Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 17(66) Special Issue – 2024
https://doi.org/10.31926/but.ssl.2024.17.66.3.12

NATIONAL COURTS BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION – A COMPLICATED TRIO RELATIONSHIP –

Vlad NEAGOE[1]

Abstract: *The two main European courts share a common history. Based on this, it is now natural to talk about what the doctrine calls "cross-fertilisation", which leads to the "unionisation" of the Conventions and the "conventionalisation" of the European Union (Sionaidh Douglas-Scott, 2013, p. 5). However, there is not always uniformity of solutions between the two European courts, so that among them is the national judge, who must comply with both guidelines. This paper aims to explore how the national judge can accomplish this.*

Key words: *human rights protection in the EU; the relationship between national courts, the CJEU and the ECtHR; EU accession to the ECHR.*

1. Introduction

It is recognised that the courts of the member states of the Council of Europe cannot lower their own standards of protection below that set by the European Court of Human Rights (hereinafter, *ECtHR*), in application of the European Convention on Human Rights (hereinafter, *ECHR*), as a minimum threshold of protection in the field of human rights.

Given that the EU is first and foremost, beyond the established autonomy of Union law, the sum of the legal orders deriving from that of the component Member States, this obligation is taken over in the Union and even enshrined in both Article 53 of the Charter of Fundamental Rights of the European Union (hereafter, the *Charter* or *CFREU*), as well as in the case law of the Court of Justice of the European Union (hereafter, the *Court* or *CJEU*, see Judgment of 12 February 2019, *TC*, C-492/18 PPU), and is also recognised as such in doctrine (Lenaerts; Gutîérrez-Fons, 2020, pp. 143, 144).

In this three-dimensional legal environment, two main questions emerge.

Firstly, if Member States cannot lower their own standards below those of the ECHR,

[1] *Transilvania* University of Brașov, *vlad.neagoe@unitbv.ro*, corresponding author.

are they obliged to do so in relation to EU standards in order not to undermine the coherence and effectiveness of EU law?

Secondly, to what extent can the ECtHR be attached to the endeavour of European integration and the protection of the principle of mutual trust on which it is based?

In order to answer these questions, we need to analyse the relationship between human rights protection standards at national, Union and conventional level, and to see where the ECtHR stands in this context.

2. The relationship between EU and national standards

Caught up in the inertia of national sovereignty in judicial matters, states have been tempted to interpret textually the provisions of Article 53 of the Charter on the level of protection, which states that the Charter cannot be interpreted as restricting or adversely affecting recognised human rights and fundamental freedoms.

But the Court of Justice of the European Union took a different view.

As regards the standard of protection of fundamental rights offered by the Charter, the Court of Justice has consistently held that it differs according to *whether there is a uniform or different level of protection across the EU*.

Where the Union legislator has established *a uniform level of protection*, Member States cannot deviate from it. This is the *Melloni* case (Grand Chamber judgment of 26 February 2013 in Case C-399/2011), in which the Court held that, where the European Union legislature has expressly laid down the cases in which the execution of a European arrest warrant may be refused in respect of a requested person in absentia, the executing judicial authority cannot apply a domestic standard in the matter, but is obliged to comply with the uniform standard enshrined in European Union law. If the national standard were to be applied contrary to the Union standard, "by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision" (*Melloni*, para. 63).

Following the Court of Justice's decision in *Melloni*, the Constitutional Court of Spain (*Tribunal Constitucional*) proceeded to lower its constitutional standard on the right to retrial of criminal cases where the accused is tried in absentia (Judgement No 26/2014 of 13 February 2014 of the Constitutional Court of Spain in *Melloni*, available at:https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC 26-2014 EN.pdf). The doctrine, however, emphasised that the *Tribunal Constitucional* presented the preliminary ruling as 'a mere hermeneutic tool' and its solution as 'a result obtained on its own initiative'. The doctrinal conclusion is that "the message was clear: The Constitutional Court retains the last word in the event of a conflict between the Spanish Constitution and EU law". (Aida Torres Pérez, 2014, p. 322 et seq).

In the other hypothesis, where there is *a different level of protection in the Member States*, national courts can apply their own domestic standards, provided they do not jeopardise the supremacy, unity and effectiveness of EU law.

The well-known case of *Åkerberg Fransson* (Grand Chamber judgment of 26 February

2013 in Case C-617/10) is illustrative in this respect. The Court started from the premise that it cannot be ignored that repressive national rules in tax matters "therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union" (para. 28). Thus, the CJEU concluded that "where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised" (para. 29).

The context in which the question referred for a preliminary ruling in *Fransson* was framed was not without controversy.

The reference for a preliminary ruling in the *Fransson* case was made by a court of first instance - *Haparanda tingsrätt* (Haparanda District Court - Sweden) - even contrary to the case-law of the Swedish Supreme Court. Moreover, the prosecutor opposed the stay of the case and the preliminary question, but the higher appeal court dismissed the prosecutor's appeal on the basis of the *Cartesio* judgment (*CJEU, Grand Chamber judgment of 16 December 2008 in Case C-210/06*), which enshrined the autonomy and importance of referral to the CJEU by the lower courts. In fact, even during the preliminary reference to the CJEU, the Swedish Supreme Court, in a decision handed down by a majority of 3-2 judges, rejected a similar request to refer a case to the CJEU on the grounds of the inapplicability of EU law in VAT tax cases (see the Danish Supreme Court decision of 29 June 2011 No NJA 2011 s. 444 - full text here: *https://lagen.nu/dom/nja/2011s444).*

The doctrine captured the wellspring of the paradigm shift from its dual perspective (Bernitz, 2015, pp. 194 and 193).

From the judiciary, the change came from a lower court and even against the established practice of higher courts, pointing out that “this much observed ‘revolt’ among Swedish judges forms an important part of the background to the *Åkerberg Fransson* case in which a district court judge in a small town decided to call into question the established Swedish system by asking the Court of Justice for a preliminary ruling”.

From the point of view of the litigant, the same author observed that the party in question, Hans Åkerberg Fransson, was merely “a self-employed fisherman with only one fishing boat which he managed himself“, so that it can be said that "when looking at the actual circumstances and the legal process in *Åkerberg Fransson*, the proverb ‘the straw that broke the camel’s back’ springs to mind".

3. The Relationship between Union and Conventional Standards

Since the Union has not (yet) acceded to the ECHR, the courts of the Convention have refused *direct review of* Union acts, but have allowed *indirect review*.

Thus ***the presumption of equivalent protection*** or ***the Bosphorus presumption,*** enshrined in the Grand Chamber judgment of 30 June 2005 in the eponymous case of

Bosphorus Airways v. Ireland, according to which ***the protection of fundamental rights in the Union is considered at least equivalent to that afforded by the Convention,*** came into being. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (para. 155). The Court also stated that the presumption was relative and could be rebutted if it was established that the protection of fundamental rights was *manifestly deficient* (para. 156).

The doctrine has viewed deference in *Bosphorus* as the result of three necessities: (i) the need to refrain from exercising indirect judicial control over the EU legal order; (ii) the need to avoid putting the respondent state in a situation of normative conflict (normative fragmentation); and (iii) the need to avoid conflicting judicial outcomes (institutional fragmentation) between the CJEU and the ECtHR, which have both exercised jurisdiction on the basis of their respective rules over what is essentially the same case (Tzevevelekos, 2014, pp. 16 and 17).

The application of *the Bosphorus presumption* requires two conditions, first, that the *Member State has no margin of discretion in the application of Union law* (ECtHR, *Povse v. Austria*, Decision of 18 June 2013; *Bivolaru and Moldovan v. France*, Judgment of 25 March 2021, para. 114*),* while on the other hand it is necessary to *use the full control mechanism provided for by EU law (*ECtHR, *Michaud v. France*, Judgment of 6 December 2012, paragraphs 114 and 115; *Avotiņš v. Latvia*, Grand Chamber Judgment of 23 May 2016, paragraph 111).

In its case-law, the ECtHR stated in *Avotiņš v. Latvia* that it was "mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require". The Court emphasised that "paradoxically, in a twofold limitation of the domestic court's review of the observance of fundamental rights, due to the combined effect of the presumption on which mutual recognition is founded and the *Bosphorus* presumption". Accordingly, the ECtHR concluded that "it must verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights – which, the CJEU has also stressed, must be observed in this context". In conclusion, the Court stated that "if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law" (ECtHR, *Avotiņš v. Latvia*, Grand Chamber judgment of 23 May 2016, paragraphs 113-116).

This conventional case-law is also confirmed by the relevant doctrine.

Thus, President of the CJEU Lenaerts, while stressing the importance of the principle of mutual recognition, did not hesitate to mention that it is possible to accommodate that principle with a level of fundamental rights protection that, whilst preserving the autonomy of the EU legal order, draws inspiration from the constitutional traditions common to the Member States and the ECHR. In that regard, the "autonomy" put forward in Opinion 2/13 does not refer to plain detachment. On the contrary, when it comes to protecting fundamental rights, the ECJ seeks to define the EU constitutional space without

denying that EU law influences, and is influenced by, the legal orders that surround it (Lenaerts, 2017, pp. 805 et seq.).

The *manifestly deficient* nature of the protection of the rights guaranteed by the Convention was first recognised in *Bivolaru and Moldovan v. France,* cited above. In that case, the ECtHR recognised that "a real risk of inhuman and degrading treatment of the person whose surrender is sought, by reason of the conditions of detention in which he is being held, assessed on sufficient factual grounds, in the issuing State, constitutes a legitimate ground for refusing to execute the EAW and, consequently, for refusing to co-operate with that State" (para. 117). In order to establish that the protection of fundamental rights was manifestly deficient, the Court considered it necessary to determine "whether or not the executing judicial authority had sufficiently solid factual grounds for concluding that the execution of the EAW would entail a real and individual risk for the applicant of being exposed to treatment contrary to Article 3 because of his detention conditions in Romania". In this respect, the Court held that the executing authority had sufficient factual grounds to recognise the existence of such a risk, but failed to take into account several elements of a concrete nature (paras 119-126).

On the contrary, on other occasions, the Court has concluded that the executing State can be held responsible for refusing to execute a European Arrest Warrant (EAW), on the ground of Article 2 of the Convention, if it is not proved that the refusal to execute was based on a detailed and up-to-date examination of the situation in the case.

Thus, in *Romeo Castaño v. Belgium* (ECtHR, *Romeo Castaño v. Belgium*, Judgment of 9 July 2019), the Belgian court refused to execute an EAW on the ground of the risk of being subjected to conditions of detention in Spanish prisons contrary to Article 3 of the Convention. The Court found that the ground relied on could constitute a legitimate argument for refusing to execute the European Arrest Warrant. However, the finding that such a risk existed had to have *a sufficient factual basis* (para. 85). Taking the view that, in the absence of a detailed and up-to-date examination of the situation, it could not be so established, the Court concluded that the Belgian State had failed to fulfil its obligation to co-operate under the procedural aspect of Article 2 of the Convention and that there had therefore been a breach of Article 2 (paras 90-91).

4. Relevant National Judicial Practice

The situation in Romania is illustrated by several known hypotheses.

By its judgment of 18 May 2021 in the case *Asociația Forumul Judecătorilor* (CJEU, Grand Chamber, *Asociația Forumul Judecătorilor*, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19), the Court of Justice – referred by an ordinary court after the Romanian Constitutional Court (hereinafter, *CCR*) had refused to make a reference for a preliminary ruling in the case – held that Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 on the Cooperation and Verification Mechanism (CVM) must be interpreted as precluding national legislation such as the criticised legislation on the establishment of the Section for the Investigation of Offences against the Judiciary (SIIJ). In its decision, the CJEU emphasised that the obligation of loyal cooperation is incumbent on any organ of the Member State, thus including ordinary or constitutional

courts (para. 176 and the case law cited there).

The Romanian Constitutional Court did not hesitate to respond. Only a few days after the CJEU judgment, by Decision No 390/2021 of 8 June 2021, the Constitutional Court made it clear that "the determination of the organisation, functioning and delimitation of competences between the different structures of the prosecution authorities fall within the exclusive competence of the Member State". In this context, the CCR also invoked *national identity*, recalling that "the essence of the Union is the attribution by the Member States of competences - more and more in number - for the achievement of their common objectives, without, of course, in the end, this transfer of competences being prejudicial to national constitutional identity" and that, "on this line of reasoning, the Member States retain competences which are inherent in the preservation of their constitutional identity, and the transfer of competences and the rethinking, emphasising or establishing new guidelines within the framework of competences already transferred are within the constitutional margin of appreciation of the Member States" (para. 79).

In other well-known cases, the ordinary courts of the country have referred to the CJEU on the interpretation of Article 47 of the Charter on the right to a fair trial, in the context in which the CCR has ruled on legal conflicts of a constitutional nature, establishing the illegal composition of the panels of 5 judges organised at the level of the High Court of Cassation and Justice for the reason of missing the drawing of lots of all the judges who compose them (Decision no. 685/2018) and the non-constitution by the same Supreme Court of specialised panels of judges for the trial at first instance of corruption offences (Decision No. 417/2019), in both cases with the consequence of resuming and prolonging criminal trials until the expiry of the statute of limitations for criminal liability. The CJEU has thus ruled in two cases in which it established that a systemic risk of impunity for offences against EU law may arise from the respective CCR decisions, in which context ordinary courts are authorised to leave such constitutional solutions unapplied (Judgment of 21 December 2021 in the case of *Euro Box Promotion SRL*, C-357/19 and Judgment of 22 February 2022 in the case of *RS*, C-430/21).

One of the solutions that have followed the decisions of the CJEU against those of the CCR is that of the High Court of Cassation and Justice in a case concerning corruption offences involving a former minister. In applying the judgment in *Euro Box Promotion and Others*, the High Court held that "the CJEU has held that the obligation to ensure that such offences are punishable by criminal penalties which are effective and dissuasive does not absolve the national court from the duty to verify compliance with the fundamental rights guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, without that court being able to apply a national standard of protection of fundamental rights which entails such a systemic risk of impunity. However, the requirements arising from that article do not preclude a possible failure to apply the case-law of the Constitutional Court relating to the composition of the panels of five judges of the High Court of Cassation and Justice' (Decision No 41/2022 of the High Court of Cassation and Justice - Criminal Division, available on the CJEU website under case No C-357/19).

Another hypothesis of contradiction with EU law comes from the perspective of the principle of legality of punishment on the grounds of Article 49 of the Charter. Thus, when the Brașov Court of Appeal referred the matter to the CJEU after the High Court had

refused to make a preliminary reference in the matter (and no request for an advisory opinion to the ECtHR under Protocol 16), by Preliminary Judgment of 24 July 2023 in the Lin case, the CJEU, in the Grand Chamber, held that Art. (1) TFEU and Article 2(1) of the PFI Convention (on the protection of the EU's financial interests) must be interpreted as meaning that the courts of a Member State are obliged to leave unapplied a national standard of protection relating to the principle of retroactive application of the more favourable criminal law (*lex mitior*) which allows the interruption of the limitation period for criminal liability in such proceedings to be called into question, including in appeals against final judgments, by procedural steps taken before such an invalidation of the law. In subsequent cases concerning similar references, by Orders of 9 January 2024, the Court held that the *Lin* interpretation applies also in pending cases, not only in extraordinary appeals (in judicial proceedings for the criminal prosecution of offences of serious fraud affecting the financial interests of the Union, Case C-131/23) and in corruption cases (Commission Decision 2006/928/EC of 13 December 2006 - CVM, Case C-75/23).

After a period of inconsistent practice, the Supreme Court handed down a binding judgment in which it held that national courts could not apply the *Lin* solution for three reasons: (i) because the higher domestic standard would take precedence over the European one, (ii) because of the discriminatory effect that would result from applying *Lin* in relation to the rest of the offences under domestic law, and (iii) because the systemic risk of impunity could not be established by the domestic court in the absence of "criteria predefined by the legislator" (Decision No 37 of 17 June 2024 - HP).

What can national courts do in this context? They have only to make the choice between the two jurisprudential solutions, but the tendency to follow binding domestic judgements is reinforced by achieving a uniform national practice in line with the practice of the domestic supreme and constitutional courts. Nor can it be ignored that this removes the risk of personal liability for failure to apply the domestic judgments of the supreme or constitutional courts, which cannot be ruled out despite the fact that in the *Lin* judgement the European court expressly prohibited the risk of such liability for the judge.

5. Proposals

In view of the contrary solutions of the European courts to the higher national courts, it is clear that a paradigm shift in the relationship between them is needed.

The first proposed approach would be that, in order to avoid contradictory solutions and uniform interpretation of Union law, the ***supreme and constitutional courts should impose on themselves the obligation to refer to the CJEU whenever a serious question of interpretation of Union law may arise.*** The model to be followed would be the Federal Constitutional Court of Germany (*BVerfG*), whose judgements contrary to the practice of the CJEU are often invoked as a benchmark of constitutional jurisprudence. In the well-known *Honeywell* case *(BverfG, 126, 286, Judgment of 6 July 2010)*, in which it applied the *ultra vires* doctrine, it self-imposed the obligation to refer the matter to the CJEU whenever a genuine and serious problem of Union law arises. Moreover, the *BverfG* sanctions the omission to refer a case to the CJEU on the basis of the right of access to the

courts enshrined in Article 101(1) of the *Grundgesetz* (Basic Law), a recent example being the judgment of the CJEU (Grand Chamber) of 18 June 2024, *A,* Case C-352/22 (see para. 28). In our opinion, if we invoke the practice of the German constitutional court in order to find arguments contrary to the practice of the CJEU, we can also do so by assimilating its good practice. To this end, the domestic higher courts may consider that ***the preliminary reference should be seen not as an obligation in itself, but as an opportunity to clarify Union law***, as President Lenaerts of the CJEU often emphasises (see the April 2024 Kuria Conference in Hungary available at: https://www.youtube.com/ watch?v=SNqipTEj1as). In this way they would directly contribute to the construction of Union law and incorporate the solutions of the European court into their own case law, thus becoming themselves an unquestionable benchmark in Union law for the lower courts.

A significant example of a preliminary reference from the ECJ was the one that gave rise to the much lauded *Coman* case (Judgment of 5 June 2018, Grand Chamber, -C673/16) at the Union level (see President Lenaerts' speech to the Oxford Union Society in 2019 available at: https://www.youtube.com/watch?v=*-GDG_45_u-A*, min. 50). The case provided an opportunity for the CJEU to clarify the notion of spouse in Union law, solely for the purpose of preserving the right to free movement of persons within the EU.

The other approach proposed by us is the ***obligation to give adequate and sufficient reasoning for judgements which may conflict with the practice of the Court of Justice.*** For example, it is difficult to accept, at the current stage of development of EU law, that 'the determination of the way in which the various structures of the prosecution authorities are organised, operate and delimit the powers of the different structures falls within the exclusive competence of the Member State', as our Constitutional Court has held (Decision No 390/2021, cited above). In this regard, we must bear in mind European practice since the *Associação Sindical dos Juízes Portugueses*, according to which, in order for effective judicial protection to be guaranteed, the preservation of the independence of such a body is paramount, as confirmed by the second paragraph of Article 47 of the Charter, which mentions access to an 'independent' court among the requirements linked to the fundamental right to an effective remedy in Union law (CJEU, Judgment of the Court, Grand Chamber, of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, p. 41).

For example, the reasoning of an internal solution which contradicts this approach of the CJEU should expressly indicate how this effective judicial protection at Union level can be ensured without an adequate review by the Court of Justice of the independence of the national court.

As for the national identity block, as we have emphasised on other occasions, “national identity should not be proclaimed, but it should be motivated”. One can thus envisage an attempt to define the constitutional national identity which the domestic judge can analyse in order to test himself the claims of a constitutional court when it invokes this national identity bottleneck. Thus, the (constitutional) national identity would represent 'that special feature of the domestic legal order, which has been formed over time, with a pronounced specific character specific to the national legal culture, within which it is naturally and necessarily integrated, distinguishing itself in the international or

supranational legal order, with the consequence of analysing the imperative need to preserve it when it contradicts the latter, as the only way to safeguard the fundamental structure of the national legal construction, in order to maintain its own path of national development and to promote specific national values. *Per a contrario*, national identity cannot be a general characteristic common to the Member States, because it would lose the national character by which it identifies and defines itself. It cannot be spontaneous, responding to interests or concerns of the moment, which can only be volatile and unreliable, but is built up over time, standing the test of time. In this way, it becomes part of the national state architecture and contributes to the formation of the domestic legal tradition. It can only be defined in relation to what it opposes, competing with the demands of European integration, against which it can only prefigure itself as the only way to preserve our national specificity and promote our national values." (Neagoe, 2024, p. 168).

From the perspective of the supreme or constitutional national courts***, a request for an advisory opinion to the ECtHR under Protocol 16 to the ECHR should be made whenever the legal issue at stake is serious and grave***. From the point of view of the conventional court, we have already shown that the ECtHR considers the project of European integration to be legitimate, which it encourages by creating protective mechanisms such as the *Bosphorus* presumption. However, the European Court does not refrain from imposing limits through the control to be exercised to ensure respect for human rights where "a serious and well-founded claim is made that there is a manifest insufficiency of protection of a right guaranteed by the Convention and that European Union law fails to remedy that insufficiency" (*Avotiņš v. Latvia,* cited above, p. 116).

Over and above obtaining an advisory opinion, the solution that would be required is to ***continue the effort to standardise and harmonise Union law in order to apply common standards of human rights protection and minimise the risk of a manifest lack of protection.*** By proceeding to apply common rules in more and more of the assigned areas, the courts of the Member States would apply the same standards of human rights protection, minimising the risk of situations of manifestly inadequate protection arising in one of the Member States. A good example of this would be the adoption of common standards at EU level on conditions of detention, in addition to those which have their source in various Council of Europe legislation and institutional actions, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*CPT*).

In all this context, however, the national judge can no longer confine himself solely to his constitutional framework, but must share the common European legal values and traditions, in that *ordered pluralism* of which Mireille Delmas-Marty speaks (Delmas-Marty, 2006, pp. 20 et seq). It is true that in this way national constitutional courts would suffer a so-called *capitis deminutio* (Bobek, 2012, p. 287) but this paradigm shift is specific to such pluralist legal systems in an increasingly globalized world and the growing demands for judicial dialogue.

Only in this way ***can European law be seen not as a foreign law, but as a law common to all Member States and therefore a domestic law of each Member State.***

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