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Long Way to Harmony**

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# The European Convention on Human Rights and European Union Law: a Long Way to Harmony

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 Asylum seekers; EC law; Harmonisation; Legal certainty; Privilege against self-incrimination

*This article offers an in-depth analysis of the relationship between European law and the case-law born of the European Convention. The author addresses the tension between the drive for legal certainty and the need to expand fundamental rights. By offering an overview of the legal reality that this tension has created, the author seeks to find the balance between needless plurality and rigid certainty. Through this overview, the author argues that the promotion of fundamental rights must be organised along lines of harmony and not of uniformity. To do this, he offers a detailed analysis of the respective approaches to the detention of asylum seekers and to the privilege against self-incrimination. The article thus traces the increasingly inter-referential nature of Strasbourg and Luxembourg jurisprudence, arguing that this trend has the potential to promote fundamental rights, as long as the jurisdiction of human rights' legislation is significantly expanded. The author goes on to discuss the EU Charter of Fundamental Rights, looking at the ways in which it grew out of jurisprudence from both legal systems and how this cross-pollination may change the expansion of fundamental rights in a wider sense.*

It is hardly possible to over-estimate the long-term impact of the relationship between the European Convention on Human Rights ("the Convention" or ECHR) and EU law on the protection of fundamental rights in Europe. While recent developments indicate that a sense of common responsibility for fundamental rights is emerging in both legal systems, the main challenge is to ensure that expanding the scope of fundamental rights is not pursued at the cost of undermining legal certainty.

This article presents an overview of the developments which have characterised the relationship between the Convention and EU law in recent years, considering to what extent they are converging and thus promoting harmony and legal certainty. Given that law-makers and judges appear to have been following somewhat different approaches

\* The author writes in his personal capacity.

on this score—the former striving for the expansion of fundamental rights and the latter for their coherent interpretation—a separate section will be devoted to each. This analysis reveals that despite the remarkable progress already achieved, further efforts towards achieving harmony—not to be confused with uniformity—are required if fundamental rights are to retain their fundamental nature, a pre-condition to their effectiveness.

### The case law of the European courts

For a long time, the Court of Justice of the European Communities (ECJ) and the European Court of Human Rights have been seeking to adjust to each other's case law.<sup>1</sup> This trend has gained momentum in the last couple of years, as a result of a rapidly growing number of issues of relevance to *both* legal systems. Both European courts seem well aware that any discrepancies in the interpretation of the same fundamental rights would be detrimental for citizens and Member States alike, if only because the latter are bound to apply EU law at the same time as being within the jurisdiction of the Strasbourg Court.<sup>2</sup> Yet, while a fair amount of harmonisation between the Convention and EU law has already been achieved by the European courts, some standards remain unharmonised.

#### *Harmonisation achieved by the European courts*

##### The European Court of Justice

As early as 1975<sup>3</sup> the ECJ ruled that the Convention had “special significance” among the legal sources to be taken into account when identifying the fundamental rights applicable under EU law. Ever since that time, the ECJ has been relying on this doctrine—which was later reinforced by art.6 of the Treaty on European Union (TEU)—as the legal basis for drawing on Strasbourg case law.

The result today is an impressive list of judgments illustrating the ECJ's commitment to have regard to the Convention and adhere to Strasbourg's interpretation when applying fundamental rights. The rights most often referred to in this context include

<sup>1</sup> See Luzius Wildhaber and Johan Callewaert, “Espace constitutionnel européen et droits fondamentaux—Une vision globale pour une pluralité de droits et de juges” in N. Colneric et al. (eds), *Une communauté de droit (Festschrift für G.C. Rodríguez Iglesias)* (Berlin: Berliner Wissenschafts-Verlag, 2003), p.61; Johan Callewaert, “‘Unionisation’ and ‘Conventionisation’ of Fundamental Rights in Europe: The Interplay between Union and Convention Law and its Impact on the Domestic Legal Systems of the Member States” in J. Wouters, A. Nollkaemper and E. de Wet (eds), *The Europeanisation of International Law* (The Hague: T.M.C. Asser Press, 2008), p.109.

<sup>2</sup> *Bosphorus v Ireland* (2005) 42 E.H.R.R. 1 ECtHR.

<sup>3</sup> *Rutili v Ministre de l'Intérieur* (36/75) [1975] E.C.R. 1219 ECJ.

the right to a fair trial (art.6 ECHR),<sup>4</sup> the right to respect for private<sup>5</sup> and family life<sup>6</sup> (art.8 ECHR), the right to freedom of expression (art.10 ECHR)<sup>7</sup> and the right to protection of property (art.1 of Protocol No.1).<sup>8</sup>

Commenting on these developments, former Advocate General Jacobs noted:

“The ECJ has treated what is perhaps the most fundamental treaty in Europe, the European Convention on Human Rights, as if it were binding upon the Community, and has followed scrupulously the case-law of the European Court of Human Rights, even though the European Union itself is not a party to the Convention.”<sup>9</sup>

In the—admittedly rather unusual—case of *Spain v United Kingdom*, the effect conferred on a Strasbourg judgment by the ECJ was even more compelling.<sup>10</sup> The case concerned the execution of the judgment in the case of *Matthews v United Kingdom*<sup>11</sup> in which the

<sup>4</sup> e.g. *Baustahlgewebe GmbH v European Commission* (C-185/95 P) [1998] E.C.R. I-8417 ECJ (length of proceedings); *Bamberski v Krombach* (C-7/98) [2000] E.C.R. I-1935 ECJ (trial in absentia); *Criminal Proceedings against Steffensen* (C-276/01) [2003] E.C.R. I-3735 ECJ (admissibility of evidence); *Varec SA v Belgium* (C-450/06) [2008] E.C.R. I-581 ECJ (right to adversarial proceedings); *Criminal Proceedings against Pupino* (C-105/03) [2005] E.C.R. I-5285 ECJ (right to cross-examination); *Katz v Sos* (C-404/07) judgment of October 9, 2008 ECJ (idem); *Ordre des barreaux francophones et germanophones v Conseil des Ministres* (C-305/05) [2007] All E.R. (EC) 953; [2007] E.C.R. I-5305 ECJ (compatibility of Directive 91/308 on money laundering with the right to a fair trial); *Ingenieurburo Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin* (C-14/07) [2009] I.L.Pr. 24 ECJ (translation of procedural documents); *Franchet v European Commission* (T-48/05) [2006] E.C.R. II-2023 CFI (presumption of innocence); *Kadi v European Council* (C-402/05 P) [2008] E.C.R. I-6351 ECJ (right to be heard and right to an effective judicial review).

<sup>5</sup> e.g. *Rechnungshof v Österreichischer Rundfunk* (C-465/00) [2003] E.C.R. I-4989 ECJ (processing of personal data); *Bavarian Lager Co Ltd v European Commission* (T-194/04) [2008] 1 C.M.L.R. 35 CFI (access to Commission documents containing personal data); *Varec SA v Belgium* (C-450/06) [2008] E.C.R. I-581 ECJ (right to observance of business secrets).

<sup>6</sup> e.g. *Carpenter v Secretary of State for the Home Department* (C-60/00) [2002] E.C.R. I-6279 ECJ; *Secretary of State for the Home Department v Akrich* (C-109/01) [2003] E.C.R. I-9607 ECJ (expulsion of foreigners); *European Parliament v European Council* (C-540/03) [2006] E.C.R. I-5769 ECJ (family reunification).

<sup>7</sup> e.g. *Connolly v European Commission* (C-274/99 P) [2001] E.C.R. I-1611 ECJ (freedom of expression of European civil servant); *Eugen Schmidberger Internationale Transporte Planzuge v Austria* (C-112/00) [2003] E.C.R. I-5659 ECJ (right to demonstrate); *Herbert Karner Industrie Auktionen GmbH v Troostwijk GmbH* (C-71/02) [2004] E.C.R. I-3025 ECJ (advertising); *Kabel Deutschland Vertrieb und Service GmbH & Co KG v Niedersächsische Landesmedienanstalt für Privaten Rundfunk* (C-336/07) [2009] 2 C.M.L.R. 6 ECJ (obligation to provide access to cable network); *Criminal Proceedings against Damgaard* (C-421/07), judgment of April 2, 2009 ECJ (dissemination of information about a medicinal product).

<sup>8</sup> e.g. *Regione Autonoma Friuli-Venezia Giulia v Ministero delle Politiche Agricole e Forestali* (C-347/03) [2005] E.C.R. I-3785 ECJ (use of a brand); *Kadi* [2008] E.C.R. I-6351 (freezing of funds—fight against terrorism).

<sup>9</sup> Francis G. Jacobs, *The Sovereignty of Law* (Cambridge University Press, 2007), p.54.

<sup>10</sup> *Spain v United Kingdom* (C-145/04) [2006] E.C.R. I-7917 ECJ.

<sup>11</sup> *Matthews v United Kingdom* (1999) 28 E.H.R.R. 361 ECtHR.

European Court of Human Rights had found a violation of art.3 of Protocol No.1 to the ECHR on account of the ban which, pursuant to the 1976 Act,<sup>12</sup> had prevented the residents of Gibraltar from participating in the elections to the European Parliament. After it became clear that Spain would oppose any initiatives by the United Kingdom to have the 1976 Act amended by the European Union so as to execute the *Matthews* judgment, the United Kingdom opted for a domestic-law solution and passed the European Parliament (Representation) Act 2003. This prompted Spain to challenge that Act before the ECJ under art.227 EC. The ECJ, however, rejected the appeal, stressing the need for EU law to be interpreted in compliance with the *Matthews* judgment, even at the expense of disregarding the provisions which it had declared incompatible with the Convention but which were still in force.<sup>13</sup>

### The European Court of Human Rights

A similar concern about harmony with EU law and ECJ jurisprudence has been shown by the European Court of Human Rights; this is demonstrated by the increasing number of Strasbourg judgments drawing on EU legal sources, sometimes even in support of major changes to the case law.

Examples of the latter category include the Court's judgments in the cases of *DH v Czech Republic*, *Maslov v Austria*, *Zolotukhin v Russia*, *Scoppola v Italy* and *Micallef v Malta*. In *DH* the Strasbourg Court based itself on EU legal sources when ruling for the first time that "reliable and significant" statistics could constitute prima facie evidence of indirect discrimination.<sup>14</sup> In *Maslov* the Court found support in ECJ jurisprudence for considering that it was an applicant's actual expulsion, rather than the expulsion order, that had to pass the Convention test.<sup>15</sup> In *Zolotukhin* the Court sought guidance from EU law when deciding that the notion of "offence" within the meaning of art.4 of Protocol No.7 to the ECHR (*non bis in idem*) was henceforth to be understood as referring only to the facts underlying an offence.<sup>16</sup> In *Scoppola* the Court had regard to art.49(1) of the EU Charter on Fundamental Rights and relevant ECJ jurisprudence when ruling that art.7(1) ECHR implicitly imposed to retrospectively apply the more lenient criminal law in pending proceedings.<sup>17</sup> Finally, in *Micallef* the Court also relied on ECJ case law in reaching the conclusion that art.6 ECHR would henceforth apply to injunction proceedings initiated with a view to taking interim measures, to the extent that those measures determine civil rights and obligations within the meaning of the provision.<sup>18</sup>

<sup>12</sup> Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage (September 20, 1976).

<sup>13</sup> *Spain v United Kingdom* [2006] E.C.R. I-7917 at [95].

<sup>14</sup> *DH v Czech Republic* (2007) 47 E.H.R.R. 3 ECtHR at [81]–[91] and [184].

<sup>15</sup> *Maslov v Austria* (App. No.1638/03), judgment of June 23, 2008 ECtHR at [93].

<sup>16</sup> *Zolotukhin v Russia* (App. No.14939/03), judgment of February 10, 2009 ECtHR at [33]–[38] and [82]. On *non bis in idem* see further below.

<sup>17</sup> *Scoppola v Italy* (App. No.10249/03), judgment of September 17, 2009 ECtHR.

<sup>18</sup> *Micallef v Malta* (App. No.17056/06), judgment of October 15, 2009 ECtHR. Further (but older) evidence of the impact of EU law on the Strasbourg case law is to be found in *Pellegrin v France* (1999) 31 E.H.R.R. 26 ECtHR and *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 ECtHR.

In several other judgments, the European Court of Human Rights took into account the effects of EU law in the legal systems of the Member States. Thus, in *Dangeville v France*<sup>19</sup> the Court found the applicant company's reimbursement claim, which was based on an EC Directive granting an exemption from VAT, to amount to a "possession" within the meaning of art.1 of Protocol No.1. In *Mendizabal v France*,<sup>20</sup> the Court ruled that, given the applicant's EU citizenship, the notion of "law" within the meaning of art.8 had to be construed in the light of Community law, notably its provisions relating to the entry and residence of EU citizens.

In the case of *John v Germany*,<sup>21</sup> the Court confirmed that the refusal to refer a case to the ECJ for a preliminary ruling under art.234 EC could infringe the fairness of proceedings within the meaning of art.6 ECHR if it appeared to be arbitrary.<sup>22</sup> In *Ooms v France*<sup>23</sup> the Court reached the conclusion that Directive 95/2, as transposed into French domestic law, was compatible with art.7 ECHR.

However, the most comprehensive contribution by the Strasbourg Court towards maintaining harmony with the jurisprudence of the ECJ came with the judgment in the landmark case of *Bosphorus v Ireland*, which established a presumption of "equivalent protection". The case concerned the impounding of an aircraft by the Irish authorities, pursuant to Regulation 990/93.<sup>24</sup>

In this judgment, the Court held that State action taken in compliance with legal obligations flowing from the State's membership of an international organisation was justified where—like the EU in respect of Community law—the organisation protected fundamental rights in a manner which was at least equivalent to the protection under the Convention. Where such equivalent protection was ensured, the presumption would be that a State had not departed from the requirements of the Convention where it did no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption could be rebutted if, in the circumstances of a particular case, the protection concerned was manifestly deficient.<sup>25</sup> Moreover, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations.

The Court first applied the presumption in *Coopérative des Agriculteurs de Mayenne v France*.<sup>26</sup> It did the same in *Nederlandse Kokkelvisserij v Netherlands*,<sup>27</sup> rejecting a

<sup>19</sup> *Dangeville SA v France* (2002) 38 E.H.R.R. 32 ECtHR.

<sup>20</sup> *Mendizabal v France* (App. No.51431/99), judgment of January 17, 2006 ECtHR.

<sup>21</sup> *John v Germany* (2007) 45 E.H.R.R. SE4 ECtHR.

<sup>22</sup> See also *Ullens v Belgium* (App. No.38353/07), pending.

<sup>23</sup> *Ooms v France* (App. No.38126/06), judgment of September 25, 2008 ECtHR.

<sup>24</sup> *Bosphorus v Ireland* (2005) 42 E.H.R.R. 1.

<sup>25</sup> This is a major difference from the "Solange" approach of the German Constitutional Court. Indeed, whereas the Bosphorus-presumption can be rebutted on a case-by-case basis, the "Solange" approach requires proof of structural or large-scale shortcomings in the protection of fundamental rights under Community law for the presumption to be rebutted (BVerfGE, 102, 164).

<sup>26</sup> *Coopérative des Agriculteurs de Mayenne v France* (App. No.16931/04), decision of October 2, 2006 ECtHR.

<sup>27</sup> *Coöperatieve producentenorganisatie van de Nederlandse Kokkelvisserij UA v Netherlands* (2009) 48 E.H.R.R. SE18 ECtHR.

complaint under art.6 concerning the fact that the applicant association had not been allowed to submit a response to the Opinion of the Advocate General before the ECJ gave judgment.<sup>28</sup>

Given the ECJ's commitment to following Strasbourg case law, it will come as no surprise that to date no "manifest deficiency" has been identified by the Strasbourg Court. And with the EU Charter playing an increasingly important role in ECJ jurisprudence,<sup>29</sup> the emergence of such a "manifest deficiency" becomes ever more unlikely, given that the Charter itself adopts the Convention as the EU minimum standard.<sup>30</sup> Against this background and through the *Bosphorus*-presumption and its tolerance as regards "non manifest" deficiencies, the protection of fundamental rights under Community law is policed with less strictness than under the Convention. This is paradoxical because, judging by the developments described above, this is precisely the kind of treatment the ECJ has sought to renounce.<sup>31</sup>

However, in practice it may be more important to clarify the scope of the presumption of equivalence. Several criteria come into play here. First, the Convention must be applicable *ratione personae* to the State concerned. This will only be the case if the State has acted in a way capable of triggering its responsibilities under the Convention. Conversely, there will be no such responsibility if the impugned measure resulted solely from action taken by an EU institution without any direct or indirect involvement of the Member State concerned.<sup>32</sup>

<sup>28</sup> The Court considered that the case differed from cases declared inadmissible *ratione personae* (see the Court's decision in the case of *Connolly v 15 EU Member States* (App. No.73274/01), decision of December 9, 2008) in that the applicant's complaint was based on an intervention of the ECJ actively sought by a domestic court in proceedings pending before it. It could not therefore be found that the respondent party was in no way involved.

<sup>29</sup> See, among others, *Parliament v Council* (C-540/03) [2006] E.C.R. I-5769; *Advocaten voor de Wereld VZW v Leden van de Ministerraad* (C-303/05) [2008] All E.R. (EC) 317 ECJ; *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* (C-275/06) [2008] E.C.R. I-271 ECJ.

<sup>30</sup> See art.52(3) of the Charter.

<sup>31</sup> The question remains, though, what exactly are "manifest deficiencies"? Indeed, in the absence of relevant case law, it could still not be clarified whether in this context "manifest" means only "clear", "obvious" or also "serious" and/or "gross". Every gross violation of the Convention is certainly manifest, but not every manifest violation is a gross one. In his concurring opinion to the judgment, Judge Ress takes the view that the protection of a Convention right would be manifestly deficient if, in deciding the key question in a case, the ECJ were to depart from the interpretation or the application of the Convention or the Protocols that had already been the subject of well-established ECHR case law. But even this scenario seems fairly unrealistic. In another concurring opinion, Judge Rozakis and his colleagues take the view that "in spite of its relatively undefined nature, the criterion 'manifestly deficient' appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under the European Convention on Human Rights". Yet if this had been the Court's intention, one wonders why it did not follow the *Solange* approach by not allowing a case-by-case review of Community law protection.

<sup>32</sup> *Connolly v 15 EU Member States* (App. No.73274/01), decision of December 9, 2008 ECtHR.

Next, a question arises concerning the amount of discretion which the ECJ sometimes leaves to the domestic courts regarding the implementation of preliminary rulings.<sup>33</sup> In their concurring opinion, Judge Rozakis and his colleagues consider such discretion not to be covered by the presumption since, according to the *Bosphorus* judgment at [157], “a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations”. It must be remembered that one of the main reasons which prompted the Court to rely on the presumption of equivalent protection was the need to safeguard European integration by preventing EU legal acts from being challenged in Strasbourg on a systematic basis.<sup>34</sup> Yet, to the extent that these acts are applied and/or complemented on a purely national scale, this justification loses much of its relevance.

Finally, by limiting the scope of the *Bosphorus* judgment to Community law in the narrow sense, i.e. the so-called first pillar,<sup>35</sup> the scope of the presumption is also limited. This rules out its application to the two other pillars relating to the Common Foreign and Security Policy and the Area of Justice, Freedom and Security respectively. Given the emphasis placed in the *Bosphorus* judgment on the key role of the ECJ in protecting human rights under EU law, it can safely be assumed that the restricted competence of the ECJ in respect of these two pillars is an implied reason for this limitation.

But how about the third pillar cases which the ECJ has actually reviewed by virtue of art.35 TEU?<sup>36</sup> Do they qualify for the application of the presumption of equivalence? And what will the situation be under the Lisbon Treaty when ECJ competences in the Area of Freedom, Justice and Security are significantly expanded?<sup>37</sup> Last but not least, a question will also arise as to the effects on the *Bosphorus*-presumption of accession by the European Union to the Convention.<sup>38</sup> The Court has not been called upon to answer these questions yet, but that might change in the not too distant future.

#### *Standards left unharmonised*

In spite of the quite encouraging developments described above, there is still some way to go for the European Courts in harmonising fundamental rights standards. There are still areas where such harmonisation has yet to take place, as illustrated by the following two examples that concern the privilege against self-incrimination and the detention of asylum seekers. While the number of these “unharmonised” areas does remain modest

<sup>33</sup> See, as examples of such rulings, *Österreichischer Rundfunk* (C-465/00) [2003] E.C.R. I-4989; *Proceedings brought by Möllendorf* (C-117/06) [2008] 1 C.M.L.R. 11 ECJ; *International Transport Workers' Federation v Viking Line ABP* (C-438/05) [2007] E.C.R. I-10779 ECJ; *Promusicae* (C-275/06) [2008] E.C.R. I-271.

<sup>34</sup> “The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations ... Such considerations are critical for a supranational organisation such as the EC” (*Bosphorus v Ireland* (2005) 42 E.H.R.R. 1 at [150]).

<sup>35</sup> *Bosphorus v Ireland* (2005) 42 E.H.R.R. 1 at [72].

<sup>36</sup> e.g. *Pupino* (C-105/03) [2005] E.C.R. I-5285; *Criminal Proceedings against Gözütok* (C-187/01) [2003] E.C.R. I-1345 ECJ.

<sup>37</sup> arts 267 and 276 of the future Treaty on the Functioning of the European Union.

<sup>38</sup> As provided for by art.6(2) TEU (as amended by the Lisbon Treaty).



and their impact should therefore not be overestimated, they nonetheless raise the question as to how any differences in fundamental rights standards can be justified; this will be touched on in the concluding remarks of this article.

#### The privilege against self-incrimination<sup>39</sup>

The two European courts are in broad agreement about the need to respect the privilege against self-incrimination as an element of the right to a fair trial.<sup>40</sup> However they disagree on whether the privilege should cover statements which are not incriminating by themselves, such as exculpatory remarks or information confined to questions of fact.

Under the Convention such statements *are* covered by the privilege, the Strasbourg Court considering that even if they can be regarded as non-incriminating when they are being made, they might still be used against the accused at a later stage of the proceedings and serve as a basis for his conviction. Consequently, an accused cannot be forced to make such statements and their use in criminal proceedings would give rise to a breach of art.6 ECHR.<sup>41</sup>

Under EU law the privilege is particularly relevant in the context of investigations into breaches of EU competition law by private companies. However, in contrast to the Strasbourg case law, the privilege is limited to statements which directly involve an admission of guilt. Consequently it does not preclude a “defendant” company from being forced to answer purely factual questions or to produce documents containing such information. According to the EU courts, there is nothing to prevent the addressee of a request for information from showing, in subsequent judicial proceedings, that the factual information concerned has a different meaning from that given to it by, for instance, the European Commission.<sup>42</sup>

#### Detention of asylum seekers

A new divergence between Convention and EU standards has recently emerged as the result of the judgment in the case of *Saadi v United Kingdom*<sup>43</sup> in which the Strasbourg Court was called upon to decide whether asylum seekers could lawfully be detained for the purpose of speeding up the processing of their application. In the case at

<sup>39</sup> On this, see Johan Callewaert, “The Privilege against Self-Incrimination in European Law—An Illustration of the Impact of the Plurality of Courts and Legal Sources on the Protection of Fundamental Rights in Europe” (2004) 4 *ERA-Forum* 488.

<sup>40</sup> *Jalloh v Germany* (2006) 44 E.H.R.R. 32 ECtHR at [100]; *Limburgse Vinyl Maatschappij NV (LVM) v European Commission* (C-238/99 P) [2002] E.C.R. I-8375 ECJ at [273].

<sup>41</sup> *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313 ECtHR; *JB v Switzerland* (App. No.31827/96), judgment of May 3, 2001 ECtHR; *O’Halloran v United Kingdom* (2007) 46 E.H.R.R. 21 ECtHR.

<sup>42</sup> *Orkem SA (formerly CdF Chimie SA) v European Commission* (C-374/87) [1989] E.C.R. 3283 at [34]–[35]; *Mannesmannröhren-Werke AG v European Commission* (T-112/98) [2001] E.C.R. II-729 at [66]–[67]; *Limburgse Vinyl Maatschappij NV* (C-238/99 P) [2002] E.C.R. I-8375 at [273]–[276]; *European Commission v SGL Carbon AG* (C-301/04 P) [2006] 5 C.M.L.R. 15 at [43]–[45].

<sup>43</sup> *Saadi v United Kingdom* (2008) 47 E.H.R.R. 17 ECtHR.

hand, the applicant had been detained for seven days, even though he had always reported as required by the authorities. After thoroughly examining the facts of the case and satisfying itself that they did not reveal any arbitrariness, the Court reached the conclusion (at [80]) that,

“given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers. . . it was not incompatible with Article 5 § 1(f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily”.<sup>44</sup>

This is in conflict with the EU directive on minimum procedural standards for granting and withdrawing refugee status,<sup>45</sup> which provides inter alia that “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum” (art.18(1)).

The different approach being followed in Strasbourg stems—at least partly—from the fact that the Convention provision applied in the *Saadi* case (art.5(1)(f)) has a much wider scope than the Directive; first, it is not limited to the 27 EU Member States but extends to the 47 states parties to the Convention and, secondly, it is not limited to asylum seekers either, covering as it does all persons seeking to enter the territory of a contracting state, no matter on what ground. Yet, when it comes to applying art.5(1)(f) to asylum seekers in the European Union, the contrast remains, as pointed out in the dissenting opinion of the *Saadi* judgment.

### European legislation

In the field of legislation the picture is also a mixed one. While the EU Charter represents a commendable attempt at keeping new EU legislation on fundamental rights in line with the Convention, other EU legal instruments give rise to some concern.

#### *The EU Charter of Fundamental Rights*

From the outset the Charter raised many questions about its relationship with the Convention, given that about half of its provisions are borrowed from the Convention or from Strasbourg jurisprudence. Within this half are found approximately 90 per cent of the justiciable rights contained in the Charter. The main problem arose in respect of the drafters’ intention to “simplify” the wording of a substantial number of Convention provisions, so as to make them easier to understand, while sticking to the scope and meaning they have under the Convention. Despite its merit, this approach risks undermining legal certainty and causing considerable confusion among lawyers, particularly in view of the fact that possible discrepancies in the interpretation of the

<sup>44</sup> See on this judgment Jean-Yves Carlier, “L’accès au territoire et la détention de l’étranger demandeur d’asile” [2009] *Revue trimestrielle des droits de l’homme* 795.

<sup>45</sup> Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

rights concerned cannot be settled by reference to the supremacy of EU law, in the absence of such supremacy in relation to the Convention.

After much debate within the EU-Convention in charge of drafting the Charter and the active involvement of the Strasbourg Observers to that Convention,<sup>46</sup> a solution was found which is now laid down in art.52(3) of the Charter<sup>47</sup> and is based on two complementary rules. According to the first, the rights borrowed from the Convention are to be given the same meaning and scope as under the Convention, regardless of their wording. In the light of the Preamble and the Explanations to art.52 of the Charter<sup>48</sup> it is clear that for the determination of this meaning, regard is to be had to the jurisprudence of the European Court of Human Rights and the ECJ.<sup>49</sup> According to the second rule, EU law is free to offer more extensive protection.<sup>50</sup>

In Strasbourg this solution has always been considered satisfactory. For, in addition to preserving legal certainty by clarifying the scope and the meaning of the new provisions in relation to the Convention, it helps to avoid clashes by formally acknowledging the Convention standards as minimum EU standards. However, it cannot be denied that it will also increase the complexity of European law in the field of fundamental rights to the extent that other legal sources will have to be consulted when determining the exact scope and meaning of the Charter provisions concerned. Thus, the “simplification” that was sought may not result in simplification in practice.<sup>51</sup> This complexity will grow with the impact of the “opt outs” granted to the United Kingdom and Poland by the Lisbon Treaty.<sup>52</sup>

#### *Other legislation*

Sometimes, however, the law stands in the way of a proper harmonisation of EU and Convention standards, as illustrated by two examples, relating to the protection of foreigners against expulsion and *non bis in idem* respectively.

<sup>46</sup> Mr Marc Fischbach, Judge at the European Court of Human Rights, and Mr Hans Christian Krüger, Deputy Secretary General of the Council of Europe.

<sup>47</sup> [2007] OJ C303.

<sup>48</sup> [2007] OJ C303/33.

<sup>49</sup> Gil Carlos Rodriguez Iglesias, speech given at the Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, January 31, 2002; European Court of Human Rights, Strasbourg, Annual Report 2001, p.35.

<sup>50</sup> Which indeed the Charter itself already does in respect of, for example, the right to marry and to found a family (art.9), the right to an effective remedy (art.47(1)) as well as to legal aid (art.47(3)). Unlike lower standards, higher standards do not undermine the necessary harmony between the Convention and the Charter. For, in line with the principle of subsidiarity underlying the Strasbourg system, the Convention itself, in its art.53, allows its standards to be surpassed “under the laws of any High Contracting Party or under any other agreement to which it is a Party”.

<sup>51</sup> Compare, for instance, art.5 ECHR with art.6 of the Charter which, according to the Explanations to the latter ([2007] OJ C303/17 (19)), is meant to have the same “meaning and scope” as the former provision.

<sup>52</sup> See the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom ([2007] OJ C306/156).

## Protection of foreigners against expulsion

The protection of foreigners against expulsion has developed into a vast and complex area which it is not possible to cover in this article. It is nonetheless worth noting the fundamentally different approaches being followed in Brussels and Strasbourg in this area and their consequences.

First, under EU law the status and rights which a person seeking protection from expulsion is entitled to claim will vary according to whether this person is an EU citizen, a person who has exercised his right of freedom of movement, a family member of one of the former categories or none of the above.<sup>53</sup> Even though the ECJ does seek to harmonise the protection enjoyed by each of these categories through increased reliance on the notion of EU citizenship,<sup>54</sup> differences still remain in relation to the rights attached to each of these categories.<sup>55</sup> In addition, as recently emphasised by the ECJ, under EU law the protection of the family life of EU citizens is primarily designed to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty.<sup>56</sup>

By contrast, the decisive consideration when assessing whether protection from expulsion should be granted under art.8 ECHR<sup>57</sup> will not so much be the nationality or legal status of the persons concerned, but rather the extent of their social integration in the host country.<sup>58</sup> This is evaluated by reference to criteria relating to the personal situation of an applicant and his family members, which will necessarily involve an element of duration.<sup>59</sup> Thus, while under EU law the specific legal category to which a foreigner belongs will usually be decisive for determining the protection against expulsion to which he is entitled, any foreigner can qualify for protection under art.8

<sup>53</sup> See, among others, *Carpenter* (C-60/00) [2002] E.C.R. I-6279; *Poirrez v Caf de la Seine Saint-Denis* (C-206/91) [1992] E.C.R. I-6685 ECJ; *Trojani v Centre Public d'Aide Sociale de Bruxelles* (C-456/02) [2004] E.C.R. I-7573 ECJ; *Proceedings brought by Turpeinen* (C-520/04) [2006] E.C.R. I-10685 ECJ; *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2009] Q.B. 318 ECJ.

<sup>54</sup> e.g. in *Turpeinen* (C-520/04) [2006] E.C.R. I-10685.

<sup>55</sup> As recently illustrated in *Metock* (C-127/08) [2009] Q.B. 318.

<sup>56</sup> *Metock* (C-127/08) [2009] Q.B. 318 at [56]. See also *Mouvement contre le Racisme, l'Antisemitisme et la Xenophobie ASBL (MRAX) v Belgium* (C-459/99) [2002] E.C.R. I-6591 ECJ at [53]; *European Commission v Germany* (C-441/02), judgment of April 27, 2006 ECJ at [109].

<sup>57</sup> art.3 ECHR will not be considered here as it concerns the wholly different situation of foreigners under the threat of an expulsion to a country where they can be expected to suffer ill-treatment (e.g. *Saadi v Italy* (2008) 49 E.H.R.R. 30 ECtHR).

<sup>58</sup> However, the increased protection enjoyed by EU citizens is not considered discriminatory by the Strasbourg Court, the existence of the EU legal order providing an objective and reasonable justification for it (*Moustaquim v Belgium* (1991) 13 E.H.R.R. 802 ECtHR at [49]; *C v Belgium* (1996) 32 E.H.R.R. 2 ECtHR at [38]).

<sup>59</sup> The full list of these criteria is to be found in the judgments given in the cases of *Boultif v Switzerland* (2001) 33 E.H.R.R. 50 ECtHR, *Üner v Netherlands* (2006) 45 E.H.R.R. 14 ECtHR and *Maslov v Austria* (App. No.1638/03), judgment of June 23, 2008 ECtHR. See Charlotte Steinorth, "Üner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life" (2008) 8 H.R.L. Rev. 185.

ECHR, regardless of his nationality or legal status, provided his actual links with the host country are sufficiently strong.<sup>60</sup>

In addition, important differences exist between the two systems as regards the procedural safeguards against expulsion. On the one hand, the Strasbourg Court declined to apply art.6 ECHR to expulsion procedures, considering that,

“decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of art.6 § 1 of the Convention”.<sup>61</sup>

On the other hand, however, and in stark contrast to the Strasbourg approach, under EU law an increasing number of safeguards, comparable to those laid down in art.6 ECHR, are being provided in expulsion procedures.<sup>62</sup>

Non bis in idem

It might be hard to find a fundamental right which over the years has given rise to more different formulations and interpretations than *non bis in idem*.<sup>63</sup> Even though it features, with varying wordings, in a sizeable number of national laws and international instruments,<sup>64</sup> the following observations will focus on the situation under Convention and EU law.

<sup>60</sup> See Luzius Wildhaber, “The Right of Residence of the Foreign Spouse—An Example Of Fruitful Cooperation Between Coexistent Human Rights Protection Systems in Europe” in G.J.M. Corstens, W.J.M. Davids and M.I. Veldt-Foglia (eds), *Europeanisering van het Nederlands Recht—opstellen aangeboden aan W.E. Haak* (Deventer: Kluwer, 2004), p.30.

<sup>61</sup> *Maaouia v France* (2000) 33 E.H.R.R. 42 ECtHR.

<sup>62</sup> e.g. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77; Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44. See also art.47 of the EU Charter on Fundamental Rights.

<sup>63</sup> See Christina Karakosta, “Ne bis in idem: une jurisprudence peu visible pour un droit intangible” [2008] *Revue trimestrielle des droits de l’homme* 25; Uno Lohmus, “The ne bis in idem Principle in the Case-law of the European Court of Justice and of the European Court of Human Rights” in Stephan Breitenmoser et al. (eds), *Droits de l’homme, démocratie et Etat de droit, Liber amicorum Luzius Wildhaber* (Zürich, St-Gallen, Baden-Baden, 2007), pp.411 et seq.; Hanspeter Mock, “‘Ne bis in idem’, une locution dont le sens ne semble pas être le même à Luxembourg qu’à Strasbourg” [2006] *Revue trimestrielle des droits de l’homme* 635; Hanspeter Mock, “Ne bis in idem: Strasbourg tranche en faveur de l’identité des faits” [2009] *Revue trimestrielle des droits de l’homme* 867; Steve Peers, “Double Jeopardy and EU Law: Time for a Change?” (2006) 8 E.J.L.R. 199.

<sup>64</sup> Among the Council of Europe instruments, see the European Convention on Extradition (art.9), the Additional Protocol to the European Convention on Extradition (art.2), the European Convention on the Punishment of Road Traffic Offences (arts 8–9), the European Convention on the Transfer of Proceedings in Criminal Matters (arts 35–37), the Convention on the Transfer of Sentenced Persons (art.8), the European Convention on Offences relating to Cultural Property (art.17), the Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (arts 2, 3, 14); the Council of Europe Convention on Action against Trafficking in Human Beings (art.31: conflict of

In the Convention, *non bis in idem* is laid down in art.4(1) of Protocol No.7, according to which,

“no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”.

The importance attaching to the principle is reflected in art.4(3) which elevates *non bis in idem* to one of the few rights from which derogation is not allowed under art.15 ECHR. Interestingly, art.50 of the EU Charter on fundamental rights uses roughly the same wording, except for the limitation to criminal convictions within the same country.<sup>65</sup>

Under current EU law, *non bis in idem* plays a role in two different areas, each regulated by different provisions. The first area is competition law where it has been found by the ECJ to be a

“fundamental principle of Community law also enshrined in Article 4 (1) of Protocol No 7 to the ECHR [which] precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous un-appealable decision”.<sup>66</sup>

In addition, *non bis in idem* plays an increasingly important role in facilitating the free movement of persons in the area of Freedom, Security and Justice, notably through art.54 ECHR implementing the Schengen Agreement, which reads:

“a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party”.<sup>67</sup>

One of the main difficulties in interpreting this provision faced by the ECJ was the determination of the scope of *idem*. The conclusion reached was that:

jurisdiction), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (art.28).

<sup>65</sup> It is true that according to its wording, art.4 of Protocol No.7 only prohibits double jeopardy by the same State. However, it seems clear that by referring to the “same State” the drafters of this provision had in mind not so much the geographical or political but rather the legal entity concerned. Thus, it cannot be ruled out that in the context of an integrated legal system such as the one created by Community law, the Strasbourg Court might one day hold that *non bis in idem* was breached on account of a double prosecution by two different States acting as members of the same legal system.

<sup>66</sup> *Limburgse Vinyl Maatschappij NV* [2002] E.C.R. I-8375 at [59].

<sup>67</sup> See also the European Commission’s Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM(2005)696 final, December 23, 2005.

“Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States. In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.”<sup>68</sup>

Much earlier, the European Court of Human Rights was confronted with the same difficulty and has struggled ever since to come up with a coherent approach to *idem*. However, the result was nothing more than a number of conflicting judgments on the issue, some relying only on the conduct of the defendant (*idem factum*),<sup>69</sup> others relying on the multiple legal classifications and offences to which one set of facts can give rise (*concoirs idéal d’infractions*)<sup>70</sup> and a third category focusing on the so-called “essential elements” of the multiple offences concerned.<sup>71</sup>

Finally, in the *Zolotukhin* case, a Grand Chamber of the Strasbourg Court decided to put an end to this confusion, which it considered was producing a “legal uncertainty incompatible with a fundamental right”.<sup>72</sup> Pointing to the case law of the ECJ and the Inter-American Court of Human Rights, it ruled that a more restrictive approach could no longer be justified by reason of the word “offence” appearing in the text of art.4 of Protocol No.7. Consequently, art.4 was to be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arose from identical facts or facts which were substantially the same.

This may be a good case to close the list of divergences between Convention and EU standards, as it shows how differences can be ironed out by European courts, in spite of the divergent wording of the relevant provisions.<sup>73</sup>

### Concluding remarks: keeping fundamental rights fundamental

The developments described above ultimately go to the heart of the notion of fundamental rights. For if one asks the question “what makes fundamental rights fundamental?”, one might meet a broad consensus that fundamental rights are supposed to go to the very essence, the basic needs—or indeed the dignity—of every human being and that, because of this fundamental nature, they should be enjoyed in the same way by

<sup>68</sup> *Criminal Proceedings against Van Esbroeck* (C-436/04) [2006] E.C.R. I-2333 ECJ at [35]–[36]. On the same line: *Criminal Proceedings against Kraaijenbrink* (C-367/05) [2007] 3 C.M.L.R. 44 ECJ and *Kretzinger v Hauptzollamt Augsburg* (C-288/05) [2007] E.C.R. I-6441 ECJ; *Criminal Proceedings against Bourquain* (C-297/07), judgment of December 11, 2008 ECJ.

<sup>69</sup> *Grading v Austria* (App. No.15963/90), judgment of October 23, 1995 ECtHR.

<sup>70</sup> *Oliveira v Switzerland* (1998) 28 E.H.R.R. 289 ECtHR.

<sup>71</sup> *Fischer v Austria* (App. No.37950/97), judgment of May 29, 2001 ECtHR. See also the summary of the different approaches followed so far in *Zolotukhin v Russia* (App. No.14939/03), judgment of February 10, 2009 at [70] et seq.

<sup>72</sup> *Zolotukhin v Russia* (App. No.14939/03), judgment of February 10, 2009 at [78].

<sup>73</sup> See, as another example, *DH v Czech Republic* (2007) 47 E.H.R.R. 3, where the Court endorsed the notion of indirect discrimination as applied under EU law.

the largest possible number of people: *everyone* should be protected from ill-treatment, *everyone* should be entitled to a fair hearing, *everyone* should be allowed to speak freely. Thus, the fundamental nature of fundamental rights has something to do with their universality, as reflected in art.1 of the Universal Declaration of Human Rights, according to which: "All human beings are born free and equal in dignity and rights". Interestingly, this sense of the universality of human rights is reflected in the European Convention on Human Rights<sup>74</sup> as well as in the Lisbon Treaty.<sup>75</sup>

Yet the reality described above, with its mixture of harmonised and unharmonised areas, seems a far cry from the universality proclaimed by the Universal Declaration, thus raising doubts as to whether Europeans are living up to their own notion of fundamental rights.

Admittedly, universality is not uniformity. Higher standards are allowed and even encouraged by some European instruments, including the Convention<sup>76</sup> and the EU Charter.<sup>77</sup> Flexibility can be a way to cater for varying situations, as illustrated notably by the margin of appreciation allowed to domestic authorities by the Strasbourg Court. Moreover, as the example discussed above shows, some disharmony between fundamental rights standards may have a positive effect by operating as an incentive to raise standards which "lag behind", provided the process of adjusting them does not take too long.

Still, there are limits to what can be done with fundamental rights without undermining their fundamental nature. It is clear that the more different versions and contents are given to *the same* fundamental rights and the more basic those rights are, the less fundamental they become and the more their meaning is eroded by relativism. This may reach the point where fundamental rights are so disparate in content that there is little that is "fundamental" about them.

So, where should the line be drawn? It seems that one could usefully rely on the criteria commonly used in European jurisprudence for identifying discriminations, because disregard for the essentially universal nature of fundamental rights is very close to, and can easily amount to, discrimination and arbitrariness. Roughly speaking, in European jurisprudence a difference in treatment will not amount to discrimination only if it is objectively justified, i.e. if it pursues a legitimate aim and is not being achieved through disproportionate measures.<sup>78</sup> With this in mind, how many of the differences currently existing between the two European legal systems—and the examples above are not exhaustive—would pass that test? Probably only a minority.

<sup>74</sup> See the Preamble to the Convention.

<sup>75</sup> art.21 TEU as amended by the Lisbon Treaty. See also the Preamble to the Treaty announcing that the EU intends to draw inspiration "from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law".

<sup>76</sup> art.53 ECHR states that "[n]othing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party".

<sup>77</sup> art.53 of the EU Charter.

<sup>78</sup> See, among others, *Andrejeva v Latvia* (App. No.55707/00), judgment of February 18, 2009 ECtHR at [81]; *C v Commission* (T-307/00), judgment of January 30, 2003 ECJ at [48]–[49].



Varying fundamental rights standards between two European legal systems are a cause of greater concern than between a European and a national legal system. The latter category is to a large extent covered either by the principle of subsidiarity underlying the Convention<sup>79</sup> or by the supremacy of EU law in relation to domestic law. By contrast, there exists no formal hierarchy between the Convention and EU law, and they both claim the right to set standards applicable to substantial part—if not all—of the continent.<sup>80</sup>

What matters for the future is that if fundamental rights are to remain fundamental, plurality in this field should be kept within reasonable and well thought-out boundaries. This is especially relevant at a time when EU legislature is making a new attempt at codifying some rights of the defence in criminal proceedings.<sup>81</sup>

In fact, it all comes down to a common responsibility of European legislatures and courts to preserve the fundamental nature of fundamental rights. Ultimately, this means that the effectiveness of these rights must not be reduced by needlessly increasing the plurality and relativism of their definition and content. Indeed, as recently pointed out by the Strasbourg Court, legal uncertainty can be incompatible with the very notion of fundamental rights.<sup>82</sup>

<sup>79</sup> art.53 ECHR (see fn.76 above).

<sup>80</sup> Even accession by the EU to the Convention, as envisaged by the Lisbon Treaty (see new art.6(2) TEU), will not as such have the effect of extending higher EU standards to persons whose situation is governed by the Convention only. It is in principle only designed to prevent EU law and institutions from breaching the Convention.

<sup>81</sup> See the Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings (14791/09, DROIPEN 131/COPEN 203, October 23, 2009).

<sup>82</sup> *Zolotukhin v Russia* (App. No.14939/03), judgment of February 10, 2009 at [78].