

PART II: PROCEDURAL RIGHTS AND SUBSTANTIVE RIGHTS

PROTECTION IN THE EU AND THE ECHR

Chapter 6

INTRODUCTION

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INTRODUCTION

This second part of this book is dedicated to procedural and substantive rights protection in the EU and the ECHR. It demonstrates whether the EU and ECHR legal orders have fortified substantive rights with stronger guarantees on the formulation of distinct procedural rights. As such, it provides a critique of the dual protection of human rights in Europe through an assessment of the evolution of the legal relationship between the CJEU and the ECtHR within the substantive areas of criminal law, labour law, asylum law and equality. As it has been pointed out, a review of procedural and substantive rights exercised by the two European courts against acts adopted by the authorities of the signatory States is both valuable and well-timed due to current efforts to reform the working practices of the ECtHR and to facilitate the EU's accession to the ECHR. Through carefully chosen case studies, these chapters therefore provide opportunities for the reader to gauge the extent to which the tensions and synergies that

emerge from the EU-ECHR symbiosis shape (procedural and substantive) protection of human rights law in Europe. As editors and discussants of this rich volume we have noted three main themes which run like a thread through this part of the collection which we would like to identify and address in turn. These are (i) the scope for convergence of protection by ECtHR and CJEU (ii) the scope for conflict, or to put it more diplomatically, conflicting approaches; and last but not least, (iii) the constitutional underpinnings or scope of rights protection. We will conclude with some final comments on the future directions for substantive rights protection.

THE SCOPE FOR CONVERGENCE OF PROTECTION BY THE ECtHR AND CJEU

With the relationship between the ECtHR and CJEU increasingly under the spotlight, evidence of apparent convergent approaches to fundamental rights protection through case law is a ripening source for analysis. While adjudicatory moves towards convergence tend to be incremental rather than giant leaps, the developments noted above make this analysis of the opportunities (or risks) posed by such convergence (or divergence) of ECtHR and CJEU jurisprudence all the more timely. Moreover, the distinctions between ‘convergence’, ‘divergence’ and simple ‘conflict-avoidance’ can be subtle and not easy to detect; an issue which *Ippolito* and *Velluti* briefly touch on in their examination of asylum case law.

The areas of asylum and equality examined in Chapters 8 and 9 provide particularly fruitful terrain for tracing the approaches of ECtHR and CJEU jurisprudence and the courts' evolving constitutional relationship. In respect of asylum, while acknowledging divergences in approaches by the two courts and the academic debate surrounding them, *Ippolito* and *Velluti* argue that ultimately a converging approach is evidenced by something more far-reaching than cross-citations of CJEU/ECtHR case law or examples of 'parallel interpretation' of Charter and Convention rights. In their view, a judicial 'integrated European approach' is emerging in the field of asylum, a phenomenon arising from a mutually reinforcing 'progressive intersection' of the two systems. In contrast with the advanced degree of convergence illustrated in the field of asylum, *Kapotas* situates the concept of equality at a tipping point. With clear substantive progress made in both the EU/ECHR legal orders in relation to positive action in gender equality, *Kapotas* argues that neither the CJEU nor ECtHR appear prepared to embrace the full implications of the new equality paradigm. Therefore, in relation to convergence, substantive fields are, it seems, at different stages on the journey.

In Chapter 8, *Francesca Ippolito* and *Samantha Velluti* analyse the approaches of the CJEU and ECtHR in the field of asylum, critically examining relevant jurisprudence vis-à-vis the ECHR and the CFR respectively (including the role of the so-called 'horizontal clauses'). Drawing on the Court of Justice's decision in *NS v Home Secretary*¹ and the ECtHR's decision in *MSS*,² *Ippolito* and *Velluti* explore the

¹ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department et M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-0000.

² *M.S.S. v. Belgium and Greece*, app. no. 30696/09, ECHR 2011.

approaches of the two European Courts in relation to interpretation, jurisdiction, and their mutual influence. In this respect, they note the ECHR as a ‘special source of inspiration’ for developing EU human rights law or the presumption of compliance of EU acts with the ECHR (*Bosphorus*).³ The authors examine the legality of and compatibility with the ECHR of the Dublin II Regulation, the Qualification Directive, the Asylum Procedures Directive and the Reception Conditions Directive. Their analysis highlights the complexities of the evolving constitutional relationship between the EU and ECHR systems in relation to asylum. Evidence of both obvious convergence and ‘conflict-avoidance’ (adjudication without reference to the Convention) is identified. In *Ippolito* and *Velluti*’s view, cases in the latter category may be motivated by the CJEU’s concern to protect the autonomy of the EU legal order. While this is a factor which will continue to occupy the CJEU, the authors are confident that, despite the complexity of this field, asylum will nonetheless prove to be a fertile area for convergence in adjudicatory approaches. In conclusion, possible implications of EU accession to the ECHR are highlighted, with particular reference to the development of the Common European Asylum System, and to EU human rights law more generally.

In Chapter 9, *Panos Kapotas* considers the distinct yet gradually converging approaches to equality in both the EU and the ECHR frameworks, with special reference to gender equality. On the face of it, both systems are committed to equality, a concept rooted in national constitutional orders. In relation to the ECHR, the concept of equality finds its concrete expression primarily through the prohibition of discrimination, while within

³ *Bosphorus Hava Yollari Turizm v. Ireland*, app. no. 45036/98, ECHR 2005-VI.

the framework of EU law, equality has been elevated into a main Union objective. *Kapotas* contends that the legal and political commitments to remove unjustified inequalities have not (yet?) produced the desired results. European societies continue to be fraught with divisions which some commentators argue are directly attributable to doctrinal shortcomings. *Kapotas* suggests that if equality continues to be understood as a ‘formulaic and neutral principle that creates minimal negative obligations’, existing inequalities will be perpetuated ad nauseam. Against this rather pessimistic background, *Kapotas* asks whether positive action can become a core feature of the new European paradigm of full and effective equality. Can positive action succeed as an element of ‘full and effective equality in practice’ where past efforts reliant on non-discrimination alone have failed? *Kapotas* examines the relationship between positive action and full equality by critically assessing the recent case-law of the ECtHR and the CJEU in relation to gender equality, and the possible transformative effects of Protocol 12 ECHR. The process for judicial appointments to the ECtHR demonstrates, in *Kapotas*’ view, the benefits of positive action in practice, the ECtHR’s advisory opinion constituting a ‘real breakthrough’ in the conceptualisation of positive action. He concludes that the direction of progress looks favourable: the CJEU and ECtHR are gradually converging towards a common, more ‘substantive’ notion of equality. However, questions remain as to whether both the ECtHR and CJEU will be prepared to accept its implications.

THE SCOPE FOR CONFLICT

The imminent accession of the EU to the ECHR, and the growing closeness of the EU and ECHR legal orders have led to speculation about the likelihood for overlap, and to

some extent, conflict between the two legal orders. No doubt, accession will bring forth numerous tensions between EU law and ECHR law that will affect the jurisprudence of the two European Courts. Most notably, accession will put into the test the coexistence of the ECHR with the CFR and the harmony between the two legal orders as currently reinforced by the Bosphorus presumption. The scope for conflict between the two legal orders is depicted succinctly by *Kargopoulos* and *Ludlow* in Chapters 5 and 6 respectively in the context of the protection of the right to a fair trial in criminal proceedings and the right to take collective action. Both authors seem to agree in that the presumption that Member States observe the ECHR and Charter obligations is not conclusive. Moreover, they both stress that although the EU's accession will not affect the constitutional autonomy of EU law, it will somewhat provoke a shift in the CJEU's current narrow approach to fundamental rights when these are in conflict with EU fundamental freedoms enshrined in EU primary law or the principle of mutual recognition as manifested in EU secondary law on the facilitation of an effective system for the surrender of persons. Although unsettling at first, EU accession to the ECHR is therefore a welcome development.

In Chapter 5, *Alexandros-Ioannis Kargopoulos* reviews the presumption of equivalent protection with reference to the protection of fundamental rights guaranteed by the EU and juxtaposes it against the protection of the right to a fair trial in criminal proceedings enshrined in Article 6 ECHR and Article 48 CFR. The chapter boldly reveals the asymmetries in the protection of the right to a fair trial, the fundamental cornerstone of the criminal procedure, between the two legal orders and proposes an interpretative alignment of the two texts on the basis of their normative interrelationship.

Kargopoulos argues that the Bosphorus presumption of equivalence is exaggerated when it comes to the right to a fair trial and that, accordingly, it can be easily rebutted as the Treaty of Lisbon and the ECHR offer asymmetrical protection. He contends that this asymmetry results from the differentiated conceptualisation of the right in the two texts. The chapter further identifies the consequences that the EU's accession to the ECHR may have in this respect. *Kargopoulos* argues that accession would enhance the alleged asymmetry between the two legal orders and raises various criticisms vis-à-vis the prospective relationship between the EU and the ECHR and the two Courts which is given a normative content in Articles 6(3) TEU and 52(3) of the Charter. For instance, he posits that the legal commitment of the CJEU to follow the jurisprudence of the ECtHR regarding any corresponding rights found in the Charter is an abstract one. Equally, post-accession, the presumption of equivalent protection, as envisaged and established in the case-law of the ECtHR, has no longer any legitimate ground, nor legal basis. The chapter provides insight to the way the ECtHR would carry out its external control over the EU in concrete human rights cases regarding the conformity of secondary EU legislation, such as the European Arrest Warrant Framework Decision, to fair trial guarantees. This is most relevant, given the recent unpopular CJEU decision in *Radu*⁴ on the extent to which Member States are required to take into account the right to a fair trial as guaranteed by the Charter and the ECHR when executing an EAW. It appears that the need for an efficient EAW system and the principle of mutual recognition will have to be watered down post-accession in a more ECHR-friendly manner.

⁴ Case C-396/11 *Radu* [2013] ECR I-0000.

In a similar vein, in Chapter 6, *Amy Ludlow* critiques the extent to which the two legal orders have accepted certain rights as fundamental. She does so by situating labour rights within the wider human rights discourse. In particular, the chapter sheds further light upon the relationship between the CJEU and the ECtHR by bringing to the fore tensions that are emerging in their jurisprudence vis-à-vis the right to strike. The chapter sets off by discussing the variation in perceptions of strike action in Europe before it goes on to raise the longstanding tension between individual rights and collective rights, a tension which – according to the author – can be traced back to the negotiations that led to the adoption of the ECHR. *Ludlow* reviews the potentially conflicting jurisprudence of the CJEU and ECtHR over the right to take collective action. She argues that there is an apparent jurisprudential gulf on this issue between the ECtHR and CJEU. This gulf mainly stems from the CJEU’s infamous *Viking* and *Laval* decisions,⁵ which place additional limits upon possibilities for lawful collective action in favour of the EU’s internal market mentality. By contrast, the ECtHR’s relevant case law demonstrates significant rigour in protecting the right to strike within the ECHR framework. Against the background of a recent application to the ECHR by UK prison officers, who are not allowed to go on strike, *Ludlow* demonstrates that the collective action case law of the two European courts is fundamentally irreconcilable, leading to a possibility of a high noon conflict between them. Once the EU accedes to the ECHR, this jurisprudential conflict might be partially resolved through the direct

⁵ Case C-438-05 *ITWF v Viking Line ABP* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767.

review of the CJEU's case law on human rights grounds by the ECtHR. *Ludlow* speculates that, provided that the ECtHR relishes this new opportunity to review EU acts, such a development may assist the EU to re-discover the social limits on its market.

THE SCOPE OF RIGHTS PROTECTION

The scope of rights protection is equally important in the context of the EU's accession to the ECHR, which according to *Luke Mason*, author of Chapter 7, constitutes an important 'constitutional' moment in the history of the EU. In line with the preceding chapter, this contribution focuses on the substantive area of labour law rights. Yet, while *Ludlow* situates those rights within the wider human rights discourse, *Mason* positions labour rights within the EU's thicker constitutional discourse - one that strives for 'ordered and principled solutions to the complexities of competing constitutional claims'. The author presents labour law as part of a European 'industrial constitution' which will become richer following EU accession to the ECHR and which legitimises the latter's supervisory role and embedded constitutional values. However, despite this significant impact, *Mason* argues that significant changes in terms of the rights of actors in the European industrial constitution cannot be brought about through rights-based judicial supervision alone, which instead require a deliberate re-ordering of market actors in the EU.

Chapter 7 commences with a historical overview of the evolution of ‘social’ justice encompassing employment rights and labour law in Europe. It portrays the ancillary place which labour law and social rights have enjoyed in both the EU and the ECHR traditions. *Mason* then moves on to consider the constitutional ramifications of the EU accession to the ECHR, the technicalities of which he calls ‘Byzantine’. He looks at the bigger picture by pointing out that the stark distinction between the two legal orders can be summarised as follows. Whilst the EU is understood as an autonomous legal order of States and people, as most recently stressed by the CJEU in *Mox Plant*⁶ and *Kadi*,⁷ the ECHR has always been understood in public international law terms. As such, the ECHR is non-constitutional in nature and consequently EU accession to the ECHR cannot bring about critical constitutional change of this nature. Of course, incorporation of external legal sources often occurs in EU law but such incorporation always occurs on the CJEU’s own terms – i.e. in a way that is not offensive to the principles of EU autonomy and EU law primacy. With this in mind, the chapter notes that an important feature of accession is that it will no longer be in the hands of the CJEU to decide the impact of ECHR rights on EU law – a monopoly which so far *Bosphorus* has tolerated so long as the level of rights protection in the EU is not ‘manifestly deficient’. As a consequence, accession will be most significant in injecting a clear set of values to provide a normative structure to resolve complex constitutional dilemmas in European law. In the context of labour law, no doubt EU accession will bring qualitative changes mandating a more rights-driven approach. However, this is likely to have less of a

⁶ Case C-459/03 *Commission v Ireland* (*‘MOX plant’*) [2006] ECR I-4635

⁷ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351.

transformative effect than it may first appear, as it fails to significantly alter the market configuration of the EU, instead merely tempering its excesses. Building on work which understands private law as ‘constitutional’ in nature by virtue of the manner in which it constitutes market actors and governs their interaction, the chapter concludes by underlining the significant limitations of accession with regard to European labour law, where trade unions possess limited market agency. It remains to be seen therefore whether accession will generate a constitutional moment.

CONCLUSION: FUTURE DIRECTIONS FOR RIGHTS PROTECTION

In their roles as defenders of fundamental rights in the EU and ECHR legal orders, the CJEU and ECtHR face inevitable challenges delivering judgments which arguably impact on the constitutional ‘space’ at both national and supranational levels. Adopting adjudicatory approaches which, on one hand, show sensitivity to national constitutional norms and traditions, while on the other hand, actively shape broader standards of rights protection, can be a delicate balancing act. Such adjudication inevitably places the legitimacy of both the CJEU and ECtHR in terms of their relationships with national courts under constant scrutiny.

The developments which led the editors to hold the workshop on which this collection is based remain a work in progress. However, change is imminent on various fronts. The legal instruments which will provide for EU accession to the Convention have, after much delay, recently been finalised. Protocols 15 and 16 ECHR, which aim to introduce a series of reforms to the ECtHR’s practice and procedure, have been adopted and (at the time of writing) are open for signature. On the part of the CJEU, litigation

testing the meaning, scope and reach of Charter provisions (Fransson, Melloni, Radu⁸) has naturally proven to be contentious. The future procedural and substantive developments in the two systems will require unprecedented degrees of co-operation and mutual respect on the parts of both courts, as they continue to mould a true ‘Europe of Rights’. As our contributors have illustrated, the interpretive challenges involved in the multiplicity of sources of rights protection in the EU/ECHR systems provide rich material for both judicial and academic debate. In examining the evolution of procedural and substantive rights protection in the EU/ECHR legal orders, they have presented a vision of a dynamic European field of human rights protection; one which the CJEU and ECtHR will continue to shape in progressive, and no doubt high-profile, ways.

⁸ Case C-617/10 *Fransson* [2013] ECR I-0000; Case C-396/11 *Radu* [2013] ECR I-0000; Case C-399/11 *Melloni* [2013] ECR I-0000.