Book Review

Towards a Convergence in the Judicial Enforcement of the ECHR and EU Law?

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Giuseppe Martinico and Oreste Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Cheltenham, Edward Elgar 2012) viii + 257 p., ISBN 978-1-84844-678-6

The attempt to bring order into the complex plot of the Euro-national legal systems by choosing judges as the standpoint for investigation is anything but easy, particularly following the Treaty of Lisbon and the latest developments surrounding the European Convention of Human Rights (ECHR). The book co-authored by Giuseppe Martinico and Oreste Pollicino deals effectively with this controversial knot of contemporary constitutionalism.

The book – a joint work but one in which Giuseppe Martinico takes responsibility for Part I and Oreste Pollicino for Part II – has the merit of systematizing in a single volume the several forms of judicial interaction and their interplay at the different levels of government in Europe: first, ordinary judges and constitutional judges in relation to the case-law of the Court of Justice of the European Union (CJEU); second, ordinary and constitutional judges with reference to the ECHR and the case-law of the European Court of Human Rights; and finally, the relationship between the CJEU and the Court in Strasbourg and the reaction to both the enlargement of the European Union and of the Council of Europe.

The study is clearly laid out and is meant to depict the convergence of the case-law of national courts, on the one hand, and of the European courts, on the other. The authors' starting point is based on the assumption that 'EU law, national law and the ECHR are conceived as the three sources of European constitutional pluralism' (p. 7). Subsequently, two research questions are posed: 1) whether national judges are extending the application of structural principles of EU law – like the principle of primacy and of direct effect – to the interpretation of the ECHR; 2) whether we are witnessing a convergence in the case-law of the two European Courts and, if so, what source such a convergence stems from.

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According to the authors, the answer to both these questions is in the affirmative – although with regard to national courts there is only a partial convergence (see further Part I) – and leads to challenge the well-known thesis that EU law and the law of the ECHR must be kept separate, since EU law and the ECHR are of distinctly different natures and have different purposes.[1]

Part I: Do national courts extend structural principles of EU law to the ECHR?

The issues affected by the first research question are considered in Chapters 2 and 3. In particular, Chapter 2 is devoted to the categorization of the status given to EU law and to the ECHR by national legal systems. I would like to highlight here that it would have been worthwhile to have developed the comparison between the constitutions and their European and international clauses according to the categories pointed out by the authors, rather than in alphabetic order. This would have allowed the reader to attribute, even more clearly, the particular national constitutional provisions to the relevant model depicted.

The most innovative and intriguing part of the answer to the first research question, however, is developed in Chapter 3, which concerns the analysis of the 'law in action', in particular of the judicial enforcement at national level. Indeed, national judges are described as the 'real "natural judges" of European laws' (p. 127) (where by 'European laws', the authors mean EU law and the ECHR).

It appears that in some member states (see below) a (partial) convergence is happening where there is a conflict between national norms and the ECHR, and national judges apply criteria as if the ECHR were EU law. Where a (partial) convergence arises, it usually follows one of these paths: a duty of consistent interpretation with the ECHR and with the judgments of the European Court of Human Rights (e.g., in Spain and Romania); a duty to disapply national norms in conflict with the ECHR (e.g., in France and the Netherlands); the rise of a judicial 'counter-limits' doctrine when applying the ECHR (e.g. in Austria, Germany and the United Kingdom). In particular, consistent interpretation is conceived as a consequence of the 'indirect effect' of the ECHR on domestic law; disapplication of national law is a result of the direct effect and primacy of the ECHR; the counter-limits doctrine, instead, aims to limit the enforcement of the ECHR, especially when a conflict with fundamental constitutional principles or with unamendable constitutional provisions arises. The authors cite examples of national judgments that fall within the three above-mentioned categories. Of course, such judicial developments do not apply equally, or with the same intensity, in all

[1] *See*, for example, L. Hoffmann, 'The Universality of Human Rights', *Judicial Studies Board Annual Lecture*, 19 March 2009.

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the Member States, or often do not happen at all and this is why the convergence is deemed 'minimal' (p. 128).

In many countries, like Spain (Article 10.2 of the Constitution), these judicial constructions do not develop autonomously, but rather find their *raison d'être* in legislative, or even constitutional, sources of law. In other states, like Italy, the evolutionary interpretation of the principles of EU law – in particular, primacy and the duty to disapply conflicting national norms – outside the scope of the application of EU norms has led to the establishment of two opposite 'factions': ordinary and administrative judges have been in favour of such a creative interpretation, whereas the Constitutional Court has tried to hinder this practice.[2] Moreover, on some occasions, for instance in Germany, the counter-limits put forward against the ECHR are different to those put forward against EU law.[3]

In the light of the broad overview of case-law provided, one could have probably expected a more in-depth 'Appraisal' at the end of Chapter 3 (p. 127-134). Although the focus of this section is definitely consistent with the analysis of the 'law in action' presented above, at first sight it appears too much turned towards the case-law of the CJEU and European Court of Human Rights, while only a few decisions of national courts are cited. However, such an Appraisal may be seen as a bridge between Part I and Part II of the volume. In fact, Part II is devoted to the relationship between the Court in Luxembourg and that in Strasbourg.

Part II: The rapprochement between Luxembourg and Strasbourg

Part II of the book tackles the second research question, on the 'external convergence' between the two European Courts. Significantly, as pointed out by the authors, 'the two European Courts seem to have involuntarily started to converge in terms of their "idea" of the domestic effects of EU law and the ECHR in the legal orders of the Member States of the two supranational organizations' (p. 239). The main causes of the rapprochement between the CJEU and the Court in Strasbourg have been identified in the growth of the number of Contracting Parties of the Treaties and, as a result, in the increasing variety of national constitutional identities. According to the authors, we are currently experiencing a new convergence, since originally the two European Courts shared common roots, both being international courts, before they began to follow different paths.

The divergence in development of the two Courts started in the 1960s and the 1970s, because of the central role played by the CJEU, primarily due to the developments and the success of its case-law on direct effects and primacy and its turning towards the protection of fundamental rights. By contrast, the European

[2] *See* Italian Constitutional Court, Decisions Nos. 348 and 349/2007.

[3] *See*, for example, the German Constitutional Court's case *Görgülü*, 2 BvR 1481/04.

Court of Human Rights – deemed potentially to act as a more effective guarantor of fundamental rights and to jeopardise the autonomy of national jurisdictions – was severely limited in its action because of the strong resistance of the Member States, and was able to decide only three cases within eight years. There was even discussion of its abolition. Only from the 1990s, and particularly since the entry into force of Protocol No. 11 to the ECHR, did the Court in Strasbourg begin to count as an effective player on the international scene, while the 'golden era' of the CJEU came to an end in post-Maastricht Europe. The increasingly significant limitations of State sovereignty, required by the full operation of the European integration process, urged the CJEU to re-adapt its case-law from activism to self-restraint.

The authors point out that while the CJEU became more careful in weighting the national constitutional identities of the Member States when it judges on alleged violations of EU law,[4] it did even more so once the reference to national identities was codified in Article 4.2 TEU;[5] the European Court of Human Rights has been keen to centralise the adjudication of fundamental rights' disputes in Strasbourg and has often departed from the doctrine of the margin of appreciation, a traditional bastion of the Court's deference towards national judges.[6]

More recently, following the Brighton Declaration, Protocol No. 15 (open for signature on 24 June 2013) and Protocol No. 16 (open for signature on 2 October 2013) to the ECHR – although the former envisages the inclusion of the margin of appreciation in the Preamble of the Convention (Article 1) – seem to further strengthen this trend towards centralization and thus confirm the thesis of the authors (p. 176-183). While the supervisory jurisdiction of the European Court of Human Rights is reaffirmed (see also the Explanatory Report to Protocol No. 15), a new mechanism that allows the Court in Strasbourg to issue advisory opinions to the highest national courts, on the interpretation and application of the ECHR, is put in place (Article 1, Protocol No. 16), although these opinions are not deemed to bind the requesting courts (Article 5).

The departure of the CJEU from an 'absolute and totalising' understanding of primacy and, at the same time, the acknowledgement on the part of the European Court of Human Rights of a '(relative) primacy' to its rulings and to the ECHR over national law, approach the status of two systems of 'European law' at

[4] *See*, for example, ECJ 14 Oct. 2004, Case C-36/02, *Omega*; ECJ 6 March 2007, Joined Cases C-338/04, C-359/04, and C-360/04, *Placanica*; and ECJ 14 Feb. 2008, Case C-244/06, *Dynamic Medien Vertriebs GmbH*.

[5] *See* ECJ 22 Dec. 2010, Case C-208/09, *Sayn-Wittgenstein*.

[6] *See* for example, ECtHR 29 Oct. 1992, Case No. 14234/88 and 14235/88, *Open Door and Dublin Well Woman* v. *Ireland*; ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt* v. *Germania*; ECtHR 28 Oct. 1999, Case No. 24846/94, and from 34165/96 to 34173/96, *Zielninsky and Pradal* v. *Francia*; and ECtHR 9 June 2009, Case No. 33401/02, *Opuz* v. *Turchia*.

national level, given the developments of the case-law of the Courts in Luxembourg and in Strasbourg. In other words, the two systems of 'European law' look more similar than one would expect.

In Part II of the book it is argued that the main explanation for this rapprochement of case-law lies in the opposite reactions of the two Courts towards the EU's and the Council of Europe's enlargement to the East. The CJEU has tried to adopt a more accommodating position by overcoming the earlier – and levelling – reference to common constitutional traditions, aiming to convince new member states, who are not particularly willing to give up their newly regained sovereignty, to comply with its judgments (p. 188). By contrast, the European Court of Human Rights has been aware of the fact that the new member states would be less reluctant to accept its jurisdiction. Indeed, the ECHR is not an international treaty like many others, but rather is based on a top-down mechanism for enforcing the protection of fundamental rights, whenever those rights are infringed at a domestic level (p. 247). Either the Court in Strasbourg is allowed to act as a subsidiary jurisdiction, or the overall system based on the ECHR is ineffective.However, the interesting outcome reached in Part II – i.e., that the convergence in the case-law of the two European Courts is the effect of their different reactions towards the same phenomenon, the eastward enlargement of the EU and the Council of Europe – leads me to further reflections, which partially depart from the central claim of the authors. First, the convergence between the Courts is a process – a feature that is also acknowledged at the beginning of the book – and, as such, it has been subject to many setbacks over the years. For example, the CJEU has often been criticised for its rulings being not deferential enough towards the national constitutional identities of the Member States and, in the 'saga' on the European arrest warrant, the Court has gone back to a more 'absolutist' understanding of primacy. Likewise, the European Court of Human Rights sometimes has alternated between indifference and deference towards the constitutional law of the Member States, as the different outcomes of the two decisions – in 2009 and in 2011 – in the *Lautsi* case show.

Secondly, it does appear that circumstances other than enlargement can also explain the convergence between the European Courts. The identification of a single independent variable for this phenomenon does not appear to me as particularly suitable. However, what the authors warn us not to overestimate is the impact of the on-going process of accession of the EU to the ECHR (p. 5). Although the prospective accession is able to reinforce this trend (for example, by way of the prior involvement of the CJEU), it cannot be seen as a trigger for the entire process, which started years ago. I would rather argue that other factors may have contributed to the rapprochement of case-law, like the entry into force of Protocol No. 11 to the ECHR in 1998 and the 'explosion' of the number of in-

dividual complaints filed at the Court in Strasbourg. By the same token, the increasing number of individual complaints might have changed the self-perception of the European Court of Human Rights and its legitimacy as the 'last resort' for the protection of fundamental rights, and thus has enabled the Court to show an interventionist approach, whereas before it was more reluctant to condemn Member States.

Furthermore, in my view, the pre-eminence of enlargement over other factors potentially justifying the self-restraint of the CJEU is equally problematic. I would claim that the lack of binding force of the Charter of Fundamental Rights of the EU until the Treaty of Lisbon and the opt-outs from it, the shock following the rejection of the Constitutional Treaty in the French and the Dutch referenda, as well as the uncertainty surrounding the EU legal framework since 1993, when a 'semi-permanent Treaty revision process'[7] started,) may have affected the judgments of the CJEU.

Whatever the influence is of the eastward enlargement on the convergence of the case-law of the European Courts and, as a result, of national courts applying the two 'European laws' (see Part II), the alignment of the effects deriving from the application of EU law and of the ECHR cannot be neglected.

Finally, the concluding chapter definitely helps the reader to integrate Parts I and II of the book, which sometimes may appear as detached. According to the authors, the explanation of the rapprochement of the national judicial treatment of EU law and the ECHR in many Member States is grounded in the new case-law of the two European Courts and indeed has been seconded, on the one hand, by the way the CJEU currently exploits the principle of EU primacy, and, on the other, by the centralization of the adjudicatory powers of the Court in Strasbourg. With regard to this, I would have probably preferred to reverse the order between the two Parts of the volume, as to provide the illustration of the 'external convergence' first, and its result – i.e. the 'internal and partial convergence' – afterwards, since a causal link does exist in the authors' view.

Contribution to the existing literature

The book offers not only a critical assessment of the national constitutional clauses affecting the relationship between domestic legal systems and international and supranational law – a topic studied at length in the 1980s and 1990s[8] – but it also

[7] B. de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process', in P. Beaumont et al. (eds.), *Convergence and Divergence in European Public Law* (Hart Publishing 2002), p. 39-57.

[8] *See*, for example, A.Z. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford University Press 1998), p. 372.

provides a comparison of the interpretation of EU law and the ECHR and the enforcement of the case-law of the two European Courts by ordinary courts and constitutional courts (or supreme courts empowered to carry out a constitutional review of legislation) in every member state of the EU (all of them also being Contracting Parties of the ECHR). Therefore a sort of 'multidimensional' comparison is provided by taking into account at the same time positive law, its interpretation by the several actors who constitute 'the European community of judges', and their different models of interaction.

Excellent contributions published in recent years deal with the relationship between national courts and national constitutional law either with EU Law or with the ECHR.[9] The book under review tries to combine the different dimensions – national, EU, and the ECHR – of the interpretation and the enforcement of the 'European legal systems', namely the EU legal order and the ECHR, by engaging in an insightful comparison. Indeed, a well-structured methodological introductory chapter to the book is specifically devoted to the use of comparative law.

Sharing the aim of other monographs recently published,[10] this volume engages successfully in an extensive comparison between the case law of the CJEU and the Court in Strasbourg, so as to encompass a variety of prominent issues, from the way in which specific rights are protected (e.g. the right not to be discriminated against, human dignity, and social rights) to interpretive techniques and the reasoning used by the Courts. The analysis is supplied with an extraordinary amount of case-law, which confirms the sound nature of the work.

The rich picture of judicial interaction offered by the authors represents a further step in their analysis, the first outcome of which was provided in their previous co-edited book on *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional perspective*.[11] This earlier book deals with the impact of EU law and of the ECHR on the case-law of national judges and provides a static picture: in particular, Section II of that book provides an analysis carried out state by state by means of national reports.

The new book further elaborates on this previous research and enriches its already complex subject by also including in the study a diachronic comparison between the national case-law of the member states in the field (in particular, Part I) and by assessing the dynamic relationship between ordinary courts, constitutional and supreme courts, the CJEU and the European Court of Human Rights

[9] *See*, for example, M. Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006), p. 771, and H. Keller and A.S. Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008), p. 892.

[10] *See*, for example, A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009), p. 224.

[11] (Europa Law Publishing 2010), p. 511.

(Parts I and II). In spite of the multiple dimensions taken into account, the authors further the reader's understanding of 'cross-judicial fertilisation' by offering a linear reasoning, which proceeds by way of theory, criticism, and falsification, and is based on a clear categorization of the nature of the legal systems and of the status of EU law and the ECHR: whether there is a monist or a dualist legal order; whether or not a constitutional clause on participation in the EU integration process is provided and whether limits to further integration are set or the constitution enjoys supremacy over EU law; whether the ECHR enjoys a constitutional status, sub-constitutional but supra-legislative status, or the status of ordinary statute law; and finally, whether the ECHR is directly applied in ordinary courts, also when in conflict to national law, or is subject to a centralized mechanism of enforcement in the hands of a constitutional or supreme court.

The book has the merit to deal with an issue, namely judicial convergence or divergence in Europe, which in the near future is likely to dominate the debate among scholars in comparative, constitutional, EU, and international law, given the on-going developments in the relationship between the EU and the ECHR, and between the European Court of Human Rights and the highest national courts.

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