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"

The tale of two cities continues: the Convention and the expanding scope of EU law

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Strasbourg, 14 June 2024

Thank you, Mr. President-elect. It is an honour to be here, before such a distinguished audience and among such eminent speakers. Also, it's quite refreshing for me that, for once, I won't be giving a speech about the EU's accession to the Convention. Not that I don't enjoy talking about it. In fact, I enjoy it a bit too much – so later, during the discussion, you might have to grab the microphone away from me. In any event, I look forward to listening to what professor Sarmiento has to say on that topic. But to kick things off, I will speak about how the tale of two cities continues.

"A Tale of Two Cities" is, of course, the title of Charles Dickens' famous novel. It's also the title of a classic legal article: "*A Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg*," written by our esteemed host of today's seminar.[1] Many of you may have read Dickens' novel, but I suspect even more of you are familiar with President O'Leary's article. Today, I want to build on that tale. In my view, that tale is about interconnection and cross-fertilization. And a key reason for this is the expanding scope of EU law. Whether we're talking about banking law, competition law, climate laws, judicial independence, religious freedom in the workplace, privacy and data protection, or the protection of asylum seekers, to name just a few areas – both the Convention and EU law are deeply involved.

I know that for some, the idea of an "expanding scope of EU law" conjures up ominous pictures of an "unstoppable tide" or a spreading ink blot. But, actually, it simply reflects the fact that in Europe, we are increasingly facing common challenges. These challenges affect us all – citizens, political communities, and judges. So, when the European Court of Human Rights and the Court of Justice tackle similar issues, they are not trespassing on each other's domain. Instead, they are addressing these issues together. Moreover, as I will argue, they often reinforce each other – a dynamic that will become even more essential in the near future.

It may go without saying, but when discussing the European Court of Human Rights and the Court of Justice, it is essential to remember their common roots. At their origin, the Convention and

[1] S O'Leary, 'A Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg' (Cambridge Yearbook of European Legal Studies 2018) 3-31.

the EU are both manifestations of the same moral enterprise: to make sure that Europe would not repeat the horrors that had taken place on its soil during the twentieth century. However, they pursue that goal with different techniques: the Convention system *oversees* political communities; the EU legal system *integrates* political communities. In some respects, these two techniques stand in tension with each other. The main areas of tension are well known to anyone who has read *Opinion 2/13*.[2] However, generally speaking, the Convention technique and the Union technique are complementary, as the long track record of constructive interaction between the two legal systems shows. In fact, Convention law and EU law bolster each other in various ways.

As judge Bay Larsen mentioned this morning, Union law incorporates Convention law into the EU legal system through Article 52(3) of the Charter. And the Court of Justice often builds on the case-law of the European Court of Human Rights. In that way, it ensures respect for the Convention in the specific framework of the EU legal order. Recent examples are plentiful. Consider *L.G.*, a ruling on judicial independence that relies heavily on *Dolinska v Poland*.[3] Or *Banka Slovenia*, a ruling about measures taken during a banking crisis, informed by *Pintar v Slovenia*.[4] Then there's *Bpost*, a ruling in the field of competition law that draws on the Strasbourg case-law regarding the principle of *ne bis in idem*.[5] Additionally, as we heard from professor Azoulaï, there is *Centraal Israëlitische Consistorie*, a ruling about ritual slaughter that references the Strasbourg case-law on freedom of religion.[6] The list goes on.

EU law also bolsters Convention law by incorporating Convention standards into EU legislation. This strengthens the protection of Convention rights, because it brings in all the features of the EU legal system. Those features include primacy and direct effect, as well as actions for damages against the EU's institutions or its Member States. A currently pending case illustrates this well. The case, called *SA and RJ*, is a preliminary reference from the High Court of Ireland to the Court of Justice.[7] It involves asylum seekers who, upon arriving in Ireland, were not provided with accommodation. For several months, they mostly slept rough on the streets, often in wet and freezing weather, without food, and at risk of violent attack. The Irish authorities have acknowledged a violation of the EU Directive on Reception Conditions. And the applicants are now seeking damages from the Irish government for breaching EU law. While the case is argued with reference to the Charter, its close connection to the Convention, particularly the prohibition of inhuman or degrading treatment, is evident. In that sense, EU law increases the pressure to uphold Convention rights.

EU law can exert pressure through other means as well, such as infringement proceedings, or – judge Koskelo alluded to it a moment ago – by withholding certain EU funds if a Member State fails to respect fundamental rights. Unlike damages claims, these tools can only be used against Member States. However, their combined impact should not be underestimated, particularly considering that EU law requires Member States to uphold fundamental rights not only when they *implement* EU law, but also when they *derogate* from EU law. In short, there are many situations in which EU law lends additional force to Convention law.

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[2] CJEU Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454.

[3] CJEU Case C-718/21 *L.G. v Krajowa Rada Sądownictwa* EU:C:2023:1015; judgment of 8 November 2021 in *Dolińska-Ficek and Ozimek v. Poland* [First Section], nos. 49868/19 and 57511/19.

[4] CJEU Case C-45/21 *Banka Slovenije* EU:C:2022:670; judgment of 14 September 2021 in *Pintar and Others v. Slovenia* [Second Section], nos. 49969/14, 20530/16, 4713/17, 13244/18 and 16311/18.

[5] CJEU Case C-117/20 *bpost SA v Autorité belge de la concurrence* EU:C:2022:202. See also the Opinion of Advocate General Bobek in that case.

[6] CJEU Case C-336/19 *Centraal Israëlitische Consistorie van België and Others v Vlaamse Regering* EU:C:2020:1031.

[7] CJEU Case C-97/24 (pending) *S.A. and R.J. v The Minister for Children, Equality, Disability, Integration and Youth, Ireland, The Attorney General*.

The reverse is also true: Convention law often reinforces EU law. A good example is the case of *Spasov v Romania*, involving a captain who was convicted of fishing in Romanian waters in the Black Sea.[8] Such fishing was perfectly legal under the EU's Common Fisheries Policy. Spasov's lawyers had invoked EU law before the Romanian courts, but their arguments were ignored. The European Court of Human Rights held that this was a "denial of justice" and found a violation of Article 6. This case illustrates how the Convention can lend additional force to EU rules. But there are many other examples I could mention. Take, for instance, the case of *S.H. v Malta*, where Convention law and EU law complement each other in the field of asylum procedures.[9] And the same spirit of complementarity is also evident in the case-law on the legal recognition of same-sex couples.[10]

The *Ullens de Schooten* case-law, mentioned earlier by judge Guyomar, offers another example of how Convention law enhances the application of EU law.[11] It requires domestic courts, whose decisions cannot be appealed, to explain their reasons for refusing to refer a question to the Court of Justice for a preliminary ruling. The Court of Justice has meanwhile incorporated this obligation into its own case-law, with its ruling in *Consorzio Italian Management*.[12] Interestingly, in the recent case of *Georgiou v Greece*, the European Court of Human Rights indicated that, to remedy a breach of this obligation, domestic proceedings should be allowed to be reopened.[13]

Finally, it is important to recognise how the *Bosphorus* case-law contributes to the proper functioning of the EU legal system.[14] Often misunderstood as a carte blanche for EU Member States, the "Bosphorus presumption" is, in fact, a meticulously calibrated exercise in judicial comity. An aspect frequently overlooked about this presumption is its inapplicability in numerous cases that are highly relevant to EU law. These cases include instances where Member States' actions are governed by EU law, while being afforded a degree of discretion. Consider, for example, the case of *Executief van de Moslims and Others v Belgium*, or the recent judgment in *MB v Netherlands*, or the case of *Satakunnan v Finland*.[15] Each of these cases came before the Court of Justice and, subsequently, was taken to the European Court of Human Rights. In each instance, both Courts fully exercised their roles: no presumptions, no "manifest error" tests, but a thorough review.

In any event, even when EU Member States implement EU law without discretion, reliance on the Bosphorus presumption is subject to a stringent condition, as the judgment in *Bivolaru and Moldovan v France* demonstrates.[16] That condition is the "full deployment" of the EU's system of legal remedies. If a highest court of an EU Member State fails to refer a preliminary question to the Court of Justice when it is obligated to do so, that Member State loses the benefit of the Bosphorus presumption. Thus, the Bosphorus case-law encourages national courts to use the preliminary reference procedure, enabling the Court of Justice, in turn, to conduct a full analysis under the Charter. In that respect too, the case-law of the European Court of Human Rights fortifies the EU legal system.

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[8] Judgment of 6 December 2022 in *Spasov v. Romania* [Fourth Section], no. 27122/14.

[9] Judgment of 20 December 2022 in *S.H. v. Malta* [Second Section], no. 37241/21.

[10] E.g. judgment of 5 September 2023 in *Koilova and Babulkova v. Bulgaria* [Third Section], no. 40209/20. See also CJUE Case C-673/16 *Coman and others* EU:C:2018:385.

[11] Judgment of 20 September 2011 in *Ullens de Schooten and Rezabek v. Belgium* [Second Section], nos. 3989/07 and 38353/07.

[12] CJEU Case C-561/19 *Consorzio Italian Management* EU:C:2021:799.

[13] Judgment of 14 March 2023 in *Georgiou v. Greece* [Third Section], no. 57378/18.

[14] Judgment of 30 June 2005 in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [Grand Chamber], no. 45036/98.

[15] Judgment of 13 February 2024 in *Executief van de ECtHR Moslims van België and Others v. Belgium* [Second Section], no. 16760/22; judgment of 23 April 2024 in *M.B. v. the Netherlands* [Third Section], no. 71008/16; judgment of 27 June 2017 *in Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [Grand Chamber], no. 931/13.

[16] Judgment of 25 March 2021 in *Bivolaru and Moldovan v. France* [Fifth Section], nos. 40324/16 and 12623/17.

Now, you might say: that's all well and good, but what about divergences in the case-law? The issue came up this morning. And I agree, it is important to identify these divergences, to understand why they exist, and to address them. Yet, I believe both Courts are, quietly but surely, doing exactly that. Let's consider the issue of "mutual trust" in the Area of Freedom, Security, and Justice, a policy domain in which fundamental rights issues are very salient. Fundamental rights considerations can form part of the rationale for *requiring* mutual trust, as demonstrated in the case of *Romeo Castaño v Belgium*.[17] However, fundamental rights considerations can also raise difficult questions about the *limits* of mutual trust, as seen, for instance, in *Avotiņš v Latvia*.[18] Both Courts have had to grapple with these issues, each from its own perspective. The perspective of the European Court of Human Rights is that of an external and subsidiary jurisdiction, responsible for supervising states in individual cases. The perspective of the Court of Justice, on the other hand, is that of a constitutional court in EU matters, which has the dual responsibility of protecting fundamental rights and maintaining the cohesion of the Union. This difference in perspective has led to a complex process of evolution and interaction in the case law – a topic that could easily fill another seminar. Suffice it to say that differences in emphasis remain, but overall, the case law of the two Courts reflects a careful, ongoing search for a middle ground in which each court takes the other's concerns into account. Here's the bottom line: we should not be complacent, but we should also not be alarmist about differences in the case-law of the two Courts. Most of all, we must not lose sight of the wood for the trees: while differences do exist, the overall trend is towards complementarity.

Up to now, I've spoken about the Court of Justice and the European Court of Human Rights as if they are the sole protagonists in this story. That, of course, is not the case. The story of fundamental rights protection in Europe is not just a tale of two cities; it's a tale of many cities. As professor Cartabia just reminded us, it is, in fact, largely a story of national courts. It is a story of what President O'Leary has called: "a complex web of jurisprudential cross-fertilization".

The recent case of *KlimaSeniorinnen v Switzerland* offers a perfect illustration of this.[19] Climate litigation based on human rights arguments nowadays occurs in many forums, but it began in national courts. The forerunner was the *Urgenda* case before the Supreme Court of the Netherlands, where Articles 2 and 8 of the Convention played a pivotal role.[20] That case was followed by, among others, the German Constitutional Court's ruling in *Neubauer*.[21] These and other rulings preceded and informed the judgment in *KlimaSeniorinnen*. And that judgment now frames how domestic courts, including the Court of Justice of the European Union, should handle climate cases.

Although the judgment concerned Switzerland, a non-EU state, it is inevitable that there will be spillover effects on the EU and its Member States. Some commentators have already called on the Court of Justice to relax its criteria for standing in direct actions. While it is too soon to predict what the Court of Justice will decide, one thing is clear: climate cases are going to reach that court eventually. To comply with the Convention, national legal systems will need to allow such cases to be brought, including within the scope of EU law. In fact, if the Court of Justice's case law on the Aarhus Convention is any indication, it is likely that the Court of Justice will encourage national courts in the EU to permit these kinds of cases, which can then reach it via the preliminary reference procedure.[22] So it is only a matter of time before the Court of Justice faces the crucial question: do the EU and its Member States' climate policies comply with the Charter – which should of course provide at least as

[17] Judgment of 9 July 2019 in *Romeo Castaño v. Belgium* [Second Section], no. 8351/17.
[18] Judgment of 23 May 2016 in *Avotiņš v. Latvia* [Grand Chamber], no. 17502/07.
[19] Judgment of 9 April 2024 in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [Grand Chamber], no. 53600/20.
[20] Supreme Court (Hoge Raad) of the Netherlands, judgment of 20 December 2019 in *State of the Netherlands v. Stichting Urgenda* NL:HR:2019:2007.
[21] Federal Constitutional Court (Bundesverfassungsgericht) of Germany, Order of the First Senate 24 of March 2021 in *Neubauer and Others v. Federal Republic of Germany* DE:BVerfG:2021:rs20210324.1bvr265618.
[22] CJEU Case C-873/19 *Deutsche Umwelthilfe* EU:C:2022:857.

much protection as the Convention? And so, the complex interaction between national courts, the European Court of Human Rights and the Court of Justice is on full display in the field of climate change, the biggest common challenge our time.

In closing, allow me to reflect on the broader context within which this intricate system of judicial interconnection operates.

On the one hand, we stand equipped with an unprecedented array of fundamental rights instruments. Moreover, our society has grown more vigilant, more attuned to injustices long overlooked. This is progress. It is a testament to our enduring commitment to justice. Yet, on the other hand, we find that war has returned to the European continent. And the resurgence of far-right parties in both national and European elections serves as a stark reminder. A reminder that Europe is still grappling with the ghosts of its past. So, we find ourselves in a time of contrasts. It is, indeed, the best of times and the worst of times. And the European judiciary is right in the thick of it. Climate change. Rule of law. Migration. Courts are playing a crucial role in all these areas and will continue to have an important role to play. But it is a precarious position to be in, when the controversies are so big and the stakes so high. That's why it is vital that, especially in these times, Europe's courts continue to share experiences, as you are doing here today. Because, across Europe, the judiciary stands stronger when courts face these challenges together.

Let us forget about tides and ink blots. I offer you a different imagery: a tale of two siblings, if you will. Imagine two siblings growing up in the same home. They venture out into the world, never quite losing sight of each other, but each exploring life in a way that suits their unique character. As they reach adulthood, they encounter similar difficulties and find themselves drawn closer together once again. Their bond deepens as they come to appreciate better their differences and their shared values. This mutual understanding allows them to rely on each other more than ever, whilst their tale continues.