The Protection of Fundamental Rights post-Lisbon

The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions

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General introduction

In democratic polities under the rule of law, all exercise of public power is subject to observance of fundamental rights. This is a main characteristic of constitutionalism. This explains the importance of the topic of fundamental rights protection in the European Union. It determines the constitutional nature of the European Union.
Because the Member States have a sometimes very longstanding experience with their autonomous fundamental rights standards, while on top of that they have to apply a Union standard when they act within the scope of Union law, the theme of EU fundamental rights protection immediately touches on the relationship and interaction between the Union and the constitutional orders of the Member States. The topic of fundamental rights protection in its various aspects is illustrative of the interdependence and the relative autonomy of the constitutional orders involved. This general report is hence inevitably an exercise in stocktaking of the constitutional relations in the EU.
Such stocktaking is particularly opportune since the recent entry into force of the Lisbon Treaty, which gave the European Union Charter of Fundamental Rights binding legal force. Also, the new Article on the sources of fundamental rights protection in the EU (Article 6 EU) holds out the promise of accession to the ECHR.
The theme of this report is broad. Difficult choices had to be made on what to include and what not. The choice has been to discuss constitutional issues concerning fundamental rights protection within the European Union. The report therefore does not cover any aspect of the EU's external human rights policy, nor relevant issues on accession of new Member States.
This report is divided into five chapters. The first chapter concerns the sources of fundamental rights and their relationship. The second is devoted to the cluster of questions which concern the contexts in which these can be invoked, in particular whether they can be invoked between private parties *inter se*, and the ancillary question of how to resolve collisions of rights.
The third chapter concerns the Charter of Fundamental Rights of the European Union (2007/C 303/01, hereafter also 'the Charter') which was given binding legal force by the Lisbon Treaty, and briefly discusses the experience in judicial practice in the brief period of its application as a legally binding instrument.
The fourth chapter is devoted to the consequences of a future accession to the European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR).
The fifth chapter ties together a number of issues also touched upon in previous sections, concerning some structural principles underlying the fundamental rights architecture of the European area of fundamental rights.

Methodology
This report is based on the national reports of the Member States and Croatia as well as the report provided by the Commission, submitted to FIDE between September 2011 and February 2012. There are no Member State reports for France, Belgium, Cyprus, Romania, Sweden, Lithuania or Latvia. It would have been impossible to cover in this report all

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The author expresses his gratitude to all the authors of the national reports and the Institutional Report for the many insights and very rich information they have provided. Also, the author thanks Mariana Gkliati for research assistance and Alison McDonnell for language editing.

analytical points and the very rich information contained in the national and Commission reports. We have instead been eclectic in this general report and must refer the reader to the national reports in their full richness to capture all the detail. The various reports provide an opportunity to inform one another of the approaches taken in various Member States.

A *caveat* concerns the progress of time. The questionnaire was drawn up when a number of important cases were pending before the ECJ and some national constitutional courts, which then seemed important. A number of these have in the meantime been adjudicated and new ones, which had not been quite foreseen, have been handed down. At the time, the accession to the ECHR seemed to be taking shape, but at the moment of writing this general report, the negotiations on the accession to this instrument have arrived at a stalemate due to disagreements among the EU Member States. No doubt, new cases will have been published and new developments may have taken place by the time of the FIDE conference. This may lead us to raise issues in this report which could not have been discussed in the national reports, or to cover developments and questions at the conference which have not been discussed in this report.

Finally, experience teaches that in comparative studies a relative outsider can go very wrong in interpreting materials foreign to him. No doubt, this has frequently occurred in this report.

1.
Nature and scope of the rights protected

Formal sources

The development of EU protection of classic fundamental rights within the EU's own legal order was triggered by the Member State courts. They referred cases to the European Court of Justice on questions which in essence were seeking to ensure that constitutional rights – often articulated and made effective in response to the very same historic events which inspired the project of European integration as we know it – were actually guaranteed in the context of what we now know as the European Union. The story is too well-known to deserve repetition in full. Let us merely mention some points which are relevant to the nature and scope of the various sources of fundamental rights in the EU.

SOURCES BINDING AT THE EU LEVEL

Already early on, the case law identified the sources for the protection of fundamental rights which were canonised in *Nold II*. Wrapped up in the primary source of the general principles of European law these comprise 'the constitutional traditions common to the Member States' and 'the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.[2]

The formula underwent minor changes. The 'common constitutional traditions and human rights treaties to which Member States are a party' were originally declared to be sources of 'inspiration' and providing 'guidelines' respectively. In some of the later landmark cases, the inspirational language was no longer used by the ECJ,,[3] but curiously returned again more systematically in more recent years. This is strange because the codification of the sources of fundamental rights in the Maastricht Treaty and after contains no such indirect language: the EU 'shall respect fundamental rights, *as guaranteed by* the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and *as they result from* the constitutional traditions common to the Member States, as general principles of Community law.' In other words, the sources mentioned are to be respected as such, not merely as sources providing 'guidelines' or 'inspiration'.

Possibly, this merely reflects a preference for archaism, whether or not caused by the digitalization of the case law, facilitating the 'copy and paste' techniques in the cabinets of the *juges rapporteurs*.

The present case law seems quite clear in actually applying the ECHR as a direct source of the relevant fundamental rights, just as the constitutional traditions are analysed to determine the common tradition resulting therefrom, without creating extra distance by considering them merely 'inspiration' – though the analysis is often left to the Advocate-General and, moreover, the common constitutional traditions are not often actually used as a source of fundamental rights.[4]

The Maastricht version of the EU Treaty (Art. F(2), after the Amsterdam revision 6(2) TEU) narrowed down the category of human rights treaties to the ECHR, but this evidently did not restrict the functioning of other human rights treaties as sources of the general principles of EU law applied by the ECJ.[5] This narrower formula has been retained in the Lisbon version of the EU Treaty (now Art. 6(3) EU) (see below, section on general principles).

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[2] ECJ 14 May 1974, Case 4-73, J. *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECR 1974, 491, paragraph 13.

[3] Notably ECJ, C-260/89, *ERT*, ECR 1991, I-2925, para. 44; ECJ, C-368/95, 26 June 1997, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH*, para. 24-25.

[4] Examples are ECJ, Cases 46/87 and 227/88, 21 September 1989, *Hoechst*,, ECR 1989, 2859, ff. Identical was the judgment of the Court in case 85/87, *Dow Benelux*, ECR 1989, 3150, as well as cases 97 en 99/87 *Dow Chemica Ibérica and others* ECR 1989, 3181; recently Case C-550/07, 14 Sept 2010, *Akzo Nobel*, Case C-279/09, 22 December 2010, *DEB*.

[5] The ECJ has, for instance, recognized the International Covenant on Civil and Political Rights to belong to the relevant sources of protection, see e.g. Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 31; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 68;

A further source of human rights protection is in two Charters belonging to the legal order of the Union, the first of which is the Community Charter on Fundamental Social Rights of Workers adopted by the Heads of State or Government at the Strasbourg meeting of December 1989 (signed by the UK only in 1998); it is referred to in Article 151 TFEU. The second is the Charter of Fundamental Rights that was drafted by the first Convention of representatives of the Heads of State or Government, national parliaments, European Parliament and the Commission in 2000.[6] The Charter acquired a certain status already before it became legally binding, although the arguments the ECJ drew from the Charter in that period tend to be more supplementary compared with the independence which the ECHR standard had gained at the time, and still has.[7] In Chapter 2 below, we return to the Charter since it has become binding with the entry into force of the Lisbon Treaty.
These are the main sources of EU fundamental rights as guaranteed by the ECJ.

SOURCES BINDING AT NATIONAL LEVEL

For Member State courts and authorities the sources of fundamental rights are not quite the same. In their exercise of public authority, the Member State courts are legally bound to respect the national bills of rights as contained in the relevant national constitutional documents. It is in the nature of a constitution that its bill of rights regulates all and any exercise of public authority within the legal order.
Member States are also bound by all human rights treaty obligations to which each of them has autonomously bound itself, although their enforcement within the national legal order may depend on the status given to such treaty obligations by the national constitution.
On top of this and In parallel to these sources, the EU sources apply when the Member States act within the scope of EU law.
However, several Member State constitutional courts, often following the legal literature, have distinguished the exercise of authority by national authorities within the scope of EU law from the exercise outside that scope, i.e. merely within the scope of autonomous national law. Significantly, this has not necessarily led them to conclude that national fundamental constitutional rights do not need to be observed when they act within the scope of EU law. Quite the contrary: a reservation is made as to the core of that fundamental rights protection in the form of accepting only EU law based exercise of authority if it is subject to equivalent protection by EU fundamental rights and which respects that core.

DIVERGENCES BETWEEN SOURCES

At an early stage, it was not very clear which nationally protected rights could at all interfere with ECSC and EEC measures. Initially, the most economic of such fundamental rights were invoked, i.e. the right to property and the – at the time – relatively odd provision on free choice of profession in the German *Grundgesetz* (Art. 12).[8] Both were subject to broad exceptions.

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and Case C-249/96 *Grant* [1998] ECR I-621, paragraph 44); Case C 540/03 *Parliament v Council* [2006] ECR I 5769, paragraph 37; Case C 244/06 Dynamic Medien [2008] ECR I 505, paragraph 39. Similarly, the UN Convention on the Rights of the Child, see Case C 540/03 *Parliament v Council* [2006] ECR I 5769, paragraph 37. In parallel paragraphs in *Viking* and *Laval*, the Court relied on European Social Charter of 1961, ILO Convention No 87 on Freedom of Association and Protection of the Right to Organise, paragraphs 43 and 90 respectively.

[6] It should be noted that the European Union is also a party to the Convention on the Rights of Persons with Disabilities, which it signed on 30 March 2007 and ratified on 23 December 2010.

[7] For a recent application of the Community Charter of Fundamental Social Rights, see ECJ (First Chamber), 16 September 2010, Case C-149/10, *Chatzi*.

[8] The Italian *Corte costituzionale* read into the 'right to work' (Art. 4 of the Italian Constitution) a similar right; Corte costituzionale, sentenza n. 45 del 1965, in Giurisprudenza costituzionale, 1965, p. 655 ff.. The French Constitution of 1956 contained only a provision in the chapter on relations between parliament and government, spelling out that the general principles of 'le droit du travail' was to be the object of *la loi*. The Belgian Constitution included a right to work and free choice of profession (now in Article 23) in 1994; Luxembourg contains a general right to work since 2007, which is not considered

For the right to property, this is illustrated by the broad language of the Protocol to the ECHR.[9]
It was not difficult for the ECJ to dismiss the appeals with broad strokes of the judicial brush, asserting the legitimacy of the objectives of the European acts involved and summarily stating that these did not interfere with the core of the relevant fundamental right.
As gradually also other classic rights were invoked,[10] this summary approach became a more pressing concern. It came as no surprise that at a certain point it was questioned whether the Court was taking rights seriously enough.[11] The *Connolly* judgment marked the turn to the application of more stringent judicial standards to which European acts should live up, in line with the practice of the European Court of Human Rights (ECtHR) and some of the national constitutional courts.
Nevertheless, the question arises what fundamental rights apply in the Member States and whether these coincide with the rights as applied by the EU Courts. Should a certain right be guaranteed by one source or set of sources but not by another, a 'gap' may be said to exist.

Gaps as perceived in Member State legal orders

The national reports provide information on what actual or potential divergence is perceived to exist between various human rights sources and how they are protected by national courts.
The various national reports lead us to distinguish between rights which are better protected by the European sources and those which are less well protected by the European sources.

Some examples of nationally less protected rights

- Right to life, protection against torture and slavery: Denmark
- Family life: in Poland the constitutional definition of monogamous heterosexual marriage spills over to the concept of 'family life' in national case law, providing less protection than Article 8 ECHR; also in Ireland the scope of the right to family life is less extensive than under 8 ECHR
- Right to marry: not protected by e.g. Maltese and Netherlands Constitution.
- Right to industrial action: the Slovak constitutional right is more narrowly constructed in the implementing legislation than in the Charter.
- Social and economic rights under Charter and international instruments: not guaranteed to the same extent in a number of countries among which Ireland.
- Status of ECHR: in Hungary the quasi-dualist system is viewed as an obstacle to provide adequate protection to ECHR rights, limiting courts to use techniques of consistent interpretation; but some authors read the new Article Q as granting primacy of international law over national law, though practice will have to confirm this.
- Lack of judicial remedies: in the Netherlands courts cannot review the constitutionality of acts of parliament;
- Croatia and Malta lack strict scrutiny in the context of proportionality test; the concept of indirect discrimination is unknown in national law

Examples of nationally more protected rights

justiciable (see Report on Luxembourg). The Netherlands included a similar right to free choice of employment in 1983 (art. 19 (3) Grondwet).

[9] Protocol, Art. 1: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[10] Although the case of Erich Stauder, 15 Marienweg, 79 Ulm, who invoked his right to privacy and wanted to remain anonymous, although the ECJ was so sensitive to publish his first and family name as well as his private address in their entirety at the heading of its judgment, was an early example of invoking a non-economic right, Case 29/69, 12 November 1969.

[11] See Coppell and O'Neill, The European Court of Justice: Taking Rights Seriously? 29 (1992) *CMLR* 669ff.; and the risposte by Weiler and Lockhart, Weiler, J and Lockhart, 'Taking Rights seriously' seriously: The European Court and its fundamental rights jurisprudence' (1995) 32 CMLR, 51 (Part I) and 579 (Part II).

- Ireland: right to life of the unborn child, trial by jury for non-minor criminal charges, right to reputation
- NL, Germany: absolute prohibition of prior censorship of expressions.
- Netherlands: right to education and educational financial equal treatment;
- Belgium, Czech Republic, Hungary (and others): rights of ethnic, linguistic or cultural minorities
- Slovenia: (details of) procedural rights as compared to the Charter (and ECtHR).
- Scotland: previously the sanction of nullity of proceedings in case of undue delay
- Luxembourg: the natural rights of the human person and family
- Slovakia, Czech Republic, Poland, Bulgaria (and others): several social and economic rights
- Spain: trial in absentia
- Portugal: right to a good administration

A number of reports specify that some national fundamental rights conceptions are considered to fall within the scope of the constitutional identity which is part of the national identity the EU is to respect under Article 4(2) of the EU Treaty. With the entry into force of the Lisbon Treaty, the ECJ has acquired jurisdiction regarding this provision, and has already granted claims restricting the exercise of rights under EU law.[12]

Examples of rights belonging to constitutional identity:

- the core of fundamental rights generally and human dignity especially (Germany; Estonia)
- linguistic rights (Belgium)
- essential elements of democratic state under the rule of law (Czech Republic, Estonia and elsewhere).
- linguistic and cultural rights and protection of natural heritage (Slovenia, Hungary)
- freedom of persons not to be totally recorded and registered (Germany)[13]
- right to equal treatment in general, and the equal educational freedom independent of denomination in particular (Netherlands)
- Abolition of the nobility and noble titles (Austria; aspects of this also in Ireland and Italy)

It is clear that precisely the protection of fundamental rights forms a core part of the constitutional identities of Member States. To the extent that fundamental rights coincide between Member States (and ECHR as well as EU), the obligation for the EU to respect the constitutional identities of Member States does not add to what the case law of the ECJ has ascertained and was codified in the EU Treaty (now in Article 6(3) EU).
The obligation to respect the constitutional identities of Member States becomes more significant when it concerns features which are not commonly shared by the Member States. These exist also in the field of fundamental rights.
That the EU shall respect this was implicitly confirmed in the *Omega* judgment of the ECJ. This case concerned a measure restricting the freedom of services, based on the particularly German concept of human dignity in accordance with the *Grundgesetz*; a prohibition of a laser-game. The Court found this measure justified as a public policy measure, and in this regard found that it is 'not indispensable … for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as

[12] Article 46 of the EU Treaty in the version antedating the Lisbon Treaty restricted the jurisdiction of the Court on the founding principles of the EU fundamental rights to Article 6(2) TEU, which is now Article 6(3) EU. The first successful claim was in ECJ C-208/09, 22 December 2010, *Sayn-Wittgenstein*; it also played a more marginal role in Case C-391/09 12 May 2011 *Runevič-Vardyn*.
[13] BVerfG, 1 BvR 256/08 vom 2.3.2010, para.218, http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html (*Dataretention*).

regards the precise way in which the fundamental right or legitimate interest in question is to be protected'.[14]
It should be noted that the elements of the constitutional identity of a Member State to be respected do not necessarily concern a fundamental right. Therefore, the invocation of the obligation to respect the constitutional identity of a Member State need not always be in the interest of protecting a right of a citizen; it may also mean the restriction of rights of citizens. This is clear from the *Sayn-Wittgenstein* case, in which the republican identity of Austria was reason to restrict the citizenship rights of free movement, in as much as the person involved was not allowed to carry the noble titles in Austria which she could carry in Germany.

Convergence and divergence

The national reports convey the picture that, overall, fundamental rights norms deriving from various sources tend to converge. A first explanation of this is that constitutional reforms or amendments in many Member States have had the very purpose of nationally anchoring rights that were already binding for them under international human rights treaties in particular the ECHR,[15] while also the EU Charter of Fundamental Rights has been used as a source of inspiration for constitutional amendment.[16]
Some of the divergences remain latent or ostensible only, because in practice courts can either not effectuate one of the two rights or they can circumvent them or fill a legal void by reference to another human rights source. Finally, divergences which take the form of (potential) conflicts can be resolved by the use of rules of precedence, or interpretative techniques which have a harmonising effect.
This is not to say that there are no perceived or real differences between national fundamental rights and the European and international ones.

- *Unproblematic and problematic divergences*

The national reports give reason to distinguish between various types of cases in which divergences of general sources of fundamental rights occur. We start out from a general starting point, which does not specifically concerns cases within the scope of EU law.
Divergences which are not very problematic occur when on the one hand national courts are unable to provide remedies for alleged infringements of provisions of international human rights treaties – either due to procedural law or to the status and rank of a treaty – while at the same time such protection can be given on the basis of national fundamental rights. The national court can in principle revert to the *equivalent national rights*, which then *substitute* for the international or European rights.[17]

Similarly, in a second group of cases the *mere absence of national rights* may be covered by international or European fundamental rights, *supplementing* the national set of rights, if and when courts are competent to apply them. Since all EU Member States have incorporated the ECHR, this tends to be the position in most of them, although there may be restrictions to the courts' powers to apply them to the full, as is for instance the case in Ireland and the UK with regard to acts of parliament.
This 'stepping in' of international and European rights, though laudable from the perspective of citizens' rights, is not always unproblematic, nor is it necessarily uncontroversial. This is a consequence of the tension between an individual right and a public interest, which is inherent in fundamental rights adjudication. Individuals' rights can outweigh measures taken in the general interest, and will then block the effectiveness of such purportedly general interest measures. This is precisely what explains the suspicion against the invocation of fundamental rights which can be sensed in the earliest cases on fundamental rights protection of the ECJ, warning that reliance on constitutional rights undermines the autonomous character and legal basis, the uniformity and efficacy of Community law,[18] the unity of the common market and the cohesion of the Community.[19] In several Member States, European

[14] ECJ, Case C-36/02, 14 October 2004 , para. 37.
[15] E.g. Finland and many of the newer Member States.
[16] see Netherlands report, paragraph 1.4.
[17] German Report at Question 1.1 in initio.
[18] ECJ, Case 11/70,17 December 1970, *Internationale Handelsgesellschaft*, para. 3.
[19] ECJ, Case 44/79, 13 December 1979, *Hauer*, para. 14.

rights are viewed as at least potential interferences with the national policy priorities. [20] This criticism seems to focus on the case law of the European Court of Human Rights, which is considered to be faced with a 'legitimacy crisis'.[21] Although the ECJ has many more judicial roles than adjudicating fundamental rights issues only, by extension this kind of criticism may also touch on the case law of the ECJ, though generally it is the overall 'competence creep' which is the target of criticism, not specifically the ECJ fundamental rights case law.

A third group of cases is probably the most problematic. These are cases when national, European or international fundamental rights conflict, in the context of a national jurisdiction, with one of these guaranteeing a different level of protection from the other. The question is which one will prevail.
The divergence between these standards can be viewed in a sense as 'collisions' of rights deriving from different sources. In other parts of the report, we return to various aspects of this. Here we point out that the national reports demonstrate the wide variety of approaches which courts take to deal with divergences.

- *Judicial techniques of overcoming discrepancies: consistent interpretation and primacy*

Many potential discrepancies are overcome by judicial techniques of 'consistent interpretation', by which national fundamental rights standards are interpreted in light of European and international standards so as to achieve their substantive concurrence. Such interpretation may be mandated explicitly in the national constitution[22] or implied in the constitution.[23]
Consistent interpretation differs in its details from country to country. It may be far-reaching. For instance, on the basis of the Section 3 of the Human Rights Act 1998, British authorities and courts have to 'read and give effect' to legislation in such a manner that it is compatible with ECHR rights 'so far as it is possible to do so'. On this basis, the House of Lords read the expression 'surviving spouse' as comprising the surviving partner in a homosexual relationship. But it would not go so far if the consistent interpretation has ramifications which go far beyond the actual question before the court.[24]
Under the case law of the *Bundesverfassungsgericht* (BVerfG), the fundamental rights of the *Grundgesetz* must be interpreted in conformity with European law and the ECHR, including in principle ECtHR interpretations thereof, even though the ECHR has sub-constitutional rank. The limits to this are that the interpretation must be 'methodically justifiable and compatible with the Basic Law's standards'. Nevertheless, the German Federal Constitutional Court has gone so far as to overrule its standing interpretation of the German Constitution's provisions on personal liberty in order to comply with the ECHR as interpreted by the ECtHR.[25]
The limits of this approach are reached in case of conflicts of rights in 'multipolar' cases, that is to say, when the conflicting rights of others are involved. More protection for one may be 'less' of the other, and the position taken by the BVerfG is that the European friendly interpretation might no longer be justified in accordance with accepted methods of statutory and constitutional interpretation.[26] We return to this in Chapter 2.

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[20] See UK report, para. 113; Netherlands Report, paragraphs 1.4 in fine, 11.2 and 11.3.
[21] E.g., The European Court of Human Rights Between Law and Politics, Jonas Christoffersen and Mikael Rask Madsen (eds.) , Introduction, passim; and Chapters 7-11.
[22] E.g. in Spain, Hungary and the UK.
[23] E.g. in Germany the *Europa*- and *Völkerrechtsfreundlichkeit*. The Italian *Corte costituzionale* has indicated in judgments nos 348 and 349 of 2007 that legislation must be interpreted by lower national courts in conformity with the ECHR as interpreted by the ECtHR, but in case a conflict cannot be resolved in that manner, the matter is to be adjudicated by the Constitutional Court, who must give priority to the ECHR on the basis of Art. 117(1) Italian Constitution. This is different for EU law, which – briefly – is given direct effect on the basis of a constitutionally legitimated (Art 11 It. Const) limitation of sovereignty by the creation of a separate legal order of the EU, which places it outside the national framework to which the jurisdiction of the Cc is restricted.
[24] UK Report, section 60.
[25] BVerfG, 2 BvR 2365/09 vom 4.5.2011.
[26] BVerfG , 2 BvR 1481/04 of October 14, 2004, paragraphs No. (1 - 72); BVerfG, 2 BvR 2365/09 vom 4.5.2011, para.93.

As regards international and European human rights treaties, the issues of constitutional status and rank of treaties can be decisive for courts. Some differences can be found between systems which treat the ECHR as forming part of national law in a 'monist' tradition and systems stemming from a more 'dualist' tradition. Some of the latter seem more reticent in applying the ECHR directly and prefer to 'draw inspiration' from the Strasbourg case law, which is subsequently conformed to.[27] The opposite is the case in some of the stronger 'monist' traditions,[28] or those systems which have constitutionally entrenched the ECHR[29] and in which all courts directly and actively apply the ECHR,[30] even to the extent that they seem to outweigh the importance of the national constitutional bills of rights.[31]
Nevertheless, the national reports show that in all three kinds of constitutional orders mentioned, courts are guided by the case law of the ECtHR. They seem on the whole happy to do so. National courts' decisions are thus legitimated by the Strasbourg case law. This may sometimes have the effect that national courts avoid having to deal with difficult aspects of the case that would have arisen if it had beenadjudicated by national standards only. Nevertheless, some reports show a degree of 'toning down' the implications of the Strasbourg court case law,[32] sometimes verging on ignoring them[33].
In some Member States courts do not have the possibility to apply the ECHR (and ECtHR case law) to the full, due either to the status and rank of the ECHR under national law or due to a separation of powers which restricts the remedies courts can provide.[34]
As regards the ECJ case law, the national reports convey that monist or dualist traditions play an even lesser role than is the case with the ECHR and other human rights treaties, due to the anchoring of EU law into the constitutional systems of the Member States and large scale national EU law practice. Nevertheless, some typically dualist countries like the UK and Denmark retain the possibility of explicitly diverging by act of parliament from EU law or from the ECHR as interpreted by the ECJ or ECtHR respectively.[35]

- *Differentiation and overlap*

We here make some general introductory remarks about the differentiation and overlap of legal orders and of their respective fundamental rights standards. We return to this in the final chapter of this report, Chapter 5, in the context of Articles 53 of the EU Charter and the ECHR.
In Member States, courts often differentiate as to the relevant applicable fundamental rights standard and the cases to which the standard applies, particularly when it comes to cases involving EU law. In particular, in federal states courts are acquainted with the distinction between areas of competence and the differentiated standards which accompany each. At the same time there is little doubt that the various 'layers' overlap.
Leaving aside the question of the exact scope of EU law in which the EU fundamental rights standards operates – which is discussed in Chapter 3 below – the question arises where the overlap is and what it means for the applicable standards.
In this regard, the German report makes clear that the national constitutional guarantees may leave a margin of discretion to political organs for legitimate action touching on fundamental rights which is 'filled' by European law which restricts this margin, as long as EU law remains *intra vires*. This is how it understands the *Mangold* judgment of the ECJ[36] and its follow-up in the German Constitutional Court's case law.[37]

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[27] E.g. Hungarian Report.
[28] E.g. Belgium, Netherlands, Luxembourg. In Luxembourg also the Universal Declaration forms part of the applicable human rights framework.
[29] E.g. Austria.
[30] Slovenia has in Art 15(5) Const a maximization clause as regards international human rights.
[31] E.g. Netherlands Report, para.1.2.4.
[32] Netherlands report, para. 5.3.
[33] E.g. Maltese report, on the obligation under *Salduz v Turkey*, on legal assistance at first hearing by police officers, Question 1 para 9.
[34] Irish and UK courts can only give a declaration of incompatibility of acts of parliament with ECHR rights, in Ireland with possibility of discretionary compensation).
[35] See UK Report, para.3 and 5; Danish Report on Question 1.
[36] ECJ C-144/04, *Mangold*.
[37] BVerfG, 2 BvR 2661/06 vom 6.7.2010, *Honeywell*.

The Austrian report mentions the doctrine of 'double bindingness' or 'double conditionality', which is premised on the idea that national authorities acting within the scope of EU law are bound both to the national and European standard. This is considered workable, for instance, when the legislature implements a Directive which leaves it a certain discretion. Within the area of discretion the national standard can cumulate with the European standard. When there is no discretion in this type of case, the applicability of this doctrine reaches its limits.[38]
Again, as long as the standards substantively concur in the protection offered, there is no problem. If the national standard differs, the case can enter in the category of problematic cases delineated above. Here it suffices to say that courts in various Member States have reserved their position, when the EU standard falls essentially below the national standard.
It is well known that the German Federal Constitutional Court reserves the right to assess the compatibility of EU law with the fundamental rights of the *Grundgesetz* only in the exceptional case in which the protection offered under EU law would be generally inadequate and no longer equivalent to that offered by the *Grundgesetz*.
This approach was recently followed by the Polish Constitutional Tribunal, as is implied by its judgment of 16 November 2011.[39]

General principles as sources of fundamental rights protection

Because of the enormous importance which general principles have played in the protection of fundamental rights in the EU, we devote special attention to them in this section.
We first discuss the kinds of general principles which can be distinguished in EU law and their respective meaning for EU fundamental rights. Next we briefly examine comparatively their meaning in the Member States.

GENERAL PRINCIPLES IN EU LAW

In this section we first discuss the threefold distinction between, firstly, the general principles which encompass the fundamental rights sources of the common constitutional traditions of Member States and the human rights treaties to which they are a party (the '*Article 6(3) principles*'), and, secondly, other general principles of EU law which *specifically aim* to protect fundamental rights, and thirdly those which are more *generally are supportive* of fundamental rights. We also discuss the functions of these general principles since the Lisbon Treaty entered into force, and the EU Charter of Fundamental Rights thereby acquired binding force.

Article 6(3) Principles and other general principles of Union law

General principles were the source through which fundamental rights as protected in Member States (on the basis of national and international bills of rights) have been incorporated into European law. Although the ECJ was ostensibly motivated to this incorporation to guarantee the autonomy of the EU legal order which would be threatened by continuous appeals to rights as protected in Member States,[40] this does not diminish the *heteronomy* of the sources thus incorporated into the general principles of Union law. This source has been retained under Article 6(3) EU, notwithstanding the binding nature of the autonomous EU Charter on Fundamental Rights and the promise of accession since the entry into force of the Lisbon Treaty.

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[38] Austrian Report, para. 2.3.2.
[39] That is after the Polish report was submitted; see Polish Constitutional Tribunal, 16 November 2011, Ref. No. SK 45/09 accessible at <http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf>.
[40] See ECJ, Case 11/70,17 December 1970, *Internationale Handelsgesellschaft*, para. 3: 'In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, *whilst inspired by the constitutional traditions common to the Member States*, must be ensured within the framework of the structure and objectives of the Community' (emphasis added).

We can next distinguish a further group of general principles specifically aiming at the protection of fundamental rights, some of which relate to heteronomous sources, others are more autonomous. The explanation of this distinction is a consequence of the incomplete codification of the ECJ's description of the general principles in the EU Treaty since the Maastricht Treaty.

ECJ case law[41]	Maastricht Art. F/ 6(2) EU	Lisbon Art. 6(3) EU
The Court ensures the observance of o 'the constitutional traditions common to the Member States' o 'international treaties for the protection of human rights' to which MS are party as general principles of Community law.	The Union shall respect fundamental rights, o as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and o as they result from the constitutional traditions common to the Member States, as general principles of Community law.	Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

There are several differences between the language of the case law and that of the EU Treaty in its various versions, for instance between the addressees of the relevant norms. In the case law of the ECJ it is the Court which is to ensure them; in the period from *Maastricht* to *Lisbon* it is the Union which is to respect them; and Article 6(3) of the EU Treaty since Lisbon does not specify who is the addressee of the relevant general principles. (Presumably this is an argument for a broad interpretation, so as to cover Member State action whenever this is covered by EU law, thus providing a more satisfactory description of the scope of fundamental rights protection than under the Charter, the language of which speaks of Member States 'only when they are implementing Union law'.[42] So here is an additional function of the Art. 6(3) principles.)
The major difference which concerns us here, however, is the absence of the mention of other human rights treaties than the ECHR. This has not prevented the Court from using such human rights treaties in its case law after the Maastricht Treaty.[43]
This can mean one of two things: either that Article 6(3) EU does not contain an exhaustive list of fundamental rights sources outside EU law,[44] or the codification in Maastricht did not overrule the preceding case law. It would, however, be stretching the text of the provision too far to read the words

> 'the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950'

as meaning

> 'all human rights treaties to which the Member States are a party'.

[41] As we already noted, the formulation in the case law is subject to slight varieties, but these are the essential elements which concern us here.
[42] Art. 51(1), EU Charter. It should be noted that the official explanation gives a very broad interpretation of 'implementation' by also referring to Member State action as in *ETR*.
[43] See above, footnote 5.
[44] The first opinion is that of rapporteur Ladenburger in the Institutional Report, section 1.2, second paragraph.

Admittedly, the ECJ has never been very clear in its interpretation of why certain rights are or are not part of the general principles of European law as intended in Article 6(3) EU. It is precisely this which leaves the matter open for a somewhat stricter reading, which ranges the human rights treaties other than the ECHR under the category of other general principles of Union law specifically aimed at the protection of fundamental rights.
Apart from this, more *autonomous* general principles specifically aiming at the protection of values of the nature of fundamental rights belong to this group. Their existence is explained by the fact that not all fundamental rights which the ECJ wished to ensure the observance of, could be derived from the sources to which Member States are bound. One clear example of this is found in concrete cases in which a particular right is invoked which cannot be recognized as belonging either to the human rights treaties or to the common constitutional traditions of the Member States; in such cases, the Court sometimes found another principle having the same effect as the fundamental right would have had.

> This was for instance the case in the *Hoechst* judgment of 1989, in which the right to protection of business premises was considered not to be covered either by the ECHR nor the common constitutional traditions. The Court found that appeal to these could not succeed but instead relied on the general principle that interference with privacy both of natural and legal persons must be based on a legal basis and be proportional.[45]

The group of general principles aiming at fundamental rights protection which are outside the category of Article 6(3) principles include, for instance, principles regarding aspects of fair trial, the right to be heard and the rights of the defence. These were postulated as general principles without being immediately connected to, in particular, Article 6 ECHR. This is mainly due to the fact that they fall, in principle, outside the scope of Article 6 ECHR if they do not concern 'the determination of civil rights and obligations or of any criminal charge' as understood in the case law of the ECtHR. Yet, for instance the right to be heard in administrative proceedings was acknowledged prior to the EU Charter of Fundamental Rights as a fundamental principle of European law in an extensive line of case law.[46]

Finally, there are general legal principles binding on Member States which may not have the specific aim of protecting fundamental rights but still contribute thereto. This may be the case with such general principles as the duty of public authorities to state reasons, reasonableness, proportionality, the duty of due care and diligence, etc.. These general principles can derive from principles of proper or good administration, but also apply more broadly in the dispensation of justice and the application of the law. Some of these principles, particularly as they originate from the field of administrative law, come very close to some of the modern fundamental rights.
In this regard, the general legal principle of treating equal cases equally must be mentioned. As is the case in Member State law, in Union law this general principle substantively overlaps with the fundamental rights provisions encapsulating the same principle. In terms of the various types of general principles we have distinguished, it is questionable whether it belongs in all its aspects to the Article 6(3)-principles, as is apparent in its expression of a prohibition to discriminate on the basis of age.[47] Whether as a general principle it specifically aims at a fundamental rights value and is not merely a principle of correct administrative behaviour is also subject to dispute.
Another general principle developed outside the specific context of classic fundamental rights, which can be considered part of this third group of principles is the principle of transparency in

[45] ECJ 21 September 1989, Joint Cases 46/87 and 227/88, ECR 1989, 2859 ff. at 2924, paragraphs 17-19. Identical considerations can be found Cases 85/87, *Dow Benelux*, ECR. 1989, 3150, para. 28 and Joint Cases 97 and 99/87 *Dow Chemica Ibérica*, ECR. 1989, 3181.
[46] Case 85/76 *Hoffmann-la Roche v. Commission* [1979] ECR 461, para. 9, acknowledged the right concerning proceedings in which sanctions may be imposed, and was later extended to 'all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person', see, inter alia, Case C-7/98 *Krombach* [2000] ECR I-1935, para. 42; Case C-135/92 *Fiskano v. Commission* [1994] ECR I-2885, para. 39; Case C-32/95 P *Commission v. Lisrestal and Others* [1996] ECR I-5373, para.21.
[47] It has been disputed that the principle of non-discrimination on grounds of age is indeed common to the constitutional traditions of the Member States as the ECJ stated in *Mangold*, para.47; see Advocate General Mazák in Case C-411/05, *Palacios de la Villa*, paragraphs 87 to 97 and 132 to 138.

administrative affairs, which contributes to and overlaps with the right of access to documents of public authorities and the right to freedom of expression as contained in various fundamental rights sources.

The function of Art 6(3) principles after Lisbon

The question arises what function Article 6(3) EU still has to play now the EU Charter, which largely codifies the sources identified in Article 6(3) EU, has become binding and there is the promise of future accession to the ECHR.
The starting point for answering this question is the assumption that Article 6(3) must be considered a meaningful addition to the EU Charter and the future adhesion to the ECHR, given that the parties concluding the Treaty cannot be presumed to have added a superfluous provision in addition to 6(1) and 6(2) EU. There would seem to be several roles left for the principles intended in Article 6(3) EU.

Article 6(3) is of main importance in promoting the coherence of the totality of the composite constitutional order of Union and Member States. This derives from the fact that the provision is the doorway through which national constitutional rights which Member States authorities are bound to observe, enter into Union law. Article 6(3) provides an opportunity for Union law to remain in touch with the development of the common constitutional tradition of the Member States on the point of fundamental rights. Fundamental rights are not static and the views on their meaning develop over time.
An example of this is the development of the right of access to judicial remedies. Whereas in several states parties to the ECHR, Articles 6 and 13 ECHR were not considered to be able to grant a direct right of access to a court of law independent of a legal provision of national procedural law, we see in many states a development towards such an independent right. This is mirrored in the EU courts' understanding of the right to a judicial remedy, which has been as expansive as that of national courts. The Court of First Instance even considered it part of international *ius cogens* in *Kadi I*. Other examples of evolution over time concern the legal rights of transsexuals, in some jurisdictions the right to marriage, and the meaning of several privacy and other rights in light of technological developments in the field of, for instance, security, ICT, biotechnology and medicine.
It is true that this function is partly covered by Article 52 paragraphs 3 and 4 of the EU Charter.[48] Nevertheless, this function remains intact as far as rights are concerned which are not formulated in the Charter. This has notoriously been the case with the minority rights which have been only cursorily mentioned in Article 22 EU Charter.[49]
As the Ladenburger Report points out, Article 6(3) EU may have a specific role to play for Poland and the UK in relation to Protocol 30 to the Lisbon Treaty on the application of the Charter to these countries, and in the future for the extension of this Protocol to the Czech Republic,[50] as well as for Ireland if and when a Protocol on the scope and applicability of the protection of the right to life, the protection of the family and the protection of the rights in respect of education under the Constitution of Ireland were to be concluded, subsequent to the Decision of the Heads of State and Government of 19 June 2009.[51] Should these Protocols have the effect of limiting the scope of EU Charter rights, it may be hypothesised

[48] '3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, 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.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'
[49] See the Ladenburger Report, para. 1.2.
[50] During the European Council of 29/30 October 2009, 'the Heads of State or Government have agreed that they will, at the time of the conclusion of the next Accession Treaty and in accordance with their respective constitutional requirements, attach the Protocol (in Annex I) to the Treaty on European Union and the Treaty on the Functioning of the European Union.' The Protocol achieves the insertion of the name of the Czech Republic after that of the UK and Poland in Protocol 30; Council Document No. 15265/1/09.
[51] Annex I to the conclusions of the European Council of June 2009.

that this may not take away the operation of equivalent fundamental rights as principles of Union law under Article 6(3) EU.[52]

The function of other general principles aiming to protect fundamental rights after Lisbon

As we pointed out, the function of this category can be understood as providing supplementary protection which cannot be derived (or, at any rate, which the Court could not derive) from the heteronomous sources to which Member State are bound (*Hoechst*). These 'other general principles' have supplementary function.
This has not changed after Lisbon. In appropriate cases one can rely on provisions from the human rights treaties to which Member States are a party, other than the ECHR, as a source for protection of fundamental rights. Recently, for instance the Court interpreted in this connection Art. 13 (2) c on access to higher education of the the International Covenant of Economic, Social and Cultural Rights (ICESCR) in *Bressol*.[53]
It remains to be seen in which other cases the general principles outside Article 6(3) EU will continue to have specific importance for the protection of fundamental rights. One may expect them to have not much more than a complementary role in the interpretation of rights as they are found in the EU Charter.

GENERAL PRINCIPLES IN THE MEMBER STATES

Conceptually and legally, there is little unity in the approach to the meaning of general principles in relation to fundamental rights. It would need more in-depth comparative research than is possible on the basis of the national reports to make more definitive statements in this area. The reports do nevertheless give rise to some tentative explanations why this is so.
One explanationis that the role of general principles in relation to constitutional bills of rights varies according to the entrenchment and exclusiveness claimed by the constitutional documents.
It is possible to divide Member States' constitutional orders roughly into two types: those countries following in the main the continental tradition of (mainly) single document constitutions of a 'blueprint' type like France, Germany and Italy; and the other countries with a more incremental constitutional order in which constitutional documents have a more codifying than modifying role. The archetype of the latter is Britain, but to this tradition belong also Scandinavian countries and the Netherlands. In the former, the role of the (mainly single document) Constitution is very strong, in the latter there is a greater variety (and often a somewhat fragmentary plurality) of constitutional sources, with more room for constitutional practice, conventions and unwritten rules and principles.
Vestiges of the distinction between these two constitutional traditions seem overall to be discernable also on the point of the role of general principles in generating and protecting fundamental rights. One might expect fundamental rights to be of greater substance in the second tradition than in the first. But the contours of the distinction are vague due to different notions of general principles as a source of law. Although there is a very marked difference if we compare the British, Dutch and German reports, not all countries in the two traditions take the same approach

In Britain, reportedly some general principles have the effect of securing protection of human rights. These are developed through the case law under common law, so can be set aside by

[52] See Ladenburger Report, section 3.5. See also below, the section on Protocol 30 in chapter 3.
[53]Case C-73/08, 13 April 2010, *Bressol*. The Belgian Constitutional Court had asked the ECJ whether the relevant provision could be invoked to justify the restriction of access of (briefly) non-Belgium EU citizens to medical studies, since their influx could threaten the access of Belgian students to and the quality of higher education in the sense of Art. 13 (2) c ICESR. The ECJ is not explicit on whether this human rights treaty had to be considered part of the general principles of Union law which Member State courts have to observe when relevant action comes within the field of application of Union law, as the Advocate-General had done in her opinion (at para. 136), but this is the most likely interpretation.

act of parliament. The principle of *ne bis in idem*, the right to good administration and the right to trial by jury (in England and Wales, differently in Scotland) are mentioned as examples.[54]
In the Netherlands, general principles of law are used to a very large extent in public law, private law and criminal law alike. Some of these are acknowledged to be of particular significance in the area of fundamental rights and have equivalent status, in particular the principle of equality, which was used as general principle as standard of review by the Netherlands Supreme Court, *Hoge Raad*, before it was codified in the Constitution of 1983.[55]
In the case law and scholarly writing it is generally accepted that fundamental rights are a species of general legal principles, without there being a clear dividing line between general legal principles and fundamental rights: it is not clear where one category ends and the other begins. Furthermore, general principles and fundamental rights share the same characteristics: while they may be written down and somewhat specified in (constitutional) legislation, they are often unwritten, wide in scope, and rather vague. Fundamental rights and general principles may serve similar purposes: to protect certain (private and public) interests against violations by public or private action.
In Denmark, fundamental principles such as equality, proportionality and legality have been recognised and used in practice. They have not, however, been recognised as free standing principles with constitutional rank. In particular, it was denied that the unwritten constitutional principle of equality or non-discrimination was able to set aside the application of an act of parliament, although the Supreme Court has not definitively settled the matter.[56]
In Finland, the contribution of constitutional practice to the legal order was large, but in terms of formal sources the general principles of law were not given a prominent place; they are, one could say, principles only. Nevertheless, nowadays fundamental rights are not in all contexts considered to have the character of rules, but rather the character of principles, enabling decision-makers to 'optimise different entitlements'.[57]

In the German report, the approach is shown to be the opposite from that in the UK and the Netherlands: fundamental rights are viewed as being the basis for general principles, not their product.[58]
Continental European countries put fundamental rights, which are generally codified, first. They are the starting point. General principles reinforce and amplify them. Even if they are not directly justiciable, this is particularly true for so-called principles of the Constitution - such as the rule of law, legal certainty and other principles -[59] which are usually also codified.[60]

THE WEAKNESS OF FUNDAMENTAL PRINCIPLES: SOME CONCLUDING REMARKS

The role which general principles of law for the protection of fundamental rights play in EU law is unique and is unparalleled in any of the Member States. This is not due to any particular concept of law or doctrinal aspect on legal sources, but can only explained historically from the absence of codified classic human rights provisions in the founding Treaties.

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[54] UK Report, paragraphs 50-57.
[55] See Hoge Raad, 1 December 1993, *Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [Industrial Insurance Board for Retail, Small Industry and Housewives], in which it held that the general principle 'as it has been laid down in Article 1 of the Constitution as of 1 February 1983 has already for a long time been part of the unwritten principles of Netherlands law, and has only found its more specific expression in the said constitutional provision'. It subsequently reviewed a Royal Decree excluding certain married women from the right to an invalidity pension, and found it in conflict with the general principle since the Decree did not exclude married men under identical circumstances.
[56] Danish Report, sub Q2.
[57] Finnish Report, section 1.2.
[58] German Report, Frage 2: 'Grundrechte sind nicht Produkt, sondern Basis der Ableitung allgemeiner Rechtsgrundsätze. Diese ergeben sich aus der Auslegung und Konkretisierung verfassungsrechtlicher Regeln und wirken funktional als Verstärker grundrechtlicher Schutzbereiche.' See also explicitly the Greek Report, section 2A.
[59] This is strongly emphasized in the Polish Report, section 2.1.
[60] See Croatian Report, section 2.1.

Overall, however, the national reports confirm that once codified, fundamental rights prevail over general principles, whatever the particular constitutional tradition a Member State follows. This is the case evidently in the UK, due to the fact that acts of parliament take precedence over the common law, but also in some newer Member States.

This could be expected to happen also as regards the EU since the formal grant of binding force to the EU Charter with regard to some principles for which clear reference points can be found (e.g. rights of defence and other procedural rights in Article 47 EU Charter), the special meaning of the principles of Article 6(3) EU will remain. Of course, other general principles retain a strong amplificatory force also in the context of fundamental rights, particularly principles such as that of proportionality, [61] but substantive fundamental rights principles can be expected to play a lesser constitutional role. This is a good thing if seen from the vantage point of the protection of fundamental rights.

The legal concept of 'general principles' has its drawbacks which can negatively reflect on fundamental rights. This is due to their normative weakness. General principles lack the apparent clarity which the written rule suggests. They are quite general and not more than principles only.

This explains why in several Member States 'general principles of law' classically have a rank below that of legislation, despite the much more prominent role they have acquired in the course of the 20th century, particularly with regard to the use courts make of them. They become principles which, in the words of Martin Scheinin, are merely a norm 'enabling decision-maker to optimise different entitlements', which lack the rule-character of codified fundamental rights.[62]

This is not to deny the foundational nature of 'constitutional principles', but these take their full effect only when they have been codified in the constitution and thus acquire more the character of a rule, as is the case in a number of Member States, but also in the European Union, witness the crucial role which Article 6(1) EU (pre-Lisbon; now Article 2 EU) played in *Kadi I*.[63] If they are not themselves codified, they may add to the protection of fundamental rights but can seldom quite take their place.

Turning fundamental rights into principles may therefore have its drawbacks as they become relative values or mere 'interests' in the balancing scales of goddess Iustitia, not an iron rule and standard to adjudicate cases. Yet, sometimes it appears impossible to avoid fundamental rights becoming relative principles only, as we shall see in the next chapter.

[61] See Art. 52 (1) of the EU Charter, on restriction of the exercise of the Charter rights, which refers to it as a principle 'outside' the Charter itself: '….subject to the principle of proportionality, limitations may be made only if they are ….'.

[62] Finnish Report, section 1.2.

[63] Caes C-402/05 P and C-415/05 P, especially para. 303: 'Those provisions [on the primacy of international obligations under the UN Charter] cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.'

2.
From Rules to Principles: Horizontal Effect and Collision of Rights

CONCEPTS OF HORIZONTAL EFFECT OF FUNDAMENTAL RIGHTS AND THEIR RECOGNITION

In Europe, the questions whether fundamental rights may or may not have be invoked by one private party against another private party, and whether fundamental rights can have effect between private parties *inter se*, is now known as the issue of the 'horizontal effect' of fundamental rights.[64]

What makes horizontal effect controversial is the idea that fundamental rights are originally intended to protect individuals against their encroachment by public authorities in the exercise of their powers. Invoking rights against a fellow citizen implies that for the fellow citizen a fundamental right becomes an obligation. If in this context of citizens *inter se* a state authority intervenes to uphold the fundamental right of one citizen against another, fundamental rights can turn from a shield of citizens' liberty against state authority into a weapon of public authorities against the freedom of (other) citizens.[65]

Those who are more favourably inclined towards the doctrine of horizontal effect may point out that not only pubic but also private actors may exercise power unilaterally in a manner equal to public powers, so as to affect the rights and freedoms of private citizens.

Most fundamental rights, moreover, are not absolute and their exercise can be restricted on the basis of specified criteria set out in relevant constitutional rights provisions, as is typical for European bills of rights[66] – of which Articles 7 to 12 ECHR are stereotypes. Taking this further, fundamental rights standards can be seen as the result of a balancing of societal interests against individual interests; they are delimitations of the sphere of private liberty, and articulations of the powers of public authorities to act in the public interest. In this type of understanding of fundamental rights there is no reason not to accept restrictions on the freedom of citizens in the framework of protecting fundamental rights.

In line with this kind of argument, it can be pointed out that some fundamental rights – particularly, but not only, social rights, or second and third generation rights - may force public authorities to adopt measures which do not merely create entitlements, but may be subject to distributive restraints which may equally affect the freedoms of some private parties. This is typically the case, for instance, with environmental legislation which may have the effect of redistributing burdens on citizens and may therefore limit the freedom some of them enjoyed before the redistribution.

This is not the place to justify any of these views, or otherwise discuss their flaws or merits, but merely to point out why the doctrine of horizontal effect is subject to controversy.

- *Direct and indirect horizontal effect*

In national law, one way of mitigating the controversy is by drawing the distinction between 'direct' and 'indirect' horizontal effect. There are different conceptual views and definitions of this distinction in circulation, which have their consequences for discourse on this topic. To avoid total confusion, it is useful briefly to elucidate the distinction.

Usually, three aspects are distinguished: actors or addressees of the obligation to respect fundamental rights, the manner in which fundamental rights play a role, and the legal remedy.

As regards 'direct' horizontal effect, the central fact is that the parties invoking rights as against each other are private parties. The action allegedly infringing a fundamental right is not that of a public authority. Direct horizontal effect entails the application of the fundamental right as it is codified in public law sources in all its elements and aspects to the relationship between private parties. The legal remedy is geared to a direct invocation of a fundamental right, i.e. concerns an action against a private party for infringement of a fundamental right by that private party.

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[64] In US constitutional law is known as the 'state action doctrine'.

[65] For a very powerful opposite view in the context of 'globalisation' – of which Europeanisation can be understood to be a regional variety – see Gavin Anderson, Constitutional Rights after Globalisation, Hart Publishing 2005.

[66] This is different in the US Bill of Rights, which – looking with continental European eyes – seems to make the determination of the scope of a right more crucial than whether and how its exercise can be restricted.

'Indirect' horizontal effect concerns a relation between private parties, but via the act of a public authority, for instance an executive or legislative act. In some definitions, the acts of courts are also included in this; such an approach, however, threatens nearly always to lead to calling any effect of a fundamental right between private parties 'indirect'.
Another aspect which leads to speaking of an 'indirect' horizontal effect of fundamental rights is the application of the underlying values informing fundamental rights to relations between private parties. The judgment of the Bundesverfassungsgericht in *Lüth*[67] has acquired International fame as *locus classicus* for this approach. This approach obviates the necessity for a very strict application of the relevant fundamental right and in particular the clauses on restriction of the fundamental right; a strict requirement of legality of the restriction of a right is difficult to apply to private relations in a range of cases.
A third aspect is where the legal remedy does not concern the infringement of a right as such; the fundamental right is applied in the context of the determination of the lawfulness of an act in the legal context of open terms which can be interpreted by taking into account relevant fundamental rights.

- Direct and indirect horizontal effect in Member States
In the large majority of Member States, direct horizontal effect of fundamental rights under national constitutional law is not accepted. The primary addressees of the obligation to respect fundamental rights are public authorities.
Some Member State constitutions, however, allow direct horizontal effect explicitly, at least as regards certain fundamental rights. This is the case in Portugal as regards civil and political rights. The Greek Constitution was amended in 2001 so as to make clear that in appropriate cases its fundamental rights can have horizontal effect (Art. 25(1) Greek Constitution), but whether this guarantees direct or only indirect horizontal effect is unclear both in the doctrine and case law.[68] Also the Irish case law holds that the Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials, although in practice this action of constitutional tort is one of last resort.[69]
Also in the case law of some other Member States direct horizontal effect has been accepted. In Cyprus the direct horizontal effect of private life, correspondence and communication (Art. 15 Constitution) has been acknowledged quite explicitly. The Cypriot Supreme Court held

> 'that a violation of human rights is an actionable right which can be pursued in civil courts against those perpetrating the violation, for recovering from them, inter alia, just and reasonable compensation for pecuniary and non-pecuniary damage suffered as a result and or other appropriate civil law remedies for the violation'.[70]

In Luxembourg, the horizontal effect of the ECHR has as a matter of principle been accepted from the moment of its ratification, and has been recognized also in the case law at least as regards Article 8 ECHR.[71] Also in the Slovenian doctrine, the direct effect of constitutional fundamental rights has been accepted, but there is not much case law confirming this.[72] In

[67] BVerfG 198, 1958; an English translation is in Donald Kommers, Constitutional Jurisprudence of the Federal Republic of Germany, 1997, 361-369.
[68] In the case law it had already been held that Art. 4, on equal pay for equal work, could only have horizontal effect as it was declared not to be applicable to civil servants, see Greek Report, section II.3.A and B.
[69] Irish Report, section 3.1.
[70] *Yiallouros v. Evgenios Nicolaou*, Civil Appeal No 9931, Judgment of 8 May. The Netherlands Report states that direct horizontal effect has not been recognized in the case law, although the Civil Code clearly defines 'the infringement of a right' as an 'unlawful' act leading to a remedy towards award of compensation for damages (Art. 6:162(2) Civil Code); in the Dutch literature there is difference of opinion to what extent fundamental rights under the ECHR or Constitution, and under what circumstances, can be considered to fall within this category.
[71] Luxembourg Report, section 3.
[72] Slovenian Report, section 3C. The Slovenian literature has held that the right to reply to and to correct published information which has damaged a right or interest of an individual, organisation or body (Art. 40 Slovenian Constitution) is typically one which is asserted directly against private parties.

Austria, only the right to data protection for private parties has been granted direct horizontal effect by the Constitution.[73]

Indirect horizontal effect is more generally accepted, but there are varying degrees to which this is the case.[74] Generally, there is no problem in acknowledging the applicability of fundamental rights to relations in which one of the formally private parties exercises official public authority,[75] or in cases in which a public authority acts under private law.
Also, it is generally acknowledged that the legislature can introduce legislation regulating relations between private parties in which fundamental rights are given a degree of horizontal effect, for instance in the context of labour relations, conditions of employment, or in creating criminal offences for certain forms of infringement of fundamental rights.
Courts review state action which concerns the indirect horizontal effect of fundamental rights with different degrees of intensity, and tend to differentiate between rights which are more likely to have horizontal effect, such as the right to privacy, secrecy of correspondence and communication, or the right to education on the one hand, and rights which are more strictly considered to protect individuals from state interference (in particular political rights).[76] Some reports indicate that, as to horizontal effect, courts are likely to follow the ECtHR but not extend the same effect in cases concerning constitutional rights.[77]

- *Direct and indirect horizontal effect in EU law*
Article 51(1) of the EU Charter specifically indicates that its provisions

> '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'.

This would seem to exclude the possibility of *direct* horizontal effect since it excludes private parties from the addressees of the obligation to comply with the Charter rights. Yet, the case law of the ECJ shows otherwise.
It is established case law that free movement of workers, the freedom to provide services and the freedom of establishment can have direct horizontal effect.[78] Apart from the fact that – as rights for EU citizens – they are now enshrined in the EU Charter as well,[79] there are good arguments to acknowledge the fundamental rights quality of these fundamental freedoms, as they typically bear the qualities of a right of individuals primarily upheld as negative freedoms against the exercise of public authority. Moreover, they have the structure of some core provisions of the European Convention of Human Rights and Fundamental Freedoms. These economic freedoms are, though more specific, fundamentally operate in function of the social rights as codified in international human rights treaties and in Member State constitutions; they contribute to the realisation of such social rights.
To the extent that this perhaps controversial view of fundamental freedoms as fundamental rights is acknowledged, these particular fundamental rights, typical for the EU legal order, have been granted direct horizontal effect.

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[73] See Austrian Report, section 3.1.1.
[74] Malta does not recognize horizontal effect of fundamental rights, see Maltese Report Question 3, point 1.
[75] See Estonian Report, section 2 second paragraph *in fine*; Irish Report, section 1.3;
[76] For a classification in three types of rights and cases of horizontal effect in this regard, see Spanish Report, section [2] 3.
[77] E.g. Italian Report, section 2.5; in Denmark, horizontal effect is largely induced by the case law of the ECtHR, and courts tend to follow the ECtHR in granting horizontal effect and solving collisions occurring as a consequence, see Danish report, section Q3 and Q4.
[78] See Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C 51/96 and C 191/97 *Deliège* [2000] ECR I 2549, paragraph 47; Case C 281/98 *Angonese* [2000] ECR I 4139, paragraph 31; Case C 309/99 *Wouters and Others* [2002] ECR I 1577, paragraph 120.
[79] See Articles 15(2) ('Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State') .and 45 ('Every citizen of the Union has the right to move and reside freely within the territory of the Member States') EU Charter. See also the Ladenburger Report, section 3.1.9.

Less controversially, *Viking* and *Laval* have made clear that the right to collective action as enshrined in Article 28 of the Charter has direct horizontal effect.[80] This can be viewed as a corollary of the direct horizontal effect of the freedom of establishment in these cases.

Article 51(1) of the Charter does allow *indirect* horizontal effect, insofar as Member State action (within the scope of Union law) is involved in relevant cases. A failure to act by a Member State, for instance to implement a directive extending horizontal effect to a right, say in the sphere of fair and just working conditions (see Art. 31 Charter), would in principle seem to be able to give rise to an action under EU law for infringement of the relevant provision. This is in line with the presumption that 'action' comprises a 'failure to act' and a 'failure to act correctly'. This is typical for legal reasoning: after all, the law is crucially important when the addressee of a legal rule fails to act in conformity with the legal norm. Hence, 'implementing Union law' in Article 51(1) would than logically also have to comprise 'a failure to implement Union law' and a 'failure to implement Union law correctly'. Under Article 51(1) rights like those under Article 31 may acquire 'indirect' horizontal effect (should the claim be granted in court).[81]
This approach to Article 51(1) and the horizontal effect of Charter rights covers cases like *Mangold* and *Kücükdevici*. These are examples of cases concerning the indirect horizontal effect of fundamental rights – in *Mangold* as a general principle, in *Kücükdevici* a Charter right – to which Article 51 forms no barrier.
In the very recent *Dominguez* case, concerning the right to paid annual leave (Art. 31(2) EU Charter) – incidentally one of the most contested of rights already contained in Article 24 of the Universal Declaration of Human Rights[82] – the question arose whether this right, either as a general principle or as a Charter provision, had horizontal effect in the sense of being able to be invoked by the employee against an employer; it arose at any rate in the hearings and Opinion of the Advocate General. The effect would be indirect, in as much as the French legislation on the calculation of the number of working days was claimed to be in conflict with the relevant EU law, including also Directive 2003/88, which can be viewed as implementing the fundamental right invoked (but which under the standing case law cannot have horizontal effect). The Court limited itself to stating that 'the entitlement of every worker to paid annual leave must be regarded as *a particularly important principle of European Union social law* from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by [Directive 2003/88]' (emphasis added). It acknowledged that the directive thus prevented the overall removal of a right to paid annual leave, and held that provisions like the French legislation at issue are in conflict with the Directive, but left it to the national court and legislature to repair this, without granting horizontal effect to the Charter right or an underlying fundamental right.[83]

COLLISIONS OF RIGHTS

In relation to both horizontal effect of rights and in vertical relations, there may be cases where rights collide.
In this sub-section, in principle we do not consider the restriction of fundamental rights by certain measures in the general interest as a form of collision of fundamental rights in all cases, as is sometimes done in the literature.[84] Not all general interests are fundamental rights interests, and most legitimate restrictions of rights are not in themselves based on protecting fundamental rights interests. If one fundamental right forms cause for restricting

[80] C-438/05, *Viking*, [2007] ECR I-10779; C-341/05, *Laval*, [2007] ECR I-11767.
[81] For a different construction see rapporteur Ladenburger in the Institutional Report, section 4.3.2.
[82] 'Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.' For an incisive criticism see Maurice Cranston, Human Rights, Real and Supposed, in: Political Theory and the Rights of Man, D.D. Raphael (ed.), Londen 1967, pp. 43-53; ibidem, Are There Any Human Rights, Daedalus 1983, p.4 and the discussion of this criticism by Amartya Sen in 'Human Rights and Development', in Development as a Human Right, Wallenberg Insitute, p. 1-8.
[83] Case 282/10, *Dominguez*. The question is open whether the 'very important principle' which the Court identified is a 'general principle' in the sense of Article 6(3) EU.
[84] E.g. in *Conflicts between Fundamental Rights*, Eva Brems (ed.), Intersentia- Antwerp at al., 2008.

another fundamental right, however, then we are indeed dealing with a collision of fundamental rights.
In national reports which have addressed this matter, an important role is given to the legislature in the balancing of conflicting rights, in particular in the relations between private parties. There is no clear information on how such legislation is approached by national (constitutional) courts in cases involving a legislative balancing of rights.
Within the individual legal orders of the Member States, collisions of fundamental rights are mostly resolved through the balancing of the rights and interests of the parties involved in the circumstances of the case. Very few general patterns emerge from the national reports in this regard, except that courts employ a judicial technique of balancing the rights or the interests being protected in a right in the circumstances of the case.
There is rarely any hierarchy between rights which mutually conflict in a particular case. This is only to some extent different when some rights which may be considered to be 'fundamental rights' are not constitutionally entrenched, such as some of the social rights in a number of Member States, in which case the codified rights tend to prevail.[85] In Germany, in the balancing of colliding rights a certain preponderance of rights with a high orientation on human dignity is taken into account.[86]
As a general remark we may point out that in resolving collisions of fundamental rights, these tend somehow to be considered more as principles than as rule-based rights. This is in the nature of what courts must do. They do not adjudicate in the abstract what the relation between the fundamental rights provisions is, but adjudicate their meaning in the specific circumstances of the cases they need to decide. This means that the focus is on the question of what interests respective parties have in applying a particular fundamental right. As these interests cannot be absolute, and not all rights can always be construed as harmonising with each other, the issue is in practice one of interests rather than rights. Here again, as with the attribution of horizontal effect, the risk is of divesting rights of their fundamental character, turning them into one or more mere interests among others.

- *Collisions across jurisdictions*
In the context of a plurality of interacting legal orders, the question arises how collisions of rights are to be resolved across these various legal orders, that is to say when it concerns assessments on the basis of norms within one part of the overarching European legal order – comprising national legal orders, the EU legal order and that established under the ECHR – which need to sort effect within another part of that order. Striking a balance between rights also involves striking a balance between the various parts or 'levels' of that composite or 'multilevel' legal order.

Two typical examples of the difficulty of resolving conflicts of rights in such contexts are provided by the line of cases known as the *Von Hannover* judgments of the *Bundesverfassungsgericht* and the European Court of Human Rights and by the *Görgülü* judgments of these courts.

> The *Von Hannover* cases concerned the right of freedom of expression of the press to publish certain photographs accompanied by texts, and the right to privacy of princess Caroline von Hannover and her spouse. In essence, the *Bundesverfassungsgericht* had come, with regard to some of the photographs involved, to a different outcome of the balancing between privacy and freedom of expression than the ECtHR. The ECtHR found in favour of privacy because of the fact that the publication did not contribute to debate on matters of public interest; the BVerfG had found in favour of freedom of expression, reluctant to find certain types of expression categorically more worthy of protection than others.[87] This changed after the first Von Hannover judgment by the ECtHR, including new elements, particularly whether a publication contributed to a factual debate and whether its contents went beyond a mere desire to satisfy public curiosity.[88] Subsequently, in a case on further publications of photographs of Caroline von Hannover which were deemed lawful by German courts, the ECtHR recently found that the German case law had taken sufficient account of the Strasbourg case law and rejected the appeal, stating, among other things, that 'where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's

[85] Explicitly in this sense, the Irish Report, section 4.1.b.
[86] German Report, Frage 4.
[87] BVerfG 15 Dec 1999; *ECtHR Von Hannover [I]*, (application no. 59320/00) of 24.06.2004.
[88] BVerfG 26 February 2008, no. 1 BvR 1626/07.

case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.'[89]

The *Görgülü* cases concerned the collision of the right of the natural father to family life with his child and the same right of the mother and foster parents of the child. The ECtHR had found in favour of the father, but in a very important subsequent judgment in this case, the BVerfG ruled that the German civil courts had to take into account both the judgment of the ECtHR on pain of acting in conflict with the German constitution, but also the interests of the other parties, who had not been parties to the case before the ECtHR: 'In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.'[90]

These cases highlight that striking a balance between fundamental rights which conflict in the context of a particular case is not just a delicate matter within one legal system, but is even more delicate if undertaken in the context of one European legal order in order then to be applied in another.[91] We return to this issue in the final chapter of this report.

- *EU legislation*

Also in the EU context, balancing of rights can and does take place through legislative acts.[92] In doing so, the EU legislature takes on powers which intrude into areas previously within the constitutional autonomy of Member States in a more invasive manner than could have been imagined in the early days of EU fundamental rights protection. This gives rise to sensitivities and potential friction between Union and Member State law.
An example is in the area of non-discrimination law. The non-discrimination Directives adopted on the basis of the former Article 13 EC contain several provisions which strike a legislative balance between competing and potentially conflicting rights, some of which may be more politically sensitive than others.[93] Thus, the Framework Employment Directive[94]

[89] ECtHR, Grand Chamber, *Von Hannover* (no. 2), (Applications nos. 40660/08 and 60641/08) 7 February 2012, para.107.
[90] ECtHR, *Görgülü v. Germany*, (Application no. 74969/01) 24 February 1999; BVerfG, Beschluss v. 14. 10. 2004 - 2 BvR 1481/04, in particular para.56.
[91] The Netherlands Report reveals that Dutch courts usually make no use of the margin of appreciation left by the ECtHR themselves, but instead leave it to the competent executive or legislative authorities to interpret their own margin of appreciation to restrict ECHR right; NL Report, section 5.2 *in fine*.
[92] The Ladenburger Report describes many important examples, see Sections 4.4.1.1-3.
[93] A tailor-made exception is on religious relations in Northern Ireland, Art. 15: '1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation. 2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorized by national legislation.'
[94] Art. 4(2), Council Directive 2000/78/EC, OJ L 303, 2/12/2000: '2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or

contains a 'religious ethos' provision. This provision is clearly a compromise between a variety of views: it is very complex formulation which is hard to understand. So much is clear that it freezes the right, on the basis of religion or belief, to require staff to be of a particular belief or religious conviction to the situation at 2 December 2000. This undoubtedly intervenes in the dynamics of church and state relations in Member States, an area of constitutional importance *par excellence*. The Netherlands report reveals that, particularly after the Commission started infringement proceedings, this Directive has rocked the boat of the national Equal Treatment Act's clauses on denominational institutions, which was the result of a very complicated and delicate political compromise, reached after intense social, political and legal debate in the early 1980s.[95]

An example of a legislative proposal that is particularly sensitive to national concerns, mentioned in the Ladenburger Report, is the reform proposal of the "Brussels I" Regulation (44/2001) concerning judicial decisions in civil and commercial matters. The Commission proposes to retain the otherwise abolished "exequatur" requirement for judgments in defamation cases. This is inspired by the sensitivity of such cases, and the diverging approaches chosen by Member States in how to ensure compliance with the various fundamental rights affected, which – as *rapporteur* Ladenburger points out – involves rights such as human dignity, respect for private and family life, data protection and right to receive and impart information.

The proposed General Data Protection Regulation[96] goes in another direction. The choice to replace the instrument of a directive with a regulation potentially leaves less scope for national adaptation. Because data protection has so far been regulated by Directive, the *Bundesverfassungsgericht* in the *Vorratsdatenspeicherungsurteil* (Data Retention judgment) could use the technique of reviewing only the German implementing act without (formally) touching on a review of the Data Protection Directive itself. If the instrument of Regulation is used, the constitutional court could become forced to take the road of a review of the compatibility of the Regulation's provisions with provisions of the *Grundgesetz* which it declared to be part of the constitutional identity of the Federal Republic in the *Vorratsdatenspeicherungsurteil*.[97, 98]

- ECJ case law

The case law of the Court of Justice shows sensitivity to the issue of the collision of rights, more than is sometimes acknowledged.

Sometimes the Court leaves scope to national courts to interpret the relevant conflicting rights, such as *Promusicae*[99]. But in cases in which there is an evident imbalance between conflicting rights, like in *Scarlet*,[100] the Court itself adjudicates the matter of how (not) to strike the balance. In both these cases, some of the conflicting rights at stake were classic rights, such as the right to impart and receive information, data protection, privacy and the right to property.

A common line of criticism is that the Court in other cases makes classic rights or social rights like the right to strike subservient to the economic freedoms. This criticism seems premised on the notion that economic freedoms have no, or a lesser, fundamental rights value. Although there may be theories and concepts of fundamental rights which support this,[101] in

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belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

[95] Netherlands Report, section 6.2.

[96] COM (2012) 11, General Data Protection Regulation.

[97] See BVerfG Judgment of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, para. 218. For constitutional controversy over the proposed Data Protection Regulation, see Johannes Masing, Ein Abschied von den Grundrechten: Die Europäische Kommission plant per Verordnung eine ausnehmend problematische Neuordnung des Datenschutzes, Süddeutsche Zeitung , 9 January 2012.

[98] See also Ladenburger, Ladenburger Report, section 4.4.1.2, third paragraph.

[99] Case C-275/06, 29 January 2008.

[100] Case C-70/10, 24 November 2011.

[101] Rawls, A Theory of Justice, OUP 1972, p. 3 , holds that at the core of the notion of justice, and one may hence say fundamental rights, is the view that ''[e]ach person possesses an inviolability founded on justice that even the welfare of society as whole cannot override', while welfare maximization is the very justification of the market freedoms. N.J. de Boer, 'Justice, Market Freedom and Fundamental Rights: Just how fundamental are the EU Treaty Freedoms', Utrecht 2011, unpublished paper.

positive human rights law the integral nature of classic, social, economic and cultural rights is a postulate that suggests otherwise. In other words, the fact that the classic rights are balanced against free movement of goods, persons or services is not in itself and inherently a manner of belittling their inherent meaning as fundamental rights. As we already pointed out above, with the exception of the free movement of goods, the Charter itself codifies the free movement rights as Charter freedoms (Art. 15(2)) and citizens' rights (Art. 45).
As to the outcome of the balancing of rights, there is no substantive difference as to whether one is taken as a restriction of the other, or vice versa – for instance, the right to freedom of assembly and expression as a restriction of the free movement of goods or services (*Schmidberger*, *Omega, Laval*) or the right to collective action as a restriction of the freedom of establishment (*Viking*) – as long as each of them can potentially be taken to restrict the other, or put differently: as long as they can each outweigh the other. Opinions can differ, of course, as to the question whether the Court has really considered these rights as equal in the balance, particularly in relation to the decisions in *Laval* and *Viking*.[102] In this regard, the technique of taking a starting point in the fundamental economic freedoms may be tampering with the weights in the balance, in as much as exceptions to those freedoms require some special justification in terms of proportionality, which may not be asked the other way round – whether the fundamental freedom forms a proportionate restriction of a fundamental right.
The Ladenburger Report suggests as an explanation for a greater deference to fundamental rights in *Omega* than in *Viking* that in the latter the right to collective action was in function of protectionist action, whereas in the former constitutional rights were at stake which bore no relation to protectionism – in fact, it concerned a right which is considered to be part of the national constitutional identity (see above).

THE FLEXIBILITY OF RIGHTS AS PRINCIPLES IN A COMPOSITE LEGAL ORDER

Within a one-tier legal system nearly the only way to resolve conflicts of rights is by mutually balancing them against each other, thus in effect transforming rule-based rights into principles. Divesting fundamental rights of their character of rights may be a negative thing. But within a 'multi-level' system in which resolving conflicts between rights also needs to take into account the balance between the various 'levels'. In this context it may be an advantage not to adhere strictly to a rule-based notion of rights, but to use them as principles. This creates the necessary space to take into account the particular circumstances of the case, which cannot always be done as effectively at European level, far removed from the concrete context. Moreover, it creates the possibility of taking into account locally differentiated preferences, which can increase the legitimacy of the balancing of values which are both, at least in the abstract, fundamental.

[102] See e.g. the criticism of Advocate General Trstenjak in *Commission v. Federal Republic of Germany* (C-271/08), paragraphs 183-184.

3.
Articulating Existent Rights for the Future
The Entry into Force of the EU Charter of Fundamental Rights and its Consequences

The EU Treaty's main provision concerning the Union fundamental rights standards opens by spelling out the recognition of the EU Charter of Fundamental Rights, thus suggesting this is the prime source of fundamental rights protection in the EU legal order (Article 6(1) EU).

> 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

This provision is hedged with a number of somewhat un-aesthetic provisos, which conveys the difficulty the treaty parties had of agreeing to it. These provisos relate, firstly, to the purely regulative nature of the Charter rights: they *regulate* the exercise of powers within the scope of EU law as defined in the Charter, they do not confer new powers. Secondly, they intend to tie the interpretation of the Charter rights to the intention of the signatory parties.

> 'The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'

That bills of rights should not give rise to the creation of new competences, is an old concern. Hamilton was initially strongly opposed to Bills of Rights precisely for this reason. Bills of rights are dangerous: they contain various exceptions to powers that were not granted in the first place; and thus they 'furnish to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason that the constitution ought not to be charged with the absurdity of providing against the abused of an authority, which was not given.'[103] Times have not changed that much over more than two centuries.
This is a useful reminder that fundamental rights are not in the class of constitutional rules which attribute powers, but merely regulate the exercise of powers that have been conferred by other attributive norms to institutions competent to exercise them. That positive obligations may under certain circumstances flow from such regulative norms does not change this.

THE IMPORTANCE OF THE CHARTER

The national reports presented to the FIDE reveal a multitude of views on what the importance is of the EU Charter as a binding instrument of primary Union law.
Clearly, the EU Charter can be understood as the articulation of the specific rights and principles which were protected previously as principles of Community law. In other words, it specifies which the rights are which are contained in the common constitutional traditions of the Member States and in the human rights treaties to which they are a party.[104] It makes visible what the Union standard of fundamental rights protection is.
In many national reports, the Charter is therefore viewed as in the main a continuation of the prior legal situation.[105] It is viewed as a symbolically important document,[106] but also stabilises and increases legal certainty and protection against Union acts.[107]

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[103] Hamilton, Federalist Paper No 84.
[104] Cf. Article (2) TEU prior to the Lisbon Treaty and ECJ, *Nold II*.
[105] This includes Bulgaria, Croatia, Czech Republic, Ireland, Italy, Finland, Poland, Portugal, Slovakia.
[106] Italian Report, 3.2.
[107] German Report, Frage 7.

Nevertheless, as specified in the reports, the practice under the Charter, both in the EU institutions and the Member States shows that as a codification of existent law, it has drawn much more attention than before. Ever since the ECJ began referring to the Charter as a source for fundamental rights as general principles, also in national courts references began being made to the Charter.[108] Since the entry into force of the Lisbon Treaty, the Charter is referred to very frequently in the ECJ case law. The use in the national courts increased after its entry into force as primary law, varying from country to country,[109] even to the point of being used outside the scope of Union law, though so far not often as a decisive standard for deciding cases either within of outside the scope of Union law.
It merits note that the question to what extent the Charter is an extension of previous standards may influence the answer to the question to what extent it affects the lives of citizens, which is an element in the pending case on the constitutionality of the ratification of the Lisbon Treaty by Denmark.[110]

THE SCOPE OF THE CHARTER

The scope of the Charter has been defined in its Article 51:

> Field of application
> 1. 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.
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

A main question is whether this definition results in a situation where the scope of the Charter and the scope of EU law differ.
The applicability of the Charter to the EU institutions, bodies, offices and agencies is in this regard no cause for much comment, beyond the note that some provisions apply only to these and not to Member State action (e.g. Art. 41 on good administration).
This is different for the clause referring to the Charter's application 'to the Member States *only* when they are implementing Union law', which has been the object of much debate in the literature.

The official Explanations Relating to the Charter of Fundamental Rights[111] state:

> 'As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493).'

Rapporteur Ladenberger sketches in his report the circumstances in which these formulations came about in the two Conventions.[112] Clearly, as already transpires from the text of the provision, there was a concern not to draw the scope of the Charter too widely as far as Member State action is concerned, nor to use it as a pretext for competence creep on the part of the Union's institutions.

[108] Estonia, Finland, Germany, Spain, Czech Republic, Netherlands, Cyprus; in Poland, before the Lisbon Treaty entered into force, the Constitutional Tribunal refused to apply it, after it became a model for interpretation.
[109] In addition to the countries mentioned in the previous footnote, in any case also Bulgaria, Slovenia; there are also Member States in which courts refer to the Charter but only rarely, which includes Finland, Malta, Austria.
[110] See Danish Report, section Q7.
[111] OJ, 2007/C 303/17.
[112] Ladenburger Report, section 3.1.1.

For us lawyers, a problem results from the relation between the text of Article 51(1) and its Explanation.
The mention of the *ERT* judgment next to *Wachauf* is generally understood to give a very broad explanation to the words '*only* when they are implementing Union law'. At the same time this is problematic, because on a normal understanding of the case law 'only implementing Union law' is taken to refer to *Wachauf* situations, i.e. when a Member State implements or applies EU law, as if on a mandate by the EU, and not to *ERT* situations, which concern autonomous Member State action, so action by a Member State authority mandated by its strictly national law, which restricts the exercise of an economic Treaty freedom and hence comes within the scope of EU law.
The case law of the ECJ in the past showed tendencies to bring a matter easily within the scope of EU law when a fundamental rights concern was involved, of which *Carpenter*[113] is probably the standard example, where the ECJ cast the net of EU law very widely.[114]
Since the Charter has acquired primary law status, the Court seems much more reticent to take that approach. It seems to take the line that when it deems it feasible to answer a preliminary question without touching on the Charter issue it will do so. The most striking example is *Zambrano*, in which the referring court posed a question concerning and explicitly referring to the relevant Charter provisions, but the Court found it sufficient not to mention the Charter at all, but rely on other primary law, thus skirting the question of the scope of the Charter. This may be a broader trend when faced with sensitive issues touching on the scope of the Charter. Just as in *Zambrano* the Advocate General's opinion in *Dominguez* elaborately discussed the applicability of the Charter rights, but the Court did not even mention the relevant provision (this time helped by the referring court not mentioning it explicitly).
It should be noted that in *Dereci*, the Court did indeed draw into the argument the right to family life under Article 7 EU Charter, without the referring court explicitly mentioning it, but it left it to the national court to decide whether the situation of the applicants comes within the scope of Union law, and hence also whether the refusal of the right of residence involved in the cases decided, undermines the right to respect for private and family life provided for in Article 7 of the Charter.[115]
The Court does construe applicable secondary legislation as a factor of first importance in this context. This is evident in *Dereci* and *NS.*[116] The latter concerned a provision in the 'Dublin' Regulation[117] on the basis of which a Member State always has discretion to examine an asylum application which is not its responsibility under the criteria set out in the Regulation. Whereas the UK government constructed this to imply a sovereign right which put the matter outside the scope of Article 51(1) EU Charter, the Court found it was a discretionary power under the Common European Asylum System governed by the relevant Regulation, having certain procedural consequences under that Regulation. Hence, it concluded the exercise of the discretionary power must be considered as 'implementing Union law' within the meaning of Article 51(1) of the Charter.
More generally it should be noted that whenever there is EU secondary legislation imposing harmonised rules on Member State legal orders, the matter covered by that legislation is always considered 'within the scope of EU law', also when a particular case has no transborder aspect, as has been confirmed in the context of the data protection directive in *Österreichische Rundfunk* and *Lindqvist*.[118]

The Institutional Report is emphatic that Article 51 should be construed narrowly, to such an extent that some definitions of the scope of EU law under the TFEU are broader and sometimes much broader than the scope of the Charter as defined in Article 51. This applies to the prohibition of discrimination on the basis of nationality 'within the scope of application of the Treaties' under Article 18 TFEU, and possibly the notion of the 'scope of EU law' as

[113] C-60/00, *Carpenter*, [2002] ECR I-6279.
[114] For a strong criticism see Editorial Comment, *Freedoms unlimited ? Reflections on Mary Carpenter v. Secretary of State*, 40 CMLRev 2003, 537-543.
[115] Case C 256/11, 15 November 2011, *Derici and others*, paragraphs 71-72.
[116] Joined Cases C 411/10 and C 493/10, 21 December 2011; relevant in this context are paragraphs 64-68.
[117] Article 3(2) of Regulation No 343/2003.
[118] Joined Cases C-465/00, C-138/01 en C-139/01, 20 May 2003, *Österreichische Rundfunk*, Case C-101/01, 6 November 2003, *Lindqvist*.

concerns data protection under Article 16 TFEU, in light of the broad interpretation of this in the ECJ case law.[119]
This point of view would result in what is at first sight somewhat curious situation that some of the rights of the Charter itself would have a broader scope than that described in Article 51. The prohibition of discrimination on grounds of nationality and right to protection of personal data are after all also codified in Article 21(2) and 8 respectively of the Charter.[120]
Presumably, then, the rule of Article 51(1) provides a *lex generalis* which applies to the rights of the Charter, from which a specific right can diverge as a *specialis* under applicable general Union law by which those rights are governed.
For the moment, this rapporteur général would conclude that it is not clear from the ECJ case law whether the phrase 'implementing Union law' in Article 51 of the Charter means something different from 'acting within the scope of Union law' in other respects, and that the Explanation of it does not suggest that there should be such a difference.
In this context it is interesting to repeat that in some Member States the courts have referred to the Charter with such enthusiasm as to disregard whether the Charter could at all be considered applicable. This may be due to the novelty as well as the merely illustrative purposes the Charter has served so far in the case law. Nevertheless, the Charter's evident inspirational value for Member States shows its significance.

PRINCIPLES AND RIGHTS IN THE EU CHARTER

The Charter makes a distinction between 'rights' or 'rights and freedoms' and 'principles'. This occurs in the already quoted Article 51(1) where it specifies that the addressees of the Charter 'shall respect the rights, observe the principles and promote the application' of the Charter. Moreover, Article 52 speaks of limitations of the exercise of 'the rights and freedoms' (para.1), the conditions and limits under which 'the rights' shall be exercised (para.2), the 'rights' corresponding to the ECHR (para.3), and the 'rights' resulting from the common constitutional traditions (para.4). In the fifth paragraph it declares:

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

This reads like a provision on the separation of powers. It is up to the legislatures and executives to realise the 'principles', that is through their legislative and executive acts, and these in turn are subject to judicial supervision. This, as well as the phrase 'respecting rights and observing principles' echo issues of justiticiability which are a classic topos in the area of human rights discourse on social, economic and cultural rights. This topos has its counterparts in various constitutional systems, among which French conceptions of *justiciabilité*, a provision like Article 53(3) of the Spanish Constitution,[121] as well as in constitutions which enumerate certain social rights as objectives of state action, *Staatsziele* as they are called in Germany.[122]
The Explanation to this provision of the Charter states that included among the principles are Articles 25, 26 (on the rights for the elderly and integration of persons with a disability) and 37 (on policy mainstreaming of environmental protection). It also points out that in some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23 (equality among men and women), 33 (on family and professional life which contains a prohibition of dismissal for reasons related to maternity) and 34 (on social security and social assistance).
No doubt these examples are not exhaustive. Other provisions entail instructions to the legislature and executive, such as Articles 22 (cultural, religious and linguistic diversity), 35(2)

[119] Ladenburger Report, section 3.1.8.
[120] Perhaps the incorporation of economic Treaty freedoms in Articles 15(2) and 45 Charter may give rise to a further differentiated 'field of application'.
[121] See in detail the Spanish Report, section 8.
[122] Cf. Art. 25 Greek Const.; Danish Rep., Q 1 on Arts. 74-76 (on right of equal access to trade, to work, public assistance and education); Netherlands Rep., section 1.2.1; Slovenian Rep., section 6.1.

(high level of human health protection) and 36 (access to service of general economic interest and promotion of social and territorial cohesion).[123]
For instance, Article 31 on fair and just working conditions requires implementing legislation but its right to paid annual leave was considered in *Dominguez* to entail a 'principle' from which 'there can be no derogations', and hence concluding (under reference to earlier case law) that Member States are 'not entitled to make the very existence of [the 'right to paid annual leave' under the Directive] subject to any preconditions whatsoever'.[124] Interestingly, the Advocate General had considered Article 31(2) a 'right', but as remarked above the Court omitted any reference to the Charter.
It requires a closer inspection of these various provisions to determine whether in fact they also carry in them elements of 'rights', also in light of specific circumstances of the case in which they are invoked.
Whereas in some national constitutional systems, the distinction along the lines of what the Charter calls 'principles' versus 'rights' has the effect of rendering claims under the former unjusticiable, this is not the case with Charter 'principles'.
This is clear from the last sentence of Article 52(5). The Charter does not aim to exclude justiciability of 'principles', but to limit this to the implementing measures, even extending it to legality review. Although 'principles' are justiciable standards for implementing standards, it may well be that court adjudicating the compatibility of a legislative or executive measure with a 'principle', may conceive of its judicial task – as opposed to the legislative and executive task – so as only to apply marginal forms of scrutiny. For instance, whether a measure actually ensures a 'high level of human health protection' is a matter which courts are under most circumstances not liable to scrutinise in-depth, disregarding the legislature's assessment of this.

PROTOCOL 30

Protocol 30 to the Lisbon Treaty on the application of the Charter to Poland and to the United Kingdom, which can be extended to the Czech Republic at the next accession,[125] has drawn public, political and legal attention. In the eyes of the public it has been claimed to be an 'opt out' from the Charter, or at any rate withdrawal of the powers of European courts (possibly also national courts) to review Member State action, while politicians have used it for similar and opposite purposes.[126]
The Polish Report sums up a variety of alleged effects of the Protocol, ranging from an opt-out to a limitation of its direct effect in Poland, to the prohibition for Polish courts to refer preliminary questions to the ECJ.[127]

Article 1 of the Protocol firstly asserts that the Charter does not extend the powers of review of the Court of Justice and the national courts (Art. 1(1)).
This is not very problematic, as has been confirmed by the ECJ in *N.S.*, which held that this provision of the Protocol `explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.'[128]

Secondly, it provides in Article 1(2)

> In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

[123] See German Report, Frage 8.
[124] Case C-282/10,*Dominguez*, para. 16-19.
[125] See Czech Report, under question 7.
[126] See UK Report, section 89; Polish Report, section 7.7-7.8
[127] See Polish Report, section 7.7
[128] UK Report, section 87.

This is potentially a more complicated provision. It only refers to Title IV of the Charter, which concerns 'solidarity rights', or social rights in the broader sense of the word, and it provides that these solidarity rights are justiciable to the extent such rights have been provided for in national law. This formulation raises a number a problems.
In the UK Report the rapporteurs claim that this provision merely 'clarifies that the principles set out in Chapter IV of the Charter will require further legislative action before they become justiciable. That is already set out in Article 52(5).'
A more literal reading leads to more problems.
The words 'provided for such rights in national law' may either refer to the national implementation of the rights under Title IV Charter, or to those rights as standards for review of implementing acts. The UK Report suggests the first, while the Polish Report suggests the latter is the case.
If those words refer to implementing measures, then it would mean the same thing as what the Charter established on the 'principles' of the Charter, which we discussed above. This, in turn, may be problematic in as far as the provisions under Title IV may contain elements of 'rights', in the sense of the Explanation of Article 52(5).
If the words 'provided for such rights in national law' refers to the rights which are meant to refer to rights as standards for review of implementing acts, one possible reading is that the incorporation of the EU Treaties, in particular Article 6(1) EU, into the British and Polish legal orders has the effect of turning the Charter rights into 'rights in its national law'. This is a theoretically possible interpretation, but an unlikely one, as it renders the provision into a fully redundant one (which may of course have been the intention of the drafters, since other provisions of the Protocol also seem legally redundant). On another reading it means for the UK, that since the Human Rights Act does not directly provide for such rights, British courts would not be able to scrutinise action under EU law against the relevant Charter rights.
It should be noted, however, that to some extent the ECtHR has for instance constructed Articles 2 and 8 ECHR to provide a measure of protection of environmental rights, also in cases against the UK. Moreover, some social rights of the type covered by Title IV Charter may be contained in Acts of Parliament against which British courts can review administrative action.
For Poland, however, it would presumably mean that only the equivalent social rights of the Constitution can be used as standard of review. The Polish Report suggests that the rights of Title IV do not go beyond the rights already given under Polish law.

Article 2 provides:

> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

This provision more clearly refers to 'rights and principles' which serve as a standard for review. This Article, however, is limited to Charter provisions which refer to 'national laws and practices'. To the words 'are recognised in the law and practices of Poland or of the United Kingdom, the same considerations apply as those on the words 'has provided for such rights' in Article 1(2) we just discussed.

From the perspective of EU law, we already noted that should the Protocol have the effect of limiting the scope of EU Charter rights, this may not take away the operation of equivalent fundamental rights as principles of Union law under Article 6(3) EU.[129] This would depend, however, on whether these general principles of Union law can derogate from the Protocol. This would be a highly contentious claim, which in turn depends on the constitutional status and rank of these general principles vis-à-vis primary Treaty law.

[129] See Ladenburger Report, section 3.5.

The mere existence of a written and binding EU Bill of Rights has fostered its use as source for fundamental right protection.[130] Codification may have the advantage of greater clarity and legal certainty. Codification may also have a freezing effect, particularly if a conservative reading is felt desirable under pressures of a political climate which is both suspicious of fundamental rights claims that constitute obstacles for effective government and of things coming from 'Europe' or 'Brussels' on top of that.

The provisos of Article 6(1) EU suggest such suspicions. They emphasise that the Charter may under no circumstance be interpreted as creating new competences for the Union. They enjoin an interpretation of the Charter with due regard to the Explanations to the Charter, which the preamble to Protocol 30 reinforces for Poland and the UK, by making explicit that Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article. The sixth recital to that Protocol, moreover, makes clear that the 'Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles'.

The ECJ in *NS*, which was referred by a British court, by quoting these parts of the Preamble by implication suggested indirectly that it was conforming to such a strict interpretation.[131]

There are legal arguments, however, which should mitigate the fear for a freezing effect. These must take their point of departure in Article 52 of the Charter. Firstly, the third paragraph is relevant, which concerns the Charter rights which correspond to rights under the ECHR. It provides that the 'meaning and scope of those rights shall be the same as those laid down by the said Convention'. This makes the meaning and scope of those Charter rights dependent on the interpretation of the Convention rights by the ECtHR, which adheres to the doctrine of the ECHR as a 'living instrument', entailing the necessity of a dynamic interpretation of the Convention rights in light of contemporary social and legal developments.[132] This will necessarily spill over into the interpretation of the relevant Charter rights.

Moreover, and perhaps more importantly, the second sentence of Article 52(3) of the Charter spells out that the parallel interpretation of ECHR and Charter rights 'shall not prevent Union law providing more extensive protection' than the ECHR. This means that scope is given for an interpretational development of rights beyond that of the ECHR. It is regrettable that in their Joint communication of 17 January 2011 on the accession of the EU to the ECHR Presidents Costa of the ECtHR and Skouris of the ECJ only emphasized the usefulness of a '*parallel* interpretation' of the two instruments in connection with Article 52(3) Charter, failing to mention that the EU may provide *more extensive* protection.

Secondly, the fourth paragraph of Article 52 of the Charter provides that Charter rights expressing rights which are part of the common constitutional tradition of the Member States, 'shall be interpreted in harmony with those traditions'. These Charter rights can therefore develop in line with the development of the constitutional traditions of Member States, which may be a progressive interpretation over time. This interlinkage with the development of Member State constitutional traditions may also have a more conserving effect.

That there may be a progressive and a conserving effect is what is evident from the case law of the ECtHR, in which the presence of a common ground as well as the lack of 'common ground' between the legal orders of the states party to the ECHR is respectively sometimes reason for progressive development,[133] or a restrictive interpretation of the ECHR rights,[134] notably – but not only – in the sphere of sexual morals, human and bio-ethics.

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[130] See Czech Report, section section 7, third and fourth paragraph, with reference to historical precedents.

[131] Joined Cases C-411/10 and C-493/10, 21 December 2011, *N.S.*, para. 116-120.

[132] E.g. ECtHR (Application no. 34503/97), Grand Chamber, 12 November 2008, *Demir and Baykara v Turkey*, para.146: '[T]he Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.'

[133] E.g. *Marckx v. Belgium*, judgment of 13 June1979, para.41.

[134] Classically in *Handyside v. The United Kingdom*, judgment of 7 December 1976, para.48-49; also e.g. in *Rees*, 17 October 1987, para. 37.

Also, with regard to the common constitutional traditions, however, the ECtHR will be of great importance for a dynamic interpretation of Charter rights. Most of that common tradition coincides after all with the ECHR rights as they are developed by the ECtHR.

SOME CONCLUDING REMARKS

After Lisbon, the EU Treaty gives the Charter the first place among the sources of fundamental rights protection. It is generally acknowledged that the Charter indeed takes this place, and the case law both at the ECJ and the national courts has already confirmed that this is also true in practice.
Nevertheless, many of the remarks in this section highlight that the Charter must not be viewed in isolation but in the context of the other sources of fundamental rights protection. This concerns both the fundamental rights protected by the general principles of Union law, and via these the constitutional traditions of Member States, the European Convention of Human Rights and other human rights treaties, whose meaning is also relevant to the European Union.
It is to the ECHR that we must now turn.

4.
Managing a Twin Peak System
Consequences of the Accession of the EU to the ECHR

INTRODUCTION

Article 6(2) EU provides:

> The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

As the Court of Justice has held, accession of the EU to the ECHR is 'of constitutional significance'. Hence, the institutional necessity exists of an explicit Treaty basis for accession.[135] Accession is also of constitutional significance in a more substantive sense for the citizens of the EU and all persons, natural and legal, resorting under the jurisdiction of the Union and its Member States acting within the scope of Union law.
At the time this general report is drafted, the negotiations for accession to the ECHR have ground to a halt. This happened shortly after texts had been negotiated, comprising a Draft Agreement on accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, with an Explanatory report, as well as a Draft Rule to be added to the Rules for the Committee of Ministers of the Council of Europe had been agreed in June 2011 – only minor adaptations to the draft Explanatory report accompanying the draft Agreement and two linguistic adaptations to the French version of the draft Agreement were made in October 2011.[136] The prospects for a timely resolution of the disagreements are uncertain. The matter is not on the priority list of the presidency for the first half of 2012, although the draft JHA agendas mention 'political agreement' on accession for the June meeting of 2012.

In this chapter of the report we discuss only some of the very many aspects pertaining to the accession, mainly focused on the consequences of an eventual accession for the protection of fundamental rights in the Member States. It will not go into some of the many intriguing issues of an institutional nature, such as the budgetary contribution of the EU to the Council of Europe, the appointment of the EU judge at the ECtHR, the selection of the members of the European Parliament delegation to the Assembly of the Council of Europe, as well as voting rights and procedures in the Committee of Ministers of the Council of Europe.

REASONS FOR ACCESSION TO THE ECHR

Article 6(2) EU provides a basis for the EU to accede to the ECHR, but it has been pointed out that it is not only a commitment of the Member States to bring about the accession within the EU framework, but also in the framework of their membership of the Council of Europe and as parties to the ECHR.[137] On the part of the Council of Europe, all the state parties have agreed to creating the possibility of the EU's accession by ratifying Protocol 14, amending Article 59(2) ECHR to read:

> The European Union may accede to this Convention.

The reasons adduced to accede are multiple.

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[135] Opinion 2/94 of 28 March 1996, ECR I-1783.

[136] See the Report of the Steering Committee for Human Rights of the Council of Europe's Committee of Ministers, CDDH (2011), 009 of 14 October 2011. Nearly all working documents and reports of sessions of the working group negotiating the accession instruments are public and published at the CoE website, http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp

[137] See Austrian Report, section 2.4.3, second paragraph.

Prior to the entry into force of the Lisbon Treaty, the ECHR has most probably been the standard for fundamental rights compliance most frequently used by the ECJ. As we already remarked above, since the *Connolly* judgment[138] not only nominally, but also substantively the overall intensity of review is comparable to that of the ECtHR – although one can, of course, be critical of specific judgments in this regard (e.g. the standard of review applied by the ECJ in specific cases or otherwise[139]). Nevertheless, this cannot be a reason not to accede to the ECHR. For one thing, it enables the ECJ to apply the ECHR directly, without the detour of the general principles under Article 6(3) EU.

All Member States are required not only to comply substantively with the ECHR, but it is a prerequisite for membership to expose the domestic fundamental rights protection to external supervision by the ECHR and ECtHR. This might also apply to the European Union itself.[140]

This also works the other way round. Accession will enable the EU to play a full role in proceedings before the ECtHR in cases concerning EU law. It will therefore cement more firmly the role and decisions of ECtHR in the EU legal order,[141] and it forms an opportunity to create channels of cooperation and dialogue.[142]

A reason for accession is, moreover, that it will create the possibility to bring applications against EU institutions' action to the ECtHR, so adds to the protection of citizens and increases accountability of the EU institutions.[143]

Also, accession will prevent negative divergence between the ECHR and EU protection, in as much as the ECtHR may correct the EU falling below the standard of the ECHR. It will thus increase the coherence of the system of fundamental rights protection in Europe.[144]

Moreover, the symbolic effect of enhanced human rights credibility of the EU for the outside world is mentioned as a reason for accession.[145]

Some reports express scepticism or even a negative overall assessment of the consequences of accession. The ECHR provides only a minimum guarantee, so it will not contribute significantly to a higher level of protection. Formal adherence to the ECHR leads to a doubling or tripling of fundamental rights norms that 'might increase the sensation of protection but in fact is just copying the same principles'.[146] Moreover, the accession will complicate procedures to such an extent that the overall balance of accession is negative. [147]

Before we discuss some aspects of the procedural complications, we first address the issue of the *Bosphorus* doctrine.

Bosphorus: EU immunity of ECtHR scrutiny continued?

One of the reasons adduced for the EU's accession to the ECHR is that EU acts can thus be reviewed by the ECtHR for their conformity with the relevant Convention rights. This is at the moment not assured in cases in which an application is brought before the ECtHR against a Member State for a violation which finds it origin in that state complying with EU law in cases in which it has no discretion under EU law to act differently.

In the *Bosphorus* judgment of the ECtHR, this court had decided that such cases are inadmissible as long as the EU can be presumed to comply with the ECHR by providing protection which is comparable to that provided by the ECtHR.[148] It based this presumption on a twofold assessment.

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[138] ECJ, Case C-274/99 P, 6 March 2001, [2001] ECR I-1611.

[139] Werner Schroeder, Neues zur Grundrechtskontrolle in der Europäischen Union, EuZW 2011/12, p. 463.

[140] Finnish Report, section 4.1; Ladenburger Report, section 5.1.

[141] Irish Report, section 9, first paragraph.

[142] Spanish Report, section 9, third paragraph; Slovak Report Q 9, para.13-14.

[143] UK Report, section 93; Spanish Report, section 9, para.4; Netherlands Report, section 9.2 ; Slovak Report, section 9, tenth paragraph; Slovenian Report, 9.2; German Report, Frage 9.

[144] German Report, Frage 9; Ladenburger Report, section 5.1.

[145] Polish Report, section 9.1; Ladenburger Report, section 5.a.

[146] Estonian Report, section 4.15.

[147] Hesitations or negative judgments to this effect are expressed in the Bulgarian, Czech, Danish, Estonian, Netherlands and Portuguese reports.

[148] ECtHR, 30 June 2005, Application n° 45036/98,Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, paragraphs 149-158; the doctrine was confirmed and applied in ECtHR, 29

The first is the assessment of the substantive fundamental rights standard as contained in the general principles of Union law and the Charter (though, in the words of the ECtHR then 'not fully binding').[149] The second assessment concerned the judicial protection available in the EU to ensure observance of that standard. In this regard, the ECtHR judged that the system of judicial protection pre-Lisbon, notwithstanding the limitations on the *locus standi* of individuals at the ECJ, based as it is on the possibilities of legal protection through national courts, in combination with the preliminary reference procedures, as well as the possibility of state action and actions being brought by the institutions at the ECJ, warrants the conclusion 'that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, "equivalent" to that of the Convention system', and hence justifies presumption of compliance with the ECHR.[150]
This presumption can be rebutted if in the circumstances of a particular case the protection of ECHR rights is manifestly deficient. For all acts falling outside its strict EU legal obligations, the Member State remains fully responsible.[151]
A major question is whether this *Bosphorus* doctrine is tenable after accession.
The national reports find the *Bosphorus* doctrine understandable and justified, but not all reports find that it should be praised.[152] It is by some also considered an invitation to the EU to become a party to the Convention.[153]
The doctrine addresses in the context of a conflict of treaty obligations the dilemma of on the one hand effective protection of the rights of citizens under the ECHR, and the legitimate compliance of the state against which a complaint is directed with EU law. Also, however, it effectively shields governments acting within the EU framework from scrutiny.[154] This effect of shielding is even stronger, if it is not only the ECtHR that presumes EU compliance with the ECHR, but also national courts refrain from scrutinising acts under EU law from compatibility with the ECHR on such a presumption.[155]
A few reports find that the *Bosphorus* doctrine does not have to be abandoned, since it establishes that the EU complies with the ECHR standard. This is combined with a built-in safety valve since the presumption of compliance can be rebutted.[156] Most reports which state a view on this, however, find that the rationale of accession would be defeated by retaining it, and hence should be discarded.
During the accession negotiations the question of whether the doctrine should be retained or abandoned was consciously not raised. On the part of the EU, this was based on an early agreement between Member States and the Commission not to request a codification of the *Bosphorus* doctrine in the accession agreement, despite some early calls to that effect.[157] This means that the negotiators left this important matter to the ECtHR to decide.
We briefly recapitulate some of the arguments for retaining and abandoning the *Bosphorus* approach.

- *Retaining the* Bosphorus *doctrine*

An argument in favour of retaining the doctrine is, firstly, that the rationale of the transfer of sovereignty from Member States to the European Union still exists after accession. It is this transfer which entails that that a Member State authority is compelled to act in the manner which is cause for an alleged violation of the ECHR. So it this transfer, then, that causes the

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January 2009, Application no. 13645/05, Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. against the Netherlands concerning the right to respond to Advocate Generals' opinions, which has been a point of controversy in the literature (and ECJ case law).
[149] *Bosphorus*, para.159.
[150] *Bosphorus*, paras.160-165.
[151] This was the case with regard to the 'Dublin II' Regulation in ECtHR, Case of M.S.S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011, see paragraphs 338-340.
[152] See Finnish Report, 4.2; criticism is expressed in the reports on Portugal, Denmark, Estonia.
[153] Spanish Report, section 10.
[154] UK Report, section 101.
[155] This is the case in the Netherlands, see Netherlands Report, 10.2
[156] E.g. Bulgarian Report.
[157] Ladenburger Report, section 5.1, penultimate paragraph *in fine*. The Bulgarian Report is the only one which suggests the possibility of a codification in the Accession Agreement, see Bulgarian Report, section IV, 10

Member State not to be held responsible for that violation, since this is exclusively caused by EU law compelling the Member State authority to act the way it did. The Member State was literally merely 'agent' for the EU. The fact that the EU, which holds the powers transferred by the Member States, itself has submitted to the ECHR after accession adds an extra reason to refrain from scrutiny of the Member States actions. The so-called co-respondent mechanism – which we discuss below – ensures that retaining the *Bosphorus* doctrine does not lead to a void in cases where an applicant mistakenly directs his application to a Member State, while it is the EU which should be the object of its application at the ECtHR.
A further reason which can justify retaining the *Bosphorus* doctrine is the very accession of the EU to the ECHR. This reinforces the argument that protection offered within the EU is 'equivalent' to that required by the ECHR. It after all imposes on the ECJ the duty in its case law to apply the ECHR directly, without the detour of the general principles under Article 6(3) EU. Moreover, the EU fundamental rights protection 'post-Lisbon' has been strengthened: the EU Charter on Fundamental Rights has become legally binding; the Court of Justice will have jurisdiction with regard to what was previously called 'third pillar' law; and even the right of standing of individuals has been extended under Article 263(4) TFEU.
So, if before Lisbon and accession to the ECHR the EU protection was equivalent to the protection offered under the ECHR, it must certainly meet the requirement of being equivalent even more easily after accession. This being the case, the ECtHR may have more reason to maintain the immunity from scrutiny granted in *Bosphorus* than at the time.

- *Abandoning the* Bosphorus *doctrine*

The most important argument in favour of abandoning the *Bosphorus* doctrine is that it seems to obviate major reasons for accession to the ECHR. Exposure to ECtHR scrutiny is the very purpose of accession, and shielding from such scrutiny undermines that objective.
Moreover, it can be argued that the *Bosphorus* doctrine was from the start an inappropriate transplant of what was an appropriate construction for the *Bundesverfassungsgericht*, in the form of the *solange* doctrine. Accession is the moment to set things right. It was appropriate for a constitutional court, working within a strong federalist framework, to step back as an institution of a Member State of the Union in favour of the jurisdiction of a Union institution with a larger remit than that Member State alone. It is inappropriate for a European institution such as the ECtHR, which has the exclusive ultimate power to adjudicate compliance with the ECHR with a larger remit than that of a contracting party, to step back in favour of the jurisdiction of a state party institution with a lesser remit. Accession by the Union to the ECHR must and should have the objective of submitting any action under the law of a state party to scrutiny within the legal order of the ECHR.

PROCEDURAL COMPLICATIONS IN THE DRAFT ACCESSION AGREEMENT

The Draft Accession Agreement has been negotiated in an informal working group composed of 7 experts from EU Member States and 7 experts from non-EU states party to the ECHR, together with representatives of the EU Commission acting upon a secret mandate from the Council. It provides in its Article 3 for two types of procedural incidents which can occur when an applicant complains against an act in which EU law is involved: the co-respondent procedure and the 'prior intervention' procedure.
We briefly indicate the pros and cons of both procedures.

- *The co-respondent procedure*

Article 3, paragraphs 1 to 5 introduce the so-called co-respondent procedure, by which on a decision of the ECtHR the EU becomes a co-respondent in proceedings instituted against an EU Member State, or vice versa: a Member State can become co-respondent in a case brought against the EU. The EU, or a Member State, can become a co-respondent only following its own request.
The co-respondent mechanism is triggered if it appears that an alleged violation of the ECHR calls into question the compatibility of 'a provision of EU law' (where the EU is respondent and a Member State co-respondent this should be 'a provision of primary EU law') with the Convention, 'notably where that violation could have been avoided only by disregarding an

obligation under European law'. Whether the latter is the case is a matter which is, given the word 'notably', not a matter which needs to be established with full certainty by the ECtHR; the Strasbourg court thus does not need to be drawn into an interpretation of EU law in order decide whether a party can rightly become co-respondent.
Different from the existent 'third party intervention' under Article 36 ECHR, a co-respondent is a party to the case. This means that a judgment becomes binding on it. This is in principle positive for the applicant if the ECtHR finds in his favour, even if it is uncertain whether the co-respondent actually caused the alleged violation. This is no doubt the greatest advantage of the co-respondent procedure for applicants.
This rather complicated procedure also means, however, that an applicant is faced with more parties at the other end of the table in Strasbourg than he had reason to expect. In most cases this will, moreover, be at a stage at which the application is not considered manifestly ill-founded, although of course the co-respondent mechanism can be triggered in admissibility proceedings.[158]
Alternatives to the co-respondent mechanism can always be thought of, but it is uncertain whether these could secure the applicant its benefits in a much less complicated manner, and would avoid him being confronted with potentially the same multitude of opponents. Thus one might think, for instance, of adopting a provision in Article 36 ECHR stating that in proceedings involving European Union law in which the EU and Member State are not both respondents, the ECtHR adjudicates the case without regard to the question whether responsibility for a violation devolves on a Member State or the Union or both. It could be left to the ECtHR to allow the relevant other contracting party (EU or Member State according to what is the case) to act with some flexibility in such cases as third party intervener, while it is left to an EU instrument to divide responsibility and mutual indemnification in cases the ECtHR held there was of a violation and awarded damages. This would leave the matter as an internal EU matter (which it is anyway), without the applicant being burdened with issues of the division of powers and responsibilities under EU law. It would not necessarily mean he is faced with fewer opponents, except that some of them would then act not as co-respondent, but as third party interveners.
In short the disadvantage of the number of opponents in the co-respondent proceedings may be outweighed by the advantage of binding the co-respondent to the outcome of the proceedings, although there may be other manners to secure this.

- *The prior involvement procedure*

Probably more controversial from the point of view of the applicant is the 'prior involvement' procedure (Art. 3(6) Draft Accession Agreement). This procedure only applies if the EU is a co-respondent, that is to say when a Member State is also involved. It is triggered 'if the Court of Justice […] has not yet assessed the compatibility with the Convention rights at issue of the provision of EU law […]'. When this occurs, 'sufficient time shall be afforded for the Court of Justice […] to make such an assessment'; the EU is to ensure 'that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed'.
The introduction of this procedure has been justified for two different reasons. The first is that within the structure of the EU it is only for the ECJ to determine the validity of EU acts. This 'prerogative .. must not be affected by accession', the Court has held in a discussion paper on the matter, published on its website.[159] Secondly, a 'subsidiarity' principle is inherent in the system of the ECHR to the effect that the domestic courts are the first to ensure compliance with the ECHR, and the ECtHR only after exhaustion of domestic remedies. Within the EU legal order, however, when Member State action is involved, the system of legal protection works mainly on the basis of the preliminary reference procedure. Under this procedure there is no obligation for a court to refer a question of compatibility with EU law (including the EU

[158] The Draft Accession Agreement proposes to amend Article 36(4) ECHR, of which the last sentence is to read: 'The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.' This merely means that the wrong choice of respondent will not affect the judgment on admissibility; it does not mean that the co-respondent mechanism cannot be triggered at the admissibility stage of proceedings.
[159] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010.

fundamental rights standard) to Luxembourg if a party to a case requests this; it is up to the national court to decide whether it will or must refer the matter. Individuals do not have general direct access to the EU Courts, this being limited only to the cases mentioned in Article 263(4) TFEU.[160] In short, in order to 'preserve the specific characteristics of the Union and Union law'[161] the prior involvement mechanism was deemed necessary.

There are some less favourable aspects to this procedure and its justification. It introduces procedurally a double standard, which is not convincingly argued in all respects. Other states which are a party to the ECHR might also be in the same position which for the EU would justify a 'prior involvement' mechanism. States may, just like the EU, be confronted with cases brought to the ECtHR in which their national constitutional courts have not had the opportunity to rule on the compatibility of the act complained of with an applicable fundamental rights standard equivalent to (or providing better protection than) the ECHR. The argument of the 'privilege' of the ECJ to adjudicate the validity of EU measures, seems to overlook the fact that in the Member States the privilege of declaring legislation invalid is usually concentrated in a constitutional court, to which direct access for individual parties (*amparo*, or *Verfassungsbeschwerde*) does not necessarily exist; nor is there always an obligation for national courts to refer question of constitutionality to the constitutional court at the request of a party to a lawsuit. In short, there is nothing odd about the monopoly of a constitutional court to invalidate legislation (together with limited access to that court) and the power of the ECtHR to hold it violates a Convention right. It would be a serious misunderstanding to believe that the ECtHR can invalidate national legislation, or even annul any act of a national authority: it is in the nature of the international character of its activity.

Also, it is ironic that the system of judicial protection of the EU is adduced as justification for the 'prior involvement' mechanism. Precisely the nature and quality of the EU system of judicial protection was deemed to provide the basis for the presumption of ECHR compliance on the part of the EU (*Bosphorus* doctrine) by the ECtHR, while now the proponents of the 'prior involvement' mechanism evidently hold that the EU system is not good enough to be exposed to ECtHR scrutiny. Should this arise in a state party to the ECHR, this would be cause to remedy the national system, not to change the ECHR system.

More importantly, the prior involvement procedure brings the applicant in an awkward procedural position, negatively affecting his judicial protection.[162] The nature of the prior involvement mechanism is such that he is brought before a court to which he neither would normally have had access and nor had he addressed his application. The applicant finds himself in a different court, under a procedure which for the moment is of an unknown nature, with an equally uncertain position before a court the legal nature and consequences of whose 'assessment' are as yet unknown. This smacks of an infringement of the *ius de non evocando*, *gesetzliche Richter*, or *giudice naturale*, as one of the oldest European fundamental rights.

On the positive side one can say that the prior involvement mechanism creates a solution, admittedly in a somewhat roundabout way, for a lacuna in the system of judicial protection, since there is no guarantee that a complaint of violation by EU law of a Convention right will reach the Court of Justice through the usual EU system. (If this is true, then - as mentioned above, the ECtHR was perhaps not right in assuming that the system of judicial protection of fundamental rights provides equivalent protection to that of the ECHR.)

SOME REMARKS ON THE PROTECTION AFFORDED BY THE ECHR COMPARED TO THE EU CHARTER

In the Draft Agreement on Accession, the scope of the accession is limited to the ECHR, the (first) Protocol and Protocol No. 6. However, Article 59(2) of the ECHR is amended so as to read:

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[160] 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

[161] See Art. 1 of Protocol no. 8, to the Lisbon Treaty, 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.

[162] See e.g. German Report, Frage 9.

2.a. The European Union may accede to this Convention and the Protocols thereto. […]

This makes it possible for the EU unilaterally to accede to the other Protocols in accordance with the further arrangements in the amended accession provision in the ECHR.

The restriction to the first Protocol and Protocol 6 can be considered a consequence of Article 2 of Protocol 8 to the Lisbon Treaty on the accession to the ECHR, which specifies among other things that the Accession Agreement 'shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto'. This should be viewed in light of the fact that the other Protocols to the ECHR have not been ratified by all EU Member States.[163]

The result is curious, though, if we compare the rights in the Protocols to which the EU does not accede with the Charter rights. The prohibition of imposing or executing the death penalty of Protocol 13 is found in Article 2(2) of the EU Charter. The *ne bis in idem* rule of Article 4 of Protocol 7 is covered by Article 50 Charter, and the same can be said of this Protocol's Article 5 (equality between spouses) and Article 20, 21 and 23 of the Charter. Also the prohibition of collective expulsion of Article 4 of Protocol No 4 is found in Article 19(1) of the Charter.

In this respect accession to the ECHR as provided for under the Draft Accession Agreement will provide less protection than the Charter does.

Moreover, an inherent feature of the ECHR is that it provides minimum standards only. This means that in the application of the ECHR in appropriate cases it is not necessary and may be undesirable to consider the ECHR as a maximum standard. Some national reports describe how this is overlooked in certain Member State jurisdictions, where consequently the ECHR has actually had or potentially has the effect of lowering the national fundamental rights standard.[164]

If that were to occur in the context of EU law, this would defeat the purpose of acceding to the ECHR.

SOME CONCLUDING REMARKS

Accession to the ECHR is of 'constitutional significance', the ECJ rightly held. It is supposed to increase the accountability of the EU institutions and Member State authorities when acting in the scope of EU law. It should increase the protection of the rights of citizens, guarantee their rights more fully and render the European system of fundamental rights more coherent.

These lofty purposes no doubt are served by an eventual accession. But the state of play concerning the accession gives not only pause for reflection but also occasion to consider more sceptical voices.

The reality of the Strasbourg system is, of course, that of being overburdened and a near inability to cope, which must be at the expense of the protection of individual rights. It is understandable that this gives rise to the questions, in somewhat exaggerated terms, whether joining the 'slightly dysfunctional' system of the EU to the 'totally dysfunctional' system of Strasbourg really provides a solution to the protection of the rights and interests of citizens.[165]

As to the institutional implications of the accession, one may well consider the introduction of the co-respondent and the prior involvement mechanisms necessary for the greater coherence of the system. But one wonders whether their sometimes very complicated formulations and justifications lead to situations in which the citizen is lost in complexity.[166]

More fundamentally, there are also questions as to what the present stalemate in the accessions negotiations tells us about the ability to live up to the EU's own constitutional

[163] Greece and the UK have not ratified Protocol No 4; Belgium, Germany, the Netherlands and the UK have not ratified Protocol No. 7; Protocol No. 12 has only been ratified by Croatia, Cyprus, Finland, Luxembourg, the Netherlands, Rumania and Spain; Protocol No. 13 has not been ratified only by Poland.

[164] See UK Report, section 17-28 with regard to the right to trial within a reasonable time; NL Report, section 5.4 suggests that it is up to the legislature, not to the courts, to provide the higher level of protection beyond the ECHR minimum.

[165] Czech Report, section 9.

[166] Cf. C. Van de Heyning, Fundamentals rights lost in complexity? (Intersentia, Antwerp 2012), forthcoming, which deals, however, in the main not with the procedural but substantive complexity of the system of fundamental rights protection in the EU.

commitments. The stalemate is at the moment entirely due to disagreement between EU Member States. This may cast doubt on the sincerity of the constitutional commitment undertaken in Article 6(2) EU to accede to the ECHR. The Member States disagree on such matters as the ECtHR jurisdiction over alleged violations deriving from the EU's Common Foreign and Security Policy, textual adaptations regarding the 'non-State' nature of the EU, voting arrangements in the Committee of Ministers and the conditions and cases for triggering the co-respondent mechanism. No doubt these are serious difficulties. Yet, somehow they do not seem to be too closely related to the concern about how to increase the protection of the rights of citizens, nor about a coherent system that is transparent and understandable enough for those same citizens. Actually, the accession negotiations give more the impression of a diplomatic game in which Member States and EU institutions struggle over their privileges than a process of sincere constitution making in the service of the citizens.

5.
The European area of fundamental rights
The future of fundamental rights protection, national and European

In this concluding chapter we reflect on the structure of the European area of fundamental rights.[167] This regards mainly the relation between the EU as a 'human rights organization'[168] on the one hand and on the other the Member States. These Member States were the ones to trigger the development of the protection of fundamental rights in the EU, provoking the EU to subject itself to a fundamental rights standard to which they now themselves have become subject in a more and more intrusive way.
In this discussion we tie together a number of the points raised across the previous chapters, concerning some principles governing the structure of the European fundamental rights architecture. More particularly, we discuss the scope of EU competence in the field of fundamental rights protection within the EU, in order to determine the contours of the competence of the EU in the field of fundamental rights. In addition, we reflect further on the relations between fundamental rights standards contained in the general principles of Union law, the EU Charter, the ECHR. In a final section we discuss the meaning of the national constitutional orders for the protection of fundamental rights in the EU.

EU HUMAN RIGHTS COMPETENCE

All the reports written for our theme deny that there is a general EU competence in the field of fundamental rights. They do not deny that the scope of EU competence in this field is ever widening. This is mainly the consequence of the Member States conferring many legislative powers to the EU through constitutional power conferral in successive Treaty amendments and by adopting EU legislation and executive acts in the field of fundamental rights.

- Competence under Articles 2 and 7 EU

The scope of EU law is determined by the Treaties as implemented in secondary law and as interpreted by the Court of Justice. In this regard it would be too limited only to take on board Article 6 EU, since fundamental rights are a broader EU concern, also when we restrict ourselves to action within the Union. We should recognize them in the foundational values of the EU as formulated in Article 2 EU:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

They are part of the constitutional identity of the EU. Whenever the EU acts it must respect and promote the respect of these rights. The respect of fundamental rights is a prerequisite for EU membership as it is a prerequisite for the EU itself. It is in this light that compliance of the EU with the standards of the Charter and compliance with the Treaty commitment to accede to the ECHR must be viewed. Protection of the 'common code' of fundamental rights protected by those documents, as well as by the Member States' adherence to their common constitutional traditions in the field of fundamental rights and the human rights treaties to which they are a party, may indeed be said to constitute an 'existential requirement for the EU legal order'.[169]

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[167] After: Viviane Reding, Vice-President of the European Commission, Towards a European Area of Fundamental Rights: The EU's Charter of Fundamental Rights and Accession to the European Convention of Human Rights High Level Conference on the Future of the European Court of Human Rights, Interlaken, 18 February 2010.
[168] The expression is taken from A. von Bogdandy, The European Union as a Human Rights Organization? Human Rights and the Core of the European Union. In: 37CMLRev 2000, 1307-1338.
[169] See Advocate General Poiares Maduro in Case C-380/05, *Centro Europa 7 Srl*, para. 19.

The Union is not, however, only the conglomerate of the EU institutions, bodies, offices and agencies. The Union also comprises the Member States and their organs and institutions, themselves governed by their own constitution, as well as by EU law whenever national authorities act within the scope of EU law. Also the Member States will have to comply with the values on which they founded the Union. Their compliance is equally a matter of living up to that existential requirement of the EU. Hence, the EU competence to supervise Membership compliance with the values of Article 2 EU under the procedure established under Article 7 EU. By its very nature, this involves much more than merely monitoring compliance with specific provisions of the EU Charter or the ECHR. It is a far reaching and broad power of oversight of the EU over Member States, which goes well beyond the scope of EU law within which the Charter is applicable.
The procedure provides for an explicit role of the political organs only, and rightly so. The matter concerns the political nature of the Union but also, and essentially, that of the Member States which form it. The extension of the jurisdiction of the ECJ since the Lisbon Treaty entered into force, implies that it now also can interpret and apply Article 2 EU. So the Commission could start infringement proceedings under Article 258 TFEU and an inter-state complaint under 259 TFEU can in principle be brought. Theoretically, also preliminary references could be made under Article 257 TFEU, although this seems very far fetched.[170]
The jurisdiction under Article 2 EU can only be exercised exceptionally.[171] I would submit that it can only be exercised in parallel with or in the framework of a procedure under Article 7 EU. It would also raise difficult questions as to the discretion of the political EU institutions to determine the criteria for or the existence of a 'clear risk of a serious breach by a Member State of the values referred to in Article 2' and 'the existence of a serious and persistent breach by a Member State' as mentioned in Article 7 EU.
Whether the ECJ would ever be called to play a role at the centre of procedures for imposing sanctions under Article 7 EU is an open question. It would be a test of the legitimacy of the ECJ as a constitutional court in times of deep constitutional conflict and crisis, with which Member States should be able to go along in terms of accepting both such a role for the Court and its outcome – although it might be logical for a Member State which is judged no longer to live up to the requirements of membership to leave the EU.[172] If such a role were to be taken up by the Court, but subsequently not accepted in practice, the consequences would be pernicious.
Nevertheless, there can be little doubt that the EU is competent to act with regard to fundamental rights in a much more incisive manner than is often realised, even outside the scope of the Charter.

> It is not necessary to construct a 'reverse *solange*' doctrine based on citizenship to establish this competence. With such a 'reverse *solange*' a research group from the Max Planck Institute proposed a principle that 'outside the Charter's scope of application a Union citizen cannot rely on EU fundamental rights as long as it can be presumed that their respective essence is safeguarded in the Member State concerned. However, in case of systemic violation of the essence of fundamental rights the "substance" of Union citizenship, within the meaning of *Ruiz Zambrano*, would be activated as a basis for her redress.[173]

- *The scope of EU law and fundamental rights*

In a previous section of this report we have reflected on issues concerning the scope of EU law and the scope of the Charter rights in order to determine when EU fundamental rights protection applies. First of all, the fundamental rights apply to the EU institutions, bodies, offices and agencies. For these the Charter, ECHR and fundamental principles of Article 6(3)

[170] Differently Armin Von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei And Maja Smrkolj, A Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom, Verfassungsblog at http://verfassungsblog.de/rescue-package-eu-fundamental-rights-illustrated-reference-media-freedom/; an expanded version forthcoming in CMLRev.
[171] See Maduro, ibidem, who seemed to construe this jurisdiction outside the specific framework of then Article 6(1) EU.
[172] Like Greece under the colonels' regime as to their membership of the Council of Europe.
[173] See footnote 169.

are the main sources of fundamental rights protection which they are always bound to observe.[174] For the Member States the application of the Union fundamental rights standard is defined functionally: the standard applies in cases in which they act within the scope of EU law as defined more precisely in Article 51 of the Charter.
We already indicated the three situations in which this is the case: when they implement (stricto sensu) Union law (*Wachauf*), when the act autonomously in such as manner as to affect the economic freedoms (*ERT*), when they act autonomously in a field covered by a harmonized Union law (*Österreichische Rundfunk* and *Lindqvist*). In the latter situation, there is no need for any transborder element: also purely internal situations are covered, in which Union law applies, with the attendant Union fundamental rights standard.
As the reach of Union legislation broadens, the scope of the Union fundamental rights standard broadens. The fundamental rights impact of this is evident in the context of EU legislation in the areas of data protection, non-discrimination, telecom- and ict-services, but also in areas touching on mutual recognition (as the child abduction cases show[175]), as well as the EAW case law, and large areas of migration law. The *Wachauf* and *ERT* situations may become the less prominent cases in which Union fundamental rights standards apply. The perhaps more intrusive effect of the Union standard in the areas of harmonized law may be partly offset, to the extent that the Court of Justice leaves it, whenever appropriate, to the national courts to make relevant assessments which determine the outcome of the case.[176] This decentralized contribution of national courts may contribute to an application of a Union standard which is responsive to the local circumstances and preferences.

RELATIONS BETWEEN FUNDAMENTAL RIGHTS STANDARDS IN MULTIPLE LEGAL ORDERS

As we pointed out in our first chapter, the Member States are not only confronted with a Union standard but also with their national fundamental rights. In a sense, the Union and national standards cumulate, which is now more generally accepted, also in the literature in federal constitutional systems.[177]
Still, it could be argued that normally in cases covered by EU law, a Member State will first apply the Union standard, particularly when it acts exclusively within the scope of EU law without further discretion. In this case, however, it may also be substantively applying a national standard which coincides with the Union standard. And, to illustrate the 'cumulative' nature of the standards, both may substantively coincide with an ECHR standard.
Often, however, authorities will be in a situation of mixed competence, in which case for discretionary acts they will apply the national standard and for those mandated by EU law, the Union standard.
These things are unproblematic as long as these standards do not significantly diverge among themselves. The problem is what should happen when they do. It is in this context that Articles 53 of the ECHR and 53 of the Charter are relevant.[178]
Let us first take Article 53 ECHR, which stipulates that the ECHR is subsidiary to other human rights standards: the ECHR only provides the minimum level of protection which must be respected.[179] This does not solve the issue when a European standard complies with the ECHR but the national standard provides broader protection, so the ECHR *cum* Union standard is lower than the national standard. As we saw in Chapter one of this report, there are numerous examples of fundamental rights norms where this can occur. Before we turn to a discussion of possible solutions to this, we must first briefly look at Article 53 of the Charter.
Article 53 Charter provides on the 'level of protection':

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[174] In appropriate cases they are also bound by the other Charters and the Convention on the Rights of Persons with Disabilities, see Chapter 1 above.
[175] Case C-491/10 PPU , 22 December 2010 *Aguirre Zarraga*; Case C-400/10, 5 October 2010, *J. McB.*
[176] Ladenburger Report, passim.
[177] See the Ladenburger Report, section 6, second paragraph; Austrian Report, Section 2.3.2.
[178] In the Reports on Austria, Hungary, Italy, Portugal, Spain, Bulgaria, Germany, it is assumed that the national standard prevails if it provides more protection than the others; not all of these specify whether this applies unconditionally and in all cases, particularly if it conflicts with directly effective EU law.
[179] Art. 53 ECHR: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, 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 European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

This superficially resembles Article 53 ECHR, but differs by its use of the expression 'within their respective fields of application'. This lends itself to different possible readings.[180] The most plausible reading does not solve anything. This is the reading that the Charter will not negatively affect Member States' constitutional standards as they apply within the field of application of the national constitution (just as it will not negatively affect the other standards in their respective fields of application). The question is how those respective fields relate to each other: are they separate and discrete fields or do the fields overlap?
In a reading in which they are discrete and separate fields, the meaning of the provision is trivial and hence superfluous. That the Charter rights to not take away the rights in a field which the Charter does not cover, is stating the obvious.
The case could be made that in European law – and it is actually the strength of European law – the activity of national authorities takes place in an area where national and European competence overlap. If this is true, then the 'respective fields of application' of Article 53 of the Charter overlap as well. The consequence of this is that this provision means that also when a national authority acts within the scope of EU law in member state X, the Charter rights cannot negatively affect the standard provided for by the national constitution of that member state X. In other words, the national constitutional standard prevails.
This is a reading which, should it ever come to such a conflict, is hard to swallow if one has primacy of EU law in mind. A range of objections to this type of reading has therefore been proposed. Also a variety of alternative solutions or strategies towards a solution have been proposed, like constitutional pluralism, that of judicial dialogue, and the idea of adopting either a universalised maximum standard, common minimal standard or 'local' (i.e. national) maximum standard approach in EU fundamental rights adjudication.[181]
Without fully discussing their implications and justifications, we will here only point to one relatively new dimension which pleads in favour of acknowledging a divergent local standard; and which also indicates a manner pragmatically to deal with conflicts of rights resulting from the horizontal effect of rights.

- Acknowledging divergent 'local' standards

Only if there is a value in national constitutions and their fundamental rights standards, which are not necessarily identical or even convergent among each other, is there room for applying a distinct national constitutional right. Until recently, European law discourse has concentrated on the uniformity and uniform application of EU law. That was not fertile ground for the acknowledgment of the value of national constitutional identity.
Although a provision on national constitutional identity has formed part of the EU Treaty since Maastricht, it was not justiciable until the Lisbon Treaty entered into effect. With the entry into force of the Lisbon Treaty, also the formulation has become more elaborate so as to incorporate more explicitly the 'constitutional' identity of Member States, which the European Union is to respect.[182] At the time of writing this report, the Court has allowed successful reliance on this provision twice.[183]

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[180] At the moment of writing, a case referred by the Spanish Constitutional Tribunal is pending at the ECJ, Case C-399/11, *Melloni*, concerning the compatibility of the EAW Framework Decision and the Spanish Constitutional provisions on the trial in absentia with the Charter. In one of the questions it asks whether Article 53 of the Charter, interpreted systematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to afford the Spanish constitutional rights a greater level of protection than that deriving from European Union law. In its reference, the Tribunal sketches three different possible interpretations of Article 53.
[181] See on this matter recently Aida Torres Pérez, Conflicts of Rights in the European Union: A Theory of Supranational Adjudication. Oxford: OUP, 2009.
[182] Art. 4(2) EU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring

Already before 'Lisbon', however, the case law began showing sensitivity to important 'local' values. This is most evident in the *Omega* case which we have had occasion to mention several times in this report.[184] In this judgment the Court allowed a public policy restriction of the free movement of services based on the particular German interpretation of human dignity in the *Grundgesetz*. The Court emphasised that public policy exceptions can vary from Member State to Member State, and that the objective pursued by the *Grundgesetz* was legitimate and proportional.
What these developments amount to is that divergent fundamental rights standards may not be resolved explicitly via provisions like Article 53 of the Charter and of the ECHR, but by reference to Article 4(2) EU. Reliance on divergent fundamental rights standards is then made dependent on whether it forms part of the constitutional identity of a Member State, which is subjected to a legitimate aim and proportionality test by the Court of Justice.[185] The 'local' standard has to live up to certain minimum requirements.

- *Conflicts of rights across jurisdictions*

One commonly entertained objection to a solution via Articles 53 Charter and 53 ECHR, that is to say by the criterion of the most protective right, is that in cases of a conflict of rights in a multiparty context this no longer works. Such a conflict can ultimately only be resolved through a 'balancing' of the rights and interests involved. It is said that in such a case the 'more' of one (party's) right implies 'the less' of the other.[186] For the sake of clarity, the example of a conflict between privacy and freedom of expression between two parties can be taken.
Prior to balancing conflicting rights, one cannot say either privacy or freedom of expression offers 'more' or 'less' protection. After balancing, the outcome indeed results in a situation in which one right does protect and the other not: the net result of the balancing is that in the overall relation between two parties either privacy is protected more, or freedom of expression is.
Consider next the balancing in two respective jurisdictions of the same conflict. Suppose that in one jurisdiction, say that of the ECHR, the balancing results in the priority of privacy, but in the other, say in a national constitutional court, the result is the opposite, so the balancing results in the priority of freedom of expression. We are then faced with a conflict between two jurisdictions.
In this case, there is no easy way of establishing in the abstract which of the two outcomes should prevail on the basis of which provides better protection: in one jurisdiction privacy is better protected, in the other freedom of expression. In other words, the criterion provided by Articles 53 of the Charter and 53 of the ECHR do not resolve this conflict. Other criteria must be used. Several can be thought of, which amount to changing the relevant elements which are put in the balancing scales. For instance, if some legally relevant circumstances were not taken into account in the balancing within one jurisdiction which were deemed relevant but not in the other, an adaptation of this might contribute to resolving the problem.[187]
In the context of relations between fundamental rights standards in multiple legal orders, it would seem important to take into account certain values but also practical aspects in the relations between the respective jurisdictions. Sometimes it is practically better left to a 'local' court to resolve the balancing as that local court may be in a better position to evaluate the particular circumstances of the case – this is a major element in the 'margin of appreciation' doctrine of the ECtHR. As a matter of principle, it should be left to the national courts to finally adjudicate the conflict of rights in cases which involve constitutional identity elements. In the

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the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'
[183] See above footnote 12.
[184] Case C-36/02, *Omega*, 2004 ECR I-9609.
[185] See further Besselink, Respecting Constitutional Identity in the EU. Case note Case law A. Court of Justice Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr., CMLRev forthcoming.
[186] In national case law particularly the *Bundesverfassungsgericht*, BVerfG , 2 BvR 1481/04 of October 14, 2004, (*Görgülü*) para.49; BVerfG, 1 BvR 1602/07 vom 26.2.2008 (*Von Hannover*), para.76; BVerfG, 2 BvR 2365/09 vom 4.5.2011, para.93
[187] This is basically how things went in the *Von Hannover* saga between the ECtHR and the BVerfG.

context of Union law, one may say that the balance is recalibrated to take into account the values expressed in Article 4(2) EU.

THE FUTURE OF NATIONAL CONSTITUTIONAL PROTECTION

In the totality of the case law of the ECJ on fundamental rights, the 'constitutional traditions common to the Member States' take the lesser role.[188] The accent has been not on the national traditions but on the European fundamental rights sources. National constitutional traditions are hardly ever referred to except in a most perfunctory manner. They do not play a role which is comparable to that of legal and social developments in the framework of the 'common ground' or 'consensual' approach of the ECtHR. On the contrary, the national reports reveal that the national constitutions are more heavily influenced by the European human rights instruments, in particular the ECHR, and even now already the EU Charter, than the other way round. In a sense, there has been a shift away from the national to the European context.

As we just noticed in the previous section of this chapter, the national constitutions have a certain 'negative' value as placing a legitimate limit on the reach of Union law. The constitutional identity of a Member State, which may well concern fundamental rights, forms the 'counter-limit' of Union law. The obligation to respect the constitutional identity of Member States is in a sense the European version of the previously national constitutional law doctrine known in Italian as that of the *controlimiti*. This then is one contribution of national constitutional law to Union law. It does not stop there.

The recent case law touching on the scope of European law within which European fundamental rights standards can be invoked by citizens runs into the issue of 'reverse discrimination'. Because purely internal situations are not within the scope of European law (unless there is applicable secondary EU legislation), Union fundamental rights cannot be asserted, in particular the prohibition of discrimination, but also other rights. This was partly remedied in *Zambrano* (as refined in its progeny) with regard to citizenship rights in case an EU citizen threatens to be deprived of these rights. That, however, is not where the fundamental rights story stops. As several examples in the national practice show, EU non-discrimination may not apply, but the national and ECHR norms do very much fill that space.[189] This positive complementary interaction between sources within the respective scope of application of European and national authorities, has now also been pointed out by the ECJ in *Dereci* with regard to the complementary roles of Charter and ECHR. The Court recalled on the issue of the applicability of the right to family life, that if the relevant matter were covered by Union law,

> '[the national court] must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.'[190]

It would therefore be a mistake to see the European area of fundamental rights only as an EU area of fundamental rights. Also in the field of fundamental rights, Europe is composed of mutually dependent and interacting orders, together forming one encompassing constitutional order.

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[188] A recent example in which it is used is Case C-550/07, 14 Sept 2010, *Akzo Nobel*, 74 and Case C-279/09, 22 December 2010, *DEB*.

[189] Thus Belgian Conseil d'Etat/ Raad van State and Cour Constitutionnel/ Grondwettelijk Hof seem to have held this to be the case, see Opinion of Adv-General Sharpston in Case 34-09, Zambrano, footnote 17. The Netherlands Raad van State has held in a series of advisory opinions that subjecting certain Netherlands nationals to 'integration requirements' from which nationals of EU Member States in an otherwise identical position are exempt on the basis of EU law, constitutes an infringement of the constitutional equality clauses of Article 1 of the Grondwet, Art. 26 ICCPR and Protocol 12 ECHR.

[190] Case C 256/11, 15 Nov 2011, *Dereci*, para.72-73.