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

Seminar

"The articulation between the European Convention of Human Rights and the European Law: past, present and future"

Closing remarks By Dineke de Groot

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Upon approaching the change of presidency of the European Court of Human Rights (ECtHR), it is particularly welcome to be together in a group of judicial and academic colleagues, here in Strasbourg and online, sharing ideas and experiences on the articulation between the European Convention on Human Rights (ECHR) and European Union (EU) Law: past, present, and future.

As mentioned during the discussion, the speeches provided much food for thought. During closing remarks in a human rights Court building, justice must be done to both the speakers and the audience, which means I will not try to summarise the excellent speeches we just witnessed on this topic. I would like to share some reflections on the collective speeches.

At the opening, it was mentioned that the articulation between the ECHR and EU law is a broad topic, of which accession of the EU to the ECHR is just one of the issues, among others. The relevance of the accession issue emerged in one of the speeches, when the position of the Luxembourg Court towards the Strasbourg Court was compared to the position of a national court applying the ECHR.

All speeches indicated the Strasbourg and Luxembourg Courts have different positions, because of their different aims and origins, the law each Court interprets, the 46 and 27 Member States they cover, the citizens and organisations within their jurisdiction, the way their competences and responsibilities are regulated, etcetera. The speeches also clearly showed these differences are so obvious and well-known, such that they should not distract us from furthering the effective protection of human rights in Europe when discussing issues of the articulation of the Convention and EU law.

I will provide an example regarding the authority of both Courts, revealing that attention to differences, indeed, has little use. Did it ever occur to you that the Strasbourg and the Luxembourg Courts show their different positions a bit in the wording they use at the start of their reasoning? The Strasbourg often starts with 'The Court notes at the outset …', whereas the Luxemburg Court often starts with 'By its question, the referring court asks, in essence, whether …' etc. The Strasbourg Court is mainly a court of last resort on the international level, with no intention of replacing the role of national courts. A preliminary ruling function for the Strasbourg Court was created not long ago and is still developing. The Luxembourg Court is, in some cases, a court of last resort on the international level. But it mainly answers questions from national courts through the preliminary ruling procedure.

In a way, the Luxembourg Court is directly amongst those with a role in the procedure before national courts, which is emphasised by this 'hooking' into the national court's requesting words in the first words of its reply. With these first words, the Luxembourg Court demonstrates its position as the highest authority in the interpretation of EU law by transferring the national question to what part of EU law this Court is going to discuss in its judgment. The Strasbourg Court weaves its authority into the narrative of what is noted at the outset which, simultaneously, makes it clear that the interpretation of the Convention is up to this Court. While the authority of these Courts is an obvious element in their judgments, the perspective of authority does not shed light on the issue of articulation between their case-law.

For both international Courts, it is obvious that interpreting the law on the international level needs an awareness that the judgment must be suitably applicable on international and national levels in many other cases, even though there is a lot one cannot know of the law and practice of all the 46 or 27 member states and one can hardly anticipate the national impact and interference of an international judgment. In other words, their authoritative power also needs legal, legitimate and effective arguments and comprehensive wording in judgments. Otherwise, the construction of the multilevel legal order will not contain enough cement to bind the bricks together. Just to mention that quite a few speeches and the discussion used building and constructing terminology.

This 'being a construction worker' is all the more important for the Strasbourg and Luxembourg Courts when we take into account that other international and national institutions are obliged to implement or even enforce their judgments. Compared with other international courts, like the International Court of Justice or the Inter-American Court of Human Rights, the existence of an enforcement mechanism gives the Strasbourg and the Luxembourg Courts a unique standing in the possible effectiveness of their judgments for people's legal protection. To be able to enforce a judgment of an international court is even historically extraordinary. For both Courts, the mechanism's history is short, an amount of only decades that can be counted on two hands. Such a mechanism not only reinforces that a judgment can have a direct and actual effect for a party to the case, but also ensures its implementation in legal practice and society insofar as its meaning transcends the case.

Because of the considerable authority of judgments of the Strasbourg and Luxembourg Courts and the significance the Courts as institutions have in the living situations of people, it is reasonably inconceivable that they would not seek to harmonise their standards. On the contrary, it is self-evident they seek to create common ground whenever they interpret concepts of law used in both the Convention and EU law. And so they do, since the beginning of their existence. This started on their own initiative, which was followed by case-law marking the position of both courts towards case-law of the other court and by the support of the EU Member States in lining up Article 52(3) of the EU Charter of Fundamental Rights. The speakers this morning provided lots of examples.

The more extensive the case-law becomes over time, the more opportunities present themselves to look for convergence. At the same time, it becomes more complex to recognise eventual divergence in a precise and timely manner. It is a bit like when one is learning to drive a car and is not yet used to operating the car while paying attention to traffic at the same time. The expanding amount of knowledge and experience requires internalisation into possible courses of action. On the following stage, these action perspectives are internalised to the extent one can better focus his or her attention on the environment. Then, a judgment of one court may more explicitly and transparently indicate its relationship with the relevant standards of the other court. Today, the speakers shared observations on the current advanced stage of the articulation between the Convention and EU Law.

Academic literature, now and then, suggests the Strasbourg and the Luxembourg Courts still have work to do to overcome divergence. It may be helpful for the interpretation of the international human rights law system that critical comments may also act as building blocks for the system. But there is another side. For instance, advisory opinions of the Venice Commission, criticising a certain

law or practice within a state, are sometimes used by some other institution to implement such a criticised law or practice, instead of furthering the rule of law-based democracy and human rights protection. It is time to be vigilant in Europe. What comes with logical, fair, truthful and rebuttable arguments during a debate on the rule of law, sometimes risks being used by majorities neglecting values of democracy and rule of law, often at the expense of minorities who need legal protection in Europe. A debate on our judicial responsibility in Europe should not divide us but must aim to unite the courts in strengthening democracy, the rule of law, and the effective legal protection of the people.

I will provide an example of such a uniting debate. During a colloquium of the Network of the Presidents of the Supreme Judicial Courts of the EU Member States in 2023, these presidents and members of the Strasbourg and the Luxembourg Courts discussed, on the basis of judgments and judicial issues, the topic of convergence and divergence in the case-law of those Courts and the national courts. This judicial dialogue indicated national practices in the EU Member States show hardly any issues with divergence between case-law on the Convention and EU law. It also indicated national courts are used to doing justice even when the application of the Convention and EU law do not fit one-to-one in a case. It was seen as helpful that in recent years the Strasbourg and Luxembourg Courts have become much clearer in stating in their judgments where they aligned with judgments of the other Court. This transparency in the Strasbourg and Luxembourg judgments may be seen as an indication that we are indeed on an advanced stage, in which action perspectives are internalised to the extent one can better focus one's attention to the environment. The new "ECHR/EU" page on the Knowledge-Sharing platform of the ECtHR (ECHR-KS), which the Strasbourg Court launched on the occasion of this seminar, highlights the progress that continues to be made.

This overcoming, to a considerable extent, of the stage of having been immersed in the mixture of convergence and divergence, is of major importance to safeguard the considerable authority of judgments from the Strasbourg and the Luxembourg Courts, and for the significance of the Courts as institutions in the living situations of people. We should not forget that for both Courts, the period of interpreting concepts of law is quite short. Maybe some of us haven't even experienced the times when they weren't there, but both have only existed for a few decades. In civil law, after more than 2000 years, common frames of reference were drafted, and they are not yet used daily by courts. In human rights law, the period in which we try to give substance to effective enforceable protection of human rights in Europe covers some 75 years. It is only 15 years ago that the EU Charter of Fundamental Rights became its constitutional position. Besides, the Luxembourg Court currently faces challenges regarding issues of national and EU constitutional identity within EU law, which also need to be addressed using and applying Convention case-law of the Strasbourg Court. The attention and caution, as well as a wise blend of patience and impatience in the pursuit of progress, which are expressed in the efforts of the international and national courts on the way to common international human rights standards, are a hopeful and promising sign that we will continue our judicial dialogue and cooperation, in these turbulent times, in the spirit of the peace project of the Council of Europe and the European Union.