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Presentation note on the workshop organised by the Court of cassation "The protection of fundamental rights: the challenges of the articulation of national law and European laws"

INTRODUCTORY ELEMENTS

This note aims to introduce the subject of the workshop dealing with the protection of fundamental rights and more particularly with the challenges of the articulation of national law and European laws in this field, while highlighting some specific issues that might be addressed during the workshop.

A theme at the intersection of international law and domestic law, the articulation of national and international standards with regard to the protection of fundamental rights raises complex questions, which are renewed by the internationalization of law. Indeed, if until the middle of the XXth century, the international treaties aimed primarily at regulating the relations between States, the last decades saw the emergence and multiplication of international standards addressed directly to the individuals, resulting in their increasing invocation in disputes brought before national courts and their application, now frequent, by the domestic judge. This is particularly true for instruments relating to the protection of fundamental rights and freedoms.

Traditionally committed to the defence of the corresponding values at the international level, European States have undertaken to build a "regional" legal system, composed of an integrated legal order and a conventional system both including a supranational jurisdictional level.

In the aftermath of the Second World War, the construction of a Europe of human rights began with the establishment, on 5 May 1949, of the Council of Europe, followed by the adoption, on 4 November 1950, of the Convention for the Protection of Human Rights and Fundamental Freedoms, and of the establishment, on 21 January 1959, of the European Court of Human Rights (ECHR). At the same time, a movement to constitutionalize fundamental rights and freedoms has developed within the States.

Historically centered on economic and social matters, the construction of the European Union has nonetheless rested, from the outset, on the idea of peace between the Member States, to which the promotion and the protection of the rule of law contribute as its main principles and values. As the Court of Justice of the European Union (CJEU) has stated in its Nold judgment of 14 May 1974: "Fundamental rights form an integral part of the general principles of law, the observance of which it [the European Court of Justice] ensures".

Until 2000 however, no European legal instrument was specifically dedicated to fundamental rights and freedoms. A provision introduced by the Treaty on the European Union, known as the Maastricht Treaty (7 February 1992), now appearing in Article 6-3, recognises that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

A further step in the progressive constitutionalisation of fundamental rights within the legal order of the European Union has been taken with the joint proclamation by the Council, the European Parliament and the Commission of the Charter of Fundamental Rights of the European Union, at the European Council in Nice, on 7-10 December 2000. This Charter has the same legal value as treaties and is therefore legally binding. Annexed to the Lisbon Treaty (13 December 2007) which came into force on 1 December 2009, this Charter brings together in a single text all the individual, civic, political, economic and social rights recognised for the benefit of the citizens of the Union.

When it was adopted, many questions arose as to its articulation with other instruments for the protection of fundamental rights, both internal and international, in particular with the Convention for the Protection of Human Rights and Fundamental Freedoms, to which all the Member States of the Union are party. To this end, several articulation clauses have been inserted into the text of the Charter:

- a clause of equivalence of rights, by virtue of which, "in so far as this Charter contains rights corresponding 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." (article 52, §3);

- a constitutional harmony clause, which states that, "in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." (article 52, §4);

- a minimum standard clause, under the terms of which "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions" (article 53).

Twenty years after the proclamation of the Charter and ten years after it was conferred a binding legal value, a large part of the questions mentioned above have now been dispelled and by the result of the interpretations adopted by the Court of Justice of the European Union, this text contributed very substantially to the emergence of an autonomous protection of fundamental rights by the European Union law.

It is nonetheless true that the articulation between national law and European laws regarding the protection of fundamental rights still raises questions.

To justify the incompatibility of the European Union's accession agreement to the ECHR with several provisions of the Treaty on EU and the Protocol No 8, in its opinion 2/13 of 18 December 2014, the CJEU stated in particular that "by failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure". This point is among those to which the working group on the accession of the European Union to the European Convention - whose work has resumed since the beginning of 2020 - will have to answer.

The European and national "dialogue of the courts" constitutes a means for judges to ensure the link between national law and European laws. The mechanism for preliminary rulings, provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU) and requests for opinions based on Protocol No 16 to the Convention for the Protection of Human Rights and fundamental freedoms, which came into effect on 1 August 2018, are its main tools.

This dialogue does not only take a procedural form. The willingness to ensure a harmonious link between rights has indeed led to the development of institutional exchanges, which are by nature more open and informal. Thus, in particular, the CJEU and the ECHR have, each as far as it is concerned, created a network of superior courts, which links them to their respective members - the Superior Courts Network and the European Judicial Network. The creation of the Network of Presidents of the Supreme Judicial Courts of the Member States of the European Union stems from the same will.

Taken as a whole, these elements help both to structure and promote relations between national and European systems in the implementation of the protection of fundamental rights and freedoms. They thus participate in the affirmation of a European rule of law of which the citizens of the Member States are the primary beneficiaries.

OBJECTIVE, SCOPE AND CHALLENGES OF THE DEBATES

Without being exhaustive, we will discuss here the main legal issues and the essential challenges of the workshop. The proposed provisional findings are naturally intended to be supplemented and, if necessary, adjusted, using the information, illustrations, comments and analyses that are invited to provide workshop participants.

The objective assigned to the workshop is, by promoting dialogue and exchange of experiences, to identify and explore the issues attached to the articulation of national and European rights regarding the protection of fundamental rights.

Within the European system for the protection of fundamental rights, national judges hold a place that is as central as it is essential. It is up to them, on the one hand, to ensure effective respect for these rights guaranteed in national constitutions, and on the other hand, to exercise their office as ordinary judges under the European Union law and the Convention for the Protection of Human Rights and Fundamental Freedoms in application of the principle of subsidiarity.

The normative pluralism of fundamental rights in Europe helps to strengthen the protection they provide.

However, the superposition of different levels of protection contributes to the complexity of the law and carries with it the risk of its fragmentation. The recognition of the same fundamental right can, in fact, be based on separate legal texts, which do not fall under the same legal order, and the interpretation of which can belong to different jurisdictions: ECHR, CJEU, national constitutional courts. The entanglement of standards can thus result in placing the national judicial judge in a complex situation, in which he/she is required to respect at the same time the ECHR, the Charter of Fundamental Rights and the national Constitution.

It may happen that the hierarchy of standards enshrined in European law and that established by national law differ. Thus, the European Union law asserts its primacy over national standards, including those of constitutional rank, while in the internal order, constitutional rules are placed at the top of the hierarchy of standards, except when a constitutional provision itself establishes the primacy of European law.

It is also recognised that differences may exist between legal orders as to the intensity of protection of guaranteed fundamental rights[7]. This solution was not without arousing in certain national constitutional courts the fear of a weakening of the degree of protection of fundamental rights.

In reaction, many of them have developed a so-called constitutional identity check, by which they allow themselves to exclude the application of provisions of the European Union law when they infringe upon principles and values constituting the constitutional identity of the nation concerned. Such an approach may lead to questioning the very principle of the rule of law of the European Union.

Finally, when it appears that a provision of national law is contrary to European law, the question arises for the national court, in most often complex terms, of the application in time, immediate or deferred, of the consequences of the finding of the contradiction thus made. Important issues are attached to this question in view of, as the case may be, the requirements of legal certainty and public order. Thus, several national supreme courts have referred questions to the CJEU for a preliminary ruling in order to assess the margin of freedom available to them to adjust the application in time of the provisions of the European Union law tending to exclude, by principle, the undifferentiated and generalized storage of connection data.

The case law relating to the European arrest warrant provides an illustration of the dialogue that can be established between European courts and national courts to promote a harmonious articulation of legal systems for the benefit of an enhanced protection of fundamental rights. As

[7] CJEU, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013.

the first instrument for the construction of a European Criminal Justice Area, the European arrest warrant is based on the principle of mutual trust, according to which judicial decisions adopted in one Member State must be recognised and enforced in all the other Member States, notwithstanding the differences between national penal systems. The Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States provides for limited grounds for refusal of execution. None of these grounds, however, cover the hypothesis of a violation or of a risk of violation of fundamental rights in the event of surrender to the issuing State. When questioned for a preliminary ruling on the possibility of handing over a suspect to a State in which he would risk inhuman and degrading treatment, the CJEU admitted that, on the basis of objective, reliable and precise information concerning the conditions of detention in the issuing Member State, the executing judicial authority may refuse the execution of the warrant, or even terminate it[8]. Bending its previous case-law[9], the Court of Justice thus places the national judge at the heart of the reconciliation of the primacy of Union law and the protection of fundamental rights as provided in particular in the Charter of Fundamental Rights.

Another example of the merits of the dialogue of the courts can be found in the case law relating to the prohibition of double proceedings for the same fact. In the European order, the prohibition finds its basis in the *non bis in idem* principle provided for both in Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and in Article 50 of the Charter of Fundamental Rights of the European Union. In some States of the Union, the prohibition also derives from a principle of constitutional value, whether it is a question of the principle *non bis in idem* itself or of another principle producing fairly similar effects. [Thus, in France, double proceedings are not, by themselves, prohibited but they must not disregard the principle of proportionality, which is deduced from the constitutional principle of necessity of offenses and penalties, set out in Article 8 of the Declaration of the Rights of Man and of the Citizen].

The case laws of the ECHR[10] and the CJEU[11] now converge to allow, under certain conditions, a combination of criminal and administrative sanctions. While the interpretations of the two European courts in this area lead to consistent assessments of compliance with the *non bis in idem* principle, they achieve this with separate reasonings which the national courts have to articulate.

While the procedures for preliminary rulings and requests for an opinion on the basis of Protocol No. 16 promote dialogue between national courts and European courts, no mechanism organises or structures a "horizontal" dialogue between the two European courts. This question is of particular importance in the perspective opened up by the European Union's plan to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms, mentioned above.

Procedure for a preliminary ruling, request for an opinion, technique of confirming interpretation, presumption of equivalent protection, these are the main tools which allow the

[8] CJEU, cases *Pál Aranyosi* (C-404/15) and *Robert Căldăraru* (C-659/15 PPU), 15 April 2016.
[9] Please refer to footnote 1
[10] ECHR, 4 March 2014, n°18640/10, *Grande Stevens and others v. Italy* ; ECHR, case *A and B v. Norway*, n°24130/11 and 29758/11
[11] CJEU, *Åklagaren v. Hans Åkerberg Fransson* (C-617/10), 26 Febraury 2013 ; CJEU *Menci* C 524/15, 20 March 2018

judge, national or European, to coordinate the standards in terms of fundamental rights, while guaranteeing an interpretation of internal rules in line with European commitments.

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These few elements highlight the interweaving of national rights and European standards in the field of the protection of fundamental rights, which the workshop will further explore.