TRENDS 2021-24:

TAKING STOCK OF THE INTERPLAY BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND EU LAW

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The following is a short and not exhaustive overview of some trends which have emerged since 2021 as regards the interplay between the European Convention on Human Rights ("the Convention") and EU law in a number of selected areas. The focus is on a comparison of the case-law of the two European Courts, with a view to allowing an assessment about the cross-system compatibility of the European jurisprudence on fundamental rights and the respective levels of protection it guarantees.

I. AREAS OF CONVERGENCE

1. Procedural rights in criminal proceedings

The area which would appear to currently offer the greatest explicit convergence with Strasbourg is that of procedural rights in criminal proceedings, which is governed by the series of Directives enshrining some of these rights. It also seems to be the area with the most frequent references to the benchmark function of the Convention, as provided for by Article 52(3) of the EU-Charter, as opposed to the Convention being used merely as a toolbox to fill the gaps left by EU law. Relevant rulings by the CJEU to that effect include *K.B. and F.S.*, Politseyski organ pri 02 RU SDVR, *HYA and Others*, *HN and DD*, and *Spetsializirana prokuratura*.

2. Judicial independence and the rule of law

Judicial independence and the rule of law is another important area of convergence between the Strasbourg and Luxembourg jurisprudence, as illustrated by the frequent reliance by the two European Courts on each other's case-law, as in *Reczkowicz v. Poland*, *Dolinska-Ficek and Ozimek v. Poland*, *Wałęsa v. Poland*, *European Commission v. Poland*, *W.Ż.* and *Krajowa Rada Sądownictwa*.

3. Freedom of religion (ritual slaughter)

The two European Courts also have a convergent approach when it comes to assessing whether the legal obligation to use reversible non-lethal stunning in the context of ritual slaughter breaches freedom of religion. *Executief van de Moslims van België and Others v. Belgium*, referring to *Centraal Israëlitisch Consistorie van België and Others*, very well illustrates how beneficial it is for the cross-system compatibility of the case-law on fundamental rights when the case-law of the ECtHR is taken on board from the start of the journey of a case through the judicial instances. Indeed, the last possible stop of such a case is in Strasbourg and its ultimate benchmark is the Convention, as minimum protection level (Art. 53 of the Convention). From this perspective, it

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makes little sense not to take into account from the start what is going to be the ultimate benchmark at the end anyway.

4. The right to be forgotten

The right to be forgotten is about to become another area of convergence between Strasbourg and Luxembourg, it seems. Whereas in *Google Spain*, the first Luxembourg judgment on that matter, the CJEU placed the emphasis more on the protection of the private life of the persons affected by an alleged abuse of their personal data by search engines, it has in subsequent judgments, e.g. in *GC and Others v. Commission nationale de l'informatique et des libertés (CNIL)*, gradually moved towards a more equal rating of respect for private life and freedom of expression on the Internet, with the consequence that conflicts between those two rights are now to be addressed by balancing them against each other in light of the circumstances of each case. This is also the approach which was recently developed by the ECtHR in *Hurbain v. Belgium*, which concerned the same kind of conflict but in a slightly different context, i.e. the electronic archives of a news publisher.

5. Migration (migrants at the State border and in transit zones)

Despite some methodological differences, the positions of the ECtHR and the CJEU are predominantly convergent in substance on the fundamental rights of migrants at the State border or in transit zones, notably in respect of their detention and the prohibition of push-backs and ill-treatment, as illustrated by *Valstybės sienos apsaugos tarnyba*, *Commission v. Hungary*, *R.R. and Others v. Hungary* and *N.D. and N.T. v. Spain*.

6. Subsidiary protection

There is also convergence in the field of subsidiary protection. In *Staatssecretaris van Justitie en Veiligheid*, the CJEU made sure to interpret Directive 2011/95 (Qualification Directive), notably on the degree of personal risk required to qualify for subsidiary protection (Art. 15), in accordance with the Strasbourg jurisprudence on the same topic, especially *NA v. the United Kingdom*, which was identified as minimum protection level, pursuant to Article 52(3) of the EU-Charter.

7. Reasons for the dismissal of a request for a reference for a preliminary ruling

In *Kubera* the CJEU has for the first time imposed an obligation on a national court against whose decisions there is no judicial remedy (Art. 267(3) TFEU) to give reasons when rejecting the request by a party to the proceedings to make a reference for a preliminary ruling by the CJEU. While this happened in the specific context of an appeal before a Supreme Court on a point of law, it nonetheless represents un upgrading of the position of the parties to proceedings in the system of preliminary rulings, similar to the well-established Strasbourg case-law to the same effect.

II. AREAS OF DIVERGENCE

The divergences listed below have their origin not so much in differences as regards the content or scope of fundamental rights, but rather in the methodology applied to them. It is indeed a well-

known fact that the same rights applied according to different methodologies can produce very different results. The following examples illustrate that reality.

1. The European arrest warrant

At present, the execution of European arrest warrants is probably the most significant area of divergence between Strasbourg and Luxembourg, the methodological bone of contention being the test to be applied by the executing judicial authority when assessing any risks of breach of the fundamental rights of the person concerned in the issuing Member State. Looking at recent cases such as *Puig Gordi and Others*, *Staatsanwaltschaft Aachen* and *GN*, it would indeed appear that the CJEU is *de facto* gradually replacing the individual test, which is of the essence of any control of respect for fundamental rights, by a collective test, thereby completely ignoring the landmark Strasbourg judgments in *Avotiņš v. Latvia* and *Bivolaru and Moldovan v. France* which are clear about the fact that in addition to any general test, an individual test must be applied (see the comment on *Openbaar Ministerie*). Moreover, through the focus on systemic deficiencies, two different categories of fundamental rights seem in the process of being created by the CJEU (*GN*). Only in *E.D.L.* did the CJEU make an exception from this approach.

2. International child abduction

In the field of international child abductions too, one can see different approaches being followed in Strasbourg and Luxembourg, leading to different results. The bone of contention here is the competence of the courts in the Member State of the new resident of an abducted child to decide on whether the return of that child would, in the circumstances of the case, entail a breach of the child's fundamental rights and/or his/her best interests. Whereas the Brussels II*bis*/*ter* Regulation follows a rather rigid approach based on the exclusive competence of the courts of the habitual residence of the child to assess those matters, as recently illustrated in *TT*, the Strasbourg approach, based on what Article 8 of the Convention requires in the specific circumstances of each case, is more flexible in this respect, notably by ruling that, in some specific circumstances, Article 8 may require the judge of the new residence of the child to decide on whether the return of the child is in his/her best interest, as was the case in *Šneersone and Kampanella v. Italy*, *Royer v. Hungary*, *M.K. v. Greece* or *O.C.I. and Others v. Romania*.

3. Non bis in idem

The recent Luxembourg case-law on *non bis in idem* in the field of dual proceedings has been characterised not only by a significant methodological divergence with the Strasbourg case-law, but also by several conceptual inconsistencies emerging from a comparison of bpost, *BV*, and *MV - 98* with each other. Serious methodological differences also appear in the application of *non bis in idem* in the context of the Convention implementing the Schengen Agreement (CISA), as in *Generalstaatsanwaltschaft Bamberg*.

4. Protection of personal data

The bulk interception of personal data is another area which has recently given rise to case-law revealing different approaches by the two European Courts. Whereas the Luxembourg approach

is more abstract and rigid, as a result of the very detailed provisions contained in the relevant secondary law, the Strasbourg approach is more concrete and flexible, but also less predictable, focussed as it is on the particular circumstances of each case and considering them in their totality.

5. Freedom of religion (wearing of overt signs of religious affiliation in the workplace)

The CJEU and the ECtHR would appear to have different approaches as regards the wearing of overt signs of religious affiliation in the workplace, as illustrated by *Commune d'Ans*, where the CJEU weighed-up the rights and interests at stake at a collective level, not at the level of the individual complaining about discrimination, in contrast with the Strasbourg case-law.

6. The Dublin Regulation

According to the interpretation of the Court of Justice in *Staatssecretaris van Justitie en Veiligheid (Mutual trust in case of transfer)*, the only fundamental rights whose risk of violation may justify an exception to the transfer of an asylum seeker to the State of first entry are, to the exclusion of all others, the rights enshrined in Article 4 of the Charter, which prohibits inhuman or degrading treatment.

7. Judicial review of detentions

In respect of procedures for the judicial review of pre-trial detentions, the CJEU in *Stachev* sought to follow the case-law of the ECtHR regarding the consequences of the absence of a lawyer during interrogations in criminal proceedings. In doing so, however, it unduly applied the criterion of the proceedings as a whole, which the ECtHR reserves for complaints based on the right to a fair trial (Article 6 of the Convention), to procedures concerning pre-trial detention, which instead fall under Article 5 of the Convention. Article 5 is strictly applied and, for this reason, does not accommodate an assessment of the proceedings as a whole but requires an autonomous examination of each stage of the proceedings in question. Moreover, as a result of a selective reading of the Strasbourg case-law cited, the CJEU ignored an essential guarantee thereof for the benefit of accused or suspected persons: namely, that the absence of a lawyer during such interrogations must be justified by "compelling reasons," failing which the burden of proving the fairness of the proceedings will rest on the authorities.

III. FIVE CONCLUSIONS

The following five conclusions emerge from the overview above.

1. Whereas the areas of convergence are a reason for satisfaction, the areas of divergence represent a challenge for the national judges and prosecutors.
2. The EU legal system is autonomous, but the national judges and prosecutors are not, because they remain subject to the Convention and must apply EU law in compliance with it, which requires a comparison of the respective levels of protection.
3. Consequently, in the field of fundamental rights, EU law is not the end of the story. Rather, a wholistic approach is called for, which takes into account the interplay between EU law and the Convention.

4. Fundamental rights are in essence individual rights. They call for an individual test, which can be complemented but not replaced by a general test.

5. As *Executief van de Moslims van België* shows, the last possible stop of a case as regards fundamental rights is Strasbourg and its ultimate benchmark is the Convention, as minimum standard. From this perspective, it makes little sense not to take into account from the start what is going to be the ultimate benchmark at the end anyway. The goal is not uniformity but cross-system compatibility of the case-law.

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