TRENDS 2021-26:

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

Johan Callewaert[1]

The following is an updated[2], short and not exhaustive overview of some trends which have emerged since 2021 until now, in some selected areas, as regards the interplay between the European Convention on Human Rights ("the Convention") and EU law. The focus is on a comparison of the case-law of the two European Courts, with a view to allowing an assessment of the cross-system compatibility of the Strasbourg and Luxembourg jurisprudence on fundamental rights and their respective levels of protection.

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*. See however § 17 below.

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. Examples of this common approach include *Reczkowicz v. Poland*, *Dolinska-Ficek and Ozimek v. Poland*, *Commission v. Poland (Disciplinary regime applicable to judges)*, *W.Ż.* and *Krajowa Rada Sądownictwa*. On the issue of the appointment of judges, *Commission v Poland (Ultra vires review of the case-law of the Court – Primacy of EU law)* is another recent illustration of this common approach.

On the different but complementary impact of the Strasbourg and Luxembourg approaches regarding judicial independence, see the comparison of *AW 'T'* with *Wałęsa v. Poland* in *What a difference a*

[1] Professor at the Universities of Louvain and Speyer. Former Deputy Grand Chamber Registrar at the European Court of Human Rights (2006-2025).
[2] As per 1 January 2026.

composition makes… Comparing AW 'T' with Walesa v. Poland on the lack of judicial independence and the use of extraordinary appeals in Poland.

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 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. As a consequence, 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

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 (Accueil des demandeurs de protection internationale)*, *R.R. and Others v. Hungary* and *N.D. and N.T. v. Spain*.

The two European Courts are also united in ensuring an effective access to procedures of international protection and rejecting the so-called "embassy procedure" put in place by Hungary, as illustrated by *European Commission v. Hungary (Procedure for international protection)* and *H.Q. and Others v. Hungary*.

Furthermore, similar approaches are adopted by the ECtHR and the CJEU in their reliance on human dignity as justification of the refusal of any exceptions to the minimum protection standards to which asylum seekers are entitled to cover their basic needs. See the comparison of *The Minister for Children* with *Camara v. Belgium* in *What is the price of human dignity?*

6. Subsidiary protection (risk of ill-treatment)

There is also convergence in the field of subsidiary protection. In *Staatssecretaris van Justitie en Veiligheid*, the CJEU interpreted Directive 2011/95 (Qualification Directive), notably on the degree of personal risk of ill-treatment 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. See however § 18 below.

7. Sexual orientation and gender identity

The ECtHR and the CJEU agree on the duty of the States to legally recognize same-sex partnerships (*Coman and Others*, *Koilova and Babulkova v. Bulgaria*), as well as changes of first name and gender identity (*Mirin*). However, under EU law this obligation only applies to persons who exercised their right to free movement.

8. Age discrimination

There is also alignment between Strasbourg and Luxembourg regarding age discrimination in recruitment procedures, as illustrated by *Ferrero Quintana v. Spain*, where the European Court of Human Rights extensively referenced *Salaberria Sorondo*.

9. Reasons for the dismissal of a request for a preliminary ruling by the CJEU

In *Kubera* the CJEU 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, which was recently confirmed in *Gondert v. Germany* (on this case-law, see The obligation to give reasons for a refusal to make a preliminary reference to the CJEU). According to *Georgiou v. Greece*, a failure to act upon a request for a preliminary ruling by the CJEU can even give rise to a reopening of domestic proceedings.

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 are an illustration of that reality.

10. 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. It seems to thereby ignore the landmark Strasbourg judgments in *Avotiņš v. Latvia* and *Bivolaru and Moldovan v. France* which are clear about the need for an individual test to complement any general test, given that fundamental rights are in essence individual rights, as confirmed by the right to *individual* petition enshrined in Article 34 of the Convention. 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.

What is particularly worrying is that by calling into question the possibility for the executing judicial authority to apply an individual test, as in *GN*, the CJEU calls into question the right for that authority to simply comply with its obligations under the Convention. Yet there is no primacy of EU law over the Convention.

11. 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*.

12. Non bis in idem

The 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. Yet consistency with Strasbourg has recently increased with *Volkswagen Group Italia and Volkswagen Aktiengesellschaft* and *Engie Romania* following more closely the *bpost* approach, which is itself rather close to *A and B v. Norway*, the leading Strasbourg case on dual proceedings.

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*.

13. 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.

As illustrated by *Inspektorat kam Visshia sadeben savet*, significant differences between the standards of the Convention and those of the General Data Protection Regulation (GDPR) also exist as regards the safeguards to be applied when allowing access by public authorities to confidential data.

14. 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.

15. The Dublin Regulation

Significant differences between Strasbourg and Luxembourg can also be noted as regards the treatment of asylum seekers who were transferred back to the State of first entry and find themselves in a situation of extreme poverty. As illustrated by *Tudmur*, which present many similarities with *M.S.S. v. Belgium and Greece*, these differences concern the scope of the rights of these asylum seekers, the relevant test in applying those rights, as well as the burden of proof on the asylum seekers.

Finally, important methodological differences emerge from *H.T. v. Germany and Greece*, in which the ECtHR required, as a pre-condition for the transfer under the Dublin Regulation of an asylum seeker, the existence of a sufficient basis for a general presumption that the applicant would, following his/her transfer, have access to an adequate asylum procedure, protecting him/her against refoulement, and that he/she would not risk being exposed to treatment contrary to Article 3 there. By contrast, under Article 3(2), second subparagraph, of the Dublin III Regulation, a transfer to the Member State primarily designated as responsible for the processing of an application for asylum is precluded only in case of systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, thus precluding any other fundamental right from being invoked in this context (*Staatssecretaris van Justitie en Veiligheid (Mutual trust in case of transfer)*).

16. 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.

17. Waiver of the right to attend trial

It also appears that under Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, the right of an absent suspect or accused person to a new trial is significantly restricted when compared to the modalities of that same right under the Convention (see *VB II (Information on the right to a new trial)*).

18. Subsidiary protection (risk of breach of the right to private and family life)

In *Nuratau* the CJEU made clear that under EU law (Qualification Directive) there is no right to international protection against a serious risk of breach of a person's right to respect for his/her private and family life which would arise in the event of a deportation of this person. This is in sharp contrast with the Strasbourg case-law on this issue (see the *Guide on Article 8 of the Convention*, at §§ 328-330). See however § 6 above.

19. Sports arbitration

As illustrated by *Semenya v. Switzerland* and *Royal Football Club Seraing*, the ECtHR and the CJEU have recently taken different approaches to the issue of dispute resolution in professional sports. Yet these approaches appear nonetheless compatible with each other, as explained in *Different but compatible approaches to international sports arbitration: comparing Semenya (ECtHR) with Royal Football Club Seraing (CJEU)*.

20. Protection of the environment / Climate change

Different – but mutually compatible – approaches also characterize the jurisprudence of the ECtHR and the CJEU in the field of the protection of the environment and of climate change. Whereas the

Strasbourg approach, primarily based on Article 8 of the Convention, is comprehensive, general and flexible, the EU approach, mainly based on detailed secondary law, is sectorial, specific and determined. This holds true both for the protection of the environment (*Environmental pollution caused by the Ilva steelworks – judgment of the CJEU in Ilva and Others, compared with Cordella and Others v. Italy*) and for the challenging issue of climate change (*KlimaSeniorinnen Schweiz and Others v. Switzerland*; *Greenpeace Nordic and Others v. Norway*).

III. THE HYBRID ENTITIES

In recent years, new entities, such as the European Public Prosecutor's Office (EPPO) and the European Border and Coast Guard Agency (Frontex), have been created under EU law, combining national and EU components both institutionally and operationally. Since the national components are subject to the Convention whereas the EU components are not, this results in a distortion of the body of fundamental rights that may be asserted vis-à-vis these hybrid entities by victims of their actions, as well as in potential discrepancies in the protection standards applicable to a single set of proceedings. The challenges to the comprehensiveness of the Convention protection system raised by these new entities have become apparent in *G.K. and Others*, *EPPO (judicial review of procedural acts)* and *WS and Others v. Frontex*. Similar issues arise in connection with the association of national and EU entities for the implementation of the General Date Protection Regulation (GDPR), as illustrated by *Inspektorat kam Visshia sadeben savet*.

IV. CONCLUSIONS

The following conclusions emerge from the overview above.

1. The areas of divergence are confirmation of the optionality of the Convention in EU law, resulting in the benchmark function of the Convention being only occasionally acknowledged (see Optionality of the Convention).

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. Compliance with the Convention in the application of EU law can be made the subject of an application before the ECtHR resulting in the finding of a violation of the Convention, as in *Bivolaru and Moldovan v. France*, *M.B. v. the Netherlands* and *H.T. v. Germany and Greece*.

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. As *Executief van de Moslims van België and Others v. Belgium* 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.