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The European Union and Human Rights after the Treaty of Lisbon

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Abstract

This article considers the state of human rights protection in the European Union (EU) after the Treaty of Lisbon. The Lisbon Treaty introduced significant changes to human rights protection in the EU, the most significant of which lie in the amendments to Article 6 of the Treaty on European Union. These provide that the EU Charter of Fundamental Rights is now legally binding, having the same status as primary EU law, and that the EU 'shall accede' to the European Convention on Human Rights (ECHR). In the two years since the Lisbon Treaty came into force, the Charter has been referred to on many occasions by the European Court of Justice, and now operates as the primary source of human rights in the EU. This article examines the import of this case law, some of it ground-breaking and controversial, as well how the higher profile for human rights under the Charter is likely to change the nature of the EU's relationship with the ECHR. The article also examines the complex procedure for the EU's accession to the ECHR, which is now underway, highlighting particularly significant aspects of this. The article concludes with some general reflections about the status of human rights protection in the EU, suggesting that this has become one of the most significant areas of EU law which has had, and continues to have, a crucial impact on the EU's relationships with its Member States, the EU and international law.

Keywords: human rights – European Union – Treaty of Lisbon – accession – European Convention on Human Rights – Charter of Fundamental Rights of the European Union

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1. Introduction

What sort of role should human rights play in the European Union (EU)? While no organisation would ever openly reject or ignore the crucial role of human rights in the contemporary consciousness (not least the EU, with its roots in post-war attempts to forge peace among nations previously guilty of the greatest atrocities), the EU's overwhelming associations with free trade, the single market and regulation might suggest that it cannot be primarily defined as a human rights organisation. Its centre of gravity appears to lie elsewhere. How best then to ensure respect for human rights in the EU, at a time when economic crisis or terrorist threat are sometimes offered as reasons for their diminution, or side-lining? Events such as the extraordinary rendition of terrorist suspects by the US via EU Member State territory,[1] or mass relocation from France of Roma in 2010,[2] illustrate the ongoing need for vigilance.

Now, with the Lisbon Treaty in force, one can begin to assess its achievements in the fundamental rights field. On the face of it, the Lisbon Treaty, which came into force on 1 December 2009, has introduced, or enhanced, provisions that should strengthen the protection of fundamental rights in the EU. The Charter of Fundamental Rights of the European Union (CFR or 'the Charter') has at last acquired binding force; provision is made for the EU to accede to the European Convention on Human Rights; and the European Court of Justice (CJEU) is to have greater powers of judicial review in the field of police and judicial cooperation in criminal law[3]—an area of obvious relevance to human rights. The EU has also now appointed a Commissioner with new and special responsibilities for fundamental rights. This appointee, Viviane Reding, has already claimed the EU as 'an area of fundamental rights'.[4] Furthermore, 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'. However, it is the transformation of the Charter into a

1 For which now see the application lodged against Poland, *Al Nashiri v Poland*, under the European Convention of Human Rights on 6 May 2011, in which it is alleged that Poland hosted a secret CIA prison at a military intelligence training base in Stare Kiejkuty where the applicant was held incommunicado and tortured.

2 See Dawson and Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma' (2011) 48 *Common Market Law Review* 751.

3 Weak mechanisms operated in the past under the 3rd Pillar with diminished control by the CJEU, and the former Article 35(2) TEU exclusion of matters of 'national security' from the scope of those cases which could be heard by the CJEU.

4 For example, see Press Release, European Parliament, Summary of Hearing of Viviane Reding—Justice, Fundamental Rights and Citizenship, 11 January 2010, available at: http://www.europarl.europa.eu/pdfs/news/expert/infopress/20100111IPR67125/20100111IPR67125.en.pdf [last accessed 17 October 2011]. See also European Commission, 'Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights', COM (2009) 205 final.

legally binding document with primary law status, and the extension of the Court's jurisdiction in areas such as asylum, immigration and criminal matters, which will (and indeed have already) in particular increase the Court's profile in the fundamental rights field, and this article will pay especial attention to the role of the Court and to its recent jurisprudence.

Yet, the first point of note is that human rights protection in contemporary Europe is complicated and not always satisfactory. There are at least three[5] possible judicial avenues for European residents to assert their human rights. First, they may apply in their national courts, for enforcement of their rights as protected by national law, for example, under the UK Human Rights Act or the German Basic Law. Secondly, if this fails, once they have exhausted domestic remedies, they may proceed in the European Court of Human Rights (ECtHR) in Strasbourg. Thirdly, if the matter is one that falls within the competence of the EU, they may have a claim under EU law, either in their national courts, in the CJEU, or both.[6]

So, from this perspective it might appear that there exists not a lack, but possibly a *surfeit* of human rights protection within the European legal space. Is the additional, EU level, necessary? Does it add any value to existing fundamental rights protection? A pertinent question might be whether fundamental rights are indeed 'lost in complexity' in the EU.[7]

2. Fundamental Rights in the EU—The Growth of an Idea

In spite of Article 2 of the TEU's majestic claim that the EU is 'founded' on the value of respect for human rights, human rights were not a pressing concern in the early EEC (as it then was). As Smismans[8] states, to suppose otherwise is to engage in mythology. The reasons for this lack of attention are embedded in the EU's history, and are similar to the explanation as to why there was no Bill of Rights in the original draft of the American Constitution, when it was thought that the Federal Government would be insufficiently powerful to require a bulwark against its powers in the form of guaranteed rights. The EEC Treaty started out as an *economic* treaty, of limited ambitions, with the aim of creating a Common Market. There were no sections on fundamental rights because the EEC founders did not think this relevant to a treaty with

5 I write 'at least' because sometimes international law may offer further avenues.

6 That is, in the instance of a claim commenced in the national courts, in which a reference is made to the CJEU in Luxembourg for a preliminary ruling, and then completed in the national courts.

7 See van der Heyning, *Fundamental Rights in the EU: Lost in Complexity?* (PhD awarded by the University of Antwerp Law School 2011).

8 Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 *Journal of Common Market Studies* 45.

mainly economic aspirations. The European Convention on Human Rights and Fundamental Freedoms (ECHR)[9] was also, of course, already in existence, and probably thought sufficient to operate as a 'Bill of Rights' for Europe. However, the EU has gone beyond being a Common Market, encompassing a much greater range of activities, particularly in the Area of Freedom, Security and Justice,[10] which includes visas, asylum and criminal law matters with obvious relevance for human rights. Cases have been heard by the CJEU concerning, for example, freedom of expression, the right to equal treatment of transsexuals, and rights of suspects within the field of international terrorism.[11] The growth of EU competence then, requires at the very least that the EU ensure that its actions comply with human rights, and that mechanisms exist for legal redress where it has not. Whether the EU should go further than this, and forge a more active human rights role for itself in the 21st century, notwithstanding that attempts to create a broader, more constitutional identity for itself failed with the defunct European Constitution, is a different matter, and will be considered in greater detail later in this article.

However, in spite of the EU's increased competences, it was only in December 2000 that the EU proclaimed its own (then non-binding) Charter of Fundamental Rights, and only with the coming into force of the Treaty of Lisbon on 1 December 2009 that this Charter eventually attained legally binding force. Therefore, for most of its history, the EU possessed no charter of rights. However, this does not mean that fundamental rights were ignored. For over 40 years, fundamental rights have had a recognised status in the EU as 'general principles of law',[12] a status confirmed by successive versions of Article 6 of the TEU.[13] And there is of course Article 2 of the TEU's assertion of the foundation of the EU on respect for human rights, which is backed up by a sanctions procedure in Article 7 of the TEU, whereby a Member State's rights may be suspended if it engages in 'a serious and persistent breach . . . of values mentioned in Article 2'.[14] There are also specific treaty items which qualify as fundamental rights, such as Article 157 of the Treaty on the Functioning of the European Union (TFEU) (the right to equal pay) and Article 19 of the TFEU, which provides the EU with a legal base to enact

9 1950, 5 ETS.

10 For which see now Title V TFEU.

11 T-163/96 *Connolly v Commission* [1999] ECR II-463; Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143: and Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council* [2008] ECR I-6351.

12 Article 6(3) of the TEU [2008] OJ C 115/15 states: 'The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to member states as general principles of Community law.'

13 Starting with the insertion of Article F(2) by the Treaty of Maastricht in 1992, which had near identical wording to Article 6(3).

14 A provision which has not been used to date, in spite of rights violating events such as the extraordinary rendition of terrorist suspects in certain EU Member States.

legislation on non-discrimination.[15] Some fundamental rights exist as *secondary* legislation rather than treaty provisions, of which the Equal Treatment directives are good examples.[16]

However, it must be stressed that protection of fundamental rights in the EU has evolved in an *ad hoc*, confusing, incremental way and that there exists no clear, conceptual underpinning to the rights protected under EU law. Hence the importance of the Charter being able to function as a 'road map'[17] and identifier of EU rights—a function which it should be able to perform more effectively since it became binding. Given the absence of any EU Bill of Rights until 2000, protection of fundamental rights for the first 40 years of European integration developed through the case law of CJEU.[18] This has resulted in a system in which *litigation* has played a very large role in the development, profile and enforcement of fundamental rights.[19] The story of how fundamental rights protection developed in the EU is already well known, and space prevents its discussion here, but the late Judge Mancini, of the CJEU, writing in 1989, summed up the position the Luxembourg Court had achieved in relation to fundamental 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] Ever since then, the EU has been prone to the claim that it has used fundamental rights as a means to strengthen the autonomy, supremacy and legitimacy of EU law, rather than for their own sakes,[21] a critique which continues to this day.[22]

15 The TFEU [2008] OJ C 115/47 was formerly known as the EC Treaty, the Treaty of Rome or the Treaty establishing the European Community. Its present name is a result of amendments by the Treaty of Lisbon. Article 19 TFEU reads: '[T]he Council . . . may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

16 See, for example, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2 December 2000, OJ L 303.

17 Cf the discussion on the EU Charter of Fundamental Rights below.

18 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, in which the Court held that respect 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 Member States, must be ensured within the framework of the structure and objectives of the Community.

19 In some of its earliest case law, the Court of Justice stated that 'the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted to . . . the Commission and Member States . . .': see Case 16/62 *Van Gend en Loos* [1963] ECR 1.

20 Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595.

21 See, for example, Coppell and O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669 at 689.

22 See below, for criticism of the *Kadi* case, with its emphasis on the EU as an autonomous legal order, necessitating an independent review by the CJEU of fundamental rights compliance of international law (in this case United Nations Security Council measures) in the context of the freezing of the assets of terrorist suspects.

Therefore, the changes brought about by the Lisbon Treaty to EU fundamental rights protection will need to be assessed according to these two critiques—of incoherence, and of manipulation of rights for other purposes.

Article 6 of the TEU, as amended by the Lisbon Treaty, now has a tripartite structure and reads as follows:

> *Article 6* (ex Article 6 TEU)
>
> (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 competences of the Union as defined in the Treaties.
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> (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(1) therefore deals with the Charter, Article 6(2) with EU accession to the ECHR and Article 6(3) with fundamental rights as general principles of law. The remainder of this article will deal with these three topics in that order.

3. The EU Charter of Fundamental Rights

On 7 December 2000, the EU Charter of Fundamental Rights[23] was proclaimed in Nice by the respective presidents of the EU institutions. It was not a high-profile occasion, overshadowed by the wrangling over the forthcoming Treaty of Nice. The Charter's apparent lack of importance seemed to be underlined by the fact that EU institutional presidents were not even given the time to complete their speeches. For the first nine years of its existence its lack of

23 For the text of the Charter, see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF [last accessed 17 October 2011].

binding legal effect undermined it, as did the fact that, for its first six years, the CJEU refused to cite it as an authority in its judgements, preferring instead to refer to the ECHR.[24]

The Treaty of Lisbon amended Article 6 of the TEU to provide for recognition of the Charter, and while the text of the Charter has not been incorporated into the Treaty by Lisbon, Article 6 now provides that it will have the same legal value as EU treaties and is legally binding. Back in 2000, then President of the European Commission, Romano Prodi, introducing the Charter, stated that the objective of the Charter is, 'to make more visible and explicit to EU citizens the fundamental rights they already enjoy at European level'. Thus it brings together rights scattered throughout many different sources such as the ECHR, and United Nations (UN) and International Labour Organisation (ILO) agreements. The Charter has 50 rights, which are divided under six headings, namely: Human Dignity, Freedoms, Equality, Solidarity, Citizens Rights, Justice. 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. These rights will be particularly crucial given the EU's now greater competence in the criminal justice field, which has rapidly evolved since the Treaty of Maastricht in 1992. Additionally, the Charter comprises economic and social rights and principles, such as the right to fair and just working conditions, as well as rights that were not envisaged at the time of the ECHR in 1950, such as rights concerning cloning and data protection. The Charter also contains some 'third generation' rights of global concern, such as the right to a clean environment. Therefore, the Charter is innovative in containing, in the same instrument, both economic and social rights along with the more traditional civil and political rights.[25] In this way the Charter presents in sharpest relief the *indivisibility* of human rights. Indeed the deployment of the term 'fundamental' rights in its title, like that of 'Grundrechte' in the German Basic law, indicates the broad scope of its rights.[26]

The Charter is accompanied by official explanations,[27] which, although they do not have the status of law, according to Article 52(7) of the Charter, 'shall be given due regard by the Courts of the Union and the Member States' when interpreting the Charter. It must be said that these explanations are

24 The first case in which the CJEU made direct reference to the Charter was Case C-540/03 *Parliament v Council* [2006] I-5769, at para 38.

25 Cf African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217.

26 The CJEU has been using the term 'fundamental' rights since at least *Internationale Handelsgesellschaft* in 1970. However, it should be highlighted that the word 'fundamental' is not limited to 'human' rights, which means, at the very least, that companies may claim them too.

27 Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

rather uninformative and say nothing about the scope and content of each right, but merely set out its source.

However, while the Charter presents human rights as indivisible, several of its provisions limit them in other ways. First, the Charter does discriminate between rights by introducing an unfortunate distinction between rights and principles. 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 cognisable only in the interpretation of such acts and in the ruling on their legality.

In this way, 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, Articles 23, 33 and 34. So the distinction remains rather unclear.

Secondly, a general limitations clause set out in Article 52 applies to all of the rights in the Charter, which reads as follows:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Most Bills of Rights include some sort of limitations. However, unlike the ECHR, the CFR's general limitations clause applies to all rights, rendering none of them absolute, unlike the prohibition on torture, inhuman and degrading treatment in Article 3 of the ECHR.

Further, the Charter is not a freestanding bill of rights, but only applies within the field of EU law. Article 51(1) states: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law . . .' So its scope is not universal. However, the official explanations seem to go further than Article 51(1) by stating instead that the

Charter is 'only binding on Member States when they act in the scope of Union law'[28] which goes beyond 'implementing' to include derogations from EU law by Member States and is a potentially very broad sphere of application.[29] What the Charter does not do, nor was intended to do, however, is to provide any new freestanding rights.

A. The UK and Polish Protocol to the Charter

Aside from conferring binding status on the Charter, one of the most controversial developments concerning the CFR introduced by the Treaty of Lisbon was the Polish Protocol,[30] which reads as follows.

> Article 1
>
> (1) The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

28 See also Court of Justice case law, which uses the same expression in C-260/89 *ERT* [1991] ECR I-2927 5.

29 Notably, 51(1) of the Charter's German version uses the term '*Durchführung*', that is, 'execution' of European Union law by the Member States. In *R (Zagorski) v Secretary of State for Business, Innovation & Skills* [2010] EWHC 3110 (Admin), at paras 66–71, the English High Court held that a Member State derogating from EU law was acting within the scope of EU law for the purposes of the Charter. In Case C-411/10 *N.S.* [2011] ECR 000 (for further commentary on which see below) Advocate General Trstenck held that, in deciding an asylum application on whether an applicant should be returned to Greece under EU Regulation 343/2003, the EU was implementing EU law and fell within the scope of the Charter.

30 Protocol No 30 to the Lisbon Treaty on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [2010] OJ C 83/313. Indeed, Poland's participation in this Protocol seems somewhat ironic, given Poland's reference to solidarity, elsewhere, in Declaration No 62 by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom [2010] OJ C 83/358:

> Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.

See also Declaration 53 to the Lisbon Treaty of the Czech Republic on the Charter of Fundamental Rights of the European Union, which contains similar terms to the UK and Polish Protocol. Also Protocol (No 35): On Article 40.3.3 of the Constitution of Ireland is also of relevance to the Charter, in attempting to ensure that Ireland's protection of the right to life of the unborn child is not disturbed by the Charter: 'Nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.'

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

Article 2

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

The UK Government originally opposed the Charter being given legal status. In 2001, then UK Europe Minister, Keith Vaz, stated: 'This is not a litigator's Charter. Nobody can sue on it. Nobody will be able to litigate on it', suggesting that the Charter would be about as persuasive an authority as the *Beano* or *The Sun*.[31] Given the Charter's now binding status, these comments look premature at the very least. However, during the negotiations for the Lisbon Treaty, the British, along with the Polish Government,[32] obtained the agreement of EU Member States to the Protocol, which seeks to function as a legally binding text preventing the Charter from being interpreted in a way that creates new rights to those already provided for in British or Polish law. It would appear that Article 1(2) of the Protocol, which provides that nothing in Title IV of the Charter creates justiciable rights, was intended to function as an opt-out. Title IV concerns solidarity rights, such as the right of collective action and the right to health care, and the Protocol is intended to ensure that these rights are not directly enforceable in these Member States. However, most of the rights in Title IV are already recognised as general principles of EU law under Article 6(3) of the TEU,[33] which means that they can be enforced in national courts without invoking the Charter. As a result, it is doubtful to what extent Article 1(2) is able to function as constituting a substantive opt-out. It seemed that the UK Government had been willing to concede as much in 2010 when the *Saeedi* case,[34] which involved the common EU Asylum regime, was litigated in the UK, and in which it had to be determined whether certain rights in the Charter could be directly enforced in the UK, preventing the return of an Afghan asylum seeker to Greece, their first point

31 *The Times*, 14 October 2000.
32 Poland had its own suspicions of the Charter, fearing it would threaten Poland's prohibition on abortion.
33 For a discussion of fundamental rights as general principles of law, see below, Section 3.
34 *R (Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705.

of entry into the EU.[35] The English Court of Appeal referred this case to the CJEU to clarify whether Protocol No 30 could be regarded as a general opt-out from the Charter for the UK and Poland. In her Opinion in 2011, in *N.S.* and *M.E. and Others*,[36] AG Trstenjak held that question could be easily answered in the negative by an analysis of the wording of Protocol No 30, its recitals, and the academic commentary. Therefore the Protocol appears to lack any impact as an effective opt-out.

B. The Charter and the European Convention on Human Rights

The Charter has borrowed about half of its rights from the ECHR. One of its general provisions, Article 52(3), states that, to the extent that rights in the Charter are borrowed from the Convention, they are to be given the same meaning and content as they have in the European Convention.[37] Article 52(3) of the CFR does not make express reference to the ECtHR's case law. Only the ECHR itself is mentioned. However, in *J.McB. v L.E.* the CJEU held in that where Charter rights are the same as those in the ECHR the Court of Justice should follow the clear and consistent jurisprudence of the ECtHR.[38] So the Charter itself establishes a strong link between its own fundamental rights and the Convention, and Article 52(3) aims to maintain consistency between these two sets of rights. This provides a reason for the Court of Justice, when applying the Charter, to maintain contact with the Strasbourg Court and its jurisprudence.[39] Therefore, Article 52(3) provides for the ECHR as a minimum standard of human rights in the EU and also leads the EU to be indirectly bound by the ECHR, as it must always be followed when restricting fundamental rights in the EU to ensure the EU maintains the same level of protection. Indeed, it has been suggested that Article 52(3) 'materially

35 The applicant's claim was that detention conditions for refugees in Greece would infringe his fundamental rights. However, the EU asylum regime required determination of applications at first point of entry into the EU, thus apparently raising a conflict between fundamental rights and EU asylum law. See further Clayton, 'Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*' (2001) 4 *Human Rights Law Review* 758.

36 The formal name of the *Saeedi* case in the CJEU. AG Trstenjak also held that the obligation to interpret the Asylum Regulation 343/2003 in a manner consistent with fundamental rights precluded the operation of a conclusive presumption by the UK of fundamental rights compliance by Greece—Joined Cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR 000.

37 Article 52(3) states: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

38 Case C-400/10 PPU *JMcB v LE* [2010] ECR 000.

39 Also, notably, Declaration on Article 6(2) of the Treaty on European Union [2010] OJ C 83/337 provides: '[T]he Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.'

incorporates the core norms of the Convention into EU law', and that Article 52(3) gives the relevant provisions of the ECHR the same status as EU primary law since the Charter has the same legal value as the treaties, and should also share the qualities of direct effect and primacy regarding domestic law.[40]

Yet which rights of the ECHR are at issue here? The wording of the Charter is neither identical to that of the ECHR, nor are rights protected therein identical. For example, Article 6 of the CFR—the right to liberty and security of the person—is expressed in one clause, whereas in Article 5 of the ECHR it is expressed in five. However, a list of corresponding rights can be found in the official explanations[41] which, as already stated, according to Article 52(7) of the Charter, 'shall be given due regard by the Courts of the Union and the Member States' when interpreting the Charter. The CJEU has applied the Charter more frequently since it became binding with the Lisbon Treaty. In a *Joint Communication from Presidents Costa and Skouris*[42] in early 2011, it was observed that the Charter has rapidly become of primary importance in the recent case-law of the CJEU. The *Communication* noted that, in the period from 1 December 2009 to early 2011, the Charter had been cited in some 30 judgments. Thus, the Charter has now become the departure point text for the CJEU's assessment of fundamental rights. For example, in 2010, in *Schecke and Eifert*[43] the CJEU assessed the validity of the regulations at issue in the light of the provisions of the Charter,[44] stressing the equivalence of protection of the Charter and the European Convention under Article 52(3) of the CFR.

On balance, it seems beneficial that the EU has its own Charter of Rights—both for reasons of clarity and transparency. But a Charter of Rights is also important on a symbolic level—an EU Charter could conceivably develop as much significance as the US Bill of Rights or the European Convention, both beacons of individual protection. It might mark the EU's coming of age as a polity.

However, if the EU is to raise its fundamental rights profile in this way, a critical question is how, if at all, this would impact on the Strasbourg system

40 Weiss, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon' (2011) 7 *European Constitutional Law Review* 64 and 71. However, the claim for direct effect of CFR provisions is questionable, at least in the case of some of its provisions, given the lack of drafting of some of its articles in terms of principles rather than rights.

41 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

42 Delegations from the ECtHR and the CJEU met on 17 January 2011—see 'Joint Communication from Presidents Costa and Skouris', Press Release No 75 issued by the Registrar of the ECtHR on 27 January 2011, available at: http://www.echr.coe.int [last accessed 17 October 2011].

43 Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert* [2010] ECR 000.

44 And in which, notably, the CJEU did not discuss the temporal applicability of the Charter, despite the fact that the disputes at issue had occurred before the entry into force of the Treaty of Lisbon.

under the EU? In this context, it is worth noting that EU law, where possible,[45] may present advantages to human rights litigants over actions in Strasbourg. Unlike under the ECHR, where the applicant must exhaust all domestic remedies in order to get a hearing in Strasbourg, applicants may get a ruling from Luxembourg by way of a preliminary reference from a domestic court. Domestic courts also have the power to set aside national measures which conflict with EU human rights law—which provides a much faster remedy than a Strasbourg lawsuit and subsequent enforcement by the Council of Europe Committee of Ministers.[46] Thus, even those member States in which the status of precedents from the European Court of Human Rights is still unclear can be forced to apply it, giving the Convention added strength through EU law. For example, section 2 of the UK Human Rights Act only requires the UK courts to 'take into account' Strasbourg jurisprudence, denying it any status as binding precedent. In Germany, the Constitutional Court has not required the strict application of ECHR case law, even in cases directly brought against Germany.[47] Therefore, ECHR rights, and ECtHR jurisprudence, could be strengthened through their enforcement as fundamental EU rights in the Member States of the EU. To the extent that rights are enforced through the EU, this could result in a harmonisation of the ECHR in the EU, rather than the more differentiated impact and dissemination, particularly due to the application of its margin of appreciation doctrine, it has to date received through the Strasbourg institutions. Further, the Strasbourg Court has also clearly recognised the growing competence of the EU in the human rights field, citing Luxembourg jurisprudence in its judgments.[48]

Furthermore, as EU competence has increased, so has its human rights competence,[49] with a possible corresponding decline in Strasbourg jurisdiction

45 The Charter of Fundamental Rights does not apply universally but only in relation to EU law. Article 51(1) of the Charter reads: '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.'

46 Further, EU law can also prove more effective than national human rights litigation, where, in the UK, for example, section 4 of the Human Rights Act provides the English courts with no power to set aside primary domestic law incompatible with human rights but only to issue a 'declaration of incompatibility' which must then be addressed by Parliament. The ECtHR has stated that declarations of incompatibility in section 4 of the HRA do not satisfy the requirement of an effective remedy in Article 13 of the ECHR in *Burden & Burden v United Kingdom* 47 EHRR 38.

47 See, on this, *Decision of the German Federal Constitutional Court* 2 BvR 1481/04 of 14 October 2004; and *Görgülü v Germany* Application No 74969/01, Merits, 26 February 2004.

48 For example, *Scoppolla v Italy (No 2)* Application No 10249/03, Merits, 17 September 2009, in which the ECtHR cited Cases C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, as authority for the retroactive application of the more lenient penalty under Article 7 of the ECHR.

49 See, for example, A-G Sharpston's call for a 'seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence'—apparently even in cases in which EU competence has not even been exercised—in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-nyr, discussed below.

which is restricted to Member States' domestic law—an ever dwindling field. The Charter contains many more rights, and a far more up to date catalogue, than the ECHR. Further, according to Article 52(3) of the CFR, the Charter may offer more extensive protection than the ECHR, so litigants may prefer to argue their rights as EU rights, rather than ECHR rights. There is also the possibility of applying fundamental rights as general principles of law under Article 6 of the TEU, in new and potentially radical ways, as the principle of non-discrimination on grounds of age, applied in the *Mangold* and *Kücükdeveci* cases,[50] illustrates. If EU competences continue to grow, the ECHR could be rendered redundant at least as far as its EU members are concerned.[51] Strasbourg is currently overloaded, and suffering from a very large backlog of applications, particularly from the newer Member States—another motivation for taking the Luxembourg route. Therefore, all sorts of possible consequences for the two institutions follow from the now binding nature of the Charter, introduced by the Lisbon Treaty. Whether these developments are desirable is another matter which must be assessed in the light of the quality of fundamental rights protection which the EU, and in particular the CJEU, is able to offer—an issue which will be taken up later in this article.

4. Accession of the EU to the ECHR

The growth of the EU into a feasible polity in its own right, with a substantial fundamental rights jurisprudence, raises the issue of external accountability. The most obvious source of this would be the ECHR. Accession of the EU (or formerly the EC or EEC) to the ECHR had been considered in the past, but was never achieved.[52] There are many perceived advantages in EU accession to the ECHR. A formal linking of the EU and ECHR could be seen as underlining EU concern with human rights, and also eliminate charges of double standards, based on the criticism that whereas the EU requires all of its Member States to be parties of the ECHR, it is not itself a party. It would also minimise the danger of conflicting rulings emanating from the CJEU,

50 Case C-144/04 *Mangold v Helm* [2005] ECR I-09981; and Case C-555/07 *Seda Kücükdeveci* [2010] ECR nyr, discussed below.

51 For the suggestion that EU states should withdraw from the ECHR, see Toth, 'The European Union and Human Rights: The Way Forward' (1997) 34 *Common Market Law Review* 491. See also Williams, 'Burying, not praising the European Convention on Human Rights: A Provocation', in Shaw, Tierney and Walker (eds), *Europe's Constitutional Mosaic* (Oxford: Hart, 2011).

52 For example, the European Commission issued a Memorandum in April 1979 on 'The Communities becoming a signatory of the European Convention on Human Rights' as an initial step towards consolidating human rights protection in the Community: see *Bulletin of the European Communities*, supplement 2/79.

and 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.[53] 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.[54] Accession would therefore satisfy a perceived need for external judicial supervision of EU institutions, especially given the large growth of EU agencies and competencies in, for example, the field of criminal law.

However, for some time, a specific obstacle to EU accession was the Luxembourg Court's *Opinion 2/94*[55] on whether the then Community had the power to accede to the European Convention. In that *Opinion* the ECJ held that, as EC law then stood, the Community had no competence to accede to the ECHR as there was no adequate legal basis in the Treaty for accession, rejecting the argument that Article 308 of the EC (then the governing provision) might serve as a base. Therefore, accession could only be brought about by way of Treaty amendment. Article 6(2) of the TEU, as amended, has

53 In Case 46/87 *Hoechst* [1989] ECR 2859, which concerned a Commission investigation into a company's anti-competitive behaviour, 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* 16 EHRR 97, the ECHR held that to interpret 'private' and 'home' as including certain business premises would be in keeping with the object and purpose of Article 8, which is to protect individuals' against arbitrary interference by public authorities. Similar conflicts also arose in the context of Article 6 in the *Orkem* and *Funke* cases. See also *Chappell v United Kingdom* 12 EHRR 1; Case 374/87 *Orkem v Commission* [1989] ECR 3283; and *Funke v France* A 256-A (1993); 16 EHRR 297. Indeed in *Orkem,* AG Darmon stressed that the ECJ was not bound by the ECHR.

54 And therefore there is jurisdiction under Article 1 of the ECHR against the Member State. Any complaint directed against the EU in the ECtHR is inadmissible, as established, for example, by the *CFTD* case: *CFTD v European Communities* (1978) 13 DR 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. An illustration is provided by the *Connolly* case, in which the applicant's complaint in Strasbourg was that, in an earlier action in the Luxembourg court, his request to submit written observations to the Advocate General had been denied. He therefore proceeded against all the (then) Member States to Strasbourg claiming a violation of Article 6 of the ECHR. However, the Strasbourg court rejected his complaint as inadmissible, holding that, EU Member States could only be held responsible where there was an act of some sort on their territory: see *Connolly v 15 Member States of the European Union* Application No 73274/01, Admissibility, 9 December 2008. Other than this, EU action would not be attributed to the Member States and did thus not fall into their jurisdiction under Article 1 of the ECHR.

55 *Opinion 2/94* [1996] ECR I-1759 taken under the then Article 308(6) of the EC Treaty.

removed that obstacle,[56] providing a legal basis for EU accession, reading as follows:

> 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.'

It was also necessary for the ECHR to be amended, and a new Article 59(2), introduced by Protocol No 14 to the ECHR, makes provision for the accession of the EU.[57] With accession, the EU would become the 48th party to the ECHR. The EU would be represented with its own judge at the European Court of Human Rights in Strasbourg, and would have to comply with judgments of this court in cases brought against it.

A. Procedure

Therefore, Article 6(2) of the TEU now makes it an obligation for the EU to accede to the ECHR.[58] This does not, however, mean that accession is by any means a simple affair. Given the particular characteristics of the EU, and its singular nature as a *sui generis* international organisation rather than a state, accession will prove challenging. The Council of Europe (COE) and its institutions are not designed with supra-national entities in mind. Questions such as the following had already been canvassed in the course of previous attempts to urge EU accession—for example, who would represent the EU in the Strasbourg court, and would non-Member States of the EU have a right to bring proceedings against the EU in the ECtHR? The requirement for exhaustion of domestic remedies under the Convention could also lead to extremely lengthy litigation if EU law were at issue and preliminary rulings had already been made to Luxembourg. The accession process must take account of these challenges as well as the complicated procedures for accession required by EU law set out below.

Accession must follow the long and complex mandatory procedure that governs all EU agreements with third countries and international organisations, set out in Article 218 of the TFEU. For such an agreement to be concluded,

56 Although it is conceivable that the CJEU might give another Opinion on a new Accession Agreement, finding it incompatible with EU law: see Jacobs, 'The Internal Legal Effects of the EU's International Agreements and the Protection of Individual Rights', in Arnull et al. (eds), *A Constitutional Order of States* (Oxford: Hart, 2011) at 153.

57 The new Article 59(2) ECHR reads: 'The European Union may accede to this Convention'.

58 Jacobs, supra n 56 at 152, notes the oddity of imposing an obligation on the EU to accede when fulfilment of that obligation is not solely in the hands of the EU itself, but also its Member States and COE non-EU Member States. Jacobs suggests that it might have been preferable for Article 6(2) of the TEU to have been drafted in terms of the EU 'using its best endeavours to accede'.

Article 218 sets a requirement of unanimity in the COE, the consent of the European Parliament (by a 2/3 majority) and its ratification in all EU[59] and COE Member States.

Further, it is probable that one or more Member States will ask the CJEU for an opinion under Article 218(11) of the TFEU on whether the accession treaty is compatible with EU law. There may also be concern or objections raised by some non-EU COE Member States. Therefore the accession process is likely to take several years. Notwithstanding this, the Stockholm Programme[60] of the Council of the EU urged that 'the rapid accession of the EU to the European Convention on Human Rights is of key importance'.

The COE Committee of Ministers adopted, on 26 May 2010, *ad hoc* terms of reference for the Steering Committee for Human Rights to draft, in collaboration with the EU, a legal instrument for the accession of the EU to the ECHR.[61] For the EU itself, the Council of the EU adopted on 4 June 2010 a Decision authorising the European Commission to negotiate an agreement for the EU to accede to the Convention.[62] Official negotiations started in early July 2010. A Working Party formed of a 'committee of experts' (mainly officials) from Member States was appointed to produce a draft of an accession document. One year later, in July 2011, a final version of such a draft for legal instruments on the Accession of the European Union to the ECHR was adopted,[63] and the ensuing discussion is based on this document. However, it should be stressed that the term 'final' is misleading here, as this document is only the basis for further discussion among the Member States and will be subject to detailed scrutiny and further changes. So it is to be stressed that, at the time of writing, the EU is a long way from the final stages of accession.

There has been some censure of the lack of transparency of aspects of the proceedings—for example, the Council decision authorising the Commission's negotiating mandate was confidential and therefore not open to parliamentary scrutiny—a feature that came under strong criticism in the UK Parliamentary European Scrutiny Committee.[64] NGOs also pressed for the

59 Some of which, including the UK following the coming into force of the EU Act 2011 in September 2011, may require a referendum under their constitutional law provisions.

60 Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens* (Brussels, 2 December 2009) at 3.

61 CM/Del/Dec (2010) 1085, 26 May 2010.

62 The decision is based on Article 6(2) of the TEU, Article 218(8) of the TFEU, Protocol No 8 and Declaration 2 to the Lisbon Treaty.

63 CDDH-UE (2011)16 fin. However, the UK Lord Chancellor, and Minister for Justice, Kenneth Clark, in his oral evidence on 7 September 2011 to the House of Commons European Scrutiny Committee on the topic of EU Accession to the ECHR (HC 1492-i) emphasised that this document had no binding legal status whatsoever, and was simply the first step in starting the complex negotiations.

64 See UK Parliamentary Briefing Paper, *EU Accession to the European Convention on Human Rights*, SN/IA/5914, 22 March 2011, at 11; and oral evidence of Kenneth Clark to European Scrutiny Committee (HC 1492-i) September 2011.

widest possible consultation, and Amnesty International expressed concern that 'the absence of civil society's participation and the lack of democratic scrutiny of the negotiations may give rise to questions about the overall process and result in gaps in human rights protection'.[65]

B. Problems

There were several problematic aspects of accession highlighted by the Council Presidency in February 2010.[66] Two issues have proved particularly challenging, which will now be discussed in further detail.

(i) Preserving the autonomy of the EU legal order

The autonomy of EU law and its specific *sui generis* nature has been a running theme throughout its legal history. EU Accession to the ECHR must therefore neither disturb EU competences nor the interpretive monopoly of the CJEU in the interpretation of EU law.

In *Opinion 1/91* and *Opinion 1/00*,[67] the ECJ 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 in *Kadi*[68] also strongly underlined the autonomous nature of EU law, particularly with regard to fundamental rights. The Lisbon Treaty itself introduced further provisions which expressly require that the accession agreement should be drafted in such a way that autonomy of EU law is not undermined, namely:

- *Article 6(2) TEU* provides that accession 'shall not affect the Union's competences as defined in the Treaties'.
- *Article 1 of Protocol No 8* provides that the accession agreement must 'make provision for preserving the specific characteristics of the Union and Union law'.
- *Article 2 of Protocol No 8* provides that accession 'shall not affect the competences of the Union or the powers of its institutions'.

65 Amnesty International, Recommendations to the European Union Hungarian Presidency. During the January-July 2011.

66 See also Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg', (2010) 35 *European Law Review* 777; and 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1025, for a thorough treatment of accession issues. Also Jacqué, 'Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *Common Market Law Review* 995.

67 *Opinion 1/91* [1991] ECR 1-6079; and *Opinion 1/00* [2002] ECR 1-3493; see also *Opinion 1/09* of the CJEU finding the Draft agreement on Community Patent Court incompatible with EU law [2011] ECR nyr.

68 See further below.

- *Article 3 of Protocol No 8* provides that the accession agreement must not affect Article 344 of the TFEU, which requires that disputes concerning the interpretation or application of the EU Treaties must be settled only in accordance with the provisions of the Treaties.

Unfortunately, this Protocol fails to elaborate on what are the 'specific characteristics of the EU and its laws'. Therefore its scope is unclear. However, it does seem clear that, if the ECtHR were to determine for itself issues of EU law, then this would violate the holdings of *Opinions 1/91* and *1/00* and threaten the autonomy of the EU legal order. The accession agreement will also have to ensure that EU Member States will continue to be bound by Article 344 of the TFEU.[69]

However, under the ECHR, and the case law of the ECtHR, it has been established that it is primarily for the national courts to interpret and apply matters of domestic law. Domestic remedies must be exhausted (under Article 34 of the ECHR) to ensure that national courts have had a chance thoroughly to consider the matter. Once the action comes to Strasbourg, the ECtHR does not rule on the validity of national law but on its compatibility with the ECHR in a concrete case. The same procedures would apply if the EU became a member, and therefore, in theory, the interpretive autonomy of the CJEU over EU law should not be threatened.

Notwithstanding, a major concern throughout the negotiating of the draft accession agreement was whether, by the time a challenge was brought to an EU action in the ECtHR, the CJEU would actually have had chance to rule on all issues of validity of EU law which might give rise to a violation of ECHR. If not, the CJEU's interpretive monopoly under *Foto Frost*[70] and Article 19(1) TEU would be at risk. The problem stems from the fact that most EU litigation is brought in the national courts rather than by way of a direct action in the EU courts (partly because of the rather restrictive standing rules under Article 263 of the TFEU), giving rise to a danger that such an action might be determined and finalised in the national courts without the CJEU having had a chance to pronounce on the issue.[71] Therefore there exists a danger that accession to the ECHR could undermine the autonomy of EU law. Members of

69 This also means that, while non-EU Council of Europe Contracting States of the ECHR may bring an action against the EU post-accession, EU states will not be able to bring an inter-party case against the EU in the ECtHR, since Article 344 TFEU law bars them from using such other international means of dispute.

70 Case 314/85 *Foto Frost* [1987] ECR 1129; Article 19(1) states: 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.'

71 The decision whether or not to make a preliminary reference to the CJEU lies in the hands of the national courts under Article 267 TFEU, and they may decide not to so, or find the matter to be *acte clair*; or refer only on some aspects of a particular case. Indeed, as the ECJ itself ruled in the *IATA* case, the very fact that the validity of an EU measure was challenged in a national court was not sufficient to require a preliminary reference: see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, at para 28.

the Court of Justice expressed particular concern over this point. So it has been deemed necessary that a specific procedure should be put in place, to ensure that the CJEU could carry out internal review before the ECtHR carried out its external review,[72] although it is not yet clear what form this procedure will take.

(ii) The introduction of a new co-respondent mechanism

A further complication is that of *who* should be held responsible in Strasbourg for human rights violations in the context of EU law, and whether there is there a need to introduce a 'co-respondent' mechanism, which would allow the joint participation of the EU and of the EU Member States concerned.

A large part of EU law is implemented by its Member States, and, therefore, it will seem logical for the applicant to proceed against the State. Yet, Member States will sometimes have no choice or discretion as to whether, or how, an action emanating from the EU is implemented.[73] In such cases, the root of the problem lies with the EU measure, rather than the Member State. On the other hand, a further and distinct challenge is that of primary EU law, normally the treaties, which it is not possible for EU institutions themselves to amend. If primary law itself is found to breach human rights, then the Member States would have to be joined as parties, as they would ultimately have to amend the treaties to remedy the situation. Therefore, EU accession prompts tricky questions as to how the responsibility between the Member States and the EU should be split.

This issue was raised in Article 1(b) of the Protocol No 8 to the Lisbon Treaty which requires the accession agreement to make provision 'in particular with regard to: . . . the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'.

Therefore a key question is *who* will be the '*appropriate*' addressee. In the negotiation of the draft accession agreement, this issue proved controversial,

72 For example, Joint Communication of Judges Skouris and Costa, supra n 42. The relevant provision is set out in the Draft Final Agreement is as follows:

> Art 3(6) In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

73 One such example is Case 84/95 *Bosphorus* [1996] ECR I 3953, discussed below.

especially with NGOs, such as Amnesty International,[74] who feared that the adoption of a co-respondent mechanism could work against individual applicants, by being overly complex in terms of law, or prejudicing their chances of success if they failed to proceed against the correct party. It would certainly also cause some delay.

Article 3 of the draft Accession Agreement sets out provisions to deal with this matter. Article 3(4) of the draft Agreement requires the insertion of a new paragraph at the end of Article 36 of the ECHR, stating:

> The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

Article 3(5) of the draft Accession Agreement also states that 'A High Contracting Party shall become a co-respondent only at its own request and by decision of the Court'. Article 3(2) now would cover to the type of case in which a state could only have avoided a breach of the ECHR by violating EU law itself,[75] and states:

> Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

EU primary law is covered by Article 3(3) of the Draft Agreement, which provides:

> Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those

74 See, for example, *Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE),* Submission by the AIRE Centre and Amnesty International, AI Index: IOR 61/003/2011.

75 Such as that in the *Bosphorus* case, supra n 73.

instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

Primary EU law may only be altered through a Treaty amendment following the procedure set out in Article 48 of the TEU, which usually requires the consent of and ratification by all EU Member States, so it cannot be remedied by EU institutions acting alone, so it would be necessary to join the Member States as co-respondents.[76]

(iii) Other issues of accession

There exist other challenges of accession, which will be briefly mentioned as space prevents more than a short treatment.

The *Bosphorus* presumption

One source of difficulty is the *Bosphorus* 'presumption of equivalence'. The *Bosphorus* case[77] arose from the fact that, in 1993, Ireland had impounded an aircraft as obligated by an EC regulation, which was itself required by a United Nations (UN) Security Council (SC) Resolution imposing sanctions on former Yugoslavia. Because the aircraft was impounded by Irish authorities on Irish territory, the ECtHR found that the applicant was within Ireland's jurisdiction according to Article 1 of the ECHR. As a result, Ireland could be held responsible for any violation of the ECHR which thereby arose, regardless of whether the act or omission was a consequence of domestic law or of the necessity to comply with international legal obligations. However, in this case, the ECtHR found Ireland not liable and no violation to have taken place on the following grounds. First, the ECtHR established the existence of a *Presumption* in which, *so long as* an international organisation 'is considered to protect fundamental rights . . . in a manner which can be considered at least equivalent to that for which the Convention provides' the Court 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 organisation. Secondly, the Court held that this presumption could, however, be rebutted where the protection in the particular case was regarded as '*manifestly deficient*'. However, the protection in the *Bosphorus* case was not found to have been manifestly deficient.[78]

76 Nor can issues of primary law be solved by a Member State acting alone. See also *Matthews v United Kingdom* 1999-I; 28 EHRR 361, in which the UK experienced great difficulties in remedying a violation ultimately attributable to UK primary law.

77 *Bosphorus* case, supra n 73, for ECJ proceedings and *Bosphorus Hava Yollari Ve Ticaret Anonim Sirketi v Ireland* 42 EHRR 1 in the ECtHR (*Bosphorus Airways* case).

78 *Bosphorus Airways* case, ibid.

The *Bosphorus* establishment of a presumption for the EU of 'equivalent protection' of human rights has attracted much criticism. First, it has been questioned as to why the EU should benefit from such a presumption at all.[79] No Member State of the ECHR benefits from such a presumption. Secondly, there is the criticism that the application of the presumption of equivalence, rebuttable only by the 'manifestly deficient' protection of rights, leads to a low, abstract standard of human rights review, rather than being based on the concrete circumstances of the case. In *Bosphorus*, there was no separate review on the facts of the case, leading to very harsh results.[80] As the concurring judges pointed out in *Bosphorus*, this was 'in marked contrast to the supervision generally carried out by the ECHR'.[81] However, the roots of the *Bosphorus* presumption have a traceable pedigree. In *M. & Co v Germany*,[82] the now defunct European Commission of Human Rights held that a transfer of powers to an international organisation by a Member State would not be incompatible with that state's obligations under the ECHR, providing that, within the international organisation, fundamental rights would receive 'equivalent protection'. This decision of the European Commission seemed to have been influenced by the similar doctrine developed by the German Constitutional Court in its *Solange II* case.[83] Furthermore, as is well known, the Luxembourg Court, in its case law on fundamental rights, has long relied on the ECHR, and the jurisprudence of the Strasbourg Court, even though it had no obligation to do so.[84] This specificity, namely the Court of Justice's willingness to adhere to the ECHR and Strasbourg case law, may help explain why the ECtHR formulated the equivalence test.

79 Furthermore, it is to be noted that in *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v Netherlands* Application No 13645/05, Admissibility, 20 January 2009, the ECtHR held that the *Bosphorus* presumption applied not only to the measures taken by a Member State when implementing legal obligations flowing from its membership of the EU, but also to the procedures followed within EU, including the procedure before the CJEU and the question whether those proceedings afforded equivalent guarantees of fairness.

80 Namely, Bosphorus was unable to run its airline, and lost three years out of a four-year aircraft lease. As it stated in argument, this was the only aircraft which had been impounded under the sanctions regulations

81 *Bosphorus Airways* case, supra n 77 at Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para 4. Judge Ress, in a separate concurrence, warned that the concept of Convention compliance by international organisations should not be seen as a step towards the creation of a double standard. Nor did he believe that the presumption of compliance should prevent a case by case review.

82 *M & Co. v Federal Republic of Germany* (1990) 64 DR 138, decided in 1990 (in which the applicant was claiming breach of the right to a fair trial under Article 6 of the ECHR in the course of the execution of an ECJ judgement in a competition case). The European Commission found that the EC legal system did provide equivalent protection and deemed the action inadmissible; see also *Heinz v Parties to European Patent Convention* (1994) 76A DR 125, where a similar approach was taken.

83 *Case No 2* BvR 197/83 (BVerfG) BVerfGE 73, 339 (NJW 1987, 577) 22 October 1986.

84 See, for example, Douglas-Scott, 'A Tale of Two Courts' (2006) 43 *Common Market Law Review* 629, for further elaboration of this.

However, there is speculation as to whether the presumption should survive the EU's accession to the ECHR. Given that the accession of the EU to the ECHR would alter the relationship between the two Courts, reserving the last word for the ECtHR, rather than maintaining the present situation of co-operation and comity, it is arguable that, post accession, Strasbourg should apply a more rigorous, concrete review to EU acts, rather than the abstract test of equivalence of *Bosphorus*. Yet, on the other hand, it could also be argued that the presumption of equivalence reflects the specific, *sui generis*, situation of the EU legal order, as maintained and acknowledged in Protocol No 8 of the Lisbon Treaty, and that accession should not change this, nor the *Bosphorus* presumption. So it is difficult to predict with any certainty what will become of *Bosphorus* post accession.

Scope of EU accession

Article 6(2) posits a duty for the EU to accede to the ECHR, but what of the ECHR's protocols? Should these also be included in the accession? Given that not all protocols have been ratified by all EU Member States, the prospect of EU accession to all of them would appear unlikely. Yet, in the course of negotiations, the European Parliament and Commissioner Reding[85] had expressed a preference for the ratification at the very least of all protocols dealing with rights in the CFR. However, Article 1 of the Draft Accession Treaty provides only for the EU to accede to the First Protocol (which guarantees the right to property, the right to vote and the right to education) and Protocol No 6 (abolition of the death penalty in time of peace), but, interestingly, not Protocol No 13, which abolishes the death penalty in all circumstances), although it is conceivable that the EU might choose in future to accede to further protocols.

The EU judge and voting in the Committee of Ministers

From the terms of the draft agreement, it appears that the role and workload of the EU judge should not be restricted to cases related to the EU. The judge appointed in respect of the EU is to have equal status to that of the other judges. The European Parliament is to participate in the procedure for election, sending a delegation to participate in the Parliamentary Assembly of the Council of Europe, whose size will be equal to the highest number of representatives to which a state is entitled under the Statute of the Council

85 See speech by Commissioner Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe', Brussels, 18 March 2010.

of Europe.[86] According to Article 7 of the draft Accession Agreement, the EU 'shall be entitled to participate in the Committee of Ministers', and has the right to vote, in certain circumstances. Some rather convoluted paragraphs set out these procedures, which are designed to deal, in particular, with the problem of bloc voting by EU Member States (who are required by EU law to act in a coordinated manner) at the expense of non-EU ECHR contracting parties.[87]

It is also established, under Article 8 of the draft Accession Agreement, that the EU will contribute towards the COE expenditure related to the functioning of the ECHR—very important, given the large workload, and small funds of the COE.

Therefore, in conclusion, given the great complexity of EU accession to the ECHR, it is unlikely to be finalised for several years, with the result that, for some time to come, the EU will lack any definitive external accountability in the human rights field (and, indeed, will be the only public authority in COE territory not to be subject to external accountability).

5. Fundamental Rights as General Principles of Law

This residual system of human rights in the EU should by no means be underestimated. Article 6(3) of the TEU, as amended by the Treaty of Lisbon, provides that '[f]undamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

Article 6(3), and its earlier versions, reflect the earlier case law of the CJEU in which, as already mentioned, it was held that respect for fundamental rights forms an integral part of the general principles of law protected by the Court. The insistence of the German courts that EU law respect fundamental rights, and their veiled threat to ignore the primacy of EU law if it did not, was the original motivation for the protection of fundamental rights in the EU, and was reflected in the Court of Justice's early jurisprudence in *Stauder* and *Internationale Handelsgesellschaft.*[88] Yet the common constitutional traditions of the Member States have not, in fact, over time, been such an important source of principles for the CJEU as the ECHR, which has been ratified by all the Member States of the EU.

86 For this, see Article 6, 'Election of Judges', Draft Accession Agreement.

87 See Article 7(1) and (2) draft Accession Agreement. EU law sometimes requires the EU and its Member States to coordinate their actions and votes similarly in international organizations, so the Accession Agreement sets out special voting procedures in order to avoid the 27 EU Member States automatically out voting other COE Members in the execution of judgments and friendly settlements in cases involving the EU.

88 Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; and Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

The constitutional traditions of the Member States provide a necessarily incoherent source, given the very different constitutional traditions and practices of those States. The result is that the Court of Justice, in analysing those sources, necessarily forms its own subjective opinion as to whether a right is recognised in common throughout the Member States, and, even if it is recognised, whether it is actually protected in the same way. Indeed, Member State constitutional traditions can prove to be a divisive and fragmenting source, rather than a unifying source, for rights. In any case, where a right is respected only in very few States, or protected in a singular and particular way (which may amount to the same thing), the tendency may be to fragment rights protection. The *Omega Spielhallen* case[89] provides an illustration.[90] In *Omega*, Germany had banned a laserdrome game which involved simulated homicide, on the basis that it infringed the protection of human dignity under the German Constitution. The applicant company, Omega, challenged the ban as contrary to freedom to provide services under EU law, arguing that the game had been lawfully produced and marketed in the UK. Human dignity is given special priority under the German Constitution and the case law of the German Constitutional Court. If the CJEU had enforced internal market law at the expense of protection of dignity in the German Constitution, this might have encouraged challenges to the supremacy of EU law from Germany. Therefore, the CJEU upheld the German ban, but, while holding that human dignity was also respected by EU law, stated that this outcome did not depend upon 'a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'. The Court, therefore, considered the subject matter to belong to a sphere properly left to the Member States. In this context, it may be seen that, rather than unifying and harmonising fundamental rights in the EU, Member State constitutional traditions may in fact separate them, operating not as conditions of legality of EU action, but rather as Member State defences to EU action, justified as furthering the public interest—a rather curious inversion of the normal function of fundamental rights to operate as claims against state action. In this case they are pleaded as state justifications for limiting the application of EU law in their territory, and function rather like the margin of appreciation under the ECHR—a point that will be elaborated further presently. The Charter also takes account of this more recent function of constitutional traditions as sources of rights, stating that, '[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in

89 *Omega Spielhallen—und Automatenaufstellungs—GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

90 Another example may be found in the right to life of the unborn child, protected most strongly in only a few States, for example, Ireland and Poland. Cf Protocol No 35 to the Lisbon Treaty on Article 40.3.3 of the Constitution of Ireland [2010] OJ C 83/321.

harmony with those traditions', a further recognition of the individual, particular and singular nature of state constitutional traditions, rather than their tendency to harmonise and unify EU fundamental rights law.

Yet if constitutional traditions provide a complex and possibly fragmentary source of general principles of law, the role of the ECHR in future elaborations of EU fundamental rights as general principles of law is questionable. Certainly, post accession of the EU to ECHR, it is arguable that the ECHR should simply be applied directly to EU law, rather than through the medium of general principles of law. Also, might not the Charter have superseded general principles of law as a source for EU rights? Possibly not. For, although the Charter is now binding, with primary law status, by continuing with this reference to general principles, Article 6(3) makes it possible for the EU courts to recognise and/or enforce rights which are not to be found in the Charter or ECHR, or, significantly, rights in the Charter whose impact is limited due to the existence of protocols such as that of the UK and Poland, or by the horizontal, or limitations, clauses. It is, however, an interesting question as to whether general principles should now be seen as subsidiary to the Charter, which now seems to have become the first point of reference for fundamental rights in the EU.

The *Kücükdeveci* case,[91] controversial in its implications, provides an interesting illustration of possible future directions for general principles of law and also as to how general principles of law might operate in tandem with the Charter. Ms Kücükdeveci had been employed in Germany by Swedex for 10 years, when, at the age of 28, she was dismissed by that company, with one month's notice. In accordance with German legislation, in calculating her notice period, no account was taken of any period of employment prior to age 25. She challenged her dismissal, claiming that German law discriminated on grounds of age and itself violated EU law, and, in particular, Directive 78/2000,[92] whose implementation period had expired prior to her dismissal. However, given that Swedex was a private party, the general prohibition on horizontal direct effect of directives[93] would normally have prevented her reliance on the Directive. In spite of this, the CJEU determined that non-discrimination on grounds of age was a general principle of EU law which was given specific expression in the Directive. Indeed, in the *Mangold* case[94] in 2005, the Court had already recognised the principle of non-discrimination on grounds of age as a new general principle of EU law. Article 21(1) of the Charter also provides that 'discrimination based on . . . age . . . shall be

91 Case C-555/07 *Seda Kücükdeveci* [2010] ECR 000.

92 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, at 16–22.

93 On the lack of direct effect of directives, see Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349.

94 Case C-144/04 *Mangold* [2005] I-9981, at para 74.

prohibited'. The Court in *Kücükdeveci* proceeded to examine the matter at hand and concluded that the principle, as given expression by the Directive, precluded the German national legislation.

At the centre of the Court's judgment was the requirement that national courts apply a general principle of non-discrimination on grounds of age as an autonomous ground for judicial review, giving rise to an obligation to set aside conflicting national legislation,[95] in a dispute between *private* parties. *Kücükdeveci* illustrates that general principles of EU law (and their realisation as EU fundamental rights) can have horizontal direct effect.[96] This development is very important, given that general principles and fundamental rights usually protect individuals from public authorities not private parties.[97] Given the significance of such a holding, it might have been thought desirable that the CJEU set out the reasons for the extending the reach of general principles of law into the private sphere. However, *Kücükdeveci* provides no such clear reasoning. In *Mangold* and *Kücükdeveci* the Court looked to Member State constitutional traditions and international law as a source for the principle of non-discrimination on grounds of age. Yet the horizontal application of the equality principle is not the norm at the national and international level, and very few EU Member States even explicitly recognise such a general principle.[98] Nor does the Court's citation of the Charter provide any support for horizontal application because the scope of the Charter is, as already discussed, in Article 51 of the CFR, limited to EU bodies and Member States.

The holding in *Kücükdeveci* provokes speculation as to which other general principles the Court might consider to have horizontal effect. Elsewhere, in the *Audiolux*[99] case, the CJEU held that a principle must have a 'constitutional status',[100] to qualify as a general principle of Community law, rather than being 'characterized by a degree of detail requiring legislation to be drafted and enacted at community level by a measure of secondary community law'. Obvious candidates for principles of constitutional status are those set out in the Charter, although the field is not limited to the Charter. Therefore, although, according to Article 51 of the CFR, the Charter may not extend EU competences, it may nonetheless be utilised to enable the faster transposition

95 *Kücükdeveci*, supra n 91 at paras 27, 50–51.

96 As did *Mangold*, supra n 50.

97 General principles of equal treatment on grounds of sex and nationality which had previously been accorded horizontal status were in the EU treaties, rather than unwritten rights established by the jurisprudence of the Court.

98 It is to be found in Article 6 of the Finnish Constitution and (with reference to professional life) Article 59(1) of the Portuguese Constitution. However, the EU treaties contain a specific legal basis for measures to combat discrimination based on age (Article 19 TFEU, ex-Article 13 TEC), which had been used as the basis for Directive 2000/78.

99 Case C-101/08 *Audiolux SA ea v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR I-9823.

100 Ibid.

of EU law into domestic law, if its provisions operate as general principles of law giving special expression to directives, and, although the Charter's scope is expressed as binding only EU institutions and Member States implementing EU law, it may nonetheless become a source of general principles of law binding on private parties.

The Court's declaration in *Kücükdeveci* of the crystallisation of unwritten obligations of private parties as overriding general principles, or fundamental rights, seems to threaten legal certainty, resulting in a situation in which EU law can apply even on matters only incidentally governed by a directive, and even if, due to the lack of horizontal effect of directives, the directive itself cannot apply. In *Kücükdeveci* the CJEU did not stress Article 21 of the Charter.[101] Indeed, the entry into force of the Lisbon Treaty post-dated the facts of the case, and a direct application of the Charter would have opened the Court to applying the Charter retrospectively. However, the Charter's binding, treaty-like nature now provides private parties with the power to invoke it in private disputes on the basis of the reasoning in *Kücükdeveci,* although it would seem that the role that the Charter plays in such cases is as a *source* of general principles of law. *Kücükdeveci* therefore illustrates the ongoing, far-reaching potential of general principles of law, and their capacity to provoke controversial, multi-directional, new developments.

6. A More Developed Fundamental Rights Law for the EU?

This article concludes with a brief discussion of further recent case law which provokes interesting questions as to the future development of EU fundamental rights law. One such case with far reaching implications is that of *Ruiz Zambrano.*[102] The main issue for determination by the European Court of Justice was whether Mr Ruiz Zambrano, a Colombian national, could claim a right of residence in Belgium under EU law following the birth of his children (who were EU citizens) in 2003 and 2005, notwithstanding that his EU citizen children had yet to exercise their right of free movement within the Union, which would normally be a requirement for triggering the application of EU law, removing it from the scope of Belgian domestic law.

Although most of the discussion in this case turned on EU citizenship and reverse discrimination, AG Sharpston, in her Opinion, considered the role of fundamental rights in EU law, arguing that their invocability should be 'dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted'.[103] Rather, AG Sharpston

101 Supra n 90 at para 22, where it just stated that, under Article 6(1) of the TEU, the Charter has the same force of the Treaties

102 Case C-34/09 *Ruiz Zambrano* [2011] ECR 000.

103 Ibid.

argued that EU fundamental rights should protect the European citizen in all areas of EU competence, regardless of whether such competence had actually been exercised. Part of the point of her comparison was to compare the present EU law on fundamental rights, with its uncertain scope of EU competence, against an ideal of consistent protection of fundamental rights. In particular, the question of reverse discrimination, whereby Member States can, in purely internal situations, apply less favourable laws than would EU law in similar situations, continues to cause problems. Some Member States indeed now reject the possibility of such a reverse discrimination, asserting that withholding a right from a national in such a way is discriminatory and infringes constitutional equality clauses.[104] AG Sharpston's suggestion is also in harmony with that of AG Maduro, who in *Centro Europa 7* argued that an EU citizen was entitled to travel to another Member State saying '*civis europeus sum*' and be treated 'in accordance with a common code of fundamental values',[105] and also suggests that the CJEU might become a court of almost general fundamental rights jurisdiction. Advocate General Sharpston did, however, acknowledge that this was likely to be too bold a step for the Court to take unilaterally at the present time, but she nonetheless suggested that the Court should consider that the evolution of EU fundamental rights law in the context of the now binding nature of the Charter, and proposed EU accession to the ECHR, might require a more robust scrutiny of fundamental rights. The Court in *Ruiz Zambrano,* however, did not discuss this point, despite the apparent centrality of the right to family life.

There are other factors which clearly have an impact on, and may accelerate, the recent development of EU fundamental rights law. The growth in anti terrorism law in the early years of the 21st century has involved the EU as much as its Member States, and actions taken at EU level, such as the European arrest warrant, or measures concerning data protection,[106] implicate human rights. The EU has also, in taking over competences previously exercised by its Member States, been subject to obligations under international law, such as UN Security Council resolutions adopted under Chapter VII of the UN Charter. *Kadi,* one of the most significant cases ever to have been

104 See AG Sharpston's reference to Belgian Conseil d'Etat and Cour Constitutionnel in *Zambrano,* supra n 102; also Protocol No 12 to the ECHR on non-discrimination. See also Case C-73/08 *Bressol, Chaverot* Opinion of A.G. Sharpston of 25 June 2009 and Judgment of 13 April 2010 [2010] ECR I nyr (Grand Chamber).

105 Case C-380/05 *Centro Europa 7* [2008] ECR I-349 at para 19. See also AG Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191.

106 For a critique of the EU's activities in this area, see Douglas-Scott, 'Fundamental Rights in the EU: The Ambiguity of Judicial Review', in Campbell, Ewing and Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays,* (Oxford: Oxford University Press, 2011); and Douglas-Scott, 'The Freedom, Security and Justice in the European Court of Justice' (2008–09) 11 *Cambridge Yearbook of European Law Studies.*

determined by the CJEU, illustrates the relevance of this. In the *Kadi* case,[107] Mr Kadi was one of a number of persons and groups who had been blacklisted as terrorists, and had their assets frozen, by a UN Security Council resolution. The EU, as successor to the Member States in this area of foreign policy, took measures to implement the resolution. Kadi argued he was the victim of a miscarriage of justice and had never been involved in terrorism. He claimed, inter alia, that the EU measure violated his fundamental rights to property, the right to a fair hearing and judicial redress. It was not possible for him to petition the UN Sanctions Committee directly, as the Committee does not accept direct representations from individuals but only from Member States. Such situations have been characterised as 'black holes' with persons finding it very hard to find a forum to challenge their blacklisting, a state of affairs which undermines the more usual perception of international law as a source of protection for human rights. So *Kadi* approached the Luxembourg courts. Unlike the CFI (now General Court)[108] the Court of Justice found that his rights had been violated. In *Kadi*, the Court of Justice proclaimed the constitutional autonomy and hegemony of the EU legal order, holding that the EU is a community based on the rule of law and that respect for fundamental rights is an integral part of the EU legal order. It also held that the obligations of an international agreement could not prejudice the constitutional principles of the EU treaty. Thus, it was less concerned than the CFI about the primacy of the UN SC resolutions. From there it was able to go on to review the measure under EU rights standards and to find that Mr Kadi's right to effective judicial process had been violated by the failure to communicate to him the reason for his listing. The failure to observer due process standards also resulted in a violation of his right to property.

This might seem like a victory for human rights. Yet the real concern of the European Court seemed to be the autonomy of the EU legal order. The CJEU relied very heavily on EU 'constitutional principles' in its judgment. Indeed, the Court locates the principle that all EU acts must respect fundamental rights among the constitutional principles of the Treaty. This illustrates a very strong constitutional emphasis on the part of the CJEU on a par with that of its early pathbreaking cases of *Van Gend en Loos* and *Costa v Enel*, which set out the basic principles of the direct effect and supremacy of EEC (as it then was) law. However, the judgement showed less respect for international law and the UN resolutions, rejecting any notion of a subordinate relationship of

107 Joined Cases C-402 and 415/05 P *Kadi & Al Barakaat International Foundation v Council & Commission* [2008] ECR I-6351.

108 At first instance the EU's CFI held that the primacy of the UN and international law, prevented review of the measure on the basis of EU standards. According to the CFI, all the EU was doing was implementing a UN measure. It had no discretion and the only possible review would be on the basis of *jus cogens* not autonomous free standing EU fundamental rights standards. The CFI found none of his alleged rights to be violated: see Case T-315/01 *Kadi v Council & Commission* [2005] ECR II-3649.

the EU to the UN.[109] The Court's decision in *Kadi*, along with AG Maduro's Opinion,[110] also seems to align itself with the German Constitutional Court's *Solange* approach, suggesting that judicial deference extends only so far as the satisfactory protection of human rights by other jurisdictions. The Court in *Kadi* was also keen to equate EU law with national and with constitutional law, rather than international law. Other similar examples of judicial assertions of constitutional autonomy may be found in the area of trade law or the law of the sea, such as the Court's judgments in *FIAMM* and *Intertanko*.[111]

However, while justice may have been done in the individual *Kadi* case, this may be storing up problems for the future observance by the EU of international law. Ziegler, for example, suggests that the Court's approach in *Kadi* may lead to a fragmentation of international law, and even ultimately to the insulation of the CJEU from any international human rights standards, because of its choice to look instead to autonomous EU standards.[112]

All of these cases indicate the important role played by the Court of Justice in the development of EU fundamental rights law. This role is, however, ambivalent.[113] The Court is well known for its role in 'integration through law'[114] in the EU. The charge that the CJEU is most concerned with integration and with the autonomy of EU law, rather than fundamental rights *per se*, is an old criticism, dating back to its earliest case law on fundamental rights, such as *Internationale Handelsgesellschaft*, in which it asserted the EU's respect for fundamental rights in order to maintain the primacy of then EEC law. Along with this charge has been the claim that EU fundamental rights protection also too strongly reflects the specific form of the EU, and its stress on the Internal Market. The Court's willingness to equate fundamental market freedoms in the EU treaty, such as the free movement of goods and services, with fundamental rights has drawn fire[115] and the counterclaim that the free movement of goods and services are in no way equivalent to fundamental rights.

This critique took on a different twist when the equivalence of fundamental market freedoms and fundamental rights was raised once again in the cases

109 See on this, De Búrca, 'The ECJ and the International Legal Order after *Kadi*' (2009) 51 *Harvard Journal of International Law* 1.

110 See Opinion of AG Maduro in *Kadi*, supra n 11 at para 54.

111 Joined Cases C-120–21/06 P *FIAMM & FEDON v Council* [2008] ECR I-6513, 63; Case C-308/06 *The Queen, on the application of Intertanko v Sectary of State for Transport* [2008] ECR I-4057.

112 Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288.

113 On this see Douglas-Scott, 'Freedom, Security, and Justice in the European Court of Justice: The Ambiguous Nature of Judicial Review', in Campbell, Ewing and Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, (Oxford: Oxford University Press, 2011).

114 See on this, for example, Cappelletti, Seccombe and Weiler (eds), *Integration Through Law* (Berlin/New York: Walter de Gruyter, 1986).

115 For example, by Coppell and O'Neill, supra n 21.

of *Viking* and *Laval*.[116] In both *Viking and Laval*, it was claimed that the applicant undertakings' market freedoms had been restricted by trade union collective action. Although the right to take such action was at least acknowledged by the Court as a 'fundamental right', and the Charter cited as a foundation[117] for this, in both cases it was held to be outweighed by the fundamental market freedom. The Court found that the right to strike had not been exercised proportionately. Yet such reasoning is antipathetic to fundamental rights and has been strongly criticised, especially in its application of a proportionality test to the concept of fundamental rights themselves. Normally, as in the test applied by the ECtHR, it is the *restrictions* on fundamental rights which must satisfy a proportionality test. However, the Opinion of AG Trstenjak in *Commission v Germany*,[118] decided in 2010, at least appears to offer evidence of an attempt to engage with criticism over the direction things have taken. In this case the Commission had brought an infringement action against Germany in the context of an occupational pensions case, which again raised the conflict between collective bargaining rights and fundamental freedoms. The Advocate General stated that 'a restriction on a fundamental freedom is justified, where that restriction arose in the exercise of a fundamental right and was appropriate, necessary and reasonable for the attainment of interests protected by a fundamental right. As a mirror image thereof, a restriction on a fundamental right is justified when that restriction arose in the exercise of a fundamental freedom and was appropriate, necessary and reasonable for the interests protected by a fundamental freedom'.[119] This is an important opinion, which apparently attempts to redress the CFEU's much censured balancing of fundamental freedoms and fundamental rights to the benefit of economic freedoms in *Viking and Laval*. AG Trstenjak proposes a more symmetrical approach, in which it is acknowledged that economic freedoms must sometimes give way to fundamental rights. However, perhaps undermining this approach somewhat, AG Trstenjak then herself proceeded to subject the social rights at issue in *Commission v Germany* to a proportionality test.

The vexed issues raised by the clash between fundamental freedoms and social rights are also likely to be played out over the terrain of both Luxembourg and Strasbourg. In the *Demir and Baykara*, case[120] decided in 2008 by the ECtHR, the Strasbourg Court held that the right to collective bargaining must be respected according to international labour conventions and regional labour standards. If *Viking and Laval* came before the ECtHR, the limits on the right to strike imposed by the CJEU might be found in violation

116 Case C-438/05 *Viking* [2007] ECR I-10779; and Case C-341/05 *Laval* [2007] ECR-I 11767. See also Case C-346/06 *Rüffert v Niedersachsen* [2008] ECR 1989.

117 See Article 28 of the Charter on the 'right of collective bargaining and action'.

118 C-271/08 *Commission v Germany* [2010] ECR 000.

119 Ibid. at para 199.

120 *Demir and Baykara v Turkey* Application No 34503/97, Merits, 12 November 2008, at paras 153–4; also *Enerji Yapi-Yol Sen v Turkey* Application No 68959/01, Merits, 21 April 2009.

of the right to association under Article 11 of the ECHR by Strasbourg.[121] Even prior to EU accession, an individual complaint might be brought in Strasbourg if national law implementing the CJEU decisions were found to be in breach of Article 11. So the CJEU may not have had the last word.

A yet further noteworthy aspect of *Viking* and *Laval* is that, like *Kücükdeveci*, they also provide an example of a horizontal application of fundamental rights (or rather the fundamental freedom of free movement of services) in this case being applied against trade unions, as well as a situation of collision of rights (namely economic freedoms versus right to collection action)—indeed, a *shrinking* of fundamental rights to a defensive claim by a private party in the face of an assertion of the freedom to provide services. To be sure, conflict between rights is not new, and a classic example much in the news recently is that between freedom of expression and the right to privacy.[122] Usually, in the case of such conflicts, there is some sort of ranking of rights by the courts dealing with the conflict, so, for example, in the case of the conflict between expression and privacy, courts have traditionally given priority to certain categories of expression, namely political expression.[123] Yet different courts may accord a different priority to different rights. For example, in the *von Hannover* case,[124] which involved a conflict between freedom of expression and privacy, the ECtHR accorded greater weight to privacy than the German Constitutional Court which had tried the case domestically, provoking great criticism in Germany. In *Viking* it seemed that the CJEU accorded a greater weight to fundamental economic freedoms (which, to stress again, have a very dubious claim to be fundamental rights) than might national judiciaries. Such differing of ranking can provoke discord, and ensures that the multiplicity of fundamental rights jurisdictions adds not just complexity but also conflict.

7. Conclusions

Part of the problem here is that the EU (and CJEU) has no clearly developed, substantive sense of human rights (or indeed of justice).[125] The Court of Justice recognised fundamental rights as an afterthought in its early case law in order to protect the supremacy of EU law against threats from the national

121 See on this Ewing and Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

122 See, for example, on this *Von Hannover v Germany* [2004] ECHR 294.

123 *New York Times Co. v Sullivan* 376 U.S. 254 (1964) is the leading US case on the primacy of freedom of the press and political speech over other types of claims.

124 *Von Hannover v Germany* 2004–VI; 43 EHRR 139.

125 Williams, *The Ethos of Europe* (Cambridge, UK: Cambridge University Press, 2010); also Douglas-Scott, 'The Problem of Justice in the EU', in Dickson and Eleftheriadis (eds), *The Philosophical Foundations of the EU* (Oxford: Oxford University Press, forthcoming 2012).

constitutional courts. Fundamental rights were not at the very foundation of the EEC, as they are, in contrast, in the German Basic Law. Cases such as *Kadi,* while stressing the primacy of fundamental rights, also reveal a continuing desire to maintain the autonomy and primacy of EU law, this time in the face of the international legal order. To put it in arcane language, fundamental rights have functioned epiphenomenally in the EU, an offshoot of the EU's more central, market led functions. To assert a central, foundational role for fundamental rights in the EU is not only to engage in myth making[126] but also to commit a reductionist fallacy, namely, in the words of Tony Judt, 'the curiously nineteenth century belief shared by classical economists and Marxists alike, that social and political institutions and affinities naturally follow economic ones'.[127] The EU cannot be constructed as a human rights organisation merely on the back of dimensions of human rights protection necessary to ensure economic integration. This is, of course, not to deny that the EU should ensure a rigorous compliance with fundamental rights, nor to question the desirability of judicial review of a greater intensity than that which has, to date, only led to the annulment of a handful of EU measures for fundamental rights violations. But it is to make the important point that the transformation of the EU from internal market to a human rights organisation cannot be achieved merely by the assertion of some new, majestic sounding treaty provisions declaring the EU's values, nor by the ordering of human rights at the pinnacle of EU law in just one case, *Kadi,* and the speculations of some Advocates General. Nor can human rights be developed in the most substantive, comprehensive and aspirational of ways through a court-led, instrumental means, in which human rights are pursued by those most able to afford to litigate them—which, in the case of the EU, are usually corporate concerns (thus justifying the transformation of 'human' into 'fundamental' rights). Much more work has to be done and, in any case, the question must be asked—to what extent *should* we look to the EU as a human rights organisation?

For all that the competences of the EU have moved beyond its economic origins and the internal market, the EU still maintains its focus on the economic, as cases such as *Viking* and *Laval* reveal. And for all that AG Maduro in *Centro Europa 7*, interpreted the provisions for fundamental rights in Article 6 TEU as ensuring that 'the very existence of the European Union is predicated on respect for fundamental rights' (a statement which was notably not adopted by the CJEU) and an 'existential requirement' which aimed to situate the EU beyond market constitutionalism,[128] to recast the EU as a human rights organisation would invite opposition in some of its Member States to say the very

126 In that fundamental rights were not a major concern at the EU's conception, see, for example, Smismans, supra 8.

127 Judt, *A Grand Illusion? An Essay on Europe* (New York/London: NYU Press, 2011) at 119.

128 AG Maduro in Case C-380/05 *Centro Europa 7* [2008] ECR I-349, at para 19.

least, as well as disturbing the division of competences between the EU and its Member States.

The EU's very *design* reveals its limited capability as a human rights organisation. The Charter of Fundamental Rights does not declare a freestanding fundamental rights competence for the EU but only applies to EU institutions and to the Member States in certain circumstances. The deliberate decision not to incorporate the Charter into the treaties by the Lisbon Treaty amendments also underlines a conscious choice not to endow it with a constitutional status. The EU's main concern has been with market building and regulation.[129] In this, it differs from traditional state constitutions and human rights regimes. Notably, it has rarely declared an act of the EU void for violating fundamental rights, and this is surely not because the EU has such a blemish-free record on human rights.[130] Part of the problem is that most litigation brought by individuals comes to the CJEU by way of a preliminary reference from the national courts, in which the Court of Justice is only seized with certain aspects of a case, and fundamental rights are often pleaded in a collateral or tangential manner. This can be contrasted to approaches of human rights courts, such as the European Court of Human Rights, in which fundamental rights themselves are the basis for an application, and applied as freestanding public goods in their own right, rather than elements which only apply within an EU sphere of competence which is dominated by the market. In the EU model, economic freedoms are still at the very centre of the EU, and still dominate EU citizenship, for all of AG Sharpston's attempts to move beyond them in *Ruiz Zambrano*. Given this, it is likely that the CJEU will continue to determine issues of fundamental rights on a case by case basis, with a particular focus on the proportionality of any infringement of rights, rather than with an eye to the development of a coherent substantive fundamental rights law.

In such a situation, the protection of fundamental rights in the EU becomes ever more complex, especially if an important further line of challenge is taken into account. In the light of the development of EU competence into ever more areas once the preserve of its Member States, the scope for fundamental rights issues constantly grows, and it is to be expected that national courts will keep a watchful eye on this. The saga of the EU Arrest Warrant and the declaration of invalidity of its national implementing measures in Germany[131] and elsewhere, on grounds of its failure sufficiently to protect fundamental rights illustrate the threat to the CJEU and EU from national

129 See, for example, von Bogdandy 'The EU as a Human Rights Organization?' (2000) 37 *Common Market Law Review* 1307; and Smismans, supra n 8.

130 *Kadi* is a rare example. See also C-236/09 *Association belge des Consommateurs Test-Achats et al v Council* [2011] ECR 000; and Case C-340/00 *Commission v Cwik* [2001] ECR.

131 For the German Constitutional Court decision, see BVerfGE, Neue Juristische Wochenschrift (NJW), 58 (2005), 2289.

constitutional courts when it is believed that inadequate protection has been given to fundamental rights. The German Constitutional Court's 2009 judgment on the compatibility of the Lisbon Treaty with German law[132] discusses these issues at a more fundamental level. The German Court interpreted the Lisbon Treaty as involving a substantial increase in the powers of the EU. However, it held that this would not violate German sovereignty if national democratic institutions were able to play a full part in European decision making, given the insufficiently democratic political structures at EU level (in the perception of the German Court). The German Court's Lisbon Treaty judgement maintains and elucidates the earlier theory of conditional acceptance of EU law established by the German Court in its *Solange I*, *Solange II* and *Maastricht*[133] judgements, according to which Germany only accepts the supremacy of EU law 'so long' as EU law guarantees the fundamental rights laid down in the German Basic Law.[134]

This indicates that the national courts will continue to reaffirm their own role in policing the observance of fundamental rights in the EU, thus ensuring that the multilevel and complex structures of fundamental rights protection in the EU will continue. This also underlines the need for the EU to accede to the ECHR and for the CJEU to conform its fundamental rights jurisprudence with Strasbourg, or at least to maintain it as a minimum standard, in order to legitimise its own institutional position, in order to ensure its fundamental rights credentials and ward off further challenges from national courts.

The avowal of a strong protection of human rights has been a means for the Luxembourg Court to maintain and increase its authority and the primacy and constitutional autonomy of EU law. However, the EU must make good on this avowal and ensure that its protection of human rights is actually robust. The Lisbon Treaty amendments, especially the now binding nature of the Charter, provide resources for a more effective protection of fundamental rights in the EU, but it will also be necessary for the EU, and in particular the CJEU, to move beyond an instrumental, *ad hoc*, market-led mentality towards a mature conception of fundamental rights as goods in themselves. In these challenging times for the EU, fundamental rights are essential and must not be diminished or become a casualty of economic or even security-driven mentalities.

132 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 30 June 2009, Entscheidungen des Bundesverfassungsgerichts, 210 (F.R.G.) 67.

133 In *Brunner v European Union Treaty* [1994] I CMLR 57, on the compatibility of the Maastricht Treaty with the German Basic Law, the German Constitutional Court held that it retained the competence to review EU measures which violate fundamental rights.

134 The German Court's judgement also appears to have inspired the Czech Constitutional Court in its decision of 3 November 2009: see Press Release, 'Constitutional Court: The Treaty of Lisbon is in conformity with the Constitutional Order of the Czech Republic and there is nothing to prevent its ratification'.

On the other hand, it is also undoubtedly the case that an increase of fundamental rights monitoring and activities through EU law would be seen as highly undesirable by some, as it might be seen as limiting state autonomy, as well as lacking in democratic legitimacy. The adoption and coming into force of the EU Act in the UK in 2011, which makes ratification of future amendments to the TEU and TFEU subject to approval by referendum, reveal a suspicion of any potential transfers of power from states to the EU—as do the legal challenges and ensuing careful scrutiny by, for example, the German Constitutional Court of each EU rehaul and transfer of sovereignty brought about by treaty change. Existing critiques of the ECtHR and a demonstration of the desire to 'bring rights home' in the context of Strasbourg[135] also reveal a reluctance to allow European regional authorities any greater competence in the human rights field. The dynamic between Luxembourg and Strasbourg also cannot be forgotten, nor the potential impact on the ECHR of a greater fundamental rights competence for the EU in the future. These are very vexed questions, which will be debated for a long time to come.

In the meantime, the most appropriate conclusion to draw on the Lisbon Treaty human rights provisions, and recent Court of Justice case law, might be that it is complexity, rather than human rights protection itself, which has increased most.

135 See *Hirst v United Kingdom (No 2)* [2005] ECHR 68, for an example of a much criticized Strasbourg judgement in the UK; see also speech of Lady Justice Arden DBE, 'Is The Convention Ours?' (January 2010) available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/lj-arden-european-court-human-rights-29012010.pdf [last accessed 17 October 2011]. Also relevant in this regard is the setting up of a Commission in the UK to consider the possibility of a 'British Bill of Rights'.