Jean Monnet Centre of Excellence – Tensions at the Fringes of the EU – regaining the Union's purpose

Human Rights in a Changing Europe – Colliding Spheres of Justice?

Conference report

Co-funded by the Erasmus+ Programme of the European Union

This international conference was introduced by TREUP's principal investigator, **Prof Dagmar Schiek** (QUB). In presenting the main theme of the conference - that is, the question about a potential for collision between the two human rights regimes in Europe - she highlighted three points. First, that despite the international character of the ECHR, its level of integration into the national legal orders of European States depends on national constitutions. Second, that despite the progressive expansion of social rights in the EU Treaties, the EU is not a human rights' regime. Third, that Brexit ("the elephant in the room") may not pose a serious threat to human rights, precisely because of the weak character of the EU in relation to human rights protection. Prof. Schiek welcomed all participants and provided a brief outline of the conference programme consisting of two panel sessions, on "Equality and Social Justice" and on "Human Rights vs Criminal Justice". Each of these key themes was presented by a keynote speaker.

Dr Evelyn Collins (NI Equality Commission) gave the conference keynote presentation for the first panel, chaired by **Prof Brice Dickson** (QUB). Her presentation focused on the roles of the EU and the Council of Europe (CoE) in the promotion of equality and social justice and the protection of human rights in Europe, the relationship between the CJEU and the ECtHR in these matters, and the risks for equality and social rights arising in the context of Brexit.

With respect to the first point, she referred to the main differences between the EU and the CoE in relation to their origins and mission. On the one hand, she reminded that while the origins of the EU relate to economic goals, the values of respect for human rights, non- discrimination and equality are fundamental principles and that the CJEU plays a crucial role in the enforcement of equality standards. This is the reason why Brexit is perceived for many as a loss of opportunity to expand on this set of rights, even though progress in EU equality law has been marred by difficulties often tied to a lack of consensus among Member States as well as tensions between the European Parliament and the Council. On the other hand, both the origins and purposes of the CoE are different from those of the EU, as this institution was established with the objective of avoiding the return to totalitarian regimes in Europe. Thus, its mission is based on the protection of human rights, democratic values and the rule of law. The ECHR – the flagship institution of the CoE- has made a significant contribution to these areas as well as being an effective monitoring system against racism and intolerance, besides promoting bodies for anti-Semitism and xenophobia.

In relation to the relationship between the EU and the CoE, she claimed that while there are areas of human rights not covered by the EU, there is now a stronger enforcement of the ECHR at the EU level. Yet, Dr. Collins raised a number of concerns. The first one is that, while there are referrals between the ECtHR and the CJEU, the Luxembourg Court may be losing its progressive drive as manifested by some of its

recent decisions. One question is whether there is a risk of cross-contamination between the Luxembourg and Strasbourg Courts. A second concern is that the accession agreement of the EU to the ECHR, required under the Treaty of Lisbon and creating a European space of human rights, has been stalled.

Finally, she discussed the risks for equality law arising from Brexit, arguing for the need to ensure that there is no regression in these matters and also the need for law enforcement. Noting that EU equality law has a good enforcement framework and that equality bodies play an important role here, she highlighted a number of challenges. These include the lack of guarantees of their independence as exemplified by cases in some Member States. In addition, equality bodies have faced resource limitations in the context of austerity, with important budget cuts. She also discussed the role of EQUINET, noting that though there are important successes (in this regard she mentioned that the EU Commission will propose a recommendation on standards for equality bodies, finalised next Wednesday) much work remains to be done. Another important step forward is that the CoE has just updated its GPR (General Policy Recommendation).

She concluded that although there is concern about ECHR belonging after Brexit, there are various routes to secure equality after the UK exits the EU. On this point, she emphasised the importance that the UK constructs synergies with the EU and, remarked there are also opportunities to draw on the CoE's convention system.

Dr Evelyn Collins' speech was followed by a Q&A session. Four questions were raised: 1) about equality issues and abortion in Northern Ireland; 2) about why are, in her view, the two judgements on the headscarf (Achbita and Bougnaoui) regressive; 3) about whether she viewed Brexit as an opportunity for the Council of Europe and 4) about the role of equality bodies vs the role of courts with respect to intersectionality. With regards to the first question, she said that CEDAW is currently looking at the implementation of abortion in the UK. In this context, a list of issues has been recently submitted. At the same time, NGOs are asking for a public consultation on the need for abortion law in NI. Turning to the second question (on headscarf judgements) she said that the Achbita judgement (CJEU C-157/15) was disappointing as the Court did find neither direct nor indirect discrimination in a headscarf ban, rather than leaving the decision of the latter to the national court. As for Bougnaoui's judgement (CJEU C-188/15), she explained that a customer's complaint about an employee wearing a veil led to the requirement that the employee removes her veil and ultimately to her dismissal. Therefore, this is again a case in which the Court did not show much nuance regarding the situation of Muslim women in Europe. In answering the third question (about the Brexit scenario) Dr Collins remarked that while in the UK anything to do with Europe tends to trigger a negative reaction, there is the hope that the Council of Europe - as one of the oldest human rights bodies- will be able to stand the test of time and draw the UK back into the European boat. Finally, regarding the fourth question,

about the role of equality bodies vs the Courts, she replied that these are quite distinct bodies, so it is hard to say.

Next, the panellists of the first session proceeded with their presentations. The first presentation was given by **Biljana Kotevska** (QUB) and entitled "Positive action in the case law of the European Court of Human Rights and the European Court of Justice". She began by defining the concept of positive action, followed by a description of the legal framework in relation to positive action in both the ECHR and the EU, including case law from both Courts, and finished with a discussion of key findings from her research. In the EU, positive action's most frequent field is economic and social rights, and particularly employment cases. In the CoE, positive action is not yet part of the material scope of the ECHR, insofar as its ambit is mainly on political rather than about economic and social rights. For this reason, the case law of the ECtHR is very little developed in relation to positive action. Both article 14 and protocol 12 enlarge the material scope for positive action but we are still not there, as Protocol 12 has been ratified by a few states. The ECtHR employs a four-part test (although this is not consistently applied): 1) Ambit of substantive provisions?; 2) Difference of treatment?; 3) Analogous treatment?; 4) Reasonable and objective justification for difference of treatment? In her conclusions, Kotevska put forward the argument that positive action should be required rather than allowed.

The second panellist was **Dr Amal Ali** (Lincoln University) with a presentation entitled "The challenges of Brexit: Highlighting intersectional invisibilities". After defining the concept of intersectionality and introducing the theoretical framework (based on feminist and black feminist theory) she provided a detailed overview of the EU's legal framework and on the basis of this, discussed the question of whether EU law is capable of addressing multiple and intersectional discrimination. Focusing specifically on the veil question as a specific case study, she provided an analysis of two judgements of the CJEU: Achbita (CJEU C-157/15) and Bougnaoui (CJEU C-188/15). She concluded that these were disappointing judgements as they leave employees very vulnerable. She referred to the situation in both France and Belgium, where Islamic clothing is being linked to Islamic fundamentalism and claimed that Muslim women are very affected by headscarf bans. She also emphasised that we have a responsibility to ensure that the erosion of rights does not take place and that the management of plurality is gendered. She finished on a positive note, stating that we should share experience and resources and engage in the promotion of rights together.

The third presentation of this panel was given by **Dr Massimo Fichera** (University of Helsinki). Entitled "The interpretation of constitutional identity in the EU and ECHR legal systems: convergence or divergence?" Dr Fichera's presentation versed on the social constitution of the EU, with a specific focus on the language and meaning of constitutional identity and how it relates to the social constitution. Constitutional identity, in his view, creates lines of division as the concept draws a line between inclusion and exclusion. Given the existence of multiple identities in the EU, the question is whether common constitutional traditions (which have been invoked in a number of CJEU cases) can facilitate and fully flesh out a social constitution. In addressing this question, he discussed a number of obstacles, one of them being an insufficient level of rights protection in the Charter of Fundamental Rights – a lack of protection which clearly transpired during the euro-crisis. The problem here, in his view, is that there are only a few articles in the Charter that constitute "social rights" per se, while social rights can only be found in the directives. On the other hand, the ECHR has recently extended political rights and freedoms into the social realm, markedly in labour law cases, but these positive developments are stymied by the margin of appreciation doctrine. Another obstacle that he cited is

the very ideological frame of social rights, the fact that they are indeterminate and conflictual, and also the fact that they are costly, hard to enforce and hard to bring to justice.

Given this conundrum, he proposes a communitarian constitutionalism that allocates resources at local levels, now that Brexit removes one of the main opponents to the advancement of social rights in Europe.

The second panel, chaired by **Prof. Gordon Anthony** (QUB), turned to the theme of human rights vs criminal justice. **Dr Daniel Sarmiento**, the keynote speaker for this panel, focused his presentation on the interconnection of the three legal systems (national, EU and CoE) in matters of judicial cooperation in criminal justice. He also discussed the impact of Brexit on the criminal justice system, stating that EU criminal law will remain relevant post-Brexit because cooperation in these matters will continue to be required, and perhaps intensified, with UK recognition of the ECJ in these areas. He also added that the UK will (hopefully) continue to recognise the ECHR as well.

With respect to the three interconnected spheres, each having their own legal system, he remarked that, since the Treaty of Amsterdam, there has never been seen such a degree of judicial cooperation in criminal matters among the three systems as we are seeing now and, that for this very reason, judicial cooperation in this area represents a good laboratory of how these three spheres interact. However, the way the Courts have been dealing with these matters is not so harmonious. On the one hand, the EU is not about rights but about the development of the internal market, where law is an accessory to facilitate the functioning of the market by freedom, security and justice (thus, while the typical instrument of market law is based on the principle of freedom of movement, non-economic people are just secondary characters in EU law). On the other hand, the case law of the Court in Strasbourg has been chiefly focused on procedural guarantees. Now, while mutual recognition is the principle that matters in judicial cooperation in criminal justice and while this has allowed the EU to impose duties on other states, in practice this principle has not been as workable as expected. The reason for this is that the Courts have not been operating as harmoniously as it might seem. There is a rich and interesting case law of CJEU in which the mutual recognition principle is being imposed on criminal justice matters. Yet, the area of judicial cooperation has limits given that the principle of mutual recognition is not as promising as it could be. In cases of breach of rights in issuing states, there is a need for review, which is carried out by the issuing judge. This raises the question of whether the standards of the rule of law can also be reviewed by CJEU. The violation of fundamental rights can be reviewed by judges, but the question is whether this can be applied to other violations. Therefore, judicial co-operation in matters of criminal justice does have limits. The three spheres are colliding because judicial action is not consistently rigorous in the protection of rights.

The second theme discussed by Dr Sarmiento was that of supranational criminal law. He began by noting that while there is an international criminal justice system there is not a supranational system of criminal law. The ECHR is a supranational instrument, but it does not include criminal legislation. On the other hand, the EU has clearly delineated powers and scope. It has the ability to issue rules about offences, and to enforce sanctions. It can enact directives harmonising criminal law in Member

States (e.g., the presumption of innocence directive, effective since March 2018) and also has a criminal prosecutor. In addition, there are many areas of EU policy with clear links with criminal law (e.g., anti-money laundering laws, tax evasion cooperation, banking union, rules of free movement). All these areas, Dr Sarmiento pointed, can produce criminal law. Furthermore, the presumption of innocence directive, which is aimed at harmonising criminal law in the EU, provides a route directly to CJEU on interpretation when there are procedural or substantive doubts about compliance. In sum, supranational law can be a source of conflict but also allows to come to a consensus.

Is the accession of the EU to the ECHR relevant for criminal justice? According to Dr Sarmiento, it could be argued that it is not relevant because the EU does not have criminal powers, as this lies with the Member States. Yet, it could also be argued that accession constitutes a priority since the EU has been imposing sanctions in relation to competition, banking and in the future, consumer protections. So, while it is the CJEU who reviews these sanctions, the question arises as to who reviews the CJEU. That is why, he contended, the accession is relevant, insofar as with the accession we will have not only colliding spheres of justice, but also spheres of cooperation.

Dr Sarmiento concluded his keynote speech by making the claim that criminal justice is not just another area of policy, since it touches on the main feature of national justice systems – the right to punish – and it is the people who hold this right. Therefore, the development of a supranational criminal law represents an acceptance that there are a supranational people who can instruct on punishment. Yet, if there is a supranational criminal justice system, does this mean that there is a supranational "demos"? And if not, are we nearly there? Do people want a supranational criminal justice system? Following this line of argument, he reminded that sovereignty is also a political concept, and because of this, the people should be offered the opportunity to consent to. In sum, this is the reason why to talk of a supranational criminal justice system can be perceived by some as a "provocation".

Dr Sarmiento's speech was followed by a Q&A session. Four questions were raised. The first one was a comment regarding recent developments about the Taricco case [add case number or year as below], whereby the Italian Court has said in last few days that this case does not apply to Italy on grounds of legality. The second question was a query about the areas of the CJEU that the UK may accede to post-Brexit. The third question raised was how, if UK doesn't agree on data sharing with EU, can the EU exert supranational sanctions on money laundering?

The first panellist of the second session was **Dr Araceli Turmo** (University of Nantes), who gave a presentation on "The *Ne Bis in Idem* Principle in European Union Law and the ECHR: Is a common European standard possible?". Dr Turmo opened her presentation with an introduction to the *Ne bis in idem* in European Law, pointing out that this was a relatively recent development and that from the 2000's there has been efforts both by the ECtHR and the CJEU at common convergence, with the ECtHR case Zolotukhin v Russia (2009) and the CJEU's Åkerberg Fransson ruling (2013). Yet, the key questions are: who is the same person? How is this described/ defined? Is the person the legal person or the physical person who is their legal representative? Does idem refer to the same fact or the same offence? And when do we have two separate proceedings? After the introduction, her presentation discussed three core points. The first point of discussion versed on the fundamental division between the two European Courts. She illustrated this with a comparison of two recent cases - ECtHR's A and B v Norway (2016) and CJEU's Menci, Garlsson, Di Puma (2018). The second point of discussion was the CJEU's insistence in the autonomy of EU standards, as illustrated by its refusal of the *ratio decidendi* in Åkerberg Fransson and its rejection of core criminal law. Dr Turmo finished her presentation with a discussion about the possibility of a compromise with Member States and the coexistence in European constitutional norms. On the possibility of a compromise, she pointed out that there is clearly stricter control in EU Law, which could signify either a "taking a stand" against insufficient ECtHR guidelines or else a choice for a higher standard. In sum, what the CJEU case law shows is a tendency to revert to its own furniture to provide a solution which gives flexibility and does not amplify the unclear elements of the ECtHR decision. Regarding the issue of a potential compromise, she raised doubts about whether reconciliation is desirable at all. In her own view, it is probably not, especially if this carries the implication that one the Courts must overrule themselves in order to go back to unanimity.

The second presentation of this panel was given by **Dr Maribel Gonzalez** (Pompeu Fabra University, Barcelona) and was entitled: "A European Standard of Human Rights protection in the AFSJ?" The position of the CJEU in the area of freedom, security and justice is precarious, because Member States have expressly established limitations to EU competences. This reluctance of the Member States has incentivised to a great extent the cautious approach of the CJEU when it comes to the interpretation of the scope of certain fundamental rights. However, the case-law of the CJEU is evolving, driven by two reasons. On the one hand, the adoption of secondary law with a more protective content enables the CJEU to protect fundamental rights more firmly (see MA or Ghezelbash). On the other hand, national courts, as well as the ECtHR (in Avotins) have questioned the pre-eminence of the effectiveness of EU law over fundamental rights, particularly when it comes to cases concerning the prohibition of degrading and inhuman treatment (ECtHR in MS v Greece and Belgium). This fact has led to a paradigmatic change in case-law both in the area of criminal law and asylum law (CJEU in Aranyosi and CK). Moreover, national courts strongly refer to the guarantees established by the case-law of the ECtHR in the fields of family and private life and the right to liberty. Besides, the assessment of the effective fulfilment of the adequate standards by the different Member States is also the subject of growing national jurisprudence, which relies on the standards of the ECHR. This competing case law is striving to carve out a European standard of human rights aligned with the needs of the AFSJ (ECtHR in Pirozzi v. Belgium).

This panel closed with a presentation by **Šejla Imamović (presenter)** and **Prof Monica Claes,** from Maastricht University, on "Competing for authority? Lessons from national courts' practices in

European human rights cases". The presentation was structured around four sections: The relationship between the EU and the ECHR; the role of national courts; national court's practices and lessons drawn from their study. Regarding the relationship between the two Courts, she discussed the question of whether they are competing for authority. She indicated that the CJEU is declining references to, and fails to engage, with the ECHR. Instead, it is mostly centred on the Charter. In this regard she also referred to Opinion 2/13, which has been seen as a flagrant motion of distrust. On the other hand, the ECtHR has confirmed its Bosphorus case law as exemplified in its judgment of the case of Avotiņš v. Latvia. In this case, the Strasbourg Court, well aware of the inadequacy of the Latvian proceedings and the obvious breach of procedural fairness, found the shortcomings not to have reached the threshold, ultimately producing an ambiguous judgment containing implicit messages. Regarding national courts practices, she highlighted that many national courts, when asked to decide hard cases, often look to the national constitution and to the ECHR for guidance on human rights issues first, as illustrated by three cases: 1) C.K. and Others; 2) BVerfG, a recent Judgment the German Constitutional Court of 19 December 2017, which found that the challenged decision of the German Higher Court, ordering the execution of a European Arrest Warrant in the application of the test provided in the case law of the CJEU, violated the complainant's right to a lawful judge; and 3) the Artur Celmer case of the Irish High Court, inquiring about the consequences of the threat to the rule of law and the independence of the judiciary in Poland. In this case, the analysis was once again based more on the ECHR and on European 'common standards' as laid down by the Venice Commission, than on the EU Charter or EU law.

The main lessons to be drawn from this analysis is, first, that the CJEU should pay due regard to the ECHR and national constitutional traditions, if it is not to alienate national courts. Second, that the insistence on the autonomy of the EU and its Court is misguided. Third, that national courts increasingly demonstrate their commitment to the ECHR and constitutional standards. And fourth, that partnering with Strasbourg and with constitutional courts would increase, rather than threaten, the CJEU's authority and legitimacy as a human rights Court.

The conference was closed by **Prof. Dagmar Schiek**. In her concluding presentation, she provided a summary of the main topics covered by the keynote speakers and panellists as well as the ensuing discussions in the open questions sessions (see summary slides). She thanked everyone by their contributions to a most fruitful discussion on the two main thematic panels.