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Seminar

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

Protection of Fundamental Rights in a Multi-Level European System – The CJEU's Perspective

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Dear colleagues, dear friends – old and new friends alike,

It is an honour for me to introduce the session on **the protection of fundamental rights in a multi-level European system**. It is my task, in light of the programme, to present the perspective of the Court of Justice. However, I must immediately clarify that I will not aim to be that ambitious. At best, I can share with you my own reading of the relevant case law of the Court of Justice without claiming to provide an 'official interpretation' of this case law.

However, following the "allocation d'ouverture" and the observations made on the issue of religious symbols, I cannot resist to remind that the motto of the European Union is "United in Diversity".

Case law on religious symbols in the public domaine illustrates that very well. France cherish "laicité", which largely implies that "nothing goes", while in Germany "Neutralität" in this area is interpreted more like "everything goes". The jurisprudence of the CJEU accepts essentially both the French and the German approach. In the same way our case law on ritual slaughter is not a "one size fits all" either.

It reflects perhaps not only that we are "United in Diversity", but also that in this multi-level system on protection of fundamental rights, it must not be forgotten that the EU arrived last from a chronological point of view.

Many European States have long had forms of national protection for fundamental rights. Similarly, the system resulting from the ECHR was historically established before the creation of the European Communities and, a fortiori, long before the integration of certain fundamental rights into Community law.

The case law of the Court of Justice regarding the general principles of Union law illustrates well the specific position of Union law. Indeed, as we all know, the integration of fundamental rights into Community law was initially carried out by explicitly drawing from the common constitutional

traditions of the Member States and from the ECHR, the latter perceived to be part of the former. These 'sources' of EU fundamental rights have been recalled in the preamble to the Charter of Fundamental Rights. This preamble even specifies that the Charter 'reaffirms' the rights resulting from these sources. The EU and the Court of Justice have therefore been called upon to find their place within the framework of pre-existing protection systems.

That being said, the historical evolution of the place of fundamental rights within EU law is sufficiently well known for me not to dwell on it further. I will therefore mainly focus, in my presentation, on the current position of EU law within the protection of fundamental rights in Europe.

In this perspective, my goal will not be to present the main characteristics of the system of protection of fundamental rights in EU law. My goal will rather be to provide an overview of the indications resulting from the case law of the Court of Justice regarding the relationship between EU law and the other levels of protection of fundamental rights. To this end, I will first examine the relationship between EU law and the system stemming from the ECHR (1), before turning to the relationship between EU law and national constitutional systems (2).

1. EU Law and Protection of Fundamental Rights by the ECHR

As the Court of Justice has largely drawn from the case law of the ECtHR on an indirect basis, the nature of the relationship between EU law and the ECHR has long been difficult to determine precisely.

In this regard, the Charter has provided an important clarification. Article 52(3) of the Charter states as follows:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]. This provision shall not prevent Union law providing more extensive protection.'

The wording of that provision is much stronger than that of Article 52(4) of the Charter, which merely refers to an interpretation 'in harmony' with the common constitutional traditions of the Member States.

That distinction is confirmed by the explanations relating to the Charter, which must, in accordance with Article 52(7) of the Charter, be given due regard by the courts of the Union and of the Member States. These explanations specify for each right enshrined in the Charter whether or not it corresponds to a right provided for in the ECHR.

The case law of the Court of Justice largely reflects this specific balance between paragraphs 3 and 4 of Article 52 of the Charter. Paragraph 4 has thus largely remained ignored and is very rarely cited by the Court. In contrast, Article 52(3) of the Charter is referred to extremely frequently, if not nearly systematically, when the Court of Justice is called upon to interpret a fundamental right in a situation that has not encountered comparable precedents before the Union courts. The reference to the identical meaning and scope of fundamental rights, which is required by Article 52(3) of the Charter, is thus understood as implying that it is necessary to refer to the case law of the ECtHR and to ensure a level of protection at least as strong as that resulting from this case law.

However, I believe it would be too simplistic to view this as a form of hierarchical relationship. First, while the Court of Justice draws inspiration from the case law of the ECtHR, it does not set aside Union law rules on the basis of the ECHR. Second, Article 52(3) of the Charter expressly envisages the possibility that a fundamental right provided for by EU law may have a wider scope than a right provided for by the ECHR. It must nevertheless be noted that the Court has not often found such 'extended protection'.

To conclude on the relationship between EU law and the ECHR, it's worth noting that this relationship is expected to evolve in the future. Indeed, Article 6(2) TEU explicitly states that the Union

shall accede to the ECHR. The realisation of this accession is currently pending, following Opinion 2/13[1]. Admittedly, this opinion identified a number of obstacles to accession. These obstacles led the Court to rule that the envisaged accession agreement to the ECHR was not compatible with Article 6(2) TEU and the preconditions set in Protocol n° 8. However, it is important to stress that this opinion called into question the modalities of accession to the ECHR, not the principle itself. The possibility of external scrutiny of the Union's actions is not excluded. This scrutiny must nevertheless be designed in a way that respects the specific characteristics of EU law.

While the relationship between the EU and the ECHR is thus embedded in a dynamic framework, the EU's relationship with national systems for the protection of fundamental rights appears to be more consolidated. (2)

2. EU Law and Protection of Fundamental Rights at the National Level

From the point of view of the Court of Justice, the main tool to regulate the relationships between Union Law and protection of fundamental rights at the national level is the principle of primacy of EU law.

The effects of the **principle of primacy of EU law**, as defined by the case law of the Court of Justice, are, by now, well known. I do not therefore consider it necessary to describe these effects in detail here. I think nonetheless that it is important to recall that the Court of Justice was confronted, at an early stage, with the theory that national constitutional norms could escape primacy and that it strongly rejected this theory. In the ***Internationale Handelsgesellschaft***-judgment[2], it stated, inter alia, that the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to fundamental rights as formulated by the constitution of that Member State. The primacy of EU law was therefore, at an early stage, regarded as a limit restricting the scope of national systems for the protection of fundamental rights.

This solution was regularly repeated thereafter. However, it was reviewed after the entry into force of the Charter. **Article 53 of the Charter** takes a direct position on the relationship between the different levels of protection of fundamental rights. More precisely, this Article provides that:

'**Nothing in this Charter** shall be interpreted as restrictive or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.'

This provision has been **interpreted** by some as giving a **general authorisation** to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution, when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. This interpretation was envisaged in particular by the Spanish Tribunal Constitucional in the ***Melloni*** case. In its judgment in this case, however, the **Court of Justice** unambiguously **rejected that interpretation**[3]. It stated, inter alia, that this interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules, which are fully in compliance with the Charter and thus the ECHR, where they infringe the fundamental rights guaranteed by that State's constitution.

Following the ***Melloni***-judgment, the scope of national standards of protection thus appears to be limited in two distinct ways.

[1] Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454.
[2] Judgment of 17 December 1970, Internationale Handelsgesellschaft, 11/70, EU:C:1970:114.
[3] Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107.

Firstly, those national standards cannot be relied upon to ensure, when implementing EU law, a lower level of protection than the one guaranteed by the Charter. Therefore, they cannot be invoked to 'do less' than the Charter requires in such a case.

Secondly, those national standards do not allow a derogation from the application of **a fully harmonized rule of EU law**, which complies with the Charter. Where such an EU standard is applicable, reliance on national standards does not allow to 'do more' than EU law permits.

The ***Melloni***-judgment remains, to date, the landmark judgment, which defines the core of the Court of Justice's position as regards the relationship between the different levels of protection of fundamental rights. However, it would be incorrect to infer from this judgment that the Court of Justice denies any room for national standards for the protection of fundamental rights.

Our case law, on the contrary, leaves areas in which differences in values may subsist or develop without, in any way, infringing EU law.

The **first area of flexibility** I will mention, stems directly from the limits of the scope of application of the Charter. As it is well known, it follows from **Article 51(1) of the Charter** that it applies to Member States **only when they are implementing EU law**. Therefore, in the absence of such implementation, the effects of national standards for the protection of fundamental rights is not circumscribed by EU law. These standards can then be less protective or more protective than the Charter.

This may seem self-evident, but it shows that the adoption of the Charter should not be regarded as the expression of a hegemonic will. This idea is expressly enshrined in **Article 53 of the Charter**, since it states that nothing in **the Charter** restricts or adversely affects human rights and fundamental freedoms as recognised, in their respective fields of application, by the Member States' constitutions. I do not think it would be useful to overly detail this well-known situation. I shall therefore limit myself to pointing out that the scope of such a situation is closely linked to the definition of the concept of '**implementation**' of EU law. It is obviously not by pure chance that the key judgment in that regard, namely the ***Åkerberg Fransson***-judgment[4], was delivered on the same day as the ***Melloni*-**judgment. The main idea, which emerges from that judgment, is that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter. The **concept of implementation therefore tends to amount to the scope of EU law**.

The **second area of flexibility** I will mention lies within the scope of application of EU law. Indeed, there are situations where national standards can play an essential role, even if a Member State is effectively implementing EU law. It is the case, inter alia, in the situation in which an act of EU law gives the Member States the freedom to choose between various methods of implementation or grants them a margin of discretion, which is an integral part of the regime established by that act.

The existence of such a room for flexibility was already quite clearly mentioned in the ***Melloni***-judgment. Paragraph 60 of that judgment states that 'Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, **provided that the level of protection provided for by the Charter, as interpreted by the Court of Justice, and the primacy, unity and effectiveness of EU law are not thereby compromised'**.

As it has already been pointed out, **where the EU legislature has adopted a precise rule governing a situation fully**, it is **impossible to substitute** it with a different rule without compromising the primacy, unity and effectiveness of EU law. On this point, the Court has been confronted several times with the invocation, by Member States, of Article 4(2) TEU to set aside the application of such specific rules. The Court's case law on this matter was summarised in the ***RS***-judgment (Effect of the

[4] Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105.

judgments of a constitutional court)[5]. It notably stems from this judgment that Article 4(2) TEU neither aims to nor results in authorising a constitutional court of a Member State to set aside the application of a rule of EU law on the grounds that this rule would undermine the national identity of the Member State concerned as defined by the national constitutional court.

However, **where EU law leaves a margin of discretion to the Member States as to the measures to be adopted**, several options can be considered while fully respecting the primacy, unity and effectiveness of EU law. National standards for the protection of fundamental rights may, in such a case, limit the options available to a Member State and thus exclude certain options, which, nonetheless, fall within the discretion conferred to it by EU law.

The room left to national standards for the protection of fundamental rights in this setting is, however, more limited than the one they may have in the absence of implementation of EU law. If such standards may go beyond the Charter, they cannot justify a less protective solution than the one guaranteed by the Charter. Only a higher level of protection of fundamental rights can therefore be envisaged in such a situation. The case law of the Court of Justice contains numerous examples, which fall within that specific area of flexibility and illustrate the different situations in which differences of values between Member States may be expressed.

Conclusion

At the end of this short overview, I tend to think that the case law of the Court of Justice demonstrates some only slightly complex links with other levels of protection of fundamental rights in Europe.

On the one hand, the relationship with the ECHR is difficult to describe precisely. It is not conceived in strictly terms of hierarchy.

Furthermore, it remains subject to potential developments, in so far as primary law provides for and requires the Union's accession to the ECHR.

On the other hand, the relationship with national protection systems is based on the definition of areas. In some areas, only the Charter is relevant, in others it coexists with national standards, while in yet others national standards are the only relevant ones. This finding is not new. It is, in a certain sense, largely a consequence of the '**permanent limitation of sovereign rights'** logic identified in the ***Costa***-judgment[6].

To end my brief presentation, I would like to add a very short remark. Contrary to what some scholars may think, the relationship between the two European Courts is **not** a fight to supremacy between two groups of very old and rather bitter men.

There is no doubt about who has the last word on very basic fundamental rights. It is the Court here in Strasbourg. This is in fact the only Court specialised in fundamental rights.

[5] Judgment of 22 February 2022, RS (Effect of the decisions of a constitutional court), C-430/21, EU:C:2022:99.
[6] Judgment of 15 July 1964, Costa, 6/64, EU:C:1964:66.

What the Court in Luxembourg, my Court, is concerned about and specialised in is EU law. We are much more like a national supreme court applying and interpreting EU law, including the Charter. Like a national court, we must also respect the ECHR.

Given the large overlap between the ECHR and the Charter, there is – and must be – a very close judicial dialogue between the two courts.

And I am pleased to confirm that the reality on the ground lived fully up to that, as demonstrated by the ***M.S.S.***[7] and ***N.S.***[8] cases, as well as cases relating to prison conditions in relation to the execution of EAWs[9].

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I thank you for your attention and patience and will now pass the floor to **Professor Cartabia**.

[7] ECtHR, 21 January 2011, M.S.S. v. Belgium and Greece, CE:ECHR:2011:0121JUD003069609.
[8] Judgment of 21 December 2011, N.S. and Others, C-411/10 and C-493/10, EU:C:2011:865.
[9] Judgments of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198; of 25 July 2018, Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589 and of 15 October 2019, Dorobantu, C-128/18, EU:C:2019:857.
ECtHR, 20 October 2017, Muršić v. Croatia, CE:ECHR:2016:1020JUD000733413, and 21 March 2021, Moldovan v. France, CE:ECHR:2021:0325JUD004032416.