

Protecting Human Rights in the European Union: problems and prospective scenarios

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Judicial protection of fundamental human rights by the European Court may operate as a source of both unity and disunity in the dialectical process of European integration.

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1. Introduction

Europe is the cradle of human rights¹ and has traditionally been its committed advocate. When human rights first became an issue of international concern, Europe established a regional framework of protection that has become the most developed one worldwide.

¹ «The idea of «human rights» is not universal - it is essentially the product of 17th and 18th century European thought». RAYNER, Moira. *History Of Universal Human Rights - Up To WW2*. Internet < <http://www.universalrights.net/main/histof.htm> >.

Also, the promotion of human rights beyond its borders is also an essential component of EU's development cooperation.²

The European integration and its regional mechanisms for the protection of human rights represent complex and evolving institutional frameworks, plagued by power tensions and permanent defiance of the political and legal paradigms. This paper intends to provide both analytical and prospective elements focused on the judicial and dimensions of human rights protection in Europe. This is a realm where inter-institutional competition and allocation of power between States, EU non-judicial institutions and European tribunals is vested with unique features and its own normative language.

The purpose of the paper is thus, on one hand, to shed light on how the judicial inter-institutional tensions, and more importantly the power-bargaining between the European institutions and States and the normative developments within the EU, have evolved to accommodate divergent interests and values; and, on the other, to reflect on how this experience might project itself into the ongoing Community and constitutional process in Europe.

2. Europe: Walking on two ropes

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The complex institutional framework now governing Europe is the result of a process of aggregation, parallelism and political tensions. The EU is the outcome of a progressive development of a project that started as an economic integration initiative. The Council of Europe, a parallel institutional setting, reinforced the communitarian project by providing political and ideological strength based on the promotion of democratic values and human rights among all its European Member States.³

Both frameworks—the EU and the Council of Europe—developed as parallel institutions, emphasizing the institutional autonomy of one in regards to the other. However, the weight of circumstances and particularly the fact that both share the same governmental and societal universe has led throughout time to an impressive level of convergence. However, the EU has become a more fundamental and comprehensive governance framework than the Council of Europe.

² «Community Policy in this area [development cooperation] shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms». Article 177(2) of the consolidated version of the Treaty of the European Community. «The objectives of the common foreign and security policy are: [...] to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms». Article J.1.2 of the TEU.

³ Ten countries (Belgium, France, Luxembourg, the Netherlands and the United Kingdom, accompanied by Ireland, Italy, Denmark, Norway and Sweden) signed the treaty constituting the Statute of the Council of Europe, on 5 May 1949, in St. James's Palace, London.

The latter was established in 1949 by a group of ten states having as primary aim the promotion of democracy, the rule of law and a greater unity among Western European nations. It embedded the commitment of its Members to these values and to the ideological containment of Communism.⁴

The origins of the EU can be traced back to the Treaty of Paris, of 1952, establishing the European Coal and Steel Community (ECSC), and subsequently to the two Treaties of Rome, of 1957, establishing the European Economic Community (EEC) and the European Atomic Energy Community.

While the notion of economic integration was implicit in the Saint James Treaty establishing the Council of Europe, no reference to human rights or to its protection was included in the ECSC Treaty of Paris, nor in the ECC Treaty of Rome. Later developments, first in the ECJ jurisprudence and later in the EC and EU treaties, incorporated human rights as a general principle of EC and then EU law.

The ECJ has played a fundamental role in the process of becoming an instance of supranational judicial control for the protection of human rights within the EU jurisdiction. It was originally divested of such power and lacked a catalogue of fundamental rights within the Treaty of Rome. It is well recognized that the judicial activism of the ECJ has been a powerful catalyst of the EU communitarian project and has shaped the EU Constitution.⁵ It gave such step in a reactive fashion, after being challenged by German national courts arguing that EC law should not necessarily prevail over the national Fundamental Law particularly on issues attaining to the protection of human rights. «It became increasingly apparent to the Court of Justice, however, that national courts were hesitant to accept the principles of supremacy and direct effect [consecrated jurisprudentially by the ECJ] if Community institutions were not required to respect

⁴ According to chapter I of its Statute, «[t]he aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage, and facilitating their economic and social progress».

⁵ «[I]n the absence of a written bill of rights in the Treaty and an apparent freedom for the Community legislature to disregard individual rights in Community legislation, the European Court of Justice, in an exercise of bold judicial activism, and a reversal of earlier case law, created a judge-made higher law of fundamental human rights, culled from the constitutional traditions of the Member States and international agreements such as the European Convention on Human Rights (ECHR). On the basis of this higher law, legislative and administrative acts of the Community organs, binding on or affecting individual citizens, could be struck in the normal course of judicial review provided by the Treaty». WEILER, Joseph H. H. «Eurocracy and Distrust: Some Questions Concerning The Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities», in 61 *Washington Law Review* 1103.

fundamental rights guarantees».⁶ The ECJ responded by announcing the doctrine of «fundamental human rights enshrined in the general principles of Community law and protected by the Court [ECJ]».⁷ Thus, the elaboration of a strong commitment towards human rights protection within the EC law was not a deliberate policy evolvement but rather a «by-product of the ECJ's effort to establish the supremacy of EC law».⁸ Furthermore, McCRUDDEN raises a relevant question: «[H]as the development of human rights in Community law been ECJ-initiated and controlled, or was it developed by the ECJ in *response* to signals from the representative institutions?»⁹ This bold judicial activism has led to the establishing, beyond the content of the EEC Treaty, of both human rights-based judicial review by the ECJ of Community law and policies, and of a European Bill of Rights.

Nowadays, the protection of human rights has become a well-recognized principle of EU governance and an indispensable prerequisite for its legitimacy.¹⁰

But the development of the European *communitas* has produced unintended conflicts between the EU institutional framework and that of the European Convention of Human Rights developed within the Council of Europe. SERA¹¹ identifies the following problem situations:

⁶ BINDER, Darcy S. «The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action», Jean Monnet Working Papers, N° 4/95 [1995].

⁷ *Stauder v. City of Ulm*, Case 29/69 [1969] E.C.R. 419, 9 C.M.L.R. 112 (1970).

⁸ SHAVER DUQUETTE, Elizabeth, «Human Rights in the European Union: Internal Versus External Objectives», in 34 *Cornell International Law Journal*, 363, at 365 [2001].

⁹ McCRUDDEN, Christopher. «The Future of the EU Charter of Fundamental Rights», Jean Monnet Working Paper N° 10/01 [2001], p. 7.

¹⁰ This fact is already reflected in the TEU. The first paragraph of article 6 (ex Article F) of the TEU states that «the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States», whilst paragraph 2 asserts: «the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law». A new provision was inserted into Article 7 (ex Article F1) by the Treaty of Amsterdam, whereby «the Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned above». If such a determination were made, the Council, acting by a qualified majority, could decide to suspend certain rights devolving on the Member State in question by virtue of the Treaty. In so doing, it would take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. EU Council. Internet < <http://db.consilium.eu.int/DF/intro.asp?lang=en> >.

¹¹ SERA, Jean M. «The Case for Accesion by the European Union to the European Convention for the Protection of Human Rights», in 14 *Boston University International Law Journal* 151, at: 163 – 176 [1996].

Conflicting Treaty Obligations. Member States may find themselves subjected to conflicting adjudicative decisions by, on one hand the ECJ, and on the other the ECHR. In *Hauer v. Land Rheinland-Pfalz*, the ECJ affirmed the EU's commitment to human rights but decided that the restriction on the use of the plaintiff's property rights over land in pursuance of the EC's interest did not infringe the substance of the right to property and served objectives of general interest.¹² But, in *Sporrong & Lonroth v. Sweden*, the other European tribunal, the ECHR, found a violation of the right to property because the Government restricted the use of a property for about fifteen years.¹³ While the level of restriction of the right to property is different in both cases, they reflect «the potential for inconsistent judgements».¹⁴

The EU has greater legal capacity to restrict human rights than the Member States. By the mere fact of not being subject to the rules of the European Convention of Human Rights and the jurisdiction of the ECHR, the EU has greater leeway to restrict human rights than States that are parties to the Convention. In *Orkem S.A. v. Commission*, the ECJ decided that the due process rights of the plaintiff under article 6 of the Convention had not been violated.¹⁵ The EU Advocate-General stated before the ECJ in *Orkem*: I must not fail to remind the court that, according to its case law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument as interpreted by the Strasbourg authorities [i.e., by the ECHR] [...] the Court's position regarding the European Convention on Human Rights consists in most cases «in using it merely as a reference» even though it «goes as far as possible in that direction» and that, by doing so, it develops «directly or indirectly its own case-law by interpreting the [human rights] Convention».¹⁶ The ECHR decided the *Funke v. France* case in opposition to what the ECJ had decided in *Orkem*¹⁷ and argued that the principle on which this latter case was decided is no longer valid. In the same fashion, contrasting decisions between the ECJ and the ECHR when applying the same rules of the human rights Convention can be traced in cases such as *Hoechst A.G. v. Commission*¹⁸, decided by the ECJ against the plaintiff, and *Niemietz v. Germany*¹⁹, decided by the ECHR in favor of the victim regarding the same right claim than in *Hoechst*.

Similarly, SERA discusses a third problem situation involving the margin of discretion a State has in regards to its obligations under the human rights Convention when implementing EU directives.²⁰

¹² *Hauer v. Land Rheinland-Pfalz*, Case 44/79 [1979], E.C.R. 3727.

¹³ *Sporrong & Lonroth v. Sweden*, 52 Eur. Ct. H.R. (Ser. A) [1982].

¹⁴ SERA, 167.

¹⁵ *Orkem S.A. v. Comisión*, Case 374/87 [1989], E.C.R. 3283.

¹⁶ *Orkem S.A.*, E.C.R. 3337-38.

¹⁷ *Funke v. France*, 1 C.M.L.R. 897 [1993].

¹⁸ *Hoechst A.G. v. Commission*, Joined Cases 46/87 and 227/88, [1989] E.C.R. 2859.

¹⁹ *Niemietz v. Germany*, 251 Eur. Ct. H.R. (Ser. A) [1992].

²⁰ SERA, 173 – 176.

3. Trying to tie the EU to the European Human Rights Convention Tree

Such normative tension between both institutional frameworks conspires against the ideal of legal security meant to exist in developed political systems. Moreover, the fact that the EU is not a Party to the human rights Convention generates undesired outcomes.²¹ The prospect of not providing human rights protections within the Community legal order generated reluctance in national constitutional courts and ordinary tribunals to accept the principles of direct effect and supremacy of EU law.²²

To fill the gap, the Council of the European Union requested in April 1994 an advisory opinion from the ECJ on whether article 228 of the Treaty of European Community (article 300 and 301 of the consolidated version) allows the EU to accede to the human rights Convention. Many EU Member States submitted *amicus curiae* briefs to the ECJ evidencing wide disagreement among them on the issue. The ECJ concluded that the EU bodies could not accede to the ECHR because there is no Treaty of the European Community provision conferring powers to the EU to enact rules or to conclude international conventions on human rights issues. Also, the ECJ held that article 235 of the same Treaty (article 308 of the consolidated version), which empowers the EU to act in lack of specific authoritative rule when required to pursue the EC purpose, does not suffice as a normative basis to allow the EC accession to the ECHR.²³ The ECJ concluded that

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Such a modification of the system for the protection of human rights in the Community [as would result from allowing the EC or later the EU to accede the ECHR], with equally fundamental institutional implications for the Community and for the Member States, **would be of constitutional significance** and would therefore be such as to go beyond the scope of Article 235 . It could be brought about only by way of a Treaty amendment [... A]s community law now stands, the Community has no competence to accede to the Convention.²⁴

There was thus wide consensus on guaranteeing the obligation of the EU to abide to the regional human rights standards applicable to its Member States, but divergence on the

²¹ While many policies and rules adopted by EU organs affect the effective implementation of human rights, only the State parties to the human rights Convention are legally liable for the consequences of such policies and rules that may infringe upon the human rights obligations it sets forth.

²² WEILER, *op. cit.*, p. 108.

²³ «That provision [art. 235], being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community». European Court of Justice, Opinion 2/94 (1996), 2 C.M.L.R. at 291, pp. 35 - 36.

²⁴ European Court, 35 – 36. Bold and italics added.

legal form in which this could be established. The TEU has given a step in the right direction by setting the moorings of such obligation in the national constitutional traditions of its Members «as general principles of Community law».²⁵

4. Intergovernmentalism and functionalism with a judicial tune

The ECJ has been a central player in the process of expanding the competencies of the EU organs, including its own. Interestingly, its activism has not generated as much resistance as the one faced by other EU organs despite its episodically more revolutionary grasp.²⁶ This lack of resistance also has a more technical and less apparent dimension: the intergovernmentalism-versus-functionalism divide has a unique conceptual narrative when projected into the realm of European judicial institutions, the ECJ and the ECHR. Part of it is typical of international tribunals and part is of European making. Thus, we cannot assess the allocation of power tensions regarding the European judicial institutions with the same analytical categories used to make sense of the intergovernmentalism-versus-functionalism divide of other EU organs.

Two specific doctrinal arguments are relevant to make our point. One is the general characteristic of international tribunals of being the masters of their own competence, reflected in the principle of *Kompetenz-Kompetenz*.²⁷ Thus, it is assumed that no superior authority exists over an international adjudication body to define the scope of their

²⁵ «The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law». TEU, art. F 2.

²⁶ «The Court thus ultimately succeeded in its endeavor: indeed, with the exception of the German and Italian courts, the Court's assertion of its power to review Community acts for compliance with fundamental rights was for the most part welcomed by Community institutions and Member States alike. Why was this the case? Several reasons may be mentioned. First, opposition to judicial review typically stems from its counter-majoritarian nature, since it results in the invalidation of the acts of a democratically elected legislature by an unelected judiciary. In the Community, however, such a democratically elected legislature was, and to some degree still is, non-existent. Judicial review of Community acts thus served to check the increasing power of an appointed executive branch. Second, because the Court's review extended only to acts of the Community institutions, it did not directly interfere with the power of the Member States. Third, the cases before the Court in which human rights issues were raised were economically oriented and often highly technical in nature. They did not involve issues that were highly sensitive to the majority of individuals in the Community, and thus the Court's human rights jurisprudence was not the subject of much debate or attention.» BINDER, 4.

²⁷ Known in French as *la compétence de la compétence*. It is recognized as a general principle of international law, and is normatively consecrated in article 36.6 of the Statute of the International Court of Justice, article 32.2 of the European Convention of Human Rights, and the rules and arbitral procedures of both UNCITRAL and the International Chamber of Commerce.

competence or to declare that a decision passed by it is in fact *ultra vires*.²⁸ The ECJ's competence goes beyond the capacity to define the boundaries of its own competence, as it also reflects on the delimitation of competences of other EU organs («final umpire over Community competences») and on the primacy of Community law. The principles of supremacy and direct²⁹ effect of Community law reinforces the primacy of EU institutions over the ones of its Nation States. The ECJ has gone as far as sustaining that «Community law has supremacy over all Member State law, including all Member State constitutional law».³⁰ The validity of the *Kompetenz-Kompetenz* principle is not necessarily challenged by objections raised by national constitutional courts, as it is firmly based on international law and the challenge originates in the overlapping but different realm of national constitutional law.³¹ Needless to say, the *Kompetenz-Kompetenz* principle provides a powerful argument to functionalism, as it places the competence of the ECJ and the ECHR beyond the authority of Member States.

In the opposite direction it can be identified the principles of subsidiarity³² and margin of appreciation. The one has been developed and applied by the ECJ, and grants Ste Members

²⁸ «The assumption that a *Community without legislative Kompetenz-Kompetenz* cannot contain a court with judicial *Kompetenz-Kompetenz* is at the core of Schilling's argument. It is not self-evident. In fact, we think it is false.» WEILER, J.H.H. «The Autonomy of the Community Legal Order: Through the Looking Glass», in J.H.H. Weiler, *The Constitution of Europe. «Do the New Clothes Have an Emperor?» and Other Essays on European Integration*. Cambridge: Cambridge, p. 312, 1999.

²⁹ «[I]n *Costa v. ENEL* the ECJ inferred the supremacy of EU law from the Treaty, which does not explicitly mention the supremacy of EU law. In doing so, the ECJ characterized the Treaty as the constitution of the EU, because it «considers that the Treaty, a creature of international law governing relations between states, has been converted [...] into a Constitution.» Consistent with its constitutional approach to treaty interpretation, the ECJ has developed the principle of *direct effect* in Member States, which gives individuals the ability to invoke EU law in national courts.» MONAGHAN, Sean C., «European Union Legal Personality Disorder: The Union's Legal Nature Through the Prism of the German Federal Constitution Court's *Maastricht* Decision», in *12 Emory International Law Review* 1443, at 1463 [1998]. Footnotes omitted.

³⁰ *Internationale Handelsgesellschaft*, Case 11/70 [1970], E.C.R. 1125, 1135.

³¹ The most notorious example of such challenge was provided by the German Constitutional Court 1993 decision on the Maastricht Treaty. «While conceding that the ECJ had a role to play, the German Court held that from a German constitutional perspective, the ultimate authority to determine this issue [Who is the ultimate umpire to declare or to determine the limits of the competences of the Community?] rested with domestic law. Indeed, any German court or other emanation of the state had a duty not to apply Community measures which in their eyes were *ultra vires*.» WEILER, *op. cit.*, p. 288. German Constitutional Court, Judgement of October 12, 1993, 89 BverfGE 155.

³² «Subsidiarity is a principle of governance designed to give meaning to the division of power and responsibility between the central government and constituent states in a federal system. The principle seeks to allocate responsibilities for policy formation and implementation to the lowest level of government at which the objectives of that policy can be successfully achieved.» INMAN, Robert P. and RUBINFELD, Daniel L., «Subsidiarity and the European Union», NBER Working Paper 6556 [1998]. «Talk of subsidiarity was introduced in the late 1980s through the

primary authority to act on issues which do not fall under the exclusive authority of the EU «only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States».

The margin of appreciation principle recognizes governments a certain discretion regarding the manner in which they implement their obligations under the European human rights Convention. It has been developed by the ECHR as a way of accommodating the conflicting interests and values of, on one hand, its own role of final arbiter of the implementation of the Convention and the universality of human rights, and on the other, the diversity of culturally-accepted legal standards among countries.³³

initiative of the European Parliament, Britain and Germany. Britain feared European federalism, and the German Länder sought to maintain their exclusive powers enjoyed in the German Federal Republic. To constrain centralising tendencies, they sought to place the burden of argument with integrationists. A Principle of Subsidiarity was included in the 1992 Maastricht Treaty on European Union (TEU), and further elaborated in a Protocol of the Amsterdam draft Treaty of 1997.» FØLLESDAL, Andreas, «Subsidiarity and Democratic Deliberation». ARENA Working Papers WP 99/21 [1999]. In 1992, the principle of sub-si-di-a-rity was incorporated into the TEU. The principle was written into both the preamble and articles one and two of the TEU (ex articles A and B TEU). Article 5 (ex 3b) of the TEU, reads: «The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty».

³³ «The ECHR originally articulated the doctrine in its earliest cases to address state derogations of rights under alleged exigent circumstances. This doctrine has since evolved as one of the ECHR's primary tools for accommodating diversity, national sovereignty, and the will of domestic majorities, while enforcing effective implementation of rights under the European Convention. [...] The rationale for the «margin of appreciation» rests upon the primacy of national implementation of rights and the notion that state authorities are often better situated to judge local conditions and the various public interests that inevitably compete with the claims of individuals. When a state's choices fall within a predictably amorphous range of acceptable alternatives, the ECHR will uphold the state's actions as being within its so-called «margin of appreciation.» The margin of appreciation that the ECHR will provide depends upon a number of factors, most prominently whether a European consensus on the issues exists. The importance of the right and the consequences of the state's conduct for the individual are also important factors in determining how wide the margin of appreciation should be in any particular case. While recognizing the importance of national discretion, the ECHR has repeatedly emphasized that the margin is limited by, and must correspond to, the concept of «European supervision.» Under this principle, the ECHR must assert its role as the final arbiter of European Convention rights and ultimately determine the consistency of state conduct with the European Convention and evolving European standards of human rights. The ECHR's teleological orientation to interpretation, demanding scrutiny of state justifications and emphasis on the «effectiveness» of rights, also tends to restrict state discretion.» DONOHO, Douglas Lee. «Autonomy, Self-

Needless to say, both the subsidiarity and the margin of appreciation principles provide powerful arguments to intergovernmentalism, inasmuch as they tend to limit the competence of the ECJ and the ECHR while recognizing exclusive authority to Member States on particular issues.

This tradeoff between competing principles confirms our argument that the intergovernmentalism-versus-functionalism divide projects itself into the European judicial sphere with a unique conceptual narrative. «[T]he subsidiarity principle introduced by the Maastricht Treaty [...] has posited a rival principle against the concept of Community law supremacy, and must therefore be balanced, in individual cases, against the latter.»³⁴ More specifically circumscribed to the judicial sphere, albeit used each by a different European tribunal, the principles of *Kompetez-Kompetenz* and margin of appreciation confirm the existence of that specialized conceptual narrative to deal with the challenge of drawing the fine line of competence boundaries between the Member States and the European courts.

5. Looking ahead

Does it make sense to keep Europe walking on two different ropes regarding human rights protection? Absolutely. One, because this duality has demonstrated to be fruitful in terms of expanding the panoply of legal recourses available to protect human rights, thus indirectly helping the EU provide positive responses to its own legitimacy problems. Two, each framework addresses different kinds of situations and targets a relatively different clientele. The ECJ-Charter system is EU-centered, i.e. addresses violations resulting from the Community laws and policies and primarily those caused by the EU institutions and bodies, and marginally by Member States «only when they are implementing Union law».³⁵ The ECHR-European human rights Convention system addresses all kinds of human rights violations attributable to any of the (now 41) Member States. Three, it can further be argued that the ECHR-European human rights Convention system prepares countries aspiring to be admitted as members of the EU to meet the basic democratic governance threshold required for admssion.³⁶ Four, because the dual-system will better serve the reality of a multi-levered European scenario, where despite the fact that not every country will be admitted into the EU, they all —EU Members and Non-Members— will cultivate a common understanding based on similar levels of human rights protection.

Governance and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights», in 15 *Emory International Law Review* 391, at 451 – 453.

³⁴ SCHILLING, Theodor. «Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously», Jean Monnet Working Papers N° 10/95 [1995].

³⁵ Charter, art. 51.1.

³⁶ See, *inter alia*, arts. 6.1 and 6.2 of the TEU.

How will the EU Charter of Fundamental Rights affect such institutional parallelism? The discussion about the prospective relationship between the parallel institutional frameworks of human rights protection, the ECJ and the ECHR, is far from remission. The adoption of the Charter, if anything, adds complexity to such relationship. Because of its immediate limited binding nature, and due to the fact that the EU Charter is applicable mainly to Community institutions and bodies but generally not to Member States³⁷, the potential for conflict between both frameworks is limited. MENÉNDEZ dispels the conflict argument by noting that the EU exists «already in a *pluralistic setting* on what concerns the protection of fundamental rights [...]».³⁸ He also refers to the «striking convergence in terms of substantive content [between the European human rights Convention and the Charter]»³⁹, which the latter has made explicit⁴⁰, and to the fact that «there are few cases in which incompatible legal solutions have been provided by the different systems of human rights protection».⁴¹

However, there are different factors that may change the correlation between both institutional frameworks. The prospective incorporation of the Charter into the EU Treaties, or its upgrade by ECJ case-law, or the EU accession into the European human rights Convention⁴², may provide new legal arguments or incentives for the heighten of tensions. The incorporation of new Member States may also play a role by increasing the demand on the ECHR concerning human rights claims typical of developing or transitional countries⁴³, in contrast with the more «sophisticated» claims of greater economic implications generated within the traditional affluent EU Member States. Last but not least, new waves of judicial activism, particularly by the ECJ, may produce transformations of immense implications.

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Will the ECJ expand its competence beyond the scope of article 51 of the Charter?⁴⁴ It seems likely and rather inevitable. Judicial activism by the ECJ is already

³⁷ «The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. [...]» Charter of Fundamental Rights of the European Union, art. 51.1.

³⁸ MENÉNDEZ, Agustín José. «Chartering Europe: The Charter of Fundamental Rights of the European Union», ARENA Working Paper N° 01/13 [2001], p. 10.

³⁹ MENÉNDEZ, 11.

⁴⁰ «This Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.» Charter, Preamble, parr. 5.

⁴¹ MENÉNDEZ, 12.

⁴² Suggested, for example, by the Laeken Declaration on the Future of the European Union, adopted on December 15, 2001.

⁴³ For example, basic freedoms, right to life and to physical integrity, due process guarantees, etc.

⁴⁴ *Supra*, note 35.

a historical fact in the process of building the EU as a unique political community. Moreover, the variety and complexity of human rights problems likely to be presented by the States to be accepted into the EU in the coming years represents an incentive —if not a direct demand— for judicial activism shaped as a closer scrutiny by the ECJ of their compliance with human rights rules. The more the EU expands, the more difficult it will be to segregate human rights violations primarily based on the application of Community policies and legislation, and thus the border line of the ECJ's human rights-related competences will become dimmer. The ECJ Advocat General Jacobs, reflected on this in the *Konstantinidis* case:

[A] Community national who goes to another Member State as a worker or self-employed person under articles 48, 52, or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that [...] he will be treated in accordance with a **common code of fundamental values** [...] In other words, he is entitled to say «**civis europeus sum**» and to invoke that status in order to oppose any violation of his fundamental rights.⁴⁵

According to BINDER, even if construed narrowly,

[...] the implications of the Advocat General's position are significant. Once the requirement that an individual be exercising a right to free movement under Article 48 et. seq. of the Treaty is met, the Advocat General's position would permit that individual to challenge potentially any national measure —regardless of the respective division of competences between the Community and the Member States with respect to the subject matter which the national measure in question addresses.⁴⁶

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What kind of opposition might the ECJ expansion of its competence beyond the scope of article 51 of the Charter generate? Implicit in the question is the assumption that opposition will ensue. That is something beyond contention. However, some qualifications are required. Except for the national judiciaries, such opposition will likely be mild. One, because the issue of human rights has a great legitimizing value and no Government or politician wants to be perceived as opposing the heightening of human rights protection, moreover when the EU faces a legitimacy-perception problem. Two, the EU does not face situations of egregious human rights violations among its Member States.⁴⁷ Such opposition may become strenuous, however, when the issues involved in a particular case are of a sensitive nature —as the right to life of a fetus⁴⁸ or, more currently, immigration from abroad the EU.

⁴⁵ *Konstantinidis*, Opinión of Advocat General Jacobs, at Recital 39, cited by: BINDER, 24. The ECJ «took a much more limited approach». *Id.*, 25.

⁴⁶ BINDER, 29.

⁴⁷ BINDER, 39–40.

⁴⁸ *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, 8 E.C.R. I-4685, 3 C.M.L.R. 849 [1991]. BINDER, 40.

While BINDER finds «harder to evaluate» the potential for rebellion on the part of national courts,⁴⁹ if history is of any guidance it would not provide applicable antecedents. «Past opposition from—in particular—the German and the Italian Constitutional Courts stemmed from the fear that the [European] Court of Justice would provide insufficient protection for fundamental rights».⁵⁰ The situation under discussion represents just the opposite. At the same time, judicial activism is not a prerogative exclusively of the ECJ.⁵¹

Will this expansion of competences by the ECJ affect the ECHR institutional framework? Yes indeed. It may generate detrimental effects on the ECHR system and generally on human rights protection in Europe. It «would deprive the Convention of much of its independent significance for Member States, as there would be little need to resort to the institutions established to administer it [ECHR] in order to remedy a violation of its provisions».⁵² A possible consequence of that competence might be one of *specialization*: EU actors will prefer to recur to the ECJ, while European actors from non-EU countries will only have available the access to the ECHR. Such *specialization* ought not to be a negative outcome inasmuch as the equal quality of the protection provided by both tribunals is equivalent. Quality is a variable that needs to be measured both in terms of standard-setting and of enforcement. While the first dimension does not warrant concern, the second does. By the mere fact of being an EU organ, the ECJ has greater direct and indirect enforcement capacities, which the ECHR lacks.

Should (and *will*) the Charter be incorporated into the EU Constitution? Not necessarily, but maybe. The formal stance of the Charter is not an urgent matter inasmuch as there is consensus among both the EU organs and the Member States on the compliance with those human rights standards. Moreover, the Charter does not add much substance to the rules already codified under the European human rights Convention. However, the EU Constitution needs the Charter to legitimize itself. A contemporary Constitution is expected to contain a Bill of Rights to be reputed legitimate. The EU needs a Constitution mainly to organize itself better by defining with greater precision its functional and competence structures, its legislative hierarchy, and to compile its governing rules—now scattered in different treaties. The EU Constitution is likely to add little to the already panoply of legal texts and judicial mechanisms of human rights protection.

Moreover, the EU Charter may acquire throughout time a higher normative stature and legitimacy independently of any prospective incorporation into the EU Constitution or its

⁴⁹ BINDER, 41.

⁵⁰ *Idem*.

⁵¹ «While not directly relevant to the issue of expanding fundamental rights review [by the ECJ], the German [Constitutional] Court's decision [on the validity of the Maastricht Treaty, of October 12, 1993] nevertheless suggests that national courts indeed may be concerned with enforcing the substantive division of competences between the Community and the Member States [...]». *Idem*.

⁵² *Idem*, 43.

treaties, in a way similar to the that of the Universal Declaration of Human Rights, whose formal nature is that of a mere U.N. General Assembly Resolution, but has become an undisputed normative source of immense authority.⁵³

⁵³ «Today few international lawyers would deny that the Declaration is a normative instrument that creates at least some legal obligations for the Member States of the UN». BUERGENTHAL, Thomas. *International Human Rights*. St. Paul, West; p. 33, 1995.