

The interplay between the European Convention on Human Rights and the EU-Charter of Fundamental Rights

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The principles (I)

1. **High importance** of fundamental rights (FR) in democratic legal systems

"... respect for those rights being a **condition of the lawfulness** of EU acts, so that measures incompatible with those rights are not acceptable in the EU." (CJEU, Opinion 2/13, § 169).

2. **Overlap** between EU law and the Convention:

- *Ratione materiae*: the Convention and EU law protect partly the same FR, but sometimes with different wordings
- *Ratione personae*: the EU Member States are all Contracting States to the Convention



The principles (II)

The case-law of the other European Court as toolbox

EU law and the Convention operate as **sources of mutual inspiration** ("toolboxes") → cross-references

Frequent use by both European Courts:

a) To fill gaps, as in:

- CJEU, Spetsializirana prokuratura (C-569/20)
- ECtHR, Beuze v. Belgium (71409/10)

b) To align on each other or raise protection level:

- CJEU, W.Z. (C-487/19)
- ECtHR, Scoppola v. Italy (n° 2) (10249/03)



The principles (III)

The Convention as benchmark

3. The Convention **predates** the creation of the EU (or its predecessor organisations) →

- *The Contracting States "must read and apply the rules of EU law **in conformity with the Convention**" (as minimum standard) (Bivolaru and Moldovan v. France, 40324/16 12623/17, § 103)*
- Compliance with the Convention when applying EU law can be made the **subject of an application** before the ECtHR
- → Explanations to Art. 52(3) of the EU-Charter: *In any event, the level of protection afforded by the Charter **may never be lower than that guaranteed by the ECHR***
- = protection of domestic judges against well-founded applications in Strasbourg

Strasbourg control: examples (I)

Bivolaru and Moldovan v. France, 40324/16 12623/17

The ECHR ruled on the **execution of two European arrest warrants** for the purpose of the service of prison sentences in Romania. It found a violation of Article 3 (prohibition of ill-treatment) in respect of one of the applicants and no violation in respect of the other.

Georgiou v. Greece, 57378/18

The ECHR recapitulated its case-law on the need for domestic courts which, under Article 267 TFEU, are in principle obliged to make a reference to the CJEU for a preliminary ruling, to **give reasons when they reject an application** to that effect by one of the parties to the proceedings. In the present case, it found that the Greek Court of cassation had breached Article 6. In addition, it suggested that the **domestic proceedings be reopened** to allow the Court of cassation to examine the request for referral.

Strasbourg control: examples (II)

Veres v. Spain, 57906/18

The ECtHR found a violation of the applicant's right to respect for his family life (Article 8 of the Convention) on account of the fact that Spanish courts had **failed to recognise and enforce without delay** a judgment by a Hungarian court acting under Article 21 et seq. of the Brussels II bis Regulation (No. 2201/2003) and ordering the return to Hungary of the applicant's daughter.

Moraru v. Romania, 64480/19

The ECHR found a violation of Article 14 of the Convention (prohibition of discrimination) taken together with Article 2 of Protocol No. 1 to the Convention (right to education) on account of the failure by the domestic authorities to put forward any reasonable and objective justification for the disadvantage faced by the applicant, whose height and weight were below the statutory thresholds, in the admission process to study military medicine. In particular, the domestic courts **failed to "meaningfully engage" with the relevant case-law of the CJEU.**

Strasbourg control: examples (III)

Spasov v. Romania, 27122/14

The ECtHR found that the applicant, the owner and captain of a vessel registered in Bulgaria who was fishing in Romania's exclusive economic zone, had been the victim, inter alia, of a **denial of justice** (Art. 6 of the Convention) because he had been convicted on the basis of Romanian criminal law which previously had been found to be **in breach of EU law**, notably the rules of the Common Fisheries Policy, by the European Commission. By not applying these rules, which had direct effect in the Romanian legal order and prevailed over national law, the Romanian courts had made a **manifest error of law**.



Strasbourg control: consequences

Since:

- a) EU law must be applied **in conformity with the Convention**, which in certain situations also requires compliance with EU law, and
- b) The Convention is a **benchmark** under EU law, i.e. a **minimum standard** which can be raised but not reduced (Art. 52(3) of the EU-Charter, Art. 53 of the Convention), and
- c) Compliance with the Convention of the application of EU law can be made the subject of a **Strasbourg control**,

Domestic judges and prosecutors should,

- Apply EU law and the Convention **simultaneously**
- In the event of diverging standards, go for the **higher standards**
- This requires a **comparison** of the respective protection levels → difficulties

Comparing levels of protection: three different categories of situations

1. Common norms
2. Duality of norms
3. Duality of methodologies



Common norms: examples

Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, § 86

That the right guaranteed by Art. 4 of the Charter is absolute is confirmed by Art. 3 ECHR, to which Art. 4 of the Charter corresponds. As is stated in Art. 15(2) ECHR, no derogation is possible from Art. 3 ECHR. Articles 1 and 4 of the Charter and Art. 3 ECHR enshrine one of the fundamental values of the Union and its Member States.



Common norms: examples

Orde van Vlaamse Balies and Others, C-694/20, § 26

*"In accordance with **Art. 52(3) of the Charter**, which is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law, the Court must therefore take into account, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Art. 8(1) and Art. 6(1) ECHR, **as interpreted by the European Court of Human Rights** ("the ECtHR"), as the **minimum threshold of protection**"*



Duality of norms: examples

Case-law

Paposhvili v. Belgium App n. 41738/10, § 183:

"a real risk of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy"

Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique), C-69/21, § 66:

"a real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain"



Duality of methodologies: examples

Limitations - property rights

BPC Lux 2 Sàrl, C-83/20, § 51

« Ainsi qu'il ressort du libellé de [l'article 17, § 1, 3^{ème} 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**. »



Duality of methodologies: examples

Limitations - property rights

Beyeler v. Italy, 33202/96, § 107

*"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."*



Duality of methodologies: examples

European arrest warrant

Puig Gordi and Others, C-158/21, § 111:

*"Where a person for whom a European arrest warrant has been issued claims that he or she will be exposed to a risk of infringement of the second paragraph of Article 47 of the Charter on the ground that he or she will be tried by a court of the issuing Member State which does not have jurisdiction to do so, but the executing judicial authority considers that the information at its disposal does **not** constitute objective, reliable, specific and properly updated information to demonstrate the existence of **systemic or generalised deficiencies** in the operation of the judicial system of that Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs, **that authority cannot refuse to execute that European arrest warrant on the ground alleged by that person.**"*

Duality of methodologies: examples

European arrest warrant

Bivolaru and Moldovan v. Romania, 40324/16 and 12623/17, § 114:

*"Regarding the establishment of a **real risk to the individual**, the Court notes that the requirements laid down by the CJEU ... are to the same effect as those arising out of its own previous judgments, which place the national authorities under a duty to ascertain whether there is **a real risk, specifically assessed, to the individual concerned**, of treatment contrary to Article 3 in the same circumstances."*



Duality of methodologies: examples

Brussels II bis

Povse, C-211/10, § 83

*"Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. **Such a change must be pleaded before the court which has jurisdiction in the Member State of origin**, which should also hear any application to suspend enforcement of its judgment."*



Duality of methodologies: examples

Brussels II bis

Royer v. Hungary, 9114/16, §§ 56 and 62

*With regard more specifically to the Hungarian courts' reasoning, the Court reiterates that Article 8 of the Convention imposed a **procedural obligation on the Hungarian authorities**, requiring that an **arguable allegation of grave risk to a child in the event of return be effectively examined** by the courts and their findings set out in a reasoned court decision (*X v. Latvia*, cited above, § 107) ...*

*The Court concludes that, having particular regard to the in concreto approach required for the handling of cases involving child-related matters, the Hungarian courts' assessment of the case in the light of the Hague Convention requirements **did not amount to a violation of Article 8** of the European Convention, as it was proportionate to the legitimate aim pursued.*

Duality of methodologies: examples

Dublin Regulation

N.S. and Others, C-411/10 and C-493/10, §§ 82-83, 86

*“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.”*



Duality of methodologies: examples

Dublin Regulation

Tarakhel v. Switzerland, 29217/12, § 101

*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.*



Concerning mutual recognition

Avotiņš v. Latvia, 17502/07, §§ 113-116

[The Court] considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention. ...

Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67(1) of the TFEU. ...

[The Court] must verify that the principle of mutual recognition is not applied automatically and mechanically ... to the detriment of fundamental rights. ...

If a serious and substantiated complaint is raised before [national courts] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.

Need for coordination

*“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



Need for coordination

Relevant areas

Increasing number of applications before the ECHR dealing with EU law matters, such as:

- Non bis in idem
- Religion (in the workplace, ritual slaughtering)
- Procedural rights in criminal proceedings
- Right to property
- Asylum
- European arrest warrant
- International child abductions
- Rule of law, judicial independence
- Preliminary rulings
- In some near future: procedures run by the EPPO

Conclusion

There is a **common responsibility** of both systems for the upholding of the **authority and efficiency of fundamental rights** by ensuring **legal clarity and harmony** in this field.

Living up to that responsibility requires:

- Not just cross-references (toolbox approach), however useful they might be
- But also a **wholistic approach** with a view to achieving legal harmony and, where necessary, properly addressing any duality of norms and/or methodologies (benchmark approach)



Thank you !

More contributions and examples on this topic at:

www.johan-callewaert.eu

