

Fundamental Rights in Europe

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Importance of fundamental rights in Europe

- "The very essence of the Convention is respect for human dignity and human freedom." (ECtHR)
- *Mutatis mutandis*, this applies to most of the fundamental rights recognized in Europe
- Fundamental rights represent **one of the most precious parts of the European legal heritage**: because they encapsulate the **core of the European values**, at the heart of which there is respect for **human dignity** → they should be **preserved** at all costs.
- Challenge:
 - **Multiple sources** of fundamental rights
 - Risk of **contradiction**, undermining their **authority**
 - Need for **coordination** → **holistic approach** required

Holistic approach

- Considering the **multilevel nature** of the protection of fundamental rights today in Europe
- Adopting the **grassroots perspective**, i.e. perspective of those who must handle this multilevel nature on the ground: judges, prosecutors, lawyers, citizens
- Asking about the **methodology** to adopt, i.e. how they should handle this reality

Outline

- A. The substantive interaction of fundamental rights in Europe
- B. The procedural interaction of fundamental rights in Europe
- C. Case-studies
- D. Best practices

A. The substantive interaction of fundamental rights in Europe

Starting point:

- three main legal systems **co-existing** and **overlapping**
 - National law
 - EU law
 - European Convention on Human Rights
- all generating fundamental rights
- applicable at domestic level, by domestic judges

→ How should **national judges and lawyers** go about this **multi-level reality**?

A. The substantive interaction: the existing legal architecture

The current **legal architecture** of fundamental rights sources in Europe is determined by **4 structuring principles**:

1. **Prevalence** of the Convention over national law (Art. 1 Convention)
2. **Primacy** of EU law over national law (*Costa v. ENEL*, 6/64)
3. **No legal hierarchy** between **EU law** and the **Convention**
4. EU law must be applied by national judges in **compliance with the Convention** (*Bivolaru and Moldovan v. France*, 40324/16 and 12623/17, § 103), because:
 - a) The Convention predates EU law
 - b) No EU Member State has left the Convention system since

→ challenge: **conflict-prevention** between the Convention and EU law

A. The substantive interaction: conflict-prevention

Why conflict-prevention?

Because case-law conflicts between the Convention and EU law:

1. Create **legal uncertainty**
2. Represent a **risk for national judges** (in case the EU level is lower → violation in Strasbourg)
→ Under the Convention, EU law must be applied by Member States in compliance with the Convention (see above)
3. Undermine the **authority of European fundamental rights** altogether

Main conflict-prevention instrument: Art. 52(3) EU-Charter

A. The substantive interaction: Article 52(3) EU-Charter

Art. 52(3) EU-Charter:

„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**.“

= double rule:

1. Wenn applying the **same rights** as the Convention, EU law must **respect the minimum Convention level**
2. EU law can **raise** the Convention protection level

A. The substantive interaction: Article 52(3) EU-Charter (II)

Effect:

- Respects the **benchmark function** of the Convention
 - by making the Convention protection level **mandatory** under EU law
 - **benchmark function** of the Convention under **national law** transposed to **EU law**
 - Respects **EU law autonomy**:
 - allowed to **raise** the Convention protection level
 - prevented from **lowering** that level (= **self-limitation** by EU law)
- **Adequate** conflict-prevention system: **core principles** of the Convention and EU-law **respected** and made **compatible** with each other

A. The substantive interaction: the reality on the ground

References to the Convention as a **binding minimum standard** (“**benchmark**”) occur only in a minority of cases.

Example:

“In accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 ECHR, the **meaning and scope of those rights are the same** as those laid down by that Article 3 ..., which does not, however, prevent EU law from providing **more extensive protection** to the said rights. When interpreting Article 4 of the Charter, account must therefore be taken of Article 3 ECHR, **as interpreted by the European Court of Human Rights**, as the **minimum threshold of protection**.” (*X and Others v. Staatssecretaris van Justitie en Veiligheid*, C-125/22, para. 60, on subsidiary protection).

Other examples: C-694/20 (criminal procedure), C-336/19 (freedom of religion)

A. The substantive interaction: the reality on the ground (II)

More common: reference to the Convention as a mere **source of inspiration**, e.g. for the **definition** of terms, as an aid to **interpretation** or to fill **gaps** in Union law (“**toolbox**”)

Examples:

- C-280/21 (notion of political opinion)
- C-569/20 (waiver of the right to a new trial following conviction *in absentia*)
- C-69/21 (expulsion of very ill persons)

A. The substantive interaction: the reality on the ground (III)

Result:

- The Convention as a **binding standard** under EU law has *de facto* become **optional**.
- → **Lack of harmony** between the Convention and EU law in some areas
- **EU accession to the Convention** (Art. 6(2) TEU) would lift this optionality and make **systematic** compliance with the Convention **mandatory** – Opinion 1/25 pending

A. The substantive interaction: the reality on the ground – Areas of convergence between the Convention and EU law

Examples:

- Procedural rights in criminal proceedings
- Judicial independence and the rule of law
- Freedom of religion (ritual slaughter)
- The right to be forgotten
- Subsidiary protection
- Migration (pushbacks and treatment in transit zones)

A. The substantive interaction: the reality on the ground – Areas of divergence between the Convention and EU law

- European Arrest Warrant (C-158/21, C-261/22)
- Non bis in idem (C-365/21)
- Dublin Regulation (C-392/22)
- Religious symbols in the workplace (C-148/22)
- International child abductions (C-87/22)
- Detention review procedures (C-15/24 PPU)
- Detention of asylum seekers (ECtHR, 71008/16)

Explanations and other examples: “Trends 2021-26” (at <https://johan-callewaert.eu/recent-relevant-case-law>)

B. The procedural interaction of fundamental rights in Europe

Powerpoint: Fundamental Rights and their Judges

C. Case-studies

1. Executief van de Moslims van België and Others v. Belgium (16760/22 and 10 Others, 13.02.2024)
2. H.T. v. Germany and Greece (13337/19, 15.10.2024)

C. Case-studies – Executief van de Moslims van België

Applications by **religious organisations** before the **Belgian Constitutional Court** challenging the compatibility with **freedom of religion** of regional decrees **banning the slaughter of animals without prior reversible stunning**

Referral by the Constitutional Court to the CJEU

Preliminary ruling by the CJEU (*Centraal Israëlitisch Consistorie van België et autres*, C-336/19):
compatibility of the impugned decrees with **Regulation 1099/2009** on the protection of animals at the time of killing, read in the light of **Article 13 TFEU** (animal welfare) and **Article 10(1) of the EU-Charter** (freedom of religion).

Extensive **reliance** by the CJEU on the ECtHR case-law on freedom of religion, explicitly considered as **minimum standard** by virtue of Art.52(3) of the EU-Charter

C. Case-studies – Executief van de Moslims van België (II)

Application to the ECtHR challenging the same decrees under **Articles 9** (freedom of religion) and **14** of the Convention (discrimination)

Judgment by the ECtHR (*Executief van de Moslims van België et autres c. Belgique*, 16760/22): **no violation** of these provisions

*« The Court cannot but note that both the **CJEU** and the **Constitutional Court** have, in the context of their respective reviews, taken detailed account of the requirements of Article 9 of the Convention, as interpreted by the Court. This dual review is in keeping with the spirit of **subsidiarity** which permeates the Convention and the importance of which was reiterated by Protocol No 15, which added an explicit reference to that principle to the Preamble to the Convention. The Court could not therefore disregard these preliminary examinations in the context of its own review under Article 19 of the Convention. »*
(§ 115, non-official translation)

C. Case-studies – Executief van de Moslims van België (III)

Lessons to be drawn from this case:

1. A **single piece of legislation** can be reviewed at **three different levels**: national, EU and Convention
2. It therefore makes much sense for the **case-law of the ECtHR** to be taken on board **from the start** of the journey of a case through the judicial instances.
3. This is because the **final judicial determination** of a case involving **fundamental rights** takes place in Strasbourg, before the **ECtHR**, applying the **Convention only**, as minimum protection level (Art. 53 of the Convention).

C. Case-studies – H.T. v. Germany and Greece

Facts: **denial of entry** and **transfer** of Syrian **asylum-seeker** from Germany to Greece under **Dublin III Regulation**

Applicant's complaint against Germany: violation of Art. 3 (prohibition of ill-treatment) on account of his **immediate removal** to Greece

Strasbourg approach:

“In all cases of removal of an asylum-seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, **regardless of whether the receiving third country is an EU member State or not or whether it is a State Party to the Convention or not**, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an **adequate asylum procedure**, protecting him or her against **refoulement** ... This examination must precede the removal to the third country ... If it is established that the **existing guarantees** in this regard are insufficient, Article 3 implies a duty that the asylum-seekers should not be removed to the third country concerned.” (§ 138)

C. Case-studies – H.T. v. Germany and Greece (II)

Three possible alternative **guarantees** against **deficient asylum procedure** in Greece required:

- **Individual assessment** by the removing State of a **risk for the applicant** to be denied access to an **adequate asylum procedure** in Greece protecting against **refoulement**, or
- A **sufficient basis for a general presumption** that the applicant would have access to such a procedure in Greece, or
- **Individual assurance** by Greece

Contrast: Art. 3(2) Dublin III Regulation: **exception** from the **obligation to transfer** an asylum-seeker to the **country of first entry or application** ONLY if “there are substantial grounds for believing that there are **systemic flaws** in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a **risk of inhuman or degrading treatment** within the meaning of Article 4 of the Charter”.

→ = lower protection standard

C. Case-studies – H.T. v. Germany and Greece (III)

Basis for the Dublin approach:

The principle of **mutual trust** which “**requires**, particularly with regard to the area of freedom, security and justice, each of [the Member States], save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.” (Opinion 2/13, 18.12.2014, para. 191)

Outcome in Strasbourg:

- **Denial of entry + automatic transfer** to Greece
- No basis for a **general presumption** confirming access to an **adequate asylum procedure** in Greece
- → **violation** of Art. 3 of the Convention (procedural limb)

D. Best Practices for Judges and Prosecutors

Goal: not **uniformity** but **cross-system compatibility** of the case-law

Method: **holistic approach**

Two possible scenarios:

A) There is a **preliminary ruling** by the CJEU with an **explicit statement** that the **Convention minimum standard** has been taken into account (art. 52(3) Charter)

B) No preliminary ruling

D. Best Practices for Judges and Prosecutors (II)

A) There is an **explicit statement** by the CJEU that it has taken account of the **Convention minimum standard** (art. 52(3) Charter) → implementation of the preliminary ruling does not call for reservations

B) No such statement → 2 steps:

1. Starting point: **Convention minimum protection level**

- The **mandatory minimum** (also under Union law: Art. 52(3) EU-Charter)
- The **only test** applicable in Strasbourg → avoid a violation!
- Which however **can be raised** by the Member States

2. **Raise** it to the level required by Union law if it is **higher** than or **similar** to that of the Convention, but not **lower** it (risk of violation in Strasbourg)!

- Without prejudice to the application of Art. 267 TFEU as required

Thank you!

More information on the interplay between the
Convention and EU law at:

www.johan-callewaert.eu