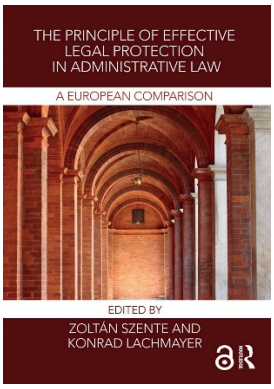




# The Principle of Effective Legal Protection in Administrative Law

## A European comparison

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# 19 The principle of effective legal protection in international and European law – comparative report

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## 1 Effective legal protection as a European principle

### *1.2 The two faces of the principle of effective legal protection in Europe*

While national constitutions do not explicitly refer to the principle of effective legal protection, European Law mentions it in their core documents: Art. 19 TEU, Art. 47 CFR and Art. 13 ECHR refer to 'effective legal protection' or 'effective remedy' as a principle to be guaranteed by the Member States. Both the Union and the European human rights system request the Member States to guarantee effective legal protection with regard to their European legal obligations. It is necessary to distinguish these European parameters with regard to the Member States from the determination of the European institutions itself. It is common knowledge that the adequate duration of a judicial procedure is part of effective legal protection.

Although the Member States are obliged to provide such procedural guarantees, the ECtHR is struggling to significantly fulfil the requirement of effective legal protection itself. The ECJ is concerned about access to courts in the Member States, but the Court itself is quite difficult to access for individuals and it is also due to the case law of the ECJ that this situation has not changed.[1] There seems to be a discrepancy between the European and domestic levels when it comes to the required standards of effective legal protection. On the one hand, it is necessary to stress that the proper application of effective legal protection on a national level would relieve the transnational level from the need to provide the same intensity of legal protection. The principle of subsidiarity also supports stronger application of effective legal protection on the domestic level. On the other hand, the European Union also directly enforces EU law and is therefore in need of effective legal protection on a European level. It does not serve the principle of effective legal protection to create dual standards.

When it comes to applying effective legal protection principles of the EU and the ECHR, one has to consider the different levels of application. The ECHR is responsible on the domestic level as well as, according to Art. 52 para 3 CFR, in the EU.[2] Arts. 6 and 13 ECHR do not, however, apply to the ECtHR itself. In contrast to this, the

1 See Görisch in this book.

2 See Paul Craig, *The Lisbon Treaty – Law, Politics and Treaty Reform* (Oxford University Press, Oxford 2010) 232–234; David Anderson and Cian C Murphy, 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds.), *EU Law after Lisbon* (Oxford University Press, Oxford 2012) 155, 162–163.

EU principle of effective legal protection in Art. 47 CFR does not only address the Member States but also the institutions of the Union itself.[3] Thus, while the EU and its Member States are bound by the principle of effective legal protection, the ECtHR is itself not bound by this principle. The following matrix applies:

*Table 19.1* Interrelations of different European principles of effective legal protection

| | *ECHR Principle (Art. 6, 13 ECHR)* | *EU Principle (Art. 47 CFR)* |
|---|---|---|
| Domestic Level | x | x |
| EU | x | x |
| ECtHR | – | – |

The ECtHR, however, has to consider questions of its own effective legal protection in its case law to ensure its own credibility. The ambivalence of the extreme increase in court cases and the duration of court procedures on the one hand and effective legal protection on the other hand is challenging the possibilities of the ECtHR. Court procedures like the pilot judgment procedure help to find solutions to this dilemma. Moreover, the effectiveness of the ECtHR also depends on the enforcement of the judgments, which is facing problems of the effectiveness of international law in general. The ECtHR has to be understood as a Court between the international law system and the system of the EU. It, remains, however, a court of international law and ultimately depends on the willingness of the Member States to comply with the case law of the court.

### *1.2 A European principle regarding domestic procedures*

The Union and the ECHR system have created a complex system to strengthen effective legal protection in the Member States. Both supra-/international orders have developed procedural standards of legal protection: first and primarily by the dynamics of the case law of the courts and second by additional amendments of and additions to the relevant treaties. The examples of the latter are relevant, though not as important to the overall developments.[4] Protocol No. 7 of the ECHR, for example, introduced further procedural rights, especially the right to appeal in criminal matters, which might also affect criminal procedures in administrative law. The Lisbon Treaty did declare the CFR as obligatory, thus reforming the fundamental rights system of the EU.[5] Art. 47 CFR dispensed with all the restrictions of Art. 6 ECHR and its different scope and concept to Art. 13 ECHR. The result is an impressively comprehensive concept of effective legal protection in Art. 47 ECHR, which applies in the scope of EU law in the Member States.[6]

3 See also Art. 41 CFR; Klara Kanska, 'Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights' (2004) 10(3) *European Law Journal* 296–326.

4 See Breuer in this book.

5 Paul Craig, *The Lisbon Treaty – Law, Politics and Treaty Reform* (Oxford UniversityPress 2010) 193–245.

6 See Pekka Aalto et al., 'Art. 47 – Right to an Effective Remedy and to a Fair Trial' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1197, 1209–1210.

The case law of the courts, however, has created crucial dynamics to establish important elements of the principle of effective legal protection. Over the decades, the ECJ and the ECtHR have developed – within their own legal framework and regarding their role and function as supra-/international courts in a transnational legal system – a particular approach towards legal protection.[7]

Görisch analyses in his paper how the ECJ developed the principle of effective legal protection in its case law.[8] Starting with the Johnson case,[9] the Court developed several substantive elements of the principle, including the right to access to a court, especially on a domestic level, as well as basic standards of court procedures, including binding effects of judgments, the duration of court procedures, liability claims, etc.[10] The Court granted not only the rights of individuals to gain access to legal protection (by the principle of equivalence and effectiveness),[11] but affected and shaped procedural and institutional settings of certain Member States.

The ECtHR followed a two-fold strategy regarding Art. 6 and Art. 13 ECHR. While Art. 6 ECHR is dominant in the case law of the EctHR,[12] Art. 13 ECHR has also contributed to the overall understanding of effective legal protection in the context of the ECHR.[13] Both Articles, however, include significant restrictions, especially when it comes to administrative law. The ECtHR, however, has tried to overcome certain limitations (e.g regarding the right to an administrative act within a reasonable time). The case law of the Court, moreover, includes the right of access to a court, right to intervention, suspensive effects, execution of national judgments, and locus standi of persons no longer affected or state liability.

In a comparison of the legal starting points of two different courts in Europe (ECJ and ECtHR), the case law shows different characteristics due to the divergent legal basis and reasoning of the courts. While the ECtHR follows a rights-based perspective, the ECJ primarily follows a rule of law-based argumentation with regard to the concept of a 'general principle of EU law'.[14] At least some convergent developments can be identified when it comes to certain procedural standards. As Breuer points out, the ECJ referred explicitly to the ECHR regarding the principle of effective legal protection.[15]

In conclusion, the emerging and increasing scope, intensity and details of the principle of effective legal protection can be traced in the jurisprudence of the European Courts. It had different effects on the domestic developments of legal protection, though these effects were significant, at least in certain jurisdictions.[16] It can

7 See Chapter 3.
8 See Görisch in this book; see also Deok Joo Rhee, 'The Principle of Effective Protection. Reaching Those Parts Other [Principles] Cannot Reach' (2011) 16 *Judicial Review (JR)* 440–457.
9 ECJ, Case 222/84 – *Johnston* [1986] ECR 1651.
10 Anthony Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 *EL Rev* 51–70.
11 See Takis Tridimas, *The General Principles of EU Law* (2nd edn., Oxford University Press, Oxford 2006) 424–427.
12 See B Rainey, E Wicks and C Ovey, *Jacobs, White & Ovey The European Convention on Human Rights* (6th edn., Oxford University Press, Oxford 2014) 278.
13 Ibid. 141.
14 See Tridimas (n. 11).
15 See Breuer in this book; Case 50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para 39.
16 See Chapter 3.

be assumed that the case law of the two courts will remain dynamic, when upcoming challenges have to be resolved by an adaption of the principle of effective legal protection.[17]

### *1.3 A European principle regarding European procedures*

Besides the relevance of the European principle of effective legal protection for the Member States of the European Union, the other dimension of the principle is directed at the European institutions themselves. While the principle of effective legal protection is not binding for the ECtHR, the Union's institutions are bound by the case law of the ECJ regarding effective legal protection, as well as by the ECHR and the CFR, which again refers back to the ECHR, but also accedes it in its scope of effective legal protection. The ECtHR itself, however, restricted itself with the *Bosphorus* jurisdiction to the further review of EU law. It is thus up to the ECJ to guarantee the principle of effective legal protection according to its own case law, the CFR and the ECHR in the Union.

The discussion of the accessibility of the ECJ itself is also part of the debate of the principle of effective legal protection, as Görisch points out.[18] The significant restrictions – also imposed by the ECJ itself – might be legitimate to a certain extent, as domestic courts primarily guarantee the effectiveness of legal protection in EU law. The limited possibilities to gain legal protection against administrative action of EU agencies or institutions remain relevant.[19] Moreover, the EU Treaties limit the scope of jurisdiction of the ECJ to a certain extent.[20] The application of the principle of effective legal protection, therefore, does not seem to reach the same intensity at the Union level in comparison to the requirements of the ECJ regarding the Member States.[21]

Finally, the ECJ is not entirely opposed to other concepts or principles of EU law to establish effective legal protection when the Court is reviewing EU legislation. In the context of the European Arrest Warrant, the ECJ has limited the possibilities of legal protection due to the principle of mutual recognition.[22] The Court does not only strengthen effective legal protection, therefore. While the Court lays great emphasis on effective legal protection to promote EU legislation in the Member States,[23] it is more reluctant to strengthen effective legal protection, especially in cases in which effective legal protection would interfere with other interests or concepts in the EU legislation.[24]

17 See Chapter 4.

18 See Görisch in this book.

19 But see the possibilities of Art. 277 TFEU.

20 See e.g. Art. 275, 276 TFEU.

21 See in legal comparison to the US in the context of administrative rulemaking, especially regarding the European Commission Alexander H Türk, 'Oversight of Administrative Rulemaking: Judicial Review' (2013) 19(1) *European Law Journal* 126, 142.

22 Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism"' (2015) 9 *Vienna Journal on Constitutional Law* 151, 175–176

23 See Alec Stone Sweet, 'The European Court of Justice' in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law* (2nd edn., Oxford University Press, Oxford 2011) 121, 149–151.

24 Craig, however, characterises the ECJ – in comparison to US and Canadian courts – as a court which is influenced by civil law tradition, which tends to reduce the independence of administration or administrative agencies. See Paul Craig, 'Judicial Review of Questions of Law: A Comparative Perspective'

## 2 International perspectives on effective legal protection

### *2.1 Effective legal protection and the international rule of law*

Unlike in European Law, the role of the principle of effective legal protection is neither crucial nor central in international law. The traditional paradigm, which is not based on the involvement of individuals, gives states other possibilities for managing conflicts, for example in the context of state responsibility.[25] This does not mean that there are no institutional and procedural possibilities available to claim rights. On the contrary, the ICJ as a starting point shows the possibilities to resolve conflicts in international law using legal procedures. Before approaching questions of effectiveness, the challenges of legal protection have to be addressed. Legal protection in international law is deeply linked to the development of an international rule of law.[26] While it is an ongoing process to strengthen the rule of law in international law and to expand different approaches, these developments are confronted with several setbacks and loopholes.[27]

The dynamics towards an international rule of law, therefore, are not so much linked to the uniform structures of international law[28] as to the decentralised and fragmented[29] character of international law. Different international treaty regimes and international organisations have established, especially in the last 25 years, manifold concepts of legal protection or quasi-court structures. Obviously these developments primarily address inter-state situations. International Economic Law[30] and the role of the WTO dispute settlement bodies can serve as an example.[31]

The role of legal protection in international law can and also must be seen in the context of the increasing role of the individual in international law. Different areas of international law not only address the individual but also integrate individuals formally – at least to a certain extent – in international law.[32]

Two kinds of international involvement of individuals shall be distinguished here: the first group refers to forms of international law which promote rights of individuals against states; the second group includes the cases in which international law

in Susan Rose-Ackerman and Peter L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar 2010) 461–462.

25 See Anthony Aust, *Handbook of International Law* (2nd edn., Cambridge University Press, Cambridge 2010) 386–395.

26 See e.g. Jeremy Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law & Public Policy* 15–30; Simon Chesterman, An International Rule of Law? (2008) 56 *American Journal of Comparative Law* 331–361.

27 See a critical approach in Ugo Mattei and Laura Nader, *Plunder – When the Rule of Law Is Illegal* (Blackwell Publishing 2008).

28 See e.g. the UN Charter or the Vienna Convention of the Law of the Treaties.

29 See Martii Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 April 2006 (available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf).

30 See regarding the interrelation between European courts and the WTO Francis Snyder, *The EU, the WTO and China – Legal Pluralism and International Trade Regulation* (Hart Publishing 2010) 152–208.

31 See Andreas Paulus, 'International Adjunction' in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, Oxford 2010) 207, 214.

32 See Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge Universit Press 2013).

addresses the individual as a threat or at least as a person affected by international law enforcement.

The first field of reference is obviously international human rights protection and all forms of courts which give individuals the possibility to file a complaint against human rights violations by states. The European human rights system is not only the most relevant one,[33] but also a model for other human rights bodies in international law.[34] As it is discussed in this article, the principle of effective legal protection is promoted by the ECtHR regarding proceedings in the Member States; it is, however, only of limited relevance when it comes to the European human rights system itself. Although the European standards of international human rights protection are significant – in comparison to other regional human rights systems – it still remains a challenge to strengthen effective legal protection on a European level.[35] The situation becomes even more problematic with regard to other regional human rights systems and finally ends at the point where other human rights systems do not provide any legal protection for individuals at all. At that point, human rights protection remains within traditional concepts of international law and does not includes individuals. Thus, the legal protection is not guaranteed.

Another example of this first group are bilateral investment treaties (BITs).[36] The protection of transnational investments in international law has developed significantly in the last 30 years and created a new field of legal protection for international corporations to protect their investments. The protection of the right to property in the context of BITs might be the most effective legal protection of individuals in international law. It does not grant protection to the whole population, but usually only to wealthy and powerful transnational corporations. It features some characteristics of international law, which still depends on the power of states and other actors in international law. Legal protection in general and the effectiveness of legal protection in particular are best guaranteed in cases in which the persons concerned have significant influence themselves or come from powerful states which support the effectiveness of legal protection. In this context, the dual standards of effective legal protection as a principle of international law become obvious.

The second aspect of involving individuals in international law treats them as a potential threat to international law, addressing them in a negative sense. One example – as illustrated by Stephan Wittich[37] – in this book refers to international counter-terrorism by the UN Security Council's Sanctions Committees.[38] The opportunities of the individuals to get any form of legal protection in the context of international counter-terrorism measures are quite limited. It is remarkable that the UN Security Council has reacted at all and that it has at least improved the overall

33 See regarding the interrelation between the ECtHR and public international law in general C. Binder and K. Lachmayer (eds.), *The European Court of Human Rights and Public international Law: Fragmentation or Unity?* (Facultas 2014).

34 See e.g. the Inter-American Court of Human Rights.

35 Pal Wenneras, *The Enforcement of EC Environmental Law* (Oxford University Press, Oxford 2007).

36 See Anthony Aust, *Handbook of International Law* (2nd edn., Cambridge University Press, Cambridge 2010) 344–353.

37 See Wittich in this book.

38 See https://www.un.org/sc/suborg/.

situation with the establishment of the Office of the Ombudsperson.[39] Although it is not possible to speak of legal protection in a narrow sense, the first steps in the direction of legal protection have been taken.

Another example in which proper legal protection in a narrow sense is missing are so called peace-keeping or police missions in post-conflict situations. Individuals in these examples are not treated as terrorists or criminals, but are affected by international law enforcement as regular citizens. Their possibilities to gain legal protection are quite limited, if at all existent. Usually, international forces or police officers have certain forms of immunities and legal protection is only guaranteed transnationally in the country where the international soldier or officer comes from or internationally, for example, by the ECtHR. In a similar way to the establishment of the UN Ombudsperson in the context of the sanction committee, the EU Police Mission in Kosovo established a Human Rights Review Panel[40] as a quasi- or pseudo-court system, which does not grant legal protection, but does at least create some sort of accountability and transparency.

Finally, the concept of International criminal law, especially the establishment of the ICC and other *ad hoc* courts, shall be mentioned.[41] In the context of accusing influential and powerful political figures of crimes, for example against humanity, a highly elaborate procedure has been established. The legal protection of powerful persons – although accused of terrible crimes – is very effective[42] by international standards.

In conclusion, the first and biggest challenge in international law is the establishment of any legal protection for individuals at all under an international rule of law. Only if this first major step is accomplished in a particular part of the fragmented system of international law can the second step regarding the effectiveness of legal protection come into consideration. The effectiveness is often limited due to the overall concept of international law[43] and is usually only improved in cases in which the international power of states and the interests of legal protection converge.[44]

### *2.2 Effective legal protection in global administrative law and global legal pluralism*

The Global Administrative Law (GAL) approach[45] is one of several different paradigms to address the developments in international law. An interesting element of the GAL approach is the attempt to develop an administrative law understanding in international law, which includes analysis of international law based on rule of law. Insights from GAL provide new structures and concepts of international law and include the institutional and procedural perspective of international law. The whole approach as such is promoting an

39 See https://www.un.org/sc/suborg/en/ombudsperson.

40 See http://www.hrrp.eu/.

41 Ian Brownlie, *Principles of Public International Law* (7th edn., Oxford University Press, Oxford 2008) 587, 604.

42 Which is necessary to provide the legitimacy of these procedures.

43 See Tom Bingham, *The Rule of Law* (Penguin Books 2010) 110–119.

44 See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge 2004) 127–136.

45 See B. Kingsbury, N. Krisch and R. B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61.

understanding of international law, resulting in the promotion of legal protection. It is part of the logic of its 'administrative' understanding of international law, which provides the necessary institutional and procedural preconditions for effective legal protection. Based on a GAL approach, a rights-based perspective of effective legal protection can be set up to identify existing elements of legal protection and to develop new concepts of legal protection to promote its effectiveness in international law.

Another important approach towards international developments of law is Global Legal Pluralism,[46] which not only focusses on international law, but also on the different layers of law between public and private law, as well as domestic, transnational and international law. The insight from Global Legal Pluralism into the principle of effective legal protection does not have a one-dimensional perspective of the possibilities of legal protection. Legal protection might be guaranteed not only on different levels in a legal multi-level system, but also in different legal procedures. Moreover, Global Legal Pluralism clarifies that new challenges for the effective legal protection of domestic administrative law might arise from different actors or legal concepts, including international standard-setting bodies, transnational corporations or subnational autonomous regions.[47]

In conclusion, both approaches promote the increasing, methodological approach of comparative international law,[48] which is not only integrating international law in comparative legal efforts, but also using comparative legal methods to address the interrelation between the different legal regimes of international law established by different international treaties or international organisations. This comparative report also follows this strategy to create a more comprehensive understanding of the principle of effective legal protection.

### *2.3 The interrelation between European law and international law*

A specific perspective of the principle of effective legal protection can be analysed due to the interrelation between international law and European Union law. The ECJ has increasingly defended its own rule of law regarding international law. It is worth evaluating two examples in this regard: first, the *Kadi* case; secondly, the EU's accession to the ECHR.

In the *Kadi* case, the ECJ[49] argued for the independent evaluation of EU legislation with regard to international law in a dualistic approach. Kokott/Sobotta[50] summarised

46 See Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, Cambridge 2014).

47 See Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 6 *Comparative Research in Law & Political Economy Research Paper* 01/2010 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542907).

48 Ugo Mattei and Boris N. Mamlyuk, 'Comparative International Law' (2011) 36 *Brooklyn Journal of International Law* 385–452. Martii Koskenniemi, 'The Case for Comparative International Law' (2009) 20 *Finnish Yearbook of International Law* 1–8; Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57–92.

49 Case C–402/05 P and C–415/05, *P. Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351.

50 Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 *European Journal of International Law* 1015–1024.

the crucial argument as follows: 'Its central argument was that the protection of fundamental rights forms part of the very foundations of the Union legal order. Accordingly, all Union measures must be compatible with fundamental rights. The Court reasoned that this does not amount to a review of the lawfulness of the Security Council measures. The review of lawfulness would apply only to the Union act that gives effect to the international agreement at issue and not to the latter as such.'[51] The Court relates to the core of the principle of effective legal protection as the *Kadi* was not granted the guarantees of judicial protection. The EU defended its autonomy to enable the rule of law in general and the principle of effective legal protection in particular. The EU/international law relationship shows that effective legal protection cannot be understood in a one-dimensional way by looking at only one level in a multi-level network of legal systems, but must be established by the specific interrelation of systems. While international law might not be able to grant effective legal protection, other legal orders might provide – at least regionally – a certain amount of legal protection.

In an overall evaluation of the EU/international law relationship, the complete opposite to the previous example is also possible. When the EU fails to provide effective legal protection in a EU police mission outside the territory of the European Union, it might be an international court, like the ECtHR, which could provide effective legal protection to the individuals concerned. This insight into the strengths of a multi-level system also refers to the interrelation between the ECHR and its Member States. It is necessary to create an international mechanism for legal protection to contribute to effective legal protection in the domestic legal order. It 'did not suffice to leave protection of fundamental rights to national constitutions'.[52] It is, however, also necessary to understand that the opposite argument is also valid. It is not possible to fully rely on the effective legal protection of international human rights mechanisms like the ECtHR, for example, due to the length of procedures, but it is primarily necessary to strengthen effective legal protection by national constitutions and domestic courts.

The second example regarding the interrelation between the EU and international law refers to the accession of the Union to the ECHR.[53] The ECJ defended in its Opinion 2/13[54] the autonomy of EU law, like in the *Kadi* case but under different circumstances regarding the rule of law and the principle of effective legal protection.[55] While in the *Kadi* case, the rule of law was under threat, the accession of the EU to the ECHR can be understood as strengthening the rule of law and the principle of effective legal protection. The ECJ was much more defending its own European (judicial) rule of law, which would have been significantly changed by the accession to the ECHR. The general insights of the example are from a pro-EU perspective that it might sometimes be necessary to avoid too close interrelations in the multi-level system to uphold the internal concept of the rule of law. From a more sceptical

51 Ibid. 1016.

52 See Breuer, in this book.

53 See Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' (2015) *Jean Monnet Working Paper* 01/15 (available at www.JeanMonnetProgram.org).

54 Opinion 2/13 of the Court delivered on 18 December 2014.

55 See Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights' (2015) 16 *German Law Journal* 105.

perspective, one might argue that the strengthening of effective legal protection on a European level was prevented by prohibiting an accession to the ECHR.

## 3 The influence from an international/European level on the Member States

### *3.1 The relevance of the European Union*

The relevance of EU law to the principle of effective legal protection in the Member States is highly divergent.[56] While some Member States like Germany, Austria or Italy are highly influenced in their administrative (procedural) law, other states are only affected by certain EU secondary laws, for example public procurement law, environmental law,[57] data protection or antitrust law (e.g. the Netherlands, Denmark or Spain).[58] Finally, in some Member States, the EU's principle of effective legal protection does not seem to have any significance at all. The reasons for this non-relevance of the EU in the context of administrative procedural law differ greatly. In the context of Spanish administrative law, the low level of legal education regarding EU law and the overall problematic situation of administrative procedural law also lead to a lack of application of or an ignorance towards EU law's principle of effective legal protection. In contrast to this, the relevance of EU law in the Danish case seems to be very small due to the fact that the Danish system of legal protection is highly developed and EU law has not created the necessity to change the overall system.

This short analysis can be furthered by looking at the different parts of effective legal protection presented in this book. The principle of effective legal protection relates to different perspectives, including the institutional and procedural perspective as well as a rights-based perspective. The influence of EU law can be distinguished as illustrated in the following matrix:

*Table 19.2* Influence of EU law on the domestic principle of effective legal protection

| | *High influence* | *Specific influence* | *Minor/No Influence* |
|---|---|---|---|
| Institutional Design | Austria, Lithuania | | Hungary, France |
| Procedure | Germany, The Netherlands, Poland | Denmark (Data Protection); Spain (Public Procurement); Slovenia (Public Procurement); France (Data Protection) | Hungary |
| Rights-based | Italy, United Kingdom | France (Legal certainty; Foreigners' rights) | Denmark, Hungary |

56 John S. Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford 2006) 1259, 1281.

57 Pal Wenneras, *The Enforcement of EC Environmental Law* (Oxford University Press, Oxford 2007); see also Ulrike Giera, *Individualrechte im europäischen Umweltrecht* (facultas 2015).

58 Arnull (n. 10) 51, 63–68.

Moreover, it is interesting to observe the relevance of the principle of effective legal protection in European states that are not EU members, like Switzerland or Macedonia. On the one hand, Swiss law is highly affected by EU law, because of the independent decision to adopt EU law in Switzerland *(autonomer Nachvollzug)*;[59] on the other hand, Switzerland is not committed to an accession to the Union.[60] On the contrary, recent political developments have tended to widen the distance between Switzerland and the Union. It is interesting that, in the context of effective legal protection, the case law of the ECJ seems not to affect Swiss administrative procedural law. In contrast to this ambivalent situation in Switzerland, the role of EU law in Macedonia, as a state which aims to accede the Union (candidate country), is different. In comparison to Switzerland, however, the level of effective legal protection in Macedonia is much lower and still requires a lot of improvement to comply with European standards.[61]

### *3.2 The relevance of the European Convention of Human Rights*

The ECHR introduced a rights-based approach in contrast to the broad and different conceptual legal approaches of EU law. However, the ECHR cannot be limited to its impact on individual rights in domestic law, and also affects institutional design and procedural law, which also affects administrative law.[62] In comparison to the impact of EU law, it can be observed that the role of the ECHR varies in the different Member States. The focus on human rights is strengthening the system; the ECHR, however, is part of international law and is not automatically part of the domestic legal system like certain legislation of the Union. Thus, the legal significance also depends on the role of the ECHR in the particular legal system. The Austrian integration of the ECHR as national constitutional law is an exemption; other countries, like Switzerland or the UK, also give the ECHR a particular role in their legal systems. Usually, the ECHR is applied in a similar way to statutory law. The role of the ECHR, however, not only depends on its legal status, but also on the specific domestic culture and attitude towards the European human rights system.[63]

The ECHR has created different constitutional effects. There has been broader influence in Austria or the UK on a constitutional level. In other countries, the ECHR has shaped specific provisions of the Constitution, such as in our context regarding the principle of effective legal protection (Art. 111 Italian Constitution, Art 45 Polish Constitution or Art 25 Slovenian Constitution). In other countries, like Germany, the impact cannot be observed in a textual dimension of the constitution, but in a substantive perspective of reasoning by the court.

59 See Uhlmann in this book.

60 See e.g. Melissa Eddy, 'Swiss Voters Narrowly Approve Curbs on Immigration', 9 February 2014 *The New York Times* (available at http://www.nytimes.com/2014/02/10/world/europe/swiss-voters-narrowly-approve-curbs-on-immigration.html?hp&_r=0).

61 See Gordana Siljanovska-Davkova and Renata Treneska-Deskoska in this book.

62 See Niels Fenger, 'New Challenges for Administrative Law Theory' in Anna-Sara Lind and Jane Reichel (eds.), *Administrative Law Beyond the State – Nordic Perspectives* (Martinus Nijhoff Publishers 2013) 120, 128–133.

63 See Dean Spielmann, 'Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe' in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford 2012) 1232–1252.

The following matrix illustrates the substantive influence of the ECtHR's case law towards the principle of effective legal protection:

*Table 19.3* Influence of the ECtHR on the domestic principle of effective legal protection

| | *High influence* | *Certain influence* | *Minor/No Influence* |
|---|---|---|---|
| Institutional Design | Austria, The Netherlands | Macedonia, France (Position of the 'general counsel'; Only the 'sitting' judge can bring effective guarantees for the protection of individual freedoms) | Denmark, Hungary, Switzerland |
| Procedure | Poland, The Netherlands, United Kingdom | Germany, Macedonia, France (Judgments within a reasonable time) | Denmark |
| Rights-based | Austria, France (Art. 6–1 and 13 ECHR + case law of the ECtHR), United Kingdom, Slovenia, Lithuania | Switzerland | Denmark, Spain |

Art. 6 ECHR can be understood as a core complex of rights within the system of the ECHR and is very important when it comes to the principle of effective legal protection. The provision stands out in its importance in the case law of the Court.[64] Although Art. 6 ECHR is relevant for domestic administrative law, it is, however, limited in its scope with regard to 'civil rights and criminal charges'. On the one hand, the different scope and concepts regarding Art. 6 and Art. 13 ECHR[65] have broadened the significance of the ECHR regarding effective legal protection; on the other hand, the limits concerning the principle of effective legal protection have become clear and show the potential of further developments, which are fulfilled almost completely by Art. 47 CFR. The effects of the CFR on the application of the ECHR in the Member States of the EU will show how the CFR can contribute to further developments of the principle of effective legal protection.[66]

### *3.3 Conclusion*

The influence of supra-/international legal orders on domestic law does not follow a coherent structure. On the contrary different forms of influences on European states

64 See Breuer in this book.

65 See Tanja Vospernik, 'Das Verhältnis zwischen Art 13 und Art 6 EMRK – Absorption oder "Apfel und Birne"?' (2001) 56 *Österreichische Juristenzeitung* 361.

66 The scope of the CFR, however, is limited to the scope of application of EU law. Thus, a certain field remains which will neither be covered by the principle of effective legal protection in EU law nor by the case law of the ECtHR according to the ECHR.

can be identified with regard to different European legal orders (EU law, ECHR). It might seem to be worth applying Vicki Jackson's concept of the role of the transnational in Supreme or Constitutional Courts in the context of the impact of different administrative legal orders too. Jackson differentiates between three modes: 'engagement, convergence, resistance'.[67] When it comes to the impact of the case law of the ECJ or the ECtHR regarding effective legal protection, European states tend to develop differently.

It is, moreover, necessary to mention that the attitude towards EU law and the ECHR might differ for different reasons; but in most cases the overall approach of each Member State will not differ as much as expected. If one takes the German example into consideration, for instance, one might identify a general acceptance of EU law as well as ECtHR case law, but in both cases it is possible to observe the German approach to uphold its own constitutional identity and not to accept all developments, but rather establish and consider certain limits due to the domestic constitutional system.[68] Another example might be the Hungarian approach, which is characterised by general scepticism towards European developments and tries to reject judgments of the ECtHR or legal requirements of EU law.[69] In this case, EU law might be relatively more able to achieve compliance and such convergence of developments.

The first group of states usually accept the developments on a European level. They change their constitutions, apply case law – even if they have not been directly affected by the concrete case – and implement new structures in their procedures due to European requirements. Moreover, and maybe most important, they also grant at least a certain level of effectiveness to legal protection. Effective legal protection cannot be achieved by statutory provisions alone but also have to be reflected in court judgments as well as by the administration's whole legal culture of applying the law. Effective legal protection has to show not only legal but also real implications. The reasons for engaging in European developments of effective legal protection might be different, but will often reflect an open attitude towards European legal orders. Engaging in the process does not exclude a strong domestic constitutional identity. Although the UK legal system can be understood as engaging in the European legal order and applies the principle of effective legal protection domestically, political resistance there against the European Union (and its law) as well as against the ECHR and the case law of the ECtHR is increasing. The overall situation might change rapidly if new political developments lead to a new approach within the UK legal system.

The second group of states might accept convergence with European developments of effective legal protection. This group includes different countries: some states might have constitutional provisions, but cannot provide full effective legal protection due to the legal culture or legal education of practitioners in the country (Italy might be an example); other countries, like Denmark, apply effective legal

67 Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, Oxford 2010) 17–102.

68 See Diana zu Hohenlohe-Oehringen in this book.

69 Gábor Halmai, 'An Illiberal Constitutional System in the Middle of Europe' in W. Benedek, F. Benoit-Rohmer, W. Karl, M. C. Kettemann and M. Nowak (eds.), *European Yearbook on Human Rights* (NWV Verlag 2014) 497–514.

protection to a significant extent, but do not refer to European principles or change their own legal system, while still fulfilling European requirements. In both cases, a certain form of convergence can be observed.

Finally, a small, third group of states resist European standards of effective legal protection. Again, different possibilities exist: one is the Hungarian example, which is step by step developing away from effective legal protection in a European sense, though an end to participation in the system of European rule of law cannot be observed. The relevance of the European principle of effective legal protection is certainly on the decline.[70] Another example might be states which cannot live up to the institutional, procedural or rights-based standards of the European principle of effective legal protection. They might not be explicitly resisting the European system, but they still fail to comply significantly, which also creates a major lack of compliance. One example might be Macedonia, which is not part of the Union; certain elements in the Spanish legal system also point in the direction of resistance instead of convergence.

In conclusion, it is possible to distinguish different intensities of influence of the European principle of effective legal protection in domestic jurisdictions around Europe. Political developments in the Member States of the Union (e.g. UK or Hungary) clearly show the fragile political situation around Europe. The overall level of effective legal protection reached in Europe does not seem to be guaranteed in the next years or decades. On the contrary, it will be up to the relevant persons and institutions in each legal system to maintain the standards of effective legal protection already reached. From a pessimistic perspective, a decline of the standards seems more probable than an improvement over the coming years;[71] from an optimistic perspective, it will be necessary to increase efforts to keep certain standards of effective legal protection at the same level.

## 4 Effective legal protection in a multi-level system

### *4.1 Complexity and heterogeneity*

As effective legal protection depends on so many different elements, like institutional design, for example, of courts, procedural concepts and guarantees, as well as individual rights, the scope of effective legal protection is already complex within one legal system. If one tries to identify the principle of effective legal protection in the multi-level system of global, European and (comparative) domestic governance,[72] two characteristics arise: complexity and heterogeneity. It would be an overly simple picture of the situation to claim a uniform concept of effective legal protection throughout the different legal orders. On the contrary, one can identify complex structures and interrelations.[73] The interplay of international, European and domestic law again

70 Ibid.

71 See e.g. the refugee crisis and the reduced number of countries which can still be considered as secure states.

72 See regarding the multi-level network in administrative law Henrik Wenander, 'A Toolbox for Administrative Law Cooperation Beyond the State' in Anna-Sara Lind and Jane Reichel (eds.), *Administrative Law Beyond the State – Nordic Perspectives* (Martinus Nijhoff Publishers 2013) 47–75.

73 S Boyron and W Lacey, 'Procedural Fairness Generally' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law* (Routledge 2013) 259, 272.

cannot be characterised by a uniform concept, but has to be studied and analysed individually. This task is a crucial purpose of this book project in general. The interrelation between for example Hungarian administrative law and Art. 6 ECHR has to be viewed completely differently from the correlation between UK administrative law and the very same provision of the ECHR. The link between the ECHR and EU law in general and the CFR in particular is another example of this complex network. The complexity of the interrelation becomes even more demanding when one takes into account that the interrelations are not static but dynamic, thus always changing due to new case law and statutory law. It does not seem to be possible to grasp the full picture at one moment, while legal dynamics are already continuously shifting the interrelations.

It is, however, possible to make some conclusions on the principle of effective legal protection within these complex and heterogeneous interrelations. First, the overall rising importance of effective legal protection shall be mentioned. Although in different states (like in Spain, Macedonia or Hungary) there is still a long way to go to establish legal protection, the overall importance is on the rise. Secondly, European legal concepts are shaping and affecting legal orders in the context of effective legal protection, although not all European states are doing so in the same way. Thirdly, effective legal protection is becoming a more differentiated and sophisticated concept, systematically including more and different kinds of elements with regard to its institutional, procedural and rights perspectives. Fourthly, when it comes to European law itself and even more so with international law, the level of effective legal protection (although exceptions exist) cannot usually be compared to effective legal protection within most European states, which provides a much more complex, broader and deeper concept of effective legal protection. This situation seems legitimate in the context of a multi-level system because the complexity and intensity of legal protection increases as the concept comes closer to the individuals concerned. As international and European law increasingly affect individuals themselves, it becomes necessary to deepen the concepts of effective legal protection on an international and European level. Fifthly, the example of the ECtHR gives an interesting insight into effective legal protection in general. If legal protection becomes effective, the applications of individuals will rise (in the case of the ECtHR dramatically); this effect, however, has the potential (as the example of the ECtHR illustrates) to endanger the effectiveness of legal protection once again. Thus, there is a major attempt to open up the possibilities of legal protection as widely and as effectively as possible, but this optimising of legal protection will lead to a huge number of proceedings, which cannot be dealt with in the end. The challenge thus remains to ensure that a legal system which provides effective legal protection remains efficient.

### *4.2 Effectiveness and flexibility*

If one tries to identify the relevant parameter for successful effective legal protection, it is necessary to understand that the principle of effective legal protection cannot remain identical – despite the differences in the particular legal systems.[74] If legal protection is to remain effective, it has to change. As legal orders are highly dynamic

74 See critical in this regard Arnull (n. 10) 51.

for different reasons, for example political developments, technological progress or legal globalisation, the principle of effective legal protection has to adapt to be able to guarantee the same level of legal protection.

The history of the development of effective legal protection clearly shows the adaptation to different challenges. First, the effectiveness has to be observed as a particular element. It is not enough to grant legal protection, which was already a historic achievement over the centuries, and it is necessary to create effectiveness within the institutional and procedural design. The case law of the ECtHR, as well as the case law of the ECJ, illustrates how the courts have developed step by step the principle of effective legal protection. Effective legal protection in the EU also means to deal legally with development in international law. The ECJ has shown in the *Kadi* case that it is necessary to clarify the interrelation between international law and European law to uphold a European rule of law. The same applies on a national level. If domestic courts are challenged with international or European law, they have to create new legal techniques within national law to grant effective legal protection.

This challenge to effective legal protection will remain in the future. The principle of effective legal protection has to be like a chameleon, adjusting and changing to stay relevant. It is first of all the task of the courts to interpret the principle of effective legal protection in a dynamic way to address the upcoming challenges of effectiveness of legal protection. The challenges for the concept of effective legal protection also depend on the position of the court within the multi-level system. Thus, the principle of effective legal protection cannot and shall not have the same contents when it is addressing different courts and different procedures on different levels in the multi-level system. Finally, it is also a responsibility of the legislator to consider reforms of the institutional and procedural design to make effective legal protection possible.

### *4.3 Permanent performance of legal protection as a basis of the rule of law*

One might identify different foundations of the rule of law: for example the principle of legality (as an expression of legal certainty),[75] law and order (as an expression of legitimacy)[76] or the principle of proportionality (as an expression of human rights).[77] Obviously, it is possible to develop different perspectives on the rule of law; all the perspectives mentioned have certain elements of relevance, which can be identified in each legal system (to a greater or lesser extent depending on the legal culture). It seems within the territorial scope of Europe[78] that in our times[79] effective legal protection forms the core of a rule of law.

75 This could be described as a typically Austrian approach. See e.g. H. Mayer, G. Kucsko-Stadlmayer and K. Stöger, *Grundriss des österreichischen Verfassungsrechts* (11th edn., Manz 2015) para. 165, 569–574.

76 See regarding the law and order aspect of the rule of law, e.g. A. W. Bradley and K. D. Ewing and C J S Knight, *Constitutional and Administrative Law* (16 edn., London, Pearson 2014) 95–96.

77 David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, Oxford 2005) 159–188.

78 In other parts of the world, the establishment of the independence of the judiciary or the guarantee of the principle of legality or the foundation of social justice might be a core element of the rule of law debate.

79 If one looks back in legal history, it becomes obvious that other principles like the overall establishment of a human rights system have formed the focus of the dynamics of the rule of law.

Effective legal protection as a fundamental perspective of the rule of law unifies questions of independence of courts, individual access to courts, fair trial and further functions of legal protection, such as ensuring the objective monitoring of the compliance of the administration regarding statutory law. The principle includes perspectives regarding the institutional and the procedural design as well as a rights-based perspective. If one tries to identify how the rule of law principle is doing in the legal order, it seems necessary to look at the principle of effective legal protection to see if the courts are working.

Only a permanent performance of legal protection creates the necessary fundament for the rule of law in the multi-level system in Europe today. Although we have seen that the principle of effective legal protection is characterised by complexity and heterogeneity in the different legal orders, it is the flexibility of the principle of effective legal protection which makes it possible for the rule of law to remain relevant in changing legal systems in global governance.