The Future of the Protection of Fundamental Rights after Brexit

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Abstract

The Union fundamental rights can become a medium of a real – two direction – dialog between European and national judicial authorities. The judicial reasoning by the British courts, reflecting the long tradition of the British system of conversations between the courts, will be missing after Brexit.

To meet the legitimate aspirations of the Union citizens means to leave the strict application of the CFR by the CJEU that should have to be more open to a discourse with national courts, which might be as well positioned to assess conflicts of constitutional values even beyond the standard instrumentalities of preliminary ruling. A more courageous use of the CFR means for judicial authorities at both levels to take their commitments in this area more seriously. The British judiciaries had been responsive in this respect. Their leaving the Union means slowing down the process of assertion of the CFR as the authoritative document on human rights protection in Europe.

I. Introduction

A process of rapprochement of three autonomous, but functionally interrelated, levels of protection of fundamental rights – national constitutions, European Convention of Human Rights and Fundamental Freedoms (the ECHR) and, for the Member States of the European Union, the Charter of Fundamental Rights (the CFR) – is running in Europe, initiated by the free movement of EU citizens within the internal market and the shared space of security and justice. The Britain´s departure from this ´community of destiny´, where the United Kingdom holds in certain respects a reserved position, will entail more than a mere withdrawal from its rights and obligations.

The enforcement of Union law at national level, whether it is applied directly or through implementation acts of Member States, relies on the effectiveness of national sanctions and other coercive measures for keeping

under control the margin of appreciation or limits of exception conferred on national authorities by Union law. The judicial review of their acts by ordinary and constitutional courts refers – besides the principle of rule of law – to the principle of protection of fundamental rights. The direct normative reception of the CFR is taking place on an alternative basis, where the higher level of protection is replacing the lower ones (Article 53), not – as in cases without the Union law dimension – on a cumulative basis, where the national constitution is in a subsidiarity position towards the ECHR or other human rights treaties. 'A total convergence'[1] of all standards of protection has been made difficult due to warries of some constitutional courts about the extensive interpretation of the CFR by the Court of Justice of the European Union (the CJEU), which could allegedly override the identity-building core elements of their national constitutions. The British reservation followed by a Polish one against the CFR at the intergovernmental conference in Lisbon 2007 has evidenced this approach.[2]

A convergence-supporting potential of references to the CJEU as well as by national judicial authorities to general principles of law with binding force, stemming both from the ECHR and from common constitutional traditions of the Member States, is evident and functionally complementing the CFR. This process results in merger of concepts originating in different legal orders by mutual communication of their interpreters, forming an autonomous frame of protection, which is not identical with the original sources. The real permeability of shared national and supranational values, which are nominally listed in Article 2 TEU, can be verified in the judicial dialog.[3]

Distinct positions towards direct application of the CFR appeared in the case-law of the constitutional courts in some Central and East European countries. The Czech Constitutional Court (the Court) admitted earlier an indirect influence of the CFR through its 'irradiation' in the national catalogue.[4] By this reserved position to the CFR the Court displayed an asym-

1 R Arnold, ´Introduction´ in R Arnold (ed), *The Convergence of Fundamental Rights Protection in Europe* (Springer, 2016), 2.

2 Protocol no. 30 on the application of the Charter of Fundamental Rights of the European Union.

3 M Wendel, Permeabilität im europäischen Verfassungsrecht. Verfassungsrechtliche Integrationsnormen auf Staats – und Unionsebene im Vergleich (Mohr Siebeck, 2011), Teil 3 (Einheitsbildende/Vielfaltswahrende Formen primärrechtlicher Permeabilität).

4 Judgment of the Czech Constitutional Court in the case *Sugar quotas III*, Pl. ÚS 3/14 (N 50/40 SbNU 443 = no. 154/2006 Coll.).

metric approach, since – after the adoption of the monistic concept in the Constitution[5]– international treaties on human rights and fundamental freedoms have been expressly declared as having the same legal status as the norms of the constitutional order[6], forming a reference point for the constitutional review of domestic law,[7] whereas – after the accession of the Czech Republic to the European Union – the same status has not been expressly granted to the CFR (yet). However, an equivalent standing is recognized to the CFR de facto by the case law of the Court on constitutional complaints.

The CFR has been referred to with certain reservation in Slovakia, what was a matter of a sharp criticism. The absence of reasoning with reference to the CFR at the level of ordinary courts 'deprives the Constitutional Court of the opportunity to establish the basics of its doctrine in relation to the Charter'.[8] Otherwise it 'infringes the principle of the prohibition of *denegatio iustitiae*', its approach to the Charter was found to be 'unreasonably dismissive, particularly in comparison with its attitude to other international documents on human rights and fundamental freedoms'.[9] A deeper analysis of the relevant case law to date leads to the conclusion that this gap has been progressively narrowed.

After 2015 a disobedience – 'a clear risk of a serious breach of the values referred to in Article 2 TEU'– in Poland has been determined by the European Commission.[10] It could result in violation of principles of rule of law as well as protection of fundamental rights.[11]

If Brexit would mean also cutting the communication between the British courts and the jurisprudence of the CJEU, it could amount to narrowing the plurality of national experiences of protection, impeding the Europe-wide convergence in the field of fundamental rights. A couple of

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5 International treaties binding the Czech Republic form a part of the legal order with priority over status in case of a conflict, Article 10 Const. as amended by Act no. 395/2001 Coll.

6 It is determined by Article 112 Const.

7 The case *Bancrupcy Trustee*,Pl. ÚS 36/01 (N 80/26 SbNU 317; no. 403/2002 Coll.).

8 J Mazák and M Jánošíková (eds), The Charter of Fundamental Rights of the European Union in proceedings before courts of the Slovak Republic (Košice, 2016), 179.

9 *Ibid*, 180.

10 See meanwhile the judgment of the ECJ, Case 619/18, *Commission v. Republic of Poland*, ECLI:EU:C:2019:531.

11 Opening remarks of the First Vice-President Frans Timmermans, *Readout of the European Commission discussion on the rule of law in Poland*, Brussels, 20 December 2017.

law students from the Central and Eastern Europe, forming the new generation of judges and practicing lawyers now, made use after 1990 of the unique opportunity to study at universities in the United Kingdom under the EU programs Socrates/Erasmus and learned the fundamental rights-based approach to law there. The treaty arrangement of the leaving of the United Kingdom the European Union should have to take the need for preservation of the link between judges at ´both sides´ into account. The access of UK´s persons to the EU internal market as well as the access of Member States´ persons to the UK´s market should have to remain supported by the shared constitutional values and fundamental rights, the execution of which, indispensable for the effective functioning of the whole system of the post-Brexit cooperation between the EU and the UK, is to be guaranteed by judicial authorities at the both sides. The mutual communication and exchange of opinions between them, enjoying also future developments of the jurisprudential standards of protection, needs an anticipating open-ended treaty frame without any isolated self-assertion in this field.

II. The position of the EU charter in United Kingdom

There has been a dispute about the application of the CFR in the United Kingdom. The Protocol no. 30 to the Treaty of Lisbon states that the ability of the Union or British courts will not be extended to 'find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles' of the CFR. As the CFR reaffirms the general principles of Union law having been developed by jurisprudence, they have binding effect on British courts, when they interpret the CFR and form part of criteria of review of British laws on their compliance with them [Article 52(4) CFR]. For instance, under Article 4 CFR the British courts 'may not transfer an asylum seeker to the "Member State responsible" …where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment' [the judgment of the CJEU in the joint cases *N. S.* (C-411/10) and *M. E.* (C-493/10)]. Whether Article 1(2) of the Protocol no. 30 exempts the United Kingdom from applying social rights as justiciable under Title IV has not been cleared yet.

The CFR has been given normative effect within the United Kingdom by Section 2 of the 'European Communities Act 1972'. This basic concept

differs from continental systems of Union law reception and is in contrast with the principle of its direct validity and enforceability as developed by the CJEU case law and has not been modified by 'European Union Acts 2008 and 2011'.

The United Kingdom´s 'Human Rights Act 1998' has established a system, which combines judicial and political intervention, guaranteeing compliance of national laws with the ECHR. The declaration of incompatibility by higher courts challenges the legislative bodies to make laws compatible. The most fundamental principle of the British constitutional order – sovereignty of the Parliament – seems to remain only formally respected by this system. It is the Government (the Minister responsible for the legislation in question), which takes a measure reflecting the respective decision of the European Court of Human Rights (the ECtHR), whereas the Parliament is expected to give its consent, in urgent cases ex post.

According to the Conservatives´ proposals for changing Britain´s human rights laws of May 2015, both the recent practice of the ECtHR, using the ECHR under a 'living instrument doctrine' leading to a 'mission creep', and the domestic legislation passed in this respect and overruling decisions of the democratically elected Parliament, 'damaged the credibility of human rights at home'. They undermined the role of British courts, that ´have to take into account´ ECtHR rulings, when they are interpreting ECHR´s rights, as well as the sovereignty of the Parliament, when the 'Human Rights Act 1998'goes far beyond the United Kingdom´s obligations under the ECHR.

The Conservatives, therefore, earlier proposed fundamental changes by repealing (Labour´s) 'Human Rights Act 1998' and restoring common sense ('put Britain first') through a new 'Bill of Rights and Responsibilities', which should have to 'prevent British laws from being effectively rewritten through interpretation'. As even after Brexit the experience of the British judicial authorities in human rights protection would continue (at least for some time), their performance would have to be counted for by the Union and Member States´ judiciaries and political bodies, even when looking for a new arrangement of the Union´s accession to the ECHR.

However, the British Government has given priority to negotiating and concluding a post-Brexit treaty. The long anticipated British Bill has been further delayed because of the Brexit judgment of the Supreme Court *R (on the application of Miller and another) v Secretary of State for exiting the European Union* given on 24 January 2017 as well as by the outcome of parliamentary election in June 2017 and later, due to turbulences in decision making process of Brexit policy, left open for post-Brexit times.

III. The relevance of the CFR for the areas of EU policies

The intensity of application of the CFR relies on the area *of Union law* considered. Where a stronger Union interest exists (e.g. internal market, competition), the CFR is more likely to be a frame of references for constitutional review of national measures. When the application of the CFR could lower the effective enforcement of Union law (like in asylum or European Arrest Warrant matters), the uniform compliance with a minimum standard of protection by Member States is presumed and precedes over the potential breach of fundamental rights in a given case.[12] When, on the other hand, the objectives of European integration can be realized only by coordinating the exercise of Member States competencies (e.g. family law, social policy), the obligation of national authorities to refer to the CFR by taking it into consideration is limited solely for the specific purposes of interpreting a piece of Union law without an assessment of national law as such.[13] In all other cases the CFR will most likely not be applied. Substantive (higher level of protection) as well as procedural (supremacy) advantages for individuals could have been always favoring the Union rather than national fundamental rights.

The relevance of the CFR in areas reserved to Member States, where the Union has not been authorized to full harmonization, is constitutionally questionable as it might result in a latent extension of competences, even when the CJEU constructed – through an extensive interpretation of the scope of application of Union law – a remote link to it, sufficient enough to refer to the CFR.[14] However, the CJEU rather attempts to ensure that the CFR should not become a vehicle for broadening the impact of Union law on national law through further limitation of the field, in which national courts must apply the CFR directly. When assessing the scope of discretion in the execution of an asylum claim, the Member State is implementing Union law; however, to ensure the full effectiveness of the Dublin II Regulation, the CFR would be as relevant as in an 'exceptional' situation.[15] The CJEU is somehow reducing the impact of the CFR even when national courts are enforcing Union law. The CJEU renounced to a broad application of fundamental rights also to avoid an intervention in the sovereignty of the Member States, in particular, in cases of migration of

12 Judgment of the CJEU in the case no. C-399/11 *Melloni*.
13 Judgment of the CJEU in the case no. C-400/10 PPU *McB*.
14 Judgment of the CJEU in the case no. C-617/10 *Akerberg Fransson*.
15 Judgment of the CJEU in the case no. C-411/10 and C-483/10 *N. S. and others*.

third country nationals within the Union. However, the CJEU did not identify such an intervention in national sovereignty in pleas of Hungary and Republic of Poland Decision (EU) 2015/1601 on provisional measures in the area of international protection in an emergency situation characterized by a sudden inflow of nationals of third countries into certain Member States.[16]

The above-mentioned findings have been in the United Kingdom, the most exposed Member State to (im)migration with its social impacts, a stock of displeasure leading to Brexit.

IV. Recent developments

The integration in sensitive matters is imaginable, when mutual trust between the Member States in adequate fundamental rights protection across the Union is underlying the legal instruments of cooperation. National authorities should not be exposed to the need to scrutinize the 'adequacy' of fundamental rights compliance in cooperating States, otherwise the effectiveness of the pieces of Union law in question would be impaired. However, national constitutional courts could be unwilling to rely only on Union guarantees, as the German Federal Constitutional Court recently demonstrated in a ruling which claimed its jurisdiction on the review whether the principle of mutual trust does not violate the constitutional guarantees of fair trial as a part of national identity.[17]

The quick answer from Luxembourg was unusual – in contrast to its earlier decisions,[18] the CJEU adjudicated, that the full effect of Union law is not the only objective to be aimed at. It is rather the elimination of any inhuman treatment in the country the court of which has been asking the extradition. The obligation of mutual recognition of standards of protection of an individual in criminal proceedings under the framework decision on the European Arrest Warrant must be supported by an impartial information about non-existence of degrading treatment of prisoners, based on a direct communication between the respective national criminal

16 Judgment of the CJEU of 6 September 2017 in joint cases no. C-643/15 and C-647/15.

17 Judgment of the German Federal Constitutional Court 2 BvR in the case no. 2535, 14 concerning European Arrest Warrant (called *Solange III*, too).

18 Case *Melloni* (supra n 11).

courts. Otherwise the process of surrender can be – rather is to be – brought to an end.[19]

This indicates that the Union fundamental rights can become a medium of a real – two direction – dialog between European and national judicial authorities. The judicial reasoning by the British courts, reflecting the long tradition of the British system of conversations between the courts, will be missing after Brexit.

V. Conclusions

It is open to debate, whether the approach of the CJEU to the application of the CFR in the Member States is not arbitrarily restrained, weakening the protection and frustrating the expectations of Union citizens. As an effective Union procedural mechanism for the enforcement of fundamental rights obligations in the Member States (regardless of the infringement procedure under Article 258 TFEU and the 'nuclear bomb' of Article 7 TEU) has been still under construction, the space for presumption of a minimum compliance within the Union would be narrowed. It can be considered whether or in which way the next draft Treaty on the accession of the Union to the European Convention of Human Rights, the first draft having been rejected by the CJEU,[20] could be supportive in this respect. The hypothetical question about the prospects of supporting the accession by United Kingdom need not to be raised now any more.

Both the CJEU case law on coordinating legislation and on Article 51 CFR seem to suggest an inferiority of Union fundamental rights in the interest of European integration (a. o., rejection to reflect the constitutional reservations of Spanish courts against the execution of European Arrest Warrant in *Melloni* case,[21] calling into doubt Article 53 CFR). National guarantees are the main source of protection for Union citizens against acts of the Member States when exercising discretion in a field occupied by Union law, whereas the CFR is a medium guaranteeing the conformity of national authorities´ obligations in the area of fundamental rights and freedoms. A generous application of the CFR might limit national autonomy and entail the loss of constitutional diversity, forming part of national

19 Judgment of the CJEU in the joint cases no. C-404/15 and C-659/15 *Aranyosi and Caldararu*, initiated by preliminary questions of German courts.

20 Opinion of the CJEU no. 2/13.

21 Supra, n 12.

identity, which is to be observed by the Union (Article 4 para 2 TEU) in a way that could be difficult to justify with regard to the principle of conferral of powers.

To meet the legitimate aspirations of the Union citizens means to leave the strict application of the CFR by the CJEU that should have to be more open to a discourse with national courts, which might be as well positioned to assess conflicts of constitutional values even beyond the standard instrumentalities of the preliminary ruling. A more courageous use of the CFR means for judicial authorities at both levels to take their commitments in this area more seriously. The British judiciaries had been responsive in this respect. Their leaving the Union means slowing down the process of assertion of the CFR as the authoritative document on human rights protection in Europe.

The question, whether the European Union does possess remedies adequate to the task of protecting its values, has been recently a matter of assessment of the CJEU, initiated by the reference for preliminary ruling concerning conditions for execution of the European arrest warrant. On the basis of the European Commission´s reasoned opinion of 20 December 2017[22] submitted in accordance with Article 7 (1) TEU and the findings of the Venice Commission for Democracy through law of the Council of Europe regarding the rule of law in Poland the CJEU has deepened its conclusions in the judgment of 5 April 2016 *Aranyiosi and Caldararu*[23] by the ruling that 'where the executing judicial authority … has material … indicating that there is a real risk of breach of the fundamental right to a fair trial … on account of systemic or generalized deficiencies so far as concerns of the independence of the issuing Member State´s judiciary, that authority must determine, specifically and precisely, whether … there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State'.[24]

The further course of human rights in the Union thus faces an uneasy dilemma: is it better for the Member States, who control the Treaties and therefore the rules of the game, to give up the national autonomy they have anxiously guarded, so that the Union may react decisively to restrictions on fundamental rights? Or should they rather accept the Union,

22 Supra, n 11.
23 Supra n 19.
24 Judgment of 25 July 2018 in the case C-216/18 *PPU*, para 80.

which does not intervene in fundamental rights' issues at the expense of tolerating new authoritarians emerging in some other Member States?[25]

25 ′The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures. Study for the PetiCommitee of the European Parliament, 2016′.