

Droit communautaire des droits fondamentaux - Recueil de décisions de la Cour de justice des Communautés européennes. Frédéric Sudre, Sabrina Quellien, Nicolas Rambion, Caroline Salviejo (eds.). Bruylant, Brussels 1999. 252 pp. Paperbound. ISBN 2-8027-1288-8. 2400 BEF/59,49 EUR.

The European Court of Justice on the European Convention on Human Rights - Who said what, when? Elspeth Guild, Guillaume Lesieur (eds.). Kluwer Law International, London/ The Hague/ Boston, 1998. xxv + 440 pp. Hardbound. ISBN 90-411-0433-X. NLG 250.00 [€ 113.45 EUR]/ USD 135.00 {€ approx. 145 EUR] /GBP 85.00 [€ approx. 143 EUR]

These two volumes both aim to collect the case law of the ECJ on the protection of human rights in the EC, with this restriction that the volume edited by Guild and Lesieur - as the title indicates - is limited to the case law explicitly involving the European Convention on Human Rights; whereas the collection *Droit communautaire des droits fondamentaux* has cast the net much wider. Both books are valuable reference tools, especially for those not having access to CD-ROM editions of the case law or on-line access (provided they have elaborate search tools) to complete versions of the case law. Even for those having access to such databases, books like those under review have the advantage of being printed and therefore better to read and thumb through, and more importantly: the editors of both books have applied more important and more relevant intellectual criteria than the search tools of digital bases seem to be unable to cope with. Nevertheless, both books have their limitations.

Numerically, the volume edited by Sudre *et al.* contains 81 judgments with a brief case description, while the collection of Guild and Lesieur contains 68 cases, being either an opinion of the Advocate General (17 out of the 68), a judgment, or both, but without case descriptions. The book edited by Guild and Lesieur has a preface of July 1998, but the last case it contains is *Kremzow*, of 29 May 1997, thus excluding an highly important case like *Vereinigte Familiapress*, 26 June 1997. *Droits communautaire* announces the 1 September 1999 as the cut-off date, the last case being *Montecatini*, of 8 July 1999. *Droits communautaire de droits fondamentaux* presents the judgments chronologically, whereas Guild and Lesieur organize their materials by provision of the ECHR (and Protocols) and one chapter, entitled 'The ECHR in General'; this is preceded with a chapter giving an very brief summary, arranged along the same lines, of all the cases more fully reported in the book. The tables provided at the end of *Droit Communautaire* consists of a chronological, alphabetical, analytical and thematic index. The book of Guild and Lesieur contains a table of cases by ECHR Article, a list of cases by type of action under the EC Treaty; a general table of cases of the ECJ, the European Commission of Human Rights (mistakenly entitled 'Applications before the European Court of Human Rights'), and judgments of the ECHR. This list of cases, however, does not only a list the cases reported in the book, but refers to all cases mentioned in the judgments and opinions; hence it does not count 68 but 144 ECJ cases. This book also contains a table of treaties and conventions and an analytical index. A list of the cases (opinions and judgments) actually reported in the book is missing, which means that those who wish to use the book as quick reference tool to look up the relevant passages of a particular case, will spend a fair amount of time in tracing it in the book, sometimes only to find out that it is not in there. Also the first chapter, giving brief summaries, is not only unhelpful for being exceedingly short in its summaries, but also misleading because it is not indicated whether a summary refers to an opinion of the Advocate General only, or to a judgment of the Court.

Guild and Lesieur have taken their self-imposed restriction to the ECHR quite literally: only those cases in which the Convention is mentioned in so many words, have been taken into account. The justification the editors present for limiting themselves to the ECHR is the pre-eminence of the Convention in the field of protection of human rights at the level of the EU. It does quite obviously mean that we have to miss out on fundamental rights case law which relies on other sources than the ECHR. The criterion that the Convention has to be mentioned literally, is infelicitous. It means that some important cases on the right to property, as also guaranteed by Article 1 of the 1st Protocol to the

ECHR are not included. Thus, for instance, cases C-2/92, *Bostock*, and C-63/93, *Duff* (both present in *Droit communautaire des droits fondamentaux*), of which the relationship to the intricate Strasbourg case law has been object of discussion in the literature, are absent.

The editorial principle under discussion occasionally, but accidentally leads to somewhat broader horizons, by including Opinions which happen to mention that something does *not* come under the ECHR, or where a mere analogical reference is made to this instrument. It has meant that the opinion of the Advocate General in *AM&S* is included because he held that the confidentiality between lawyer and client is not protected under Article 6 ECHR. Unfortunately the strict interpretation that a literal mention of the ECHR is necessary before a judgment is reported in the collection, has the curious result that the judgement in *AM&S* is not included. This gives a most distorted view of what the Court actually held on the right to confidentiality in *AM&S* and why we know this case in relation to the protection of fundamental rights.

An analogical reference to the ECHR led to the inclusion of part of the Opinion in *R v. Henn and Derby*.

I have found one exception to the otherwise strictly applied principle of literalism, case C-49/88, *Al Jubail Fertilizer*, in which the Opinion does explicitly refer to the ECHR, but the judgment does not. Perhaps the inclusion of both the opinion and the judgment in case C-85/76, *Hoffmann LaRoche*, may also count as an exception (the opinion referred particularly to Art. 7 ECHR, whereas the judgment does not, although it does go into the rights of the defence).

That the opinions of the Advocate General are included in the book by Guild and Lesieur, is very positive and indeed a clear advantage over the collection in *Droit communautaire*. Without the famous opinions in *Konstantinidis* and *Grogan*, any collection of case law is incomplete, although the Court never took over the views there expressed. These opinions can stand on themselves. Nevertheless, it is also meaningful to see whether the Court did or did not take the same view as the Advocate General. In this respect it is a pity that Gould and Lesieur have not been able consistently to include both the opinion (if there was one) and the judgment.

In comparison, the sections which Guild and Lesieur reproduce are briefer than the ones included in *Droit communautaire des droits fondamentaux*, several times too brief given the fact that - unlike *Droit communautaire* - there are no case descriptions. This sometimes leaves the reader who is unacquainted with a particular case, at a loss as to the background and context of the texts reproduced. In this respect *Droit communautaire des droits fondamentaux* compares more favourably, although also here the case descriptions sometimes remain briefer than one might wish.

Between the two books there is an overlap of only 38 cases. It may make one doubt whether to be unsettled with the arbitrariness of fishing materials from the pond of fundamental rights cases, or whether it should be a comfort that in the relatively sizeable case law of the ECJ only 38 cases seem to constitute the core of case law in the field of the protection of fundamental rights. If we take into account the periods covered, and we antedate the cut-off date of *Droit communautaire* to that of the book of Guild and Lesieur, the former contains 74 judgments against the 68 cases of Guild and Lesieur. The 38 cases overlap is then slightly more than half. But if we deduct the cases in which the latter only reproduce the opinion of the Advocate General (17 cases), in fact the overlap of 38 cases concerns a collection of 74 and 51 cases respectively (which perhaps is still uncomfortably small). To some extent this is explained by the limitation of Guild and Lesieur to the ECHR, but on the other hand the criteria for selection used by the editors of *Droit Communautaire des droits fondamentaux* contribute to the incommensurability.

The editors, under the leadership of Frédéric Sudre, have included the case law on certain fundamental principles which are connected to human rights, such as the principle of legal certainty. As a matter of fact, in the editorial preface in *Droit communautaire des droits fondamentaux* this is said to be

inspired by the reference which the Strasbourg Court has made to it as a principle inherent to the law of the Convention in the *Marckx* case. Taking their cue from the ECHR, they have thus found it necessary to include fundamental principles which the ECJ has not actually called a 'fundamental right' (p. 9). On the other hand, the editors have decided to exclude the free movement of persons, notwithstanding Article 18 EC, because this has primarily been enshrined in Article 39 (formerly 48) EC as an economic freedom which has not been approached by the ECJ from the perspective of the protection of fundamental rights, this in contrast to the right to equal treatment (p. 10). Although there is much truth in this, it overlooks the fact that the Court has called the free movement of persons - just as is the case with the other economic freedoms - a 'fundamental right' before it considered the classic human rights as fundamental rights which deserve protection under EC law. As a matter of fact, the distinction between the economic freedoms and the right to equal treatment in terms of their fundamental nature has only recently been made in a decision by the Fifth Chamber in *Schröder*, C-50/96, and *Sievers and Schrage*, C-270-271/97, of 10 February 2000. Moreover, it is not entirely true that the free movement of persons has not been constructed in the light of fundamental rights in the classic sense. The judgment of the ECJ in *Konstantinidis* is a clear example of a construction of the restrictions on the free movement of persons in the light of the principle of non-discrimination (at any rate in the judgment - as opposed to the Advocate General's opinion).

Much as the choice for legal principles related to classic ECHR rights might lead to an approach which is not far removed from that of *Guild and Lesieur*, in fact there is a fair amount of material over which one might disagree as to whether it really belongs to the *droit communautaire des droits fondamentaux*. Thus the collection begins with *Dineke Algera et al.* (joined cases 7/56, 3/57 and 7/57, 12 July 1957), which is quite interesting with regard to the fundamental principles of Community law and their basis in the common legal principles of the Member States, especially in acquired rights, reasonable expectations (*Treu und Glauben*), renunciation and estoppel. But this case does not immediately strike one as being most relevant to fundamental *rights* in the by now classic sense of the word. This applies *mutatis mutandis* also to most of the fifteen other judgments included under the general theme of legal certainty.

If we thus eliminate also these 16 judgments for a fair comparison, the ratio between *Sudre c.s.* and *Guild and Lesieur* becomes 59 to 51, with an overlap of 38, which seems more reasonable than it at first appeared. Had *Guild and Lesieur* included judgments which really are (though implicitly) dealing with Convention rights (as can be deduced from the opinions of the Advocate General in relevant cases), things would have looked even more reassuring.

There remains one curious omission in the *Guild* collection, which must be mentioned. It concerns the cases on HIV tests and Article 8 ECHR, which in the editorial introduction is hailed as setting out a line 'which has excited some interest' (p. xxii). In an endnote to this text (endnotes are not really very practical in a book which by its nature already necessitates a lot of turning pages backwards and forwards - why do even these very expensive books have no ribbons for pagemarkers?) reference is made to *X v Commission*, of the Court of First Instance of 18 September 1992, of which the most relevant recitals are reproduced in the book. However, this judgment was quashed on appeal to the ECJ, precisely because it had drawn a wrong conclusion on the meaning and scope of Article 8 ECHR in the context of this case (involuntary medical tests), see ECJ case C-404/92 P, 5 October 1994, ECR, I-4737. The ECJ case is missing in this collection. It is not missing in the collection of *Sudre c.s.*, where the judgment of the Court of First Instance is - understandably - omitted.

Are these books useful? For the reasons already indicated at the outset, the answer must be in the affirmative. Although both have their limitations, they are useful reference tools for the case law up to May 1997 for the book by *Guild and Lesieur* and for *Sudre c.s.* until July 1999. For the later case law the generally accessible site of the Court can be searched and consulted without great difficulty. From this perspective they should be wished on the desks and in the libraries of scholars and students in the field of Community law and in that of human rights.

Are they to be purchased? The Kluwer Law International book by Guild and Lesieur is nicely printed in a clear type face and hardbound. Although the process of producing it has obviously taken a fairly long time (more than a year between the last judgment included and the date of the preface), there are quite a few remaining typing errors. A disturbing one changes case 323/82 to 323/52 and thus turns the *Intermills* case of 1984 into the oldest of cases in the list of cases. The collection by Sudre *c.s.*, although paperbound, is nicely compact and has certain advantages over Guild and Lesieur's book. But for both there is an obstacle. The price of the book by Guild and Lesieur - as with so many books and journals by Kluwer Law International - is absolutely prohibitive for academics, let alone students. This is a great pity, because the book might very well be used in university courses. Although the Bruylant book by Sudre *c.s.* is nearly half the price and contains more material in fewer pages, it also suffers under a price which cannot be expected to be paid by students. The librarian might be more easily convinced; as will be the academic who takes a special interest in the ECJ and fundamental rights and has no easy access to the digital databases.

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