EUROPEAN COURT OF HUMAN RIGHTS
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Seminar

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

Protecting fundamental rights in a multi-level European system: the view from the European Court of Human Rights

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In 1961, eleven years after the signing of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention" or "the ECHR"), the European Commission of Human Rights delivered the *Austria v. Italy*[1] decision, in which, after citing the Preamble to the Convention, it found as follows: "it clearly appears from these pronouncements that the purpose of the High Contracting parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law." (p. 138)

The Commission went on to clarify that "the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" (p. 140).

Two years later, in 1963, six years after the signing of the Treaty establishing the European Economic Community (EEC), the Court of Justice of the European Communities delivered the *Van Gend en Loos*[2] judgment, in which it held as follows: "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."

The court concluded that, "independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage" and went on to hold that "Article 12 of the Treaty

[1] European Commission of Human Rights, *Austria v. Italy*, no. 788/60, Commission decision of 11 January 1961, Yearbook 4, p. 116 ff.
[2] Court of Justice of the European Communities, judgment of 5 February 1963, *van Gend en Loos*, C-26/62, EU:C:1963:1.

establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect".

What is striking, upon reading these two seminal decisions side by side, are the strong similarities linking the two European legal orders in their very design, especially when viewed from the perspective of the protection of fundamental rights.

The overall architecture of the two European systems is often presented in the following way: while Community law and the European Community, subsequently the European Union (EU), on the one hand, and the European Convention on Human Rights and its legal order, integral as they are to the project driven by the Council of Europe, on the other, were originally constructed on entirely different foundations, they have tended to converge over time. The two cases cited above, however, shed a somewhat different light on the relationship between the two systems and their respective bodies of law, in that they point to the shared foundations on which these systems were based from the start.

Without wishing to downplay their respective particularities, it is important to emphasise that, from the outset, the seeds of complementarity and convergence had been sown, thereby enabling an overall coherence to emerge – in keeping with institutional and legal changes within the two systems – in the service of the protection of fundamental rights in Europe.

In other words, a description of the specific characteristics of each of the two European systems as a result of its original design and architecture (Part 1) should not mask the extent of their shared foundations, which have gradually brought them closer together (Part 2) and have enabled convergences to develop and a form of complementarity to arise, thereby fostering overall consistency (Part 3).

1. The specific characteristics of each system as a result of its design and architecture

Institutionally speaking, we are dealing with two international organisations operating at a regional level, but the very nature of the Council of Europe, as an intergovernmental body, is wholly distinct from the integrated nature of the European Community, now the EU.

As to the political foundations of the two projects, we need not dwell on their respective origins and the difference in their initial orientations. The Council of Europe was a political project for reconstruction following the Second World War and, at a time when Europe was divided between the Western and Communist blocks, with the aim of building an area founded on liberal democracy and the rule of law – a political project spearheaded by its legal instrument, the European Convention for the Protection of Human Rights and Fundamental Freedoms. The construction of the European Communities, also intended to help rebuild Europe, was, for its part, first and foremost an economic project which, following upon the failure of the European Defence Community, was based on the integration of resources (energy and steel) and subsequently of economic activities (the common market).

In this connection, and more specifically with regard to the protection of fundamental rights, it is interesting to refer to the analyses undertaken by Robert Schwartz in his doctoral thesis entitled *The Court of Justice of the European Union and the European Court of Human Rights: Two Autonomous Human Rights (R)Evolutions*. Even if one does not agree with all of his conclusions, the comparative portrait he paints, leading him to contrast the "output legitimacy" of the Court of Justice of the European Union (CJEU) with the "input legitimacy" of the European Court of Human Rights (ECtHR), is quite stimulating[3]: "The CJEU approaches the same provisions of Fundamental Human Rights as does

[3] "The CJEU's top-down, Hartian/Kelsenian approach to normative control via substantive rights and ECtHR's bottom up approach to popular acceptance via bottom up transparent procedures demonstrate diametrically opposed roads towards similar results. *Niels Petersen* views the conflict between output legitimacy and input legitimacy in terms of communitarianism versus individualism. That characterization provides a window into the

the ECtHR from a very different base. The CJEU evolved a utilitarian/consequentialist approach to rights, however designated, where fundamental human rights are weighed in a proportionality analysis against their interference with the Union's primary economic integration objectives, and output legitimacy. The ECHR on the other hand, has always been primarily concerned with the inviolability of individual human rights from a deontic, agent-relative framework which values the input-legitimacy of democratic participation, economic rights being of secondary importance. … For the ECtHR, *the right is prior to the good*, while for the CJEU, *the goods are prior to the rights*."[4]

Legally speaking, both sets of institutions – which have different legal areas (that of the Convention[5] encompassing the EU States) – were founded on international law, but the normative architecture is profoundly different in either case. When it comes to examining a relationship between systems, it is essential to grasp the specific features of each one with the utmost precision. EU law constitutes an integrated, autonomous legal order which has direct effect and is empowered by the principles of primacy, uniformity and *effet utile*. As can be seen from the CJEU's Opinion 2/13[6], fundamental rights in the EU form part of a constitutional framework, an institutional structure and a system of norms which are integrated into that of each member State, in which the process of integration constitutes "the *raison d'être* of the EU itself". By contrast, Convention law, the implementation of which is based on the principle of subsidiarity, is not intended to replace, even in part, the legal orders of the States Parties, or even to harmonise them. As noted by Professor Laurence Potvin-Solis in her article "Le dialogue entre la Cour européenne des droits de l'homme et la Cour de justice de l'Union européenne dans la garantie des droits fondamentaux", "the Convention does not entail formal substitution for national law or the general principle that the rights it sets out should be applied in a specific manner or interpreted uniformly"[7].

From a functional point of view, the two legal orders each have their own judicial organ – an international court which fulfils a substantially different function in either case. As guardian of the Treaties, the Court of Justice acts essentially *in abstracto*, based on preliminary references from the courts of the EU member States, in order to ensure the proper interpretation of primary and secondary law or to rule on the validity of secondary legislation. Its scrutiny consists in a review of lawfulness in the broad sense, which requires it to establish how the various norms interact. The ECtHR, on the other hand, the role of which is to ensure effective compliance with the engagements undertaken by the States signatories to the Convention, mainly hears individual applications lodged under Article 34 of the Convention. In addition, inter-State applications are provided for in Article 33 and, since the entry into force of Protocol No. 16, it has begun to receive requests for advisory opinions. However, the core function of the ECtHR remains *ex post facto* review, such that, once domestic remedies have been exhausted, it rules *in concreto* on particular situations. It is in the light of these different approaches, which derive from the roles assigned to the two courts by the relevant treaties, that the procedures for reviewing compliance with fundamental rights must be understood and the significance of any differences in approach analysed.

Whereas the Luxembourg Court engages in the task of ensuring compliance with fundamental rights by scrutinising the validity of norms in the context of implementing EU law, the Strasbourg Court does so as part of a different exercise, namely by reviewing the compatibility of a given legal situation, in a domestic context, with the requirements of effective respect for Convention rights. By

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relationships between the CJEU's communitarian bias and its utilitarian outlook, and the ECtHR's individual rights approach and its deontic outlook." (R. M. Schwartz, *The Court of Justice of the European Union and the European Court of Human Rights: Two Autonomous Human Rights (R)Evolutions*, Lund University, 2019, p. 511).

[4] Ibid., p. 569. Emphasis added.

[5] Since the 46 States Parties to the Convention include the 27 EU member States.

[6] CJEU, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454

[7] L. Potvin-Solis, "Le dialogue entre la Cour européenne des droits de l'homme et la Cour de justice de l'Union européenne dans la garantie des droits fondamentaux", in *Les droits de l'homme à la croisée des droits : mélanges en l'honneur de Frédéric Sudre*, LexisNexis, 2018, p. 597 (translation).

undertaking, in Article 1 of the Convention, to secure to everyone within their jurisdiction the rights and freedoms defined by the Convention and its Protocols, States have in effect agreed that their domestic legal systems should comply with the requirements of effective respect for these rights and freedoms. The principle of subsidiarity is inherent in the general scheme of the Convention system: the idea is to "embed in the legislation of the various countries something which, to some extent at least, will constitute a kind of fortified island for mankind" (M. Norton). On this view, Convention law must be understood not as a substitute for such legislation but rather as a body of law that embraces domestic legal orders so that the national authorities – those that define them (the legislature), apply them (the executive), and interpret or ensure compliance with them (the domestic courts) – will discharge their respective duties in the light of the requirements of respect for fundamental rights.

In a certain sense, it could be argued that the scrutiny of compliance with fundamental rights exercised by the CJEU is a means of ensuring the proper application of EU law, whereas the ECtHR applies the Convention to the various domestic systems within its legal area with a view to ensuring effective respect for fundamental rights.

These are all features of the two European systems that are here to stay. Nevertheless, these specificities, which are inherent in the very nature of the projects pursued by the systems, must not be allowed to eclipse foundations that were shared from the start or the gradual convergence of the two European orders that has been constantly at work since their inception.

2. Shared foundations working towards gradual convergence

The two European organisations pursue a common goal:

- "the achievement of greater unity among its members" in the case of the Council of Europe, as set out in the Preamble to the Convention;
- to establish "an ever closer union among the peoples of Europe" in the case of the European Union, as stated in the preambles to the Treaty on European Union (TEU) and the Charter of Fundamental Rights.

These shared perspectives are rooted in European history and civilisation and can be expected to evolve along the same lines, drawing on common values.

The substantive homogeneity of the European machinery of judicial safeguards is directly tied to the system of values common to both European legal orders, which are the fruit of this history and of this civilisation[8].

The two European projects designed to ensure "justice and peace" (Preamble to the Convention) and to "share a peaceful future" (Preamble to the Charter) are built on the same foundations: democracy, the rule of law, human or fundamental rights (Preamble to the Convention and Preamble to the TEU), which display the same "indivisible, universal values" (Preamble to the Charter) and the same "common heritage of … ideals" (Preamble to the Convention). Whereas the Convention, in its very intent, and by nature as an instrument of legal humanism, is inevitably anthropocentric, placing the individual at the heart of its system of protection, the construction of the EU, throughout the development of the main freedoms, such as the free movement of goods, services, capital and people, has continually enshrined individual rights while defining EU law, as acknowledged in the Preamble to the Charter, which reminds us that the EU "places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

[8] Ibid., p. 601

As Jean-Paul Jacqué put it (in his article "Protéger les valeurs communes aux états members de l'Union européenne. Sommes-nous au terme d'un long cheminement ?"), "[o]nly gradually did the perception arise that the Community's economic vocation did not entail indifference to values"[9]. This is reflected in the TEU through the mechanisms by which it protects the values mentioned in Article 2: Article 49 makes accession to the EU conditional upon respect for these values, while Article 7 lays down the procedure for ensuring their observance by EU member States. Moreover, it was not long before the Court of Justice established in its case-law that EU values and the requirements of EU policies were closely linked[10].

Not only do both European legal orders place respect for fundamental rights at their core, they also protect the same civil, political, economic and social rights. While certain rights are guaranteed only in one or the other of the two legal instruments, it should be emphasised that the rights protected in either case very largely coincide. This broad overlap has sometimes been the result of jurisprudence, in which the rights expressly laid down in one of the two legal instruments came to be reflected in the interpretation given in the case-law to a different text which had not expressly provided for them. The substance and scope of some of the rights derived in the Strasbourg case-law from the provisions of the Convention correspond to those of rights expressly enshrined in the Charter: the protection of personal data (Article 8 of the Charter) attaching to respect for private life under Article 8 of the Convention, a guarantee equivalent to that afforded by the right of asylum (Article 18 of the Charter) falling under Article 3 of the Convention[11], or the protection of individuals from environmental risks in the light of Articles 2, 3 and 8 of the Convention, where protection of the environment itself is expressly guaranteed by Article 35 of the Charter.

The largely overlapping nature of the protected fundamental rights can also be explained by the fact that both the rights guaranteed by the Convention and those enshrined in EU law derive from the shared heritage of the various States of the European continent and were already, for the most part, part and parcel of common constitutional traditions. As Pierre-Henri Teitgen explained during the preparatory discussions prior to the drafting of the Convention: "the common ground of our [national] laws, the general principles distilled from them, will undoubtedly enable us to define the practical content of each of these freedoms".

This survey of the shared foundations would be incomplete if it failed to mention the progressive aspirations underlying the establishment of the two systems from the outset, as is apparent from the two preambles:

- the aim of the Council of Europe is "the maintenance and further realisation of Human Rights and Fundamental Freedoms";
- the EU aims "to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter".

Reflected here is the need to update the scope of the protected rights, a task which falls primarily to the European courts, which are responsible for developing a dynamic and evolutive interpretation of the treaties. Just as, in the words of Robert Lecourt from his *L'Europe des juges* (1976), the Court of Justice's vision of a living and evolutive system of law reveals a "hidden dynamic

[9] J.-P. Jacqué, "Protéger les valeurs communes aux états membres de l'Union européenne. Sommes-nous au terme d'un long cheminement ?", in *Mélanges en l'honneur de Florence Benoît-Rohmer*, 2023, p. 260 (translation).

[10] As emphasised by Jean-Paul Jacqué in the article cited above: "in the *Hauer* judgment [of 13 September 1979], [the Court of Justice] clearly justified incorporating fundamental rights into the general principles of law by the need to ensure the effective application of Community law."

[11] In this regard, Article 3 of the Convention encompasses the prohibition of *refoulement* within the meaning of the Geneva Convention on the Status of Refugees (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020)

of legal integration" throughout the EU, so too has the ECtHR consistently repeated that the Convention is a "living instrument" which must be interpreted in the light of present-day conditions and the ideas prevailing today in democratic States in order to ensure, in the contemporary context, respect for practical and effective rights (see, *inter alia*, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002).

In addition to this substantive congruence, there are textual bridges by which to ensure, beyond their shared foundations, the overall coherence of the two European legal orders:

- Article 53 of the Convention thus provides that nothing in the Convention may be construed as limiting or derogating from human rights and fundamental freedoms which may be ensured under, in particular, any other agreement to which a Contracting Party is a party (Article 53 of the Charter mirrors this provision);
- Article 52 of the Charter, which entrenches the Court of Justice's incorporation of Convention requirements into the general principles of EU law, provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights will be the same as those laid down by the Convention, without preventing EU law from providing more extensive protection.

3. Convergence and complementarity serving to ensure overall consistency

While the specific features of the two systems are explained and justified by their genesis, their shared foundations have gradually yet consistently led them to converge, without fusing into one another or allowing either one to be swallowed up by the other. There has been neither blending at the risk of redundancy, nor absorption at the risk of monopoly, nor opposition at the risk of conflict. On the contrary, where respect for fundamental rights is concerned, the convergence on display illustrates the complementarity of the two systems, which are equipped with the necessary instruments to work towards achieving overall synergy and consistency[12].

The configuration of these relationships between systems and the greater or lesser need to ensure their harmonious interaction depend on the nature of the situations in question. They will vary according to whether the disputes brought before the ECtHR concern a non-EU State or a State which is also an EU member State, and will depend, in the latter case, on whether the situation complained of falls within the scope of the implementation of EU law.

These different possibilities will be examined in turn, the interactions between the two legal orders covering the following scenarios.

First scenario: the situation complained of directly concerns EU acts or institutions. Since the EU is not a party to the Convention, applications brought against it directly will be inadmissible as incompatible *ratione personae*. In a case where an act of the EU is alleged to have violated the Convention, the ECtHR will consider that the applicant does not fall within the jurisdiction of a respondent State for the purposes of Article 1 of the Convention (see, in particular, concerning the dismissal of an official of the European Commission, *Connolly v. 15 member States of the European Union*[13]). It is in this area in particular that the EU's accession to the Convention would open up new perspectives for litigation.

[12] As Professor Laurence Potvin-Solis explained in her above-mentioned article, "relations between systems govern the judicial implementation of the Convention and the Charter and require the two European courts to adopt a coordinated approach to this implementation, which is achieved through the unique link between their respective bodies of case-law. Dialogue between them is thus in itself a guarantee of fundamental-rights protection since the relationship between the Convention and EU law is mediated by the courts."

[13] ECtHR, *Connolly v. 15 member States of the European Union* (dec), no. 73274/01, 9 December 2008

Second scenario: the situation complained of concerns the examination of national measures implementing EU law. The Convention does not prohibit States Parties from transferring powers to an international organisation for the purposes of cooperation in certain fields of activity, but they remain responsible for all acts and omissions on the part of State bodies, including those arising from the need to comply with international legal obligations.

In order to resolve this type of situation without placing States, in the European context, before the dilemma that such a conflict of legal and/or judicial loyalty would represent, the ECtHR has established a presumption of equivalent protection.

This presumption – commonly known as the *Bosphorus* presumption after the 2005 Grand Chamber judgment of the same name[14] in which it was first set out – is now a well-known device for ensuring consistency across the two networks of European norms and achieving the greatest possible harmony in the relationship between systems.

A State is presumed to comply with the requirements of the Convention when it is simply fulfilling legal obligations resulting from its membership of an organisation which affords a fundamental rights protection at least equivalent to that of the Convention. The *Bosphorus* presumption is based on the twofold finding that the protection of fundamental rights ensured by the EU legal order is in principle equivalent to that of the Convention and that the mechanism overseeing the observance of those fundamental rights affords a level of protection comparable to that provided by the Convention (on this point, see, in particular, the 2016 Grand Chamber judgment in *Avotiņš v. Latvia*[15], which considers the role and powers of the CJEU).

However, once the presumption of equivalent protection has been established, it can be rebutted if it appears that, in the case in question, the protection of the Convention rights was manifestly deficient. In such cases, the respondent State remains wholly responsible under the Convention (see, for example, *Bivolaru and Moldovan v. France*[16], where a violation of Article 3 was found). If, on the other hand, the ECtHR finds that the presumption applies and that the protection of the Convention rights was not manifestly deficient in the case in question, the Court will conclude that there has been no violation of the rights asserted.

The application of the *Bosphorus* presumption is subject to two cumulative conditions:

(1) Firstly, it must be the case that the domestic authorities had no margin of manoeuvre. In order for the ECtHR to apply the presumption of equivalent protection, it is first necessary to establish that the interference with the rights in issue was a matter of legal obligation for the respondent State. Where that State has been reproached for interference resulting from the use of its discretion or any independent margin of manoeuvre, the presumption will not apply (see, for example, *M.S.S. v. Belgium and Greece* [GC][17], concerning the application of the so-called sovereignty clause provided for in the Dublin Regulation, and *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*[18], concerning the enforcement of a judgment of the CJEU delivered in infringement proceedings, where the obligation to comply applied only to the result to be achieved and not to the means of achieving it). Conversely, concerning the implementation of the Framework Decision on the European Arrest Warrant, the ECtHR considered that the executing judicial authority could not be regarded as having an independent margin of manoeuvre to refuse to execute such a warrant given that the power to assess the facts and circumstances and determine the legal consequences properly attaching thereto was exercised within the parameters strictly delineated by the case-law of the CJEU (see *Bivolaru and Moldovan v. France*, cited above).

[14] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005
[15] ECtHR, *Avotiņš v. Latvia* [GC], no. 17502/07, 23 May 2016
[16] ECtHR, *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, 25 June 2021
[17] ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011
[18] ECtHR, *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, no. 44460/16, 8 October 2018

(2) Secondly, the full potential of the supervisory mechanism provided for by EU law must have been deployed. Such is the case where the domestic courts have made a preliminary reference to the CJEU or where it has been found that the case does not raise any serious issues of compatibility with fundamental rights. However, in a case where it noted that the French *Conseil d'État* had decided not to make a preliminary reference to the CJEU, even though the latter had yet to rule on the question in issue, which was regarded as serious in nature, the ECtHR considered that this condition had not been met (see *Michaud v. France* from 2013[19]). This condition demonstrates the ECtHR's confidence in the effectiveness of the mechanism of judicial supervision provided for by EU law. By considering such supervision as a prerequisite, the ECtHR has developed a model of judicial cooperation based on a form of relay between the two European courts. This concern is reflected in the case-law on the obligation for domestic courts to give reasons for refusing to make a preliminary reference to the CJEU. While the Convention does not guarantee a right to a preliminary reference by domestic courts as such, the ECtHR does not rule out the possibility that, in some circumstances, a refusal to refer a question may fall foul of the principle of a fair hearing under Article 6 § 1 of the Convention. That Article has thus been construed as imposing an obligation on the domestic courts to give reasons for such refusals, thereby echoing the conditions laid down by the Court of Justice in its 1982 *Cilfit and Others* judgment[20] into the Convention system (see, for example, *Dhahbi v. Italy*[21], and *Sanofi Pasteur v. France*[22]).

The *Bosphorus* presumption is emblematic of the sophistication of the judicial structures created to ensure effective protection of fundamental rights in a multi-level European system. That system comprises four dimensions:

- a systemic dimension: the requirement of equivalent protection of fundamental rights as a core element of the relationship between systems;
- a normative dimension corresponding, with regard to sufficient causality, to the establishment of the facts having given rise to the interference complained of before the ECtHR in order to determine, depending on the relative discretion of the respondent State, whether or not those facts are attributable to it;
- a functional dimension, calling for judicial cooperation between the two courts;
- a practical dimension, manifesting itself as a form of safety mechanism, to ensure that the protections afforded are not manifestly deficient.

Third scenario: the situation complained of concerns neither an act by the EU nor a domestic implementing measure but, in view of the stakes, gives rise to a conflict between the protection of fundamental rights under the Convention and that afforded by EU law.

In keeping with the principle of harmonious interpretation of the Convention, the ECtHR will not hesitate to employ the instruments of EU law and the CJEU's case-law like any other instrument of international law, including where they are not decisive or where the complaint is directed against a non-EU State (see, for example, the Grand Chamber judgment of 2015 in *Perinçek v. Switzerland*[23] concerning the consensus, or lack thereof, on the question of punishment for genocide denial). This is explained by the vast array of shared subject matter between the two legal orders and the growing importance of fundamental rights within that subject matter, including asylum and immigration, procedural rights in criminal proceedings, freedom of religion, the prohibition of discrimination, judicial independence, the right to be "forgotten" online, or the protection of personal data, to name but a few issues. It is thus noteworthy that the latest request for an advisory opinion under Protocol

[19] ECtHR, *Michaud v. France*, no. 12323/11, 6 March 2013
[20] CJEU, *Cilfit and Others*, C-283/81, EU:C:1982:335, 6 October 1982
[21] ECtHR, *Dhahbi v. Italy*, no. 17120/09, 8 July 2014
[22] ECtHR, *Sanofi Pasteur v. France*, no. 25137/16, 13 June 2020
[23] ECtHR, *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015

No. 16, from the Romanian High Court of Cassation and Justice, concerns the applicability of Article 6 of the Convention and of Article 1 of Protocol No. 1 to a law adopted in response to the requirements laid down by the European Commission in a 2006 decision establishing a mechanism for cooperation and verification[24].

The decisions and judgments of the ECtHR are thus replete with references to EU law, which represent so many contextual factors or sources of inspiration and illustrate the care taken to ensure the greatest overall consistency between the two legal orders, thereby ensuring the complementarity of the two systems of fundamental rights protection (for recent examples, see in particular *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021, and *Walesa v. Poland*, no. 50849/21, 23 November 2023, with a reference to the CJEU's Grand Chamber judgment of 5 June 2023 in *Commission v Poland (Independence and private life of judges)*, C-204/21, EU:C:2023:442, or *Executief van de Moslims van België and Others v. Belgium and Others*, no. 16760/22, 13 February 2024, with a reference to the CJEU's judgment of 17 December 2020 in *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031). Similarly, the judgments of the CJEU contain numerous references to those of the ECtHR. To mention only the most recent examples, one might point to the judgment of 30 April 2024 in *La Quadrature du net and Others*[25], with a reference, in particular, to the ECtHR's *Benedik v. Slovenia*[26] judgment, or the *K.B. and F.S.* judgment of 22 June 2023[27], in which the CJEU employed the ECtHR's approach involving an assessment of the overall fairness of criminal proceedings, referring in particular to *Ibrahim and Others v. the United Kingdom*[28].

The *K.I. v. France* judgment of 2021[29] is a particularly apt illustration of the interaction between norms which the ECtHR endeavours to ensure. The issue in this case was to ensure consistency between the requirements of the 1951 Geneva Convention, EU law and Convention law regarding the distinction to be made, pursuant to a judgment of the CJEU of 14 May 2019[30], between the withdrawal of refugee status and the fact of ceasing to be a refugee altogether, and its consequences for the forcible removal of aliens and the assessment of the risk to which they might be exposed under Article 3 of the Convention: "123. The Court would emphasise, however, that under the terms of Article 19 and Article 32 § 1 of the Convention it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. Furthermore, in the context of a reference for a preliminary ruling, such as on the question whether a person remains a refugee following the withdrawal of refugee status, the CJEU, unlike the national courts and this Court, may be called upon to rule on the validity *in abstracto* of the possibilities offered by the provisions of EU law … More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see *N.H. and Others v. France*, nos. 28820/13 and 2 others, § 166, 2 July 2020). More specifically, the Court has not, to date, ruled on the distinction made in EU and domestic law between refugee status and the fact of being a refugee. The Court would emphasise that neither the Convention nor the Protocols thereto protect, as such, the right to asylum. The protection they afford is confined to the rights enshrined therein, including particularly the rights under Article 3

[24] Several applications against the Netherlands are also pending before the Grand Chamber concerning, in particular, the compatibility with Article 8 of the Convention of the transfer and use, in competition-law proceedings, of data obtained in the context of a criminal investigation – questions which, by their nature, give rise to a conflict between the case-law of the two European courts.

[25] CJEU, 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:7916

[26] ECtHR, *Benedik v. Slovenia,* no. 62357/14, 24 July 2018

[27] CJEU, 22 June 2023, *K.B. and F.S. (Raising* ex officio *of an infringement in criminal proceedings)*, C-660/21, EU:C:2023:498

[28] ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016

[29] ECtHR, *K.I. v. France*, no. 5560/19, 15 July 2021

[30] CJEU, 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403

of the Convention, as restated above. In that connection, Article 3 embraces the prohibition of *refoulement* under the Geneva Convention (see *N.D. and N.T. v. Spain*, cited [in footnote 11 above], § 188)."[31]

However, this tendency towards reciprocal engagement, consideration and convergence does not efface certain particularities, which can be explained by the two courts' respective functions.

The following examples provide illuminating illustrations in this regard.

The *ne bis in idem* principle, which establishes the right not to be prosecuted or punished for the same offence twice and is guaranteed both by Article 4 of Protocol No. 7 to the Convention and by Article 50 of the Charter, provides a particularly clear illustration of a point at which the two European legal orders intersect. In cases where it has been called upon to apply this principle, the ECtHR has referred extensively to EU law and to CJEU case-law. This was already the case in the 2009 Grand Chamber judgment in *Zolotukhin v. Russia*[32] and again in a 2016 judgment which clarified the battery of criteria used to apply this principle (see *A and B v. Norway*[33], and more recently in *Nodet v. France*[34] and *Galović v. Croatia*[35]). Nevertheless, the case-law of the two courts is not identical in this regard (see, for example, the *Luca Menci* case of 2018[36], in which the CJEU acknowledged that the principle could be restricted for the purpose of protecting the EU's financial interests, or the judgment of 23 March 2023 in *Generalstaatsanwaltschaft Bamberg*[37] concerning exceptions to the principle). In the words of Judge André Potocki, the courts have ultimately adopted two different methods to move in a new direction common to both. This methodological difference can be explained by the specific features of the two legal orders. Whereas Article 52 § 1 of the Charter contains general provisions for the restriction of rights in pursuit of a goal in the public interest, subject to the condition of proportionality (which explains why the CJEU's reasoning is based on the requirement that any restriction of the *ne bis in idem* principle should be necessary and effective), the Convention does not allow for such reasoning in respect of that principle, no derogation from Article 4 of Protocol No. 7 being permitted. For the ECtHR, this Article indeed provides for a non-derogable right, which is therefore not subject to a proportionality test. However, the criteria for reviewing compliance with that principle – namely, the complementarity of the proceedings, the foreseeability of their duality and the proportionality of the sanction as a whole – have for the most part tended to converge, thus ensuring overall consistency.

[31] See also § 144: "As is clear from the Court's case-law, the fact that the person concerned is a refugee is an element which must be taken into particular account by the domestic authorities when examining the reality of the risk he or she would allegedly face in the event of expulsion (see, *mutatis mutandis*, *Shiksaitov v. Slovakia*, nos. 56751/16 and 33762/17, §§ 70-71, 10 December 2020, and *Bivolaru and Moldovan v. France*, [cited above, § 141]). In the light of what has been stated in paragraphs 142 to 143 above, the Court notes that the fact that the revocation of the applicant's refugee status has no bearing on whether or not he remains a refugee was not taken into account by the French authorities in the context of the decision to deport him to the Russian Federation and the subsequent review of that order. The Court concludes that the French authorities and the domestic courts did not assess the risks that the applicant allegedly faced if the deportation order were to be enforced in the light of that situation and the fact that, at least when he arrived in France in 2011, the applicant had been identified as belonging to a group that was, at that time, considered to be targeted."

[32] ECtHR, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009

[33] ECtHR, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016

[34] ECtHR, *Nodet v. France*, no. 47342/14, 6 September 2019

[35] ECtHR, *Galović v. Croatia*, no. 45512/11, 30 November 2021

[36] CJEU, 20 March 2018, *Menci*, C-524/15, EU:C:2018:197

[37] CJEU, 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle* ne bis in idem*)*, C-365/21, EU:C:2023:236

This difference in approach can also be found in cases where the issue of discrimination has been raised. Although CJEU case-law has had a certain influence on the ECtHR's application of Article 14 of the Convention (see, for example, *Guberina v. Croatia*[38] or *Molla Sali v. Greece*[39] concerning discrimination by association), the difference between the methods employed by the two courts stems from the particularities of each legal order. As President Siofra O'Leary[40] of the ECtHR has explained, there is thus a contrast between the function of the ECtHR, which is responsible for establishing a minimum level of protection for fundamental rights such that they can be exercised in a non-discriminatory manner, and the constitutional nature of the EU legal order, which contains provisions ensuring strict equality, such as Articles 20 and 21 of the Charter, or Article 2 which makes such equality one of the EU's values. This by no means precludes the ECtHR from taking account of EU law, as necessary, in ruling either under Article 14 (taken in conjunction with Article 2 of Protocol No. 1; see *Moraru v. Romania*[41]) or under Article 1 of Protocol No. 12 (see *Moraru and Marin v. Romania*[42]). In these two cases, the findings of violations were based in part on the fact that the domestic courts had not drawn all the conclusions from the relevant CJEU judgments.

Recognising and accepting differences, where they exist, is part and parcel of the smooth functioning of the whole formed by the two European legal orders overall. Such nuances are not so much the sign of an attempt by either court to "go it alone", which would be detrimental to the effectiveness of the system of protection of fundamental rights, as they are a natural manifestation of the specific features of each of the two orders.

The legitimate preservation of these differences takes place in a context of overall convergence, reflecting an increasingly visible phenomenon of cross-fertilisation based on a choice of judicial policy which tends, as far as possible, to favour harmonious solutions.

In its recent judgment of 13 May 2024 in the case of *X v. Greece*[43], which concerned the positive obligations arising from Articles 3 and 8 of the Convention and where a violation of those Articles was found in connection with the failure of investigative and judicial authorities to provide an appropriate response to rape allegations, the ECtHR cited, in the part of the judgment concerning international-law material, the 2012 Directive on the rights of victims and the 2015 Report on violence against women published by the EU Agency for Fundamental Rights, to which it then expressly referred in the part of its reasoning concerning the assessment of the victim's consent (see § 82 of the judgment).

The protection afforded to whistle-blowers under Article 10 of the Convention, which guarantees freedom of expression, is also emblematic of such cross-fertilisation between the two legal orders. In its 2008 Grand Chamber judgment in *Guja v. Moldova*[44], the ECtHR laid the foundations for a framework of robust protections for whistle-blowers. As a result of this seminal judgment, the level of protection afforded to whistle-blowers in other legal orders continued to develop, culminating in the adoption of the Directive of 23 October 2019 on the protection of persons who report breaches of Union law and its transposition into the Member States' legal systems. Noting this increase in the level of protection, the ECtHR was led to consolidate and clarify its own case-law in the Grand Chamber *Halet v. Luxembourg* judgment of 2023[45], which states: "120. ... [T]he Court is fully conscious of the developments which have occurred since the *Guja* judgment was adopted in 2008, whether in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they are liable to play by bringing to light information that is in the public interest, or in terms of the

[38] ECtHR, *Guberina v. Croatia*, no. 23682/13, 12 September 2016
[39] ECtHR, *Molla Sali v. Greece*, no. 20452/14, 19 December 2018,
[40] S. O'Leary, "The Principle of Non-Discrimination – Methodology and Application", ECtHR visit to the CJEU, November 2011
[41] ECtHR, *Moraru v. Romania*, no. 64480/19, 8 February 2023
[42] ECtHR, *Moraru and Marin v. Romania*, nos. 53282/18 and 31428/20, 20 March 2023
[43] ECtHR, *X v. Greece*, no. 38588/21, 13 May 2024
[44] ECtHR, *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008
[45] ECtHR, *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023

development of the European and international legal framework for the protection of whistle-blowers … In consequence, it considers it appropriate to grasp the opportunity afforded by the referral of the present case to the Grand Chamber to confirm and consolidate the principles established in its case-law with regard to the protection of whistle-blowers, by refining the criteria for their implementation in the light of the current European and international context."

These examples reflect the fruitfulness of the exchanges between the two European legal orders, which the dialogue between the two courts serves to promote. As Professors Sudre and Labayle have pointed out: "on a harmonising view of relations between systems, the requirement of normative concordance or interpretative uniformity, when it comes to fundamental-rights protection, can only move towards alignment with the highest standard of protection".

To those who fear that "*trop de droit tue les droits*" ("too much law kills rights") or that judicial multipolarity will lead to competition or even all-out war between the courts, it should be pointed out that the institutional and normative developments at work, the judicial policies of the two European courts and the direction of their respective case-law demonstrate that, while they are not twins, the Strasbourg and Luxembourg courts nevertheless exercise their respective functions like two sisters in the service of the protection of fundamental rights. In so doing, they manifest their shared desire to discharge their duties jointly for the benefit of national courts and to enable the latter to carry out their own task of protecting fundamental rights with their grass-roots responsibility for applying EU law and as the primary guarantors, in their domestic contexts, of effective respect for the rights protected by the ECtHR.

Just as political pluralism is one of the guarantees of democracy, legal pluralism is one of the conditions for safeguarding rights.