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The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?

The early days

The protection of fundamental rights and human rights in the European Union has witnessed several phases and fluctuations. In the early days of European integration, whilst it would be exaggerated to brand the then Communities[1] a 'villain,'[2] there was no explicit recognition of fundamental rights/human rights as being part of Community law. In some cases of the late 1950s and early 1960s where the European Court of Justice[3] was invited to apply national constitutional fundamental rights, the Court not only declined to apply a given provision of a national constitution[4] but also abstained from developing a fundamental rights regime at Community level.[5]

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1 Hereinafter: EU. The European Coal and Steel Community, founded in 1951 (and abolished in 2002), and the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), both founded in 1957. On the historical development of the Communities and subsequently the EU v., e.g., A. Rosas, L. Armati, *EU Constitutional Law: An Introduction*, Oxford 2012, pp. 9-12.

2 Which, to cite the Oxford Dictionary, is a person 'guilty or capable of great wickedness.'

3 Hereinafter: ECJ.

4 Such application of a national constitutional provision would have been difficult as the Court's competence was limited to EEC law and also as the then six national constitutions (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) were quite different in status and content.

5 A. Rosas, *The European Union and Fundamental Rights/Human Rights*', in *International Protection of Human Rights: A Textbook*, ed. C. Krause, M. Scheinin, Turku – Åbo 2012, pp. 481.

But such an approach proved untenable in the long run. The famous judgment of the ECJ in *Stauder*, delivered in 1969, set the stage for a system of the protection of fundamental rights as general principles of Community law.[6] In later judgments, the Court specified that, with a view to determining which rights form part of the general principles of Community law, inspiration could be sought from the 'constitutional traditions common to the Member States'[7] and guidelines could be found in 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.'[8] It was later added that the European Convention on Human Rights[9] was not only one such international treaty but also that it enjoyed 'special relevance.'[10]

These developments in case law, which undoubtedly can be characterized as 'judge-made law,' were not only prompted by concerns about fundamental rights and human rights in themselves. There is every reason to believe that the ECJ also took into account the need to uphold the principle of the primacy of Community law over the laws of Member States, which the Court had explicitly confirmed in *Costa v ENEL* in 1964, five years before *Stauder*.[11] If a Community law bereft of rules on fundamental rights always prevailed over the national law of the Member States, including their constitutional Bills of Rights, there was a clear risk that national constitutional and other courts would begin to restrict the application of rules of Community law which posed a problem from the point of view of their own constitutionally protected fundamental rights. The solution at which the ECJ arrived was to advance the protection of fundamental rights at Community level, corresponding to the national Bills of Rights.[12]

It may be equally exaggerated, however, to consider the EEC and the other Communities of those days as a 'vanguard' (to cite once more the Oxford Dictionary, the 'leader of a movement or of opinion') of fundamental rights. The initial Community fundamental rights regime fell somewhat short of the national systems, consisting in

6 Case 29/69 *Stauder* EU:C:1969:57.

7 Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, §§ 3-4.

8 Case 4/73 *Nold v Commission* EU:C:1974:51, § 13.

9 Hereinafter: ECHR.

10 V., e.g. Joined Cases 46/87 and 222/88 *Hoechst v Commission* EU:C:1989:337, § 13. Cf. A. Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, in *The EFTA Court: Ten Years On*, ed. C Baudenbacher et al., Oxford 2005, pp. 163, 168-169; A. Rosas, *The European Union...*, *op. cit.*, p. 497.

11 Case 6/64 *Costa* EU:C:1964:66; Case 26/62 *Van Gend & Loos* EU:C:1963:1.

12 V. notably the seminal article by one of the then judges of the ECJ, P. Pescatore, *Les droits de l'homme et l'intégration européenne*, "Cahiers de droit européen" 1968, pp. 629-673, which, in fact, outlined the approach the Court would ultimately take, starting the following year with *Stauder*, *supra* note 6. Cf. A. Rosas, *The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?*, in *European Integration through Interaction of Legal Regimes*, ed. C. Baudenbacher, H. Bull, Oslo 2007, pp. 34, 36-37.

12 most cases of a constitutional Bill of Rights as well as of adherence to the ECHR and other international human rights treaties. Moreover, as noted above, *Stauder* and subsequent judgments can at least partly be seen as a reaction to the risk that the principle of primacy of Community law would be called into question by national judges rather than as being prompted by human rights considerations in their own right. That said, it can be held that the judicial branch of the Communities (the ECJ) acted as a kind of a vanguard as compared to the other Community institutions or to the Member States in their capacity of authors of the basic Treaties. As has been the case also in some other instances, it was the Court that acted as an initiator and the other actors mainly followed suite.[13]

These other actors, on the other hand, did follow suite and so the seminal judgments of the Court did not remain isolated phenomena but were soon confirmed or reaffirmed by political declarations and Treaty changes. But in 1974, before the political declarations and Treaty changes, the German Constitutional Court still held that the Communities had not yet developed a full-fledged fundamental rights system. In its first *Solange* decision of 1974,[14] the Court reserved a right to verify the applicability of Community legislation in Germany under the national Bill of Rights contained in the *Grundgesetz* 'as long as' (*solange*) no equivalent system had been developed at Community level.[15] This was precisely the kind of situation the ECJ had tried to avoid by launching its own fundamental rights case law but these efforts were not considered sufficient by the German Constitutional Court, which thought that the Communities were still a bit of a villain as far as the protection of fundamental and human rights were concerned.

One of the main conclusions to be drawn from these early days of an EU fundamental rights regime is that the question of fundamental rights as part of EU law has from the very beginning been a markedly constitutional question, with consequences for the relationship between the legal orders of the Union and those of its Member States. At stake have been primordial questions of competence and powers. It is a story of developing fundamental rights for the Union and its citizens internally rather than of promoting human rights in a worldwide or broader regional setting. Hence the term 'fundamental rights' has from the beginning been preferred for these developments, whilst 'human,

13 There is an extensive literature on the role played by the ECJ in the European integration process. For two recent contributions initiated or published by the ECJ itself: *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, ed. A. Rosas et al., The Hague 2013; *Van Gend en Loos 1963–2013: 50ème Anniversaire de l'arrêt – 50th Anniversary of the Judgment*, ed. A. Tizzano et al., Luxembourg 2013.

14 Decision of 29 May 1974, BVerfGE 37, 271.

15 V., e.g. D. Thym, *Attack or Retreat? Evolving Themes and Strategies of the Judicial Dialogue between the German Constitutional Court and the European Court of Justice*, in *Constitutional Conversations in Europe: Actors, Topics and Procedures*, ed. M. Claes et al., Cambridge 2012, pp. 235.

rights' has become a term used in the context of EU *external* relations.[16] This is also the terminology that will guide us in the ensuing discussion.

Consolidation and Refinement

The Joint Declaration issued by the European Parliament, the Council and the Commission in 1977,[17] in which the three main political institutions underlined the primary importance they attach to the protection of fundamental rights as derived in particular from the constitutions of the Member States and the ECHR, was meant to further alleviate fears of the Community as a fundamental rights-free-zone. In parallel, the ECJ continued to develop and refine its own case law. These developments led the German Constitutional Court to reverse its *Solange* I decision in 1986 ("*Solange* II").[18] The German Court now held that Community fundamental rights law had developed to such an extent that it would not exercise its competence to control the compatibility of Community law with the fundamental rights provision of the German Constitution 'as long as' the Communities guarantee an equivalent system for the effective protection of fundamental rights.

The Maastricht Treaty of 1992 implied that some basic provisions on fundamental and human rights were brought into the remit of binding Community primary law. The provision relating to fundamental rights as part of the general principles of Community law, as guaranteed by the ECHR and as they result from the constitutional traditions of the Member States, has survived until our days and is now expressed in Article 6(3) TEU. In this way, the Member States as 'Masters of the Treaties'[19] have accepted that the *Nold* approach, used by the ECJ already in 1974, has been incorporated into binding primary law (with the exception that Nold referred to human rights treaties in general whereas Article 6(3) TEU and its previous versions mention the ECHR only).

The Maastricht Treaty also contained some provisions relating to the promotion of human rights in the external relations of the Communities. In 1996, in *Portugal v Council*, the ECJ ruled that insertion of a general human rights clause in agreements with third States was compatible with Community law. The fact that the Court explained the legality of the human rights clause by observing that it does not create new human rights but rather confirms some basic principles and provides for the taking of countermeasures against third States in case of violation of those principles is indicative of the

16 A. Rosas, *The European Union...*, *op. cit.*, p. 481.

17 [1977] OJ C103/1.

18 Decision of 22 October 1986, BVerfGE 73, 339. Cf. the Banana market regulation decision of 7 June 2000, BVerfGE 102, 147.

19 V. *EU Constitutional Law...*, *op. cit.*, pp. 32-51.

fact that there were at the time doubts about the extent of an external competence in this field.[20]

These doubts came to the surface in connection with the plans to enable the Communities to accede to the ECHR. Many Member States and the Legal Service of the EU Council were still in the 1990s generally of the opinion that the Communities did not have a veritable external competence in the field of human rights and the ECJ was requested to give an opinion as to whether accession to the European Convention was compatible with the Treaties. In its Opinion 2/94, delivered in 1996, the Court held that as Community law stood at the time, the Communities lacked competence to adhere.[21]

The Court in this context referred to the specific nature of the ECHR, considering that accession would have such important institutional and constitutional implications that there was no sufficient legal basis in the existing Treaties to enable accession and that accession would require amending the Treaties. This left the question of accession in abeyance for a long time to come. I shall come back to this question after a while, in the context of some remarks on the recent Opinion 2/2013, in which the Court this time held that the draft accession agreement which had been negotiated by the European Commission, on behalf of the EU, and the Member States of the Council of Europe is not as to its substance compatible with the Treaties.

The situation after Opinion 2/94 of 1996 thus remained more or less as it had been before. In other words, the dominant factor in the *internal* fundamental rights regime continued to be the case law of the ECJ, inspired by the ECHR and Strasbourg case law in particular, and supplemented by the general provisions of the Maastricht Treaty. As to *external* relations, the main legal element was the human rights clause, combined with some Community legislative acts providing for financial assistance to human rights activities in third countries or the possibility to suspend financial assistance or trade preferences more generally if a third country was deemed to violate basic human rights principles.[22]

The Charter of Fundamental Rights

Especially with regard to the internal fundamental rights system, the situation was not considered to be entirely satisfactory. If a citizen wanted to know exactly what funda-

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20 Case C-268/94 *Portugal v Council* EU:C:1996:461. Cf. B. Brandtner, A. Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, "European Journal of International Law" 1998, vol. 9, pp. 468-490, 472-473, 483.

21 Opinion 2/94 *Accession to the European Convention on Human Rights* EU:C:1996:140.

22 B. Brandtner, A. Rosas, supra note 20; B Brandtner, A. Rosas, *Trade Preferences and Human Rights*, in *The EU and Human Rights*, ed. P. Alston, Oxford 1999, p. 699; A. Rosas, *The European Union...*, *op. cit.*, pp. 489-491, 505-507.

mental rights he or she enjoyed under Community law, it was probably not so helpful to be told that one should consult a few thousand pages of the Court's case law.

And referring to the ECHR was not sufficient. First of all, the ECHR, whilst constituting an important guideline for determining the fundamental rights which were considered to form part of the general principles of Community law, was not an integral part of Community law and so was not applied directly.[23] Secondly, the ECHR, even taking into account its Protocols, is not a complete codification of human rights; the initial Convention of 1950 was prepared after the Second World War and it does not fully reflect today's human rights agenda. That is probably why the ECJ in its case law did not limit itself to refer to the ECHR but sometimes cited some other international human rights instruments, such as the European Social Charter and, as to universal instruments, the Universal Declaration of Human Rights, the two Covenants of 1966 or the Convention on the Rights of the Child.[24]

The need to clarify the situation was again raised soon after Opinion 2/94 and some Member States, Germany in particular, advanced the idea that the EU should have its own Bill of Rights, corresponding to the national constitutional Bills of Rights. After some rather difficult discussions it was decided to proceed along this path, whilst not excluding the idea of accession to the ECHR. On the basis of a text prepared by a Convention, consisting not only of Member States' governments but also of representatives of the national parliaments as well as of the European Parliament and the Commission, the three main political institutions, the European Parliament, the Council and the Commission, adopted the Charter of Fundamental Rights of the European Union.[25]

The Charter was at first adopted in 2000 as a 'solemn proclamation'. This version of the Charter was not considered legally binding at least in the strict sense and whilst Advocates General of the ECJ and the then Court of First Instance (now the General Court) soon started to refer to it, the ECJ itself was more cautious and made such a reference for the first time only in 2006.[26] The Treaty for the Establishment of a Constitution for Europe, signed in Rome in 2004 but which because of negative referendums in two Member States never entered into force, included the Charter as Part II of the

23 Also recently, the ECJ has recalled that the ECHR does not form an integral part of Union law: Case C-617/10 Åkerberg *Fransson* EU:C:2013:105, § 44; Opinion 2/13 *Draft Accession Agreement ECHR* EU:C:2014:2454, § 179.

24 A. Rosas, *The European Union and International Human Rights Instruments*, in *The European Union and the International Legal Order: Discord or Harmony*, ed. V. Kronenberger, The Hague 2001, p. 53; *idem*, *The European Union: In Search of Legitimacy*, in *60 Years of the Universal Declaration of Human Rights in Europe*, ed. V. Jaichand, M. Suksi, Antwerp 2009, p. 415; *idem*, *The Charter and Universal Human Rights Instruments*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014, p. 1685.

25 [2000] OJ C364/1.

26 Case C-540/03 *Parliament v Council* EU:C:2006:429, § 38. Cf. A. Rosas, *The European Union...*, *op. cit.*, pp. 499-500.

Constitutional Treaty.[27] The Lisbon Treaty of 2007, which entered into force on 1 December 2009, completed this process by amending Article 6 TEU and inserting in it a § 1 providing that the Charter 'shall have the same legal value as the Treaties'. It was, in other words, made part of binding primary EU law, despite the fact that the text of the Charter, unlike the Constitutional Treaty of 2004, was not included in the TEU itself but appears as a separate instrument. As indicated in Article 6(1), this instrument is an 'adapted' version of the Charter as proclaimed in December 2000, containing some minor modifications above all to the general provisions contained in Title VII.[28]

And so the EU had finally given itself a true Bill of Rights, a constitutional instrument which prevails over EU legislative and other legal acts. If we look at the content of the Charter we shall find that the EU was here somewhat of a forerunner. The Charter is a modern fundamental rights instrument, which is inspired by not only the ECHR but also other European and universal instruments as well as national constitutions and taking into account a more recent human rights discourse.

Unlike the divide between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, which can be seen in the split between the ECHR and the European Social Charter, and between the two universal Covenants of 1966,[29] the EU Charter combines in one single instrument basically all human rights considered to be worthy of such elevated status. It is true that the so-called economic, social and cultural rights occupy a somewhat more modest position than the so-called civil and political rights. But the way these two categories, to the extent we really can speak of categories, are interwoven in the text of the Charter points to the principle of the indivisibility of human rights and also illustrates the difficulties in making a sharp distinction between the two categories – in which category should we, for instance, put Article 26 on the rights of persons with disabilities or Article 28 on the right of workers and employers to take collective action to defend their interests, to name but two examples? Whilst there is not yet much case law on social rights in the narrow sense of the term, the two Articles mentioned figure among the Charter rights which have already been examined by the ECJ.[30]

27 [2004] OJ C310/1.

28 For a detailed commentary to the Charter: *The EU Charter...*, *op. cit.* Cf. e.g. *Fundamental Rights Protection of the European Union*, ed. J. Barz, Warsaw 2009; *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, ed. G. Di Federico, Dordrecht 2011.

29 On this divide and the problems related to it v., e.g. *Economic, Social and Cultural Rights: A Textbook*, ed. A. Eide, C. Krause, A. Rosas, Dordrecht 2001.

30 On Article 26 of the Charter: Case C-356/12 *Glazel* EU:C:2014:350, §§ 74-79, which also refers (§§ 67-71) to the UN Convention on the Rights of Persons with Disabilities, [2010] OJ L23/35. In other judgments relating to the rights of persons with disabilities the Court has, apart from the UN Convention, based itself on Council Directive 2000/78/EC of 27 Novem ber 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16; cf. e.g. Joined Cases C-335/11 and C-337/11 *HK Danmark*

There are also some other elements in the Charter which could be regarded as innovations or at least progressive developments as compared to most earlier human rights/ fundamental instruments. I am thinking for instance of Article 3(2), which prohibits, inter alia, the reproductive cloning of human beings. Another example could be Article 21, which prohibits discrimination generally and includes as examples of what is prohibited discrimination on the grounds of, inter alia, genetic features, disability, age and sexual orientation. The reference to membership of a national minority, and the reference to the rights of persons belonging to minorities in Article 2 TEU, are novelties in an EU context, even if minority protection, of course, has previously received much attention in other contexts such as the Council of Europe.[31] Among other provisions of the Charter which are have not as such received much attention elsewhere can be mentioned Article 37 on environmental protection and Article 38 on consumer protection.[32] Finally, it is worth mentioning that Article 47 on the right to an effective remedy and a fair trial has a wider scope of application than Article 6 of the ECHR, in the sense that Article 47 is applicable to all alleged violations of rights and freedoms guaranteed by Union law whereas Article 6 of the European Convention is limited to penal proceedings and situations involving 'civil rights and obligations.'[33]

The reference in Article 47 of the Charter to rights and freedoms 'guaranteed by EU law' on the other hand points to a general limitation of the applicability of the Charter spelled out in general terms in its Article 51. At Member States' level, the Charter is applicable only when the Member State concerned is 'implementing Union law.' The Charter in other words has not obtained the status of the US Bill of Rights, which may be applied at sub-federal level also when state law rather than federal law is involved. That said, the difficulties in drawing a sharp line between Union law and national law in the EU context are also present when the applicability of the Charter at national level is at stake and the ECJ has had to struggle with these difficulties in a number of cases.[34]

EU:C:2013:222; C. O'Brien, *Article 26: Integration of Persons with Disabilities*, in *The EU Charter...*, *op. cit.,* p. 709. As to Article 28 of the Charter: Case C-438/05 *International Transport Workers' Federation* ('Viking Line') EU:C:2007:772, §§ 43-44; Case C-341/05 *Laval un Partneri* EU:C:2007:809, §§ 90-91. Cf. C. Barnard, *Article 28: Right of Collective Bargaining and Action*, in *The EU Charter...*, *op. cit.*, p. 773.

31 On the prohibition of discrimination and the right of minorities in the Charter v., e.g. *EU Constitutional Law...*, *op. cit.*, pp. 174-177. On Article 21 specifically: C. Kilpatrick, *Article 21: Non-Discrimination*, in *The EU Charter...*, *op. cit.*, p. 579.

32 On Article 37: E. Morgera, G. Marín Durán, *Article 37: Environmental Protection*, in *The EU Charter...*, *op. cit.*, p. 983. On Article 38: S. Weatherhill, *Article 38: Consumer Protection*, in *The EU Charter...*, *op. cit.*, p. 1005.

33 P. Aalto et al., *Article 47: Right to an Effective Remedy and to a Fair Trial*, in *The EU Charter...*, *op. cit.*, p. 1197.

34 V., e.g. A. Rosas, *The Applicability of the EU Charter of Fundamental Rights at National Level*, "European Yearbook on Human Rights" 2013, vol. 13, pp. 97-112; A. Ward, *Article 51: Field of Application*, in *The EU Charter...*, *op. cit.*, p. 1413.

To the extent that the scope of Union law is expanding, the scope of application of the Charter will expand accordingly.

The EU and the ECHR

In situations where the Charter is not applicable the Member State concerned of course remains bound by the ECHR and other human rights conventions and individuals may complain to the European Court of Human Rights or, where applicable, other human rights complaint bodies. But the ECHR and other human rights conventions are not only relevant in the context of the national law of the Member States but they also play a role in the application of EU fundamental rights, be it under the Charter of Fundamental Rights or as general principles of Union law. As I noted before, the ECJ started to apply fundamental rights as general principles of Union law already in 1969 and the Court soon followed suit by holding that the international instruments may serve as guidelines in this respect.

These international instruments, and the ECHR in particular, are also present in the Charter context. First of all, the Charter, as is obvious from its Preamble and from the Explanations to the Charter, is to a large extent inspired by these instruments (the Preamble singles out the ECHR and the European Social Charter). Secondly, Article 52(3) of the Charter provides that the rights of the Charter which 'correspond to' rights guaranteed by the ECHR shall be given the 'same meaning and scope' as the corresponding rights in the Convention. Thirdly, Article 53 of the Charter contains a reserve habitual in human rights contexts according to which nothing in the Charter shall be interpreted as restricting or adversely affecting human rights as recognized, inter alia, by international law or by international agreements to which the Union or all the Member States are party.

In the light of the Court's case law, it seems that the latter provision (Article 53) cannot compromise the principle of primacy of Union law.[35] In case of a conflict, the Charter as primary law would prevail over human rights conventions, even if they have been concluded by the Union itself.[36] Article 52(3), on the other hand, is of greater importance and has already been applied by the Court several times, despite the fact that the EU is not a party to the ECHR.[37] In this way, the Charter transforms, as it were, the minimum protection afforded by the ECHR into Union law and the Charter more specifically. But Article 52(3) is no obstacle to the more progressive elements of the Charter in that,

35 V., in particular, Case C-399/11 *Melloni* EU:C:2013:107. Cf. Opinion 2/13, *Draft Accession Agreement...*, *op. cit.*, §§ 191-194.

36 In the EU hierarchy of norms, primary law prevails, in principle, over international agreements while the latter prevail, in principle, over regulations, directives and other acts of secondary law, v., e.g. *EU Constitutional Law...*, *op. cit.*, pp. 53, 59-61.

37 For example: Case C-279/09 *DEB* EU:C:2010:811 §§ 35-36.

first, the provision itself spells out that it shall not prevent Union law from providing 'more extensive protection' than that offered by the ECHR, and second, the Charter, as noted earlier, contains a number of rights which are not to be found or go beyond what is contained in the Convention. Moreover, EU legislation may contain provisions which provide more extensive protection than the ECHR, even in cases where this is not expressly spelled out in the Charter itself.

In view of this progressive feature of EU fundamental rights law it should perhaps not come as a great surprise that there are cases where the European Court of Human Rights has been inspired by a Charter provision, another rule of EU law or an ECJ judgment in arriving at a progressive development of an earlier interpretation of a provision in the ECHR. Examples are the right to marry in the context of change of sex,[38] the right to a lighter penalty provided by a law passed subsequent to the commission of the crime,[39] and the right to interim measures in the context of Article 6 of the ECHR.[40]

In some instances, such as the question of asylum seekers asserting discrimination on grounds of homosexuality, it still remains to be seen whether the Strasbourg Court will follow the line taken in the recent A, B and C judgment relating to the verification of the sexual orientation of applicants.[41]

EU accession to the ECHR?

Between the ECJ and the European Court of Human Rights there has, in other words, been a two-way street, where both Courts have taken into account the case law of the other. This interaction has taken place and, in my view, functioned fairly well without the EU being a Contracting Party to the ECHR. As noted earlier, the question of EU accession to the ECHR has been on the agenda quite some time.[42] Article 6(2) TEU, as amended by the Treaty of Lisbon, provides that the Union shall accede to the ECHR. It is added, however, that accession should not affect the Union's existing competences as defined in the Treaties. And, as is recognized in Article 218(8) TFEU, accession, to become operative, requires the conclusion of an accession agreement with the Member States of the Council of Europe[43] as well as amendments to the ECHR itself. Protocol

38 Case of *Goodwin v United Kingdom*, Eur.C.H.R., judgment of 11 July 2002 (Application No. 28957/95), referring to the wording of Article 9 of the Charter.

39 Case of *Scoppola v Italy*, ECHR, judgment of 17 September 2009 (Application No. 10249/03), referring to Article 49(1) of the EU Charter of Fundamental Rights and the ECJ judgment in Joined Cases C-387/02, C-391/02 and C-404/02 *Berlusconi* EU:C:2005:270.

40 Case of *Micallef v Malta*, ECHR, judgment of 15 October 2009 (Application No 17056/06), where a reference was made to ECJ case law.

41 Joined Cases C-148/13 to C-150/13 A, B and C EU:C:2014:2406.

42 Opinion 2/94 *Accession to the European Convention…*, *op. cit*.

43 According to Article 218(8) TFEU, the adoption of the Council decision concluding the accession agreement requires unanimity in the Council.

No 8 annexed to the TEU and the TFEU requires that the accession agreement 'shall make provision for preserving the specific characteristics of the Union and Union law' and contains some other conditions which this agreement must meet.

The draft accession agreement which was negotiated between the European Commission and the 47 Council of Europe Member States and which was finalized at negotiators' level in April 2013[44] was subsequently referred to the ECJ for a binding opinion, under Article 218(11) TFEU, as to whether the draft agreement was compatible with Union law. In its Opinion of 17 December, the Court gave a negative answer, referring to a number of issues which needed to be corrected or clarified in order to make an accession agreement compatible with Union law.[45] The Court stressed that one fundamental problem arose from the fact that the draft agreement was to a large extent based on the assimilation of the EU with States Party to the Convention, thus sidestepping some of the institutional and technical problems which arise mainly from the fact that the EU would not join the Convention replacing its Member States but alongside them.

To mention here just one of the problems which the Court underlined in its Opinion: The draft accession agreement contains no provisions providing for some special rules applying to the EU Member States in their internal relations in the fields of Union law based on mutual recognition and mutual trust.[46] Especially in these areas, to cite Opinion 2/13, 'the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States.[47] In this regard, there has been a certain tendency in the case law of the European Court of Human Rights to treat the relations between EU Member States more or less in the same way as the relations between them and other contracting parties to the ECHR, or even between contracting parties and third States.[48]

Such an approach would pose a serious problem for the proper functioning particularly of the EU area of freedom, security and justice, which sometimes requires the speedy and quasi-automatic transfer of a person from one Member State to another.

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44 Draft Revised Agreement, Final Report to the CDDH, Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission, Council of Europe.

45 Opinion 2/13, supra note 23. There is already an abundance of articles and case notes on Opinion 2/13; for a fairly detailed analysis: D. Halberstam, *It's the Autonomy, Stupid! – A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, "Public Law and Legal Theory Research Paper Series," Paper No. 432, Michigan Law, University of Michigan, February 2015, http://ssrn.com/abstract=2567591.

46 The concept of mutual recognition appears, apart from secondary law, in the TFEU in the context of the 'area on freedom, security and justice': Articles 67(3), 67(4), 81(1), 81(2), 82(1) and 82(2) TFEU. Cf. Article 67(2) TFEU, which refers to 'a common policy on asylum, immigration and external border control, based on solidarity between Member States.'

47 Opinion 2/13 *Draft Accession Agreement...*, *op. cit.*, § 192.

48 V., e.g. Case of *Tarakhel v Switzerland*, judgment of 4 November 2014 (Application No. 29217/12). Cf. D. Halberstam, *It's the Autonomy, Stupid!...*, *op. cit.*, pp. 23-27.

It is not a question of lowering the standard of fundamental rights protection required. However, the main responsibility, in the context of the EU, for ensuring the protection of the person's fundamental rights should be on the receiving Member State, which is the one that should principally deal with the matter (such as treating an asylum request, ordering an unlawfully abducted child to be returned to the receiving State and the protection of the child in the receiving State, or prosecuting a person handed over on the basis of the European arrest warrant).[49]

In other cases, however, the European Court of Human Rights has shown more understanding for the special nature of the EU internal market and area of freedom,, security and justice and has recognized that EU legislation based on mutual recognition and mutual trust should, as a rule, be applied as it is meant to be in the relations between the Member States. At the same time, ECJ case law can be said to have come closer to the approach of the European Court of Human Rights, as the ECJ has recognized that there may be exceptional circumstances where the sending Member State should not blindly execute a transfer of a person to the requesting Member State if there are serious concerns about the treatment he or she is likely to receive in the latter (a concrete risk of inhumane or degrading treatment).[50]

This rapprochement between ECJ and Strasbourg case law could make it less difficult to find an acceptable solution to EU accession to the ECHR. Moreover, it is also true that EU accession to the ECHR might reinforce the idea of the EU forming, in these matters, a single area rather than several disparate jurisdictions, which could make it easier for the Strasbourg Court to recognize fully the principles of mutual recognition and mutual trust in EU law. As this is pure speculation, however, and as Strasbourg case law seems partly based on a stricter control also of the decision to transfer than what should be allowed under EU law, the ECJ in Opinion 2/13 insisted that this issue be dealt with in the accession agreement rather than be left to the vicissitudes of future case law.

It is now too early to say what will happen next, in other words what consequences will be drawn by the European Commission, the EU Council and the Member States as to the way forward. Let me only stress here that the Opinion should not be seen as a step

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49 Case of *Povse v Austria*, ECHR decision of 18 June 2013 (Application No. 3890/11), §§ 82-86, in which the Court of Human Rights (correctly it is believed) observed that the transferring State (Austria) had no more than fulfilled its strict obligations flowing from its membership of the EU (§ 82), that is the Dublin Regulation (EC, No. 343/2003), and that the applicants should have relied on their ECHR rights before the courts of the receiving State (Italy) and could have ultimately lodged an application with that Court against Italy (§ 86). See also *the Case of Avotinš v Latvia*, judgment of 23 May 2016 (Grand Chamber) (Application No 17502/07).

50 Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldarăru* EU:C:2016:198 (concerning the European arrest warrant); Joined Cases C-411/10 and C-493/10 *NS and ME* EU:C:2011:865 (concerning the Dublin Regulation on the Member State competent to deal with asylum requests).

back in the Court's approach to the substance of fundamental rights. Already a few years before the Opinion, as the Lisbon Treaty entered into force, the Court shifted somewhat its focus from the ECHR to the EU Charter.[51] This was inevitable, as the Charter, as I said earlier, now came to constitute the EU's own Bill of Rights and is also a more modern and more comprehensive fundamental rights instrument than the ECHR.

Concluding remarks

The case law adopted on the basis of the Charter demonstrates in my view that both the ECJ, and the EU more generally, take fundamental rights seriously and are not particularly shy at the possibility of progressive development either. The post-Lisbon case law also includes some judgments declaring EU legislative acts invalid in whole or in part as constituting violations of Charter provisions. The most well-known case is the judgment of 2014 in *Digital Rights Ireland*, finding the whole EU Directive on data retention invalid as being incompatible with Articles 7 (respect for private life) and 8 (protection of personal data) of the Charter.[52] More generally, the Court in its case law relating to the Charter will no doubt take into account developments not only at the national constitutional level but also in the international human rights arena, notably with respect to the ECHR and other Council of Europe instruments and, as the case may be, in a more universal context.

Alongside these developments, the EU has focused on its *external* human rights agenda which consists of not only the human rights clauses referred to earlier but also a string of programmes and structured dialogues with third States.[53] In this context, the EU is often cooperating closely with international organizations such as the UN and the Red Cross movement. Some of the sanctions (called 'restrictive measures') taken against third States have been resorted to because of perceived violations of basic principles relating to human rights, democracy and the rule of law. And whilst the EU is not a Contracting Party to the ECHR, it fairly recently became the first non-State entity to conclude a human rights convention, the UN Convention on the Rights of Persons with Disabilities.[54] In this way the EU has increasingly become to be seen not only as a trading bloc but also as an actor exercising 'soft' power.

That said, I would like to emphasize that the EU should not be seen as a human rights organization, nor should the ECJ be seen as a human rights court.[55] The exclusion of

51 V., e.g. A. Rosas, H. Kaila, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: Un premier bilan*', "XVI Il diritto dell'Unione Europea" 2011, pp. 1-28.

52 Joined Cases C-293/12 *Digital Rights Ireland* and C-594/12 *Kärntner Landesregierung and Others*, EU:C:2014:238.

53 V., e.g. A. Rosas, *The European Union...*, *op. cit.*, pp. 505-518.

54 V. supra note 30.

55 A. Rosas, *Is the EU a Human Rights Organisation?*, "CLEER Working Papers" 2011, no. 1.

the applicability of the Charter when solely national law is at stake is an illustration of this. And more generally, the EU is an economic and political union of States, not an intergovernmental organisation such as the Council of Europe, which is centred on the promotion and protection of human rights.

It is true that fundamental rights and human rights figure prominently among the values and objectives of the EU but there are many other objectives of the EU as well, for instance the creation of a single market and an area of freedom, security and justice, both 'without internal frontiers.'[56] And it is indicative that the TEU, when referring to the external objectives of the Union, mentions not only the values of the Union but also its 'fundamental interests, security, independence and integrity' (Article 21 TEU). As is demonstrated for instance by the sanctions policy of the EU, including with regard to some European States such as Byelorussia and Russia, the Union action in some respects resembles that of independent States (in fact, in the field of sanctions, the Union has replaced its Member States as the entity instigating the restrictive measures).[57] At the same time, as the *Kadi* I and II judgments of 2008 and 2013 and the case law of the Union Courts more generally demonstrate, such sanction decisions are subject to a fairly strict judicial control in accordance with basic principles of fundamental rights and the rule of law.[58]

To come back to the initial question, is the EU in the human rights field a vanguard or a villain? I hope it should have become clear by now that the Union does not fit particularly well into any of these two extremes. But by comparison to the other EU institutions, the Court of Justice has been somewhat of a forerunner, taking the first steps towards a fundamental rights system already in 1969 and contributing in many respects to its further development. Also outside the EU framework, there seems to be an increasing tendency among courts and other actors to take note of, and sometimes even cite, ECJ judgments in the fundamental rights/human rights area.[59] And in some

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56 Article 3(2) TEU and Article 26(2) TFEU.

57 V., e.g. A. Rosas, *Counter-Terrorism and the Rule of Law: Issues of Judicial Control*, in *Counter-Terrorism: International Law and Practice*, ed. A. M Salinas de Frías et al., Oxford 2012, pp. 83, 88-93. On sanctions undertaken against Russia, in particular, see Case C-72/15 *Rosneft* EU:C:2017:236.

58 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ('Kadi I') EU:C:2008:461; Case C-584/10 P *Commission and Others v Kadi* ('Kadi II') EU:C:2013:518. On the other hand, the intensity of the control may vary depending on the nature of the sanctions and the factual circumstances of each case. V., e.g. Case C-348/12 P *Council v Kala Naft* EU:C:2013:776.

59 As to the European Court of Human Rights, v. *supra* notes 38-40. For an example of a national judgment citing *Kadi I*: A. Rosas, *Counter-Terrorism…*, *op. cit.*, p. 101, citing the judgment of the UK Supreme Court of 27 January 2010 in *Ahmed and Others*, [2010] UKSC 2, [2010] AC 534. In the United Nations, *Kadi I* led to some improvements in the monitoring of Security Council sanctions decisions: A. Rosas, *Counter-Terrorism…*, *op. cit.*, p. 102.

respects the Union itself, too, whilst having been almost silent on fundamental and human rights in the 1960s, has been more of a forerunner in adopting, with the Treaty of Lisbon, a veritable constitutional Bill of Rights, that is, the Charter of Fundamental Rights. The Union has also, since the 1990s, developed an external human rights policy which seems more visible than that pursued by many States. It is my belief that in so far as EU fundamental rights and human rights are concerned, we have not come to the end of the story and that there will also in the future be many interesting developments to witness and to digest, both at the political and judicial level.

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SUMMARY

The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?

The protection of fundamental rights and human rights in the European Union has witnessed several phases and fluctuations. In the early days of European integration, whilst it would be exaggerated to brand the then Communities a 'villain,' there was no explicit recognition of fundamental rights/human rights as being part of Community law. I hope it should have become clear by now that the Union does not fit particularly well into any of these two extremes. But by comparison to the other EU institutions, the Court of Justice has been somewhat of a forerunner, taking the first steps towards a fundamental rights system already in 1969 and contributing in many respects to its further development.

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