

ABSTRACT

This work is part of the RESHUFFLE research project, which explores the growing impact of the European Union’s role in the field of fundamental rights. Historically, Europe was split between two systems: the Council of Europe, focused on democracy, the rule of law, and human rights through the European Convention on Human Rights; and the European Union, originally centred on economic integration and the internal market. In the absence of its own fundamental rights regime, the EU—through the Court of Justice of the EU—drew heavily on the ECHR to build its framework.

Over the past few decades, however, the EU has increasingly established its own standards in fundamental rights. Since 2000, the Charter of Fundamental Rights has served as the EU’s own Bill of Rights. Legislative action in areas such as equality, data protection, and non-discrimination has further expanded the EU’s role. This evolution marks a shift in Europe’s fundamental rights landscape: from a position of ‘standard-taker’, the EU is emerging as a ‘standard-setter’. Yet, this transformation and its consequences have received limited academic attention.

This project investigates how EU fundamental rights standards have influenced the case-law of the European Court of Human Rights. The research aims to uncover how the Court has engaged with EU standards, the opportunities these provide, and how it navigates the tensions arising from their use in its case-law.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CJEU	Court of Justice of the European Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ComEDAW	Committee on the Elimination of Discrimination against Women
ComFCNM	Advisory Committee on the Framework Convention for the Protection of National Minorities
Convention 108	Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
Convention 108+	Modernised Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPC	European Political Community
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
Istanbul Convention	Convention on Preventing and Combating Violence Against Women and Domestic Violence
OECD	Organisation for Economic Co-operation and Development
SCEC	Study Committee for the European Constitution
UN HRC	United Nations Human Rights Committee

Je n'ai plus peur de la pluie
Ni même de la nuit
Le noir en toile de fond
Est havre de ma lumière

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FOREWORD

Bridging Two Europes



The story I am about to tell you is that of a photograph. I took this photograph on a Saturday morning in November two years ago. The location of this photo, which you will probably recognise, is Strasbourg. Strasbourg is a city whose structure and architecture speak of our shared past. It was built up in successive waves and layers. If you dare to take a boat tour in Strasbourg, and so did I three times, it will take you to the heart of the conflicts and turmoil of our European history. Not far from Place du Corbeau, the tour begins in the historic district of Strasbourg. As you proceed along the Ill canal, you catch sight of the famous Palais Rohan before noticing a change in the surroundings. The Alsatian architecture with its half-timbered houses gives way to massive buildings constructed from cut stone. You have entered the German imperial quarter, the Neudstadt, which was built following the Treaty of Frankfurt in 1871 when Strasbourg was ceded to the German Empire.

Continuing the visit, you arrive in the European quarter, constructed after the Second World War as a symbol of a new beginning and a commitment to ‘never again’ on the European continent. This is the place you see in the photograph. On either side of the canal, two buildings are visible. On the right is the Louise Weiss building, where the plenary sessions of the European Parliament are held. To the left, you can catch a glimpse of the Winston Churchill Building, which also belongs to the EU institutions. Just behind this building is the Palais des droits de l’Homme – which cannot be seen on the picture –, home to the Council of Europe, which can be accessed through the Winston Churchill Building. Although both Europes share the purposes of ensuring peace and cooperation between European States, they resemble twins separated at birth.¹ The Council of Europe emerged as the ‘Europe of values’, upholding democracy, the rule of law, and human rights as its banners. The European Union, known back then as three European Communities, represented the ‘Europe of the market’, with roots tracing back to Schuman’s vision that ‘Europe will not be made all at once, or according to a single plan’, but will be ‘built through concrete achievements which first create a de facto solidarity’.²

Within these two Europes, the protection and promotion of human rights, as enshrined in the 1948 Universal Declaration of Human Rights, took divergent paths: central to one, absent in the other. The Council of Europe placed human rights at the heart of its mission. Under its aegis, the European Convention on Human Rights came to birth, along with the European Court of Human Rights, housed in the Palais des Droits de l’Homme, not far from the location in our photograph. The Convention would become one of the most successful and effective human rights instruments in the world, thanks to the supervisory mechanism it puts in place, which operates beyond the national level. In the founding Treaties establishing the European Communities, traces of these rights were scarcely found. But let us not be mistaken. While the absence of human rights may seem like an anomaly, it was the result of historical circumstances. These rights could very well have been at the heart of the Union’s architecture from the very beginning too.

Even though the ‘young’ EU institutions were primarily focused on economic matters, making their impact on human rights not obvious, the issue of their (lack of) protection knocked on the door of the Court of Justice of the European Union, driven by litigants seeking to defend their rights. Although it initially showed some resistance, the EU judiciary – located not in Strasbourg but in Luxembourg – began incorporating these rights through the gateway

¹ G. QUINN, ‘The European Union and the Council of Europe on Human Rights Issues: Twins Separated at Birth’, 2001, *McGill Law Journal*, pp. 849–874.

² Schuman Declaration of 9 May 1950, available at: <https://op.europa.eu/en/publication-detail/-/publication/2fa0afe0-9f7c-426d-9933-fca909c50983>, p. 17.

of general principles, under increasing pressure from national courts. Lacking sources of inspiration within EU law itself, the CJEU had to look elsewhere. It first turned to the common constitutional traditions to the Member States and then to international treaties, eventually elevating one source as the true *primus inter pares*: the European Convention on Human Rights. The CJEU regarded this as a source of ‘particular’ or ‘special’ significance, drawing extensively on both the Convention and Strasbourg case-law, far more than on constitutional traditions, international conventions, or related jurisprudence. The prominent role of ECHR law, endorsed by EU political institutions, led to a situation in which, for a long time, EU fundamental rights were significantly inspired by those of the ECHR.

To express it more vividly and return to our photograph, let us consider, in simplified terms, that the right bank symbolises the EU and EU law, while the left bank represents the Council of Europe and ECHR law. With our picture in mind, one could say that the flow of human rights was unidirectional, crossing the bridge from left to right – from ECHR law to EU law. From right to left, the issue was quite different: it was not about the ECtHR drawing inspiration from EU law, but rather about whether it could oversee measures originating from EU law that might threaten human rights. In this vein, the potential accession of the EU to the ECHR has been in the pipeline since the late 1970s, with the aim of ensuring that acts of EU institutions comply with ECHR law.

The story up to now is well known, but in recent decades, a new chapter seems to be unfolding that could alter its course. This is because, on the right side of the canal, the EU has increasingly adopted fundamental rights standards. One immediately thinks of the Charter of Fundamental Rights, a bill of rights for the Union, which gained the same legal force as the EU Treaties with the Treaty of Lisbon. But that is not all. Although it does not have a general competence in human rights matters, the EU legislator has been granted specific powers since the Treaty of Amsterdam, leading to a burgeoning of legislation that gives flesh to the Charter in areas such as the right to equality and non-discrimination, data protection, and procedural rights, among others.

The wave of EU fundamental rights could modify the flow of traffic between our two banks. The flow from ECHR law to EU law is slowing down: increasingly, the CJEU focuses on the fundamental rights enshrined in the Charter and expressed in secondary legislation, which it tends to interpret autonomously from Strasbourg. A new flow could also emerge, not from left to right, but from right to left, where EU fundamental rights find a place within the ECtHR’s case-law. There are solid reasons to believe this may happen: these fundamental rights are highly sophisticated and deeply integrated within the majority of the Council of Europe’s States, making them a valuable source of inspiration and a source of law which is part of the background in cases

involving EU States. As these rights evolve autonomously from those of the ECHR, there is also a growing need to articulate the EU and ECHR layers.

If this might be true, we should bear in mind that the context in which the flow goes from EU fundamental rights to ECHR law is quite different from the reverse flow. This is because, firstly, all EU States are Parties to the ECHR, whereas not all Convention States are EU States. Moreover, EU law does not enter uncharted territory: the ECtHR has long been open to drawing on international instruments and the practices of European states in shaping its jurisprudence. One might assume that, despite their growing significance in the ECtHR's case-law, EU fundamental rights are just one source among others that the ECtHR takes into account.

So, what impact has the growing role of the EU as a fundamental rights standard-setter had on the other side of the canal? Are EU fundamental rights simply one source among many, or do they hold a special place in ECtHR case-law? At the core of this book lies one central thesis we will unfold: EU fundamental rights are, to some extent, a source of special significance for the ECtHR, a significance that could increase over time. This special significance should be supported by a specific method aimed at strengthening the EU-ECHR fundamental/human rights bridge, which is crucial for upholding our shared European values and advancing the common European project of peace and cooperation, at the very heart of our two Europes.