Denmark

The Protection of Fundamental Rights Post-Lisbon:
The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions

Dr. Jens Elo Rytter and Dr. Kristian Cedervall Lauta

Q1-Q2 Rights Architecture

Q1: Are there any remaining (potential or actual) gaps in the substantive scope and level of protection of fundamental rights? And can (potential) gasp in one fundamental rights source be filled by reference to other fundamental rights sources?

It would seem that with the codification of EU fundamental rights in the EUC and with future EU accession to the ECHR not many gaps are left in the substantive protection of fundamental rights, at least at the EU level. The EUC contains a very comprehensive catalogue of rights, although some of these rights are not readily enforceable in law, since they are principles to be implemented first by secondary law, cf. EUC Article 52(5). Should any "gaps" remain, the ECJ will, like it was before Lisbon, be able to close those gaps by relying on the third and original source of EU fundamental rights, the unwritten general principles of EU law (derived from the ECHR and the common constitutional traditions of member states), cf. TEU Article 6(3).

It is another question entirely, whether any fundamental rights "gaps" would be left in the Danish legal order. To answer this question, one must consider the fundamental rights protection of the Danish Constitution as well as the legal status of EU and ECHR fundamental rights in Danish law.

Compared to modern standards of fundamental rights protection, the Danish Constitution – dating back from 1849 and having been only slightly modified since then – appears fragmentary and partly outdated. Several core rights are not protected at all, including the right to life, the prohibitions of torture and slavery, the prohibition of retroactive punishment and a general prohibition of discrimination. A catalogue of constitutional fundamental rights is however enshrined in the Danish Constitution, the *Grundlov*: physical personal liberty, inviolability of the home and privacy of correspondence, inviolability of property, freedom of expression, freedom of association whether religious or otherwise, freedom of religion, freedom of assembly, free and equal access to trade, the right to work and to public assistance, the right to free primary education and freedom to receive instruction, and – less explicitly – the prohibition of discrimination. Several rights have a rather limited substantive scope. This is i.e. true of Section 72 protecting only against interference with and surveillance of communication and against searches of

houses, but not against other intrusions of an individual's private life. Section 71 on the right to liberty contains strong procedural guarantees in case of any deprivation of liberty, but hardly contains any substantive restrictions on the freedom of public authorities to detain individuals. Equally the abovementioned Section 72 requires only that specific types of interference with the right to privacy be based on a court warrant and even allows for legislative exemptions from this requirement. Section 77 on freedom of speech prohibits only prior restraints on publication, but does not set any limits on the extent to which publications may be sanctioned by punishments etc. Section 78 concerning the freedom of association applies only to associations with a "lawful" purpose, thus essentially leaving it to the legislature to define what purposes of association should be allowed, and so on.

In short, the Danish Constitution leaves many "gaps" as far as fundamental rights protection is concerned. The absence of constitutional guarantees of other rights which should be considered as fundamental rights certainly does not imply that these rights are not recognized in practice (for instance the right to medical care, which is highly developed in Denmark); the catalogue of fundamental rights in the *Grundlov* is mostly the result of a historical development in which certain accents seem to have been laid more or less haphazardly.

The sparse rights catalogue in the Constitution means that the ECHR has played an extensive role as a driver of the developments in the rights architecture in Danish law, thus the relatively general and stagnating character of the Grundlov's right-catalogue has allowed for the convention to become the central human rights instrument in Danish Law.[1]

Denmark has always been a contracting party to the ECHR (except for Additional Protocol 12 on the principle of equality) and is also bound by the EUC and other EU fundamental rights when implementing EU law. In addition, Denmark has ratified numerous other international human rights treaties, including the core UN treaties.[2] The ECHR was incorporated into Danish law in 1992. The incorporation put an end to a

[1] It remains a recurring discussion whether the ECHR dynamic character provides the driver for an dynamic interpretation of the Constitution or if the ECHR are basically becoming the central instrument, independently of the interpretation of the Constitution. See more below.

[2] In 2001 a committee established by the Minister of Justice recommended that a number of other human rights treaties were likewise to be incorporated into Danish law. These are general treaties like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture (1984) and the Convention on the Rights of the Child (1989). As regards the fundamental rights protected by the New York conventions, Denmark does not recognize any direct effect of the relevant treaty provisions for its citizens. These provisions are considered to be binding only on the states and they cannot have force of Danish law until the legislature has incorporated them into the Danish system of positive law. Consequently, complaints lodged by citizens can only be directed against an omission to fulfil this obligation of incorporation. Fundamental rights protected in such treaties may, however, play a role in the interpretation of Danish law. But in practice, fundamental rights not incorporated into Danish law have proved to have rather limited influence.

discussion on the legal position of the ECHR in Danish law. Until around 1985 it was generally assumed without further examination that Danish law was in conformity with the ECHR. It was in particular the judgment of 24 May 1989 given by the European Court of Human Rights in the *Hauschildt* case, in which the Court condemned Denmark for violation of Article 6 ECHR, which drove the need for a clearer implementation of the Convention. Since 1992, both the courts and administrative bodies are bound to apply the European Convention. The solution of implementing the EHRC by law, has given rise for several constitutional theorists to conclude that the ECHR should be attached a higher value as legal source than other laws, as it has the status as both a national act and an international obligation. This rather technical discussion seem to underline the particular status of the ECHR in Danish law, and its undisputed role as a central human rights instrument, with vertical as well as to some extent horizontal effect (see Q3 below).

Following, it could be said that the constitutional "gaps" are filled by Denmark's international and supranational fundamental rights obligations. However, these sources of fundamental rights do not have constitutional status in Danish Law. EU law normally enjoys primacy over incompatible Danish law, but EU law does not have constitutional status (UfR 1998.800 H) and it is generally assumed that the Danish legislature may chose to depart from EU law[3], as well as the ECHR[4]. As regards other international human rights obligations, their status is even weaker, since they do not take precedence over clear Danish legislation even in the absence of an explicit desire on the part of the Danish legislature to depart from international obligations (UfR 2006.770 H). One way to solve in part the constitutional "gap" as far as the level of protection goes would be to dynamically reinterpret existing fundamental rights provisions of the Danish Constitution in light of parallel rights found in instruments like the ECHR and the EUC. The interpretation tool is regarded by some as a circumvention of the strict requirements of constitutional amendment found in Section 88 of the Danish Constitution.[5] In any case, Danish courts seem reluctant to go down this path. There exists only a couple of cases in which Constitutional rights have been interpreted in light of the parallel ECHR right, see on freedom of assembly UfR 1999.1978 H and on prior restraints on freedom of speech UfR 2010.1859 H. The general approach is to keep the Constitution and external sources of fundamental rights strictly separated, see e.g. on the independence of the judiciary UfR 1994.536 H.

[3] Cf. Forfatningskommissionens Betænkning, 1953, p. 31, see further Henrik Zahle: Dansk Forfatningsret 2 (2001), p. 276f and Peter Germer: Statsforfatningsret (2007), p. 241.

[4] Cf. Lorentzen, Lov og Ret, nr. 3 (1999) p. 8; Torben Jensen: Højesteret og retsplejen (1999) p. 283f; Jens Elo Rytter: Grundrettigheder (2000) p. 121 f; Vedsted-Hansen, i Festskrifte om Menneskerettigheder til Carl Aage Nørgaard (2004), p. 384. See also White paper on the Implementation of the Conventions in Danish law, Betænkning no. 1407 (2001), p. 308f.

[5] Cf. Jens Peter Christensen: Domstolene – den tredje statsmagt (2003), p. 22-25

In sum, the Danish legislature remains, as a matter of constitutional legal principle, free to depart from each and every one of Denmark's "external" fundamental rights obligations.

In order to closer asses this constitutional reservation as to the status of the different human rights sources in Danish law, it seems necessary to briefly re-examine the Danish Maastrict-decision from 1998.

In 1998 the Danish Supreme Court handed down a landmark judgment in the so called "Maastricht Case".[6] A number of Danish citizens had been allowed *locus standi* to challenge the compatibility with the Danish Constitution of Denmark's accession to the Maastricht Treaty. Their primary argument was that the Maastricht Treaty entailed a transfer of Danish sovereignty to the EU of such scope and in such an unspecified manner that Danish accession should have followed the - very troublesome - procedure for amending the Danish Constitution (Section 88 of the Danish Constitution), rather than the – more simple – ordinary procedure for the transfer of specified powers to a supranational body (Section 20 of the Danish Constitution). The challenge was unsuccessful. The Supreme Court unanimously ruled that the accession to the Maastricht Treaty in accordance with the ordinary transfer procedure in Section 20 of the Danish Constitution had been constitutional. However, the reasoning of the Supreme Court erects a constitutional reservation to the supremacy of EU law and sends a discrete warning to the ECJ, relevant to understand the architecture of legal sources in Danish law:

"The Supreme Court finds that it follows from the specification requirement in Section 20(1) of the Danish Constitution, combined with the power of Danish courts to review the constitutionality of Acts of Parliament, that Danish courts cannot be deprived of the access to review questions as to whether a legislative act of the EU exceeds the limits of the Danish transfer of sovereignty as defined by the Danish act of accession. Therefore, Danish courts must regard a legislative act of the EU as inapplicable in Denmark should the extraordinary event occur where it can be established with sufficient certainty that a legislative act of the EU which has been upheld by the ECJ is based on an application of the Treaty which goes beyond the transfer of sovereignty, according to the Danish act of accession. The same applies with regard to EU norms and principles established through the case law of the ECJ."[7]

With this statement, the Danish Supreme Court in clear terms – while reserving this option for extraordinary cases of manifest *ultra vires* acts by the EU institutions – affirmed its competence and willingness to police the constitutional frontier *vis-à-vis* EU law, reserving the final say as to the constitutionality, and thus the validity in Denmark, of EU law to Danish courts. The statement includes a reference to EU law created by the ECJ, thus sending a clear signal to Luxembourg that there are constitutional limits as to what Danish courts will accept when it comes to judge made law from the ECJ. The Maastricht judgment represents a piece of carefully calibrated critical constitutional dialogue,

[6] The Danish Supreme Court's "Maastricht judgment", *Ugeskrift for Retsvæsen* [Danish Law Weekly Gazette] 1998, pp. 800 et seq.

[7] *Op. cit.*, p. 871. The English translation is mine.

obviously inspired and encouraged by the precedent from the German Constitutional Court five years earlier.[8]

It does not seem at all unlikely that the ECJ might choose an activist approach to the EUC, baring in mind the ECJ's record of judicial activism and realising the importance of individual rights to the constitutional ambitions of the EU (and the ECJ!). Approaching the charter as a legal document it is obvious that it contains the potential of expanding the present human rights protection substantially, not least in the area of social and economic rights, not as extensively covered by the ECHR. Though the Danish Constitution contains provisions safeguarding i.e. both the access to work (art. 74) and to education, their character and interpretation in Danish Constitutional law is as policy or programme declarations rather than as actual rights.

It thus seems important to line out that the legal basis of such a development is fragile, at least from the perspective of Danish legal tradition. The EUC is expressly envisaged to be nothing more than a codification of existing rights, and it is repeatedly stated that the EUC does not in any way expand the competences of the EU, cf. Article 6(1) TEU and Article 51(2) – see further Q7 below.

In Danish law, fundamental rights protection is therefore truly multi-levelled. Some rights are protected on a constitutional level (constitutional rights), others usually take precedence over acts of parliament, but may be explicitly departed from (ECHR), yet others have the same status but do not apply generally but only within the field of EU law (EU fundamental rights) and, finally, others are relevant to the interpretation of Danish law but do not take precedence over clear acts of parliament (non-incorporated international human rights obligations).

Before finally concluding Q1, a point of general validity to understand the background for the relationship between the Danish and the international courts needs to be accentuated, though not necessarily directly corresponding to question 1.

Experience since 1992 shows that the assumptions underlying the incorporation act, that the legislator would at all times ensure the conformity with ECHR provisions and case law of Danish law, were perhaps unrealistic. The legislator has not always been able – or even willing – to adapt its legislation in detail to the Convention complex.[9] And so, Danish courts have in some areas come to function as a regular enforcement organ of the Convention rather than as

[8] German Constitutional Court, "Maastricht decision" 1993, *Entscheidungen des Bundesverfassungsgerichts* [Decisions of the German Constitutional Court] Vol. 89, pp. 155 et seq (notably 188).
[9] Cf. Torben Jensen, *Højesteret og retsplejen* [The Supreme Court and Procedure] 283 (Copenhagen GadJura 1999); Jens Vedsted-Hansen, Chapter 2, in I.E. Koch and others (eds.), *Menneskerettigheder og magtfordeling* [Human Rights and Distribution of Powers] 30 and 37-38 (Århus: Aarhus Universitetsforlag 2004).

an ultimate safety net. This fact is not only due to the better ability of courts to respond swiftly to new developments in Strasbourg case law, but also – and perhaps more importantly - to the inability of the legislator to strike the appropriate balance in specific cases often required by the Convention.[10]

As regards the legislative desire that Danish courts should generally refrain from autonomous interpretations of the ECHR and restrict themselves to enforcing Strasbourg case law and its clear implications, Danish courts have in most cases followed suit. Occasionally, the Danish Supreme Court seems to have gone somewhat further in autonomously applying the Convention than what was envisaged by the 1992 incorporation act.[11] In a few cases the Supreme Court (or a minority within the Court) has been willing to set aside Danish law as incompatible with the Convention, although it could hardly be said that the incompatibility clearly followed from or was clearly implied by existing Strasbourg case law. Rather, the assessment of incompatibility required some amount of autonomous interpretation by the Danish court.[12]

Other cases make clear that the Convention is still quite far from being actively interpreted and applied by national courts, and is thus not yet a living instrument in Danish law.[13] There are cases where the compatibility might be considered doubtful in light of the principles established by Strasbourg case law. However, for lack of a clear Strasbourg precedent and having regard to the far-reaching consequences, the Supreme Court generally abstains from setting aside Danish legislation due to the lack of a "basis" for setting aside Danish legislation.[14]

Furthermore, there are several cases where Danish courts summarily reject the relevance of the Convention, although this conclusion might not have been be so obvious despite the absence of immediately relevant Strasbourg case law.[15]

---

[10] A clear illustration of the latter, is the case law concerning the compatibility with Article 8 ECHR on the right to respect for private and family life of decisions to expel aliens convicted of crime. Here, the political majority has adopted strict legislation providing for expulsion as a rule in case of a criminal sanction of imprisonment, while – at the same time - leaving it to the courts to uphold human rights obligations which may prohibit expulsion in concrete cases. On this basis the Danish Supreme Court has on numerous occasions ignored the wording of the legislation, enforcing Article 8 ECHR, see in detail Jens Vedsted-Hansen, *Chapter 6*, In I.E. Koch and others (eds.), *Menneskerettigheder og magtfordeling* [Human Rights and Distribution of Powers], 151-169 (Århus: Aarhus Universitetsforlag 2004). Similarly, With regard to criminal sanctions for libel and violations of private property the Danish legislation remains unaltered although its scope has been restricted due to Article 10; it has thus been left to the courts to interpret the legislation in accordance with Article 10 and Strasbourg case law.

[11] See also Jonas Christoffersen, Højesteret og Den Europæiske Menneskerettighedskonvention [The Supreme Court and the European Convention of Human Rights], in *Ugeskrift for Retsvæsen* [Danish Law Weekly Law Gazette] 2000, Sec. B, pp. 593-600 (595).

[12] See notably three Supreme Court judgments published in *Ugeskrift for Retsvæsen* [Danish Law Weekly Gazette] 1994, p. 536, 1994, p. 988, and 2010, p. 1035 (dissenting opinion), respectively.

[13] Cf. also Ole Spiermann, 'Om ikke at fortolke internationale menneskerettighedskonventioner' [On non-interpretation of international Human Rights Conventions], in J. Christoffersen & M. Rask Madsen (eds.), *Menneskerettighedsdomstolen: 50 års samspil med dansk ret og politik* [The European Court of Human Rights: 50 years of co-operation with Danish law and politics] , 127, 127-145. (Copenhagen: Thomsen Reuters 2009).

[14] See Supreme Court judgments published in *Ugeskrift for Retsvæsen* [Danish Law Weekly Gazette] 1999, p. 1316, and 2008, p. 64, respectively.

[15] See Western High Court judgment published in *Ugeskrift for Retsvæsen* [Danish Law Weekly Gazette] 2000, p. 2101 (the doubtful justification for the Court's summary rejection of Article 8's relevance to the retention by the police of fingerprints from former criminal suspects, has subsequently been more than confirmed by the judgment of the Strasbourg Court in *S and Marper v. United Kingdom* [GC], ECtHR judgment of 4 December 2008, Appl. No. 30562/04

Overall however this means that the Danish courts are caught between a national constitutional tradition which to positions the legislator as the main driver of the rights architecture, and a very activist ECtHR. This crossfire position has contributed to the development of particular attitude towards rights-based questions before Danish courts; as a passive enforcer. While on the hand the courts are implementing the developments stemming from Strasbourg, they to a large extend refrain from independently interpreting the convention.

Following in so far as the perceived role of Danish courts was to merely "follow Strasbourg"[16] and prevent Denmark from being found in violation of the Convention before the Strasbourg Court, Denmark's record of implementing the Convention is a success. Denmark is among the Contracting States which are least often found to have violated the Convention. However whether or not Danish courts have fulfilled their responsibility under the Convention is much more questionable. Article 1 ECHR places the primary responsibility to "secure" Convention rights on national authorities, including courts. The Strasbourg Court performs a subsidiary role of international supervision, cf. Articles 1 and 19 ECHR. This distribution of functions finds expression in the subsidiarity principle and the doctrine of margin of appreciation recognised by the Strasbourg Court.[17] Any restraint from Strasbourg does not affect the obligation under Article 1 ECHR of Contracting States to give full effect within their jurisdiction to the rights protected by the Convention.[18] In this regard there is an increasing need for national courts to take this responsibility seriously also serve the urgent purpose of taking pressure off the Strasbourg Court and its ever-increasing case load.[19]

It however remains a fact that Danish courts are extraordinary cautious in their interpretation and application of the international human rights obligation. This has also lead to a very restrictive practice with regard to preliminary references to the EUC.

---

and 30566/04 - finding a violation of Article 8 in partly comparable circumstances). See also the Western high court judgment published in *Ugeskrift for Retsvæsen* [Danish Law Weekly Gazette] 2001, p. 910, and the Supreme Court judgment published in *Ugeskrift for Retsvæsen* [Danish Law Weekly Gazette] 2008, p. 641.

[16] See in this direction Torben Jensen, *Højesteret og retsplejen* [The Supreme Court and Legal Procedure] 284 (Copenhagen: GadJura 1999).

[17] Cf. the leading case on subsidiarity *Handyside vs. United Kingdom* (plenary), judgment of 7 December 1976, Appl. no. 5493/72, para. 48: "[T]he machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (…). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. (…). By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements…(…) Consequently [the Convention] leaves to the Contracting States a certain margin of appreciation. This margin is given both to the domestic legislator…and to the bodies, judicial among others, that are called upon to interpret and apply the laws in force. …".

[18] Jf. Jens Elo Rytter, *Den Europæiske Menneskerettighedskonvention – og dansk ret*, 2. udgave [The European Convention of Human Rights and Danish Law, 2. edition], 111 (Copenhagen: Thomson 2006). Jonas Christoffersen has investigated this issue more in depth in his doctoral thesis, in which he argues in favour of a doctrine of "multiple standards" of protection, such a doctrine being a consequence of the restraint exercised by the Strasbourg Court due to its role as an international control body (known as "the principle of subsidiarity"), the implication of which is a duty on the part of national organs, including the courts, to enforce a higher standard of protection (labelled by the author as "the principle of primarity", see Jonas Christoffersen, *Fair Balance. Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Chapters 5.1 and 5.3 (Kluwer/Martinus Nijhoff, Haag 2009).

[19] Cf. the conclusions from the High Level Conference on the Future of the European court of Human Rights, *Interlaken Declaration*, 19 February 2010, operational paragraphs 2-3.

This is not only sustained by a procedural structural observation, but also by the fact that the role of the Convention is consequently downplayed in Danish court decisions. Quite often the Convention is relied on seemingly in passing as a supplementary argument only, even when it seems clear that, in fact, the Convention was a crucial or even decisive consideration.[20] Potentially this holds true not only for the convention, but to an even larger extent to the EUC.

In the only Supreme Court decision including the charter, the Defendant claimed that the Charter's art. 47, on the right to an effective remedy and to a fair trial, were infringed as an administrative decision could not be considered an effective remedy. The EUC was not even mentioned in the court decision (even though the court found in favour of the defendant). This seems to confirm the general impression, outlined in petit above, that Danish Court are extraordinarily cautious when approaching new international sources.

The decision is further illustrative to another potential problematic to the application and position of ECU in Danish law. The defendant further requested the court to make a preliminary reference to the European Union's Court of Justice. The Supreme Court settled the case by reference to the Danish Constitution and the ECHR.[21] Though not setting an independent precedence on the interpretation of the EUC in Danish law, the case non the less raises an important issue of the application of *acte clair* in cases concerning fundamental rights poses special problems, especially after the coming into force of the Lisbon Treaty. The Lisbon Treaty has elevated the EU Charter of Fundamental Rights (EUC) to formally binding EU law as well as paved the way for EU accession to the ECHR, Article 6 TEU. Both are likely to strengthen the role of individual rights in the EU and the role of the ECJ in interpreting those rights. The Charter explicitly provides that with regard to parallel rights, the ECHR should be regarded as a binding minimum standard, which does not however, prevent the ECJ from according a higher level of protection, Article 52(3) EUC. As regards Charter rights which are not found in the ECHR, the ECJ must interpret them on their own.
Having regard to the ECJ's record of dynamic treaty interpretations, this raises the question, whether in cases falling within the scope of EU law, national courts will be obliged, as a rule, to refer cases touching upon individual rights to the ECJ for a preliminary ruling on the scope and meaning of EU fundamental rights, since one can never be sure, even where clear Strasbourg case law exists, that the ECJ will not be inclined to develop the EU fundamental rights protection further.[22] This question however seems to go beyond the scope of this questionnaire.

[20] See three Supreme Court decisions published in *Ugeskrift for Retsvæsen* [Danish Law Weekly Gaztette] 1994, p. 988, 1999, p. 1798, and 2008, p. 2394, respectively.
[21] U.2011.1800H
[22] Under the strict *CILFIT* formula of *acte clair* it would seem that the wise thing to do is to refer most or all rights cases to the ECJ. However, here too, it seems unlikely that Danish courts will subject themselves completely to the CILFIT understanding of *acte clair*; they would more probably apply their own, more relaxed, formula in a flexible way so as

In conclusion the Danish rights architecture consists of a number of different elements supplementing each other to form a more or less coherent structure. The charter will in particular in the area of social and economic rights potentially have a significant role to play, but the Danish tradition of implementation of such international obligations will lead Danish courts to approach the EUC with significant interpretational reticence. This holds true both with regard to material application as well as with preliminary references to the ECJ.
Thus, it seems difficult to *prima facie* determinately position the Charter in the Danish rights-architecture.

Q2: What is the role of general legal principles: can they function as sources of fundamental rights protection?

General legal principles are a familiar source of law in Danish law. Several basic principles of Danish law are recognised as unwritten general legal principles, including the principle of legality, the principle of equality and the principle of proportionality. It is more doubtful whether any unwritten legal principles relevant for the protection of fundamental rights can be recognised as having constitutional rank in Danish law.

So far, while not entirely excluding the possibility, Danish courts have abstained from taking a clear stand on the matter. Commenting on a Supreme Court judgment from 1965 (UfR 1965.293 H) in which an unwritten constitutional principle of equality was unsuccessfully invoked against an Act of Parliament, the Danish Supreme Court judge Schaumburg made the following remark:

"If, on the basis of the "spirit of the Constitution" or democratic principles, such a principle was at all to be recognised as a viable basis for setting aside an Act of Parliament (on thus as an unwritten part of our Constitution), it would probably have to relate to clear instances of gross and arbitrary discrimination of the citizens" (Schaumburg UfR 1965 B 244).

In 1987 Supreme Court Judge Riis, commenting on the Supreme Court judgment in UfR 1986.898 H, considered the existence of a general constitutional prohibition on discrimination to be "extremely

---

to avoid a flood of rights cases going to Luxembourg and back and, in many cases, possibly ending up in Strasbourg in the last resort. Perhaps such an approach is only sensible. Referrals are time consuming, the ECJ does not even possess authoritative competence to interpret the ECHR, and excessive judicial dialogue might end up compromising the right of the individual to a fair trial "within a reasonable time", cf. Article 6(1) ECHR and Article 47(2) EUC.

doubtful" referring then to Schaumburg's statement with approval.[23] To some extent the protection under the ECHR and the general EU-law seems to have "overtaken" this debate, rendering the discussion on the existence of such principle superfluous.

So far, Danish courts have not recognised unwritten legal principles as free-standing legal sources with constitutional rank. Such recognition would in any event be reserved for instances where the most basic considerations of the rule of law and democracy are manifestly violated. In other respects, however, general legal principles play an important role in fundamental rights protection, both in the interpretation and application of constitutional rights (legality, proportionality principles) and on the lower levels of administrative law.

Q3 – Q6 Horizontal effect and the collision of rights

Q3: To what extent is horizontal effect of fundamental rights accepted in the Member States? How is the case law of the ECJ in this respect received?

The idea of horizontal effect of fundamental rights is more or less foreign to Danish constitutional law. The fundamental freedoms in the Danish Constitution are formulated - and have traditionally been perceived - as classical liberal freedoms protecting the individual against the state by imposing limitations on state power (the only exception being freedom of assembly, which is generally considered to infer a positive obligation on the police to protect demonstrations against violent counter-demonstrations). Even so, the values expressed in constitutional rights, such as the freedom of expression, have for long influenced Danish court decision in cases between private individuals, not in their capacity as constitutional rights but as (unwritten) general principles of law. The fundamental right turns into a value which public authorities must give due consideration in any decision, even in cases between individuals. In a decision from 1980 (UfR 1980.1047 H), concerning the question of a prior restraint on satiric posters criticising the production methods of Danish farmers, the Supreme Court (without, however, referring to the constitutional provision on freedom of expression, which is what sets Danish constitutional law apart from e.g. German

[23] Riis UfR 1987 B 54

constitutional law) rejected the restraint referring to the "consideration for the freedom to express opinions on such an important public question".[24]

With the ECHR finding its way into Danish case law in the late 1980'es and being incorporated into Danish law in 1992, horizontal effect has become more common also in Danish law. According to which ECtHR freedoms are not merely negative state obligations, but also entail positive obligations, including protecting individual rights against interference by other private individuals. Most predominantly Danish courts apply a model of indirect horizontal effect in cases between private individuals, i.e. interpreting national legislation in accordance with ECHR rights. This has been e.g. the applied approach in libel cases, in which the penal provisions on libel have been interpreted narrowly in light of ECHR Article 10. However, the distinction between indirect and direct horizontal effect is not entirely clear and on occasion, Danish courts have been willing to apply ECHR rights more or less directly in cases between individuals, without the intercession of national legislation, and thus to enforce direct horizontal effect. One recent example is a decision from 2011 passed by the Eastern High Court (UfR 2011.3021 Ø) in which the two private parties essentially both relied on the ECHR. The case regarded the collision of the plaintiff's right to respect for his private life enshrined in Article 8 ECHR and the defendant's freedom of artistic expression protected by Article 10 ECHR. The Court essentially weighed the two ECHR rights against each other and found in favour of the freedom of expression of the defendant (see further below). The court did not explicitly consider the question of horizontal effect of the convention, but clearly seemed to regard such effect as uncontroversial.

In EU law the ECJ has since *Defrenne* (1976) been willing to give direct horizontal effect to EU primary law, even though the relevant provision may be addressed to the member states, the rationale being the efficiency of EU law. Case law on horizontal effect has so far been dominated by cases regarding the principle of non-discrimination, but it is hardly limited to this fundamental right. It may thus well be applied to other EU Charter rights as well. The ECJ may even regard the last sentence of Article 52(3) EUC, according to which the ECJ is free to develop a higher level of protection than under the ECHR, as an invitation to an EU doctrine of (direct) horizontal effect of fundamental rights. As already mentioned no substantial references to the EU Charter have yet been made in Danish courts. However, it is to be expected that Danish courts will follow the ECJ and thus allow horizontal effect of EU fundamental rights in the same way as it has with regard to the ECHR.

[24] A case rather parallel to the German *Lüth* decision from 1958

Q4: How do Member States within their respective jurisdictions and EU institutions deal with cases of the collision of rights?

Fundamental rights cannot collide in a classic liberal understanding of fundamental as rights upheld by individuals. However, when one moves away from this understanding, recognising that the state is obliged not only to respect the freedom of citizens but also to protect this freedom vis-à-vis another citizen's right (indirect horizontal effect), the possibility of fundamental rights collisions arises. Such fundamental rights collisions pose problems in any legal order, because there is really no point of departure, such as *in dubio pro libertate*, for the balancing which must be performed. The colliding rights must simply be weighed against each other in light of the specific factual circumstances.

Such fundamental rights collisions have become more common in Danish law with the impact of the ECHR and EU law. Danish courts generally follow the same approach as the Strasbourg Court, which it is suggested, is also the approach taken by the ECJ in Luxembourg. They assess the weight of each right in the specific circumstances to find the result which is most fair and which does not do way with the essence of either right. The abovementioned decision from 2011 passed by the Eastern High Court (UfR 2011.3021 Ø) in which two private parties essentially both relied on the ECHR seem illustrative to this point. The case regarded the inclusion of detailed information on plaintiff's life, including his name, picture, address, and the name of his children, in a fictive work. The work was formally created by a Danish experimenting avant-garde art organisation called das Beckwerk, but was essentially written by the defendant and published by one of the biggest publishing houses in Denmark, the second defendant. The case thus regarded the collision of the plaintiff's right to respect for his private life enshrined in Article 8 ECHR and the defendant's freedom of artistic expression protected by Article 10 in ECHR. The Court in their assessment essentially weighed the two ECHR rights against each other. In their decision the court emphasised that:

> "(…) the work is an artistic expression of participation in a debate of great societal value [the book regarded a failed attempt to democratize the United States] and the information that Thomas Skade-Rasmussen Strøbech (plaintiff) wanted to protect, was either of a less sensitive character, or information that was already publicly known (…)".

On those grounds the court found that "the artistic freedom of expression clearly outweighed the [plaintiff's] wish to protect his privacy", and thereon found for the defendants. Without going to much to details with the very complicated facts of the case, it can be established that the plaintiff was himself entangled in an avant-garde sub-culture in Denmark, and had on numerous accounts during the last 10 years changed name and identity.

The weighing displayed in the judgment is on a general level an expression of a tradition of preferred position of politcal rights in Danish Constitutional law.

Thus, Danish courts have in recent years adopted something approaching a doctrine of a preferred position for certain rights which are deemed especially fundamental to democracy and the individual. This means a strict scrutiny of measures interfering with those preferred rights. Danish Courts essentially takes the same approach as the Strasbourg Court. In a 1999 case (UfR 1999.1798 H) regarding restrictions on the freedom of assembly, the Supreme Court stated that freedom of assembly, like freedom af expression and freedom of association, are necessary conditions of a democracy, before proceeding with a strict scrutiny of the restrictive legislation in question. However, while the "preferred position" means that serious grounds must exist before public interference with the right is justified, it does not necessarily mean that preferred rights will generally outweigh colliding individual rights. For instance, Danish courts will only allow interference with individual privacy for the sake of freedom of expression if the expression is of real public interest. If there is no such interest in the information provided, the protection of privacy prevails as in *Von Hannover* by the Strasbourg Court, see e.g. 2010.12448 H regarding paparazzi photos published by the tabloid press of a half-naked pregnant woman on a deserted beach. In our view, this approach must be the right one, since there is absolutely no democratic value and thus no legitimate interest that the public should receive information of such kind.

It has been an ongoing concern whether the ECJ would give sufficient weight to classic fundamental rights (freedoms) whenever those rights collide with EU economic freedoms, since the latter are regarded as fundamental under EU law. This concern would generally seem to be unjustified, at least today, considering the vigour with which the ECJ is (now) upholding classic rights such as those protected by the ECHR, even when this means restricting free movement in the EU. A clear examples is *Schmidberger* (2003) in which the ECJ accepted as compatible with EU law a serious restriction on the free movement of goods which was due to an environmental demonstration, approved by the authorities, which for some 30 hours blocked a main road for transport in and out of Austria. Another example is *Omega* (2004) concerning by which the ECJ approved of a restriction on the free movement on goods, by way of a prohibition in Germany on laser-games involving "playing at killing", for the sake of protecting human dignity. The now legally binding EU Charter further underscores the need for the ECJ to keep giving due weight to classic freedoms in collision with economic interests, cf. Article 52(3) EUC on EUC rights having the "same meaning and scope" as parallel Convention rights.

5: How does, or should, the balancing take place in the context of the multiplicity of EU, ECHR and national legal orders (multilevel legal order)?

It should be recalled, that there is no inherent conflict of norms in the different sources of fundamental rights protection at play in Danish law. There is no conflict between the Danish Constitution and external sources of fundamental rights just because the latter may provide a higher level of protection, just as there is no conflict the other way around if national constitutions provide for better rights protection than the ECHR, cf. Article 53 ECHR, or the EUC, cf. Article 53 EUC. So while there is a likely competition to provide the best rights protection ahead – especially between the ECtHR and the ECJ, jf. Also Article 52(3) EUC – this does not in itself lead to conflicts in the rights protection. It should be added that Danish courts do not seem keen on taking part in such a competition, see the petit in Q1. There is only sparse evidence of a more dynamic and expansive approach to fundamental rights interpretation in Danish case law. Danish courts are by constitutional tradition cautious and have historically been very attentive to those public interests which may justify limitations on individual rights. So far, Danish courts seem satisfied to play the part as a passive, occasionally even reluctant, receiver of new fundamental rights developments from the outside, leaving the rights competition to others.

Furthermore, a principle of conflict-avoidance seems to permeate the approach of European as well as Danish courts in areas where conflict between the different legal orders may arise. The ECJ has for years been careful to take into account ECtHR case law; the ECtHR has stated its deference to EU law with *Bosphorus*; likewise, the Danish Supreme Court in UfR 1998.800 H held that while it must disapply in Danish law possible ultra vires acts of the EU, EU law should be presumed not to be ultra vires the Danish transfer of competences, a presumption which may only be rebutted if the transgression of EU competences is clear and manifest. It is not to be ruled out that this cautious constitutional reservation might be activated, should the ECJ see fit to use the EUC as a vehicle for a dynamic expansion of the existing fundamental rights protection in EU law.

Since there is no clear judicial yardstick for the balancing of colliding fundamental rights it seems only natural, that inter-/supranational control bodies like the Strasbourg and Luxembourg courts should leave a reasonable margin of appreciation to the national authorities, including national courts. Indeed, this is what the ECtHR and the ECJ both do. An example is the Danish case *Pedersen and Baadsgaard* (2004) where the Strasbourg Court ultimately respected the outcome of the careful balancing by the Supreme Court of freedom of the press vis-à-vis the protection against libel (privacy). As regards the ECJ, in both the abovementioned cases – *Schmidberger* and *Omega* - the ECJ relied not least on the margin of appreciation

which was due to the national authorities as the basis for accepting that national restrictions on free movement for the purpose of protecting fundamental rights was compatible with EU law. This does not mean that the discretion of the national courts is entirely unrestricted. Should the balancing be regarded as plainly wrong by the standards of the inter-/supranational control body, the latter should naturally set aside the outcome of the national balancing, as was the case in e.g. the Danish case *Jersild* (1994) from Strasbourg concerning freedom of the press vs. protection of minorities against hate speech. In Jersild, the Strasbourg Court found that, in their balancing, the Danish Courts had not attached sufficient weight to the freedom of the press and so had violated Article 10 ECHR. This decision has permanently affected the approach of Danish Courts in cases where the freedom of the press collides with other individual rights to the effect that freedom of the press carries more weight in the balancing. Before 1994, journalists were routinely punished for trespassing, even though the trespassing served the purpose of reporting on matters of public interest.[25] After Jersild – and relying on that very judgment - the Danish Supreme acquitted journalist trespassers who had followed demonstrators into the garden of the Danish minister of the environment to cover the demonstrators' happening there.[Fejl! Hyperlinkreferencen er ugyldig.] Similarly, the criminal protection against libel used to be relatively strong, but in light of the weight attached to freedom of the press in Strasbourg case law concerning Article 10 ECHR, the protection of an individual's honour and reputation has been markedly reduced in more recent Danish case law.[26]

There are exceptions to this general picture sketched here. And over the last 20 years, it is possible to see a development where European law is getting more attention by Danish courts. Nevertheless, one would have to say, that up until now Danish courts have, overall, been reluctant to engage in an open constitutional dialogue with European courts. When dialogue does not take place, it reduces the influence of Danish courts on European legal developments. The dialogue that *does* take place has been predominantly critical, reducing the impact of European law on the Danish legal system.

Q6: What role does the legislature have in granting horizontal effect to fundamental rights? What is its role in ordering and prioritizing rights which might collide? In particular, what is the influence of the non-discrimination Directives on the exercise of other fundamental rights in the Member States?

The balancing of colliding fundamental rights is first and foremost the task of the legislator. This is also the view in Danish law and political practice. One reason is that, by definition, the tradition constitutional

[25] See e.g. Ugeskrift for Retsvæsen 1987.934 H and 1987.937 H.
[26] See e.g. Ugeskrift for Retsvæsen 2004.698 Ø and 2008.276/2 Ø.

concern that courts are needed to protect individual rights against the state does not apply in the same way to rights collision. Another is that, unlike in the case involving rights infringements for the sake of a public purpose (suitability, necessity or public policy), there is no clear judicial yardstick for the balancing of colliding fundamental rights. This does however not entirely exclude national courts from cases involving such collisions, should the legislator have manifestly disregarded one fundamental right in the balancing.

Q7- Q8 Implementation

Q7: Is the Charter perceived as being a mere continuation and consolidation of the previous sources of EU fundamental rights protection; or does the Charter provide added protection (or rights) as compared to the pre-Lisbon situation, if one looks at the case law in various jurisdictions since its entry into force?

In a Supreme Court decision from October 2011, the Supreme Court considered the question of *locus standi* for a group of citizens questioning the accession-procedure applied to ratify the Lisbon treaty.[27] The Danish Constitution distinguishes between the prerogative of the executive branch to act on behalf of the Realm in intergovernmental matters (art. 19), and delegation of powers vested in the authorities of the Realm (art. 20). While it is the prerogative of the executive branch to accede to agreements that does not entail a delegation of state competence, such delegation can only occur by adoption of a Bill explicitly addressing the extent of such delegation (passed with five-sixths majority in Parliament). Furthermore the delegation must promote international rule of law and cooperation.

The plaintiffs, a group of citizens, claimed that the accession to the Lisbon treaty constituted a delegation of power in sense of article 20 of the Danish Constitution, and that the non-observance of the procedure in art. 20 thus constituted an infringement of the Danish Constitution.

In order to assess whether this dispute could give right to assigning the claimants *locus standi* the Supreme Court had to consider the treaty complex as such, including the Charter's effect on these citizens everyday life and the potential of extending the competences of the European Union law.

The Supreme Court in their analysis stressed that neither the charter nor the Union's accession to the European Convention on Human Rights extents the competences of the Union, but refrains from

[27] UfR 2011.984 H

conducting a material test of the Charter's content (this test will be reserved for the pending re-trail in the High Court).[28]

The decision and the proceedings underlined the general position of the Danish Government in general and the Ministry of Justice in particular, namely that the Charter is to be understood as a compilation of existing human rights and fundamental principles already in force before the introduction of the charter, and that it following does not expand the function, competences nor jurisdiction of the Union. This cautious approach to the interpretation of international law in general is as mentioned under Q1 not confined to the interpretation of this particular treaty, but rather can be said to characterize the implementation of international law in general, and European law in particular throughout the last 50 years.

In an answer given to Parliament responding to a question of the evolution of charter, the responsible minister answered that the aim of the charter is to *accentuate* the already existing human rights obligations in the Community Law[29]. This formulation is repeated in the Minstry of Justice general analysis of the Treaty-complex, and thus seem to characterize the Danish authorities approach to the EUC.

In sum, it seems to be the conviction of all three branches of Government that the Charter is to be understood as a compilation of existing human rights obligations and principles; the pending retrial in the High Court might shed new light on this – though it seems highly unlikely. This interpretation seems to be in sync with a narrow reading of the text of the charter (cf. Article 6(1) TEU and Article 51(2)) as well as the interpretational guidelines provided.

Q8: Has the distinction made in the Charter, especially in its official Explanation Relating to the Charter of Fundamental Rights (OJ 2007/C 303/02), between "rights and freedoms" and "principles" been reflected in the practice of courts and legislatures in the respective jurisdictions, as well as in the doctrine?

The Danish courts have not had occasion to consider the matter.Thus, there are very few sources available.

The few contributions in doctrine all point to the fact that a Danish Constitutional tradition demands a certain robustness of international human rights obligations before they can be applied. Accordingly

[28] While the Maastricht verdict thus regarded how much competence can be transferred to a supranational entity within art.20, the Lisbon-treaty verdict regards how much competence that can be transferred *without* applying art. 20 in the Constitution. The decision in the High Court can thereby say regard to "lower" limits of the application of the Danish Constitution's art. 20, while the earlier decision on the accession to the Maastricht-treaty regarded the "upper" limits of art. 20, Cf. UfR 2011.948 H, p. 1004, see also Torben Melchior Torben Melchior, 'Hvem Bestemmer: Folketinget Eller Domstolene?', *UfR,* B (2011) at 46.

[29] Folketinget og EU's charter om grundlæggende rettigheder: spørgsmål og svar (2002), p. 65

principles as understood in art. 52(5) must be interpreted as programme declaration rather than rights, able to substantiate a claim before a judge.
In support of this position a governmental white paper from 2001 stated on the interpretation of international treaties in Danish law:

"Conventions that mainly contains provisions of a soft character ["vagt formulerede"] - hereunder so-called "program declarations", which can only implemented through political prioritization or choice, that should be made by the Parliament - can after Danish legal tradition not be eligible for enforcement in Danish courts."[30]

In short; it is *prima facie* contrary to the Danish legal tradition to enforce vaguely formulated principles, as understood in the sense of the charter.[31] This position seems to be in line with the interpretational guidelines provided in the official Explanation. The Danish courts will therefore refrain from enforcing the principles, unless an active political or supranational judicial authority leads the way.

Q9 – Q10 Institutional Issues

Q9: Does EU accession to the ECHR overall add to the protection of fundamental rights of citizens; does it outweigh the procedural complications to which it may give rise, for instance when the EU is co-respondent, and more especially when a prior involvement of the ECJ in a case pending at the ECtHR would become possible?

With the negotiations on an accession agreement still pending, it seems difficult to determinably answer the question. It seems obvious that the accession can potentially contribute to the individual rights protection, though the scope and magnitude remains opaque from our present position.

The draft accession agreement outlines a fairly complicated and inaccessible procedural system, in which the two courts will be given amble opportunity to refer to each other at different stages of a given procedure. It following seems reasonable to establish that there remains a substantial risk of the procedural complications outweighing the potentiality of a strengthened rights protection in the present institutional set-up. Furthermore an overcomplicated institutional architecture imposes the risk of losing

[30] Betænkning 1407/2001 om inkorporering af menneskerettighedskonvention, p. 151. Own translation
[31] See also Melchior, 'Hvem Bestemmer: Folketinget Eller Domstolene?', (at 51.

sight of the aim of the conventions, namely the protection of individual rights. The more complicated the system becomes the less accessible it will seem to a potentially infringed individual. Furthermore by overcomplicating the rights architecture a more structural alienation seems to occur, a process in which the management and ownership of the instruments are pushed further towards being instruments of lawyers and bureaucrats, rather than individuals.

Thus, it seems that the Union's accession to the ECHR aims at having impact on a symbolic and political *macro* level, rather than on a legal substantial *micro* level – at least in the short term.

It could be claimed that some sort of institutionalized (fixated) structure had to be established in order to avoid the two legal frameworks from growing apart. Thus, on the longer term the accession can be seen to contribute to the establishment of a more permanent rights-architecture in Europe, and will hopefully serve to counter potential power-struggles between the international courts by fixating their internal relationship (EU now being bound by the convention, and thus by the practice of Strasbourg). This could in turn indirectly secure the individual a more coherent and accessible rights architecture, giving an overall better protection and a larger degree of transparency in the material legal status of individuals (compared to the alternative of having two sets of human rights standards).

In this sense the accession, including the possibilities of involvement during the procedure, could potentially be of great importance in securing the coherence of the European rights protection, though it seems to, in the short term, to create a more bureaucratic and in-transparent procedural system, with a substantial risk of further alienating the individual from the procedure.

Q10: The ECtHr *Bosphorus* ruling exempts Member State action covered by EU law from scrutiny on the rebuttable assumption of an overall conformity of EU measures with the ECHR. (…)

The multi-level structure of European governance, including in the field of fundamental rights protection, creates dilemmas and risk of conflict between competing legal systems. Those European states which are parties to the ECHR as well as members of the EU are faced with a difficult situation, should EU law exceptionally oblige them to undertake measures whose conformity with the ECHR is doubtful. In the last resort, such a state might have to choose between either breaching its EU obligations of its ECHR commitments. Therefore, mutual consideration and efforts of conflict avoidance is called for on the inter/supranational level both to prevent such painful dilemmas on the part of each state and to uphold the authority of the ECHR and the EU respectively.

The Strasbourg Court's judgment in *Bosphorus*[32] is a response to these concerns. In order to respect and not hinder international co-operation among Contracting States (including through the establishment of supranational organisations like the EU), the Court decided in *Bosphorus* that there should be a rule of assumption that a Contracting State has not violated the ECHR if it does no more than implement mandatory EU obligations. That rule of assumption is conditioned upon the recognition that the EU is itself protecting fundamental rights in a manner at least "equivalent" to that of the ECHR.[33] This assumption, however, is rebuttable in specific cases, if it is found that the protection of Convention rights has been "manifestly deficient".

Bosphorus provides for an especially favourable treatment in Strasbourg of rights intrusions originating in EU obligations. Normally, the Strasbourg Court will find a violation of the Convention, if it finds that the national authorities' protection of the ECHR is insufficient (the threshold depending on the margin of appreciation left by Strasbourg to the national authorities according to the substance of the case at hand). According to *Bosphorus*, in cases regarding national implementation (with no discretion) of EU law, the finding of a violation requires that the violation is manifest.

Bosphorus must thus be seen as concerned with the standard of Strasbourg judicial review, an expression of judicial self-restraint. As such, *Bosphorus* does not in principle affect the obligation of the Contracting State under Article 1 ECHR to secure its jurisdiction Convention rights, even when it has acted to implement EU obligations. As the Strasbourg Court stated in *Bosphorus* (para. 153)

> "[A] Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question is a consequence of domestic law or of the necessity to comply with international legal obligations".

That the *Bosphorus* formula is best understood as a special standard of review to be applied in "EU cases" is confirmed by the fact that it is formulated by the Strasbourg Court in the context of reviewing the compatibility of national measures implementing EU obligations with the substantial right in question (Article 1 AP 1 on the right of property) rather than in the context of interpreting Article 1 ECHR. That is also why the Court's conclusion in Bosphorus is the finding that Article 1 AP 1 had not been violated, rather than a rejection of the case as inadmissible for reasons of lack of competence. There is, however, also (ambiguous) language in the judgment hinting at the

[32] *Bosporus Hava Yollari Turizm Ve Tizaret Anonim Sirketi v. Ireland*, Grand Chamber judgment of 30 June 2005 (Appl. no. 45036/98), paras. 150-165.

[33] This construction as well as its conditional character - "as long as" - echoes the "So Lange" decision of the German Constitutional Court regarding the relationship between constitutional review and EU law.

Bosphorus formula having the effect of somehow reducing the extent of a Contracting State's responsibility under the Convention in "EU cases". In para. 154 the Court held that "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer [of sovereign powers to an organisation like the EU] would be incompatible with the purpose and object of the Convention", and, having established the rebuttable assumption in favour of EU law, held in para. 157 that "a State would be fully responsible under the Convention for all acts falling outside its strict international obligations". Nevertheless, the correct understanding of *Bosphorus* must be that it is concerned with the scope/standard of Strasbourg review.

The justification of the *Bosphorus* formula could be questioned (even prior to a future EU accession of the ECHR). This holds true not least for the question of legal basis for the decision. Furthermore it creates a double standard of review, and it might be seen as reducing for EU member states the scope of the obligations following from ECHR article 1, while upholding it in full for non-member states parties to the ECHR – and increasingly so considering the ever-expanding scope of EU law. This is inherently problematic considering that international legal obligations are traditionally based on equality and reciprocity. These concerns are addressed in Bosphorus itself by the minority of judges (concurring opinion of Rozakis, Tulkens, Traja, Botoacharova, Zagrebelsky and Garlicki) questioning 1) the claim that EU offers "equivalent protection", noting that the control mechanisms of the EU, preliminary rulings, are far from equivalent to the right of individual application under the ECHR, as well as 2) the justification of the concrete rebuttal standard of "manifestly deficient" protection, noting that this indicates a markedly lower standard of review compared to the review generally undertaken by the Strasbourg Court, entailing the risk of double standards and different ECHR obligations for states which are EU members and states which are not. The minority continues to suggest that the ladder contravenes with the very aim of the Convention as also expressed in its Preamble; adding that such a favourable treatment of measures stemming from EU law is difficult to accept considering the status of ECHR standards in EU law, including in Article 52(3) according to which EUC rights corresponding to ECHR rights shall have the "same meaning and scope" as those in the Convention. In essence, the court minority urges the Court to "remain vigilant" in its supervision, even in EU cases. In a similar vein Judge Ress, to avoid the danger of double standards, endeavours to interpret the "manifestly deficient" reservation in such a way that there will not be significantly more lenient scrutiny in Strasbourg just because the national interference stems from EU obligations.

Bosphorus is essentially a pragmatic tool; a compromise to make things function in a multi-level and multi-geometric system of fundamental rights protection - conflict avoidance for the purpose of

peaceful co-existence. In legal terms, however, *Bosphorus* seems hard to justify and could even be regarded as a legal anomaly.

When understood as a self-imposed restriction on Strasbourg supervision in "EU cases", the approach of national courts to the similar problem should as a matter of principle remain unaffected by the *Bosphorus* formula. National Courts must thus undertake the obligation under Article 1 ECHR to secure the respect for Convention rights. In any event, the *Bosphorus* doctrine could never be binding on national courts when they are called upon to review the compatibility of EU law with the ECHR. Even so, it is not at all unlikely, that *Bosphorus* might in fact affect the approach of national courts, including Danish courts, using Bosphorus as a (welcome) excuse to avoid reviewing or reviewing only extremely cautiously the compatibility with the ECHR of measures originating in EU law. Although Danish courts have yet to take a stand, it is not unlikely that they might utilize the *Bosphorus* doctrine in this field similarly to the "certainty doctrine" developed by the Danish Supreme Court with regard to judicial review of EU acts as to their conformity with the Danish Constitution (has EU acted *ultra vires* the Danish transfer of power?).[34] Certainly, the incentive is strong for a national/Danish court to rely on some special doctrine of judicial restraint in order to avoid taking a stand in cases where ECHR and EU obligations might collide. Should a Danish court choose a cautious stand, as Danish courts traditionally have, *Bosphorus* ensures that it can do so with little risk of being subsequently taught a lesson from Strasbourg. Despite the dubious legal justification of *Bosphorus*, it is easy to see why it has, as far as is known, not been criticised by any Danish authority. It is clearly in the interest of states like Denmark which are parties to the ECHR as well as members of the EU, that the risk of conflict between these legal systems is diminished by pragmatic approach expressed in *Bosphorus*.[35]

As regards the consequences of *Bosphorus* for the role of the EU/ECJ in European fundamental rights protection, there is hardly any doubt that it has strengthened the authority of the EU/ECJ in supervising respect for fundamental rights (within the field of EU law). As explained above, this strengthening takes place at the cost of Strasbourg supervision, but, to be sure, as a result of a deliberate decision taken in Strasbourg. However, the big picture remains that it is Strasbourg who has dominated the fundamental rights agenda, including within the EU; the ECJ now routinely refers to and upholds ECHR case law as part of EU general principles of law, see also Article 6(3) TEU and now also Article 52(3) EUC on corresponding rights having "same meaning and scope" as in the ECHR. Even so, *Bosphorus* does affect the balance, since with it the Strasbourg Court has essentially

[34] Ugeskrift for Retsvæsen 1998, page 800 et seq.

[35] Se Ane Maria Røddik Christensen, i Christoffersen og Madsen (red.), *Menneskerettighedsdomstolen – 50 års samspil med dansk ret og politik*, 2009, s. 211ff.

vowed to stay out of the ECJ's way within the latter's field of competence (EU law). Thus, Bosphorus accentuates the importance and responsibilities of an efficient EU supervision (within the field of EU law). This means a stronger need for national courts to refer possible violations of ECHR stemming from EU law to the ECJ for a preliminary ruling. Danish courts, however, have so far shown some reluctance to make preliminary references to the ECJ, and *Bosphorus* would not seem to have changed this state of affairs. It should be added, that the *Bosphorus* doctrine, being a doctrine of Strasbourg review in "EU cases", could not be relied on by the ECJ itself; it is a formal principle of restraint, the rationale of which is to allow room for states to engage in international/supranational co-operation. But it surely gives the ECJ some peace of mind when assessing the compatibility of EU law with the ECHR to know that its assessment will hardly be overruled in subsequent Strasbourg proceedings.

The *Bosphorus* doctrine is a distinctly pragmatic invention, and it is hard to see how it could survive EU accession to the ECHR. The rationale of *Bosphorus* may well be respect for international and supranational co-operation (see para. 152), but it was founded in the explicit condition (creating the dilemma to be solved) that the EU itself was not itself a Contracting Party to the ECHR (see para. 152). When in a not so distant future the EU accedes to the Convention, the *Bosphorus* formula will have lost what (political and pragmatic) justification it might have had before. EU will take its place among the other Contracting Parties being subject to the same formal obligation to secure the ECHR as are the rest of the Contracting Parties (unless special agreements be made during CE and EU negotiations, which as far as is known is not the case). Then, it will be hard to explain why one contracting Party – the EU - should enjoy a more favourable treatment (less searching scrutiny) than the others. Surely, Contracting States not members of the EU in particular would then - if they have not already - rightly oppose the upholding *Bosphorus*. In short, it is to be expected that the *Bosphorus* doctrine will not survive EU accession to the ECHR.

Q11-Q14: Normative Assessments

Q11: Is the interpretation which the ECJ has so far given of the general provision on the scope of the Charter, its relation to national constitutional rights and human rights treaties, and on restricting the exercise of rights (Title VII of the Charter) looked upon favourably?

Q12: Is there a general EU human rights competence, or should there be such competence? What the implications for the future of the ECHR system of protection of rights?

Q13: What role should be envisaged for EU institutions as to fundamental rights protection within a more polycentric constitutional system of Europe?
Would you conclude on the basis of the development of the ever-widening scope of EU law and fundamental rights activity, as well as your discussion of the previous question in your report, that a gradual but definite transfer of human rights protection has taken place from Member States to the EU/ and from the Council of Europe and ECHR to the EU?

Q14: Although fundamental rights protection in the EU has been triggered by Member State courts, the common constitutional traditions of Member States on fundamental rights protection have not functioned as an important direct source of protection in the case law of the ECJ. This gives rise to the general question what the role of the common and individual constitutional traditions can be at present and in future.