

# CONTENTS

<i>List of Abbreviations .....</i>	xix
------------------------------------	-----

## PART I. INTRODUCTORY

### Chapter 1.

#### Introduction: Purpose and Structure, Categorisation of States and Hypotheses

Patricia POPELIER, Sarah LAMBRECHT en Koen LEMMENS .....	3
1. Purpose of the Edited Volume .....	3
2. Structure of the Edited Volume .....	4
2.1. Criticism of the European Court of Human Rights .....	5
2.2. Counter-Dynamics at the Political Level .....	6
2.3. Counter-Dynamics at the Judicial Level .....	8
3. From Strasbourg-Friendly to Strasbourg-Suspicious: A Ranking of States.....	9
4. Decisive Factors: Seven Hypotheses.....	10
4.1. Institutional Context .....	11
4.2. Historical and Cultural Context .....	14
4.3. Political Dimension .....	17
4.3.1. Political Front-Office .....	17
4.3.2. Political Back-Office .....	18
4.4. Judicial Dimension.....	19
5. Conclusion .....	20

### Chapter 2.

#### Criticising the European Court of Human Rights or Misunderstanding the Dynamics of Human Rights Protection?

Koen LEMMENS .....	23
1. Introduction.....	23
2. Onto- and Praxis-Legitimacy among Legal Critics of the Court .....	26
3. The Legal System as a Perennial Dialogue between <i>lex</i> and <i>ius</i> .....	28
4. (European) Human Rights as Law's Confrontation with Itself.....	31

4.1.	Situation 1 .....	35
4.2.	Situation 2 .....	36
4.3.	Situation 3 .....	37
4.4.	Situation 4 .....	38
5.	Conclusion .....	38

**Chapter 3.****European Union: The EU's Attitude to the ECHR**

Clara RAUCHEGGER and Sarah LAMBRECHT .....	41
1. Criticism of the European Court of Human Rights .....	41
2. Counter-Dynamics at the Political Level .....	43
2.1. EU Politics and the Convention System .....	43
2.2. Political Strategies in the European Parliament .....	45
2.2.1. Views on EU Accession to the ECHR .....	45
2.2.2. Reform of the Convention System .....	47
2.3. Official Position of Commission and Council.....	48
3. Counter-Dynamics at the Judicial Level .....	49
3.1. The CJEU and the Convention System .....	50
3.1.1. Formal Legal Status of the ECHR .....	50
3.1.2. Limited Explicit References to the ECHR.....	52
3.1.3. Tensions Rather than Deviance .....	55
3.2. Impact of a Future EU Accession to the ECHR.....	55
3.3. Opinion 2/13 – A Backlash against the ECtHR? .....	57
3.3.1. The Principle of Mutual Trust as a Source of Tension ..	58
3.3.2. The CJEU's Misunderstanding of Article 53 ECHR .....	61
3.3.3. Other Objections.....	63
3.3.4. General Approach of Opinion 2/13 .....	64
3.4. Aftermath of Opinion 2/13 .....	66
3.4.1. Relationship between the Two Courts.....	66
3.4.2. Potential Impact on National Counter-Dynamics .....	68
3.4.3. Follow-Up by the EU Institutions .....	69
4. Conclusion .....	70

**PART II.****SPARSE CRITICISM****Chapter 4.****Austria: Endorsing the Convention System, Endorsing the Constitution**

Anna GAMPER .....	75
1. Criticism of the European Court of Human Rights .....	75
1.1. The Convention in Austrian Constitutional Design.....	75
1.2. The 1987 "Rebellion" .....	77

1.3. Recent Surges in Criticism? .....	80
2. Counter-Dynamics at the Political Level .....	82
2.1. Politics and the Convention System .....	82
2.2. Political Strategies at the European Level: Reform of the Convention System .....	84
2.3. Political Strategies at the National Level. ....	86
3. Counter-Dynamics at the Judicial Level .....	89
3.1. National Supreme Courts and the Convention System .....	89
3.2. Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	94
3.2.1. Conflicts .....	94
3.2.2. Dialogues and Monologues.....	97
3.3. Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	99
4. Conclusion .....	101

## **Chapter 5.**

### **Belgium: Faithful, Obedient, and Just a Little Irritated**

Patricia POPELIER .....	103
1. Criticism of the European Court of Human Rights .....	103
1.1. Respect for the Convention System is Shared at All Levels.....	103
1.2. ... But a Growing Sense of Irritation Emerges.....	105
2. Counter-Dynamics at the Political Level .....	106
2.1. Politics and the Convention System .....	107
2.1.1. A Disinterested Position .....	107
2.1.2. A More Supporting Position.....	107
2.1.3. A Highly Critical Position.....	108
2.2. Political Strategies at the European Level: Reform of the Convention System .....	109
2.3. Political Strategies at the National Level.....	111
2.3.1. A 'Strategy' of Compliance .....	111
2.3.2. A 'Strategy' of Efficacy .....	114
2.3.3. A Strategy of Centralisation of Fundamental Rights Protection.....	115
3. Counter-Dynamics at the Judicial Level .....	117
3.1. National Supreme Courts and the Convention System .....	117
3.2. Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	123
3.3. Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	127
4. Conclusion .....	128

**Chapter 6.****Czech Republic: Strasbourg Case Law Undisputed**

Lubomír MAJERČÍK .....	131
1. Criticism of the European Court of Human Rights .....	131
2. Counter-Dynamics at the Political Level .....	136
2.1. Politics and the Convention System .....	136
2.2. Political Strategies at the European Level: Reform of the Convention System .....	137
2.3. Political Strategies at the National Level.....	138
3. Counter-Dynamics at the Judicial Level .....	145
3.1. The Constitutional Court and the Convention System .....	145
3.2. Supreme Courts and the Convention System .....	148
3.3. Judicial Strategies: Limits to Following ECHR Case Law .....	149
3.4. Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	150
4. Conclusion .....	151

**Chapter 7.****Germany: The Long Way of Integrating the Strasbourg Perspective into the Protection of Fundamental Rights**

Katharina PABEL .....	155
1. Criticism of the European Court of Human Rights .....	155
2. Counter-Dynamics at the Political Level .....	156
2.1. Politics and the Convention System .....	156
2.2. Political Strategies at the European Level: Reform of the Convention System .....	157
2.3. Political Strategies at the National Level.....	158
2.3.1. Institutional Overview.....	158
2.3.2. Reports on Human Rights.....	159
2.3.3. Human Rights Policy in the Future.....	160
3. Counter-Dynamics at the Judicial Level: The Constitutional Court (Bundesverfassungsgericht) and the Convention System.....	161
3.1. Introduction .....	161
3.2. Stages of the Developing Implementation of the European Convention on Human Rights in the German Legal System ....	161
3.2.1. Stage 1: Insignificance of the European Convention on Human Rights .....	162
3.2.2. Stage 2: Looking for the Right Way of Implementation: The <i>Görgülü</i> Judgment of the Bundesverfassungsgericht (2004) and its Surroundings .....	165

3.2.3.	Stage 3: Consolidation of the Relationship between the Bundesverfassungsgericht and the European Court of Human Rights after the <i>Görgülü</i> Judgment . . . . .	167
3.3.	Two Examples Illustrating the Current Debate on the Convention System . . . . .	169
3.3.1.	<i>Caroline</i> Cases: Freedom of the Press Versus the Right to Private Life . . . . .	169
3.3.2.	Preventive Detention Cases: The Implementation of Delicate Judgments . . . . .	172
3.4.	The Perception of the ECHR by the Bundesverfassungsgericht . .	173
4.	Conclusion . . . . .	174

## Chapter 8.

### Italy: Between Constitutional Openness and Resistance

Giuseppe MARTINICO . . . . . 177

1.	Criticism of the European Court of Human Rights . . . . .	177
2.	Counter-Dynamics at the Political Level . . . . .	179
2.1.	Politics and the Convention System . . . . .	179
2.2.	Political Strategies at the European Level: Reform of the Convention System . . . . .	179
2.3.	Political Strategies at the National Level . . . . .	181
3.	Counter-Dynamics at the Judicial Level . . . . .	182
3.1.	National Supreme Courts and the Convention System . . . . .	182
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law . . . . .	188
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection . . . . .	194
4.	Conclusion . . . . .	196

## Chapter 9.

### Poland: The Taming of the Shrew

Krystyna KOWALIK-BAŃCZYK . . . . . 199

1.	Criticism of the European Court of Human Rights . . . . .	202
2.	Counter-Dynamics at the Political Level . . . . .	206
2.1.	Politics and the Convention System . . . . .	206
2.2.	Political Strategies at the European Level: Reform of the Convention System . . . . .	209
2.3.	Political Strategies at the National Level . . . . .	211
2.3.1.	Institutional and Legislative Reactions . . . . .	211
2.3.2.	Cross Reactions to Particular ECtHR Judgments . . . . .	215

3.	Counter-Dynamics at the Judicial Level .....	222
3.1.	National Supreme Courts and the Convention System .....	222
3.1.1.	The Constitutional Tribunal and the Convention System .....	222
3.1.2.	The Supreme Court and the Convention System .....	228
3.1.3.	The Chief Administrative Court and the Convention System .....	231
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	233
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	235
4.	Conclusion .....	237

## **Chapter 10.**

### **Sweden: European Court of Human Rights Endorsement with Some Reservations**

Henrik WENANDER .....	239	
1.	Criticism of the European Court of Human Rights .....	239
1.1.	The Development of Constitutional Protection of Fundamental Rights in Sweden .....	239
1.1.1.	Ratification of the ECHR .....	239
1.1.2.	Incorporation of the ECHR .....	243
1.1.2.1.	General Features .....	243
1.1.2.2.	The Development of Case Law .....	245
1.2.	Examples of Criticism .....	247
2.	Counter-Dynamics at the Political Level .....	251
2.1.	Politics and the Convention System .....	251
2.2.	Political Strategies at the European Level: Reform of the Convention System .....	252
2.3.	Political Strategies at the National Level .....	253
3.	Counter-Dynamics at the Judicial Level .....	254
3.1.	National Supreme Courts and the Convention System .....	254
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	255
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	260
3.3.1.	The Place of ECHR and the ECtHR Case Law in Rights Protection .....	260
3.3.2.	A Shift in the Constitutional Role of Swedish Courts? ..	262
4.	Conclusion .....	263

PART III.  
MODERATE CRITICISM

**Chapter 11.**

France: *“Je t’aime, moi non plus”*

Katarzyna BLAY-GRABARCYK and Christophe MAUBERNARD ..... 269

1.	Criticism of the European Court of Human Rights .....	269
2.	Counter-Dynamics at the Political Level .....	274
2.1.	Politics and the Convention System .....	274
2.1.1.	Inconclusive Political Arguments .....	275
2.1.2.	Different Opinions of ‘Trans-Political Parties’ .....	277
2.2.	Political Strategies at the European Level: Reform of the Convention System .....	279
2.3.	Political Strategies at the National Level.....	282
3.	Counter-Dynamics at the Judicial Level .....	284
3.1.	National Supreme Courts and the Convention System .....	284
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights.....	288
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	292
4.	Conclusion .....	294

**Chapter 12.**

Hungary: ‘Gains and Losses’. Changing the Relationship with the European  
Court of Human Rights

Eszter POLGÁRI ..... 295

1.	Criticism of the European Court of Human Rights .....	295
1.1.	Introduction .....	295
1.2.	Outside Politics: General Neutrality .....	296
1.3.	Political Discourse: Stronger Critical Remarks.....	298
2.	Counter-Dynamics at the Political Level .....	301
2.1.	Politics and the Convention System .....	301
2.2.	Political Strategies at the European Level: Reform of the Convention System .....	302
2.3.	Political Strategies at the National Level.....	304
2.3.1.	A Failed Attempt: ‘Human Rights Tax’.....	304
2.3.2.	Lack of Proactivity .....	305
2.3.3.	Firmer Resistance: The <i>Red Star</i> Cases .....	307
3.	Counter-Dynamics at the Judicial Level .....	309
3.1.	The Constitutional Court and the Convention System .....	309
3.1.1.	The Post-Transition System (1989–2011).....	309
3.1.2.	The Constitutional Reform (2010–2011) .....	311

3.1.3.	Relationship with the Convention and the Juris-prudence of the European Court of Human Rights .....	313
3.1.3.1.	Academic Positions .....	313
3.1.3.2.	Theory in Practice .....	315
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	317
3.2.1.	Criticism within the Constitutional Court.....	317
3.2.2.	Emerging Differences in Approach: Inconsistency.....	319
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	321
3.3.1.	Ordinary Courts and the European Court of Human Rights: An Ambivalent Relationship.....	321
3.3.2.	Conflicts in Rights Protection .....	323
4.	Conclusion .....	324

## **Chapter 13.**

### **The Netherlands: Political Dynamics, Institutional Robustness**

Janneke GERARDS .....	327	
1.	Criticism of the European Court of Human Rights .....	327
1.1.	Development and Locus of the Dutch Debate on the Role of the Court .....	327
2.	Counter-Dynamics at the Political Level .....	331
2.1.	Politics and the Convention System .....	331
2.1.1.	Political Parties and the Convention.....	331
2.2.	Political Strategies at the European Level: Reform of the Convention System .....	337
2.2.1.	The Dutch Position at the Brighton Conference .....	337
2.2.1.1.	The Road towards Brighton .....	337
2.2.1.2.	The Government's Position in Brighton.....	340
2.2.1.3.	After Brighton: Radical Changes in the Dutch Political Situation.....	340
2.2.2.	The Dutch Position as Regards Protocols No. 15 and 16 .	342
2.3.	Political Strategies at the National Level.....	344
2.3.1.	Impact on Legislation and Policy.....	344
2.3.2.	Constitutional Impact .....	346
3.	Counter-Dynamics at the Judicial Level .....	348
3.1.	National Supreme Courts and the Convention System .....	348
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	353
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	356
4.	Conclusion .....	359

**Chapter 14.****Norway: New Constitutionalism, New Counter-Dynamics?**

Michael REIERTSEN .....	361
1. Criticism of the European Court of Human Rights .....	361
2. Counter-Dynamics at the Political Level .....	370
2.1. Politics and the Convention System .....	370
2.2. Political Strategies at the European Level: Reform of the Convention System .....	371
2.3. Political Strategies at the National Level.....	374
3. Counter-Dynamics at the Judicial Level.....	377
3.1. The Norwegian Supreme Court and the Convention System ....	377
3.2. Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	379
3.3. Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	381
4. Conclusion .....	383

**Chapter 15.****Switzerland: The Substitute Constitution in Times of Popular Dissent**

Tilmann ALTWICKER .....	385
1. Criticism of the European Court of Human Rights .....	386
1.1. Criticism in the Media, Academia, Political Arena, and the Judiciary.....	386
1.2. Typology of Critical Arguments .....	388
1.3. Discourse Strategies for Making Critical Arguments .....	390
2. Counter-Dynamics at the Political Level .....	394
2.1. Politics and the Convention System .....	394
2.2. Political Strategies at the European Level: Reform of the Convention System .....	397
2.3. Political Strategies at the National Level.....	398
3. Counter-Dynamics at the Judicial Level .....	401
3.1. The Federal Court and the Convention System.....	401
3.2. Judicial Strategies: Limits to Following the European Court of Human Right's Case Law .....	405
3.3. Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	407
4. Conclusion .....	410

**Chapter 16.****Turkey: The European Convention on Human Rights as a Tool for Modernisation**

Olgun AKBULUT .....	413
1. Criticism of the European Court of Human Rights: Why the Court is Liked and Disliked .....	416
2. Counter-Dynamics at the Political Level .....	418
2.1. Politics and the Convention System .....	418
2.2. Political Strategies at the European Level: Turkey's Contribution to the Reform of the Convention System .....	422
2.3. Political Strategies at the National Level.....	424
2.3.1. <i>Cyprus</i> Cases .....	424
2.3.2. <i>Alevi</i> Cases.....	427
3. Counter-Dynamics at the Judicial Level.....	430
3.1. National Supreme Court and the Convention.....	430
3.1.1. The Turkish Constitutional Court and the Convention..	430
3.1.1.1. Traditional Approach of the Turkish Constitu- tional Court in Protecting Convention Rights ..	430
3.1.1.2. New Approach of the Turkish Constitutional Court in Protecting Convention Rights.....	433
3.1.2. Convention at Other Courts .....	440
3.2. Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	442
3.3. Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	444
4. Conclusion .....	444

**PART IV.****STRONG CRITICISM****Chapter 17.****The United Kingdom: From Strasbourg Surrogacy Towards a British  
Bill of Rights?**

Roger MASTERMAN.....	449
1. Criticism of the European Court of Human Rights .....	449
2. Counter-Dynamics at the Political Level .....	452
2.1. Politics and the Convention System .....	452
2.2. Political Strategies at the European Level: Reform of the Convention System .....	456
2.3. Political Strategies at the National Level.....	459
2.3.1. From Decision-Specific to Systemic Criticism.....	459
2.3.2. Mistruth and Routine Deployment of Political Outrage .	460

2.3.3.	Political Interventionism .....	462
2.3.4.	Towards an Autonomous United Kingdom Bill of Rights?.....	463
3.	Counter-Dynamics at the Judicial Level .....	466
3.1.	The United Kingdom Supreme Court and the Convention System.....	466
3.1.1.	Judicial Review, the Human Rights Act and the Convention.....	466
3.1.2.	Taking into Account the Strasbourg Jurisprudence .....	468
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	472
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	476
4.	Conclusion .....	478

**PART V.  
HOSTILE CRITICISM**

**Chapter 18.**

**Russia: In Quest for a European Identity**

Aaron MATTA and Armen MAZMANYAN..... 481

1.	Criticism of the European Court of Human Rights .....	481
2.	Counter-Dynamics at the Political Level .....	483
2.1.	An Introduction to Russia's Complexity.....	483
2.2.	First Concerns: Uncertainties at the Time of Accession .....	484
2.3.	First Tensions: Chechnya, Protocol no. 6 and Responses to Political Repressions.....	486
2.3.1.	The Wars in Chechnya.....	486
2.3.2.	Protocol no. 6: Death Penalty .....	487
2.3.3.	Democratic Concerns and Reaction to Political Repression .....	488
2.4.	Towards "Cold War" Rhetoric between Russia and the Council: Politics and the Convention System .....	490
2.4.1.	Protocol no. 14 Amending the Control System of the Convention .....	490
2.4.2.	Conflicts with Georgia and Ukraine .....	492
2.5.	ECHR and the Strasbourg Court in the Public Discourse and the Inter-Political Debate.....	496
3.	Counter-Dynamics at the Judicial Level .....	498
4.	An Inquiry into Russia's Boldness: In Search for a Post-Imperial Identity? – Conclusions .....	502

**PART VI.**  
**SYNTHESIS**

**Chapter 19.**

**Assessing the Existence of Criticism of the European Court  
of Human Rights**

Sarah LAMBRECHT .....	505
Introduction: Status of the ECHR.....	505
1. Criticism of the European Court of Human Rights .....	510
1.1. Nature of the Criticism .....	510
1.2. Recent Surge of Criticism? .....	512
2. Counter-Dynamics at the Political Level .....	514
2.1. Politics and the Convention System .....	514
2.1.1. Political Debate on the Convention System .....	514
2.1.2. Euro-Scepticism and the Convention System .....	516
2.2. Political Strategies at the European Level: Reform of the Convention System .....	518
2.2.1. Diverging Strategies on Tackling the Influx of Cases .....	518
2.2.2. Protocol No. 15: Ambiguity as Compromise .....	522
2.2.3. Protocol No. 16: Between Hesitation and Enthusiasm ..	524
2.2.4. Exit Strategy.....	525
2.3. Political Strategies at the National Level.....	526
2.3.1. Strategies to Strengthen the Impact of the Convention System.....	526
2.3.2. Strategies to Obstruct Implementation.....	528
2.3.2.1. Silent Obstruction .....	528
2.3.2.2. Explicit Refusal.....	529
2.3.2.3. Strategies to Diminish Impact of Convention System .....	531
3. Counter-Dynamics at the Judicial Level .....	534
3.1. National Supreme Courts and the Convention System .....	534
3.1.1. Review Mandate .....	534
3.1.2. Interpretative Authority of the ECtHR Case Law .....	536
3.1.3. Tension between National Supreme Courts: Strategic Use of the ECHR.....	538
3.2. Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	539
3.2.1. Implicit Divergence.....	539
3.2.2. Limits of Judicial Mandate .....	541

3.2.3.	Problems with Judicial Transplanting: Divergence Without Intent.....	544
3.2.4.	Criticism of the European Court of Human Rights .....	544
3.2.4.1.	Criticism in Domestic Case Law: A Rare Strategy .....	544
3.2.4.2.	Criticism Outside Judgments: Varying Traditions .....	546
3.2.5.	Judicial Dialogue: Predominant Strategy for Deliberate Divergence .....	547
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	550
4.	Conclusion .....	551

## APPENDIX

<b>Annex 1.</b>		
Questionnaire .....		557
1.	Criticism of the European Court of Human Rights .....	557
2.	Counter-Dynamics at the Political Level .....	557
2.1.	Politics and the Convention System .....	557
2.2.	Political Strategies at the European Level: Reform of the Convention System .....	558
2.3.	Political Strategies at the National Level.....	558
3.	Counter-Dynamics at the Judicial Level .....	559
3.1.	National Supreme Courts and the Convention System .....	559
3.2.	Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	560
3.3.	Judicial Strategies: National Dynamics in Fundamental Rights Protection .....	560
4.	Conclusion .....	561
<b>Annex 2.</b>		
Questionnaire EU .....		563
1.	Criticism of the European Court of Human Rights .....	563
2.	Counter-Dynamics at the Political Level .....	563
2.1.	Politics and the Convention System .....	563
2.2.	Political Strategies at the European Level: Reform of the Convention System .....	564
3.	Counter-Dynamics at the Judicial Level .....	564
3.1.	The Court of Justice and the Convention System .....	564

3.2. Judicial Strategies: Limits to Following the European Court of Human Rights' Case Law .....	565
3.3. Judicial Strategies: EU Dynamics in Fundamental Rights Protection.....	566
4. Conclusion .....	566
<i>Authors' Biographies</i> .....	567