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Editorial

Human Rights: Member State, EU and ECHR Levels of Protection; P.S. Catalonia; Why Does it Take So Long for my Article to Be Published?; In this Issue

Human Rights: Member State, EU and ECHR Levels of Protection

Article 53 of the Charter of Fundamental Rights of the European Union caused, already at its inception, a hermeneutical conundrum:

> Nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.

Article 51, which defines the Charter's field of application, provides:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

What if in, say, the implementation of Union law, it is found that the Union law violates a constitutional provision of the Member State protecting fundamental human rights? Under the pre-Charter regime the resolution of such a conflict would proceed as follows. First, under *CILFIT* (Case 283/81 of 6 October 1982) the validity of the Union law would rest in the hands of the ECJ. A Member State court, even a court against whose decision there was a judicial remedy, would be required to make a preliminary reference for a finding of invalidity. Second, the ECJ would review the Union measure according to *its* human rights standards (informed, of course, by the constitutional traditions common to the Member States and the ECHR). The applicable human rights norm could not be dictated by the standard of level of protection of any given Member State (*Hauer*, Case 44/79 of 13 December 1979). If the ECJ were to find that the Union measure was not violative of human rights as defined by the ECJ, it would, by virtue of the principles of supremacy and equality of application of Union law, have to be followed by and within the Member States, even if a similar national

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measure would violate Member State constitutional provisions. There was a period in which some authors suggested that the ECJ would always have to adopt the highest level of protection to be found among the Member States. That nonsense has luckily been purged from most treatments of the subject matter.

Article 53 seemed to call that orthodoxy into question since an implementing measure could be thought to fall within both the sphere of application of the Union and a Member State. Article 53 could, thus, suggest that the prior understanding would mean that the constitutional protection in a Member State would be restricted and/or adversely affected if it afforded more extensive protection than the Union standard applied by the ECJ.

In the recent *Melloni* case (Case C-399/11 of 26 February 2013) the Court addressed this precise issue and, not surprisingly, confirmed that one could not read Article 53 as changing the prior orthodoxy. A Member State cannot disapply a Union measure which conforms with European Union human rights standards for violation of its own human rights constitutional provisions.

There is, however, an intriguing ambiguity. What if the national court wishes to set aside the measure implementing Union law (and assuming that there is no alternative implementation possibility) for violation of the ECHR? In theory the question should not arise. Article 52(3) of the Charter provides that

> [i]nsofar as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

In conducting its own review, the ECJ should, thus, when dealing with corresponding rights, ensure conformity. And should there be a case of non-corresponding rights, the ECJ has indicated often that it will ensure the compatibility of Union norms with the ECHR.

In *Melloni*, which concerned the right of a Member State to refuse the execution of a European arrest warrant in respect of individuals who were tried in absentia in the requesting state, the ECJ, with a clear nod to Article 52(3), did duly take a look at the Convention in Recital 50 of its judgment:

> This interpretation [of the relevant provisions of the Charter] is in keeping with the scope that has been recognized for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights.

Whether or not the interpretation by the ECJ of the relevant provisions of the Charter is in fact in keeping with the jurisprudence of the ECHR may not be quite as straightforward as the apodictic statement in Recital 50 suggests. But be that as it may, the more delicate question is whether a national court is required to accept as binding the interpretation of the ECHR by the European Court of Justice.

Paradoxically, I consider it easier from a constitutional theory point of view for a Member State constitutional court to accept that in relation to European Union norms its own norms must yield to those of the Union as a whole, even in matters of human rights, than for the same court to accept what it perceives as an erroneous interpretation of the Convention by the ECJ. Both as a matter of

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status and expertise the ECJ should have primacy in defining the content and scope of European Union norms. But neither as a matter of status nor expertise is it in a superior position *vis-à-vis* the constitutional courts of the Member States when it comes to interpreting the Convention. The matter is aggravated by the notoriously telegraphic style that the ECJ adopts when dealing with the Convention jurisprudence – a style not designed to inspire confidence – as evidenced in the *Melloni* case itself. It is also not helped by the barely disguised historic hostility of the ECJ to the notion that it may have to submit, in matters of human rights, to the superior authority of the European Court of Human Rights.

What is the legal duty of a Member State court when it comes to the conclusion that the ECJ has erred in interpreting an international norm designed to protect individuals and that the rights of said individuals would be violated if it were to follow such an interpretation? Does it simply leave it in the hands of the individual to commence the arduous road to Strasbourg? Does it, instead, refuse to give effect to the Union norm which it finds in violation of the ECHR? Note that in doing so the national court would not be playing a chauvinist game, but would be concerned not to compromise the strictures of the Convention which bind it in a way that does not bind the EU as such.

The interested reader may find it is worth reading with care Recital 44 in *Åklagaren* (Case 617/10, of the same date as *Melloni*) in which the ECJ recalls, inter alia, that the ECHR

> does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of a conflict between the rights guaranteed by that convention and a rule of national law.

Should a Member State court accept an interpretation of the ECHR by the ECJ, which in its view would bring its jurisdiction into violation of an international obligation of the highest order, a risk which the ECJ does not have? (Did the ECJ shoot itself in the foot in *Åklagaren*?) Does its legal duty to the European Union legal order trump its legal duty under international law to the Convention system?

There clearly would be some mischief if Member State implementing measures were to differ based on a different understanding of the ECHR requirements. No doubt the ECJ would trumpet its 'essential feature of the EU legal order' rhetoric and all the rest. But would it be less mischievous if, say, the ECJ's interpretation of the Convention was the odd man out compared with the constitutional courts of the Member States? Or would it not violate an essential feature of a national legal order if domestic legislation falling outside the scope of Union law were to be interpreted by Member State courts according to one understanding of the Convention requirements, whilst implementing legislation of the Union followed a different understanding of the Convention?

I can see various plausible ways of thinking about this problem and also various solutions to the problem; my only disagreement will be with those who think it is an 'easy case'. And, of course, the machinery of seizing Strasbourg, the only Court able to resolve authoritatively the meaning of the Convention, is extraordinarily cumbersome and not suitable for this type of situation. However, the new proposed Accession Protocol for the EU may offer interesting possibilities in this regard.

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P.S. Catalonia

My Editorial on Catalan independence certainly put the cat among the pigeons – or perhaps more accurately, the pigeon (or dove) among the cats. Reactions were ferocious and some unpleasantly *ad hominem*, even by some authors who should know better. I read with care all reactions, including those removed by our Blogmasters for violating the decorum and sobriety which are a hallmark of EJIL: Talk! Most underscored, with different levels of vehemence, the longevity and authenticity of Catalan nationalism – something that was not called into doubt – and a variety of historical grievances. None, in my view, came even close to meeting my basic point, which was that to insist on independence as a solution to resolving the grievances and vindicating Catalan national identity, was a defeat of the very spirit and ethos which gave birth to that noble experiment which is the European Union. I repeat: Independence? Bon Voyage. But not in the EU.

Why Does it Take So Long for my Article to Be Published?

I have asked the Managing Editor to provide me with the statistics for the length of time it takes from submission to publication in *EJIL*. Here are the figures. The average time in review for manuscripts accepted without revision is 2.8 months and for those requiring revision the review period extends to seven months. These are averages; times range from one to 12 months. The average time from acceptance to publication is 6.5 months, ranging from two to 13 months. Thus, a fortunate author – whose article is punctually reviewed and accepted without the need for revision – may travel the path from submission to publication in, say, six months. But more commonly, the review process, particularly if revision is involved, followed by the queue to publication, means that authors will not see their article in print until well over a year after the initial submission.

There are two principal bottlenecks in the process: peer review remains one. For a recent article we wrote to eight peer reviewers before receiving a positive response! And one peer reviewer took 108 days before we finally obtained the report, albeit an excellent one. We now give a one-year digital subscription to our peer reviewers as compensation for their efforts and in the hope of expediting the procedure.

The second bottleneck is our pipeline. By the time an article is accepted for publication it will normally have to wait at least two and sometimes three issues before a slot becomes available. OUP is efficient in processing the copy we give them – typically it is them waiting for us! But that should not give the impression that we sit around twiddling our toes and flying kites with your submissions.

This, however, would be a good occasion to remind our authors and readers of our basic philosophy of journal publishing in the age of the internet, blogs, Facebook, and the like. We expect the instant note and comment on recent developments to take place on EJIL: Talk! In *EJIL* we aim to publish pieces which in our view have some lasting value – our rule of thumb is an expected shelf life of at least five years. I have, more than once, found myself writing such to an impatient author: 'Maybe we made a mistake in accepting your piece, if it will, as you seem to suggest, lose its relevance if not published immediately.' If someone is in the process of tenure review or the like, I would be happy to write to the relevant committees to attest that publication in *EJIL* is pending.

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In this Issue

We open this issue with three articles showcasing the variety of high-quality international law scholarship that finds a welcome home in *EJIL*. Christopher McCrudden and Brendan O'Leary examine the recent decision of the European Court of Human Rights in *Sejdić and Finci*, exploring the difficult issues that arise where consociational or power-sharing arrangements, implemented to secure peaceful constitutional settlements in divided societies, are seen to conflict with the deep-seated norms and values of international human rights institutions. Boris Rigod analyses the purpose of the SPS Agreement in light of its negotiating history and economic theory; if properly applied, he concludes, it will neither undermine democratic self-government nor lead to a 'post-discriminatory' world trade regime. Anne Peters offers further reflections on Nino Cassese's last book, defending a 'critical' or 'ideational' positivist approach to international legal scholarship.

This issue sees the launch of what we hope will become a regular *EJIL* feature in succeeding years: a selection of papers from the Annual Junior Faculty Forum for International Law. A short essay by the Faculty Forum convenors – Dino Kritsiotis, Anne Orford and myself – describes the organization and goals of the inaugural Forum, and introduces the three exceptional papers selected for publication in this issue. Christopher Warren's contribution delves into the work of 17th-century English republican poet John Milton, delineating his vision of the law of nations and shedding new light on the humanist tradition in international law. Evan Criddle's article identifies and analyses the mechanism of 'humanitarian financial intervention', surveying the range of possible purposes to which it can be directed and the variety of international regimes that determine its legality. And Martins Paparinskis advances our understanding of the law of state responsibility by exploring how it applies in the context of investment treaty arbitration, where the participation of non-state actors has the effect of producing some surprising variations.

Our occasional series *Critical Review of International Jurisprudence* returns in this issue with a piece by Aldo Zammit Borda, who takes a formal approach to Article 38(1)(d) of the Statute of the International Court of Justice – regarding the application of 'judicial decisions and the teachings of the most highly qualified publicists' – and distils an original interpretation of that provision from the judgments of international criminal courts and tribunals.

Roaming Charges shifts back from Moments of Dignity to Places, with 'Backviews' of two great international cities, New York and Singapore.

In this issue's *EJIL: Debate!* Emmanuelle Tourme-Jouannet introduces and outlines what she affirms is an emergent new branch of international law, the 'international law of recognition'. In his reply, Jean d'Aspremont focuses on the 'methodological and functional anthropomorphism' underlying Tourme-Jouannet's project, which he argues acts to destabilize it.

The Last Page presents a poem on a theme with unfortunate resonance in our times: Ballade of Schadenfreude, by Susan McLean.

JHHW

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