

Giuseppe Martinico and Oreste Pollicino (eds), ***The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective***. Groningen: Europa Law Publishing, 2010. Pp. 511. €75. ISBN: 978908952069

This volume collects the essays presented at the workshop entitled 'National Judges and Supranational Laws: On the Effective Application of EU Law and the ECHR', hosted by the Sant'Anna School of Advanced Studies (Pisa) on 15 and 16 January 2010. The workshop gathered 21 scholars from across Europe to discuss two fundamental questions: whether domestic judiciaries handle European Union (EU) law and the European Convention of Human Rights (ECHR) in a similar manner; and whether national courts facilitate a convergence in the implementation of EU law and the ECHR in domestic legal orders.

In order to answer these questions the participants were asked to review their national legal systems in the light of three parameters, each containing a complex array of specific questions. Under the 'legal' parameter the authors were required, *inter alia*, to illustrate the status of EU law and the ECHR in the domestic hierarchy of sources and to explain whether there have been amendments of national constitutions or statutes following a decision of the European Court of Justice (ECJ) or the European Court of Human Rights (ECtHR). Under the 'judicial' parameter the participants were asked, *inter alia*, to examine the case law of national courts (both

constitutional and ordinary courts) in order to appraise whether special status is granted to EU law and the ECHR and to identify the effects of the judgments of the ECJ and of the ECtHR on national legal systems. Moreover, the contributors were invited to describe the solutions devised by national judges (if any) to handle conflicts between, on the one hand, the European legal orders and national laws and, on the other hand, between the ECJ and the ECtHR and domestic courts. Finally, under the 'academic' parameter the authors were asked to explain what the understanding of EC and ECHR law is in domestic scholarship, especially in comparison with international law.

This research outline reveals the ambitious goal of the editors: underlining the frequent discrepancies between the formal status of the European legal orders in the domestic hierarchy of sources and their actual effectiveness as determined by domestic jurisprudence. Stated differently, the editors sought to corroborate the hypothesis according to which there is a growing convergence in domestic case law on EU law and the ECHR as special supranational legal sources. They derive this hypothesis from the ECJ's and ECtHR's reactions to the challenges posed by the enlargement of the membership of the EU and ECHR. While the ECJ seems to be committed to reining in the primacy of EU law *vis-à-vis* domestic laws when it comes to protecting the fundamental values guaranteed by EU Member States' constitutions, the ECtHR tends to affirm the direct effect of its case law on domestic legal orders. According to the editors, the combination of the ECJ's self-restraint and ECtHR's activism has reduced the distance between EU law and ECHR law, on the one hand, and domestic legal orders, on the other, in matters of human rights protection. The main feature of this book, however, is the focus on the practice of national courts and not on the procedural and substantive aspects of the protection of human rights before the ECtHR or the ECJ.

The book consists of three sections. The first section, which provides the theoretical framework for the research, comprises three chapters. In the first chapter, Giuseppe Martinico describes the aims and the boundaries of the research. In particular, he stresses that the book's focus is on the vertical relationship between national judges and the EU and ECHR legal systems. He points out that the horizontal convergence between the Strasbourg Court and the Luxembourg Court (which however is concisely described in the book's foreword by Paolo Carrozza) is purposely omitted. Furthermore, Martinico summarizes the variety of constitutional provisions concerned with the impact of EU and ECHR law on national legal systems in order to pave the way for the national reports contained in the second section of the volume. The second chapter, by Giuseppe Franco Ferrari, focuses on the essential differences between the EU and ECHR legal systems and between the jurisdictional scope of the ECJ and ECtHR. On the one hand, the author underlines that the ECHR is a homogeneous 'parameter' because it is centred on the protection of human rights, whereas, on the contrary, EU law is a very heterogeneous 'parameter' for the ECJ as it relates to several different fields, including economics (at 25). On the other hand, Ferrari recalls that the Luxembourg Court is 'the court of a legal order that has its own institutional integrity' and that is 'beneficial not just to the Member States but also to individuals' as a consequence of its direct effect at the domestic level, while the Strasbourg Court 'has the sole role of verifying violations' of the ECHR committed by a state Member of the Council of Europe (at 23). He maintains that this diversity explains why national judges refer to the case law of such European Courts in different ways. The chapter by Robert Harmsen deals with the effects of the enlargement of ECHR membership. The author underlines that the Strasbourg Court has shown variable patterns of interaction with national judiciaries as well as inconsistent jurisprudence across three different groups of countries – established democracies, (post-)transition states, and states exhibiting serious structural difficulties. He thus questions whether the different roles of the ECHR and of the ECtHR – as far as the domestic implementation of ECHR norms and ECtHR jurisprudence is concerned – in such different national situations could affect the operation and legitimacy of the human rights system.

The bulk of the research is contained in the second section, which comprises 18 national reports describing the state of affairs in 26 European countries. Predictably, these reports do not offer a univocal answer. Although it appears that the differences relating to the domestic implementation of EU and ECHR law are progressively fading away, there are multiple resistances to the actual affirmation of a convergence of the impact of both European systems in the domestic legal orders of Member States. It is true that a few reports signal that the jurisprudence of constitutional courts 'demonstrates the convergence of views towards the ECHR and EU law as special sources of supranational legal orders' (report on Estonia, Latvia, and Lithuania, at 202). However, in other states there are major discrepancies in the attitude of domestic courts towards these two bodies of law. The report on France evidences that 'there are differences in the approach to both systems' (at 219), while the report on Austria and Germany concludes that 'there is no indication for domestic developments towards an approximation or convergence between the approaches and structures applicable to EU and ECHR' (at 77). Similarly, the report on Hungary maintains that '[a] convergence in the handling of EU law and the ECHR is not detectable at the moment' (at 265). The report on the UK and Ireland states that 'the two sources of European law are treated differently – while popular understanding of the law might not distinguish between the EU and the ECHR, the courts certainly do' (at 496). Therefore, it appears that, on the whole, the majority of state-specific reports demonstrate that the ECHR and EU law are understood as having different scopes and objectives.

In the third section, which closes the book, Oreste Pollicino provides an assessment of the research findings and identifies some plausible causes for the differential treatment of the ECHR and EU law. With respect to the latter issue, he points out that the national reports demonstrate that domestic judges (especially constitutional judges) are increasingly resorting to new interpretative techniques in order to overcome the effects of the static understanding of the relevant 'European' or 'international' clauses contained in their own constitutions. In this respect, the author comments on the reports on the Scandinavian countries, the Czech Republic, and Italy as pertinent examples demonstrating how national judiciaries tend to follow new 'off-piste' routes in the interpretation and application of supranational laws, other than those designated by the national constitutions. In some other instances, the reason for such a disparity is to be found in the mandates of national tribunals. In most jurisdictions only constitutional courts have the power to set aside national norms that conflict with European human rights standards. Ordinary judges can only raise the issue of constitutionality before their own constitutional court. By way of contrast, under pressure from the ECJ, ordinary courts are empowered to set aside national norms that are in conflict with EU law. Another reason for the uneven treatment of EU law and ECHR – particularly in newly acceded Member States – is that domestic judges are still not familiar with EU and ECHR law as well as with the jurisprudence of the ECJ and ECtHR. Furthermore, Pollicino emphasizes the importance of the principle of consistent interpretation. According to the author, this principle is the privileged interpretive technique used by domestic judges in nearly all the jurisdictions examined in order to harmonize states' international obligations with national legislation. Indeed, virtually all reports point out that domestic courts at various levels interpret national law in conformity with relevant rules of supranational law, construing the internal norm in the light of the 'external' one. This is why the author concludes the volume by pointing out that the principle of consistent interpretation 'represents the real *trait d'union* between the domestic impact of the two European legal orders' (at 510).

Any work of such ambition and extent as the one under review has its limitations. As far as form is concerned, some chapters would have benefited from more accurate proof-reading. Furthermore, the value of this book as a research tool is reduced by the absence of a table of cases. This is a real weakness for a work centred on decision-making by domestic and European judges. At the substantive level, the main problem is that the 18 chapters reveal the research findings with different degrees of clarity and precision. In effect, it appears that not all contributors have scrupulously addressed the questions with which they were provided. However, this is one of

the typical problems affecting comparative studies carried out with the participation of several contributors. A further relevant shortcoming of this volume concerns the concluding chapter, which is entitled 'Conclusions: In Search of Possible Answers'. Contrary to what one might expect, this chapter does not attempt either to explain or summarize the findings resulting from the reports in light of the 'legal', 'judicial', and 'academic' parameters mentioned above. As a result, one is left with the impression that an essential component of this comparative study is missing. The last – minor – shortcoming is quantitative, in that this research is incomplete as the experiences of Finland and Malta, both EU and ECHR Member States, have been left out.

In spite of these deficits, this volume deserves a positive review as it offers an innovative comparative approach. Whereas various earlier authors have tackled the question of the effects of either EU or ECHR law (and the respective jurisprudence) in domestic legal systems, nobody so far had attempted to analyse simultaneously the influence and effects of these two European legal orders through the lenses of the experience of domestic judges. The added value of the resulting state-based reports is that all information is conveyed through the 'legal', 'judicial', and 'academic' parameters selected by the editors. Another notable aspect of this volume is emphasized by the coordinators of this multi-state research project. They underline that this book represents the first step in a longer project that will be developed in the future by taking account of the legal changes introduced by the Lisbon Treaty. These include the attribution of binding legal force to the Charter of Fundamental Rights, the introduction of a legal basis for EU accession to the ECHR, and the ensuing (predictable) increase in convergence between the two systems and between the methods by which they will be implemented at the national level. Therefore, the editors' research endeavour is firmly rooted in the present state of affairs. Nevertheless, they emphasize that domestic judges will play, also in the future, 'a crucial role in shaping the relationship between interlocking legal orders', thereby acting 'as bridge-builders, creating connections between legal systems, solving legal conflicts and . . . facilitating possible convergences' (at 17).

## *Individual Contributions*

*Giuseppe Martinico*, National Judges and Supranational Laws: Goals and Structure of the Research;

*Giuseppe Franco Ferrari*, National Judges and Supranational Laws. On the Effective Application of EU Law and ECHR;

*Robert Harmsen*, The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges facing the European Court of Human Rights;

*Philipp Cede*, Report on Austria and Germany;

*Patricia Popelier*, Report on Belgium;

*Maria Fartunova*, Report on Bulgaria;

*Michal Bobek and David Kosař*, Report on the Czech Republic and Slovakia;

*Nikolas Kyriakou*, Report on Cyprus;

*Irmantas Jarukaitis*, Report on Estonia, Latvia and Lithuania;

*Maria Fartunova*, Report on France;

*Vassilis P. Tzevelekos and Stella-Eirini Vetsika*, Report on Greece;

*Pál Sonnevend*, Report on Hungary;

*Giuseppe Martinico and Oreste Pollicino*, Report on Italy;

*Elaine Mak*, Report on the Netherlands and Luxembourg;

*Krzyszyna Kowalik-Bańczyk*, Report on Poland;

*Francisco Pereira Coutinho*, Report on Portugal;

*Ioana Raducu*, Report on Romania;

*Carl Lebeck*, Report on Scandinavian Countries;

*Matej Avbelj*, Report on Slovenia;  
*Aida Torres Pérez*, Report on Spain;  
*Cian C. Murphy*, Report on the UK and Ireland;  
*Oreste Pollicino*, Conclusions. In Search of Possible Answers.

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