ZBORNIK ZNANSTVENIH RAZPRAV

2019

LETNIK LXXIX

Perspectives on European Union Law

Zbornik znanstvenih razprav
LXXVIII. letnik, 2019, Perspektive prava Evropske unije / *Perspectives on European Union Law*

Izdala / *Published by*
Pravna fakulteta Univerze v Ljubljani,
za Založbo Pravne fakultete v Ljubljani Boštjan Koritnik, direktor

Zbornik je izšel s finančno pomočjo Javne agencije za raziskovalno dejavnost RS.
The publication is financially supported by Slovenian Research Agency.

Oblikovanje naslovnice / *Cover design*
Ranko Novak

Jezikovni pregled in grafična priprava / *Proofreading and layout*
Dean Zagorac

Tisk / *Printed by*
Litteralis, d.o.o.

Cena zvezka skupaj z DDV / *Price (VAT incl.)*
41,30 EUR

Prvi natis / *First press run*
200 izvodov, Ljubljana 2019

Naročila / *Orders*
telefon: 01 42 03 113, faks: 01 42 03 115, www.pf.uni-lj.si

UDK34(497.4)(05)
Zbornik znanstvenih razprav

ISSN 1854-3839
ISSN (spletna izdaja / *on-line edition*): 2464-0077

Spletni strani / *Web pages*
http://zbornik.pf.uni-lj.si
http://journal.pf.uni-lj.si

Pravna fakulteta
Univerza v Ljubljani

ZBORNIK ZNANSTVENIH RAZPRAV

2019

LETNIK LXXIX

Perspectives on European Union Law

6

UDC: 342.7:347.9:061.1EU

Maja Menard[*]

Protection of Human Rights – Relations between Legal Orders: National, EU, ECHR

1. Introduction

The subject-matter of the present contribution has both an international law and a European law dimension, each of which raises currently very prominent and most interesting issues. On the one hand, the legal multidimensionality of the protection of human rights is in constant flux, particularly in Europe. The national and supranational legal orders are, in the human rights fields as in many others, increasingly intertwined, the boundaries between them are ever more blurred.[1] These complex connections raise concerns both on the jurisdictional and on the substantive level. However, the real question is the ultimate effect on the "consumer", i.e. the holders of human rights: is the potential for conflict a realistic threat?

On the other hand, the law of the protection of human rights also relates to the fragmentation of international law, until recently an engaging international academic topic that has grown into a candidate for international law codification.[2] Fragmentation embraces three elements: first, fragmentation *stricto sensu*, i.e. the substantive "splintering" of international law; second, proliferation, i.e. the institutional multiplication; and third, self-contained régimes, i.e. distinct legal blocks of primary and secondary norms, including mechanisms of implementation of their norms, which are essentially separate from general international law.[3]

[*] *Dr. iur. Maja Menard, Attorney at Law; maja@mmenard.si.*

[1] See, *e.g.,* de Vries, EU and ECHR: Conflict or Harmony? (2013), p. 1.

[2] See, *e.g.,* International Law Commission, Fragmentation of International Law (2006).

[3] Crawford, Chance, Order, Change: The Course of International Law, General Course on public International Law (2014), pp. 211–212; Simma, Pulkowski, Of Planets and the Universe: Self-

Human rights law has all three elements: first, it is a special fragment ("box"[4]) of international law, i.e. a substantively distinct legal field, relatively autonomous in relation to general international law as well as in relation to the other fragments; second, within the human rights fragment, jurisdiction is shared between different proliferating national and supranational institutions; third, within the fragment, self-contained régimes have developed. The European continent boasts itself with the most prominent of such régimes, that of the European Court of Human Rights (ECtHR), which has, over the past decades, come into (seemingly ever fiercer) competition with the Court of Justice of the European Union (CJEU).

The self-contained character of the régimes has been acknowledged to be limited: the régimes are interconnected (even within a particular fragment) and permeable, not only mutually, and also in relation to the general international law.[5] Yet the international lawyers' concerns are thereby not necessarily alleviated since the régimes, as a matter of principle, jeopardise the unity of international law, and there is potential for conflicts between the respective norms of the régimes and the respective practice of the institutions of the régimes.[6] This undoubtedly holds true for human rights law.

However, the mere potential for conflict is not sufficient to make the system collapse, and the risk of conflict is determinately confined. In fact, a true conflict would be an extremely rare occurrence. Most often, a disagreement or difference of opinion is not yet a conflict and can be explained by the respective specificities of each case, whether factual or legal. Furthermore, the disagreement will rarely be completely contemporaneous, and the different outcome may be explained by the evolution of the law or of the interpretation thereof. Finally, even if there were a conflict, it could most often be resolvable by different means, whether normative, such as *lis pendens* / *res judicata*, or a softer solution based on comity, dialogue, cooperation or permeability.

The risk of conflict is fundamentally overshadowed by choice offered to both the creators of the normative structure of the fragment and, most importantly, to the users of the fragment. The other side of the coin is necessarily brighter: albeit threatened, to a certain extent, by the fragmentation and proliferation, the human rights fragment users may only profit from the permeability of the régimes and the forum shopping possibilities.

Human rights are primarily legally protected in the domestic legal order: naturally at the constitutional level, but the obligation of protection of human rights applies to all jurisdictional levels, and also to all other public authorities. Increasingly, however,

---

contained Regimes in International Law (2006), p. 485.

4 Ajevski, Fragmentation in International Human Rights Law – Beyond Conflict of Laws (2014), p. 88.

5 Dupuy, A Doctrinal Debate in the Globalisation Era: On the 'Fragmentation' of International Law (2007), p. 1.

6 Ajevski, Fragmentation in International Human Rights Law – Beyond Conflict of Laws (2014), p. 87; International Law Commission, Fragmentation of International Law (2006), p. 11, para. 8.

the responsibility for human rights protection is no longer exclusively national, but ever more supranational and hence shared.

2. The Fragmented Substance of Protection of Human Rights

2.1. The Substantive Interaction between the National and the Supranational Level

Taking Slovenia as an (obvious) example, the substantive bases for the protection of human rights within the domestic legal order are threefold. First, the Slovenian Constitution contains its own catalogue of human rights.[7] At the same time, given the "youth" of Slovenia's statehood, its very own human rights practice is necessarily rather limited, in particular compared to jurisdictions with long human rights protection traditions, and naturally also compared to the practice of supranational régimes.

Slovenia has adopted the principle of direct applicability of binding international agreements,[8] which means that the (self-executing) provisions of international treaties can be directly invoked by parties and must be applied by the public authorities, in particular judicial, within the Slovenian legal order. This applies, in the human rights context, to the second substantive basis, i.e. the European Convention of Human Rights (ECHR).

Although the catalogue of human rights protected under the Constitution is broader, more comprehensive and more rigorous than the ECHR catalogue, the Slovenian Constitutional Court has been very progressive in its substantive interaction with the ECHR system. It had referred to the ECHR even before Slovenia ratified it. Since its ratification, the Constitutional Court has relied upon it in hundreds of cases. Such reliance intensified following the ECtHR's first judgment against Slovenia in the *Rehbock* case in 2000, which modified the perception of the Slovenian Constitutional Court as the ultimate decision-making instance in the human rights arena in Slovenia, above which there was only the blue sky.[9]

The Slovenian Constitutional Court presently consistently relies on the ECtHR's case law in support of its analyses and findings, even in cases in which it eventually does not

[7] Articles 17–79 of the Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a,47,68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90, 97,99, 75/16 – UZ70a.

[8] Article 8 of the Constitution. See also, Türk, Temelji mednarodnega prava (2007), p. 75.

[9] Ribičič, Pilotne sodbe ESČP zoper Slovenijo in vloga Ustavnega sodišča RS (2016), p. 171.

expressly cite ECtHR case law in its decisions. Finally, parties to proceedings before the Constitutional Court now regularly refer to the ECHR and the case law of the ECtHR.[10]

The reliance on the ECHR and the ECtHR case law has also trickled down the judicial pipeline to the regular courts. Such trickling down is, in fact, the consequence of the principle of subsidiarity of the constitutional protection, and even more so of the supranational protection of human rights. Primarily responsible for the protection of human rights, the regular courts must eliminate any potential violations upon their first appearance in the context of judicial proceedings, with the constitutional and supranational authorities only intervening in cases in which the regular courts have not been able to eliminate the violations.[11] Such approach is facilitated, on the one hand, by the fact that any violation of human rights is necessarily also a violation of substantive or procedural law. On the other hand, the Constitutional Court is an important medium for the lower courts' access and reference to the ECHR and its case law. The regular courts rely directly on the Constitutional Court's case law, directly applying the ECHR, a living instrument, the application of which inevitably entails also reliance upon its case law.[12]

Third, the European Union (EU) human rights law constitutes an additional fundamental, directly applicable, substantive basis for the protection of human rights in Slovenia. In this context, it is significant that Slovenia's EU membership was expressly subject to the requirement, in Article 3a of the Constitution, that Slovenia may only accede to membership of international organisations founded on the respect of human rights.

To the extent that the Charter of Fundamental Rights of the European Union (Charter), the cornerstone element of the EU human rights law, may not be interpreted in the sense of restricting human rights as guaranteed by EU law, international law and national (constitutional) law, human rights protection, primarily within the national legal order, must always be subject to the substantive legal basis that guarantees the highest possible level of protection of human rights.[13]

Within this framework, Slovenia must, and does, aspire to consistently protect ECHR rights as a minimum standard of human rights protection, while at the same time working towards ensuring respect, reinforcement and development of human rights at a level beyond the average European standard of protection (whether national or supranational).[14]

---

[10] Ribičič, Vpliv sodišča Evropskih skupnosti na varstvo človekovih pravic v domačem ustavnem sistemu (2005), p. 966; Ribičič, Uveljavljanje evropskih standardov v praksi slovenskega ustavnega sodišča (2004), p. 69; Wedam-Lukič, Vpliv odločitev ESČP na odločanje Ustavnega sodišča (2010), p. 1039; Umek, Ko ustavnosodna praksa slovenskega Ustavnega sodišča nasprotuje rationibus decidendi ESČP (2012), p. 17.

[11] Galič, Varstvo človekovih pravic pred rednimi sodišči (2010), p. 1047.

[12] Betetto, Vpliv Evropske konvencije za človekove pravice na slovensko sodno prakso (2012), p. 1235.

[13] See also, Ribičič, Ustavno sodišče – ESČP – Sodišče EU (2010), p. 1054.

[14] *Ibid.*

2.2. The Substantive Interaction between the Supranational Levels

The two European régimes within the human rights fragment, i.e. the ECHR régime and the EU régime, are not secluded from each other, for there is a constant "conventionalisation" of EU law, along with a "unionisation" of ECHR law.[15]

Ever since the 1960s, the Luxembourg court has expressly protected fundamental rights as an integral part of the general principles of law stemming from the constitutional tradition common to the EU Member States.[16] Soon thereafter, it introduced references to the ECHR as support for such protection, ascribing a "particular significance" to it in this context.[17] Since the mid-1990s, the CJEU has also relied on the ECtHR practice[18] and implemented doctrines and mechanisms essentially paralleling or approximating those of the ECtHR, such as the margin of appreciation. In this process of "incremental valorisation",[19] Luxembourg remains generally aligned on Strasbourg on the content of the substantive law it applies.

On the other side, the ECtHR also follows and progressively relies on the CJEU case law, *inter alia* because the ECHR, as a living instrument, must be interpreted in its contemporaneous setting, in which the EU is a fundamental element.[20] Naturally, the references by the ECtHR to CJEU case law are fewer than *vice versa*. At the same time, the ECtHR has consistently refrained from entering into substantive analyses and arguments regarding EU law and adjudicating on matters that would interfere with the ECJ's integration function, even in cases in which EU law was indirectly the object of the ECtHR's adjudication. The Strasbourg court has expressly declined jurisdiction to adjudicate on EU acts as such in the absence of the EU becoming a contracting party to the ECHR, subject to the general assumption that the transfer of competences from the Member States to the EU is premised on the protection of human rights.[21] At the same time, the

---

15 Callewaert, 'Unionisation' and 'Conventionalisation' of Fundamental Rights in Europe (2008), p. 109.

16 Case 29/69, *Stauder v. Ulm*, ECLI:EU:C:1969:52; case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle* für Getreide und Futtermittel, ECLI:EU:C:1970:114.

17 See, *e.g.* Case C-36/75, *Rutili*, [1975] ECR 1219, para. 32; cases C-47/87 and C-227/88, *Hoechst*, [1989] ECR 2859, para. 13; case C-540/03 *Parliament v. Council*, [2006] ECR I-5769, para. 35.

18 Case C-13/94, *P v. S and Cornwall County Council*, [1996] ECR I-2143, para. 16.

19 Simon, Des influences réciproques entre CJCE et CEDH : 'Je t'aime, moi non plus?' (2001), p. 35. See also, *e.g.*, Costello, The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe (2006), p. 112.

20 *Pellegrin v. France,* application no. 28541/95, [1999] ECHR 140; *Goodwin v. UK*, application no. 17488/90, [1996] 22 EHRR 123. See also, Spielmann, The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or How to Remain Good Neighbours After the Opinion 2/13, URL: http://www.fp7-frame.eu/judicial-dialogue/, p. 11.

21 *Cantoni v. France*, application no. 17862/91, Reports 1996-V; *Matthews v. UK*, application no. 24833/94, [1999] 28 EHRR 361 (ECHR).

ECtHR proactively supported the application of EU law, e.g. by condemning Greece for not implementing an ECJ preliminary ruling and France for not aligning French law with EU law.[22] National courts have received encouragements from Strasbourg to make preliminary references to the ECJ, with the implicit threat of the refusal by a national court to seek advice from the ECJ potentially constituting a violation of Article 6 of the ECHR.[23]

The ECtHR "restated the law" of its relationship to the EU in the landmark *Bosphorus* case.[24] The ECtHR assumes that the EU Member States do not deviate from their obligations under the ECHR in their implementation of EU law, while the latter ensures human rights protection (at least) equivalent to the ECHR. The ECtHR may indirectly review the legality of EU acts, within the framework of its review of the national implementation measures, but these occurrences remain specific and extremely rare.

The two courts thus had a functional division of labour: the CJEU held on to its essential economic integration function, building unity through standardisation and harmonisation. The ECtHR held on to its specialised human rights protection function, building community through interdependence and pluralism. Both courts operated on the bases of judicial comity, respect and interpretational convergence, understanding that such a setup mutually reinforces legitimacy, while conflict would undermine their respective authorities.[25]

With Lisbon, the Charter brings a normative link between Strasbourg and Luxembourg in Articles 52(3) and 53, expressly giving the Charter rights corresponding to ECHR rights the same meaning and scope, and defining the ECHR as the minimum standard of protection. At the same time, it significantly enhances the substantive scope of the EU human rights law, giving new momentum to the CJEU as a human rights court, with now a constitutional basis for such a role.

Lisbon also brought about a procedural challenge, with the obligation of the EU's accession to the ECHR, which ultimately led to the CJEU's *Opinion 2/13*.[26] In light of the immensity of writings, the latter has given rise to, the discussion here will be limited to the elements relevant to the substantive interaction between the two European courts. In essence, the Luxembourg court emphasises the constitutional nature of the Charter to the extent that would, in its opinion, now justify the Charter's and the CJEU's seclusion

[22] *Hornsby v. Greece*, application no. 18357/91, Reports 1998-II; *Dangeville v. France*, application no. 36677/97, 2002-III Eur Ct HR.

[23] See, *e.g., Soc. Divagsa v. Spain*, application no. 20631/92, (1993) 74 DR 274.

[24] *Bosphorus v. Ireland*, application no. 45036/98, (2006) 42 E.H.R.R. 1.

[25] *E.g.,* Pavone, The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis, URL: https://ssrn.com/abstract=2042867, pp. 3 f.; Glas, Krommendijk, From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court (2017), p. 2.

[26] Opinion no. 2/13 of 18 December 2014, ECLI:EU:C:2014:2454.

from, respectively, the ECHR and the ECtHR. The CJEU thus reveals its vision of EU law as a special, distinct legal order with its own constitutional framework, its own general principles, a proper institutional structure and a comprehensive set of rules ensuring the functioning of this legal order. A self-contained régime…?

Most of the elements of the CJEU's vision are not novelties: the CJEU has consistently operated on the premise of a certain judicial hierarchy (within EU law), with itself on top of the pyramid, and its exclusive jurisdiction for matters pertaining to the interpretation and application of the EU Treaties. Consequently, now that human rights have been expressly elevated to a "Treaty matter", while at the same time protected at a level (presumably) above the ECHR level, and also broader in scope, CJEU as a supreme human rights court within the EU system does not seem such an absurd proposition. The relevant question is whether this position truly can seclude EU law and the CJEU from the ECHR and the ECtHR and make the EU human rights régime literally self-contained.

The reaction in Strasbourg was rather dramatic, albeit focusing on the procedural aspect of *Opinion 2/13*, i.e. the rejection of the proposed terms of accession of the EU to the Convention. In its disappointment, the ECtHR is said to be prepared to compensate the prejudice done to the citizens deprived of the opportunity to have acts of EU institutions reviewed by the ECtHR in the same manner as the Member States' acts.[27] This indicates the threat of overt aggressiveness of the ECtHR, which could, in turn, stimulate similar reactions in national courts.[28]

Reality seems to have dissipated both sets of fears. Since *Opinion 2/13*, the CJEU continues to quote ECtHR case law, albeit in a more reserved manner, relying primarily on the Charter.[29] There is, for that matter, not yet any conflict between the two courts and their case law. Article 52(3) of the Charter continues to represent the normative link and the interpretative bridge between the Charter and the ECHR, while also binding the Member States. Arguably, the post-*Opinion 2/13* practice is less transparent concerning the terms of application of the Strasbourg minimal standard. Yet, the initial human rights practice of the CJEU, based on the application of general principles of law, can hardly be argued to have been any more transparent and less discretionary. The risk of the CJEU applying human rights standards below the ECHR level is inexistent, and the

[27] European Court of Human Rights, 2014 Annual Report (2015), p. 6.

[28] Halleskov Storgaard, EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR (2015), p. 521; Freundlich, The Autonomy of EU Law – The ECHR Accession Opinion and its Aftermath (2016), p. 41.

[29] See, *e.g. Kadi II*, cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission et al. v. Yassin Abdullah Kadi*, ECLI:EU:C:2013:518; Halleskov Storgaard, EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR (2015), p. 515.

substantive content of the human rights protection in the segment of overlap between the ECHR and EU law remain intact.[30]

In Strasbourg, *Bosphorus* has been reaffirmed in *Avotiņš*, without antagonism, although seemingly on more cautious bases.[31]

The comity, respect, deference and cooperation thus manifestly continue even after *Opinion 2/13*.[32] Regardless of whether and on what terms the EU may one day accede to the ECHR, or whether the EU should adopt the ECHR itself but without resorting to accession,[33] the real question for both courts should remain how best to protect human rights.[34]

The EU human rights law régime is undoubtedly not truly self-contained. There is very little autonomy of EU human rights law from domestic and from international (in particular ECHR) law since EU law is a sum of the protection offered by the national systems of the Member States, while it is normatively tied to the ECHR via the Charter. The national and the ECHR systems are thus integrated into the EU system, while the reverse is also true, EU law—including its human rights segment—is integrated into the laws of the Member States, following the principles of direct effect and primacy.[35]

Throughout history, both European courts have recognised that their respective jurisdictions are limited—to their respective legal systems, but also shared—because of their mutual integration. They have resolved, and are expected to continue to resolve any potential conflicts by judicial dialogue, focusing on integration, while benefitting from the wealth of their respective practices to expand the scope and enhance the authority of their decisions. Any necessary adjustments to align their practices and avoid outright conflict should not be so difficult to make, in spite of the overarching principles and visions one may have at a given point in time.

---

30 Isiksel, European Exceptionalism and the EU's Accession to the ECHR (2016), p. 583.

31 *Avotiņš v. Latvia,* application no. 17502/07, ECHR 2016.

32 Glas, Krommendijk, From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court (2017), p. 2; Fabbrini, Larik, The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights (2016), pp. 171–173.

33 Davies, Integrity or Openness? Reassessing the History of the CJEU's Human Rights Jurisprudence (2016), p. 814.

34 Douglas Scott, Autonomy and Fundamental Rights: The ECJ's *Opinion 2/13* on Accession of the EU to the ECHR (2016), p. 44.

35 Eeckhout, Human Rights and the Autonomy of EU Law: Pluralism or Integration? (2013), pp. 175–177.

3. The Proliferating Jurisdiction in the Protection of Human Rights

Given the nature of human rights and the essence of their protection, the net into which human rights violations can be caught can never be dense enough.[36] The proliferation of jurisdictional venues and the potential multiplication of identical or similar claims, should, therefore, as a matter of principle, be less problematic in this field of law than in others, such as for instance international investment law.[37]

Nevertheless, human rights protection is subject to the principle of subsidiarity: the primary responsibility remains with the domestic courts, and supranational remedies are generally allowed under the assumption that there are no (longer any) effective remedies in the domestic legal order that could remedy the wrong caused before it is taken to a higher level of sanctioning.

The underlying rationale of the principle of subsidiarity is normatively based on the necessity of legitimacy and margin of appreciation of national authorities. It also has a practical component: given the sheer size of the territory and population covered by the European courts, the potential volume of their jurisdiction in the absence of the principle of subsidiarity would simply render the courts' functioning impossible.

Yet, in spite of the above-described "no fourth instance" rule, the courts' congestion is a fact of life. This holds acutely true of the Strasbourg court, which remains, in spite of its reforms over the past years, severely overwhelmed by the number of applications as well as the backlog, and the treatment of applications and the ensuing proceedings before the ECtHR extremely lengthy. The question of whether this state of affairs, to some extent at least, voids the protection of its substance, seems rather on point.

The state of affairs may be more positive with regard to the Luxembourg court, with a qualified notion of subsidiarity to go along, but in comparison to the Strasbourg system, Luxembourg is by definition a less welcoming venue for the typical victim of a human rights violation, who will not have direct access to the CJEU in such matters.

However, the congestion disease has also spread to the domestic level. The Slovenian Constitutional Court is also overloaded. Seemingly inspired by the ECtHR reforms aimed at diminishing the caseload, the Constitutional Court has, as one way of dealing with the backlog, developed a practice of summary rejections of constitutional complaints over the past years. In all fairness, the increase in the Constitutional Court's caseload can be ascribed in part to the increased sophistication of parties and the growing popularity of human rights protection with their users. This is, however, manifestly not a

[36] Ribičič, Ustavno sodišče – ESČP – Sodišče EU (2010), p. 1054.

[37] See, *e.g.,* Gaillard, L'avenir des traités de protection des investissements (2015), pp. 1044–1045.

sufficient and justified basis for the Constitutional Court's summary rejection of approx. 98% of the constitutional complaints filed before it.[38]

In any event, the proposition here is that proliferation is good—for the user, who should, to the largest possible and practicable extent (costs often being a legitimate concern), make use of any remedies in any fora they may have access to. As a general rule, the national net should first be fully explored, and if the violation still escapes through it, the journey beyond should definitely be made. The question then is: does the journey lead to Strasbourg, or to Luxembourg, or to both?

The backlog of human rights jurisdictions, both national and supranational, is the proof of the extent of recourse of the users to human rights violations claims and related proceedings. There is undeniably a high level of awareness of the existence of the content and the means of protection of human rights on the side of the users. This holds particularly true of the domestic and Strasbourg remedies, while Luxembourg apparently remains somewhat of unchartered territory in this regard.

Although individuals have a direct path to Luxembourg for challenges of acts of the EU institutions, human rights violations will typically stem from acts of national authorities, with regard to which recourse to the Luxembourg remedies is not directly available to individual victims of human rights violations.

The more natural indirect path, in line with the principle of subsidiarity, is through the national courts, by way of the preliminary reference procedure. In this context, the CJEU, however, deals with only certain aspects of the case and the human rights-related questions are merely collateral or tangential.[39] Furthermore, the matter is then handed back to the domestic courts for the implementation (or not) of the CJEU's findings.

The alternative, even less frequent and obviously underestimated, indirect path leads through Brussels: the European Commission may be notified of alleged violations of human rights in the context of EU law. In case of a finding of a violation, the Member State at issue will, as a first step, be granted the opportunity to remedy the violations, including under the threat of monetary sanctions. Should this first step not suffice, the Commission may take the case up to the CJEU. However, ultimately, the victim of the violation will not directly benefit from a positive outcome of the court proceedings, as any satisfaction sought by the victim will be a matter for the domestic courts.

Within this framework, access to Luxembourg "is still poor and insufficient, sometimes leading towards a procedural labyrinth involving two or three jurisdictional levels,

[38] Slovenian Constitutional Court, 2013 Annual Report; 2014 Annual Report. See also, Černič Letnar, Vprašljiva praksa Ustavnega sodišča?, URL: http://www.iusinfo.si/DnevneVsebine/Kolumna.aspx?id=128941.

[39] Douglas-Scott, The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon (2015), pp. 20–21.

which can hardly comply with the principle of effectiveness of the judicial system."[40] In the current state of affairs, however, this should, in itself, not be a sufficient reason not to tread the path to Luxembourg.

The question then arises of whether the paths to Luxembourg and Strasbourg can be taken in parallel. Strasbourg's response is a clear yes. Called upon to confirm that a victim may file an application before the ECtHR in parallel with its seizing the European Commission concerning the same alleged violation of human rights, the ECtHR found that Article 35(2)(b) of the ECHR does not prevent such parallel proceedings. Specifically, although the matter submitted to both venues may be "substantially the same" (concerning the same persons, facts and claims[41]), "another procedure of international investigation or settlement" refers to judicial and quasi-judicial proceedings similar to those set up under the ECHR.[42] The assessment of such similarity turns on the nature of the decision-making body, the procedure before it and the effects of its decisions. The ECtHR determined that the Commission is under no obligation to commence proceedings against the Member State at issue but rather has discretionary empowerment to assess the existence of a violation, in the absence of any specific entitlements of the victim in this regard.[43] Furthermore, the ultimate outcome of the proceedings before the Commission and eventually before the CJEU does not directly provide "just satisfaction" to the victim, who will have to seek specific remedies in the national legal order based on the outcome of the CJEU proceedings. On these bases, the ECtHR concluded that the proceedings before the Commission were not similar to the proceedings before the ECtHR, neither in terms of procedure nor in terms of effects, and that, consequently, the paths to Strasbourg and to Luxembourg (via Brussels) may be tread in parallel.[44]

4. Fragmentation + Proliferation = Better Protection?

The metaphoric comparison with the Bermuda triangle has been advanced with regard to the triangular structure of human rights protection: national constitutions and constitutional (or supreme) courts in one corner, the ECHR and the ECtHR in the second, the Charter and the CJEU in the third. Should this triangle be deemed as fatal

40 Galera, The Right to a Fair Trial in the EU: Lights and Shadows (2013), p. 74.

41 *Pauger v. Austria*, application no. 24872/94, DR 80-A, p. 170.

42 *Lukanov v. Bolgaria*, application no. 21915/93, DR 80-A, p. 108.

43 Case T-47/96, *Syndicat Départemental de Défense du Droit des Agriculteurs (SDDDA) v. Commission*, [1996] ECR II-1559, para. 42.

44 *Karoussiotis v. Portugal*, application no. 23205/08, paras. 75–76. See also, *Cavani v. Hungary*, application no. 5493/13, para. 35.

as its Bermuda counterpart, are violations of human rights really disappearing unpunished?[45]

Concerning substance, the fragmentation is undeniably beneficial, as all three corners are progressively expanding and enhancing the content of the protection of human rights. In part, such enrichment of substance is due to the corners' mutual interaction and a positive effect of the proliferation. The dynamic of the interaction between the corners is in constant flux. In the current state of affairs, the EU corner is appropriating to itself an ever-larger chunk of the human rights law fragment, at least in relation to its Member States. At the same time, the ECtHR's positive activism may be reactivated to compensate for any deficiencies the CJEU's rigid stance towards accession to the ECHR and absolutist interpretation of the autonomy of EU law may create within the European space. All the while, the national courts remain the ultimate forum to ensure the victims of the human rights violations ultimately obtain just satisfaction. To the extent that the proactive expansive approach of the supranational levels may not be forthcoming, or prove to be insufficient, it will be up to the national courts to fill the void accordingly. In any event, national courts must make the most of the reverse of the principle of subsidiarity: to ensure that the case-law of the supranational courts indeed permeates back into the national legal order and thereby continuously enhance the integration between the three corners of the triangle.[46]

With regard to jurisdiction, the proliferation inevitably leads the way to forum shopping and to the multiplication of proceedings. The former should be regarded as a strategic institutional choice of the institutional setting that best accords with one's individual objectives.[47] The latter may put States into the awkward position of having to pick and choose which ruling to follow and presents a threat to legal peace and certainty.[48] However, the technicalities from which the potential conflicts stem do not affect the substance of the protection.[49]

Whatever the dynamics of the triangle, the judges in the three corners of the triangle should consider the fragmentation and the proliferation as an opportunity rather than a problem.[50] They have the tools to use the permeability between the régimes to enhance

[45] Ribičič, Ustavno sodišče – ESČP – Sodišče EU (2010), p. 1054.

[46] Wildhaber, Temeljne pravice: Varstvo človekovih pravic s strani ESČP in nacionalnih sodišč (2000).

[47] Pavone, The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis, URL: https://ssrn.com/abstract=2042867, pp. 16–17.

[48] Hofstötter, 'Can She Excuse My Wrongs?' The European Court of Justice and International Courts and Tribunals (2007), pp. 392 and 411.

[49] Tomuschat, The Relationship between EU Law and International Law in the Field of Human Rights (2016), p. 619.

[50] Hofstötter, 'Can She Excuse My Wrongs?' The European Court of Justice and International Courts and Tribunals (2007), p. 413.

their practice and legitimise their role, but also to mitigate any negative effects of the fragmentation and proliferation.

> "[T]he history of the EU's own fundamental rights regime suggests that competition and overlap among judiciaries can generate a higher standard of human rights protection overall, particularly where each is anxious to prove to the others the stringency of its own standards. […] it is more in keeping with Europe's pluralist constitutional landscape to construe external human rights review as a sustained dialogue among peer or constituent legal orders, including member state constitutional courts and the ECtHR."[51]

The victim of a human rights violation should use the forum or the fora that allow the maximisation of the protection. The judge called upon to decide on such human rights violation should use the legal basis that provides the best possible level of protection. The judges and the corners of the triangle should positively compete to achieve this goal.

References

Ajevski, Marjan: Fragmentation in International Human Rights Law – Beyond Conflict of Laws, in: Nordic Journal of Human Rights, 32 (2014) 2, pp. 87–98.

Betetto, Nina: Vpliv Evropske konvencije za človekove pravice na slovensko sodno prakso, in: Podjetje in delo, 6-7 (2012), pp. 1235–1248.

Callewaert, Johan: 'Unionisation' and 'Conventionalisation' of Fundamental Rights in Europe, in: The Europeanisation of Public International Law: The Status of Public International Law in the EU and Its Member States (Ed. Wouters, Jan, Nollkaemper, André, de Wet, Erika), TMC Asser Press / Springer, The Hague 2008, pp. 109–136.

Costello, Cathryn: The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe, in: Human Rights Law Review, 6 (2006) 1, pp. 87–130.

Crawford, James: Chance, Order, Change: The Course of International Law, General Course on public International Law, in: Collected Courses of the Hague Academy of International Law (2014), Brill / Nijhoff, 2014.

Černič Letnar, Jernej: Vprašljiva praksa Ustavnega sodišča?, URL: http://www.iusinfo.si/DnevneVsebine/Kolumna.aspx?id=128941 (30 September 2017).

[51] Isiksel, European Exceptionalism and the EU's Accession to the ECHR (2016), p. 587. See also, Ribičič, Ustavno sodišče – ESČP – Sodišče EU (2010), p. 1054.

Davies, Bill: Integrity or Openness? Reassessing the History of the CJEU's Human Rights Jurisprudence, in: The American Journal of Comparative Law, 64 (2016) 4, pp. 801–814.

de Vries, Sybe A.: EU and ECHR: Conflict or Harmony?, in: Utrecht Law Review, 9 (2013) 1, pp. 78–79.

Douglas-Scott, Sionaidh: Autonomy and Fundamental Rights: The ECJ's *Opinion 2/13* on Accession of the EU to the ECHR, in: Swedish European Law Journal, special edition 2016, pp. 29–44.

Douglas-Scott, Sionaidh: The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon, in: Legal Research Paper Series, Paper No XX/2015 (2015).

Dupuy, Pierre-Marie: A Doctrinal Debate in the Globalisation Era: On the 'Fragmentation' of International Law, in: European Journal of Legal Studies, 1 (2007) 1, pp. 25–41.

Eeckhout, Piet: Human Rights and the Autonomy of EU Law: Pluralism or Integration?, in: Current Legal Problems, 66 (2013) 1, pp. 169–202.

European Court of Human Rights: 2014 Annual Report, Strasbourg (2015).

Fabbrini, Federico, Larik, Joris: The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights, in: Yearbook of European Law, 35 (2016) 1, pp. 145–179.

Freundlich, Petri: The Autonomy of EU Law – The ECHR Accession Opinion and its Aftermath (Bachelor's thesis), Tallinn University, Helsinki 2016.

Gaillard, Emmanuel: L'avenir des traités de protection des investissements, in: Droit international des investissements et de l'arbitrage transantional (ed. Leben, Charles), Editions A. Pedone, Paris, 2015, pp. 1027–1046.

Galera, Susana: The Right to a Fair Trial in the EU: Lights and Shadows, in: Revista de Derecho Politico, 87 (2013) 49, pp. 49–76.

Galič, Aleš: Varstvo človekovih pravic pred rednimi sodišči, in: Podjetje in delo, 6-7 (2010), pp. 1047–1053.

Garlicki, Lech: Cooperation of Courts: the Role of Supranational Jurisdictions in Europe, in: International Journal of Constitutional Law, 6 (2008) 3-4, pp. 509–530.

Glas, Lize R., Krommendijk, Jasper: From *Opinion 2/13* to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts, in: Human Rights Law Review, 17 (2017) 3, pp. 567–587.

Halleskov Storgaard, Louise: EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR, in: Human Rights Law Review, 15 (2015) 3, pp. 485–521.

Hofstötter, Bernhard: 'Can She Excuse My Wrongs?' The European Court of Justice and International Courts and Tribunals, in: Croatian Yearbook of European Law & Policy, 3 (2007) 3, pp. 391–413.

International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, A/CN.4/L.682, Geneva (13 April 2006).

Isiksel, Turkuler: European Exceptionalism and the EU's Accession to the ECHR, in: European Journal of International Law, 27 (2016) 3, pp. 565–589.

Juncker, Jean-Claude: A Sole Ambition for the European Continent, Report, 11 April 2006, URL: https://www.cvce.eu/en/obj/report_by_jean_claude_juncker_council_of_europe_european_union_a_sole_ambition_for_the_european_continent_11_april_2006-en-c0eddf42-c7af-4ed6-af62-550130f592d0.html (30 September 2017).

Lock, Tobias: The ECJ and the ECtHR: The Future Relationship between the Two European Courts, in: The Law and Practice of International Courts and Tribunals, 8 (2009), pp. 375–398.

Martinico, Giuseppe: Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts, in: The European Journal of International Law, 23 (2012) 2, pp. 401–424.

Pavone, Tommaso: The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis, 28 May 2012, URL: https://ssrn.com/abstract=2042867 (30 September 2017).

Ribičič, Ciril: Pilotne sodbe ESČP zoper Slovenijo in vloga Ustavnega sodišča RS, in: Slovenske misli o mednarodnih odnosih in pravu. Prispevki ob 80-letnici dr. Ernesta Petriča (ed. Zidar, Andraž, Štiglic, Sanja), Založba FDV, Ljubljana 2016, pp. 169–192.

Ribičič, Ciril: Ustavno sodišče – ESČP – Sodišče EU, in: Podjetje in delo, 6-7 (2010), pp. 1054–1061.

Ribičič, Ciril: Uveljavljanje evropskih standardov v praksi slovenskega ustavnega sodišča, in: Revus – Journal for Constitutional Theory and Philosophy of Law, 2 (2004) 3, pp. 69–83.

Ribičič, Ciril: Vpliv sodišča Evropskih skupnosti na varstvo človekovih pravic v domačem ustavnem sistemu, in: Podjetje in delo, 6-7 (2005), pp. 966–979.

Scheeck, Laurent: Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks, Garnet Working Paper No. 23/07, August 2007; URL: https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/garnet/workingpapers/2307.pdf

Simma, Bruno; Pulkowski, Dirk: Of Planets and the Universe: Self-contained Regimes in International Law, in: The European Journal of International Law, 17 (2006) 3, pp. 483–529.

Simon, Denis: Des influences réciproques entre CJCE et CEDH : 'Je t'aime, moi non plus ?', in: Pouvoirs, 96 (2001) 1, pp. 31–49.

Slovenian Constitutional Court, 2014 Annual Report

Spielmann, Dean: The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or How to Remain Good Neighbours After the Opinion 2/13, Brussels, 27 March 2017 – FRAME, URL: http://www.fp7-frame.eu/judicial-dialogue/ (30 September 2017).

Škrk, Mirjam: Mednarodne človekove pravice, slovenska ustava in ustavno sodišče, in: Slovenske misli o mednarodnih odnosih in pravu. Prispevki ob 80-letnici dr. Ernesta Petriča (ed. Zidar, Andraž, Štiglic, Sanja), Založba FDV, Ljubljana 2016, pp. 211–237.

Tomuschat, Christian: The Micro Level: Insights from Specific Policy Areas: The Relationship between EU Law and International Law in the Field of Human Rights, in: Yearbook of European Law, 35 (2016) 1, pp. 604–620.

Torres Pérez, Aida: The Judicial Impact of European Law in Spain: ECHR and EU Law Compared, in: Yearbook of European Law, 30 (2011) 1, pp. 159–179.

Trstenjak, Verica: Temeljne pravice in vpliv Sodišča EU, in: Slovenske misli o mednarodnih odnosih in pravu. Prispevki ob 80-letnici dr. Ernesta Petriča (ed. Zidar, Andraž, Štiglic, Sanja), Založba FDV, Ljubljana 2016, pp. 193–210.

Türk, Danilo: Temelji mednarodnega prava, GV Založba, Ljubljana 2007.

Umek, Simon: Ko ustavnosodna praksa slovenskega Ustavnega sodišča nasprotuje rationibus decidendi ESČP, in: Pravna praksa, 31 (2012) 5, pp. 17–19.

Wedam-Lukič, Dragica: Vpliv odločitev ESČP na odločanje Ustavnega sodišča, in: Podjetje in delo, 6-7 (2010), pp. 1039–1046.

Weiler, J.H.H.: Human Rights: Member State, EU and ECHR Levels of Protection; P.S. Catalonia; Why Does it Take So Long for my Article to Be Published?; In this Issue, in: The European Journal of International Law, 24 (2013) 2, pp. 471–475.

Weiler, J.H.H.: The Jurisprudence of Human Rights in the European Union. Integration and Disintegration, Values and Processes, The Jean Monnet Center for International and Regional Economic Law & Justice, 1996, URL: http://www.jeanmonnetprogram.org/archive/papers/96/9602.html (30 September 2017).

Wildhaber, Luzius: Temeljne pravice: Varstvo človekovih pravic s strani ESČP in nacionalnih sodišč, in: Pravna praksa, 19, 20 (2000), pp. 6–8.

UDK: 342.7:347.9:061.1EU
Zbornik znanstvenih razprav
LXXIX. letnik, 2019, Perspektive prava Evropske unije, strani 131–147

Maja Menard

Zaščita človekovih pravic – razmerja med pravnimi redi: nacionalni, EU, EKČP

Za zaščito človekovih pravic je značilna materialna fragmentacija prava, v okviru katere integracijska interakcija med nacionalnimi in nadnacionalnimi redi vodi evolucijo materialnega prava človekovih pravic. Hkrati pa institucionalna proliferacija uporabnikom sistema daje na voljo strateške institucionalne izbire za maksimizacijo njihovih interesov. Nobena od teh značilnosti ni povezana z realističnim tveganjem konflikta med različnimi normami ali institucijami, ki bi lahko ogrozila sistem, ali, še pomembneje, vsebino zaščite.

Ključne besede: človekove pravice, Evropska konvencija o človekovih pravicah, Evropsko sodišče za človekove pravice, Evropska unija, Sodišče Evropske unije, Ustava, nacionalno sodišče, fragmentacija mednarodnega prava.

UDC: 342.7:347.9:061.1EU
Zbornik znanstvenih razprav
LXXIX. letnik, 2019, Perspectives on European Union Law, pp. 131–147

Maja Menard

Protection of Human Rights – Relations between Legal Orders: National, EU, ECHR

The protection of human rights is characterised by the substantive fragmentation of the law, within the framework of which an integrational interaction between national and supranational orders drives the evolution of the substantive human rights law. At the same time, the institutional proliferation provides the users of the system with strategic institutional choices for the maximisation of their interests. Neither characteristic is subject to a realistic threat of a conflict between different norms or institutions that could jeopardise the system or, more importantly, the content of the protection.

Keywords: human rights, European Convention on Human Rights, European Court of Human Rights, European Union, Court of Justice of the European Union, Constitution, national court, fragmentation of international law.