4. THE IMPORTANCE OF THE 'MARGIN OF APPRECIATION' IN CASES (POTENTIALLY) INVOLVING HORIZONTAL EFFECT

Against this background, it becomes clear that the ECtHR avails itself of broad possibilities to extend the applicability of the Convention in the realm of the relations between private parties under private law through the doctrine of positive obligations and the review of the interpretation of private instruments given by the national courts. By using these tools, the Court can involve itself in a delicate balancing of the countervailing interests of private parties and even determine the limits of individuals' private autonomy under national private law. At the same time, it appears that at least the majority of the judges of the Court are not explicitly guided by the considerations of the distinction between private and public law and conduct or the preservation of private

autonomy of individuals.[36] This raises concerns about the future of private law as the law that guarantees a special legal framework within which private parties are in principle free to exercise their will in mutual relationships with each other.

The question which arises in this connection is whether there are limits to the Court's extension of the horizontal effect of the Convention rights to contracts, private wills and other private acts in practice, and it appears that, at present, the major limit to such an extension is set by the doctrine of 'margin of appreciation'. This doctrine is one of a number of techniques used by the Court to justify abstaining from a fully-fledged review of the merits, which is reminiscent of the international character of the Convention mechanism for the protection of fundamental rights.[37] As will be demonstrated below, the importance of this doctrine is particularly great when the ECtHR is dealing with cases involving the horizontal effect of the Convention rights, and this fact has in theory been acknowledged by the Court itself in cases involving the positive obligations of the state and the review of national court decisions.

The ECtHR has consistently stressed that considering their direct contact with and first-hand knowledge of the circumstances involved, the national authorities are more suited than international tribunals to assess the extent to which and the ways in which

[36] By contrast, these considerations were originally taken into account by the German Constitutional Court when deciding upon the effect of fundamental rights in private law in the *Lüth* case (BVerfG 15 January 1958, *BVerfGE* 7, 198, at 205). According to the Constitutional Court in this case, although no rule of German private law may be in conflict with constitutional values, the dispute between private parties 'remains substantively and procedurally a civil law dispute'. This suggested that it was private law which was supposed to play a decisive role in accommodating constitutional values within it and therefore the distinction between public and private law was to be preserved. In reaching this conclusion, the Court adopted what has to be called the doctrine of the 'indirect' effect of constitutional values on private legal relations – as opposed to the theory of 'direct' effect. For the overview and analysis of the recent developments in German law on this issue, see O. Cherednychenko, 'The Constitutionalization of Contract Law: Something New under the Sun?', with further references, in particular to German literature.

[37] As to the margin of appreciation doctrine in general, see R. Bernhardt, 'Internationaler Menschenrechtsschutz und nationaler Gestaltungsspielraum', in R. Bernhardt et al. (eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtbarkeit, Menschenrecht: Festschrift für Hermann Mosler*, (Springer-Verlag, 1983), 75; T.A. O'Donnell, 'The Margin of Apreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly* 474 (1982); P. Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin', 11 *Human Rights Law Journal* 57 (1990); R.St.J. Macdonald, 'The Margin of Appreciation', in R.St.J. Macdonald et al. (eds.), *The European System for the Protection of Human Rights*, (Nijhoff, 1993), Chapter 6. E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 1-2 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240 (1996); H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (Nijhoff, 1996); N. Lavender, 'The Problem of the Margin of Appreciation', 4 *European Human Rights Law Review* 380 (1997); J.G.C. Schokkenbroek, *Toetsing aan de vrijheidsrechten van het Europees verdrag tot bescherming van de rechten van de mens*, (W.E.J. Tjeenk Willink, 1995); J.G.C. Schokkenbroek, *Methoden van interpretatie en toetsing: een overzicht van beginselen toegepast in de Straatsburgse Jurisprudentie*, (Koninklijke Vermade, 2000).

positive obligations may be implemented.[38] In virtually every case in which the issue of positive obligations has arisen, the Court has reiterated that 'especially where positive obligations ... are concerned ... the requirements [on the state] will vary considerably from case to case ...'[39] and that 'this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention ...'[40] The wide margin of appreciation has also been stressed by the ECtHR in the context of those cases in which the imposition of the positive obligations on the State had given rise to the need to strike a balance between the competing private interests.[41] Thus, for example, in *Hokkanen v Finland*,[42] the Court had to deal with a claim by a father who argued that the failure of the national authorities to take concrete steps aimed at returning his daughter to him from his parents-in-law constituted an infringement of his right to family life. In this case, the Court stressed that it was not its role to substitute itself for the competent national authorities in regulating custody and access issues in national law. Instead, its role was limited to reviewing under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. Therefore, according to the Court, where the interests of the parent in having a reunion with his child might appear to threaten the interests or interfere with the rights and freedoms of other parties concerned, in particular, that of the child, it is for the national authorities to strike a fair balance between them. The wide margin of appreciation made available for the national authorities in such cases can be explained by their delicate position in striking a balance between the fundamental rights of two or more private parties.[43] Similarly, the margin of appreciation widens when the ECtHR has

38 Compare, for instance, Clapham, *Human Rights in the Private Sphere*, 188 ff., in particular, 344 –345; G. Phillipson, 'The Human Rights Act, ''Horizontal Effect'' and the Common Law: a Bang or a Whimper?', 6 *The Modern Law Review* 841 (1999), 842; Y. Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights', 1 *Netherlands Quarterly of Human Rights* 41 (1998), 57-58.

39 See, for example, *B v. France* (1992), Series A, vol. 232-C, para. 44. See also *Johnston and Others v. Ireland* (1986), Series A, vol. 112, para. 55.

40 See, for example, *Johnston and Others v Ireland* (1986), para. 55; *Abdulaziz, Cabales and Balkandali* (1985), para. 67. This does not mean, however, that, in the view of the ECtHR, positive obligations entail a wide margin of appreciation per definition. See R.A. Lawson, 'Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair balance'-test', 5 *NJCM-Bulletin* 558 (1995), 558 ff., and 6 *NJCM-Bulletin* 727 (1995), 727 ff., in particular, 749.

41 Compare, for example, E.A. Alkema, *De reikwijdte van fundamentele rechten* (preadvies voor de Nederlandse Juristenvereiniging, 1995), 104; Lawson, 'Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair balance'-test', 5 *NJCM-Bulletin* 558 (1995), 572 and 6 *NJCM-Bulletin* 727 (1995), 740 ff.

42 *Hokkanen v. Finland* (1994), Series A, vol. 299-A.

43 Compare Lawson, 'Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair balance'-test', 5 *NJCM-Bulletin* 558 (1995), 572.

to review national court decisions in essentially private disputes.[44] Thus, in the *Markt Intern* case,[45] having found that an injunction issued by a German court in a private competition case was an interference by a public authority with the freedom of expression, the Court nevertheless held that it was prescribed by law and for a justified reason. According to the Court, it will 'not substitute its own evaluation for that of national courts ... where those courts, on reasonable grounds, had considered the restrictions to be necessary'.[46]

This basic point was also in principle recognized in the *Pla* case in which the Court started from the following considerations:

> 'On many occasions and in very different spheres the Court has declared that it is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law ... . That principle, which by definition applies to domestic legislation, is all the more applicable when interpreting an eminently private instrument such as a clause in a person's will. ... [T]he domestic courts are evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests ... When ruling on disputes of this type the national authorities and, in particular, the courts of first instance and appeal have a wide margin of appreciation.'[47]

Furthermore, it is worth noting that, according to the ECtHR, national authorities must be afforded a wide margin of appreciation when dealing with controversial issues on which there is no consensus among the States parties to the ECHR.[48] Thus, for example, in the *Rasmussen* case, the Court did not find any 'common ground' in the Contracting State's legislation regarding the terms on which proceedings to contest paternity could be instituted.[49] The fact that the Danish legislation did not differ from that of most other Contracting States in this respect was considered a reason to justify time-limits being only imposed on a husband, but not on a wife.

The pattern which can thus be traced in the case law of the Strasbourg Court is that the margin of appreciation widens when the Court is dealing with cases (potentially)

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44 Compare Clapham, *Human Rights in the Private Sphere*, 240 ff., in particular, 241-242, 345; I. Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?', 1 *International and Comparative Law Quarterly* 57 (1999), 83.

45 *Markt Intern Verlag GMBH and Klaus Beermann v. Germany* (1989), Series A, vol. 165.

46 *Markt Intern Verlag GMBH and Klaus Beermann v. Germany*, para. 37.

47 *Pla and Puncernau v. Andorra*, para. 46.

48 See, for example, *Rasmussen v. Denmark* (1984), Series A, vol. 87, para. 41; *Rees v. the United Kingdom* (1986), Series A, vol. 106, para. 37; *Cossey v. the United Kingdom* (1990), Series A, vol. 184, para. 40; *Stjerna v. Finland* (1994), Series A, vol. 299-B, para. 39; *X, Y and Z v. the United Kingdom* (1997), Reports of Judgments and Decisions 1997-II, para. 44.

49 *Rasmussen v. Denmark* (1984), para. 41.

involving the horizontal effect of fundamental rights. This seems to suggest that, in general, the decisions of national courts in purely private disputes will not be readily 'second-guessed in Strasbourg',[50] especially in those cases in which an issue is at stake concerning which there is no consensus among the States parties to the ECHR. Such an approach appears to be reasonable considering the fact that the views as to a fair balance between certain countervailing private interests protected by the ECHR or a correct method of interpretation of a private instrument may differ among European legal systems. This is even more true for the views regarding the scope of private autonomy in a particular legal system. Such highly delicate issues are particularly closely linked with the national sovereignty of the States parties to the Convention and they do not easily lend themselves to the imposition of a uniform approach thereto by the *international* court of human rights. Moreover, the fact that a failure to establish the true intention of a private party may lead to the unjustified limitation of his of her private autonomy as a consequence of the horizontal effect of fundamental rights, requires extra care when dealing with such cases, and national authorities are undoubtedly in a better position to trace the will of the party than international courts.

§5. THE COURT'S APPROACH TO THE 'MARGIN OF APPRECIATION' IN CASES (POTENTIALLY) INVOLVING HORIZONTAL EFFECT IN PRACTICE

Although in theory the ECtHR seems to recognize the importance of a wide margin of appreciation in cases (potentially) involving the application of the Convention between private parties, it is rather doubtful whether the Court always follows its own guidelines in practice. On the one hand, the decision of the ECtHR in the *Appleby* case in particular provides evidence that the Court may be reluctant to interfere with the balance struck by the national authorities between competing private interests not only in theory but also in practice. An important factor which probably profoundly impacted on the Court's decision to exercise caution in *Appleby* was the absence of consensus among European countries on such a delicate issue as to whether or not the owner of private property is obliged to respect the freedom of expression of other private parties on his property only because his property is open to the public. It can even be argued that in upholding the balance struck between the competing interests of property owners and environmental activists by English law, the ECtHR in *Appleby* was 'under the sway of the British Government's contention that 'it [is] not for the Court to prescribe the necessary content of domestic law by imposing some ill-defined concept of 'quasi-public' land to which a test of reasonable access should be applied''.[51] On the other hand, however, the decision

[50] Clapham, *Human Rights in the Private Sphere*, 241.

[51] O. Gerstenberg, 'Private Law and the New European Constitutional Settlement', 10 *European Law Journal* 766 (2004), 780.

of the ECtHR in the *Pla* case demonstrates that a promised 'wide margin of appreciation' does not necessarily entail a limited scrutiny in practice, in particular in those cases which can potentially lead to the horizontal effect of fundamental rights as a result of the ECtHR's review of the national court's interpretation of a private instrument. If, like the dissenting Judge Bratza, one sees in the decision of the Court in *Pla* the granting of horizontal effect to the fundamental right of the adopted child not to be discriminated against, a practical absence of discretion on the part of the national authorities can already be found in the fact that the extension of the applicability of the ECHR to testamentary dispositions had taken place without exploring the trends in European legal systems on this issue and thus without any guarantee that there is an emerging European consensus on such a sensitive issue as the limits to the testator's private autonomy.[52]

Even if one assumes, however, that the ECtHR in *Pla* was indeed concerned with the interpretation of the testamentary disposition and did not intend to grant horizontal effect to the applicant's rights, it is surprising how easily it arrived at the conclusion that the High Court of Justice of Andorra's interpretation of the testatrix's will was erroneous. It should be noted that the High Court of Justice of Andorra spent a great deal of time resolving the crucial question for establishing the testatrix's will; that of whether a child who has been adopted in accordance with the procedure for full adoption could be regarded as a child of a lawful and canonical marriage, as required by the testatrix in her will of 1939. Analyzing the testatrix's intention in the light of the legal position of adopted children in the social and family conditions in which she lived (in Catalonia), the High Court of Justice observed that the purpose of a family settlement *si sine liberis decesserit* under Catalan law was to keep the family estate in the legitimate or married family and that Catalan legal tradition had always favoured the exclusion of adopted children from such family settlements. Under such circumstances, in the view of the Court, in order for adopted children to be able to inherit under a Catalan family settlement, there would have to be no doubt as to the testatrix's intention to depart from the usual meaning ascribed to that arrangement. However, the expression 'offspring of a lawful and canonical marriage' used in the will in question is not sufficient to support such a

[52] The importance of the freedom of testamentary disposition is rather great, for example, in Germany, where this private law principle is also a fundamental right protected by Article 14 of the German Constitution which is given priority in the absolute majority of cases over other constitutional rights such as, for example, the right not to be discriminated against. On this, see J. Smits, *Constitutionalisering van het vermogensrecht*, 93. The primary importance of the freedom of testamentary disposition was also stressed in the recent judgement of the German Constitutional Court. See Judgement of the Federal Constitutional Court of 22 March 2004, 1 *BvR* 2248/01, para. 38. At the same time, in this judgement the Constitutional Court also recognized that the freedom of testamentary disposition is not without limits. See Judgement of the Federal Constitutional Court of 22 March 2004, 1 *BvR* 2248/01, para. 39 ff. In fact, although highly important, the freedom of testamentary disposition has never been unlimited in the private law of many European legal systems, where open private law norms, in particular, good morals, provided a framework for balancing competing private interests. On this, see B. J. de Vos, 'Testamentary Freedom and Fundamental Rights. Dealing with Despotism from Beyond', in G. Brüggemeier *et al* (eds.), *Fundamental Rights and Private Law in the European Union. Selected Essays*, forthcoming.

conclusion. The Court also added that although the law in force when the child in question, Antoni Pla, was actually adopted allowed adopted children to inherit from their adoptive parents in an intestate succession, those rights could not extend to a testate succession, where the main factor was the testator's intention. In view of these considerations to which the intention of the testatrix is central, the Court ruled that the testatrix did not intend to allow the adopted child of her son to inherit her estate. This extended analysis which led the High Court of Andorra to conclude that it was indeed the testatrix's intention to discriminate against the adopted children was, however, dismissed by the ECtHR as 'blatantly inconsistent with the prohibition of discrimination'[53] on the basis of the following very general statement:

> '... The Court cannot agree with that conclusion of the Andorran appellate court. There is nothing in the will to suggest that the testatrix intended to exclude adopted grandsons. The Court understands that she could have done so, but as she did not the only possible and logical conclusion is that this was not her intention. The High Court of Justice's interpretation of the testamentary disposition, which consisted in inferring a negative intention on the part of the testatrix and concluding that since she did not expressly state that she was not excluding adopted sons this meant that she did not intend to exclude them, appears over contrived and contrary to the general legal principle that where a statement is unambiguous there is no need to examine the intention of the person who made it (*quum in verbis nulla ambiguitas est, non debet admitti voluntis queastio*).'[54]

Probably the first thing which strikes one when reading this passage is an apparent contradiction in the Court's reasoning – first the Court suggests that it is the intention of the testatrix which is of importance in this case, but it subsequently denies that by saying that it is not necessary to examine the party's intention where a statement is unambiguous. What is most notable in this passage, however, is how quickly the Court came to the conclusion that the testamentary disposition in this case was unambiguous and that, absent ambiguity, no inquiry must be undertaken into the intention of the testatrix. Considering the difficulties surrounding the establishment of whether or not a certain term in a private instrument is unambiguous and, in particular, the differences existing among the European legal systems with regard to the role of the subjective intention of the parties in interpreting private instruments, even when a text may appear obvious,[55] it is questionable whether the ECtHR could in fact establish the true will of the

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53 *Pla and Puncernau v Andorra*, para. 59.

54 *Pla and Puncernau v Andorra*, para. 58.

55 For a detailed discussion of these two issues in the context of the *Pla* case, see, in particular, A. Staudinger, 'Die Europäische Menschenrechtenrechtskonvention als Schtanke der gewillkürten Erbfolge?', 2 *Zeitschrift für Erbrecht und Vermögensnachfolge* (2005) 140, 141 f. and Kay, 'The European Convention on Human Rights and the Control of Private Law', 468 ff., with further references.

testatrix without examining any legislation, court decisions or commentaries on the interpretation of testamentary dispositions or other legal texts apart from the judgments of the Andorran courts. The Court, however, did not even mention the complexity and diversity of the national laws of the European legal systems relating to the interpretation of testamentary dispositions – a fact which gives rise to doubts as to the existence of the consensus among European countries concerning the method of interpreting the testamentary disposition in the circumstances of the *Pla* case. Against this background, it does not seem to be an exaggeration to say, as Judge Bratza did in his partly dissenting opinion, that the majority 'substituted their own view of the proper interpretation of the will for that of the High Court of Justice of Andorra'[56] and in this way reduced the wide margin of appreciation promised by it in the *Pla* case itself to zero.

Furthermore, the majority of the Court in *Pla* imposed an additional judicial obligation to interpret wills not in the light of the social and legal conditions which prevailed at the time when the will was drafted – as the High Court of Justice of Andorra had done – but at the time when the will fell to be examined. This duty of dynamic interpretation of private instruments, which seems to be inspired by the Court's vision of the ECHR as 'a living instrument, to be interpreted in the light of present-day conditions',[57] was also established by the Court without demonstrating the existence of an emerging consensus among the States parties to the Convention on this issue. It is questionable, however, whether a dynamic interpretation is always suitable for private instruments in the same way as it is for international treaties, as 'it would wreak havoc in commercial transactions if contracts were to be treated as 'living instruments'''[58]. In view of the high complexity of this issue and no evidence as to the existence of consensus among European legal systems thereon, denying the domestic court's possibility to interpret the will according to its own rules of interpretation clearly goes far beyond the promised discretion of the national courts. If it is open to the domestic courts to endeavour to establish the intention of a testator or a testatrix in using a certain clause in his or her will – which the Court does not seem to dispute – it is difficult to understand why it is not possible to interpret such a clause in the light of the social and legal conditions which prevailed at the time when the will was drawn up.[59]

The displacement of the national rules for the interpretation of private instruments thus undertaken by the ECtHR in *Pla* shows how narrow the state's margin of

Furthermore, it should be noted that even the private law courts of Andorra did not reach an agreement on the true will of the testatrix in *Pla*. In contrast to the High Court of Justice of Andorra, the lower court, the *Tribunal des Battles* of Andorra, came to the conclusion that the testatrix did not intend to discriminate against the adopted children.

56 *Pla and Puncernau v Andorra*, Application no. 69498/01, Judgement of 13 July 2004, Partly Dissenting Opinion of Judge Bratza, para. 7. See also the Dissenting opinion of Judge Garlicki in this case who agreed with Judge Bratza on this point.

57 *Pla and Puncernau v Andorra*, Application no. 69498/01, Judgement of 13 July 2004, para. 62.

58 Kay, 'The European Convention on Human Rights and the Control of Private Law', 472.

59 See also *Pla and Puncernau v Andorra*, Partly Dissenting Opinion of Judge Bratza, para. 14.

appreciation can be in practice in cases involving disputes between private parties. In the light of all the above-mentioned, however, it appears that the wide margin of appreciation of the national courts is essential for tracing the true will of a private party, since the ECtHR's judgment in *Pla* raises serious doubts as to whether its approach allows one to do that. By imposing its own view on a correct method of interpreting wills on the Andorran courts in the absence of the uniform approach in Europe on this matter, the ECtHR itself risks misinterpreting the will of a private party, which provides extra evidence that it is indeed the national courts which are much better equipped for resolving such questions. This finding, in its turn, demonstrates how close the connection is between a narrow margin of appreciation and the horizontal effect of the Convention rights, since the limitation of the private autonomy of a private party by fundamental rights can directly result from the misinterpretation of the private party's intention by the ECtHR.

The main conclusion to be drawn from the analysis of the Court's approach to the margin of appreciation in *Appleby* and *Pla*, however, is that in cases involving disputes between private parties under the national private law of the States parties to the ECHR the Court *may* grant a wide margin of appreciation to the national authorities in practice, but this will not *always* be the case. Whereas the judgment of the Court in *Appleby* demonstrates that in certain cases of a private law nature the Court prefers to avoid dealing with sensitive private law issues, the Court's judgment in *Pla* provides evidence that in other private law cases, it is not at all reluctant to interfere with highly delicate matters of national private law. It is notable that the decision of the ECtHR in *Pla* cannot be easily reconciled with the Court's own approach to the margin of appreciation followed, in particular, in *Appleby*, as according to this approach, the discretion left to the Contracting States is wider in cases where there is no consensus among them with regard to a certain issue before the Court. The existence of such consensus with regard to the issues involved in *Pla* appears, however, to be rather doubtful. Moreover, from a private law point of view, it is striking that a wide margin of appreciation was not observed in a case involving a private testamentary disposition to which the idea of private autonomy is central, but it was respected in a case in which a quasi-public property was involved and in which a possible horizontal effect of the Convention rights would not lead to such a severe interference with the private autonomy of a private party like that in *Pla*. This shows that although the doctrine of margin of appreciation is indeed an important limit to the ECtHR's control over the conduct of private parties, the Court does not abstain from such control in every case, which raises the possibility that individual private autonomy may be considerably limited under the ECHR as interpreted by the ECtHR.

§6. CONCLUDING REMARKS

The judgments of the ECtHR in *Appleby* and *Pla* have shown that the ECtHR avails itself of broad possibilities for exercising control over private acts as to their compatibility with the ECHR through the doctrine of positive obligations and the review of the

interpretation of private instruments by the national courts. By using these tools, the Strasbourg Court can displace national private law rules, thereby becoming involved in a delicate balancing of the countervailing private interests or even imposing considerable restrictions on the private autonomy of individuals. Given the fact that the Court does not seem to take seriously the considerations of the distinction between private and public law or the preservation of private autonomy, it is not difficult to imagine how far-reaching the effect of the ECHR could be on relations between private parties and, in particular, on private transactions as a result of the imposition of the positive obligations on the States parties to the Convention and the review of their national court decisions. In view of the ECtHR's approach to the public/private divide, it is not surprising that the central role in restraining the imposition of the duty to observe fundamental rights on private parties by the Court is currently being played by the 'margin of appreciation', which, in the view of the Court itself, widens in cases involving the positive obligations of the state or the review of national court decisions, especially where no consensus can be found to exist on a certain issue among European legal systems.

Although the margin of appreciation indeed serves as a buffer against the ECtHR acquiring a final say in highly sensitive private law matters, as powerfully demonstrated by the Court's approach in *Pla*, the margin of appreciation is certainly not a panacea against the expansion of the ECHR into the sphere of the relations between private parties, including the most sacred spheres protected by private law such as determining the destiny of one's property after one's death. Particularly disturbing for the future of private law is that, by limiting the scope of the margin of appreciation, the ECtHR may substitute the national court's view on the proper interpretation of a private instrument, be it a testamentary disposition or a contract, with its own view to that end and, through such review, it may interfere with private instruments under the cover of testing the national courts' interpretation of such instruments. Furthermore, paying due regard to such a factor as the existence of a European consensus on a certain sensitive issue in some private law cases, but not in others, may also lead to a situation when a purely private sphere will be more affected by fundamental rights than a 'quasi-public' private sphere where public interest can in principle be sooner respected than in a purely private sphere.

It appears, therefore, that despite the great importance of the margin of appreciation for limiting the control of private acts by the ECtHR as to their compatibility with the ECHR, the extent of such control still largely depends on the readiness of the Court to draw a distinction between public and private conduct and to openly take into account that the acts which may be prohibited for public authorities under the ECHR may not necessarily be prohibited for private parties. In particular, it should not be forgotten that, as Lord Wilberforce put it, 'discrimination is not the same thing as choice, it operates over a larger and less personal area, and ... private selection [has not] yet become a matter of public policy'.[60]

[60] *Blathwayt v Baron Cawley*, [1975] All England Law Reports 625.