



EDITORIAL

TOWARDS A UNIFORM STANDARD OF PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPE?

The multiplicity of systems of protection of fundamental rights is certainly a badge of honour for Europe. At present, there are no less than three general instruments of protection applicable to the territories of the Member States: the European Convention of human rights, the Charter of fundamental rights and the plethora of national bills of rights. Their coexistence, however, is not as peaceful as one could expect. The European judicial chronicles yearly report a relatively high figure of conflicts, real or sometimes imaginary, between rights and procedural instruments of control.

This conflictual coexistence is due, to an extent at least, to the fact that the various systems of protection, although largely converging in substance, have overlapping scopes and grant different standards of protection. It may seem strange that the process of integration in Europe has not attained a unitary standard of protection of fundamental rights. Yet, the existence of concurrence on the fundamentality of a set of rights and values, of individual and collective nature, and the corresponding establishment of a uniform standard of protection, appears an indispensable complement of the process of integration and a hallmark of a new constitutional community.

The settlement of conflicts between competing systems of protection of human rights would require a generally recognized rule for the resolution of conflicts. Whereas such a rule can be discerned in the relationship between the ECHR and domestic systems of protection, including EU fundamental rights, it is hardly identifiable in the relations between the EU and the national systems of protection.

For years, the relationship between the ECHR and the bills of rights of its signatory States rested on the principle of more extensive protection. According to that rule, enshrined in Art. 53 of the Convention, the protection granted at the Convention level is to be considered as a minimum standard. The signatory States retain their freedom to apply a higher standard of protection.

Although the EU is, notoriously, not bound by the obligations flowing from the Convention, it has unilaterally adopted the same rule. After stating that the level of protection granted by the Charter of fundamental rights must be equivalent to that granted by the ECHR, Art. 52, par. 3, of the Charter goes on to say that “this provision shall not prevent Union law providing more extensive protection”.

Albeit sometimes not easily applied in practice, this principle appears to be fully appropriate to govern the relationship between domestic bills of rights and treaty-based bills of rights. In that particular context, it also provides a useful tool for enhancing the level of protection. This is basically due to the fact that, normally, the scope of the two instruments overlaps. The ECHR is hardly violated if the EU grants a more extensive protection to an individual right protected by the Convention, upon condition, however, that this higher level of protection does not go to the detriment of other rights or interests protected at the Convention level.

If transposed to the relationship between EU and national bills of rights, however, this principle creates unacceptable consequences. Since European fundamental rights constitute a limit to the exercise of the EU competence, their uniform interpretation and application is necessary to secure the uniform interpretation and application of EU law. The granting by a MS of a more extensive protection than that granted by the Charter of fundamental rights in situations governed by EU law, therefore, affects its uniform application. This consideration has probably led the Court of Justice to rule, in *Melloni* (judgment of 26 February 2013, case C-399/11[GC], para. 58), that Art. 53 of the Charter cannot be construed as enshrining the principle of more extensive protection. The Court of Justice famously said that this provision could not be interpreted as allowing “a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”.

Unsurprisingly, in Opinion 2/13 (of 18 December 2014, para. 189), while accepting that the rule of more extensive protection applies to the relationship between the ECHR and the Charter of fundamental rights, as well as to the relationship between the ECHR and the fundamental rights of the MS, the Court of Justice pointed out that

“the power granted to Member States by Article 53 of the ECHR is limited – with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised”.

If the rule of more extensive protection does not apply to conflicts between the EU and, respectively, the MS systems of protection of fundamental rights, how can these conflicts be settled? One could assume that, in principle, no rule of conflict would be necessary if each system of protection exclusively applied within its scope of application.

The determination of the scope of EU law, is, however, a difficult exercise. If it were confined to the conducts performed, and the rules adopted, by the EU Institutions, this would entail that MS are entitled to apply their own set of fundamental rights to domestic acts implementing EU law, thus, again, affecting the uniform implementation of EU law. This consideration has probably led the Court of Justice, as early as in 1989, to extend the scope of EU fundamental rights beyond the strict exercise of EU competence. In *Wachauf* (judgment of 13 June 1989, case C-5/88), the Court of Justice ruled that EU

fundamental rights are “binding on the MS when they implement [EU] rules”. This holding is now reproduced in Art. 51, para. 1, of the Charter of fundamental rights.

In recent years, due to interpretative doctrines adopted by the Court of Justice, the scope of EU fundamental rights has considerably expanded. This process was based on the consideration that, due to the interconnection between the competence respectively possessed by the EU and by the MS, a strict notion of implementation may not be sufficient to guarantee the objective of uniformity. In *Åkerberg Fransson* (judgment of 26 February 2013, case C-617/10 [GC]) and, recently, in *Berlioz Investment Fund* (judgment of 16 May 2017, case C-682/15 [GC]), the Court of Justice grounded this notion on a simple legal paradigm: wherever MS act in a normative space regulated by EU law, EU fundamental rights apply. Arguably, this expansive doctrine has not yet reached its farthest limits. If the scope of fundamental rights is only functionally determined, with regard to the need not to affect the effectiveness of EU law, it is to be expected that they apply wherever such a risk materializes; for example, to MS actions in areas contiguous to those regulated by EU law, or thickly covered by EU law. The doctrine of the functional determination of the scope of EU fundamental rights therefore has an irresistible expansive effect, even beyond the scope of EU law itself, and covers also areas pertaining to the exclusive competence of the MS.

The Court of Justice has never expressly fashioned this doctrine in terms of exclusivity. In *Åkerberg Fransson*, it pointed out that “national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised” (para. 29). However, in order not to compromise of the unity and effectiveness of EU law, that level of protection cannot be lower than that provided under EU law. Nor can it be higher, as expressly established by the controversial ruling adopted in *Taricco et al.* (judgment of 8 September 2015, case C-105/4 [GC]).

The combined effect of these two rulings inexorably leads to the conclusion that, whenever the application of national fundamental rights may affect the effectiveness of EU law, their standard of protection must coincide with that granted by EU fundamental rights. By securing the uniformity of the standard of protection, the Court of Justice is thus silently creating, in the vast and still relatively unexplored area falling within the scope of EU law, a *de facto* harmonization of fundamental rights.

Far from defusing the tension with the national systems of protection of fundamental rights, this case law has exacerbated it and has encouraged the tendency of national high courts to present themselves as the custodians of their constitutional orthodoxy, threatened by European fundamental rights imperialism.

Further, and perhaps more importantly, it entails the existence of a dual standard of protection applicable to classes of situations substantially analogous or even identi-

cal. In *Berlioz Investment Fund*, the Court of Justice found that the higher standard of the European principle of judicial protection applies to national administrative proceedings connected with the implementation of a Directive, whilst other administrative claims unrelated with the implementation of EU law, continue to be exclusively governed by the lower national standard. In *Taricco et al.*, the Court of Justice found that the less extensive protection granted by European law applies to criminal proceedings concerning offences related the breach of VAT, whereas the more extensive protection granted under Italian law continues to apply to criminal proceedings concerning offences related to breaches of domestic tax. Fundamental rights thus apply differently to comparable situations on the basis of a mere formal element, namely the existence of a direct or indirect connection with European law.

Time seems to be ripe to establish the uniformity of the standard of protection of fundamental rights in Europe: a standard equally applicable to situations that fall within the scope of EU law and to purely domestic situations.

A uniform standard of protection would cure the incoherence deriving from the conflictual co-existence of a plurality of autonomous systems of protection of fundamental rights. It would be consistent with the idea of the unity of fundamental values as a part of the European constitutional heritage. It would consider the process of integration of fundamental rights and values as an integral component of the on-going process of European integration. All the more so that, in spite of the jealous defence of their prerogatives by the national high courts, a creeping harmonization of the standard of protection of human rights has already silently taken place in Europe, mainly through the harmonising effect of the ECHR.

Of course, a different view appears to be equally legitimate: that the establishment of a uniform standard of protection would be detrimental to the constitutional diversity in Europe; that it would unjustly compress the idiosyncratic sensitivities of the Nation States; that it would impose constitutional models not firmly grounded in the principles of democracy and the rule of law.

Pragmatically, all depends on how this process is performed. Along the lines suggested in this editorial, this determination should not be conceived as a means to preserve the unity and the interests of EU law. It must, rather, proceed along a dynamic process of assessment, which includes the consideration of common interests and sensitivities emerging from the MS. It must be conceived as a limit to the exercise of public powers in the larger context of the European constitutional framework. In the search of the most appropriate standard of protection, therefore, national high courts should be entitled to give their contribution.

But, ultimately, is the Court of Justice the proper organ for such an engaging challenge? Or, rather, does the ambitious process of unifying the different standards of pro-

tection of human rights in Europe also require institutional reforms and, specifically, the setting up a European Constitutional Court?

Admittedly, arguments in favour of a positive answer are not lacking. The construction of a value-based common heritage in Europe could be easier made by a different Court, detached from the EU daily judicial business and exclusively devoted to spell out and protect fundamental values in Europe. However, the Court of Justice has proved to possess, in the course of the time, a combination of judicial wisdom and political realism that could help identify the most appropriate way to realize this philosophical project. And, after all, the present time does not encourage one to indulge in an exercise of constitutional engineering.

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