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Brussels in Strasbourg: Theoretical Reflections on the Impact of European Union Law on the Case-Law of the European Court of Human Rights

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Brussels in Strasbourg: Theoretical Reflections on the Impact of European Union Law on the Case-Law of the European Court of Human Rights

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Summary. The article presents a theoretical reflection on one of the aspects of the impact of European Union law on the case-law of the European Court of Human Rights from the perspective of the competition between these two legal systems, and in the broader context of the perception of international law as a fragmentised legal reality. It is argued that the interplay between the law of the Convention and EU law is horizontal, as none of these legal systems is and perhaps will never be subordinated to the other. It is shown that one of the tools of harmonisation of the two legal systems is the so-called mutually friendly interpretation, and it is demonstrated how EU law-friendly (and, more broadly, international law-friendly) interpretation has been undertaken by the ECtHR in the cases of *Al-Dulimi* ([GC] 2016), *Hanan* ([GC] 2021) or *Bosphorus* ([GC] 2005). It is also discussed how the ECtHR's approach to EU law as particular international law is reflected in the structure of the judgments of this Court.

Keywords: collision rule; conflict of legal systems; Constitutional Court of the Republic of Lithuania; Convention for the Protection of Human Rights and Fundamental Freedoms; Court of Justice of the European Union; European Court of Human Rights; European Union law; fragmentation of international law; friendly interpretation; internalisation of international and EU law; preliminary ruling.

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Briuselis Strasbūre: teoriniai svarstymai apie Europos Sąjungos teisės poveikį Europos Žmogaus Teisių Teismo jurisprudencijai

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Santrauka. Straipsnyje teoriškai apmąstomas vienas iš Europos Sąjungos teisės poveikio Europos Žmogaus Teisių Teismo jurisprudencijai aspektų; tai daroma iš šių dviejų teisės sistemų konkurencijos perspektyvos ir platesniame tarptautinės teisės, kaip fragmentuoto teisinio reiškinio, sampratos kontekste. Teigiama, kad Konvencijos teisės ir ES teisės sąveika yra horizontali, nes šios dvi teisės sistemos nėra ir turbūt niekada nebus subordinuotos viena kitai. Pagrindžiama, kad vienas iš šių teisės sistemų harmonizavimo įrankių yra vadinamasis abipusiškai draugiškas aiškinimas, ir parodoma, kaip ES teisei draugiškas aiškinimas (ir plačiau – tarptautinei teisei draugiškas aiškinimas) EŽTT buvo pasitelktas *Al-Dulimi*, *Hanan* ar *Bosphorus* bylose. Taip pat aptariama, kaip EŽTT požiūris į ES teisę kaip partikuliarinę tarptautinę teisę atsispindi šio Teismo sprendimų struktūroje.

Pagrindiniai žodžiai: kolizijos taisyklė; teisės sistemų konkurencija; Lietuvos Respublikos Konstitucinis Teismas; Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija; Europos Sąjungos Teisingumo Teismas; Europos Žmogaus Teisių Teismas; Europos Sąjungos teisė; draugiškas aiškinimas; tarptautinės ir Europos Sąjungos teisės internalizacija; tarptautinės teisės fragmentacija; prejudicinis sprendimas.

Introduction

The tropes "Brussels" and "Strasbourg" denote, respectively, the European Union (EU; Union) and the Council of Europe, as the headquarters of these organisations are located in those cities. The "Strasbourg" metonymy, though conventional, is quite accurate, because it is Strasbourg which hosts the Parliamentary Assembly, the Committee of Ministers, the Congress of Local and Regional Authorities and other Council of Europe institutions. The seats of its Secretary General and the Commissioner for Human Rights are also in this city. The centralisation of Council of Europe institutions is not absolute, for some of them operate in Paris, Venice, Lisbon, Graz, etc. Also, the summits of heads of state and governments of Council of Europe Member States also often take place elsewhere and not in Strasbourg[2]; in addition, the Statute of the Council of Europe was signed not in this city but in London, and the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention; ECHR) and some of its protocols were also adopted elsewhere[3]. But the official construction of the Convention is the function of the European Court of Human Rights (ECtHR; Strasbourg Court), which has its seat in Strasbourg. The word "Strasbourg" therefore often refers to ECtHR only, rather than the Council of Europe as a whole. This is most characteristic of legal texts and contexts, where "Strasbourg has decided" means not that a resolution has been passed by, say, the Committee of Ministers or the Parliamentary Assembly, but that the ECtHR has decided a case. In this article, the place-name "Strasbourg" is used in this narrower sense.

The "Brussels" metonymy is even more conditional. The headquarters of the EU (which has adopted the same flag as the Council of Europe) are located in Brussels, where the European Commission sits. But some of the main EU institutions operate in Frankfurt and Luxembourg, others are scattered throughout various EU Member States, while the European Parliament holds its sessions not

[2] Of four summits only one took place in Strasbourg (1997); others took place in Vienna (1993), Warsaw (2005) and Reykjavik (2023).

[3] The Convention was signed in Rome, its Protocol no. 1 in Paris, Protocol no. 12 in Rome, and Protocol no. 13 in Vilnius. Further in the article, the mentioning of the Convention encompasses also its protocols, but in order not to overload the text, the words "and its protocols" are not added.

only in Brussels but also in Strasbourg. Whereas for lawyers, "Strasbourg" refers to the ECtHR and *per extensionem* the law of the Convention, "Brussels" means for them EU law, because most of EU law-making is concentrated namely there, even if a great part of it – first and foremost, primary law, i.e., the treaties on which the EU's predecessors and the EU itself have been founded – were concluded in Paris, Rome, Luxembourg, The Hague, Maastricht, Amsterdam, Nice, or Lisbon. The Court of Justice of the European Union (CJEU), which is tasked with the interpretation of both primary and secondary EU law, operates in Luxembourg. If one reasonably accepts that law is what is interpreted by courts, this article could be called also "Luxembourg in Strasbourg" (cf. O'Leary, 2018). On the other hand, even if in theory all EU law may be "interpreted in Luxembourg", realistically having in mind its growing scope and constant development, this will never be the case. This possibility is also refuted by the CJEU case-law, wherein a line is drawn between *actes clairs* and *actes eclairés*. Thus, if "Luxembourg" is chosen as the name-place for denoting EU law as such, this would be not without some reservations, which I do not delve in here. I merely condescend to the settled conventional usage of the trope "Brussels" and do not aim at changing it. My aim is more modest – to theoretically reflect on one aspect of the impact of the "Brussels law" on "Strasbourg law" in the context of competition of different legal systems and of international law as a fragmentised phenomenon, and to do that in general terms without going into specificities of particular cases.

Only one, because the variety of this impact cannot be covered in a short article. This article does not purport to be comprehensive, but presents a theoretical reflection on the impact of EU law on the ECtHR case-law from the perspective of the competition between these two legal systems. The use of EU law in Strasbourg, including not only references but, at times, also a certain degree of reliance, does not necessarily mean that EU law provides decisive reasons for the judgments of the Strasbourg Court. But before addressing this question, let us turn to the more general topic of the competition between EU law and national law. In this context, and by way of an example, the status of EU law in the legal system of Lithuania deserves some attention.

1. Of Internalisation of EU Law in General

There is no such thing as "one law", which is "discovered" by those construing and applying it. Instead, there is a big variety of legal systems, both national and international (supranational). To the extent that they regulate the same matters, or relations, they compete with each other. When competing, they not only assert themselves, but also reflect the fact that other systems overlap with them by interfering in the domain which they legitimately see as "theirs" and, consequently, are alternatives to them. Although nothing formally obliges sovereign states to apply the law of other states to matters within their jurisdiction, their, so to say, solipsist self-perception as the only and, consequently, "final" regulator would preclude the consideration of alternatives and could and most likely would provoke an analogous self-positioning of other legal systems, at least with regard to them. Such head-on collision could be detrimental to a system that asserts only itself, and this is why it is rational to attempt to avoid it. On the junction of competing national legal systems, there has emerged even a specific field of national law – private international law (or conflict of laws), which embraces collision norms, which allow for making decisions as to which of the competing provisions (of domestic or foreign law) should be applied in specific situations.[4] This does not eliminate the competition of provisions belonging to

[4] Of course, such overlapping is not limited to private law, but extends to such branches of law as tax law, criminal law, penitentiary law and so on.

different systems as such, because what may and do compete are not only provisions, the application of which in certain situations is determined by national collision norms, but also collision norms of different legal systems themselves. The resolution of conflict between national collision norms may be facilitated by collision norms of yet higher level, including those set out in bilateral treaties, rulings of international courts and arbitrations (if any) etc.

The competition between national and international legal regulation is of a different nature than that between national legal systems. Normally, state sovereignty is not something which is not limited by international law. Therefore, the adjustment of national legal provisions to international law is inevitable. This adjustment may be achieved by means of the so-called friendly interpretation, where national legal provisions are construed so as to conform to the overlapping international law provisions. This method has been approved also in Lithuanian legal doctrine. In particular, the Constitutional Court has postulated that the ECtHR and the CJEU case-law is an important source of construction of Lithuanian law[5]. And yet friendly interpretation is not a universal method of rapprochement of national law with international law, one of the reasons for this being that when domestic legal provisions are worded in an inflexible way, to interpret them "according to the Convention" or "according to EU law" may be possible only at the expense of distorting and abandoning their true meaning. In addition, the need of a friendly interpretation usually arises only when a legal dispute is already in place. Therefore, it would be more convenient to reapproach national law with international law by internalising the latter, that is to say, by transposing the provisions of international law in domestic law[6]. Internalisation may be limited to separate provisions (it is not always obvious wherefrom a certain provision has been transplanted to domestic law, because it may be "copied" not directly from international legal instruments, but from other legal systems which had internalised that provision earlier), and there is a an abundance of such transplants from international law in domestic law (among others, the ones pertaining to human rights). But certain legal regulation may be internalised also *en bloc* and *a priori*, when it is anticipated that the respective extranational legal system is going to be developed (as is the case with the unremitting growth of EU law), and that non-internalisation of the outcomes of that development would be formally not permissible or unacceptable. Such internalisation of international law in domestic law is routinely entrenched in constitutions.

In Lithuanian law, the examples of *en bloc* internalisation of international law are the provision of Article 135 § 1 that „[i]n implementing its foreign policy, the Republic of Lithuania shall follow the universally recognised principles and norms of international law", and of Article 138 § 3 that "[i]nternational treaties ratified by the Seimas <..> shall be a constituent part of the legal system of the Republic of Lithuania" and of Article 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" that "[t]he norms of European Union law shall be a constituent part of the legal system of the Republic of Lithuania" and that "[w]here it concerns the founding Treaties of the European Union, the norms of European Union law shall be applied directly, while in the event of the collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania."

Here, heed must be paid to two terminological peculiarities. Firstly, "international treaties ratified by the Seimas" and "the norms of European Union law", being regulation of extranational origin,

[5] For the first time, this was stated in the Constitutional Court ruling of 8 May 2000 ("as a source of construction of law is also important for construction and applicability of Lithuanian law"). An analogous doctrinal provision regarding the CJEU case-law (at the material time, the Court of Justice of the European Communities (CJEC) and the Court of First Instance) appeared in the Constitutional Court ruling of 21 December 2006.

[6] This may take time. For instance, the United Kingdom, the Council of Europe Member State since 1949, has internalised the Convention only in 1998 (by adopting the Human Rights Act).

are labelled as part of "the legal system of the Republic of Lithuania", but not of her national legal system. This is so, because the legal system of the Republic of Lithuania, while not ceasing to be one "of Lithuania", encompasses not only national, but also internalised extranational regulation, which "international treaties ratified by the Seimas" and "the norms of European Union law" are part of. The notion of "national legal system" has not only the broad meaning which comprises all domestic law with internalised provisions of extranational origin (and is often used synonymously[7]), but also a narrow meaning, which comprises only the law made by the law-making bodies of the state of Lithuania. Secondly, the Lithuanian Constitution, by internalising "international treaties ratified by the Seimas" or "the norms of European Union law", does not bestow on them the power of the Constitution itself. What has been constitutionalised by the cited constitutional provisions, are not the provisions of "international treaties ratified by the Seimas" and not "the norms of European Union law",[8] but only their status, that is to say, their being a constituent part of the legal system of the Republic of Lithuania. In the interpretation of the Constitutional Court, the provisions of Articles 135 § 1 and 138 § 3 have constitutionalised the principle *pacta sunt servanda*, which means that "the Republic of Lithuania observes international obligations undertaken of its own free will and respects universally recognised principles of international law", therefore, "in cases when national legal acts <..> establish a legal regulation which competes with that established in an international treaty, then the international treaty should be applied".[9] As to the cited provisions of Article 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union", they have been interpreted by the Constitutional Court as explicitly establishing the collision rule "which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising out of the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal force is), save the Constitution itself"[10]. Thus, in Lithuanian constitutional doctrine, EU law, despite its international origin, is treated primarily not as international law, but as part of the non-national segment of Lithuania's domestic law (as we shall see, from the perspective of the law of the Convention it is primarily of international nature). The said collision rule is based on the approach to EU law as a *sui generis* law, which, being of international origin but also a part of domestic law, does not fit the habitual (for national legal doctrines) typologies of legal regulation and sources of law. It consolidates such algorithm of coexistence of EU law and Lithuanian law, where what is pertinent is not the superiority of any of these legal systems, but the primacy of application of EU law: even if under the typologies relied upon in Lithuanian national law, a EU legal instrument is not "superior" to the act issued by a Lithuanian law-making body (e.g., an EU regulation is not "superior" to a statute passed by the Seimas), under this rule it is the EU's legal instrument which still must be applied. At the same time, this general collision rule contains one important stipulation, without which it would not be what it is, namely: an EU legal provision enjoys no priority of application, if it competes with the regulation enshrined in the Constitution itself and, we may add to what has been postulated by the Constitutional Court, if that competition may not be eliminated by means of friendly interpretation. This stipulation logically stems from the fact that it is the Constitution, i.e., the supreme law of the land, which has authorised the internalisation of EU law, and not vice versa.

Truth be told, on one occasion the said stipulation had been ignored by the Constitutional Court itself, and that raised some eyebrows. In a decision of 20 December 2017, by which the Constitutional

[7] Also, for convenience, in this article, where the context permits.

[8] But this may be done by separate constitutional provisions, e.g., those that enshrine particular human rights.

[9] For the first time, this was stated in the Constitutional Court ruling of 14 March 2006.

[10] For the first time, this was stated in the same Constitutional Court ruling of 14 March 2006.

Court applied to the CJEU for a preliminary ruling on the interpretation of an EU directive, it postulated that "European Union law is a source of the interpretation of law of the Republic of Lithuania, *inter alia*, the Constitution in the areas where, under Article 1 of the Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union, the Republic of Lithuania shares with or confers on the European Union the competences of its state institutions", therefore, "[a]s the areas of agriculture and internal market fall under shared competence between the European Union and the Member States, there are no grounds for interpreting the provisions of the Constitution linked to these areas, *inter alia*, Article 46 thereof, in a different manner than the specified areas are regulated by European Union law".[11] In that decision,[12] there is no even a hint of the collision rule, which has long become part of the official constitutional doctrine.[13] Even more, no difference has been drawn between EU primary law, which in Article 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" (cited with an essential preterition) is called "the founding Treaties of the European Union", and EU secondary law, i.e., directives and regulations, the compliance of which to EU primary law may not be presumed *a priori* without reservations (for what has been decided in Brussels may not necessarily be approved in Luxembourg) and which, moreover, are subject to constant change. In this "new interpretation" (if interpretation it is, and not a fiat), all EU law is called "European Union law", as if the Constitution does not oblige to see its internal hierarchy[14]. The readership is left guessing whether the long-standing doctrine, which asserts the collision rule was overturned by mistake, or it was a deliberate capitulation of the Constitutional Court to the CJEU, given that the latter has proved to be very unwilling to view the relationship between EU law and nation al law from the perspective of primacy of application of EU law, and not from that of its supremacy, and protects that supremacy so covetously that, when referring, in its earlier preliminary ruling (adopted upon request of the Lithuanian Constitutional Court), to the collision rule, it even suppressed the stipulation "save the Constitution itself" and thus distorted that rule almost beyond recognition.[15] Still, soon after the finalisation of the case in which the Constitutional Court departed from the collision rule, it has reverted to its earlier principled stance,[16] thus making the departure from it a doctrinal anomaly, an aberration hopefully not to be followed in the future[17].

This example, not related to the case-law of the ECtHR, is mentioned here only in order to show that the competition of legal systems is not uncomplicated. It presents challenges to each of them, and the choices, which must be made at their junction, may shift. The Lithuanian algorithm of coexistence between national law and EU law is not the only one possible: the constitutions and constitutional case-law of EU Member States have created others, which may vary from almost full subordination of national (even constitutional) law to decisive (if not necessarily well reasoned) resistance to it, but further examination

[11] The Constitutional Court ruling in that case was adopted on 6 February 2020. Therein, the cited wording has been repeated.

[12] And in the ensuing ruling of 6 February 2020.

[13] Cf. the earlier (first) application of the Constitutional Court to the CJEU for a preliminary ruling, where the said rule is not suppressed, but explained to this supranational Court. Constitutional Court decision of 8 May 2007.

[14] For the criticism of this decision see, e.g., Birmontienė, 2020, p. 90-94.

[15] *Sabatauskas and Others* (2008).

[16] Constitutional Court decision of 8 April 2020, no. KT70-A-S65/2020. In that decision, it is stated that "the collision of legal norms of the laws and other legal acts of the Republic of Lithuania and of EU law is a matter of application of law". On this awkwardly worded basis the Court declined the examination of an applicant's individual constitutional complaint.

[17] Although there has been at least one modest attempt to harmonise the two approaches. Constitutional Court ruling of 7 June 2023.

of these matters would go far beyond the topic of this article. To generalise, the recognition of the autonomy of other legal systems is the condition of their coexistence, and the way in which a national legal system is capable of reflecting the functioning of competing legal systems, national or international, and to respond to them, is one of the preconditions of its virtue of efficiency. Mutual reflection of other legal systems and adequate response to them allows for their coexistence. A head-on collision would not allow that. Although the ECtHR may and often does assess the quality of national law, e.g., from the point of its correspondence to the standards of the rule of law as the principle which permeates all the Articles of the Convention (See: Kūris, 2018; Spano, 2021), it, guided by the principle of subsidiarity, does not question its interpretation, as provided in the case-law of domestic courts of a respective state, unless it is arbitrary or manifestly unreasonable.[18] But specific issues may and occasionally do arise when the Strasbourg Court is faced with the need to assess the quality of EU law, as internalised in the domestic law of the Council of Europe Member States. It is this issue I now turn to.

2. Law of the Convention and EU Law: Competition and Coexistence

Not only national law competes with international law, but various international legal systems also compete with each other. This is related to the so-called fragmentation of international law.[19] The notion of fragmentation means that the regulatory and institutional development of international relations is uneven, and that various instruments of international law regulate the same matters differently. It has been observed long ago that the fragmentation is not so much the fault of international law but rather an inevitability: owing to the fact that international law is not created from one centre, its fragmentation reflects not mere political pluralism but fundamentally different approaches and their substantiation, and global legal pluralism is not only a result of political pluralism, but is an expression of contradictions between colliding sectors of a global society (see, e.g., Koskenniemi, Leino, 2002; Fischer-Lescano, Teubner, 2004). The report of the Study Group[20] of the International Law Commision (ILC) (of the United Nations (UN)) "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law"[21] is based on international law's strong presumption against a normative conflict, which must be avoided in the interpretation of international treaties, including the widely recognised principle that states, when taking on new obligations, must not depart from those already undertaken. According to Article 103 of the UN Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under this Charter shall prevail" (1 UNTS XVI). Though it is not explicitly stated that the Charter has "priority" over other norms of international law, such priority is widely recognised both in practice and the doctrine.

It appears that the further, the more this wishful thinking departs from reality, as is testified by the increasing impotence of the United Nations in the face of the wars of the 21st century (some of which have been caused by a permanent member of its Security Council). And yet, although international law cannot be fully neither hierarchised nor unified to a significant extent, its hierarchisation remains an aim to be pursued. The Study Group, in its report, has postulated the foundations of the hierarchy of the norms of international law, placing on its top *jus cogens* norms, immediately followed by norms,

[18] See, e.g., *Ljaskaj v. Croatia* (2016).

[19] I.e., public international law.

[20] Chaired by Professor Martti Koskenniemi.

[21] A/CN.4/L.682/Add.1. See also: Treves, 2009.

the obligatory nature of which as "hierarchically superior" stems from Article 103 of the Charter, and by defining the methods, which must be applied when dividing the questions of the conflict of norms etc. At the same time, it is a reality that particular systems of international law may and do apply their provisions in disregard of UN law, if they are unable (or unwilling) to interpret them in a UN law-friendly manner. Be that as it may, fragmentation of international law is a fact, and not a permission for particular systems of international law to oppose others and not to seek harmony of the overall system of international law, even if this ideal can never be achieved. Therefore, it is perfectly understandable why the ECtHR case-law aims at minimising contradictions between the law of the Convention and other particular systems of international law and general international law.

In this regard, the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (2016) is symptomatic[22]. The case concerned the freezing of assets and economic resources of the applicants in implementation of the UN Security Council resolution which imposed sanctions on officials of the former Iraqi regime. The ECtHR found a violation of Article 6 § 1, because Swiss courts had not assessed national measures, by which the sanctions were implemented, although, according to the interpretation of the Strasbourg Court, they were not prevented from doing that, as such assessment was not prohibited by the resolution in question. This reasoning (in which the case law of CJEC is also referred to) did not convince all, and some commentators see it as raising more questions than providing answers (see, e.g., Tzevelekos, 2017). However, had the ECtHR not attempted at avoiding the contradiction between the Convention (an international treaty) and the UN resolution (general international law), it would have to recognise the superiority of the resolution over the Convention, relying on Article 103 of the Charter, and, consequently, to sacrifice the powers of domestic courts to assess the implementation of sanctions to person requesting such assessment, which would run against Convention standards, or to confront both the resolution in question and Article 103 of the UN Charter (Koker, 2016). None of these hypothetical options seemed attractive; the ECtHR was not seduced by similar alternatives also in other cases, where the Convention was interpreted so that it was possible to avoid a normative conflict with general or particular international law.[23]

The ECtHR acts in such competitive environment where a too categorical assertion of the Convention as the most authoritative ("final") regulator could provoke the backlash on the part of international legal systems that regulate the same matters. This does not mean that the ECtHR may never assess "extraneous" international law from the point of its compliance with the Convention standards (whatever hierarchy of international law may be engineered by the ILC). In this regard, the case of *Hanan v. Germany* ([GC] 2021) could be mentioned. In the centre of that case there was the jurisdictional link between the air strike conducted in Afghanistan, which caused the death of civilians, and the obligation of Germany, as a Council of Europe Member State, to investigate their death. In *Hanan* judgment, alongside the usual structural parts "Facts" and "Law", there is one more, in this regard equivalent to them – "Relevant legal framework and practice" – where relevant international law has been presented.[24] This quite unusual (at that time) structure was determined by the fact that the ECtHR had to assess the compatibility of provisions of general international law with Article 2 of the Convention and, at the same time, aimed at avoiding any normative conflict; therefore, it was inclined, to the extent that it was possible, to interpret the provisions of the Convention in an international law-friendly manner. No violation has been found.

[22] *Al-Dulimi ir Montana Management Inc. v. Switzerland* (2016). The author was part of the composition of the Grand Chamber, voted for the finding of a violation, but filed a concurring opinion.

[23] See, e.g., *Nada v. Switzerland* ([GC] 2012).

[24] EU law proper did not feature in that case.

In this respect, the *Hanan* was to a certain extent a turning point. Since then, the structural choice adopted in that judgment, has been increasingly repeated in a series of other cases[25]. However, previously, the Grand Chamber judgments by which cases were decided on their merits, as a rule, consisted of two big structural parts:[26] "Facts" and "Law". Here, "Law" denoted the law of the Convention. „Extraneous" law was presented in the "Facts" part, and the "Law" parts included not only general international law, but also relevant EU law, *inter alia*, references to the EU Charter of Fundamental Rights and the interpretation of its provisions in the CJEU case-law as well as other EU instruments, including *travaux préparatoires*.[27] This signified the Strasbourg Court accepted EU law as a "fact", that is to say, a legal system autonomous to the law of the Convention, and did not undertake its interpretation itself, in the same way, as it, when presenting domestic law, relied on its interpretation by domestic bodies (in the first place, the courts) and did not formulate any alternative interpretation thereof. It was telling that in ECtHR judgments EU law was sometimes categorised as particular international law (when the "Facts" part contained in the section "International law" contained the sub-section "European Union law"[28]), sometimes as a legal system having affinity with international law and not sharply distinguished from it (sub-section "International and European Union law"[29]), sometimes as a legal system "parallel" to international law and not embraced by the latter,[30] and sometimes "joined" together with the law of the Council of Europe.[31] At the same time, the previous practice has not been completely abandoned.[32] The structural peculiarities of judgments depend on various circumstances: the subject matter of the case, the technique of judgment drafting, but also such subjective factors as the attitudes of drafters and judges. There have been attempts to unify the practice of structural choices, but, as transpires from the said variety, unification has not been achieved. Bet that as it may, irrespective of whether EU law is presented under the heading "Facts" or in a separate structural part, it has not entered the "Law" part.

The "joining", in the case-law of the ECtHR, of EU law with international law, especially where the sub-section "European Union law" of the section "International law" is structurally on par with sub-sections "General international law", "United Nations law" or "Law of the Council of Europe", may look to some unacceptable from the EU law perspective, because for already six decades (since the 1963 landmark case, briefly known as *Van Gend en Loos*) the European Community, and now the EU, is understood as „a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals";[33] thus EU law is seen as different both from national law (even if, as in the case of Lithuania, it is internalised), and from international law proper. Sometimes EU law is seen as different from international law in that respect that under the founding treaties there have been created supra-national institutions, which issue instruments that are mandatory to EU Member States;

[25] See, e.g., *Savickis and Others v. Latvia* ([GC] 2022); *Macatė v. Lithuania* ([GC] 2023); *L.B v. Hungary* ([GC] 2023).

[26] Not to count introductory and operative parts. Sometimes there was also a short structural part "Complaints", but this practice is already a matter of the past (see, e.g., *Jaloud v. The Netherlands* ([GC] 2014)).

[27] As well as soft law, comparative legal material, documents of various international organisations etc.

[28] See, e.g., *Maslov v. Austria* ([GC] 2008); *Naït-Liman v. Switzerland* ([GC] 2017); *Simeonovi v. Bulgaria* ([GC] 2017).

[29] See, e.g., *Vallianatos and Others v. Greece* ([GC] 2013); *Avotiņš v. Latvia* ([GC] 2016); *Zubac v. Croatia* ([GC] 2018).

[30] See, e.g., *G.I.E.M. s.r.l. and Others v. Italy* ([GC, merits] 2018).

[31] See, e.g., *L.B. v. Hungary* ([GC] 2023).

[32] See, e.g., *Sanchez-Sanchez v. the United Kingdom* ([GC] 2022); *Halet v. Luxembourg* ([GC] 2023).

[33] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* (1963).

also, they (as well as EU institutions) are obliged by rulings of CJEU. The perception of EU law as of a *sui generis* legal system is rooted in the fact that the EU itself is a *sui generis* organisation (see, e.g., Peročević, 2017). Still, the lax distinguishing (and at times non-distinguishing) of EU law from "other" international law in ECtHR judgments may be explained, or even vindicated. Firstly, EU law originates from treaties, which, however specific (in particular, in that respect that they comprise the extranational element of domestic legal systems of EU Member States), have all traits of international treaties. Secondly, EU law is not global or universal as general international law, but regional and therefore particular. Thirdly, even the creation of supranational institutions (including the CJEU) is not a distinctive feature of EU law, because supranational institutions and international courts, which adopt mandatory decisions, are created also according to other international treaties[34] (by the way, the ECtHR is also created by an international treaty – ECHR). What also matters is that only slightly more than half of the Council of Europe Member States are at the same time EU Member States (currently 27 out of 46[35]), while for all the others EU law is "merely" particular international law which does not directly bind them.[36] *À propos*, it is worth considering whether this circumstance could not be a an "internal", "untold", motive for the CJEU to reject the EU's accession to the ECHR,[37] especially in view of the fact that political and legal practices of some Council of Europe Member States are far-off of EU standards (or even have never met them). In the ECtHR case-law there have been cases, where the relative deficiency of EU law (at that time, EC law) has shown itself, where a human right could be defended against the position of Brussels and Luxembourg. A chrestomatic example would be the case of *Koua Poirrez v. France*, where the ECtHR found a violation of Article 14, taken in conjunction with Article 1 of Protocol no. 1. In that case, the French courts, adopting decisions regarding disability allowances to the applicant, which were unfavourable to him, discriminated against him. However, domestic courts were guided by unambitious preliminary ruling of the European Court of Justice (ECJ).[38] In view of such cases (even if they still are quite exceptional), the EU's accession to the Convention would be meaningful not only because it would implement the commitment written in the Lisbon Treaty; however, in doing this, it is crucial to beware of the risks related to political and legal practices of some Council of Europe Member States, which must not be ignored. Despite the attempts to pursue this accession, renewed after some break following its rejection in 2014 by the CJEU, it is difficult to expect that they will come to fruition in the nearest future (at least I do not expect that this will happen before I finish my professional activity, although I would like to be wrong). And when this happens, this nevertheless will not mean the subordination of EU law to the law of the Convention, because this would not be permissible under the Lisbon Treaty.[39]

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[34] Including the (UN) International Court of Justice, the EFTA Court etc.

[35] Before Brexit and expulsion of Russia from the Council of Europe, the numbers were, respectively, 28 and 47.

[36] The degree of (un)boundedness varies: e.g., states which belong to the European Economic Area cannot be considered as completely unbound by EU law.

[37] *Opinion 2/13 of the Court (Full Court)* (2014).

[38] *Koua Poirrez v. France* (2003).

[39] In *Protocol* relating to article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (protocol no. 8) it is *explicitly stated that "[t]he* agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms … provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate" (Article 1), and that "[n]othing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union" (Article 3).

Thus, not only the interplay of the EU law and the law of the Convention is horizontal, but it is condemned to remain such. This does not negate the possibility of mutually friendly interpretation of one's "very own" law having regard of the law of the "partner system". The Strasbourg Court follows this path. As mentioned, it assesses EU law as autonomous of the law of the Convention. At the same time, as one can draw from such cases as *Koua Poirrez*, it has not renounced its power to assess its accord to the latter, when the circumstances of the case under examination so require.

The key for solving the dilemma of how to secure the application of Convention standards in such cases, where EU Member States (all of whom are Council of Europe Member States) apply EU law, which is autonomous of the law of the Convention, was found – or at least is thought to have been found – in the landmark case, briefly known as *Bosphorus*.[40] In that case, the Court had to decide on the seizure of a plane, leased by a Turkish company, which then leased it to a company of Yugoslavia (later Serbia and Montenegro). The plane was seized in Ireland, which applied UN sanctions, implemented under EU law. Ireland, an EU Member State, had no margin of appreciation in this matter, but had to apply the impugned measure. In the ECtHR's assessment, the fact that the state has transferred competencies to an international organisation, in this case the EU, does not absolve it from the obligation to secure Convention rights. As Ireland had no margin of appreciation, the regime of sanctions applied under EU law itself became the subject matter of the examination from the point of view of its compliance with the Convention. That regime had been already approved by the ECJ. The ECtHR found no violation of Article 1 of Protocol no. 1. *De jurisprudentiae ferenda*, what was more important than this finding was the elaboration of the principle that "State action taken in compliance with <…> legal obligations [stemming from the membership in an international organisation] is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides"; by "equivalent" the Court meant "comparable" and not "identical" (for the requirement "that the organisation's protection be 'identical' could run counter to the interest of international cooperation pursued"). But, apart from this theory, the Court was guided by the assumption that the EU law provided the requisite "equivalent" protection. As the Irish authorities, when seizing the plane, were guided by an unrebutted presumption that the measure applied under EU law complied with the Convention, the ECtHR did not examine that measure *in concreto*. This approach was criticised by six members of the Grand Chamber in their separate (concurring) opinions. Indeed, from the point of view of logic, it would be difficult to explain how a measure may be found to violate or not to violate any legal instrument, if that measure has not been examined *in concreto*, but it is noteworthy that none of those on the bench, including the authors of the separate opinions, voted against the finding of no violation. Thus, by this unanimous judgment foundations were laid for an EU law-friendly interpretation of the law of the Convention. In *Bosphorus* judgment, it is noted that "any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection".

In this respect, the reasoning of the ECtHR reminds that of the German Federal Constitutional Court in the case known as *Solange II*.[41] The principle formulated in the *Bosphorus* judgment has

[40] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (2005).

[41] *Solange* is not a surname, but the word which means "so long". It is taken from the phrase "so long as the European Communities" ("*Solange die Europäischen Gemeinschaften"*). The principled stance and the doctrinal essence of the *Bundesverfassungsgericht*'s judgment has been formulated in the following way: "it must be held that, so long as the European Communities and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar

been repeated and explicated in a series of ECtHR judgments and decisions, in particular in *Michaud v. France* (2012), *Povse v. Austria* (2013), and *Avotiņš v. Latvia* ([GC] 2016).

There is no doubt that, owing to the fact that the law of the Convention covers the geographical area where EU law operates and that the latter regulates, in part, the same matters as the former, their harmony is something to be pursued by all legitimate means. It is therefore not incidental that provisions of EU law are cited, even if as comparative material, also in cases against states, which are not EU Member States.[42] At times they are relied upon (as the argument reinforcing arguments based on the Convention) when assessing such situations, which took place even before the establishment of a particular EU standard. In this context, the case of *Vīzgirda v. Slovenia* (2018), deserves special mentioning. In that case, violations of Article 6 §§ 1 and 3 have been found on the account that the applicant, who was suspected of a criminal offence and subsequently convicted for it in Slovenia, was not granted translation or interpretation into Lithuanian.[43] Two judges who objected to the finding of violations criticised, in their joint dissenting opinion, the fact that the majority[44] relied, *inter alia*, on a EU directive which was subsequent to the events under examination and, in addition, in its light assessed the actions of Slovenian authorities committed at that time when Slovenia was not yet an EU Member State. From the formal point of view, these reproaches look valid, but it must be emphasised that, as a matter of course, the law applied in the case under examination was not EU law but the Convention. Whatever the appreciation of this criticism, that judgment (not the only one in the ECtHR case-law) discloses one more – and a very important – aspect of the potential of EU law: the latter may serve as a source of inspiration for the interpretation of Convention provisions even when certain EU regulation has been established *ex post*.

Conclusion

To review the whole variety of ECtHR case-law where the Strasbourg Court has relied, in one or another manner, on EU law would be too broad an undertaking for a short article. There has been a visible growth of cases regarding certain matters, to the extent and these cases may no longer be regarded as specific, let alone exceptional, as it was at the time of *Koua Poirrez*. To mention a few, these are cases pertaining to the so-called Dublin II regulation,[45] EU arrest warrant,[46] freedom of expression,[47] or independence of the judiciary.[48] In some cases the ECtHR has examined whether the non-application of EU law by

to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German civil courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution". *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE 73, 339. It is more than obvious that the difference of the *Bundesverfassungsgericht*'s approach in this case from the one explicated by Lithuania's Constitutional Court in its decision of 20 December 2017 is as stark as can be, despite the fact that both these Courts, each in its own way, have aimed at harmonisation of respective national law with EU law.

[42] See, e.g., *Tarakhel v. Switzerland* ([GC] 2014); *Naït-Liman v. Switzerland* (2017); *Merabishvili v. Georgia* ([GC] 2017); *Guðmundur Andri Ástráðsson v. Iceland* ([GC] 2020).

[43] Slovenian authorities were of an opinion that it would suffice if the applicant, an ethnic Lithuanian, was provided with the translation and/or interpretation into Russian, which he (having been born in Kaunas in 1980) knew feebly.

[44] The author was in the composition and voted with the majority.

[45] See, e.g., *M.S.S. v. Belgium and Greece* ([GC] 2011); *Tarakhel v. Switzerland* ([GC] 2014).

[46] See, e.g., *Bivolaru v. Romania* (2017); *Pirozzi v. Belgium* (2018); *Romeo Castaño v. Belgium* (2019).

[47] See, e.g., *Delfi AS v. Estonia* (2015); *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* ([GC] 2017).

[48] *Grzęda v. Poland* ([GC] 2022); *Juszczyszyn v. Poland* (2022).

domestic courts could be justified from the Convention perspective. For instance, on the account of non-application of EU law violations of Article 6 § 1 and Article 1 of Protocol no. 1 were found in the case of *Spasov v. Romania*. However, such cases are rare so far, therefore it would be premature to state that there is a tendency that the ECtHR has undertaken the assessment of the legitimacy and appropriateness of application or non-application of EU law. But another tendency has become more apparent: the ECtHR has become more exigent in assessing the situations where domestic courts do not apply to Luxembourg for a preliminary ruling and, in addition, do not substantiate this inaction or refusal or satisfy themselves by providing only a minimalist wording substantiating it, – this has been increasingly assessed as arbitrariness or manifest unreasonableness and, accordingly, as a violation of the Convention (Article 6 § 1).[49] Thus, step by step, the impact of EU law on the law of the Convention grows not only in that respect that it may be a source of inspiration for the interpretation and application of the Convention (as in the case of *Vizgirda*), but also in that respect that ECtHR itself stimulates the development of EU law through preliminary rulings, on which it then may rely, once the case on the same subject matter reaches Strasbourg.

There is no doubt that all this is very far from the complete rapprochement of EU law with the law of the Convention, which may never take place. But this does not prevent the development of a symbiotic relationship between these two particular international legal systems and to the convergence of their content, to which the CJEU's contributes, *inter alia*, by relying on the case-law of the ECtHR (see, e.g.: Spano, 2021). This is achieved by mutually friendly interpretation, and this diminishes, at least to some extent, the fragmentation of international law.

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[49] In cases involving the issues of non-application to CJEU for a preliminary ruling a violation is found far from always (see, e.g., *Ullens de Schooten and Rezabek v. Belgium* (2011); *Stichting Mothers of Srebrenica v. The Netherlands* (2013); *Baydar v. The Netherlands* (2018); *Somorjai v. Hungary* (2018); *Repcevirág Szövetkezet v. Hungary* (2019)). But cf. judgments where a violation has been established (e.g.: *Dhahbi v. Italy* (2014); *Sanofi Pasteur v. France* (2020)). A committee case (which in many other respects may be regarded as a routine one) of *UAB Baltic Master v. Lithuania* (2019) may be mentioned, in which a violation of Article 6 § 1 of the Convention was found, on account that the refusal of Lithuanian courts to apply to the CJEU for a preliminary ruling was worded in an extremely minimalist manner. In this context, one could consider whether Convention standards are met by the following reasoning of Lithuania's Constitutional Court: "It should be noted that, under Article 267(1)(b) and Article 267(3) of the [Treaty on the Functioning of the European Union], if a court of a Member State is faced with the issue of the interpretation of, *inter alia,* acts issued by institutions of the Union, this constitutes the grounds for making a reference to the Court of Justice for a preliminary ruling. Taking into account the EU legal regulation discussed in this ruling of the Constitutional Court, in the constitutional justice case at issue, the Constitutional Court is not faced with doubts about the interpretation of the provisions of EU legal acts specified by the representative of the petitioner. In addition, it should be noted that one of the questions raised by the representative of … the petitioner, regarding the interpretation of EU legal acts is connected with the impugned legal regulation … was amended and, regarding this issue, this part of the constitutional justice case must be dismissed." Constitutional Court ruling of 3 April 2015. The above question is purely hypothetical, because the petitioner in that case was a group of Seimas members that could not be ever considered a victim in the sense of Article 34 of the Convention.

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