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No more common understanding of fundamental rights ?

About the looming fundamental rights patchwork in Europe and the chances for the current negotiations on EU-accession to the ECHR to help avoid it

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1 - The picture regarding the protection of fundamental rights in Europe today increasingly looks like a patchwork, due to a lack of coordination at different levels. Developments reinforcing that picture include the emergence of different methodologies for the application of fundamental rights, Constitution-based challenges to European law by national Supreme Courts, codifications of existing case-law and the creation of so-called « *hybrid* » institutions.

2 - The resulting complexity is a challenge for domestic courts, a threat to the confidence of citizens and detrimental to the fundamental rights themselves, their special role and authority being gradually eroded by a general relativism.

3 - EU-accession could have an anti-patchwork effect and represent a chance for a general coordination of fundamental rights in Europe. Beyond making the Convention binding upon the EU, it would also have a pan-European (re)structuring effect by confirming the Convention as the minimum benchmark providing both the bedrock and the framework for any other national or European fundamental rights as well as for the necessary judicial dialogue on the latter.

4 - Good progress has been achieved since the resumption of negotiations for EU-accession, justifying cautious optimism as to the possibility to find adequate solutions to the outstanding issues.

1. Europe on the way to a fundamental rights patchwork

5 - Fundamental rights in Europe have always been characterized by some degree of diversity, if only because of the diversity of the domestic legal systems involved and the variety of interpretations they give to fundamental rights. At the same time, in the face of that diversity, there has also been a growing awareness of the need to acknowledge what those many rights have in common, i.e. what was « *universal* » about them, and of the collective responsibility resulting from it.

6 - Ever since the run-up to the creation of the Convention system, it was indeed felt that in the face of national diversities, the best way to preserve the authority of the most essential fundamental rights, called « *human rights* », was to agree at international level on a common minimum standard of protection which would be determined by an international mechanism operating with the participation of all concerned. Being backed-up in this way by the international community and sheltered from national drops in protection, those rights could serve as a beacon and give guidance across the continent on what the minimum protection of every human being ought to be. The idea of the European Convention on Human Rights was born. It was not meant to impose a uniform but only a minimum standard, which however would be univocal and binding, so as to preserve both the authority of the rights concerned and legal certainty about their requirements. In other words, a single European reference point which is determinative of the minimum content of all other fundamental rights.

7 - Yet, seventy years on, that common minimum understanding of fundamental rights finds itself under heavy pressure. The picture regarding the protection of fundamental rights in Europe today indeed looks increasingly like a patchwork, with not one but several reference points emerging and competing with each other because of a lack of coordination between their different national and European sources. This makes it increasingly difficult for domestic courts to find their way through the multitude of formulations and interpretations given to rights which, in the end, are very often meant to address the same concerns but are nonetheless given different wordings with different nuances and/or methodologies. Only recently, Frank Clarke, Chief Justice at the Supreme Court of Ireland stated in Strasbourg :

> « Whatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, the net result at the end of the day has to be a single answer. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of individual cases within the national legal order needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but can I suggest that we do need a coherent and harmonious human rights order. » [1]

* All views expressed are strictly personal.

1. Frank Clarke, « Who Harmonises the Harmonisers ? », speech held at the Ceremony for the Opening of the Judicial Year of the European Court of Human Rights, 31 January 2020, published in *Dialogue between judges*, European Court of Human Rights, Council of Europe, p. 32 (34) 2020. In the

8 - This problem has long had one of its main sources in some occasional discrepancies between the Strasbourg and Luxembourg jurisprudence. However, it now seems to be taking on a new, more comprehensive dimension with some recent developments such as the emergence of different methodologies for the application of fundamental rights, Constitution-based challenges to European law by national Supreme Courts, codifications of existing case-law and, last but not least, the creation of so-called « *hybrid* » institutions subject to different standards.

9 - The first part of the following observations will present and discuss some illustrations of the on-going developments referred to above, both in the field of jurisprudence and legislation. In the second part the question will be asked whether the current negotiations on EU-accession to the Convention could also represent a chance to remedy the patchwork situation thus emerging.

A. - A looming jurisprudential patchwork

1° Methodological differences

10 - At jurisprudential level, the looming patchwork is not least the result of some methodological differences characterizing the relationship between the Convention and EU law in some areas, notably in the field of mutual recognition. The starting point in assessing their impact is the fact that EU Member States remain liable under the Convention for any acts performed under Union law. Consequently, domestic courts are bound to apply Union law in a manner which is compatible with the Convention [2]. Hence the need for these requirements to be mutually compatible, not only in terms of their substance but also of their methodology. The latter is perhaps the trickiest aspect.

11 - One of the most recent and striking illustrations of the situation resulting from such methodological differences and their consequences for domestic courts is provided by the judgment given by the ECtHR in the case of *Bivolaru and Moldovan v. France* [3]. The case concerned the applicants' surrender by France to the Romanian authorities under European arrest warrants issues for the purpose of the execution of their prison sentences. Interestingly, the judgment also deals, if only indirectly, with the « *two-step* » methodology ordered by the CJEU to be applied when assessing whether fundamental rights invoked by an applicant, such as the prohibition of ill-treatment or the right to a fair trial before an independent court, preclude this person's surrender pursuant to a European arrest warrant. In the recent case of *Openbaar Ministerie*, which concerned an objection to the execution of a European arrest warrant based on the right to a fair trial before an independent court, the CJEU described this methodology as follows :

> The possibility of refusing to execute a European arrest warrant on the basis of Article 1(3) of Framework Decision 2002/584, as interpreted in that judgment, presupposes a two-step examination. In the context of a first step, the executing judicial authority of the European arrest warrant in question must determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary... In the context of a second step, that authority must determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State. [4]

12 - In combining a general with an individual test, this « *two-step* » methodology seems the result of some efforts by the CJEU in trying to reconcile the Luxembourg system-oriented approach, flowing from the mutual recognition logic, with the Strasbourg person-oriented approach, flowing from an individual justice logic. It does however mean that, as a pre-condition to any assessment of the individual situation of the person concerned, evidence of shortcomings on a sufficiently large scale be first adduced by that same person. This can seriously affect the level of protection enjoyed by the individual concerned, in two different respects. First, from a substantive point of view, because some shortcomings in the protection of an individual do not necessarily need to be of a systemic or general nature but can be linked to particular circumstances of their personal biography. Secondly, from a procedural perspective, because adducing evidence of systemic deficiencies represents a heavy and complex burden of proof for an individual.

13 - Interestingly, in *Bivolaru and Moldovan* the ECtHR clearly distinguishes between the substance and the methodology of the right at stake, i.e. the prohibition of ill-treatment, which is laid down with the same wording in Articles 3 of the Convention and 4 of the EU-Charter. While it acknowledges a convergence between the Strasbourg and the Luxembourg jurisprudence as regards the substance of the right concerned [5], it does not extend that finding to the Luxembourg « *two-step* » methodology which it only describes before focusing on the individual risks incurred by the two applicants, thereby sticking to its own – more protective – one-step-approach. The latter does not of course prevent the ECtHR from having regard to the general situation prevailing in a country, but it does not make evidence on this score a pre-condition to any findings regarding the individual circumstances of the person concerned and the risks incurred in the event of their surrender.

14 - Thus, in respect of Mr Moldovan, the ECtHR found a « *manifest deficiency* » resulting in a violation of Article 3 because the French courts had surrendered him, even though they had before them sufficient factual elements indicating that he would be exposed to a serious risk of ill-treatment because of the detention conditions in the prison in which he would be detained after his transfer. These factual elements only concer-

same sense : Beatrijs Deconinck, First President of the Belgian Court of cassation, in : *Le métier de juge*, Journal des tribunaux, p. 847, 2019.

2. EU Member States are indeed considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (ECtHR, *Bosphorus Hava Yollari Turizm V^e Ticaret Anonim Sirketi v. Ireland (« Bosphorus v. Ireland »)*, 45036/98, § 154, 30 June 2005.
3. ECtHR, Bivolaru and Moldovan v. France, 40324/16 and 12623/17, 25 March 2021. On this judgment, see Johan Callewaert, *The European Arrest Warrant under the European Convention on Human Rights : A Matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility*, Zeitschrift für Europäische Studien, Saarbrücken, special issue, p. 105 (2021) ; William Julié & Juliette Fauvarque, *Bivolaru and Moldovan v. France : A New Challenge for Mutual Trust in the European Union ?*, available at [https ://strasbourgobservers.com/2021/06/22/bivolaru-and-moldovan-v-france-a-new-challenge-for-mutual-trust-in-the-european-union/], 22 June 2021, last consulted on 1 August 2021 ; Sébastien Platon, *La présomption Bosphorus après l'arrêt Bivolaru et Moldovan de la Cour européenne des droits de l'homme : un bouclier de papier ?*, Revue trimestrielle des droits de l'homme, p. 91, 2022.
4. CJEU, *Openbaar Ministerie*, joined cases C-354/20 PPU and C-412/20 PPU, §§ 53-55, 17 December 2020.
5. Bivolaru and Moldovan, *§ 114*.

ned the personal situation of Mr Moldovan, as opposed to any systemic or generalised deficiencies. At no point in the judgment did the ECtHR inquire about the systemic or generalised nature of any deficiencies in the Romanian prison system, contrary to the French courts which were bound by EU law to apply the *« two-step »* examination.

15 - The fact remains, though, that this level of complexity resulting from divergent methodological standards represents a challenge for domestic judges in their day-to-day practice, with potentially significant consequences. It is indeed the case that, in practical terms, domestic courts may engage a Member State's Convention liability for not refusing to execute a European arrest warrant where a real and individual risk of ill-treatment in the event of the surrender of a person has been duly established without there being evidence, as required by EU law, of a link between that individual risk and any systemic or generalised deficiencies.

16 - Other methodological differences [6] have emerged in cases such as those raising the question whether the courts of a Member State to which a child was abducted can be allowed under the Brussels II bis Regulation to refuse the forced return of that child to the Member State where he/she was habitually resident immediately before removal, when this is clearly in the child's best interest [7]. The *non bis in idem* principle, which prohibits the double punishment in criminal law, is another example of serious methodological differences generating more legal uncertainty [8].

2° Constitution-based challenges by national supreme courts

17 - Adding to the patchwork situation increasingly characterizing the case-law on fundamental rights are some recent Constitution-based rulings by national Constitutional or Supreme Courts challenging European law in general or some of its provisions in particular.

In this context, one should mention, among others : the Constitutional Court of the Russian Federation opening up the possibility for State organs to request its opinion on whether a judgment by the ECtHR would be *« impossible to implement »* because it would go against the foundations of the Russian constitutional order [9] ; the German Constitutional Court declaring the ruling by the CJEU in the case of *Weiss* [10], which concerned the legality of the European Central Bank's decisions on the Public Sector Purchase Programme, to be *« objectively arbitrary »* and incompatible with the German Constitution [11] ; the Polish Constitutional Tribunal first declaring several provisions of the Treaty on European Union to be inconsistent which some provisions of the Constitution [12] and soon after finding that Article 6 § 1, 1st sentence, of the Convention, insofar as the term *« tribunal »* used in that provision comprises the Constitutional Tribunal and insofar as it grants the ECtHR jurisdiction to review the legality of the process of electing judges to the Constitutional Tribunal, to be inconsistent with some provisions of the Constitution [13] ; the French *Conseil d'État* [14] and the French *Conseil constitutionnel* [15] each making some Constitution-based reservations in respect of the effects of EU law. Meanwhile, the British Minister of Justice recently revealed plans designed to overhaul the Human Rights Act and to allow judges to override rulings from the ECtHR rather than following them *« blindly. »* [16]

Regardless of whether each of these moves can claim legitimacy, it is fair to say that even if they may seem isolated events, when considered together they nonetheless reveal a pattern which, if not properly addressed, could well become contagious and accelerate the on-going trend away from the common understanding on which the European fundamental rights architecture is based to a large extent [17].

B. - A looming legislative patchwork

1° Case-law codifications

18 - Legislation too is subject to initiatives which tend to increase the extent of the fundamental rights patchwork in Europe. Of significant impact in this context are the EU Directives codifying the case-law on certain procedural rights in criminal proceedings, pursuant to the *« Roadmap for strengthening procedural rights of suspected or accused persons in criminal*

6. On these methodological differences in general, see Johan Callewaert, *Do we still need Article 6(2) TEU ? Considerations on the absence of EU-accession to the ECHR and its consequences,* Common Market Law Review, p. 1699, 2018. An overview of recent examples showing how the Convention and EU law interact in the European case-law can be found at https ://johan-callewaert.eu/recent-relevant-case-law.
7. Compare CJEU, *Deticek,*. C-403/09 PPU, 23 December 2009 and CJEU, Povse, C-211/10 PPU, 1 July 2010, with ECtHR, *O.C.I. and Others c. Romania*, 49450/17, 21 May 2019
8. Compare ECtHR, *A and B v. Norway,* 24130/11 and 29758/11, 15 November 2016, with CJEU, *Menci*, C-524/15 (20 March 2018). On these differences, see Johan Callewaert, *supra* note 7, p. 1707. See also Léa Maulet, *Le principe ne bis in idem, objet d'un « dialogue » contrasté entre la Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme*, Revue trimestrielle des droits de l'homme, p. 107, 2017 ; Laure Milano, *Le principe non bis in idem devant la Cour de Luxembourg, vers un abaissement de la protection accordée au principe*, Revue trimestrielle des droits de l'homme, p. 161, 2019.
9. Resolution of the Constitutional Court of the Russian Federation, n° 21-PG (14 July 2015) ; Rossiskaya Gazeta Federal Edition n° 163, 27 July 2015. On this, see Bill Bowring, *Russia and the European Convention (or Court) of Human Rights : the End ?*, Revue québécoise de droit international, special issue, p. 201 (206), 2020 ; Maria Smirnova, *Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions*, available at [https ://www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/], 15 July 2015, last consulted on 19 January 2022.
10. CJEU, Weiss e.a., C-493/17, 11 December 2018.
11. German Federal Constitutional Court, 2 BvR 859/15, 5 May 2020. On this, see Vlad Constantinesco, *Coup de semonce ? Coup de force ? Coup d'épée dans l'eau ? A propos de l'arrêt du Tribunal constitutionnel fédéral d'Allemagne du 5 mai 2020*, Journal de droit européen, p. 264, 2020 ; Dimitrios Kyriazis, *The PSPP judgment of the German Constitutional Court : An Abrupt Pause to an Intricate Judicial Tango*, available at [https ://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/] 6 May 2020, last consulted on 19 January 2022.
12. Constitutional Tribunal of the Republic of Poland, judgment K 3/21, available at [https ://ribunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej], 7 October 2021, last consulted on 19 January 2022. On this, see Takis Tridimas, L'arrêt qui va trop loin, Revue de droit européen, p. 409, 2021.
13. Constitutional Tribunal of the Republic of Poland, judgment K 6/21, available at [https ://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny], 24 November 2021, last consulted on 19.1.2022.
14. Conseil d'État, n° 393099, *French Data Network et al.,* n° 394922-397851 et al., 21 April 2021. On this, see Denys Simon, *Retour des monologues juridictionnels croisés ? À propos de l'arrêt du Conseil d'État dans l'affaire « French Data »*, Europe, Etude 2, June 2021.
15. Conseil constitutionnel, n° 2021-940 *QPC, Société Air France*, 15 October 2021. On this, see Henri Labayle, *Identité constitutionnelle et primauté du droit de l'Union. Libres propos sur une décision récente du Conseil constitutionnel*, Europe, Etude 6, December 2021.
16. Haroon Siddique & Rajeev Syal, *Raab to claim overhaul of human rights law will counter « political correctness »* The Guardian, 14 December 2021.
17. In this sense : Denys Simon, *Juridictions nationales : virus de l'identité nationale, où est le vaccin ?*, Europe, p. 1 December 2021.

proceedings. » [18] The Directives already adopted on this basis cover *inter alia* such topics as the right to translation and interpretation [19], the right to information [20], the right to access to a lawyer [21] and the presumption of innocence [22].

19 - These initiatives are in principle to be commended as a contribution to ensuring a more harmonious level of protection of these rights in the EU, with a view to facilitating the mutual recognition of national judicial decisions across the twenty-seven Member States [23]. Yet, it nonetheless remains a delicate endeavour to try and codify a subject matter such as procedural fundamental rights, which is primarily the result of a dynamic case-law resulting from the application of Articles 6 of the Convention and 47-48 of the EU-Charter, without freezing that case-law or creating tensions between the law and the case-law on the same rights. It is indeed a well-known fact that the Convention is a *« living instrument »* and is interpreted accordingly by the ECtHR, with the consequence that its rights must on occasion be adapted to new situations and their requirements refined. Will these Directives be updated accordingly ? Or will they turn into a static alternative to a dynamic case-law after some time, thus generating another patchwork ?

20 - Already now, and to take just one example, there is clearly no perfect match between the rights laid down in the Directive on access to a lawyer and the Strasbourg case-law on the same topic. On some issues, such as the scope of the assistance by a lawyer, the Directive would appear to provide a higher level of protection than the Strasbourg case-law. On others, a lower protection seems to result notably from the fact that some forms of assistance are made contingent on their also being provided for under the relevant national legislation. Unfortunately, the CJEU case-law on these issues is still rather scarce, which makes it difficult to anticipate how these differences will play out in practice.

21 - Admittedly, the Directives mentioned above contain a so-called non-regression clause stipulating that they shall not be construed as limiting or derogating from any of the rights that are ensured under the Charter, the Convention or any other relevant provisions of international or domestic law laying down a higher level of protection. However, the challenge for the courts here will be to compare those different co-existing sources and their respective protection levels, with a view to figuring out whether the non-regression clause should be applied in the first place. This can be a tricky and time-consuming exercise. In any event, this type of legal constellation is likely to produce quite some additional complexity for domestic courts and citizens alike, thereby only reinforcing the patchwork effect described above.

2° Hybrid institutions and dual standards

22 - A further recent and serious challenge to the common understanding of fundamental rights on the legislative side comes from the new generation of hybrid institutions which operate on the basis of a cooperation of EU and domestic agents. The most striking examples of this phenomenon are the Frontex Agency [24] and the European Public Prosecutor's Office *(« EPPO »)* [25].

23 - Another kind of patchwork is indeed looming here. In terms of the protection of fundamental rights, the issue arising in connection with this new type of structure flows from the fact that its components, despite working together on the same facts or persons, are not subject to the same corpus of fundamental rights, the EU itself not being a Contracting Party to the Convention whereas the Member States are. As a result, the respective actors involved in the same set of proceedings are no longer answerable to the same institutions either, including for their compliance with fundamental rights. Citizens may therefore have to rely on different legal sources setting different fundamental rights standards, and/or address themselves to different authorities, depending on whether the legal acts they want to challenge, even though performed in the context of the same proceedings, were so on behalf of a domestic or an EU institution. All of this is generating another layer of complexity and legal uncertainty in an area which, by itself, is already very complex.

24 - The newly created EPPO, governed by Regulation 2017/1939 establishing the European Public Prosecutor's Office (*« the Regulation »*) and in charge of prosecuting offences against the Union's financial interests, provides a practical illustration of that emerging reality. In terms of its structure, the striking feature is the fact that while the EPPO is an EU office operating in the interest of the sole EU, it does so by relying on the operational and judicial support of the Member State in which the case is being investigated and prosecuted by the EPPO. The latter has therefore been given a two-level structure combining a centralised European level with a decentralised national level, the investigations and prosecutions on the ground being carried out at domestic level by national prosecutors acting as so-called European Delegated Prosecutors (the EDPs). Thus, the EDPs are at the same time members of the EPPO and members of their own national judiciary. They act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors [26]. In addition, the system relies to a large extent on the national enforcement and the national judicial authorities [27].

25 - One of the legal challenges posed by the EPPO structure lies in the fact that it combines partners who are not subject to the same corpus of European fundamental rights, the national authorities being in principle bound by both the Convention and

18. Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 30 November 2009.
19. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 20 October 2010.
20. Directive 2012/13/EU on the right to information in criminal proceedings, 22 May 2012.
21. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 22 October 2013.
22. Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, 9 March 2016.
23. In this sense, see Directive 2013/48/EU above, Recital 4.
24. Regulation 2019/1896 on the European Border and Coast Guard (13 November 2019). On this, see Romain Tinière, *Le règlement 2019/1896 et le renforcement des compétences de Frontex*, Journal de droit européen, p. 10, 2021.
25. On the EPPO, see among many others, Morgan Bonneure &Michaël Fernandez-Bertier, *Habemus executorem ! La création du parquet européen*, Journal de droit européen, p. 42, 2018 ; Chloé Brière, *Le parquet européen : analyse critique d'une réussite tempérée par d'importants défis à relever*, Cahiers de droit européen, p. 149, 2019 ; Constance Chevallier-Govers & Anne Weyembergh (edit.), *La création du Parquet européen – Simple évolution ou révolution au sein de l'espace judiciaire européen ?*, 2021 ; Peter Csonka, Adam Juszczak & Elisa Sason, *The Establishment of the European Public Prosecutor's Office*, eucrim, p. 125, March 2017 ; Francesco De Angelis, *The European Public Prosecutor's Office*, eucrim, p. 272, April 2019 ; Katalin Ligeti & Vanessa Franssen, *Le contrôle juridictionnel dans les projets de parquet européen*, in : Geneviève Giudicelli-Delage, Stefano Manacorda &Juliette Tricot (dir.), *Le contrôle judiciaire du parquet européen – néccesité, modèles, enjeux*, Société de législation comparée, p. 127, 2015 ; Alexandre Met-Domestici, *The Hybrid Architecture of the EPPO*, eucrim, p. 143, March 2017 ; Ante Novokmet, *The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution*, New Journal of European Criminal Law, p. 374, 2017.
26. Art. 13 of the Regulation.
27. Recital 69 of the Regulation.

EU law whereas the EPPO, as an EU office, is only subject to EU law. Consequently, the hybrid structure of the EPPO gives rise to the application of a hybrid fundamental rights framework. As a result, under this new scheme the national courts may end up applying Convention standards to a prosecution which was carried out by an authority which was not itself bound by the Convention and may therefore not have complied with it, e. g. by not applying the more protective Strasbourg interpretation of the *non bis in idem* principle [28], while having nonetheless acted lawfully under Union law.

26 - This may also have repercussions in Strasbourg, in the context of applications challenging judgments by the national courts handing down convictions based on the Regulation. In this setting, the Member States concerned can be expected to be answerable for any determinations made by their own courts regarding prosecutions by the EPPO [29]. Thus, they will find themselves as respondents in Strasbourg on account of prosecutions which were initiated, steered and controlled by an EU body and for the exclusive benefit of the EU, which is not itself subject to the Convention. In this capacity, they will be held accountable for any breaches of the Convention resulting from these prosecutions and left unremedied by their own courts, notably those which might stem from the fact that the EPPO, although faithfully complying with EU fundamental rights, did not meet the Convention minimum. To this extent, the EPPO scheme entails a distortion of the hitherto prevailing principle, according to which, the single and overall responsibility of States under the Convention is the logical consequence of their full control over – and full benefit from – the actions being challenged in the application.

27 - Moreover, the fact that EPPO proceedings are to be conducted under a double corpus of fundamental rights, one for the prosecution – by the EPPO – and another for the adjudication – by the national courts –, is a case of *« double standards »* distorting the uniformity which should in principle characterize, throughout criminal proceedings, the fundamental rights applied to the latter, as required by the rule of law. Where this results in a failure to comply with the Convention, the Member State concerned will, in addition, incur liability in Strasbourg. By way of example, should the EPPO have applied the less protective Luxembourg interpretation of the *non bis in idem* principle rather than the more protective Strasbourg one, and should this – whatever the reason – not have been remedied by the national courts, the Member State concerned will assume full responsibility for the finding of a violation of Article 4 of Protocol n° 7 to the Convention by the ECtHR. This would include responsibility for the execution of the judgment, which may also entail consequences for the EPPO. And even if this was remedied by the domestic courts applying the Convention standards, the question remains whether it is right in principle to let the EDPs operate under different, potentially lower standards, with the consequence that their prosecution might be declared invalid in the course of a judicial review by the domestic courts.

28 - In sum, with their involvement in this hybrid EPPO structure, the Member States take the risk of being held accountable under the Convention for actions by the EPPO which they do not fully control, which are subject to a different corpus of fundamental rights and which do not benefit them but only the EU. And the EU, for its part, takes the risk of seeing EPPO prosecutions being invalidated by domestic courts applying a Convention protection level which may be higher than the EU level [30].

29 - Here too, given the quantum leap which a hybrid structure uniting components not subject to the same rules represents, the dominating impression is that of a lack of a proper coordination of fundamental rights. And with the competences of the EPPO likely to be extended beyond the preservation of the EU's financial interests, the scope of the problem can be expected to broaden in the same proportion. Or indeed even more with the operation of other hybrid institutions such as Frontex, whose activities give rise to some concerns as regards respect for fundamental rights [31].

2. EU-accession as a chance to avoid a fundamental rights patchwork in Europe

A. - The pan-European (re)structuring effect of EU-accession

30 - Overall, the picture resulting from the developments described above shows an increasing lack of coordination of fundamental rights at different levels. While it initially was a problem mainly limited to the case-law of the two European Courts, it is now also involving the interaction between national Constitutions and European law, some case-law codifications as well as the introduction of dual standards in single proceedings. Autonomism, constitutionalism or indeed legal nationalism are on the rise, it seems.

31 - The result is a steadily growing legal patchwork instead of the common understanding of fundamental rights envisaged by the Preamble to the Convention. A patchwork which is made of different sorts of overlapping but insufficiently coordinated national and European fundamental rights, an increasing number of them being considered autonomous, equivalent or indeed prevailing by their respective proponents, thus creating tensions and legal competition rather than harmony and legal certainty.

32 - This may perhaps be considered by some as a paradise for lawyers, but it certainly is a nightmare for national judges, since they ever more often must find their way through ever more complex and subtle distinctions regarding the respective scope, content, methodology and rank of overlapping fundamental rights, depending on whether the latter stem from a national Constitution, from the Convention, from *« simple »* or *« hybrid »* EU law or indeed from more than only one of these sources.

28. See CJEU, *Spasic*, C-129/14 PPU, 27 May 2014, ruling that Art. 54 of the Convention Implementing the Schengen Agreement, which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed « has been enforced » or is « actually in the process of being enforced », is compatible with Art. 50 of the EU-Charter. This is in contrast with ECtHR, *Sergey Zolotukhin v. Russia*, 14939/03, § 110 (10 February 2009) : « Article 4 of Protocol n° 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice ». On the significant methodological differences in the way the two European Courts apply the non bis in idem principle, see *supra* note 9.
29. See, *mutatis mutandis*, ECtHR, *Barbulescu v. Romania*, 61496/08, § 110, 5 September 2017.
30. On these issues, see Johan Callewaert, *No Case to Answer for the European Public Prosecutor under the European Convention on Human Rights ? Considerations on Convention Liability for Actions of the European Public Prosecutor's Office*, Europe of Rights & Liberties/Europe des Droits & Libertés, p. 20, 2021.
31. Recently, Mr Jonas Grimheden, the fundamental rights officer of the Frontex agency told Members of the European Parliament that « Frontex could be seen as being implicated or supportive of fundamental rights violations » in some Member States. See Nikolaj Nielsen, *Frontex implicated « to some extent » in violations, says officer*, euobserver, available at https ://euobserver.com/migration/153666, 30 November 2021, last consulted on 15 January 2022.

Stephan Harbarth, President of the German Federal Constitutional Court, recently warned in those terms against the destructive effects of an excessive complexity of the law :

> « A loss of acceptance of the law and the rule of law, as well as a loss of trust in them, are perceptible in society. They are caused, among other things, by an increasing, sometimes excessive complexity of legal acts, i.e. of laws and ordinances, orders of the administration or indeed court rulings. Confidence in the law, however, also presupposes that the law is comprehensible. Otherwise, citizens can literally « no longer follow » it. » [32]

33 - This trend is also detrimental to the fundamental rights themselves, their special role and authority being thereby gradually eroded by a kind of general relativism resulting from the fact that virtually every fundamental right, it would appear, can nowadays be made the subject of different interpretations by different courts which are occasionally also pitched against one another. Yet, even those who, like Andreas Voßkuhle, advocate the mobile rather than the pyramid as the appropriate concept to approach the multi-level reality of fundamental rights today, insist on the need for coordination and consistency between the overlapping human rights catalogues. After all, he stated in Strasbourg, *« we do not want the mobile and its strings to turn into a spider's web in which those who seek protection get entangled. »* [33]

34 - Such coordination will certainly not happen overnight, it being a long and complex process. At the same time, the experience of the last decades shows that judicial dialogue, while very important, cannot achieve that on its own, and certainly not at the scale of the European continent. It is here that EU-accession could represent a chance to help that general process take place, since its impact would indeed not be confined to the EU and its Member States or to the legal aspects involved in it.

35 - Of course, EU-accession is primarily designed to have a legal impact on the EU itself, by making the Convention binding upon it and allowing an external control by the ECtHR over the EU's actions [34]. That in itself would already be a significant contribution to help reduce the patchwork effect described above, as it would formally establish the Convention as official benchmark for the interpretation of EU law, something which the CJEU has so far rejected [35]. It would also do away with any dual standards being applied in a single set of proceedings, as is currently the case with proceedings initiated by hybrid institutions such as the EPPO, since it would ensure that all actors involved in such proceedings are equally subject to the Convention, in addition to EU law.

36 - Beyond that, however, EU-accession would also have a general political impact on all Contracting Parties to the Convention, whether EU Member States or not. The mere fact that it would have to be agreed upon and ratified by all 47 Member States of the Council of Europe, in addition to the EU itself, would indeed make it a pan-European event implicitly reaffirming the commitment of all Contracting States to the Convention system, including the idea of a common understanding of fundamental rights underlying it.

37 - The political message which could result from such a move could make a significant difference and have an important anti-patchwork effect, in that it would, both internally and externally, confirm the Convention in its unique role as pan-European minimum benchmark providing the bedrock for all other national or European fundamental rights and at the same time setting a clear common reference point for their further developments. In other words, the Convention could on this occasion be (re)discovered as providing the cornerstone of the conceptual framework which is increasingly needed for the sake of ensuring a coordinated, stable and harmonious co-existence of the many sources of fundamental rights in Europe. In this way, EU-accession could turn out to also have a beneficial (re)structuring effect at the scale of the entire continent.

38 - This would of course not be tantamount to endorsing the *current state* of the Strasbourg case-law, which is indeed subject to fluctuations. Rather, it would, in these troubled times lacking orientation, send out a clear signal by formally (re)acknowledging the agreement on the common minimum level of protection enshrined in the Convention as the basis for a more coordinated development of fundamental rights in Europe, so as to preserve their efficiency as what they ultimately are, i.e. instruments designed to ensure that the law in all circumstances remains sufficiently human, which indeed represents a permanent challenge.

By contrast, giving up on EU-accession to the Convention would entail the risk of undermining the very idea of a collective understanding of fundamental rights, thereby opening the floodgates to more patchwork and more relativism. For why should European States remain the subject of an external control of their respect for fundamental rights if the EU is not ? This *« inequality before the Convention »* could initiate a process leading to the current European architecture of fundamental rights protection being unravelled altogether. It would also have detrimental consequences on the autonomy of EU law itself, as aptly described by Jean-Paul Jacqué, the former Director-General of the Legal Service of the EU Council [36].

B. - Progress of negotiations

39 - Even though EU-accession is an old idea, negotiations to that effect did not start before 2010, after the entry into force of the Lisbon Treaty which inserted Article 6(2) in the Treaty on European Union, thus creating the legal basis for the EU to accede to the Convention and the legal obligation for the EU to do so.

40 - These negotiations first resulted in 2013 in a unanimously adopted agreement at negotiators' level on a comprehensive package of legal instruments setting out the modalities of accession of the EU to the Convention. However, on 18 December 2014, the CJEU delivered its Opinion 2/13, concluding that the agreement was not compatible with Article 6(2) TEU or with Protocol n° 8 relating to Article 6(2) of that Treaty. This Opinion was followed by a reflection period during which the EU Member States and the European Commission internally considered how to amend the draft agreement so as to address the objections of the CJEU. This process led to the former President

32. Stephan Harbarth, *Besser als Medizin*, Frankfurter Allgemeine Zeitung, p. 6, 27 January 2022 (non-official translation).
33. Andreas Voßkuhle, *Pyramid or Mobile ? – Human Rights Protection by the European Constitutional Courts*, speech held at the Ceremony for the Opening of the Judicial Year of the European Court of Human Rights, 31 January 2014, published in *Dialogue between judges*, European Court of Human Rights, Council of Europe, p. 36 (40) 2014.
34. On EU-accession in general and its purpose, see https ://johan-callewaert.eu/eu-accession.
35. See, among many others, CJEU, *Facebook Ireland and Schrems*, C-311/18, §§ 98-99, 16 July 2020 : « [The Convention] does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law... In those circumstances, the Court has held that the interpretation of EU law and examination of the legality of EU legislation must be undertaken in the light of the fundamental rights guaranteed by the Charter ».
36. Jean Paul Jacqué, *Encore un effort camarades... L'adhésion de l'Union à la Convention européenne des droits de l'homme est toujours à votre portée*, Europe des Droits & Libertés/Europe of Rights & Liberties, p. 27, March 2020.

of the European Commission informing the Secretary General of the Council of Europe on 31 October 2019 that the European Union stood ready to resume the negotiations on EU-accession to the Convention.

41 - Thus, negotiations were resumed on 22 June 2020, their focus being on addressing the objections raised by the CJEU in its Opinion 2/13. For that purpose, the points for discussion were divided up into four so-called *« baskets »* covering respectively the EU's specific mechanisms of the procedure before the ECtHR, including the co-respondent mechanism, inter-party applications under Article 33 of the Convention and Protocol n° 16, the principle of mutual trust between the EU Member States and the Common Foreign and Security Policy.

42 - At the end of 2021, eight sessions had been held, one of them being also devoted to hearing some representative NGOs. All topics were already addressed and provisional agreement on provisions concerning the triggering of the co-respondent mechanism and mutual trust was virtually reached during the session which was held in December 2021 [37]. This would appear to justify cautious optimism as to the possibility to also find adequate solutions to the remaining issues.

43 - As many said already in this context, this is probably the last chance for EU-accession and what it means for the preservation of the role of fundamental rights in Europe. Delegations will therefore hopefully remain open to the necessary compromises which negotiations on such complex issues inevitably entail. ■

37. See the report of that meeting : *12th Meeting of the CDDH Ad Hoc Negotiation Group (« 47+1 ») on the Accession of the European Union to the European Convention on Human Rights – Meeting Report*, Council of Europe, available at [https ://rm.coe.int/cddh-47-1-2021-r12-en/1680a4^{e}547 %20], 10 December 2021).