

<i>Contents</i>	v
-----------------	---

Foreword	
Paolo Carrozza	1

SECTION I

CHAPTER 1	National Judges and Supranational Laws: Goals and Structure of the Research	
	Giuseppe Martinico	7
I	Aims of the Research	9
2	Constitutional Variety: The Formal Parameter	11
a)	A First Look at the Relationship between the ECHR and National Laws	11
b)	A First Look at the Relationship between EU and National Laws	14
3	Final Remarks on the Research Findings	17
CHAPTER 2	National Judges and Supranational Laws. On the Effective Application of EU Law and ECHR	
	Giuseppe Franco Ferrari	21
CHAPTER 3	The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges facing the European Court of Human Rights	
	Robert Harmsen	27
I	The Shifting Geography of the Strasbourg System	30
2	Mapping National Situations	32
2.1	Established Democracies	33
2.2	(Post-) Transition States	35
2.3	States Exhibiting Serious Structural Difficulties	39
3	The Opportunity Structures of Human Rights Implementation	44
3.1	The Risse and Sikkink ‘Spiral Model’ of Human Rights Change	45
3.2	NGOs	46
3.3	National Judiciaries	47
4	Conclusion	50

SECTION II

CHAPTER 4	Report on Austria and Germany	
	Philipp Cede	55
1	Introduction	57
2	Legal Parameter: Rank of EU Law, EU-Based Amendments, Constitutional Limits to Primacy of EU Law	57
2.1	Germany	57
2.2	Austria	60
3	Rank and Impact of ECHR Law and Case Law	62
3.1	Germany	62
3.2	Austria	63
4	Modification of the Constitutional Mandate of the National Court?	64
4.1	Germany	64
4.2	Austria	64
5	EU/ECHR Law as a Parameter for Constitutional Review of Norms?	65
5.1	Germany	65
5.2	Austria	65
6	Constitutional Court as Referring Court under Article 267 TFEU (ex Article 234 EC)	66
6.1	Germany	66
6.2	Austria	67
7	Enforcement of Article 267 TFEU through the Constitutional Courts	68
7.1	Germany	68
7.2	Austria	69
8	Procedural Consequences of ECtHR Judgments	69
8.1	Consequences <i>Erga Omnes</i>	69
8.2	Consequences <i>Inter Partes</i>	70
8.2.1	Germany	70
8.2.2	Austria	71
9	Procedural Consequences of ECJ Judgments	74
10	Conflict, Interpretation: EU and ECHR Law in the Application of Domestic Law	75
10.1	EU Law: Particular Interpretative Strength?	75
10.2	"So Far as Possible": The Boundary of Interpretation	77
11	Concluding Remarks	77

CHAPTER 5	Report on Belgium	
	Patricia Popelier	81
I.	The Normative Framework of EU and ECHR Law in Belgium	83
I.	Normative Framework Concerning the Relation National and Supranational Law	83
2.	Constitutional Amendments Induced by Supranational Law	85
II.	Supranational Law in the Case Law of the Belgian Courts	86
I.	Belgian Courts: An Introductory Overview	86
2.	Principle: A EU and ECHR Friendly Stance	87
3.	A More Reserved Tendency in the Case Law of the Constitutional Court	90
4.	Concurrence of Constitutional and Supranational Legal Questions	92
III.	Appraisal in Belgian Doctrine	94
IV.	Conclusion	96
CHAPTER 6	Report on Bulgaria	
	Maria Fartunova	101
I	Legal Parameter	103
2	Judicial Parameter	105
3	Academic Parameter	111
4	Conclusion	113
CHAPTER 7	Report on the Czech Republic and Slovakia	
	Michal Bobek and David Kosař	117
	Introduction	119
A	European Union Law	119
1)	The Legal Parameter: The Constitutional Bases for Domestic Application of European Union Law	119
2)	The Judicial Interpretations of the Legal Parameter: The Constitutional Cases Dealing with European Union Law	121
3)	Constitutional Courts and Preliminary Rulings	126
4)	The Judicial Parameter: Review of National Law on its Compatibility with European Union Law	129
B	Law of the European Convention on Human Rights	132
1)	The Legal Parameter I: The ECHR and Domestic Sources of Law	132
2)	The Legal Parameter II: The Effects of ECtHR's Decisions in the National Legal Systems	137
3)	The Judicial Parameter I: The ECHR before the Constitutional Courts	138

4)	The Judicial Parameter II: The ECHR before the Ordinary Courts	141
C	Conclusions	145
CHAPTER 8	Report on Cyprus Nikolas Kyriakou	151
I	Introduction	153
II	Legal Parameter	154
III	Judicial Parameter	156
i)	Doctrine of Necessity	159
ii)	A Look from ECtHR	161
iii)	An Uneasy Affair: EU Law and the Constitution	162
IV	Concluding Remarks	164
CHAPTER 9	Report on Estonia, Latvia and Lithuania Irmantas Jarukaitis	167
	Introduction	169
I	The Legal Parameter	170
II	The Judicial Parameter	176
II.1	The Case-Law of the Highest Courts of the Baltic States with Regard to the ECHR and EU Law	176
II.2	The Practice of Other National Courts Related to the ECHR and EU Law	194
	Conclusions	202
CHAPTER 10	Report on France Maria Fartunova	205
I	Legal Parameter	207
2	Judicial Parameter	210
3	Academic Parameter	218
4	Conclusion	219
CHAPTER 11	Report on Greece Vassilis P. Tzevelekos and Stella-Eirini Vetsika	223
I	In Lieu of an Introduction: a Word on the Supranational Phenomenon and the Limits of Legal Positivism	225
2	Legal Parameter: The Limits Set by the Greek Constitution	229
3	Judicial Parameter: The "Meta-Positivist" Realities	231
a.	When the "Tectonic Plates" of the Greek Constitution and the EU Order Collide	231

i.	<i>De Facto</i> Supremacy of the Union Law over the Greek Constitution Through Harmonisation	232
ii.	When Harmonisation Fails: The Inglorious “Thermopylae” of the Greek Judge	234
b.	The Impact of the ECHR on the Greek Legal Order: Rectification Through Complementarity and Conflict	236
i.	Different Types of Complementarity	238
ii.	Conflict	240
4	Academic Parameter	242
5	Conclusion	244
CHAPTER 12	Report on Hungary Pál Sonnevend	251
I	Legal Parameter – Constitutional Foundations	253
I	The Status of the European Convention of Human Rights	253
I.a	International Treaties in the Domestic Legal Order	253
I.b	The Applicability of the Convention and of the Jurisprudence of the European Court of Human Rights in the Hungarian Legal Order	254
2	The Position of EU Law as a <i>Sui Generis</i> Legal Order	255
3	A special Constitutional Provision Paving the Way for the Principle of Mutual Recognition in Criminal Matters: The New Article 57 (4) of the Constitution	257
II	Judicial Parameter	258
I	What Court can Enforce the Convention?	258
I.a	Procedural Obstacles in Front of Enforcing the Convention	259
I.b	The Convention as Part of Constitutional Standards?	259
2.a	Constitutional Reservations to the Supremacy of EU Law: Procedural Aspects	260
2.b	Is a Piece of Hungarian Legislation Incompatible with EU Law also Unconstitutional?	261
III	Academic Parameter	262
I	Consensus on the Position of the ECHR in the Hungarian Constitutional Order – Sort Of	262
2	Supremacy of EU Law over the Constitution – a Religious War?	263
IV	Conclusive Appraisal	264
CHAPTER 13	Report on Italy Giuseppe Martinico and Oreste Pollicino	269
I	EU Law and National Law: The Legal Parameter	271
2	EU Law and National Law: The Judicial Parameter	272

2.1	The Italian Constitutional Court before EU Law: The Impermeability Doctrine	272
2.2	The Italian Constitutional Court before EU Law: The Counter-Limits Doctrine	275
2.3	The Preliminary Ruling Mechanism and the Italian Constitutional Court	276
2.4	Ordinary and Administrative Supreme Courts Before EU Law	278
3	ECHR and Italian Constitutional Court: Before and After 2007	281
3.1	The Relevant Constitutional Case Law Before the Adoption of the Decision 348 and 349 of 2007	281
3.2	Decisions 348 and 349 of the Italian Constitutional Court	285
4	The Application in the Subsequent Case Law of the Principles Handed Down in 2007 Decisions: The Constitutional Case Law	293
4.1	The Application in the Subsequent Case Law of the Principles Handed Down in 2007 Decisions: The Reaction of the Common Judges	295
CHAPTER 14	Report on the Netherlands and Luxembourg Elaine Mak	301
I	The Judicial Organisation in the Netherlands and in Luxembourg	304
2	Legal Parameter	306
2.1	The Status of EC Law and the ECHR in the Domestic Hierarchy of Sources	307
2.2	Legal Effects of EC Law and the ECHR	309
3	Judicial Parameter	312
3.1	Judicial Recognition of a Special Status of EC Law and the ECHR	312
3.2	Judicial Effects given to the EC Law and the ECHR	314
3.3	Conflicts between EC Law or the ECHR and National Law: Judicial Solutions	317
4	Academic Parameter	319
4.1	The Strength Attributed to EC Law and the ECHR	319
4.2	Considerations Regarding the Transfer of Sovereignty to the EU and the ECHR System	320
5	Conclusion	322
CHAPTER 15	Report on Poland Krystyna Kowalik-Bańczyk	327
I	Legal Parameter	329

1.1	Legal Basis	329
1.2	Modification of National Law Because of ECtHR or ECJ Judgments	330
1.3	Possibility of Reopening of the Procedure Subsequent to an ECtHR Judgment	333
2	Judicial Parameter	334
2.1	The Primacy of EU Law in the Jurisprudence of Constitutional Tribunal	334
2.2	The Primacy of EU Law in Jurisprudence of Administrative Courts	335
2.3	The Primacy of EU Law in Jurisprudence of Common Courts	336
2.4	Control of Compatibility of Polish Law with EU Law/ECHR by Constitutional Tribunal	336
2.5	Disapplication of Polish law Provisions Inconsistent with EU Law	337
2.6	Constitutional Tribunal as a Court in the Meaning of Article 267 TFEU	338
2.7	Incidenter Question in Case of Conflict between EU and National Law	339
2.8	EU Consistent Interpretation of Polish Law	340
2.9	The ECHR Consistent Interpretation of National Law	341
2.10	Conflict between Domestic Law and ECHR	342
3	Academic Parameter	343
4	Conclusive Appraisal	344
CHAPTER 16	Report on Portugal Francisco Pereira Coutinho	351
1	Introduction	353
2	Legal and Academic Parameter	354
3	Judicial Parameter	358
3.1	Constitutional Court	358
3.2	Other Courts	360
3.2.1	EU Law	360
3.2.2	ECHR Law	364
4	Conclusions	366
CHAPTER 17	Report on Romania Ioana Raducu	369
1	Legal Parameter	372
2	Judicial Parameter	374

3	Academic Parameter	384
	Conclusions	386
CHAPTER 18	Report on Scandinavian Countries	
	Carl Lebeck	389
1	Introduction	391
2	Constitutional Basis for ECHR and EEA/EU Law: Integration and Incorporation Clauses in Scandinavian Constitutions	391
2.1	Sweden	392
2.1.1	Constitutional Basis for EU-membership in Swedish Law	392
2.1.2	The Legal Basis for the ECHR – Constitutional and Statutory Incorporation	393
2.1.3	IG 2:23 and Constitutional Law in General – the Problems of Coherence and Interpretation	397
2.2	Denmark	398
2.2.1	The Constitutional Basis for EU Law	398
2.2.2	ECHR – Incorporation Solely by Statute	399
2.3	Norway	400
2.3.1	The Legal Basis for EEA-Membership	400
2.3.2	Statutory Incorporation and Constitutional Prescription of Respect of (International) Human Rights	401
2.4	Conclusions	403
3	ECHR and EC/EU/EEA Law in Scandinavian Courts: an Analysis	405
3.1	The Special Role of European Law in Case Law: the Role of Primacy	405
3.2	European Law as an Impetus for Legal Change	407
3.2.1	European Law as an Impetus for Constitutional Change	407
3.2.2	Legislative Adaptation to European Law	408
3.2.3	Reopening of Judicial Procedures Following Judgments of the ECJ and the EctHR?	408
3.3	Application of European Law as a Form of Constitutional Judicial Review?	409
3.4	European Case Law as National Precedents?	410
3.5	National Supreme Courts as Judges under ECHR and EU/EEA Law	412
3.6	Derogations of National Judicial Powers through European Law?	414
3.7	Conflicts between National Law and European Law	417
3.7.1	The Interpretative Strength of European Law?	417
3.7.1.1	Sweden	418
3.7.1.2	Denmark	422

3.7.1.3	Norway	425
3.7.1.4	Conclusion	429
3.8.2	Conflicts between Domestic Law and EC/EU/EEA Law	429
3.8.3	Conflicts between ECHR and National Law	430
3.8.4	Do Judges Disapply National Law in case of Conflict between National Law and ECHR Law?	431
3.9	The Dog that did not Bark: Constitutional Conflicts between National and European Law	433
3.10	Review of Secondary European Norms in National Courts	434
3.11	Which National Courts May Strike down European Law?	434
3.12	Convergence between ECHR and EU Law in National Law?	435
4	European Law in Legal Scholarship	435
5	Conclusions: between Consistent Interpretation and Constitutionalisation	436
CHAPTER 19	Report on Slovenia Matej Avbelj	441
1	Normative Framework of EU and ECHR Law in Slovenia	443
2	Supranational Law in Judicial Action	446
3	Supranational Law in the Eye of the Slovenian Academic Beholders	451
4	Sleeping Beauty still waiting for its Supranational Prince	453
CHAPTER 20	Report on Spain Aida Torres Pérez	457
1	Introduction	459
2	Legal Parameter	460
3	Judicial Parameter	461
3.1	Constitutional Court	461
3.2	Ordinary Courts	465
4	Academic Parameter	471
5	Concluding Remarks	473
CHAPTER 21	Report on the UK and Ireland Cian C. Murphy	479
1	Introduction	481
2	EU Membership	481
2.1	Ireland: Amending the Bunreacht	482
2.2	UK: Challenging Parliamentary Sovereignty	484
2.3	Enduring National Constitutional Supremacy	487
3	Implementing the European Convention	487

3.1	UK: Human Rights Act 1998	488
3.2	Ireland: European Convention on Human Rights Act 2003	489
3.3	Compromised Solutions	491
4	Judicial Application: Points of Comparison	492
4.1	Preliminary References to the ECJ	492
4.2	Substantive Rights Protection	493
4.3	Declarations of Incompatibility	494
5	Conclusion	496
CHAPTER 22	Conclusions. In Search of Possible Answers	
	Oreste Pollicino	499