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UNIVERSIDADE DE MACAU

UNIVERSITY OF MACAU

The European Union and Human Rights: Development of a Legal Field

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MASTER THESIS IN EUROPEAN UNION LAW

2021

Faculty of Law

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The European Union and Human Rights: Development of a Legal Field

"I, SHEN SIQIN, hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. This work has not been submitted anywhere else, either in part or whole, for a degree or other academic credits. I undertake the sole responsibility for any inaccuracy in this declaration."

Yours Sincerely,

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Acknowledgements

Writing my Graduation Thesis over the course of the past two years was a challenge but ultimately very rewarding experience. It has been difficult to work on a project that contains a large quantity of complex components, such as EU's history, the principles, competence, actions and interactions of EU institutions and Member States that characterize policies concerned with different fundamental rights. Even after days, weeks and months of work, there are always further thoughts that remain and projects that are left finished. Now I am very pleased to be able to show the final results of my work in this thesis.

I would not have accomplished it without the excellent guidance provided by Prof. Castro. Prof. Castro made time to my thoughts and struggles with the materials, and to give me the most helpful feedback on my work. He has given me the confidence to do the research on the European Union law and human rights. I could not wish for a better supervisor.

There are others to thank too. I am grateful to the Faculty of Law of University of Macau which has offered me a great studying environment with huge amounts of resources and books, and which has allowed me to keep learning about the European Union Law. Thanks to my parents for offering me complete understanding and support during my master's degree, as well as to my boyfriend for always being there. I am very lucky to have you in my life.

ABSTRACT

The development of human rights protection in the European Union (EU) is complex. Now, with the Lisbon Treaty in force, human rights are protected at a national, supranational and international level. The general competence of the EU to ensure human rights protection are, however, still not defined by the Treaties. Instead, the competence issue is mainly addressed in negative terms. In some areas, the Member States have attributed a specific power to the EU to protect certain human rights, such as Article 16(2) TFEU was used to adopt the General Data Protection Regulation. There is also a concern of expanding competences of the EU by judicial activities of the Court of Justice in this field. The legally binding Charter of Fundamental Rights of the European Union ('CFR' or 'the Charter'), one of the most important instruments, is not yet used to its full potential under the problems such as scope application, horizontal direct effect, the distinction between "rights" and "principles" and its relationship with the European Convention on Human Rights (ECHR). As another important instrument, ECHR is far from being accessed by the EU after the rejection in Opinion 2/13. Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), two different courts in the EU and the Council of Europe, have mutual influenced relationship. The CJEU developed a practice whereby it has referred to the provisions of the Convention, as well as to the judgements of the ECtHR to determine the meaning and scope of human rights within the context of EU law, while there are also conflicts between these two courts.

KEYWORDS: human rights; European Union; Charter of Fundamental Rights of the European Union; accession; European Convention on Human Rights.

CONTENT

ABBREVIATIONS

AFSJ	**Area of Freedom, Security and Justice**
BVerfG	**Federal Constitutional Court of Germany**
CDDH	**Steering Committee for Human Rights**
CFR	**Charter of Fundamental Rights of the European Union**
CJEU	**Court of Justice of the European Union**
CoE	**Council of Europe**
COVID-19	**Coronavirus Disease 2019**
DAA	**Draft Agreement on EU Accession to the European Convention on Human Rights**
EAW	**European Arrest Warrant**
EC	**European Community**
ECJ	**European Court of Justice**
ECHR	**European Convention on Human Rights**
ECSC	**European Coal and Steel Community**
ECtHR	**European Court of Human Rights**
EEC	**European Economic Community**
EIDHR	**European Instrument for Democracy and Human Rights**
EPC	**European Political Community**

EU	**European Union**
Euratom	**European Atomic Energy Community**
FRA	**European Union Agency for Fundamental Rights**
ILO	**International Labour Organisation**
TEU	**Treaty on European Union**
TFEU	**Treaty on the Functioning of the European Union**
UN	**United Nations**

Chapter 1 Introduction

1.1. Research Background

In 2020, all countries are shrouded in the unprecedented coronavirus pandemic. It not only brings challenges to the right to life and to health for people, but also add hurdles to the international trade and social life. Not surprisingly, the outbreak of COVID-19 affects citizens in the 27 European Union (EU) Member States as well. Governments takes a raft of measures in order to contain the spread of the virus as the number of infected people in the EU territory began to mount rapidly in February 2020. For example, all EU Member States introduced physical and social distancing measures. These measures can affect many human rights[1] regulated in the Charter of Fundamental Rights of the European Union (the Charter or CFR), including the rights to liberty and security (Article 6, CFR), respect for private and family life (Article 7, CFR), freedom of thought, conscience and religion (Article 10, CFR), freedom of expression and information keep together on one line, freedom of movement and of residence (Article 45, CFR). It shows how, in the exceptional emergency situations, the urgent need to save lives - itself a core human rights obligation - justifies restrictions on other human rights. These actions taken by the states should be in a supervised manner other than being arbitrary because of special natures of the EU.

With respect to the internal organization, it is obvious that the EU is different from other similar institutions. The EU is a multi-layered institution. Within the same political and legal order, the Member States internal institutions comply with the European Union's internal institutions. Thus, human rights mechanisms apply not only to national situations like other international human rights

[1] Human rights and Fundamental rights are both used in EU law and documents. It is true that the distinction between human rights and fundamental rights is often used to emphasis the legal nature of fundamental rights, and in particular to distinguish between moral human rights and constitutional fundamental rights. Since human rights can be regarded as the most encompassing group, I will mainly use the term 'human rights' throughout this thesis. In some citations or law texts, 'fundamental rights' will be used as well. They refer to the same meanings and scopes in this thesis.

instruments, but also to EU policies and actions.[2] Under the Treaties, the EU's institutions have legislative, executive and judicial powers, and the Union remains the scrutiny of these powers. This enables the Union to have resources to human rights enforcement mechanisms other than judicial remedies, such as policymaking, mainstreaming or monitoring.[3]

Moreover, the EU is not of itself a human rights organization though it has adopted one of the most modern collections of human rights. The EU is legally bound to comply with the Charter of Fundamental Rights of the European Union, and it shall accede to the European Convention on Human Rights (ECHR). As a result of these developments, human rights have been given an important place within the EU legal order.

The human rights protection in contemporary Europe, however, is complex. The EU combines different layers of judicial control. National courts, the Court of Justice of the European Union (CJEU or the Court) and the European Court of Human Rights (ECtHR) all apply at least some of the same human rights over the same countries. Therefore, this thesis aims to set out the development of human rights protection in the EU and its corresponding legal problems.

1.2. Research Questions

The author of this thesis mainly studies the following three groups of research questions.

Firstly, the structure of the European Union project is based on the distribution of competence. In order not to violate the basic EU principles such as that of conferral and subsidiarity, the EU and the Member States need to obey the division of competence when constructing a new EU human rights policy. The exact competence of the EU to ensure human rights protection are, however, still not

[2] Eeckout, P. (2002). The EU Charter of Fundamental Rights and the Federal Question. *Common Market Law Review*, Vol. 39, Issue 5, p. 990.
[3] Besson, S. (2006). The European Union and Human Rights: Towards A Post-National Human Rights Institution. *Human Rights Law Review*, 6(2), p.353.

defined by the Treaties. In hence, the specific objectives of this group of questions are mainly concerned with the competence and are listed as follows: how is human rights protection developed during the integration of the EU? Does the EU have competence on this field and what is its corresponding legal basis? Would the judicial activities by the CJEU in the field of human rights protection expand the competences of the EU?

Secondly, the Charter was proclaimed in 2000 and finally came into force in 2009 with the adoption of the Treaty of Lisbon. It is transferred into a legally binding document with primary law status. Does it be fully used after the Lisbon Treaty? If not, what factors lead to this phenomenon?

Thirdly, as another important instrument in the field of human rights, the Lisbon Treaty regulated an obligation for the EU to accede to the ECHR. In 2014, Opinion 2/13, however, rejected the Draft Agreement on EU Accession to the European Convention on Human Rights (DAA). Why did the Court kickoff the accession and what is the relationship between the CJEU and the ECtHR?

1.3. Methodology

In answering main questions underlying the thesis, the following methods are used.

Firstly, authoritative texts like legislation and official documents are considered the main formal sources of information for understanding the development of human rights protection in the EU. In addition, the main method used to write the thesis are both induction and deduction on the premise of historical research and academic publications. It is the method of literature collection and specific review to analyze how the competence and different instruments of the EU in the field of human rights protection has evolved.

Secondly, the method of case law is adopted in this research. Both cases in the Court Justice of the

European Union and the European Court of Human Rights are reviewed. This method could be used to analyze the development of human rights protection in the EU, and the expanding competence by the judicial activities of the CJEU, as well as the mutual influence between the CJEU and the ECtHR. Through the case-law of CJEU, there will be a deep understanding of the underlying principles, values and interests that determine the division of competence between the EU level and the national level, and the mechanisms determining the relationship between the EU and the Convention.

These research materials are mainly coming from library and library's online databases; journals; official websites and news websites, which are listed as follows:

(a) The official website of the European Commission and EUR-Le.
(b) The official website of European Court of Human Rights.
(c) Legal Database such as HeinOnline, Westlaw and LexisNexis.

1.4. Chapter Layout

Chapter 1 is a brief introduction of the whole thesis, including the reasons for choosing the topic, the research feasibility of this topic and the questions that the thesis concerned.

Chapter 2 briefly describes the development of human rights protection in the EU, especially focus on the integration and how human rights protection emerged. The author then analyze the legal basis of the competence of human rights and problems encountered at the execution level.

Chapter 3 is mainly about the Charter. The author briefly introduces the Charter's present application and the history, followed with four legal problems.

Chapter 4 analyzes the history of the EU accession to the ECHR before and after the Lisbon Treaty. It mainly focuses on Opinion 2/13 and the relationship between the CJEU and the ECtHR and their

case-law.

Chapter 5 is the summary of the whole thesis.

Chapter 2 Emergence of the Competence of Human Rights Protection

Recent EU Treaty changes have significantly strengthened the status and role of human rights within the EU legal order. Firstly, Article 6 TEU lists various sources of human rights within EU law, and one of them gives effect to the requirement for a clear legal basis for the accession of the EU to the ECHR. Secondly, Article 2 TEU sets the lists of values of the EU, stating that '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'. Article 3 TEU, in setting out the goals and objectives of the EU, adds that the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. In addition, Article 3(5) TEU states that the Union 'shall contribute to peace, security, the sustainable development of the Erath, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child'. Thirdly, Article 7 TEU, which was introduced by the Amsterdam Treaty, empowers the Council to suspend certain of the voting and other rights of a Member State which is found by the European Council to be responsible for a serious and persistent breach of the principles, which mentions the respect for human rights, in Article 2. Additionally, there are also specific treaty items which qualify as human rights, such as Article 157 TFEU related to the right to equal pay and Article 19 TFEU, which confers power on the EU to adopt measures combating discrimination on a range of specified grounds. Besides, some human rights exist as secondary legislation rather than treaty provisions, of which the Equal Treatment directives are good examples. Significant as they are, these developments are relatively recent. This Chapter would mainly discuss the history of human rights protection in the European Union and its competence, as well as the concern of expanding EU competence by judicial activities in this field by the CJEU.

2.1. European Integration and Human Rights Protection

No mechanism was provided to ensure human rights protection in the original European Communities. The European Communities - European Coal and Steel Community (ECSC), European Economic Community (EEC) and European Atomic Energy Community (Euratom) - were born of the desire for a united Europe, an idea which gradually took shape as a direct response to the events that had shattered the continent.[4] Robert Schuman, the French Foreign Minister, made the appeal on 9 May 1950, which can be regarded as the starting point for European Integration. He set the principle that 'Europe will not be made at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity'[5]. Starting with the signing of the Treaty of Paris which established the ECSC in 1951, the European Union came through more than sixty years, improving and perfecting its mechanism. At the beginning, France, Italy, West Germany and the Benelux countries (Belgium, the Netherlands and Luxembourg) were the original Member states and now the EU has 27 Member States, covering most European countries.

The EEC Treaty (Treaty of Rome) started out as an economic treaty, of limited ambitions, with the aim of creating a Common Market. Human rights protection was not specifically referred to under the founding EEC Treaty because the founders did not think this relevant to a treaty with mainly economic aspirations. It only had several words - 'to preserve and strengthen peace and liberty'- in the last recital in the preamble. The first mention of human rights in EC law was pertained to economic issues such as equality between men and women and anti-discrimination rights.[6] Besides, the European Convention on Human Rights and Fundamental Freedoms (ECHR), signed in 1950,

[4] European Parliament, *The Historical Development of European Integration*, 18 June 2018. p.4. https://www.europarl.europa.eu/RegData/etudes/PERI/2018/618969/IPOL_PERI(2018)618969_EN.pdf.
[5] Schuman, R., *The Schuman Declaration*. 9 May 1950. https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.
[6] Besson, S. (2006). The European Union and Human Rights: Towards A Post-National Human Rights Institution. *Human Rights Law Review*, 6(2), p.343.

was probably thought sufficient to operate as a 'Bill of Rights' for Europe. Even though efforts to broaden the integration project were never entirely off the agenda, re-inserting more ambitious goals and fundamental values into the EU's legal and constitutional framework was slow to get off the ground.

In addition, the original Treaty provided limited opportunities for possible conflicts in human rights. If they did arise, national constitutions may be regarded as the best guarantee of protection of human rights. The CJEU resisted attempts by litigants to invoke rights and principles recognized by domestic law and was unwilling to treat them as part of the Community's legal order.[7] In a serious of judgments through to the mid-1960s, the early case law of the Court reflected this line of thinking.[8]

In the landmark cases of *Van Gend en Loos* and *Costa v E.N.E.L.*[9], the ECJ developed the principles of direct effect and supremacy of Community law. After these two cases, the supremacy of EU law meant that the national constitutional provisions could no longer be used to safeguard human rights in all circumstances, in other words, human rights protected under domestic constitutions might be undermined. Even if the common market were to bring many benefits to the citizens of Europe, it was not sufficient to protect them. Human rights, by contrast, since the Second World War, acquired 'symbolic pre-eminence' as an instrument for polity legitimation. They were a particular powerful symbol in the context of European integration, for they were something archetypically European. Protection of human rights offered a legitimation for EU constitutional authority that market integration did not.[10]

The President of the Commission argued openly for an understanding of fundamental human rights

[7] 'Human Rights in the EU'. In Craig, P. & Búrca, G. (2020). *EU Law: Text, Cases, and Materials* (7th ed.). Oxford University Press, p. 364.
[8] Case C-1/58, *Stork v High Authority*, ECLI:EU:C:1959:4.; Joined Cases C-36/59-38/59 and C-40/59, *Geitling v High Authority*, ECLI:EU:C:1960:36; Case C-40/64, *Sgarlata v Commission*, ECLI:EU:C:1965:36.
[9] Case C-26/62, *Van Gend en Loos,* ECLI:EU:C:1963:1; and Case C-6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66. Cf. BVerfG 29 May 1974, 2 BvL 52/7, Solange I.
[10] 'Fundamental Rights'. In Chalmers, D., Davies, G., & Monti, G. (2019). *European Union Law: Cases and Materials* (4th ed). Cambridge University Press. p. 233.

as part of the 'general principles' of EU law which, although autonomous in source from national constitutions, nevertheless took into account the common legal conceptions of the Member States.[11]

Moreover, the insistence of the German courts that EU law respect human rights and their veiled threat to ignore the primacy of EU law if it did not, was the original motivation for the protection of human rights in the EU.[12] In *Stauder*[13], the Court affirmed the recognition of general principles of EU law, including the protection of human rights.

The idea was further clearly formulated by the Advocate General *Dutheillet De Lamothe* in the *Internationale Handelsgesellschaft* case[14], and the Court held that:

'The fundamental principles of national legal systems contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.'

These two cases respected for human rights forms an integral part of the general principles of Community 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. Then in the case of *Rutili*[15] in 1975, the Court articulated that Member States are bound by the general principles of EU law when they are applying provisions of EU human rights protection.

In some of its earliest case law, the Court of Justice stated that 'the vigilance of individuals

[11] 'Fundamental Rights'. In Chalmers, D., Davies, G., & Monti, G. (2019). *European Union Law: Cases and Materials* (4th ed). Cambridge University Press, p.365.
[12] Douglas-Scott, S. (2011). The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review*, 11(4), p.669.
[13] Case C-29/69 *Stauder v City of Ulm*, ECLI:EU:C:1969:57. In this case, the Court ruled that if there were two legitimate interpretations of an EU law provision, the Court would adopt the one that did not violate human rights.
[14] Case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.
[15] Case C-36/75, *Rutili*, ECLI:EU:C:1975:137.

concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted to … the Commission and the Member States…'[16]. This shows that it resulted in a system in which litigation has played a very large role in the development, profile and enforcement of human rights.[17]

In 1977, the European Parliament, the Commission and the Council signed a Joint Declaration in which they undertook to continue respecting the human rights arising from the two sources, namely the constitutional traditions of the Member States and the international Treaties to which the Member States belonged (and the ECHR in particular), identified by the Court.[18] Further, the CJEU has established in its case-law that human rights were to be protected by the EU institutions, as well as by the Member States when they were implementing Community law.[19]

Judge Mancini, of the CJEU, writing in 1989, summed up the position the Luxembourg Court had achieved in relation to human rights in the following way:

'Reading an unwritten Bill of Rights into Community law is indeed the most striking contribution the Court has made to the development of a constitution for Europe.' But he continued by qualifying it in this way, 'this statement was forced on the Court by the outside, by the German and, later, the Italian constitutional courts.'[20]

They reacted promptly to the CJEU's case law indicating that the absence of a functioning human rights protection was of such significance that there could be no question of 'real' supremacy of EC law over national constitutional provisions of human rights. Since then, it has criticisms for using human rights as a means to strengthen the autonomy, supremacy and legitimacy of EU law, rather

[16] Case C-26/62, *Van Gend en Loos,* ECLI:EU:C:1963:1.
[17] Douglas-Scott, S. (2011). The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review*, 11(4), p.649.
[18] Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the ECHR, 5 April 1977, OJ C 103/1.
[19] Case C-5/88, *Wachauf*, ECLI:EU:C:1989:321; and Case C-260/89, *ERT*, ECLI:EU:C:1991:254.
[20] Manici, G. F. (1989). "The Making of a Constitution for Europe". *Common Market Law Review*, Vol. 26. p. 595.

than for their own sakes.[21]

Some scholars also doubt whether the EU's project of economic integration bears any relation to the project of a human rights organization.[22] They argued that 'the Court is undertaking a more general expansion of its jurisdiction, in the guise of fundamental rights protection, into areas previously the preserve of Member States, by means of subtle changes in its formulation of a crucial jurisdictional rule'.[23] If Member States were bound by EU human rights, it was not in their own fields of competence and the EU has no business telling them how best to protect human rights in their national sphere of competence. In fact, due to the Member States' resistance, there was, for a long time, no real proactive human rights policy in the EU. It is only from the early 1990s that a progressive consolidation of human rights protection started taking place both internally and externally.[24]

As European integration has progressed, the European Union has gradually widened its field of action, reflecting the determination of the Member States to act as one in areas which until now have been a strictly national preserve. In view of these changes, which necessarily go beyond the sectoral context of the Community's early days and impinge on the daily life of European citizens, there is a need for clear legal texts which proclaim respect for human rights as a basic principle of the European Union. The Treaty of Amsterdam meets this need.[25] It aimed to integrate respect for human rights and fundamental freedoms into formal structure of the EU. It clarifies Article 6 (ex Article F) of the Treaty on European Union that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

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[21] Coppel, J. & O'Neill, A. (1992). The European Court of Justice: Taking Rights Seriously. *Legal Studies*, 12(2), p. 227-245.
[22] Ibid. p.227.
[23] Ibid. p.227.
[24] Besson, S. (2006). The European Union and Human Rights: Towards A Post-National Human Rights Institution. *Human Rights Law Review*, 6(2), p.344.
[25] Fundamental Rights and non-discrimination.
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:a10000&from=EN.

Besides, there was the need to codify the rights which were protected in the EU by the CJEU into the form of a written catalogue of human rights.[26] It resulted the Charter of Fundamental Rights first being proclaimed in 2000. After a failed attempt to adopt the Charter as a part of the EU Constitution in 2005, the Charter was added, as a separate document, to the Lisbon Treaty, which came into force in December 2009. It has been given legally binding status as well as the status of primary law. Furthermore, though the CJEU's 2/94 Opinion denied the EU's competence to the full accession of the EU to the ECHR,[27] the Lisbon Treaty provided a specific legal basis for the accession. This accession allows external review by the ECtHR of the EU's compliance with human rights. It will further help to ensure consistency between the Strasbourg and Luxembourg approach to the protection of human rights.[28] In addition, Article 2 of the Treaty on European Union (TEU), as amended, insists that 'respect for fundamental rights' is one of the values on which the EU is founded, including a new reference to 'the rights of persons belonging to minorities.'

All these providing a growing evidence that human rights are holding a central position in European Union law and they are now reflected in Article 6 TEU which sets out the current system of human rights protection of the EU as follows:

1) The Union recognizes 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. The provisions of the Charter shall not extend in any way the competence of the Union as defined in the Treaties. The right, 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 with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

[26] The Presidency Conclusions of Cologne European Council of 3 – 4 June 1999. Available at http://www.europarl.europa.eu/summits/kol1_en.htm.
[27] Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140.
[28] Beijer, M. (2017). *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations*. Intersentia. p.111.

2) 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.

3) 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.

Article 6 TEU shows that there are various sources of human rights in the EU, which include the Charter, the ECHR, national constitutional traditions and the general principles of EU law. This raises a host of questions over the interrelationship between these various sources which will be discussed throughout Chapter 3 and Chapter 4. It also draws attention to one another important aspect that EU has only limited competences to protect human rights.

2.2. EU Competences to Protect Human Rights

2.2.1.Basic Principles of the European Union

Principles related to competence are at the heart of the existence of the EU and they are of key concern for defining the powers of the EU.[29] As has mentioned before, the principle of primacy in which EU law takes precedence over national law was first proclaimed in *Costa* and it governs the question of the hierarchy between EU law and national law. When there is a conflict between them, the doctrine of pre-emption is applied. However, the EU only has the competence conferred on it by the Treaties. This means that the EU can only act within the limits of the competences which have

[29] Ibid, p.181.

been conferred upon to it by the Member States in the Treaties to achieve its objectives provided therein. It is called the principle of attributed powers, also known as the principle of conferral, which is given in Article 5(2) TEU. In addition, Article 4(1) TEU regulates that the Member States retain the competences which they have not conferred to the EU.

The division of different types of competences is as important as principles. Under the Lisbon Treaty, there are the categories of exclusive, shared and supporting competences, and Article 3 to 6 TFEU list the different areas which fall within each one of these competences. For all of them the Treaty foresees a general definition on the one hand and a list of pertinent policy areas on the other. This categorization implied how the EU and the Member States can cooperate and exercise their power in a given area, which is indicated by Article 2 TEU.

Article 2(1) TFEU defined *exclusive* competence as an area where 'only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only when they are empowered by the Union or for the implementation of the Union acts.' In other words, Member States cannot make a regulation in areas that fall under the exclusive competence of the Union unless they are specifically authorized to do so.[30] Article 3 TFEU lists the areas of this exclusive competence of the Union. It applies particularly to the customs union, the establishment of competition rules within the internal market, common commercial policy and the conclusion of certain international agreements.

Article 2(2) TFEU is about *shared* competence. It allows both the EU and the Member States have the power to adopt legally binding acts. There is no exhaustive list of policy fields for shared competence. Article 4(1) TFEU explains that competences are shared when they are not in the areas which have been indicated by the Treaty provisions as providing an exclusive or supporting competence. Article 4(2) makes a list of several principal areas such as internal market, environment,

[30] Case C-41/76, *Donckerwolcke and Schou*, ECLI:EU:C:1976:182.; Case C-174/84, *Bulk Oil*, ECLI:EU:C:1986:60.; Case C-70/94, *Werner*, ECLI:EU:C:1995:151 and Case C-83/94, *Leifer and Others*, ECLI:EU:C:1995:329.

consumer protection, and area of freedom, security and justice. As has been regulated in Article 2(2) TFEU that the Member States act only when the EU has not exercised its competence, or when the EU has decided to cease exercising its competence, the exercise of using these competences by the Member States may not be certain, even diminishes over time. As soon as the EU has taken action within an area of shared competences, the area becomes 'pre-empted'. If the EU have made exhaustive regulation in a particular area, the Member States then have severe restricted competences. But it also leaves power to a larger degree at national level when the EU provide for minimum harmonization.

The third category of EU competences is that of *supporting* competences. As determined by Article 2(5) TFEU, the Union is allowed to carry out actions to support, coordinate and supplement the actions of the Member States. Article 6 TFEU gives a specific list of areas which includes protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation. In these areas, the EU may not go as far as harmonizing the Member States' laws and regulations.

In addition, there are a few other areas that are not indicated as an exclusive, shared or supporting competence by the Treaty. For example, Article 2(3) TFEU indicates that the Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide. Common foreign and security policy (CFSP) is one of them as well. Article 2(4) TFEU does not specify which type of competence applies in it, as well as the areas of exclusive and supporting competence. Apart from that, used to be part of a separate pillar in the former Community's structure, decision-making in CFSP is more intergovernmental and less supernational by way of comparison with other areas of Union competence.

The categories of EU competence show to what extent the EU may exercise its power in a certain field and how the EU and the Member States divide competences. Determining the degree of power

which can be exercised by the EU and the Member States are much more important because it decides the matter on which the EU may take action, the type of acts that can be adopted (regulations, directives, minimum or maximum harmonization etc.), and the type of legislative procedures that must be followed.[31] This is regulated throughout the Treaty and by other types of EU acts. Thus, the different categories of competence mean the different degrees of power that are held by the EU. Closely linked to it are the principle of subsidiarity and the principle of proportionality, which are intended to regulate the 'exercise' of competence. The principle of subsidiarity was introduced in the Maastricht Treaty, and be retained in the Lisbon Treaty, embodied in Article 5(3) TEU.

2.2.2.Limited Competences of Human Rights Protection

2.2.2.1. No general Competence to Protect Human Rights

Opinion 2/94 of the Court on 28 March 1996 is the first judicial authority that has to be dealt with the issue about whether there is a legislative human rights competence in the EU. The request in this opinion was that would the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 be compatible with the Treaty establishing the European Community?[32] The answer was no because the EU lacked competence under the Treaties at the time to accede to the Convention. The Court explained in the opinion that:

'Respect for human rights is … a condition for the lawfulness of the Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry into of the Community into a distinct international institutional system as well as integration of all the provisions of the

[31] Beijer, M. (2017). *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations*. Intersentia. p.182.
[32] Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140, para.1.

Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 EEC (current Article 352 TFEU). It could be brought about only be way of Treaty amendment'[33].

Therefore, at that time the Treaty did not include a legal basis for the EU to do so.[34] In the Opinion, it also confirmed that 'the Council recognizes that the Treaty confers no specific powers on the Community in the field of human rights. Such rights are protected by way of general principles of Community law'[35].

Thus, not only did the EU not have competence at the time to accede to the ECHR because of the 'fundamental institutional implications' of accession, but the Court also ruled that no provision of the Treaty conferred general power on the EU to enact rules on human rights or to conclude international human rights conventions.[36]

Nowadays, there is a clear legal basis for the accession of the EU to the ECHR in the Lisbon Treaty. The Treaties have also made clear that the protection of human rights constitutes one of the objectives of the EU. Article 2 TEU indicates that 'respect for human rights' is one of the values upon which the EU has been founded, and Article 3 TEU clarifies that the promotion of such values forms an objective of the EU.[37] The exact competences of the EU to protect human rights, however, still not as such defined by the Treaties. Instead, the competence issue is mainly addressed in the negative terms.[38] Article 6(1) TEU clearly stresses that the protection of human rights may not lead

[33] Ibid, para. 34-35.
[34] 'Fundamental Rights'. In Chalmers, D., Davies, G., & Monti, G. (2019). *European Union Law: Cases and Materials* (4th ed). Cambridge University Press.
[35] Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140, para. 8.
[36] 'Human Rights in the EU'. In Craig, P. & Búrca, G. (2020). *EU Law: Text, Cases, and Materials* (7th ed.). Oxford University Press. pp.391-392.
[37] Specifically in the area of the EU 's external policies, it is emphasized further by Article 3(5) and 21(2) TEU that the value of human rights is to be upheld, promoted and consolidated.
[38] Besson, S. (2011). 'Chapter 1: The Human Rights Competences in the EU- The State of the Question after Lisbon'. In G. Kofler, M. P.

to the extension or modification of the existing powers of the EU and that the limited competences must be respected. Article 6(2) TEU regulates that the accession of the EU to the Convention cannot affect the competences of the EU. These shows that the EU set limits on the exercise of powers in human rights. Ahmed and Butler, in particular, argued that:

'The nature of human rights protection within the EU is essentially 'negative'. That is, the EU is seen to be under a duty not to violate human rights when it takes steps to fulfil the obligations arising from the Treaty. It is considered to be under a duty not to violate human rights whenever it takes action, but without any general competence to take positive action on human rights.'[39]

Some scholars believe that there is a certain general power for the EU to protect human rights, even though Opinion 2/94 denied such power. Alston and Weiler were great defender of this point. They found that in order to respect for human rights in matters that cut across different fields of Community law, certain general measures need to be taken. The legal bases for doing so were provided by Community law.[40] Such measures could entail monitoring and reporting mechanism or legislative measures designed to protect human rights which could be affected when they exercise the free movement rights.[41] They pointed to Article 352 TFEU in particular as an appropriate basis to allow for the adoption of certain general measures to protect human rights.[42] In addition, Article 114 TFEU has been mentioned as a basis that would allow broad measures to be taken in relation to the establishment and the functioning of the internal market.[43] The use of Article 114 and 352 TFEU, however, attributed to the broad interpretation of the competences by the EU institutions, which raises the concern of expansion of EU competence.[44] Therefore, it remains some suspicion.

Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World*. IBFD, p. 40.

[39] Ahmed, T. & Butler, (2006). 'The European Union and Human Rights Review: An International Law Perspective'. *European Journal of International Law*, 17, pp. 771-801.

[40] Alston, P. & Weiler, J. (1999). An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights. In P. Alston (Ed.), *The EU and Human Rights* (pp.658-723). Oxford university Press. p.680.

[41] Weiler, J. & Fries, S.C. (1999). "A Human Rights Policy for the European Community and Union-The Question of Competence". In P. Alston (Ed.), *The EU and Human Rights.* Oxford university Press, pp. 158-159.

[42] Alston, P. & Weiler, J. (1999). An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights. In P. Alston (Ed.), *The EU and Human Rights* (pp.658-723). Oxford university Press. p.684.

[43] Weiler, J. & Fries, S.C. (1999). "A Human Rights Policy for the European Community and Union-The Question of Competence". In P. Alston (Ed.), *The EU and Human Rights.* Oxford university Press, pp. 158.

[44] Beijer, M. (2017). *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations*.

Article 7 TEU is also argued that it could be a legal basis for the general competence of EU human rights protection because its power is not as such restricted to a specific competence field of the EU. It regulates that if 'there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU',[45] the Council could 'decide to suspend certain of the rights deriving from the application of the Treaties to the Member States in question'.[46] However, the far-reaching powers provided by Article 7 TEU to intervene in the area of human rights have not been used. There has been a great lack of political willingness to actually use of this provision.[47] In hence, it raises some doubts that whether the EU has a viable general competence to protect human rights on the basis of these provisions.

2.2.2.2. Limited Competences to Protect Human Rights

Although the EU does not have a general competence in this field, there are limited competences for the EU to take measures to protect human rights.

As for the external perspective, Article 3(5) TEU provides that the EU should contribute 'to the protection of human rights' in its relations with the wider world, including 'respect for the principles of the United Nations Charter.' Article 21(1) TEU provides that 'the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the university and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. These provisions provided a legal basis for the EU's policy to integrate human rights protection into its external relations. The EU introduced human rights

Intersentia. p.182.
[45] Article 7(2), TEU.
[46] Article 7(3), TEU.
[47] Beijer, M. (2017). *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations*. Intersentia. p.187.

clauses in external agreements dealing with trade, development, and association relationships, and it has occasionally imposed sanctions or withdrawn trade concessions for human rights violations, as in the cases of Myanmar and Sri Lanka.[48] The EU also runs an extensive international human rights and democratization program known as the EIDHR[49], as well as has been publishing the Union's Annual Report on Human Rights to outline EU activities in the field each year since 1999.

As for the internal policies, the EU has specific competence to protect certain human rights. First, Article 16(2) TFEU allows the EU to enact rules relating to the protection of individuals with regard to the processing of personal data by Union institution, bodies, offices and agencies, and the Member States when they are carrying out activities falling within the scope of EU law and rules relating to the free movement of such data. This provision, for example, is used to adopt the General Data Protection Regulation.[50] Secondly, Article 19 TFEU allows the EU to take action to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' This provision has led to the adoption of the Race Equality Directive, as well as the Framework Equality Directive.[51] Thirdly, Article 157(3) TFEU allows measures to be taken to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

While these provisions relate only to certain limited human rights issues, they can be of great importance for the EU because their subject matters relate to multiple policy fields of relevance for the EU, such as labour law and free movement law.[52] Moreover, these specific powers of the EU to protect human rights have been interpreted quite broadly by the EU legislature. For example, a broad

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[48] 'Human Rights in the EU'. In Craig, P. & Búrca, G. (2020). *EU Law: Text, Cases, and Materials* (7th ed.). Oxford University Press. p.392.

[49] European Programme, *European Instrument for Democracy and Human Rights (EIDHR)*. https://www.euro-access.eu/programm/european_instrument_for_democracy_and_human_rights.

[50] Council Directive 2016/80/EU of 27 April 2016 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data*, OJ L199/1, 4 May 2016. See Council Directive 95/46/EC of 24 October 1995 *on the protection of individuals with regard to the processing of personal data and the free movement of such data*, OJ L281/31, 23 November 1995.

[51] Council Directive 2000/43/EC of 29 June 2000 *on implementing the principle of equal treatment between persons irrespective of race or ethnic origin*, OJ L180/22, 19 July 2000; Council Directive 2000/78 of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation,* OJ L303/16, 2 December 2000.

[52] Beijer, M. (2017). *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations*. Intersentia. p.188.

material scope of application is provided by the Race Equality Directive. Not only matters of employment and working conditions are applied, but also areas of housing and education.[53] Therefore, although the specific competences of the EU are restricted in certain fields, they are effective in broad areas.

In addition, human rights laid down in the Charter are also bind to the EU and the Member States. They could also provide a further basis for the EU to take actions.

First, Article 51(1) of the Charter requires the EU institutions and the Member States to 'respect the rights, observe the principles and *promote* the application' of the provisions of the Charter when implementing EU law. This provision provides a general requirement for the EU institutions, as well as the Member States, to take the rights of the Charter into account in the exercise of their powers under EU law. Next, several other provisions of the Charter guarantee specific human rights and indicate in more detail what kind of guarantees would have to be provided to secure those rights, such as various socio-economic rights included in the 'Solidarity' Title of the Charter. In hence, the provisions of the Charter could also provide a power for the EU to protect human rights.

2.3. Problems Presented by the Implementation of Human Rights

2.3.1. Competence Creep

As discussed in the foregoing sections, it is plausible that there are some limited competences for the EU to take (legislative) action to protect human rights. Article 6 TEU stipulated that neither the provisions of the Charter nor the accession of the Convention shall extend or affect the competences of the EU as defined in the Treaties. A central concern raised subsequently is that the risk of 'competence creep', that is, the risk of silent and surreptitious expansion of the competences of the

[53] Article 3 of Directive 2000/43/EC.

EU.[54]

There are a variety of factors should be taken into account to understand the expansion of EU competences. For example, some powers have been laid down in quite a broad way in the EU Treaties. Of concern, here are Article 114 TFEU, which allows for the adoption of harmonizing measures with object of the establishment and functioning of the internal market, and Article 352 TFEU, which provides for a residual power to take measures to attain one of the objectives set out in the Treaty. These provisions are used to justify the adoption of a wide range of actions by the EU. A striking example is provided by the establishment of a directive harmonizing patient's rights based on Article 114 TFEU.[55] This legal basis can be used to ensure the establishment of the internal market.

The judicial activity of the ECJ, however, is the prominent factor of the expansion of the EU competences. As there is not possible for the EU legislative institutions to uses the Charter provisions as a legal base for legislation, the only way for this to happen is through judicial activity. The most obvious concern is that the Court of Justice might use the Charter to found new powers of judicial review for itself over activities that were thought to fall outside the Treaties. Another one would be if it were to interpret competences in the light of the Charter in such a way that they were to become 'stretched'.[56] All these concerns go to the following review by the Court and its relationship with the other EU institutions and the Member States.

2.3.2. The Concern of Expanding EU Competences by Judicial Activities of the CJEU

[54] Beijer, M. (2017). *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations*. Intersentia. p.197.
[55] Ibid. p.101.
[56] 'Human Rights in the EU'. In Craig, P. & Búrca, G. (2020). *EU Law: Text, Cases, and Materials* (7th ed.). Oxford University Press. p.248.

Human rights are used as a basis for review whereby courts can strike down legislation or administrative acts that do not observe them. They are also used as an interpretive tool to shape the content of legislation and the scope of administrative discretion. The Court of Justice of the European Union, which is the highest judicial body of the European Union, ensures that the law is observed in the interpretation and application of the Treaties. Human rights protection by the CJEU stands on a solid foundation of case law from the end of the 1960s and onwards. In two judgements of principle which has been discussed in section 2.1., in 1969 and 1970, it ruled that respect for human rights formed an integral part of the general principles of law, the observance of which the Court had to ensure.[57] This occurred in reaction to national constitutional courts' questioning of the primacy of European law and their threats not to apply it as long as it did not provide sufficient protection of human rights at least equal to that provided by national constitutions and international agreements.[58] The protection of these rights, while inspired by the constitutional traditions common to the Member States, had nevertheless to be ensured within the framework of the Community's structure and objectives.[59]

In subsequent decisions the Court of Justice has specified the criteria according to which it intends to ensure the protection of human rights at Community level, declaring that 'it could not accept measures incompatible with fundamental rights recognized and protected by the constitutions' of the Member States.[60] The Court of Justice also stated that 'similarly, international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'.[61]

This case law of the Court, through which a whole series of human rights and general principles of

[57] Case C-29/69 *Stauder v City of Ulm*, ECLI:EU:C:1969:57. Case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.
[58] The German Federal Constitutional Court's decisions: Solange I BVerfGE 37, 271 (1974); Solange II BVerfGE 73, 339 (1986); and Brunner BVerfGE 89, 155 (1993).
[59] *Memorandum on the Accession of the European Communities to the Convention for the Protection of the Human Rights and Fundamental Freedoms*. COM (79) 210 final, 2nd May 1979. Bulletin of the European Communities, Supplement 2/79, para.3.
[60] Case C-4/73, *Nold v Commission*, ECLI:EU:C:1974:51.
[61] Case C-36/75, *Rutili*, ECLI:EU:C:1975:137.

law have been subsequently recognized as essential elements of the Community legal order,[62] has been highly praised throughout the Community. The political institutions of the Community supported it in their Joint Declaration on fundamental rights of 5 April 1977 and have repeatedly stressed the prime importance they attach to the method adopted by the Court for developing a means of protection of human rights which is specifically adapted to the requirements of the Community.

Basing its jurisprudence on "common constitutional traditions" and "general principles of EC law", the judges of the Court understanding of fundamental guarantees flowed naturally into their jurisprudence and they found early inspiration in the ECHR as a European catalogue of human rights.[63] The Court of Justice has only been willing to grant social rights an interpretive function other than to strike down legislation for non-compliance with these. The interpretive role is also significant because it can be used to enlarge the scope and shape the ideological direction of legislation. [64] Case *Landeshauptstadt Keil v. Jaeger* (2003) [65] is a good example. Directive 93/104/EC concerns certain aspects of the organization of working time. It required that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.[66] Jaeger was a doctor who worked in a hospital in the German town of Kiel. He was on-call for about three-quarters of his working time, which requires him to be present in the hospital to be available when needed. It was agreed that he performed services about 49 per cent of the time he was on call. The hospital regarded that the time on call counted as a rest period for the purposes of the Directive. Jaeger believed it was work. The Court agreed with him and explained as follows:

'…it should be stated that it is clear both from Article 118a of the EC Treaty… which is the legal basis of Directive 93/104, and from the first, fourth, seventh and eighth recitals in its preamble as well as the wording of Article 1(1) itself, that the purpose of the directive is to lay down minimum

[62] Report of the Commission submitted to the European Parliament and the Council. *The Protection of Fundamental Rights as Community Law is created and developed*. COM (76) 37 final, 4 February 1976. Supplement 5/76. Bulletin of the European Communities.
[63] Lorenz, N., Groussot, X. & Petursson, G.T. (2013). *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* Martinus Nijhoff. p.127.
[64] 'Fundamental Rights'. In Chalmers, D., Davies, G., & Monti, G. (2019). *European Union Law: Cases and Materials* (4th ed). Cambridge University Press. p. 249.
[65] Case C-151/02, *Landeshauptstadt Keil v. Jaeger*, ECLI:EU:C:2003:437.
[66] Article 3 of Directive 93/104/EC.

requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time…

According to those same provisions, such harmonization at Community level in relation to the organization of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods – particularly daily and weekly - and adequate breaks and by providing for a ceiling on the duration of the working week…

In that context it is clear from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, and in particular points 8 and 19, first paragraph, thereof, which are referred to in the fourth recital in the preamble to Directive 93/104, that every worker in the European Community must enjoy satisfactory health and safety conditions in his working environment and must have a right, inter alia, to a weekly rest period, the duration of which in the Member States must be progressively harmonized in accordance with national practices.

With regard more specifically to the concept of 'working time' for the purposes of Directive 93/104, it is important to point out that at paragraph 47 of the judgement in *Simap*[67], the Court noted that the directive defined that concept as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive. At paragraph 48 of the judgement in *Simap* the Court held that the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams in Valencia (Spain) where their presence at the health center is required. The Court found, in the case which resulted in that judgement, that it was not disputed that during periods of duty on call under those rules, the first two conditions set out in the definition of the concept of working time were fulfilled and, further, that, even if the activity actually performed varied according to the

[67] Case C-303/98, *Simap*, ECLI:EU:C:2000:528.

circumstances, the fact that such doctors were obliged to be present and available at the workplace with a view to providing their professional services had to be regarded as coming within the ambit of the performance of their duties.'[68]

In this case, the Court made a wide interpretation of what constitutes work by using the Community Charter of Fundamental Social Rights. Although it did not broaden Treaty competences, it did enlarge the meaning of the legislation and extend the duties upon the Member States.[69]

In addition, human rights were used by the CJEU to seek a benign interpretation to resist the circumstances in which EU legislation is struck down. Only when it is impossible to interpret, it will strike down the measure. Case *Rechnungshof v Osterreichischer Rundfunk and others*[70] is good to prove it. The Austrian law required public bodies subject to control by the Court of Auditors to report to it the names, salaries and pensions above a certain level paid to their employees and pensioners. The Court of Auditors then would make a report to the Austrian Parliament which would be made public, the object being to expert pressure on public bodies to keep remuneration within reasonable limits. Austrian radio and other bodies refused to provide the information, arguing that it violated Directive 95/46/EC on the protection of individuals with regards to the procession of personal data. In interpreting the obligations set out by the Directive, the Court was eager to interpret them in the light of Article 8 ECHR, upholding the rights to respect for private life.

The Court stated that:

'the provisions of Directive 95/46, in so far as they govern the processing of personal data likely to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case law, form an integral

[68] Judgment of the Court of 9 September 2003, Case C-151/02, *Landeshauptstadt Keil v. Jaeger*, ECLI:EU:C:2003:437, paras. 45-49.
[69] 'Fundamental Rights'. In Chalmers, D., Davies, G., & Monti, G. (2019). *European Union Law: Cases and Materials* (4th ed). Cambridge University Press. p.250.
[70] Case C-465-00, *Rechnungshof v Osterreichischer Rundfunk and others*, ECLI:EU:C:2003:294.

part of the general principles of law whose observance the Court ensures… For an employer to publish the names and incomes of employees to a third party was an interference with the right to respect for private life, protected by Article 8 of the European Convention on Human Rights, but that it might be justified if it was both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being for the national courts to determine. But if the national legislation was incompatible with Article 8of the Convention, then it was also incapable of satisfying the requirements of proportionality in Article 7(c) or (e) of Directive 95/46. Nor could it be covered by any of the exceptions referred to in Article 13 of that Directive, which likewise requires compliance with the requirement of proportionality with respect to the public interest objective being pursued. In any event, that provision cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life contrary to Article 8 of the Convention.'[71]

The Data Protection Directive is thus to be interpreted in the light of the ECHR. Paul Craig and Gráinne de Búrca regards that this would lead to the danger that courts will look for mutual compatibility. They will not merely interpret EU secondary legislation in the light of fundamental rights norms but will also interpret fundamental rights norms in the light of the legislation being challenged, with the possibility of the safeguards offered by the latter being adjusted downwards to protect the legislation in question.[72]

Seeing that there is a broad range of areas where the EU law has ramifications for protecting human rights when implementing indirect competence, Muir finds that (all) EU legislation can in effect easily be used as a 'vehicle for fundamental rights protection'.[73] It can be considered problematic if the EU uses certain legal bases to ensure human rights and that legal bases were conferred for different policy objectives: 'Such a use of legislation giving effect to a policy objective that is initially different from fundamental rights protection may be perceived as a circumvention of limits

[71] Ibid, paras. 68-91.
[72] 'Fundamental Rights'. In Chalmers, D., Davies, G., & Monti, G. (2019). *European Union Law: Cases and Materials* (4th ed). Cambridge University Press. pp.250-251.
[73] Muir, E. (2014). The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges. *Common Market Law Review*, 15, p.228.

on EU competences and feed virulent criticisms…'[74]

The case mentioned before is the situation that the ECJ reviews the behavior of the Member States. It is another matter when it comes to review of behavior by the EU institutions. Though in Case *Italy v. Commission*[75] the General Court and the Court of Justice are quite willing to strike down administrative acts by the Commission for not complying with EU human rights law, they are more cautious when it comes to EU legislative acts. There is no instance of a Directive being struck down for failure to comply with human rights. Only one instance, namely the *Kadi* Case[76], refers to a Council Regulation being struck down. In this case, the ECJ delivered its most important judgment to date on the subject of the relationship between the European Community and the international legal order. The U.N. Security Council imposed sanctions under Chapter VII of the U.N. Chapter against individuals and entities allegedly associated with Osama bin Laden, the AI Qaeda network and the Taliban in its effort to fight terrorism. A list of alleged offenders was compiled by the U.N, Sanctions Committee and sanctions included freezing such persons and entities asserts. To give effect to the Security Council resolutions, the Council of the European Union adopted a regulation ordering the freezing of the asserts of those on the list. The asserts of Yassin Abdullah Kadi and AI Barskaat International Foundation was frozen as being involved with terrorism. The ECJ delivered a powerful judgement annulling the relevant implementing measures and declaring that they violated fundamental rights protected by the EC legal order. *Kadi* Case shows a specific conflict between the norms of different regimes or sub-system within the global legal arena. But in reality, it is a particularly compelling instance insofar as the conflict involves some of the most fundamental norms of the modern international law system, namely Article 103 of the U.N. Charter,[77] peremptory or *jus cogens* norms,[78] and Chapter VII Resolutions of the Security Council.[79] The

[74] Ibid. p.233.
[75] Case T-185/05, *Italy v. Commission*, ECLI:EU:C:2008:519.
[76] Joined Cases C-402 & 415/05P, *Kadi & AI Barakaat International Foundation v. Council and Commission* (2008), ECLI:EU:C:2008:461.
[77] Article 103 of the U.N. Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
[78] Orakhelashvili, A. (2006). *Peremptory Norms in International Law*.
[79] Under Chapter VII of the U.N. Charter, the Security Council is empowered to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken…to maintain or restore international peace and security" including "measures not involving the use of armed force" such as economic sanctions. U.N. Charter arts. 39,41. In Chapter V, Article 25

Kadi judgement takes its place instead within a different strand in the Court's jurisprudence, revealing a Court that increasingly adopts what will be explained below as a robustly pluralist approach to international law and governance, emphasizing the separateness, autonomy, and constitutional priority of the EC legal order over international law.[80]

Besides, as most administration regulated by EU law was carried out by national authorities, it would cause a problem. It was that if the EU institutions were subject to a regime in which they were bound by human rights but these same rights did not bind implementing national authorities, the coherence and unity of the EU legal order then would be compromised.[81] *Wachauf*,[82] for example, a German tenant farmer, argued that the German legislation which implementing an EU Regulation, violated his rights to property as the compensation for discontinuing the milk production was for something he had built up through working the land during his lease. The Court stipulates that

'The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights. Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in

of the Charter stipulates that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. Charter art.25.

[80] Weiler, J. (2009). *The ECJ and the International Legal Order after Kadi.* Jean Monnet Working Paper No.01/09, p.7.

[81] K. Lenaerts, Fundamental Rights to be Included in a Community Catalogue. *European Law Review.* 3. Lang, The Sphere in which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles. *LIEI,*23, pp. 28–29.

[82] Case C-5/88, *Wachauf*, ECLI:EU:C:1989:321.

accordance with those requirements…The Community regulations in question…leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.'[83]

Although the Court did not rule directly, there was a strong implication that the German legislation violated tenants' fundamental rights. It was also made clear that the German Authorities were responsible as they had not exercised the discretion available to them in a manner that complied with EU human rights norms. This last nuance allowed the Court to expand the reach of EU fundamental rights law. National compliance with fundamental rights was no longer merely about the coherence of the EU legal order and making sure the formulation and implementation of a legislative act were bound by the same norms. Rather, it was now about ensuring that national authorities exercised the discretion available to them in accordance with human rights.[84]

[83] Ibid, paras. 18-20.
[84] 'Fundamental Rights'. In Chalmers, D., Davies, G., & Monti, G. (2019). *European Union Law: Cases and Materials* (4th ed). Cambridge University Press. pp.252-253.

Chapter 3 Charter of Fundamental Rights of the European Union

European Union Agency for Fundamental Rights (FRA) and European Commission hosted a joint event on strengthening the EU Charter in the next decade on 07 December 2020.[85] The Charter has been applied by the national authorities and the institutions of the European Union for more than 10 years with the entry into force of the Lisbon Treaty on 1 December 2009. References to the Charter by the ECJ have increased substantially, up from 27 references in 2010 to 356 times in 2018.[86] However, through the Commission's 2019 survey on EU citizens' awareness of the Charter[87], it could be reminded that the Charter is not yet used to its full potential by the enforcement chain and awareness remains low, especially at the national level.[88] As first Vice-President Frans Timmermans said: "Ten years on, the Charter of Fundamental Rights is living up to its promise. It is the buttress of our Union of values and sets out our rights, freedoms and principles. For the Charter to be most effective in people's lives they must know about their rights and where to turn to when these are violated. This is why it is important to continue to spread the world about the Charter and let people know what is truly as theirs as Europeans."[89] Hence, as the Charter is able to function as a 'road map' and identifier of EU rights, it should be able to perform more effectively since it became binding and the main problem related to the Charter is most likely related to its normative structure, which will be discussed as follows.

3.1. History of the Charter

The protection of human rights holds a very prominent place in the contemporary debate in the EU.

[85] European Union Agency for Fundamental Rights. *Strengthening the EU Charter in the next decade*. 07 December 2020. https://fra.europa.eu/en/event/2020/strengthening-eu-charter-next-decade.
[86] *European Commission reports on the EU Charter of Fundamental Rights*, 5 June 2019. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2790.
[87] *Eurobarometer survey launched in 2019 March by European Commission*, March 2019. https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2222.
[88] *European Commission reports on the EU Charter of Fundamental Rights*, 5 June 2019. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2790.
[89] Ibid.

In particular, the attention for the subject matter was prompted in 1998 by the 50th anniversary of the United Nations Universal Declaration of Human Rights, originally adopted in 1948. And yet, the issue of human rights protection in the EU is far from being a recent phenomenon. On 7 December 2000, the EU Charter of Fundamental Rights was proclaimed in Nice by the respective presidents of the EU institutions. As the absence of any EU Bill of Rights until 2000, protection of human rights for the first 40 years of European integration developed through the case law of CJEU.

The birth of the European Charter and its nature can be explained by two and interrelated important ambitions – first, somewhat ambivalent EU constitutional developments and, second, the emerging human rights case law of the European Court of Justice that has aimed to solve the potential conflict between dogmatic common market approach and dynamism of the EU as related to the citizens of Europe.[90]

As has been discussed in Section 2.1., from the end of the 1960s, the ECJ began to rule that respect for human rights was part of the legal heritage of the Community.[91] After that, there was widespread belief that the EU should have its proper Bill of Rights and not be dependent on the one elaborated within the Council of Europe, as defined by Member States constitutional law or as elaborated in the case law of the ECJ. The need was not perceived as stemming from insufficient levels of protection in legal practice. It was rather on the political level that the desire for codification was strongest. Consequently in 1999, by appointment of the European Council, a convention under the chairmanship of the former German president Roman Herzog was convened to deal with the issue of such Bill of Rights for Europe. On 2 October 2000 the Convention completed its task.

The Charter was declared by the European institutions in Nice in December 2000.[92] It was explicitly

[90] Kerikmae, T. (2014). "EU Charter: Its Nature, Innovative Character, and Horizontal Effect". In T. Kerikmae (ed.), *Protecting Human Rights in the EU*, Springe Press, p.7.
[91] Besson, S. (2006). The European Union and Human Rights: Towards A Post-National Human Rights Institution. *Human Rights Law Review*, 6(2). p.344.
[92] Official Journal of the European Communities. *Charter of fundamental rights of the European Union 1*, OJ 2000/C 364/01, 18 December 2000.

mentioned in the so called *Laeken Declaration*[93] by the European Council of 15 December 2001. In the declaration, the European Council recognized that the situation was no longer satisfactory and that there was a need for a "Constitution for European citizens" in the shape of a basic constitutional treaty that included the Charter. The idea was that a constitution is hardly complete without a Bill of Rights. All Member States that have a written constitution have a catalogue of rights in their constitution and the EU could hardly settle for less than its Member States.

The declaration contained 60 questions on the future of the Union revolving around four main themes: the division and definition of powers, the simplification of the treaties, the institutional set-up and moving towards a Constitution for European citizens. To that end, the *Laeken Declaration* also set up a Convention to tackle the above-mentioned issues.

The result of the Convention was a draft Constitutional Treaty which included, in Part II, the full text of the Charter. This draft version was subsequently adopted as the Treaty Establishing a Constitution for Europe (the Constitutional Treaty). Following its rejection in the 2005 French and Dutch referenda, the idea of a Constitutional Treaty was abandoned in favor of a more traditional reform treaty amending the existing treaties. After a period of reflection, called for in June 2005 by a declaration by the European Council,[94] the EU proceeded to amend the existing treaties including in Article 6 of the new TEU a reference to the Charter attributing to the latter (which is annexed to the Lisbon Treaty[95]) full binding force.

3.2. A Binding Charter of Human Rights

3.2.1. Scope of Application of the Charter under its Article 51 in practice

[93] *Laeken Declaration on the future of the European Union*, 15 December 2001.
[94] *Declaration by the Heads of State or Government on the ratification of the Treaty establishing a Constitution for Europe*, 16 and 17 June 2005.
[95] Protocol 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.

Although the Charter became a legally binding bill of rights for the EU, the scope of application of the Charter is limited in a significant way. Article 51 CFR governs the applicability of provisions, reading as follows:

'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.'[96]

Accordingly, EU human rights apply at national level only where Member States are 'implementing Union law'. However, this is a rather broad notion. 'It follows unambiguously from the case-law of the Court of Justice' that this requirement covers 'the Member States when they act in the scope of Union law'.[97] This form of 'implementing Union law' concerns national acts that fall under an EU prohibition. To justify such national acts, Member States need to use exceptions provided for by EU law. In such situations, EU law authorities the existence of such national acts, which, however, must not encroach on EU human rights. For this reason, the Charter applies to ensure that EU law does not authorize Member States to take measures infringing human rights.[98] Therefore, a clear limitation is set as to its interaction with domestic law. The CJEU's role as a 'constitutional court' has been secured as the authoritative interpreter of the Charter rights.[99] The Explanations clarify that the rule was derived from a principle set forth by the case law of the Court of Justice, according to which Member States are under a duty to respect human rights when they are acting under EU law.

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[96] Article 51 of the Charter.
[97] Explanations on Art. 51; see European Union (2007), *Explanations relating to the Charter of Fundamental Rights*, OJ 2007/C 303,14 December 2007, pp. 17-37.
[98] Case C-260/89, *ERT*, ECLI:EU:C:1991:254, paras. 41–43. See also Case C-390/12, Robert Pfleger and Others, 30 April 2014, paras. 30–37; CJEU, C-145/09, Land Baden-Württemberg v. Panagiotis Tsakouridis [GC], 23 November 2010, para. 52.
[99] Genberg, J. (2014). The Scope of Application of the Charter of Fundamental Rights of the European Union – Quo Vadimus? *Helsinki Law Review*, 1, p.35.

Regarding the application of the Charter, the CJEU has issued several judgements clarifying the Charter's purpose and objectives. For example, it was established in the 1980s, in the landmark case of *Wachauf*[100], that Member States – when implementing EU law – are bound to respect EU fundamental rights. The CJEU continued to stake out the path and later held that Member States were also to respect EU fundamental rights when derogating from EU law[101] and potentially when acting 'within the scope of EU law.'[102] In the *ERT* case[103], the court went further by holding that it could also review a national rule which may restrict a fundamental freedom on grounds of public order, public security or public health, adding that such a rule must be interpreted in the light of the general principles of law and in particular of fundamental rights whose efficacy is ensured by the CJEU. Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply, as the example of *Annibaldi*[104] demonstrates.

A few years after the entry into force of the Lisbon Treaty, on 26 February 2013, the CJEU issued two important decisions, *Åkerberg Fransson*[105] and *Melloni*[106] that brought some interesting and expected (but also criticized) precisions on the application of the Charter on a national level, especially concerning the terminology and the consequences of the notion of implementing EU law in the sense of Article 51(1) of the Charter. In *Melloni*, the Court touched on the important issue of the relationship between national fundamental rights and EU fundamental rights. The *Melloni* case is important for the interpretation of Article 53 of the Charter. Article 53 reads as follows:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights

[100] Case C-5/88, *Wachauf*, ECLI:EU:C:1989:321, para. 19. The central question in the landmark case was the issue of the implementation of EU secondary legislation, and that Member States when implementing EU law are bound to respect EU fundamental rights as far as possible. In other words, the Charter applies to the Member States when they are acting as part of the decentralized administration of the Union and applying or implementing a regulation, transposing a directive or executing a decision of the Union or a judgment of the CJEU.
[101] Case C-368/95, V*ereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v Heinrich Bauer Verlag (GmbH)*, ECLI:EU:C:1997:325; Case C-260/89, *ERT*, ECLI:EU:C:1991:254.
[102] Case C-309/96, *Annibaldi*, ECLI:EU:C:1997:462.
[103] Case C-260/89, *ERT,* ECLI:EU:C:1991:254.
[104] Case C-309/96, *Annibaldi*, ECLI:EU:C:1997:462.
[105] Case C-617/10, *Åklagaren vs Åkerberg Fransson*, ECLI:EU:C:2013:105.
[106] Case C-399/11, *Stefano Melloni vs Ministerio Fiscal (Melloni)*, Judgement of 26 February 2013.

and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.'

The CJEU rejected the interpretation according to which Article 53 authorizes Member States to apply their standard of protection of human rights guaranteed in the constitution when that standard is higher than the one based on the Charter, and thus giving priority to it over the application of EU law.[107] The CJEU reaffirmed that EU law is superior to national law, including national constitutions. Consequently, based on Article 53, the question is whether a Member State could invoke its constitution and constitutional protection of human rights and refuse to apply a provision of EU law. Here the issue is not merely about the scope of Article 53 but, interestingly, it turns into an issue of the relation between national constitutional law and EU law, more specifically the nature and limits of the principle of primacy of EU law.

In Case *Åkerberg Fransson*, there are two complicated problems. The first problem concerns whether the CJEU can try a question of interpretation whatsoever when the case concerns a situation on a national level. The other problem regards the application of the principle of *ne bia in idem* in Article 50 of the Charter.[108]

One of the elements of this case was the CJEU's attempt to clarify Article 51(1), and how the sentence according to which the Charter is addressed 'to the Member States only when they are implementing Union law' is to be interpreted. The Court addressed the question of implementation to establish its jurisdiction, not because the referring court put its forward as a preliminary question itself. This caused some alarm in the Advocate- General's office.[109] The most important element of

[107] The Court stated that "That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution". It then went on by saying that "by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order... rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State." See paras. 55–57.
[108] No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.
[109] Case C-617/10, *Åklagaren vs Åkerberg Fransson*, ECLI:EU:C:2013:105, para.53.

this case concerns the clarification that Article 51(1) is to be interpreted as meaning that the Charter is addressed to the Member States when they are acting 'within the scope of European Union law'. The Charter can be invoked not only in situations when Member States are transposing an EU directive or executing a Regulation, but more broadly when the situation at issue falls 'within the scope of EU law', which also covers for example situations when Member States are derogating from the free movement provisions of the internal market.[110]

The reference to the Explanations via Article 52(7) the Charter and Article 6(1) TEU, allow the conclusion that the wording 'when implementing EU law' in Article 51(1) is to be equated with the phrasing 'within the scope of EU law', which is used in the Explanations.

The CJEU allows the applicability of the national human rights standard 'in a situation where action of the Member States is not entire determined by European Union law', yet the fact that there is a connection with EU law means that the Charter level of protection applies as a minimum guarantee. It also means that the national standard can only apply if it does not compromise the primacy, unity and effectiveness of EU law.

In dealing with *Åkerberg* and *Melloni* in a coordinated way, the CJEU took a conscious first step towards developing a general theory on how to apply the Charter. First, it engaged with a long running debate about the Charter's scope of application with regard to Member Sates' actions, interpreting the Article 51(1) wording of 'only when implementing Union law'. Second, it interpreted Article 53, which states, 'Nothing in the Charter shall be interpreted as restricting or adversely affecting human rights… as recognized by the ECHR and by the Member Sates' constitutions.'[111]

[110] As far as the issue of admissibility is concerned Advocate-General Cruz Villalón proposed that the Court of Justice should find that it lacks jurisdiction, since the Member State concerned is not implementing Union law within the meaning of Article 51(1) of the Charter. The Advocate-General believed that a careful examination of the circumstances of the case militates in favour of reaching that conclusion.

[111] Genberg, J. (2014). The Scope of Application of the Charter of Fundamental Rights of the European Union – Quo Vadimus? *Helsinki Law Review*, 1, 35-50.

3.2.2.Horizontal Direct Effect

The term of Direct effect was first used by the Court of Justice in the famous case *Van Gend en Loos*[112]. It has applied direct effect to directives on the basis of three main rationales: (1) compatibility with the Treaty text;[113] (2) the diminished utility of the measure if direct effect were not allowed[114] and (3) the estoppel argument[115]. When the Charter becomes an issue, horizontal direct effect is one of the most intensive discussion in legal theory.

The controversy in applying the horizontal effect doctrine is that the aim of fundamental rights was to protect individuals from violation of their rights by public authorities. However, if an individual can invoke rights against another individual, human rights become a duty and requirement for the other person.[116] According to Article 51, the Charter is directed to the EU institutions, bodies, offices and agencies as well as to the Member States when they are 'implementing Union law.[117] It excludes private groups or individuals as addressees. Moreover, the majority of Member States do not allow direct horizontal effect under their national law, therefore, it puts an obligation only to public authorities to respect the human rights and become the addressees of the Charter.[118]

Some cases looked like that the horizontal character of the Charter is not possible, for instance, Opinion of AG Trstenjak delivered on 8 September 2011,[119] and a Protocol on the Application of the Charter to Poland and the United Kingdom[120]. Some Member States allow direct horizontal

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[112] Case C-26/62, *Van Gend en Loos,* ECLI:EU:C:1963:1.
[113] Case C-41/47, *Van Duyn v Home Office*, ECLI:EU:C:1974:133, n2: 'It would be incompatible with the binding effect attributed to a directive by article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned'.
[114] Ibid: 'The useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of community law'.
[115] Case C-148/78, *Pubblico Ministero v Ratti,* ECLI:EU:C:1979:110. 'A member state which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails'.
[116] Besselink, (2012). 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. *Report of 25th FIDE congress*, p.17.
[117] Cf. with the original version of the Charter, (2000) OJ C364/1.
[118] Besselink, Ibid, p.18.
[119] Joined Cases C-411/10 and C-193/10 *N.S. and Opinion of AG Trstenjak* delivered on 22 September 2011.
[120] The Protocol does not give these two states an 'opt-out' from the Charter, as it allows both the courts of those states and the Court of

effect, however, it only is restricted in a small field of human rights, such as civil and political rights in Portugal.[121]

It should be mentioned that accepting the horizontal direct effect of certain Charter provisions is nothing revolutionary. Rather, it fits into a line of cases in which horizontal direct effect was accepted of fundamental or quasi-fundamental rights that existed already before the Charter. These are the principle of equal pay of women and men, now laid down in Article 157 TFEU, which developed from an economically inspired labour law standard to a human right[122]; and free movement of workers, including the prohibition of discrimination on the basis of nationality.

The cases, all decided in 2018, concern horizontal direct effect of Article 21 of the Charter, more particularly the prohibition of discrimination on grounds of religion, Article 47, the right to effective judicial protection, and Article 31(2), the right to paid annual leave.

The religion discrimination cases concerned alleged discrimination by private employers. Case *Egenberger*[123], *IR*[124], and *Cresco Investigation*[125], all of these cases' substance was dealt with under Directive 2000/78.[126] However, since provisions of a directive have no horizontal direct effect and it was not certain whether consistent interpretation of national law was possible, therefore the Court

Justice to rule on disputes occurring in those states. The Charter can only be interpreted. It cannot be extended. (3. 257)

[121] Besselink, Ibid, p.18.

[122] According to the Court Article 141 EC (now Article 157 TFEU) '… constitutes the expression of a fundamental human right'. See Case C-50/96, *Deutsche Telekom AG v Lilli Schröder*, ECLI:EU:C:2000:72, para. 56.

[123] Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, n. 7. In the case, Ms Egenberger applied for a job with Evangelisches Werk für Diakonie und Entwicklung, a private organization which pursues charitable, benevolent and religious purposes. The job entailed the preparation of a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. Ms Egenberger, of no denomination, was shortlisted but eventually not invited for an interview, apparently because she did not belong to a Protestant church.

[124] Case C-68/17, *IR v JQ*, 2018, n.7. This case concerned JQ, a doctor in a hospital run by IR, a limited liability company which carried out the work of Caritas (the international confederation of Catholic charitable organisations). JQ was a Roman Catholic but he divorced and remarried in a civil ceremony without his previous marriage being annulled. For this reason, he was dismissed. However, the hospital did not dismiss another employee in a comparable situation but who was of Protestant faith.

[125] Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, 2019, n.7. The issue in the case was the very fact that in Austria, Good Friday is a paid public holiday only for members of 4 specific churches, namely the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church. If a member of one of those churches works on Good Friday, he or she is entitled to additional pay. Mr. Achatzi, not a member of any of the churches in question, worked on Good Friday and claimed extra pay from Cresco Investigations, a private detective agency. He argued that he suffered discrimination by being denied public holiday pay.

[126] Council Directive 2000/78/EC of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation*, OJ 2000 L 303, p.16.

turned to Article 21 CFR. The Court pointed out that the principle of equal treatment in the field of employment and occupation originates in various international instruments and the constitutional traditions common to the Member States and is not established, as such, by the Directive. Moreover, the prohibition of discrimination on grounds of religion is mandatory as a general principle of EU law and is laid down in Article 21 CFR. That provision is sufficient in itself to confer on individuals a right, which they may rely on as such in disputes between them. Finally, the Court observed that as regards its mandatory effect, Article 21 CFR is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on other grounds and these provisions apply also where discrimination has origin in contractual relationships.

For these reasons, if consistent interpretation of national law is not possible, the referring court must ensure judicial protection of the right conferred by Article 21 CFR and guarantee the full effectiveness of that Article even in disputes between individuals.[127]

With a less detailed reasoning, the Court further decided on the horizontal direct effect of Article. 47 CFR, in combination with Article 21 CFR. The Court held that Article 47 is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such and that the national court must ensure the judicial protection for individuals flowing from Articles 21 and 47 CFR.

At the origin of the cases on the right to paid annual leave were again two labour law disputes. Both *Willmeroth*[128] and *Max-Planck*[129] cases concerned, in the first place, an interpretation of the content of Article 47 of the Working Time Directive[130] and Article 31(2) CFR. As to the effects these provisions may produce, since directives cannot be relied upon against private individuals and consistent interpretation was, according to the referring court, not possible, the Court addressed the

[127] Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.* 2018, n. 7, paras. 75-77.
[128] Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn*, 2018.
[129] Case C- 684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v. Tetsuji Shimizu*, 2018.
[130] OJ 2003 L299, Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

question of the horizontal direct effect of the Charter provision.

The Court recalled that the right to paid annual leave is an essential principle of EU social law, is mandatory in nature and is based on various pre-existing EU or international instruments, such as the Community Charter of the Fundamental Social Rights of Workers, the European Social Charter and the Convention No 132 of the International Labour Organisation. Therefore, it is not, as such, established by the Working Time Directive. Next, the Court emphasised the mandatory terms of the provision, which does not refer to the fact that the right is guaranteed in 'the cases and under the conditions provided for by Union law and national laws and practices', as does for instance Article 27 CFR.

The Court considered that the right to a period of paid annual leave, as affirmed in Article 31(2) CFR, is, as regards its very existence both mandatory and unconditional in nature. There is no need to elaborate the right in that respect by other provisions of Union or national law. Such provisions are only required in order to specify the exact duration of the leave and the conditions for the exercise of that right. Therefore, Article 31(2) CFR is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer.

The Court also considered an argument that was often brought to the fore in order to deny horizontal direct effect of the Charter provisions. That, however, according to the Court, does not systematically preclude the possibility that individuals may be directly required to comply with certain provisions of the Charter. As the case law makes clear, the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals. In particular, in *Egenberger,* the Court accepted that individuals may rely on Article 21 (1) CFR in a dispute with another individual without 51(1) CFR preventing it. Finally, the right of every worker to annual paid leave entails by its very nature a corresponding obligation on the employer, which is to grant such periods of paid leave.

The central requirement in the case law on the horizontal direct effect of the Charter is that the provision concerned must be sufficient in itself to confer a right, no further elaboration or specification being necessary for its application. Although at first blush this requirement may see, clear and simple, its concrete application raises a number of unexplored questions. These questions concern, in particular, the relevance of the reference to EU implementing measures and/or national legislation or practices and, partly in the wake of that, the distinction between rights and principles, an issue far from clarified in the case law.[131]

3.2.3.Distinction between Rights and Principles

Though the Charter and the Explanations are uninformative and say nothing about the scope and content of each right. However, the Charter does discriminate between rights by introducing a distinction between rights and principles. The preamble and the second sentence of Article 51(1) of the Charter explicitly introduce the distinction between "rights" and "principles". Article 52(5) clarifies the judicial nature of these "principles".[132] Article 52(5) states:

'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 cognizable only in the interpretation of such acts and in the ruling on their legality.'

This distinction is mainly influenced by Spanish constitutional law, particularly Article 53(3) of the Spanish Constitution concerning the justiciability of the guiding principles of social and economic policy.[133] It was also influenced by French constitutional law, which features a distinction between

[131] Prechal, S. (2020). Horizontal Direct Effect of the Charter of Fundamental Rights of the EU. *Revista de Derecho Comunitario Europeo,* 2020

[132] The Court has not yet adjudicated on the distinction between rights and principles.

[133] Danwitz, T. & Paraschas, K. (2017). A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights. *Fordham International Law Journal*, 35(5), p. 1411. An English translation is available at Spanish Constitution

rights that are fully justiciable and "principles of constitutional value" that do not give the individual persons a rights to commence an action and only permits the constitutional council to determine whether the legislature took measures that are contrary to such principles.[134]

According to Article 52(5) CFR, those rights that are "principles" are deemed incapable of creating any directly enforceable rights. Unfortunately, however, Article 52(5) does not clearly distinguish which provisions are to be interpreted as "rights" and which as "principles". It is often suggested that "principles" refer to economic, social and cultural rights, although in fact only three provisions in the Charter explicitly use the word "principle" – Article 23 (principle of equality between men and women); Article 37 (sustainable development) and Article 47 (proportionality and legality of criminal offences). The Explanations are not of great help, especially as they note that some Articles may contain both rights and principles – for example, Article 23, 33 and 34. So the distinction remains rather unclear. [135]

In addition, the principles neither include rights for their implementation by the legislatures of the EU or Member States, and thus positive benefits, nor do they confer standing to take legal action. Furthermore, the right to an effective remedy, as provided for under Article 47 of the Charter, does not result in, or serve as the basis for, a claim for damages based on the noncontractual liability of the EU under Article 340(2) of the TFEU, or the noncontractual liability of Member States for a violation of a principle.

S. Douglas-Scott argued that the Court will grant to the legislature of the EU, as well as to the national legislatures, within the limits set by EU law, a large margin of appreciation with regard to the implementation of a principle, so that the extent of judicial review might, in the end, be limited

art. 53, at 15, http://www.scnado.es/coinstitu_i/indices/consti-ing.pdf, ("Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them.")

[134] Ibid, p. 1411.

[135] Douglas-Scott, S. (2011). The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review*, 11(4), p.652.

to manifest errors of law.[136]

3.2.4. Relationship between the Charter and the European Convention on Human Rights

The Charter brings together rights scattered throughout many different sources such as the ECHR, United Nations (UN) and International Labour Organisation (ILO) agreements. It covers a whole raft of traditional human rights, such as the right to life, prohibition of torture, and the right to a fair trial, many drawn from the ECHR. Additionally, the Charter covers a number of guarantees which find no correspondence in the ECHR, namely social and economic rights, as well as "third generation rights"[137], such as the right to good administration (Article 41 of the Charter) or the right to access to documents (Article 42 of the Charter). Whilst the European Social Charter has been adopted to (partially) remedy the shortcomings of the ECHR as regards the first category, the subsequent Protocols and the expansive properties of the ECtHR case law were unable to fully compensate for the lack of explicit provisions concerning new rights.

The coexistence of two binding instruments of human rights protection is considered admissible both under the Convention and under EU law. As far as the latter is concerned, their complementary nature emerges directly from Arts. 52(3) and 53 CFR, where the meaning and scope of the rights guaranteed therein are claimed to be the same and understood to offer only a minimum standard of protection.

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[136] Ibid, p. 1414.

[137] The notion of three generations of rights is provided by Karel Vašák, which is probably the most practical, commonly used, and comprehensive categorization of human rights. The first generation regards negative rights and corresponds to civil and political liberties. The second generation presumes a positive action of the state and includes social, economic, and cultural rights. The first two generations of rights have their corresponding covenants signed in 1966: the ICCPR for the first and ICESCR for the second. The sharp distinction between the two covenants lies in the parties' obligations stemming from the respective Article 2.1 for each of them. The third generation of human rights is the most recent and vague in content. Those rights include right to self-determination, economic and social development, healthy environment, natural resources, and participation in cultural heritage. Hence, such rights are positive and collective and demand responsibility, which lies beyond the nation-state.

Article 52(3) CFR does not in itself preclude conflicting decisions between the Luxembourg and Strasbourg judges. It is possible to derogate from the rights contained in the Charter provided the customary principles of legality, necessity and proportionality are respected. Moreover, limitation will be tolerated inasmuch as they "meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".[138] Hence, the CJEU could decide to prioritize a right over another taking into account the specificities of the EU legal order. This hermeneutical operation might very well entail a violation of the Convention, as interpreted by the ECtHR. On the other hand, pursuant to Art. 53 CFR, the ECHR will remain the minimum standard from which the Union cannot depart.

Experience shows that, although improbable, the risk of the two courts offering different interpretations of the ECHR exists, even when the facts of the case at hand are essentially the same(It will be discussed in Chapter 4 specifically). In addition, a risk that is reinforced by the likelihood that the CJEU will become less orientated on the (case-law under the) ECHR as soon as the EU legal order has its own human rights catalogue, for instance, the Charter.

The later one seems to be supported by a research done by De Búrca.[139] An interesting difference is shown between the case-law of the CJEU prior to the Charter acquiring the same legal status as the Treaties on 1 December 2009 in comparison to the case-law subsequent to the Charter acquiring the same legal status as the Treaties. From 1998 to 2005, the ECHR was referred to 7.5 times more often than all other human rights instruments the Luxembourg Court relied on, including the Charter. In the period between December 2009 and December 2012, the Court of Justice made reference to or drew on provisions of the Charter in at least 122 judgments. In 27 of these 122 judgments, the CJEU dealt with arguments based on the Charter substantively. The increased reference to the Charter was detrimental to the importance of the ECHR as a source of inspiration. Out of the 122 cases mentioned above, the CJEU referred to the ECHR in just 20 and the CJEU did not refer at all

[138] Article 52(1) CFR.
[139] Búrca, G. (2013). After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 20, p.168.

to other sources of human rights jurisprudence. One may conclude that the CJEU has become orientated towards the Charter at the expense of the Convention and the case-law of the Strasbourg Court.

Although it is understandable that the CJEU would primarily draw on its 'own' human rights catalogue, it is not conducive for the two main European legal systems developing in harmony.[140]

[140] Lawson, R. (2000). Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, Order of the Court of Justice of 4 February 2000, nyr. Full Court. *Common Market Law Review*, 37(4), pp. 983–990.

Chapter 4 Relationship between the CJEU and ECtHR and Accession to the European Convention on Human Rights

The European Convention on Human Rights (ECHR) establishes not only the world's most successful system of international law for the protection of human rights, but one of the most advanced forms of any kind of international legal process, as well as the most important human rights instrument in Europe.[141] All EU Member States are parties to the ECHR, the EU itself, however, has always remained outside the scope of it, despite various attempts to accede. Accession of the EU (or formerly the EC or EEC) to the ECHR would mean that complaints can be brought directly against the EU before the Strasbourg Court, namely the ECtHR. It had been considered in the past but was never achieved. While the Charter deployed its legal effects immediately upon entry into force of the Lisbon Treaty on 1 December 2009, EU accession is still far from being completed.

Why should the EU make effort to accede to the ECHR? The ECHR has acquired particular significance because of the extent to which it has been cited in the case law of the Court of Justice. The latter has also tended to interpret its provisions in line with the approach adopted by the ECtHR. The result is that the Convention has played a fundamental role not simply in providing a mechanism for protection but also in underscoring the European commitment to human rights and in emphasizing that such commitment, if taken seriously, involves important concessions which states must make to classical notions of national sovereignty. The European Convention system has become more than a legal safety net. It is now a part of the cultural self-definition of European civilization.[142] It is this reason that we return to the long-standing issue of EU accession to the ECHR.

[141] Jorg Polakiewicz, The EU Accession to the European Convention on Human Rights – A Matter of Coherence and Consistency. In Foadi, S. M. & Vickers, L. (eds.) (2015). *Fundamental Rights in the EU: A Matter for Two Courts.* Hart Publishing, p.xvii.
[142] Alston, P. & Weiler, J. (1999). An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights. In P. Alston (Ed.), *The EU and Human Rights* (pp.658-723). Oxford university Press. p.23.

In addition, there are other pros. Firstly, it would minimize the danger of conflicting rulings emanating from the CJEU and the ECtHR, given that they could now rule on virtually identical issues. The problem of conflicting rulings has already arisen in the context of the right to respect for private life under Article 8 and the right to a fair trial under Article 6 of the ECHR respectively. For example, in Case *Hoechst*[143], it concerned a Commission investigation into a company's anti-competitive behavior. The ECJ was asked to apply Article 8 to the company's business premises. It refused to do so, holding that Article 8 applies only to private dwellings, stating that 'the protective scope of that article is concerned with the development of man's personal freedom and not however be extended to business premises.' But in *Niemietz v. Germany*[144], the ECtHR held that to interpret 'private' and 'home' as including certain business premised would be in keeping with the object and purpose of Article 8, which is to protect individuals against arbitrary interference by public authorities[145]. Secondly, EU accession to the ECHR would also alleviate the situation in which individuals may find themselves when faced by possible breaches of the ECHR by EU institutions, given the present situation in which there is no possible remedial action in Strasbourg unless EU law has been implemented by some act on Member State territory.[146] Although there are many benefits of the accession, it was rejected by the Opinion 2/13 in 2014 and has not been passed yet. In this part, I would discuss the history of the accession and the relationship between two courts.

4.1. The European Convention on Human Rights and Its Mode of Operation

The European Convention on Human Rights (ECHR) was signed on 4 November 1950 and came into force on 3 September 1953. Five protocols were adopted later. ECHR represents a collective

[143] Case C-46/87, *Hoechst*, ECLI:EU:C:1989:337.
[144] ECtHR, *Niemietz v Germany*, App. No. 13710/88, 16 December 1992.
[145] Similar conflicts also arose in the context of Article 6 in the *Orkem* and *Funke* cases. See also ECtHR, *Chappell v United Kingdom* App. No. 10461/83, 30 March 1989; Case C-374/87, *Orkem v. Commission*, ECLI:EU:C:1989:387; and ECtHR, *Funke v France*, App. No. 10828/84, 25 February 1993. Indeed in *Orkem*, AG Darmon stressed that the ECJ was not bound by the ECHR.
[146] There is jurisdiction under Article 1 of the ECHR against the Member State. Any complaint directed against the EU in the ECtHR is inadmissible, for example, Case *CFTD V. European Communities* (1978) 13DR 213; also *M. & Co v Germany* (1990) 64 DR 138. Nor will applicants be successful in Strasbourg if they attempt to proceed against all of the EU Member States as jointly liable for EU action.

guarantee at a European level of a number of principles set out in the Universal Declaration of Human Rights, supported by international judicial machinery making decisions which must be represented by contracting States. It has mainly a mission of inquiry and conciliation. If no friendly settlement has been reached on the basis of respect for human rights, the European Commission of Human Rights formulates a legal opinion as to whether there is a breach of the ECHR. The case may then be referred to the European Court of Human Rights (ECtHR) within three months. If the case is not referred to the ECtHR, the Committee of Ministers of the Council of Europe has to take a decision. The ECtHR is competent to take a judicial decision which is binding on the parties to the action on whether in a given case the Convention has or has not been violated by a contracting State. The European Commission of Human Rights or one of the contracting parties may refer a case to the ECtHR, but not an individual applicant. (Article 44 and 48, the ECHR). The ECtHR decides on the case in question by means of a judgement which is final and may award compensation to the injured party. If the case has not been referred to the ECtHR within three months of the submission of the European Commission of Human Rights' Report, the Committee of Ministers of the Council of Europe decides by a two-thirds majority whether there has been a violation of the ECHR; at the same time, it prescribes a period during which the State concerned must take the necessary measures.

4.2. The Road of EU Accession to the European Convention on Human Rights

4.2.1. History of the Accession before the Lisbon Treaty

It is well-known that protection of human rights developed mainly through the case law on general principles of the Court of Justice.[147] The lack of a written catalogue of human rights led to one shortcoming: the impossibility of knowing in advance which are the liberties which may not be

[147] *The Joint Declaration of the European Parliament, the Council and the Commission* of 5 April 1977, OJ C103/1.

infringed by the Union institutions under any circumstances. The protection of human rights in the EU has often been a source of inconsistencies as well.[148] Therefore, on 29 May 1974, the German Federal Constitutional Court made a judgement that, so long as there existed no Community catalogue of fundamental rights corresponding to the German Constitution, it was entitled to decide upon the validity of legal acts of the Community – even where these had previously been declared lawful by the Court of Justice – in the light of the fundamental rights laid down in the German Constitution is certainly incompatible with the principle of exclusive power of review by the Court of Justice and of the unity of Community law, but also demonstrates that at least some of the highest courts in the Member States consider it necessary to bind the Community to a written text.[149] The Italian Constitutional Court did not go quite so far in its Judgement No 183/1973[150] but did none the less suggest a similar concern. After that, there had increasing support for the idea of a written catalogue of human rights for the Union. The Court also use the ECHR indirectly as an indicator of the standard existing at Community level in the field of fundamental rights, though the ECHR represents a minimum standard of the 'general principles of law' protected by the Court. There was, however, the fear that it would bring to light differences between the Member States particularly with regard to economic and social rights, and that agreement would be possible only on the basis of the lowest common denominator.[151] As a way out of these difficulties, the suggestion of accession to the ECHR has been put forward from various sides, and in particular on the occasion of a symposium organized by the European Parliament in October 1978 in Florence.[152] In the Report of 4 February 1976 to the European Parliament, the Commission declared that the Community was obliged to observe the human rights embodied in the ECHR on the basis of the decisions of the Court, but it did not consider it necessary for the Community formally to accede to this Convention.[153] Closer consideration has recently revealed more clearly to the Commission the

[148] Gerven, W. (1996). Towards a Coherent Constitutional System within the European Union. *European Public Law*, 2(1), p. 98.
[149] BVerfGE 37, 271. English version at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=582.
[150] Case 183/73, Judgement of 27 December 1973, Frontini and Associates, Giurisprudenza Costituzionale, 1973, 2406; Foro Italiano, 1974, I, 315; Giurisprudenza Italiana, 1974, I, 1, 865.
[151] *Memorandum on the Accession of the European Communities to the Convention for the Protection of the Human Rights and Fundamental Freedoms*. COM (79) 210 final, 2nd May 1979. Bulletin of the European Communities, Supplement 2/79, para 5, p.8.
[152] Resolution of the European Parliament of 27. 4. 1979; OJC 127 of 21. 5. 1979.
[153] Report of the Commission submitted to the European Parliament and the Council. *The Protection of Fundamental Rights as Community Law is created and developed*. COM (76) 37 final, 4 February 1976. Supplement 5/76. Bulletin of the European Communities, point 28.

disadvantages which arise from the lack of a written catalogue both for the image of the Community in general and for the protection of the rights of the European citizen. As a result, the Commission has reconsidered its position. It has considered the legal and technical problems which would be posed by the accession of the Community to the ECHR and it has come to the conclusion that there are no obstacles to such a step that cannot be overcome. After a thorough examination, the Commission recommended the formal accession of the Community to the ECHR[154] in 1979. The decisive factor in its view is that 'the ECHR and the protection of fundamental rights ensured by the Court of Justice of the European Union essentially have the same aim, namely the protection of a heritage of fundamental and human rights considered inalienable by those European States organized on a democratic basis. The protection of this Western European heritage should ultimately be uniform and accordingly assigned, as regards the Community also, to those bodies set up specifically for this purpose'.[155] Since then, the idea of the accession to the ECHR kept resurfacing on the EU agenda, and at the same time, there was a debate about the idea of drafting an EU Bill of Rights.[156] In 1996, it was temporarily put to rest by Opinion 2/94 in which the CJEU established that the accession would entail EU law changes of 'constitutional significance' and made a claim that the precondition needed an explicit treaty basis.[157]

From the Strasbourg side, it is worth noting that in a declaration of 2000 the European Ministerial Conference on Human rights stressed the need of unity of human rights protection in Europe by pointing out the role of the Council of Europe as the appropriate institution for the achievement of that unity and reaffirmed that the Convention must continue to play an essential role as the constitutional instrument of European Public order on which the democratic stability of Europe depends. Following this development, the Steering Committee for Human Rights[158] created in 2001

[154] *Memorandum on the Accession of the European Communities to the Convention for the Protection of the Human Rights and Fundamental Freedoms*. COM (79) 210 final, 2nd May 1979. Bulletin of the European Communities, Supplement 2/79.
[155] Ibid, para.7. p.8.
[156] For example, McCrudden, The Future of the EU Charter of Fundamental Rights. *Jean Monnet Working Paper 10/01*, pp.2-6; and Alston, P. & Weiler, J. (1999). An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights. In P. Alston (Ed.), *The EU and Human Rights* (pp.658-723). Oxford university Press.
[157] Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140.
[158] CDDH, Steering Committee for Human Rights, composed of representatives from all 47 member states and a number of observers (from other countries, international organizations and non-governmental organizations), which defines policy and co-operation with

a working group to study the legal and technical issues that would have to be addressed by the Council of Europe in the event of an accession. The CDDH adopted in 2002 this report which contained the technical and legal aspects of EU accession to the Convention.

The Action Plan adopted by the Council of Europe during the Warsaw Summit on 17 May 2005 demonstrated its clear interest towards accession.[159] Despite the failure of the Constitutional Treaty in 2005, the new discussions around the future Treaty did not stop the momentum on accession. In a report presented to the Parliamentary Assembly of the Council of Europe in 2006 by Jean-Claude Juncker, concerning the relationship between the ECHR and the EU, it was stated: 'EU accession to the ECHR will not affect the division of powers between the EU and its Member States provided for in the Treaties. Nor will one organization - the European Union – be in any way subordinated to the other – the Council of Europe. Accession will, however, subject the EU institutions to that external monitoring of compliance with fundamental rights which already applies to institutions in the Council's member states. Accession will also allow the EU to become a party in cases directly or indirectly concerned with Community law before the European Court of Human Rights. This will allow it to explain and defend the contested provisions. The binding effects on the EU of any decision by the Court that the ECHR has been violated will also be strengthened, and the execution of judgments by the EU, when this is a matter for it, will be guaranteed. On a technical level, contacts between experts in the two organizations have already answered most of the questions raised concerning the practical implications of EU accession to the ECHR. The methodology adopted for accession must preserve the integrity of the EU legal system.'[160]

Subsequently, the Lisbon Treaty established the basis as Article 6(2) TEU prescribes that the Union 'shall' accede to the ECHR.[161] This latter provision is, within the ECHR system, mirrored by an amendment to Article 59(2) of the ECHR introduced by Protocol No 14 to the ECHR (1 June 2010)

regard to human rights and fundamental freedoms.

[159] CM (2005) 80 final 17 May 2005.

[160] Report by J-C. Juncker, Council of Europe – European Union: "A sole ambition for the European Continent', Doc. 10897, 11 April 2006, p.4.

[161] Article 6(1) and (2) of the TEU (2012) OJ C 326/13.

that states that the European Union may accede to the ECHR.[162]

4.2.2.History of the Accession after the Lisbon Treaty

Article 6 TEU stipulates that the ECHR is one of the sources of human rights within EU law and it, together with common national constitutional traditions inspire the general principles of EU law. The provisions of the ECHR are therefore relevant to EU law in three ways currently: first, the ECHR is one of the main sources of inspiration for the general principles of EU law; secondly, the provisions of the ECHR will eventually become formally binding on the EU following the EU's accession to the ECHR; and thirdly, the provisions of the Charter which are based on provisions of the ECHR are to have the 'same' meaning as the ECHR provisions. By comparison, the provisions of the Charter and the general principles of EU law are currently binding provisions of EU law, enjoying the same status as provisions of the EU Treaties.[163]

Article 6(2) TEU now makes it an obligation for the EU to accede to the ECHR.[164] This does not, however, mean that the accession is by any means a simple affair as the EU's single nature is a *sui generis* international organization rather than a state. The Council adopted on 4 June 2010 a Decision authorizing the European Commission to negotiate an agreement for the EU to accede to the Convention. The decision was based on Article 6 (2) TEU, Article 218 (8) TFEU, Protocol No 8 and Declaration 2 to the Lisbon Treaty. In 2014, however, the Court of Justice of the European Union issued Opinion 2/13, ruling that EU accession to the ECHR on the basis of the current Draft Accession Agreement (DAA) would be incompatible with the EU Treaties and therefore, the accession was prevented. In its opinion, the Court spelt out certain elements that any draft Accession Agreement would have to take into account in order to be compatible with EU law. Recently, the

[162] Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2004, ETS 194.
[163] 'Human Rights in the EU'. In Craig, P. & Búrca, G. (2020). *EU Law: Text, Cases, and Materials* (7th ed.). Oxford University Press. p.389.
[164] Jacobs notes that the fulfilment of this obligation is not solely in the hands of the EU itself, but also its Member States and the Council of Europe non-EU Member States. He suggests that it might have been preferable for Article 6(2) TEU to have been drafted in terms of the EU 'using its best endeavours to accede'. Supra n 56 at 152.

Committee of Ministers of the Council of Europe approved the continuation of negotiations between the EU and the 47 Member States. The first meetings took place on 29 September – 2 October 2020. The European Commission and the Secretary General of the 47-nation Council of Europe issued the statement concerning the resumption of negotiations.[165]

4.3. Reasons of Opinion 2/13 Kicking off the Accession

The CJEU's body of case law, issued on the basis of Article 218(11)[166] of the TFEU, is a source of key relevance to understand the EU accession framework. For the present purposed it therefore suffices to refer to Opinion 1/00. Opinion 1/00 concerned the draft agreement on a European Common Aviation Area, the Court held that the EU had no competence to enter into international agreements that would permit a court other than the Luxembourg court to make binding determinations about the content or validity of EU law. The Court also identified the two key components of the Union's external autonomy claim to be: (i) that the essential character of the powers of the Union and its institutions as laid down in the Treaty must remain unaltered[167] and (ii) that an international agreement must not grant a supervisory body the competence to interpret EU law in an internally binding manner, that is in a manner which binds the EU and its institutions.[168] In the vast majority of the cases in this area, the pivotal point of the Court's assessment has been the international agreements' implications on its own jurisdictional authority and monopoly, and the clear signal sent by the Court is that it is not favorably disposed towards judicial competition.

The DAA is part of a package of documents which, according to the preamble of it, 'are equally

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[165] *The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission*, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1748.
[166] Article 218(11) TFEU stipulates that the Member States, or any of the EU institutions, 'may obtain the opinion of the Court of Justice as to whether an 'international' agreement envisaged is compatible with the Treaties. When the opinion of the Court is in the negative, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.
[167] Opinion pursuant to *Article 300(6) EC-Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, Opinion 1/00, ECLI:EU:C:2002:231, para. 12-13.
[168] Ibid.

necessary for the accession of the EU to the Convention'.[169] After quickly determining that the DAA constitutes a sufficiently comprehensive and precise framework for the case to be declared admissible, the CJEU dismissed the DAA in a remarkably explicit and confrontational manner in Opinion 2/13, which was surprising and controversial. The CJEU expressed 10 objections to the Treaty compliance of the DAA under five main headings: (i) the specific characteristics and the autonomy of EU law; (ii) Article 344 of the TFEU; (iii) the co-respondent mechanism; (iv) the prior involvement procedure and (v) the specific characteristics of EU law as regards judicial review of Common Foreign and Security Policy (CFSP) matters.

For the specific characteristics of EU law and its autonomy, the CJEU listed three ways in which the DAA is likely to adversely affect them. It explained that the accession should 'not be possible for the ECtHR to call into question the Court's finding in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by the fundamental rights of the EU'.[170]

Firstly, in Opinion 2/13, the Court declared that in order not to violate EU law autonomy, the power granted to the EU Member States under Article 53 of the ECHR to exceed the Convention's standard of protection must be 'coordinated' with the requirements imposed by the CJEU under Article 53 of the EUCFR in *Melloni*.[171] In other words, the level of human rights protection offered pursuant to the ECHR by EU Member States must not, when they act within the scope of EU law, be higher than the standard set by the CJEU in respect of the corresponding provisions of the Chapter.[172]

Secondly, the CJEU fiercely defended the principle of mutual trust underlying the legislative measures adopted within the AFSJ such as the Dublin Regulation on intra-EU transfers of asylum

[169] Recital 9 of the DAA; explanatory report, supra n 24 at para 15.
[170] *Opinion 2/13*, EULI:C:2014:2454, para. 185-186.
[171] Case C-399/11, *Stefano Melloni vs Ministerio Fiscal (Melloni)*, Judgement of 26 February 2013, paras. 55-64. In Melloni the CJEU determined that Article 53 of the EUCFR's functioning as a traditional non-regression clause is subject to the caveat that the final interpretative output respects EU law basics, including the supremacy doctrine.
[172] Storgaard, L. (2016). EU Law Autonomy versus European Fundamental Rights Protection on Opinion 2/13 on EU Accession to the ECHR. *Human Rights Law Review*, 16(4), p.493.

seekers[173] and the EAW.[174] Pursuing an harmonized EU law and policy on border control, asylum, immigration, judicial cooperation and police cooperation, this principle is usually justified by a confidence in the Member States' observance of their human rights commitments, including the ECHR.[175] In Opinion 2/13 the CJEU explained that the principle of mutual trust implies that in implementing EU law in this area, a Member State may only in 'exceptional circumstances' check whether another Member State has observed fundamental rights guaranteed by the EU.[176] The risk that the ECtHR may impose an obligation on an EU Member State to conduct a more thorough fundamental rights review in individual cases is, in the view of the CJEU, liable to upset the underlying balance of the Union and undermine EU law autonomy.[177]

Finally, the CJEU found that the negotiators had failed to take due account of Protocol No 16 to the ECHR which was adopted by the Committee of Ministers of the Council of Europe six months after the DAA was concluded.[178] This protocol provides that a court or a tribunal of a Contracting Party can request the ECtHR for an advisory opinion on the interpretation of the ECHR.[179] The CJEU found that there is a risk that such a request relating to an ECHR right corresponding to a right of the Charter could collide with and circumvent the CJEU's competences under the preliminary referrals procedure.[180] By failing to inset into the DAA a provision governing the relationship between the Protocol No 16 procedure and the Article 267 of the TFEU procedure, the autonomy and effectiveness of the latter procedure is therefore jeopardized.[181]

4.4. The *Bosphorus* Ruling Post Accession

[173] Regulation No 604/2013 (2013) OJ L180/13 (Dublin III) which as of 19 July 2013 has replaced Council Regulation (EC) No 343/2003 (2003) OJ L 50/1 (Dublin II). It applies to all EU Member States as well as to Norway, Iceland, Switzerland and Liechtenstein.
[174] *Opinion 2/13*, EULI:C:2014:2454, paras 191-195.
[175] For example, recital 3 of the Dublin III Regulation, supra n 52; the Cardiff European Council Program of measures to implement the principle of mutual recognition of decisions in criminal matters (2001) OJ C 12/10 at 1; Joined Cases C-411/10 and C-193/10 *N.S. and Opinion of AG Trstenjak* delivered on 22 September 2011, paras 75-86.
[176] *Opinion 2/13*, EULI:C:2014:2454, para 192.
[177] Ibid. at para 194.
[178] *Protocol No.16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 214,2013.
[179] Ibid, see Gragl, (2013). (Judical) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No. 16. *European Law Review*, 38, p.229.
[180] Opinion 2/13, EULI:C:2014:2454, para 198.
[181] Ibid. at para 199.

Opinion 2/13 led to a discussion in the literature as to whether the ECtHR would apply the *Bosphorus* doctrine[182] in the post-Opinion era as if nothing had happened. On 23 May 2016, the Grand Chamber of the ECtHR delivered its judgement in the case of *Avotiņš v. Latvia*[183]. It seems to be the ECtHR's first detailed appraisal of the *Bosphorus* presumption after Opinion 2/13. Therefore, this section will mainly discuss what is the *Bosphorus* principle, namely the *Bosphorous* 'presumption of equivalence'? Why does it matter?

In general, it is the leading decision from the perspective of the ECtHR on the relationship between human rights protection afforded by the EU and the ECHR. There may be potential gap under these two legal systems and the size of the gap will become apparent only after accession.[184] When a new Member State joins the EU, many competences exercised by that Member State are transferred to the EU. All measures taken prior to joining the EU, are subject to challenge before the Strasbourg Court; after that State joins the EU, the exercise of those competences by the EU, if exercised directly, may escape such challenge. Therefore, how the Strasbourg Court exercises its jurisdiction in cases brought against the EU is important and it raises the question: will it continue to apply the '*Bosphorus* presumption'?

In the construction of the EU legal system, it has mechanisms to proliferate and increase resource to judicial-type dispute settlement, which ensuring that Member State courts interacted with the CJEU, and could be enlisted as agents for the enforcement of EU law.[185] One of those mechanisms is the preliminary rulings system, which instituted a formal dialogue between the CJEU and national courts. But there has also been a dialogue outside the framework of that system, for example between *the German Bundesverfassungsgericht* (BVerfG) and the CJEU.[186] It could even be argued that at

[182] Case *Bosphorous Hava Yollari Turizm v.Ticaret Anonim Siketi v. Ireland*. App. No. 45036/98, 30 June 2005.
[183] Case *Avotiņš v. Latvia*, App. No. 17502/07, 23 May 2016.
[184] Kosta, V., Skoutaris, N. & Tzevelekos V. P. (eds.) (2014), *The EU Accession to the ECHR.* Hart Publishing. p.2.
[185] Eeckhout, p. Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky? *Jean Monnet Program, Jean Monnet Working Paper 01/05*, p.2.
[186] The first ever reference by the BVerfG is currently pending, see Case C-62/14 Gauweiler and Others, Opinion of Cruz Villalón AG, EU:C:2015:7.

the grand constitutional level the non-formal dialogue has been more influential than the preliminary rulings mechanism. That is certainly the case as regards the EU system of human rights protection, which is the product of the pressure exercised by the German and Italian constitutional courts.[187] It is the BVerfG which has introduced the *Solange* criterion, a Janus-like concept which serves as a gatekeeper for ensuring that, where a legal system opens itself up to another system, its fundamental principles – in particular the protection of human rights – are safeguarded.[188] This is an idea which has caught on. The ECtHR has employed it in its *Bosphorus* decision, which accepted the EU system of fundamental rights protection as equivalent to its own.[189] The CJEU has referred to it in *Kadi I*, even if in the negative sense of not accepting the adequacy of human rights protection by the UN Security Council when listing supporters of terrorism.[190]

The *Bosphorus* case was concerned with the impounding of an aircraft by Ireland on the basis of an obligation in a European Communities regulation, which itself was based on a Resolution by the United Nations Security Council imposing sanctions on former Yugoslavia. Because the aircraft was impounded by Irish authorities on Irish territory, the ECtHR had no difficulty finding that the applicant company was within Ireland's jurisdiction according to Article 1 of the ECHR so that Ireland could be held responsible for impounding the aircraft and any violation of the ECHR that arose therefrom, regardless of whether the act or omission was a consequence of domestic law or of the necessity to comply with international legal obligations. The ECtHR then famously held that the Contracting Parties to the ECHR are not prohibited from transferring sovereign power to an international organization such as the EU, even if the organization was not itself a contracting party under the ECHR. But they remained responsible for all acts and omissions of their organs 'regardless whether the act or omission was consequence of domestic law or of the necessity to comply with international legal obligations'.[191] The ECtHR went on to state that as long as the international

[187] Búrca, G. (2011). The Evolution of EU Human Rights Law. In P. Craig, & G. de Búrca (Eds.). *The Evolution of EU Law* (2nd ed.). Oxford University Press, p.465.
[188] BVerfG, Solange I [1974] CMLR 540 and Wünsche Handelsgesellschaft (Solange II) [1987] CMLR 225.
[189] Piet Eeckhout, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky? J*ean Monnet Program, Jean Monnet Working Paper 01/05*, p.2.
[190] Joined Cases C-402 & 415/05P, *Kadi & AI Barakaat International Foundation v. Council and Commission* (2008), ECLI:EU:C:2008:461, pp.319-325.
[191] ECtHR, *Bosphorous Hava Yollari Turizm v.Ticaret Anonim Siketi v. Ireland*, App. No. 45036/98, 30 June 2005, para.153.

organization 'is considered to protect fundamental rights… in a manner which can be considered at least equivalent to that for which the Convention provides' the ECtHR will presume that a State has acted in compliance with the Convention, where the state had no discretion in implementing the legal obligations flowing from its membership of the organization.[192] That presumption can, however, be rebutted where the protection in the particular case is regarded as 'manifestly deficient'.[193] The ECtHR thus introduced a two-stage test: at the first stage the ECtHR established the existence of a *Presumption* in which, so long as an organization 'is considered to protect fundamental rights… in a manner which can be considered at least equivalent to that for which the Convention provides' , then the ECtHR will presume that a State has acted in compliance with the Convention, where the state had no discretion in implementing the legal obligations flowing from its membership of the organization. The Strasbourg Court also made it clear that 'equivalent' meant comparable, not identical and that the finding of equivalence might alter if there was a relevant change in fundamental rights' protection by the international organization.[194] At the second stage the ECtHR examines whether that presumption has been rebutted in the concrete case before it because of a *manifest deficit* in the protection of human rights.

In the *Bosphorus* case, the ECtHR considered the human rights protection afforded by the European Union to be equivalent to that of the Convention, so the presumption applied. However, the protection in it was not found to have been manifestly deficient.[195] Therefore, the ECtHR held that the interference with the applicant's property rights protected by Article 1 of Protocol No. 1 of the ECHR was justified.

After finding that the alleged violation was not the result of an exercise of discretion by the domestic authorities, the ECtHR went on to examine the substantive requirement. It attached considerable importance to the (then not yet binding) Charter and the CJEU's case law, which included extensive

[192] Ibid. para. 155-156.
[193] Ibid. para.156.
[194] Ibid. para. 155.
[195] Ibid. para.159-166.

references to the ECHR and ECtHR jurisprudence.[196] The EU, furthermore, fulfilled the procedural requirement because individuals are protected by actions brought before the CJEU by the EU states and institutions. Additionally, individuals can bring a domestic case to determine whether a state violated EU law, in which case the CJEU exercises supervision through the preliminary reference procedure.[197] If, conversely, a domestic court does not refer a question to the CJEU, even though the latter has not yet examined the right in issue, the domestic court rules without the 'full potential' of the supervisory machinery having been deployed.[198] In this circumstance, the presumption does not apply.[199] Having a supervisory machinery does, therefore, not suffice; it must also be deployed.

In general terms, the application of the *Borphorus* doctrine means that the ECtHR dose not scrutinize EU law and that it does not place itself above the CJEU or take over the CJEU's role of being arbiter of the validity of EU law.[200] The ECtHR thus shows respect for the CJEU and the autonomy of the EU legal system and prevents a conflict with Luxembourg.[201] To find that the presumption applies, the ECtHR has relied heavily on the CJEU's fundamental rights case law and the role of that court in supervising fundamental rights in the EU.[202] Rather than being suggestive of conflict, the doctrine seems to be 'suggestive of a desired relationship of comity, or even cooperation'.[203]

Opinion 2/13 may, however, have troubled that relationship and, it raised the question that whether the ECtHR would continue to apply the doctrine to the EU. In recent few rulings in which the *Bosphorus* principle plays a role, the answer is yes but it is hard to definite whether the doctrine is in a stricter fashion than it had before.[204] There are four cases which could be listed to make a

[196] Ibid. para.159.
[197] Ibid. para.161-164; ECtHR, *Michaud v France,* App. No. 12323/11, 6 December 2012, Merits and Just satisfaction, 6 December 2012 at para 111.
[198] ECtHR, *Michaud*, supra n 30 at para 115.
[199] Ibid, para 115.
[200] Costello. (2006). The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe. *Human Rights Law Review*, 6(1), p.103.
[201] Lock, The European Court of Justice and International Courts (2015), supra n 19 at 180, 218.
[202] Costello,Ibid, supra n 8 at 102. See for a highly critical discussion of the judgment and doctrine: Besselink, 'The European Union and the European Convention on Human Rights after the Lisbon Treaty: From Bosphorus Sovereign Immunity to Full Scrutiny?' in Sabitha (ed.), State Immunity: A Politico-Legal Study (2009).
[203] Douglass-Scott, Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, Application No. 45036/98, Judgement of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R.1. *Common Market Law Review*, 43, p. 243; See also Lock, supra n 19 at 177–8, 180, 218.
[204] The doctrine can also be applied to other international organizations than the EU (cases in which the Court applied the doctrine to other

comparison. In the decisions in *Mayenne and Biret*, the ECtHR presumed equivalent protection mainly with reference to *Bosphorus*.[205] In the decision in *Kokkelvisserij*, it held that the sole fact that the applicant could not respond to the AG's opinion in preliminary ruling proceedings did not make the protection afforded manifestly deficient, meaning that the presumption was not rebutted.[206] Lastly, in the decision in *Povse*, the ECtHR assumed there was no discretion because the CJEU had ruled so. Furthermore, the ECtHR did not consider it problematic that the CJEU had not dealt with the alleged violation in a preliminary ruling, because the CJEU had stipulated that it was for domestic courts to protect the rights of individuals in the relevant context and because the applicants had not invoked their rights before domestic courts even though they could have done so.[207] These decisions affirm that the ECtHR approves of how the CJEU discharges its task, avoids stepping in the CJEU's shoes and defers to the CJEU's findings.

In *Avotiņš v. Latvia*, the ECtHR takes two conditions for applying the *Bosphorus* doctrine. As for the first condition, the ECtHR concluded that the domestic courts had no discretion to refuse to recognize the Cypriot judgment under Article 34(2) of the Brussels I Regulation. The ECtHR reached this conclusion because a 'fairly extensive body of [CJEU] case-law' on the provision clarified that it 'did not confer any discretion on the court from which the declaration of enforceability was sought'.[208] As regards the second condition for applying, the Grand Chamber of the ECtHR did not mention the requirement that the EU should provide comparable substantive fundamental rights guarantees; it only discussed the procedural requirement and specifically whether the EU's supervisory mechanism had been fully deployed.[209] It held that this condition should not be applied with 'excessive formalism' and stipulated that 'it would serve no useful purpose to make the implementation of the Bosphorus presumption subject to a requirement for the

international organizations were not taken into consideration in this thesis), see Ryngaert, 'Oscillating between Embracing and Avoiding Bosphorus: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the European Union' (2014) European Law Review 176.

[205] ECtHR, *Coope´rative des agriculteurs de Mayenne v France* App. No. 16931/04, 10 October 2006; *Biret v States*, App. No. 13762/04, 9 November 2008.

[206] ECtHR, *Kokkelvisserij v The Netherlands*, App. No. 13645/05, 20 January 2009.

[207] ECtHR, *Povse v Austria*, App. No. 3890/11, 18 June 2013, at paras 82, 84–8.

[208] ECtHR, *Avotins v Latvia*, App. No. 17502/07, 25 February 2014, para 106.

[209] *Avotins*, ibid. at para 108. The ECtHR probably does not mention the substantive requirement because it discusses the content of the matter when contemplating whether the presumption of equivalent protection can be rebutted

domestic court to request a ruling from the CJEU in all cases without expection, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights'.[210] The actual test that the ECtHR subsequently conducted was rather formalistic and superficial. The ECtHR considered that the applicant had paid insufficient attention to Article 34(2) of the Brussels I Regulation and its compatibility with fundamental rights and had refrained from requesting the Latvian Supreme Court to make a preliminary reference to the CJEU on this matter. The ECtHR thus concluded that the absence of a reference by the Latvian court was 'not a decisive factor' and held that the *Bosphorus* presumption applied.

It could make several observations from this case. Firstly, it is the first time that the ECtHR explicitly acknowledged that the procedural criterion for the application of the doctrine should not be applied stringently and it aligns its approach more closely to the case law of the CJEU. Secondly, the ECtHR leaves the substantive question about whether the Supreme Court had an obligation to submit a reference for a preliminary ruling of its own motion to the CJEU. Thirdly, and most importantly, the ECtHR put much emphasis on the question whether there had been a request for a preliminary reference by one of the parties. A request from one of the parties is, however, unimportant from the perspective of EU law, because the CJEU famously ruled in CILFIT that Article 267 TFEU 'does not constitute a means of redress available to the parties to a case'.[211] The reliance by the ECtHR seems run counter to the way in which the CJEU construes the preliminary reference procedure. In addition, the ECtHR clarifies that the autonomy of EU law is not unlimited and it can, therefore be concluded that the ECtHR seems to apply the *Bosphorus* doctrine somewhat more strictly than before Opinion 2/13 in comparison with the handful of judgements in which it dealt with the doctrine previously. It also needs to discuss the relationship between the two Courts further.

[210] *Avotins*, ibid. at para 109.
[211] Case C-283/81 *CILFIT*, ECLI:EU:C:1982:335, para. 9.

4.5. Autonomous Interpretation Post Accession

A legal order chooses to become a party to an international treaty that entails some subjection to the norms applied therein does not thereby entail the conclusion that the legal order ceases to be autonomous. All national legal orders are party, albeit to varying degrees, to different international treaty obligations, such as the ECHR. Participation in such regimes does not undermine the features that constitute a separate legal system, although it does require the Member State to take some actions to adhere to the general principles of *pacta sunt servanda*, which ensure that international obligations are obliged to.

In the famous case *Van Gend en Loos*, there is an argument of another concept of autonomy. It is the idea that a particular legal order has features that may be regarded as distinctive from other legal orders, with the consequence that it should be interpreted differently in certain respects.

In *Van Gend en Loos*, the Court was asked whether Article 12 EEC could give rise to individual rights, which could be invoked before national courts to challenge national action, which was said to be in breach of EEC law. The Member States argued that the EEC Treaty was no different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of those who had created the Treaty. The Court's decision, however, was in essence to distance the EEC Treaty from other international treaties and thereby justify the conclusion that the former could in principle have direct effect, even if this was a ratify in international treaties more generally. The CJEU pointed to the fact that the EEC Treaty was designed to establish a common market, which was of direct concern to interested parties, and that this carried the implication that the Treaty was more than an agreement creating mutual obligations between the contracting states. It was from these foundations that the Court drew the conclusion that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also

their nationals. Thus, the message was that even if direct effect was a ratify in international treaty law, it was warranted in the EEC, because it constituted a new legal order, as judged by its spirit, general scheme and wording.

In the relationship between the CJEU and the ECtHR no questions arise as to the degree of integration of ECHR norms into EU law. Indeed, the CJEU has for a long time used the Convention as one of the main sources for determining what human rights form part of the general principles of EU law. it has attempted to respect the ECHR, as well as the ECtHR case law.[212] The EU Charter of Fundamental Rights effectively incorporates the Convention norms into EU law and contains strict instructions for EU law to respect the Convention.[213] So the Convention rights are already fully integrated in EU law, albeit not in a formal sense. However, as the CJEU points out and accepts in Opinion 2/13, EU accession to the ECHR would have the effect of formally incorporating the Convention into the EU institutions, including the Court, to the decisions and judgements of the ECtHR, as well as autonomous interpretation.[214]

4.5.1.Relationship between the CJEU and the ECtHR

4.5.1.1. Mutual Influence of the CJEU and the ECtHR before the Lisbon Treaty

The Court has characterized the ECHR as a "constitutional instrument of European public order in the field of human rights."[215], and in the early 1950s, according to the explanation of Gráinne de Búrca, there were clear attempts to ensure a formal connection between the EU and the ECHR. In

[212] Scott, S.D. (2006). A Tale of Two Courts: Luxembourg, Strasbourg, and the Growing European Human Rights Acquis. C*ommon Law Review*, 43, n 9
[213] Article 52(3), the Charter.
[214] Craig, P. (2013). EU Accession to the ECHR: Competence, Procedure and Substance. Fordham International Law Journal, 36(5), p.1145.
[215] Federico, G. (ed.). (2011). *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*. Springer Press. p.17.

particular, the Treaty establishing the European Political Community (EPC), drafted in 1952-53 as a followed-up of the ESCS, provided that the ECHR would become an integral part of the basic law of the EPC and set up a mechanism by which the CJEU could relinquish jurisdiction to the ECtHR on matters of principle concerning the ECHR.[216] From the late 1950s until the early 1990s, the EU and the ECHR developed largely along separate lines and the possibility of reviewing the action of the EEC (and ECSC and Euratom) for compatibility with the ECHR was explicitly excluded. After the failure of the grand project of political integration enshrined in the EPC, the EU Member States consciously decided to pursue a form of economic integration in which human rights were left to the side. According to the drafters of the EEC and Euratom Treaties, the EU would no longer 'have a substantial role in promoting and protecting human rights, and it would not work along-side the CoE and the ECHR system for that purpose'.[217] Thus, the EEC Treaty did not contain a reference to human rights and no formal institutional link was in place to connect the EU to the ECHR. This opened a period during which relations between the EU and the ECHR were rather weak.

This does not mean that this time was characterized by total indifference between the EEC and the ECHR. As early as in the late 1960s, in fact, the CJEU affirmed that fundamental rights formed an integral part of the general principles of law which the CJEU protected.[218] In the *Rutili* decision of 1975, the CJEU clarified that the ECHR represented a source of special importance, also in light of the fact that all ECC Member States where parties to the ECHR and subject to its supervisory machinery.[219] As a matter of fact, for almost 40 years the ECtHR 'never had the opportunity to rule either on cases against the Community or on cases against Member States concerning Community acts, because all such cases were declared inadmissible by the European Commission on Human Rights (ECommHR) for the reason of not being a party to the Convention.[220]

[216] Búrca, G. (2011). The Road Not Taken: The European Union as a Global Human Rights Actor. *American Journal of International Law,* 105, p.649.
[217] Ibid, p.665.
[218] Case C-29/69, Stauder, ECLI:EU:C:1969:52; and Case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.
[219] Case C-36/75, *Rutili*, ECLI:EU:C:1975:137.
[220] Schermers, H. (1999). Case Note: *Matthews*. *Common Law Review*, 36, p.674.

During the 1990s, the dynamics of the relationship between the ECHR and the EU accelerated dramatically and the possibility of a review by the ECtHR of the acts of the EU became a highly likely scenario.[221] The early signs of a new relationship between the organs of the ECHR and the EU emerged in the 1990 *M & Co. v Germany* decision of the ECommHR.[222] In this case, the ECommHR, while declaring inadmissible a complaint against an EU Member State for acts it had carried out in execution of its EEC obligations, held that the ECHR 'does not prohibit a Member State from transferring powers to international organizations'[223] but made it clear that 'a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred power'.[224] According to the ECommHR, 'the transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection'.[225] As has been argued, this statement suggested that the inadmissibility of the application was not *ratione personae* but rather *ratione materiae*, that is , due to the equivalence of the systems for the protection of fundamental rights in the ECHR and in the EU framework.

However, Opinion 2/94, the CJEU's first judicial decision on the accession of the EU to the ECHR made the relationship between the CJEU and the ECtHR tenser. The ECtHR produced a critical reaction to this judgement. A first 'warning shot' against the CJEU was delivered by the ECtHR in the *Cantoni* case.[226] In this case, the ECtHR had no hesitation in reviewing the complaint of a French citizen against a state law which simply implemented domestically an EC directive. And in the 1999 *Matthews* case,[227] the ECtHR elaborated in a more comprehensive way for the review of the action of the EU by the ECHR bodies. This case involved a challenge of the UK application of EU rules concerning the election of representatives of the European Parliament by direct universal

[221] Weiler, J. (1995). Fundamental Rights and Fundamental Boundaries. In N. Neuwahl, & A. Rosas (Eds.), *The European Union and Human Rights* (pp.40-65). Kluwer.
[222] ECtHR, *M & Co. v Germany*, App. No.13258/87, 9 February 1990.
[223] Ibid at para. 8.
[224] Ibid.
[225] Ibid.
[226] ECtHR, *Cantoni v France*, App. No. 17862/91, 11 November 1996.
[227] ECtHR, *Matthews v UK*, App. No. 24833/94, 18 February 1999. In this case, the application was raised by a British citizen residing in Gibraltar, he was concerned compatibility with the right to vote (protected by Article 3 Protocol 1 to the ECHR) of the 1976 EC Act establishing the direct election of the European Parliament, but he was excluded from the suffrage in Gibraltar.

suffrage (the 1976 Act). In an annex to the 1976 Act,[228] it was stipulated that albeit Gibraltar was a territory dependent of the United Kingdom the said Act did not apply to it. The British citizen, who lived in Gibraltar, wanted to register as a voter for the European Parliament elections. However, the application was turned down by the Electoral Registration Officer on the grounds of the prohibition provided in the 1976 Act. Consequently, British citizens residing in Gibraltar were not entitled to vote in election for the European Parliament. One of the main questions at stake was to determine if the absence of elections to the European Parliament in Gibraltar constituted an infringement of Article 3 of Protocol No.1. This query led to another series of questions, such as the question of the applicability of this Protocol to the European Parliament. In other words, can the European Parliament be regarded as a "legislative body"? Can the UK be held responsible under the auspices of the Convention for the absence of elections in Gibraltar?

The case reached the ECtHR. The ECtHR made it clear that 'acts of the EC as such cannot be challenged before the ECtHR because the EC is not a Contracting Party'.[229] It also underlined how the contested act '[could] not be challenged before the European Court of Justice for the very reason that it [was] not a "normal" act of the Community, but [it was] a treaty within the Community legal order'[230] and therefore undertook a detailed examination of the merit of the complaint, reaching the conclusion that in the circumstances of the present case, the very essence of the applicant's right to vote was denied.[231] This decision represented a fundamental step towards the idea that (some of) the legal acts of the EC/EU could be subject to review for compatibility with the ECHR.[232] It reflected 'the opinion that rules of Community Law should be in accordance with the European Convention on Human Rights…[and]that it belongs to the task of the Human Rights Court to supervise the proper application of the Convention also by the Community',[233] if EC Member States invoke the responsibilities.

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[228] Annex II states that the UK will apply the provisions of this act only in respect of the United Kingdom.
[229] Matthews, Ibid. para. 32.
[230] Matthews, Ibid. para. 33.
[231] Matthews, Ibid. para. 65.
[232] Canor, I. (2000). Primus Inter Pares: Who is the Ultimate Guardian of Fundamental Rights in Europe? *European Union Law Review*, 25, p.4
[233] Schermers, H. (1999). Case Note: *Matthews*. *Common Law Review*, 36, p.681.

After this case, it was witnessed that there was an acceleration of applications to the ECHR directed against the then 15 Member States. In *Guérin* case[234], the complaint argued that two letters of the European Commission in the course of a competition investigation infringed Articles 6 and 13 of the ECHR regarding the right to an effective judicial protection. The complainant was notably holding that these acts should mention the delays, possible remedies and relevant jurisdictions. The ECtHR rejected the complaint due to the fact that the allegations did not correspond to the scope *ratione materiae* of the Convention. However, the ECtHR noted that the application was directed against the 15 contracting member states and not the European Union. The ECtHR pointed out that the question of the compatibility *ratione personae* would have been a necessary question to examine in the case of a potential finding of admissibility *ratione materiae*.

In another case, *Senator lines v. The Member States of the European Union*, a company called Senator Lines challenged before the General Court a Commission decision imposing a fine of EUR 13.75 million for violations of EU competition rules. The General Court upheld the Commission's decision, the applicant then brought an appeal against the judgement. After that, it had no obligation to pay the fine, but was obliged to provide an adequate bank guarantee in order to cover it. Senator Lines argued that it could not supply the guarantee due to a difficult financial situation and a risk of bankruptcy. Furthermore, it maintained the rights to presumption of innocence, to judicial resource and fair hearing had been infringed.[235] On 21 July 1999, the General Court rejected the application for interim relief. Senator Lines then lodged an appeal against the order of the General Court before the CJEU, reiterating the contentions relative to the fundamental rights infringements. The Court rejected the appeal considering that the existence or imminence of serious and irreparable damage had not been established.[236] Parallel proceedings were brought to the ECtHR. The memorial addressed to the Court declared that the application should be declared admissible on the following

[234] *Société Guérin Automobiles v. 15 Member States of the European Union*, ECtHR decision on admissibility of 4 July 2000; *Bernard Connolly v. 15 EU Member States,* ECtHR judgment of 9 December 2008; *Etablissement Biret v. 15 Member States*, ECtHR judgment of 9 December 2008

[235] Memorial to the Court, 21 HRLJ, Nos. 1-3, 2000, p.113.

[236] Case C-364/99 P (R). *DSR-Senator Lines v. Commission*, ECLI:EU:C:1999:609.

grounds:[237] 1) The ECtHR is competent to rule on the compatibility of the decisions of the European Community institutions with the ECHR. 2) The 15 member states are individually and collectively responsible for the acts of Community institutions. 3) The admissibility criteria set out in Article 35 of the ECHR (exhaustion of domestic remedies) were met by the applicant.

The applicant's memorial reiterated the above-mentioned *Matthews* case and held that since all the member states are parties to the ECHR, they must be held responsible even where power and competencies have been transferred to the European Communities. The fact that the EU in itself is not a party to the ECHR does not mean that an application can be held inadmissible. The ECtHR, in *Matthews*, stated that the transfer of competencies to an international organization is not incompatible with the ECHR, provided that such an organization has an adequate and equivalent protection, but also observes and controls the fundamental rights. The main difference between *Senator Lines* and *Matthews* was that in the latter there was no remedy possible under EC law to challenge the 1976 Act. In the former case, EC law provides for remedies, which the applicant had exhausted. However, it is worth remarking that the president of the ECtHR cancelled the hearing fixed for 22 October 2003.[238] The decision could have been taken in the light of the decision of the General Court setting aside a fine imposed by the Commission on the company. It may be said that the acceleration of the direct complaints before the ECtHR reflected a certain malaise. Alternatively, no magic solution exists for precluding the conflicts of interpretation and jurisdiction, which is a threat to legal certainty.

The above cases and *Bosphorus* are of crucial importance in order to understand the nature and scope of the legal interaction. These cases reflect the gap which has been created due to the Union not being party to the ECHR and demonstrate the importance of the EU being able to participate at all levels at the ECtHR in Strasbourg, which can only be achieved through accession.[239]

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[237] Memorial to the Court, 21 HRLJ, Nos, 1-3, 2000, p.116.
[238] Press release issued by the Registrar concerning App. No. 56672/00, 16 October 2003.
[239] Groussot, X., & Stavefeldt, E. (2015). Accession of the EU to the ECHR: A Legally Complex Situation. In J. Nergelius, & E. Kristroffersson (Eds.), *Human Rights in Contemporary European Law* (pp. 357-376). Hart Publishing, p.13.

4.5.1.2. Mutual Influence of the CJEU and the ECtHR after the Lisbon Treaty

EU accession to the ECHR is an attempt to manage heteronomy and to remedy the present gap in the coordination of the two European supranational systems of human rights protection and to ensure external control in relation to the respect for fundamental rights within the EU's legal order, the ultimate goal being a more coherent system of protection of fundamental rights in Europe. Despite different jurisdictions, differing interpretative methodologies and decisional autonomy, and linked to that, relationship with national courts, both the Luxembourg and Strasbourg Courts, therefore, are showing a willingness to ensure further protection of human rights as an attempt to tackle the legislative deadlock in the EU.

The question remains whether the objective of improving human rights protection in the European legal space, that is progress, bodes well with the other equally important aim of avoiding open conflicts between the case law of the ECtHR and the CJEU on human rights issues, that is coherence, or whether the two objectives are conflicting ones and thus the achievement of one goes to the detriment of the other.[240]

While Article 52(3) of the Charter regulates the relationship between the two European human rights systems by trying to the Charter the meaning and scope of those rights that correspond to the rights of the Convention, no reference to the case law of the ECtHR is to be found in the Charter. However, the Explanations to Article 52(3) of the Charter state that 'paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECtHR' and that 'the scope of the guaranteed rights are determined also by the case-law of the CJEU and the ECtHR'.[241] Besides, Article 52(7)

[240] Heyning, C. (2012). Coherence and Progress in the European Protection of Human Rights: friends or feuds? Paper presented at the Reserach Workshop, *A Europe of Rights: the EU and the ECHR*, School of Law, University of Surrey.
[241] Explanations Relating to the Charter of Fundamental Rights (2007) OJ C 303/17.

of the Charter states that the Explanations shall begiven due regard by the two European courts.

So far, the Luxembourg and Strasbourg Courts have resolved their collisions and conflicts in an informal setting of cross-fertilisation and mutual acknowledgment[242] as confirmed by the Joint Communication of the Presidents *Costa* and *Skouris*.[243] This arrangement has been defined as a kind of 'common supranational diplomacy'.[244] However, it nonetheless maintains the autonomy and primacy of the CJEU within the EU system. Indeed, in *Kamberaj*,[245] the CJEU underlined the distinctiveness of the two European human rights regimes by stating that Article 6(3) TEU does not lead to a progressive incorporation of the ECHR into EU law or that the principles of primacy and direct effect extend to the ECHR by virtue of this provision. Once again, the Luxembourg Court seems driven by a concern to preserve the autonomy of the EU legal order.[246] In the context of asylum cases, we have seen that the CJEU has at times closely followed the jurisprudential approach of the ECtHR such as, for example in *N.S.* or, alternatively, has opted for avoiding any explicit consideration of the Strasbourg Court's case law, as in Samba Diouf. How do we reconcile then these two contrasting objectives pursuant to the methodological change demanded by the Lisbon Treaty?[247] As aptly noted by *Iglesias Sánchez*,[248]the latter's variable impact will depend on 'the existence of already well-established case-law, the complexity of the issue or the readiness and clarity of EU rules.' Ultimately, therefore, it could be possible to conclude that the question posed earlier of whether the aim of ensuring consistency may conflict with that of progress is an overrated problem. Indeed, there are remaining gaps and inconsistencies in the Union's human rights system despite the renewed emphasis and centrality given to human rights by the Lisbon Treaty, which are

[242] Iglesias Sánchez, n. 9; Scheeck, L. (2005). The relationship between the European courts and integration through human rights. *Heidelberg Journal of International Law*, 65, pp. 837–885.
[243] Joint Communication from Presidents Costa and Skouris of 24 January 2011. Available at http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf.
[244] Scheeck, L. (2009). The diplomacy of European judicial networks in times of constitutional crisis. In F. Snyder and I. Maher (Eds.), *The evolution of the European Courts: change and continuity*. Brussels: Bruylant, pp.17–36.
[245] Case C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, paras. 62–63.
[246] The autonomy of the Union's legal system has been most famously emphasized in the *Kadi* ruling; see Joined Cases C-402/05 P and C-415/05 *P Kadi and Al Barakaat*, n. 49.
[247] On the methodological change demanded by Lisbon, Weiß, W. (2011). Human rights in the EU: rethinking the role of the European Convention of Human Rights after Lisbon. *European Constitutional Law Review*, 7, p. 80.
[248] Iglesias Sánchez, n. 9, 1604; Scheeck, L. (2005). The relationship between the European courts and integration through human rights. *Heidelberg Journal of International Law*, 65, pp. 837–885.

yet to be addressed and arguably would require further Treaty amendments.

Later, there are two implied points could be seen in Opinion 2/13: the ECtHR clarifies that the autonomy of EU law is not unlimited and it can, therefore, be concluded that the ECtHR seems to apply the Bosphorus doctrine somewhat more strictly than before Opinion 2/13 in comparison with the handful of judgements in which it dealt with the doctrine previously. Furthermore, it seems that the ECtHR wanted to show its dissatisfaction with Opinion 2/13, but without entering into open warfare. A similar conclusion can be drawn from the way in which Luxembourg has dealt with the ECHR and the case law of the ECtHR. Also, here one can discern a mixed bag with judgements that show a willingness on the part of the CJEU to autonomously interpret the Charter without regard to Strasbourg. A good illustration of it is the Grand Chamber judgement in J.N. which is about the detention of asylum seekers in the context of their deportation for reasons of public order and security. In J.N., the CJEU added that the review of the validity of EU secondary law 'must be undertaken solely in the light of the fundamental rights guaranteed by the Charter'.[249] The CJEU went two steps further than its previous fundamental rights case law. First, by using the language of obligation ('must') and secondly, by referring to the Charter in general. The CJEU also tried to minimize the effects of Article 52(3) of the Charter. It held for the first time, on the basis of the Explanations to the Charter, that consistency between the Charter and the ECHR should only be arrived at 'without thereby adversely affecting the autonomy of Union law' and its own.[250] On the other side, judgements show considerable respect and comity towards the ECtHR. For example, in regard of cases like *Aranyosi*,[251] the ECtHR have stressed that the CJEU has given national courts room to deviate from the automatic character required by mutual trust in order to protect human rights in criminal law and the EAW. One potential explanation for the ECtHR's reticence is that references to those human rights considerations might give the impression that there was discretion for national courts.

[249] Case C-601/15, *J.N. v Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2016:84, at para 46.
[250] See subsequently also C-294/16, *JZ v Prokuratura Rejonowa Łódź*, at para 50.
[251] Jointed Case C-404/15 and 659/15 PPU, *Aranyosi and Căldăraru*, 5 April 2016.

Conclusion

The European Communities Treaties are a consequence of World War II, as social development could not be achieved without political stabilization and economic cooperation. Human rights protection was not mentioned in the founding treaties, and they were originally neither the focus of the CJEU nor the EU. In a series of human rights cases which came before the CJEU in the 1950s and 1960s, the Court resisted attempts by litigants.

The European Union's supranational character was promptly recognized by the CJEU in *Van Gen den Loos*[252] and *Costa v E.N.E.L.*[253] The insistence of the German courts that EU law respect human rights and their veiled threat to ignore the primacy of EU law if it did not, was the original motivation for the protection of human rights in the EU. It began in *Stauder*[254] and *Internationale Handelsgesellschaft*[255] when the CJEU judges stated that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice". EU human rights are created by judge-made law. The CJEU developed its human rights concepts in its jurisprudence gradually. Later the CJEU was criticized for "vampirising" the ECHR.[256] This does not seem convincing when we look at the cross fertilization of courts and inspiration that ECtHR received in recent years from CJEU. Basing the arguments on common constitutional traditions, the first general reference to the ECHR was in *Rutili*[257]. With *Stauder*, *Nold*,[258] *Internationale Handelsgesellschaf* and *Rutili*, the judges created a basis for human rights protection. The basis of human rights protection, given in these cases, was developed further and created the EU's human rights standards. This development reached its peak with the ratification of the Charter on Fundamental Rights.

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252 Case C-26/62, *Van Gend en Loos,* ECLI:EU:C:1963:1.
253 Case C-6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66.
254 Case C-29/69, *Stauder v City of Ulm*, ECLI:EU:C:1969:57.
255 Case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.
256 Scheeck, L. (2005). The relationship between the European courts and integration through human rights. *Heidelberg Journal of International Law*, 65, p. 871.
257 Case C-36/75, *Rutili*, ECLI:EU:C:1975:137.
258 Case C-4/73, *Nold v Commission*, ECLI:EU:C:1974:51.

The Lisbon Treaty which came into force on 1 December 2009, has introduced significant changes to human rights protection in the EU. The Charter attained legally binding force with primary law status and there is an obligation for the EU to accede to the ECHR.

Under the Lisbon Treaty, there is no general competence defined in the Treaties. Though Article 352 TFEU and Article 114 TFEU may be regarded as an appropriate basis to allow for the adoption of certain general measures to protect human rights, they are also contributed to the expansion of EU competences. Except for Treaty provisions, the Court's interpretation of human rights may also expand EU competences. In *Jaeger*[259], although it did not broaden Treaty competences, it did enlarge the meaning of the legislation and extend the duties upon the Member States. They are also used to seek a benign interpretation to resist the circumstances in which EU legislation is struck down.[260] It is another matter when it comes to review of behavior by the EU institutions, though the Court is more cautious about reviewing EU legislative acts. *Kadi*[261] is the only one instance that a Council Regulation being struck down recently.

Though the EU does not have a general competence to protect human rights, there are limited and specific competences in this field. Article 3(5) and 21(1) TEU provide a legal basis for the EU to protect human rights for the external perspective. As for the internal policies, Article 16(2), Article 19 and Article 157(3) TFEU relate to certain human rights issues. They can also be of great importance because their subject matters related to multiple policy fields of relevance for the EU, such as labour law and free movement law. Besides, the Charter could also provide a basis for the EU to take actions.

References to the Charter by the CJEU have increased substantially after the Lisbon Treaty, however, it was not used to its full potential by the enforcement chain and awareness remains low. The main

[259] Case C-151/02, *Landeshauptstadt Keil v. Jaeger*, ECLI:EU:C:2003:437.
[260] Case C-465-00, *Rechnungshof v Osterreichischer Rundfunk and others*, ECLI:EU:C:2003:294.
[261] Joined Cases C-402 & 415/05P, *Kadi & AI Barakaat International Foundation v. Council and Commission* (2008), ECLI:EU:C:2008:461.

problems related to the Charter is most likely related to its normative structure. Firstly, the scope of application of the Charter is limited in a significant way. Article 51 of the Charter governs the applicability of provisions, states that EU human rights apply at national level only where Member States are 'implementing Union law'. In the landmark case of *Wachauf*[262], the Court ruled that Member States are bound to respect EU fundamental rights when implementing EU law. It then, in *ERT*[263], went further by holding that it could review a national rule which may restrict a fundamental freedom which is related to public order, public security or public health and such a rule must be interpreted in the light of the general principles of law. In *Melloni*[264], the Court turned the wording of Article 53 CFR completely on its head, practically positioning the Charter as a maximum rather than a minimum standard of human rights protection. The development in case law has witnessed an expansion in the CJEU's approach in the case *Åkerberg Fransson*[265], to equate "implementing Union law" to "acting within its scope". In these two cases, the EU indeed strengthened the legal certainty of the Charter, but details of the general theory should be modified in further cases. Secondly, the Charter excludes private groups or individuals as addressees. Some cases looked like that the horizontal character is not possible. However, some fundamental freedoms (which are the core elements of EU policy) have been given direct effect in the EU level and consequently, in the Member States. These cases[266], all decided in 2018, concern horizontal direct effect of Article 21 of the Charter, more particularly the prohibition of discrimination on grounds of religion, Article 47, the right to effective judicial protection, and Article 31(2), the right to paid annual leave. However, the central requirement in the case law on the horizontal direct effect of the Charter is that the provision concerned must be sufficient in itself to confer a right, no further elaboration or specification being necessary for its application. Its concrete application raises a number of unexplored questions, as well as the distinction of rights and principles. Thirdly, the Charter discriminate between rights by introducing a distinction between "rights" and "principles".

[262] Case C-5/88, *Wachauf*, ECLI:EU:C:1989:321.
[263] Case C-260/89, *ERT*, ECLI:EU:C:1991:254.
[264] Case C-399/11, *Stefano Melloni vs Ministerio Fiscal (Melloni)*, Judgement of 26 February 2013.
[265] Case C-617/10, *Åklagaren vs Åkerberg Fransson*, ECLI:EU:C:2013:105.
[266] Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257; Case C-68/17, *IR v JQ*, 2018; Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, 2019.

According to Article 52(5) of the CFR, those rights that are "principles" are deemed incapable of creating any direct enforceable rights while it does not clearly distinguish which provisions are to be interpreted as "rights" and which as "principles".

As for the EU accession to the ECHR, opinion 2/13 rejected the DAA in 2014 and the accession was prevented. For the specific characteristics of EU law and its autonomy, the CJEU listed three ways in which the DAA is likely to adversely affect them. Firstly, the level of human rights protection offered pursuant to the ECHR by the Member States must not, when they act within the scope of EU law, be higher than the standard set by the CJEU in respect of the corresponding provisions of the Chapter. Secondly, the ECtHR may impose an obligation on an EU Member State to conduct a more thorough human rights review in individual cases, and under the principle of mutual trust, it may undermine EU law autonomy. Thirdly, the DAA did not take account of Protocol No 16 to the ECHR and there is a risk that the autonomy and effectiveness of EU law is jeopardized.

This opinion also led to a discussion that whether the ECtHR would apply the *Bosphorus* Ruling. In recent case *Avotiņš v. Latvia*[267], the ECtHR takes two conditions for applying it. As for the first condition, the ECtHR concluded that the domestic courts had no discretion to refuse to recognize the Cypriot judgment under Article 34(2) of the Brussels I Regulation. As for the second condition, the ECtHR only mentioned the procedural requirement and specifically whether the EU's supervisory mechanism had been fully developed. It seems like that the ECtHR put much emphasis on the question whether there had been a request for a preliminary reference by one of the parties. In addition, the ECtHR clarifies that the autonomy of EU law is not unlimited and it can, therefore be concluded that the ECtHR seems to apply the *Bosphorus* doctrine somewhat more strictly than before Opinion 2/13 in comparison with the handful of judgements in which it dealt with the doctrine previously. It also needs to discuss the relationship between the two Courts further.

The CJEU has for a long time used the ECHR as one of the main sources for human rights protection.

[267] ECtHR, *Avotins v Latvia*, App. No. 17502/07, 25 February 2014.

The Charter effectively incorporates the Convention norms into EU law and contains strict instructions for EU law to respect the Convention. However, there is gap which has been created due to the Union not being party to the ECHR. After the Lisbon Treaty, Article 52(3) of the Charter and its Explanations ensure the consistency between the Charter and the ECHR. The Luxembourg and Strasbourg Courts have resolved their collisions and conflicts in an informal setting of cross-fertilisation and mutual acknowledgment. However, there are remaining gaps and inconsistencies in the Union's human rights system despite the renewed emphasis and centrality given to human rights by the Lisbon Treaty, which are yet to be addressed and arguably would require further Treaty amendments.

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