EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

The Quest for Consistency between the EU and the European Convention on Human Rights

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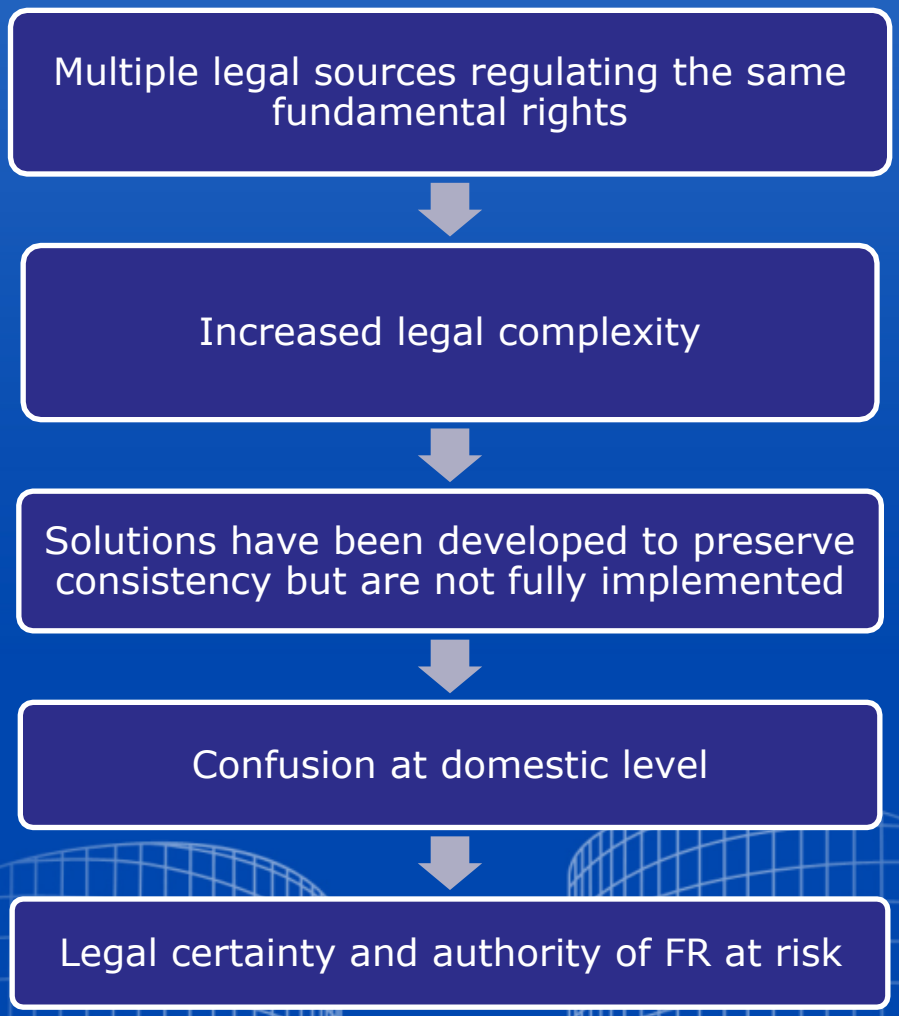
The problem in a nutshell



Outline of the presentation

- Description of the context
- Why is there a need for consistency?
- How can it be achieved?
- How does the reality on the ground look like?
- Conclusion and outlook

The Context (I)

- 3 sources of fundamental rights
  - EU Member States' legislation
  - EU law
  - European Convention on Human Rights
- (Partial) overlap between those sources
  - Ratione materiae
  - Ratione personae
- 3 levels of jurisdiction
  - Courts of the EU Member States
  - CJEU (intervening ex ante under 267 TFEU)
  - European Court of Human Rights (intervening ex post)

The Context (II)

- EU Member States **did not pull out of the Convention system** after creating the EU (or its predecessors)
- → remain **under the jurisdiction of the ECHR and the ECtHR** when applying EU law
- → **Domestic courts** must apply EU law in conformity with the ECHR
- → Conformity with the ECHR can be **reviewed by the ECtHR** → can give rise to the finding of a violation (see recently Bivolaru and Moldovan v. France, 40324/16 and 12623/17)
- → risk of domestic courts finding themselves confronted with **different norms to be applied simultaneously**
- → need for **coordination**, in the interest of **consistency**

Coordination and consistency: why?

For the sake of preserving:

- The **authority of FR**: different, uncoordinated versions of the same FR in different legal systems undermine their authority, as virtually every interpretation of a FR can be challenged by another
- **Legal certainty** at domestic level: domestic judges engage their responsibility under the ECHR in applying their national law and EU law
- → must **combine** these three sources of FR
- → they should be made **consistent**, i.e. **compatible** with each other (which is not the same as **identical**)

Coordination and consistency
National courts' perspective

"Whatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, **the net result at the end of the day has to be a single answer**. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of **individual cases within the national legal order** needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but **can I suggest that we do need a coherent and harmonious human rights order**."

Frank Clarke, Chief Justice at the Supreme Court of Ireland, Strasbourg, 31.1.2020

Coordination and consistency: how?

By establishing the ECHR as the **minimum protection level** under EU law as well, as in:

- Art. 52(3) of the EU-Charter on Fundamental Rights
- The stand-still clauses in EU secondary legislation
- Art. 6(2) TEU

= **harmonising** the **minimum protection** across the legal systems
= conferring on the ECHR a « **benchmark function** »

- safeguards the role of the ECHR as **pan-european minimum protection** level (Art. 53 ECHR)
- allows EU law to **raise** that level (Art. 52(3) EU-Charter)
- **protects national judges** against breaching the ECHR when applying EU law

Coordination and consistency: practice

The CJEU, in the vast majority of cases, has been following an « **autonomistic » approach** in relation to the ECHR, by:

- Developing its **own methodology and criteria** when applying the **same rights** as those of the ECHR
- → **duality of norms**
- → but also a **permanent ambivalence**: its norms are never entirely identical but never entirely different either

- Using the ECHR mostly only as a « **toolbox** », i.e. for filling the gaps in its own case-law (as recently in C-569/20)

- Only rarely communicating about its compliance with the ECHR as **benchmark**, i.e. about whether the **duality of norms** also entails a **duality of protection**

Duality of norms: examples
Dublin

It **cannot** be concluded from the above that **any infringement** of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003. At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice … If there are substantial grounds for believing that there are **systemic flaws** in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision. (N.S. and Others, C-411/10 and C-493/10, §§ 82-83, 86)

The Court considers it necessary to follow an approach similar to that which it adopted in the M.S.S. judgment, cited above, in which it examined the ***applicant's individual situation in the light of the overall situation*** *prevailing in Greece at the relevant time. (Tarakhel v. Switzerland, 29217/12, § 101)*

Duality of norms: examples
Property rights - limitations

Ainsi qu'il ressort du libellé de [l'article 17, § 1, 3ème phrase], l'usage des biens peut être réglementé par la loi dans la mesure nécessaire à l'intérêt général. À cet égard, il découle de l'article 52, paragraphe 1, de la Charte que des limitations peuvent être apportées à l'exercice de droits consacrés par celle-ci, pour autant que ces limitations sont **prévues par la loi**, qu'elles respectent le **contenu essentiel** desdits droits et que, dans le respect du principe de **proportionnalité**, elles sont **nécessaires** et répondent effectivement à des **objectifs d'intérêt général reconnus par l'Union** ou au **besoin de protection des droits et des libertés d'autrui** (BPC Lux 2 Sàrl, C-83/20, pt. 51).

*In order to be compatible with the general rule set forth in the first sentence of the first paragraph of **Article 1 of Protocol No. 1**, an interference with the right to the peaceful enjoyment of "possessions", apart from being **prescribed by law** and **in the public interest**, must strike a "**fair balance**" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see Beyeler v. Italy, 33202/96, § 107)*

Duality of norms: examples
non bis in idem in mixed proceedings

For the Court to be satisfied that there is **no duplication** of trial or punishment (bis) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time". In other words, it must be shown that they have been **combined in an integrated manner** so as to form a **coherent whole** (A and B v. Norway, 24130/11 29758/11, § 130)

It appears that the national legislation at issue in the main proceedings allows criminal proceedings to be brought against a person, such as Mr Menci, in respect of an offence consisting in the failure to pay VAT due on the basis of the tax return for a tax year, after the imposition on that person, in respect of the same acts, of a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter. Such a ***duplication of proceedings*** *and penalties constitutes a* ***limitation*** *of the fundamental right guaranteed by that article. (Luca Menci, C-524/15, § 39)*

Coordination and consistency: the challenge for national judges

Even though they engage their own responsibility under the Convention, national judges are left in the dark as to:

- Whether the **duality of norms** entails a **duality of protection** and, if so, what the respective levels of protection are

- And whether they can be satisfied that EU law, as interpreted by the CJEU, is **compliant with the ECHR**. This is not necessarily the case, in the absence of a general statement of the CJEU to that effect. See e.g.:

  - N.S. and Others (see above)
  - Bivolaru and Moldovan v. France (40324/16 and 12623/17)

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Conclusion and outlook

The **EU legislature** has shown to be fully aware of the need to preserve consistency between EU law and the ECHR → has acted accordingly

This is in contrast with the « **autonomistic approach** » followed by the CJEU, which is characterized by **insufficient communication** about its **ECHR sources** and their **relationship with EU law**, thus seemingly trying to « reinvent the wheel » (another wheel perhaps, but still a wheel).

It is thereby ignoring the fact that if EU law is autonomous, **national judges are not**, bound as they are to comply with the ECHR when applying EU law

The *Bivolaru and Moldovan* jurisprudence could serve as an **eye-opener** and help the CJEU realise the need for an **increased consistency** in this field, in the interest of national judges and FR altogether.

Thank you !

More contributions on this and similar topics at:

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