

A Collective Enforcement of European Fundamental Rights as a Condition for their Common Understanding

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Why a collective understanding and enforcement of fundamental rights?

- Notion found in the Preamble to the Convention and in the case-law.
- Referring to the rationale of the Convention mechanism, i.e. the idea that an effective protection of fundamental rights requires States to agree on a common approach to fundamental rights, in order to avoid legal uncertainty and relativism.
- This idea is also true in respect of the European Union.



Convention / European Union

- Opinion 2/13 of the CJEU has significantly delayed a collective enforcement of fundamental rights involving the EU as such.
- This does not affect the need for a common understanding of fundamental rights with the EU, because:
 - The EU has its own sources of fundamental rights
 - Some of them, notably the EU-Charter, heavily draw on the Convention
 - Unlike national fundamental rights, they apply to 28 Member States at the same time
 - There is a multiple overlap (*ratione personae* and *materiae*) between the Convention and EU law
 - See, e.g., directives on procedural rights in criminal proceedings

4 Key Questions

- Why is there an overlap between the scope of EU Law and that of the Convention?
- What are the implications of this overlap for the courts of the EU Member States?
- Do the Convention and EU Law protect the same fundamental rights?
- What are the challenges for the courts of the EU Member States?



Why is there an overlap between the scope of EU Law and that of the Convention?

- The scope of the Convention covers the entire legal system of the 28 EU Member States, including those parts of it which are governed by EU law (Matthews v. the United Kingdom, Appl. No. 24833/94, judgment of 18 Feb. 1999).
- The Convention is not displaced by EU law wherever EU law applies (Bosphorus v. Ireland, Appl. No. 45036/98, judgment of 30 June 2005)



Implications for the Courts of the EU Member States

- The domestic courts of the EU Member States must act in compliance with the Convention when applying EU law.
- This compliance can be assessed by the European Court of Human Rights in the context of an application under Article 34 of the Convention directed against the Member State concerned. There are many examples to that effect.
- However, the European Court of Human Rights will assume – until proof of the contrary, to be adduced on a case-by-case basis – that the EU Member States act in compliance with the Convention when they do no more than execute their obligations under EU law (i.e. when no discretion is involved) (*Bosphorus v. Ireland*, cited above).

Do the Convention and EU Law protect the same fundamental rights? (I)

- In part, yes: because the EU Charter has imported – albeit with a different wording – a large number of the rights contained in the Convention and its Protocols.
- In doing so, the Charter stated in its Article 52(3) that those rights will have “the same meaning and scope” under EU law as they have under the Convention.
- At the same time, it reserved the possibility for EU law to raise the level of protection of those Convention rights.



Do the Convention and EU Law protect the same fundamental rights? (II)

Consequence: under EU law the level of protection of the rights imported from the Convention:

- can be raised
- but cannot be brought below the level of protection guaranteed by the Convention.

This makes sense, in view of the possibility of a review by the Strasbourg Court of the domestic implementation of EU law.



Challenges for the courts of the EU Member States (I)

- The number of cases before the European Court of Human Rights challenging the application of EU law by domestic courts is increasing, e.g. in areas such as
 - The European arrest warrant
 - The Dublin regulation
 - The handling of requests for a preliminary ruling by the CJEU



Challenges for the courts of the EU Member States (II)

- Typically, problems arise for the domestic courts when they have to combine fundamental rights under EU and Convention law which set different protection levels.
 - Examples:
 - Non bis in idem
 - Protection of personal data
 - Procedural rights?
- In such a situation, it is safe to assume, as the result of a combination of Art. 52(3) of the EU-Charter and Art. 53 of the Convention, that domestic courts should apply the higher of the two levels → to be identified beforehand

Challenges for the courts of the EU Member States (III)

In some areas of the CJEU case-law, Art. 52(3) EU-Charter is being:

- either simply ignored
 - or applied in a apodictic way, i.e. without proper reasoning
 - or denied any impact on the methodology of fundamental rights
- Consequence: some confusion and/or disagreement as to the proper level of protection to be applied under EU law, as compared with the Convention level → domestic courts at a loss.

Challenges for the courts of the EU Member States – Illustrations (IV)

Methodological issues

- CJEU departing from Strasbourg standards on the methodology of fundamental rights:
 - Collective or individual test? (“systemic flaws”)
 - Issuing or executing State competent? (limited exceptions to doctrine of mutual trust: “exceptional circumstances”)
- On these issues, there have been considerable fluctuations of the Luxembourg case-law, not least as a result of some reactions from Strasbourg, Karlsruhe, Paris and other supreme courts.

Challenges for the courts of the EU Member States – Illustrations (V)

Art. 52(3) applied in an “apodictic” way

- Non bis in idem in dual proceedings (Menci, C-524/15)
 - Different methodology (fictional unity / limitation)
 - Partly similar and partly different criteria
 - Difficulty in identifying higher / lower level of protection
 - Claim by CJEU, without demonstration: 52(3) respected
- → Challenge for domestic courts having to apply the two methodologies simultaneously
- → bound to produce further adjustments

Conclusion (I)

- In some areas, which tend to expand, there is an insufficient common understanding of FR between EU law and the Convention.
- Art. (52)3 EU-Charter, as currently applied by the CJEU, is not enough to ensure a comprehensive common understanding.
- The drafters of the Lisbon Treaty were right in considering that the Charter should be complemented by a mechanism involving the EU in the common enforcement of FR, along with its Member States.

Conclusion (II)

- In other words: the collective enforcement of European FR has become a condition for their common understanding.
- For as long as a collective enforcement mechanism involving the EU is not in place, there is a risk of
 - Legal uncertainty
 - Fragmentation of European FR
 - Frustration at the level of domestic courts
 - Loss of trust of citizens in the value of their FR – and in the capacity of the judiciary to deliver on them.
 - A risk of rejection of European FR altogether?



Thank you.

For further information:

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