DIALOGUES

DIALOGUE ON THE WAY THE CJEU USES ECHR CASE LAW
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THE USE OF ECTHR CASE LAW BY THE CJEU: INSTRUMENTALISATION OR QUEST FOR AUTONOMY AND LEGITIMACY?

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ABSTRACT: Whilst the ECtHR's case-law has occupied a central position in the CJEU's fundamental rights case-law since the latter's beginning, the entry into force of the EU Charter of Fundamental Rights seems to have opened a new and more chaotic period. Relying on this new fundamental rights instrument, the CJEU tends to cite ECtHR case-law in a far less systematic way, raising questions about the function of this case-law in the CJEU's new and ever-growing fundamental rights jurisprudential corpus. But, beyond this apparent inconsistency, nothing has really changed: ECtHR case-law still helps the CJEU to legitimate its own jurisprudence, being summoned whenever the EU Court needs it, and the ECHR human rights standard is still the CJEU's first (but not only) compass.

KEYWORDS: ECHR – EU Charter – legitimacy – EU law autonomy – CJEU – instrumentalisation.

I. INTRODUCTION

The European Convention on Human Rights (ECHR) is at the heart of fundamental rights protection in the EU almost from the beginning. Whilst the story is well known, it might be worth telling it one more time because some key points as to the use of European Court of Human Rights (ECtHR) case-law by the CJEU today emerged at the very start. After having "discovered" that there were general principles of European Community law

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protecting fundamental rights, the European Court of Justice (CJEU) identified two inspirations: the constitutional traditions common to the Member States[1] and the international treaties for the protection of human rights signed by the Member States.[2] Soon after France ratified the ECHR – in 1974 – the Court had the opportunity to mention it in *Rutili*[3] and since then, the ECHR has occupied a more and more important place in fundamental rights protection in the European Communities, then the European Union.[4]

To be brief on this well-known subject, the European Convention law (the ECHR itself, its protocols and its interpretation by the Strasbourg Court) has been used by the CJEU to build, right by right, the European Union fundamental rights standard, and to forge most of the tools needed to protect concretely those rights.[5] The space occupied by European Convention law in the CJEU case-law has been so significant that the Court has sometimes forgotten to mention that it was only an inspiration for the general principles, not a binding source of law for the European Communities. There are indeed numerous examples in which the CJEU directly quotes the European Court on Human Rights case-law[6] without any reference to the general principles, mostly between 1990 and 2010.[7]

In a nutshell, the story of fundamental rights protection in the EU is mainly a story of European Convention law.[8] Or at least it was so until the Charter became binding.[9]

But, before speaking about this second chapter of the story, we have to answer an important question: why did the European Convention law have such a central role from the beginning? To put it simply, it is about primacy and legitimacy.

Primacy, first, because we must not forget that fundamental rights protection in the EU was created to protect EU law primacy from threats from national supreme courts. Indeed, the general principles of law have the merit of offering an autonomous source of protection distinct from national constitutional law and safe from national courts' influence. But, relying on the constitutional traditions common to the Member States was still

[1] Since case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114 para. 4.

[2] Since case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51 para. 13.

[3] Case 36/75 *Rutili v Ministre de l'intérieur* ECLI:EU:C:1975:137 para. 32.

[4] "Particular significance" for the CJEU in joined cases 46/87 and 227/88 *Hoechst* ECLI:EU:C:1989:337 para. 13.

[5] See R Tinière, *L'office du juge communautaire des droits fondamentaux* (Bruylant 2007) 79-84 and 119-131.

[6] Hereafter also called "European Convention law" referring to the ECHR interpreted by the ECtHR in its case-law.

[7] Case C-270/99 P *Z v European Parliament* ECLI:EU:C:2001:639 para. 23; case C-245/01 *RTL Television*, ECLI:EU:C:2003:580 para. 68; joined cases C-482 and 493/01 *Georgios Orfanopoulos and others and Raffaele Oliveri v Land Baden-Württemberg* ECLI:EU:C:2004:262 para. 98; case C-499/04 *Werhof* ECLI:EU:C:2006:168 para. 33; and case C-117/01 *K.B.* ECLI:EU:C:2004:7 paras 33-34.

[8] "Mainly", because if the national constitutional traditions have also played a role, it was far more modest – at least in the case-law wording – than the European Convention law's one. See for example J Ziller, 'La constitutionnalisation de la Charte des droits fondamentaux et les traditions constitutionnelles communes aux États' in *Mélanges en l'honneur du professeur J. Molinier* (LGDJ 2012) 677.

[9] Charter of Fundamental Rights of the European Union [2012]

risky for EU law primacy. Indeed, national supreme courts could well have tried to identify their own constitutional principles behind the constitutional traditions and then explain to the CJEU how to interpret them.[10] The ECHR offered, then, a perfect remedy, being out of Member States' reach and genuinely independent from them.

Legitimacy, next, because the CJEU had, at the time, a great need to prove its good will to protect fundamental rights and not only European Community law. Relying on the most important human rights document in Europe, binding since 1974 and its ratification by France for all EU Member States,[11] was therefore the perfect way to convince the Member States of this good will before gradually expanding the standard and the scope of protection.

So, everything was going well – except maybe the legibility of this protection to ordinary people – until the Charter came.

II. Post-Charter situation at first glance

With the Charter having become the principal fundamental rights instrument in the EU according to art. 6 TEU, the position of ECtHR case-law in CJEU case-law has changed drastically. In fact, references to ECtHR case-law have progressively given way to EU-centred references following three main paths.

First, in numerous fundamental rights cases the CJEU mentions only the Charter, its explanations and its own case-law, even if the right in question is also protected by the ECtHR and as a general principle of EU law. The contrast between, for example, *Österreichischer Rundfunk*[12] in 2003 and *Google Spain*[13] in 2014 is striking: omnipresent in the first instance, European Convention law is completely absent in *Google Spain,* although the right to privacy and personal data protection is well-protected in European Convention law.

The second path followed by the CJEU is the substitution of legal reference. When European Convention law is invoked by parties, the CJEU tends to recall that the Charter now implements in EU law the fundamental right at issue and that it is necessary to refer only to the relevant Charter article.[14] Moreover, since Opinion 2/13 on the EU's accession to the ECHR, the Court seems to delight recalling that, "the ECHR does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been

[10] On this topic, see D Simon, 'Y a-t-il des principes généraux du droit communautaire?' (1991) Droits 73 and J Vergès, 'Droits fondamentaux de la personne et principes généraux du droit communautaire' in *Mélanges Jean Boulouis, l'Europe et le Droit* (Dalloz 1991) 513.

[11] Which, by the way, explains that the CJEU waited until 1975 to refer explicitly to the ECHR in its *Rutili* case-law (*Rutili* cit. para. 32).

[12] Joined cases C-465/00, 138 and 139/01 *Österreichischer Rundfunk* ECLI:EU:C:2003:294 paras 71 ff.

[13] Case C-131/12 *Google Spain* ECLI:EU:C:2014:317.

[14] Case C-386/10 P *Chalkor* ECLI:EU:C:2011:815 para. 51 (effective judicial remedy).

formally incorporated into EU law".[15] And as it does not legally bind the EU, there is no obligation to follow the ECtHR's path when interpreting the limits of a fundamental right, like *ne bis in idem* in *Menci*.[16]

By the third, last and perhaps more subtle path, the CJEU can choose to quote European Convention law, but only after having put some distance between the Charter's right and its ECHR equivalent. For example, in *Digital Rights Ireland,*[17] the Court prefaces each ECHR law reference with "see as regards art. 8 of the ECHR". This "as regards" seems to have a clear function: to give some space for the Charter's interpretation. And never mind if the right referred to is a "corresponding right" according to art. 52(3) of the Charter and must therefore be given the same meaning and scope as laid down by the Convention.

Yet, the Charter's drafters took precautions to avoid a split in European fundamental rights' standards, in particular with the "corresponding rights" mechanism enshrined in art. 52(3) of the Charter. It is precisely building on this article that the CJEU decided in some judgments to quote ECtHR case-law like in the good old days, namely without taking any distance from European Convention law. That is what it does, for example, in the *WebMindLicences* judgment concerning the right to respect for private and family life,[18] in *Lanigan* concerning the right to liberty and security,[19] and in *Commission v Hungary (usufruct over agricultural land)*[20] on the right to property.

The CJEU's use of ECtHR case-law thus appears random. That risks undermining its predictability as Johan Callewaert stresses out in his contribution.[21] And it raises old fears about the Court using these sources merely instrumentally.[22] But things can be seen differently for there is an underlying pattern behind that development.

III. Post-Charter situation: second thoughts

Indeed another interpretation of this apparent jurisprudential fluctuation is possible and there is actually a pattern behind it. This time, the duo is slightly different: it is not about primacy and legitimacy, but autonomy and legitimacy. More precisely, it is autonomy first and legitimacy only when needed.

[15] Joined cases C-203 and 698/15 *Tele2 Sverige* ECLI:EU:C:2016:970 para. 167 (respect for private life); case C-601/15 *J. N.* ECLI:EU:C:2016:84 paras 45-46 (right to security).

[16] Case C-524/15 *Menci* ECLI:EU:C:2018:197.

[17] Joined cases C-293 et 594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238 paras 35, 47, 54 and 55.

[18] Case C-419/14 *WebMindLicences* ECLI:EU:C:2015:832 paras 70-72.

[19] Case C-237/15 PPU *Lanigan* ECLI:EU:C:2015:474 paras 56-57.

[20] Case C-235/17 *Commission v Hungary (usufruct over agricultural land)* ECLI:EU:C:2019:432 paras 72 and 85.

[21] J Callewaert, 'Convention Control Over the Application of Union Law by National Judges: The Case for a Wholistic Approach to Fundamental Rights' (2023) European Papers www.europeanpapers.eu 331.

[22] J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously ?' (1992) CMLRev 669.

III.1. Autonomy (first)

Why autonomy? Because the autonomy of the EU legal system, namely its independence and its self-determination,[23] is the key concept, explaining the CJEU's position in its Opinion 2/13 and the main reason why the Charter is preferred to the European Convention whenever possible.

It is probably unnecessary to recall that every legal order, including that of the EU, needs to ensure its autonomy and that it is the CJEU's duty, as enshrined in art. 19 TEU,[24] to protect EU law from the law of the Member States and international law. Moreover, if the CJEU protects fundamental rights, it is not a "human rights court" like the ECtHR, because it has not only one task (protecting human/fundamental rights) but many, including the protection of the EU legal order's autonomy or EU law effectiveness, like a national supreme court.

This obvious reality has been expressed by the Court in its Opinion 2/13 as follows: "[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[25] Fundamental rights protection must take into account the autonomy of EU law. This autonomy can be preserved in various ways but, since the EU now has its own fundamental rights instrument, it is quite logical that the CJEU relies on this instrument rather than on an extraneous one, including even the European Convention itself.

Hence, one may understand that the CJEU's main rule is to use the Charter and other EU possibly existing instruments before referring to European Convention law. And actually it does refer to this law, but only when needed and mostly for legitimacy reasons.

III.2. Legitimacy (when needed)

The CJEU's position has fundamentally changed since the early days of EU fundamental rights protection, and has changed even more with the entry into force of the Charter. Its good will to ensure such protection is no longer seriously debated and it has a legal text to rely on. But as EU fundamental rights protection has gradually built up, expanding to all EU law areas until becoming a part of the EU's constitutional pact itself, expectations about the legitimacy of this protection have dramatically evolved. To put it simply, if the Court wants to give a fundamental rights interpretation that is widely accepted enough

[23] See for example, D Simon, 'Les fondements de l'autonomie du droit communautaire' in *Droit international et droit communautaire. Perspectives actuelles* (Pedone 2000) 207; C Vial and R Tinière, 'Propos introductifs – L'autonomie du système de protection des droits fondamentaux de l'Union européenne en question' in *La protection des droits fondamentaux dans l'Union européenne – entre évolution et permanence* (Bruylant 2015) 9.

[24] Art. 19(1) TEU: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed".

[25] Opinion 2/13 ECLI:EU:C:2014:2454 para. 170.

to constitute a common ground in Europe[26] and form part of this constitutional pact, it cannot do it alone and needs to rely on the European Convention law which remains "The" European common standard of protection.

It follows that whilst "ordinary EU fundamental rights protection questions" do not need European Convention law, that law may be required for certain hard cases. More precisely, the Convention can help to legitimate the CJEU's statements broadly in three different ways.

First, the European Convention law can help to establish a new or little-used right's interpretation as it is the case, for instance, in *Commission v Hungary (transparency of associations).*[27] In this judgment, the Court had to assess the Hungarian's law on the Transparency of Organisations which receive Support from Abroad (Transparency law), as regards its compatibility with EU law including, among others, freedom of assembly and of association as enshrined in art. 12 of the Charter. It was the first time the Court had the opportunity to interpret this right in depth[28] and it decided to do so in the light of European Convention law by referring to the "corresponding rights" mechanism before relying heavily on ECtHR case-law[29] without any particular precaution for EU law's autonomy. Another example may be found in another *Commission v Hungary*[30] case concerning higher education, where a Hungarian law was adopted to obtain the closure of the Central European University. In this judgment, the Court ruled for the first time on academic freedom (art. 13 of the Charter) and did so again in the light of the European Convention. What is of particular interest here is that this right is not clearly identified by the Charter as having a corresponding right. But, for the Court, even if "it is true that the text of the ECHR makes no reference to academic freedom", it is "apparent from the case-law of the European Court of Human Rights that that freedom is associated, in particular, with the right to freedom of expression enshrined in art. 10 of the ECHR",[31] allowing it to ground its interpretation on this ECtHR case-law so as to define more precisely this new right's meaning.

[26] On this question see E Dubout, *Droit constitutionnel européen* (Bruylant 2021) 386.

[27] Case C-78/18 *Commission v Hungary (transparency of associations)* ECLI:EU:C:2020:476.

[28] Even though already (but scarcely) present in CJEU's jurisprudence, this right has always remained at the periphery of the Court's reasoning. See case C-415/93 *Bosman* ECLI:EU:C:1995:463 paras 79-80 or case *Werhof* cit. Even in *Schmidberger* (case C-112/00 ECLI:EU:C:2003:333) or *Laval* (case C-341/05 ECLI:EU:C:2007:809), the Court did not examine the very substance of this right.

[29] *Commission v Hungary (transparency of associations)* cit. paras 112-114.

[30] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792.

[31] *Ibid*. para. 224. The Court quotes ECtHR *Mustafa Erdoğan and Others v Turkey* App n. 346/04 39779/04 [27 May 2014] and considers in para. 225 that "[f]rom that specific perspective, academic freedom in research and in teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction, although it should be made clear that that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions".

European Convention law can also help to introduce a new methodology, opening new ways of interpreting EU fundamental rights. This was the case in *Centraal Israëlitisch Consistorie van België and others.*[32] In this judgment concerning freedom of religion and animal welfare in case of ritual slaughter, the CJEU borrows explicitly two tools that are emblematic of European Convention law – the margin of appreciation and the principle of a Charter as a living instrument which must be interpreted in the light of present-day conditions[33] – to help itself find the correct balance and to accept that the Member State had lawfully restricted freedom of religion in the name of animal welfare. Another example can be found in *Quadrature du net*[34] in which the CJEU borrows the positive obligation technique from European Convention law.[35] If the Court of Justice does it to answer to the Belgian Constitutional Court who tried to use this concept to justify the preventive retention of traffic and location data for the purpose of combating crime, especially prevention and punishment of the sexual abuse of minors, by invoking positive obligations flowing from arts 4 and 7 of the Charter,[36] this new technique is now officially part of EU law.[37]

Finally, the European Convention law can also help to reinforce an already well-established interpretation of a fundamental right when this interpretation is seriously challenged or if the context in which it applies is politically particularly delicate as in Poland or Hungarian affairs for example. This is what the Court of Justice is trying to do in its "rule of law jurisprudence", especially about the situation in Poland, when it refers to ECHR case-law concerning impartiality and tribunal established by law.[38] In this situation, quoting ECHR case-law is a way for CJEU to reinforce its position and recall that this is supported by the ECtHR.

IV. Conclusion: what about the standard of protection?

To conclude, it seems that the CJEU can actually quote and use ECtHR case-law in a proper way – at least when the quest for legitimacy makes it forget about autonomy or, to go a bit further, when the quest for legitimacy reinforces autonomy. "At least" because whilst the framework here proposed tries to offer some explanation for the apparent chaos

[32] Case C-336/19 *Centraal Israëlitisch Consistorie van België and others* ECLI:EU:C:2020:1031.

[33] *Ibid*. respectively paras 67 and 77.

[34] Joined cases C-511, 512 and 520/18 *Quadrature du net* ECLI:EU:C:2020:791.

[35] *Ibid*. paras 126-128.

[36] *Ibid.* para. 85.

[37] Especially since the CJEU uses the corresponding rights mechanism to recognise the existence of positive obligations. Moreover, this recognition suggests that other positive obligations existing under European Convention law may in the future be used by the Court.

[38] Case C-791/19 *Commission v Poland (régime disciplinaire des juges)* ECLI:EU:C:2021:596 paras 165-173 or joined cases C-562 and 563/21 PPU *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* ECLI:EU:C:2022:100, notably paras 56, 57, 71 and 79.

resulting from the post-Lisbon jurisprudence of the CJEU, it does not pretend to be exhaustive. Other explanations may exist, such as the usual vagaries of judgment-writing, or ECHR reference in secondary law.[39] However, it seems to me that this balance between autonomy and the quest for legitimacy is prominent.

One final thought. One might say: this is all well and good, but is it the most important thing when talking about fundamental rights the standard of protection? Whatever the causes – autonomy or legitimacy –, are all of these jurisprudential fluctuations not affecting the level of protection in the EU compared to the ECHR standard? No, they are not. The standard of protection remains broadly unaffected by the use or non-use of European Convention law in the CJEU's case-law. Surely the EU standard is not always exactly identical to that of European Convention law. It can be, for a while, slightly lower or higher than the ECHR's one.[40] But it does not differ more (or less) than it would if compared to how a national supreme court proceeds in similar settings.[41] Because, whatever the formal place occupied by ECtHR case-law in the CJEU's case-law, the European standard remains the bottom line of EU fundamental rights' protection. And this is the most important point.

[39] For example, case C-348/21 *HYA and others (Impossibilité d'interroger les témoins à charge*) ECLI:EU:C:2022:965 concerning Directive (EU) 2016/343 and the right to a public and adversarial hearing.

[40] For an illustration of an EU standard slightly lower than ECHR's one, see for example the first judgments in mutual trust affairs like joined cases C-411 and 493/10 *N.S. and others* ECLI:EU:C:2011:865. On the opposite, the EU standard in case C-465/07 *Elgafaji* ECLI:EU:C:2009:94 is slightly higher. At least until ECtHR, *Sufi and Elmi v UK* n. 8319 and 11449/07 [28 June 2011]. In some situations, it can also be difficult to determine precisely if a different interpretation leads to a lower or higher standard of protection like, for example, in *Menci* above-mentioned.

[41] Even when the EU Court decides to accept limitations on the exercise of *ne bis in idem*, which is an absolute right in European Convention law (*Menci* cit.), the level of protection remains similar in line to that under the ECtHR.