**The relation between the Charter and the Convention – how to solve conflicts?**

**Summary**

In order to answer this question it is necessary to shift it into the broader context of preventing and solving conflicts between fundamental rights stemming from different legal sources within a composite and multilevel system called “European Area of Fundamental Rights” (Reding).

The relation between the rights enshrined in the ECHR and the rights and principles “reaffirmed” by the EU Charter is challenging, in particular because of the numerous “corresponding” rights. Those rights, however, have to be divided in two groups. According to the explanations joint to the Charter, there are indeed “articles of the Charter where both the meaning and the scope are the same as the corresponding articles of the ECHR” but also “articles where the meaning is the same as the corresponding articles of the ECHR, but where the scope is wider”. Furthermore, some of these “corresponding” rights do in addition correspond with rights resulting from the common constitutional traditions of the member states.

Different types of conflicts, divergences or collisions are thus likely to occur, notably: (1st) divergences on the substance or the scope of one particular right affirmed in both instruments, (2nd) collisions between two conflicting rights, freedoms or principles, (3rd) differences concerning access to court and the level of effective judicial protection and (4th) a potential “negative” conflict regarding the exclusive competence of both the ECJ (article 344 TFEU) and the ECtHR (article 55 ECHR).

Mainly, it will be a task of the courts to avoid, to prevent and to solve conflicts in the application and the interpretation of both instruments. Within the European Area of Fundamental Rights there is indeed a shared duty of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and the jurisdictions of the EU member states to cooperate within what Voßkuhle called the “Europäische Verfassungsgerichtsverbund”.

As they do not have the same competencies and as the scope of the Charter differs fundamentally from the scope of the Convention, a certain division of functions appears in practice. As a main difference, the ECJ and the national judges in the EU member states are (subject to some conditions) competent and required to apply both the Charter and the Convention, whereas the Strasbourg Court, who is the only specific Human Rights Court, is merely competent to apply and construe the Convention.

As a result these different judges will have to apply, at least to some extent, specific or distinctive methods and rules of conflict solving (I.). However, they will also make common use of judicial techniques that have proven appropriate to overcome potential conflicts between fundamental rights instruments (II.).

**I. Distinctive methods and rules**

A. Methods and rules applicable by the CJUE and the national courts

1. Interpretation clauses of the Charter (art. 52 and 53)

2. Reasoning in terms of hierarchy of norms (as implied by art. 6 TUE)

B. Methods available to national (constitutional) courts

1. Cumulative application versus narrow interpretation of the Charter’s scope

2. Reference to the CJEU for a preliminary ruling (article 267 TFUE)

C. Relevant principles proper to the ECHR and the ECtHR

1. Subsidiarity of the conventional system

2. The “equivalent protection” doctrine (or “Bosphorus test”)

3. Prior involvement of the CJEU

4. “Last word” competency of the ECtHR after accession

**II. Shared judicial techniques**

A. Consistent interpretation

B. Balancing colliding fundamental rights and freedoms

C. Judicial dialogue

1. Mutual reception of case law

2. Struggle for the “best solution”