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# Fundamental rights in the European Union

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## 1 Introduction

In this chapter we are going to look at fundamental rights in the EU. As we shall see, the original Treaties did not contain any specific reference to fundamental rights. For this reason it fell upon the Court of Justice to develop a fundamental rights jurisprudence to ensure that individuals would be adequately protected. Eventually this gap was remedied and the EU ‘proclaimed’ its own catalogue of rights, the Charter of Fundamental Rights of the European Union, which became ‘legally binding’ following the entry into force of the Lisbon Treaty. The Lisbon Treaty also provided for competence for the EU to accede to the European Convention on Human Rights (ECHR), a fundamental rights document adopted in the context of the Council of Europe (which is a separate organization from the EU). Accession negotiations have been concluded and the EU shall, once all the legal and political obstacles have been removed, become a party to the Convention so as to ensure that its fundamental rights record is open to external scrutiny by the European Court of Human Rights established by that Convention, in the same way as that of the EU’s Member States.

The protection of fundamental rights in the EU is a rich, and at times contested, area of EU law and it has become increasingly important with the expansion of the powers of the EU, especially in the field of criminal law. However, when reflecting on the debate on fundamental rights you should bear in mind the bigger picture: the more extensive the jurisdiction of the Court, the more enthusiastic its protection of individuals, the more pronounced the intrusion in national law.<sup>1</sup> Here, consider that once the Court of Justice has asserted jurisdiction, the national courts must relinquish it – if the Court decides that it is for itself to assess whether, for example, a national immigration rule falling within the scope of EU law is compatible with fundamental rights, it will then be only for the Court to balance the competing interests (ie the desire to curtail immigration vis-à-vis the rights of the migrant). Those incursions in what is felt to be the national jurisdiction might lead to problems especially when national courts disagree with the level of protection afforded by the Court. Moreover, further judicial review of national legislation might be perceived as an unwelcome intrusion into the sovereignty of national parliaments.

This chapter will start by analysing the historical background and the development of the case law on fundamental rights since, despite the introduction of the Charter, an understanding of the previous case law is vital to appreciate when and how fundamental rights apply in the EU. We will then analyse the main Treaty provisions relating to fundamental rights protection, before turning to the Charter of Fundamental Rights of the EU. In the last section we will look at the relationship between the EU and the ECHR, including the extent to which the European Court of Human Rights agrees to scrutinize EU acts. We will also analyse the draft agreement on the EU's accession to the ECHR.

## 2 Historical background and development of the case law

We have seen in chapter 2 how in the aftermath of the Second World War there was a drive towards international cooperation, which also lay the roots for the creation and development of the European Communities. Not surprisingly, the atrocities committed during the war provoked a reaction aimed at ensuring that the past could not repeat itself and, as a result, the codification and protection of fundamental rights became of paramount importance both at international<sup>2</sup> and national level.<sup>3</sup> In particular, in the European context, state parties created a new international instrument, the ECHR.<sup>4</sup> The Convention is a catalogue of civil and political fundamental rights and states parties accepted not only to be bound by its rules but also to establish a supervisory mechanism through the

<sup>1</sup> In some instances, national courts are concerned about the fact that the standard of protection guaranteed by the Court of Justice is insufficient; see eg *Internationale Handelsgesellschaft* ('Solange I') [1974] 2 CMLR 540; the 'bananas saga' triggered by the ruling in C-280/93 *Germany v Council* [1994] ECR I-4973, N Reich 'Judge Made "Europe à la carte": Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation' (1996) *European Journal of International Law* 103–111; and more recently, and in the context of the Charter, see Case C-399/11 *Melloni v Ministerio Fiscal*, judgment of 26 February 2013, discussed further in section 4.4.2. In relation to the problems raised by differing standards of protection in the context of the European Arrest Warrant, see also decision of Higher Regional Court in Stuttgart translated and noted by J Vogel and J Spencer, 'Proportionality and the European Arrest Warrant' [2010] *Criminal Law Review* 474.

<sup>2</sup> Universal Declaration of Human Rights 1948; and ECHR, see n 4.

<sup>3</sup> See eg the German and Italian Constitutions.

<sup>4</sup> The ECHR was completed on 4 November 1950 and entered into force on 3 September 1953. The UK was the first state to ratify it, but it did not incorporate it into national law until 1998, with the Human Rights Act.

European Commission of Human Rights and the European Court of Human Rights;<sup>5</sup> this would ensure that good intentions would not remain unfulfilled ideals. Given this background, it might come as a surprise that fundamental rights were largely absent from the founding European Treaties;<sup>6</sup> the reason for such a gap is that, according to the original plans, European cooperation was to be part of a much broader political project which also comprised a European Defence Community Treaty and a European Political Community Treaty. The latter, provided as its first aim ‘to contribute towards the protection of human rights and fundamental freedoms in the Member States’<sup>7</sup> Furthermore, it incorporated the rights and freedoms contained in the ECHR (ie Part I),<sup>8</sup> and it limited accession to the Political Community to those European states that guaranteed fundamental rights as provided in the ECHR.<sup>9</sup> However (and as seen in chapter 2), both the Defence and the Political Community Treaties were abandoned in 1954 as the French national assembly would not ratify the former. As a result, fundamental rights remained largely absent from the founding Treaties establishing the three Communities.<sup>10</sup>

## 2.1 The development of the case law of the Court of Justice

This fundamental rights gap became all too apparent at a very early stage in the life of the Communities: in particular, national courts feared that Member States could use the Communities in order to circumvent the fundamental rights guarantees that had been at the centre of the post-war constitutionalizing effort. If the Communities had been given regulatory powers which could directly affect individuals, and those powers were not curtailed by fundamental rights, then individuals might see their fundamental rights limited beyond what was permissible under their own constitutional arrangements.

In an initial stage, individuals sought to enforce domestic fundamental rights against the (then) Communities Institutions.<sup>11</sup> However, those attempts failed since EU law (and previously EEC/EC law) can only be measured according to its own constitutional principles otherwise the principle of supremacy would be compromised and the application of EU law would vary from one country to the other. The problem then was a serious one: national courts were not willing to allow executive action, even if exercised through international cooperation, to go unchecked, rather declaring that ultimately they would exercise jurisdiction to assess compatibility with (domestic) fundamental rights.<sup>12</sup> In this

<sup>5</sup> Until 1998 the European Commission of Human Rights acted as gatekeeper and decided on the admissibility of cases. Following the entry into force of Protocol 11 ECHR, the Commission has been abolished. The system was further restructured following the entry into force of Protocol 14 ECHR in 2010; this Protocol also provides for the possibility for the EU to join the Convention, subject (according to the explanatory report to the Convention) to the negotiation of a separate treaty to this effect (on which, see section 5.2).

<sup>6</sup> With the exception of the right not to be discriminated against on grounds of sex in relation to pay which was included from the start.

<sup>7</sup> See Information and Official Documents of the Constitutional Committee of the Ad Hoc Assembly (Paris 1953), 53 *et seq* (Art 2).

<sup>8</sup> See *ibid*, 53 *et seq* (Art 3). <sup>9</sup> See *ibid*, 53 *et seq* (Art 116).

<sup>10</sup> See G de Búrca, ‘The Evolution of EU Human Rights Law’ in P Craig and G de Búrca, *The Evolution of EU Law* (2nd edn, Oxford: Oxford University Press, 2011) ch 16.

<sup>11</sup> Case 1/58 *Stork v High Authority* [1959] ECR 17; Case 36-40/59 *Geitling v High Authority* [1960] ECR 425; Case 40/64 *Sgarlata v Commission* [1965] ECR 215.

<sup>12</sup> *Solange I* (n 1); see also *Steinike und Weinling* [1980] 2 CMLR 531; and cf also the Italian Constitutional Court rulings *Sentenza 7/3/64*, no 14 (in F Sorrentino, *Profili Costituzionali dell’Integrazione Comunitaria* (2nd edn, Turin: Giappichelli Editore, 1996) 61 *et seq*) and *Società Acciaierie San Michele v High Authority* (27 December 1965, no 98) [1967] CMLR 160.

way, one of the very foundations of the emerging European building – the principle of supremacy of EU law – was at risk of being compromised.<sup>13</sup> It did not take long for the Court of Justice to find that fundamental rights were part of the ‘general principles of Community law’ which the Court would protect (on the broader context of the general principles, see chapter 8).

In the case of *Stauder*,<sup>14</sup> Mr Stauder attacked a Commission decision which made the distribution of butter at reduced prices conditional upon the identification of the recipient; he claimed that having to be identified by name breached his right to dignity as protected by the German Constitution. The German court referred a question to the Court of Justice to assess the validity of the Commission’s decision. However, this time the national court did not enquire as to the compatibility of a Community act with its own national constitutional fundamental rights; rather, it enquired whether the regime provided by the decision was ‘compatible with the *general principles* of Community law in force.’<sup>15</sup> Having examined different language versions of the Commission’s decision, the Court of Justice found that identification by name was not required by the Community act. It then continued:

Interpreted in this way the provision at issue contains nothing capable of *prejudicing the fundamental human rights enshrined in the general principles of Community law* and protected by the Court.<sup>16</sup>

In this way, the Court made clear that:

- it considered fundamental rights unwritten general principles applicable to the acts of the Communities’ Institutions;
- it would protect such rights, so that an act of the Communities adopted in breach of fundamental rights would be declared void; and
- if more than one interpretation of a legal instrument was possible, that which did not infringe fundamental rights would have to be adopted.

In subsequent case law the Court clarified that in deciding which fundamental rights formed part of the general principles of Community law it would draw inspiration from constitutional traditions common to the Member States<sup>17</sup> and from international Treaties for the protection of human rights to which Member States were signatory or had collaborated;<sup>18</sup> of those, the most significant is without doubt the ECHR.<sup>19</sup>

As mentioned previously, the gap-filling function of general principles was of paramount importance not only to ensure that the Communities would be a constitutionally complete system, but also to assuage the fears of national courts in relation to fundamental rights protection. Whilst at first, some national courts, and especially the German

<sup>13</sup> Some authors (eg P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, Oxford: Oxford University Press, 2011) XXX) believe that the recognition of fundamental rights as general principles was due exclusively to pressure from national courts; however, it should be pointed out that it is unlikely that experienced judges and jurists coming from countries with a strong constitutional ethos would be insensitive to such a major constitutional gap.

<sup>14</sup> Case 29/69 *Stauder* [1969] ECR 419.

<sup>15</sup> *Ibid*, para 1 (emphasis added). <sup>16</sup> *Ibid*, para 7 (emphasis added).

<sup>17</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.

<sup>18</sup> Case 4/73 *Nold* [1974] ECR 491, para 13.

<sup>19</sup> See eg Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT) v Dimotiki Etairia Pliroforissis and others* [1991] ECR I-2925; Opinion 2/94 [1996] ECR I-1759; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629.

Federal Constitutional Court, were cautious in relinquishing jurisdiction,<sup>20</sup> with time it was accepted that the standard of protection afforded by the Court of Justice could be considered equivalent (never identical) to that afforded by domestic courts, so that the latter could entrust the review of the validity of Community/Union acts to the judgment of the Court of Justice.<sup>21</sup> This approach was therefore compatible with the *Foto-Frost* ruling,<sup>22</sup> where the Court made clear that it had sole jurisdiction to declare an act of the EU invalid.

## 2.2 The scope of application of fundamental rights as general principles

### 2.2.1 Fundamental rights as a limit to the acts of Union Institutions

Fundamental rights as general principles of Union law (and now also those enshrined in the Charter) apply first and foremost as a limit to the acts of the Union Institutions. Therefore, respect for fundamental rights is a precondition for the legality of any act of the Union, whether administrative or legislative. An example of such review can be seen in case study 9.1 on the momentous decision in *Kadi*. You have already seen in the first case study of this judgment (in chapter 8, case study 8.4) that this case developed the Court's case law on the right to be heard as a general principle of EU law; in this chapter we examine the importance of the *Kadi* judgment for the EU system of human rights protection.

#### Case study 9.1: Terrorism, fundamental rights and the ruling in *Kadi I*

The background to *Kadi I*<sup>23</sup> follows from the terrorist attacks perpetrated against the US on 11 September 2001 after which there was a surge in international action aimed at combating terrorism. In this context, the UN adopted Resolution 1390(2002) which requires states to freeze the assets of those entities and individuals identified by the UN Sanctions Committee as being connected with Osama bin Laden, al-Qaeda, or the Taliban.<sup>24</sup> Those identified at UN level did not have any right to judicial review through the UN; rather, any request to be delisted was to be made to the state of nationality or residence, which would then make

<sup>20</sup> *Solange I* (n 1); see also *Steinike und Weinling* [1980] 2 CMLR 531; see also the Italian Constitutional Court rulings *Sentenza 7/3/64*, no 14 (in Sorrentino, *Profili Costituzionali dell'Integrazione Comunitaria* (n 12), 61 *et seq*) and *Società Acciaierie San Michele v High Authority* (27 December 1965, no 98) [1967] CMLR 160. On the *Solange* decision, see chapter 4, case study 4.1.

<sup>21</sup> *Wünsche Handelsgesellschaft ('Solange II')* [1987] 3 CMLR 225; this said the relationship between national supreme courts and the Court of Justice in relation to fundamental rights protection is a complex one; see eg *Maastricht* decision (*Brunner and others v EU Treaty* [1994] 1 CMLR 57); German Federal Constitutional Court, decision 7 June 2000 [2000] *Human Rights Law Journal* 251; and *Treaty of Lisbon* decision [2010] 3 CMLR 13; French Conseil Constitutionnel, Decision No 2004-496 (10 June 2004); Decision No 2004-497 (1 July 2004); the Polish Constitutional Court ruling in *Trybunał Konstytucyjny, arrêt du 27.04.05*, P 1/05, *Dziennik Ustaw 2005.77.680*, as reported by *Réflète-Infos Informations rapides sur les développements juridiques présentant un intérêt communautaire*, no 2/2005, p 16, also available at [http://curia.eu.int/en/coopju/apercu\\_reflets/lang/index.htm](http://curia.eu.int/en/coopju/apercu_reflets/lang/index.htm). See A Pliakos and G Anagnostaras, 'Who is the Ultimate Arbiter? The Battle Over Judicial Supremacy in the EU' (2011) 26 *European Law Review* 109.

<sup>22</sup> Case 314/85 *Foto-Frost* [1987] ECR 4199, and see chapter 10.

<sup>23</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-6351, reversing the General Court's decisions in Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649; Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533.

<sup>24</sup> This is also referred to as the 1267 Committee as it was created pursuant to UN Resolution 1267(1999).



representations to the Sanctions Committee.<sup>25</sup> The UN system was therefore highly unsatisfactory (and open to abuse) in that it deprived individuals of any possibility of defending themselves; furthermore, the reasons for inclusion in the list were not disclosed to those concerned.

Resolution 1390(2002) was implemented directly by the EU on the grounds that the existence of the free movement rights, and especially of free movement of capital, would render national implementation unsatisfactory.<sup>26</sup> As a result individuals listed by the UN would have, almost automatically, their assets frozen in the EU. As the identification of those subject to the sanctions was carried out directly at UN level, there was no possibility for those individuals to know the reasons which led to such a step and consequently to defend themselves. Mr Kadi, a rich Saudi businessman,<sup>27</sup> challenged the freezing of his assets in front of the EU Courts. In particular, he relied on two grounds: first of all, he argued that there was no competence for the EU to adopt these measures.<sup>28</sup> Secondly, he argued that those measures breached his fundamental rights, and in particular his right of defence and his right to property. Both the General Court and the Court of Justice found that the EU had competence to adopt the contested measures. However, they differed on whether it was possible to carry out a fundamental rights review.

The General Court found that since the Community measures were giving effect to a UN Security Council resolution they could not be scrutinized in relation to fundamental rights as general principles of Union law. To do this, the Court argued, would amount to an indirect review of the UN resolutions, something that the Court felt unable to do. It therefore limited itself to reviewing the Community measures vis-à-vis the less stringent *jus cogens* requirements (general principles of international law). It then found that those had not been violated by the Community measures at issue. Following the ruling of the General Court, the application of EU fundamental rights to the acts of the Union Institutions was not universal: when the Council was implementing a UN resolution, it would be sheltered from the application of EU fundamental rights.

The Court of Justice rejected this approach: it restated the autonomy of the Community legal system and the centrality of fundamental rights as general principles of Community law in this system. It then held:

... The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.<sup>29</sup>

<sup>25</sup> The system has then been amended, not least to address the concerns expressed by the Court of Justice in *Kadi*. See generally, E Spaventa, 'Counter-Terrorism and Fundamental Rights: Judicial Challenges and Legislative Changes after the rulings in *Kadi* and *PMOF* in A Antoniadis, R Schütze, and E Spaventa, *The EU and Global Emergencies* (Oxford: Hart Publishing, 2010).

<sup>26</sup> Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them (OJ [2002] L169/4; implemented by Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (OJ [2002] L139/9), modified by Regulation 1286/2009 (OJ [2009] L346/42).

<sup>27</sup> See interview on *New York Times*, web edition 13 December 2008, <http://www.nytimes.com/2008/12/13/world/middleeast/13kadi.html?fta=y&r=1&>.

<sup>28</sup> Express competence was only introduced with the Lisbon Treaty, see Art 215 TFEU.

<sup>29</sup> Para 285.

It further rejected the reasoning of the General Court: the judicial review would have at its object only the Community implementing measures and not the UN Resolution. It therefore stated in the strongest possible terms that the European Institutions cannot escape their fundamental rights obligations, even in those cases, such as the one at issue, where a finding of a breach might put the Union in breach of international law.<sup>30</sup>

The Court then found that the rights of the applicant had been violated: of paramount importance in this respect was the fact that Mr Kadi was never informed of the reasons that led to his inclusion in the list. Unaware of the evidence against him, he could not attempt to explain or challenge it. Furthermore, the absence of any statement of reasons made it impossible for the Court to review whether inclusion in the list was justified (at least *prima facie*). Mr Kadi's right to defence had therefore been breached as he was in no position to defend himself or make his reasons heard.

Secondly, the Court had to assess whether the freezing measures constituted a disproportionate interference with Mr Kadi's right to property as guaranteed by the EU fundamental rights, and Protocol 1 to the ECHR. It found that while, in principle, those types of sanctions can be justified, in practice the absence of any procedural guarantee entailed a violation of his right to property. The Regulation was therefore annulled insofar as Mr Kadi was concerned.

### 2.2.2 Fundamental rights as a limit upon the acts of Member States

EU fundamental rights also apply, somehow more controversially, to the acts of the Member States when they are implementing EU law, or when they act within its scope. The basic principle behind this interpretation is that when Member States implement Union law,<sup>31</sup> or act within its scope by limiting one of the rights granted by the Treaties, they have to comply with all of the constitutional principles of the EU, including fundamental rights protection. Thus, if a Member State is implementing a regulation or a directive it has to exercise its discretion in a manner that is consistent with EU fundamental rights<sup>32</sup> (as well as with national fundamental rights where this is appropriate).

In *NS*,<sup>33</sup> the case related to the application of Regulation 343/2003,<sup>34</sup> which provides the criteria for allocating the Member State responsible to examine asylum claims: usually this would be the country where the asylum seeker first entered the territory of the Union. However, the Regulation also contains the so-called sovereignty clause according to which

<sup>30</sup> See also the rulings in Case T-85/09 *Kadi II* [2010] ECR II-5177, and Joined Cases C-584, C-593 and C-595 P, judgment of 18 July 2013, nyr; Mr Kadi was eventually also delisted at UN level, see UN Security Council Press Release, 5 October 2012 (SC/10785) <http://www.un.org/News/Press/docs//2012/sc10785.doc.htm>.

<sup>31</sup> The concept of implementation has been given a broad interpretation; see eg Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013, nyr, examined in more detail in section 4.4.1.

<sup>32</sup> This obligation is very broad, also encompassing the possibility for a horizontal application of the general principles; see eg Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Kücüdeveci v Swedex* [2010] ECR I-365; see generally E Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of EU Law' and M Dougan, 'In Defence of *Mangold*?' both in A Arnull, C Barnard, M Dougan, and E Spaventa, *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing 2011) chs 11 and 12 respectively.

<sup>33</sup> Joined Cases C-411 and C-493/10 *NS and others*, judgment of 21 December 2011.

<sup>34</sup> Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ [2003] L50/1). On EU asylum law, see further chapter 26.

Member States retain the discretion to examine claims even when such examination is not their responsibility pursuant to the Regulation. In the *NS* case the claimants were challenging their deportation from the UK, the country where they were present, to Greece, which was responsible for their application (being the first port of entry). In particular, they argued that given the conditions under which asylum applications were dealt with in Greece, deportation would entail a breach of their right not to be subjected to degrading treatment as protected by Article 4 of the Charter and Article 3 ECHR.<sup>35</sup> The issue was then whether the discretion of the Member State should be subjected to review pursuant to EU fundamental rights: the Court found that the exercise of discretion still constituted implementation of EU law and that therefore EU fundamental rights were (at least to a certain extent) applicable. The UK could not therefore deport the applicants if it could not be unaware of the systemic deficiencies of the asylum system in the country of destination (Greece). As mentioned previously, this case law applies in the same way when Member States are acting ‘within the scope’ of EU law, that is to say when they are seeking to limit a right conferred on individuals directly by the Treaty. Thus, for instance, in *Familiapress* the Court held that when limiting the free movement of goods the Member States are bound to respect freedom of expression as guaranteed (then) by Article 10 ECHR.<sup>36</sup> This can also be seen in case study 9.2 on the decision in *Carpenter*.

#### Case study 9.2: Immigration, sovereignty, and fundamental rights: the case of Mr and Mrs Carpenter

Mrs Carpenter was a national of the Philippines living in the UK; she married Mr Carpenter, who was a British citizen also living in the UK, and applied for a residence permit as the spouse of a British national.<sup>37</sup> Her application was denied on the grounds that she had overstayed her visa and she was asked to leave the country and apply for a new visa from the Philippines. The immigration authorities accepted that the marriage of Mr and Mrs Carpenter was genuine, that is, it was not a sham entered into only to avoid the application of immigration rules. The refusal of leave to remain therefore constituted an interference with Mr and Mrs Carpenter’s right to family life, as protected by both the ECHR and the general principles of EU law. The issue was then whether the interference was legitimate, in that it constituted a proportionate interference with the right to family life justified by the policy aim of curtailing illegal immigration by discouraging overstays on visas. The most obvious route would have been to invoke the Human Rights Act 1998,<sup>38</sup> which incorporates the ECHR in British law. However, according to a consistent body of case law, immigration policy, as long as it is applied proportionately, constitutes a legitimate ground to limit the right to family life; the claim was therefore unlikely to succeed by invoking the Human Rights Act.

Counsel for Mr and Mrs Carpenter therefore chose a different strategy: he sought to transform the case into an EU law case so that EU fundamental rights could be invoked.

<sup>35</sup> The European Court of Human Rights had examined a similar issue in *MSS v Belgium and Greece*, judgment of 21 January 2011, esp paras 358, 360, and 367, and found that, as a matter of ECHR law, Member States could not deport asylum seekers to the Member State responsible under the EU rules when they knew that the country of destination would not examine the application properly, and that the asylum seeker would be exposed to living conditions that amounted to degrading treatment.

<sup>36</sup> Case C-368/95 *Familiapress* [1997] ECR I-3689, esp para 24; see also Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

<sup>37</sup> Case C-60/00 *Carpenter* [2002] ECR I-6279.

<sup>38</sup> This could have been invoked as the UK government lifted the non-retroactivity clause.



This strategy had two advantages: first of all, if EU law was applicable, the Court of Justice would have jurisdiction to assess the case. Since Convention rights are a minimum standard (the Court of Justice will not fall below the protection granted by the Convention), he was hoping that the Court would be willing to grant more extensive protection to the right to family life. Secondly, if EU law could be invoked then in balancing the right to family life with the immigration policy of the Member State, the Court of Justice (and the national court) would also take into account the right to move granted by the Treaty. As a result, the balance might be tilted in favour of the claimants. But how did counsel manage to establish a sufficient link with EU law? After all, all the elements of the case were linked exclusively to the UK: Mr Carpenter was British; his wife had overstayed the visa granted by British authorities; neither party had moved to, or was returning from, another Member State. From an EU law perspective the case seemed *prima facie* purely internal. As a result, as you will see in chapter 13, the EU rules on the free movement of persons would not apply, and so the UK would be free to apply its own restrictions on immigration.

Counsel argued that Mr Carpenter, who ran a business selling advertising space, provided services to clients in other EU states; he also occasionally had to travel to France on business. He was therefore a service provider covered by Article 56 TFEU. Further, he argued that when he was travelling on business his wife would take care of his children; her deportation would therefore constitute a hindrance to his ability to travel to provide services. In order to assess whether this hindrance was justified, due recourse should be taken of his family rights. Counsel thus suggested that deportation was a disproportionate interference with the Carpenters' family life and therefore an unjustified restriction on Mr Carpenter's right to provide services in the EU as protected (now) by the TFEU. The Court, broadly speaking and with marginal differences, accepted this reasoning. Regardless of the subtleties of the free movement issues, it should be noted that by linking the case to EU law, and by ensuring that EU fundamental rights were applicable, Mr and Mrs Carpenter obtained what they would have been denied had they relied solely on UK immigration rules and the Human Rights Act: Mrs Carpenter obtained leave to remain without having to return to the Philippines and apply from there.

As you will see in Chapters 13 and 20, a more delicate situation arises when Treaty freedoms clash with fundamental rights so that the enjoyment of the former results in the limitation of another claimant's fundamental right.<sup>39</sup>

### 3 The response of the political Institutions: from the 1977 Declaration to the Lisbon Treaty

It was mentioned previously that the gap in the Treaties concerning fundamental rights protection was largely coincidental; it is not surprising then that the developments in the case law of the Court met with the approval of the political Institutions. In 1977, just eight years after the ruling in *Stauder* and once the case law was 'settled', the European Parliament, the Council, and the Commission issued a joint declaration to the effect that they considered themselves bound by fundamental rights as general principles of (then)

<sup>39</sup> See Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-438/05 *International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line et al* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

Community law.<sup>40</sup> After that, every Treaty revision strengthened the protection of fundamental rights in the EU.<sup>41</sup> In particular, following the expansion of Union competences in the field of asylum, immigration, and criminal law, the protection of fundamental rights in the EU became of paramount importance for many of the Member States. The process of codification of the Court's case law, and the ongoing attention to fundamental rights, culminated in 2000 with the drafting of the Charter of Fundamental Rights of the European Union.<sup>42</sup> Whilst at first the Charter was 'merely' proclaimed by the three political Institutions, almost mirroring the 1977 Declaration, the Lisbon Treaty subsequently gave it the same legal value as the Treaties themselves (Article 6(1) TEU). Furthermore, and as we shall see in more detail later, the debate as to whether the Union should become a party to the ECHR has finally received a positive answer and Article 6(2) TEU provides not only the competence for accession but also a legal obligation to do so.

Article 6 TEU also recognizes the continued relevance of the case law preceding the Charter; Article 6(3) TEU provides that:

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.

Thus, even after the incorporation of the Charter in the primary law of the EU, the Treaty restates the centrality of fundamental rights, the ECHR, and the common constitutional traditions, as general principles of Union law.<sup>43</sup> Article 6(3) therefore allows the Court of Justice to go beyond the rights contained in the Charter, should the need ever arise.

Beside Article 6 TEU, the Lisbon Treaty further enhanced the protection of fundamental rights in several fields. Thus, for instance, it provides for (almost) full jurisdiction of the Court of Justice in the field of cooperation in criminal law;<sup>44</sup> for the Court's jurisdiction to review Common Foreign and Security Policy (CFSP) decisions that provide for measures against natural or legal persons;<sup>45</sup> and for slightly relaxed conditions for standing before the Union Courts.<sup>46</sup>

<sup>40</sup> OJ [1977] C103/1. Note that the declaration was referred to by the German Federal Constitutional Court in the ruling in *Solange II* (n 21) as one of the indications that the fundamental rights protection in the EEC had reached a satisfactory level and that they would as a result cease, for the time being, to exercise their power of scrutiny over EEC law. That power has, to a certain extent, been reinvoked in later case law; see n 21.

<sup>41</sup> See Preamble to the Single European Act; Art F(2) of the Treaty on European Union (Maastricht version); Articles 7, 46, and 49 TEU as modified and renumbered by the Treaty of Amsterdam; and the modification to Art 7 TEU introduced by the Treaty of Nice.

<sup>42</sup> Charter of Fundamental Rights (OJ [2000] C364/1); other initiatives in the field of fundamental rights include the establishment of an EU Fundamental Rights Agency, Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights (OJ [2007] L53/1); see generally P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Oxford: Hart Publishing, 2005).

<sup>43</sup> On the 'multiple' sources of fundamental rights, see HCH Hofmann and BC Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' [2013] 9 *European Competition Law Review* 73; on the post-Lisbon fundamental rights landscape, see S Morano-Foadi and S Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17 *European Law Journal* 595.

<sup>44</sup> See chapter 25. However, Art 276 TFEU excludes jurisdiction for the Court of Justice to review the validity and proportionality of police and law enforcement operations of a Member State, or the exercise of Member States' responsibilities as regards law and order and internal security. <sup>45</sup> Art 275(2) TFEU.

<sup>46</sup> See chapter 10; Art 263(4) TFEU provides that individuals can challenge regulatory acts which are of direct concern to them and which do not entail implementing measures, hence removing in those cases the need to prove individual concern. On the concept of 'regulatory act', see eg Case C-583/11 P *Inuit Tapiriit Kanatami et al v European Parliament and Council*, judgment of 3 October 2013.

Finally, respect for fundamental rights, as well as the other values listed in Article 2 TEU, is a precondition for accession to the EU,<sup>47</sup> and relevant for participation in the EU. For this reason, Article 7 TEU provides for a procedure to police and react to the risk of serious breaches of those values. In a case in which the Council determines that the breach is serious and persistent, it can suspend certain rights, including voting rights, of the Member State in question.

## 4 The Charter of Fundamental Rights

The adoption of the EU's Charter of Fundamental Rights is one of the most significant constitutional steps in the history of the EU.<sup>48</sup> This is particularly so for two reasons: first of all, the Charter was drafted using a new (and some might say revolutionary) procedure which involved not only representatives of national governments but also representatives of national and European parliaments.

Secondly, the fact that Member States felt the need to adopt a fundamental rights document (even though there is no general fundamental rights competence for the EU), is a further step in the long process of the constitutional evolution of the EU. We will first analyse the way the Charter was drafted and explain, in broad terms, its content, before turning to its scope of application.

### 4.1 The drafting of the Charter

In 1999 the Cologne European Council held in its conclusions that:

...at the present stage of development of the European Union, the fundamental rights applicable at Union level *should be consolidated in a Charter and thereby made more evident*.<sup>49</sup>

According to the mandate contained in the Cologne Conclusions, the Charter should contain:

- the rights and procedural guarantees contained in the ECHR and those derived by the common constitutional traditions, as general principles of European law;
- the rights pertaining to Union citizens (eg right to move and reside in Member States); and
- account was to be taken of the social rights contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.

The Cologne European Council also identified the composition of the body that should be entrusted with the drafting of the Charter: it should be composed of the representatives of the heads of state and government (ie representatives of national executives); the President of the Commission; representatives of national parliaments; and members of the European Parliament.

<sup>47</sup> Art 49 TEU.

<sup>48</sup> For a detailed article-by-article analysis of the Charter, see S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart Publishing, 2014).

<sup>49</sup> Cologne European Council, 3 and 4 June 1999, Presidency Conclusions, 150/99 REV 1, para 44 (emphasis added); see also Annex IV to the Conclusions.

The inclusion of representatives from both the European and national parliaments was a true novelty in the context of the EU (and international relations more broadly) since normally international treaties are drafted and negotiated by representatives of national governments and are then presented to national parliaments for ratification on a ‘take it or leave it’ basis. In this way, parliaments are less able to influence the outcome of negotiations. This time, however, given the fundamental importance of the document to be drafted, the Member States decided to include in the discussions representatives of directly elected parliaments hence enhancing the democratic credentials of the drafting body (called somewhat confusingly the ‘Convention’). The final composition of the Convention was decided at the subsequent Tampere European Council<sup>50</sup> and included:

- 15 representatives of the heads of state or government of the Member States;
- 1 representative of the Commission;
- 16 representatives of the European Parliament;
- 30 representatives of the national parliaments (two for each Member State).

The number of representatives of the European Parliament was set so as to counterbalance the number of representatives of the (then) Community executive (15 + 1); whilst the number of representatives of national parliaments was set at two for each Member State in order to ensure that those Member States which have a bicameral system could have a representative from each chamber. The Convention was then dominated by parliamentarians, rather than the executive: furthermore, in order to enhance its democratic legitimacy, all documents were made public and placed on the internet, and the Convention also accepted representations from acceding Member States as well as non-governmental organizations (NGOs). The mode of drafting of the Charter was considered a crucial step in the constitution building of the Union – so much so that, as you have seen in chapter 2, the same process was followed in the drafting of the Constitution for Europe; however, the latter failed, and the states reverted to intergovernmentalism (ie negotiation among Member States’ governments only) for the Lisbon Treaty.

The Convention took just over ten months to draft the Charter of Fundamental Rights which was then ‘proclaimed’ by the European Parliament, the European Commission, and the Council at Nice on 7 December 2000.<sup>51</sup> Following its proclamation, there was some uncertainty as to its legal value since, on the one hand, it had not been given official legal status but, on the other hand, it codified *existing* rights, hence making issues about its legal value if not redundant at least less crucial than would have otherwise been the case.<sup>52</sup> The issue has now been settled following the entry into force of the Lisbon Treaty: Article 6(1) TFEU expressly provides that the Charter has the same legal value as the Treaties.

## 4.2 The structure of the Charter

We have seen earlier that the mode of drafting the Charter was novel, being if anything more reminiscent of national constitution drafting than of international treaty-making; equally

<sup>50</sup> Tampere European Council, 15 and 16 October 1999, Annex to the Presidency Conclusions, available at [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm).

<sup>51</sup> Charter of Fundamental Rights (OJ [2000] C364/1); the text of the Charter was modified by the Constitutional Treaty and it is this latter version that has been incorporated by the Lisbon Treaty.

<sup>52</sup> Advocates General referred to the Charter from the very beginning, see eg AG Alber in Case C-340/99 *TNT Traco Spa* [2001] ECR I-4109; the then Court of First Instance also referred to it in several cases, see eg Case T-177/01 *Jégo-Quéré* [2002] ECR II-2365.

novel was the choice made by the Convention to depart from the traditional dichotomy of civil and political rights/economic and social rights instead of approaching fundamental rights as an indivisible whole, hence placing all rights, at least theoretically, on the same level.<sup>53</sup> The Charter is thus divided into titles according to six fundamental values: dignity, freedom, equality, solidarity, citizens' rights, and justice. The substantive provisions are then complemented by the Preamble and by the so-called horizontal provisions (Articles 51 to 54), which are general provisions which set out the scope of application of the Charter, the legitimate grounds of limits on, and derogations from, Charter rights, as well as the relationship with the ECHR, national constitutions, and international human rights treaties. As we shall see later, the scope of application of the Charter mirrors that of the general principles so that the Charter applies to the Union Institutions as well as to the Member States when they implement or act within the scope of Union law. The Charter is also complemented by 'explanations' which clarify the scope and, most importantly, the source of each of the Charter rights/provisions.<sup>54</sup> The identification of the 'origin' of Charter rights is of paramount importance for understanding their scope, since the Charter incorporates rights contained in other documents and in particular in the ECHR and in the TEU/TFEU. The Convention-derived rights must be interpreted to give *at least* the same protection granted by the Convention (Article 52(3)), whilst Treaty-derived rights must be given the same scope as their Treaty counterparts (Article 52(2)).

### 4.3 The substantive provisions of the Charter

#### Title I Dignity (Articles 1 to 5)

Title I contains those rights which are essential to the enjoyment of any other right: the right to human dignity;<sup>55</sup> the right to life; the right to the integrity of the person, which contains new generation rights such as the principle of informed consent in relation to medical intervention and the prohibition of eugenic practices; the prohibition of torture and inhuman and degrading treatment; and the prohibition of slavery and forced labour. As we have seen previously, in the *NS* case the prohibition of torture and inhuman treatment was relied upon to curtail the discretion of the UK and prevent it from deporting the asylum seekers to Greece.<sup>56</sup>

<sup>53</sup> The dichotomy between civil and political rights on the one hand, and social and economic rights on the other, is reflected at European level in the ECHR, which only protected civil and political rights. There is a long-standing debate, also between Western and non-Western countries, as to the respective strengths of different rights (eg is any right meaningful without the right to true democratic participation; or is any political right of any significance if individuals are not put in the condition to survive). The Charter seeks then to go beyond this debate and stress the indivisibility of fundamental rights. Furthermore, the structure and breadth of the Charter seeks to go beyond the traditional market-centrism which characterized the earlier stages of European integration.

<sup>54</sup> The original explanations can be found on the Council documents website (<http://www.europa.eu.int>), or as an official publication of the European Communities (ISBN 92-824-1955-X (2001)); the amended explanations can be found in Explanations relating to the Charter of Fundamental Rights (OJ [2007] C303/02). Art 52(7) Charter provides that the explanations must be given 'due regard' by the courts of the Union and of the Member States; Art 6(1), third subpara, TEU provides that the Charter must be interpreted having due regard to the explanations.

<sup>55</sup> Case C-377/98 *Netherlands v Council* ('Biotechnology Directive') [2001] ECR I-7079; see also Case C-36/02 *Omega* [2004] ECR I-9609, esp para 34. Even though it is not expressly mentioned in the Convention, the right to dignity informs the interpretation of all Convention rights; eg *Tyrer v UK* (Appl No 5856/72) (1979–80) 2 EHRR 1.

<sup>56</sup> Joined Cases C-411 and C-493/10 *NS and others*, judgment of 21 December 2011, nyr. See section 2.2.2.



### Title II Freedom (Articles 6 to 19)

This heading contains some of the traditional civil and political rights, such as the right to liberty; the right to private life; the right to freedom of expression; the right to property; some new generation rights, such as the right to the protection of personal data; as well as some socio-economic rights, such as the right to work and the right to education. It is interesting to note that despite the Charter's ambitions to reflect a more contemporary take on rights, the right to freedom of thought and religion was not broadened explicitly to include the right not to hold a religious belief,<sup>57</sup> as suggested by many NGOs.<sup>58</sup> As we have seen in case study 9.1 in the *Kadi* case, the Court held that whilst the freezing of Mr Kadi's assets could in principle have been justified, in the case at issue it violated his right to property because it did not provide for sufficient procedural guarantees.

### Title III Equality (Articles 20 to 26)

Title III contains traditional equality rights (non-discrimination on grounds of sex, race, sexual orientation, religion, belief, etc), together with the right not to be discriminated against on grounds of nationality within the scope of application of the Treaty and the rights of more vulnerable members of society such as children, the elderly, and disabled people. For more on the application of these rights in EU law, see chapter 20.

### Title IV Solidarity (Articles 27 to 38)

Title IV is, at least in the UK,<sup>59</sup> the most contested part of the Charter in that it contains traditional social rights and 'principles', such as the right to collective bargaining and action, including the right to strike and protection against unjustified dismissal; the right to fair working conditions as well as protection for children and young people at work, and protection for the family, including protection against dismissal linked to maternity. It also includes 'recognition' of social security and social assistance; access to services of general economic interests; and the 'right' to health care, as well as the obligation for the Union to ensure a high level of environmental and consumer protection in its policies. It should be noted that some of these rights are entirely dependent on national laws and practices; whilst others are 'principles', that is, not self-standing rights, rather instructions that establish the principles the Union legislature must respect.<sup>60</sup> For more on the application of these rights in EU law, see again chapter 20.

### Title V Citizens' rights (Articles 39 to 46)

Title V reproduces rights contained in the TFEU and mainly benefits only Union citizens. It includes the right to vote and stand for elections in the European Parliament and in municipal elections in the Member State of residence, the right to move and reside freely in the territory of the Member States, and the right to consular and diplomatic protection, all limited to Union citizens. The 'administrative rights' in this title, such as the right to good administration, the right to access documents, the right to complain to the Ombudsman, and the right to petition, are also available to non-EU citizens resident in or, in the case

<sup>57</sup> This is especially disappointing since the ECtHR has found that the right not to hold a religious belief is inherent in the correspondent ECHR right (Art 9) *Buscarini and others v San Marino* (Appl No 24645/95) (2000) 30 EHRR 208.

<sup>58</sup> cf Amnesty International Comments on the Draft Charter, CHARTE 4446/00, CONTRIB 300.

<sup>59</sup> For the position of UK and Poland on Title IV, see discussion in section 4.5 on Protocol No 30.

<sup>60</sup> On the distinction between principles and rights, see also discussion on Art 52(5) in section 4.4.2.

of legal persons, to companies having their registered office in, the EU. As an example of how the rights in Title V apply in practice, see chapter 13 regarding the free movement of persons.

### Title VI Justice (Articles 47 to 50)

Title VI is concerned with the administration of justice and draws mainly on the ECHR and on the common constitutional traditions to the Member States. It includes the right to an effective remedy and a fair trial; the right to be presumed innocent and the right of defence; the principle of legality and proportionality of criminal offences and penalties; and the principle of *ne bis in idem*, which is to say the right not to be tried or punished twice for the same offence. These rights were relevant, for instance, in the *Kadi* and *Fransson* cases discussed in this chapter.

## 4.4 The horizontal provisions

As mentioned previously, Articles 51 to 54 set out the scope of application of the Charter, clarifying: its field of application (Article 51); the scope and interpretation of rights and principles (Article 52);<sup>61</sup> the level of protection (Article 53); and the prohibition of abuse of rights (Article 54). Those are, without doubt, the most complex and difficult provisions of the Charter since they reflect anxieties and divisions amongst Member States in relation not only to what the Charter should achieve, but also in relation to the direction of the EU. In particular, some Member States fear that fundamental rights might become a vehicle for further intrusion into national sovereignty, even in those fields which Member States have reserved to themselves; that the Charter might eventually have the effect of granting the Court of Justice broad and general fundamental rights jurisdiction; and that the Charter is a further step towards a more integrated, and federal, EU. We shall now consider some of these issues.

### 4.4.1 The scope of application of the Charter

As we have seen, the Charter codifies existing case law making rights more visible to the citizen. Its primary addressee, then, is the EU. However, the Member States are also bound by EU fundamental rights when they exercise a discretion which has either been conferred by Union law (ie when they implement a Union law instrument) or when they bring themselves within the scope of EU law by limiting or derogating from one of the rights conferred by the Treaties. Article 51(1) therefore states that the provisions of the Charter are addressed to the EU Institutions, agencies, and bodies and to the Member States ‘only’ when they implement Union law.<sup>62</sup> It should be noted, however, that the interpretation of what constitutes ‘implementation’ for the purposes of Article 51(1) is very broad. It covers cases in which the Member State is implementing or giving effect to a directive, regulation, or decision, as well as cases where the Member State is limiting one of the rights granted by the Treaty. More controversially it also

<sup>61</sup> See generally K Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ [2012] 8 *European Competition Law Review* 375.

<sup>62</sup> To start with there was some confusion about the fact that whilst fundamental rights as general principles apply when the Member States implement EU law or *act within its scope* (see previously), Art 51 only referred to the former. However, the explanations to the Charter refer to Member States acting with the scope of EU law, and the Court, rightly, has adopted an integrated reading so that the reference to ‘implement’ in Art 51 also includes Member States acting within the scope of EU law; see eg Case C-256/11 *Dereci et al* [2011] ECR I-11315, para 72.

covers cases in which the Member States exercise a power that was ‘reserved’ to them in a piece of secondary legislation;<sup>63</sup> as well as cases where the subject matter is only partially related to EU law.

For instance, in *Åkerberg Fransson*,<sup>64</sup> the issue related to whether the principle of *ne bis in idem* provided for in Article 50 Charter, applied to proceedings brought against Mr Åkerberg Fransson on charges of serious tax offences, including providing false information in relation to VAT. Several intervening Member States, together with the Commission, argued that the Charter was not applicable since the legislation which formed the basis for the proceedings was not implementing EU law. The Court disagreed: it found that the tax penalties and the criminal proceedings to which Mr Åkerberg Fransson was subjected were in part connected to his obligations to declare VAT. The Court then found that it followed from Directive 2006/112<sup>65</sup> as well as from the principle of loyal cooperation that Member States have an obligation to take ‘all legislative and administrative measures’ to ensure collection of VAT due on their territory. Furthermore, since part of the VAT revenue is destined to EU own resources, a lacuna in collection of the tax would also determine a reduction in the revenues of the EU. Since Article 325 TFEU obliges Member States to counter illegal activities affecting the financial interests of the EU, the tax penalties at issue also constituted implementation of that provision of the Treaty. For these reasons, and even though the proceedings also related to the collection of income tax, which is not harmonized at EU level, the Court found that the tax penalties and the criminal proceedings constituted ‘implementation’ of EU law and therefore fell within the scope of application of the Charter.<sup>66</sup>

Article 51(1) also states that Institutions and Member States apply the Charter ‘in accordance with their respective powers and respecting the limits of the powers of the Union as conferred in the Treaties’, hence reinforcing the separation between Union and national competences. This is further restated in Article 51(2) which clarifies that:

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

<sup>63</sup> See Joined Cases C-411 and 493/10 *NS v Secretary of State for Home Department and others*, judgment of 21 December 2011, nyr, also discussed previously.

<sup>64</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013, nyr; noted E Hancox (2013) 50 *Common Market Law Review* 1411; on this case and the reaction it provoked in the German Federal Constitutional Court, see F Fontanelli, ‘*Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*’ [2013] 9 *European Competition Law Review* 315; and ‘Ultra Vires – Has the Bundesverfassungsgericht Shown its Teeth?’, editorial (2013) 50 *Common Market Law Review* 925; D Sarmiento, ‘Who is Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in the EU’ (2013) 50 *Common Market Law Review* 1267.

<sup>65</sup> Directive 2006/112 on the common system of value added tax (OJ [2006] L347/1).

<sup>66</sup> In Case C-40/11 *Iida v Stadt Ulm*, judgment of 8 November 2012, nyr, the Court stated that in order to determine whether the Member State is implementing EU law:

it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it. (para 79)

See also Case C-87/12 *Ymeraga v Ministre du Travail, de l’Emploi et de l’Immigration*, judgment of 8 May 2013.

As we mentioned previously, Article 51 reflects a certain anxiety on behalf of the Member States that the Charter might become a vehicle to establish general fundamental rights jurisdiction for the Court of Justice.<sup>67</sup> These fears were duly taken into account by the Court in the ruling in *McB*.<sup>68</sup>

In *McB* the issue related to Irish rules on custody rights according to which, whilst the mother obtains automatic custody of her children, the unmarried father, lacking an agreement, must apply to a court to see his right recognized. When the McB couple separated, Mr McB applied for custody to the Irish courts; the mother, however, removed the children from the jurisdiction of the Irish courts before custody had been granted. Pursuant to Regulation 2201/2003 on the recognition of judgments in matters of parental responsibility, if children are wrongfully removed from their country of residence the jurisdiction is maintained by the latter's courts.<sup>69</sup> However, the Irish court denied jurisdiction on the ground that when the removal took place the father had not yet acquired custody rights. The Irish Supreme Court then referred a question to enquire whether the Regulation, read in light of the Charter, precluded the national rule that, in the case of unmarried fathers, subordinated custody rights to agreement between the parents or to judicial pronouncement. Mr McB argued that the Irish rules were inconsistent with his right to private and family life as guaranteed by Article 7 Charter, and Article 8 ECHR.

The question was very sensitive: family law is, broadly speaking, reserved to the Member States. As a result, Regulation 2201/2003, which merely coordinates national rules and does not harmonize them, refers to the law of the Member States to determine when removal of the child has been wrongful thereby resulting in abduction. However, Mr McB was seeking through the medium of EU law a review of the national rules on custody: in this way a matter reserved to the Member State would become open to scrutiny by the Union judicature. The Court relied on Article 51 to limit the effects of the Charter, and it held:

52. It follows that, in the context of this case, the Charter should be taken into consideration solely for the purposes of interpreting Regulation No 2201/2003, and there *should be no assessment of national law as such*.<sup>70</sup>

The Court then performed an indirect review of national law by focusing on its own interpretation of the Regulation. In this way it sought to respect the letter and the spirit of Article 51 Charter and to balance the need to respect the competencies of the Member States, with the need to ensure that the rights of individuals are protected.

#### 4.4.2 The scope and interpretation of the Charter

Very few fundamental rights are absolute; the vast majority of fundamental rights can be limited in order to protect the rights of others and/or to ensure that public policy objectives can be carried out. Take, for instance, the right to liberty on the one hand, and the need to impose custodial sentences for given crimes on the other; or the need to respect other people's property when enjoying one's own. In order to ensure that a balance can be struck between competing private or public interests, fundamental rights documents

<sup>67</sup> On the duty of national courts in relation to the Charter, see again Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013.

<sup>68</sup> Case C-400/10 PPU *McB* [2010] ECR I-8965.

<sup>69</sup> OJ [2003] L338/1.

<sup>70</sup> Emphasis added.

often contain derogation and limitation clauses:<sup>71</sup> thus, for instances, the ECHR contains the permissible grounds of limitation in each of the relevant right-granting articles, and a general power to derogate from most of the Convention in emergencies (Article 15). By contrast, the Charter provides for just one general derogation and limitation clause. Article 52(1) states that limitations on the exercise of Charter rights must:

- be provided by law;
- respect the essence of those rights;
- respect the principle of proportionality; and
- be necessary to meet the objectives of ‘general interest recognised by the Union or the need to protect the rights and freedoms of others’.

Furthermore, in order to ensure consistency, Article 52(2) clarifies that Treaty-derived rights are to be exercised according to the conditions and limits defined by the Treaties (eg Union citizenship rights can be legitimately detailed/limited in Directive 2004/38; see further chapter 16). More importantly, in order to ensure adequate protection, paragraph 3 of the same article provides that insofar as Charter rights correspond to ECHR rights, their meaning and scope must be the same as those laid down by the Convention, even though it is open to the Union to afford more generous protection (eg in immigration cases the Union might legitimately give a more generous interpretation of the right to family life; see case study 9.2 on the Carpenter judgment). Article 52(4) provides that rights resulting from common constitutional traditions must be interpreted in harmony with those traditions.

These latter provisions are complemented by Article 53 which ensures that the protection afforded by the Charter cannot fall below that afforded by international law and international agreements to which the EU or all of the Member States are parties, including the ECHR, and by the Member States’ constitutions.<sup>72</sup> The reference to national constitutions proved somewhat confusing: in particular, it was unclear whether Article 53 would amend the status quo according to which in relation to EU legislation the only fundamental rights standard which is relevant is that set by the EU constitutional order. In *Melloni*,<sup>73</sup> the Court of Justice clarified that Article 53 cannot be used to apply national fundamental rights (even when more protective than the Charter) to EU law which complies with the Charter. In that case, the issue related to the execution of a European Arrest Warrant;<sup>74</sup> this is an instrument pursuant to which Member States can request another Member State to surrender a suspect for the purposes of criminal prosecution; or to surrender a convicted person in order to execute a custodial sentence. Unlike extradition, the execution of a European Arrest Warrant is, beside a few listed exceptions, automatic. Mr Melloni had been convicted *in absentia* (ie he was not present at the trial); even though he was not physically present

<sup>71</sup> In those cases in which derogations are not expressly provided, the courts will interpret the content of the rights to reflect the need to balance them against conflicting legitimate interests. For an example of how the Court of Justice applies the limitation clause, see the judgment of 17 October 2013 in Case C-291/12 *Schwarz*, in which the Court ruled that fingerprinting passport holders was a justified interference with the right to private life.

<sup>72</sup> On the interpretation of the Charter, see G de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 20 *Maastricht Journal of European and Comparative Law* 168; P Popelier, C Van de Heyning, and P Van Nffel (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Cambridge: Intersentia, 2011).

<sup>73</sup> Case C-399/11 *Melloni v Ministerio Fiscal*, judgment of 26 February 2013, noted N De Boer (2013) 50 *Common Market Law Review* 1083.

<sup>74</sup> Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States (OJ [2002] L190/1), consolidated version 28 March 2009.



during the trials, because he had fled, he was legally represented by lawyers of his choosing. Once the conviction was final, the Italian authorities issued a European Arrest Warrant for the execution of the sentence. Mr Melloni was then arrested by the Spanish authorities. In an attempt to resist surrender to the Italian authorities, Mr Melloni argued, inter alia, that his conviction *in absentia* breached his right to a fair trial inasmuch as Italian procedural law did not allow appeal against (final) sentences imposed *in absentia*. He therefore argued that his surrender should be made conditional upon the possibility to appeal the Italian judgment. Otherwise, his rights as guaranteed by the Spanish Constitution would be violated.

The national court made a reference to the Court of Justice enquiring, amongst other things, whether Article 53 Charter allowed a Member State to make surrender conditional upon further review of the conviction *in absentia*, therefore providing protection of the right to fair trial and defence more generous than that afforded by the Charter but in line with its own national constitutional standard. In other words, the national court was enquiring whether, if the standard of protection afforded by the national constitution is higher than that afforded by the Charter, national courts can enforce the former. Whilst this is not a new question, having been discussed in cases such as *Internationale Handelsgesellschaft*,<sup>75</sup> it acquired a new poignancy given that Article 53 Charter provides that nothing therein can be interpreted as restricting or adversely affecting human rights as guaranteed by national constitutions. An affirmative answer would possibly maximize protection of human rights in the EU, always allowing the highest standard to prevail; however, it would jeopardize the principle of supremacy since the application of EU law would differ from country to country according to national fundamental rights standards. The Court of Justice, not surprisingly, held that:

It is settled case law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order . . . , rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State . . .

It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided* that the level of protection provided for by the Charter, as interpreted by the Court, and the *primacy, unity and effectiveness* of EU law are not thereby compromised.<sup>76</sup>

As a result, national courts are prevented from imposing their own constitutional standards in those cases in which to do so would affect the uniform application of EU law, that is, when EU law leaves no discretion to Member States. On the other hand, and in the same way as was the case before the Charter, when EU law leaves space for the exercise of discretion by national authorities, the Charter only provides Member States with a floor of rights leaving national authorities (and national courts) the freedom to apply their own (higher or differing) constitutional standards.<sup>77</sup>

Article 52(5) introduces a distinction between rights and principles: the latter are judicially cognizable only in the interpretation of legislative and executive acts and in the

<sup>75</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, and discussion in section 2.1; cf also eg Case C-377/98 *Netherlands v Parliament and Council ('Biotechnology Directive')* [2001] ECR I-7079.

<sup>76</sup> Paras 59 and 60.

<sup>77</sup> On this point, see also Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013, para 29.

assessment of their validity. This basically means that programmatic provisions, such as Article 37 which provides that a high level of environmental protection must be integrated into Union policies, do not grant a free-standing right. An individual would therefore not be able to rely on Article 37 Charter in order to uphold a right to live in a pollution-free environment. Rather, the Court would be able to use Article 37 to interpret existing legislation as well as annul acts of the Union which clearly disregard the principles enshrined in that article.

Article 52(6) restates that full account must be taken of national law and practices specified in the Charter, whilst Article 52(7) instructs the courts to have due regard to the Charter explanations when interpreting the Charter.

Finally Article 54 provides a prohibition on abuse of rights, and it is almost identical to Article 17 ECHR. It is aimed at ensuring that the Charter rights cannot be used in order to deprive individuals of rights conferred therein.<sup>78</sup>

Very few people would take Articles 51, 52, and 53 Charter as examples of clear and unambiguous drafting; rather, those provisions reflect the tensions and anxieties pertaining to EU fundamental rights. Be that as it may, the Charter is a remarkable document – it took over 30 years following the *Stauder* judgment to provide Union citizens with a proper catalogue of rights in order to ensure, at least theoretically, better awareness and therefore increased protection of fundamental rights.

#### 4.5 Protocol No 30 on the application of the Charter to Poland and the UK<sup>79</sup>

We mentioned earlier that the UK (and Poland) has a less than serene attitude towards EU fundamental rights – and as we have seen in case study 9.2 on *Carpenter*, the reasons for this scepticism lie not with reservations as to the need to hold the EU Institutions to account; rather, they stem from a deep unease towards the possibility that national acts be subjected to (yet) another layer of fundamental rights scrutiny.<sup>80</sup> It is against this background, then, that Protocol No 30 should be understood: as a clarification (and possibly a reassurance to the British public) rather than a ‘derogation’ (or ‘opt-out?’) proper.<sup>81</sup>

The Protocol is composed of a long Preamble followed by just two articles. Article 1(1) is tautological: it states that the ‘Charter does not *extend* the ability’ of the Court of Justice or any of the courts of Poland or the UK to find that the laws, regulations, administrative provisions, practices, or actions of Poland or the UK are inconsistent with the Charter.

<sup>78</sup> See in the ECHR context, eg *Lawless v Ireland (No 3)* (1979–80) 1 EHRR 15.

<sup>79</sup> In November 2009, the European Council promised to add the Czech Republic to Protocol No 30, in return for the Czech President ratifying the Lisbon Treaty (which he then did). A draft Protocol to the Treaties to this end was then drawn up, but the Czech Senate then voted against being added to Protocol No 30, and the European Parliament expressed a negative opinion on such extension. It remains to be seen whether the Protocol extending Protocol No 30 to the Czech Republic will ever be signed or ratified. For the relevant documents, see <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2011/0817%28NLE%29>.

<sup>80</sup> A cursory internet search provides many interesting, if wholly inaccurate, reports; see eg <http://www.dailymail.co.uk/debate/columnists/article-181289/The-New-Soviet-Union-Europe-us.html#>. On the UK and European (Convention) fundamental rights, see eg C Grayling (Lord Chancellor and Secretary of State for Justice) and T May (Home Secretary) speeches at the Conservative Party Conference 2013 ([http://www.conservativepartyconference.org.uk/Speeches/2013\\_Chris\\_Grayling.aspx](http://www.conservativepartyconference.org.uk/Speeches/2013_Chris_Grayling.aspx); [http://www.conservativepartyconference.org.uk/Speeches/2013\\_Theresa\\_May.aspx](http://www.conservativepartyconference.org.uk/Speeches/2013_Theresa_May.aspx))

<sup>81</sup> On this point, see also the European Parliament Resolution on the Czech inclusion in Protocol No 30 in n 79.

As clarified by the Court, Article 1(1) is of no legal significance since the Charter codifies existing rights, rather than creating new ones. It is clear then that, also having regard to the horizontal provisions examined previously, the Charter cannot *extend* the jurisdiction of any court, whether in the UK, Poland, or in any other country in the EU.<sup>82</sup>

Article 1(2) is more confused: it states that Title IV (Solidarity), which contains social rights, does not create ‘justiciable rights’ applicable in Poland or in the UK, except insofar as ‘Poland or the UK has provided for such rights in national law.’ The legal relevance of this provision is further confused by the fact that it is in relation to Title IV that the distinction between rights and principles had been introduced (at the insistence of the UK). It is open to doubt whether there is any right in Title IV which is not already provided for in Union law and therefore also in the laws of the UK and Poland.<sup>83</sup> Article 2 also restates the obvious: if the Charter refers to national laws and practices, it shall apply to the UK and Poland only to the extent to which those two countries recognize in their laws and practices the rights and principles therein. For instance, the right to health care provided for in Article 35 Charter is entirely dependent upon national laws and practices, not least since the EU has very limited competence in this field.

## 5 The EU and the ECHR

The Lisbon Treaty introduced a new Article 6(2) TEU, which provides:

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

Negotiations for accession started in June 2010 and ended (at least pending the Opinion of the Court of Justice) in April 2013; we will first look at the background to accession and then analyse the draft accession agreement.

### 5.1 Background to accession

The ECHR is a charter of rights adopted in the aftermath of the Second World War by the Council of Europe, a body distinct from, and of much wider composition than, the EU. In order to ensure that the Convention would have ‘teeth’, the contracting parties set up an international court, the European Court of Human Rights (ECtHR) entrusted with interpreting the ECHR and holding the contracting parties to account.<sup>84</sup> Uniquely for the time, cases before the ECtHR can be brought by individual parties; however, since the Convention is a ‘safety net’, setting only the minimum standard of fundamental rights for participatory Member States, individuals must have exhausted domestic remedies before being able to bring a case before the ECtHR.

<sup>82</sup> See Joined Cases C-411 and C-493/10 *NS and others*, judgment of 21 December 2011, nyr, paras 116 *et seq*; see also the Opinion of AG Trstenjak in Case C-411/10 *NS*; and the Opinion of AG Kokott in Case C-489/10 *Bonda*, 15 December 2011.

<sup>83</sup> For a slightly different view, see C Barnard, ‘The Opt-Out for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in S Griller and J Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Vienna: Springer, 2008) 276–281.

<sup>84</sup> The ECtHR is based in Strasbourg and for this reason is at times referred to as the Strasbourg Court; the Court of Justice is instead at times referred as the Luxembourg Court.

It has been mentioned previously that, from the very first cases concerning human rights protection in the (then) EEC, the Court of Justice stated that it would draw inspiration also from the ECHR, and that this document had special importance for the EU. Furthermore, in interpreting fundamental rights, the Court of Justice looks at the jurisprudence of the ECtHR and whilst discrepancies in the interpretation given by the two courts have occurred, those have not been intentional.<sup>85</sup> And, starting with the Maastricht Treaty, the centrality of the ECHR in the system of fundamental rights protection in the EU has also been restated at Treaty level.<sup>86</sup>

In many respects, then, the ECHR is already part of EU public law: it is mentioned in the Treaties and it is applied through the case law of the Court of Justice. Yet, the fact that the EU is not a party to the Convention raises very serious legal and political issues, and especially:

- it excludes the jurisdiction of the ECtHR over the EU;
- it introduces an idiosyncrasy as regards the EU Member States, in that respect for human rights is a precondition for joining the EU and yet the EU does not subject itself to any external scrutiny of its fundamental rights compliance; and,
- it leads to accusations of double standards as regards non-EU states, since the EU often imposes human rights conditionality clauses in international treaties.

For these reasons, discussions as to whether the EU should accede to the Convention have been long-running and in 1994 the Court of Justice was asked for an Opinion (2/94) on whether accession would be legally possible. The Court declared that, as the Treaties stood at the time, there was no competence for the Union to accede to the ECHR.<sup>87</sup> This eventually led to the adoption of Article 6(2) TEU.

### 5.1.1 The case law of the European Court of Human Rights: the doctrine of equivalent protection

The problems arising from the fact that the EU is not a party to the Convention became more pressing in the 1990s. In *M&Co*, the claimant attacked the acts of German authorities which were enforcing a European Commission decision taken within the field of competition law. The company argued that the ECHR was applicable, and the ECtHR had jurisdiction, since the obligations imposed by the ECHR on the German authorities did not cease just because the authorities were giving effect to a decision of the European Commission. Otherwise, it was argued, it would be all too easy for contracting parties to evade their obligations by acting through the medium of Union law rather than national law. The European Commission of Human Rights (then in charge of deciding on the admissibility of the case before the ECtHR), partially rejected such reasoning. It first noted that according to Article 1 ECHR, Member States are responsible for *any* violation of the Convention, whether it is a consequence of domestic or international law. However, it also found that the EU system both secured and controlled compliance with fundamental rights. To require the Member State to check whether the Convention rights had been respected in each individual case

<sup>85</sup> See eg Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859 and compare with *Niemietz v Germany* (1993) Series A, Vol 251, 16 EHRR 97; note that the European Court of Justice ruling predates the ECtHR interpretation; this divergence was corrected at the earliest possible opportunity, see Case C-94/00 *Roquette Frères Sa v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] ECR I-9011. On the relationship between the Court and ECtHR, see generally C Timmermans, 'The Relationship Between the European Court of Justice and the European Court of Human Rights' in Arnulf, Barnard, Dougan, and Spaventa, *A Constitutional Order of States?* (n 32), ch 8.

<sup>86</sup> Art F(2) TEU, Maastricht Treaty; and now Art 6(3) TEU.

<sup>87</sup> Opinion 2/94 [1996] ECR I-1783.

would be contrary to the very idea of transferring powers to an international organization.<sup>88</sup> This non-interventionist stance was successfully challenged in the case of *Matthews*.<sup>89</sup>

Ms Matthews, a resident of Gibraltar, was denied the possibility of voting in the European Parliament elections on the ground that franchise for such elections was reserved to British nationals resident in the UK. Residents in Gibraltar were therefore excluded, even though most of EU law applies to that territory. Ms Matthews then complained that her disenfranchisement was a violation of Article 3 Protocol 1 of the Convention which guarantees the right to free elections. The issue was therefore a thorny one: at stake was the very foundation of the democratic process, the principle of democratic representation. However, the case related to the elections to the European Parliament which, in this matter, were regulated by the 1976 Act on direct elections, a measure having the same value as the Treaties.<sup>90</sup> For this reason, the UK argued that the ECtHR did not have jurisdiction; and that the UK could not be held responsible for a potential violation arising from a collective act of the (then) 15 Member States, since it was unable to amend that act unilaterally.

The ECtHR found that acts of the (then) European Community were not subject to its scrutiny since the EC was not a contracting party to the Convention, and the latter did not exclude transfer of competences to international organizations provided Convention rights continued to be 'secured'. However, in the case of EC primary legislation, where the Court of Justice has no jurisdiction to assess compliance with fundamental rights, the UK, together with the other EC Member States would be responsible for violations of the Convention.

*Matthews* is a seminal case in that it lays the foundations for the subsequent evolution of the case law of the ECtHR on the relationship between the Convention and EU law. In particular, it makes clear that gaps in fundamental rights protection cannot be tolerated so that when the Court of Justice is unable to protect those rights then the ECtHR is willing to step in and hold the Member States collectively responsible for upholding/violating Convention rights. In the case of *Bosphorus*,<sup>91</sup> the ECtHR further clarified that, even when the Court of Justice has jurisdiction, the review of the ECtHR is not altogether excluded. Rather, the ECtHR will refrain from exercising its jurisdiction over the act of an international institution (eg the EU) as implemented by a Member State (ie the contracting party to the Convention) only to the extent to which it deems that:

the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least *equivalent* to that for which the Convention provides...

...

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

<sup>88</sup> *M & Co v Germany*, decision of the European Commission of Human Rights, 9 February 1990 (1990) 64 ECHR 138; see also *Pafitis and others v Greece*, decision of the ECtHR, 26 February 1998; in *Cantoni v France* (1997-V) ECHR 1614, the ECtHR held that that fact that a piece of national legislation reproduced word by word the provision of a Community directive did not subtract it from the scope of application of the Convention.

<sup>89</sup> *Matthews v UK* (Appl No 24833/94), ECtHR 1999-I.

<sup>90</sup> Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom. This was later amended partly as a result of the ruling in *Matthews*, see Council Decision 2002/772/EC Euratom (OJ [2002] L283/1); the UK then amended its rules and faced a challenge before the Court of Justice in Case C-145/04 *Spain v UK* [2006] ECR I-7917.

<sup>91</sup> *Bosphorus v Ireland* (Appl No 45036/98), ECtHR 2005-VI, noted [2005] *European Human Rights Law Review* 649.



However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was *manifestly deficient*. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights.

The ruling in *Bosphorus* then ensures that the safety net provided by the Convention remains in place even when the contested act can be ascribed to the EU rather than to its Member State: however, *Bosphorus* only provides protection against significant gaps in the safety net, since:

- it establishes a presumption of equivalent protection of EU law with the ECHR;
- it is for the claimant to prove that such equivalent protection is not only lacking but manifestly deficient.

That said, in *Michaud v France*<sup>92</sup> the ECtHR clarified that the presumption of equivalent protection applies only when the control mechanism provided for by EU law has been fully brought into play. This is not the case where a national court refuses to make a reference on the compatibility between EU law and fundamental rights.<sup>93</sup> Furthermore, in cases where Member States are exercising discretion (eg normally when implementing directives but also when they implement regulations), the ECtHR will exercise full jurisdiction on the (discretionary) act of the Member States, since the latter are parties to the Convention.<sup>94</sup>

## 5.2 EU accession to the ECHR

As we have seen in the previous section, even though the EU is not yet party to the ECHR, the ECtHR has accepted, in limited cases, exercising jurisdiction in order to ensure that membership of the EU does not deprive individuals of protection at least equivalent to that provided by the Convention. This state of affairs is not, however, completely satisfactory since, lacking accession:

- the jurisdiction of the ECtHR is limited to those cases where the claimant can rebut the presumption of equivalent protection; this means that overall it is more difficult for individuals to seize the ECtHR in cases relating to EU law than it is in domestic cases;
- the EU is not party to the proceedings so that it is the Member States collectively that incur responsibility, and the EU is not bound by the ECtHR ruling.

It is for these reasons, together with the political considerations mentioned previously, that accession to the ECHR has been deemed desirable. That said, accession of an international organization to a Convention which was aimed at states is not without its challenges. In this respect, consider: that the EU is also the sum of its Member States; that in most cases, an EU act would also involve an act of national authorities (even in cases in which a regulation is at issue, since it is usually for national authorities to police compliance, seize goods, etc); and that, crucially, in the EU there is already a supranational court, the Court

<sup>92</sup> *Michaud v France* (App No 12323/11), judgment of 6 December 2012, paras 114 *et seq.*

<sup>93</sup> For an interesting ruling concerning the duty of national courts of last instance to make a reference to the Court of Justice pursuant to Art 267 TFEU, see *Ullens de Shooten and Rezabek v Belgium* (Appl Nos 3989/07 and 38353/07), judgment of 20 September 2011.

<sup>94</sup> eg *MSS v Belgium and Greece* (App No 30696/09), judgment of 21 January 2011, esp para 338; this ruling had important effects in relation to the European asylum system framework, see *Joined Cases C-411 and 493/10 NS v Secretary of State for Home Department and others*, judgment of 21 December 2011, nyr, discussed at section 2.2.1.

of Justice, which is the only court entrusted with the interpretation and assessment of validity of Union law.<sup>95</sup> The relationship between the ECtHR and the Court of Justice was then one of the points that needed clarification in the accession negotiations; furthermore, also complex is the interaction between the Member States and the EU especially in those cases where responsibility might be more difficult to ascertain. To address these issues, the draft accession agreement provides for a co-respondent mechanism (see the following subsection) and for the possibility of ‘delaying’ proceedings to allow the Court of Justice to assess the compatibility with the Convention of the EU legislation if it did not have the possibility to do so before the case reached the ECtHR.<sup>96</sup>

### 5.2.1 Co-respondent mechanism

Article 3(2) draft agreement provides that, when an application is directed against a Member State of the EU, the EU may become a co-respondent if ‘it appears’ that the compatibility of EU law with the Convention is called into question. This provision will allow the EU to become a full party to the proceedings (at present the EU can only submit third party interventions) which also means it will become bound by the ruling of the ECtHR. Take, for instance, a case like *NS*<sup>97</sup> where deportation of asylum seekers to another EU Member State is made possible by an EU regulation, although Member States take the final (discretionary) decision as to whether they want to assess the asylum application themselves. If the individual brings the case against her Member State,<sup>98</sup> it seems reasonable that the EU might choose to become a co-respondent as there would be some uncertainty as to whether the potential breach has been caused by the EU legislation or by the implementing national act.

The reverse is also possible: in cases concerning a provision of the TEU or TFEU or another piece of EU primary law, Member States can become co-respondents in a case directed against the EU since, should a violation be found, they would have to act collectively to modify the Treaties or primary legislation. So, for instance, in a case like *Matthews*<sup>99</sup> where the complaint related to EU primary law (in that case the failure to extend the franchise for the European Parliament to EU citizens resident in Gibraltar), the case would be directed against the EU as the body primarily responsible for the adoption of the contested act. However, Member States have a direct interest in a case like this, since it is they who are in charge of amending EU primary law: it therefore seems reasonable that should they so wish, they can become co-respondents.

In order to ensure full protection for the individual, a new paragraph will be added to Article 36 Convention so that the admissibility of an application is decided without ‘regard to the participation of a co-respondent in the proceedings’. As a result, the individual will not be penalized for not having correctly identified the potential responsibility of the EU in the alleged breach.

### 5.2.2 The role of the Court of Justice

As mentioned previously, in those cases in which the EU is co-respondent, that is, where EU law might conflict with the Convention, there is the possibility to delay proceedings to allow

<sup>95</sup> Case 314/85 *Foto-Frost* [1987] ECR 4199, and see chapter 10.

<sup>96</sup> Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, *Final Report to the CDDH*, doc 47+1(2013)008rev2, available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp); see P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford: Hart Publishing, 2013).

<sup>97</sup> Joined Cases C-411 and C-493/10 *NS and others*, judgment of 21 December 2011, see section 2.2.2.

<sup>98</sup> This would in fact be the case in *MSS v Belgium and Greece*, judgment of 21 January 2011.

<sup>99</sup> *Matthews v UK* (Appl No 24833/94), ECtHR 1999-I, see section 1.1.1.

the Court of Justice to assess for itself whether the rule is compatible with the Convention. For instance, take the case of *Stauder* where Mr Stauder complained that identification by name of those eligible for discounted butter constituted a breach of his right to private life.<sup>100</sup> In a case such as that, lacking a prior ruling by the Court of Justice, the ECtHR would be able to delay proceedings to allow the Court of Justice to examine the matter, possibly suggesting an interpretation which would make the measure compatible with fundamental rights (as was the case in *Stauder* where the Court of Justice was able to provide an alternative interpretation of the (then) Community instrument that did not breach the applicant's right).

The reasons for this procedure are clear: in the case of national rules, an individual must have exhausted domestic remedies before being able to bring a complaint before the ECtHR. This ensures that fundamental rights protection is primarily the responsibility of national courts; it is only when something was overlooked or went wrong in that forum that the ECtHR will intervene. The ECtHR is not a further court of appeal; rather, it ensures that a minimum standard of protection is applied throughout the territories of the contracting parties.

In the case of the EU, matters are more complex because, mostly, cases reach the Court of Justice through the preliminary ruling mechanism: conditions for direct access (standing) to the EU Courts to challenge the validity of EU law are strict. Since in most cases there is also a national enforcement element to the case, issues are more often examined by national courts which then decide whether a reference to the Court of Justice is appropriate.<sup>101</sup> In those cases, however, the parties have no control over whether the reference is made; and on what questions are asked of the Court of Justice. For this reason, it would have been unwise to include prior scrutiny by the Court of Justice as a prerequisite for the 'exhaustion' of domestic remedies under the Convention. Since the individual has no power to decide whether a preliminary reference is sought, she should not be penalized if the national court failed to refer the question to the Court of Justice. On the other hand, it was felt that in those cases it would be beneficial for the Court of Justice to have 'first shot' at the correct interpretation of EU law and its compatibility with the Convention (and the Charter), not least since the matter might be resolved without the need for further investigation by the ECtHR. For this reason, when the EU is a co-respondent, and the Court of Justice has not yet assessed the Convention compatibility of the rules at issue, proceedings are delayed to allow the Court of Justice to examine the matter.

How well this system will work in practice remains to be seen;<sup>102</sup> on the one hand, in straightforward cases where the national court of last instance refused to request a preliminary ruling, thereby going against the wording and the spirit of Article 267(3) TFEU, the procedure provided in the Accession Treaty will allow for 'a fix', by allowing the Court of Justice to rule on the matter despite the absence of a preliminary reference. However, it could be questioned whether such a 'fix' should not be provided in the context of the EU itself rather than through an external mechanism.

In other cases, it might be more difficult to ascertain whether the Court of Justice has already ruled on the issue: take, for instance, the ruling in *Kaba II*,<sup>103</sup> where the Court of Justice was also asked to assess the compatibility of EU law, and in particular the role of the Advocate General, with fundamental rights. The Court reversed the order of the questions so as to avoid examining the fundamental rights issue.<sup>104</sup> It is open to debate whether in those cases the ECtHR

<sup>100</sup> Case 29/69 *Stauder* [1969] ECR 419, see section 2.1. <sup>101</sup> See generally chapter 10.

<sup>102</sup> For a (more) positive assessment, see R Baratta, 'Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement' (2013) 50 *Common Market Law Review* 1305.

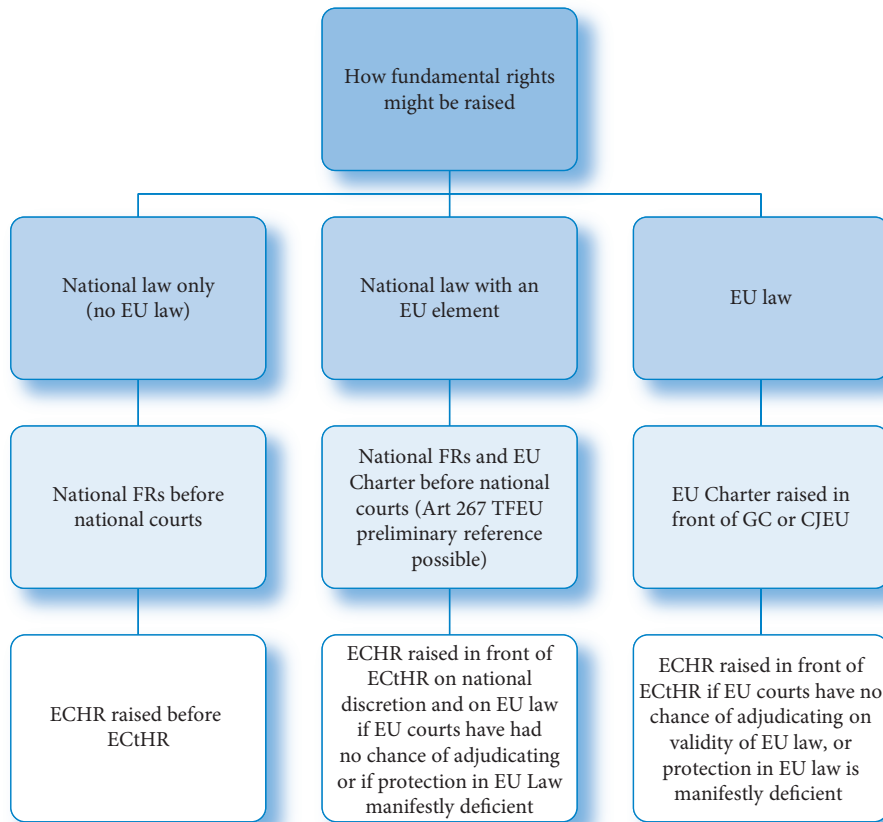
<sup>103</sup> Case C-466/00 *Kaba v Secretary of State for the Home Department* ('*Kaba II*') [2003] ECR I-2219.

<sup>104</sup> See also the case of *Michaud* (*Michaud v France* (App No 12323/11), judgment of 6 December 2012) discussed in section 5.1, where the applicant complained about the relevant EU law breaching Art 8 ECHR. In

could delay the proceedings to allow the Court of Justice to have another say. Furthermore, the function of gatekeeper allocated by the TFEU to national courts might well be compromised if individuals can then seize the Court of Justice through the ECtHR. After all, the fact that it is for the national court to decide what questions to refer, and when, is aimed at ensuring that the Court of Justice is not flooded by unmeritorious and spurious claims.

Another slight oddity is that, when the Member State is a co-respondent, the special delaying procedure is not available. Member States can be co-respondent when the issue relates to the compatibility of a piece of primary law with the Convention. The most likely reason the Court of Justice does not need to be involved in those cases is that it has no jurisdiction to declare EU primary law invalid. However, it could be argued that the compatibility of primary (hence, more general) rules with fundamental rights might depend very much on the interpretation given to such rules, an interpretation which is for the Court of Justice to provide.

That said, there is no doubt that accession to the ECHR will be a positive step and will ensure that the EU is bound by the same rules that bind its Member States and its international partners. For an overview, see Figures 9.1, 9.2, and 9.3.



**Fig 9.1** Fundamental rights protection in the EU before the EU’s accession to the ECHR

Case C-305/05 *Order des barreaux francophones et germanophone and others v Conseil des Ministres* [2007] ECR I-5305, the Court of Justice examined the compatibility of the same piece of legislation (Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering (OJ [1991] L166/77), as amended by Directive 2001/97 (OJ [2001] L344/76) only with the right to fair trial as guaranteed by Art 6 ECHR (and Arts 47 and 48 Charter).

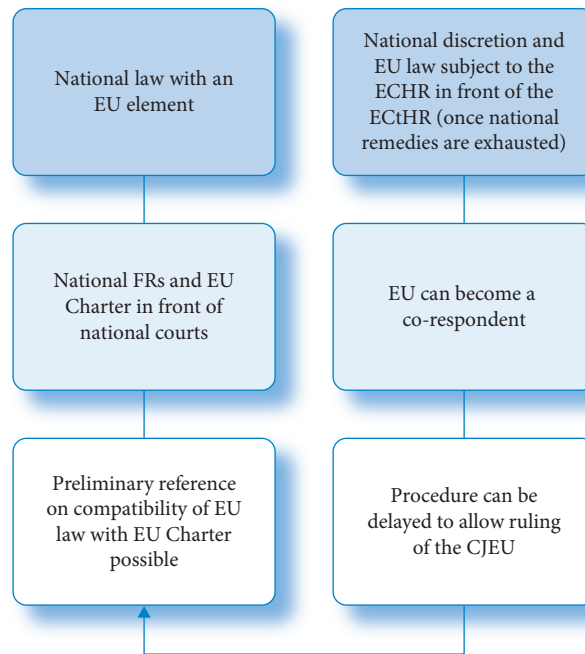


Fig 9.2 Jurisdiction in respect of *national law* with an EU element post-EU accession to the ECHR

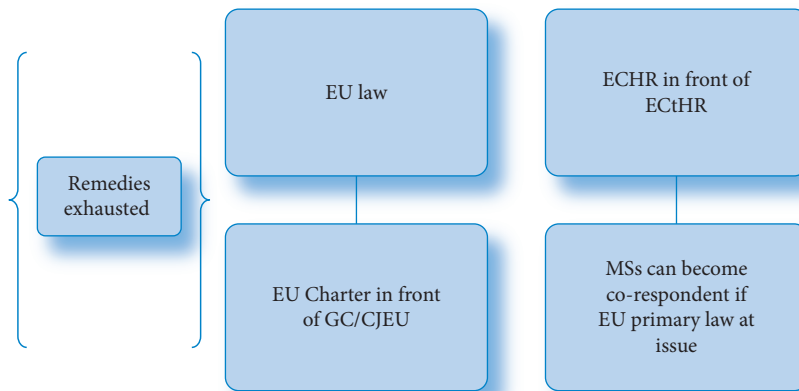


Fig 9.3 Jurisdiction in respect of *EU law* post-EU accession to the ECHR

## 6 Conclusion

The field of fundamental rights is that which has evolved more markedly with the evolution of the EU – it arose from a constitutionally limp Community, it was followed by institutional acknowledgement, progressive legislative recognition, to result eventually in full codification. Given its inextricable link with the process of deeper integration, it is not surprising that it is a field which is not only complex but also, at times, deeply contested. Some Member States would like to see more and better protection of fundamental rights in the EU, whilst other are deeply cautious, if not altogether sceptical, of giving the Court

of Justice yet another weapon in its already powerful armoury. In particular, the fear is that fundamental rights jurisprudence will have an excessive impact on national rules and further blur the boundaries between EU and national sovereignty.

And yet, to most citizens those issues matter little: what is of value is that with every Treaty revision the rights of individuals against the EU legislature and executive (including where EU rules have been implemented by Member States) have been strengthened. Institutions that have the power deeply to affect the lives of many should be held to account: the Court, the Charter, and the Convention seek to do exactly that.

### Further reading

G DE BÚRCA, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168

P GRAGL, *The Accession of the European Union to the European Convention on Human Rights* (Oxford, Hart Publishing, 2013)

HCH HOFMANN AND BC MIHAESCU, 'The Relation Between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' [2013] 9 *European Competition Law Review* 73

K LENAERTS, 'Exploring the Limits of the EU Charter of Fundamental Rights' [2012] 8 *European Competition Law Review* 375

S PEERS, T HERVEY, J KENNER, AND A WARD (eds), *The Charter of Fundamental Rights – A Commentary* (Oxford: Hart Publishing, 2014)

A PLIAKOS AND G ANAGNOSTARAS, 'Who is the Ultimate Arbiter? The Battle Over Judicial Supremacy in the EU' (2011) 26 *European Law Review* 109

D SARMIENTO, 'Who is Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in the EU' (2013) 50 *Common Market Law Review* 1267