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ON CONVERGENCE IN THE INTERPRETATION OF HUMAN RIGHTS IN THE EUROPEAN HUMAN RIGHTS REGIME

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I. PLURALIST LEGAL STRUCTURES AND THE ROLE OF THE COURTS

The architecture[1] of European human rights law is often referred to as multi-level and pluralist. Multi-level because the system for the protection of human rights consists of various legal standards – national standards set out by the domestic human rights law, standards contained in EU law (such as the EU Charter of Fundamental Rights[2] and the human rights case law of the European Court of Justice), and international standards (especially as set out by the European Convention of Human Rights[3]). These different systems of human rights protection are not complementary but rather parallel, overlapping instruments of protection, with diverging scopes of application.

In addition, the European human rights order is also described as a pluralist legal regime. Lacking a common legal framework of reference that would particularly allow for an overall conflict resolution, the different actors of human rights protection compete for authority, thereby creating certain points of tension.[4]

Given the substantive linkage between the manifold constituent parts of the European human rights framework, legal scholarship increasingly suggests to refrain from a classic dichotomic perception of domestic and European human rights law. Yet, the different legal orders are not conceived as an integrated whole, organised through rules of hierarchy and based on a clear distribution of tasks.[5]

Against this background, I will stress one point that proves to be essential when talking about the interpretation of human rights in the European human rights regime: The interaction between the courts competent to ultimately decide in human rights cases – the European Court of Human Rights in Strasbourg (ECtHR), the European Court of Justice in Luxembourg (ECJ) and domestic Supreme and Constitutional Courts – has always played a major role in European human rights law. And it keeps on contributing constantly to its evolution.

The relationships between the courts, as institutions originating from different legal orders, raise various difficult questions, particularly with a view to the scope of jurisdiction and the problem of supremacy. Bearing in mind that within the European structure of human rights protection these different courts have jurisdiction to apply the same or – in their essence – similar human rights provisions, it is certainly also possible that conflicting rulings may be delivered by these courts in the interpretation of the respective human rights guarantees. Thus, one could argue that

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[1] *Nico Krisch*, The Open Architecture of European Human Rights Law, The Modern Law Review 2008, 183.

[2] Charter of Fundamental Rights of the European Union, OJ 30 March 2010, C 83/389. The scope of the Charter is limited to the EU institutions and to the Member States only when they implement EU law.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14, Rome, 4/11/1950. For an overview on further international Human Rights instruments which do also have certain influence on the EU Human Rights regime see *Bezemek/Müller*, International Human Rights Protection (2010).

[4] See *Nico Krisch*, The Open Architecture of European Human Rights Law, The Modern Law Review 2008, 183.

[5] *Nico Krisch*, The Open Architecture of European Human Rights Law, The Modern Law Review 2008, 183 (184).

the "pluralist" structure of the European human rights regime is by its very nature destined to produce friction between the divergent legal standards and their respective judicial actors.

But we could also approach the topic from a different angle. The overall successful story of the European Convention of Human Rights (ECHR) not surprisingly has come to be seen as an essential instrument of constitutional integration. And the ongoing strong developments in the EU human rights law strengthen the impression of human rights protection as being a further means in the continuing process of a deeper European integration.[6] Having said that, could we even come to believe that in Europe, the courts' interaction in human rights adjudication eventually tends towards an approximation of standards, through convergence in the interpretation of human rights?

Taking up fundamental scholarly work in this field[7] I will try to argue in the following that we can observe an increasing tendency towards a convergence in the interpretation of human rights in the European human rights regime particularly due to three aspects: First, the relationship between the ECJ and the ECtHR, which is more and more one of dialogue and cooperation, not of confrontation.[8] Second, the harmonising impact of the ECtHR's jurisprudence *vis à vis* national human rights law. And third, the harmonizing effects of comparative constitutional reasoning by domestic courts.

Needless to say, these three aspects – which will also underlie the structure of this paper – can only highlight some factors that are of importance for the development of the European human rights regime as a whole. Other elements of interest would without doubt be the EJC case law on human rights as such and particularly the rise of the (now legally binding) EU Charter of Fundamental Rights. However, I consider the three factors mentioned as being crucial for the further development of European human rights law; therefore the focus shall be put on these aspects.

II. ECJ AND ECTHR – A DIALOGUE ON HUMAN RIGHTS

Let me start with my first area of observation, the relationship between the ECJ and the ECtHR as it has evolved in their judicial dialogue over the years. I would like to stress that despite the potential problems arising from different rulings and although areas of divergence in their human rights adjudication continue to exist,[9] the two jurisdictions are in a relationship of communication and cooperation, showing remarkable tendencies towards convergence.[10]

I would like to substantiate this claim with two examples, first taking a look at the case law of the two courts pertaining to the right of privacy.[11] Article 8 ECHR states that "*everyone has the right to respect for his private and family life, his home and his correspondence*". While the ECJ in a 1989 judgment – in the context of European Commission investigations in the field of competition law, and referring to the absence of ECtHR case law on the matter – held that the right to the inviolability of the home does not extend to business premises,[12] subsequently the ECtHR held in a 1992 judgment that the protection of Article 8 also extends to the professional offices of a lawyer.[13] The Strasbourg Court found this broad interpretation of the words "*private life*" and "*home*" as being more consistent with the underlying objective of Article 8. Within a couple of years, the ECJ followed this interpretation as set out by the ECtHR. In a 2002 judgment the Luxembourg Court reinterpreted its former case law and particularly stated that in determining the scope of Article 8 the ECtHR's case law must be taken into account. Hence

[6] E.g. *Paul Craig/Gráinne de Búrca*, EU Law[4] (2008) 379 et seq.

[7] Cf. in particular and with further references *Nico Krisch*, The Open Architecture of European Human Rights Law, The Modern Law Review 2008, 183; *Sionaidh Douglas-Scott*, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, Common Market Law Review 43 (2006) 619.

[8] *Paul Craig/Gráinne de Búrca*, EU Law[4] (2008) 426 stress that both Courts are increasingly determined to avoid conflict in their respective case law, and to demonstrate deference to the approach of the other Court in relation to similar questions arising before them.

[9] For examples see *Paul Craig/Gráinne de Búrca*, EU Law[4] (2008) 425-426.

[10] See *Takis Tridimas*, The General Principles of EU Law[2] (2006) 342-343. On the "Dialogue on Rights" cf. particularly *Sionaidh Douglas-Scott*, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, Common Market Law Review 43 (2006) 619-665; *Nina-Louisa Arold*, The Relationship Between the ECtHR and the ECJ – the Story of Two Sisters Becoming More Alike?, in Benedek et al (eds) European Yearbook on Human Rights (2009) 189 (192-193).

[11] For this example also see *Takis Tridimas*, The General Principles of EU Law[2] (2006) 343.

[12] Judgment of 21 September 1989 joined cases 46/87 and 227/88 *Hoechst* para. 18.

[13] Judgment of 16 December 1992 app no 13710/88 *Niemietz v Germany* paras. 27-33.

the ECJ concluded that the protection of the "*home*" may in specific circumstances be extended to cover business premises.[14]

But it is not always Luxembourg referring to Strasbourg case law; the judicial dialogue between the courts involves traffic in both directions and the ECtHR, too, appears to be willing to reconsider its own case law in the light of (later) ECJ case law.[15]

A very recent example may illustrate this point: Artice 4 of Protocol No. 7 to the ECHR grants the right not to be tried or punished twice for an offence for which one has already been acquitted or convicted.[16] Basically, this so-called *ne bis in idem* principle prohibits a second trial or punishment for the same offence. As regards the understanding of the *same offence* the ECtHR had followed different approaches over the years, shifting to a newly adopted approach in a 2009 judgment.[17] For reason of legal certainty, the ECtHR thereby – among other deliberations – considered the ECJ case law on the interpretation of similar provisions in EU law.[18] Thus the ECtHR argued that the *ne bis in idem* principle prohibits the prosecution or punishment for a second offence if the elements of the facts in both proceedings are either *identical* or *essentially the same*. By taking up such a *fact-oriented* understanding the ECtHR abandoned its previous approaches that – basically speaking – emphasized the legal classification of the offences rather than the conduct, irrespective of its legal qualification.

These and other similar[19] developments in the Luxembourg as well as in the Strasbourg case law may serve as examples for the fact that both courts, ECJ and ECtHR, are – certainly to a greater or lesser extent, yet – in general prepared to adjust their jurisprudence to the other court's case law with the aim of contributing to an increasingly harmonized European human rights standard.

III. ECTHR CASE LAW VIS À VIS NATIONAL LAW

Moving on to the next section of my paper, I would like to address the harmonizing impact of the ECtHR's case law *vis à vis* national legal orders. In order to approach this question I will focus on the Austrian Constitutional Court's (*Verfassungsgerichtshof*) adjudication in human rights cases. Again, I do not intend to provide an exhaustive account of the Constitutional Court's human rights adjudication as such but rather outline core developments and highlight trends by presenting some of the Court's recent judgments in this area.[20]

But let me start with giving you an idea about how the ECHR has been received legally in Austria and about the role it plays within the structure of the Austrian legal system. Other than in most European countries, in Austria the ECHR not only obtained the status of domestic law but enjoys constitutional rank. In addition to its character as an international treaty,[21] it has been transformed on the domestic level as constitutional law.[22] This double status basically implies two consequences: First, given their rank as constitutional law,[23] the rights deriving from the

[14] Judgment of 22 October 2002 case C-94/00 *Roquette Frères SA* para. 29.

[15] On references to Luxembourg case law by the Strasbourg Court cf. *Sionaidh Douglas-Scott*, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, Common Market Law Review 43 (2006) 619 (640-644).

[16] "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*"

[17] Judgment of 10 February 2009 app 14939/03 *Sergey Zolotukhin v Russia.*

[18] The ECtHR particularly referred to Article 50 of the EU Charter of Fundamental Rights ("*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*") and Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 ("*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.*").

[19] See inter alia with further references *Sionaidh Douglas-Scott*, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, Common Market Law Review 43 (2006) 619-665.

[20] The Constitutional Court's judgments and decisions are delivered in the German language. English language summaries of select case law are published in the ICL-Journal (www.icl-journal.com).

[21] Austria signed the Convention on 13 December 1957. It was ratified by the Austrian Federal President on 3 September 1958.

[22] Federal Law Gazette (*Bundesgesetzblatt – BGBl*) 59/1964. On the implementation process also see *Andrew Z. Drzemczewski*, European human rights convention in domestic law: a comparative study (2004) 93-106.

[23] According to Article 44 para 1 Austrian Federal Constitutional Law (*Bundes-Verfassungsgesetz*) the adoption of constitutional law requires higher quora regarding the attendance and approval

Convention may be relied on before the Courts, especially the Constitutional Court, and administrative authorities. And second, the ECHR's constitutional rank makes it a binding standard for – both prior and subsequent – ordinary legislation and subjects all ordinary laws to review by the Constitutional Court.[24]

With regard to the effect of the ECtHR's case law we can generally mention that even though they do not, legally speaking, have an *erga omnes* effect, the interpretation chosen by the Strasbourg Court has a *de facto* relevance for the application of domestic law in similar pending cases. Thus Austrian courts, among these in particular the Constitutional Court, do not only rely on Convention articles regularly and extensively; also, Strasbourg jurisprudence is cited constantly and proves to have a remarkable impact on the domestic case law.[25] Although not serving as a "precedent" for the Austrian Constitutional Court, Strasbourg's interpretation of the Convention will usually affect the Constitutional Court's case law as well.[26]

This Viennese readiness to loyally consider Strasbourg jurisprudence holds true in many cases, even when the evolution of the Strasbourg case law would require legislative amendments or takes rather unexpected turns. The latter has recently been the case regarding the scope of "*civil rights and obligations*" under Article 6 para. 1 ECHR,[27] when the Constitutional Court followed the new Strasbourg understanding that does – contrary to the former perception[28] – also include disputes concerning civil servants as having a "*civil rights*" character.[29] The Austrian Constitutional Court – albeit attaching some critical remarks to the ECtHR's newly adopted approach – also overruled its previous case law to swing into the line developed in the Strasbourg case law.[30]

There have however also been constellations in which the Constitutional Court sustained its critical view and decided not to follow the ECtHR case law. In its 1987 *Miltner* judgment – once more dealing with the meaning of the concept of "*civil rights and obligations*" according to Article 6 ECHR – the Constitutional Court pointed out that the following to Strasbourg would encounter its limits if the ECtHR stretched its law-making functions ("*offene Rechtsfortbildung*") too far; any broadening of the interpretation of Article 6 ECHR would be incompatible with the basic principles of the Austrian Federal Constitution.[31]

The particular problem that provoked this holding was solved by some slight modifications in the respected case law and open friction between the courts has been rare since. But still, instances of Viennese resistance to Strasbourg can be found, as shall be illustrated by a very recent judgment concerning the above mentioned *ne bis in idem* principle:

As has already been alluded to briefly, the ECtHR's interpretation regarding the question of the "*same offence*" in Article 4 of the 7th Protocol to the ECHR took an important and rather unexpected turn towards

of members of the National Council as well as the express designation as "constitutional law" or "constitutional provision".

[24] On the hierarchy of norms in Austrian law see *Herbert Hausmaninger*, The Austrian Legal System[4] (2011) 23-30.

[25] As the ECHR contains a number of rights which had not been guaranteed before, solely under Austrian domestic law, reference is made frequently to the provisions of the ECHR and to the decisions of the (former European Commission of Human Rights as well as the) ECtHR. Cf *Herbert Hausmaninger*, The Austrian Legal System[4] (2011) 169.

[26] Cf. *Christoph Grabenwarter*, Zur Bedeutung der Entscheidungen des EGMR in der Praxis des VfGH, RZ 2007, 154.

[27] Article 6 ECHR guarantees the right to a fair trial. Article 6 para. 1 reads: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*" On the Constitutional Court's case law on Article 6 ECHR see *Theo Öhlinger*, Austria and Article 6 of the European Convention on Human Rights, 1 EJIL (1990) 286 and *Philipp Cede*, Some aspects of the case law of the Austrian Constitutional Court on Art. 6 ECHR, ICL-Journal 1/2009, 27.

[28] Until then, the ECtHR case law had recognized a separate category of "*political rights*", barring the application of rights deriving from Article 6 ECHR. Thus, cases involving civil servants had generally been declared inadmissible insofar as the complainants relied on Article 6 ECHR.

[29] Judgment 19 April 2007 app 63235/00 *Vilho Eskelinen and others v Finland* paras 42-64.

[30] See inter alia VfSlg 18.309/2007.

[31] VfSlg 11.500/1987. Cf. also *Theo Öhlinger*, Austria and Article 6 of the European Convention on Human Rights, 1 EJIL (1990) 286 (286-287); *Philipp Cede*, Some aspects of the case law of the Austrian Constitutional Court on Art. 6 ECHR, ICL-Journal 1/2009, 27 (35-37).

a more fact-oriented approach as expressed especially in the 2009 *Zolotukhin* case.[32] Before this, the ECtHR's approach and the Austrian Constitutional Court's case law basically had been in the same line in this regard. The Constitutional Court however did not adopt the new Strasbourg approach, explicitly referring to the object and purpose of the ECHR as well as to historic arguments, and suggesting inter alia that the interpretation given by the ECtHR would not be consistent with the principle of the separation of powers as perceived in the Austrian Constitution.[33]

Thus, despite the fact that the ECtHR's case law and the interpretation of the ECHR is generally granted great weight in the adjudication of the Constitutional Court, in both cases, the *Miltner* and the *ne bis in idem* case, the Constitutional Court sets limits to its allegiance with the ECtHR. By disagreeing with Strasbourg on the interpretation of Convention provisions the Constitutional Court thereby especially indicated that there was a limit in Strasbourg's authority to interfere with certain fundamental constitutional contents.

Thus, in general, the Austrian Constitutional Court's adjudication routinely follows the ECtHR's case law and open rejection of the Strasbourg Court's interpretation is not only a clear exception, but basically also reduced to a few cases with high stakes.

IV. COMPARATIVE CONSTITUTIONAL REASONING IN THE NATIONAL CONSTITUTIONAL COURTS' ADJUDICATION

A third claim that I would like to make is that legal comparison through national Constitutional or Supreme Courts eventually leads to a convergence in human rights interpretation.

As regards the Austrian situation, not least indebted to the membership to the Council of Europe (and being party to the ECHR) and the EU, the Constitutional Court has gradually opened up to a more comparative approach. Although the court is not very much disposed to cite foreign national law or foreign case law, looking across the borders especially towards Germany and Switzerland (both countries being parties to the ECHR and Germany being a member of the EU as well) has – to a certain extent – ever since inspired the Constitutional Court in its human rights adjudication.[34]

The case law of the German *Bundesverfassungsgericht* has for example proved to be an important source of inspiration for the Austrian Constitutional Court when – basically in accordance with the German case law – the Constitutional Court qualified the request for a preliminary ruling to the ECJ as being within the scope of the right to a lawful judge under domestic law.[35]

Another, more recent judgment dealt with the freedom of expression pursuant to Article 10 ECHR and a criminal conviction for defamation of state symbols.[36] Again, the Constitutional Court referred to German case law in order to interpret the scope of the human rights provision and it eventually shared the findings of the *Bundesverfassungsgericht*[37] in that regard.

Under the umbrella of the European human rights regime as set out by the ECHR and EU law, we can observe such phenomena of legal comparison between Constitutional Courts throughout Europe – the aim of the comparison being a further integration in human rights law with strong tendencies towards convergence in the interpretation of human rights.

V. PLURALISM AND CONVERGENCE

Let me conclude these short remarks on the interpretation of human rights law in Europe with the following observations: In the operation of the European human rights regime through the different courts involved, the pluralist structure does more and more lead to convergence rather than friction, generally tending towards an approximation of standards.[38] The different judicial actors both on a national and international level primarily are keen to achieve a cooperative relationship and have reached a state of mutual respect, endorsing each other in their human rights adjudication.

[32] Judgment of 10 February 2009 *Sergey Zolotukhin v Russia*.

[33] VfSlg 18.833/2009. See the English summary of the judgment by *Michael Kalteis* in ICL-Journal 2/2010, 227.

[34] On comparative constitutional reasoning in the Austrian Constitutional Court's adjudication see *Anna Gamper*, On the Justiciability and Persuasiveness of Constitutional Comparison in Constitutional Adjudication, ICL-Journal 3/2009, 150; cf. also *Claudia Fuchs*, Verfassungsvergleichung durch den Verfassungsgerichtshof, JRP 2010, 176.

[35] VfSlg 14.390/1995.

[36] VfSlg 18.893/2009..

[37] BVerfG 15.9.2008, 1 BvR 1565/05.

[38] *Nico Krisch*, The Open Architecture of European Human Rights Law, The Modern Law Review 2008, 183 (209)

Further instruments particularly on the EU level are aimed at strengthening European integration in this field even more, by reducing separating, pluralist elements in the European human rights order. One of these mechanisms to foster integration being for example the principle to interpret the provisions of the EU Charter of Fundamental Rights in a way that does not go beyond the level of protection as guaranteed by corresponding rights guaranteed by the ECHR.[39] Another door that is more and more likely to open is the Union's accession to the ECHR as envisaged in the Lisbon Treaty which would – basically speaking – subject EU law to ECHR (and ECtHR) control.[40]

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[39] See Article 52 para. 3 Charter of Fundamental Rights: "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*."

[40] See Article 6(2) TEU: "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.*" At present, however, the EU is not a contracting party to the ECHR, and the Convention is therefore not binding on the EU. EU law may only be subject to ECtHR control by means of the control exercised over the Member States. See *Pernice/Kanitz*, Fundamental Rights and Multilevel Constitutionalism in Europe, WHI-Paper 7/04. On the implications for the ECtHR's review see *Tobias Lock*, EU accession to the ECHR: implications for the judicial review in Strasbourg, E.L. Rev. 2010, 35 (6) 777.