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The Coordination of the Protection of Fundamental Rights in Europe

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Our subject-matter is so topical that I could speak for hours about it, in the light of the principle of subsidiarity, of the margin of appreciation, of the dichotomy between judicial activism versus judicial self-restraint, or of the binding force of precedent in our Court and the effect of our Court's judgments in domestic law. Given the limited time that I have, I shall however concentrate on our relations with the Court of Justice of the European Communities and the domestic courts.

We have now in Europe up to three different legal sources of fundamental rights co-existing in Europe: national sources, international sources – such as the ECHR – and EU law sources, including the case-law of the European Court of Justice. We also have three different types of jurisdictions applying those different legal sources: the domestic courts of the Member States, the two Courts of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg. The result is that today virtually every act of every public institution in Europe can be reviewed as to its compliance with fundamental rights. While this represents a huge achievement of the European legal and ethical culture, it also raises the question of the coordination of those multiple legal sources.

What makes the situation particularly tricky is the fact that the different legal sources mentioned are not compartmentalized in the sense that each court would have to apply only the fundamental rights of its own legal system. Rather, in most cases different sources will have to be combined, as the legal systems concerned do not only *co-exist* but *overlap* each other. This is especially true for the domestic courts of the Member States which, in cases involving EU law, may have to take into account up to three different sources simultaneously: their own national law, the European Convention on Human Rights and EU law. In this respect, domestic courts can be said to play a central role in the European protection of fundamental rights. In EU law they are

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often called «*Community* courts of ordinary jurisdiction»[1]. In fact, one should add that they are to the same extent «*Convention* courts of ordinary jurisdiction», as it is first for them to apply the Convention, since the Convention makes it an essential requirement for any complaint to be declared admissible by the Strasbourg Court that it has been duly raised before the domestic courts of the respondent State.

All of this, of course, leads to a fairly high amount of complexity. International law specialists among you will know the expression coined by GEORGES SCELLE, the so-called «dédoublement fonctionnel», which describes the task of domestic courts having to apply both municipal and international law. When we describe the modern-day challenge of European domestic courts faced with the implementation of human rights standards, we might well have to call this «détriplement fonctionnel».

Do not misunderstand me, however. I am not calling into question the co-existence of those different legal systems, each with its own set of fundamental rights, which I consider as an essential part of our legal tradition, reflecting an important aspect of European cultural history and diversity. The fact remains that the co-existence of all these overlapping legal sources raises at least two major challenges for the future: one in respect of efficiency of human rights protection, the other – linked to the first – in respect of the need to preserve legal certainty.

To make clear what I have in mind when talking about efficiency, let me tell you the story of Mr KOUA POIRREZ, whose case we recently had in Strasbourg (30.09.2003). Here was a physically disabled applicant, a national of Ivory Coast, who had been adopted as an adult by a French citizen, although he did not thereby acquire French nationality. He applied for an adult disability allowance, but the French courts turned down his application on the ground of his Ivory Coast nationality. The French court hearing his appeal decided to ask the Court of Justice of the European Communities for a preliminary ruling on the compatibility between the relevant French law and Community law, on the basis that the applicant was a direct descendant of a citizen of the European Union. The Court of Justice found that Community law did not apply to the facts of the case: although the applicant's adoptive father was indeed a national of a Member State of the European Communities, he did not qualify as a migrant worker, since he had always lived and worked in France. On the strength of this Luxemburg judgment, all the French courts which successively dealt with the appeal rejected the applicant's request for a disability allowance. He then applied to the Strasbourg Court which, in a judgment of 30 September 2003, i. e. more than 13 years after he had originally applied,

1 Juges communautaires de droit commun; ordentliche Gemeinschaftsgerichte.

found that the applicant had been the victim of discrimination based on nationality. This was contrary to Article 14 of the Convention taken together with Article 1 of Protocol no. 1, and our Court, ruling on an equitable basis, awarded him 20 000 euros for the damage he had suffered.

This case demonstrates the complementarity of the three legal systems involved, but also the complexity of their interplay: French law contained an element of discrimination which Community law was powerless to remedy, because it did not apply in the particular case; accordingly it was only in Strasbourg that the situation could finally be remedied.

The Koua Poirrez case furthermore highlights the problem of the length of proceedings in Europe. The applicant had to wait for more than 13 years before finally being vindicated in Strasbourg. While such a length is also the result of the intervention of three different levels of jurisdiction, it is no option to abolish one of them, as each level has a key role to play in the European legal architecture. It is of course true that the Court of Justice had no other choice but to rule that Community law was not applicable to the facts of the case, but it would not have taken much for Community law to apply. It would have sufficed if for example the applicant's adoptive father had been a German or Italian rather than a French national.

So what needs to be done about such delays? At least part of the solution must undoubtedly come from the domestic courts. In the Koua Poirrez case, a domestic court inquired of its own motion about the effects of Community law which in the event was inapplicable. Yet if failed to consider the impact of the European Convention on Human Rights, which not only was applicable, but moreover had been breached. If the domestic courts had applied the Convention of their own motion, the applicant might not have had to wait for more than 13 years before receiving his allowances.

Another major challenge of the years to come will be the preservation of legal certainty and harmony amidst all those different legal sources of fundamental rights, through a coordinated and harmonized approach designed to avoid confusion and relativism in this sensitive but most important area. This implies that while each legal system should be allowed to have its own fundamental rights and levels of protection, adapted to the specificities of the State or system concerned, it is equally essential to have a coherent approach in respect of the rights which are common to most of the legal systems concerned, especially those laid down in the European Convention of Human Rights. Because they are common to *all* European legal systems, they can truly be said to build the *ius commune* of fundamental rights in Europe.

Here we have to be aware of the fact that the same persons may claim the same rights under different legal systems. Remember Mr Koua Poirrez who

invoked basically the same right – the right not to be discriminated against – first under French law, then under Community law and finally under the Convention, each time with a different result. The Convention's system is of course subsidiary and decentralized, subject to our Court's European control, which must establish whether or not the meaning and content of a fundamental right should vary according to the legal system involved.

Fortunately, a lot has already been achieved in this respect, not least thanks to an excellent cooperation between the domestic courts of the EU Member States, the European Court of Justice and the European Court of Human Rights.

As far as the cooperation between the two European Courts is concerned, we have seen in the case-law of the Court of Justice, in parallel to the gradual expanding of the amount of litigation involving fundamental rights, an increasing number of references to the Convention and to the Strasbourg case-law, demonstrating a clear commitment to ensure harmony between the Luxembourg and Strasbourg jurisprudence. As a result, hardly any conflicts between the two European courts have occurred in the past.

A striking example of this approach is to be found in the preliminary ruling recently given by a Grand Chamber of the Court of Justice in the case of Maria Pupino (16 June 2005, C-105/03), which had to deal with an issue relating to domestic criminal procedure, one of the core areas of the European Convention on Human Rights. Called upon to interpret the Framework Decision on the standing of victims in criminal proceedings, the Court of Justice stated inter alia that it was for the domestic courts to ensure that in interpreting national law in conformity with Community law, criminal proceedings remained fair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights.

Another landmark judgment in the history of the relations between the two European Courts is certainly the one recently delivered in the Bosphorus case (30 June 2005), in which the Strasbourg Court considered the protection of fundamental rights under Community law *stricto sensu* – that is within the so-called «first pillar» – to be «equivalent» to that for which the Convention provides. The case concerned the impounding by the Irish authorities of an aircraft which had been leased by the applicant Turkish company from a Yugoslavian airline. The Irish authorities had acted in pursuance of EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia. In a preliminary ruling delivered on 30 July 1996, the ECJ had found inter alia that the consequences of the impounding for the applicant company were not disproportionate and therefore not incompatible with the fundamental right to property.

One could of course argue that Community law is not the only legal system to provide for protection of fundamental rights in a manner which could be called «equivalent» to the Convention, since the Contracting States are not bound to apply the Convention as such and are free to uphold the Convention standards through other, domestic legislative means. It is clear, however, that the Bosphorus jurisprudence can only apply to an international organisation such as the EU, for it is explicitly justified by the Court in view of the interests of international co-operation as pursued within such an organisation. The Court did state that «equivalent» meant the same as «comparable», as any requirement that the organisation's protection be «identical» rather than «comparable» could run counter to the interests of international co-operation (§ 155).

That being said, what does it mean for the protection of fundamental rights under Community law to be called «equivalent» to the one ensured under the Convention? According to the Court, if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it did no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption could be rebutted if, in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient. In such cases, the interests of international co-operation would be outweighed by the Convention's role as a «constitutional instrument of European public order» in the field of human rights (§ 156). Furthermore, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations.

It is apparent that the Court of Justice is absolutely instrumental in ensuring the «equivalence» of the protection of fundamental rights under Community law. This becomes clear when we realise that to come to the conclusion that the Convention had not been breached in the Bosphorus case, the Strasbourg Court relied heavily on the role played by the Court of Justice in protecting fundamental rights under Community law and indeed on the fact that in the case at hand, the Court of Justice had in its preliminary ruling duly considered the applicant company's property rights. It is also confirmed by the MATTHEWS judgment (18 February 1999) in which the Strasbourg Court carried out a full review of the impugned piece of primary EU legislation. One of the considerations on which our Court relied was the fact that primary law was not open to review by the Court of Justice.

Should the new Bosphorus-jurisprudence of our Court be seen as some adapted version of the well-known Solange-jurisprudence, as has recently been suggested by some academics? Actually there seems to be at least one essential difference between the two approaches. Whereas the German Constitutional Court requires for the presumption of equivalence to be rebutted

that a general or large-scale drop in the EU-standards be established[2], under the Bosphorus-jurisprudence the presumption can be rebutted on a case by case basis. Hence the fact that contrary to the situation under German law, applications challenging in Strasbourg the domestic implementation of Community law are in principle not inadmissible *ratione materiae*.

Turning now to the role of domestic courts in the protection of fundamental rights, I certainly do not need to dwell long on how essential their contribution is, as under the Convention system the role of the Strasbourg Court in relation to the domestic authorities is – and can only be – a subsidiary one. In fact, the problems encountered here arise not so much in theory – since the rules governing the relationship between the domestic courts and the Strasbourg Court are pretty clear – but rather in practice, with the Strasbourg Court still being flooded by a never ending rise in the number of applications. A newly adopted amending Protocol No. 14 to the Convention, along with a stricter approach by the Court in respect of the execution of its judgments (as evidenced in the case of Broniowski v. Poland, 22 June 2004), are expected to provide some relief in this respect but it will not suffice in the long run. This is why it was decided at the Third Summit of the Council of Europe to set up a group of Wise Persons entrusted with the task of shaping – or re-shaping – the long-term future of the Convention system, of devising the European protection system of the 21st century.

Allow me to briefly stress another important aspect of the role of domestic courts in the protection of fundamental rights. It would indeed appear that in practice the harmony between the Convention and Community law is to a significant extent also the result of an essential contribution being made by the domestic courts, through their role in respect of the preliminary rulings by the ECJ. For at the end of the day it is for the domestic courts to apply the ECJ's preliminary rulings to the facts of the case in the main proceedings. While there are indeed a good many preliminary rulings in which the ECJ draws it-

2 «Sonach sind auch nach der Entscheidung des Senats in BVerfGE 89, 155 Verfassungsbeschwerden und Vorlagen von Gerichten von vornherein unzulässig, wenn ihre Begründung nicht darlegt, dass die europäische Rechtsentwicklung einschließlich der Rechtsprechung des Europäischen Gerichtshofs nach Ergehen der Solange II-Entscheidung (BVerfGE 73, 339, 378–381) unter den erforderlichen Grundrechtsstandard abgesunken sei. Deshalb muss die Begründung der Vorlage eines nationalen Gerichts oder einer Verfassungsbeschwerde, die eine Verletzung in Grundrechten des Grundgesetzes durch sekundäres Gemeinschaftsrecht geltend macht, im Einzelnen darlegen, dass der jeweils als unabdingbar gebotene Grundrechtsschutz generell nicht gewährleistet ist. Dies erfordert eine Gegenüberstellung des Grundrechtsschutzes auf nationaler und auf Gemeinschaftsebene in der Art und Weise, wie das Bundesverfassungsgericht sie in BVerfGE 73, 339 (378–381) geleistet hat.» (BVerfG, 7.6.2000, «Bananen-Urteil»)

self the conclusion from the existing Strasbourg case-law, in other rulings it confines itself to pointing to the relevant Strasbourg case-law, leaving it to the referring domestic court to apply it to the circumstances of the specific case, thereby conferring on the domestic court some discretion as to what the impact of the Convention on Community law issues should be.

A good illustration of these different approaches can be found by comparing the cases of CARPENTER (11 July 2002, C-60/00) and HACENE AKRICH (23 September 2003, C-109/01), which were both concerned with the expulsion of third country spouses of EU citizens. In the CARPENTER case the ECJ ruled, having regard to the Strasbourg jurisprudence, that a deportation of Mrs CARPENTER would not be proportionate and would therefore infringe her husband's right to respect for his family life within the meaning of Article 8 of the Convention. A similar problem, though involving different Community law provisions, arose in the case of HACENE AKRICH, in which the ECJ considered that even though Regulation no. 1612/68 did not apply to the facts of the case, the authorities of a Member State, in assessing an application by the foreign spouse of an EU citizen to reside in that Member State, were under a Community law obligation «to have regard to the right to respect for family life laid down in Article 8 of the Convention». Unlike in the CARPENTER case, however, the ECJ did not itself assess the impact of Article 8 on the facts of the case but confined itself to referring to the relevant Strasbourg case-law. Another striking example of the latter approach is provided by the PUPINO case to which I have referred a moment ago[3].

An indication that domestic courts are doing fairly well in using the amount of discretion left to them in this respect by the ECJ can be seen in the fact that so far there have hardly been any serious applications brought to the Strasbourg Court challenging the result of the application by domestic courts of ECJ preliminary rulings, even though such applications are admissible ratione materiae, as has now been recently confirmed by the Strasbourg Court in the Bosphorus case.

3 See also, e. g., ECJ 22.10.2002, ROQUETTE, C-94/00, § 52; ECJ 20.5.2003, Österreichischer Rundfunk and Others, C-465/00, operative provision no. 1; ECJ 6.11.2003, BODIL LINDQVIST, C-101/01, operative provision no. 5.